Chapter 7

WORKPLACE BULLYING: ANOTHER NEED FOR WORKPLACE JUSTICE AND THE POTENTIAL UTILITY OF FACT-FINDING, MEDIATION, ARBITRATION, AND EMPLOYER-SPONSORED INTEGRATED CONFLICT MANAGEMENT SYSTEMS

Suzy Fox, Ph.D.* and Lamont E. Stallworth, Ph.D.**

Abstract

Workplace bullying has become a pervasive fact of working life and a matter in need of workplace justice. This is a feature of what National Academy of Arbitrators President Dennis Nolan referred to as "the incremental crisis in workplace justice."[1] The authors explain bullying, the consequences of same, and the apparent extent of this problem in the United States. They also describe the legislative background, relevant case law, and the potential utility of employer-sponsored anti-bullying policies and procedures.

At a time when the Academy is examining becoming more involved in the mediation and arbitration of workplace disputes in the non-union setting, this article proposes that workplace bullying is one type of conflict for which mediation and arbitration, as well employer-sponsored dispute resolution systems, could be used as fair, timely, and cost-effective forums for workplace justice that could help maintain employment relationships and promote safer and healthier workplaces.

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*Suzy Fox is an Associate Professor of the Institute of Human Resources and Employment Relations at Loyola University-Chicago, Illinois.

**Lamont E. Stallworth, Member of National Academy of Arbitrators and Professor, Institute of Human Resources and Employment Relations, Loyola University-Chicago, Illinois, and Founder and Chair, Center for Employment Dispute Resolution.

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[1]Nolan, *Workplace Justice: The Incremental Crisis and Its Cure,* in Arbitration 2007: Proceedings of the 60th Annual Meeting, National Academy of Arbitrators, (BNA Books 2008), at 1.

Introduction and Purpose

The issues of workplace "bullying" (also called "mobbing" and "psychological violence") can be discussed and analyzed within a number of disciplinary contexts including industrial/organizational psychology, human resource management, labor and employment relations and law, ethics, organizational communication, and, of course, conflict management and alternative dispute resolution, to name a few.

For the purposes of this article, the authors attempt to analyze and discuss the issue of workplace bullying within an interdisciplinary context. In light of the challenge posed by Academy President Dennis Nolan, the primary theoretical prism through which the authors view this critical and timely topic is the potential utility and effectiveness of integrated conflict management systems (ICMS) and alternative dispute resolution (ADR) to provide workplace justice and the effectuation of workplace dignity in combatting abusive workplace conduct.[2]

In examining and discussing the realities and consequences related to the decrease in union density rates and the concomitant decrease in labor arbitration cases, Academy President Nolan averred that:

> Arbitrators, [too] have important roles to play in ensuring workplace justice. Finding opportunities to play those roles, however, [may] be a challenge. The first step is to recognize what we are—*workplace* dispute resolvers. Some of us choose to work only in certain segments of the workplace, but wherever we work our job is the same: to solve employment-related problems objectively and with full respect toward controlling authorities such as laws and contracts. In short, what we do is provide workplace justice.[3] . . . In short, all of us have something extremely important to offer to modern workers and their employers—to the *entire* workforce, that is, not merely the small and shrinking fraction of it that we have traditionally served. It would be a tragic waste of that intellectual and moral capital not to use it where it is most needed today. I do not have a detailed roadmap that will enable us to widen the reach of workplace justice. I only know that we have to *begin* that journey now if we hope to complete it in our professional lifetimes. I urge each of you, union advocates and leaders, management advocates and executives, and ADR professionals alike, to determine what you can do to cure the incremental crisis in workplace justice, and then take your own first steps toward that goal.[4]

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[2] *Id.* at 16.
[3] *Id.*
[4] *Id.* at 22.

In his book entitled *Dignity at Work*, Randy Hodson states that ".... the ability to establish a sense of self-worth and self-respect and to enjoy the respect of others, is necessary for a fully realized life. Working with dignity is a fundamental part of achieving a life well lived, yet the workplace often poses challenging obstacles because of mismanagement or managerial abuse. Defending dignity and realizing self-respect through work are key to workers' well-being."[5]

Hodson expressly uses the term "abusive bosses" in discussing the denial of worker dignity.[6] Therefore, the authors submit that it is fair to conclude that such acts as workplace bullying would undoubtedly fall within the category of "abusive workplace conduct."

Building on Hodson's conceptual model of "human agency" and workplace dignity and the "clarion call" of Academy President Dennis Nolan, there are seven specific purposes to this article. The overall and most important purpose of this article is to inform the reader and our colleagues about the existence of and the physical, health, and economic consequences of workplace bullying.[7] In many, if not most, instances, the consequences incurred by a "target" of bullying are worse than those incurred by the typical worker who is properly discharged in accordance with the principle of just cause and industrial due process.

The second purpose of this article is inform the reader of the prevalence and frequency of workplace bullying in the United States.[8] The third purpose is to summarize the status (or absence)

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[5]Hodson, Dignity at Work (Cambridge University Press 2001). See also Peyton, Dignity at Work: Eliminate Bullying and Create a Positive Working Environment (Routledge, Taylor & Francis Group 2003); Fuller All Rise: Somebodies, Nobodies and the Politics of Dignity (2004), at pp. 1–2; www.breakingranks.net provides further information on efforts to create a "dignatarian movement." See also Trunk, *A Battle Cry for the Rank and File: Dignatarian Cause Gives Voice to the Principle That Every Worker Deserves Respect*, Boston Sunday Globe (Aug. 6, 2006); and Fuller, Somebodies and Nobodies: Overcoming The Abuse of the Rank File (2003). And lastly, see Yamada, *Review Essay: Dignity, 'Rankism', and Hierarchy In The Workplace: Creating a 'Dignatarian' Agenda For American Employment Law*, 28:1 Berkeley J. Employment & Lab. L. 306–25 (2007).

[6]Hodson at p. 4, 93–97.

[7]See generally Namie & Namie, *The Bully at Work: What You Can Do to Stop the Hurt and Reclaim Your Dignity on the Job* (Sourcebooks, Inc. 2003). And see Butts, *The Black Mask of Humanity: Racial/Ethnic Discrimination and Post Traumatic Stress Disorder*, 30 J. Am. Acad. Psychiatric L. 336–339.

[8]See, e.g., the study by the Employment Law Alliance, "New Employment Law Alliance Poll: Nearly 45% of U.S. Workers Say They've Worked for an Abusive Boss," in which 64% of the survey respondents say bullied workers should be able to fight back in court (San Francisco, CA: Mar. 21, 2007), www.employmentlawalliance.com. This poll was conducted by Dr. Theodore Reed, Reed Group (Philadelphia, PA), and sponsored by the Society of Human Resources Management (SHRM).

of anti-bullying legislation providing causes of action for claims of workplace bullying.[9] The fourth purpose is to discuss the anti-bullying legislative movement and the recent anti-bullying legislation enacted by the Canadian Province of Quebec (June 1, 2004). Specifically, the authors detail the specific elements of the Quebec anti-bullying statute. The authors also provide the essential elements of the model Healthy Workplace Legislation proposed by Dr. Gary Namie and Professor David Yamada. The fifth purpose is to address the heretofore overlooked potential linkage between the incidence of being a "target" of bullying and one's race and ethnicity.[10] The sixth purpose and a critical focus is to discuss current and recommended employer-sponsored anti-bullying strategies, policies, and procedures that may be implemented in either the union or non-union setting.[11] This focus also addresses the potential utility of what is called "integrated conflict management systems."[12]

Last, the authors discuss the need for federal (and state) policy and/or legislation to overcome the barriers to the design and implementation of fair and legitimate internal conflict management systems and programs to address, among other things, claims of workplace bullying. This is in keeping with the urging of Academy President Nolan for the Academy and advocates to take our own steps toward the goal to cure the incremental crisis in workplace justice.[13] The design and implementation of such

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[9]See Yamada, *Crafting a Legislative Response To Workplace Bullying*, 8 Employee Rts. & Employment Pol'y J. 475 (2004); and see Yamada, *The Phenomenon of 'Workplace Bullying' and the Need for Status-Blind Hostile Work Environment Protection*, 88 Geo. L.J. 475 (2000). At the time of the writing of this, there are 12 states in which there are some 22 pending proposed anti-bullying legislative bills.

[10] Fox & Stallworth, Bullying, Racism, and Power: An Investigation of Racial/Ethnic Bullying in the U.S. Workplace, Symposium, Society for Industrial/Organizational Psychology (Chicago, April 2004). See also Fox & Stallworth, *Racial/Ethnic Bullying: Exploring Links Between Bullying and Racism in the U.S. Workplace*, J. Vocational Behav. (2004).

[11]See, for example, Richards & Daley, *Bullying Policy: Development, Implementation and Monitoring*, in Einarsen, et al., Bullying and Emotional Abuse in the Workplace, at 247–58. See also Hubert, *To Prevent and Overcome Undesirable Interaction: A Systematic Approach Model*, in Einarsen, et al., Bullying and Emotional Abuse in the Workplace, at 299–311. And lastly, see Keashley & Nowell, *Conflict, Conflict Resolution and Bullying*, in Einarsen, et al., Bullying and Emotional Abuse in the Workplace, at 339–58.

[12]Rowe, *Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?*, in Workplace Dispute Resolution: Directions for the Twenty-First Century, ed. S.E. Gleason (Michigan State University Press 1997), at 79–106. And see Lipsky, Seeber & Fincher, Emerging Systems for Managing Workplace Conflict (Jossey-Bass 2000).

[13]Nolan, *Workplace Justice: The Incremental Crisis and Its Cure,* in Arbitration 2007: Proceedings of the 60th Annual Meeting, National Academy of Arbitrators, (BNA Books 2008), at 1.

employer-sponsored systems would be pursuant to the proposed legislation called The National Employment Dispute Resolution Act (NEDRA).[14]

What is Workplace Bullying?

Bullying has been described as one of the "nasty little secrets" of today's workplace, and it certainly robs an employee of dignity.[15] According to Randy Hodson, "Working with dignity is a fundamental part of achieving a life well lived, yet the workplace often poses challenging obstacles because of mismanagement or managerial abuse.[16] Defending dignity and realizing self-respect through work are key to workers' well-being." Hodson expressly uses the term "abusive bosses,"[17] and, therefore, the authors submit that it is fair to conclude that bullying would undoubtedly fall within the category of "abusive workplace conduct."

Bullying today may be in a position similar to that of the legal principle of sexual harassment 10 to 15 years ago, before the related landmark U.S. Supreme Court decisions and the work of the U.S. Equal Employment Opportunity Commission (EEOC) resulted in a degree of consensus in defining what constitutes sexual harassment.[18]

Published definitions of workplace bullying vary widely in scope and rigor, and in fact, the proliferation of definitions has been a major stumbling block in developing employer-sponsored organizational anti-bullying policies and procedures and the debate regarding the proposed model Healthy Workplace legislation.[19] The proposed anti-bullying statute defines workplace bullying as "derogatory remarks, insults or epithets, physical conduct that a reasonable person would find threatening, intimidating or humiliating, or the gratuitous sabotage or undermining of an employee's work performance."[20] Both Dr. Gary Namie, a major U.S. anti-

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[14]See Proposed National Employment Dispute Resolution Act (NEDRA), H.R. 4593 (2000), introduced by Congresswoman Eva Clayton (D-North Carolina); see also Appendix 2 of this chapter.

[15]Namie & Namie, *The Bully at Work: What You Can Do To Stop The Hurt and Reclaim Your Dignity on the Job* (Sourcebooks, Inc. 2003).

[16]Hodson, Dignity at Work (Cambridge University Press 2001), at preface.

[17]Hodson, Dignity at Work (Cambridge University Press, 2001), at 4, 93–97.

[18]See, for example, *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); and see Namie & Namie, *supra* note 15, where the authors make this assertion. And see generally Lindemann & Kadue, Sexual Harassment in Employment Law (BNA Books 1999).

[19]See Yamada, *Crafting a Legislative Response To Workplace Bullying*, 8 Employee Rts. & Employment Pol'y J. 475 (2004);and Appendix 1 of this chapter.

[20]See Appendix 1 of this chapter.

bullying activist, and many European researchers include health-harming outcomes in the definition. Several researchers require that bullying behaviors be repeated,[21] patterned, or persistent, and involve a power differential. The human resources and employment law communities add concerns that bullying be defined so as to exclude trivial or frivolous incidents or accusations.

Dr. Gary Namie emphasizes that bullying should be distinguished from mere incivility: "It's not rudeness or boorishness. It's not little insignificant stuff. . . . It's very important that we make it about serious abusive health-harming mistreatment.[22] We're not talking about an arched eyebrow, an inadvertent glance. AND it's also not conflict. It's very important that people understand it's not traditional conflict; therefore it will not be solved by traditional tools."[23]

The authors consider three definitional issues:

1. Does mistreatment have to be pervasive, persistent, and repeated to constitute bullying?
2. Does there have to be a power imbalance (e.g., supervisory vs. co-worker bullying)?
3. How do we exclude trivial or frivolous incidents or accusations from "classes" of workplace bullying?

To begin to address the first issue, the authors analyzed data from two studies to contrast reports of strains (distress or adverse consequences of job stress) by non-targets compared with targets of "rare" and pervasive bullying. To address the second issue, the authors compared reports of strains by targets when the bully was a supervisor versus a co-worker.

Participants in the first study, entitled "Employee Perceptions Study",[24] involved 262 full-time employees, 61.9 percent of whom held managerial positions. Survey measures included bullying,

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[21]The anti-bullying statute of the Canadian province of Quebec provides that there may be single instances of bully-type conduct that may be considered actionable under the Act.

[22]Dr. Gary Namie suggests that incidents of bullying must result in harm to the target's health. See, however, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), where the Supreme Court held that psychological damage does not have to exist or be proven for a plaintiff to prevail in a sexual harassment lawsuit.

[23]Namie & Namie, *The Bully at Work: What You Can Do To Stop the Hurt and Reclaim Your Dignity on the Job* (Sourcebooks, Inc. 2003)_.

[24]See Fox & Stallworth, *Employee Perceptions of Internal Conflict Management and ADR Processes in Preventing and Resolving Incidents of Workplace Bullying: Ethical Challenges For Decision-Makers in Organizations*, 8 Employee Rts. & Employment Pol'y J. 375–405 (2004).

emotional reactions to bullying incidents (e.g., "became intensely emotionally upset when reminded of the incident"), active/behavioral responses to bullying incidents (e.g., filed a grievance), negative job-related emotions in general (e.g., "my job makes me feel anxious"), and counter-productive work behaviors (CWB) committed by the respondent (e.g., "tried to look busy while doing nothing"). For each bullying behavior experienced, the respondent indicated whether the main bully was a co-worker, supervisor, or other.

Participants in the second study, entitled "A Chance to Be Heard: A Study of Teacher Stress" (hereinafter called "Teacher Stress Study"),[25] involved 753 teachers in a major urban public school system who responded to invitations to participate in the study by their union. Measures included bullying, job satisfaction, burnout, job-related emotions, and physical symptoms, among other measures. For each bullying behavior experienced, the respondent indicated whether the main bully was a co-worker, principal/administrator, parent, student, or other.

Does Mistreatment Have To Be Pervasive?

Can one acute attack have similar consequences as a chronic pattern? Is it useful to propose two types of bullying (overt action and pervasive abusive environment), comparable to statutory-based evidentiary standards regarding sexual harassment (quid pro quo and hostile environment)? For each study, respondents were classified into three groups: (1) those who answered "never" to all bullying items ("None"); (2) those who answered "rarely" or "sometimes" to at least one item, but "quite often" or "extremely often" to no items ("Rare"); and (3) those who answered "quite often" or "extremely often" to at least one item ("Pervasive"). ANOVA and Tukey comparisons tested for differences in strains among the three bullying groups.[26]

In both studies, targets of pervasive bullying reported more distress. In the "Employee Perception Study" the Pervasive group statistical means were significantly higher than the None and Rare

[25]Fox & Stallworth, Teacher Stress Study. This survey-based study examines, among other things, the "stressors" for teachers and the incidence of bullying.

[26]The terms "ANOVA" and "Tukey" are respectively defined as follows: ANOVA (analysis of variance) is a statistical method for testing whether the means of a variable are statistically different among two or more groups (e.g., whether the variable measuring bullying is significantly different for different racial/ethnic groups). If differences are found in a multi-group ANOVA, the Tukey post-hoc test indicates which groups are significantly different from which other groups.

groups for emotional response to bullying and negative job-related emotions; and significantly higher than the Rare group (but not the None group) for active response to bullying and CWB. The Rare group was not higher than the None group.

In the "Teachers' Stress Study," teachers who reported Pervasive bullying were significantly lower than both the Rare and None groups on job attachment and satisfaction, and higher on frustration and burnout. The Rare group was not significantly different than the None group. Both the Rare and Pervasive groups experienced significantly more physical symptoms than the None group, the Pervasive groups more than the Rare group.

Thus what is called "Pervasive bullying" predicted higher levels of all strains than Rare bullying; and for most strains, Rare bullying is not significantly different than No bullying. This suggests distinct processes and perhaps supports separate consideration of single incidents from pervasive patterns. The "pervasiveness requirement" may be helpful in establishing valid legislative and organizational approaches and avoiding of frivolous claims of bullying. Perhaps single acts of blatant harassment can be handled under other statutes and policies (e.g., battery).[27] Alternatively, single acts may be included in policies, but defined and handled distinctly from pervasive bullying.

Does There Have To Be a Power Imbalance?

Is workplace bullying by one's supervisor a different phenomenon than bullying by one's co-worker? How do we evaluate effects of proximate and relative power differences—formal and informal? Research on supervisory bullying has included studies of "abusive supervision," "social undermining," and "petty tyranny by supervisors."[28] These studies have demonstrated consequences to the target of "supervisory bullying" to include overall psychological distress, a sense of powerlessness, lowered sense of self-worth, heightened anxiety, perceptions of organizational injustice, decreased job and life satisfaction, lower organizational commit-

[27]Parks, Targeting Workplace Harassment In Quebec: On Exporting a New Legislative Agenda, 8 Employee Rts. & Employment Pol'y J. 423 (2004).

[28]The use of racial and ethnic slurs and statements has been found to be evidence of unlawfully motivated discrimination. See Schlei & Grossman, Employment Discrimination Law (BNA Books 2006). See, e.g., *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006); Paetzold, Ash v. Tyson Foods, Inc.*: Are Being Called 'Boy' and Having Superior Qualifications Probative of Discriminatory Intent?,* 10:2 Employee Rts. & Employment Pol'y J. 310–13 (2006).

ment and trust, heightened frustration, stress, work alienation, and an increase in the targets' own performance of CWB.

To address theses questions, t-tests for dependent correlations from the same sample evaluated differences in correlations of "co-worker bullying" versus "supervisory bullying" with strains.[29] In the "Employee's Perception Study," "supervisory bullying" significantly predicted emotional and active responses to workplace bullying, negative job-related emotions, and CWB of targets, while co-worker bullying predicted emotional and active responses to bullying, but not general negative emotions or behaviors. "Supervisory bullying" had significantly greater relations than "co-worker bullying" with emotional and active responses to bullying and negative job-related emotions.

In the "Teachers' Stress Study," both "supervisory bullying" and "co-worker bullying" predicted job un-attachment, negative emotions, burnout, and physical symptoms; only "supervisory bullying" predicted job satisfaction. Correlations between supervisory bullying and strains were significantly greater than "co-worker bullying" and strains, except physical symptoms.

For many strains, "supervisory bullying" is more potent (i.e., has a more adverse effect) than "co-worker bullying"; however, it is not clear that bullying by co-workers or other parties (students, clients, and subordinates) should be excluded from any proposed employer-sponsored anti-bullying policies and legislation.

A Working Definition

To summarize, a good and practical working definition of workplace bullying would be "…behavior that threatens, intimidates, humiliates, or isolates an individual at work, or undermines his/her reputation or job performance." This definition includes bullying that is racially or ethnically motivated.[30] In addition, specification of two distinct subsets, single and pervasive behaviors, should be considered. Perhaps it would be useful to invoke the language and delineations of sexual harassment as a guide to organizational anti-bullying policies, legislation, internal organizational programs, and training.

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[29]T-tests are used to determine whether correlations among variables are significantly different for two different groups.

[30]The authors recognize that where racial and ethnic slurs are used in connection to workplace bullying, that such terms may be evidence of unlawful motive under Title VII of the Civil Rights Act of 1964. *Supra* note 28.

Specific Bullying Behavior

Survey-based studies of workplace bullying generally use checklists of specific behaviors, which vary only slightly from study to study.[31] Some researchers use frequency response choices ranging from "never" to "daily" or from "never" to "extremely often." Other researchers use "yes/no" or "agree/disagree" formats. Fox and Stallworth[32] developed a bullying checklist that specifically factored into "general bullying" and "racial/ethnic bullying." "General bullying" behaviors are defined as conduct that can target anyone, regardless of race or ethnicity. This behavior might be broadly categorized as follows:

- Threatening or intimidating behavior:
  - nonverbal (e.g., eye contact, gestures)
  - verbal (e.g., yelling, cursing)
  - threatening physical violence or job loss
- Demeaning behavior:
  - insults and put-downs
  - excessively harsh criticism of job performance
- Isolation:
  - silent treatment
  - exclusion from work meetings
  - intentionally leave room when you enter
  - failed to return your phone calls, e-mails, etc.
- Work sabotage:
  - attacked or failed to defend your plans to others
  - intentionally destroyed, stolen, or sabotaged your work materials
- Harm to reputation:
  - spread rumors (personal or work performance-related)
  - took credit for your work
- Abusive supervision:
  - threaten with job loss or demotion
  - excessively harsh criticism of job performance
  - blamed you for errors for which you were not responsible

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[31]See Namie & Namie, *The Bully at Work: What You Can Do To Stop the Hurt and Reclaim Your Dignity on the Job* (Sourcebooks, Inc. 2003).

[32]Fox & Stallworth, Bullying, Racism, and Power: An Investigation of Racial/Ethnic Bullying in the U.S. Workplace, Symposium, Society for Industrial/Organizational Psychology (Chicago, April 2004). See also Fox & Stallworth, *Racial/Ethnic Bullying: Exploring Links Between Bullying and Racism in the U.S. Workplace*, J. Vocational Behav. (2004).

– applied rules and punishments inconsistently
– made unreasonable work demands

"Racial and Ethnic Bullying"

One of the difficulties in defining workplace bullying is distinguishing bullying from specific and blatant forms of harassment and unlawful discrimination that are already covered by federal and state anti-discrimination statutes and policies,[33] as well as whistle blowing and no-retaliation law and policies. But the authors contend that bullying can be based on race or ethnicity, and arguably such racial and ethnic statements may also serve as evidence of unlawful discrimination. This type of bullying includes the following behaviors:[34]

- Made derogatory comments about your racial or ethnic group
- Told jokes about your racial or ethnic group
- Used racial or ethnic slurs to describe you
- Excluded you from social interactions during or after work because of your race or ethnicity
- Failed to give you information you needed to do your job because of your race or ethnicity
- Made racist comments (for example, says people of your ethnicity aren't very smart or can't do the job)
- Made you feel as if you have to give up your racial or ethnic identity to get along at work.

It should be noted, however, that "racial/ethnic bullying" is consistent with the proposed definition of bullying as a threatening, humiliating, intimidating, and isolating behavior, without necessarily being subject to anti-employment discrimination policy or law. The authors also point out from a more global perspective that a number of European countries include acts motivated by gender, race, and migrant status as also falling within the definition of bullying.[35] A number of these countries either by statute or

[33] *Supra* note 30.
[34] *Supra* note 30.
[35] A number of European anti-bullying laws include gender, race, and migrant status as the basis for a claim of workplace bullying and psychological harassment.

court decisions consider bullying to be covered by and violative of health and safety laws.[36]

The Emotional/Psychological, Economic, and Organizational Consequences of Bullying

Much has been written about consequences of workplace bullying to targets, bystanders, managers, and their organizations.[37] These consequences of workplace bullying are as follows:

The Target

Emotional responses:

- Frustration, stress, anger, powerlessness, depression, humiliation, fear, self-doubt

Health damage:

- Anxiety, depression, other psychological distress
- Post-traumatic stress disorder (PTSD)
- Short- and long-term stress-related physical health consequences

Responses toward the job and the organization:

- Sense of injustice
- Job dissatisfaction
- Burnout
- Isolation
- Strained relationships with colleagues, clients, and other business associates

Behavioral responses:

- Retaliation/escalation
- Avoidance of bully

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[36]Graham, Mopping Up Mobbing: Legislate or Negotiate?, at 55–60. Available online at www.oit.org/pyblic/english/dialogue/actrav/publ/133/11.pdf.

[37]See Tracy, Lutgen-Sandvik & Alberts, *Nightmares, Demons and Slaves: Exploring the Painful Metaphors of Workplace Bullying*, 20:2 Management_Communications Quarterly 148–85 (Nov. 2006) and the references cited therein regarding the consequences of "adult bullying" or workplace bullying including potential violence.

- Withdrawal from work efforts
- Acts of violence

Economic consequences:

- Income reduction or loss
- Damage to professional reputation and career
- Departure from the organization

The Organization

Organizational performance and employee productivity:

- Interference with workplace performance, productivity
- Rise in accidents and mistakes
- Diminished corporate reputation (abusive employer)

Withdrawal:

- High turnover, loss of the brightest employee talent
- Absenteeism
- Increase in the target's CWB

Culture and climate:

- Strained loyalty, fostering of distrust, sabotage, resentment
- Decreased communication
- Spiral of incivility, emotional contagion within the work-group
- Potential escalation to workplace violence
- Evolution of social norms condoning CWB

Direct organizational costs:

- Legal liability
- Grievances, Equal Employment Opportunity complaints, and lawsuits
- Higher workers' compensation and disability costs
- Employee morale
- Employee Turnover

Bullying and the Law and the *Zimmerman* Decision

It is beyond the scope of this article to detail and discuss the various court decisions related to the attempts of "self-identified" targets who have sought legal redress for alleged acts of workplace bullying;[38] however, the use of the term "status-blind harassment" (with an emphasis on "status-blind") underscores the difficulty that alleged "targets" historically have had in seeking redress in either state or federal court.[39] Suffolk University Law Professor David Yamada has been the leading legal scholar regarding workplace bullying and the law.[40] In the opinion of Professor Yamada, because of the absence of specific anti-bullying legislation, there is an urgent need for the enactment of anti-bullying legislation fashioned after his Model Healthy Workplace Act.[41]

Zimmerman v. Direct Federal Credit Union and David Breslin

There is, however, one relatively recent federal court of appeals decision arising in Massachusetts that a number of observers have viewed as a successfully litigated claim of workplace bullying.[42] In *Zimmerman v. Direct Federal Credit Union and David Breslin*,[43] Chief U.S. Federal Magistrate Judge Robert B. Collings (U.S. Court of Appeals for the First Circuit) concluded that the plaintiff, Celia Zimmerman, was a victim of "intentional interference with

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[38]See Yamada, *The Phenomenon of 'Workplace Bullying' and the Need for Status-Blind Hostile Work Environment Protection*, 88 Geo. L.J. 489–97 (2000), where the author lists cases where alleged "targets" sought redress for bullying under the following causes of action: (1) intentional infliction of emotional distress; (2) intentional interference with employment relationships; (3) workers' compensation; (4) state and federal EEO legislation; (5) Occupational Safety and Health Statutes; (6) federal labor laws; and (7) anti-retaliation and whistleblowing provisions and employer policies.

[39]*Id.*

[40]David Yamada is the leading scholar regarding the issue of workplace bullying and the law. See, e.g., Yamada, *The Role of the Law in Combating Workplace Mobbing and Bullying*, in Workplace Mobbing in Academe: Reports From Twenty Universities, ed. Westhues (2004). See also Yamada, *Workplace Bullying: Crafting a Legislative Response to Workplace Bullying*, 8 Employee Rts. & Employment Pol'y J. 475 (2004); Yamada, The Role of the Law in Research and Practice, (Stale Einarsen, et al., eds. 2003); Yamada, The Phenomenon of 'Workplace Bullying' and the Need For Status-Blind Hostile Work Environment Protection, 88 Geo. L.J.475 (2000); Yamada & Maltby, *Beyond Economic Realities: The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. Rev. 239 (1997).

[41]See Yamada, *supra* note 38.

[42]See Pfaffenbach, *Verdict for Workplace 'Bullying' Is Upheld: Bias Claim Fails, But Plaintiff Gets $730K*, Mass. Law. Wkly. 731 (Nov. 27, 2000). Reporting on *Celia G. Zimmerman v. Direct Federal Credit Union & David Breslin*, 262 F.3d 70, 2001 U.S. App. Lexis 19596 (Sept. 4, 2001). See also http://bullyinginstitute.org/home/twd/bb/legal/masslaw.html.

[43]262 F.3d 70.

advantageous relations."[44] Celia Zimmerman was awarded some $740,000 in damages.[45] The *Zimmerman* decision is noteworthy for four primary reasons. First, the facts in *Zimmerman* clearly illustrate the insidious, if not vicious, elements of what the authors call "blatant persistent and severe" workplace bullying.[46]

Second, and as previously stated, *Zimmerman* is one of the few arguable cases in which a federal or state court appears to conclude that there is a legitimate cause of action for a claim of "blatant, pervasive and severe counterproductive workplace behavior" or in the court's words "a malicious vendetta." On this latter point, the authors hasten to point out that the gravity and malice of the conduct illustrated in *Zimmerman* also arguably rise to the level of intentional infliction of emotional distress.[47]

The third noteworthy aspect of *Zimmerman* is the damages that the court awarded therein.[48] The authors note that the facts in *Zimmerman* can be described only as "intended malicious vendetta." It is also worth noting that perhaps most claims of "blatant workplace bullying" would not rise to this level; however, the federal court's rationale and basis for meting out such compensatory and punitive damages might provide some guidance for labor

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[44]Malsberger, Tortious Interference in the Employment Context: A State by State Survey (BNA Books 2007).

[45]The U.S. Court of Appeals for the First Circuit upheld the decision of the Chief U.S. Magistrate Judge Robert B. Collins' decision upholding the jury's award of $130,000 for intentional interference with advantageous relations and $400,000 in punitive damages against Direct Federal Credit Union and David Breslin. The $200,000 verdict based on the plaintiff's retaliation claim was not challenged by Direct Federal Credit Union and David Breslin.

[46]See Fox & Stallworth, Bullying, Racism, and Power: An Investigation of Racial/Ethnic Bullying in the U.S. Workplace, Symposium, Society for Industrial/Organizational Psychology (Chicago, April 2004). See also Fox & Stallworth, *Racial/Ethnic Bullying: Exploring Links Between Bullying and Racism in the U.S. Workplace*, J. Vocational Behav. (2004), where the authors discuss the insidious, pervasive and pernicious nature of workplace bullying. See also Butts, *The Black Mask of Humanity: Racial/Ethnic Discrimination and Post-Traumatic Stress Disorder*, J. Am. Acad. Psychiatric L. 336–39 (2002).

[47]Asserted "targets" have pursued intentional infliction of emotional distress (IIED) claims against both their employers and the individual co-employees who engaged in the alleged workplace bullying conduct. See Yamada, *Crafting a Legislative Response To Workplace Bullying*, 8 Employee Rts. & Employment Pol'y J. 475 (2004); Yamada, *The Phenomenon of 'Workplace Bullying' and the Need for Status-Blind Hostile Work Environment Protection*, 88 Geo. L. J. 475 (2000). The tort of IIED can be defined as follows:

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.

See, e.g., Kroger Co. v. Willgruber, 920 S.W.2d 61, 65 (Ky. 1966); *see also Travis v. Alcon Labs*; Restatement (second) of Torts (1965), 504 S.E.2d 419 (W. Va. 1998).

[48]*Supra* note 44.

and employment arbitrators and other neutral workplace dispute resolvers "including mediators" of the potential appropriate remedies in these types of severe cases of bullying.[49]

Lastly, holding defendant David Breslin, the manager of Ms. Zimmerman, personally liable for his conduct and the monetary damages stemming from his conduct should send a "sobering" message to those "abusive bosses" who believe that they are protected by some corporate shield or qualified privilege.[50]

The Story of Zimmerman *and the Chronology of Relevant Events*

The chronology of events related to *Zimmerman* illustrates what Harvard psychiatrist Chester Pierce once described as "micro-aggressions." These events are detailed as follows:

- Celia Zimmerman, a woman, was a graduate of Princeton University and subsequently earned a master's degree in business administration from Southern University and held a variety of positions in the financial sector.
- September 1994, Zimmerman accepts employment with Direct Federal Credit Union as its manager of financial planning and analysis.
- September 1994, David Breslin, Direct's chief executive officer and later defendant, hires Zimmerman, representing to her that her new position offered "promising opportunities for advancement."
- September 1994, Zimmerman's performance was described as a "tour de force"!
- Joseph Capalbo, Vice President and Controller, was to become the Supervisor of Zimmerman; however, due to the death of his wife he had a long-term absence. Zimmerman assumes

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[49] *See, e.g.,* Hill Sinicropi, Remedies in Arbitration (BNA Books 1991), where the authors indicate that it is rare for arbitrators to award damages and attorneys' fees for violations arising under collective bargaining agreements. The authors note, however, that incidents of workplace bullying occur in the union setting. *See, e.g.*, Soares, *Like 2 + 2 = 5: Bullying Among Hydro-Quebec Engineers* (last visited Nov. 4, 2007), available online at www.SoaresAngelo@ugam.ca. Also, under the Quebec anti-bullying statute it appears that where claims of bullying arise and a grievance procedure exists, the parties are first to attempt to resolve the matter pursuant to contractual grievance procedure. Yuen, *Beyond the Schoolyard: Workplace Bullying and Moral Harassment Law in France and Quebec,* 38 Cornell Int'l L.J.625 (2005).

[50] *See* Pierce, *Offensive Mechanisms*, in The Black Seventies, ed. Barbour (Porter Sargent 1970), at 265–82, where the author coins the term "micro-aggressions." The authors suggest that in the aggregate and determined by the degree of severity, these acts of micro-aggression may constitute "severe or blatant workplace bullying," "covert workplace bullying," and even a form of "marginalization."

many of Capalbo's responsibilities. Zimmerman performs these responsibilities "admirably."

- 1994, Zimmerman receives successive promotions and eventually becomes Director of Finance. Zimmerman also receives pay raises and bonuses.
- 1994, Breslin requests that Zimmerman attend all but two of the 20 Board of Director meetings. Zimmerman makes presentations at 14 of these Board meetings. She also coordinates the annual senior management strategic planning retreat.
- End of 1995, Zimmerman has a sizeable staff and is functioning successfully as Direct's *de facto* controller. Her performance reviews describe her as a "team player" and a "role model."
- January 1996, Zimmerman informs Breslin that she is pregnant. The next day Breslin trims her responsibilities and reduces the size of her staff.
- March 1996, Zimmerman develops toxemia and her physician prescribes "episodic bed rest" throughout the day.
- March 1996, Breslin initially agrees to accommodate the medical needs of Zimmerman but then reneges, and assigns her tasks to be performed during her physician-prescribed allotted rest periods.
- March 1996, Zimmerman is forced to leave the facilities entirely in order to obtain needed rest.
- July 1996, Zimmerman gives birth prematurely and takes medical leave. Because of other non-pregnancy–related medical issues, Zimmerman takes some additional time off.
- December 1996, Zimmerman returns to work and is told that she had been stripped of her management role and Capalbo had assumed most of her responsibilities.
- December 1996, Zimmerman is moved into a smaller office (which she shares with a noisy wire transfer machine), given duties of modest importance, and excluded from high-level discussions (including Board meetings). Breslin shuns Zimmerman and communicates only through Capalbo.
- March 3, 1997, Zimmerman files a complaint with the Massachusetts Commission Against Discrimination (MCAD), charging sex- and pregnancy-related discrimination.
- March 5, 1997, Zimmerman hand-delivers a copy of her complaint to Breslin. Breslin reacts by "storming from office to office to speak to other executives."
- Post-March 5, 1997, Zimmerman is invited to some management meetings but excluded from the 1997 senior manage-

ment retreat. Zimmerman had previously organized these events. Additionally, Breslin routinely ignores Zimmerman's attempts to participate in meetings and speaks about her in the third-person as if she were not there.

- Post-March 5, 1997, Zimmerman is repeatedly assigned to projects unrelated to the finance function (e.g., facility redesign) and to monotonous tasks beneath her pay scale and for which she has no prior experience (e.g., underwriting 20 to 30 home equity loans per day).
- April 1997, Zimmerman receives a poor performance review for her "teamwork."
- May 1997, Direct and Breslin respond to the MCAD complaint, denying the allegations and attacking Zimmerman's credibility.
- Post-May 1997, Zimmerman pre-empts MCAD administrative proceedings by filing suit in Massachusetts state court charging, inter alia, gender and pregnancy discrimination, retaliation, intentional inflection of emotional distress, tortious interference with advantageous relations, and various statutory violations (e.g., violations of the Family and Medical Leave Act, the Equal Pay Act, the Massachusetts Civil Rights Act, and the Massachusetts Equal Rights Act). Direct and Breslin remove the case to the federal district court. (See 28 U.S.C.§§1331, 1441.)
- Post-May 1997 Lawsuit, Breslin holds a company-wide meeting humiliating Zimmerman, stating that "a certain person was not 'woman enough' to come face with me." Breslin further suggests that bonuses would be larger if certain employees would leave as expected.
- Post-May 1997, Capalbo, Vice President and Controller, instructs Zimmerman to prepare presentations for a board meeting, giving her only four days' notice for a project that involves unfamiliar areas.
- Post-May 1997, Breslin reports to the Board on the status of Zimmerman's lawsuit and subsequently asks her to join the meeting and deliver her report. Zimmerman is not invited to any subsequent board meetings.
- Post-May 1997, Breslin and Capalbo continue to "tinker" with Zimmerman's job description, repeatedly assigning her menial chores or duties unrelated to her expertise.

- Post-May 1997, Breslin made repeated attempts to put Zimmerman's coworkers against her by quoting, not always accurately, from Zimmerman's journal (which Breslin had obtained in the court of pre-trial discovery).
- Post-May 1997, Breslin targets a Steve Hagerstrom, a Direct executive, a sympathetic supporter of Zimmerman, by telling him that he "didn't understand why a talented guy such as [Hagerstrom] would stay at Direct in such a hot economy if [he] had obvious negative feelings toward [Breslin]."
- Post-May 1997, Zimmerman receives declining performance reviews, often with little or no explanation as to why. Her performance scores decrease.
- June 1998, Zimmerman obtains psychiatric help related to job stress. Zimmerman is diagnosed as suffering with a "severe depressive disorder"; is advised not to return to work. Zimmerman is placed on anti-depressant medication.
- September 1998, Direct Federal Credit Union terminates Zimmerman. After a three-month absence, Zimmerman's depression has improved marginally by the time of the trial. She is still unable to function as a normal person, much less work.
- January 2000, Zimmerman and Direct and Breslin consent to proceed before a U.S. Magistrate Judge. (See 28 U.S.C. §636(c).) By summary judgment, Zimmerman's claim for intentional infliction of emotional distress and various statutory initiatives are disposed. The trial lasts some 15 days and during this time Zimmerman voluntarily discontinues her Title VII claims and one of her state law discrimination claims.
- February 9, 2000, the jury renders a split verdict, providing as follows:
  - Direct Federal Credit Union had neither discriminated against Zimmerman nor violated the Family and Medical Leave Act.
  - Direct Federal Credit Union and Breslin were guilty of violating state law, retaliation, and tortious interference with advantageous relations.
  - The jury awarded Zimmerman: (1) $200,000 in compensatory damages; (2) $400,000 in punitive damages on the former claim and (3) $130,000 in compensatory damages on the latter.

Discussion and Analysis of Zimmerman

Direct Federal Credit Union and Breslin promptly moved for a judgment as a matter of law for a new trial,[51] questioning, *inter alia*, the sufficiency of the evidence on the tortious interference claim and arguing that the punitive damage award should be set aside or at least, reduced substantially.[52] The magistrate judge denied the motions. In regard to the tortious interference claim, U.S. Chief Magistrate Judge Robert B. Collings found that "a reasonable jury could readily conclude that Breslin acted with a *vindictive motive*" (emphasis added)[53] and that Breslin both individually and by means of Capalbo, "undertook a deliberate, calculated, systematic campaign to humiliate and degrade Zimmerman both professionally and personally."[54]

In regard to the punitive damages, the Chief Magistrate Judge Collings concluded that the jury had an adequate evidentiary basis to find that Breslin "engaged in a *vendetta*" (emphasis added)[55] and that such conduct merited an award of punitive damages against both Direct Federal Credit Union and David Breslin.

Lastly, the Chief Magistrate Judge Collings found that both the awarded compensatory and punitive damages were reasonable in amount.[56] On appeal, Direct Federal Credit Union and Breslin raised three issues: (1) a challenge to the sufficiency of the evidence of tortious interference; (2) that the Magistrate Judge Collings erred in refusing to give a requested jury instruction and (3) a request to revisit the punitive damage award.

Relevance and Significance of Zimmerman

In particular regard to the topic of workplace bullying and to the extent that *Zimmerman* constitutes an arguable workplace bullying case, three relevant and significant issues here are: (1) supervisor personal liability and qualified privilege, (2) evidentiary proof of actual malice, and (3) the appropriateness of the award of punitive damages.

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[51] *Zimmerman,* 262 F.3d 70, 2001 U.S. App. LEXIS 19596 at 5. And see Fed. R. Civ. P. 50(b), 59(e).
[52] *Id.*
[53] *Id.* at 6.
[54] *Id.* at 11.
[55] *Id.*
[56] *Id.*

Malice, Tortious Interference, and Qualified Privilege

In *Zimmerman*, the court recognized that in the employment context, tortious interference takes an "intriguing turn."[57] However, the court of appeals further recognized that despite an employer's immunity, a supervisor may be personally liable if he or she tortiously interferes with a subordinate's employment relationship.[58] The court, relying on what it refers to as Massachusetts's courts' "matrix of rules,"[59] relied on one element of this matrix. According to the court, the Massachusetts's Supreme Court (SJC) Judicial Court has held that a "defendant-supervisor is entitled to a qualified privilege in an employment-based tortious interference case and, thus, will not be liable for employment decisions that are within the scope of his supervisory duties."[60]

The court went on to note that the Massachusetts courts adopted this limitation to allay a supervisor's fear of personal liability when, or if, the supervisor makes an adverse employment decision on behalf of the employer.[61] However the court opined that this

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[57]*Id.* at 6. *See also Harrison v. Netcentric Corp.*, 433 Mass. 465, 744 N.E.2d 622, 632 (Mass. 2001).

[58]*Id.* at 6. *See also Steranko v. Inforex, Inc.*, 5 Mass. App. Ct. 253, 362, N.E.2d 222, 235 (Mass. App. Ct. 1977).

[59]The Massachusetts courts have constructed a matrix of rules designed to address and ensure against any irrational results stemming from the supervisor and subordinate employment relationships. A more nuanced set of rules applies in a suit against a supervisor who is so closely connected to a corporate employer as to be considered its alter ego. *See Harrison v. Netentric Corp.*, 744 N.E.2d at 633 (observing, in dictum, that courts frown upon a "tortious interference claim against an individual decision maker who is indistinguishable from the corporation itself"); *Schinkel v. Maxi-Holding, Inc.*, 30 Mass. App. Ct. 41, 565 N.E.2d 1219, 1225 (Mass. App. Ct. 1991) ("Conceivably, one in the position of chief executive officer might be so closely identified with the corporation itself, and with its policies, that he should not be treated as a third person in relation to corporate contracts, susceptible to charges of tortious interference when he causes the corporation to breach its contractual obligations."). The court noted that "because Breslin does not contend that he is Direct's alter ego, we need not probe this point." *Id.* at 6.

[60]The Massachusetts Supreme Judicial Court (SJC) has held that a defendant-supervisor is entitled to a qualified privilege in an employment-based tortious interference case (and, thus, will not be liable for employment decisions that are within the scope of his supervisory duties. *See Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659, 429 N.E.2d 21, 24 (Mass. 1981).

[61]In order to allay a supervisor's fear of personal liability when the occasion arises for that supervisor to make an adverse employment decision on behalf of the employer. *Id.* Withal, the privilege is not sacrosanct. Massachusetts treats proof of actual malice as the Massachusetts Supreme Court (SJC) has adopted one element of this matrix to the subordinate employment relationships. *See Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659, 429 N.E.2d 21, 24 (Mass. 1981), in which the court held that the supervisor qualified privilege is not sacrosanct and that Massachusetts treats proof of actual malice as a proxy for proof that a supervisor was not acting on the employer's behalf, and deems such proof sufficient to overcome the qualified privilege. In allowing plaintiffs to overcome the qualified privilege by a showing of actual malice, Massachusetts is far more plaintiff friendly than other jurisdictions. In some states, a plaintiff must demonstrate that the defendant-supervisor acted both with malice and outside the scope of his employment. *E.g., George A. Fuller Co. v. Chicago Coll. Of Osteo. Med.*, 719 D.2d 1326, 1333 (7th Cir. 1983)

privilege is not "sacrosanct" and that Massachusetts "treats proof of actual malice as a proxy for proof that a supervisor was not acting on the employer's behalf and deems such proof sufficient to overcome the qualified privilege."[62] The court of appeals further opined that proof of actual malice requires more than a showing of mere hostility. For one thing, according to the court, the plaintiff must prove that malice was the controlling factor in the supervisor's interference. Additionally, "any reasonable inference of malice must be based on *probabilities* rather than possibilities" (emphasis added). Finally, such an inference requires an affirmative showing that the actions taken by the supervisor were not derived from a desire to advance the employer's legitimate business interests. The court further noted that certain situations lend themselves to proof of malice and that the SJC has held that the elements underlying a claim of unlawful discrimination may be used to demonstrate malice in the context of a tortious interference claim.[63] Accordingly, the court averred that it logically follows that the elements underlying a claim of unlawful retaliation may be used to show malice when a tortious interference claim is brought against a supervisor in a loss-of-employment case.[64] Based on this reasoning and conclusion of law, the court of appeals found that Zimmerman did sufficiently overcome the qualified privilege, notwithstanding the contention of Breslin that the evidence revealed only a "series of slights" that cannot, as a matter of law, amount to malice in this context.[65] The court dismissed this argument, noting Breslin's failure to appeal from the jury's finding of intentional retaliation under Mass. Gen. Laws

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(applying Illinois law); *McGanty v. Staudenraus*, 321 Or. 532, 901 P.2d 341, 847 (Or. 1995). Texas, in particular, stringently protects the privilege; if a corporation does not later excoriate the supervisor or renounce his acts, then that supervisor is deemed to have been acting in the corporate interest. See Power Indus., Inc. v. Allen, 985 S.W.2d 455, 457 (Tex. 1998). *Id.* at 6.

[62] *Id.* at 7.

[63] *Id.* at 6.

[64] *Id.* at 7. Where the court states that the elements underlying a claim for unlawful discrimination may be used to demonstrate malice in the context of a tortious interference claim. *See Comey v. Hill*, 387 Mass. 11, 438 N.E. 2d 811, 816 Mass. 1982). The *Zimmerman* court went on to state that "it follows logically that the elements underlying a claim for unlawful retaliation may be used to show malice when a tortious interference claim is brought against a supervisor in a loss-of-employment case. *See, e.g., Draghetti v. Chmielewski,* 416 Mass. 808, 626 N.E.2d 862, 868–69 (Mass. 1994). It should be noted that as of this writing, the California Supreme Court is deciding this issue of supervisor qualified privilege. *See James v. Lodge at Torrey Pines Partners*, 147 Cal. App. 4th 475 (No. F046600, Fourth Dist., Div. on Feb. 5, 2007); and see Maclean, *Retaliation Claims Tested in California*, Nat'l L.J. (Nov. 12, 2007).

[65] *Id.* at 7.

Ch. 151B, §4.[66] Specifically, the court of appeals held that "the commission of such unlawful discriminatory acts suffices to ground a reasonable inference that Breslin's motives were illegitimate and that his interference had no relationship to any proper corporate purpose. No more is necessary to sustain a finding of actual malice." In the court's words to "cinch" matters:

> We agree with the magistrate judge that the evidence presented at trial, when arrayed in the light most flattering to the plaintiff, is sufficient to demonstrate malice on Breslin's part and to warrant *an illation* that *his acts fell outside the scope of his employment.* (Emphasis added.) Breslin's deliberate humiliation of the plaintiff at both the company-wide meeting and before the board of directors denotes something more pernicious than mere personal dislike. Breslin's use of the plaintiff's diary is also apposite. He effectively drove a wedge between the plaintiff and her colleagues, poisoning her working relationships. On the basis of this evidence the jury reasonably could have inferred (as it apparently did) that Breslin's interference sank to depths more peccant than mere slights and that *he acted with actual malice.* (Emphasis added.)

Punitive Damages

The other primary focus of the appeal of Direct Federal Credit Union and Breslin was the award of punitive damages. The authors hasten to point out that the awarding of punitive damages in labor arbitration is rare[67] and perhaps more often issued in employment arbitration cases. In *Zimmerman*, the court noted a then-recent U.S. Supreme Court decision, which clarified that under the Due Process Clause of the Fourteenth Amendment, the amount of a punitive damage award presents a legal issue.[68] The court, relying on the Supreme Court decision, *BMW of North America v. Gore*,[69] reasoned that where punitive damages are involved, *de novo* review is informed by principles of fundamental fairness. Those principles,

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[66] *See* Mass. Gen. Law Ch. 151B§4, under which Breslin had a right to appeal from the jury's finding of intentional retaliation but failed to do so, and therefore Breslin's unlawful discriminatory acts suffice to ground a reasonable interference that Breslin's motives were illegitimate and that his interference had no relationship to any proper corporate purpose. The court concluded that no more was necessary to sustain a finding of "actual malice." *See Wright v. Shriner's Hosp. For Crippled Children*, 412 Mass. 469, 589 N.E.2d 1241, 1246 (Mass. 1992) (holding that a "spiteful malignant purpose, unrelated to the legitimate corporate interest," suffices to show actual malice). *Zimmerman* at 7–8.

[67] See Hill & Sinicropi, Remedies in Arbitration (BNA Books 1991).

[68] The Supreme Court has clarified that under the Due Process Clause of the Fourteenth Amendment, the amount of a punitive damage award presents a legal issue. *See Cooper. Indus. Inc. v. Leatherman Tool Group, Inc.,* 149 L. Ed. 2d 674, 121 S. Ct. 1678, 1685–686 (2001).

[69] 517 U.S. 599, 574, 124 L. Ed. 2d 809, 116 S. Ct. 1589 (1989).

"dictate that a person receives fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[70]

In the court of appeal's view, *BMW* furnished three general guideposts for conducting such a review: (1) What is the degree of reprehensibility of the defendant's conduct? (2) What is the ratio between the compensatory and punitive damages? (3) What is the difference between the punitive damage award and the civil penalties imposed for comparable conduct?[71] According to the court,

> [t]hese guideposts should neither be treated as an analytical straitjacket nor deployed in the expectation that they will draw a bright line marking the limits of a constitutionally acceptable punitive damages award. Other pertinent factors may from time to time enter into the equation. When all is said and done, a punitive damage award will stand unless it clearly appears that the amount of the award exceeds the outer boundary of the universe of sums reasonably necessary to punish and deter the defendant's conduct.[72]

The court noted that the *Zimmerman* jury awarded punitive damages for retaliation under Mass. Gen. Laws Ch. 151B, §4, and further noting that this statute does not provide any ceiling on punitive damage awards, looked towards a decision of the SJC for guidance. In *LeBonte v. Hutchins & Wheeler*,[73] the SJC recommended that reviewing courts consider:

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[70] *Id.* at 574, where the Court opines that where punitive damages are involved, *de novo* review is informed by principles of fundamental fairness. According to the Court, those "principles dictate that a person receives fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."

[71] The Supreme Court in *BMW* provided three general guideposts for conducting such a review: (1) What is the degree of reprehensibility of the defendant's conduct? (2) What is the ratio between the compensatory and punitive damages? (3) What is the difference between the punitive damage award and the civil penalties imposed for comparable conduct? *Id.* at 575. According to the *Zimmerman* court, these guideposts should neither be treated as an analytical straitjacket nor deployed in the expectation that they will "draw a bright line marking the limits of a constitutionally acceptable punitive damages award" *Id.* at 585. Other pertinent factors may from time to time enter into the equation. When all is said and done, a punitive damage award will stand unless it clearly appears that the amount of the award exceeds the outer boundary of the universe of sums reasonably necessary to punish and deter the defendant's conduct. *Romano v. U-Haul Int'l*, 233 F.3d 655, 672 (1st Cir. 200).

[72] *Zimmerman* at 10. *See Romano v. U-Haul Int'l*, 233 F.3d 655, 672 (1st Cir. 2000), where the court reasoned that "a punitive damage will stand unless it clearly appears that the amount of the award exceeds the outer boundary of the universe of sums reasonably necessary to punish and deter the defendant's conduct."

[73] 424 Mass. 813, 678 N.E.2d 853 (Mass. 1997), where the Massachusetts Supreme Judicial Court recommended that reviewing courts consider: a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred; a reasonable relationship to the degree of reprehensibility of the defendant's conduct; removal of the profit of an illegal activity and be in excess

> A reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred; a reasonable relationship to the degree of reprehensibility of the defendant's conduct; removal of the profit of an illegal activity and be in excess of it so that the defendant recognizes a loss; factoring in of the costs of litigation and encourage plaintiffs to bring wrongdoers to trial; an examination whether criminal sanctions have been imposed; an examination whether other civil actions have been filed against the same defendant.[74]

According to the court in *LeBonte*, the SJC thus followed the same path as the *BMW* Court, requiring review of punitive damage awards to ensure that any such award "is reasonable and not simply a criminal penalty."[75]

Degree of Reprehensibility of the Defendant's Conduct. In evaluating the punitive damage award in *Zimmerman*, the court of appeals applied the first *BMW* guidepost. Specifically, the first component of the inquiry "the degree of reprehensibility of the defendants' conduct—typically is the most telling indicium of the reasonableness *vel non* of a punitive damage award."[76] The simple fact is that "some wrongs are more blameworthy than others." According to the court, in order to justify a substantial punitive damage award, a plaintiff ordinarily must prove that the defendants' conduct falls at the upper end of the blameworthiness continuum, or, put another way, that the conduct reflects a high level of culpability.[77] Accordingly, the court found that the arguments of Direct Federal Credit Union and Breslin that the complained of acts were

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of it so that the defendant recognizes a loss; factoring in one of the costs of litigation and encourage plaintiffs to bring wrongdoers to trial; an examination whether criminal sanctions have been imposed; an examination whether other civil actions have been filed against the same defendant. 678 N.E.2d at 862–63 (citing *BMW*, 517 U.S. at 589–92) (Breyer, J., concurring).

[74] *Zimmerman* at 12–13.

[75] In evaluating the punitive damages in *Zimmerman* and in light of *BMW*, the court of appeals held that "the first component of the inquiry—the degree of reprehensibility of the defendants' conduct—typically is the most telling indicium of the reasonableness vel non of a punitive damage award," *BMW*, 517 U.S. at 575. "The simple fact is that 'some wrongs are more blameworthy than others.'" *Id.* In order to justify a substantial punitive damage award, a plaintiff ordinarily must prove that the defendants' conduct falls at the upper end of the blameworthiness continuum, or, put another way, that the conduct reflects a high level of culpability. See *id.* The appellants argue that the record does not evince any behavior warranting an award of punitive damages. They see nothing egregious or outrageous about what they have done, but, rather, posit that the evidence, even when viewed favorably to the plaintiff, shows only slights and affronts. This argument lacks force."

[76] *Id.*

[77] *Id.* at 10.

neither "egregious nor outrageous" lacked force.[78] The court further noted that:

> the harm inflicted was far more than wounded pride and hurt feelings. The *BMW* Court made plain that "evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law." This statement finds considerable traction on the facts of this case, in which the jury rationally could have found that Breslin (and through him, Direct) mounted a deliberate, systematic campaign to punish the plaintiff as a reprisal for her effrontery in lodging a discrimination claim. The campaign involved abasing her, isolating her from her colleagues, and degrading her professionally. The appellants should have realized that this scurrilous course of conduct was unlawful, yet they persisted in it. Such a vendetta, to use the magistrate judge's apt description, is not only deserving of opprobrium but also flatly prohibited by Massachusetts law. Hence, the reprehensibility of the appellants' conduct can be viewed as calling for a substantial award of punitive damages.[79]

Ratio of Compensatory Damages to Punitive Damages. The second *BMW* guidepost is the ratio between compensatory and punitive damages. This guidepost provides that a 4:1 compensatory-to-punitive ratio does not "cross the line into the area of constitutional." They see nothing egregious or outrageous about what they have done, but, rather, posit that the evidence, even when

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[78] *Id.* at 11, where the defendants argue that the record does not evince any behavior warranting an award of punitive damages. The defendants further argue that they see nothing egregious or outrageous about what they have done but rather argue that the evidence, even when viewed favorably to Celia Zimmerman, shows "only slights and affronts."

[79] According to the court, they see nothing egregious or outrageous about what they have done, but, rather, posit that the evidence, even when viewed favorably to the plaintiff, shows only slights and affronts. This argument lacks force. The short but dispositive answer is that the appellants have not appealed the jury's adverse verdict on the retaliation claim and, thus, have left unchallenged a finding, supported by extensive evidence, that the harm inflicted was far more than wounded pride and hurt feelings. The BMW Court made plain that "evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law." *BMW* at 576–77. This statement finds considerable traction on the facts of this case, in which the jury rationally could have found that Breslin (and through him, Direct) mounted a deliberate systematic campaign to punish the plaintiff as a reprisal for her effrontery in lodging a discrimination claim. The campaign involved abasing her, isolating her from her colleagues, and degrading her professionally. The appellants should have realized that this scurrilous course of conduct was unlawful yet they persisted in it. Such a vendetta, to use the magistrate judge's apt description, is not only deserving of opprobrium but also flatly prohibited by Massachusetts laws. Hence, the reprehensibility of the appellants' conduct can be viewed as calling for a substantial award of punitive damages.

viewed favorably to the plaintiff, shows only slights and affronts. This argument lacks force.

The court upheld the conclusion of the jury "that the harm inflicted was far more than wounded pride and hurt feelings." The *BMW* Court made plain that evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law.[80]

Accordingly, the court concluded that the 2:1 ratio of compensatory to punitive damages awarded by the *Zimmerman's* jury "presents no cause for concern."[81]

Punitive Damage in Light of Statutory Schemes and Fair Notice of Potential Liability. The third and final *BMW* guidepost requires a reviewing court to assess the punitive damage award in light of the complex of statutory schemes to respond to the same sort of underlying conduct. Specifically, the *BMW* Court states that "a reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue."[82]

In response to the argument of Direct Federal Credit Union and Breslin, the court opined the appellants have misconstrued the nature and purpose of this guidepost. Decided cases are relevant, but positive law—statutes and regulations—are even more critical. Moreover, a reviewing court should search for comparisons solely to determine whether a particular defendant was given *fair notice as to its potential liability* (emphasis added) for particular misconduct, not to determine an acceptable range into which an award might fall.[83]

In *Zimmerman*, the court concluded that Direct Federal Credit Union and Breslin had sufficient notice. According to the court, "in another section of the very statute upon which the plaintiff sued, the Massachusetts legislature provided for the assessment

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[80] *Zimmerman* at 11. *See also BMW* at 576–77.

[81] *Id.* at 11.

[82] Specifically, the court stated in a footnote: "We believe that it is appropriate to construct the ratio by looking only to the count on which punitive damages were awarded (here, the retaliation count). Were we to widen the lens of inquiry and take into account the tortious interference count, the ratio would be smaller still (1.2:1)." *Id.* at 7–8.

[83] *Id.* at 12–13.

of treble damages for age discrimination."[84] The court went on to point out that because the legislature provided explicit notice that the violator of one of the provisions of Chapter 151B could be liable for punitive damages several times greater than the compensatory award in the same case, the defendants were sufficiently on notice that retaliating against Zimmerman in violation of the statute potentially could subject them to a similar level of punitive damages.[85]

Summary

The *Zimmerman* court summarizes its view of the specific counter-productive behavior or workplace bullying conduct and concluded that the Direct Federal Credit Union and David Breslin engaged in a course of behavior that a jury easily could have deemed "outrageous and worthy of condemnation." The evidence thus supported a punitive damage award, and the appellants had fair notice of its potential size. As such, the award presents no legal or factual impediment that would warrant disturbing it.[86] The *Zimmerman* court did not award attorneys' fees in its decision; however, it stated that a party seeking an attorneys' fee award must do so by separate motion, filed within 30 days of the court's decision.[87]

The Prevalence and Incidence of Workplace Bullying and the Anti-Bullying Legislative Movement

"Abusive Bosses Study" by Employment Law Alliance and Society of Human Resources Management

The authors hesitate to hypothesize how widespread and common place the insidious facts in *Zimmerman* may be in the workplace. There is no doubt, however, that there are different degrees of severity of workplace bullying ranging from intentional infliction of emotional distress to the more "covert" forms of bullying

[84] *See* Mass. Gen. Law Ch 151 B, §9, under which the Massachusetts legislature left uncapped the damages stemming from other types of discrimination under that statute. *See also Fontaine v. Ebtec Corp.*, 415 Mass. 309, 613 N.E.2d 881, 889–90 (Mass. 1993) (stating that "it is not reasonable to assume that the Legislature intended to design a damage scheme which singles out age discrimination ad significantly more egregious than, for example, racial or sexual discrimination").

[85] *Id.* at 11.

[86] *Id.* at 11–12.

[87] In Massachusetts a party seeking a fee award must do so by separate motion, filed within 30 days of the date of the courts final judgment. See 1st Cir. R. 39.2.

as suggested by Loraleigh Keashly.[88] However, in whatever the case, the emotional, economic, and other consequences are often demonstrable and long term.[89]

There have been several studies designed to attempt to ascertain the prevalence and incidence of workplace bullying.[90] These studies all assert that the prevalence and incidence of workplace bullying and abusive bosses is widespread in the U.S. workforce.

One of the most recent studies regarding "Abusive Bosses" was published in March 2007. This study was sponsored by Employment Law Alliance and the Society of Human Resources Management (SHRM).[91] In this well-publicized study some 44 percent of the 1,000 survey respondents indicated that they worked for abusive bosses.[92] See Figure 1: Personally Experienced Supervisor/Employer Abuse?

Even more noteworthy and relevant to potential workplace dispute resolvers of the Academy is that some 64 percent of the survey respondents supported the enactment of anti-bullying legislation designed to combat this apparent widespread existence and conduct of "Abusive Bosses." See Figure 2: Right to Sue?

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[88]See Keashly, *Bullying in the Workplace: Its Impact and Management*, 8:2 Employee Rts. & Resps. J.335–73 (2004), in which she points out that workplace bullying may also be "covert" as well as blatant. Similarly see Yamada, *Crafting a Legislative Response To Workplace Bullying*, 8 Employee Rts. & Employment Pol'y J. 475 (2004); Yamada, *The Phenomenon of 'Workplace Bullying' and the Need for Status-Blind Hostile Work Environment Protection*, 88 Geo. L.J. 475 (2000).

[89]For an excellent and unique article examining "how it feels to be bullied" and using a type of research method called "metaphor" analysis, see Tracy, Lutgen-Sandvik & Alberts, *Nightmares, Demons, and Slaves: Exploring the Painful Metaphors of Workplace Bullying*, 20:2 Mgmt. Comm. Q. 148–85 (Nov. 2006). The authors further recommend reviewing the articles referenced in Tracy et al. regarding the prevalence and consequences of workplace bullying.

[90]See *supra* note 89, Tracy et al., for other international and U.S. research regarding workplace bullying or adult bullying."

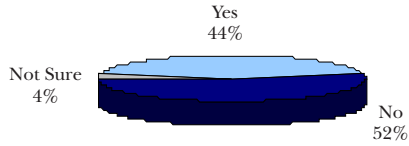
[91]Employment Law Alliance, *New Employment Law Alliance Poll: Nearly 45% of U.S. Workers Say They've Worked For An Abusive Boss*, (San Francisco, CA: Mar. 21, 2007), www.employmentlawalliance.com. This poll was conducted by Dr. Theodore Reed, Reed Group (Philadelphia, PA), and sponsored by the Society of Human Resources Management.

[92]The SHRM survey or poll results were based on a survey of a representative sample of 1,000 American adults. Detailed interviews were conducted with 534 full- or part-time workers. The confidence interval for this sample size is +/-4.24%. Summary of findings:

- 44% said they have worked for a supervisor or employer who they consider abusive.
- More than half of American workers have been the victims of, or heard jokes/teasing remarks, rudely interrupting, publicly criticizing, giving dirty looks to, or yelling at subordinates, or ignoring them as if they were invisible.
- 64% said that they believe an abused worker should have the right to sue to recover damages.
- Southern workers (34%) are less likely to have experience with an abusive boss than are their Northeastern (56%) and Midwestern (48%) counterparts.

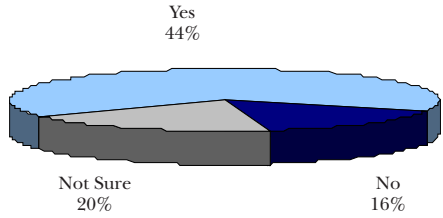
Complete poll results are posted on the Employment Law Alliance Web site at www.employmentlawalliance.com.

Figure 1: Personally Experienced Supervisor/Employer Abuse?



- 44% of American workers have worked for supervisor or employer whom they consider abusive.
- Workers aged 18 to 24 (24%) are less likely to have encountered an abusive boss than are their older counterparts (25 to 34: 37%; 35 to 44: 49%; 45 to 54: 49%; 55 to 64: 56%)
- Compared to workers with a high school education or less (34%), those with some college or a college degree (47%) are more likely to have been a victim of abuse by a supervisor or employer.
- Southern workers (34%) are less likely to have experience with an abusive boss than are their Northeastern (56%) and Midwestern (48%) counterparts.

Figure 2: Right to Sue?



- 64% of American workers think an employee who has been abused by a supervisor or employer should have the right to sue the supervisor and their employer to recover damages.

These findings of the existence of widespread workplace bullying along with the suggestions of activists who support the enactment of anti-bullying legislation portend that if such anti-bullying legislation were to be enacted, two or three immediate consequences would follow. First, employers would be more inclined to design and implement specific employer-sponsored internal organizational anti-bullying policies and procedures as employers and labor unions did with the enactment of Title VII of the

Civil Rights Act of 1964.[93] Second, any state or federal agencies established to oversee such anti-bullying laws would soon be inundated with cases, and would in time encourage covered employers to implement internal dispute resolution procedures to resolve these claims early on. (It is noteworthy that Congress faced this reality in enacting the Americans with Disabilities Act and the Civil Rights Act of 1991, and incorporated into the provisions of both Acts the use of such ADR processes as fact-finding, mediation, and arbitration.[94])

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[93]See Civil Rights Act of 1964, 42 U.S.C. §2000, is the most sweeping and important civil rights Act ever enacted. The law contains 11 titles barring discrimination in voting rights, public accommodation, education, employment, and the use of federal funds. The Supreme Court upheld the constitutionality of the Act under the commerce clause and the fourteenth amendment. *See Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964); *Katzenbach v. McClung,* 1379 U.S. 294 (1964).

[94]As a matter of public policy, the federal government has "encouraged" the use of ADR, particularly the mediation of EEO disputes. Both the Americans with Disabilities Act and the Civil Rights Act of 1991 contain provisions that encourage the use of ADR, including mediation. The relevant provisions of these statutes read, in part, as follows:

Americans with Disabilities Act: Alternative Means of Dispute Resolution:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation fact-finding, mini-trials, and arbitration, is encouraged to resolve disputes arising under this Act.

Civil Rights Act of 1991: Alternative Means of Dispute Resolution:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation fact-finding, mini-trials, and arbitration, is encouraged to resolve disputes arising under the Acts of provisions of Federal law amended by this title.

These ADR provisions are designed to "encourage" the use of ADR. They do not mandate or effect participation in mediation, which may result in voluntary settlement outcome. In July 1999, the EEOC adopted a "Policy Statement on Alternative Dispute Resolution." In addition to providing a number of "Core Principles," the EEOC Policy Statement provided, in part, the following:

> The Equal Employment Opportunity Commission (EEOC) is firmly committed to using alternative methods for resolving disputes in all of its activities, where appropriate and feasible. Used properly in appropriate circumstances, alternative dispute resolution (ADR) can provide faster, less expensive and contentious, and more productive results in eliminating workplace discrimination as well as in commission operations. The use of ADR is fully consistent with EEOC's mission as a law enforcement agency. It is squarely based in the statutes creating and enforced by the commission—Title VII of the Civil Rights Act of 1964, the Age discrimination in Employment Act, the Equal Pay Act and the Americans with Disabilities Act.

In keeping with the concept of encouraging the early resolution of EEO disputes, the EEOC adopted, as a matter of public policy, the "Agency Program To Promote Equal Employment Opportunity," codified as 29 CFR Part 1614-Federal Sector Equal Employment Opportunity, as amended (November 9, 1999). Among other things, "1614" requires under Section 1614.603, the following:

> Voluntary settlement attempts: Each agency shall make reasonable efforts to voluntarily settle complaint of discrimination as early as possible in, and throughout, the administrative processing of complaints, including the pre-complaint counseling stage. Any settlement reached shall be in writing and signed by both parties and shall identify the claims resolved.

The third most likely consequence would be that workplace bullying targets, covered employers, labor organizations, and public policy decisionmakers would turn to the use of private outside workplace dispute resolvers including fact-finders, mediators, and arbitrators to facilitate the resolution of an anticipated ground swell of costly workplace bullying charges and complaints.

In effect, the authors envision the establishment or creation of a *de facto* labor court system to handle and resolve these many claims.[95] The workplace neutrals for this *de facto* labor court system would be the current corps of private professional fact-finders, mediators, and arbitrators, many of whom would be members of the National Academy of Arbitrators.

Proposed Healthy Workplace Act

There are two leaders of the anti-bullying legislative movement in the United States—Dr. Gary Namie of the Workplace Bullying Institute (WBI),[96] and Suffolk University Law Professor David Yamada, chair of the New Workplace Institute.[97] Professor Yamada has argued that there is a need for legislation to combat what

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(2) Establish or make available an alternative dispute resolution program. Such program must be available or both the pre-complaint process and the formal complaint process. Section 1614.105, Agency Processing, also requires that:

(2) Counselors shall advise aggrieved persons that, where the agency agrees to offer ADR in the particular case, they may choose between participation in the alternative dispute resolution program and the counseling activities provided for in paragraph of this section.

Lastly, Section 1614.109, Hearings, provides as follows:

Offer of resolution. (1) Any time after the filing of the written complaint but not later than the date an administrative judge is appointed to conduct a hearing, the agency may make an offer of resolution to a complainant who is represented by an attorney.

(2) Any time after the parties have received notice that an administrative judge has been appointed to conduct a hearing, but not later than 30 days prior to the hearing, the agency may make an offer of resolution to the complainant, whether represented by an attorney or not.

As it relates to one of the central themes of this article, the EEOC's public policy arguably supports the position advocated by Professors Nancy Rogers and Craig McEwen in "Employing the Law to Increase the Use of Mediation and To Encourage Direct and Early Negotiations." Section 1614 also supports the extension of the requirement to "establish or make available alternative dispute resolution program(s)" to federal contractors (and possibly state and local governments) as suggested by the proposed NEDRA. Thus, Section 1614 may actually be a precursor to NEDRA.

[95]For information on The Federation of European Employers, visit www.fedee.com/about.shtml (last visited Nov, 14, 2007).

[96]For the Web site of Dr. Namie, see www.bullybuster.org and www.bullyinginstitute.org.

[97]The Web site for David Yamada is www.newworkplaceinstitute.org.

he terms "status-blind harassment."[98] Dr. Namie and Professor Yamada have proposed the Model Healthy Workplace Act.[99] The proposed Act defines its basic cause of action as follows:

> It shall be an unlawful employment practice under this Chapter to subject an employee to an abusive work environment as defined by this Chapter.
>
> This bill describes an "abusive environment" as one that:
>
> Exists when the defendant, acting with malice, subjects the complainant to *abusive conduct* so severe that it causes *tangible harm* to the complainant.[100]

Quebec Anti-Bullying Legislation

On June 4, 2004, the Canadian Province of Quebec implemented anti-bullying legislation called the Quebec's Psychological Harassment Act. This Act provides that:

> Every employee has a right to a work environment free from psychological harassment. Employers must take reasonable action to prevent psychological harassment and whenever they become aware of such behavior, to put a stop to it.[101]

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[98]Yamada, *The Phenomenon of 'Workplace Bullying' and the Need for Status-Blind Hostile Work Environment Protection*, 88 Geo. L.J. 775 (2000).

[99]*Crafting a Legislative Response To Workplace Bullying*, 8 Employee Rts. & Employment Pol'y J. 475 (2004); Yamada, *The Phenomenon of 'Workplace Bullying' and the Need for Status-Blind Hostile Work Environment Protection*, 88 Geo. L.J. 475 (2000),and see Appendix 1 of this chapter. See, e.g., Namie & Namie, *The Bully at Work: What You Can Do To Stop the Hurt and Reclaim Your Dignity on the Job* (Sourcebooks, Inc. 2003), at 53–58; Keashly & Jagatic, *By Any Other Name: American Perspectives on Workplace Bullying*, in Bullying and Emotional Abuse in the Workplace, eds. Einarsen et al. (2003).

[100]The Healthy Workplace Act defines "abusive work environment" within the following context: "abusive work environment," "exists when the defendant, acting with *malice*, subjects the complainant to *abusive conduct* so severe that it causes *tangible harm* to the complainant."

Abusive conduct is defined as "conduct that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests." In considering whether abusive conduct is present, a trier of fact should weigh the severity, nature, and frequency of the defendant's conduct. Abusive conduct may include, but is not limited to: repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating; or the gratuitous sabotage or undermining of a person's work performance. A single act normally will not constitute abusive conduct, but an especially severe and egregious act may meet this standard." Conduct is defined to include "all forms of behavior, including acts and omissions of acts."

[101]*See* Act Respecting Labour Standards, R.S. Q. Ch. V-2, § 81.20 (2000) (in force on June 1, 2004) (Can.), available at www.cnt.gouv.gc.ca/en/site_hp/loi/normes.asp. See Interpretation, Act Respecting Labour Standards, R.S.Q. ch. V-2, § 81.20 (Can.) available at www.cnt.gouv.gc.ca/en/site_hp/loi/normes.asp. And see Soares, *The Anti-Bullying Law: The Quebec Experience*, Work, Stress, and Health Conference (Miami: Mar. 2–4, 2006), available at www.en.uguam.ca/nobel/~13566. And see Yuen, *Beyond The Schoolyard: Workplace Bullying and Moral Harassment Law in France and Quebec*, 38 Cornell Int'l L.J. 625 (2005), for another discussion of the operation of the Quebec anti-bully-

The Quebec Anti-Bullying Act defines psychological harassment as:

> Any vexatious behavior in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee. A single serious incidence of such behavior that has a lasting harmful effect on an employee may also constitute psychological harassment.[102]

Remedies and Damages. The Quebec anti-bullying statute also provides for a rather broad range of remedies and damages where there has been a finding of workplace bullying. This should be viewed in contrast to the Model Healthy Workplace Bill.[103] In addition, the types of remedies and damages actually provided by the Canadian Labour Relations Board may also provide some guidance for U.S. workplace neutrals handling or deciding workplace bullying disputes arising under private anti-bullying policies and procedures.[104]

In regard to remedies and damages, the Quebec Act provides as follows:

> If the Labor Relations Board considers that the employee has been the victim of bullying and that the employer has failed to fulfill his or her obligations, it may render *any decision it believes fair and reasonable, taking into account all the circumstances of the matter.* . . .

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ing statute. See also Parkes, *Introduction to the Symposium on Workplace Bullying: Targeting Workplace Harassment in Quebec: On Exporting a New Legislative Agenda*, 8 Employee Rts. & Employment Pol'y J. 423 (2004).

[102]The Healthy Workplace Act addresses and defines the terms "tangible harm," psychological harm, and physical harm as follows: the plaintiff proves that he or she has been tangibly harmed by the actionable conduct:

Tangible harm. Tangible harm is defined as psychological harm or physical harm.

i. Psychological harm. Psychological harm is the material impairment of a person's mental health, as documented by a competent psychologist, psychiatrist, or psychotherapist, or supported by competent expert evidence at trial.

ii. Physical harm. Physical harm is the material impairment of a person's physical health or bodily integrity, as documented by a competent physician or supported by competent expert evidence at trial.

[103]The Quebec Anti-Bullying statute (or Psychological Harassment Act) provides payment for punitive and moral damages, or to pay for psychological services. The Labour Relations Commission files its decision in Superior Court, after which it becomes binding and enforceable. (citing §129 of the Labour Code). Also see Yuen *supra* note 101.

[104]For an example of several of the decisions made under the Quebec Act, see *Ganley v. Subway Sandwiches* (Jan. 13, 2006); *Carole Tavernier v. Hydro-Quebec* (Dec. 16, 2005); *Marie-Hélène Dubois v. Clair Foyer, Inc.* (Oct. 13, 2005); *Lucien St. Pierre v. Ministère u Revenu du Quebec* (July 22, 2004); and *Lise Forget-Changnon v. Marché Bel-Air.* Source Angelo Soares, The Anti-Bullying Law: The Quebec Experience: presented at the Work Stress and Health Conference (Miami, March 2-4, 2006) http://www.er.uqam.ca/nobel/r13566/.

The early experience of our Canadian neighbors and colleagues under this new statute reveals that there has not been a "ground swell" of bullying claims filed with the CLS. Early statistics indicate that only 6 percent of claims received by the CLS represented bullying complaints. As of January 31, 2006, 4,000 complaints had been received, with only 150 being sent to the Labour Board. Some of the early statistics are summarized below in Figures 3 and 4.[105]

[105]Soares *supra* note 101. Another report regarding the regional distribution of complaints is set forth below: Since the introduction of the new dispositions of the Act, the CNT received 2,500 complaints: 48% of the files have been regularized and 52% are in treatment. A complaint on three already was the subject of an agreement between the employer and the employee putting an end quickly at some difficult situations. The CNT realized nearly 300 investigations and 36 complaints were transferred to the Commission des relations de travail. "These figures send us an unambiguous message: these provisions introduced into the law had a basis; psychological harassment at work exists, it must cease and must especially be prevented," underlined Mr. Florent Francoeur, CEO of the ORHRI. One important fact, he noted, was there are very few frivolous complaints.

Regional distribution of complaints:

Montréal	731	29%
Montérégie	400	16%
Capitale-Nationale	248	10%
Laurentides	171	7%
Mauricie et Centre-du-Québec	167	7%
Lanaudière	134	5%
Laval	133	5%
Estrie	99	4%
Saguenay-Lac-Saint-Jean	98	4%
Outaouais	97	4%
ChaudiÃ¯re-Appalaches	80	3%
Bas-Saint-Laurent et Gaspésieâ^'ÃŽles-de-la-Madeleine	46	3%
Abitibi-Témiscamingue et Nord-du-Québec	36	1%
Cète-Nord	30	1%
Total	**2 500**	**100%**

Other interesting stats:

- 93% of the complaints are filed for a vexatious behavior in repetitive matter (v. 7% for only one serious control)
- 62% of the plaintiffs are women, whereas they represent 44% of the working population
- 81% of the complaints blame a person in situation of management

See www.cnt.gouv.qc.ca.

Figure 3: Quebec Anti-Bullying Legislation Statistics, General Status

June 1, 2004 to March 31, 2005

- **2,067 complaints**
  - **– 864 settled complaints (41.8%)**
  - **– 1,203 complaints in progress (58.2%)**
- **Average time of treatment (in days)**
  - **– Before judicial intervention 89.1**
  - **– After judicial intervention 106.0**

Source: Labour Standards Commission

Figure 4: Quebec Anti-Bullying Legislation Statistics, Results of Complaints

June 1, 2004 to March 31, 2005

Results of complaints	n	%
Inadmissible complaints	132	15.3
Bullying criteria not satisfied	127	14.7
Withdraw of complaint	255	29.5
Resolution	137	15.9
Resolved with another complaint	147	17.0
Unfounded complaint	32	3.7
No resolution	1	0.1
Other results	32	3.7

Source: Labour Standards Commission

The complaint procedures related to the Quebec anti-bullying statute are interesting in two specific regards. These procedures, as detailed below, provide for both a mediation step and conciliation step. The authors suggest that at either of these steps external professional mediators and conciliators could be utilized to facilitate the resolution of workplace bullying complaints. The authors also suggest that if fact-finding, mediation, and even voluntary

arbitration were made available at the organization level and pre-complaint stages, more than 20 percent of these complaints would be resolved.[106] See Figure 5.

The second and probably most important goal and objective of this article is the early resolution of workplace disputes. On this score, it is the opinion of a number of observers that some 20 percent of the workplace bullying charges filed under the Quebec Act could have been resolved if the employer had in place either formal or informal internal conflict management or dispute resolution programs or systems. It is presumed that such programs would also provide access to external professional fact-finding and mediation.

In its report, however, the CLS indicated that the majority of the respondent employers did not have specific anti-bullying policies and procedures in place.[107] It was also reported that there is general employer resistance to designing and implementing such organization-level protocols and procedures. In the authors' opinion and from a public policy standpoint, it would be in the public's interest to require employers to design and implement fair and legitimate employer-sponsored conflict management systems to cut costs and provide for the early resolution of workplace bullying disputes. This would be one of the goals and benefits of the later-proposed National Employment Dispute Resolution Act.

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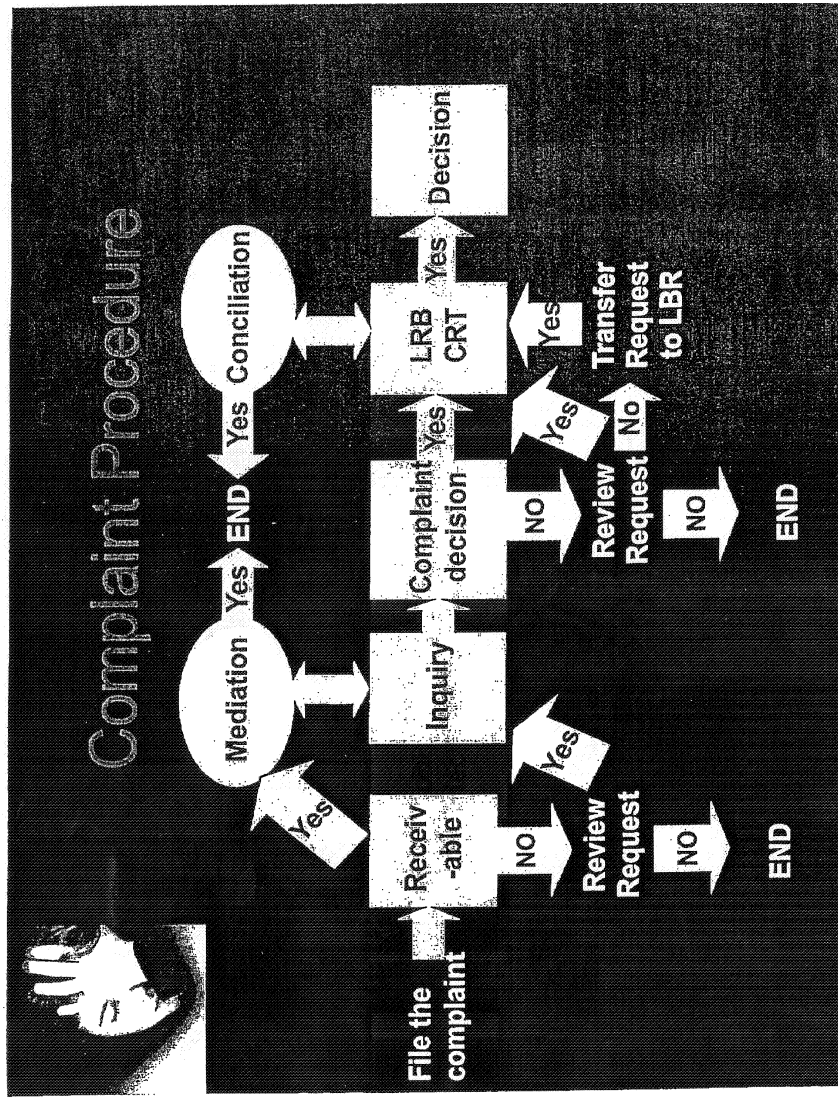
[106]There is mounting research indicating employer resistance to the early resolution of employment disputes using conflict management programs and ADR processes. *See, e.g.,* Rogers & McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 Ohio St. J. Disp. Resol. 21 (1998); Gourlay & Soderquist, *Mediation in Employment Cases: Is 'Too Little Too Late': An Organizational Conflict Management Perspective on Resolving Disputes*, 21 Hamline L. Rev. 216 (1998) (February, 2000) at pp. 32 through 43. And see Stallworth & Stroh, *Who Is Seeking to Use ADR? Why Do They Choose To Do So?*, Disp. Resol. J. 30 (Jan./March 1996); Varma & Stallworth, *Barriers to Mediation*, Disp. Resol. J. 32 (Feb. 2000). For discussion of the effectiveness of early mediation, see Meece, *The Very Model of Conciliation*, N.Y. Times (Sept. 6, 2000), at C1; Varma & Stallworth, *Barriers to Mediation: A Look At The Impediments And Barriers To Voluntary Mediation Programs That Exist Within The EEO*, Disp. Resol. J. (Jan.-Mar. 1996). For discussion of the effectiveness of early mediation, see Aimee Gourlay & Jenelle Soderquist, *Mediation in Employment Cases is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving Disputes*, 21 Hamline L. Rev. 216 (1998) and Mickey Meece, *The Very Model of Conciliation*, N.Y. Times (Sept 6, 2000) at C1.

[107] *Supra* note 104. Because of this apparent resistance to utilize ADR processes early on and in light of the experiential evidence that such ADR processes as fact-finding, mediation, and arbitration are effective, the authors propose the enactment of the National Employment Dispute Resolution Act (NEDRA), which as a matter of public interest and policy would require covered federal contractors to design and implement employer-sponsored integrated conflict management systems or programs.

Figure 5: Quebec Anti-Bullying Legislation Statistics: Complaint Procedures

QUEBEC ANTI-BULLYING LEGISLATION STATISTICS
CHART IV



Available at www.bullyinginstitute.org/education/bbstudies/SoaresQuebec.pdf

Workplace-Based Anti-Bullying Strategies, Policies and Procedures

Approaches to preventing and resolving workplace bullying claims fall into three categories: (1) personal or private interpersonal responses, (2) internal organizational or employer-sponsored anti-bullying policies and procedures, and (3) external judicial and legislative/public policy solutions.

Private Interpersonal Responses

Considerable research has addressed the consequences to targets of workplace bullying, particularly stress-related psychological, physical, and behavioral strains.[108] How targets respond (actively or passively) toward the bully and the organization is a key concern. Anderson and Pearson have studied the "spiral of incivility" that may ensue when the target in turn responds aggressively toward the bully, including acts of violence.[109] Conversely,

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[108]Tracy, Lutgen-Sandvik & Alberts, *Nightmares, Demons, and Slaves: Exploring the Painful Metaphors of Workplace Bullying,* 20:2 Mgmt. Comm. Q. 148–85 (Nov. 2006). *See also* G. Hofstede, Culture's Consequences: Comparing Values, Behaviors, Institutions and Organizations across Nations, 2nd Ed. (Thousand Oaks, CA: Sage Publications 2007); Trompenaars & Hampden-Turner, Riding The Waves of Culture: Understanding Diversity in Global Business, 2nd ed. (New York: McGraw-Hill 1998).

[109]According to Professor Tracy and her colleagues, although there is scant evidence in either the bullying literature or data regarding the potential for bullied workers to respond with violence, workplace aggression, research suggests active revenge could be a very real possibility. *See*, John D. Lewis and Tim Lawson, *Harassment and Bullying in the Workplace,* in Nota Bene (May, 2004) *available at* www.heenanblaikie.com. However, see Recommendation #4 from O.C. Transpo Coroner's Inquest (Rebased 2000), where in 1999, an employee of O.C. Transpo in Ottawa shot and killed four employees and then turned the gun on himself. The employee had been the victim of repetitive bullying and ridicule by his co-workers. Although this is an extreme case, it illustrates the causal linkage between bullying and violence in the workplace. The authors further suggest that perceptions and reports of unfair treatment are common precursors of workplace aggression, violence, and sabotage. *See* Analoui, *Workplace Sabotage: Its Styles, Motives and Management*, 14 J. Mgmt. Dev. 454–71 (1995); Hood, *Violence at Work: Perspectives From Research Among 20 British Employers,* 4 Security J. 64–86 (1993); Newman & Baron, Social Antecedents of Bullying: A Social Interactionist Perspective (Taylor & Francis 2003). According to Tracy, et al., if a child feeling like the unpopular kid at school is one factor leading to bloodshed among children, it is not unthinkable that a worker who feels continually abused, tortured, and isolated in an organization might respond with aggression. Tracy, et al., *supra* note 108 at 176. See also Garbarino & deLara, And Words Can Hurt Forever: How to Protect Adolescents From Bullying, Harassment, and Emotional Violence (Free Press 2002). See also Picoult, Nineteen Minutes (Atria Books 2007,) a novel that describes a "Columbine-like tale" of a disenfranchised young man and the tragedy he wreaks on his local high school; Lies II, Corralling The Workplace Bully (presentation Seyfarth, Shaw) (Mlies@seyfarth.com), where the author suggests a relation between bullying and workplace violence. See also *United States Postal Serv. v. National Ass'n of Letter-Carriers, AFL-CIO*, USPS Case No. 194N-41-C-99136168 NALC Case No. GTS 2348 (Nov. 2000), where arbitrator discusses the evolution of workplace violence. Lastly see Anderson & Pearson, *Tit for Tat? The Spiraling Effect of Incivility in the Workplace,* 24 Acad. Mgmt. Rev. 452–71.

taking a more controversial approach, Bies and Tripp argue that revenge (which they define as "an action in response to some perceived harm or wrongdoing by another party which is intended to inflict damage, injury, discomfort, or punishment on the party judged responsible by the target") may serve a functional purpose, by keeping a bully's aggressive or unfair behavior in check.[110] Fox and Stallworth investigated the utility of personal apologies in resolving bullying incidents,[111] while Namie and the Workplace Bullying Institute offer practical advice and support for individual targets, aimed at helping them protect their physical, mental, and occupational health.[112]

These and other individual approaches are useful and should be carefully considered in designing and implementing anti-bullying training. However, the authors submit that the primary focus should be on the development of specific organizational anti-bullying policies and procedures for preventing and resolving incidents of workplace bullying early on and before the earlier detailed consequences occur.

Employer-Sponsored Anti-Bullying Policies and Procedures

A number of U.S. employers and labor organizations, including the U.S. Postal Service, have adopted anti-bullying policies and provisions under their collective bargaining agreements. In specific regard to the U.S. Postal Service, the adoption of such provisions was prompted by the recognition that such counter-workplace behavior (i.e., bullying) also served as the potential basis for workplace violence.

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[110]Bies & Tripp, *The Study of Revenge in the Workplace: Conceptual, Ideological, and Empirical Issues,* in Counterproductive Work Behavior: Investigations of Actors and Targets, eds. Fox & Spector (APA Press 2005), at 165–81.

[111]*See* Fox & Stallworth, *How Effective Is An Apology in Resolving Workplace Bullying Disputes: An Empirical Research Note*, Disp. Resol. J. 55–63 (May/July 2006). And see Hoffman, *The Use of Apology in Employment Cases*, 1 Practical Disp. Resol. (1999). *See also* Wagatsuma & Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20(4) Law Soc. Rev. 461–98 (1986). See also Levi, *The Role of Apology in Mediation*, 72 N.Y.U.L. Rev. 165–210 (Nov. 1997); Schneider, *What It Means to Be Sorry: The Power of Apology in Mediation,* available online at www.mediate.com/articles/apology.cfm; Lazare, *Go Ahead, Say You're Sorry*, Psychology Today 40–43, 76–78 (Jan./Feb. 1995); Tavuchis, Mea Culpa: A Sociology of Apology and Reconciliation (Stanford U. Press 1991). Lastly, see Kellerman, *When Should a Leader Apologize and When Not?*, Harv. Bus. Rev. 73–81 (April 2006).

[112]Self-help books include Namie & Namie, The Bully at Work (2000); Horntein, Brutal Bosses (1996); Davenport, Schwartz & Elliott, Mobbing: Emotional Abuse in the American Workplace (2002); Wyatt & Hare, Work Abuse: How to Recognize It and Survive It (1997); Hirigoyen, Stalking the Soul (1998); Randall, Bullying in Adulthood (2001); and NiCarthy, Gottlieb & Coffman, You Don't Have to Take It: A Woman's Guide to Confronting Emotional Abuse at Work (1993).

As distinct from most employers, the U.S. Postal Service has a zero-tolerance policy against violence in the workplace. It defines violence as any "verbal, physical, or psychological threat or assault on an individual that has the intention or results in physical and/or psychological damage." The policy further states that the U.S. Postal Service will not tolerate "harassment, intimidation, threats, or *bullying*" (emphasis added). The words of arbitrator Bernice Fields are particularly worth noting: "Violence in the workplace begins long before fists fly or lethal weapons extinguish lives. Where resentment and aggression routinely displace cooperation and communication, violence has occurred."[113]

The decision of the U.S. Postal Service and the APWU should be applauded and used as one example or model of what labor organizations and employers can do to attempt to combat workplace bullying.[114] It should be pointed out that most recently the AFL-CIO is focusing more on the existence of "abusive bosses," workplace bullying, and the now-recognized emotional and economic consequences of this conduct.[115] The issue and debate in the United States concerning the wisdom and necessity of enacting state-level anti-bullying legislation appears to be heating up.

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[113] *United States Postal Serv. v. National Ass'n of Letter-Carriers, AFL-CIO,* USPS Case No. 194N-41-C 99136168, NALC Case No. GTS 2348 (Nov. 2000).

[114] The Quebec Anti-Bullying statute also provides access to contractual grievance arbitration procedures to resolve workplace bullying grievances. Morin, *Countdown To Implementation of Legislation on Psychological Harassment in the Workplace*, in In Fact and In Law (Lavery, DeBilly) (April 2004), at 1–4. *See also* Yuen, *Beyond the Schoolyard: Workplace Bullying and Moral Harassment Law in France and Quebec,* 38 Cornell Int'l L.J.625 (2005). And see Lewis & Lawson, *Harassment and Bullying In The Workplace* (Heenan, Blaikie, LLP, May 2004) (www.heenanblaikie.com).

[115] See, e.g., Employment Law Alliance, *New Employment Law Alliance Poll: Nearly 45% of U.S. Workers Say They've Worked for an Abusive Boss,* (San Francisco, CA: Mar. 21, 2007), www.employmentlawalliance.com. This poll was conducted by Dr. Theodore Reed, Reed Group (Philadelphia, PA), and sponsored by the Society of Human Resources Management (SHRM); Selvin, *Bills Aiming To Rid Us of Bad Bosses: Proposed Legislation in Several States Would Allow Workers to Sue Abusive Supervisors*, Chicago Tribune, (Monday, Aug. 27, 2007), at p. 3 (also reporting on the AFL-CIO contest called "My Bad Boss Contest" available at http://www.workingamerica.org/badboss/; *Bullies in the Workplace: Anti-Bullying Measures*, Stewart News, (Stewart, FL, Sunday, July 22, 2007), reporting on the following:

- Places with anti-bullying laws: Quebec, Canada; State of South Australia; Sweden (world's first, effective 1994); France (2002); Britain (2001) (source: www.bullyfreeworkplace.org)
- Places considering anti-bullying legislation (active or completed bills): Canada, Oregon, New York, New Jersey, Vermont, Washington, Montana, Connecticut, Hawaii, Oklahoma, Kansas, Missouri (source: www.bullyfreeworkplace.org). And see Baldas, *Office Bullies May Face Suits, Warn Employment Lawyers*, The Recorder (Monday, Apr. 9, 2007), at 2; Duncan, *Workplace Anti-Bullying Legislation: The Next Frontier?* No.,l 6 BNA Safety Net (Mar. 28, 2006), at 47; Larson, *Stamping Out Workplace Bullies*, available online at www.hrinz.org. nz/site/hrinfo/hutstuff/2007/2007/(8-1-2007).

Labor organizations might play an ever-increasing role in combating this type of behavior in the U.S. workplace.

There is excellent work being done in Europe in the development of employer-sponsored anti-bullying policy guidelines for organizations. Labor organizations and worker councils have been participants in development of such policies.[116]

The Unison Experience

UNISON, the largest trade union in the United Kingdom, has taken the lead in writing specific policies for several sectors whose workers it represents (such as public services, private contractors providing public services, utilities, the police service, and colleges and schools). Likewise, the European Union is working on incorporating anti-bullying (and anti-mobbing) considerations in its guidelines. Richards and Daley summarize policy directions recommended by UNISON and others; Peyton details "Dignity at Work" policies.[117]

An important prerequisite for writing anti-bullying policies is beginning with data collection (surveys and interviews of employees, managers, and other internal stakeholders) to find out what adult or workplace bullying issues currently exist in the organization, and to give employees a voice in developing policy. In general, an effective anti-bullying policy makes a clear statement about what the organization thinks, its relationship with staff, and how it expects people in the organization to behave.

An example of UNISON policy is described in a document entitled "STOP…bullying me: Guidance and support for UNISON members working at Bournemouth University".[118]

The authors suggest developing general policy guidelines for U.S. organizations, but fine-tuning each organization's policy through preliminary surveys and discussions with management,

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[116]Graham, *Mopping Up Mobbing: Legislate or Negotiate*, available online at www.oit.org/public/english/dialogue/actrav/publ/133/11.pdf.

[117]And see Richards & Daley, *Bullying Policy: Development, Implementation and Monitoring,* in Bullying and Emotional Abuse in the Workplace: International Perspectives in Research and Practice, eds. Einarsen, Hoel, Zapf & Cooper (London: Taylor and Francis, at 247–58. See also Peyton, Dignity at Work: Eliminate Bullying and Create a Positive Working Environment (Hove, U.K.: Brunner-Routledge 2003).

[118]UNISON (2003), STOP…bullying me: Guidance and support for UNISON members working at Bournemouth University, available online at www.bournemouth.ac.uk/unison/documents/stop_bullying_me_2.pdf.

employees, and other key internal stakeholders. As a template, at minimum a policy should include the following:

- Written statement of anti-bullying policy and commitment of top leadership, disseminated regularly throughout the organization
- Flexible communication channels and procedures (e.g., anonymous hotlines, in-person, and written/e-mail channels) to report bullying
- Definitions (how the organization defines bullying; delineating how bullying is distinct from statutorily covered behavior such as sexual harassment and employment discrimination on the one hand, and attempting to exclude trivial or frivolous accusations on the other hand)
- Clarification of confidentiality, protection from retaliation
- Complaints procedure (e.g., informally approach bully, contact officer, formally file complaint)
- Designated Contact Officers (e.g., human resources, ombudsperson, specially appointed contact person) to receive and process complaints
- Availability of counselors, ombudspersons, mentors, or other contact persons
- Investigation and follow-up procedures for bullying complaints, including fair process and protection for employees accused of bullying
- Alternative dispute resolution processes, including mediation and binding arbitration
- Specific duties of managers; responses to bullying and harassment issues included as component of managers' performance appraisals
- Disciplinary procedures and measures specifically addressing bullying
- Company-wide training (stand-alone anti-bullying training or additions to existing sexual harassment and diversity training and new-employee orientation) (an exciting project in which we are participating is the development of videos, role-play exercises, and other materials for anti-bullying training.)

The authors strongly advocate that a central and critical component of any employer-sponsored or organizational anti-bullying

policies include the design and implementation of integrated conflict management systems (ICMS).[119] It is further recommended that these systems afford the disputants early access to external fact-finding, mediation, and voluntary arbitration.[120] The authors also recommend that the design and implementation of such systems be guided by the standards recommended by the Society of Professionals in Dispute Resolution (SPIDR) (now merged into the Association for Conflict Resolution).[121]

The Potential Utility of Integrated Conflict Management Systems

In light of the increasing recognition and interest in addressing workplace bullying, employers and other organization decision-makers[122] are confronted with a number of specific ethical and perhaps legal issues. First is that most enlightened and responsible employers would oppose and seek to combat any form of harassment including "status-blind harassing" or bullying. Second is that given the contemplated general employer opposition to status-blind harassment, how should employers design and implement internal anti-bullying policies and procedures to effectively combat and resolve claims and incidence of bullying, including taking the appropriate action against action of "bullies" and also addressing the potential emotional and economic consequences borne by "targets?" On the latter score, many, if not most, employers would be concerned about the potential financial costs and consequences related to findings of actual bullying. Such findings

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[119] Rowe, "*Dispute Resolution In in the the Non-Union Environment: An Evolution Toward Integrated Systems For for Conflict Management?*," in S.E. Gleason (ed.) Workplace Dispute Resolution: Directions for the Twenty-First Century, ed. S.E. Gleason (Michigan State University Press, E. Lansig, 1997), at p. 79 through –106. And see Lipsky, Seeber & Fincher, Emerging Systems for Managing Workplace Conflict (Jossey-Bass 2000).

[120] See, e.g., Rogers & McEwen, *Employing The Law To Increase The Use of Mediation and to Encourage Direct and Early Negotiations*, 13.3 Ohio St. J. Disp. Resol. (1998); Baruch Bush & Folger, The Promise of Mediation (Jossey-Bass 1994); Meece, *The Very Model of Conciliation: Postal Service Becomes a Model of Conciliation*, New York Times (Sept. 6, 2000); Gourlay & Soderquist, *Mediation in Employment Cases, Is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving Disputes*, 21 Hamline L. Rev. (1998); Lipsky, Seeber & Fincher, Emerging Systems for Managing Workplace Conflict (Jossey-Bass 2003).

[121] *See* Gosline & Stallworth (co-chairs), SPIDR's Guidelines for the Design of Integrated Conflict Management Systems Within Organizations (Aug. 2, 2000), may be obtained from Cornell's Scheinman Institute on Conflict Resolution. See also the ABA's Due Process Protocol and National Employment Rules for Mediation and Arbitration of the American Arbitration Association.

[122] *Supra* note 115.

and consequences of bullying, particularly supervisory bullying, might subject the employer to damages and remedies similar to those that would be appropriate in cases of intentional infliction of emotional distress.[123] Enlightened employers also would be concerned about frivolous claims of bullying being raised that have no merit but still would be costly to investigate and resolve.[124]

Another challenge for both enlightened and responsible employers and "self-identified targets" is designing and implementing fair and legitimate internal "voice mechanisms," which are, relatively speaking, "user friendly";[125] address "imbalance of power issues"; are cost-effective; ensure no retaliation, and do not have a "chilling effect" on workers.[126]

One of the last ethical and legal challenges that employers, labor organizations, and public policy decisionmakers must address is how to effectively encourage or "direct" disputants to actually make use of these ADR processes. The authors suggest that a number of these challenges can be addressed by employers, particularly federal and state contractors, designing and implementing what are called "integrated conflict management systems." Second, in regard to addressing "imbalance of power issues," the authors recommend that employers and labor organizations could adopt the guidelines and policies as detailed in such documents as the "Guidelines for the Design and Implementation of Integrated Conflict Management Systems" created by Association for Conflict Resolution (ACR) and other guidelines such as the ABA's Due Process Protocol and the National Employment Rules of the American Arbitration Association. All of these guidelines attempt to recognize and address the issues related to "power imbalance," including the employee's right to have legal

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[123] *See, e.g.,* McDonald & Kulick, eds., Mental and Emotional Injuries in Employment (BNA Books 1994).

[124] *See* Casio, *The High Cost of Mismanaging Human Resources*, in Costing Human Resources: The Financial Impact of Behavior in Organizations, 4th ed. (Cincinnati, Ohio: South Western College Publishing 2000), at 83–105.

[125] Saunders et al., When Do Employees Speak Up?: Factors Influencing The Propensity To Use Voice (Nat'l Inst. Dispute Resol. Ed. 1987). Notwithstanding Title VII and the case law and sanctions against sexual harassment, women victims remain reluctant to make formal complaints. *E.g.,* Schmoller Philbin, *"Silent Majority" Before Laws Made It Illegal, Sexual Harassment Was Often Swept Under the Rug,* Chicago Tribune (Feb. 25, 2004, Woman News, Zone C, at 1).

[126] Copies of the SPIDR's *Guidelines for the Design of Integrated Conflict Management Systems Within Organizations* (Aug. 2, 2000), may be obtained from Cornell's Scheinman Institute on Conflict Resolution.

representation and the sharing of the cost of processes such as mediation and arbitration.[127]

In addition and in particular regard to ensure both perception of fairness as well as actual fairness and procedural and substantive due process, integrated conflict management systems and the earlier cited ADR guidelines contemplate and permit the use of external professional fact-finders, mediators, and arbitrators. A number of the members of the Academy can fulfill these roles immediately and/or with some additional training.

What Are Integrated Conflict Management Systems?

MIT Professor and Ombudsperson Mary P. Rowe was one of the first individuals to coin the term "integrated conflict management systems."[128] Professor Rowe describes and distinguishes integrated conflict management systems as follows. According to Professor Rowe, there are several basic changes implicit in this evaluation toward integrated dispute management systems. The first is the idea of a system that provides various options and various resource people for all persons in the workplace and all kinds of problems. This approach contrasts with the more traditional methods of providing a single grievance procedure that is only for workers grieving against management, or one designed for a limited list of disputes arising under a contract. Such a system provides "problem-solving" options based on the interests of the disputants, and "justice" options based on rights and power. The second major change is on the broad idea of conflict management. This may, for example, include the idea of teaching peers, such as managers and teammates, how to negotiate their differences with each other, teaching a whole workplace to use constructive dissent for continuous improvement, and learning how to prevent some costly conflict. Conflict management is a more comprehensive idea than just a process for ending specific grievances. A third idea is that of

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[127]A number of courts have recognized and addressed the "economic imbalance" regarding the arbitration of employment disputes and have placed a greater responsibility on employers. *See, e.g., Cole v. Burns Int'l Sec. Serv.*, 105 F.3d 1465 (D.C. Cir. 1997); *Armendariz v. Foundation Health Psychcare Serv. Inc.*, 24 Cal. 4th 83, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (2000).

[128]Rowe, "*Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?*," in Workplace Dispute Resolution: Directions for the Twenty-First Century, ed. Gleason (Michigan State University Press 1997), at 79–106. And see, Lipsky, Seeber & Fincher, Emerging Systems for Managing Workplace Conflict (Jossey-Bass 2000).

integrating conflict management option and structures with each other, in the context of an overall human resource strategy.

"Directed" Early Access to Integrated Conflict Management Systems

In particular regard to the topic and problem of workplace bullying to date there has been inadequate focus on the potential utility that employer-sponsored dispute resolution programs and integrated conflict management systems can play in both preventing, combating, and resolving claims and actual incidents of bullying, as well as marginalization.[129] The authors submit that the utilization of integrated conflict management systems can play a significant role in addressing a wide variety of employment disputes including traditional EEO claims and union-based adverse actions,[130] as well as claims and incidents of bullying, mobbing, and marginalization in both the union and non-union setting. In the authors' opinion, the critical factor is that such conflict management systems are designed and operated in a fair and non-discriminatory fashion. Key to this goal and objective is that the design, implementation, and operations of such systems are supported and monitored by the chief executive officers of the organization.[131]

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[129]Thus far the literature in bullying area has not focused on ADR and conflict management. *Cf.* Fox & Stallworth, *Employee Perceptions of Internal Conflict Management Programs and ADR Processes for Preventing and Resolving Incidents of Workplace Bullying: Ethical Challenges For Decision-Makers in Organizations*, 8 Employee Rts. & Employment Pol'y J. (2004). The research and literature regarding workplace bullying has thus far focused on the prevalence and consequences of such anti-bullying behavior and possible anti-bullying legislation. There has been a lack of sufficient attention given to the potential utility of employer-sponsored internal conflict management policies and programs and ADR designed specifically to address preventing and resolving claims of workplace bullying.

[130]"Union–animus" based harassment would also be considered a form of workplace bullying under Section 8(a)(4) of the National Labor Relations Act. Professor A. Soares found in his research that Canadian workers who filed charges and grievances were also subject to workplace bullying. See Soares, *Like 2 + 2 = 5: Bullying Among Hydro-Quebec Engineers* (Jan. 2004), www. Soaresangelo@ugam.ca. See also Hoyman & Stallworth, *Who Files Suits and Why: An Empirical Portrait of the Litigious Workers,* U. Ill. L. Rev. 115–58 (1981).

[131]The authors are of the opinion that similar to conflict management systems and ADR, support for effective anti-bullying employer-sponsored policies strategies and procedures must come from the top down. See, e.g., Carver & Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does,* Harv. Bus. Rev. 120–30 (May-June 1994); Ronde & Flannagan, Becoming a Conflict Competent Leader: How You and Your Organization Can Manage Conflict Effectively (Jossey-Bass 2007); Phillips, *What Your Client Needs To Know About ADR,* Dispute Resol. J. 64–68 (Feb. 2000).

Proposed National Employment Dispute Resolution Act

The authors further recognize that most anti-social behavior in our society is not regulated or proscribed on a voluntary basis. Indeed, whether the matter involves the integration of public schools or the wearing of car seat belts, changing societal behaviors often requires the compulsion of law.[132] This has particularly been the case regarding the integration and diversification of our society.

Accordingly, the authors are also sufficiently realistic to know that a number of employers and perhaps to a lesser degree labor organizations will be reluctant, if not resistant, to support either the implementation of internal anti-bullying organizational policies and anti-bullying legislation for a variety of reasons.

In light of this reality, the authors propose the enactment of the early proposed legislation called the National Employment Dispute Resolution Act (NEDRA). The cornerstone of NEDRA is the "directed participation" in mediation where, after the exhaustion of certain internal procedures, the worker will have the option to submit the matter to mediation.[133] Any settlement, however, would be strictly voluntary. Thus, mediation under NEDRA is not strictly "voluntary" in some sense, but any outcome would be.[134] NEDRA requires federal contractors having contracts of $200,000 or more and 200 employees or more to establish internal dispute resolution programs that would, among other things, provide for the early access and opportunity to resolve EEO as well as work-

[132]It has been quite normal to use the compulsion of law to effectuate social change and human behavior. *See, e.g., Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); and see recently published book discussing the role that President Dwight Eisenhower played in advancing and effectuating civil rights during his administration. *See* Nichols, A Matter of Justice: Eisenhower and the Beginning of the Civil Rights Revolution (Simon & Schuster 2007) where the authors point out that presidents have also used Presidential Executive Orders applicable to federal contracts to require covered employers to adopt certain employment policies and practices. The Drug Free Workplace Act and Executive Order No. 11246 are two examples.

[133]See, e.g., Rogers & McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13:3 Ohio St. J. Disp. Resol. Research indicates that workers are generally more interested in using internal conflict resolution processes and ADR than employers. See *supra* note 106. This position is further supported by the findings of Professor Soares, where he found under the Quebec anti-bullying statute employers were reluctant to establish either informal or formal internal conflict management programs.

[134]Although under the proposed Act there is some compulsion for the disputants to participate in ADR processes such as mediation, any settlement outcome would be strictly voluntary and no outcome would be imposed on the disputants.

place bullying disputes internally, and ideally prior to the filing of a formal charge or lawsuit or the alleged target.[135]

Where the dispute is not satisfactorily resolved internally, the employee would have the option to use an outside professional mediator, similar to the REDRESS program of the U.S. Postal Service, to assist the disputants in resolving the dispute at hand.[136] The federal contractor would subsidize the cost of the fact-finder and mediator, including the mediator's fees and related reasonable expenses.[137] The disputants would also be permitted to enter into a private tolling agreement, and reasonable attorneys' fees may be part of any settlement.[138] There are a number of other issues to be identified and addressed related to NEDRA. It is contemplated, however, that these issues would be resolved in the adoption of any related administrative rules and policies.[139]

Conclusion: Private and Public Policy Recommendations and Integrated Conflict Management Initiatives: One Step to Cure the Incremental Crisis in Workplace Justice

One of the primary and overarching purposes of this article was to examine and discuss the potential role and utility that processes

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[135]See Namie & Namie, *The Bully at Work: What You Can Do To Stop the Hurt and Reclaim Your Dignity on the Job* (Sourcebooks, Inc. 2003), where the authors assert that in most instances the "target" leaves the organization. In the absence of "tolling agreements," many workers feel compelled to either resign from their positions or file an external charge or lawsuit and any subsequent settlement is conditioned upon a severance of the employment relationship. This has effectively resulted in what the authors call the "file a charge or lawsuit and lose your job" paradigm because it is generally recognized that once a worker seeks external redress, the organization usually prefers to terminate the employment relationship. *See* Lewin, *Workplace ADR: What's New and What Matters* in Arbitration 2007: Proceedings of the 60th Annual Meeting, National Academy of Arbitrators, ed., 89 (BNA Books 2008). The authors suggest that an employer adopting such a policy or practice would arguably be volatizing state and federal EEO laws because of the disparate impact that such a policy and practice would have on certain protected classes. *See Griggs v. Duke Power Co*, 401 U.S. 424, 91 S. Ct. 849 (1971). NEDRA would provide a type of "reasonable cooling off period" during which the alleged target and employer would have the opportunity to "problem solve" the matter and possibly preserve the employment relationship prior to seeking external redress. Again, it is generally recognized that most often "targets" leave the organization.

[136]Meece, *The Very Model of Conciliation*, N.Y. Times (Sept. 6, 2000), at C1.

[137]It is contemplated that employers and alleged targets would be permitted to enter into "tolling agreements," which would hold in abeyance any applicable statutory time limits for a reasonable period. During this "cooling off" period, the disputants would be afforded the opportunity to attempt to resolve the dispute without feeling compelled to file an external charge or lawsuit.

[138]The Civil Rights Act of 1991 provides, among other things, the awarding of attorneys' fees.

[139]*See, e.g.,* Martineau & Salerno, Legal, Legislative and Rule Drafting In Plain English (Thomason West 2005).

and protocols of integrated conflict management systems such as fact-finding, mediation, and arbitration can play as one step in addressing the goal of workplace dignity and the need to provide one viable/practical step to address the need or issue of incremental workplace justice, as Academy President Dennis Nolan has argued.

Although one of the derivative benefits of embracing and actually implementing a number of the suggestions and recommendations made by the authors would also be to expand the dispute resolution opportunities for members and non-members of the Academy, rest assured that this at best is a tertiary goal and impact of this article.

The primary objective of this article is to appreciate that there is an ever-pressing and increasing need for employers, labor and civil rights organizations, and public policy makers to systematically reflect upon what processes and protocols are needed today and will be needed in the near future to effectively address and resolve the wide variety of disputes arising in the workplace, including workplace bullying and mobbing. This is particularly critical as the workforce becomes increasingly diverse and many immigrant workers who hereto after fall under the statutory radar screen will soon be in positions to exercise their voices in the workplace and demand workplace justice.[140] It should be noted that private griev-

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[140]Employees are also protected under Title VII against harassment on the basis of national origin. Claims of national origin harassment have sharply increased recently, rising from 1,383 charges filed with the EEOC in 1993 to 2,719 in 2002. 30%of all national origin charges filed with the EEOC included a claim of harassment. In the aftermath of September 11, 2001, hate crimes against individuals of Middle Eastern descent dramatically increased. Workplace discrimination complaint brought by Muslims and those of Middle Eastern descent also rose sharply. From September 11, 2001 to February 2002, the EEOC received 260 such claims, an increase of 168% over the same period a year earlier. The EEOC even created a special classification, "Code Z," to designate complaints tied to September 11. *See* Lichtblau, *Bias Against U.S. Arabs Taking Subtler Forms,* Los Angeles Times (Feb. 10, 2002). In its October 1999 Enforcement Guidance on Remedies Available to Undocumented Workers, the EEOC emphasized that workers' undocumented status does not justify workplace discrimination. The EEOC also set forth that employers' liability for monetary remedies irrespective of a worker's unauthorized status promotes the goal of deterring unlawful discrimination without undermining the purposes of IRCA. The EEOC's position on available remedies is that unauthorized workers are entitled to the same remedies as any other worker, including back pay and reinstatement. The National Labor Relations Board took a similar position with respect to discrimination based on union activity. However, in *Hoffman Plastic Compounds Inc. v. NLRB*, 122 S. Ct. 1275 (2002), the U.S. Supreme Court held that the NLRB could not award backpay to unauthorized workers who had been unlawfully discriminated against for engaging in union-organizing activities. According to the Court, to do so would contravene federal immigration policy embodied in IRCA. *Hoffman* opens the possibility that backpay will not be available to unauthorized workers who have been illegally discriminated against under Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. *See* Porter, *Undocumented Workers have NLRA Rights, but Not Monetary*

ance procedures historically have been looked upon as a means for effectuating workplace dignity.[141] The authors submit that it is in the national public interest for federal and state governments to take the lead in recognizing and prohibiting workplace bullying and mobbing and "directing" government agencies and contractors to use conflict management systems including fact-finding, mediation, and voluntary arbitration to prevent and combat this and other types of counter-workplace behavior.

Remedies, Employment L. Strategies (June 6, 2002). *See Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002), where the issue before the court was whether employee's filing of wage claim was protected activities, and whether employer's reporting the employee to the INS stated a claim for retaliation. "The question before this Court is whether *Hoffman* has so altered the legal landscape that the underlying premises of both Sure-Tan and Patel—that undocumented workers have the right to particular remedies—have changed such that plaintiff no longer has a cause of action."

In *dicta* the court stated: "Indeed, every remedy extended to undocumented workers under the federal labor laws provides a marginal incentive for those workers to come to the United States. It is just as true, however, that every remedy denied to undocumented workers provides a marginal incentive for employers to hire those workers. The economic incentives are in tension. Given this tension, the courts must attempt to sensibly balance competing considerations. In this case, the balance tips sharply in favor of permitting this cause of action, and the remedies it seeks, to go forward. Prohibiting plaintiff from bringing this claim under the FLSA would provide a perverse economic incentive to employers to seek out and knowingly hire illegal workers, as defendant did here, in direct contravention of immigration laws. Though employers that succumbed to these incentives would run the risk of sanctions under the IRCA, those risks may be worth taking. National labor and immigration policy is most appropriately balanced by permitting this case to go forward."

[141]The early literature in industrial sociology placed a strong emphasis on the norms governing employment, including the need for employers to develop and adhere to norms concerning recruitment, promotions, and grievances. *See, e.g.*, Dunlop, Industrial Relations Systems (Southern Illinois University Press 1958) and Barbash, The Elements of Industrial Relations (University of Wisconsin Press 1984) (one of the most important workplace norms is for management to refrain from abusive practices.) *See* Adler & Borys, *Two Types of Bureaucracy: Enabling and Coercive*, 41:1 Admin. Sci. Q. 61–89 (Mar. 1986). The authors submit that internal fair and legitimate grievance procedures have been one of the most important policies and procedures today for ensuring that abusive practices are limited and that workers have a meaningful vehicle for redress. *See* Eaton, Gordon & Keefe, *The Impact of Quality of Work Life Programs and Grievance System Effectiveness on Union Commitment*, 45 Indus. & Lab. Rel. Rev. 591–604 (Apr. 1992).

Appendix 1 to Chapter 7

The Model Healthy Workplace Act

SECTION 1—FINDINGS AND PURPOSES

A. LEGISLATIVE FINDINGS

The Legislature finds that:

1. The social and economic well-being of the State is dependent upon healthy and productive employees;
2. Surveys and studies have documented between 16 and 21 percent of employees directly experience health-endangering workplace bullying, abuse, and harassment, and that this behavior is four times more prevalent than sexual harassment alone;
3. Surveys and studies have documented that abusive work environments can have serious and even devastating effects on targeted employees, including feelings of shame and humiliation, stress, loss of sleep, severe anxiety, depression, post-traumatic stress disorder, suicidal tendencies, reduced immunity to infection, stress-related gastrointestinal disorders, hypertension, and pathophysiologic changes that increase the risk of cardiovascular disease;
4. Surveys and studies have documented that abusive work environments can have serious consequences for employers, including reduced employee productivity and morale, higher turnover and absenteeism rates, and significant increases in medical and workers' compensation claims;
5. Unless mistreated employees have been subjected to abusive treatment at work on the basis of race, color, sex, national origin, or age, they are unlikely to have legal recourse to redress such treatment;
6. Legal protection from abusive work environments should not be limited to behavior grounded in protected class status as that provided for under employment discrimination statutes; and
7. Existing workers' compensation plans and common-law tort actions are inadequate to discourage this behavior or to provide adequate redress to employees who have been harmed by abusive work environments.

B. LEGISLATIVE PURPOSE

It is the purpose of this Chapter:

1. To provide legal redress for employees who have been harmed, psychologically, physically, or economically, by being deliberately subjected to abusive work environments;
2. To provide legal incentive for employers to prevent and respond to mistreatment of employees at work.

SECTION 2—DEFINITIONS

1. Employee. An employee is an individual employed by an employer, whereby the individual's labor is either controlled by the employer and/or the individual is economically dependent upon the employer in return for labor rendered.
2. Employer. An employer includes individuals, governments, governmental agencies, corporations, partnerships, associations, and unincorporated organizations that compensate individuals in return for performing labor.
3. Abusive work environment. An abusive work environment exists when the defendant, acting with malice, subjects the complainant to abusive conduct so severe that it causes tangible harm to the complainant.
   a. Conduct is defined as all forms of behavior, including acts and omissions of acts.
   b. Malice. For purposes of this Chapter, malice is defined as the desire to see another person suffer psychological, physical, or economic harm, without legitimate cause or justification. Malice can be inferred from the presence of factors such as: outward expressions of hostility; harmful conduct inconsistent with an employer's legitimate business interests; a continuation of harmful, illegitimate conduct after the complainant requests that it cease or demonstrates outward signs of emotional or physical distress in the face of the conduct; or attempts to exploit the complainant's known psychological or physical vulnerability.
   c. Abusive conduct. Abusive conduct is conduct that a reasonable person would find hostile, offensive, and

unrelated to an employer's legitimate business interests. In considering whether abusive conduct is present, a trier of fact should weigh the severity, nature, and frequency of the defendant's conduct. Abusive conduct may include, but is not limited to:

i. repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets;
ii. verbal or physical conduct that a reasonable person would find threatening;
iii. intimidating or humiliating; or the gratuitous sabotage or undermining of a person's work performance. A single act normally will not constitute abusive conduct, but an especially severe and egregious act may meet this standard.

d. Tangible harm. Tangible harm is defined as psychological harm or physical harm.
   i. Psychological harm. Psychological harm is the material impairment of a person's mental health, as documented by a competent psychologist, psychiatrist, or psychotherapist, or supported by competent expert evidence at trial.
   ii. Physical harm. Physical harm is the material impairment of a person's physical health or bodily integrity, as documented by a competent physician or supported by competent expert evidence at trial.

4. Negative employment decision. A negative employment decision is a termination, demotion, unfavorable reassignment, refusal to promote, or disciplinary action.
5. Constructive discharge. A constructive discharge shall be considered a termination, and, therefore, a negative employment decision within the meaning of this Chapter. For purposes of this Chapter, a showing of constructive discharge requires that the complainant establish the following three elements: (a) abusive conduct existed; (b) the employee resigned because of that abusive conduct; and, (c) prior to resigning, the employee brought to the employer's attention the existence of the abusive conduct and the employer failed to take reasonable steps to correct the situation.

SECTION 3—UNLAWFUL EMPLOYMENT PRACTICE

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

SECTION 4—EMPLOYER LIABILITY

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

SECTION 5—DEFENSES

A. It shall be an affirmative defense for an *employer only* that:
   1. the employer exercised reasonable care to prevent and correct promptly any actionable behavior; and
   2. the complainant employee unreasonably failed to take advantage of appropriate preventive or corrective opportunities provided by the employer.

This defense is not available when the actionable behavior culminates in a negative employment decision.

B. It shall be an affirmative defense that:
   1. the complaint is grounded primarily upon a negative employment decision made consistent with an employer's legitimate business interests, such as a termination or demotion based on an employee's poor performance; or
   2. the complaint is grounded primarily upon a defendant's reasonable investigation about potentially illegal or unethical activity.

SECTION 6—RETALIATION

It shall be an unlawful employment practice under this Chapter to retaliate in any manner against an employee because he or she has opposed any unlawful employment practice under this Chapter, or because he or she has made a charge, testified, assisted, or participated in any manner in an investigation or proceeding

under this Chapter, including, but not limited to, internal complaints and proceedings, arbitration and mediation proceedings, and legal actions.

SECTION 7—RELIEF

1. Relief generally. Where a defendant has been found to have committed an unlawful employment practice under this Chapter, the court may enjoin the defendant from engaging in the unlawful employment practice and may order any other relief that is deemed appropriate, including, but not limited to, reinstatement, removal of the offending party from the complainant's work environment, back pay, front pay, medical expenses, compensation for emotional distress, punitive damages, and attorneys' fees.
2. Employer liability. Where an employer has been found to have committed an unlawful employment practice under this Chapter that did not culminate in a negative employment decision, its liability for damages for emotional distress shall not exceed $25,000, and it shall not be subject to punitive damages. This provision does not apply to individually named co-employee defendants.

SECTION 8—PROCEDURES

1. Private right of action. This Chapter shall be enforced solely by a private right of action.
2. Time limitations. An action commenced under this Chapter must be commenced no later than one year after the last act that comprises the alleged unlawful employment practice.

SECTION 9—EFFECT ON OTHER STATE LAWS

1. Other state laws. Nothing in this Chapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any law of the State.
2. Workers' compensation and election of remedies. This Chapter supersedes any previous statutory provision or judicial ruling that limits a person's legal remedies for the underlying behavior addressed here to workers' compensation. However, a person who believes that he or she has

been subjected to an unlawful employment practice under this Chapter may elect to accept workers' compensation benefits in connection with the underlying behavior in lieu of bringing an action under this Chapter. A person who elects to accept workers' compensation may not bring an action under this Chapter for the same underlying behavior.

Appendix 2 to Chapter 7

The Proposed National Employment Dispute Resolution Act of 2000 (NEDRA)

106th Congress, 2d Session, H.R. 4593

To amend title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, the Vocational Rehabilitation Act of 1973, and the Civil Rights Act of 1991, to require the Equal Employment Opportunity Commission to mediate employee claims arising under such Acts, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

June 7, 2000

Mrs. Clayton introduced the bill which was referred to the Committee on Education and the Workforce.

A BILL

To amend Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, the Vocational Rehabilitation Act of 1973, and the Civil Rights Act of 1991, to require the Equal Employment Opportunity Commission to mediate employee claims arising under such Acts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "National Employment Dispute Resolution Act of 2000 (NEDRA)."

SECTION 2. FINDINGS.

The Congress finds the following:

(1) The prohibitive costs and emotional toll of litigation as well as the growing backlog of employment civil rights claims and lawsuits have impeded the protection and enforcement of workplace civil rights.
(2) Mediation is an economical, participatory, and expeditious alternative to traditional, less cooperative methods of resolving employment disputes.
(3) Mediation enables disputants to craft creative solutions and settlements, surpassing the reach of traditional remedies, thereby possibly protecting the continuity of the employment relationship.
(4) As we enter the new millennium, a national program of directed or required participation in mediation where any settlement is voluntary mandated mediation for certain employment and contract disputes, will help fulfill the goal of equal opportunity in work and business places of the United States.
(5) Overt and subtle discrimination still exists in our society and in the workplace.
(6) Overt and subtle forms of discrimination cause measurable economic and noneconomic costs to employers and the American workforce, create a barrier to fully realizing equal opportunity in the workplace, and are contrary to public policy promoting equal opportunity in the workplace.

(b) PURPOSES—The Purposes of this Act are—
(1) to establish a fair and effective alternative means by which employees and covered employers may have an increased likelihood of resolving both alleged overt and subtle forms or acts of discrimination without the necessity of the employee taking some form of legal action against the employer,
(2) in accordance with the various public policies encouraging the use of mediation, to make mediation available at an early stage of an employment dispute, thus—
(A) possibly reducing economic and noneconomic costs,
(B) preserving the employment relationship and decreasing acrimony, and

(C) decreasing the filing of a number of formal discrimination complaints, charges, and lawsuits and further burdening our public justice system, and

(3) to provide that the participation in mediation shall not preclude either the employee-disputant or covered employer-disputant from having access to the public justice system.

SECTION 3. AMENDMENTS TO TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

(a) FEDERAL EMPLOYEES–Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) is amended—

(1) in section 706(a) by inserting after the 7th sentence the following:
'Regardless of whether the Commission makes an investigation under this subsection, the Commission shall provide counseling services regarding, and endeavor to responsibly address and resolve, claims of unlawful discrimination using certified contract mediators.', and

(2) in section 711(a) by adding at the end of the following: 'Every employer, employment agency, and labor organization shall provide to each employee and each member, individually, a copy of the materials required by this section to be so posted.'.

(b) OFFICE OF FEDERAL CONTRACT COMPLIANCE—Section 718 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-17) is amended—

(1) By inserting '(a)' after 'SEC. 718', and

(2) By adding at the end the following:

'(b) The Office of Federal Contract Compliance shall endeavor to responsibly address and resolve any alleged discrimination using mediation with respect to which this section applies.

'(c) An employer who establishes, implements an approved internal conflict management program or system providing the use of a certified mediator participates in mediation under this section shall be given preferred status in contract bidding for additional and for maintaining current Federal Government contracts.

'(d) An employer who is a party to a Government contract or the agency of the United States shall assume the costs of mediation under this section, including the fees of the mediator and any travel and lodging expenses of the employee, if such travel exceeds 25 miles, one way. Any settlement shall include, among other things, any appropriate and reasonable attorney fees.

'(e) Retaliation by an employer who is a party to a Government contract or the agency of the United States, or in the destruction of evidence, shall result in the imposition of appropriate civil or criminal sanctions. The participation in mediation shall be at the option of the employee. The participation in mediation shall not preclude the employee's access to any State, local, or Federal EEO enforcement agency or any State or Federal court.

'(f) The Office of Federal Contract Compliance shall have authority over employers who are parties to Government contracts that fail to comply with this section. Failure to comply shall result in the loss of a current Government contract and disqualification from consideration for future Government contracts.

'(g) No resolution by the disputants may contravene the provisions of a valid collective bargaining agreement between an employer who is part to a Government contract and a labor union or certified bargaining representative. Any voluntary settlement outcome and agreement may not be in conflict with the collective bargaining agreement.'.

SECTION 4. AMENDMENTS TO THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

The Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.) is amended—

(1) in section 7(e) by inserting after the 2d sentence the following:
'The Commission shall provide counseling services regarding, and endeavor to responsibly address and

resolve, claims of unlawful discrimination using certified contract mediators.', and

(2) in section 8 by adding at the end the following: 'Every employer, employment agency, and labor organization shall provide to each employee and each member, individually, a copy of the materials required by this section to be so posted.'

SECTION 5. AMENDMENT TO AMERICANS WITH DISABILITIES ACT OF 1990.

Section 107(a) of the American with Disabilities Act of 1990 (42 U.S.C. 12117(a)) is amended by adding at the end the following: 'The Commission shall provide counseling services regarding, and endeavor to responsibly address and resolve, claims of unlawful discrimination using certified contract mediators.'

SECTION 6. MEDIATION.

(a) DEFINITIONS—For purposes of this section:

(1) The term 'employer' means any Federal agency (including Federal courts) or business enterprise receiving Federal funds of $200,000 or greater or having 20 or more employees.

(2) The term 'mediator' means any neutral, third-party, including an attorney and a nonattorney, who is trained in the mediation process and has demonstrable working knowledge in relevant EEO and employment law, including a third party who is—

(A) appointed or approved by a competent court, the Equal Employment Opportunity Commission, a certified mediation center, or a university, or

(B) jointly chosen by the disputants.

(3) The term 'trained mediation professional' means a person who—

(A) has participated in employment mediation training of 40 or more hours, or

(B) has co-mediated with or been supervised by another trained certified mediation professional for at least three employment or contract dispute cases of no fewer than 15 hours.

(4) The term 'certified mediation center' includes any private or public entity that is qualified to facilitate the employment or contract mediation process and provide training on employment and contract dispute resolution, including, but not limited to, the American Arbitration Association, the American Bar Association, the Center for Employment Dispute Resolution, CPR Conflict Institute, JAMS/Endispute, United States Arbitration and Mediation, Inc., Institute on Conflict Resolution at Cornell University, and the Society of Professionals in Dispute Resolution.

(b) REQUIREMENTS—(1) All employers shall—

(A) establish an internal dispute resolution program or system that provides, as a voluntary option, employee disputant access to external third-party certified mediators,

(B) participate in mediation if the employee has exhausted the internal dispute resolution program or system and has formally requested mediation without the filing of a charge or lawsuit, and

(C) participate in mediation if the claimant has filed a charge or lawsuit and the claimant formally requests mediation.

(2) While the mediation settlement outcome would be voluntary, the employer shall participate in mediation where the employee-disputant has expressed a desire to mediate.

(3) Under all circumstances, the employee-disputant is entitled to legal representation.

(4) Employers shall inform employee-disputants of the mediation alternative and their respective rights thereof, and the employee-disputant would have 30 days in which to decide whether to participate in mediation.

(5) When an employee-disputant voluntarily agrees to participate in the mediation process, any applicable statute of limitations shall be tolled, and the private tolling agreement shall be enforceable in any court of competent jurisdiction.

(6) The employee and employer disputants shall not have more than 90 days within which to resolve the dispute.

(7) Should mediation prove unsuccessful, the employer shall again inform the employee-disputant of their rights, in writing, including the right to pursue the matter under any applicable State, county, local ordinance, or Federal statutes.

(8) Consistent with section 705 of the Civil Rights Act of 1964, the Equal Employment Opportunity Commission, and any State or local authority involved in proceedings described in section 706, shall offer technical assistance to any unrepresented or self-represented party, provided that a formal complaint has been filed with the Commission or such authority. Such assistance shall include, but not be limited to—
   (A) pre-mediation counseling,
   (B) assistance in understanding the status of relevant case law,
   (C) assistance in what would be the appropriate remedy if the instant claim were to be found to have merit, and
   (D) assistance in drafting any post-mediation settlement agreement or resolution.

(9) Submission of a claim for mediation shall not preclude either the claimant or respondent from seeking other appropriate relief on that claim, except that neither party shall seek other relief until the mediation process has concluded.

(10) Any settlement as a result of the mediation process shall be strictly voluntary and remain confidential except for research and evaluation purposes.

(11) In every case, the privacy, privilege, and confidentiality of all parties to the dispute shall be preserved, including complaint intake personnel and mediation consultations.

(c) ATTORNEY'S OBLIGATION TO ADVISE CLIENTS OF MEDIATION—For the purposes of this Act and all of the other related statutes, attorneys and consultants are legally obligated to advise their clients of the existence of the mediation alternative and their obligations under the Act to participate in mediation in good faith.

(d) JUDICIAL ENFORCEMENT—Either party to a mediation agreement to bring an action of enforcement in a Federal

district court of competent jurisdiction, however any matter discussed or material presented during mediation shall not be used in any subsequent local, State, or Federal administrative or court proceeding. The confidential provisions of any internal conflict management program or system or agreement to mediations shall be immune from attack by any third party.