

Workplace Bullying and the Law: A Report from the United States

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I. America addresses workplace bullying

A. From Europe to America

Although workplace bullying presumably has existed ever since people started working in groups and organizations, the term is comparatively new to American employee relations. Our initial understanding of this phenomenon comes from Europe, and most researchers agree that the work of the late Heinz Leymann, a Swedish psychologist and professor, during the 1980s constituted the starting point for conceptualizing and understanding it. Leymann drew on his experience as a family therapist and began investigating “direct and indirect forms of conflicts in the workplace.”¹ He used the term “mobbing” to describe the kinds of hostile behaviors that were being directed at workers. His pioneering research is considered to be among the seminal works on psychological abuse in the workplace.²

Andrea Adams, a British journalist, popularized the term “workplace bullying” in the 1980s and early 1990s, using a series of BBC radio documentaries to bring the topic to a more public audience. In 1992 she authored what may have been the first book to use “bullying” at work as its operative term.³ She observed that even though workplace bullying “like a malignant cancer” and that “the majority of the adult population spends more waking hours at work than anywhere else,” the manifestations of this form of abuse “are widely dismissed.”⁴

The husband and wife team of Gary and Ruth Namie, two psychology Ph.D.s, would introduce “workplace bullying” into the vocabulary of American employee relations, starting in the late 1990s. Gary was a social psychologist with a background in college teaching and organizational development, while Ruth was a licensed clinical therapist. They learned firsthand about workplace bullying during the 1990s, when Ruth endured it at her workplace. Eager to understand more about what she was experiencing, the couple did some

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¹ Stale Einarsen, *et al.*, The Concept of Bullying at Work: The European Tradition, in *BULLYING AND HARASSMENT IN THE WORKPLACE: DEVELOPMENTS IN THEORY, RESEARCH, AND PRACTICE* 6 (STALE EINARSEN, HELGE HOEL, DIETER ZAPF, AND CARY L. COOPER, EDs., 2011).

² For representative examples of Leymann’s work, see Heinz Leymann, The Content and Development of Mobbing at Work, 5 No. 2 *EUROPEAN JOURNAL OF WORK AND ORGANIZATIONAL PSYCHOLOGY* 165 (1996); Heinz Leymann and Annelie Gustafsson, Mobbing at Work and the Development of Post-traumatic Stress Disorders, 5 No. 2 *EUROPEAN JOURNAL OF WORK AND ORGANIZATIONAL PSYCHOLOGY* 251 (1996).

³ ANDREA ADAMS WITH NEIL CRAWFORD, *BULLYING AT WORK: HOW TO CONFRONT AND OVERCOME IT* (1992)

⁴ *Id.* at 9.

research and discovered the works of Andrea Adams, Heinz Leymann, and other European writers and scholars. They decided that an American campaign of research and education was necessary to expose this widespread form of common mistreatment at work, and they chose to use the term bullying because they believed it would resonate with the public.

The Namies' work coincided with the emergence of the Internet as a medium for sharing and exchanging information, and so they began the Campaign by launching their "Bullybusters" website in 1998. Their first book, *Bullyproof Yourself at Work! Personal Strategies to Stop the Hurt From Harassment*, would be published in 1999.⁵ They also organized and hosted "Workplace Bullying 2000," the first U.S. conference on workplace bullying. The conference, which was held in Oakland, featured presentations from an international assemblage of practitioners, academicians, and bullying targets. Their work continues to this day, under a renamed organizational rubric they named the Workplace Bullying Institute.⁶

From the outset, the Namies began to work with a small number of North American academicians who were doing researching issues related to bullying, including Loreleigh Keashly, a social psychologist from Wayne State University in Detroit, Joel Neuman, an organizational behavior specialist at the State University of New York at New Paltz, and Ken Westhues, a sociologist at the University of Waterloo in Canada. (I first contacted the Namies in 1998 and asked whether they had examined the legal and policy implications of workplace bullying. This would be the beginning of our ongoing collaboration.)

Since those early efforts, workplace bullying has entered the lexicon of American employment relations. Leading newspapers and periodicals have devoted feature articles to the topic. Segments about workplace bullying have appeared on leading local and national electronic media. Workplace bullying is a topic of increasing popularity among human resources, business management, and employment relations practitioners. The Internet is rife with websites and blogs devoted to workplace bullying and similar topics. Buttressing these developments has been the emergence of a growing multidisciplinary network of scholars who are devoting their attention to workplace bullying, especially from fields such as psychology and organizational behavior.

B. Workplace bullying, American Employment Law, and the Healthy Workplace Bill

Despite the growing recognition of the harm caused by severe workplace bullying, many targets of this behavior have little recourse under law. Overall, workplace bullying remains the most neglected form of serious worker mistreatment in American employment law. However, there are many emerging signs of change. Workplace bullying has been the topic of major articles in bar association journals, legal newspapers, and legal newsletters, including the *ABA Journal*, *National Law Journal*, *Lawyers USA*, and *U.S. Law Week*, among others.⁷ It has been a featured topic at national programs sponsored by groups such as the Association of American Law Schools, National Employment Lawyers Association, and Labor and

⁵ GARY NAMIE & RUTH NAMIE, *BULLYPROOF YOURSELF AT WORK!* (1999).

⁶ For more information, see www.workplacebullying.org.

⁷ Wendy N. Davis, No Putting Up with Putdowns, *ABA JOURNAL*, February 2008, 16; Tresa Baldus, States take aim at taming 'bully bosses,' *NAT'L L. J.*, April 9, 2007, 4; Justin Rebello, States weigh anti-bullying laws, *LAWYERS USA*, March 12, 2007; Eric Matusewitch, Workplace Bullying Increasingly Surfacing in Courts and Legislatures, 78 *NO. 10 U.S. LAW WEEK* 2151 (Sept. 22, 2009).

Employment Relations Association. The legal blogosphere has shown growing interest as well. In 2009, the American Bar Association's legal practice management newsletter listed workplace bullying as among the reasons why employment law was likely to remain a "hot" area of practice during the coming year.⁸

Workplace bullying is becoming a more frequent subject of commentary in law review articles. Many of these scholarly forays, especially the initial commentaries, have been intertwined with the very American paradigm of mistreatment on the basis of protected class status, especially questions of sex and gender.⁹ In view of the great attention we have given to matters of difference over the past 50 years, it is understandable that these perspectives have served as something of point of entry for examining workplace bullying in the United States. Scholars are also looking to European legal responses to bullying for insights that might inform American initiatives.¹⁰ More recently, law student articles discussing workplace bullying have appeared in the legal literature.¹¹

In terms of proposals for law reform, the most significant development has been state legislative consideration of versions of the Healthy Workplace Bill, model legislation I have authored that provides targets of severe workplace bullying with a claim for damages and creates liability-reducing incentives for employers to act preventively and responsively toward bullying behaviors. Although the legislation has yet to be enacted, it has been introduced in some 20 state legislatures since 2003, and support for it is growing.

Before discussing the Healthy Workplace Bill in greater detail, however, it may be useful to outline existing potential legal claims and liability risks for severe bullying behaviors at work.

II. Intentional tort theories

A. Intentional infliction of emotional distress

A favored tort law theory for seeking relief against emotionally abusive treatment at work has been intentional infliction of emotional distress ("IIED"). Typically, plaintiffs have sought to impose liability for IIED on both their employers and the specific workers, often supervisors,

⁸ Robert W. Denney, What's Hot and What's Not in the legal profession, 35 No. 1 LAW PRACTICE 12 (Jan./Feb. 2009), available at <http://www.abanet.org/lpm/magazine/articles/v35/is1/pg12.shtml>

⁹ For example, one of the earliest works on the tort of intentional infliction of emotional distress in the employment context emphasized the racial, gender, and class dynamics of abusive work environments. See Regina Austin, Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress, 41 STANFORD L. REV. 1, 37-42 (1988). See also Rosa Ehrenreich, Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment, 88 GEORGETOWN LAW JOURNAL 1 (1999); Catherine L. Fisk, Humiliation at Work, 8 WILLIAM & MARY JOURNAL OF WOMEN AND THE LAW 73 (2001); Gabrielle S. Friedman & James Q. Whitman, The European Transformation of Harassment Law: Discrimination Versus Dignity, 9 COLUMBIA JOURNAL OF EUROPEAN LAW 241 (2003); Brady Coleman, Pragmatism's Insult: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence, 8 EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL 239 (2004); Ann C. McGinley, Creating Masculine Identities: Bullying and Harassment "Because of Sex," 79 COLO. L. REV. 1151 (2008); Kerri Lynn Stone, From Queen Bees and Wannabes to Worker Bees: Why Gender Considerations Should Inform the Emerging Law of Workplace Bullying, 65 N.Y.U. ANN. SURV. AM. L. 35 (2009).

¹⁰ Friedman & Whitman, *supra* note 9; Brady Coleman, Shame, Rage and Freedom of Speech: Should the United States Adopt European "Mobbing" Laws?, 35 GEORGIA J. INT'L & COMP. L. 53 (2006); Susan Harthill, Bullying in the Workplace: Lessons from the United Kingdom, 17 MINN. J. INT'L L. 247 (2008);

¹¹ Note, Jordan F. Kaplan, Help is on the Way: A Recent Case Sheds Light on Workplace Bullying, 47 HOUSTON L. REV. 141 (2010); Note, Joanna Canty, The Healthy Workplace Bill: A Proposal to Address Workplace Bullying in Massachusetts, 43 NEW ENGLAND L. REV. 493 (2009); Note, Amanda E. Leuders, You'll Need More than a Voltage Converter: Plugging European workplace Bullying Laws into the American Jurisprudential Outlet, 25 ARIZONA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 197 (2008).

who engaged in the alleged conduct. The tort of IIED is typically defined this way:¹²

1. The wrongdoer's conduct must be intentional or reckless;
2. The conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality;
3. There must be a causal connection between the wrongdoer's conduct and the emotional distress; and
4. The emotional distress must be severe.

When I began researching what would become my first article on workplace bullying and American employment law, I hypothesized that IIED would be a primary and effective legal claim for bullied workers. However, my extensive survey and analysis of state case law, concentrating on the period 1995-98, revealed that typical workplace bullying, especially conduct unrelated to sexual harassment or other forms of status-based discrimination, seldom results in liability for IIED. In many instances, trial courts granted defense motions for dismissal or summary judgment, and the appellate courts affirmed.

IIED Claims (Summary of study concentrating on 1995-98 cases)

The most frequent reason given by courts for rejecting workplace-related IIED claims was that the complained-of behavior was not sufficiently extreme and outrageous to meet the requirements of the tort. Here are some examples:

Not Sufficiently Extreme and Outrageous

- In *Turnbull v. Northside Hospital, Inc.*,¹³ the Georgia Court of Appeals found that alleged conduct including “glaring at plaintiff with purported anger and contempt, crying, slamming doors, and snatching phone messages from plaintiff’s hand was childish and rude,” but that “it is not the type of behavior for which the law grants a remedy.” The court found persuasive the absence of cursing, derogatory remarks about the plaintiff, and verbal and physical threats.
- In *Denton v. Chittendon Bank*,¹⁴ the Vermont Supreme Court affirmed summary judgment entered for an employer and a supervisor where the plaintiff alleged that the supervisor “embarked on an insulting, demeaning, and vindictive course of conduct toward [the plaintiff] that included ridicule, invasions of privacy, intentional interference with ability to car pool, competitiveness in afterwork sports, and an unreasonable workload.” Liability should not be extended for “a series of indignities,” wrote the court, adding that “(a)bsent at least one incident of behavior” such as retaliation or an act of extreme humiliation, “incidents that are in themselves insignificant should not be consolidated to arrive at the conclusion that the overall conduct was outrageous.”
- In *Mirzaie v. Smith Cogeneration, Inc.*,¹⁵ the Oklahoma Court of Civil Appeals affirmed a trial court’s dismissal of an IIED claim where the plaintiff had alleged that his supervisor, among other things, yelled at him in front of other company

¹² Kroger Co. v. Willgruber, 920 S.W.2d 61 (Ky. 1996).

¹³ 220 Ga. App. 883, recon. den., cert. den. (1996).

¹⁴ 655 A.2d 703 (Vermont 1994).

¹⁵ 1998 WL 184582 (Okla.App. 1998).

executives, called him at 3:00 a.m. and “browbeat him for hours,” required him to “needlessly cancel vacation plans,” refused to allow the plaintiff to spend a day at the hospital with his wife after the birth of their son, intentionally called plaintiff’s wife by the plaintiff’s former wife’s name, and delivered the notice of termination two hours before the plaintiff’s wedding. There was nothing “in this working milieu,” said the court, “that would elevate the recited facts to the ‘outrageous’ level.”

- One of the most wrongheaded interpretations of IIED doctrine in the employment context came in *Hollomon v. Keadle*,¹⁶ an Arkansas Supreme Court case that involved a female employee, Hollomon, who worked for a male physician, Keadle, for two years before she voluntarily left the job. Hollomon claimed that during this period of employment, “Keadle repeatedly cursed her and referred to her with offensive terms, such as ‘white nigger,’ ‘slut,’ ‘whore,’ and ‘the ignorance of Glenwood, Arkansas.’” Keadle repeatedly used profanity in front of his employees and patients, and he frequently remarked that women working outside of the home were “whores and prostitutes.” According to Hollomon, Keadle threatened her with severe bodily harm “if she quit or caused trouble.” Hollomon claimed that she suffered from “stomach problems, loss of sleep, loss of self-esteem, anxiety attacks, and embarrassment.” On these allegations, the Arkansas Supreme Court affirmed summary judgment for the defendant Keadle. Skirting the question of whether Keadle’s conduct was outrageous on its face, the Court held that Hollomon’s failure to establish that Keadle “was made aware that she was ‘not a person of ordinary temperament’ or that she was ‘peculiarly susceptible to emotional distress by reason of some physical or mental condition or peculiarity,’” was fatal to her claim.

Insufficient Emotional Distress

Plaintiffs also can lose their IIED claims because they did not show the requisite level of severe emotional distress, as this case shows:

- *Harris v. Jones*,¹⁷ is a compelling illustration of the difficulty of establishing severe emotional distress. Plaintiff Harris was an assembly-line worker who suffered from a lifelong stuttering problem. During a five-month period, Harris’ supervisor and co-workers continually mimicked, verbally and physically, his speech impediment. As a result of this behavior, “Harris was ‘shaken up’ and felt ‘like going into a hole and hide.’” Jones’ wife said that his nervous condition worsened during this time. At trial, the jury found for Harris, but the trial court reversed the judgment, holding that the plaintiff’s emotional distress lacked the requisite severity to allow recovery. The Maryland appeals court then affirmed the trial court’s reversal of the verdict. Even though agreeing with Harris that Jones’ conduct was cruel and insensitive, the court found that the humiliation suffered by Harris was not, “as a matter of law, so intense as to constitute the ‘severe’ emotional distress required to recover” for IIED.

More Promising Factual Scenarios

Although typical workplace bullying alone usually does not result in IIED liability, the

¹⁶ 326 Ark. 168 (1996).

¹⁷ 380 A.2d 611 (Md. Ct.App. 1977).

presence of an aggravating factor may rescue what otherwise is likely to be an unsuccessful claim. These factors are discussed immediately below:

Status-Based Discrimination and Harassment

The most successful types of workplace-related IIED claims are those grounded in allegations of severe status-based harassment or discrimination. This may be of crucial significance in cases where the typically short statute of limitations governing a statutory harassment or discrimination claim has expired. Here are two examples where plaintiffs were able to bring an IIED claim:

- In *Soto v. El Paso Natural Gas Co.*,¹⁸ the Texas Court of Appeals reversed summary judgment entered for the defendant on both IIED and statutory harassment counts where the supervisory employee's alleged conduct included fondling and ridiculing a female employee following her return to work from a second mastectomy and reconstructive surgery.
- In *Takaki v. Allied Machine Corp.*,¹⁹ the Hawaii Court of Appeals reversed summary judgment entered for the defendant on both IIED and statutory discrimination counts where, among other things, the supervisor frequently called the plaintiff a "lousy f--king Jap."

Despite these holdings, it is important to note that many IIED claims based upon allegations of harassment or discrimination are dismissed, even where accompanying statutory claims based on the same facts are upheld. For example:

- In *Jeremiah v. Yanke Machine Shop, Inc.*,²⁰ the Idaho Supreme Court upheld a hostile work environment claim based on national origin while dismissing an IIED claim where at trial the plaintiff presented evidence that he was subjected to demeaning epithets and harassment regarding his national origin. The court avoided addressing whether the behavior was extreme and outrageous, instead finding that because the plaintiff was merely "seriously frustrated" by the treatment, he did not meet the requisite level of severe emotional distress to maintain his IIED claim.
- In *Hoy v. Angelone*,²¹ a Pennsylvania trial court dismissed an IIED claim following a jury verdict for the plaintiff, after the plaintiff had testified that she was subjected to various forms of abusive treatment, including sexual propositions, necessitating psychiatric help. The court found that absent a factor such as retaliation for refusing sexual advances, sexual harassment does not constitute outrageous conduct sufficient to support an IIED claim.

Retaliation

When abusive behavior appears to be motivated by a desire to retaliate against an employee who has reported illegalities or irregularities, a court may find that it constitutes extreme and outrageous conduct.

¹⁸ 942 S.W.2d 671 (Tex. Ct.App. 1997).

¹⁹ 951 P.2d 507 (Haw. Ct.App. 1998).

²⁰ 953 P.2d 992 (Idaho 1998).

²¹ 691 A.2d 476 (Pa. Super.Ct. 1997).

- In *Vasarhelyi v. New School for Social Research*,²² a New York appeals court reinstated an IIED claim brought by a former university controller and treasurer who had questioned the university president's handling of reimbursements for his personal and business expenses. The court found that the plaintiff had pleaded a valid IIED claim where, after she complained about the president's actions, she had been subjected to intense, lengthy interrogation, humiliation over her English language ability, questions about her personal relationships, and the "impugning both her honesty and her chastity."
- Similarly, in *Polk v. Inroads/St. Louis, Inc.*,²³ a Missouri appeals court reinstated an IIED claim where the plaintiff was subjected to "a calculated plan to cause . . . emotional harm" after she exposed misrepresentation by her supervisor.

B. Intentional interference with the employment relationship

Another tort law theory that potentially may be raised as a response to workplace bullying is intentional interference with the employment relationship, which is defined this way:

1. The plaintiff had an employment contract with an employer;
2. A third party knowingly induced the employer to break that contract;
3. The third party's interference was both intentional and improper in motive or means; and,
4. The plaintiff was harmed by the third party's actions.²⁴

Where available, this claim is brought directly against the offending co-employee. More specifically, in some states one can argue that the "third party" is a supervisor or co-worker who is acting outside of the scope of his employment relationship when he bullies an employee.²⁵

However, there are potential difficulties in raising this cause of action. First, not all state courts agree that a current employee qualifies as the "third party" necessary to invoke this legal theory.²⁶ Second, the law may not allow a bullied employee to sue the employer under this theory, as the Oregon Court of Appeals reasoned in *Lewis v. Oregon Beauty Supply Co.*,²⁷ when it held that a "company cannot be liable for interference with an employment relationship to which it is a party."

C. Other intentional torts

Common law torts such as assault, battery, and false imprisonment may be applicable to certain bullying cases. However, unless such a case is accompanied by severe physical and/or mental harm, it may be impractical to bring an action. In rare cases, defamation claims may be viable as well. Furthermore, the preemptive effect of workers' compensation statutes must certainly be considered in this context.

²² 230 A.D.2d 658 (N.Y. App.Div. 1996).

²³ 951 S.W.2d 646 (Mo. App. 1997).

²⁴ *Shea v. Emmanuel College*, 425 Mass. 761 (1997).

²⁵ *See e.g.*, *O'Brien v. New England Telephone & Telegraph Co.*, 422 Mass. 686 (1996) (holding that a supervisor could be liable for engaging in a course of abusive, bullying conduct towards the plaintiff that was unrelated to the company's corporate interests).

²⁶ *E.g.*, *Miles v. Bibb Co.*, 177 Ga.App. 364 (1985), *reh. den.*, *cert. disp.* (1986) (holding that neither supervisor nor human resources director was a third party unauthorized to discharge plaintiff).

²⁷ 77 Or.App. 663, *recon. den.* (1986).

D. Preemption by workers' compensation

Finally, we must consider the effect of workers' compensation laws on tort claims. In most states, workers' compensation laws are considered the sole remedy for workplace injuries and thus preclude employees from bringing a wide variety of tort claims against employers. Jurisdictions are split on whether state workers' compensation acts preclude intentional tort claims such as IIED.²⁸

However, even where an IIED claim against an employer is precluded by workers' compensation, it may be possible (although, in many cases, not practicable) to bring an action against a specific, offending co-worker.²⁹

E. Updating the study

In preparation for a forthcoming book on workplace bullying and American employment law, I am updating the IIED case study. Based on preliminary summaries of cases prepared by my research assistant, it appears that the state of the law is largely unchanged.

III. Discrimination claims

A. Discriminatory harassment

Harassment that is grounded in a target's membership in a protected class is actionable under both federal and state discrimination statutes. In particular, hostile work environment theory offers some potential relief to employees who are subjected to abusive treatment at work on the basis of protected class membership. For example, in *Lule Said v. Northeast Security*,³⁰ the Massachusetts Commission Against Discrimination took "judicial notice of the emerging body of law relative to 'workplace bullying'" in awarding damages to an employee who endured severe religious harassment because he practiced Islam.

The "Disaggregation" Problem

However, lawyers who are considering the use of statutory discrimination law as a potential means of legal relief for bullied employees are advised to consider the problem of "disaggregation" and whether it applies in their jurisdiction.

Law professor Vicki Schultz analyzed the evolution of sexual harassment law under Title VII and concluded that "the most prominent feature of hostile work environment jurisprudence" is the "disaggregation of sexual advances and other conduct that the courts consider 'sexual' in nature from other gender-based mistreatment that judges consider nonsexual."³¹ In other words, in considering sexual harassment lawsuits that allege the creation of a hostile work environment, the courts often disregard any harassing conduct that is not of a sexual nature. This line of analysis not only means that many horrible cases of sexual harassment are not considered in their factual entirety, but also precludes the application of

²⁸ *E.g., compare* Cole v. Fair Oaks Fire Protection Dist., 729 P.2d 743 (Cal. 1987) (finding that workers' compensation bars employee's IIED claim); *with* McSwain v. Shei, 402 S.E.2d 890 (S.C. 1991) (holding that workers' compensation act does not bar employee's IIED claim).

²⁹ *See e.g.,* Brown v. Nutter, McClennen & Fish, 696 N.E.2d 953 (Mass. App. Ct. 1998) (holding that co-workers "are not immunized from suit by the workers' compensation act for tortious acts which they commit outside the scope of their employment, which are unrelated to the interest of the employer").

³⁰ 2000 WL 33665354 (MCAD 2000).

³¹ Vicki Schultz, Reconceptualizing Sexual Harassment, 107 YALE LAW JOURNAL 1683, 1713-1714 (1998).

hostile work environment theory in bullying situations motivated by discriminatory animus where the hurtful conduct is of a primarily nonsexual nature.

Fortunately, some federal courts, in part responding to Schultz's critique, are permitting the introduction of evidence of non-sexual harassment in hostile work environment claims.³²

B. Disability discrimination

Disability discrimination statutes may offer some relief when abusive behavior has induced or exacerbated a recognized mental disability. Research conducted by University of Miami law professor Susan Stefan early in the history of the Americans with Disabilities Act showed that psychiatric disability claims grounded in factual allegations of workplace stress or mistreatment were unlikely to prevail.³³ Stefan explained that many employees "are losing their ADA cases because abuse and stress are seen as simply intrinsic to employment, as invisible and inseparable from conditions of employment as sexual harassment was twenty years ago."³⁴ Although the ADA was amended in 2008 to broaden the scope of statutory coverage, there is no evidence at present that these changes have rendered the law more applicable to workplace bullying.

IV. Retaliation and whistleblowing generally

Retaliation after filing some sort of internal or external complaint is one of the most frequently reported bullying tactics. Rebuffing sexual advances, reporting allegedly unethical business practices, and engaging in union organizing activity are examples of activities that could invite bullying behaviors as forms of retaliation. In such instances, various anti-retaliation and whistleblower protections may apply.

However, the scope of coverage of these provisions may vary greatly. For example, Title VII of the Civil Rights Act of 1964 provides anti-retaliation protection to anyone who "has opposed any practice, made an unlawful employment practice under this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."³⁵ Federal courts interpreting this provision have held that the plaintiff must establish only a reasonable belief that the protested action was unlawful, not that it actually was unlawful.³⁶

By contrast, consider New York's whistle blower law, which prohibits an employer from taking retaliatory actions against employees who engage in whistle blowing activities on matters implicating legal violations that present "a substantial and specific danger to the public health or safety."³⁷ In *Border v. General Electric Co.* (1996), the New York Court of Appeals held that "a reasonable belief that a law, rule or regulation affecting public health and safety has been violated" was insufficient to invoke the statute.³⁸ Rather, "proof of an actual violation of

³² See e.g., *Williams v. General Motors Corp.*, 187 F.3d 553 (6th Cir. 1999) (non-sexual conduct can contribute to hostile work environment); *Durham Life Ins. v. Evans*, 166 F.3d 139 (3rd Cir. 1999) (same).

³³ Susan Stefan, "You'd Have to Be Crazy to Work Here": Worker Stress, The Abusive Workplace, and Title I of the ADA, 31 *LOYOLA LOS ANGELES LAW REVIEW* 795, 797-98 (1998).

³⁴ *Id.* at 844.

³⁵ 42 U.S.C. Sec. 2000e-3(a) (1994).

³⁶ See, e.g., *Berg v. LaCrosse Cooler Co.*, 612 F.2d 1041, 1046 (7th Cir. 1980); see also *Trent v. Valley Elec. Ass'n*, 41 F.3d 524, 526 (9th Cir. 1994).

³⁷ N.Y. Labor Law, Sec. 740 (McKinneys 1988).

³⁸ *Bordell v. General Elec. Co.*, 667 N.E.2d 922 (N.Y. 1996).

law” was required to sustain a whistle blower claim.³⁹ Of course, this means that under the New York statute, employees who are bullied in retaliation for filing a complaint would have to prove the merits of that complaint in order to claim protection.

V. Labor and collective bargaining statutes

Federal and state labor and collective bargaining laws are potential sources of protection for bullied workers, especially those covered by a collective bargaining agreement (CBA). They also create opportunities for unions to address bullying in a more pro-active manner. First, unions can bargain for provisions that protect members against abusive supervision. Second, even in the absence of specific protections against abusive supervision, the general rights granted in a CBA may provide legal protections for a bullied union member. Third, effective shop stewards can serve a valuable mediating role in a bullying situation.

Union and non-union employees alike may be able to invoke Section 7 of the National Labor Relations Act, which grants employees the right to engage in “concerted activity” for “mutual aid or protection.”⁴⁰ Invoking this provision, a group of non-union employees concerned about workplace bullying could approach their employer about it. However, the most common workplace bullying scenario involves a single targeted employee, often in a subordinate relationship to a bullying supervisor. In such a situation, the target’s non-litigious choices include doing nothing, confronting the bully, reporting the objectionable behavior to the bully’s superior, or in some way consulting and enlisting the assistance of her coworkers. Only the last scenario fits easily within the concerted activity provisions of the NLRA.

Jurisdictional Requirements

Workplace bullying frequently occurs in white collar and service sector settings. Accordingly, the NLRA’s limitations on the categories of workers who are statutorily protected may be relevant considerations. Expressly excluded from the NLRA’s protections are supervisors, independent contractors, domestic and agricultural workers, and family member employees.⁴¹ The Supreme Court has read the supervisory exemption so broadly that even registered nurses have been deemed excluded from statutory protection merely because they supervised nurses’ assistants.⁴² In addition, the Court has held that managerial and confidential employees are excluded as well.⁴³

Contract Provision

An example of a successful collective bargaining occurred in 2009, when Massachusetts unions affiliated with the Service Employees Union International and the National Association of Government Employees (SEIU/NAGE) and Commonwealth of Massachusetts agreed to include a “mutual respect” provision in their new contract that covered, among other things, bullying and abusive supervision. As a result, a CBA covering some 21,000 state workers includes this provision:

³⁹ *Id.* at 923.

⁴⁰ 29 U.S.C. Sec. 157. Section 8 of the NLRA states that employers may not “interfere with, restrain, or coerce” employees who are exercising this right. 29 U.S.C. Sec. 158.

⁴¹ 29 U.S.C. Sec. 152(3).

⁴² *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994)

⁴³ *See NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980) (exempting managerial employees); *NLRB v. Hendricks Co. Rural Elec. Membership Corp.*, 454 U.S. 170 (1981) (exempting confidential employees).

The Commonwealth and the Union agree that mutual respect between and among managers, employees, co-workers and supervisors is integral to the efficient conduct of the Commonwealth's business. Behaviors that contribute to a hostile, humiliating or intimidating work environment, including abusive language or behavior, are unacceptable and will not be tolerated. Employees who believe they are subject to such behavior should raise their concerns with an appropriate manager or supervisor as soon as possible, but no later than ninety (90) days from the occurrence of the incident(s). . . .

An alleged violation of the provision may be grieved, but it may not proceed to arbitration. This is a real limitation: It precludes a worker from obtaining an enforceable award or an order to stop the behavior. Nevertheless, it is a huge step forward to have a collective bargaining agreement that covers bullying and allows grievances to be filed when the behavior arises.

VI. Occupational safety and health laws

The federal Occupational Safety and Health Act of 1970 was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."⁴⁴ Arguably, OSHA permits regulation of working conditions associated with stress and emotional abuse. OSHA's general duty clause states, "Each employer . . . shall furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees."⁴⁵ Professor Susan Harthill has argued persuasively that occupational safety and health law can be part of a multi-pronged approach that includes collaborative and cooperative efforts between public and private employment relations stakeholders.⁴⁶ Potentially, the most extreme effects of workplace bullying -- high blood pressure, heart attacks, etc. -- might meet the standard of "serious physical harm" within the meaning of the statute.

Even if certain types of workplace bullying could fall within the regulatory reach of OSHA, this statute is not well-suited to be the primary legal protection against workplace bullying. First, bullying, establishing that bullying is sufficiently serious so as to create the risk of "death or serious physical harm" would prove to be a difficult hurdle in many situations. Furthermore, adding workplace bullying to the list of concerns for a regulatory agency that already is severely understaffed would guarantee enforcement difficulties. It is unrealistic to believe that OSHA inspectors would be able to conduct adequate investigations about workplace bullying on a regular basis. Because OSHA does not provide for a private right of action,⁴⁷ bullied employees would depend solely on the government to invoke the statute's protections. Finally, the limited employer sanctions provided by OSHA would provide little economic incentive for employers to take preventive action.

⁴⁴ Occupational Safety and Health Act of 1970, 29 U.S.C. Sec. 651(b).

⁴⁵ 29 U.S.C. Sec. 654(a)(1).

⁴⁶ See Susan Harthill, *The Need for a Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act*, 78 UNIVERSITY OF CINCINNATI L. REV. 1250 (2010).

⁴⁷ See 29 U.S.C. Sec. 659.

VII. Free-speech protections

In limited instances, confronting an individual aggressor or reporting bullying conduct to a supervisor or human resources office may be a viable option. Unfortunately, if we assume that such acts would be construed legally as forms of speech, the law offers only limited protections to people who have engaged in this brand of self-help.

In the U.S., public employee speech is protected by the First Amendment, but only for expression on matters of public concern that does not involve an employee's job duties.⁴⁸ This is a difficult standard to meet in most everyday bullying scenarios, though it could have some application to whistleblower or retaliation situations.

For private-sector employees, there is little hope of invoking a constitutional right to free speech. A body of case law, consistent in result though very muddled in analysis, holds that employees enjoy no federal or state constitutional protection against incursions on free speech by private actors.⁴⁹ One state, Connecticut, provides general statutory protection for employee speech, though its application to bullying situations is apparently untested.

VIII. The Healthy Workplace Bill

The Healthy Workplace Bill provides a private cause of action for damages and injunctive relief to targets of severe workplace bullying and creates legal incentives for employers to act preventively and responsively toward these behaviors. It was drafted for the purpose of introducing at the state level, though its contents are adaptable to legislation, regulations, and collective bargaining agreements at all levels. The template version of the HWB has undergone several revisions over the years, with its core components remaining substantially intact. Obviously the text of the bill, once filed in state legislatures, has been subject to revision by its sponsors and legislative committees.

The following summary is based upon a revised version of the bill that will be submitted to state legislatures for the 2013-14 sessions.⁵⁰

A. Primary cause of action

The Healthy Workplace Bill defines its basic cause of action this way:

It shall be an unlawful employment practice under this Chapter to subject an employee to an abusive work environment as defined by this Chapter.

As is often the case with protective legislation, the details that shape and limit the cause of action are contained in definitions and other provisions. The critical definition in this cause of action is "abusive work environment," which:

exists when an employee or employer, acting with intent to cause pain, injury, or distress to an employee, subjects the employee to abusive conduct that causes physical harm, psychological harm, or both to the employee.

Abusive conduct is defined as:

⁴⁸ See *Connick v. Myers*, 461 U.S. 138 (1983) (articulating public concern test); *Garcetti v. Ceballos* 547 U.S. 410 (2006) (excluding from constitutional protection public employee speech pursuant to official job duties).

⁴⁹ For more information on speech protections for private sector employees, see David C. Yamada, *Voices From the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 *BERKELEY JOURNAL OF EMPLOYMENT & LABOR LAW* 1 (1998).

⁵⁰ Contact the author for this version.

... acts, omissions, or both, that a reasonable person would find abusive, based on the severity, nature, and frequency of the conduct. Abusive conduct may include, but is not limited to: repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal or physical conduct of a threatening, intimidating, or humiliating nature; the sabotage or undermining of an employee's work performance; or attempts to exploit an employee's known psychological or physical vulnerability. A single act normally will not constitute abusive conduct, but an especially severe and egregious act may meet this standard.

The decision to use a reasonableness standard for determining what constitutes abusive conduct was an easy one, drawn from Supreme Court's 1993 decision in *Harris v. Forklift Systems, Inc.* defining a hostile work environment for sexual harassment under Title VII of the Civil Rights Act.⁵¹

The bill is, in significant part, a response to the severe strictures of the tort of intentional infliction of emotional distress, in that it does not require that the complained-of behavior be "outrageous" and "beyond the bounds of civilized society" in order to be actionable.⁵² Instead, it consciously aligns itself with Supreme Court dicta explaining the nature of a hostile work environment under Title VII. However, unlike Title VII jurisprudence, in which the parameters of hostile work environment doctrine are judicially defined rather than included in the statute, the Healthy Workplace Bill expressly includes illustrations of the kind of conduct that may, in the aggregate, be considered actionable. These examples are drawn from the Supreme Court's definition of a hostile work environment under Title VII and the behavioral research on bullying behaviors. This is intended as a clear signal to courts and juries that this bill is not to be mistaken for a statutory adoption of IIED jurisprudence.

B. Employer liability

The Healthy Workplace Bill imposes a strict liability standard upon employers for actionable behavior:

An employer shall be vicariously liable for an unlawful employment practice, as defined by this Chapter, committed by its employee.

However, it also provides employers with an affirmative defense when:

1. the employer exercised reasonable care to prevent and correct promptly any actionable behavior; and,
2. the complainant employee unreasonably failed to take advantage of appropriate preventive or corrective opportunities provided by the employer.

This framework is drawn directly from the U.S. Supreme Court's 1998 companion decisions concerning employer liability for sexual harassment, *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*.⁵³ The defense is not available when the actionable behavior

⁵¹ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). The Court promulgated a two-part test to determine whether a hostile work environment is present. First, the conduct must create "an environment that a reasonable person would find hostile or abusive."⁵¹ Second, the victim must "subjectively perceive the environment to be abusive."⁵¹ In analyzing the objective prong of the test, the frequency and severity of the discriminatory conduct, whether the conduct was "physically threatening or humiliating, or a mere offensive utterance," and whether the conduct "unreasonably interfere[d] with an employee's work performance," are among the factors that will be considered.

⁵² *C.f.*, Restatement (Second) of Torts, Sec 46, *supra* note --.

⁵³ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In both cases, the Court held that an "employer is subject to vicarious liability to a victimized employee for an actionable hostile work environment

culminates in an adverse employment decision.⁵⁴

C. Other significant provisions

1. Damages

The Healthy Workplace Bill provides for standard forms of compensatory and injunctive relief, as well as for punitive damages and attorney's fees,⁵⁵ largely mirroring damages commonly awarded in successful tort and employment discrimination claims, the two doctrinal areas that have most informed its drafting. Two additional provisions are noteworthy. First, a court may order "removal of the offending party from the complainant's work environment."⁵⁶

This is included out of a sense of fairness to the severely bullied employee, who should not have to change jobs, departments, or offices in order to avoid working with or for the offending co-employee or co-employees, which is an unfortunate "resolution" of so many sexual harassment situations.

Second, the bill provides safeguards against runaway verdicts for emotional distress and punitive damages:

Where an unlawful employment practice under this Chapter did not include an adverse employment action, an employer shall be subject to damages for emotional distress only when the actionable conduct was extreme and outrageous, and it shall not be subject to punitive damages. This provision does not apply to individually named employee defendants.

This is the only provision of the bill that expressly adopts the high standard of IIED in order to recover damages for emotional distress. In effect, when bullying behaviors have stop short of expressly implicating the plaintiff's job security and compensation, the availability of emotional distress damages are subject to the IIED standard, and punitive damages are not available.

The damage limitations serve as powerful incentives for employers to stop bullying behaviors before they intensify and lead to events that could open the door to significant emotional distress and punitive damages. One of the most common laments from bullying targets who reported the behavior to their employer is that complaints either were ignored or the employer made the situation even worse. This also has the effect of discouraging extensive litigation and promoting quick resolution.

2. Private Right of Action

The Healthy Workplace Bill is enforceable "solely by a private right of action."⁵⁷ Plaintiffs will file their claims directly in a state trial court. The bill does not contemplate the creation or involvement of a state administrative agency for adjudicating or deciding claims.

3. Anti-Retaliation Protection

created by a supervisor with immediate (or successively higher) authority over the employee."⁵³ The Court then promulgated a two-element affirmative defense available to employers where no tangible employment action⁵³ had been taken: First, the employer must establish that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior."⁵³ Second, the employer must establish that the "plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."⁵³

⁵⁴ *Id.*

⁵⁵ Mass. Senate No. 699, Sec. 7.

⁵⁶ *Id.* at 7(a).

⁵⁷ *Id.*, Sec. 8(a).

The Healthy Workplace Bill provides anti-retaliation protection:

It shall be an unlawful employment practice under this Chapter to retaliate in any manner against an employee because she has opposed any unlawful employment practice under this Chapter, or because she has made a charge, testified, assisted, or participated in any manner in an investigation or proceeding under this Chapter, including, but not limited to, internal complaints and proceedings, arbitration and mediation proceedings, and legal actions.

This is standard anti-retaliation language, drawn from federal employment discrimination statutes.⁵⁸ Obviously if potential complainants and witnesses are not protected against retaliation, the preventive and remedial objectives of the bill are severely compromised. The major addition is express coverage of “internal complaints and proceedings.” This provision reflects the legal significance of employer policies that contain in-house grievance procedures. It also supports the policy objective of encouraging early, internal resolution of bullying problems by not requiring targets of bullying to file a legal claim in order to be protected against retaliation.

4. Additional Affirmative Defenses

The Healthy Workplace Bill provides three other affirmative defenses that are designed to protect employer prerogatives:

It shall be an affirmative defense that:

- a. The complaint is based on an adverse employment decision reasonably made for poor performance, misconduct, or economic necessity;
- b. The complaint is based on a reasonable performance evaluation;
- or
- c. The complaint is based on a defendant’s reasonable investigation about potentially illegal or unethical activity.

These defenses are included to discourage use of the Healthy Workplace Bill as a “backdoor” attempt to create a just cause requirement for termination. Although I am sympathetic to the argument that the law should provide such protections to employees, that should be addressed by a separate statutory measure or collective bargaining.

D. Responses to the Healthy Workplace Bill

On May 12, 2010, the New York State Senate passed the Healthy Workplace Bill by a 45-16 vote that included strong bipartisan support.⁵⁹ The lead Senate sponsor was a high-seniority Republican who learned about workplace bullying from a constituent who had been targeted at her place of employment. Unfortunately for the bill’s supporters, it stalled in the State Assembly. However, the Senate vote in a state that is home to national media outlets resulted in unprecedented attention to workplace bullying legislation.

The New York vote marked the second time that spring that the Healthy Workplace Bill had passed a state legislative floor vote. On March 18, 2010, a version of the Healthy Workplace Bill covering public employees was approved by the Illinois State Senate by a

⁵⁸ See Age Discrimination in Employment Act, 29 U.S.C. Sec. 623(d); Americans with Disabilities Act, 42 U.S.C. Sec. 12203(a); Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-3.

⁵⁹ Office of Senator Thomas P. Morahan, Senate Passes Landmark Legislation to Halt Bullying in the Workplace (May 13, 2010) (news release, copy on file with author); Cohen, *supra* note – (reporting 45-16 vote).

35-17 vote.⁶⁰ That measure, too, was not brought to a vote in the other house of the legislature.

The approval by the New York State Senate apparently triggered a lot of attention. In July 2010, *Parade* magazine, a syndicated periodical distributed with Sunday editions of newspapers across the country, ran a short piece inviting readers to vote yes or no on the question, “Should workplace bullying be illegal?,” in an online poll.⁶¹ Support for legal protections was overwhelming, as some 93 percent of respondents voted yes.⁶²

Days after the *Parade* piece appeared, *Time* magazine posted to its website an article examining the pros and cons of enacting the Healthy Workplace Bill.⁶³ The internet site Yahoo! carried the story on its home page the same day.⁶⁴ Within days, over 1,600 comments were posted to the two websites, many of which shared personal stories of being bullied at work and expressed support for the legislation.⁶⁵

In a 2011 guest column on workplace bullying in the *New York Law Journal* -- the daily newspaper for the legal profession in New York State -- two management-side employment lawyers wrote:

Therefore, it appears that we may be on the cusp of a new era of legislation and legal precedent targeted at preventing and punishing workplace bullying.

Indeed, it seems inevitable that some form of the HWB will become law, whether in New York or elsewhere, and that once the first state adopts an anti-bullying statute other will shortly follow.⁶⁶

A decade ago, such an observation, especially by lawyers representing employers, would have been unthinkable. Initial reactions to the possible enactment of workplace anti-bullying legislation were politely skeptical or downright dismissive.⁶⁷ In recent years, however, responses to this possibility have changed considerably. As the Healthy Workplace Bill has been introduced in more state legislatures, however, interest has grown, with some lawyers anticipating eventual enactment.⁶⁸

Advocacy Movement

The core supporters of the legislation have affiliated with small, volunteer-driven groups known as “Healthy Workplace Advocates,” operating and forming in states across the country. Some of the groups, such as New York and Massachusetts, are fairly well

⁶⁰ Illinois Healthy Workplace Bill, bill history, at <http://www.healthyworkplacebill.org/states/il/illinois.php>.

⁶¹ Janet Kinoshian, Workplace Bullying: Do We Need a Law?, *PARADE* (July 18, 2010), at <http://www.parade.com/news/intelligence-report/archive/100718-workplace-bullying-do-we-need-a-law.html>.

⁶² *Id.* (poll results as of July 25, 2010).

⁶³ Adam Cohen, New Laws Target Workplace Bullying, *TIME* (July 21, 2010), at <http://www.time.com/time/nation/article/0,8599,2005358,00.html>.

⁶⁴ Adam Cohen, New York Bill Targets Abusive Bosses (July 21, 2010), http://news.yahoo.com/s/time/20100721/us_time/08599200535800.

⁶⁵ Cohen, *supra* note --, at http://news.yahoo.com/s/time/20100721/us_time/08599200535800 (1,595 posted comments as of July 25, 2010); Cohen, *supra* note --, at <http://www.time.com/time/nation/article/0,8599,2005358,00.html> (76 posted comments as of July 25, 2010).

⁶⁶ Jason Habinsky and Christine M. Fitzgerald, Office Bully Takes One on the Nose: Developing Law on Workplace Abuse, *NEW YORK LAW JOURNAL* (Jan. 21, 2011).

⁶⁷ See generally Ana Marie Cox, Is Your Office Bullyproof?, *MOTHER JONES* 61-62 (May-June 1999) (expressing skepticism about potential legislation).

⁶⁸ See Judy Greenwald, Workplace Bullying Threatens Employers, *BUSINESS INSURANCE* (June 10, 2010) (quoting law firm partners on the inevitability of workplace bullying legislation); Valeri S. Pappas & Gregory F. Szydlowski, Workplace Bullying Legislation – A Primer for Colorado Employers and Employees, *TRIAL TALK*, June/July 2008, 39 (discussing implications of passage of the Healthy Workplace Bill).

organized and have been functioning for several years. Others are just getting off the ground. Many of these groups have been launched by individuals who have either experienced or witnessed bullying and its effects.

It is a sign of the growing awareness of workplace bullying that among the institutional stakeholders are organizations with significant visibility and political clout. In recent years, public employee unions have become especially receptive to workplace bullying legislation. For example, in New York State, unions supporting the legislation have included the Public Employees Federation, New York State United Teachers, Civil Service Employees Union, and Professional Staff Congress.

In Massachusetts, a union local affiliated with the Service Employees International Union/National Association of Government Employees has taken a lead role in advocating for the Healthy Workplace Bill. Civil rights and women's rights groups have emerged as sources of organizing and lobbying support for the legislation as well. The National Association for the Advancement of Colored People and Business and Professional Women are among the organizations that have supported the enactment of workplace bullying legislation.⁶⁹

Employment Practices Liability Insurance

In 2011, an insurance industry newsletter published by PropertyCasualty360.com reported that some employers are requesting that insurance companies include workplace bullying in their employment practice liability insurance (EPLI) policies. EPLI policies have become a fact of life in corporate America, and it makes sense that the insurance industry would be discussing the potential impact of workplace bullying legislation. Furthermore, it is a sign of the growing strength of the movement to enact the Healthy Workplace Bill that employers and their insurance companies are anticipating its passage. If the HWB becomes law, lawsuit negotiations will be influenced by insurance coverage of bullying-related disputes.

Criticisms of the Healthy Workplace Bill

Opposition to the Healthy Workplace Bill has come primarily from state chapters of the Chamber of Commerce, the Society for Human Resource Management, and from management-side employment lawyers. Specific criticisms have ranged from practical legal concerns to ideological objections. First, some critics have posited that a workplace bullying law will create a groundswell of frivolous litigation. This is a reasonable concern, but typically these critiques have overlooked numerous provisions in the Healthy Workplace Bill that limit its reach to severe cases of workplace bullying. These include a requirement that plaintiffs establish intent to cause distress and to show actual harm; a higher standard for proving emotional distress damages in cases that did not involve a negative employment decision; and express preservation of traditional employer prerogatives such as conducting employee evaluations, thus precluding an employee from raising a claim over a fair but negative performance appraisal.

Concededly, when the Healthy Workplace Bill is enacted in a given state, there probably will be an initial surge of claims. However, as these cases wind their way through

⁶⁹ See Resolutions, THE CRISIS, Fall 2008, 50 (reporting on enacted resolution calling upon all NAACP units to support workplace bullying legislation); <http://www.brevardbpw.org/newsletters/v4i7.pdf> (chapter newsletter of Business and Professional Women reporting adding workplace bullying to the national legislative agenda).

the court systems, it soon will become apparent that the requirements of proving malice and actual harm make for a stiff legal threshold in order for individuals to prevail. Ultimately, the most valuable function played by the Healthy Workplace Bill will be a preventive one, in that employers will have a strong legal incentive to be pro-active in preventing these situations from occurring.

Second, some critics have argued that existing law, especially tort law and discrimination law, already provides a sufficient legal response to workplace bullying. My extensive analysis of tort claims such as intentional infliction of emotional distress (summarized in Part II above) easily refutes that assertion. At present, only claims that threaten or involve physical violence, or claims that expressly raise mistreatment based on protected class membership, fall comfortably within existing tort law. In addition, workers' compensation preempts tort claims against employers in many states. Furthermore, discrimination law requires a plaintiff to show that the objectionable conduct was motivated by her protected class status. Such motivation often is far from clear in bullying cases, even when the complainant is protected under discrimination law.

A third type of argument against workplace bullying legislation is grounded in a defense of competition and the free market. In a sharp criticism of the Healthy Workplace Bill, management-side employment lawyers Timothy Van Dyck and Patricia Mullen closed their commentary by claiming that protections against malicious, harmful mistreatment at work are somehow contrary to high performance expectations for workers and healthy competition.⁷⁰ They posited that "tension created by competition" fuels productivity at work, and the Healthy Workplace Bill "would not only inhibit productivity and employers' freedom to hire and fire at-will employees but moreover, it would chill critical workplace communication."⁷¹ They continued:

The United States has always prided itself on its rugged, even idiosyncratic, individualism. At a time when corporate America at least purports to celebrate diversity in the workplace, it is ironic that legislation is being considered which, if passed, would serve to clone workplace behavior. . . . (I)t is those who push us to excel to whom we often owe our greatest debt of gratitude. By labeling pushing as 'bullying,' there exists a profound risk that high expectations go by the boards and employees are denied real opportunities for advancement.⁷²

IX. Other law and policy initiatives

A. Grand jury reports

Grand juries typically are associated with criminal proceedings, whereby citizen jurors are assembled to consider whether there is sufficient evidence to issue a criminal indictment.

A less familiar function for county-level grand juries is that of an overseer or monitor of county government and municipalities within a county, vested with some investigative powers. In this setting, a grand jury may serve as a fact finder and issue recommendations

⁷⁰ Timothy P. Van Dyck and Patricia M. Mullen, *Picking The Wrong Fight: Legislation That Needs Bullying*, 3 No. 11 MEALEY'S LITIGATION REPORT 1, 3 (June 2007) (predicting "a huge uptick in employment lawsuits were this legislation to pass").

⁷¹ *Id.*

⁷² *Id.*

as this one did, but that typically is the extent of its authority. Nevertheless, this is an encouraging development for the anti-bullying movement. The reach of grand jury report may be limited — after all, their findings and recommendations apply only to certain government employees within the county and carry little enforcement power — but they serve as a valuable tool for public education locally and beyond.

Ventura County, California (2011)

In 2011, a Ventura County, California grand jury issued a report finding that workplace bullying is a serious problem in county government and recommending that the county Board of Supervisors adopt an anti-bullying policy and collect information on bullying in county government offices.⁷³ The investigation was triggered by a public complaint, leading to a 33-page report containing these main findings:

The Grand Jury found that bullying is occurring in County government and that the County has no anti-bullying policy. Employees have escaped from bullying by leaving their County positions. These employees did not file complaints of bullying because they perceived they could not get a fair and impartial investigation into their complaints. They felt their situation would worsen if their identities became known.

Riverside County, California (2012)

In 2012, a Riverside County grand jury issued a report finding that “workplace bullying by supervisors and managers has become pervasive” in two large programs within the county’s human resources department.⁷⁴ The report found that supervisory bullying “is causing fear and intimidation among employees, as reported in seven complaints.” It further observed that the “County has no written policy or employee training specifically directed against bullying the workplace.” Some employees testified that they escaped the bullying “by leaving their positions, while others testified they feel trapped in the positions and fear termination.” The grand jury recommended, among other things, the adoption of “written policies and procedures” concerning workplace bullying for the affected departments, the adoption of an anti-bullying policy for all county employees, and the creation of strong reporting and enforcement mechanisms.

B. Ballot measures

Advocates for greater legal protections against workplace bullying generally have eschewed ballot measures as a possible avenue toward legal reform, but in 2004 the personal initiative of one Massachusetts citizen illustrated how it could be done. After attending a public forum on workplace bullying in the town of Amherst, Paul Piwko decided to take action, and he decided to collect draft and collect signatures for a ballot measure that would instruct the state representative to introduce legislation (1) declaring workplace bullying “to be an occupational safety and health issue”; (2) mandating a statewide study on the impact of workplace bullying on individuals, the healthcare system, and insurance rates; and, (3) requiring employers with 50 or more workers to adopt a policy on workplace

⁷³ Ventura County Grand Jury 2010-11, Final Report: Bullying in the Workplace (May 24, 2011), at http://portal.countyofventura.org/portal/page/portal/Grand_Jury/Reports/TAB2010-11/Bullying_in_the_Workplace_Final_Report.pdf.

⁷⁴ Riverside County, 2011-2012 Grand Jury Report, Riverside County Human Resources Department 2 (June 13, 2012).

bullying.⁷⁵ At the November 2004 general election, the ballot measure was approved by over a two-to-one margin, with 8,178 votes in favor and 3,850 opposed.⁷⁶

The district's state representative, Rep. Ellen Story, was very receptive to the ballot measure and introduced a bill consistent with its specifications in the next legislative session.

That bill and a virtually identical successor would not get out of committee. However, Rep. Story's interest in the workplace bullying issue would continue, and eventually she became a primary sponsor of the Healthy Workplace Bill.

C. Proclamations

In 2011, over two dozen U.S. cities, towns, and counties issued proclamations endorsing Freedom from Workplace Bullies Week, an event created by the Workplace Bullying Institute.⁷⁷ In 2012, over one hundred local government entities issued proclamations. The proclamations were the result of outreach by grassroots activists from Healthy Workplace Advocates groups across the country. Although they lack any legal authority, they serve as evidence of growing awareness of workplace bullying and potential receptivity to legal interventions.

D. Professional accreditation standards

As workplace bullying more fully enters the mainstream of American employee relations concerns, it is possible that non-governmental regulators may become more influential in addressing it. The most significant example to date is the Joint Commission, an independent, non-profit organization that accredits health care organizations and programs, has entered the fray. In 2008, the Joint Commission issued a standard on intimidating and disruptive behaviors at work, citing concerns about patient care:⁷⁸

Intimidating and disruptive behaviors can foster medical errors, contribute to poor patient satisfaction and to preventable adverse outcomes, increase the cost of care, and cause qualified clinicians, administrators and managers to seek new positions in more professional environments. Safety and quality of patient care is dependent on teamwork, communication, and a collaborative work environment. To assure quality and to promote a culture of safety, health care organizations must address the problem of behaviors that threaten the performance of the health care team.

Two leadership standards are now part of the Joint Commission's accreditation provisions: The first requires an institution to have "a code of conduct that defines acceptable and disruptive and inappropriate behaviors." The second requires an institution "to create and implement a process for managing disruptive and inappropriate behaviors."

⁷⁵ Commonwealth of Massachusetts, Application for a Public Policy Question, 3rd Hampshire District (petition form on file with author).

⁷⁶ http://www.boston.com/news/special/politics/2004_results/general_election/questions_all_by_town.htm

⁷⁷ David Yamada, "Cities, towns, and counties support Freedom from Workplace Bullies Week 2011," *Minding the Workplace* (Oct. 18, 2011), at

<http://newworkplace.wordpress.com/2011/10/18/cities-towns-and-counties-proclaim-support-for-freedom-from-workplace-bullies-week-2011-2/>.

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MINDING THE WORKPLACE blog (<http://newworkplace.wordpress.com>), by David Yamada

Forthcoming symposium essay in the *TEMPLE POLITICAL & CIVIL RIGHTS LAW REVIEW* and forthcoming book on workplace bullying and American law.