While it may be immoral and unprofessional, it is not universally illegal in the United States for managers to threaten, insult, humiliate, ignore or mock employees. Nor is it illegal to gossip and spread rumors, withhold information, to take credit for someone else’s work.1

I. INTRODUCTION

Although “Bustin’ Bullies” is becoming a popular headline and desirable goal in American workplaces, there is no absolutely accepted description or definition of bullying. It is called by many names such as, “interpersonal mistreatment, psychosocial harassment, psychological violence, abusive workplace conduct, antisocial employee behavior, escalated incivility, and psychological aggression.”2 However, there are common behaviors. Bullies make personal insults, invade another’s personal space, make uninvited physical contact, make both verbal and nonverbal threats and intimidation, make sarcastic jokes and tease, write withering emails, engage in public shaming, make rude interruptions, glare and give dirty looks, and treat people as if they are invisible.3 Reported behaviors have included yelling, temper tantrums, put-downs, exclusion, nasty gossip, pushing, shoving, biting, kicking, and other assaults, both sexual and nonsexual. Additionally, bullies treat others in rude, disrespectful manners, interfere with work activities, give the silent treatment, give little or no feedback on work performance, withhold deserved praise, fail to give needed support, and intimidate and spread rumors.

1 Teresa A. Daniel, Tough Boss or Workplace Bully?, HR MAG. June 2009, at 82.
2 C.W. Von Bergen et al., Legal Remedies for Workplace Bullying: Grabbing the Bully by the Horns, 32 EMPL. REL. L. J. 14, 16 (2006).
information, delay action on important personnel decisions, lie, and prevent individuals from expressing themselves.4

A. Severity of the Problem

Numerous surveys and studies of workplace bullying have been conducted over the past ten years. The studies have varied over industries and geographic areas, but the one constant remains: approximately one third to one half of workers surveyed have reported that they have experienced workplace bullying.5 For example, in 2000 a survey of 700 Michigan workers reported that twenty-seven percent of the workers experienced mistreatment.6 In a 2002 study of 5,000 employees at the U.S. Department of Veterans Affairs thirty-six percent reported “persistent hostility” from coworkers and supervisors.7 A study by Zogby International and the Workplace Bullying Institute, found that thirty-seven percent of all Americans say they have experienced bullying on the job. Of that group, forty-five percent of respondents reported stress-related health problems such as panic attacks and depression.8 More recently three studies have documented the seriousness of the problem in the United States.9 In 2007 nearly forty-five percent of 1,000 employees surveyed by the Employment Law Alliance reported that they have worked for abusive bosses. Also in 2007 an online survey of 7,740 employees, conducted by the Workplace Bullying Institute, estimated that thirty-seven percent of American workers, approximately fifty-four million people, have been bullied at work. If co-worker bystanders are included nearly half of all U.S. employees are impacted. In 2008 the Society for Human Resource Management (SHRM) and the Ethics Resource Center in Arlington, Va. surveyed 513 participants. Fifty-seven percent confirmed that they had witnessed abusive or intimidating behavior toward employees. Considering the wide variety and scope of the surveys, it certainly appears that American workers perceive that there is a severe bullying problem in the workplace.

4 Von Bergen et al., supra note 2, at 15-16.
5 P. Lutgen-Sandvik et al., Burned by Bullying in the American Workplace: Prevalence, Perception, Degree, and Impact, 44 J. MGMT. STUD. 837 (2007).
7 Id. citing Gary Namie & Ruth Namie, Workplace Bullying: How to Address America’s Silent Epidemic, 8 EMP. RTS & EMP. POL’Y J. 315, 325 (2006).
9 Daniel, supra note 1, at 82.
B. Workers Neglected in the United States

Little has been done in the United States to address this problem. According to one commentator, although bullying is “the most neglected form of serious worker mistreatment in American employment law,” the United States lags behind many parts of the world in addressing it. This fact is particularly disconcerting because the incidents of bullying are increasing in U.S. organizations, at least partially due to American cultural values that emphasize “individuality, assertiveness, masculinity, achievement, and a relatively higher power disparity.” Psychological abuse and bullying are also common in European countries, but they are being addressed through legislation. Europeans are more likely to provide remedies for actions that violate human dignity. Sweden, England, France, Germany, Italy, Spain, the Netherlands, Norway and parts of Canada and Australia have regulatory responses to workplace bullying.

C. American Workplace Primed for Bullying

The American workplace has become primed for bullying due largely to the economic pressures that exist today and to the growth of the service sector, which now represents over seventy percent of the economy. Because service sector work involves significant face-to-face or voice-to-voice interaction, it is susceptible to personality clashes that afford potential bullies greater opportunities.

The global marketplace has put increasing pressure on managers and workers to provide more and better goods and services at a lower cost, but these stressful elements fuel natural bullies and create new ones. That many companies have adopted a downsizing mentality has exacerbated the problem, for the survivors are expected to produce more with fewer resources. Some managers have developed a siege mentality and believe they must clamp down on subordinates to stay on top of things. Bullying is a natural result.

12 Von Bergen et al., supra note 2, at 17.
14 Sutton, supra note 3, at 23.
15 Carbo, supra note 10, at 101.
17 Id. at 487-88.
The decline in union membership makes workplaces more susceptible to bullying.\textsuperscript{18} Although a union’s presence cannot ensure a bully-free environment, it can alter the balance of power and make bullying less likely via collective bargaining provisions and mechanisms designed to prevent arbitrary management actions. Unions also enable bilateral lines of communication to exist and provide safety valves for resolving disputes created or compounded by abusive supervisors.

The diversification of the workplace creates tension and provides additional opportunities for bullies.\textsuperscript{19} Bringing together people with diverse characteristics and backgrounds leads to decreased levels of interpersonal attraction and increased potential for aggression, especially if diversity is not well managed.

The increased reliance on contingent workers reduces loyalty to co-workers and to the organization.\textsuperscript{20} As traditional employment relationships give way to more part-time and temporary work, loyalty to any employer becomes difficult. There is also less chance for the development of the interpersonal bonds that form when people stay together over time. The result is a leaner, but meaner, workplace with an atmosphere in which bullying is more likely to happen.

D. Scope of the Article

This article first explores the legal issues raised by the phenomenon of workplace bullying; it confirms that there are few appropriate remedies for victims of bullying. Second, it discusses the Healthy Workplace Bill, which has been introduced in several states to provide avenues of relief for bullying victims. Third, the arguments of the proponents and opponents to the proposed legislation are assessed and analyzed. However, regardless of the success of proposed legislation, employers still need to address the issues in order to reduce the cost of bullying to its victims and to the organizations. In the last section the managerial perspectives are discussed and recommendations for policies and procedures are offered.

II. STATUS OF EXISTING LEGAL TOOLS TO COMBAT WORKPLACE BULLYING

There is no legislative or judicial cause of action for workplace bullying at the federal level or in any state. Bullying victims must, therefore, try to fit the facts of their cases into existing legal categories, and in most instances

\textsuperscript{18} \textit{Id.} at 488-89.
\textsuperscript{19} \textit{Id.} at 489-90.
\textsuperscript{20} \textit{Id.} at 490-91.
they have been unable to do so. In a study of 524 cases that were decided between 2006 and 2008 and involved behavior that fits within definitions of workplace bullying, researchers found that employers won roughly eighty-five percent.\textsuperscript{21} The difficulty has been that the elements of the legal theories on which bullying victims have most often relied are so stringent that plaintiffs have had difficulty in meeting their burden of proof. This section briefly summarizes the law in this area.

A. Assault

The tort of assault allowed the plaintiff to score a victory in \textit{Raess v. Doescher},\textsuperscript{22} the only reported case in which workplace bullying was explicitly discussed. Raess, a surgeon, became angry because Doescher, a member of the operating team, had complained to the hospital administration about how Raess treated co-workers. Doescher claimed that Raess “aggressively and rapidly advanced on him with clenched fists, piercing eyes, beet-red face, popping veins, and screaming and swearing at him;” believing that Raess was going to “smack the s**t” out of him, Doescher backed up against a wall and put his hands up.\textsuperscript{23} Then Raess turned and stormed out of the room, telling Doescher “you’re history.”\textsuperscript{24} Claiming that this incident caused, among other things, a major depressive disorder with anxiety and panic that prevented him from returning to work,\textsuperscript{25} Doescher sued, alleging intentional infliction of emotional distress (IIED), tortious interference with his employment relationship with the hospital, and assault.

The trial court dismissed the interference claim and the jury rejected the IIED claim, but Doescher won $325,000 in damages on the assault claim. The Indiana Supreme Court affirmed, finding ample evidence to support the jury’s conclusion that Raess’s conduct caused Doescher to reasonably fear imminent harm.\textsuperscript{26} In similar cases, where conduct is sufficiently provocative to warrant the inference that a physical attack is imminent, bullying claimants should also win. But if behavior is not physically threatening, and often it is not, the tort of assault will afford no relief no matter how obnoxious or abusive the behavior is.

A central issue on appeal was whether the court should have allowed Doescher’s expert, Dr. Gary Namie, to depict Raess as a “workplace bully.”\textsuperscript{27} The Court of Appeals held that this testimony was prejudicial because it

\begin{itemize}
  \item \textsuperscript{21} Martin et al., \textit{supra} note 13, at 149-51.
  \item \textsuperscript{22} Raess v. Doescher, 883 N.E.2d 790, 794 (Ind. 2008), \textit{reh’g denied}, (Jun. 30, 2008).
  \item \textsuperscript{23} \textit{Id.}
  \item \textsuperscript{24} \textit{Id.}
  \item \textsuperscript{25} \textit{Id.} at 795.
  \item \textsuperscript{26} \textit{Id.} at 794.
  \item \textsuperscript{27} Raess v. Doescher, 858 N.E.2d 119, 121 (Ind. Ct. App. 2006).
\end{itemize}
allowed the jury to conclude, not that the elements of assault had been proven, but that Raess was a bad person who committed assault because that is what bullies do.  

The appellate court also held that the trial judge erroneously rejected Raess’s request to have the jury instructed that workplace bullying is not a recognized cause of action and that its verdict must be based on the elements of the asserted claims.  

The Supreme Court, however, held that Raess had not properly preserved his objections to the Namie testimony because only trial objections, not motions in limine, can do this. As for the rejected jury instruction, the court stated that it advanced two concepts: bullying was not an issue in the case, and the jury need not decide whether Raess was a bully. The first assertion was incorrect because Raess’s behavior was relevant to the assault and IIED issues, and workplace bullying, “like other general terms used to characterize a person’s behavior,” was an appropriate phrase for the jury to consider in deciding those issues. As for the second assertion, the court held that other instructions adequately informed the jury of the elements of Doescher’s claims.  

Raess v. Doescher is hardly a major win for the workplace bullying concept. Because of its procedural ruling, the court did not address the merits of the claim that Namie, the expert, should not have been allowed to discuss workplace bullying in general or to label Raess as a bully. Many courts would likely find persuasive the Court of Appeals’ views on these issues. Finally, although it endorsed the use of the bullying testimony insofar as it bore on what Doescher inferred from Raess’s behavior, the Supreme Court did not depart from the requirement that victims prove the elements of recognized causes of action to prevail.

B. Intentional Infliction of Emotional Distress

In other cases in which the term was not invoked but bullying clearly was involved, IIED has been the favored theory for obtaining relief. Most plaintiffs, however, have met the same fate that Doescher did. The main reason involves the strict requirements of the Restatement of Torts definition of IIED on which courts rely: “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is

28 Id. at 122-23.
29 Id. at 123-24.
30 Raess, 883 N.E.2d at 796-97.
31 Id. at 799.
32 Id.
33 Id. at 796.
subject to liability . . . .” The stumbling blocks are the requirements that plaintiffs prove extreme or outrageous conduct that caused severe distress.

Comment d to this section of the Restatement says liability has been found “only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.” Given this high bar, courts have rejected claims involving such conduct as “glaring at plaintiff with purported anger and contempt, crying, slamming doors, and snatching phone messages from plaintiff’s hand,” yelling at plaintiff in front of other company executives and calling him at 3 a.m. and “browbeating him for hours,” and cursing plaintiff and referring to her with terms such as “white nigger” and “slut.” The rationale seems to be that unless distress is so severe as to emotionally destroy its target, it is presumed to be part of the price of living together. The Texas Supreme Court has gone so far as to hold that IIED is a “gap-filler” tort on which one may rely only if no other cause of action is available, and that IIED occurs, not where conduct is “callous, meddlesome, mean-spirited, officious, overbearing, and vindictive” but only where it involves a “ring of hell” and “borders[s] on serious criminal acts.”

In the Raess case, the Indiana Supreme Court observed that workplace bullying could be a form of IIED. As the foregoing discussion indicates, however, the law in most jurisdictions is such that a bullying victim who asserts an IIED claim will have a tough row to hoe to prevail.

C. Tortious Interference with a Business Relationship

A workplace bullying victim who quits work due to the behavior may claim tortious interference with a contract or business relationship. This tort requires proof of a contract or relationship that contemplated an economic benefit to the plaintiff, defendant’s knowledge of the contract or relationship and intentional interference with it for an improper goal or by improper means, and damages. Although Doescher’s claim was dismissed, other victims of a campaign of insults, yelling, and retaliatory measures have won, with the courts holding that the behavior was unrelated to any valid corporate

34 RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).
35 Id. cmt. d.
37 Dentron v. Chittenden Bank, 655 A.2d 703 (Vt. 1994).
38 Holloman v. Keadle, 931 S.W.2d 413 (Ark. 1996).
interest. However, although some courts have held that an interference claim may lie if a co-worker or even a supervisor engages in conduct that interferes with the target’s relationship with their mutual employer, others have held that an employer cannot wrongfully interfere with a contract between it and an employee. The at-will employment doctrine may pose another obstacle to recovery. Some jurisdictions allow a claim where the employment relationship is at-will, but others do not.

D. Harassment

Someone who experienced ongoing abuse might also claim that it resulted in the hostile environment form of harassment, a type of discrimination barred by Title VII of the 1964 Civil Rights Act. A hostile environment exists if a workplace is permeated with “discriminatory intimidation, ridicule, and insult,” with courts considering the frequency and severity of the conduct and whether it was “physically threatening or humiliating, or a mere offensive utterance” and unreasonably interfered with one’s work performance. Like any other form of Title VII discrimination, however, harassment must be based on a protected trait – race, color, sex, religion, or national origin – to be actionable. As a result, as one legal scholar has noted, more than seventy-five percent of bullying cases are not covered by Title VII. Also, conduct is harassment only if it was sufficiently severe or pervasive to alter the conditions of one’s employment. The reporters are full of cases in which courts have rejected claims because neither standard was met.

The 1990’s saw courts take two approaches that made recovery even more difficult. First, most courts disaggregated conduct that they considered sexual in nature from other gender-based mistreatment that they deemed nonsexual. Only overt sexual conduct counted in establishing harassment. Second, some courts held that the “equal opportunity harasser” who mistreats both sexes is not guilty of discrimination. Under this perverse theory,
someone who abuses one sex violates Title VII, but if he casts a wider net and abuses both sexes, he gets off scot-free.

In 1998, however, the Supreme Court held that conduct need not be motivated by sexual desire or even have sexual overtones to be actionable; thus, a cause of action exists where, for example, behavior established that the actor was hostile to the presence of either men or women in the workplace. Thus, disaggregation is no longer an obstacle to recovery. In addition, many courts have discarded the equal opportunity harasser concept and instead are focusing on the quantity and quality of harassing conduct. Thus, a cause of action for sex discrimination lies if someone abuses both sexes but uses gender-specific terms with one – e.g., bitch or slut – or targets more members of one sex or treats one sex more harshly than the other. Given these developments, although they still must prove that they were mistreated because of a protected trait and that the conduct was severe or pervasive, it is at least easier for a workplace bullying victim to proceed under a hostile work environment theory than it was a few years ago.

Some commentators have read the cases that rejected the equal opportunity harasser concept as suggesting that there may now be a basis for finding actionable harassment where the conduct was not based on a protected trait. For example, Professors Von Bergen, Zavaletta, and Soper stated that a recent Ninth Circuit decision “left a possible legal loophole to expand application of Title VII to workplace bullying that is not ‘based on sex.’” In fact, the cases suggest no such loophole. On the contrary, although they allowed the plaintiffs to prove their harassment claim using evidence that men and women were disproportionately mistreated, the courts explicitly held that harassment must be based on a protected trait – sex, in those cases – to be illegal.

E. Americans with Disabilities Act

The Americans with Disabilities Act may afford relief if bullying creates or exacerbates a disability. To be considered disabled, one must have a physical or mental impairment that substantially limits one or more major life activities or have a record of, or be regarded as having, such an

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56 See, e.g., Von Bergen et al., supra note 2, at 20, citing EEOC, 422 F.3d at 845.
impairment. Given this stringent requirement, workplace bullying targets must reach an acute psychiatric stage to invoke the ADA; when they do, they must be willing to claim that they suffer a disability, thereby running the risk of social and professional stigmatization. In a study of claims involving psychiatric disabilities, moreover, Professor Stefan found that many employees lose their 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.” As Professor Yamada has noted, because the standards for qualifying as disabled are so strict, the ADA has proven to be an ineffective tool for combating workplace bullying.

F. Constructive Discharge

A constructive discharge claim could lie if abuse becomes sufficiently overwhelming that the victim quit work. The Supreme Court has held that where a hostile environment existed due to sexual harassment, the victim has a constructive discharge claim if they can show that “the abusive working environment became so intolerable that [their] resignation qualified as a fitting response.” That one proves sexual harassment is, however, not enough to establish the necessary intolerability, for unless conditions went beyond “ordinary” discrimination, one is expected to stay on the job while seeking internal redress. Courts have also said that, because the constructive discharge claim is “so open to abuse by those who leave employment of their own accord . . . it [must] be carefully cabined,” that workers are not guaranteed a stress-free environment, and that feeling unfairly criticized and unpleasant working conditions are not so intolerable as to compel a reasonable person to quit. Relying on these standards, a court rejected a claim involving a supervisor who yelled at an employee, told her she was a poor manager, and chastised her in front of customers. Another court, however, found a triable fact issue where the supervisor and others subjected an employee to daily epithets about his Iranian origin and tried to embarrass him in public, resulting in an ulcer and his eventual resignation.

60 Yamada, supra note 16, at 516.
61 Id. at 147, citing Perry v Harris Chernin, Inc., 126 F.3d 1010, 1015 (7th Cir. 1997).
63 Williams v. Giant Food Inc., 370 F.3d 423, 434 (4th Cir. 2004).
Although most cases involving constructive discharge arise in a Title VII context, this is a free-standing tort; thus, a workplace bullying victim could rely on this tort even if the abuse she suffered was not linked with a protected trait. But it is also clear that, as is true of IIED claims, the standards applicable in a constructive discharge setting are extremely demanding.

G. Miscellaneous Legal Theories

Other statutes on which bullying victims might rely include the Age Discrimination in Employment Act, Fair Labor Standards Act, Occupational Safety and Health Act, National Labor Relations Act, Labor Management Relations Act, Employee Retirement Income Security Act, Family and Medical Leave Act, Fair Credit Reporting Act, and False Claims Act. In the public sector, claimants may invoke constitutional amendments; the most commonly used are the First, Fourth, and Fourteenth Amendments.

III. EMPLOYMENT BULLYING LEGISLATION

The odyssey of legislative proposals specifically aimed at employment bullying is largely identified to the Drs. Gary and Ruth Namie and their efforts beginning in the early 1990’s. Adding credence to their position was the article of Professor David Yamada in 2000, and his participation in the Workplace Bullying Institute (referred to as WBI) since 1998. With the creation of the WBI, and its subsidiary WBI-Legislative Campaign, efforts have been underway to institutionalize anti-workplace bullying legislation into American employment law. To date, twenty-one states have had proposed some form of workplace bullying legislation. The proposals range from a study, to a general prohibition of employment bullying, in addition to the other more common Title VII and other recognized discriminatory

75 Martin et al., supra note 13, at 148.
77 Yamada, supra note 16.
grounds. Additionally, several foreign jurisdictions have legislatively incorporated generalized workplace bullying restrictions.

A. The Healthy Workplace Bill

The model proposal for legislation is the Healthy Workplace Bill (HWB), created by David Yamada and published in 2004. In discussing the HWB in numerous articles, it is clear that Professor Yamada has made reasoned efforts to address the perceived problem of abusive behavior at work, shortcomings of current processes, and also recognize the efforts and limitations employers may face. Drs. Namie and Professor Yamada have been the principal advocates for legislative action, as well as having coined the workplace bully phrase as its identifier.

Viewing the existing remedies for abusive behavior at work as too limited, the thrust of the HWB is to provide an individual civil cause of action to those subjected to what has become styled workplace bullying. Specifically to reduce the possibility of increased numbers of frivolous claims, Professor Yamada chose to restrict the proposal to non-administrative actions, rather than providing an EEOC styled system, in the belief that the greater hurdle of the lawsuit would result in additional self-selection.

Although the HWB, as proposed in some states, has been modified to meet legislative desires, common attributes of the model bill proposed by Yamada are consistently present. The key to application of the HWB cause of action is the existence of an abusive work environment or retaliation, both declared to be unlawful employment practices, which can be asserted against the employer on vicarious liability grounds and against an offending co-employee. An abusive work environment under the terms of the HWB requires the presence of acts or omissions, judged by the reasonable person standard, by any employee of the employer, management or co-employee, which:

- are made with malice – defined as desire to cause pain, injury, or distress;

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78 David C. Yamada, Professor of Law, Director of the New Workplace Institute, Suffolk University Law School.
80 Yamada, supra note 11, at 255.
81 Id. at 266.
82 Healthy Workplace Bill § 3(a)-(b).
83 Id. at § 4(a).
84 Id. at § 5(a).
are abusive conduct – acts or omission reasonably hostile based on nature or severity, including verbal abuse, such as derogatory remarks, epithets, and insults; intimidation, threatening, or humiliating conduct; undermining work performance; and exploiting a known physical or psychological weakness; and,

causes tangible harm – either physical or psychological, as proven by competent evidence.

The HWB provides affirmative defenses diversified between employer and employee defendants. If the complained of conduct did not result in an adverse employment action,85 reasonable care by the employer in prevention or correction of the conduct, and unreasonable failure of the employee to utilize employer provided corrective measures, may relieve the employer of responsibility.86 The corrective measure language is applicable to only the employer, however, and will not provide any protection to an offending employee.87 The HWB provides general affirmative defenses to any defendant, not restricted to a lack of adverse employment action, if the complained of conduct is due to poor performance, misconduct, or economic necessity; a reasonable performance evaluation; or a reasonable investigation about potential illegal or unethical activity.88

Relief to the complaining employee specifically incorporates all of the expected civil damages such as injunction, front and back pay, expenses, emotional distress, punitive damages, and attorney’s fees. Echoing sexual harassment, the HWB also specifically allows consideration of removal of an offending party from the work environment. It is important to note, however, that the list is not exclusionary; generally any claims can be made and are recoverable if otherwise available in a civil action.89 The primary exception is, as with the affirmative defense, that in the event of a lack of adverse employment action an employer, but not fellow employees, also enjoys a denial of punitive damages and a limitation of $25,000 for emotional distress.90 Note that there is no absolute damage cap, and whether consequential damages such as injury to personal relationships might be considered arising from emotional distress is not directly addressed.

85 Id. at § 2(c), “including termination [whether actual or constructive], demotion, unfavorable reassignment, failure to promote, disciplinary action, or reduction in compensation.”
86 Id. at § 4(b)(1)-(2).
87 Healthy Workplace Bill, § 4(b), “Where the alleged unlawful employment practice does not include an adverse employment action, it shall be an affirmative defense for an employer only that . . . .” [emphasis added].
88 Id. at § 6(a)-(c).
89 Id. at § 9.
90 Id. at § 7(a).
B. Former and Pending State Legislation

To date, neither the federal government nor any state in the United States has passed legislation adopting any form of general anti employment bullying statute. In the roughly eight years since the first legislative proposal in California in 2003, other articles have recounted and summarized efforts at adoption. Moreover, for those wishing to remain current on legislative proposals, there are websites, such as that of the HWB, which vigilantly track the topic. The table below provides an outline of the more recent state legislation relating to behavior styled workplace bullying, and its outcome or current status. Shaded areas identify states with 2011 legislation relating to abusive workplace conduct. Notation of HWB content represents that the legislation utilizes the same or similar language and structure, although variations may be present. Some legislation is noted as being modified HWB when substantial changes were present.

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<td>HB 214</td>
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93 The content of the table draws from data on the website of the Healthy Workplace Bill, as well as original sources. States are listed alphabetically, and in instances of several proposals in different years the most recent proposal is listed. Review of state legislation was conducted on or about March 15, 2011.
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<td>H.B. 224</td>
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<td>Bill Number</td>
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<tr>
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<td>2011</td>
<td>S.B. 52</td>
<td>Introduced</td>
<td>Modified HWB</td>
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<td>S.87</td>
<td>Died</td>
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<td>Washington</td>
<td>2011</td>
<td>HB 1928 &amp; SB 5789</td>
<td>Introduced</td>
<td>Modified HWB</td>
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<td></td>
<td>2011</td>
<td>HB 1591 &amp; SB5552</td>
<td>In committee</td>
<td>Protective orders for harassment affecting employee or employer</td>
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<td>Died</td>
<td>Prohibition to harassment by or to University students and staff</td>
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<td></td>
<td>2008</td>
<td>SB 6622 &amp; HB 2142</td>
<td>Died</td>
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<td>2011</td>
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<td>2009</td>
<td>AB 894</td>
<td>Failed to pass</td>
<td>HWB</td>
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<tr>
<td>Wyoming</td>
<td>2011</td>
<td>HB 262</td>
<td>Introduced</td>
<td>HWB</td>
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Of those bills considered in previous years, the 2009 New York Senate Bill 1823 has come closest to adoption. Senate Bill 673 passed the New York Senate by a vote of 45 to 16, but stalled in committee in the New York Assembly. The New York Senate action was noteworthy in that it received bipartisan support from both Democrats and Republicans. The successor bill introduced this year, however, could have a high probability of passage. Thirty-four of the New York Senators voting aye on the 2009 bill remain active in 2011, of the total New York Senate of sixty-three, providing more than the majority necessary to again gain Senate passage should the present bill be adopted by the Democratically lead New York Assembly.
If Democrats are more sympathetic to anti-bullying legislation, the Republican/Democratic party composition of state legislatures and governorships rises in importance. In 2011, of the states that have current legislation pending, Connecticut, Hawaii, Maryland, Massachusetts, Vermont, Washington, and West Virginia appear the most likely candidates for successful passage, having both a Democratic legislative majority and a Democrat in the governor’s position. The New York bill discussed above may suffer blockage in the republican majority senate, but the prior legislation garnered support from both parties. New Jersey legislation, although having a Democratic majority in the legislature, could find an obstruction in the governor’s office.

1. 2011 State Legislation

Current 2011 legislative proposals, within the states listed in the above table, include mandates to create a taskforce to study and/or report on employee complaints of abusive conduct, anti-harassment policies for universities, criminalization of abusive work conduct, and versions of the HWB. Although the states indicating use of the HWB generally appeared to follow the model statute, as gauged by significant terminology and construction, potentially impactful changes were present.

a. Hawaii

Hawaii, in S.B. 131, designated the private cause of action specifically for emotional distress. Malice is defined as the intent to cause physical, psychological, or economic harm, differing from the HWB standard of pain, injury or distress. A substantial variation in Hawaii S.B. 1411 was its election of remedies to that of a private claim for abusive conduct, or recovery under the workers’ compensation provisions. While the HWB does provide a system of reimbursement to a workers’ compensation fund for medical expenses or absenteeism, it does not require an election, but rather specifically dictates that the HWB is “in addition to any other law.”94 Hawaii additionally, in its H.B. 214 should it be passed into law, would make “malicious conduct . . . that a reasonable person would find hostile, offense, and unrelated to an employer’s legitimate business interests”95 a misdemeanor criminal offense, with counseling included as an available remedy.

94 Healthy Workplace Bill, supra note 82, at§ 9.
95 H.B. 214, 26th Leg. (Haw. 2011).
b. Illinois

Illinois once again has a Healthy Workplace Bill, located in HB 942, pending in the 2011 legislative year. The proposed legislation duplicates the primary content of the HWB.

c. Maryland

Senate Bill 600, introduced February 4, 2011, closely tracks the HWB, but reduces available emotional distress damages, absent an adverse employment action, to a maximum of $7,500.

d. Massachusetts

Massachusetts has three bills pending in the 2011 legislative session, all of which are essentially duplicates of the model HWB. Each bill has the same summary description and has been referred to the Joint Committee on Labor and Workforce Development.

e. Montana

Montana has before it in 2011 Senate Bill 196 which incorporates many of the terms and concepts of the HWB, but also significant differences. Whereas the HWB references employee, S.B. 196 takes an additional step of defining employees as those employed, and additionally elected or appointed government officials.\(^{96}\) Going further than the vicarious liability imposed on employers for acts of employees, S.B. 196 includes acts by third parties, not just the employer or co-employees, to its coverage.\(^{97}\) S.B. 196 also adds, however, hostile work environment\(^ {98}\) to its requisites for abusive conduct thereby limiting employment actions through the definition of hostile work environment to conduct relating to the listed attributes, as contrasted to the general prohibition in the HWB. The hostile work environment section of S.B. 196 cites the common existing Title VII, gender, and disability grounds, but expands the grounds to include veteran status, sexual orientation, political affiliation, citizenship, marital status, family responsibilities, and personal appearance.\(^ {99}\)

Unlike the HWB, S.B. 196 is more of a resolution system. It dictates a more specific complaint procedure that is to be followed, requiring a written

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\(^{96}\) S.B. 196, § 5(5), 62nd Leg. (Mont. 2011).

\(^{97}\) Id. at § 7.

\(^{98}\) Id. at § 6.

\(^{99}\) Id. at § 5(8).
complaint. The employer then has one month to, among other actions, investigate and, appoint a review committee or mediator. Following receipt of the decision of the reviewing entity, the employer must either implement any suggestions, or explain to the complainant why they did not implement the recommendations.\textsuperscript{100} Compliance with the investigation and committee/mediator requirements serve as an affirmative defense to an action under the S.B. 196. More expansive than the HWB, the S.B. 196 general affirmative defense also applies when no negative employment decision resulted, presumably irrespective of compliance with the investigation and review requirements,\textsuperscript{101} as compared to the HWB limitation of damages.

\textbf{f. Nevada}

Nevada A.B. 90 draws some of its terminology from the HWB, but is greatly abbreviated. Simply stated, the Nevada bill prohibits an employer from subjecting an employee to workplace conduct which “a reasonable person would find hostile, offensive and unrelated to the legitimate interests of the employer,”\textsuperscript{102} including verbal abuse, insults, and epithets, and conduct which is threatening, intimidating or humiliating.\textsuperscript{103} No requirement of malice is included thereby creating the possibility of liability without wrongful intent. Upon violation a general grant of damages, back pay, costs and attorney’s fees are authorized.

\textbf{g. New Jersey}

New Jersey has mirror proposals, A.B. 673 and S.B. 2515. Each is styled the \textit{Healthy Workplace Act} and draws on the abusive conduct and abusive workplace terminology of the HWB. The New Jersey 2011 legislative proposals require conduct be \textit{malicious}, but do not define malice as in the HWB.\textsuperscript{104} Penalty damages are available for \textit{knowing and willing} employer violations, but are limited to a maximum of $25,000.\textsuperscript{105} A claimant also will be deemed to have made an election not to pursue remedies under the bill if they receive workers’ compensation benefits due to the abusive conduct.

\textsuperscript{100} Id. at § 6(1)-(2).
\textsuperscript{101} Id. at § 6(5)(b).
\textsuperscript{102} A.B. 90, § 3, 76th Session, (Nev. 2011).
\textsuperscript{103} Id. at § 3(a)-(b).
\textsuperscript{104} A.B 673, § 3, 214th Leg. (N.J. 2011).
\textsuperscript{105} Id. at § 5.
h. New York

Although there are variations in the New York A.B. 4258\textsuperscript{106} from the current iteration of HWB,\textsuperscript{107} it is essentially the same.

i. Utah

Utah H.B. 292 is a significantly modified HWB. Although it uses some of the terminology such as abusive conduct and abusive workplace, the bill restricts the definition of employer to state, federal, or local governments, or those who receive money from such public agencies. Although the act is not an exclusive remedy, the cause of action provided by H.B. 292 is limited to sharply curtailed damages of $500 together with costs.

j. Vermont

Vermont, in its Senate Bill 52, has much of the relevant content of the HWB as to definitional terms, and designates an abusive work environment as an unlawful employment practice. It deviates in substantial form from the HWB, however, in its omission of the damage cap included in the HWB where there was no adverse employment action. Under the Vermont bill, absent the availability of its other affirmative defenses, an employer would be liable without limitation for all damages assessed without the $25,000 cap on emotional distress or the elimination of punitive damages contained in the HWB.

k. Washington

The introduced Washington bills H.B. 1928 and S.B. 5789 incorporate much of the HWB and use its elements of *malice* and the reasonable person standard to define *abusive conduct* and work environment. However, the bills reference the conduct as an unfair practice within Washington’s labor regulations dealing with discrimination, leaving any defenses or enforcement provisions to existing law. Other legislation pending in the State of Washington deals specifically with the workplace but is limited to protective orders, with the thrust seemingly more to provide remedies when domestic violence and stalking spills into the place of employment.


\textsuperscript{107} See Yamada, *supra* note 11, at Appendix.
l. West Virginia

Proposed West Virginia legislation utilizes the HWB as a general template. Changes to the HWB include the elimination of employer affirmative defenses under the HWB’s § 6, including poor performance and reasonable evaluation, and increases the available limited emotional distress damages from $25,000 under HWB § 7(b), to $50,000.

m. Wyoming

Wyoming House Bill 262\(^{108}\) is virtually identical to the HWB. It does deviate in one important aspect in its limitation of employer liability to a total of $25,000 in damages if there was no adverse employment action.\(^{109}\) The HWB’s limitation incorporates the same dollar figure, but applies the monetary limitation only to emotional distress and excludes punitive damages.

C. Foreign Jurisdictions

The prohibition of behavior generally described as workplace bullying has achieved more prominence in no less than nine jurisdictions outside the United States.\(^{110}\) The European Union, France, Belgium, Quebec, South Australia, Finland, Denmark, Sweden, and some Brazilian states are all reported to have adopted some form of bullying legislation.\(^{111}\) This paper does not intend to provide an extensive review of foreign principles, but only to note attributes of some of the more prominent examples:

- Sweden is reported to be the first European nation to institutionalize anti-bullying behavior in 1993.\(^{112}\) In its Ordinance against Victimization At Work as enforced by the Swedish equivalent of the Occupational Safety and Health Administration, the Swedish system prohibits “recurrent reprehensible or distinctly negative actions which are directed against individual employees in an offensive manner and can result in those employees being placed outside the workplace community.”\(^{113}\) But as opposed to the HWB structure,

\(^{109}\) Id. at § 1, creating Wyo. Stat. Ann. 27-15-107(b).
\(^{110}\) Katherine Lippel, The Law of Workplace Bullying: An International Overview, 32 COMP. LAB. L. & POL’Y J. 1, 5-6 (2010).
\(^{111}\) Id. at 5-6.
\(^{112}\) Id. at 7.
the Swedish approach is that of requiring employers to incorporate policies and procedures to deal with prevention and correction.

- French law, in its Labor Code, prohibits repeated acts “of moral harassment, which have the purpose or effect of causing a deterioration in working conditions by impairing the employee’s rights and dignity, affecting the employee’s physical or mental health, or compromising the employee’s professional future.”  
  Violation carries not only civil damages, but also criminal punishment of up to one year in prison.

- The European Union considers itself to have addressed bullying in its Safety and Health Framework Directive (89/391/EEC), although commentators argue the effectiveness.  
  The EU directive recognizes that “[e]very worker has the right to working conditions which respect his or her health, safety and dignity.”  
  Criticism has been levied, however, that although the language is sufficiently broad to treat bullying, its intent and application are aimed at physical risk, not psychological.

- England is considered to have anti-bullying legislation in its 1997 Protection from Harassment Act, which applies “if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.”  
  The act received notice in 2006 when a roughly $1.6 million judgment was awarded to an employee due to exclusion, arbitrary workloads, and offensive conduct by coworkers.

IV. COMPETING VIEWS OF ADVISABILITY OF LEGISLATION

A. Proponents of Legislation

There are enthusiastic proponents of the legislative adoption of the HWB. They believe that existing legal theories fall far short of deterring

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114 See Maria Isabel S. Guerrero, The Development Of Moral Harassment (Or Mobbing) Law In Sweden And France As A Step Towards EU Legislation, 27 INT’L & COMP. L.R.477, 491(2010).


116 Guerro, supra note112, at 493.

117 Id. at 493-94.

118 Protection from Harassment Act, 1997, c. 40, § 1 (Eng.).

workplace bullying and affording its victims meaningful relief. They also believe that the adoption of the HWB would correct this problem and that there are enough safeguards in the bill to forestall frivolous litigation and to allow courts to dismiss questionable claims on summary judgment.

Professor Yamada has identified four policy goals that should inform a legal response to workplace bullying: (1) Prevention – the law should encourage employers to use preventive measures to reduce the likelihood of bullying, for this would benefit workers and employers and reduce litigation. (2) Self-help – the law should protect workers who resort to self-help measures if bullying occurs and provide incentives to employers who respond promptly and effectively when informed of incidents of bullying. (3) Relief, compensation, and restoration – the legal system should provide relief to bullying targets if self-help measures are inadequate and enable the target to return to the job assured that the bully has been reformed or removed. (4) Punishment – bullies, and employers who put them in positions in which they can abuse their co-workers, should be subject to punitive measures, for this will deter future misconduct.120 Supporters of the adoption of the HWB believe that this would advance these goals.

Supporters can point to some intriguing scholarly findings. Professors Martin & LaVan have asserted that bullying is perceived in some quarters as a legitimate management style and that cultural values unique to the United States, e.g. individuality, assertiveness, masculinity, and achievement, create an environment in which this phenomenon may flourish more than it does in other countries.121 They also cited a study concluding that factors such as a perceived status incongruence/power imbalance, low perceived costs for the perpetrator, lack of a policy against bullying, and lack of punishment create disincentives for someone with bullying tendencies to avoid acting on them.122 Combine this with the fact that employees who file legal challenges against bullying so often fail, with only claims involving threats of or actual physical violence or mistreatment based on a protected trait falling within existing legal categories, and the result is a strong argument for the adoption of the HWB. Although this would not result in the overnight disappearance of bullying, supporters believe that it might alter the landscape enough that more employers would feel impelled to adopt policies prohibiting this behavior and to be proactive in preventing it, and bulliers would have an incentive to calm down. They believe that it should not be the case that, as Professor Yamada put it, malicious, psychological abuse of employees is

120 Yamada, supra note 16, at 492-93.
122 Id. at 180-82.
regarded as part of healthy competition, a form of social Darwinism that separates the wheat from the chaff and frees people to excel.123

Proponents also point to the fact that critical elements of an abusive work environment, as defined by the HWB, are that the perpetrator engaged in the challenged conduct with malice, that it must cause tangible harm, and that it will be judged by the reasonable person standard. In addition, the employer has an affirmative defense if the conduct did not result in an adverse employment action. In large part, supporters note, the HWB simply adopts current Supreme Court standards for finding Title VII harassment and for allowing employers to defend against such claims, while removing the requirement that the conduct be based on a protected trait.124

Although the elimination of that requirement would open the door to more harassment claims, proponents believe there are enough safeguards in the rather narrow definition of abusive work environment and in other features of the HWB to guard against claims lacking in merit. In the end, they stress, the HWB will only address severe forms of bullying at work.125

Interestingly, the HWB has been criticized for not going far enough. Professor Carbo, for example, has argued that the “severe or pervasive” and malice standards and the focus on repetitive acts are so stringent that the HWB would leave most bullying victims with no legal protection.126 In fact, some claimants who could prevail under current law might be unable to do so under the HWB.127 Carbo also dislikes the affirmative defense in the HWB, preferring instead a standard that would hold employers liable for bullying of which they or their agents had actual or constructive knowledge.128 Citing interviews he conducted with bullying victims, he asserted that the decision to report harassment and bullying in the workplace is difficult even under the best of circumstances, for many victims lack the courage to do so, feel shame, or think that it would be fruitless because nothing would be done or the situation might become worse. Many fear reprisals or that filing a grievance would be career suicide.129 At best, in Carbo’s view, the HWB is a good foundation on which new legislation may be built.130

123 Yamada, supra note 11, at 270.
124 Id. at 263.
125 Id. at 262.
126 Carbo, supra note 10, at 116.
127 Id.
128 Id. at 118.
129 Id. at 116.
130 Id. at 116-17.
B. Opposition to Legislation

In considering the legislative desirability of the HWB, it may be useful to review the asserted statistics used to support the legislation. The HWB provides a proposed justification within its preface to be used in its adoption. The HWB recites that between thirty-seven and fifty-nine percent of employees directly experience health harming workplace bullying.\textsuperscript{131} Although other investigators have conducted surveys, caution should be counseled in acceptance of all survey data. It is important to remember that many of the statistics being quoted are based on surveys conducted, presumably at the expense of a primary proponent of the legislation, the Workplace Bullying Institute.\textsuperscript{132} The survey which is reported as scientifically based makes the admission that, of the 2010 survey, 49.6\% of the respondents had not been bullied at work, and never witnessed workplace bullying. And while the 2010 survey used language essentially taken from the HWB, one has to question its impartiality when generalized terms such as \textit{intimidation}, \textit{humiliation}, and \textit{verbal abuse} are used, together with leading or inflammatory categorizations such as \textit{mistreatment} and \textit{bullying}. Also often referenced is the July 2010 Parade magazine on-line survey. Even though the Parade poll was admittedly unscientific,\textsuperscript{133} its 93.39\% favorable endorsement for legislation is held up as a mandate from a neutral source. But consider its question: the simplistic “[s]hould workplace bullying be illegal?” Without consideration of the elements of the HWB, who would vote to approve of the stereotype bully? The surveys conducted by the Workplace Bullying Institute do not include a question on the corollary impact of the HWB: “should you personally be financially liable for perceived intimidation, humiliation, or verbal abuse toward a coworker?” One cannot know, but it seems likely such an inquiry would have a decidedly different response.

Perhaps the basis for opponents of the HWB, or anti-bullying legislation in general, is that of its apparent dismissal of the American standard of at-will employment. Although the HWB does not directly establish the necessity of \textit{cause} for employee sanction or dismissal, its structure will inevitably result in de-facto incorporation of for-cause in employment decisions. The HWB’s affirmative defenses based on poor performance and

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\textsuperscript{131} Healthy Workplace Bill, \textit{supra} note 82, at § 1(a)(2).
\textsuperscript{132} See, The WBI Workplace Bullying Survey, 2010, http://workplacebullying.org/docs/WBI_2010_Natl_Survey.pdf (stating that the survey was commissioned by the WBI). For a list of the surveys conducted by the WBI, see http://www.workplacebullying.org/research/wbi-studies.html.
\textsuperscript{133} Yamada, \textit{supra} note 11, at 251. It should be noted that Professor Yamada is most forthright in his approach, always stipulating to any preferential attributes or possible bias.
reliance on a reasonable performance review\textsuperscript{134} expressly insert second-guessing by triers of fact into management decisions. Every employer would be well advised to maintain documentation on every employee with an eye to justifying their every decision. Even good faith repeated warning of impending personnel decisions might provide the distressing event which, if determined to be too frequent, tip the scales in favor of liability.

But even assuming employer justification in an adverse employment decision, the HWB may prove exceptionally available for abuse. Retaliation is specifically designated as an unlawful practice, and is unexceptional as being incorporated in other protection legislation. The HWB, however, provides a disjunctive phrase extending protection not only to an employee who has opposed abusive conduct, or to an employee “who 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.”\textsuperscript{135} The provision does not require that there have actually been abusive conduct; only that a charge, internal or lawsuit, had been levied. The employer would continue to have the affirmative defense of for-cause termination, but would such a threat of inferred retaliation chill the employer’s reasonable management of its workforce?

A danger recognized by Professor Yamada in the adoption of the HWB is the possibility of a flood of frivolous litigation, but the possibility is considered by Professor Yamada as offset by the expectation that a low probability of success will stem the tide.\textsuperscript{136} If data from the principal 2010 survey by the WBI is taken as accurate, the percentage of employees claiming to be currently bullied is eight and eight tenths percent (8.8\%) of those between eighteen and sixty-five years old.\textsuperscript{137} The 2008 estimate of the United States population between eighteen and sixty-four was approximately 191,248,160,\textsuperscript{138} with the Bureau of Labor Statistics reporting a civilian employed labor force in January 2011 of 139,323,000 people between the ages of sixteen and sixty-five.\textsuperscript{139} If only one tenth of those claiming they are currently bullied chose to litigate, the surge suggested could equate to

\textsuperscript{134} Healthy Workplace Bill, \textit{supra} note 82, at § 6(a)-(b).
\textsuperscript{135} \textit{Id.} at § 3(b).
\textsuperscript{136} Yamada, \textit{supra} note 11, at 269.
\textsuperscript{139} Bureau of Labor Statistics, table series ID LNS12000000. The Bureau of Labor Statistic information is not an exact match due to its inclusion of ages 16 and 17, whereas the WBI survey was confined to ages 18 to 65.
approximately 1,226,000 lawsuits. Even assuming the eventual experience was reduced to an annual one percent of the current estimated 8.8%, the annual number of suits would exceed the total charges filed with the EEOC in 2010.\footnote{One percent of the estimated 8.8% currently bullied would result in approximately 122,600 claims, compared to total claims reported for the year 2010 by the EEOC of 99,922. See EEOC charge statistics table 1997-2010 at http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Feb. 9, 2011).}

While such optimism as to the appeal of litigation is laudable, the experience to which tort reform is generally attributable would suggest otherwise. The HWB has no upper limit, save that on emotional distress and punitive damages, and then only if no adverse employment decision was made. Every attorney understands that each suit has a nuisance value, even if the probability of success is less than excellent. And since the HWB is not exclusive of any other theory, including the maligned intentional infliction of emotional distress, all theories of recovery, administrative or litigation, apparently remain as additional leverage. Even recovery under worker’s compensation programs remain available, with the stipulation that medical expenses and loss of wages disbursed must be reimbursed to the plan, but not as an offset to the employer. Arguably even the possibility of multiple recovery is present. Other than the restrictions on recovery being subject to malice, and unreasonable, but not extreme, behavior, there is really no disincentive to pursuing suit. Were disincentive for marginal or frivolous suits included, such as assessment of fees and expenses or sanctions for groundless suits, perhaps the palatability of the HWB would be greater to the business community. And unlike the more familiar class based actions which require some minimum number of employees, the HWB will apply to all employers, irrespective of size. While the literature typically discusses the ability of companies and human resource departments to counter the HWB with planning and policies, the small business person will not likely have that advantage and will be the least able to absorb heavy litigation costs.

V. MANAGERIAL PERSPECTIVE

A. The Cost of Bullying

Calculating the total cost of bullying in the workplace is an unrealistic goal; there are too many uncertain factors,\footnote{SUTTON, supra note 3, at 44.} but some researchers have estimated that litigating bully-related claims cost can exceed $350,000 per
case.\textsuperscript{142} Other studies assert that approximately twenty-five percent of targets and twenty-percent of witnesses resign because of a workplace bully; in an organization with 1,000 employees the annual cost is estimated at $750,000.\textsuperscript{143} The lowest estimate is that organizations lose an estimated $30,000 to $100,000 annually for each bullying incident within their workplace.\textsuperscript{144} These losses result from a number of causes, such as turnover and health cost, but it also is the consequence of litigation as discussed in Section II above. In the United States most bullying litigations flows through equal employment protections laws,\textsuperscript{145} but claims are also based on intentional torts.

1. The Perpetrators

Mean-spirited people engage in a variety of destructive behaviors in the workplace. Robert Sutton, author of the book \textit{The No Asshole Rule}, observes, “You might call such people bullies, creeps, jerks, weasels, tormentors, tyrants, serial slammers, despots, or unconstrained egomaniacs, but for me at least, asshole best captures the fear and loathing I have for these nasty people.”\textsuperscript{146} Although the word is “potentially offensive, no other word quite captures the essence of this type of person.”\textsuperscript{147} Sutton notes, that many bullies are clueless about their behavior, some are proud of it and some can’t control themselves even though they are troubled and embarrassed.\textsuperscript{148}

2. Impact on the Victims

Usually bullies aim their venom at people who are less powerful than they are,\textsuperscript{149} but they also “infuriate, demean, and damage their peers, superiors, underlings, and at times, clients and customers, too.”\textsuperscript{150} Targets feel oppressed, humiliated, de-energized, or belittled.\textsuperscript{151} Numerous studies

\begin{footnotesize}
\begin{enumerate}
\item Lieber, \textit{supra} note 8, at 93.
\item Patricia Meglich-Sespico et al., \textit{Relief and Redress for Targets of Workplace Bullying}, 19 EMP. RESP. RTS. J. 31 (2007).
\item Anthony J. Wheeler et al., \textit{Eating Their Cake and Everyone Else’s Cake, Too: Resources as the Main Ingredient to Workplace Bullying}, 53 BUS. HORIZONS 553,554 (2010).
\item SUTTON, \textit{supra} note 3, at 1.
\item \textit{Id.} at 4.
\item \textit{Id.} at 5.
\item SUTTON, \textit{supra} note 3, at 5.
\item \textit{Id.} at 9.
\end{enumerate}
\end{footnotesize}
show that victims report reduced job satisfaction and productivity, trouble concentrating at work, and mental and physical health problems such as difficulty sleeping, anxiety, feelings of worthlessness, chronic fatigue, irritability, anger, and depression.\textsuperscript{152} “The effects of assholes are so devastating because they sap people of their energy and esteem mostly through the accumulated effects of small, demeaning acts, not so much through one or two dramatic episodes.”\textsuperscript{153} Demeaning acts drive targets out of the organization and sap the effectiveness of those who remained.\textsuperscript{154} Behavior poisons everyone in the workplace; there is often a ripple effect on witnesses and bystanders. A 2004 study reveals that “exposure to bullying is associated with heightened levels of anxiety, depression, burnout, frustrations, helplessness, negative emotions such as anger, resentment, and fear, difficulty concentrating, and lowered self-esteem and self-efficacy.”\textsuperscript{155}

3. Impact on the Organization

American firms are now beginning to recognize that bullies poison their work environment with low morale, job dissatisfaction, fear, anger, and depression. It is understood that the employer pays for this in lost efficiency, absenteeism, sick leave due to stress-related illnesses, high staff turnover, severance packages, law suits, self-defensive paperwork, and wasted time at work involving targets defending themselves and networking for support. In extreme cases, violence may be the tragic result of workplace bullying.\textsuperscript{156}

In a business environment where bullying is permitted the culture becomes more competitive; co-workers lose their sources of support and become defensive.\textsuperscript{157} Workplace bullying is a logical adaptation to a stressed workplace\textsuperscript{158} and bullying behaviors continue to escalate. When people are afraid they focus on protecting themselves, not on helping their organizations improve.\textsuperscript{159} Organization performance is impaired by costs of increased turnover, absenteeism, decreased commitment to work, and the distraction and impaired individual performance.\textsuperscript{160} “There is even some evidence that

\textsuperscript{153} SUTTON, supra note 3, at 29.
\textsuperscript{154} Id.
\textsuperscript{156} Von Bergen et al., supra note 2, at 31.
\textsuperscript{157} Wheeler et al., supra note 143, at 556.
\textsuperscript{158} Id. at 557.
\textsuperscript{160} Id. at 36.
when people work for cold and mean-spirited jerks, employees steal from their companies to even the score.”

In contrast to the damage that bullying effects on companies, there is evidence that organizations that effectively manage workplace bullying outperform those that do not by thirty to forty percent. Some very effective organizations like Google, Southwest Airlines, and JetBlue Airlines “disdain, punish, and drive out ordinary jerks.” People are hired and fired for attitude. Bad attitude toward colleagues, customers, and the company results in termination. Men’s Wearhouse has a detailed and impressive policy designed to eliminate workplace bullying. Included is this statement: “Everyone deserves to be treated fairly. If leaders are the problem, we ask those being served by leaders to let them know or go up the chain of command – without the threat of retaliation.”

B. Effecting Change

Regardless of whether, or when, legislation is adopted business organizations need to address the issue of workplace bullying because “destructive characters damage their fellow human beings and undermine organizational performance.” By instituting policies now, “employers can minimize the impact of the workplace bullying legislation that is to come in the near future, and maintain a safer and more productive workplace.”

There is evidence that effective change in organizational behaviors has occurred by focusing on conversations and interactions. The U.S. Department of Veterans Affairs reduced employee bullying, psychological abuse and aggression by eliminating seemingly small slights like glaring, interruptions, and treating people as if they were invisible. The results included less overtime and sick leave, fewer employee complaints, and shorter patient waiting times. Productivity went up nine percent. Over two years there were substantial drops in thirty-two of sixty kinds of bullying, for example, glaring, swearing, the silent treatment, obscene gestures, shouting,

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161 Id. at 41, citing JERALD GREENBERG, STUDIES OF THREE MIDWESTERN MANUFACTURING PLANTS (2007).
162 Id. at 43.
163 Von Bergen et al., supra note 2, at 31.
164 SUTTON, supra note 3, at 56.
165 Id. at 60.
166 Id. at 61.
physical threats, temper tantrums, rumors and gossip, and sexist and racist remarks.\textsuperscript{168}

1. Implementing a Policy

There are several reasons why business organizations should be proactive and establish policies and procedures regarding workplace bullying.\textsuperscript{169} First, the organization may be able to avoid litigation. Even in the absence of legislation on workplace bullying, employers still have to defend intentional tort actions based on bullying behaviors. “While the true equal-opportunity jerk usually is breaking no law, proving that the offending employee doled out abuse without discrimination may be a difficult and awkward task for an employer.”\textsuperscript{170} Second, if the Healthy Workplace Bill is adopted, the policy and procedures can be the basis for an affirmative defense. Third, a policy can help create a strong organizational behavior. Businesses without effective policies “take too much of a Band-Aid approach, reacting to specific incidents of bullying instead of having a systemic program in place that gets at the root of the problem.”\textsuperscript{171}

It is recommended that a policy outlawing workplace bullying should be created by a collaborative effort. Employees will have greater commitment to a policy they shaped. Suggested provisions of a policy include a statement of zero tolerance, a clear definition of bullying with illustrative examples, training, effective grievance channels that might include ombudspeople, mediation and hotlines.\textsuperscript{172}

2. Recognizing Bullying Behaviors

As previously discussed in Section III, one major issue for employers is how to define what is, and what isn’t unacceptable abuse.\textsuperscript{173} “Bullying lies on a continuum anchored by on-the-job incivilities on one end and physical violence on the other.”\textsuperscript{174} Decisions makers will have to differentiate between

\textsuperscript{168} SUTTON, supra note 3, at 79.

\textsuperscript{169} Sidle, supra note 147, at 91.


\textsuperscript{171} Sidle, supra note 147, at 89.

\textsuperscript{172} See William C Martucci & Katherine R. Sinatra, Antibullying Legislation – A Growing National Trend in the New Workplace, 2 EMP. REL. TODAY 77, 82 (2009), Wheeler et al., supra note 143, at 558.


\textsuperscript{174} Von Bergen et al., supra note 2, at 14.
bullying and legitimate, but sometimes unpleasant, communications that result from poor performance. Possibly the alleged bully is just a tough boss doing valid employee discipline and evaluations.\textsuperscript{175} Interviews with twenty experienced human resource practitioners revealed how they make their determinations. Workplace bullies are characterized as people who frequently misuse power and authority, focus on personal self-interest, as opposed to the good of the organization, are prone to emotional outburst, and are often inconsistent and unfair in their treatment of employees.\textsuperscript{176} In contrast, tough bosses are described as almost directly opposite. They are objective, fair and professional, self-controlled and unemotional, performance-focused and insistent upon meeting high standards and holding employees accountable for meeting those expectations, and organizationally oriented (consistently operating to achieve the best interests of their companies).\textsuperscript{177} Decision makers will have to distinguish between constructive arguments and ideas and nasty, personal arguments.\textsuperscript{178} Employers should be reminded that it’s acceptable to challenge people’s thinking, but not their character. Both employers and employees should resist the temptation to brand people as bullies just because they annoy, or are having bad, temporary moments.

3. A Screening Tool

Use of a screening tool may help decision makers analyze suspicious behavior and to reach reasonable and appropriate conclusions about what behavior constitutes bullying.\textsuperscript{179} This tool will present ten factors for consideration that should be analyzed when evaluating potential bullying behavior. The behavior should be evaluated objectively considering how the reasonable person in the same or similar circumstance would perceive the conduct. (1) \textit{Severity of the conduct}. Different types of bullying may be considered more or less severe. Physical abuse certainly would be more severe and likely to create liability for the employer. (2) \textit{Number and frequency of encounters}. The number of bullying occasions and the time span between occasions is relevant. A pattern and practice of persistent bullying should be considered more serious than a few isolated incidents. (3) \textit{Apparent intent of the bully}. Would an objective observer perceive that the behavior was malicious? The actual subjective intent of the perpetrator

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\textsuperscript{175} Daniel, \textit{supra} note 1, at 83.

\textsuperscript{176} \textit{Id.}

\textsuperscript{177} \textit{Id.}

\textsuperscript{178} SUTTON, \textit{supra} note 3, at 17.

\textsuperscript{179} \textit{Adapted from} Patricia Linenberger, \textit{What Behavior Constitutes Sexual Harassment?}, 34 LAB. L. J. 238 (1983).
should be irrelevant.  (4) **Power relationship between the parties.** Superior conduct should be expected to maintain a higher standard of conduct. A supervisor’s conduct will be interpreted as more serious and threatening than the conduct of a co-worker. (5) **Response of the target.** Did the target clearly communicate an opinion of the offensive behavior? (6) **Apparent effect on the victim.** An objective evaluation should be made of the consequences of the behavior. (7) **The work environment.** The nature of the workplace often determines the appropriateness of particular behavior. Reasonable people would expect different behavior from a less formal blue collar environment than from a more formal office environment. (8) **Public or private situations.** Different types of behavior could be more serious in a particular situation. Physical threats may be more intimidating in private, but humiliating comments may be more serious in public. (9) **Totality of the circumstances.** What is the combined effect of all aspects of the behavior? (10) **Impact on the work environment?** Are other employees and bystanders being impacted by the behavior?

4. **Enforcing a No-Bullying Rule**

Sutton, author of *The No Asshole Rule,* suggests the top ten steps to enforce a no-bullying rule.\(^{180}\)

1. State a workplace rule against bullying, write it down in a company policy, and enforce it. Be careful not to look like a hypocrite by stating the rule, but not really enforcing it.
2. Since bullies are likely to hire other bullies, include civilized people in job interviews.
4. Treat bullies as incompetent employees even if they do other things extraordinarily well.
5. Carefully watch good people when they are promoted because power corrupts the best of us.
6. Realize that organizations have, and should have pecking orders, but downplay and reduce unnecessary status differences. If you keep social distance between higher and lower status employees smaller, high status employees are less likely to act like jerks.\(^{181}\)
7. Manage the moments by observing the daily interactions and correcting behavior when appropriate.

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\(^{180}\) SUTTON, *supra* note 3, at 89-91.

\(^{181}\) *Id.* at 44.
8. Model and teach constructive confrontation; teach people how to fight.\textsuperscript{182} At Intel “People are also taught to delay their arguments until all the key facts are in, because it wastes time and because taking a public stance based on incomplete information leads people to defend and publicly commit to paths that ultimately clash with the best evidence.”\textsuperscript{183}

9. Because people follow rules better when there are some examples of bad behavior, consider keeping one or two token bullies in the workplace. (This rule appears to contradict Rule 1.)

10. Link big policies to small decencies; create a self-reinforcing cycle between company policy and workplace practices.

VI. CONCLUSION

Bullying in the workplace has received extensive attention in the popular media as well as in academic journals. Research studies report that anywhere from one-third to one-half of current employees have been impacted by it. Although the American workplace is primed for bullying, the United States lags behind European countries who have adopted legislation prohibiting it.

It is undoubtedly correct to say that virtually no one likes a bully. The stereotypical taunting, superior, invidious classmates from our school years inevitably come to mind. The migration of that personality from the schoolyard to one’s employment is the base issue of the workplace anti-bullying legislation. Certainly regulation, whether through common law or legislation, will intrude into the management process. However, we are told that for every wrong there should be a remedy. How wrong conduct must be, and how much injury will be required to justify redress are the thorny issues.

Currently, except for the notable examples arising under discrimination law such as sexual harassment and Title VII, protection from perceived bullies is generally considered lacking. The elimination of disaggregation in sexual harassment may provide more opportunity to address generalized bullying behavior, as may constructive discharge, but the probability of widespread success by those claiming to have been bullied is not expected. The most logical theory, intentional infliction of emotional distress, to address the psychological effect has been vilified as erecting too high a bar to recovery, both in its degree of culpability and its required injury. Although the Raess\textsuperscript{184} case, discussed previously, is perhaps an indication that bullying behavior may lead to common law liability, it was decided on the basis of

\textsuperscript{182} Id. at 80.
\textsuperscript{183} Id. at 81.
\textsuperscript{184} Raess v. Doescher, 883 N.E.2d 790 (Ind. 2008), reh’g denied (Jun. 30, 2008).
assault and therefore is significantly more restrictive than the bullying concepts advocated by proponents of legislation.

The legislative solution generally endorsed by proponents of legislative intervention, the Healthy Workplace Bill, has been annually proposed for adoption in various state legislatures. It is almost assured that at some point the HWB in some form will find legislative favor. Several states are considering legislation in 2011, with New York, New Jersey, and Hawaii all having a favorable environment for passage. The adoption of legislation will not, as a general proposition, spell doom for employers. Small employers may find more difficulty due to a lack of availability human resource planning, and the magnified effect of the cost of suit. Larger employers will likely adapt with policies to serve as an affirmative defense. The cost of compliance will, as always, be passed on in the price of goods or services.

A legislative response to bullying has to recognize the concern of business that any such legislation may all but eliminate the at-will doctrine, especially given unfettered retaliation provisions, or create such a vague system that a constant paper trail of employment justifications will be necessary. An overly liberal definition of bullying opens the door to the kindergarten complaint that someone made a mean face at me. Too stringent and directed a definition and abuse solely intended to exploit the targeted individual’s vulnerability is excluded. Thus the legislative quandary of defining bullying conduct is perhaps best sympathetically captured with the classic Justice Potter Stewart quote that “[we] know it when [we] see it,” although in that instance Justice Stewart was considering the difficulty of defining obscenity and was referencing pornography.

Perhaps the projected increase in productivity will more than offset any odd liability or cost of defense. Proponents of legislation point to the cost of bullying on the workforce and its attendant loss of efficiency, absenteeism, and health cost. But at the same time aggressive management is cast as a reflection of increased competitiveness, the level of which is normally considered the purview of management and often in increased compensation. Certainly management that most people would see as good will seek to assure fair treatment of all of its employees. Should that decision be substantially expanded and made subject to second guessing by courts and juries beyond current law is perhaps the ultimate question.

Regardless of the eventual adoption of state legislation, business organizations are advised to consider establishing policies and procedures to limit bullying in the workplace. The cost of bullying, as calculated by looking at potential lost profits, impact on the victims and impact on the

organization, may be overcome by effecting change in organization behavior.