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POTENTIAL LEGAL PROTECTIONS AND LIABILITIES FOR WORKPLACE BULLYING

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I. INTRODUCTION

Among scholars and practitioners in labor and employment relations, there is a growing recognition that workplace bullying can inflict serious, even devastating harm on employees and employers alike. In many aspects of the employment relationship that are rife with potential conflict and disruption, legal protections, regulatory mechanisms, and employee benefits play important roles in terms of prevention, corrective measures, compensation and assistance, and dispute resolution. This is not yet the case with workplace bullying. This paper will briefly examine the legal implications of workplace bullying and propose measures to address serious inadequacies in protections for severely bullied workers.

This paper is based on many years of research and writing about workplace bullying and the law. In 2000, the GEORGETOWN LAW JOURNAL published my lengthy analysis of the legal implications of workplace bullying, the first in-depth treatment of the topic. (A full citation to the piece appears at the end of this paper.) I also am the author of the Healthy Workplace Bill, model anti-bullying legislation that has been the basis of bills introduced in several state legislatures.

Workplace bullying can be defined as the "repeated, malicious, health-endangering mistreatment of

one employee . . . by one or more employees." GARY NAMIE & RUTH NAMIE, THE BULLY AT WORK, rev. ed., 3 (2003). Common bullying behaviors include: false accusations of mistakes and errors; hostile glares and other intimidating non-verbal behaviors; yelling, shouting, and screaming; exclusion and the "silent treatment"; use of put-downs, insults, and excessively harsh criticism; and unreasonably heavy work demands. Loraleigh Keashly & Karen Jagatic, U.S. Perspectives on Workplace Bullying, in STALE EINARSEN, ET AL., EDS., BULLYING AND EMOTIONAL ABUSE IN THE WORKPLACE: INTERNATIONAL PERSPECTIVES IN RESEARCH AND PRACTICE 36-37 (2003); NAMIE & NAMIE, supra, at 18.

Severe Harm to Workers

Bullying can inflict devastating harm on targeted employees. According to Dr. Gary Namie, severely bullied workers may experience conditions such as clinical depression, high blood pressure, cardiovascular disease, impaired immune systems, and even symptoms consistent with Post Traumatic Stress Disorder. Many of these individuals are faced with life-altering decisions about whether to stay in or leave a job.

Frequency and Costs

Workplace bullying is common and costly:

- In a recent Wayne State University survey conducted by professor Loraleigh Keashly, nearly 60 percent of respondents reported experiencing emotionally abusive behavior from co-workers during their working lives.

- In the 1990s, Columbia University researcher Harvey Hornstein examined information about abusive supervision from 1,000 workers in a wide variety of occupations and concluded that approximately 90 percent of the workforce experiences abuse from their bosses at some point in their careers.

- A 1992 study by human resources expert Emily Bassman found that abusive work environments result in "fear and mistrust, resentment, hostility, feelings of humiliation, withdrawal, play-it-safe strategies, and hiding mistakes."

- In 2002, the ORLANDO BUSINESS JOURNAL reported on a study of 9,000 federal workers indicating that 42 percent of female respondents and 15 percent of male respondents had experienced bullying-type behaviors over a two-year period, "resulting in a cost of more than $180 million in lost time and productivity."

- A 1998 study by University of North Carolina management professor Christine Pearson of 775 targets of workplace incivility and aggression found that "28 percent lost work time avoiding the instigator," "22 percent decreased their effort at work," and "12 percent actually

changed jobs to avoid the instigator."

- Joseph Kinney, the founder of the National Safe Workplace Institute, reported that "there have been numerous instances where abusive supervisors have baited angry and frustrated employees, pushing these individuals to unacceptable levels of violence and aggression."

II. PUBLIC POLICY GOALS

The legal and regulatory system should embrace the following policy goals with regard to workplace bullying:

Prevention

Most importantly, the law should encourage employers to use preventive measures to reduce the likelihood of workplace bullying. These include developing policies, educating employees, and supporting a workplace culture that values dignified treatment of all employees. If bullying is prevented, then workers and employers alike will benefit, and the legal system is spared additional litigation.

Fair and prompt resolution

The law should encourage the internal resolution of bullying disputes, with procedures designed to be fair to all parties. It also should protect workers who engage in peaceful self-help measures to address the problem. In addition, the law should provide incentives to employers who respond fairly, promptly, and effectively when informed about alleged bullying behavior.

Compensation and assistance

The legal system should provide relief and assistance to targets who have been subjected to severely abusive treatment. This should include, where applicable, monetary damages, mental health counseling, and reinstatement to the target's original position.

Deterrence

Bullies, and employers who enable them, should be subject to punitive measures for their actions. The threat of punishment will have a deterrent effect and encourage the use of preventive measures to discourage bullying behavior.

At this juncture, it is fair to say that the state of American employment law relative to bullying does not meet these public policy goals. Nevertheless, bullied employees do have some potential legal protections, and correspondingly employers do face potential liabilities.

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

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.

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

"Garden Variety" Bullying and IIED

An 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. 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 Denton v. Chittendon Bank, 655 A.2d 703 (Vermont 1994), 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., 1998 WL 184582 (Okla.App. 1998),* 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 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, 326 Ark. 168 (1996), 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, 380 A.2d 611 (Md. Ct.App. 1977), 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

* By ruling of the Oklahoma Court of Civil Appeals, this case should not be regarded as a reported case for use as judicial precedent. Thus, it is summarized here for illustrative purposes only.

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 presence of an aggravating factor may rescue what otherwise is likely to be an unsuccessful claim.

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. For example:

- In Soto v. El Paso Natural Gas Co., 942 S.W.2d 671 (Tex. Ct.App. 1997), 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., 951 P.2d 507 (Haw. Ct.App. 1998), 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., 953 P.2d 992 (Idaho 1998), 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.

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. For example, in Vasarhelyi v. New School for Social Research, 230 A.D.2d 658 (N.Y. App.Div. 1996), 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."

Preemption by Workers' Compensation

Finally, we must consider the effect of workers' compensation laws on IIED claims. Jurisdictions are split on whether state workers' compensation acts preclude IIED claims against employers. For example, 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).

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. 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").

B. INTENTIONAL INTERFERENCE WITH THE EMPLOYMENT RELATIONSHIP

Another tort law theory that potentially may be invoked 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.

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

One commentator has aptly stated that because of confusion and inconsistency in the case law interpreting this doctrine, "employers and employees have little upon which to rely in evaluating claims premised upon tortious interference." Tortious Interference with Business Relations: "The Other White Meat" of Employment Law, 84 MINNESOTA LAW REVIEW 863, 914 (2000). However, particularly in cases where it is feasible to sue an individual employee, this may be a viable cause of action. 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. 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).

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. E.g., Miles v. Bibb Co., 177 Ga.App. 364 (1985), reh. den., cert. dism. (1986) (holding that neither upervisor nor human resources director was a third party unauthorized to discharge plaintiff). 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., 77 Or.App. 663, recon. den. (1986), 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.

IV. DISCRIMINATION CLAIMS

Harassment Law

Harassment that is grounded in a target's membership in a legally protected class (typically, sex, race, color, national origin, disability, age, or religion) may be 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, 2000 WL 33665354 (MCAD 2000), 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.

Disability Discrimination

Disability discrimination statutes may offer some relief when abusive behavior has induced or exacerbated a recognized mental disability. Research by civil rights attorney and former law professor Susan Stefan has demonstrated that claims under the Americans with Disabilities Act by employees involving psychiatric disabilities tend to fit into one of four common profiles:

1. Employees who had worked satisfactorily for an extended period of time until the appointment of a new supervisor and whose claims clearly arose from escalating interpersonal difficulties with their supervisors.

2. Employees whose psychiatric disabilities arose from other work environment issues, including women who were sexually harassed; individuals subjected to hostile work environments as a result of disability, gender, race, or sexual preference; whistleblowers; and people whose disabilities were related to other claims of employer abuse or unfair treatment.

3. Employees whose disabilities were related to increasing stress, increased hours on the job, or the demands of new positions or new responsibilities. . . .

4. Employees disciplined for misconduct, usually sexual harassment, who claimed that their behavior resulted from a mental disability or that being disciplined showed that their employer perceived them as being mentally disabled.

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). However, as Stefan concluded 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." Id. at 844.

V. RETALIATION AND WHISTLEBLOWING GENERALLY

Survey data collected by the Workplace Bullying Institute suggests that retaliation engaging in some type of whistleblowing behavior or for rebuffing sexual advances is a leading motivation behind workplace bullying. Engaging in union organizing activity also may encourage retaliatory behavior. Obviously, the anti-retaliation provisions of various protective employment statutes may be applicable. In addition, retaliatory actions that culminate in a discharge (actual or perhaps even constructive), may raise not only statutory violations, but also the public policy exception to at-will employment and other wrongful discharge claims.

VI. LABOR AND COLLECTIVE BARGAINING STATUTES

Federal and state labor and collective bargaining statutes may be a source of protection for bullied employees. The critical distinction, of course, is whether a client is covered by a collective bargaining agreement (CBA). However, it is possible that even non-union employees may have limited recourse under federal or state labor laws.

If an individual is covered by a collective bargaining agreement, then her substantive and procedural rights will be defined largely by its provisions. It is beyond the scope of this article to explore all of the labor law ramifications concerning workplace bullying, but several points are worth briefly raising. First, unions could be encouraged to 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. Finally, both the union's and management's legal obligations become tangled when a bullying situation arises between union members, or between a bullying union member and a targeted supervisor.

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." 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. Potentially, a group of non-union employees concerned about workplace bullying could approach their employer about it. Such activity presumably would be protected under Section 7, and any employer retaliation for engaging in the activity would be prohibited under Section 8.

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 nonlitigious 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. 29 U.S.C. Sec. 152(3).

VII. FREE-SPEECH PROTECTIONS

In some (but certainly not all) instances, the best way to deal with bullying behavior is to confront the bully before the situation escalates. However, if we assume that confronting the bully would be

construed legally as a form of speech, the law offers only limited protections to people who have engaged in this brand of self-help.

Public employee speech is protected by the First Amendment, but only to the degree that it addresses matters of public concern. See Connick v. Myers, 461 U.S. 138 (1983). Furthermore, employee speech related to one's official duties, which very well could encompass a worker's internal complaints about bullying, is not covered by the First Amendment. This is a difficult hurdle to surpass for most everyday bullying scenarios, though it could have some application to whistleblower or retaliation situations.

For private 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. One state, Connecticut, provides general statutory protection for employee speech, though its application to bullying situations is apparently untested.

VIII. OCCUPATIONAL SAFETY AND HEALTH AGENCIES

NIOSH

In recent years, the National Institute for Occupational Safety and Health has been taking much greater interest in workplace bullying and abuse. In February 2005, NIOSH hosted an international roundtable discussion of experts on workplace bullying and psychological aggression at its Cincinnati office. During the fall, NIOSH continued these discussions with small working groups composed of individuals who participated in the February roundtable. NIOSH researchers also contributed an article to a 2004 symposium issue on workplace bullying that I edited for the EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL.

NIOSH is not a policy-making body. However, the fact that the federal government's primary research arm for workplace safety is paying attention to bullying is a powerful validation of this social and economic problem. In addition, NIOSH's research may help to inform discussions about future regulatory initiatives.

OSHA

The Occupational Safety and Health Administration (OSHA) is responsible for promulgating and enforcing the nation's workplace safety standards. At first glance, federal and state occupational safety and health laws would seem like natural sources to turn to in seeking legal protections for bullied employees. After all, 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." 29 U.S.C. Sec. 651(b). However, the main concern behind the OSH Act was the prevention of physical injuries, especially those occurring in

the industrial sector, and manufacturing and construction sites remain the primary focus of enforcement efforts in America.

Nevertheless, the OSH Act's mandate to provide safe and healthful working conditions can be used as a basis for developing effective human resources programs to safeguard employees from bullying. For example, the supervisor of health services and occupational risk for the Osram Sylvania Corporation has cited the OSH Act approvingly in incorporating bullying prevention into the company's strategies for maintaining employee health.

IX. EMPLOYER POLICIES

While the vast majority of employers proscribe harassment based on protected class status, such as race, sex, or religion, few go so far as to cover bullying behaviors. A small number of employers, including IBM, the Oregon Department of Environmental Quality, the Federal Reserve Bank of Boston, and the Massachusetts Institute of Technology, address general harassment and bullying behaviors in their employee policies. This can implicate liability issues, for courts increasingly are holding that written employment policies are enforceable as contractual agreements.

X. SAFETY NET: EMPLOYEE BENEFITS

The current amalgam of health insurance, workers' compensation, unemployment insurance, and disability benefits fails to provide bullied employees with an adequate safety net. If anything, navigating the bewildering assortment of qualification rules, application requirements, and multiple bureaucracies serves to exacerbate the stress and related health problems faced by many bullying targets.

Health Insurance

It is well beyond the scope of this paper to discuss America's gaps in health coverage for its citizens, but certainly it must be noted that the health care crisis applies to bullied employees. Many health care plans provide limited or no coverage for mental health counseling and treatment. Targets of bullying who leave their jobs stand to lose employer-supported health insurance, and the costs of paying for continued coverage under COBRA may be prohibitive.

Workers' Compensation

Workers' compensation is another possible remedy for workplace bullying that has caused an employee to become partially or fully incapacitated. However, such claims are more likely to be contested where the injury is a psychological one, and often this will trigger an inquiry into the employee's past emotional state. In addition, workers' compensation laws in many states do not provide coverage for stress-related illnesses.

Unemployment Insurance

Bullied employees who leave their jobs instead of continuing to face abuse may encounter difficulties obtaining unemployment benefits. An individual who resigns "voluntarily" is ineligible for unemployment compensation. In the case of the bullied worker who quits a job, in order to receive benefits she must establish that she left due to intolerable conditions that the employer refused to correct upon learning of them.

Social Security Disability Benefits

If a bullied worker becomes disabled and cannot work on a long-term basis, he may be able to receive Social Security Disability payments. However, for someone who is suffering from psychiatric illness, it often is difficult to establish eligibility. Indeed, the lengthy form that applicants must complete in order to be considered for benefits is so weighted toward purely physical injuries that someone who is suffering from psychiatric illness must ingeniously navigate the questions in order to convey fully the gravity of his situation.

XI. PROSPECTS FOR LAW REFORM

Law and policy reform with regards to workplace bullying may take time, but there are signs that the day is coming when targets of bullying will have better legal protections at their disposal. The call for change will have to come from the grassroots, but it can be done. For example, in 2004, voters in the Amherst, Massachusetts legislative district overwhelmingly approved a ballot measure instructing their state representative to introduce legislation that funds a statewide study of workplace bullying and requires employers to develop policies concerning workplace bullying. In 2005, their representative introduced such a bill, which is now in committee.

Ultimately, we need reform in two main areas. First, we need a comprehensive anti-bullying law that protects employees and provides incentives for employers to respond to bullying. That is the purpose of the Healthy Workplace Bill, described immediately below. Second, we need to fix the menu of employee benefits to make these programs more helpful to individuals suffering from psychiatric and stress related illnesses.

Healthy Workplace Bill

As a result of my research on available legal protections for targets of severe workplace bullying, I drafted model anti-bullying legislation, now dubbed the Healthy Workplace Bill, that defines the intentional infliction of a hostile work environment as an unlawful employment practice. The Healthy Workplace Bill includes a number of important provisions:

- It provides compensation to targets of workplace bullying who can demonstrate actual physical or psychological harm.

- It imposes liability on both individual perpetrators and their employers, but it includes incentives for employers that allow them to avoid liability by engaging in preventive measures and by responding fairly and promptly to allegations of bullying.
- It includes provisions that reduce the likelihood of frivolous or weak lawsuits.

Thanks largely to the public education efforts of the Workplace Bullying & Trauma Institute, since 2003 the Healthy Workplace Bill has been introduced (but not yet enacted) in some 12 states, and efforts on behalf of the bill are underway in several other states as well.

Building a Genuine Safety Net

In addition to providing severely bullied workers with a viable cause of action, we need to develop a more comprehensive array of employee benefits for those who do not wish to pursue litigation. Between the current states of health insurance, workers' compensation, unemployment insurance, and disability benefits, bullied workers do not have a strong safety net to support them. The New Workplace Institute (see boxed item below) will be studying ways in which these programs can be more helpful and receptive to individuals who are suffering from stress-related and psychiatric illnesses.

International Legal Responses to Workplace Bullying

The Healthy Workplace Bill has not been formulated in a vacuum. Around the world there is a growing conviction that national and local legal systems should respond to the harm caused by workplace bullying. Australia, Canada, France, Sweden, and the United Kingdom are among the nations that have adopted or are considering the adoption of legal and regulatory responses to bullying. In some of these countries, references to workplace bullying can be found in judicial and administrative decisions. In addition, the International Labor Organization and the European Union have acknowledged that bullying is a serious workplace problem.

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To Learn More About Workplace Bullying

Sources

Much of the information in this paper has been drawn from longer works, including:

David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL 475 (2004).

David Yamada, *Workplace Bullying and the Law: Towards a Transnational Consensus?*, in STALE EINARSEN, ET AL., EDS., BULLYING AND EMOTIONAL ABUSE IN THE WORKPLACE: INTERNATIONAL PERSPECTIVES IN RESEARCH AND PRACTICE (London: Taylor & Francis, 2003)

David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEORGETOWN LAW JOURNAL 475 (2000).

Additional Materials

STALE EINARSEN, ET AL., EDS., BULLYING AND EMOTIONAL ABUSE IN THE WORKPLACE: INTERNATIONAL PERSPECTIVES IN RESEARCH AND PRACTICE (London: Taylor & Francis, 2003)

SUZY FOX & PAUL SPECTOR, EDS., COUNTERPRODUCTIVE WORK BEHAVIOR: INVESTIGATIONS OF ACTORS AND TARGETS (Washington, D.C.: APA Press, 2005).

ROBERT W. FULLER, SOMEBODIES AND NOBODIES: OVERCOMING THE ABUSE OF RANK (British Columbia: New Society Publishers, 2004).

GARY NAMIE & RUTH NAMIE, THE BULLY AT WORK, rev. ed. (Naperville, IL: Sourcebooks, 2003).
David C. Yamada, ed., Symposium on Workplace Bullying, 8 EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL 235 et seq. (2004).

Helpful Website

Workplace Bullying Institute, www.bullyinginstitute.org.

The New Workplace Institute is an independent, multidisciplinary, non-profit research and education center devoted to healthy, productive, socially responsible workplaces. A primary focal point of the Institute's initial efforts is workplace bullying and abuse. If you would like to receive more information about the Institute, please send me an e-mail and mailing address to info@newworkplaceinstitute.org.