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Workplace Mysteries:
Employment Law Under the Magnifying Glass
I. INTRODUCTION.

Harassment and abuse in the workplace is not a new phenomenon, but it wasn’t until recently that it was called “workplace bullying.” The term was originally popularized in the 1980s and early 1990s by BBC radio documentaries, and the husband-and-wife team of Dr. Gary and Dr. Ruth Namie have fought to make “workplace bullying” part of the American vocabulary. The Namies also founded the Workplace Bullying Institute (the “WBI”), which is the primary force behind legislation to make workplace bullying illegal.

The Namies’ and the WBI’s campaign against workplace bullying appears to be effective. Behavior once seen as “horseplay”—chasing and running into a 16-year-old employee with a vehicle, putting sanitary napkins in his lunch pail, and threatening to cut his hair—would today be characterized as workplace bullying. Mock v. Georgia Pacific Corp., 252 Or. 116, 118, 446 P.2d 125 (1968). The term itself began appearing in cases, mostly claims of hostile work environments, during the 21st century. Anti-workplace bullying bills have been proposed in nearly half of the state’s legislatures, although so far none have been successfully enacted into law. While currently a claim of workplace bullying is unlikely to be upheld by a court, employers should be aware of the issue, especially if the WBI’s efforts begin to make traction.

II. ATTEMPTS TO PASS BULLYING LAWS.

There are currently no workplace-bullying statutes at either the federal or state level. Twenty-one states have introduced bills that would allow an employee to bring a civil action alleging workplace bullying, including Oregon and Washington. These bills usually die in committee, but they have passed the Senate in both New York and Illinois.

A. The Healthy Workplace Bill.

The template for all this workplace-bullying legislation is the Healthy Workplace Bill advocated by the WBI. The model Healthy Workplace Bill creates a cause of action for an employee subject to an “abusive work environment.” According to the bill, this occurs when the defendant (1) acting with malice (2) subjects the complainant to abusive conduct that is (3) so severe that it causes tangible harm, either physical or psychological. Under the bill, an employer

1 As is discussed in Section IV below, even if a stand-alone bullying claim cannot be brought, bullying conduct can give rise to other claims.

2 The complete text of the Healthy Workplace Bill can be found in the appendix of Professor David C. Yamada’s article Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment, 32 Comp. Lab. L. & Pol’y J. 251, 257 (Fall 2010).
would be vicariously liable for the defendant’s actions, with the affirmative defense that the employer exercised reasonable care to prevent and correct the actionable behavior and the complainant employee unreasonably failed to take advantage of the provided preventive or corrective opportunities. This affirmative defense would not be available if the actionable behavior led to a “negative employment decision,” defined as demotion, termination, constructive discharge, refusal to promote, unfavorable reassignment, or disciplinary action.

B. Attempts to introduce the bill in Oregon and Washington.

The Healthy Workplace Bill has been introduced three times in the Oregon legislature, the latest attempt in 2009. The 2007 version, known as SB 1035, got the furthest along in the process. The Senate Commerce Committee held a public hearing and the Senate Rules Committee heard testimony about workplace bullying, but the bill failed to advance further in either committee.

In Washington, the Healthy Workplace Bill has been passed by the House Commerce and Labor Committee twice (2007 and 2009) but stalled in Appropriations both times. Public hearings in January 2012 on the latest version of the bill were held in both a House (HB 1928) and a Senate committee (SB 5789), but failed to advance out of either committee.

III. WORKPLACE BULLYING IN THE NEWS.

Teenage bullies are more often the focus of media attention, but shocking incidents of workplace bullying have made the news. The most prominent was in 2010, when the Virginia Quarterly Review’s 52-year-old managing editor, Kevin Morrissey, committed suicide after repeatedly complaining to the university president and the Human Resources Department about bullying by his boss. The workplace at the prestigious literary magazine had grown tense in recent years, with staff members accusing their boss of being belittling and defensive. Morrissey, who suffered from clinical depression, was hurt by his boss’s open dismissiveness and endured episodes of being yelled at behind closed doors. Shortly before his death, Morrissey was devastated when he was banned from the office by his boss via e-mail for unidentified “unacceptable workplace behavior.” Coworkers noticed Morrissey’s despair and warned university officials that they were afraid he was suicidal. In the aftermath of Morrissey’s suicide, the entire staff resigned and the winter issue of the literary magazine was canceled. See, e.g., Julie Bosman, A Suicide Leaves a Literary Journal and Its Editor in Limbo, N.Y. Times, Sept. 10, 2010, available at http://www.nytimes.com/2010/09/11/books/11quarterly.html?pagewanted=all.

In July 2012, Morrissey’s family filed a $10 million wrongful-death lawsuit against the University of Virginia and individual employees. The suit alleges that Morrissey’s death was a result of the hostile work environment created by university officials and that the university should have taken greater measures to protect their managing editor. Associated Press, UVA Sued by Family of Virginia Quarterly Review Editor Over Suicide, WSLS-TV, Aug. 1, 2012, available at http://www2.wsls.com/news/2012/aug/01/uva-sued-family-virginia-quarterly-review-editor-o-ar-2100910/.
IV. LEGAL CLAIMS THAT ARISE OUT OF WORKPLACE BULLYING.

While to date there is no stand-alone cause of action for workplace bullying, such behavior can give rise to any number of possible claims, both tort and statutory.

A. Intentional infliction of emotional distress.

At first glance, the tort of intentional infliction of emotional distress (“IIED”) appears to be an excellent legal claim for workplace bullying. It provides relief for mental anguish, which often occurs in workplace bullying. Extensive analysis by anti-workplace-bullying crusader Dr. Yamada, however, finds that employment-related claims for IIED, especially those unrelated to sexual harassment or other protected-class discrimination, rarely lead to IIED liability. David C. Yamada, Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment, 32 Comp. Lab. L. & Pol’y J. 251, 257 (Fall 2010). This is because it is extremely difficult to find behavior sufficiently outrageous to uphold an IIED claim.

An employee sued her ex-employer for IIED after a coworker she had been dating responded to the breakup with extreme hostility—glaring, swearing at her, calling her a whore, searching through her personal belongings, and throwing things at her. The company owner, who was also her hostile coworker’s father, tolerated the coworker’s misconduct. This behavior was found to not rise to the level of unacceptable behavior necessary for an IIED claim. Lewis v. Oregon Beauty Supply Co., 302 Or. 616, 627-28, 733 P.2d 430 (1986). Oregon courts, however, have allowed claims for IIED to go forward in several cases, although this is usually when the bullying takes the form of sexual harassment—for instance, when a supervisor subjected his employee to unwelcome sexual comments and unwanted touching. Harris v. Pameco Corp., 170 Or. App. 164, 172-73, 12 P.3d 524 (2000).

In Washington, an employee pursued an IIED claim against her former employer, claiming that her supervisor had intimidated her by getting very close to her face while criticizing her, threatened to “hunt you down and kill you” if she told others about a pay raise, publicly mocked her, demanded that she work a weekend without pay, poked her in the chest, stating that the supervisor would not tolerate insubordination from the plaintiff, and generally showed unkindness and acted with a callous lack of consideration. The Washington State Supreme Court affirmed dismissal of the claim. Snyder v. Med. Serv. Corp., 145 Wn.2d 233, 238, 35 P.3d 1158 (2001).

B. Assault and battery.

When workplace bullying crosses the line into physical touching, a battery claim is possible. If there is an apprehension of harmful or offensive contact, it could be assault. The case seen as the biggest success for anti-workplace-bullying advocates was won on an assault claim. In this case, the jury awarded the plaintiff a $325,000 verdict against a surgeon painted as a classic workplace bully. The surgeon, angry at the plaintiff for reporting the surgeon’s treatment of other employees to the hospital administration, charged the plaintiff and backed him against a wall. The surgeon, with “piercing eyes, beet-red face, popping veins,” screamed and swore as he advanced on the plaintiff. The plaintiff testified that he was afraid the surgeon “was...
going to smack the s**t out of me or do something.” The surgeon suddenly turned and stormed out of the room, but not before telling the plaintiff “you’re finished, you’re history.” Raess v. Doescher, 883 N.E.2d 790, 794 (Ind. 2008). The Indiana Court of Appeals found it improper that the trial judge had allowed Dr. Gary Namie, the cofounder of the WBI, to testify as an expert on workplace bullying, but the Indiana Supreme Court reinstated the trial verdict and held that the defendant had not adequately objected to Dr. Namie’s testimony. Although the case did not make any substantial changes to the claims surrounding workplace bullying, it illustrated the role of workplace bullying in claims such as assault and battery.

C. Workers’ compensation claims for stress.

Workers’ compensation covers injuries arising in the course and scope of employment. The employment conditions must be the major contributing cause—but not necessarily the sole cause—of the injury. Injuries can be mental or physical disorders, and for job-related stress arising from workplace bullying, the claims are often for mental injuries, such as post-traumatic stress disorder and depression. An employee must be diagnosed with the injury by a medical professional, such as a psychiatrist for mental disorders. Workers’ compensation functions as an exclusive remedy, meaning that it preempts tort recovery against employers for injuries, both physical and mental, arising out of the employment relationship. In fact, the WBI expressly advises workplace-bullying victims to avoid workers’ compensation claims.

Employees have successfully won workers’ compensation claims for injuries arising out of workplace bullying. A woman was awarded workers’ compensation for temporary total disability after becoming anxious and depressed as the result of her immediate supervisor’s abusive behavior. The woman had been shot by her ex-husband and had developed a fear of guns. Her supervisor enjoyed provoking this fear by jabbing the woman in the ribs as if holding a gun, intentionally dropping books to startle her, and more than once firing a cap gun. Hansen v. Duprin, 507 N.E.2d 573, 574 (Ind. 1987).

In Oregon, employees have recovered for bullying by both coworkers and supervisors. A millworker was compensated for his depression from on-the-job stress that had been caused in part by his coworkers’ engaging in such harassment as occasionally throwing food and wood chips at him, putting firecrackers under his seat, and blowing apart a space heater that the millworker was using to warm his hands. SAIF Corp. v. Noffsinger, 80 Or. App. 640, 643, 723 P.2d 358 (1986). Meanwhile, a deputy sheriff’s stress-related mental disorder from his captain’s vendetta against him, which included frequent public reprimands, was found to be a compensable occupational disease. McGarrah v. SAIF Corp., 296 Or. 145, 147, 675 P.2d 159 (1983).

In Washington, WAC 296-14-300 explicitly lays out which mental conditions caused by stress do not fall within the definition of an occupational disease necessary to file a workers’ compensation claim. This includes conflicts with a supervisor and relationships with supervisors and coworkers. WAC 296-14-300(1). An exception to this bar on stress-related injuries is those that arise from a single traumatic event. This type of injury may be eligible for a workers’ compensation claim. Rothwell v. Nine Mile Falls Sch. Dist., 149 Wn. App. 771, 783, 206 P.3d 347 (2009). Given that workplace bullying tends to unfold over a period of time, it’s
usually unlikely to qualify as a single traumatic event. These cases will more likely go to court as tort claims for emotional distress.

D. Discrimination and harassment claims.

Discrimination based on race, color, religion, sex, and national origin is illegal under Title VII. Disability and age discrimination are covered by the Americans with Disabilities Act (the “ADA”) and the Age Discrimination in Employment Act of 1967 (“ADEA”), respectively. Harassing behavior that falls outside of these protected classes is not actionable. As the courts have pointed out, Title VII is not a general civility code, and the ADA and ADEA aren’t either.

A hostile work environment based on one of the protected categories violates Title VII. To be found a hostile workplace, the discriminatory intimidation and ridicule must be pervasive. There is no bright-line rule for determining when a workplace crosses the line into being abusive. Frequency and severity are emphasized—isolated remarks or occasional episodes are generally not found to create a hostile work environment, unless they are extremely severe. It’s not enough for the workplace to be abusive, however. The hostility must be rooted in discrimination of a protected class for it to be illegal. With regard to a pattern of abuse in the workplace, only the abuse based on discrimination of protected classes will be considered.

In a case that “horrified” the judge with testimony that was “extensive and disturbing” about a “work environment more hostile than in any case the court had ever seen,” the abuse was not found to violate any antidiscrimination law. There were occasional incidents of the victim being called “offensive names with an Ecuadorian or Latino twist,” but for the most part, the vicious name-calling, the pornography placed in the victim’s locker, the threats, the assaults, and the other abuse that occurred were not motivated by the victim’s race, ethnicity, or disability. Mendez v. Starwood Hotels & Resorts Worldwide, Inc., 746 F. Supp. 2d 575 (S.D.N.Y. 2010) (jury verdict in favor of defendant on discrimination claims, but in favor of employee on claim that defendant retaliated against him for complaining about the hostile environment). A few incidents of actionable discrimination in the larger context of an abusive environment are not enough for a discrimination claim.

Hostile-workplace claims are the type to most commonly use the term “workplace bully.” Courts have explicitly ruled that being an equal-opportunity bully does not create a cause of action. In a Seventh Circuit case, an employee identified as a “workplace bully” in the opinion and described as “confrontational, rude and disruptive in the workplace” did not create an actionable hostile work environment because the conduct complained of didn’t have a racial character or purpose. While the plaintiff, who was white, complained that the bully, who was black, was racist against white people, the court did not find that the bully’s harassment was based on race. The bully made hostile comments to both the white and Hispanic workers, and was just as likely to knock a Hispanic worker out of his way as to smack a white worker in the head. The plaintiff felt that the bully acted better toward the only other African-American employee in the company, but a coworker testified that the bully was hostile to other African-Americans outside of work and that he was just “mean with everybody.” Yancick v. Hanna Steel Corp., 653 F.3d 532, 535, 539-42 (7th Cir. 2011). Another court dismissed a plaintiff’s complaints of harassment as, “at most, workplace bullying completely detached from any
discriminatory motive.” The plaintiff had complained of incidents such as her supervisor’s ringing a bell in her presence, a coworker’s throwing tape at her and displaying a sign with “69” written on it, and her colleagues’ having her read a card that may have contained the f-word. Vito v. Bausch & Lomb, Inc., 403 F. App’x 593, 596 (2d Cir. 2010).

Employers should be careful about ending the employment of an employee who has complained of bullying in the workplace, because she may be able to make a claim under Title VII for retaliation. A plaintiff who was unable to establish a case for discrimination on the basis of race or sex or a case for a hostile work environment was nonetheless allowed to proceed on a claim of retaliation. The employee had e-mailed her supervisors about concerns regarding bullying and had distributed anti-bullying materials to her coworkers’ mailboxes. The complaints about bullying constituted activity protected by Title VII, and the e-mails qualified as notification. The court ruled that a reasonable jury could find that there was a connection between the employee’s firing and her anti-bullying campaign. Counce v. Nicholson, No. 3:06cv00171, 2007 WL 1191013, at *18-19 (M.D. Tenn. Apr. 18, 2007); see also the Mendez case discussed above.

V. WORKPLACE-BULLYING FREQUENCY AND ECONOMIC IMPACT.

A 2010 Zogby poll written and commissioned by the WBI found that about a third of adult Americans (35 percent) claimed to have experienced workplace bullying, defined as “repeated, health harming abusive conduct committed by bosses and co-workers.” A similar poll in 2007 found that alleged bullying was four times more prevalent than illegal discriminatory harassment.

Workplace bullying can create serious negative effects on the workplace. Direct costs can include increased medical costs from stress-related health problems caused by the bullying. Indirect costs can include higher turnover, decreased quality of work, and absenteeism. Targets of bullying take more days of sick leave per year than other employees, and reports put the cost to a company at about $30,000 to $100,000 per year for each individual subjected to bullying. See Dan Calvin, Workplace Bullying Statutes and the Potential Effect on Small Businesses, 7 Ohio St. Entrepreneurial Bus. L.J. 167 (2012).

VI. TIPS TO REDUCE THE LIKELIHOOD OF ADVERSE CONSEQUENCES AND CLAIMS BASED ON WORKPLACE BULLYING.

Employers should take steps to mitigate the risks from potential workplace bullying. The first step should be a policy prohibiting workplace bullying. This can be either a new policy or an expansion of the current harassment policy. Employers should be careful, though, since such a policy could confer legal rights to employees if provisions in the employee handbook are found to be contractually enforceable.

When drafting a workplace-bullying policy, explain that bullying is unacceptable in the workplace. Define the problem and clearly outline the consequences for such behavior. Ensure that the employees are aware of the proper procedure for reporting incidents—possibly the same procedure already established for harassment claims. Documentation, either electronic or written, that employees have received and understood the workplace-bullying policy is
encouraged. Allegations should be taken seriously, and each complaint should be thoroughly investigated.

Training sessions and workshops on workplace bullying can also be helpful to build awareness of the problem and the company’s policy on the issue.

An employer should also be aware of signs that workplace bullying is occurring. High turnover in a particular department or unusual patterns of absenteeism, early retirement, and transfer requests could be signs that bullying is occurring. Conducting meaningful exit interviews could also allow for the detection of any patterns or problems.

Finally, if the employer receives a complaint or some other evidence of workplace bullying, the employer needs to timely respond and not ignore it or put off a response. It may be that the person making the complaint is overly sensitive or is asserting that proper discipline is “bullying,” but it is better to address such a complaint up front before the employee has the chance to create discord among coworkers. Alternatively, the complaint could involve serious allegations, and as with any such complaint, it is better to address and correct the situation while the problem is a molehill rather than a mountain.