Chapter 13

# WORKPLACE BULLYING

## I. Workplace Bullying—The New Violence?

A leading expert in the field, along with a panel of experienced practitioners, will explore the issue of bullies in the workplace. Learn about the impact upon employees who are the subject of workplace bullying by either supervisors or coworkers, and how these cases might play out in the arbitration and National Labor Relations Board (NLRB) arenas.

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| **Moderator:** | **Sara Adler,** NAA, Los Angeles, CA |
| **Presenter:** | **Dr. Gary Namie,** The Workplace Bullying Institute, Bellingham, WA |
| **Panelists:** | **Van Goodwin,** Littler Mendelson, San Diego, CA |
| | **Ami Silverman,** NLRB Region 21, Los Angeles, CA |
| | **Carlos Perez,** Reich, Adell & Cvitan, Santa Ana, CA |

**SARA ADLER:** I am delighted to see you here after a long week. Immediately to my left is Dr. Gary Namie, who is the founder and chief honcho at the Workplace Bullying Institute. He is here with his lovely wife Joan, who is also involved in running the institute. They have a new book out called *The Bully-Free Workplace*. To his left is Ami Silverman from the NLRB in Los Angeles. To her left is Van Goodwin from Littler Mendelson down here in San Diego who represents management. To Van's left is Carlos Perez from Reich, Adell in Santa Ana.

The idea for this program came from the fact that I participated for many years in the American Bar Association's (ABA) International Labor Law group. Over the years, it has seemed like the United States was ahead of the European Union in recognizing and dealing with discrimination and related issues. Then a few years ago, I began to hear about their dealing with bullying in the workplace and I thought, how does it fit in to our legal scheme, which is parallel to, but not identical with, the European-developed scheme? Since that time there has been an enormous

amount of publicity about bullying in schools. There's been a lot of talk about it in the schools but not as much in the workplace, although I think that I thought it would be worthwhile to give an initial thought about what bullying in the workplace might be. In this week's legal newspaper here in Los Angeles, bullying was described as verbal violence and harassment, intimidation, and coercion. Being a child of my children's time, I went to *Dictionary.com*, and it suggests that a bully is "a blustering, quarrelsome, overbearing person who habitually badgers and intimidates smaller or weaker people." The synonyms for it are "cow, browbeat, coerce; terrorize and tyrannize." It's a somewhat similar definition. If you need to think of that in terms of the American legal system, there's always the famous Justice Scalia opinion that employers are not obligated to ensure civility in the workplace.

On the other hand, to some degree we've been dealing with these issues as arbitrators for a very long time, more in terms of defenses than affirmative actions taken by the employer. What I can think of particularly, or what immediately comes to mind, are the defenses when someone responds to provocation. What do we excuse by way of provoking or mitigate by way of provoking behavior when someone reacts? We've all seen cases like that. It's not uncommon to see people, whose performance has declined, offer as one of the reasons why their performance has declined is that they can't work for a particular supervisor or in a particular workplace or a work unit because it has become impossible for them to function due to the behaviors of their coworkers.

More recently, perhaps we've seen it in cases that relate to the Americans with Disabilities Act (ADA), where there's a reasonable accommodation request for the stress-free workplace, which I think is not a possible alternative. But, certainly, lower stress might be achieved by waiving some set of rules or some particular rule or moving an employee from one work unit to another work unit, or one supervisor to another supervisor, if the employees and/or supervisor in the present work unit are bullying the person seeking a reasonable accommodation.

First we will ask Dr. Namie to make us aware of his definition of bullying in the workplace.

**DR. GARY NAMIE:** Thank you, Sara. To the list of ever-expanding numbers of groups that give a darn about workplace bullying, I will add arbitrators. We're going to have a little discussion among ourselves soon about its applicability to your field, but I want to tell you some of the definitions first.

In the mid-eighties German researcher Heinz Leymann, who was working in Sweden, ran an ad in the paper calling for people who had been terribly harmed by the workplace. He ran a government-funded trauma clinic, and he defined that term as "work trauma." He studied a group of 62 people, and from that study he developed the major themes common to their experience. What he documented was the causal linkage between the mistreatment and post-traumatic stress disorder.

So his concern was about health impact and serious traumatization, PTSD or post-traumatic stress disorder. He developed a scale to measure PTSD. However, he was subsequently de-funded because he dared to title his popular book *The Suicide Factory*; they were rather mad that he would speak so forcefully and truthfully.

Leymann didn't use the term "bullying" because Dan Olweus had been studying bullying for schoolchildren since the 1970s, so Leymann used the Scandinavian term of "mobbing," which depicted a ganging up. "Mobbing" is also an ethno-biological term for several small birds ganging up on a big bird and bringing him down. When targets of bullying, the recipients or the targeted individuals, do try to tell people what has happened to them, they actually present themselves in a quite paranoid manner—they're all against me.

By the time the bullying case has gone to arbitration or a civil case or the attempt at a civil case, it's not paranoid to the target—it's real; everyone is actually against them by then. Their coworkers have treated them with distance because of a fear of retaliation—they didn't want to be next; then the estrangement evolves into abandonment and often siding with the aggressor or aggressors.

So, mobbing had three key parameters that have since defined the whole scientific, social science field of workplace bullying and mobbing. Forget the term "harassment." The problem with using the word harassment is it connotes illegality. Harassment is status blind, status-protected, status driven; the complainant has to be a member of a protected status group and woe to them if their harasser is also a member of a protected status group. When it's same race and same gender, the two protections seem to nullify one another, and this causes a stalemate.

The three parameters are frequency, duration, and impact. "Frequency" means that at least once a week you're going to have to suffer some sort of form of mistreatment. All of the scholars agree that abuse is repeated—it's chronic abuse—it's never a single-shot event. If it was a single shot, then you had a bad day, and if

there was an apology following it, as most often comes subsequent to an emotional explosion like that, it's not bullying because it's over. For a single explosion, the person said "I'm sorry," but bullies never apologize.

There also must be "duration"; that is, a negative event once a week for at least a period of six months. So it's a slow build; it's a long exposure period. The distress experienced by people is going to come from the repeated, unremitting exposure. It could be the traumatization from a natural disaster, such as a hurricane or a tsunami, or it could be trauma from a war wound, or it could be trauma from an abusive relationship, or it could be from trauma at work.

The third parameter is "impact." There has to be impact. It's either in the work environment, the work team, or disruption of employer goals and objectives, actually preventing work from getting done. It is totally a myth that a little good bullying helps to motivate people. It's always impact that follows harassment. There has to be an adverse consequence to the individual to have bullying.

I think there have to be standards, because what I don't want is, "I feel like I'm being bullied." That becomes a burden for all of us that started the movement and brought it from Europe to the United States. We don't want to excuse poor performance. We don't want to take away a manager's right to objectively criticize poor performance. But when management is translated into the act of character assassination and debasement and humiliation and intimidation and all the rest, that's beyond the pale. What's that got to do with work?

So, Leymann set the standard. The laws have spread throughout Europe, beginning in Sweden. The French law followed the best-selling book called *Stalking the Soul* by Marie-France Hirigoyen, a French psychiatrist. The British movement was launched by Andrea Adams, who coined the phrase "workplace bullying" in her book, *Bullying at Work*. In Europe, they use their criminal anti-harassment, anti-stalking laws. In Britain, they have employment law tribunals and deal with bullying in that way.

Australia began dealing with bullying under their workers' compensation system, and passed a law in 2005 that made bullying very expensive for employers under their civil system with hefty fines and corrective steps that had to be taken in the workplace. After a young woman committed suicide, Australia's state of Victoria has just proposed criminalizing workplace bullying if coworkers can

be shown to have coerced the employee by failing to provide support. This may be an overreaction.

So what are we doing here in the States? Well, not a lot. Not on the legal front so far, but a number of states are considering legislation.

First let me tell a little of how my wife and I happened to establish our institute. We were offering executive retreats where I was teaching management skills. My wife was working for a large California HMO when she began working for Sheila, who began tormenting Ruth. For four months, Ruth suffered in silence. Then, the bullying took its toll, which cost Ruth her job, her career, and her health. When we consulted an attorney, we found there was no law against Sheila's cruelty. So Ruth said that we must do something about this.

So, in mid-1997 we started what has become the Workplace Bullying Institute. Oprah called very early, and we didn't have a book so that's when we wrote our first book. When Oprah calls, you've got to have a book. We've done a lot of TV and all that since, and it's been a good public relations campaign.

In 1999, Suffolk University law professor David Yamada approached us about writing a treatise on workplace bullying. His article, "The Need for Status-Blind Hostile Work Environment Protection," a.k.a. "workplace bullying," was published in the *Georgetown Law Journal*, March 2000.

Yamada also drafted legislation which we called the Healthy Workplace Bill. We didn't know anything about lobbying but we learned. We got our bill introduced in California in 2003. Since then, 21 states have introduced our bill. Right now in 2011, we have 15 bills current in 11 states. I've a cadre of volunteers in the country, and we're kicking the Chamber of Commerce in the shins. However, we have not yet passed it. New York passed it in the senate last year, and right now we have half of the assembly members in New York as co-sponsors. So, it has a very strong chance of passing. *New York Law Journal* wrote this January that the bill's passage is inevitable, but, as you know, it's a crazy law-making session.

So we don't have a law, but employers are taking notice. The employer who practices in the liability insurance industry has told them, "you don't really have to do anything but you probably should; it's good business practice. Why would you let these expensive fools destroy your internal credibility and productivity?" So, they're getting pressure internally. I love when the corporate attorneys write articles about bullying. "No, there doesn't need to

be a law. But, you know we're here to write your policies for you." We love that.

We write policies for employers. May I say that? Very good. We pay for our work by our consulting with employers. I love the corporate attorneys who are recognizing the need for policies against workplace bullying. The insurance industry is recognizing the need; the lawmakers are starting to recognize the need. There's a convergence. So it's going to come.

But in our preliminary discussions, we were saying, "Is it going to come to arbitration?" I don't know.

Before I conclude, let me give you our full definition today of workplace bullying: Repeated health-harming mistreatment by one or more people that takes the form of verbal abuse or behavior including non-verbal behavior or conduct that is threatening, intimidating, or humiliating; work interference and sabotage or the exploitation of a known vulnerability, psychological or physical. It's very broad.

We can go back and forth on the law, because it's all about standards. But, I think this panel has much to contribute to the discussion.

**SARA ADLER:** Van, why don't you comment? I know you have strong feelings about this.

**VAN GOODWIN:** I wouldn't say I had strong feelings about it. But, I think my role today is to present the management perspective. So, I'll try to do that as eloquently and articulately as I can.

I think the management community—the employer community—certainly recognizes, as Gary said, that workplace bullying is a phenomenon that has, and can have, a very dramatic effect in the workplace. It undermines productivity. It creates all kinds of problems with attendance and employee retention. It causes and creates dissension. It creates and causes anxiety, tension, depression, stress, and a lot of other bad ailments that we all know. And, as I'm sure Ruth will tell us, this is often what you experience if you're the beneficiary or the target of this kind of conduct. But, I think most of us would agree, and I think everyone on the management side would agree, that workplace bullying is not a style of management that is the preferred and most appropriate method of working with employees.

So that's sort of a given. We all start, I think, from that same proposition. But as Gary said, the real problem is that—I'll actually disagree slightly with him in this respect—is workplace bullying unlawful or illegal? And I would also echo the fact that,

while management is the easy target, many of the people who are engaging in bullying are supervisors and management. However, we know, and I think Gary would concede, that it isn't just managers and supervisors. Rank-and-file employees are just as capable and just as violent when it comes to engaging in the same kind of behavior that leads to the "mobbing" phenomenon that has gotten a lot of recognition.

The real problem is that, as Gary has already told us this and suggested, the worst form of bullying is already regulated. So do we really need a law to prohibit certain types of conduct that constitutes discrimination, unlawful harassment? Certain forms of bullying have now been established by courts, and ultimately will be found by the Board and by arbitrators when these cases come before them, that rises to a certain level that constitutes unlawful discrimination and harassment.

The Ninth Circuit, in a decision that came out in 2005 called *EEOC v. National Education Association,* sort of stretched this whole concept. And, really, the case is a workplace bullying case. We also have the traditional "equal opportunity" harassers, who treat everybody with equal disrespect and inappropriately. In this case, women complained because of the conduct because—at least in the eyes of the court—they took the most umbrage with the problem and filed a complaint with the Equal Employment Opportunity Commision (EEOC). The case went to the district court, and ultimately was appealed to the Ninth Circuit, which said—and I think what we really see is the answer with respect to this kind of conduct—that when this conduct rises to a certain level, and it has a disparate or disproportionate impact on certain people who are more susceptible to this kind of abuse, they have a remedy under Title VII. Thus, a legal remedy exists for bullying when it rises to this level.

So, the real question is, if there is a remedy for the most aggressive and abusive forms of workplace bullying, what is it that we're trying to accomplish? You know, what are we trying to remedy? I'm not going to accuse Gary of being the source of this, but I think the advocates of introducing legislation for workplace bullying to some extent could be accused of trying to legislate a certain degree of decorum in the workplace by prohibiting every conceivable inappropriate behavior in the workplace. I don't think that's probably something that most of us see as a real solution. It may, in fact, be a bit of a panacea and idyllic. So, I don't think that's a very realistic objective. And the standards that Gary's talked about are

the same kind of standards that would apply to what we all know, or at least those of us that are practitioners know, as intentional infliction of emotional distress. Or, sexual harassment, depending on the frequency, duration and impact. These are all the same elements that constitute legally cognizable unlawful discrimination and harassment.

I'm not saying we don't need some form of legislation. But, what exactly are we legislating? Are we really talking about just legislating good behavior in the workplace? I don't think that's going to work real well, at least not in the American workplace. And, more importantly—and I think the reason we are discussing this topic here—is to determine how you, as arbitrators, to the extent these claims ever come to you, how are you going to be able to decide whether someone's behavior was truly abusive? Or, is it just tough love and tough management? Because, we know in the workplace that there's this sometimes irreconcilable conflict between management and employees. Many courts have recognized that, in order to properly manage its business, every employer has an occasion to criticize, demote, transfer, and discipline employees. As a result, we're all aware that employees are going to feel distressed about a lot of those kinds of adverse employment decisions, and while they may consider every one of these decisions to be improper and outrageous—and they usually attach the word "harassment" or "bullying" when describing the legitimate exercise of these often unavoidable management decisions—it's going to be unusual that an employee isn't going to suffer some form of emotional distress, and it's possible that this conduct may happen over a period of time. But, is this really where we want to wind up? Are we going to introduce some standard to say, "Oh, this is just wrong." We're going to legislate some sense of morality and impose this standard of industrial justice now on an employer to say this new civility standard is the way we're going to do business now? Is that really the role that you think that management, since I negotiate collective bargaining agreements, is going to confer upon you as an arbitrator? I think not—employers are not going to give a third party the right to decide what is not "appropriate" based on some amorphous and unworkable standard of "civility in the workplace."

The issue presented in arbitration is where a specific provision of the collective bargaining agreement has been violated. How are you going to determine if this type of conduct has been violated? Your role as arbitrators, obviously, is to interpret the collec-

tive bargaining agreement, and the authority that management and labor gives to you to help us divine what is the right answer when things go awry. Where's the source of your responsibilities and your rights here? What contract provision has been violated? I don't know. And that, to me, is the problem our arbitrators face if they are going to get involved in these cases. I think it's a rickety ship to board, let alone navigate.

I've talked to the union representative, as well as to the NLRB representative, on this panel, and there may be a sea change in terms of private arbitrations. In the collective bargaining environment, we now know, based upon recent Supreme Court cases, that in order for there to be a waiver of the employee's rights to file statutory claims of discrimination and to litigate those claims in court, that the waiver has to be clear and unmistakable. That's a heavy standard. It's going to be a difficult burden to bear in most cases, with all of the bells and whistles that are involved. Trust me when I tell you it's going to be a hard thing to prove a clear and unmistakable waiver in most cases. Employers may want to have it go through arbitration, but I think there's going to be a lot of resistance from labor. And even if the parties to a labor agreement have attempted to negotiate a waiver, to the extent that any misconduct is recognizable as an unfair labor practice, my friend Ami and the NLRB are now going to get involved in determining whether the "waiver" is truly "clear and unmistakable" and the conduct itself is within the protection of the National Labor Relations Act (NLRA) from the perspective of the NLRB.

And the other interesting development that has occurred in the last couple of years is the Board's deferral standard deferring to arbitration. It is no longer going to defer to your decision as an arbitrator like they used to under *Collyer* and say, "you know, it looks about right and we're okay with it." Now, the answer seems to be, unless the Board changes the standard again this year, well, as long as the arbitrator came to the same result as we the NLRB would have come to—and Ami's not going to agree with that—but as long as the arbitrator came to the same conclusion that we the NLRB would have reached in an unfair labor practice (ULP) proceeding, then we're okay with it. But if you came to a different answer than we would have come to in a ULP proceeding, we're not going to defer to your decision as an arbitrator who was entrusted by the parties to interpret and apply the terms of the collective bargaining agreement.

So, now we're kind of back in this quagmire. We have a somewhat fuzzy sense of what constitutes workplace bullying, which in my opinion is really not the foundation for workable unnecessary legislation and in most cases legislation is simply unnecessary. We have the most extreme forms of workplace bullying conduct which is already recognizable under existing tort law and existing statutory remedies. But it must be part of a collective bargaining agreement for an arbitrator to get involved to determine whether any violation of the agreement has been violated. There's already machinery that exists under the EEOC and in private litigation for the more serious forms of workplace bullying conduct. I think there is a real problem with getting arbitrators involved in the day-to-day kinds of activities that involve sometimes trivial and sometimes less trivial behaviors that go on in the workplace. If the parties to a collective bargaining agreement cannot, and most likely will not, define the specific types of conduct that constitutes "workplace bullying" in a clear and understandable method so that everyone is aware of what is prohibited, how can an arbitrator be expected to decide if the agreement has been violated? What is the standard? What's the difference between workplace bullying and harsh management? Is workplace civility really the appropriate domain of arbitration?

**SARA ADLER:** You set up the next two speakers. I'm going to ask Carlos if he will speak up on behalf of what unions can and maybe what they should be doing for their members or on behalf of their members or with their members.

**CARLOS PEREZ:** Well, thank you. It's a pleasure to be on this panel. I enjoyed talking to several of my colleagues this morning. I was particularly pleased to evaluate and review some of the resources from the Workplace Bullying Institute, because I think that is an emerging problem.

Let me share with you some of the things that I am seeing as a union-side lawyer. I traditionally work in the public sector, and for about the last five or six years, I have almost exclusively been representing teachers. For those of you who may not be familiar right now with what's happening in education, every year we're seeing about twenty to thirty thousand teachers go through layoffs, and I represent teachers in that scenario. But, I also represent teachers who are essentially dismissed—who go through the dismissal process.

When I started working in my firm, I was lucky to see maybe three or four dismissals come through the Board that would even-

tually go through an administrative process. And teacher cases are unique, because in those cases, unlike arbitrations, they have a full panoply of discovery and go through depositions. We prepare for that administrative hearing.

At this point, currently, I'm seeing about four to five dismissals a week come to us. This summer about 19,000 teachers were laid off throughout California. This is the economic climate that I believe is creating a much more significant push to see bullying situations arise in the workplace, and I'll explain what I mean. It's very expensive and costly to dismiss a teacher.

Part of the problem, I think, is that management fails to properly document employee deficiencies. I know this because I am a partner of a law firm, and I've had to occasionally fire employees. It takes a great amount of concentration and effort to document that person over time. When I defend someone and I see that process has not been observed, it's one of the first things I'm going to point out in advocating for that person. I have seen, for instance, a great deal of frustration in management over how to deal with the declining resources in school districts and how to deal with teachers who have not been evaluated over a 20-year period. The school district may be perfectly content in failing to evaluate a teacher until the district, for economic reasons, wants to terminate the most highly paid teachers, who are the most senior teachers.

So then begins a campaign of observation of criticism. One of the unique things about teaching is that it is very subjective. Depending on who you talk to, a teacher may go work with a principal for 20 years who thinks that teacher is a wonderful teacher and then some day will work with a new principal, and that principal thinks they're the worst teacher in the world. It's a very subjective process.

I believe, and my opinion from what I've observed, is that management does not have sufficient resources to support them in how they evaluate people. One of the primary issues where that comes up, for instance, is mental illness. Many of the people that have come to me through the group legal services program, as Gary mentioned, sometimes display certain symptoms or certain behaviors that truly make for difficult cases. I represent many people who come in the door who I recognize as having symptoms of mental illness. Under the Education Code in California, there's a process to terminate employees with mental illness, but it is very costly. It's much more costly than the traditional process. So, in

my experience, most school districts don't use that process. They use the regular termination process.

Many times a person has had performance issues over time which have not been documented. The lack of support from management to identify and deal with those individuals creates a climate where there is the sense of frustration in how to deal with someone. Then that person becomes, as we'll see, hypothetically, King Kong. It's a very pronounced and observable campaign, especially when you deal with a particular school site. You see how this administrator deals with particular people.

Administrators tend to focus on a single person at a school site, much like predators who attack the weakest animal in the pack. That single person will remain the focus of that administrator for a period of two or three years, as Gary mentioned, until the person is so frustrated that he wants to leave. It's safe to say that the average dismissal proceeding costs a school district more than $250,000. At times, the costs can be higher particularly if the teacher wins the dismissal proceeding and must be reinstated. So you can see the financial incentive for a school district to create pressure for someone to leave.

One of the problems that I have, and one of the things that I am trying to find as an acceptable answer to in what I do, is how to deal with cases where the employee wins the right to reinstatement. It's often what I call a Pyrrhic victory. Because once you affect the employment relationship, it's hard for someone to go back to that situation that they were in. It's what I call a fear of victory. In those cases where I represented people and they've succeeded in defeating the charges for their termination, they go back to a situation which is just as stressful as before, because oftentimes, we can't necessarily do something to address the harassment.

In many cases, as a union-side attorney, what I will actually look for is other ways that I can address the problem. I think one of the deficiencies we have in this country is the inability to deal with bullying behavior. Aside from the problem in determining how bullying should be defined, there seem to be very few remedies once it is determined that bullying has occurred. So, it's often the case that someone in my position will look for an alternative remedy. Can I file a discrimination suit? Can I make out an age discrimination case?

In terms of going to arbitration, I look at the traditional definition of just cause. Is there just cause for discipline? Has the district followed progressive discipline? Or is there an internal complaint

procedure that the district hasn't followed? So, I don't necessarily always have the ability to address the bullying behavior.

But, one of the things that I see, one of the demands that arbitrators may see, is more and more grievances. Because, at least in my field, teachers are very attuned to the fact that because there's progressive discipline, things that have not been challenged before make all the difference.

One of the hardest things for me to do is to prevail in a termination case where there is a history of progressive discipline, where there's a reprimand—suspensions, maybe—that lead up to the termination. I find that my clients are increasingly aware of that. So, I am seeing, at least over the last year or so, people expressing an interest in going through the arbitration process to fight matters of reprimand or suspensions, especially if they're teachers. Because teachers, once they have defended themselves in an administrative case, may have to later defend themselves before the California Commission on Teacher Credentialing and thus be involved in no less than two hearings relating to a single incident. So there's a lot at stake. And, I think we may be seeing a higher amount of grievances, at this point.

One of the things that I have done over the years is to successfully rely upon the services of mediators. When it becomes apparent to my client that he/she doesn't want to return to the school district, on some occasions we have brought in private mediators—and we share the cost with the school district. We then have a full mediation. We try to resolve all issues between the school district and the employee by negotiating a severance package. That has been fairly successful. Districts are fairly willing to participate in that process. That's partly because we don't have a remedy, and also because if you do go through the administrative process, it can take a very long time. I've had dismissals that have taken almost five years sometimes, because they go through the appeal process.

So, I have actually started to use arbitrators for the mediation process. I recently had two cases a couple weeks ago that were resolved. I would certainly like to see some sort of legislative solution. But, I believe that, with the current state of the economy, at least in education, we're going to see more pressure to lay off and fire more teachers. As those pressures rise, we will see more and more incidents of workplace bullying as a means of making employees voluntarily resign from their positions so that employers may avoid the high cost of litigation.

**SARA ADLER:** Thank you. Gary, Dr. Namie has madly been making notes here, and I know he wants to speak now.

**DR. GARY NAMIE:** When you do a survey through a website about workplace bullying, you wind up with a self-selected group of people who have been harmed by bullying or who believe they have been harmed. In 2007, working with Zogby polls, we did a study with a sample large enough to be representative of all adult Americans. When we asked, "Has workplace bullying happened to you or has it ever happened to you?" in 2007, it was 37 percent of adult Americans—54 million. It was 35 percent in 2010, when we re-did it. So, it's quite an epidemic. And 15 percent said they witnessed workplace bullying. But, interestingly, a full half of adult Americans don't know what we're talking about. Haven't seen it, smelled it, touched it, or tasted it.

As far as the source of the bullying, according to our study, coworkers were a very vexatious source. But 72 percent of the bullying is top down. So management has to bear the responsibility. The majority is still done by the boss. The press loves that we found that women bully women, and the press loves to use the alliterative phrase "bully boss." It's true that if I want to be a petty tyrant, I've got to have title power to take you out. I can make your life miserable as a coworker; that's 18 percent. And don't forget the 10 percent of administrative assistants who are going to torment anybody in their office and up the ladder. So that amounts to 28 percent of coworkers who are bullies.

The comparison of sexual harassment, a form of bullying, is interesting. Management puts sexual harassment at the apex of the worst that can happen, but it's not even close, because being told that your complaint has no legitimacy is more devastating. Our 2007 study asked if individuals felt that they had a right to file an EEOC-type claim, but we found that 80 percent of the cases of bullying are not eligible to file under EEO because they fail to meet some criteria, such as being a member of a protected-status group (based on gender, race, age, disability) and your harasser is not also a member who enjoys similar protection in the eyes of the law.

And then there's the researchers led by Judy Richmond of the University of Illinois, Chicago. She contrasts the mental health impact of sexual harassment to bullying, which she calls generalized workplace mistreatment. In her repeated studies, she found that bullying is two to three to four times more prevalent, and the mental health correlates. There's more anger, hostility, and depression with bullying than with sexual harassment.

So, the legality of bullying is partly responsible for the source of the harm. With sexual harassment, you can say there's an external source. You can blame it on a person, and he's basically guilty until proven otherwise. Therefore, the onus is on him, and it makes me feel calm. But, if I'm saying, "You're mean," and they say, "So what?," you begin this internal introspective process of, "Could I be wrong? Maybe I'm complaining." Then you find that society is committing the fundamental attribution error: blame the victim. In domestic abuse, we used to say, "Well, if it were so bad, why didn't you just leave?" "Remember when, speaking man-to-man, we used to rationalize abuse?" "He wouldn't hurt a flea." We're not talking about hurting fleas. We're talking about breaking her bones—look at the police picture. And yet, we always rationalize that. Now, we're saying workplace bullying, and he's talking tough love. If you have to manage that way, you don't know how to manage, period. So we're using the same rationalizations. You need to look at the overlay, be informed by domestic violence and the rationalizations. You're getting snookered if these cases come before you, and you listen to management saying they just need to grow up. No. You need to be skilled. How much of bullying is a cover-up for a lack of skills or fraud and theft and embezzlement?—I don't know. I didn't run that study yet, but I'm going to, because it's really important.

The premise that employers care is utterly false. Three percent—now back to our self-selected sample where we asked the bully targets, how many of your employers are actually taking proactive steps by creating a policy having an enforcement mechanism parallel to that which they have for the illegal forms of harassment? It's 3 percent. Three. Without a law pushing them, three. Do you think that employers would voluntarily say to Sara and to Ami, "Women aren't getting treated correctly in the workplace; we need to have sexual harassment laws"? No. That was thrown in the civil rights laws by Southern lawmakers to kill civil rights legislation. No employer said, "We want to take care of our women." They only do that begrudgingly because the law makes them.

Is Bernice Fields in the room? Bernice Fields. She was attending the conference. I always quote her. She was an arbitrator in a NALC case, and we actually put her in the book. Bullies cannot exist unless the employer tacitly prevents or encourages bullying behavior. She's got that right. When an employer wants it to stop, an executive wants it to stop, it stops. When an executive is the sponsor of the management bully or the VP or the C-suite bully, it

never ends. This is not an HR problem. This is not there. In fact, we wrote the book to tell employers what they could do until there is a law. So, no—employers don't care.

In terms of taking out the subjectivity, I agree with Van completely. But, the hope is in neuroscience. You can't fake the functional MRI, and they're doing remarkable stuff. I don't have you here all day, but if you had one of our all days, or a three-day training, we go through the voluminous data. You say ostracism doesn't hurt anybody. Being cut out from a group doesn't hurt anybody. Kip Williams at Purdue rolls them in there in a functional MRI, and he insults them. It's an odd way to make a living, but he's a social psychologist, like me. And, they found that when insults and social exclusion are levied against someone that the pain pathways and the trauma pathways in the brain are brought up. Can't fake that; you can't fake brain damage.

There's a whole host of studies on brain plasticity. It turns out when the brain is stressed, the hippocampus shrinks and the person's ability to concentrate and condense memories are lost. So if I call you stupid, I call you stupid, I call you stupid, I will render you stupid. Therefore, I can write you up with the voluminous documentation, which is bogus—now I've made you incompetent. It's really key what Carlos said: Over the course of a couple years, I've taken a fully integrative, high-performing person and made him incompetent. And the targets are not weaklings. The targets are the salt of the earth, the ones who pose a threat to the insecure, idiot bully. These are the highest performers before the bully came into their lives.

You, as arbitrators, should look at a timeline. Demand a timeline. High performing? In comes the new supervisor. Wow, did they suddenly lose their brain? No. It's external. What the Europeans have over us is the required duty of care by employers, and they have the concept of work environment. The employer is entirely responsible for the work environment. In this country, because of our fixation on individualism, we hold people responsible for their own fate. We don't see the invisible factors of environments.

So, in our book, we talk about psychosocial factors. We're saying to people, look for the invisible causes of people's behavior rather than just look at their personalities. But you know, we're a Britney Spears–dominated world. We say, "Well, if you were bullied and I'm looking at you, there must be something about you." Then it's bring in the manager, accused of being a bully, and look at them and say, "What are the causal factors for you?" You'll find

that fully half of the time—I don't know this empirically, it's my gut from the thousands of cases—that they were ordered to do it. They were told to do it: "You go down there and clean up that unit. You do it, and that's the way we manage here, if you want to keep your job."

So, there's no beneficence on American management at all. I side with Carlos. It's getting tougher and rougher, and that's the American way. So that's what kind of what we're up against.

I'll stop now, so that we can go on to our other participants.

**SARA ADLER:** Thank you, Gary.

**DR. GARY NAMIE:** And, don't mediate, by the way. You don't mediate violence. Your title of this is violence. The National Institute for Occupational Safety ad Health (NIOSH) recognizes bullying as a form of violence. I'm done now. I'm just saying, you wouldn't mediate domestic violence, would you? Would you put him across the table and say, "How about if he only beats you three days a week?" No.

**SARA ADLER:** I do want to give Ami a chance to share with us. Originally the NLRB was considered for this panel in the context of EFCA, or the Employee Free Choice Act, because there were newspaper articles and editorials and other things talking about why EFCA couldn't possibly be a good way to go, because employees' unions would be coercing or bullying employees to sign the cards, to do card checks. That, as Wilma has told us yesterday, is a dormant, if not dead, issue. So, I'm going to let Ami talk about where the NLRB can help now.

**AMI SILVERMAN:** Well, I have a specific viewpoint on this issue, coming from the National Labor Relations Board: What appears to be bullying by employees may, in fact, be protected concerted activity.

The Act, as originally promulgated in 1935, was intended to promote collective bargaining and also to protect employees' rights to engage in protected concerted activities. These are activities that any worker can engage in and that can occur in a workplace even without a union. Generally, it is activity engaged in by one or more employees over an issue involving a term and condition of employment. It can even be engaged in by a single employee who has been authorized by others to speak on their behalf as a spokesperson, to complain about terms and conditions of employment. It also implicitly embodies employees' rights to discuss any term and condition of their employment including their wages and their benefits among one another.

Both union activity and protected concerted activity are uniquely American concepts in that they're rooted in the freedom of association and, of course, in free speech. The Act, because it was an industrial age statute promulgated in 1935, comes from a factory setting. So it recognizes the existence of what we call shoptalk, the way working people at that time and probably at this time, as well, commonly speak.

The Act also recognized that the workplace is an arena that's full of passion. People feel passionately about their work. They feel passionately about their jobs. They are filled with what the Act has called "animal exuberance" on occasion.

So what this leads us to is that one person's bullying language may be another person's free speech. There are actually a number of fairly interesting recent cases under the Act that have arisen, some of which might surprise you, if you heard the presentation dealing with electronic media.

Very often, the kind of bullying that Sara has alluded to arises during union organizing campaigns. These are generally very volatile campaigns. There are employees who are very passionately pro-union, and there are employees who are equally passionately anti-union. This gives rise to a lot of exuberant behavior and often a lot of fairly volatile speech.

In a recent case involving a union organizing campaign, pro-union employees, during the course of this campaign, made comments to other employees who opposed the union that they would kick them or bitch slap them. These comments could be construed as workplace bullying.

These employees said they would get even with their coworkers who didn't support the union and would kick their asses if they didn't vote for the union. The Board concluded that these comments were not so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.

The Board noted that comments by employees did not carry the same weight as a threat by a manager or a supervisor would carry. They also concluded that in this workplace such language was fairly common, if you imagine a workplace where people threatened to bitch slap each other. I suppose that could be the case. So, this language, that in some context might be looked at as employee-on-employee bullying, was found to be acceptable free speech in the context of this case.

Other cases before the Board refer to varying types of concerted activity that was viewed by the Board as protected speech

that might be considered by parties to a labor agreement as they attempt to define workplace bullying and what behaviors may or may not be acceptable.

In a recent Board case out of Baltimore involving a pharmaceutical company, there were statements by an employee referring to other employees that was also determined to be protected speech. This was a South African company that employed many people from South Africa. A nurse who worked there had a conversation with one of these employees who had recently returned from South Africa, and he told this nurse that when he returned from his absence, he got a big raise and the company slotted him back in and gave him his seniority back. When she expressed her surprise at this, he said, "Oh, the company takes care of us," meaning he and the other workers from South Africa.

She complained to her supervisor and made a comment to the effect that she believed they were treated differently than other employees and that the South Africans were taking over the company. Her supervisor immediately reported her to the Human Resources (HR) department. The HR department called her in. They want to know if she was the source of these rumors that certain employees were treated differently than others. She said that those were her beliefs and that is what she told her supervisor. They then asked her if she had talked to any other employees about these concerns. She said no. They then fired her on the spot.

When the Board got this case, the Board found that her comments were protected because they involved terms and conditions of employment, that it was her belief that certain employees were treated differently than others based on some criteria. The interesting thing is that even though this conduct was not concerted, that is, she acted by herself, these were her own personal beliefs which were not authorized or ratified by other employees. The Board concluded that by firing her, the company was attempting to prevent her from discussing these concerns with other employees and possibly creating dissension in the workplace. For that reason, they found that her firing was unlawful, and they ordered her reinstated.

So here, again, you have language that might in some context appear to be disrespectful, might constitute some kind of bullying by separating out a group of employees, and yet the Board found it to be protected speech.

Other cases dealing with comments by employees about company policies are always kind of interesting cases. There was a case out of New Jersey involving a drugstore distribution center. The company held a big staff meeting before the shift and announced several changes in the workplace, which the employees didn't like. When the employees later met with their direct supervisor, they raised their concerns about these changes. The supervisor said, "Oh, yes. Well, just for that, we're going to reduce your break time from 15 minutes to 10 minutes. So how do you like that?"

So one of the employees jumps up and says, "That's bullshit." And the supervisor says, "Who said that?" And the guy says, "I said it. This is bullshit." Fired him right on the spot for insubordination, disrespect to a supervisor.

Under well-established Board law, the Board general counsel concluded this conduct was protected concerted activity. It involved a term and condition of employment. And even though this individual spontaneously jumped up by himself and expressed his opinion about these changes, those kinds of spontaneous outbursts, as the Board calls them, are actually a call to action in a group that occurs a group setting, in a group of employees. And this employee was sort of rallying the other employees to join with him in protesting these changes.

So again, here we have conduct that might seem to be an employee bullying his supervisor or intending to coerce other employees to agree with him. But, the Board has consistently held these kinds of outbursts to be protected speech.

Another case out of Missouri, the employees in this factory were issued warnings for exceeding their break times. This was announced in a group meeting. One of the employees said, "Well, this is really going to get ugly" and that the supervisor "better bring his boxing gloves when he tries to hand out these warnings." Another employee standing next to him says, "Yes, this could get real ugly." Both employees were fired on the spot under the employer's zero tolerance policy for this kind of speech—for making threats in the workplace. The Board—and you'll see where this is going now—concluded that the firings were unlawful, because the comments were made in front of other employees, again, in a group setting. They were not the kind of unambiguous, physical threats that might render an employee unfit for service, but rather were single, brief, and spontaneous utterances prompted by these actions by the employer.

More recently, the Board has reached into the electronic age with this now fairly infamous Facebook filing case. But, it generally considered the media coverage because it was the first case of its kind before the Board.

It involved a large national ambulance company. An employee who was threatened with discipline for poor performance went home and went on her personal Facebook page and criticized her supervisor. She called the supervisor a "17," which was the company's internal code for a psychiatric patient. She called him a "scumbag" and a "dick." A lot of the employee's Facebook friends, who were also coworkers, logged on to her Facebook page. Many of them chimed in and generally agreed with this characterization of the supervisor, and a general discussion on Facebook ensued of the terms and conditions of their employment that would cause them to have this kind of supervisor. One of the employees reported her to management. Management looked at the Facebook page, saw these comments, and fired the employee.

The Board, of course, overturned the termination. The employer in this case actually had a policy which prohibited employees from disparaging, discriminatory, or defamatory comments when discussing the company, the employees' superiors, their coworkers, or their competitors. The Board acknowledged that essentially the Internet was like the new water cooler, that this was where employees now vented their feelings about their company, where before maybe they would express their opinions of their supervisors and the working conditions in the break room or around the water cooler or the coffee pot. Now, of course, they do it electronically; they do it on Facebook, and this forum is really not to be treated any differently than any other setting where employees would discuss these issues.

Also, in this case, the general counsel found the rule itself to be unlawful on its face. Because, again, the Act protects employees' right to freely discuss their terms and conditions of employment, even if that includes criticizing the supervisor. Again, this case was settled before it went to the Board, but it generated a lot of press.

Do I have another minute?

**SARA ADLER:** Sure.

**AMI SILVERMAN:** I'll just keep rolling here. Another electronic age case out of New York involves an employee criticizing another employee on Facebook. An employee goes on her personal Facebook page in advance of a big meeting the company is going to have to announce some changes in terms and conditions

of employment. On Facebook, this employee criticizes another employee who spoke out in favor of these changes.

So Facebook friends, who are also coworkers, chime in and basically "dis" this other employee who came out in favor of these changes. The employee—the "dissee," I guess we can call her—finds out about this dialogue and complains to human resources. Human resources fires all five people who were involved in the Facebook dialogue. The New York region of the NLRB concluded that the Facebook discussion was protected concerted activity because it involved conversation among her coworkers and it was concerted. And it was also protected because it involved terms and conditions of employment, which were these changes that were being anticipated by the employees.

A hearing on this case is pending before an administrative law judge, and you probably know which way we expect it to go. But, here again, you have conduct that could be construed as bullying, as these five employees ganged up on this other employee. But because they were discussing terms and conditions of employment, their dialogue was protected and concerted activity.

Now, the implications for arbitrators relates to what Van said. With the general counsel's new approach towards deferment cases, the unfair labor practice is filed concurrently with the grievance so that the parties can preserve their statutory filing date. The Board's long-standing practice has been to defer processing of the unfair labor practice pending the arbitration to allow, first of all, the parties an opportunity to resolve the dispute within the context of their collective bargaining agreement.

Under a very long-standing standard, once the arbitrator's award issued, the Board would review it through the regional offices to determine if it was repugnant to the Act. Pretty low standard. And unless the award was clearly just unacceptable on its face, the Board would then defer to that decision and dismiss the unfair labor practice.

Under the new general counsel, these arbitrated awards are going to be subject to much closer scrutiny, and what the regions have been asked to look for is whether the arbitrator has actually addressed the statutory issue, not just the contractual issue, but the actual statutory issue arising under the Act. So, for example, if there are inklings of retaliation for protected concerted activity as there are in these cases, if the arbitrator hasn't at least raised that issue, or discussed it, what happens is, even though the arbitrator's award may go one way or the other, the Board may still res-

urrect the unfair labor practice, even after the arbitration award, resulting in yet another hearing in another forum, and conceivably a different result.

So it sort of behooves you to be aware of the underlying issues under these so-called bullying cases and to keep an eye open for protected concerted activity. And, at least address it or discuss it in your award to avoid this sort of double dipping.

**SARA ADLER:** I would like to ask the panel if they foresee collective bargaining provisions being attempted, if not actually negotiated, to cover bullying. A quick answer to that?

**VAN GOODWIN:** I think the answer, from the employer's side, is probably not. Expect the opposite answer from the union side.

**CARLOS PEREZ:** Well, I think one of the problems that unions are going to have is we don't want to have provisions that are going to create arbitrations where we're suddenly dealing with discrimination cases and things of that nature, to revisit *Penn Plaza*.

**VAN GOODWIN**: I think that's probably the quid pro quo for management because if bullying would find its way into a labor agreement and be subject to grievance-arbitration, we'd want to ensure the arbitration provision includes discrimination statutes or unlawful discrimination to be able to take full advantage of the *Penn Plaza* decision. I mean that's where employers would certainly want to go, so hence the dilemma.

**DR. GARY NAMIE:** The first provision that's passed was in the state of Massachusetts in March 2009. It's public sector; all the public sector unions that work with the State of Massachusetts decided to go for the anti-bullying provision. A neutral respect provision was won by the union NAGE, a division of SEIU. It's very weak. It talks about mutual respect. But, here's the point, the state did not yield and allow arbitration to be done. So, you can file a grievance but never arbitrate. So, that's the foot in the door. But, the first thing they did was preclude arbitration.

**HOWELL LANKFORD:** It seems to me that organizational, top-down bullying has been with us for a long time. It's an argument that one hears made. Its chance of success in arbitration has never been more than five percent. But, one out of every twenty times when you hear this argument, the union actually makes a pretty darn good case. It really is the supervisor, and you really do put the grievant back to work on those grounds.

I have had one very recent case that's kind of illustrative, a four-day hearing—employee discharged for what amounts to being a serial bullier. An employee who would pick some coworker and

simply make that person—almost always a woman—make her life miserable to the point that she would be driven out of the workplace. The interesting thing about the case was that it was not done as a misbehavior-based discharge. I've had two or three other similar cases where there is a serious element of bullying. But employers can't quite wrap their conceptual mechanism around that as misbehavior, so they take the much more difficult avenue of presenting it as a failure to perform case. Give me a choice between failure to perform and misbehavior, and I'll go for misbehavior any time.

But I think employers are having a difficult time dealing with that sort of thing. So, I was a bit surprised at how much this became a party-line discussion. I do think employers are more sensitive to issues of workplace milieu maintenance. Certainly, the postal service is. And Marty's here. The postal service has one of the broadest work rules of any institution ever, and you can probably give me the ELN. But there's an ELN that says play nice, and if you don't, we can discharge you. But a lot of employers, I think, are in the process of rule revision, trying to deal with the social media issues. But I see a lot of conferences going on, and a lot of policy writing workshops going on, that really do seem to be brushing up against this sort of employee-on-employee bullying behavior. Maybe Van would like to talk about that.

**VAN GOODWIN:** Not that I would ever disagree with Gary. That was my attempt at humor. It got no laugh at all. But, I do think he's wrong in terms of management not taking it seriously. He thinks we're just sweeping it under the table. I mentioned to him that the person that wrote the foreword in his book—who is, I would say, probably one of the preeminent experts in the field, who wrote *The No Asshole Rule* book—was a speaker at our employment conference. We had almost a thousand employer representatives present, from some of the largest employers in the country, in attendance. So, I think he's quite wrong. I do think employers are taking it seriously. I do really think they're seriously looking at this behavior and how to address it from a management perspective.

I know that we—as part of my law firm's training—we do an awful lot of training for employers. We also have a sister organization that does a lot of electronic training. Workplace bullying is a part of this training and, when I teach classes on discrimination and wrongful discharge law in colleges and law schools, as well as in workplace training programs, I talk about workplace bullying as

the new generation of discrimination harassment, because it is a new frontier. So, I do think employers are taking it seriously.

I think the challenge that we have, as employers, in the management side of the question in these arbitrations, is that it's—and I think if you read the article that I submitted, if you have it, you should—is that there's a real difficult issue that we all recognize. And that is, sometimes the people that are the worst bullies are also the key executives of an organization. The people that really make the show run and, I'd hate to say—

**SARA ADLER:** Say all of us.

**VAN GOODWIN:** Yes. My point is that some of the people that engage in bad behavior oftentimes are people at the very top of organizations. And, as result, they can also be the most difficult to rein in. That creates a real dilemma and challenge for management, but it is one that management needs to address, and is really not something that is within the purview of legislation, litigation, or arbitration.

**CARLOS PEREZ:** I have a slightly different view. I think that school districts and the public employers I deal with are very sensitive to employee-on-employee bullying. There are complaint procedures. There's an investigative process. But when it comes to bullying from management, there seems to be a deaf ear. And, I do have the ability in my cases that I do in the administrative forum to address the panels that hear these cases; we'll look at extenuating circumstances and whether or not the conduct has a chilling effect on the rights of the teachers. So sometimes I can get those issues in.

But, I see very passive forms of bullying. For instance, one of the things I deal with that is most common is a teacher might be called in and placed on administrative leave, paid leave for four months while they're investigating the case. And so, Gary, you talk about the isolation that people go through. Those are things that are not necessarily direct bullying behavior but still have a consequence, and may lead to the employee eventually deciding that he or she doesn't want to work there anymore.

**SARA ADLER:** Thank you. Our time has passed all too quickly. I would like, again, to thank the panel for coming in on a Saturday afternoon to share with us.