

The Workplace Bullying Dilemma In Connecticut: Connecticut's Response to the Healthy Workplace Bill

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“Playground bullies grow up. They leave behind the broken toys and bloodied noses of the sandlot in exchange for the broken pencils and bruised egos of the office.”¹

“Prevention is the key to combating bullying, and accepting that bullying might be occurring even though you cannot see it is the first step in curbing it.”²

I. INTRODUCTION

A. Workplace Bullying: A National Dilemma

The phrase “growing up” has come to embody an expected and assumed phase of mental and emotional development in an individual’s life. Starting from early childhood, continuing throughout primary and secondary education, society expects individuals will be properly socialized and transformed into responsible, respectful, and mature adults. But what happens when these adults conduct themselves in an unbecoming manner? What happens when these adults assume positions of power in the workforce and have the ability to affect and control their subordinates? Furthermore, what happens when their inappropriate behavior goes unchecked and unfairly burdens a growing class of bullied employees?

Bullying is a widespread social phenomenon that reaches adults.³ In

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¹ John A. Mack, *The Law of Bullying: Off the Playground and into the Workplace*, 62 BENCH & B. MINN. 1, 1 (Sept. 2005), available at <http://perma.cc/83F-8UAG>

² *Id.* at 7 (arguing that workplace bullying is a real and pressing legal concern requiring preemptive legal protection for its vulnerable victims).

³ Prominent periodicals have reported on the workplace bullying phenomenon and termed it a modern social phenomenon. See *infra* note 5; *infra* note 6; Sam Hananel, *Growing Push to Halt Workplace Bullying*, ASSOCIATED PRESS, Mar. 1, 2013, available at <http://perma.cc/JH6V-QF2M> (last visited, Feb. 23, 2014); Cari Tuna, *Lawyers and Employers Take The Fight to ‘Workplace Bullies.’* WALL ST. J., Aug. 4, 2008, <http://perma.cc/XW3N-JZPJprintMode>.

today's globalized economy, increasing numbers of individuals receive undergraduate and graduate degrees.⁴ Arguably, the average bully is the superior of the target⁵ and is of high enough intellect to elude the detection of overtly hostile behavior.⁶ She has also been socialized to view more aggressive behavior as the norm.⁷ The bleak reality remains that workplace bullying is the "sexual harassment of the new century."⁸

In the wake of the national campaign calling for comprehensive healthy workplace reform,⁹ advocates in states across the nation have sought to modernize existing law to allow for both deterrence and restorative statutory measures for victims of workplace violence and

⁴ Jaqueline C. Falkenheim, *Higher Education in Science and Engineering*, in NAT'L SCI. BD., SCIENCE AND ENGINEERING INDICATORS 2012, 2-1, 2-16, available at <http://perma.cc/L6ES-762Ahtml>.

Over the last 15 years studied, enrollment in U.S. institutions of higher education at all levels rose from 14.5 million students in fall 1994 to 20.7 million in fall 2009, with most of the growth occurring in the last 10 years. In 2009, the types of institutions enrolling the most students were associate colleges (8.2 million, 40% of all students enrolled), master's colleges/universities (4.7 million, 23%), and doctorate-granting universities with very high research activity (2.8 million, 14%). Between 1994 and 2009, enrollment nearly doubled at doctoral/research universities and increased by about 50% or more at associate's colleges, master's colleges, and medical schools/medical centers.

Id.

⁵ Adam Cohen, *New Laws Target Workplace Bullying*, TIME, Jul. 22, 2010, <http://perma.cc/QFK3-7X7Ahtml>.

[T]here is a good chance that at some point during your working adult life you will have an abusive boss – the kind who uses his or her authority to torment subordinates. Bullying bosses scream, often with the goal of humiliating. They write up false evaluations to put good workers' jobs at risk. Some are serial bullies, targeting one worker, and when he or she is gone, moving onto the next victim. Bosses may abuse because they have impossibly high standards, are insecure or have not been properly socialized. But some simply enjoy it.

Id.

⁶ Tara Parker-Pope, *When the Bully Sits in the Next Cubicle*, N.Y. TIMES, Mar. 25, 2008, <http://perma.cc/J6G3-NCPT>. ("A surprising number of bullying cases involve health care settings, where the problem is said to be endemic, with senior hospital workers, particularly doctors and supervisors, harassing nurses and technicians. The problem is also common in academia and the legal profession experts say.")

⁷ Cristina Gonzalez, *When Violence Goes To Work*, 17 No. 6. N.Y. EMP. L. LETTER 1, 2 (Jun. 2010):

Workplace violence is the "sexual harassment" of the new century. Twenty years ago, most companies didn't have a policy on sexual harassment and thought little of the importance of dealing with that issue in the workplace. Now, society has changed, and it's well accepted that employers must police sexual harassment in the workplace or face significant liability. Society has changed again, and employers have been charged with bringing order to a workplace populated by a generation of workers who have experienced school shootings, violent music lyrics, and violence at home before stepping foot on the job.

Id.

⁸ *Id.*

⁹ See HEALTHY WORKPLACE BILL, <http://perma.cc/SL5R-XD5W> (last visited Feb. 24, 2014).

bullying.¹⁰ As a result, scholars, legislators, and other advocates have struggled to adapt the “markets and management”¹¹ belief system that permeates the American employment law schema. To quote scholar and professor David C. Yamada¹²:

American employment law has been dominated by a belief system that embraces the idea of unfettered free markets and regards limitations on management authority with deep suspicion. Under this “markets and management” framework, the needs for unions and collective bargaining, individual employment rights, and most recently, protection of workers amid the dynamics of globalization, are all weighed against these prevailing norms . . . [T]oday, the state of American employment relations is at a critical juncture . . . [H]uman dignity should supplant “markets and management” as the central framework for analyzing and shaping American employment law. Simply put, we need . . . to focus on the dignity and well-being of workers.¹³

David C. Yamada, Drs. Gary and Ruth Namie, and similar proponents have sought to galvanize support for state employment law reform by steadfastly and persuasively arguing that current employment law has created an invisible workforce that is subject to extreme emotional abuse without legal redress. As less than 30% of employers have workplace violence policies or programs in place, and only 20% provide training on preventing workplace violence,¹⁴ it is clear that action must be taken to curtail the growing prevalence of workplace bullying.

B. Workplace Bullying in the State of Connecticut

As of February 2014, twenty-six states have introduced a version of David C. Yamada’s original anti-bullying model statute entitled, “The

¹⁰ Laurie Bloom, Note, *School Bullying in Connecticut: Can the Statehouse and the Courthouse Fix the Schoolhouse? An Analysis of Connecticut’s Anti-Bullying Statute*, 7 CONN. PUB. INT. L.J. 105, 124 (2009).

¹¹ David C. Yamada, Essay, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523, 523–24 (2009).

¹² Professor of Law and Director, New Workplace Institute, Suffolk University Law School, Boston, Mass. J.D., 1985 New York University School of Law. Author of the Model Healthy Workplace Bill. See David C. Yamada, *Introduction to the Symposium on Workplace Bullying: Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL’Y J. 475 (2004).

¹³ See Yamada, *supra* note 11, at 523–24.

¹⁴ Gonzalez, *supra* note 7, at 2.

Healthy Workplace Bill.”¹⁵ The twelfth state to introduce the Healthy Workplace Bill—Connecticut—is one of a growing number of states to attempt to acknowledge the issue of workplace bullying.¹⁶ Unfortunately, similar to the general tenor of American employment law, Connecticut employment law has not proven to be hospitable to the active passage of anti-bullying legislation.¹⁷ Despite popular support and lobbying efforts, none of the states to introduce workplace bullying legislation have enacted it.¹⁸

For example, in its steadfast, yet arguably diminishing, resistance to workplace bullying legislation, the Connecticut General Assembly has chosen not to recognize a private cause of action for victims of workplace abuse and bullying.¹⁹ Without a private cause of action, victims of workplace bullying must turn to alternative statutory and less comprehensive common law remedies.²⁰

This Note will highlight and analyze the workplace bullying phenomenon. How do employees find themselves in compromising workplace relationships? Why do targets of workplace hostility remain in unhealthy work environments? How are unbalanced power relationships allowed to go unchecked? What deters employees from voicing their grievances—patterns of internalized self-blame; belief that no realistic remedy exists; or fear that negative employment action is imminent?

To date, previous scholarly works have primarily focused on exploring Yamada’s Model Healthy Workplace Bill, identifying statistical information on workplace bullying, and discussing potential legislative and common law remedies.²¹

Broadly, this Note examines the present status of workplace bullying policy and anti-bullying legislation on the national scale, and then in

¹⁵ See HEALTHY WORKPLACE BILL, <http://perma.cc/SL5R-XD5W> (last visited Feb. 1, 2014).

¹⁶ As of May 2013, California, Oklahoma, Hawaii, Washington, Oregon, Massachusetts, Missouri, Kansas, New York, New Jersey, Montana, Connecticut, Vermont, Utah, Illinois, Nevada, Wisconsin, New Hampshire, West Virginia, Maryland, and Minnesota, New Mexico, Florida, Maine have introduced the Healthy Workplace Bill in their respective legislatures (in chronological order). *Healthy Workplace Bill Legislative History in the United States*, HEALTHY WORKPLACE BILL, <http://perma.cc/QV5A-TSGY> (last visited Feb. 23, 2014).

¹⁷ See discussion *infra* Section IV.

¹⁸ See *Healthy Workplace Bill Legislative History in the United States*, HEALTHY WORKPLACE BILL, <http://perma.cc/76TU-5FLA> (last visited Feb. 23, 2014). Nine states have active bills as of Feb. 23, 2014: Massachusetts, New York, Maine, West Virginia, Florida, New Mexico, Vermont, New Jersey, New Hampshire. *Id.*

¹⁹ Bloom, *supra* note 10, at 125. See also 2012 Conn. S.B. 154, 2012 Leg., Feb. Sess. (Conn. 2012), <http://perma.cc/CL2G-TDN6>; 2007 Conn. S.B. 371, 2007 Leg., Jan. Sess. (Conn. 2007), available at <http://perma.cc/RT6C-8C9Z>.

²⁰ See discussion *infra* Section V.

²¹ See generally Michael E. Chaplin, *Workplace Bullying: The Problem and the Cure*, 12 U. PA. J. BUS. L. 437, 450 (2010); Robert B. Fitzpatrick, *Bullying in the Workplace*, ST001 ALI-ABA 2265, 2269 (2011); Yamada, *supra* note 12.

Connecticut. Narrowly, this Note assesses why the Healthy Workplace Bill has met such limited success in the Connecticut General Assembly. Analyzing Connecticut state legislative initiatives and failures, state constitutional and statutory considerations, and federal acts, this Note additionally traces the inability of Connecticut's legislative process to effectuate an anti-workplace-bullying statute. State case law is also discussed to contextualize the private causes of action available to victims of workplace bullying. This Note advances a predictive discussion on the future of comprehensive and preventative workplace bullying remedies in the state of Connecticut.

In sum, this Note concludes that Yamada's Model Healthy Workplace Bill is an unworkable legal solution for the workplace bullying dilemma in Connecticut. Specifically, Yamada's model bill fails to acknowledge that the most successful preventative workplace bullying initiatives may be beyond the periphery of the legislature and the courts. This Note posits that administrative agency supervision and stringently enforced employer codes of conduct would be the most efficient and meaningful remedial solutions to Connecticut's workplace bullying dilemma. This Note hopes to persuasively advance that lasting social change is a gradual process—increased awareness of workplace bullying and its detrimental effects cannot be sweepingly implemented in the blink of an eye.

II. WORKPLACE BULLYING

A. Defining Workplace Bullying and Identifying Its Causes

Workplace bullying has multiple complementary definitions. Generally, it has been defined as “the repeated, health-harming mistreatment of one or more persons, which takes one or more of the following forms: verbal abuse, offensive conduct or threatening behavior, humiliation or intimidation or work interference that prevents work from getting done.”²² Gary Namie of the Workplace Bullying and Trauma Institute more narrowly defines bullying as “the repeated health-endangering mistreatment of a target by a cruel perpetrator,” through hostile verbal and nonverbal communication and interfering actions, or the withholding of resources (time, information, training, support and equipment—that guarantee failure), which are all driven by the bully's

²² Dan Calvin, Note, *Workplace Bully Statutes and the Potential Effect on Small Business*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 167, 167 (2012) (citing *The WBI Definition of Workplace Bullying*, WORKPLACE BULLYING INST., <http://perma.cc/FZ4G-RUP3> (last visited Feb. 23, 2014)).

need to control the target.²³

In short, workplace bullying is “the deliberate, hurtful and repeated mistreatment of a target that is driven by the bully’s desire to control.”²⁴ Sometimes referred to as workplace “mobbing,”²⁵ workplace bullying includes psychological or status-blind harassment. Other interchangeable terms are: “[w]orkplace harassment,” “psychological harassment,” “work abuse,” and “workplace aggression.”²⁶ As defined by the International Labour Organization, workplace bullying can be classified as “offensive behavior through vindictive, malicious or humiliating attempts to undermine an individual” or groups of employees.²⁷

The top ten bullying behaviors in the workplace include: glaring in a hostile manner; treating in a rude/disrespectful manner; interfering with work activities; giving the silent treatment; giving little or no feedback on performance; not giving praise to which a coworker feels entitled; failing to give information needed; delaying actions on matters of importance; lying; and preventing a coworker from expressing self.²⁸

Examples of verbal bullying include: yelling, screaming and cursing at the target; angry outbursts or temper tantrums; nasty, rude, and hostile behavior toward the target; accusations of wrongdoing; insulting or belittling the target; and excessive or harsh criticism of the target’s work performance, all often in front of other workers.²⁹

Examples of non-verbal bullying include: aggressive eye contact;

²³ See Etelka Lehoczky, *The Bully Principle: Nice Workers More Likely to Get Pushed Around, Less Likely to Get Promoted*, THE BOS. GLOBE, Nov. 21, 2004, <http://perma.cc/3XMJ-4Y22>; see also Mack, *supra* note 1, at 2 (internal citation omitted).

²⁴ Calvin, *supra* note 22, at 170 (citing GARY NAMIE & RUTH NAMIE, BULLYPROOF YOURSELF AT WORK! 17 (1999)).

²⁵ Brady Coleman, *Pragmatism’s Insult: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence*, 8 EMP. RTS. & EMP. POL’Y J. 239, 241 (2004). Mobbing is a more common term used in European nations. *Id.* at 241. See also Heinz Leymann, *The Content and Development of Mobbing at Work*, 5 EUR. J. OF WORK & ORG. PSYCHOL. 165, 167–68 (1996) (preferring the term “mobbing” to “bullying”).

²⁶ See Jordan F. Kaplan, Comment, *Help is on the Way: A Recent Case Sheds Light on Workplace Bullying*, 47 HOUS. L. REV. 141, 144 (2010) (citing Yamada, *supra* note 12, at 479; DUNCAN CHAPPELL & VITTORIO DI MARTINO, VIOLENCE AT WORK 22 (3d. ed. 2006) (stating mobbing originally referred to multiple coworkers ganging up on one person, whereas bullying referred to a one on one situation)).

²⁷ Calvin, *supra* note 22, at 170. The International Labour Organization is a United Nations agency that is responsible for drawing up and overseeing international labor standards. *Id.* at 170 n.22.

²⁸ LORALEIGH KEASHLY & JOEL H. NEUMAN, *Workplace Bullying: Persistent Patterns of Workplace Aggression*, ST. UNIV. OF N.Y. AT NEW PALTZ, <http://perma.cc/7BQ-ZY3L> (last visited Feb. 23, 2014). Professor Loreleigh Keashly, Wayne State University, and Professor Joehl H. Newman, SUNY-New Paltz, are scholars on work abuse and workplace aggression who have published various articles on the topic. See *id.*

²⁹ David C. Yamada, *The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 481–82 (1999) (citing Loreleigh Keashly, *Emotional Abuse in the Workplace: Conceptual and Empirical Issues*, 1 J. EMOTIONAL ABUSE 85, 97–98 (2008)).

giving the silent treatment; intimidating physical gestures (i.e., finger pointing); and the slamming or throwing of objects at or in close range of the target.³⁰ Workplace bullying may also take the form of false rumors about the target, breaching the target's confidentiality, making unreasonable work demands, withholding needed information, and taking undeserved credit for the target's work product.³¹

While instances and examples of workplace bullying appear rather obvious, the causes behind workplace bullying are less overt. According to David C. Yamada, workplace bullying results from a combination of factors: growth of the service sector economy; global profit squeeze; decline of unionization; diversification of the workforce; and increased reliance on contingent workers.³² Yamada also finds that the globalization of the economy contributes to workplace bullying by creating more stressful work environments in companies whose singular focus is cutting costs while providing superior goods and services.³³

In the American workplace, bullying is the natural result of modern day economic pressures and the growth of the service sector industry.³⁴ Workplace bullying may be getting worse due to the poor economy.³⁵ Further, as service sector work involves significant face-to-face or voice-to-voice interaction, it is susceptible to personality clashes, which afford potential workplace bullies greater opportunities for mistreatment.³⁶ Increased diversity in the workforce is also a significant factor behind workplace bullying.³⁷

B. *Workplace Bullying Demographics*

Workplace bullying affects a startling percentage of American workers.

- Bullying is four times more prevalent than other illegal forms of "harassment."
- 37% of American workers, an estimated 54 million people, have been bullied at work.
- 49% of American workers, 71.5 million workers, are affected when witnesses are included.

³⁰ *Id.*

³¹ *Id.* at 482.

³² *Id.* at 486–91.

³³ *Id.* at 487.

³⁴ *Id.*

³⁵ Cohen, *supra* note 5.

³⁶ Yamada, *supra* note 29, at 487.

³⁷ *Id.* at 489–90.

- 58% of all perpetrators are women. 81% of female bullies, and 71% of men, target women.³⁸
- Targets of workplace bullying are “predominantly 40-ish, educated and veteran employees,” and “cannot be called thin-skinned,” as “they stay for a long time working under conditions rational people would consider intolerable.”³⁹

As many scholars and statistics assert, workplace bullying is in fact “an epidemic in the American workplace.”⁴⁰ Workplace bullying is four times more prevalent than discrimination based on sex, race, religion, sexual orientation, age, disabilities, and veteran status.⁴¹ The majority of those victimized by this form of harassment are not members of a federally recognized or protected group.⁴² Title VII of the Civil Rights Act of 1964 identifies race, color, national origin, religion, and sex as protected classes.⁴³

Available statistical information posits staggering numbers. A 2007 online survey conducted by the Workplace Bullying Institute (“WBI”) estimated that 37% of American workers have been bullied at work.⁴⁴ A more current 2010 Zogby International poll found that 54 million, or 35%, of American workers have experienced workplace bullying firsthand.⁴⁵ Twelve to fifteen percent of American workers have witnessed workplace bullying in their place of business.⁴⁶

According to a 2010 survey conducted by the WBI, 8.8% of employees

³⁸ THE PERMANENT COMM’N ON THE STATUS OF WOMEN, *Testimony of The Permanent Commission on the Status of Women Before the Labor and Public Employees Committee* (Mar. 8, 2012), available at <http://perma.cc/S99D-RM5H>. The Permanent Commission on the Status of Women compiled the following statistical information justifying their support of passage of S.B. 154, showing the importance of addressing workplace bullying. *Id.*

³⁹ Gary Namie, *2003 Report on Abusive Workplaces*, THE WORKPLACE BULLYING INST. 3 (Oct. 2003), <http://perma.cc/6U8W-2LDT>.

⁴⁰ Calvin, *supra* note 22, at 173.

⁴¹ *Id.*

⁴² *Id.* at 180.

⁴³ See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006).

⁴⁴ Donald E. Sanders, Patricia Pattison & Jon D. Bible, *Legislating “Nice”: Analysis and Assessment of Proposed Workplace Bullying Prohibitions*, 22 SOUTHERN L.J. 1, 2 (2012). The WBI surveyed 7,740 employees online. As of 2007, the American workforce is estimated to comprise of approximately fifty-four million people. *Id.* A 2008 survey conducted by the Society for Human Resource Management and the Ethics Resource Center in Arlington, Virginia found that 57% of 513 participants confirmed they witnessed abusive or intimidating behavior toward employees. *Id.*

⁴⁵ Calvin, *supra* note 22, at 171; *Results of the 2010 WBI U.S. Workplace Bullying Survey*, WORKPLACE BULLYING INSTITUTE, <http://perma.cc/UH8B-HEJM> (last visited Mar. 30, 2012).

⁴⁶ *Id.*; Vijay Nair, President, Conn. State Univ. Amer. Ass’n of Univ. Professors, Written Testimony in Support of S.B. 154 (Mar. 8, 2012), available at <http://perma.cc/CUF2-C2CA>

between the ages of eighteen and sixty-five claim to have been bullied.⁴⁷ Taking into account the years of service of bullied targets, academics surmise that those bullied may very well comprise employers' most valuable and knowledgeable employees.⁴⁸ Further, bullying behavior is not limited to interactions between colleagues of equal standing. Bullies can come in the form of a boss or superior. In 2007, the Employment Law Alliance reported nearly 44% of 1,000 surveyed employees have worked for an abusive boss.⁴⁹

C. *The Detrimental Impact of Workplace Bullying*

1. *A Disincentivized and Unhealthy Workforce*

The numerous surveys and reports conducted in the past decade collectively demonstrate that the effects of workplace bullying are profound and widespread. On the whole, approximately one-third to one-half of surveyed American workers have experienced workplace bullying.⁵⁰

As documented by studies and surveys in support of New York workplace bullying legislation, between 16 and 21% of employees experience workplace bullying, abuse, and harassment.⁵¹ According to a 2007 online survey, fifty-four million, or 35%, of American workers are predicted to experience workplace bullying firsthand.⁵² An additional survey conducted by Zogby International and the Workplace Bullying Institute found that 45% of the Americans who have experienced workplace bullying reported stress-related health problems, namely, panic attacks and depression.⁵³

Common physical side-effects from workplace bullying include stress headaches, high blood pressure, impaired immune systems, and digestive

⁴⁷ *The WBI Workplace Bullying Survey 2010*, WORKPLACE BULLYING INSTITUTE, available at <http://perma.cc/LU59-KWS4>

⁴⁸ Christopher S. Simon & Denise B. Simon, Esq., *Bully for You: Full Steam Ahead: How Pennsylvania Employment Law Permits Bullying in the Workplace*, 16 WIDENER L.J. 141, 149 (2006).

⁴⁹ Tuna, *supra* note 3. The Employment Law Alliance is an association of 3,000 employment lawyers. *Id.*

⁵⁰ Sanders, *supra* note 44, at 2.

⁵¹ Calvin, *supra* note 22, at 171 (citing TERESA A. DANIEL, STOP BULLYING AT WORK: STRATEGIES AND TOOLS FOR HR AND LEGAL PROFESSIONALS 41 (2009) (reporting results from a 2007 U.S. Workplace Bullying Survey: 57% of those employees were targeted for bullying are female; female bullies target other females in 71% of reported cases, 55% of targets were "rank-and-file" employee; 45% suffer stress-related problems; 40% never complain or report the abuse; 24% of the targets were terminated; 40% voluntarily left the organization; 4% complain to state or federal agencies; and only 3% file a lawsuit).

⁵² Sanders, *supra* note 44, at 2.

⁵³ Sanders, *supra* note 44, at 2.

problems.⁵⁴ Some specific examples are: severe anxiety, depression, post-traumatic stress disorder, reduced immunity to infection, stress-related gastrointestinal disorders, hypertension, pathophysiologic changes, and other such conditions.⁵⁵ Common psychological side-effects include stress, mood swings, depression, loss of sleep, fatigue, as well as deep feelings of shame, embarrassment, guilt, and low self-esteem.⁵⁶

Targets can also suffer further economic harm through termination, demotion or denial of promotion.⁵⁷ In 70% of cases, targets are fired or forced to resign.⁵⁸ Fearing possible retaliation—as occurs in 52% of cases—victims often suffer in silence.⁵⁹ Even when targets take action with their employer, a remedy is not guaranteed. Of the roughly 42% of bullied employees who file complaints with their employer, 60% of such complaints are ignored.⁶⁰

2. *The Impact of Increased Absenteeism and Decreased Productivity on Employers' Bottom Line*

According to recent studies, this issue has nation-wide effects on small and large businesses alike.⁶¹ Specifically, this issue has been reported to cost anywhere between \$30,000 to \$100,000 annually per bullied individual.⁶²

On the whole, workplace bullying costs businesses high rates of employee absences, health problems, and turnover.⁶³ According to a 2003 report, employers lose otherwise productive employees if they do not address workplace bullying behavior.⁶⁴ The specific findings of the 2003 survey found:

- 37% of targets were fired or involuntarily terminated.
- 33% of targets quit, typically taking some form of constructive discharge.
- 17% of targets transferred to another position within the same employer.

⁵⁴ Yamada, *supra* note 12, at 480.

⁵⁵ *Id.* at 517.

⁵⁶ *Id.* at 480.

⁵⁷ *Id.* at 519.

⁵⁸ Nair, *supra* note 46, 1.

⁵⁹ *Id.*

⁶⁰ *Id.* at 2.

⁶¹ Calvin, *supra* note 24, at 168.

⁶² *Id.* at 169.

⁶³ Simon & Simon, *supra* note 48, at 148.

⁶⁴ See Namie, *supra* note 39, at 3.

- Once targeted, bullied individuals faced a 70% chance of losing their job.⁶⁵

The findings of a 2002 study concluded that employee harassment accounts for \$180 million in lost time and productivity over a two-year span.⁶⁶ Estimates from 2007 suggest employee absenteeism has increased due to workplace bullying, costing the United States roughly \$74 billion annually.⁶⁷ Direct costs of workplace bullying include increased medical costs from stress-related health problems, which can result in disability pay or a worker's compensation claim.⁶⁸ Indirect costs of workplace bullying include decreased quality of work, high turnover of employees, absenteeism, poor customer relationships, sabotage, and revenge as a result of the abusive relationship.⁶⁹ Reported "opportunity costs include lack of effort, commitments outside of the job, time spent talking about the problem, and loss of creativity."⁷⁰

On a national comparative scale, the United States seriously lags behind many other countries in addressing the dilemma presented by workplace bullying.⁷¹ In America, workplace bullying has been referred to as "the most neglected form of serious worker mistreatment in American Employment law,"⁷² and has been traced to American cultural values emphasizing "individuality, assertiveness, masculinity, achievement, and a relatively higher power disparity."⁷³

⁶⁵ *Id.*

⁶⁶ Liz Urbanski Farrell, *Workplace Bullying's High Cost: \$180M in Lost Time, Productivity*, ORLANDO BUS. J., Mar. 18, 2002, available at <http://perma.cc/SF8V-B59T>. The study included 9,000 federal employees reporting harassment. *Id.*

⁶⁷ Michelle Conlin, *Shirking Working: The War on Hooky*, BUS. WK., Nov. 11, 2007, at 72, available at ProQuest, Doc. No. 236779077.

⁶⁸ Yamada, *supra* note 12, at 480–81.

⁶⁹ *Id.* at 481.

⁷⁰ Calvin, *supra* note 24, at 174.

⁷¹ See Kerri Lynn Stone, *From Queen Bees and Wannabes to Worker Bees: Why Gender Considerations Should Inform the Emerging Law of Workplace Bullying*, 65 N.Y.U. ANN. SURV. AM. L. 35, 45–46 (2009).

Canada and several European countries have enacted anti-bullying legislation that contains no requirement that the victim be a member of a particular protected group. Instead, such legislation operates from the premise that workers possess an unassailable right to a certain amount of dignity in the workplace. In 1994, Sweden became the first nation to enact legislation against workplace bullying: the Victimization Work Ordinance. Quebec, Canada, was the first jurisdiction in North America to enact anti-bullying legislation in June of 2004: the Act Respecting Labour Standards.

Id.

⁷² David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL'Y J. 251, 253 (2010).

⁷³ William Mary Martin et al., *What Legal Protections Do Victims of Bullies in the Workplace Have?*, 14 J. WORKPLACE RTS. 143, 146 (2009).

D. Existing Legal Remedies and Potential Causes of Action

On both the state and federal level, existing legal remedies for victims of workplace bullying do not provide a uniform or comprehensive means for dealing with and controlling workplace bullying.⁷⁴ Approximately 80% of bullying targets are left without sufficient legal recourse.⁷⁵ Surprisingly, state and federal anti-discrimination laws are only implicated in 20% of workplace bullying cases.⁷⁶

State anti-discrimination laws are generally based off of the language of the federal act, Title VII. Generally, state and federal discrimination statutes are limited to providing relief only when the victim is a member of a protected class.⁷⁷ Also, the adverse action taken by the aggressor must have been taken based on the victim's membership in his or her protected class.⁷⁸ Bullying that cannot be connected to a target's status is not illegal or unlawful, even if the victim is a member of a protected class.⁷⁹ One scholar has found that more than 75% of bullying cases are not covered by Title VII.⁸⁰

The Occupational Safety and Health Act ("OSHA") was signed into law in 1970, with the purpose of assuring "every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."⁸¹ The impetus behind implementing the Act was Congress's determination that injuries in the workplace cost the American economy in the form of lost production, wage losses, medical expenses, and disability compensation benefits.⁸² While these effects mimic the effects workplace bullying has on the American economic system, OSHA was merely intended to deal with the physical hazards presented by the workplace, and only in the larger industrial sector.⁸³ In addition, the Act does not provide for a private right of action, but requires victims to rely on the agency for workplace protection.

Unfortunately, "[a]s OSHA currently stands, there is no such deterrent influencing employer response to the problem of workplace bullying and this—substantive, traditional regulation—is the building block for any

⁷⁴ Calvin, *supra* note 22, at 168.

⁷⁵ *Id.* at 180.

⁷⁶ See *Frequently Asked Questions about the Healthy Workplace Bill*, HEALTHY WORKPLACE BILL, available at <http://perma.cc/6HAT-UG2Y> (last visited Apr. 26, 2014).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Kaplan, *supra* note 26, at 157–58 (citing Yamada, *supra* note 29, at 503).

⁸⁰ See Sanders, *supra* note 45, at 8 (citing Jerry Carbo, *Strengthening the Healthy Workplace Act – Lessons from Title VII and IED Litigation and Stories of Target Experiences*, 14 J. WORKPLACE RTS. 97, 100 (2009)).

⁸¹ Yamada, *supra* note 29, at 521.

⁸² *Id.*

⁸³ *Id.*

progress in tackling workplace bullying.”⁸⁴ As a result, the courts have applied or relied on OSHA as a source for protecting bullied employees.⁸⁵

“The primary legal theory pursued against workplace bullying is the intentional infliction of emotional distress (“IIED”).”⁸⁶ IIED is defined as extreme and outrageous conduct that intentionally or recklessly causes severe emotional distress to another.⁸⁷ One found liable for IIED is liable for the emotional distress or physical harm caused by his or her actions.⁸⁸ The largest obstacle in proving the tort in a workplace context is that bullying behaviors are often subtle and far removed from extreme and outrageous conduct.⁸⁹ It follows, then, that IIED claims are largely unsuccessful, and the primary reason for their lack of success is that the standard for “extreme and outrageous conduct” is very high.⁹⁰ Liability will only be found “where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”⁹¹ Courts primarily disagree on whether conduct is “outrageous” or merely “highly offensive.”⁹²

In a March 2005 suit, *Doescher v. Raess*,⁹³ the Supreme Court of Indiana affirmed a jury’s decision ordering a heart surgeon to pay a former coworker \$325,000 for screaming and lunging at him while in the operating room. Although this particular case did not create a new legal claim in the state of Indiana, the decision has received national attention because the media has characterized it as a successful workplace bullying claim.⁹⁴ Some anti-bullying advocates believe this decision will help lead to the passage of anti-bullying legislation,⁹⁵ while other commentators find the *Raess* holding to be less significant.⁹⁶

Arguably, the limited number of instances where the elements of IIED

⁸⁴ Susan Harthill, *The Need for a Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act*, 78 U. CIN. L. REV. 1250, 1305 (2010).

⁸⁵ See Calvin, *supra* note 22, at 179.

⁸⁶ Mack, *supra* note 1, at 23.

⁸⁷ Restatement (Second) of Torts § 46(1) (1965).

⁸⁸ *Id.*

⁸⁹ Mack, *supra* note 1, at 23.

⁹⁰ Yamada, *supra* note 29, at 494–95.

⁹¹ RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

⁹² RESTATEMENT (THIRD) OF TORTS § 46 cmt. d (2005).

⁹³ *Doescher v. Raess*, 883 N.E.2d 790, 793–94 (Ind. 2008).

⁹⁴ Yamada, *supra* note 76, at 272 (citing Karen E. Klein, *Employers Can’t Ignore Workplace Bullies*, BUS. WK., May 7, 2008 <http://perma.cc/UB45-2YH6> (reporting that the decision “drew national attention as acknowledgment by the courts of workplace bullying both as a phenomenon and as legal terminology”).

⁹⁵ See Sarah Morris, *The Anti-Bullying Legislative Movement: Too Quick to Quash Common Law Remedies?*, 65 BENCH & B. MINN. 1, 23 (Nov. 2008), <http://perma.cc/DTV2-6ENY>.

⁹⁶ See Kaplan, *supra* note 26, at 168–70.

are met fails to provide sufficient relief to the many employees bullied in their workplaces. Thus, as advanced by scholars, legislators, and other advocates of anti-bullying workplace legislation, IIED is an inadequate legal remedy for the victims of workplace abuse and bullying.⁹⁷

In sum, it remains clear that protection under existing laws is lacking for bullied victims who are targeted for reasons other than their membership in a protected class. States, like Connecticut, are arguably the exception to the rule. As will be discussed later in this Note, Connecticut's expansive anti-discrimination statute provides greater shelter for victims of workplace bullying through its broadly defined protected classes.⁹⁸

III. THE MODEL HEALTHY WORKPLACE BILL⁹⁹

A. Key Provisions of the Healthy Workplace Bill

Developed by the predominant scholar in the area, David C. Yamada, the Healthy Workplace Bill is a model statute and a response to current actionable laws, aimed at addressing the issue of workplace bullying while attempting to minimize the impact on small businesses.¹⁰⁰ In key part, the Healthy Workplace Bill defines an abusive workplace environment as one where a defendant, acting with malice, subjects an employee to abusive conduct so severe as to cause tangible harm to said victimized employee.¹⁰¹ The reasonableness standard used to define an "abusive workplace environment" is notably modeled after the United States Supreme Court's discussions of a "hostile work environment" in *Harris v. Forklift Systems*.¹⁰²

Significantly, the Healthy Workplace Bill creates a baseline cause of action for severe cases of workplace bullying. The bill defines "tangible harm" as physical or psychological harm, imposes strict liability on employers, provides caps on remedies in certain circumstances, and

⁹⁷ See Timothy Glynn et al., EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 276 (2d ed. 2011).

⁹⁸ See discussion *infra* Part V.

⁹⁹ Originally drafted by David C. Yamada in 2003. See Yamada, *supra* note 12, at 517–21.

¹⁰⁰ *Id.* at 518.

¹⁰¹ *Id.* at 498.

¹⁰² Kaplan, *supra* note 26, at 160 (citing Yamada, *supra* note 12, at 499–500). In *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993), the United States Supreme Court created a two-part test to determine whether an employee has been subjected to a hostile work environment. This test requires that alleged conduct create "an environment that a reasonable person would find hostile or abusive," and the victim must "subjectively perceive the environment to be abusive." *Id.* at 21. This standard was an attempt by the Court to establish a way for legal action to be taken before behavior causes psychological harm, but without opening employers up to lawsuits for "merely offensive" conduct. Kaplan, *supra* note 26, at 158 (citing *Harris*, 510 U.S. at 21–22).

includes anti-retaliation measures to protect employees.¹⁰³ In total, the bill seeks to promote prevention, compensation, and discouragement of frivolous and marginal claims of workplace bullying.¹⁰⁴

Yamada categorizes protections against workplace bullying in his model bill as “status-blind hostile work environment protection.”¹⁰⁵ He further proposes that when workplace bullying is sufficiently abusive, an employer should not be shielded from liability if such abusive conduct is inflicted without discernible correlation to race, sex, or national origin.¹⁰⁶ Yamada consistently argues that the law should provide a baseline for minimal dignity in the workplace regardless of one’s status in relation to a protected class.¹⁰⁷ Such a baseline is intended to exist in tandem with additional protections which might exist for those persons bullied on the basis of their race, sex, or national origin.¹⁰⁸

1. A Primary Cause of Action

The Healthy Workplace Bill is the direct result of Yamada’s desire to provide a cause of action for severe bullying.¹⁰⁹ Yamada’s Healthy Workplace Bill would make it an unlawful employment practice to subject an employee to an abusive work environment.¹¹⁰ Yamada’s bill critically defines abusive conduct as:

Conduct that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interest. 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

¹⁰³ Kaplan, *supra* note 26, at 160 n.179 (citing Yamada, *supra* note 12, at 500–01).

¹⁰⁴ See Yamada, *supra* note 12, at 498.

¹⁰⁵ Yamada, *supra* note 29, at 523.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See Yamada, *supra* note 12, at 498.

¹¹⁰ See *id.* (“It shall be an unlawful employment practice under this Chapter to subject an employee to an abusive work environment as defined by this Chapter.”); see also Nancy Hatch Woodward, *Sending Bullies To The Toolshed: Some Laws Apply, But Not Many*, 23 NO. 7 EMP. ALERT 2 (Mar. 30, 2006).

especially severe and egregious act may meet this standard. Conduct is defined to include all forms of behavior, including acts and omissions of acts.¹¹¹

According to Yamada, the bill's reasonable person standard is intended to be distinguishable from the extreme and outrageous standard typically entailing an IIED cause of action.¹¹² Further, the bill's provided cause of action and lengthy definition of abusive conduct, requiring tangible harm¹¹³ and malice,¹¹⁴ is intended to deter weak or frivolous suits while simultaneously incorporating elements of both tort and hostile work environment doctrine.¹¹⁵

It is significant that the Healthy Workplace Bill is enforceable "solely by a private right of action"¹¹⁶ that "must be commenced no later than one year after the last act that comprises the alleged unlawful employment practice."¹¹⁷ This requires plaintiffs to file their claims directly in a state trial court.¹¹⁸ Yamada makes clear his bill does not contemplate the creation or involvement of a state administrative agency for adjudicating or deciding claims.¹¹⁹

2. Employer Strict Liability Standard and Affirmative Defenses

The Healthy Workplace Bill goes to lengths to hold employers responsible for their employees' actions. The bill broadly holds employers vicariously liable for any actionable unlawful employment practices committed by employees.¹²⁰ Such broad liability is allegedly balanced with safeguards. While making the employer vicariously liable for a

¹¹¹ Yamada, *supra* note 12, at 498–99.

¹¹² Calvin, *supra* note 22, at 182.

¹¹³ Tangible harms amount to either psychological or physical harm. Psychological harm is defined by Yamada as "the material impairment of a person's mental health, as documented by a competent psychologist, psychiatrist, or supported by competent expert evidence at trial." Yamada, *supra* note 12, at 500. Yamada defines physical harm as "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." *Id.*

¹¹⁴ 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. *Id.* at 501.

¹¹⁵ *Id.* at 501.

¹¹⁶ *Id.* at 504–05.

¹¹⁷ *Id.* at 521.

¹¹⁸ Yamada, *supra* note 12, at 505.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 501.

bullying violation by one of its employees, the bill does offer employers certain affirmative defenses.¹²¹

Affirmative defenses are available for an employer in the following circumstances: (1) the employer exercised reasonable care to prevent and promptly correct any actionable behavior; (2) the complainant employee unreasonably failed to take advantage of appropriate preventative or corrective opportunities provided by the employer; (3) 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 (4) the complaint is grounded primarily upon a defendant's reasonable investigation of potentially illegal or unethical activity.¹²²

According to Yamada and other scholars, these available affirmative defenses limit the circumstances whereby an employer will be held liable.¹²³ Allegedly, they serve as a means to protect employers against weak and frivolous litigation.¹²⁴ These affirmative defenses also encourage employers to take comprehensive, preventative, and responsive measures to correct any abusive behavior that may exist in their workplaces.¹²⁵

3. *Forms of Damages*

Under the Healthy Workplace Bill, where an unlawful employment practice does not result in a negative employment decision for the victim, liability for emotional distress suffered by the victim is capped at \$25,000 and punitive damages are unavailable.¹²⁶ The Healthy Workplace Bill specifically provides courts the ability to: (1) enjoin a defendant from engaging in the alleged unlawful employment practices; (2) reinstate the targeted employee; (3) remove the bully from the complainant's work environment; or (4) require the employer to compensate the victim for back pay, front pay, medical expenses, emotional distress, punitive damages, and attorney's fees.¹²⁷ Lastly, a bullying target retains the opportunity to forego bringing an action under the enacting Healthy Workplace Bill statute, in order to accept workers' compensation benefits.¹²⁸

Effectively, the bill seeks to provide a bullying target with a choice,¹²⁹

¹²¹ *Id.* at 501–02.

¹²² *Id.* at 501–02, 506.

¹²³ *Id.* at 503.

¹²⁴ Yamada, *supra* note 12, at 506.

¹²⁵ *Id.*

¹²⁶ *Id.* at 520–21.

¹²⁷ *Id.* at 520.

¹²⁸ *Id.* at 506–07.

¹²⁹ *Id.* at 507.

while simultaneously precluding the possibility of unjust enrichment by prohibiting double-relief through an anti-bullying statute and worker's compensation.¹³⁰

4. *Anti-Retaliation Protection*

The Healthy Workplace Bill would also make it unlawful for employers to retaliate against an employee who has made a charge or been a part of an investigation.¹³¹ The bill provides in relevant part:

It shall be an unlawful employment practice under this Chapter to retaliate in any manner against an employee because she has opposed any unlawful employment practice under this Chapter, or because she has made a charge, testified, assisted, or participated in any manner in an investigation or proceeding under this Chapter, including, but not limited to, internal complaints and proceedings, arbitration and mediation proceedings, and legal actions.¹³²

Yamada identifies the above language as “standard anti-retaliation language, drawn from federal employment discrimination statutes.”¹³³

B. *General Reactions and Legal Responses to the Healthy Workplace Bill*

1. *Proponents' Arguments for Changing Attitudes and Growing Advocacy*

Traditionally, American harassment law focuses on a victim's status or lack of status in a constitutionally protected class.¹³⁴ Proponents of reform argue that so long as an alleged bully can demonstrate his or her actions were not status-based, Title VII and similar statutes fail to provide protection for bullied employees.¹³⁵

A 2007 survey found that a staggering 64% of American workers believe employees should have a right to sue their employers for workplace abuse, harassment, and humiliation.¹³⁶ Professor Yamada has

¹³⁰ Yamada, *supra* note 12, at 507.

¹³¹ *Id.* at 505.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See Title VII of the Civil Rights Act of 1964, U.S.C. § 2000e-2 (2006) (including race, color, national origin, religion, and sex as protected classes); Coleman, *supra* note 29, at 248–49.

¹³⁵ See Yamada, *supra* note 29, at 509–15.

¹³⁶ Press Release, Employment Law Alliance, New Employment Law Alliance Poll (Mar. 21, 2007) available at <http://www.gpmlaw.com/news/press-release-detail.aspx?id=31116> (Nearly 45% of

identified four necessary policy goals reachable by the passage of the Healthy Workplace Bill, or any legal response to workplace bullying:

- (1) Prevention – the law should encourage employers to use preventative measures to reduce the likelihood of bullying, such action will benefit workers and employers and in turn reduce litigation;
- (2) Self-help – the law should protect workers who resort to self-help measures if bullying occurs and provide incentives to employers who respond promptly and effectively when informed of incidents of bullying;
- (3) Relief, compensation, and restoration – the legal system should provide relief to bullying targets if self-help measures are inadequate and enable the target to return to the job assured that the bully has been reformed or removed; and
- (4) Punishment – bullies and employers who put bullies in positions in which they can facilitate abuse of their co-workers, should be subject to punitive measures so as to deter future misconduct.¹³⁷

Many proponents of anti-bullying legislation also emphasize the cost of bullying on the workforce and its attendant loss of efficiency, absenteeism, and health cost.¹³⁸

2. Criticisms of and Arguments Against the Healthy Workplace Bill

A substantial portion of the United States' business community continues in its staunch opposition to the Healthy Workplace Bill and any related legislation. To date, neither the federal government nor any state governments have passed legislation adopting any form of the Healthy Workplace Bill.¹³⁹ The chief concerns amongst the business community include the default rule of at-will employment, the intrusion into private ordering and business decisions, and the potential for frivolous litigation.¹⁴⁰ Opponents further argue there are already federal and state laws that

U.S. workers say they have worked for an abusive boss; 64% say bullied workers should be able to fight back in court). Permalink??

¹³⁷ Yamada, *supra* note 29, at 492–93.

¹³⁸ See Sanders, *supra* note 44, at 35.

¹³⁹ See *id.* at 14.

¹⁴⁰ Scott H. Greenfield, *Bad Bosses Meet Teacups (Update)*, SIMPLE JUSTICE (May 29, 2010, 5:16 AM), available at <http://blog.simplejustice.us/2010/05/29/bad-bosses-meet-teacups-update/>. Permalink??

protect against sexual harassment and discrimination.¹⁴¹

The U.S. Chamber of Commerce has argued the bill is far too subjective to be tenable legislation, employers do not need more regulation to comply with, implementation of the bill will be too costly, and the bill will further stifle, if not kill, job activity.¹⁴² Opponents on the side of the U.S. Chamber of Commerce consistently suggest mere economic incentives will be sufficient inducements for companies to take independent steps to correct and prevent workplace bullying.¹⁴³ Another argument against workplace bullying legislation is grounded in a defense of competition and the free market. Specifically, management-side employment lawyers have expressed that “tension created by competition” fuels productivity at work, and the Healthy Workplace Bill “would not only inhibit productivity and employers’ freedom to hire and fire at-will employees, but moreover, it would chill critical workplace communication.”¹⁴⁴

In view of opposition discussion regarding the Healthy Workplace Bill, a significant portion of opposition appears to stem from the belief that anti-bullying legislation dismisses the American standard of at-will employment.¹⁴⁵ A commonly held belief is that while the Healthy Workplace Bill does not directly establish the necessity of showing cause for employee sanction or dismissal, its structure will inevitably result in *de facto* incorporation of for-cause action justifications in employment decisions. Such is reinforced by the Healthy Workplace Bill’s own provisions, in which its affirmative defenses are based on an employer’s evaluation of an employee’s poor performance and reliance on a reasonable performance review.¹⁴⁶

Another potential danger, even recognized by Professor Yamada, is the possibility of a deluge of frivolous litigation. While Yamada is quick to qualify such recognition with the expectation that a lower probability of success will be an effective deterrent for illegitimate claims,¹⁴⁷ other scholars question the Healthy Workplace Bill’s ability to deter frivolous litigation. Three Texas law professors succinctly surmise that the Healthy Workplace Bill will affect waves of litigation and resultant costs that small businesses will be unable to bare:

¹⁴¹ Calvin, *supra* note 22, at 189.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Yamada, *supra* note 72, at 270 (quoting Timothy P. Van Dyck & Patricia M. Mullen, *Picking The Wrong Fight: Legislation That Needs Bullying*, EDWARDS WILDMAN, <http://www.edwardswildman.com/insights/PublicationDetail.aspx?publication=1957> (last visited Feb. 23, 2013)). Permalink??

¹⁴⁵ See Sanders, *supra* note 44, at 25.

¹⁴⁶ Healthy Workplace Bill § 6 (a)-(b). See Yamada, *supra* note 12, at 520.

¹⁴⁷ Yamada, *supra* note 72, at 269.

Were disincentive[s] for marginal or frivolous suits included, such [as] an assessment of fees and expenses or sanctions for groundless suits, perhaps the palatability of the HWB would be greater to the business community. And unlike more familiar class[-]based actions which require some minimum number of employees, the HWB will apply to all employers, irrespective of size. While the literature typically discusses the ability of companies and human resource departments to counter the HWB with planning and policies, the small business person will not likely have that advantage and will be the least able to absorb such heavy litigation costs.¹⁴⁸

It follows that critics of Yamada's model Healthy Workplace Bill may be well-grounded in their hesitation to support such anti-bullying legislation. When weighing business interests on the one hand, against those of employees on the other hand, one can see why state legislatures cannot easily sacrifice the interests of one group against those of the other. Arguably, creating additional legal remedies for employees might come at the cost of diminishing the sustainability of businesses and employers.

IV. CONNECTICUT'S REACTION TO WORKPLACE BULLYING AND ITS LEGISLATIVE RESPONSE TO THE HEALTHY WORKPLACE BILL

A. *Summary of Statewide Attitudes Toward the Healthy Workplace Bill*

[W]orkplace bullying [is a] devastating, epidemic, and ubiquitous problem . . . Now is the time to commit ourselves, as citizens of Connecticut, to creating and maintaining the healthiest workplaces we can . . . Over the six years I have been an anti-workplace bullying advocate I have heard [hundreds of] outrageous stories. Workers are humiliated for necessary bathroom break[s], for having cancer, for being pregnant.¹⁴⁹

According to 2007 and 2010 studies, 35 to 37% of the American

¹⁴⁸ Sanders, *supra* note 44, at 27.

¹⁴⁹ Katherine Hermes, J.D., Ph.D., Volunteer Co-coordinator for Connecticut Healthy Workplace Advocates, Written Testimony in Support of S.B. 154 (Mar. 8, 2012), *available at*, <http://cga.ct.gov/2012/LABdata/Tmy/2012SB-00154-R000308-Katherine%20Hermes-TMY.pdf>.
Permalink??

workforce has been bullied at work.¹⁵⁰ An estimated 4,000 employees are targets and afraid of retaliation.¹⁵¹ Unlike protected class harassment and hostile environment claims, targets of bullying have no law to protect them, and many work in companies without workplace abuse policies.¹⁵²

In Connecticut, several lobbying groups have worked to garner support for the passage of the Healthy Workplace Bill. Several websites provide forums for aggrieved victims of workplace bullying to share their stories and encourage support for passage of necessary and timely anti-bullying legislation.¹⁵³ One particular website, *change.org*, provides an informative petition addressed to the Connecticut State Legislature. Written by Dr. Gary Namie, the electronic petition reads, in relevant part:

To:

Connecticut State Legislators

I just signed the following petition addressed to:
Connecticut State Legislators.

Pass the anti-bullying Healthy Workplace Bill

- Current laws do not address workplace bullying/abusive conduct
- 35% of adult Americans experience workplace bullying (WBI 2010 U.S. National Survey)
- Harm includes stress-related diseases (cardiovascular, immunological, gastrointestinal), plus anxiety, clinical depression and PTSD.
- Without laws, employers can legally ignore this abusive conduct, and do.

Please pass a state law that gives workers the right to sue their employer for subjecting them to an abusive, malicious, health harming workplace. Allow employers who prevent and correct it to be free from liability. Adopt the Healthy Workplace Bill.

Sincerely,

¹⁵⁰ *See id.* Studies conducted by the Workplace Bullying Institute in 2007 and 2010, with Zogby Research International.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ The Connecticut Healthy Workplace Advocates, an affiliate of the Workplace Bullying Institute (“WBI”) is one of the most popular websites and blogs for supporters and advocates of the Healthy Workplace Bill; *See generally* CONNECTICUT HEALTHY WORKPLACE ADVOCATES, <http://ctbullybusters.blogspot.com/> (last visited Apr. 16, 2014). Permalink??

[Your name]¹⁵⁴

To date, An Act Concerning State Employee and Violence and Abusive Conduct in the Workplace S.B. 154 (“S.B. 154”)¹⁵⁵ is arguably Connecticut’s most modern vestige of the Healthy Workplace Bill—the embodiment of an enduring and hotly contested nationwide lobbyist movement, calling on state legislators to end workplace bullying. In the following pages, this Note will explore the discrete legislative history of S.B. 154. Furthermore, this Note will posit that S.B. 154¹⁵⁶ is a timely piece of legislation, indicative of a highly controversial public policy tug-of-war between Connecticut labor and employees’ interests on the one hand, and business and employer interests on the other. In view of legislative resistance to passage of a version of Yamada’s Healthy Workplace Bill and a closer look at existing statutory remedies, this Note will conclude that legislation may not necessarily be the sole avenue for addressing the workplace bullying dilemma in the state of Connecticut. While S.B. 154 is a noble piece of legislation, it is not sufficiently comprehensive to affect tangible change in the workplace arena.

B. Most Significant Attempted Legislative Acts

1. The Healthy Workplace Bill S.B. 371: Introduced to the General Assembly in 2007

Proposed in 2007, Connecticut Senate Bill No. 371, An Act Concerning Workplace Safety (“S.B. 371”), was intended to provide a private cause of action for victims of workplace abuse and bullying.¹⁵⁷ Introduced by Senator Thomas Colapietro of the 31st District, the bill sought to memorialize the main provisions and language of David C. Yamada’s model Healthy Workplace Bill. S.B. 371 is in fact the embodiment of David C. Yamada’s Healthy Workplace Bill. The Statement of Purpose of Proposed S.B. 371 was, “[t]o end workplace bullying.”¹⁵⁸ Additionally, Connecticut Senate Bill No. 371 defined *abusive conduct*, abusive workplace, conduct, constructive discharge, employee, employer, *malice*, negative employment decision, physical

¹⁵⁴ Gary Namie, *Petition to Connecticut State Legislature: Pass the anti-bullying Healthy Workplace Bill*, CHANGE.ORG, http://www.change.org/petitions/connecticut-state-legislators-pass-the-anti-bullying-healthy-workplace-bill?utm_source=share_petition&utm_medium=url_share&utm_campaign=url_share_before_sign. Permalink??

¹⁵⁵ S.B. 154, 2010 Leg., Feb. Sess. (Conn. 2012).

¹⁵⁶ See discussion *infra*, p. 25.

¹⁵⁷ S.B. 371, 2007 Leg., Jan. Sess. (Conn. 2007).

¹⁵⁸ *Id.*

harm, and *psychological harm*.¹⁵⁹ The proposed bill mandated:

Sec. 2. (a) No person shall:

(1) Subject an employee to an abusive workplace, or
(2) *Retaliate* in any manner against an employee because such employee has made a charge that he or she has been subjected to an abusive work place under this section, or has testified, assisted or participated in any matter in an investigation or proceeding under this Sec. or Sec. 3 of this act, including, but not limited to, the employer's internal investigations or proceedings, arbitration and mediation proceedings and legal actions.

(b) An employer shall be in violation of this Sec. if such employer (1) subjects an employee to an abusive work environment, or (2) has knowledge that any person has subjected an employees of such employer to an abusive work environment and has failed to exercise *reasonable care* to prevent and promptly correct the abusive conduct.

(c) It is an *affirmative defense* to an action brought against an employer under this Sec. that:

(1) The employer exercised reasonable care to prevent and promptly correct the abusive conduct and the aggrieved employee unreasonably failed to take advantage of appropriate preventative or corrective opportunities provided by the employer. Such defense is not available when the abusive conduct culminates in a negative employment decision;

(2) The complaint is based on a negative employment decision that was made consistent with the employer's legitimate business interests, such as a termination or demotion based on an employee's poor performance; or

(3) The complaint is based on the employer's reasonable investigation of potentially illegal or unethical activity.

Sec. 3. (a) A violation of Sec. 2 of this act may be enforced solely by a *private right of action*. Such action shall be commenced *not later than one year* after the last act that comprises the alleged abusive conduct.

(b) Where a defendant has been found to have subjected an employee to an abusive workplace in violation of Sec. 2 of this act, *the court may enjoin the defendant* from engaging

¹⁵⁹ S.B. 60, 2008 Leg., Feb. Sess. (Conn. 2008) (emphasis added), available at <http://www.cga.ct.gov/2008/TOB/S/2008SB-00060-R00-SB.htm>. Permalink??

in the abusive conduct and may order any other relief that is deemed appropriate, including, but not limited to, reinstatement, removal of the offending person from the complainant's work environment, back pay, front pay, medical expenses, compensation for emotional distress, punitive damages and attorneys' fees.

Sec. 4. Nothing in Sec. 2 or 3 of this act shall be deemed to exempt or relieve any person from liability, duty, penalty or punishment provided by any other provision of the general statutes.¹⁶⁰

Under the act, employer retaliation is clearly prohibited.¹⁶¹ An employer would be held in violation whether she dispensed the abusive conduct, or had knowledge that an employee was subject to an abusive work environment and failed to exercise reasonable care to prevent and remediate the situation.¹⁶² The act also expressly provides for a private cause of action and explicitly denies any waiver of liability.¹⁶³

2. *S.B. 154 – Most Current Vestige of the Healthy Workplace Bill S.B. 371*

The most current vestige of the 2007 S.B. 371, Connecticut Senate Bill No. 154, An Act Concerning State Employee and Violence and Abusive Conduct in the Workplace ("S.B. 154"),¹⁶⁴ signifies the Connecticut Legislature's determined unwillingness to enact a status-blind statutory private cause of action for workplace bullying. Slightly modifying the Statement of Purpose of H.B. 5285, the Bill is intended, "[t]o require the Department of Administrative Services to report the number of complaints of abusive conduct in the workplace *between state employees* to the General Assembly."¹⁶⁵

A simple review of S.B. 154 reveals the bill's focus on and recognition of workplace bullying in the State of Connecticut. The text of S.B. 154 provides, in relevant part:

Be it enacted by the Senate and House of Representatives in General Assembly convened . . . Section 1 . . . (c) On or before January 1, 2013, and annually thereafter, *the Commissioner of Administrative Services shall submit a*

¹⁶⁰ *Id.* (emphasis added).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ S.B. 154, 2012 Leg., Feb. Sess. (Conn. 2012).

¹⁶⁵ *Id.* (emphasis added).

report . . . to the Governor and the joint standing committee of the General Assembly having cognizance of matters relating to public employees *summarizing the number of complaints of workplace violence or abusive conduct involving state employees* and the outcomes of such complaints for the preceding year. Such report shall include recommendations for administrative or legislative action related to such complaints. (d) For the purposes of subsection (c) of this section, (1) “*abusive conduct*” means *conduct or a single act of a state employee in the workplace that is performed with malice and is unrelated to the state’s legitimate interest that a reasonable person would find hostile or offensive considering the severity, nature and frequency of the conduct of the severity and egregiousness of the single act. Abusive conduct includes, but is not limited to, (A) repeated infliction of verbal abuse such as the use of derogatory remarks, insults and epithets; (B) verbal or physical conduct that a reasonable person would find threatening, intimidating or humiliating; or (C) sabotaging or undermining a person’s work performance;* and (2) “state employee” means all state agency personnel, but does not include contractors, subcontractors or vendors of the state. Section 2. . . . the Commissioner of Administrative Services, or the commissioner’s designee . . . shall, within existing budgetary resources, establish policies and procedures for preventing, reporting, evaluating and investigating complaints of abusive conduct occurring in the workplace between state employees.¹⁶⁶

A reading of the above-proposed statutory language offers further insight into the core substance of S.B. 154. Significantly, S.B. 154 calls upon the Commissioner of Administrative Services to report on the number of complaints of workplace violence reported by state employees. As well, S.B. 154 furnishes an explicit and refined definition of “abusive conduct.” In spite of its arguably narrow focus on state employees, the proposed definition of “abusive conduct,” and keeping in mind predecessor bills which have also faced the gamut of the Connecticut General Assembly, S.B. 154 is easily relevant in a broader employment context. In light of the serious nature of the chronic and harmful conduct described, the tone of

¹⁶⁶ *Id.* (emphasis added), available at cga.ct.gov/2012/TOB/S/2012SB-00154-R00-SB.htm. Permalink??

S.B. 154 confirms that it is derived from an earlier legislative proposal and is an integral and modern part of the Connecticut workplace bullying prevention lobbyist movement.

While S.B. 154 was a step made in the right direction, it remains a far cry from a comprehensive statute which would protect private and public employees alike. S.B. 154 is a gutted version of S.B. 371. It follows that the Connecticut legislatures' refusal to pass S.B. 154 is a clear indication that the Connecticut legislature is resistant to considering or enacting a preventative anti-workplace bullying statute.

C. *Less Significant Legislative Acts.*

The 2008 follow-up to the failed Connecticut Senate Bill No. 371, Connecticut Senate Bill No. 60, An Act Concerning Workplace Bullying in the Workplace ("S.B. 60"), aimed "[t]o provide a private right of action against bullying in the workplace."¹⁶⁷ It was a companion to its predecessor, continuing to advocate for protection of workplace bullying victims.

In contrast to earlier proposed legislation, Connecticut House Bill No. 6188, An Act Concerning *State Employees* and Violence and Bullying in the Workplace ("H.B. 6188"),¹⁶⁸ narrowed the subjects of the legislation from all employees to state employees. The Statement of Purpose provided, "[t]o codify the existing policies and procedures for state employees for handling violence in the workplace and add language concerning abusive conduct in the workplace."¹⁶⁹

In 2010, the House of Representatives introduced Connecticut House Bill No. 5285, An Act Concerning State Employees and Violence and Bullying in the Workplace ("H.B. 5285"),¹⁷⁰ as an alternative to the 2007 S.B. 371. The aim of the bill was "[t]o require that the Department of Administrative Services report the number of complaints of bullying or abusive conduct to the General Assembly."¹⁷¹

To date, neither of these acts have survived passage in the Connecticut General Assembly.

¹⁶⁷ S.B. 60, 2008 Leg., Jan. Sess. (Conn. 2008).

¹⁶⁸ H.B. 6188, 2009 Leg., Jan. Sess. (Conn. 2009) (emphasis added), available at <http://www.cga.ct.gov/2009/TOB/H/2009HB-06188-R00-HB.htm>. Permalink??

¹⁶⁹ *Id.*

¹⁷⁰ H.B. 5285, 2010 Leg., Feb. Sess. (Conn. 2010), available at <http://www.cga.ct.gov/2010/TOB/H/2010HB-05285-R00-HB.htm>.

¹⁷¹ *Id.*, available at <http://www.cga.ct.gov/2010/TOB/H/2010HB-05285-R00-HB.htm>. Permalink??

D. Reviewing the Anti-Workplace Bullying Lobbyist Movement

Arguably, a singular lobbying movement—advocating for workplace bullying prevention—has been instrumental in the support of S.B. 371 and S.B. 154. The same movement has also consistently thrown its support behind pushing for passage of less publicized bills S.B. 60, H.B. 6188, and H.B. 5285.

S.B. 371 and S.B. 154 are uniquely tied to one another. Both share support from the Connecticut AFL-CIO and the Permanent Commission on the Status of Women. Written testimony submitted in support of the Public Hearing held on S.B. 371 evidences the interconnectedness between S.B. 371 and S.B. 154. A close scrutiny of the written testimony documents reveals that S.B. 371 proponents are clearly pro-labor organizations, namely the Connecticut AFL-CIO and the Permanent Commission on the Status of Women.¹⁷² Meanwhile, the opposition against S.B. 371 is pro-business, namely, the Connecticut Business and Industry Association.¹⁷³ It follows that the proponents of S.B. 371 and S.B. 154 are one and the same.

In spite of their shared advocacy grounds, it is noteworthy that S.B. 371 and S.B. 154 are distinct in important regards. Namely, S.B. 154 is intentionally narrower in scope than its predecessor. Having learned from the earlier failure of S.B. 371, and in hope of avoiding opposition from private business, it stands to reason that the drafters of S.B. 154 consciously restricted the parameters of the bill to focus on protection of state employees so as to increase its odds of passing. Such tailored statutory language suggests the lobbying movement is attempting to adapt to Connecticut's pro-business political landscape. S.B. 154 is in fact, a *modern* limited vestige of Connecticut's Healthy Workplace Bill. Moreover, the short lives of S.B. 371 and S.B. 154 clearly convey that a legislative remedy for Connecticut's workplace bullying dilemma is not likely to be successful.

In view of the stunted success of either S.B. 371 and S.B. 154, it is evident the Connecticut General Assembly is at odds over the "need" for passage of an anti-bullying statute. The remaining sections in this Note will seek to understand and assess the General Assembly's resistance

¹⁷² See Written Testimony of Lori J. Pelletier, Secretary-Treasurer, Conn. AFL-CIO (Feb. 20, 2007), available at <http://cga.ct.gov/2007/LABdata/Tmy/2007SB-00371-R000220-CT%20AFL%20CIO-TMY.PDF>; written Testimony of Teresa C. Younger, Executive Director, The Permanent Commission on the Status of Women (Feb. 20, 2007), available at <http://cga.ct.gov/2007/LABdata/Tmy/2007SB-00371-R000220-Teresa%20Younger-TMY.PDF>. Permalink??

¹⁷³ See Written Testimony of Kia D. Floyd, Assistant Counsel, Lab. & Emp., Conn. Bus. & Indus. Ass'n (Feb. 20, 2007), available at <http://cga.ct.gov/2007/LABdata/Tmy/2007SB-00371-R000220-Kia%20Floyd%20-%20CBIA-TMY.PDF>. Permalink??

towards an anti-bullying statute.

V. A VIABLE CAUSE OF ACTION ENCOMPASSING WORKPLACE BULLYING IN CONNECTICUT

Currently, bullying in the workplace is only actionable under state and federal discrimination laws if it is directed at a protected characteristic.¹⁷⁴ Of existing legal theories and bases, one particular cause of action is best suited to provide legal redress for targets of workplace bullying—the Connecticut anti-discrimination statute.

A. Title VII & The Connecticut Anti-Discrimination Statute

Under Title VII of the Civil Rights Act of 1964, employers are prohibited from discriminating against employees in hiring, compensation, and terms of employment.¹⁷⁵ The Act further provides that employers shall not:

[L]imit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.¹⁷⁶

Title VII covers all private employers, state and local governments, and educational institutions that employ fifteen or more individuals.¹⁷⁷ It is significant that Title VII does not preempt state law.¹⁷⁸

In the case of Connecticut, Conn. Gen. Stat. § 46a-60a(1) (“the Human Rights statute”) is the state’s broader antidiscrimination statute, and it expands upon the coverage afforded under Title VII.¹⁷⁹ In relevant part, the statute provides:

¹⁷⁴ Fitzpatrick, *supra* note 21, at 2269.

¹⁷⁵ Robert T. Carter & Thomas D. Scheuermann, *Legal and Policy Standards For Addressing Workplace Racism: Employer Liability And Shared Responsibility For Race-Based Traumatic Stress*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 37 (2012).

¹⁷⁶ *Id.* (citing 42 U.S.C. § 2000e-2 (2006)).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Compare* Patino v. Birken Mfg. Co., 304 Conn. 679, 691–92 (2012) (holding that Conn. Gen. Stat § 46a-81c(1) (2007) permits hostile work environment claims where employees are subject to sexual orientation discrimination) *with* Britell v. Dept. of Correction, 247 Conn. 148, 164 (1998) (holding that the legislature intended to make the Human Rights statute coextensive with Title VII of the Civil Rights Act of 1964); Curry v. Allan S. Goodman, Inc., 286 Conn. 390, 407 (2008) (“Connecticut antidiscrimination statutes should be interpreted in accordance with federal antidiscrimination laws.”).

It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer's agent . . . to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in *terms, conditions or privileges of employment* because of the individual's race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disability, mental retardation, learning disability or physical disability.¹⁸⁰

Although modeled after Title VII,¹⁸¹ the Human Rights statute is far more expansive and intentionally extends broader protection than its federal counterpart.¹⁸² Under Title VII, discrimination is only prohibited on the basis of "race, color, religion, sex, or national origin."¹⁸³ Meanwhile, the Human Rights statute broadly prohibits discrimination based on "race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disability, mental retardation, learning disability or physical disability."¹⁸⁴

In *Patino v. Birken Manufacturing Co.*,¹⁸⁵ the Connecticut Supreme Court affirmed the statute:

[I]s itself undoubtedly more expansive than Title VII and thus, like § 46a-81c, was intended to extend broader protection than its federal counterpart . . . Hence, § 46a-60a(1) protects additional classes of individuals who are not entitled to protection under Title VII, but whom the legislature has nevertheless deemed deserving of such protection under state law.¹⁸⁶

Affirming that hostile work environment claims fall within the purview

¹⁸⁰ CONN. GEN. STAT. § 46a-60(a) (2011) (emphasis added).

¹⁸¹ See 42 U.S.C. § 2000e-2(a)(1) (2006).

¹⁸² *Patino*, 304 Conn. at 693.

¹⁸³ 42 U.S.C. § 2000e-2(a)(1) (2006).

¹⁸⁴ CONN. GEN. STAT. § 46a-60a(1) (2011).

¹⁸⁵ *Patino*, 304 Conn. 679 (2012).

¹⁸⁶ *Id.* at 693. Connecticut courts have allowed hostile work environment claims brought under the broader anti-discrimination statute Conn. Gen. Stat. § 46a-60a(1) for disability discrimination, race/national origin/ancestry discrimination, race discrimination. See respectively, *Rodriguez v. Triumph Actuation Systems-Connecticut, LLC*, Docket No. CV-11-6020397S, 2012 WL 432594 (Hartford Sup. Ct., January 20, 2012); *Tosado v. State*, Docket No. CV-03-0402149S, 2007 WL 969392 (Fairfield Sup. Ct., Mar. 15, 2007); and *Bramwell v. State*, Docket No. CV-97-0481200S, 2002 WL 725491 (New Britain Sup. Ct., Mar. 28, 2002).

of one of the state's narrower anti-discrimination statutes, the Connecticut Supreme Court ruled that Conn. Gen. Stat. § 46a-81c(1)¹⁸⁷ bars an employer from discriminating in *terms, conditions, or privileges of employment* because of an employee's sexual orientation.¹⁸⁸ Finding "terms, conditions or privileges of employment" is a well-settled term of art in anti-discrimination law under the Human Rights statute and an "expansive concept"¹⁸⁹ encompassing and authorizing hostile work environment claims, the court determined that the Connecticut legislature intended to create a cause of action for hostile work environment claims under Conn. Gen. Stat. § 46a-81c(1).¹⁹⁰ The Supreme Court even went so far as to hold, "we disagree with the defendant that the legislature must include such language in order to evince an intent to permit hostile work environment claims."¹⁹¹

It follows that where Title VII fails to adequately provide for broad enough "protected classes" to provide comprehensive protection for targets of workplace bullying, Connecticut's anti-discrimination statute is far more inclusive. Further, in view of cases with holdings like *Patino*, it stands to reason that legitimate targets of workplace bullying should be capable of bringing actions for hostile workplace environment claims under the above state anti-discrimination statutes.

VI. EXPLORING WHY THE HEALTHY WORKPLACE BILL OR ITS PROGENY ARE UNLIKELY TO BE ENACTED IN THE STATE OF CONNECTICUT

Although noble in its intentions, the Healthy Workplace Bill as it stands remains a costly and unrealistic solution to the workplace bullying phenomenon in Connecticut.

A. *Fear of Frivolous Lawsuits and Disparate Impact on Small Businesses*

Fear of increased and uncapped employer liability will likely hinder any efforts to enact the Healthy Workplace Bill as it stands. According to the Connecticut Chamber of Commerce, anti-bullying legislation will lead to frivolous lawsuits, because "bullying is any little bit of criticism that is a

¹⁸⁷ CONN. GEN. STAT. § 46a-81c(1) (2007) reads, "It shall be a discriminatory practice in violation of this section: (1) For an employer, by himself or his agent . . . to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against him in compensation or in *terms, conditions or privileges of employment* because of the individual's sexual orientation or civil union status . . ." *Patino v. Birken Mfg. Co.*, 304 Conn. 679, 688 (2012) (emphasis added).

¹⁸⁸ *Patino*, 304 Conn. at 682.

¹⁸⁹ *Id.* at 686.

¹⁹⁰ *Id.* at 692.

¹⁹¹ *Id.* at 695.

little too big for an employee's tastes."¹⁹² As astutely stated by a group of Texas professors, "[w]ere disincentive for marginal or frivolous suits included, such as assessment of fees and expenses or sanctions for groundless suits, perhaps the palpability of the HWB would be greater to the business community."¹⁹³ In this regard, the Healthy Workplace Bill would potentially be amenable and feasible for small businesses if its current broad application to all employers, irrespective of size, were narrowed.¹⁹⁴ The same is true of the palpability of the Healthy Workplace Bill in the state of Connecticut. Any potential future legislation would be wise to be wary of small businesses who will be the least able to absorb heavy litigation costs.¹⁹⁵

B. Resistance to Challenging the At-Will Employment Doctrine and Straining the Employer-Employee Relationship

To quote the joint conclusion of several scholars, "[i]t is almost assured that at some point the HWB in some form will find legislative favor."¹⁹⁶ However, such a legislative response to bullying "has to recognize the concern of business that any such legislation may all but eliminate the at-will doctrine, especially given unfettered retaliation provisions, or create such a vague system that a constant paper trail of employment justifications will be necessary."¹⁹⁷ In the case of Connecticut, such concerns will likely contribute to constraining the success of Yamada's model Healthy Workplace Bill.

Lack of collaborative input between employers and employees alike will also strain the possibility of passage of the present Healthy Workplace Bill in Connecticut. Several scholars recommend that a policy outlawing workplace bullying should be created by a collaborative effort. They put forth that employers and employees will have greater commitment to a policy they both shaped. Such scholars also take issue with the ambiguity and open-endedness of Yamada's Healthy Workplace Bill. They suggest that additional provisions to protect the employer-employee relationship might include, "a statement of zero tolerance, a clear definition of bullying with illustrative examples, training, effective grievance channels that might include . . . mediation and hotlines."¹⁹⁸

¹⁹² M. Neil Browne & Mary Allison Smith, *Mobbing In The Workplace: The Latest Illustration of Pervasive Individualism In American Law*, 12 EMP. RTS. & EMP. POL'Y J. 131, 151 (2008).

¹⁹³ Sanders, *supra* note 44, at 27.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 35.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 31 (citing William C. Martucci & Katherine R. Sinatra, *Antibullying Legislation – A Growing National Trend in the New Workplace*, 2 EMP. REL. TODAY 77, 82 (2009)); Anthony J.

C. Connecticut Lacks the Resources to Adjudicate An Anticipated Influx of Workplace Discrimination Suits

From a purely logistical and economic standpoint, Connecticut arguably lacks the resources to adjudicate the influx of workplace discrimination suits that would result from passage of the Healthy Workplace Bill. Potential passage of the Healthy Workplace Bill or its likeness would unquestionably lead to a deluge of complaints seeking to benefit from the lowered “reasonable” standard.¹⁹⁹

D. Connecticut’s Anti-Discrimination Statute(s) Viewed As Adequate Vehicles for Compensating Legitimate Victims

Finally, in view of the existing progressive anti-discrimination statute(s) discussed above, Connecticut legislators have and will likely continue to view passage of an anti-workplace bullying statute like the Healthy Workplace Bill as superfluous. Contrary to other states, Connecticut’s employment law provides sufficiently inclusive legal remedies for targets of workplace bullying, including Conn. Gen. Stat. § 46a-60a(1) and Conn. Gen. Stat. § 46a-81c(1) discussed above

VII. VIABLE ALTERNATIVES TO THE HEALTHY WORKPLACE BILL IN CONNECTICUT

A. Shift Away From Judicial Adjudication of Disputes: Provide for Administrative Agency Review of Workplace Bullying Claims

On the federal level, less than 5% of all discrimination plaintiffs will ever achieve any form of litigated relief.²⁰⁰ In sharp contrast, success on motions to dismiss or summary judgment are extremely common in discrimination litigation, accounting for 86% of litigated outcomes.²⁰¹

In view of the operating and budgetary constraints of the Attorney General’s Office and the staggering numbers of discrimination actions deemed meritless, perhaps courts are not the best avenue for legal redress for workplace bullying and discrimination complaints. Turning to Conn. Gen. Stat. § 46a-82(e), the state law seemingly already provides targets of workplace bullying with the option of seeking administrative agency relief. Under this statute, “[a]ny employer whose employees, or any of them,

Wheeler et al., *Eating Their Cake and Everyone Else’s Cake, Too: Resources as the Main Ingredient to Workplace Bullying*, 53 BUS. HORIZONS 553, 558 (2010).

¹⁹⁹ Realistically, the state courts and Assistant Attorney Generals in charge of pursuing such actions would not be able to carry the additional and potentially less merit-worthy caseload.

²⁰⁰ Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1276 (2012).

²⁰¹ *Id.*

refuse or threaten to refuse to comply with the provisions of section 46a-60 or 46a-81c may file with the [Commission on Human Rights and Opportunities] a written complaint under oath asking for assistance by conciliation or other remedial action.²⁰² Moving forward, the Commission on Human Rights and Opportunities may provide a better forum for employers and employees alike to make claims.

B. Focus on Prevention: Require Private and Public Employers To Take Preventative Measures And Devise Procedures For Dispute Resolution

Employers should and must be encouraged to identify and address bullying preventatively. Employers must recognize their stake in stemming bullying's detrimental effect on the workplace, and should also be motivated by avoiding possible costly legal action that might ensue. As best surmised by practitioner John A. Mack, "[p]revention is the key to combating bullying, and accepting that bullying might be occurring even though you cannot see it is the first step in curbing it."²⁰³

1. Educate Employees on Healthy Workplace Behavior

Moving forward, Connecticut employers could provide mandatory meaningful seminars and workshops for all of its employees. According to a partner in a Los Angeles law firm, managers can benefit from learning how to give constructive criticism and provide evaluations of people's performances in an appropriate manner.²⁰⁴ Further, teaching managers how to effectively communicate with their employees is critical, as is teaching managers how to recognize signs of inappropriate behavior.²⁰⁵ In this vein, Connecticut employers could proactively address common situational issues that arise between employees, their co-workers, and more senior superiors. While education itself poses no guarantees, an informed workforce is arguably better than an uninformed workforce.

2. Establish and Enforce Healthy Workplace Standards

All in all, Connecticut companies must be tasked with taking bullying seriously.²⁰⁶ As articulated by a partner in a Chicago law office, companies can show they mean business by having 360-degree reviews and providing financial incentives to managers who treat their employees

²⁰² CONN. GEN. STAT. § 46a-82(e) (2011).

²⁰³ Mack, *supra* note 1, at 7.

²⁰⁴ Woodward, *supra* note 110, at 3 (quoting Helene Wasserman, a partner in the Los Angeles law office of Ford & Harrison, LLP).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 3.

well.²⁰⁷ He suggests that employers “[r]eward managers who have records of low attrition in their departments and who receive high evaluations for their co-workers . . . [y]ou can also inflict financial penalties—reduce bonuses or freeze salary adjustments—for those who continue to have problems.”²⁰⁸

Also, companies could provide several avenues for employees to report bullying behavior.²⁰⁹ This is especially necessary, as employees often cannot go to their direct supervisors, as they may be the source of bullying behavior. Employers could also go so far as to discipline, terminate, or move bullies to an area within the company where they do not supervise any employees.²¹⁰ In this vein, it follows that Connecticut employers may have better odds of retaining qualified employees by taking steps to ensure its employees have meaningful internal ways to communicate their concerns.

VIII. CONCLUSION

Every worker has a right to be treated with dignity, respect, and to work in a safe and healthy environment free of verbal and nonverbal abuse, intimidating body language, retaliation, and any form of hostility. In light of all developments surrounding the impact of workplace bullying, both state and private employers should identify and address bullying when it happens within their walls. State and private employers alike have much to gain, economically and socially, by curbing the negative productivity and health effects which directly result from a hostile work environment.

Unquestionably, the Healthy Workplace Bill or some iteration of it will pose short-term hurdles for employers and initially strain the employer-employee relationship. More likely than not, the Connecticut General Assembly will not enact anti-bullying workplace legislation as broadly worded as David C. Yamada’s Model Healthy Workplace Bill. It is probable that Connecticut’s sister states are more likely to sooner enact versions of a Healthy Workplace Bill.²¹¹ As it stands, Connecticut lacks

²⁰⁷ *Id.* (quoting Andrew Boling, a partner in the Chicago law office of Baker & MacKensize Global Services, + LLC).

²⁰⁸ *Id.* at 3.

²⁰⁹ *Id.*

²¹⁰ Woodward, *supra* note 110, at 3.

²¹¹ Massachusetts and New York are well-positioned to enact their own versions of the Healthy Workplace Bill. The Massachusetts version of the Healthy Workplace Bill was referred to Joint Committee on Labor and Workforce Development. Massachusetts is one of few states to have held a public hearing on a version of the Healthy Workplace Bill. Said public hearing was held on HB 2310 on July 14, 2011. Calvin, *supra* note 22, at 186. Massachusetts is well suited to take legislative action on the Healthy Workplace Bill in 2013. See <http://healthyworkplacebill.org/blog/wwlp-22/>. Compared to other states, New York has made the most progress in its endeavors to pass workplace bullying legislation. The New York State Senate passed the Healthy Workplace Bill by a vote of 45-16 on May

the capacity and thus, will not elect to be one of the states on the forefront in support of the Healthy Workplace Bill. Additionally, for fear of challenging the at-will employment system, risking employer willingness to create job growth, and satisfaction with its expansive anti-discrimination statutes, Connecticut will likely avert enacting a status-blind statutory private cause of action for victims of workplace abuse and bullying. It follows that Connecticut's anti-discrimination statutes will remain the best vehicle for targets of workplace bullying to seek legal redress in the near future.

Moving forward, Connecticut's leaders—executive, legislative, and judicial—and its employers must continue to work in tandem to elevate the workplace environment. The state must strive to provide its citizens with a feasible course of preventative action by encouraging or requiring employers to follow stringent internal standards of conduct for all employees. The state must also strive to ensure compensation for legitimate victims of workplace bullying by reassuring victims that a forum does exist for their wrongfully suffered grievances. Simultaneously, employers must take affirmative action to prevent workplace bullying before it occurs—both to save money and to facilitate a healthier and more humane work environment.

12, 2010. While this bill stalled in the New York Assembly Labor Committee, a new version of the Healthy Workplace Bill, A 2458, was introduced in the New York Assembly on February 2, 2011. Shortly thereafter, a companion bill, S 4289 was introduced in the Senate and referred to the Labor Committee on March 28, 2011. As of March 2012, the Senate bill boasted seventeen sponsors and the Assembly bill seventy-five sponsors. Calvin, *supra* note 22, at 186-87.