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## Low-Wage Workers and Bullying in the Workplace: How Current Workplace Harassment Law Makes the Most Vulnerable Invisible

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# **Low-Wage Workers and Bullying in the Workplace: How Current Workplace Harassment Law Makes the Most Vulnerable Invisible**

BY E. CHRISTINE REYES LOYA

Olga (a pseudonym) is a single mother of two young children and takes care of her elderly mother. She has been the sole provider for the four people in her household since her husband died.<sup>1</sup> Olga is a Hispanic, monolingual Spanish speaker who did not finish elementary school. She worked at a small restaurant as a dishwasher and earned minimum wage. On Olga's first day at her job, a prep cook named Abel (also a pseudonym), yelled at Olga for misplacing food containers. Olga was surprised at Abel's reaction and did not respond. Abel then began repeatedly yelling at Olga during each of her shifts, and making spiteful comments about her intellect and appearance to co-workers. Abel's conduct continued for nearly a year. Olga's other coworkers would either laugh or pretend they did not hear anything whenever Abel's verbal abuse occurred. Often, because they wanted to be on Abel's side and avoid being bullied themselves, coworkers would participate in bullying Olga. Abel would often bring dirty dishes to Olga's workstation and throw them at the sink near her, causing a loud clashing and rattling of dishes that would startle Olga while Abel walked away laughing. This constant bullying made Olga dread going to work every day, and she began experiencing anxiety, headaches, insomnia, and stress. Olga asked her supervisor for help. Her supervisor said that he would talk to Abel, but nothing changed. Olga insisted on getting help from her supervisor and asked for assistance repeatedly, but he just dismissed anything she would say.

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1. Olga, and other workers subsequently mentioned, are clients of the Legal Aid Society – Employment Law Center's Worker's Rights Clinic (now called "Legal-Aid at Work") in San Francisco, California. The Worker's Rights Clinic provides free information regarding legal rights to unemployed and low income workers.

She cried to her supervisor for help, but became fearful of losing her job when he seemed tired of listening to her.

Olga tried to stand up for herself by telling Abel to complain to their supervisor if he had a problem with her work. Then Olga stopped talking with Abel altogether because it made no difference in the way Abel treated her. She tried to avoid Abel as much as she could. Unfortunately, Abel often worked the same shifts as Olga, allowing Abel plenty of opportunities to bully her. Olga's anxiety and stress became worse, and she started becoming depressed. She eventually went to see a doctor who recommended she take a day off work before her regular two days off to try to relax. When she returned to work, she was told she had been replaced. Her supervisor did not give her a reason for why she was let go, and did not want to listen to Olga beg for her job back. Olga's supervisor valued Abel substantially more because he was a prep cook, while Olga was replaced over a weekend.

Olga went to a Worker's Rights Clinic desperate to find help getting her job back. After an employment attorney assessed her situation, he concluded that there was no legal action available to Olga. She was an at-will employee and, thus, her employer was not required to have any valid justification for firing her. No law protected Olga from being harassed at work unless the harassment was because of her race, national origin, age, disability, or sex. Abel and Olga were both Hispanic (in fact, from the same country), as were many of their coworkers, and they were roughly the same age. When Olga was asked why she thought Abel treated her that way, she could not come up with a reason. She did not think it was because she was a woman (Abel would bully other coworkers who were male), nor because of her nationality. Abel never made any sexist or racist comments. The insults and harassment did not seem to be based on anything other than Abel's mere dislike of her.

Unfortunately, workers have no legal protection from harassment or bullying that is not clearly discriminatory. This type of behavior is known as general harassment or bullying, and it constitutes one of the most common and serious problems facing employees in today's workplace.<sup>2</sup> Bullying in the workplace has been studied more in recent years and it

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2. See David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 477 (1999-2000). [hereinafter "Yamada"]

has been found to be a very common problem among workers.<sup>3</sup> The sad reality for these workers is that this type of bullying, just as Abel's behavior, is not illegal.

### I. What Is General Harassment, and Why Does It Matter?

The first definitions of workplace bullying described it as “the deliberate, hurtful and repeated mistreatment of a target by a bully, driven by the bully’s desire to control another person” at their place of employment.<sup>4</sup> General harassment, or bullying, is not based on a protected status – such as the victims’ race, sex, nationality, religion or color – and occurs regularly and repeatedly over a period of time.<sup>5</sup> It has also become known as “moral harassment” because it can happen between people of the same-sex and/or same-race and often encompasses spiteful comments about the victim’s appearance, intellect, ability to work, and other personal remarks.<sup>6</sup> While the type of abusive behavior can vary greatly, the defining characteristic of workplace bullying is “the repetitive nature of the bully’s action that is oppressive and causes harm”.<sup>7</sup> It is when the abuse is repeated and prolonged that it has a serious effect.<sup>8</sup> Given how much time employees spend in their workplace, “there is ample opportunity for reoccurring harassment [of] targeted victims.”<sup>9</sup> Research has shown that the most common victims of this behavior are known to be nice, nonthreatening, vulnerable, unlikely to confront the bully, and are oftentimes talented and stand out at their job.<sup>10</sup> Like in Olga’s example, coworkers often participate in the bullying. Bullies tend to look for coworkers that are

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3. *See id.* at 478.

4. Yamada, *supra*, note 2 at 480.

5. *See* Gary Namie & Ruth Namie, *Symposium on Workplace Bullying – Workplace Bullying: How to Address America’s Silent Epidemic*, 8 EMP. RTS. & EMP. POL’Y J. 315, 324 (2004) [*hereinafter*, “Namie”].

6. *Id.*

7. Jordan Kaplan, *The Fourteenth Annual Frankel Lecture: Comment – Help Is On the Way: A Recent Case Sheds Light On Workplace Bullying*, 47 HOUS. L. REV. 141, 146 (2010).

8. *See generally* Yamada, *supra* note 1, at 503.

9. 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, 133 (2008) [*hereinafter* “Browne”].

10. Yamada, *supra* note 2, at 482.

agreeable to their behavior.<sup>11</sup> Experts refer to this group bullying tactic as “mobbing.”<sup>12</sup>

Supervisors and managers are known to participate in this type of bullying often due to how their position of power in the workplace facilitates the behavior.<sup>13</sup> Supervisors may assign unreasonable or impossible targets and deadlines, give constant negative criticism, remove responsibilities and replace them with trivial tasks, verbally abuse and ridicule the victim, withhold information, and deny promotions.<sup>14</sup>

Bullying in the workplace can occur with any type of employer or employee. The documented rate of the behavior is so alarming that, in the United States alone, 32-44 percent of workers have reported being bullied at work.<sup>15</sup> Another study estimates that two million U.S. workers are victimized by some type of harassment annually, and over 24 percent of companies surveyed in 2004 reported that some degree of bullying had occurred there during the previous year.<sup>16</sup> In 2010, a study concluded that 35 percent of workers in the U. S. have experienced bullying firsthand, while an additional 15 percent have witnessed it at their job.<sup>17</sup> Social media’s expanding role as a primary form of communication has likely increased the opportunities for bullies to harass their victims. Due to its prevalence, the significant scale at which it affects workers, the magnitude of victims and the consequences of the behavior, bullying in the workplace should be of concern to us all.

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11. *Id.* at 483.

12. *See* Browne, *supra* note 9, at 132.

13. *See* Yamada, *supra* note 2, at 481.

14. *See generally* Susan Harthill, *Workplace Bullying as an Occupational Safety and Health Matter: A Comparative Analysis*, 34 HASTINGS INT’L & COMP. L. REV. 253, 253-54 (2011). [*hereinafter* “Harthill”]

15. *Id.* at 265 (citing Pamela Lutgen-Sandvick et al., *Burned by Bulling in the American Workplace: Prevalence, Perception, Degree and Impact*, 44 J. MGMT. STUD. 837, 849 (2007); Abusive Boss Poll, EMPLOYMENT LAW ALLIANCE (2007) available at [http://millerkanfield.com/media/news/200036\\_ELA%20Abusive%20Boss%20Charts%20D2%20031907.pdf](http://millerkanfield.com/media/news/200036_ELA%20Abusive%20Boss%20Charts%20D2%20031907.pdf)).

16. *Id.* (citing *Most Workplace Bullying Is Worker to Worker, Early Findings from NOISH Study Suggest*, CENTERS FOR DISEASE CONTROL AND PREVENTION (July 28, 2004), <http://www.cdc.gov/Noish/updates/upd-07-28-04.html>).

17. Kerri L. Stone, *Symposium: Bullying: Redefining Boundaries, Responsibility, And Harm – Floor to Ceiling: How Setbacks and Challenges To The Anti-Bullying Movement Pose Challenges To Employers Who Wish To Ban Bullying*, 22 TEMP. POL. & CIV. RTS. L. REV. 355, 359 (2003) (citing *Results of the 2010 and 2007 WBI U.S. Workplace Bullying Survey*, Workplace Bullying Inst. (2010), <http://www.workplacebullying.org/wbiresearch/2010-wbi-national-survey/>).

### A. *The Costs to Bullying Victims*

Recent publications have found that workplace bullying inflicts harmful and devastating effects on its targets.<sup>18</sup> Workplace bullying can cause significant physical and psychological problems in victims' health such as clinical depression, symptoms associated with posttraumatic stress disorder, and increased risk of heart disease, among many other health problems.<sup>19</sup> Bullying "leads to stress-related physical problems including cardiovascular problems, adverse neurological changes, immunological impairment, fibromyalgia, and chronic fatigue syndrome."<sup>20</sup> Experts indicate that long term health problems should also be considered, as the effects of workplace bullying are not always immediate.<sup>21</sup> Decreased psychological well-being and psychosomatic functioning are some of the long term effects bullying can have when it is not alleviated.<sup>22</sup> Bullying has also been identified as a major cause of work-related stress, depression, low self-esteem, loss of sleep, anxiety, and other physical health problems.<sup>23</sup> In addition, the emotional impact of bullying can have serious repercussions for job performance.<sup>24</sup> Bullying can result in symptoms characterized as stress-related health diseases, symptoms associated with generalized anxiety disorder, clinical depression, and post-traumatic stress disorder.<sup>25</sup> Additionally, the feelings of "shame, guilt, embarrassment, and low self-esteem" that victims often experience in the aftermath of bullying can exacerbate other health problems.<sup>26</sup>

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18. See Yamada, *supra* note 2, at 483.

19. Harthill, *supra* note 14, at 265.

20. *Id.* at 266.

21. *Id.*

22. *Id.*

23. Yamada, *supra* note 2, at 483.

24. See Joanna Canty, *The Healthy Workplace Bill: A Proposal to Address Workplace Bullying In Massachusetts*, 43 NEW ENG. L. REV. 493, 502 (2009) [*hereinafter* "Canty"].

25. *Id.* at 501.

26. Yamada, *supra* note 2, at 483.

### ***B. Costs to Employers***

An employer's business may suffer both direct and indirect costs as a result of abusive work environments.<sup>27</sup> Although the harm is mostly felt by individual victims, employers should also be concerned about potentially significant decreases in overall employee morale and productivity.<sup>28</sup> In abusive workplaces, employers are likely to see an upswing in workers' compensation and disability claims, as well as increased medical costs.<sup>29</sup> The emotional and physical state of bullying victims has been found to affect their job performance; they often miss work, use more sick days, are distracted, and can be overall unproductive workers.<sup>30</sup> Since many victims leave their job to escape bullies, employers can also find they have higher employment turnover.<sup>31</sup> Victims of bullying are often talented employees who stand out at their job and get the bullies' attention, so an employer's best workers may be driven out of the workplace to avoid harassment.<sup>32</sup> Bullying in the workplace can also affect more than just the targeted victim, as witnessing degradation of a fellow employee undermines the rest of the workers' morale and employee commitment and productivity.<sup>33</sup> Recruitment of new employees is also put at risk as word of mouth within the labor pool may tarnish the employer's reputation.<sup>34</sup> The quality of customer service can also be affected by abusive work environments.<sup>35</sup>

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27. *Id.*

28. Stone, *supra* note 17, at 359.

29. *Id.*

30. See Namie et al., *supra* note 5, at 326.

31. Canty, *supra* note 24, at 502.

32. Namie, *supra* note 5, at 326.

33. *Id.* at 327.

34. *Id.*

35. See Yamada, *supra* note 2, at 483.

***C. Low-Wage and Minimum-Wage Workers Are Especially Vulnerable to Bullying and Encounter Additional Barriers***

Low-wage and minimum-wage workers experience this type of harassment at their job at alarming rates, and the majority do not report the harassment.<sup>36</sup> These workers have many disadvantages that make them an easy target for bullying.<sup>37</sup> Low-wage and minimum-wage workers are less inclined to seek help because their employment is often at the will of the employer, and they fear losing the job if they complain.<sup>38</sup> Their daily sustenance depends on their income from said job.<sup>39</sup> Each case may involve a different severity of harassment and violence, yet the barriers to asserting their rights low-wage workers face are remarkably similar.<sup>40</sup>

In addition to the hardship they experience because of harassment, workers encounter more challenges when they attempt to stop the harassment at their jobs.<sup>41</sup> Language and financial barriers and their lack of bargaining power are a few of the many setbacks they may face. Often, these barriers are big enough to discourage them from looking for help to find a solution. The problem may be further exacerbated by their fear of retaliation by their employers, who may use any of a worker's disadvantages to prevent them from fighting harassment. All this coalesces into a system in which it is especially hard for already marginalized workers, who are all the while trying to financially support themselves and their families at minimum wage, to stop the bullying.

Immigrant workers, those with less education or fewer skills, and those in smaller workplaces or in sectors prone to a high degree of informal work arrangements are particularly vulnerable.<sup>42</sup> The multicultural composition of workers in the United States is made up

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36. Elizabeth Kristen et al., *Workplace Violence and Harassment of Low-Wage Workers*, 36 BERKELEY J. EMP. & LAB. L. 169, 170 (2015) [*hereinafter* "Kristen"].

37. *See id.* at 171.

38. *See id.* at 180.

39. *See id.* at 178.

40. *Id.* at 171.

41. Kristin, *supra*, note 36.

42. *Id.* at 173.

in great part by non-English speakers.<sup>43</sup> Most of these workers are immigrants who have minimum wage jobs.<sup>44</sup> The language barriers create significant problems when victims of violence and harassment in the workplace seek help.<sup>45</sup> Their unfamiliarity with both the culture and the language can be daunting and discouraging. Inability to express the severity of their problem in English and their resulting frustration can be another factor that compounds the sense of helplessness victims of harassment often feel. When trying to seek intervention from their supervisors, often they are ignored or are not given the proper attention. Supervisors and managers may be inclined to dismiss the complaints and regard them as any other worker altercation because they cannot grasp the toll that the harassment is taking from the few English words that their worker knows. Further, many cases involve a bilingual speaker as the perpetrator, and a non-English speaker as the victim. This language advantage that the bully often has over the victim allows the bully to feel a greater sense of power and to continue the abuse. This may create great inequality when the worker tries to involve a manager in solving the issue, and can put the victim in a worse position than they were in before they complained to management.

In addition, the lack of health care and other benefits impacts makes their situation worse:

First, after experiencing a violent incident, workers often do not receive medical or psychiatric attention, [nor the referrals to social and legal resources that medical professionals often make to victims]. Second, long-term mental and physical injuries can persist even after the violence has ceased, which may limit the victim's ability or desire to pursue justice.<sup>46</sup> Post-traumatic stress disorder (PTSD) is not uncommon among victims of workplace violence.<sup>47</sup>

These injuries often go untreated, and those afflicted may lack the

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43. Meredith B. Stewart, Note, *Outrage in the Workplace: Using the Tort of Intentional Infliction of Emotional Distress to Combat Employer Abuse of Immigrant Workers*, 41 U. MEM. L. REV. 187, 193 (2010).

44. *Id.*

45. *Id.* at 191.

46. Kristen et al., *supra* note 36, at 184, 185.

47. *Id.*

resources to properly address their health issues.

Undocumented workers, domestic workers, and restaurant workers have been found to be the most vulnerable to harassment, though they're hardly alone.<sup>48</sup> The many low-wage workers who are undocumented immigrants face additional barriers as a result of their immigration status. They not only fear losing their job, but also deportation in retaliation for reporting harassment.<sup>49</sup> It is thus particularly difficult for undocumented workers to report and seek help for harassment and bullying.

Another significant barrier that impoverished workers face is the very fact that they are completely dependent on their jobs, as most of them live paycheck to paycheck and desperately need their jobs to subsist. This creates additional fear of losing their income, a sad reality because they're employed at will, which means that an employer can terminate the worker with or without cause, as long as the termination does not violate the law.<sup>50</sup> Like in Olga's experience, workers can be fired for trying to complain about the abuse they're experiencing. Many times this will be the reason why the worker puts up with the abuse for a long period of time, as the alternative of having to look for another job and the possibility of not finding one is too daunting. Sometimes keeping quiet seems like the best option because they do not want to risk being fired. Moreover, having no paid time off, they cannot afford losing a day's wages as it can significantly impact their ability to provide essential household supplies, so the stress keeps building over time. Low-wage workers often work overtime hours because this is the only way their paycheck will be enough to subsist. Therefore, working long hours and often with no breaks, there is plenty of time for abuse to occur at work, and no time to recover.

A hierarchy between supervisors and workers in places where the vast majority of workers are minimum wage is to be expected. The problem occurs when "the lines between acceptable management styles and harassing behavior" are blurred.<sup>51</sup> Factories, the agriculture

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48. *Id.* at 171.

49. *Id.* at 180.

50. Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387 (1994).

51. Browne, *supra* note 9, at 133.

industry, and fast food restaurants are just a few examples of work settings in which bullying is prevalent, and often the bullying comes from a supervisor. Supervisors often abuse their power and allow for personal issues to interfere with managing personnel.

Finally, a worker already facing one of these barriers may be further prevented from taking action because of a fear of retaliation not only from the perpetrator, but from their employer. When victims of harassment seek legal help, they often find that there is no specific legal remedy to pursue if they were terminated from their employment after reporting harassment, as was the case with Olga. Workers anticipate retaliation from their employer, and, unfortunately, the employer often does choose to terminate the worker or to take other adverse actions. The employer may see any remedy for the worker as a burden and thus decide to fire the employee rather than do anything to help them. Sadly, if it is a low-skill job (like many minimum-wage positions are), the employer can easily replace the victim with another worker, leaving the victim abused and with no income. Due to their at-will employment status, there's no legal help available to them. With almost every odd against them, low wage workers who suffer from bullying are often left with little hope.

## II. Why Current Law Is Not Enough

The U.S. lacks legislation or laws to prevent workplace bullying.<sup>52</sup> There is legislation directed toward proscribing certain types of discrimination in the workplace, but inequalities persist among workers.<sup>53</sup> There are only two types of laws that address harassment or abuse in the workplace — the protected classes under Title VII and other employment antidiscrimination laws that are also limited to protected statuses. Neither of these, however, address the issue at hand. The latter type is based in tort law. It primarily functions under the rubric of intentional infliction of emotional distress (“IIED”), and thus is not a useful tool for bullying victims due to a very high threshold to prove

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52. Harthill, *supra* note 14, at 254.

53. Jessica L. Roberts, *Rethinking Employment Discrimination Harms*, 91 IND. L.J. 393, 397 (2016).

53. Kristen et al., *supra* note 36, at 172.

a claim.<sup>54</sup>

### A. *Title VII*

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating or harassing employees on the basis of sex, race, national origin, color, or religion.<sup>55</sup> However, Title VII still allows for a large measure of mistreatment despite its stated goals of equality and eliminating discrimination in the job market.<sup>56</sup> Victims of general harassment or bullying in the workplace, like Olga, often cannot explain why they are being targeted. For victims who are members of a protected class, or those who can prove that the bullying was *because* they are a member of a protected class, they can seek relief in Title VII. Title VII requires plaintiffs to establish discriminatory intent, something that is very difficult to prove in the first place.<sup>57</sup> It requires inquiring into the perpetrator's motivation for the harassment for the underlying cause of the behavior.<sup>58</sup>

For victims of workplace bullying who are not members of a protected status or cannot prove that that was why they were discriminated against, Title VII will not be of any help to them.<sup>59</sup> A clear case of nondiscriminatory harassment is Eduardo (a pseudonym) who had been working at a construction company for nearly ten years and, over the last four years, was under the direct supervision of Manny (also a pseudonym).<sup>60</sup> From the beginning, Manny showed his dislike of Eduardo by blaming him for anything that went wrong, which often had nothing to do with Eduardo. This escalated when Manny started ridiculing Eduardo in front of other workers and yelling at him for things that other employees could freely do such as taking a cigarette break. Manny took a photo of Eduardo and drew obscene images on it, and

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54. *Id.* at 120-21.

55. *Id.* at 172.

56. *Id.*

57. *Id.*

58. Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 72 (1991).

59. Yamada, *supra* note 2, at 503.

60. Eduardo is another Worker's Rights client who called their phone-in clinic to seek help with his work related problem.

began showing it to the other workers. Eduardo tried laughing at it too, pretending it did not affect him, but inside he was so angry and embarrassed that he wanted to quit. Eduardo called a worker's rights clinic to seek help to stop the bullying and harassment he was subjected to by his supervisor. Because the harassment and bullying were not clearly based on Eduardo's nationality, sex, or any other protected category, the clinic determined there was not much he could do.

Eduardo knew he was disliked by his supervisor, but, since the rest of his coworkers were also Hispanic, around the same age, and generally had similar characteristics but were not treated the same way, he could not truthfully assert that this dislike was the result of discrimination. Manny never made any discriminatory statements, nor gave any other clue regarding why he had chosen to bully Eduardo. It could have been a number of factors, including Eduardo's personality or attitude, that contributed to Manny's hostile behavior; jealousy, and intimidation. It is not uncommon for a person to dislike someone, and often there is no explanation. To determine whether conduct is based on a protected status is to inquire at the intent of the bully as to what motivates the bullying behavior. It is difficult to prove the intent or reasoning behind someone's actions because cognitive functions often occurs implicitly, making it difficult to prove a clear and conscious motivation.<sup>61</sup> As a result, plaintiffs often cannot recover because establishing the "because of" requirement of the civil action is too difficult.<sup>62</sup> Even if Manny's motivation was because of Eduardo's race or age (or any other protected status), Eduardo could not have proven Manny's intent was discriminatory. Eduardo had no recourse to sue his employer.

Harassing and humiliating a person should not be excused simply because the mistreatment does not stem from the person belonging to a protected status. The emotional anguish and humiliation that Eduardo felt was not eased knowing that it was not based on his religion or his nationality. The motive behind bullying should be irrelevant because the emotional and physical damage, along with the humiliation, are felt all the same.

There are other current federal employment discrimination

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61. Yamada, *supra* note 2, at 503.

62. *Id.*

protections that vary according to the particular area they cover, but they have an overlapping characteristic: the harmful, employment-related conduct must be on the basis of a protected status.<sup>63</sup> Some states have also implemented legislation, such as California's Fair Employment and Housing Act ("FEHA") which provides broader protections than Title VII. Currently, FEHA prohibits harassment based on race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, and military and veteran status.<sup>64</sup> While it expands to more categories than Title VII, a plaintiff must still belong to a protected category to seek relief under FEHA.

### ***B. Intentional Infliction of Emotional Distress***

Intentional infliction of emotional distress (IIED) claims have proven almost completely unsuccessful to victims of workplace bullying because the threshold of proof is too high. Plaintiffs rarely recover for IIED "due to the high burden requiring conduct that is so extreme and outrageous and beyond all possible bounds of decency to be regarded as atrocious, and utterly intolerable in a civilized community."<sup>65</sup> Joanna, (a pseudonym), a fifty-six-year-old live-in house maid, encountered the burden of proof challenge that courts impose on plaintiffs in an IIED case.<sup>66</sup> She worked at the private residence of Mr. and Mrs. Lark (also pseudonyms). Mrs. Lark talked down to Joanna every day, yelled at her, and made her do chores twice to punish Joanna for not obeying her exact orders the first time. Despite Joanna's best effort to follow Mrs. Lark's exact orders, there would always be something Mrs. Lark would complain about. During the course of her ten-year employment at Mrs. Lark's house, Joanna was constantly yelled at and insulted by Mrs. Lark. Joanna knew that it would

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63. Yamada, *supra*, note 2 at 503.

64. Kristen et al., *supra* note 36, at 172 (citing Cal. Gov't Code § 12940(j)(1)).

65. Marcia L. Narine, *Symposium: Title VII at 50 Years After The Passage Of Title VII: Is It Time For The Government To Use The Bully Pulpit To Enact A Status-Blind Harassment Statute?* 89 ST. JOHN'S L. REV. 621, 642 (2015).

66. Joanna was another Worker's Rights' client who called their phone-in clinic to seek help with her work related problem.

be difficult to find another job at her age, so she did not quit. Joanna was constantly stressed by and fearful of Mrs. Lark. She began feeling inept, and her self-esteem deteriorated over time. Joanna was finally fired because she could not stop crying after Mrs. Lark had yelled at her for cooking Mr. Lark a meal without being told to do so by Mrs. Lark.

Afterwards, Joanna cried for days and felt helpless and abused. Her doctor diagnosed her with depression and various physical health issues. She called a worker's rights' clinic hoping she could sue her former employers for the emotional distress they caused her. However, the emotional damage that Joanna put up with for ten years had no legal solution. A court would have likely dismissed Joanna's IIED claim because Mrs. Lark's conduct was not "severe and outrageous" enough.<sup>67</sup> Courts have noted that a series of indignities does not amount to severe and outrageous conduct.<sup>68</sup> In addition to not being able to show that Mrs. Lark's abuse was "outrageous," courts have tended to find that the employee did not suffer severe emotional distress.<sup>69</sup>

The high threshold that courts use to determine whether behavior is "outrageous and severe" enough renders IIED claims of little help to workplace bullying victims.<sup>70</sup> Courts should evaluate the conduct as a whole when it has been repeated and ongoing. Tort claims, such as IIED, are ineffective and can also be costly as there is no administrative solution for them; plaintiffs must litigate tort claims to pursue available remedies.<sup>71</sup> In Olga's case, her only option would have been to bring a tort claim against her harasser. This would not have worked for several reasons: the relatively small amount of damages won through litigation, the fee recoverable for collecting a damages award will also be small that attorneys may lack financial motivation for taking her case, and the financial viability of the defendant can also prevent the recovery.<sup>72</sup>

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67. *Id.*

68. Kaplan, *supra* note 7, at 161.

69. *Id.* at 162.

70. *Id.* at 161.

71. *Id.*

72. Kristen et al., *supra* note 36, at 183–84.

### III. Other Countries Have Attempted to Address Workplace Bullying

#### A. Sweden

In contrast to the United States, the majority of European Union countries have substantially more laws that protect employees with respect to bullying.<sup>73</sup> Sweden was the first nation to pass anti-bullying legislation when they enacted the Ordinance on Victimization at Work in 1993.<sup>74</sup> This ordinance includes language that prevents workplace bullying, stops retaliation against employees who try to address bullying, compensates the victims, and penalizes bullies and employers that permit bullying.<sup>75</sup> Sweden is frequently regarded as the leader in combating bullying in the workplace.<sup>76</sup> The Swedish government went on to create Occupational Health and Safety Act (OHS) along with a regulatory agency that implemented ordinances and provided for inspection for workplaces.<sup>77</sup>

There are two Swedish safety and health ordinances that address workplace bullying: (1) the Ordinance on Violence and Menaces in the Working Environment and (2) the Ordinance on Victimization at Work.<sup>78</sup> The Ordinance on Violence and Menaces in the Working Environment deals with risks and threats of violence.<sup>79</sup> Violence is broadly defined in this ordinance as violence that ranges from murder to harassment.<sup>80</sup>

The Ordinance on Victimization defines more specifically victimization at work as “recurrent reprehensible or distinctly negative actions directed at an individual employee, and that can result in those employees being placed outside the workplace community.”<sup>81</sup> The

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73. William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 92, 126 (2003).

74. Browne, *supra* note 9, at 134.

75. Gina Vega, et al., *Sticks and Stones May Break Your Bones, but Words can Break Your Spirit: Bullying in the Workplace*, 58 J. BUS. ETHICS, 101, 105 (2005).

76. Harthill, *supra* note 14, at 286.

77. *Id.* at 287.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

Swedish National Board of Occupational Safety and Health's Guidance provisions further explain that the term "victimization" refers to adult bullying, mental violence, social rejection, and harassment.<sup>82</sup> The Swedish model for anti-bullying defines workplace bullying and lists may possible consequences for it. Other countries have enacted similar legislation that followed this model.<sup>83</sup>

Swedish law, however, has not been effective. This is due to: "(1) the law itself; (2) the response of employers; (3) the response of trade unions; (4) the response of the bodies responsible for enforcement; and (5) weaknesses in the victims' opportunities for redress."<sup>84</sup> The "non-punitive" approach of Swedish law is perhaps its biggest shortcoming because, without the risk of punitive sanctions, many employers are not persuaded to enact any policies at their businesses to combat bullying.<sup>85</sup> This failure of regulatory enforcement has produced employer apathy.<sup>86</sup> An absence of internal investigative procedures, lack of litigation culture, private causes of action and low inspection rates are among the shortcomings of the Swedish Ordinance contributing to this criticism.<sup>87</sup>

## ***B. France***

French labor courts began recognizing bullying by calling it "moral harassment" in the workplace in the 1990s.<sup>88</sup> France passed the Modernization of Employment Act ("MEA") in January of 2002. MEA defines psychological harassment as composed of three essential elements: (1) repeated acts (2) whose purpose or effect is the degradation of working conditions and (3) may affect a worker's rights and dignity, impair his mental or physical health, or compromise his professional future.<sup>89</sup> MEA does not inquire into the mental state of

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82. *Id.* at 288.

83. Harthill, *supra*, note 14 at 289.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Rachel A. Yuen, *ARTICLE: Beyond the Schoolyard: Workplace Bullying and Moral Harassment Law in France and Quebec*, 38 CORNELL INT'L L.J. 625, 635 (2005) [*hereinafter* "Yuen"].

89. *Id.*

the perpetrator, but rather says in one of its provisions that the intention will be assumed.<sup>90</sup> MEA has required an existing relation to authority where the victim had to be subordinate to the harasser. Although this requirement was later removed, it was eventually expanded to apply to any working relationship.<sup>91</sup>

There are several inconsistencies between the French labor code and the penal code in the penalties for each.<sup>92</sup> MEA “requires repeated acts,” and states that “a single act cannot constitute bullying.”<sup>93</sup> The three elements are “relatively opened ended, and therefore are subject to be defined by case-law,” which “has meant that the specific meaning of bullying evolves through case law.”<sup>94</sup> This has resulted in a broad definition of bullying and raised particular questions as to when bullying actually occurs.<sup>95</sup> In the first case tried under MEA, an employee brought suit against her employer for having isolated her by not inviting her to meetings and placing her desk in a different floor from the rest of the workers.<sup>96</sup> The court found that the treatment was not directed at her.<sup>97</sup> This decision was a surprising, unexpected move because the law had been enacted to help victims.<sup>98</sup> After this decision and unfortunately many others like it, the scope of the French harassment law has been greatly limited.<sup>99</sup>

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90. *Id.*

91. Yuen, *Supra*, note 88 at 635.

92. *Id.*

93. Narine, *supra* note 65, at 633.

94. Jerome Hartemann et al., *Bullying, Harassment and Stress in the Workplace - A European Perspective*, Proskauer 3 (Jan. 15, 2013) <http://www.internationallaborlaw.com/files/2013/01/Bullying-Harassment-and-Stress-in-the-workplace-A-European-Perspective.pdf>. [Hereinafter “Hartemann”].

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*; Maria Isabel S. Guerrero, *The Development of Moral Harassment or Mobbing Law in Sweden and France as a Step Towards EU Legislation*, 27 B.C. INT’L & COMP. L. REV. 477, 493 (2004). [Hereinafter “Guerrero”].

99. Hartemann, *supra* note 94.

### C. *Canada*

Quebec became the first Canadian province to legislate workplace bullying standards through amendments to its Labor Standards Act.<sup>100</sup> The Amendments included definitions for psychological harassment and said that a single serious incident of psychological harassment with a “lasting harmful effect on an employee was enough to consider an actionable offence.”<sup>101</sup> In addition, these laws grant every employee a right to work in an environment free from psychological harassment and require employers to take reasonable action to prevent and stop harassment.<sup>102</sup> Remedies include reinstatement, modification of the employee’s disciplinary record, back pay, expenses for psychological support, and punitive and other damages.<sup>103</sup> The act and its provisions are available on the Labor Relation Commission’s website along with a sample statement of an employer’s commitment to keep their business harassment-free, awareness and prevention guides for employers and employees, and examples of scenarios that constitute harassment.<sup>104</sup> Unfortunately, these Quebec laws only apply to the Provincial government, leaving private employers without any regulation regarding bullying or psychological harassment.

The Swedish, French, and Quebec approaches require employers to create policies to prevent bullying and places the burden for preventing bullying on employers.<sup>105</sup> Like other countries, the U.S. should consider evidence from numerous studies that clearly indicate workplace bullying is a prevalent problem. The need and demand for laws to protect workers cannot be ignored. Workers that are experiencing harassment everyday are suffering from the lack of regulation. While legislation addressing employment harassment might be difficult to enforce and face opposition from employers, there are several models that may be drawn from to draft a balanced, thorough law to protect workers.

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100. *Id.*

101. *Id.*

102. Hartemann, *supra*, note 94.

103. *Id.*

104. *Id.*

105. *Id.* at 135.

#### IV. The Hostile Work Environment Doctrine Under Title VII Provides a Model for Workplace Bullying Protection

Recognizing that harassment occurs within protected classes as well as outside of them would be a step in the right direction to expanding worker protection. Title VII limitations to protected status make it useless to protect non-status based harassment victims. In the 1980s, courts began to recognize a hostile work environment as a type of sexual harassment that arises when unwelcome conduct based on sex creates a hostile environment.<sup>106</sup> A hostile work environment is one that is “deemed hostile by both the plaintiff and by a reasonable person in the plaintiff’s situation.”<sup>107</sup> The first case to establish hostile work environment harassment was *Meritor Savings Bank v. Vinson*.<sup>108</sup> The Supreme Court held that a plaintiff may establish a violation of Title VII by showing that discrimination on the basis of sex has created an abusive work environment.<sup>109</sup> *Meritor* case didn’t specify the requirements to establish a hostile work environment, but later, in *Harris v. Forklift Systems*, the Court made it easier to bring such claim against an employer. In *Harris*, the Court established that the conduct must be such that a reasonable person would find it hostile or abusive, and the victim must subjectively perceive the environment to be abusive.<sup>110</sup> The Court looked at the totality of the circumstances, including the frequency and severity of the discriminatory conduct, whether the conduct was physically threatening or humiliating, and whether the conduct unreasonably interfered with employee work performance.<sup>111</sup>

In *Burlington Industries v. Ellerth*, the Supreme Court clarified the standard by which an employer is liable when a supervisor creates an actionable hostile work environment for an employee in violation of Title VII.<sup>112</sup> An employer is vicariously liable to a victimized employee for an actionable hostile environment created by a supervisor or their

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106. *Id.*

107. Yamada, *supra* note 2, at 524.

108. *Id.*

109. *Id.*

110. *Harris v. Forklift Sys, Inc.*, 114 S. Ct. 367, 371 (1993).

111. *Id.*

112. Yamada, *supra* note 2, at 513.

employees.<sup>113</sup> The Court also created an affirmative defense for employers for when there are no tangible actions taken such as discharge, demotion, or undesirable reassignment. First, the employer must establish that they “exercised reasonable care to prevent and correct promptly any sexually harassing behavior.”<sup>114</sup> Secondly, the employer must establish that the “plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>115</sup>

The Court in *Burlington* based its holding on the common law principle of employer liability for actions taken by an employee within the scope of their employment.<sup>116</sup> While sexual harassment by a supervisor is not conduct within the scope of employment, it is not the only basis the Court used for employer liability.<sup>117</sup> The level to which the perpetrator employee “was aided in accomplishing the tort by the existence of the agency relation” is also considered in subjecting employers to liability.<sup>118</sup> This standard of “aided in the agency relation,” supports the finding that any “tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer.”<sup>119</sup>

The newest harassment doctrine under Title VII has provided for employers to implement anti-harassment policies and training on how to handle status-based harassment complaints.<sup>120</sup> Employers are not held liable for sexual harassment if they take adequate measures to prevent the harassment from happening, offer remedies and properly address the issue in a timely manner. This incentivizes employers to monitor their employees’ well-being in the workplace. It also allows room for employees to feel comfortable to speak up and report any type of unwanted sexual behavior. While Title VII has expanded to provide status-based harassment protections and hold employers liable, this protection is still limited and cannot be used by employees

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113. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998).

114. *Id.*

115. *Id.* at 764.

116. *Burlington Indus.*, 524 U.S. 756.

117. *Id.*

118. Yamada, *supra* note 2, at 513 (citing *Burlington Indus.* 524 U.S. 758).

119. *Id.*

120. *Id.* at 515.

who do not belong to a protected class.<sup>121</sup>

In contrast to the legal protection against sexual harassment that Title VII provides, most people do not enjoy a similar safeguard against bullying in their workplaces.<sup>122</sup> The doctrine of hostile work environment under Title VII can help expand protections for employees without requiring that employees belong to a protected class. All workers could benefit from receiving protection against being harassed by supervisors or coworkers. While low-wage workers might still face the aforementioned challenges, they would nonetheless benefit if employers are aware they may face liability if they do not support their workers. Removing the status-based requirement would also prevent workers from getting fired from their jobs because they are being harassed by a higher level employee, supervisor or in retaliation for denouncing harassment. The dearth of employment legislation since 1993 demonstrates how the need to protect employees from abuses in the workplace has increased in many respects.<sup>123</sup>

***B. Employer-Based Solutions Will Follow After establishing Status-Blind Protections Under Title VII***

When Title VII's hostile work environment doctrine was established, it had a "dramatic impact on company policies and procedures regarding actionable harassment."<sup>124</sup> Many employers "quickly moved to develop stronger anti-harassment policies and more effective procedures for handling employee complaints of harassment."<sup>125</sup> Therefore, making harassment under Title VII status-blind would likely produce the necessary changes that employers can implement to assure a bully-free workplace.

Employers should begin by becoming aware of the stages of harassment and how to identify them by recognizing the signs in both victims and perpetrators. Appropriate measures should be put in place

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121. Yamada, *supra* note 2, at 513 (citing Burlington Indus. 524 U.S. 758).

122. Vega, *supra* note 62, at 105.

123. Corbett, *supra* note 73, at 94.

124. Yamada, *supra* note 2, at 513.

125. *Id.*

for each stage of harassment. During the prevention stage, employers should be educated and prepared to intervene, especially during conflict. Designating certain employees or managers as point people for victims of harassment would also be helpful so that victims can be supported and potentially report harassment.<sup>126</sup> Managers who become aware of a harassment situation should protect the victim by preventing stigmatization of the employee.<sup>127</sup>

Employer-led, voluntary solutions are likely to prevent workplace harassment.<sup>128</sup> Ideally, an employer would incorporate provisions in their work policies with a clear definition of bullying that encompasses any type of harassment, constant disrespectful behavior towards an employee, or unreasonable treatment from supervisors. Further, the same policy might state a zero tolerance for bullying and harassment. Most of all, these policies will not succeed in preventing workplace harassment and bullying if they are not properly enforced. Unenforced policies undermine organizational credibility.<sup>129</sup> Having informal and formal channels to redress policy violations would provide the context for investigatory processes that could be executed by trained peer or enforcement specialists.<sup>130</sup>

For low-wage workers, however, employer-based solutions may not benefit them as much as it would at a corporate office. Bigger employers, if required by law, will likely implement measures to prevent workplace harassment to avoid liability. However, smaller employers that can often get away with non-compliance with basic work regulations are not likely not to comply with any anti-bullying measures imposed on them. As a result, these work environments would remain hostile unless their employees seek help. In the few cases that employees seek legal assistance, however, they could bring suit against their employer and have a chance of holding them liable when they did not comply with employment law. However, while employer-based solutions are likely to succeed in preventing bullying in the workplace, there is no incentive for employers to implement such policies. If employers are held liable, they would address the

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126. Guerrero, *supra* note 98, at 483.

127. *Id.*

128. *Id.*

129. Guerrero, *supra* note 98 at 483.

130. *Id.*

issue with much more attention and care.

## V. Conclusion

Further development of harassment law is needed, but the harassment model in Title VII provides for a comprehensive way of avoiding employer liability for bullies at work, while at the same time protecting their workers. Bullying in the workplace is a pervasive problem, and its consequences should be taken seriously. Much is needed to protect workers and perhaps much more to protect low-wage workers. Limiting protections by requiring that harassment be related to a protected class leaves many workers helpless and ignored. As workplaces and jobs change, so should the laws regulating them. Title VII has accomplished a lot in terms of solving discrimination in the workplace, but there is still much room for improvement.

There is ample research and evidence showing how harmful workplace harassment can be.<sup>131</sup> The existing legal doctrine does not protect all workers, and the consequences for impoverished workers are sometimes devastating. Disparities among workers still exist and often expose the most vulnerable to dehumanizing working conditions. They, along with workers everywhere, should be protected, not forgotten.

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131. Yamada, *supra* note 22, at 536.

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