Floor to Ceiling: How Setbacks and Challenges to the Anti-Bullying Movement Pose Challenges to Employers Who Wish to Ban Bullying

Kerri Lynn Stone
Florida International University College of Law, stonek@fiu.edu

Follow this and additional works at: http://ecollections.law.fiu.edu/faculty_publications

Part of the Labor and Employment Law Commons, and the Law and Gender Commons

Recommended Citation
Available at: http://ecollections.law.fiu.edu/faculty_publications/207

This Article is brought to you for free and open access by the Faculty Scholarship at eCollections @ FIU Law Library. It has been accepted for inclusion in Faculty Publications by an authorized administrator of eCollections @ FIU Law Library. For more information, please contact lisdavis@fiu.edu.
Citation: 22 Temp. Pol. & Civ. Rts. L. Rev. 355 2012-2013
Provided by:
FIU College of Law

Content downloaded/printed from
HeinOnline (http://heinonline.org)
Tue Mar 22 16:16:10 2016

-- Your use of this HeinOnline PDF indicates your acceptance
of HeinOnline's Terms and Conditions of the license
agreement available at http://heinonline.org/HOL/License

-- The search text of this PDF is generated from
uncorrected OCR text.

-- To obtain permission to use this article beyond the scope
of your HeinOnline license, please use:

https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1062-5887
FLOOR TO CEILING: HOW SETBACKS AND CHALLENGES TO THE ANTI-BULLYING MOVEMENT POSE CHALLENGES TO EMPLOYERS WHO WISH TO BAN BULLYING

by KERRI LYNN STONE*

INTRODUCTION

This article is intended to be part of a much broader conversation, held both at the February 2013 symposium that produced this volume and within this volume itself about bullying. As the symposium's organization reflected so well, bullying is a phenomenon that transverses the human life cycle from childhood to old age, across contexts and locations. Abusive speech and behavior that is uncivil at its best and beneath contempt at its worst, has permeated society and public life.

The fallout has altered (sometimes irrevocably) the mood, functioning, morale, and some would say, the composition of schools, workplaces, and other organizations. In the wake of what has been noted as a rise in incivility in all areas of public life, and especially in the aftermath of high-profile tragedies like the suicides of Phoebe Prince¹ and Tyler Clementi,² increased

---

¹ Phoebe Prince was a 15-year-old girl who committed suicide in 2010 after enduring weeks of bullying at school which consisted of taunts, teases, and name calling, which even extended to text messages and social media sites. See Andrea Canning et al., Phoebe Prince's Family Speaks Out as One Year Anniversary of Suicide Nears, ABC NEWS (Dec. 23, 2010), http://abcnews.go.com/US/phoebe-princes-family-speaks-settling-lawsuit-school/story?id=12465543 (describing the type of bullying that Phoebe Prince experienced); Helen Kennedy, Phoebe Prince, South Hadley High School's "New Girl," Driven to Suicide by Teenage Cyber Bullies, N.Y. DAILY NEWS (Mar. 29, 2010), http://www.nydailynews.com/news/national/phoebe-prince-south-hadley-high-school-new-girl-driven-suicide-teenage-cyber-bullies-article-1.165911 (describing how Prince was "mercilessly tormented" and that "[h]er books were routinely knocked out of her hands, items were flung at her, her face was scribbled out of photographs on the school walls, and threatening text messages were sent to her cell phone").

² Tyler Clementi was a freshman at Rutgers University when he committed suicide after a
awareness of bullying has led to countless calls for its redress. This call has been heeded more on some fronts than on others. While many have successfully taken up the anti-bullying cause, for example, in public schools, with legal and social reform heralded in the form of increased awareness, prevention, and remedies, the workplace has been notably untouched by social and legal change when it comes to bullying.

Ever since David Yamada published his watershed article in 2000, calling for awareness and redress of the problem of workplace bullying, numerous scholars, social scientists, and others have echoed his sentiments. Looking at other countries that have recognized the harm that inures to workers’ dignity, productivity, and well-being in the workplace from workplace bullying and seeking to promote model legislation that would regulate the workplace, reformers have been stymied as model legislation has been introduced, but has failed to pass in state after state. Many employers, however, took solace in the fact that employment is presumed to be “at will” (meaning that they could regulate the workplace as they saw fit, so long as they did not run afoul of the law and they could legislate internally to proscribe behavior that they found distasteful). In other words, they could voluntarily undertake to ban bullying, or even behavior that fell short of any definition of bullying found in the model legislation, simply because they did not want to tolerate it.

Several recent rulings from the National Labor Relations Board, however, have called the unfettered exercise of this prerogative into question, marking yet another setback for the anti-workplace bullying
movement. This piece explores the history of the movement’s perceived need for change and examines this latest setback, urging that awareness of the problem of workplace bullying and its intensification when employers’ hands are tied is critical.

I. WHAT IS BULLYING AND WHAT ARE ITS EFFECTS IN THE WORKPLACE?

Professor David Yamada, known as one of the foremost initiators and leaders of the workplace anti-bullying movement and the founder of the Workplace Bullying Institute,6 has drafted the preeminent piece of workplace anti-bullying model legislation, the Healthy Workplace Bill.7 The Workplace Bullying Institute defines bullying as the “repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators that takes one or more of the following forms: verbal abuse; offensive conduct/behaviors (including nonverbal) which are threatening, humiliating, or intimidating; and work interference—sabotage—which prevents work from getting done.”8 The bill, as presented to the New Hampshire legislature, defines abusive conduct as:

[A]n ongoing pattern of unreasonable actions of an employee or a group of employees directed towards an employee or group of employees which intimidate, degrade, or humiliate the victim. Such actions may be overt or covert behavior, or both. A single event may qualify as abusive conduct if it is particularly egregious.9

Examples of abusive behavior are listed in the bill, as presented to the Washington legislature, as, among other things, “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.”10

6. See Help for Individuals, WORKPLACE BULLYING INST., http://www.workplacebullying.org/front-page/ (last visited Apr. 19, 2013) (“[The Workplace Bullying Institute] is the first and only U.S. organization dedicated to the eradication of workplace bullying that combines help for individuals, research, books, public education, training for professionals-unions-employers, legislative advocacy, and consulting solutions for organizations.”).


Professor Yamada has identified industrial psychologist, educator, and founder of the nonprofit U.S. Campaign Against Workplace Bullying, Gary Namie, as well as his wife, Ruth Namie, a psychotherapist who focuses on helping workplace bullying victims, "as the two individuals most responsible for popularizing the term 'workplace bullying' in the United States." According to Professor Yamada, bullying is "the intentional infliction of a hostile work environment upon an employee by a coworker or coworkers, typically through a combination of verbal and nonverbal behaviors."

Often referred to as "equal opportunity harassment," or "status-blind discrimination," so as to distinguish it from actionable discrimination targeting legislatively protected classes, workplace bullying is often used to refer to abusive behavior that is repeated over time and designed to intimidate, offend, degrade, or humiliate an individual or group ("targets").

According to published studies, "bullying behaviors vary widely, covering a variety of overt and covert and verbal and nonverbal acts that undermine a target's ability to succeed at her job," and that "[b]ullies seek out agreeable, vulnerable and successful co-workers, often motivated by the bullies' own feelings of inadequacy." According to Namie, who, in conjunction with Zogby International, conducted 7740 online interviews of U.S. adults, bullies can be "cruelly innovative... vary[ing] their tactics hour to hour, day to day." Bullying behavior in the workplace can include giving people overly burdensome amounts of work and/or deadlines that make it impossible or nearly impossible for them to succeed. Such tactics divest people of their significant responsibilities in favor of meaningless make-work. Bullying may also take the form of incessant criticism, sabotaging people by deliberately failing to communicate essential facts to them, or scolding and verbal abuse designed to humiliate the victim. Victims, by contrast, according to Namie, tend to be "nice people" who are zeroed in on because the bullies assume that they will be too nice to resist them or stop them, and are generally "self-starters [who] know the work, have emotional

---

11. Yamada, Phenomenon, supra note 3, at 480.
12. Id. at 481.
intelligence, are well-liked, and are honest and principled. . . . They are nonconfrontational to the point that they cannot defend themselves when attacked.”

The consequences of workplace bullying are dire for enterprises and individuals alike. There are significant drops in morale and productivity in workplaces where workplace bullying occurs. Employers of workplace bullies can anticipate an upswing in workers’ compensation claims, increased medical costs, and increased litigation. In terms of harm that inures to individuals, victims have been reported to experience serious psychological and physical trauma, declining health, clinical depression, post-traumatic stress disorder, cardiovascular problems, musculoskeletal disorders, neurological and immunological impairments, fibromyalgia, and chronic fatigue syndrome. As Professor Yamada stated, “this behavior inflicts harmful, even devastating, effects on its targets and can sabotage employee morale in ways that severely undercut productivity and loyalty,” making it “bad for business.”

Costs that are a bit more remote but no less attributable to workplace bullying, include excessive absenteeism, high employee turnover rates, bad public relations, and increased workplace aggression.

Workplace bullying is quite commonplace. According to studies conducted by the Workplace Bullying Institute in 2010, 35% of U.S. workers, an estimated 53.5 million Americans, have experienced bullying firsthand, and an additional 15% of workers report witnessing it, meaning that half of


20. See Yamada, Phenomenon, supra note 3, at 483 (explaining that workplace bullying has direct and indirect costs to the company, including workers’ compensation claims and lawsuits).

21. See Gary Namie & Ruth Namie, Workplace Bullying: How to Address America’s Silent Epidemic, 8 EMP. RTS. & EMP. POL’Y J. 315, 320 (2004) (demonstrating that workplace bullying has been shown to lead to a variety of stress-related and psychological injuries, including PTSD, clinical depression, severe anxiety, and panic attacks); see also Harthill, A Comparative Analysis, supra note 17, at 266 (listing physical, stress-related, and psychological injuries and symptoms that can result from pervasive workplace bullying); Yamada, Phenomenon, supra note 3, at 483.


23. Id. at 483.

U.S. workers have directly experienced it. Some clear gender patterns have emerged in studies regarding bullying, with studies showing that 62% of bullies are men and 58% of targets are women; and bullies of both sexes target women in 80% of cases. While actionable sexual, racial, or other harassment is unlawful, bullying is four times more prevalent than unlawful harassment.

In a survey of 1000 adults, 44% claimed to work for abusive bosses; 59% claimed to have witnessed or experienced bosses criticizing employees in front of coworkers; and 50% claimed to have been personally insulted by bosses or to have witnessed such insults in the workplace. The survey also showed that 64% of workers believed that employees should be able to sue their employers for workplace abuse, humiliation, and harassment. A study by Harvey Hornstein of approximately 1000 employees over an eight-year period led him to posit that approximately 90% of the workforce falls prey to supervisory abuse from their bosses at least once during their careers.

II. No Recourse for Victims Presently, Model Legislation Holds Out Promise

Currently, there are no American laws that specifically protect victims of workplace bullying, although recourse may be available in some circumstances, such as when actionable harassment is directed at a member of a protected class under Title VII of the Civil Rights Act of 1964, or when a state claim of intentional infliction of emotional distress is successfully made out and not preempted by federal law or worker’s compensation statutes. Attempts to capture this behavior through legal channels, like

26. Id.
27. Id.
29. Stone, supra note 28, at 44.
30. Id.
31. Id.
32. David C. Yamada, Crafting a Legislative Response to Workplace Bullying, 8 EMP. RTS. & EMP. POL’Y J. 475, 481-82 (2005); Stone, supra note 28, at 44-45.
33. See generally FAQ, HEALTHY WORKPLACE CAMPAIGN, http://www.healthyworkplacebill.org/faq.php (last visited Apr. 21, 2013) (explaining that no state or federal laws exist that address workplace bullying).
35. See generally Yamada, Phenomenon, supra note 3, at 478 (stating that bullying claims for
intentional infliction of emotional distress claims, have proven almost totally unsuccessful due to their high threshold and exacting standards (extreme/outrageous behavior, severe emotional distress, etc.), as well courts’ resistance to regulate what they often consider to be merely the interpersonal dynamics of a workplace.\textsuperscript{36} Most suits brought based on bullying where no unlawful, class-based discrimination occurred thus seem destined to fail. To the extent that no redress is available for bullying per se under current state or federal law, one leading scholar observed that “the current approach to sexual harassment . . . creates a negative dynamic that encourages women (and sometimes men) to frame their complaints in terms of sexual offense, even when much more—or much less—may be at stake.”\textsuperscript{37}

Passage of the Healthy Workplace Bill,\textsuperscript{38} an extremely thoughtfully drafted piece of legislation, is the best hope for would-be workplace bullying plaintiffs and for this relatively new movement to gain significant traction. First introduced by California in 2003, the bill sets forth a civil cause of action for workplace bullying and creates incentives for employers to address and prevent workplace bullying.\textsuperscript{39} The Bill defines abusive conduct as that which “a reasonable person would find hostile,” based on the “severity, nature, and frequency of the defendant’s conduct.”\textsuperscript{40} Examples of the kind of conduct that would be actionable under the law include “repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal or physical conduct of a threatening, intimidating, or humiliating nature; the sabotage or undermining of an employee’s work performance; or attempts to exploit . . . [a] known psychological or physical vulnerability.”\textsuperscript{41}

Moreover, this legislation would not be unprecedented globally. Canada\textsuperscript{42} and several European countries have enacted anti-bullying legislation with no requirement that the victim be a member of a particular

\textsuperscript{36} See Gary Namie, Why the U.S. = Needs, and We are Advocates for, the Healthy Workplace Bill, WORKPLACE BULLYING INST. (Nov. 22, 2011), http://www.workplacebullying.org/2011/11/22/hwb-importance/ (stating that the claim of intentional infliction of emotional distress for a case of workplace bullying “nearly always fails to provide relief for bullied targets”); see also Yamada, Phenomenon, supra note 3, at 478.


\textsuperscript{38} THE HEALTHY WORKPLACE BILL, supra note 4.


\textsuperscript{40} Id.

\textsuperscript{41} See, e.g., H.B. 2054, 81st Leg., 1st Sess., § 21-3E-3(a) (W.V. 2013), available at http://www.legis.state.wv.us/Bill_Status/bills_text.cfm?billdoc=hb2054%20intr.htm&yr=2013&styp=RS&i=2054 (defining “abusive conduct”).

\textsuperscript{42} Susan Harthill discusses the Federal Canadian Labour Law, stating that in 2008, the Canada Occupational Health and Safety Regulations added a regulation addressing “violence prevention in the workplace,” and describes the 2008 Violence Prevention regulation as requiring “employers to develop and post a violence prevention policy setting out employer obligations.” Harthill, A Comparative Analysis, supra note 17, at 268-70.
protected class.\textsuperscript{43} Rather, this legislation operates from the premise that workers possess an unassailable right to a certain amount of dignity in the workplace.\textsuperscript{44} In 1994, Sweden became the first nation to enact legislation against workplace bullying: the Victimization at Work Ordinance.\textsuperscript{45} Quebec, Canada, was the first jurisdiction in North America to enact anti-workplace-bullying legislation in effect June of 2004: the Act Respecting Labour Standards.\textsuperscript{46}

Despite the fact that twenty additional states have proposed anti-workplace-bullying legislation since 2003,\textsuperscript{47} no anti-workplace-bullying legislation in the U.S. has been enacted.

\textsuperscript{43} In 2002, France passed the Social Modernization Law, which prohibits "moral harassment" in the workplace. "The Labor Code 'now provides that no employee shall suffer repeated acts of moral harassment, which have the purpose of causing a deterioration in working conditions by impairing the employee's rights and dignity, affecting the employee's physical or mental health, or compromising the employee's professional future.'" Yamada, supra note 32, at 512. In 1993, Sweden passed the Victimization at Work Ordinance, which characterizes victimization as "adult bullying, mental violence, social rejection and harassment—including sexual harassment," and obliges employers to prevent and take actions against such victimization. Id. (internal quotation marks omitted). In 1997, the United Kingdom passed the Protection from Harassment Act, which creates civil liability for a person who acts in a "course of conduct [(1)] which amounts to harassment of another, and [(2)] which he knows or ought to know amounts to harassment of another." Id. at 513. (internal quotation marks omitted).

\textsuperscript{44} For example, the United Kingdom's 1997 Protection from Harassment Act states that "[e]very individual has a right to be free from harassment." Protection from Harassment Act 1997, c. 40 § 1 (Eng.). Sweden's Victimization at Work Ordinance states that "[v]ictimization does not occur until personal conflicts lose their reciprocity and respect for people's right to personal integrity slips into unethical actions . . . and individual employees are dangerously affected as a result." KRÄNKANDE SARBEHANDLING I ARBETSLIVET [VICTIMIZATION AT WORK] (Arbetarskyddsstyrelsens Författningssamling [AFS] 1993:17) (Swed.) (see Guidance on Section 1) (emphasis added). Canada's law affirmatively states that "[e]very employee has a right to a work environment free from psychological harassment." An Act Respecting Labour Standards, R.S.Q., (2002) c. N-1.1, § 81.19 (Can.).


\textsuperscript{47} The Healthy Workplace Campaign, The Healthy Workplace Bill—Workplace Bullying Legislation for the U.S., http://www.healthyworkplacebill.org/ (last visited Apr. 8, 2013) ("Twenty-four States since 2003 have introduced the HWB—No laws yet enacted" and there are "[nine] states with [twelve] bills active as of March 25, 2013.").
legislation has been enacted into law. The bill, additionally, is not without its critics, who voice concern about the opening up of the floodgates of litigation over what are perceived to be often trivial and commonplace slights, and the redundancy of the bill, in light of existing tort and discrimination law, among other things. Some reports in both social media and scholarly journals, however, have trumpeted the bill as gaining support, even as larger scale anti-bullying movements that target school and societal bullying have gained significant traction.

III. MANY REASONS TO LEGISLATE AGAINST WORKPLACE BULLYING

Even during the course of this symposium on bullying in 2013, the topic of bullying across the human life cycle (in the stages of childhood, early education, working adulthood, and later in life) and across contexts (the schoolyard, the workplace, etc.) has never been more timely. However, when focusing on workplace bullying, and assessing where we are in terms of surveying and trying to solve the problem, it is important to keep several things in mind. In the first place, work has never been more central to people’s lives than it is today. People are spending unprecedented amounts of time in the workplace. With the proliferation of social media and


49. See generally Yamada, Phenomenon, supra note 3, at 493-521 (discussing the possibility of pursuing a status-blind workplace harassment as possible intentional infliction of emotional distress, Title VII hostile work environment, ADA, NLRA, and OSHA claims); id. at 532-33 (overviewing possible policy criticisms of status-blind hostile work environment legislation, including increased litigation, and “tortifying” the workplace).

50. See Jessica R. Vartanian, Speaking of Workplace Harassment: A First Amendment Push Toward a Status-Blind Statute Regulating “Workplace Bullying”, 65 ME. L. REV. 175, 209 (2012) (stating that the Healthy Workplace Bill has gained positive attention and that the public’s opinion of the Bill has transformed from skepticism to advocacy); see also Yamada, Progress Report, supra note 48, at 267-68 (“As the Healthy Workplace Bill has been introduced in more state legislatures, however, interest has grown, with some lawyers anticipating eventual enactment.”).

51. See, e.g., Anti-Bullying Campaign Has Success in County, THE DAVIS CLIPPER, Nov. 16, 2012, http://www.davisclipper.com/view/full_story/20849064/article-Anti-bullying-campaign-has-success-in-county (last visited Apr. 18, 2013) (indicating that an anti-bullying program was working when no children raised their hands when asked if they had been bullied or had seen someone being bullied, and that the program will be available to all interested schools in the area); Ross Kay & Kallee Buchanan, Student-Led Anti-Bullying Program Success in Monto, ABC WIDE BAY, Aug. 3, 2012, http://www.abc.net.au/local/stories/2012/08/03/3560219.htm. (reporting that a teacher remarked that she had seen a change around the playground in response to a school-wide student led effort to combat bullying).

technology that aid work and communication with co-workers after hours, the workplace is often seen as pervasive, sometimes oppressively so, in employees’ private lives.

Further, the impact of workplace bullying has been documented to impact not only, as discussed, the target of the bullying, but the workplace and the employer itself, with impact seen on internal morale, loyalty, efficiency, and profitability among other things. Finally, due to differences in the way in which the sexes are socially conditioned to absorb, process, and respond to workplace abuse there may very well be a disproportionate effect on women that comes from even so-called “equal opportunity bullies.” It is clearly more important than ever to enable victims of workplace bullying to vindicate their rights pursuant to legislation that will help regulate the workplace.

IV. EMPLOYERS STEPPING IN TO RECTIFY THE PROBLEM

In the absence of any external regulation, many employers have recognized that compliance with legislation is merely a floor, and not a ceiling, and that their employees need not suffer the harms conferred by workplace bullies and the caustic workplace environments that they create. These employers have voluntarily undertaken to craft anti-harassment policies that not only prohibit the protected status-based harassment proscribed by extant legislation like Title VII and the Americans with

\[\text{available at} \ http://www.sleepfoundation.org/article/press-release/longer-work-days-leave-americans-nodding-the-job ("Spending an average of nearly 4.5 hours each week doing additional work from home on top of a 9.5 hour average workday, Americans are working more . . .").

53. See Nicky Jatana et al., Advising Employers on the Use of Social Media in the Workplace, 34 L.A. LAW. 12, 12 (2012) ("Social media had become an integral part of the way Americans communicate. In 2010, social media accounted for 22 percent of all time spent online . . . [employees] are also spending more time using social media, often on company hours.").

54. See C. Brady Wilson, U.S. Businesses Suffer from Workplace Trauma, 70 PERSONNEL J. 47 (1991) (stating that workplace trauma causes U.S. businesses to lose five to six billion dollars annually due to decreased productivity); Daniel, supra note 15, at 71-75 (describing the costs of workplace bullying as including loss of talent, decreased employee morale, as well as a decrease in employee efficiency, productivity, and profitability); Alexia Georgakopoulos et al., Workplace Bullying: A Complex Problem in Contemporary Organizations, 2 INT'L J. OF Bus. & SOC. SCI. (SPECIAL ISSUE) 1, 2 (2011) (stating how bullying targets will reduce their work efforts, will take time off to avoid the bully, or will leave the organization which results in reduced productivity and profits for the company); see generally Maureen Duffy, Preventing Workplace Mobbing and Bullying with Effective Organizational Consultation, Policies, and Legislation, 61 CONSULTING PSYCHOL. J. 242, 248 (2009) ("It is in an organization's best interests to take seriously the issue of workplace culture by preventing bullying and mobbing, if only to protect itself from the high costs of absenteeism, sick leave, staff turnover, litigation, and negative publicity through failure to do so.").

55. Stone, supra note 28, at 59 (coining the term “equal opportunity bully” and generally discussing factors that tend to obscure the truth of the effects of workplace bullying on women).
Disabilities Act, but also ban what these employers consider bullying behavior that they simply do not wish to tolerate. At least one top employment lawyer, the Vice Chair of Littler Mendelson, a top Labor and Employment law firm, has estimated that over the course of the next decade, up to eighty percent of businesses will have a written policy on workplace bullying. Because employment is presumed to be at will, employers may hire and fire for any reason that they wish, including because of bullying behavior.

In fact, the Association of Corporate Counsel has published articles advising employers that in order to mitigate the risks that workplace bullying poses to the workplace environment and its functioning, they should "consider establishing a policy that prohibits workplace bullying either by creating a new policy or by expanding the employer's current harassment policy." Employers seem to have sat up and taken notice. While some companies have formal anti-bullying policies for the workplace, offenders of which are subject to discipline or even termination, others report that while their policies are intended to engender a bully-free workplace, they are not explicitly labeled "anti-bullying" policies.

57. A survey by the Society for Human Resource Management (SHRM) reports that forty percent of respondents say their employer has an anti-bullying policy that is part of another policy and three percent of respondents say their employer has a separate anti-bullying policy. Soc'y for Human Res. Mgmt., Workplace Bullying Survey Findings, SHRM, (Feb. 28, 2012), http://www.shrm.org/Research/SurveyFindings/Articles/Pages/WorkplaceBullying.aspx.
60. See RESTATEMENT (THIRD) OF EMP'T LAW § 2.01 (2012) ("The courts in forty-nine states and the District of Columbia recognize the principle that employment is presumptively an at-will relationship."); see generally 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, 152 (2008) (stating that the U.S. operates under an at-will employment doctrine, which leads frequent job changes to be seen as normal).
61. "Some employers have realized the importance of taking steps to prevent bullying or make employees aware that they have a strict no-tolerance bullying policy, not only for the obvious reason of protecting their valued employees, but also because it's good for business." Amy C. McDonnell, Workplace Bullying and Your Employees: What Can You Do?, THE HIRING SITE (Apr. 20, 2011), http://thehiringsite.careerbuilder.com/2011/04/20/workplace-bullying-and-your-employees-what-can-you-do/.
62. Carol R. Gibbons et al., Don't Get Pushed Around: What Employers Should Do to Address Bullying Behavior in the Workplace, ASS'N OF CORP. COUNSEL DOCKET, Apr. 2010 at 84, 90.
63. See Renee L. Cowan, "Yes, We Have an Anti-bullying Policy But..." HR Professionals' Understandings and Experiences with Workplace Bullying Policy, 62 COMM. STUD. 307, 314 (2011) ("[M]any of the HR professionals felt they did have a policy to deal with bullying in the workplace, but it was not labeled 'bullying' and was actually a policy or a mix of policies
V. AN EFFECTIVE OPTION?

Not everyone thinks that formal policies are the optimal way in which to combat and eradicate workplace bullying. Some of those who study, forecast, and regulate workplace behavior alike have posited that:

What tends to work better, instead of laws and policies from the top, is creation of a culture or behavioral norm among all peers/co-workers where everyone agrees that bullying is unacceptable. Recasting and developing positive socio-emotional climates in organizations, and doing everything possible to maintain those climates, is much more productive and beneficial than flash-in-the-pan policy implementations.64

Many feel that policies may simply be superficial “lip service,” or “window dressing,”65 and that bullying can only be effectively stopped by “leadership that is committed because it sees that productivity is threatened, resulting in policies that are linked to the bottom line.”66

Additionally, studies of corporate codes of conduct have led researchers to conclude that in reality, corporate codes are promulgated not for the benefit of employees and not to necessarily “do good” or “do the right thing,” but rather as “the result of struggle between interested groups.”67 Thus, one researcher has concluded, “it is unlikely that any voluntary employer anti-bullying policy will meet the needs or rights of the target employees, except where these needs overlap with those of the organization.”68

The Workplace Bullying Institute, however, has chastised employers for their inaction in the face of this problem, noting that “[b]ullies derive most of their support from . . . HR. It’s a club, a clique, that circles the wagons in defense when one of their own is accused.”69 The so-called “movement,” has traditionally favored formal regulation, like the legislation and strong

---

64. Sameer Hinduja, Bullying Policies Aren’t Magic Bullets, ATLANTA J. CONST., Nov. 15, 2012, at A18; see also Duffy, supra note 54, at 243 (“[W]ithout incorporating antimobbing/antibullying policy development within a wider program of providing education about the effects of mobbing and bullying and fostering positive workplace behaviors across the board, an add-on policy against mobbing and bullying is likely to backfire.”); Georgakopoulos et al., supra note 54, at 17 (stating that workplace bullying is not a simple problem and will not be resolved by a one-size-fits all policy).

65. Duffy, supra note 54, at 254.

66. Gutner, supra note 59.


68. Id.

internal policies that evince employers’ pledge to rid themselves of this behavior, even if it has not been formally outlawed.

VI. FLAWED POLICIES

Most experts agree that a typical anti-bullying policy has several key components. It should explicitly contain the term “bully” or “bullying,” with a workable and comprehensible statement about it, as well as a statement of the core purpose of the policy and a statement of the employer’s values that are furthered by the policy.70 Examples of the types of behaviors prohibited should be furnished, as should an appropriate and workable investigation procedure containing elements like required documentation to support allegations, so that it will be received as credible and just.71 A policy should outline a mechanism by which reporting can take place and describe employer options and remedies, which should include an informal resolution option, an alternative dispute resolution option, and a means for filing a formal charge or grievance.72 Victims should be made to feel secure through the offering of an anti-retaliation provision and assurances of timely investigations, due process, an appeals process, and confidentiality.73 Finally, findings should be reported to all involved parties and accountability and sanctions should be attached to a finding of the prohibited behavior.74

While this sounds feasible, it looks as though many employers have struggled to promulgate and implement effective policies that are clear about what they intend to accomplish. In a 2011 study conducted by Renee E. Cowan, researchers sought to gain insight into “whether U.S. organizations use policies to address bullying and, if they do, to uncover how HR professionals interpret these policies . . . and what the policies may communicate to employees.”75 In regards to a survey by other researchers,

70. See Cowan, supra note 63, 322-23 (stating that organizations need to clearly define the term “‘bullying’ in their policies and include a statement of commitment); Duffy, supra note 54, at 255 (stating that an anti-bullying policy should have a clear purpose and should reference how the company’s values support the policy).

71. See Duffy, supra note 54, at 256-59 (outlining examples of bullying or mobbing behavior to include in policies and possible procedures for filing formal charges and grievances).

72. Id. at 257-58; Georgakopoulos, supra note 54, at 16 (stating the need for formal reporting and documentation processes within a workplace bullying policy).

73. See Cowan, supra note 63, at 323 (overviewing researchers’ suggestions about how to implement an anti-bullying policy, including an “investigation procedure that will be perceived as credible and fair, required documentation by claimant/target, a description of the range of employer proposals to remedy the situation and an antiretaliation clause”); Duffy, supra note 54, at 258-59 (providing an outline of different procedures for enforcing a workplace anti-bullying provision, including confidentiality assurances).

74. See Duffy, supra note 54, at 258 (“A finding of workplace mobbing or bullying should trigger an internal evaluation of the organizational context. . . . Employers also need to have informal and formal sanctions available for employees found to have been perpetrators of workplace bullying/mobbing.”).

75. Cowan, supra note 63, at 308.
the researchers acknowledged numerous interpretations as to what an anti-bullying policy would look like and that these interpretations would impact whether and how the policies were utilized. They observed that many policies "lacked the detail to address bullying, a possible sign of a low commitment to the anti-bullying policy." In addition, these policies were crafted "in response to bullying activity instead of . . . as a preventative measure."

The results of the study were disheartening. Researchers reported that the policies studied appeared to communicate to employees that "(a) Anti-bullying measures are not a priority, (b) bullying does not rise to the level of illegal harassment, and (c) only some behaviors are explicitly prohibited." Specifically, the policies studied lacked explicit references to bullying or any workable definition of the behavior that would constitute bullying, despite the intent of the policy drafters and human resource specialists to effectuate policies that would prohibit bullying behavior in the workplace. Moreover, the researchers concluded, the "ad hoc nature" of combining multiple policies, such as codes of conduct, harassment policies, and workplace violence policies, in lieu of a formal, comprehensive anti-bullying policy, evinced a lack of organizational emphasis or priority placed on the issue of workplace bullying.

In addition, the researchers found a divergence between what the policies actually said and what the human resources professionals believed they said, suggesting that these policies might be misguided and misapplied from their inception. An over emphasis on behavior already prohibited by

---

76. The researcher in this study "surveyed over 400 Finnish city administrators, asking questions on the existence of written anti-bullying policies, preventative measures taken to prevent bullying, and the performance of the municipality in regards to bullying. She also conducted a content analysis of actual bullying policies used by these cities and reported [that] they had 'copied and pasted' policy wording from other organizations and did not adapt these to their specific city. She speculated that these policies lacked the detail to address bullying, a possible sign of a low commitment to the anti-bullying policy. Results also suggested that the cities incorporated the anti-bullying policy in response to bullying activity instead of utilizing it as a preventative measure." Id. at 309. See Denise Salin, The Prevention of Workplace Bullying as a Question of Human Resource Management: Measures Adopted and Underlying Organizational Factors, 24 SCANDINAVIAN J. MGMT. 221, 222 (2008) (describing the study's aims "to analyse organizational action against bullying, and to explore the factors that affect the extent of any anti-bullying measures that are undertaken" using the "Finnish context" as an example).

77. Cowan, supra note 63, at 309; Salin, supra note 76, at 228 ("Merely imitating what other organizations do and write, rather than thoroughly investigating the organization's own needs and resources and getting support from broad participation . . . may mean that people are less committed, less aware of the policies, and lacking the detail needed to address bullying successfully in a particular work environment.").

78. Cowan, supra note 63, at 309.
79. Id. at 317.
80. Id.
81. Id.
82. Id. at 321.
law, the researchers said, could easily telegraph to employees that the policy only protects those already protected by existing law, such as federal anti-discrimination law, which does not protect targets of bullying. Further, according to the researchers, admonitions for employees to, for example, "be respectful" or "be courteous," fail to address those things that render behavior bullying behavior, such as repetition, or harmful impact, and similarly fail to address how employers should redress grievances that stem from policy violations. Many policies appear to render simple incivility against the rules.

The researchers found that “[a]fter analyzing the policy language, it [was] clear [the policies] were ambiguous about bullying or completely ignored the phenomenon. However, the [human relations] professionals overwhelmingly voiced the idea that these policies communicated that the organization cared about bullying situations.” In the end, the researchers recommended that with the proliferation of the term bullying, there should be “clearer policies regarding bullying and a shift in policy language.”

In another study conducted by the Workplace Bullying Institute in 2012, 311 respondents were asked whether their employer had a specific policy forbidding workplace bullying. The researchers had previously tried to ascertain this information, but had concluded that “based on the response, we were certain that they confused an anti-discrimination policy (written to comply with state and federal laws) with the need for additional protections for workers against abuse in same-gender and same-race situations.” The researchers found that even when the question was posed in a more point-blank manner, 38 of the 311 respondents chose the option: “Not sure if policy exists.” Those responses were eliminated from the sample, leaving 273 who were certain their workplace had anti-bullying policies and could properly evaluate their enforcement.

Of those responses, 61.9% chose “No. There are only anti-harassment or anti-violence policies,” while 17.9% chose “Yes. [An anti-bullying] policy exists, but not applied to everyone (some are immune from enforcement).” Another 14.6% of responses chose “Sort of. [The policy is] Named Respect or Incivility, too weak to stop bullying” deemed by the researchers “an employer failure to credibly stop abusive conduct.” By contrast, 2.9% chose
"Sort of. [The policy is] Named Respect or Incivility but strong enough to stop bullying," which the researchers counted as an “employer success.”91 A mere 2.5% chose “Yes. [An anti-bullying] Policy exists, and is applied to everyone (good enforcement).”92 Finally, the researchers reported that:

According to the customers of internal employer anti-bullying protections, approximately only five percent of employers have adequately addressed workplace bullying. Within the good employer group, less than three percent have the courage to call bullying what it is and to craft explicit policies with credible enforcement procedures. About one-third of employers (32.5%) created something but either the policy or its enforcement is considered by targets to be too weak to prevent or correct workplace bullying. The majority of employers (61.9%) simply ignore bullying.93

It makes a good deal of sense that so many employers are dispassionate about policing lawful bullying at work despite all of the incentives that exist for them to do so, and that so many are reluctant to, or even wary of, promulgating internal formal policies to prohibit the behavior. As Professor Yamada has noted, in the wake of an employment law trend in which courts are construing written employer policies as enforceable contracts, it is logical for employers to shy away from unwittingly exposing themselves to increased liability for tolerating behavior in their workplaces that is perfectly lawful.94 Passage of the Healthy Workplace Bill or other “anti-workplace-bullying” legislation is thus seen as the lone viable option for the movement’s advancement.95

Further hampering and complicating employers’ attempts at crafting and promulgating policies are how new the field is and thus how scarce and unavailable templates and model policies are. Moreover, as scholars and researchers have recognized, it is often the case that bullying behaviors, in certain circumstances, can actually aid employers and employees in goals involving productivity and economic advancement.96 It is thus only natural

---

91. Id.
92. Id.
94. See David Yamada, Potential Legal Protections and Liabilities for Workplace Bullying, NEW WORKPLACE INST. June 2007, at 12 available at http://www.academia.edu/161810/Potential_Legal_Protections_and_Liabilities_for_Workplace_Bullying ("A small number of employers ... address general harassment and bullying behaviors in their employee policies. This can implicate liability issues, for courts increasingly are holding that written employment policies are enforceable as contractual agreements.").
96. See Salin supra note 76, at 223 (discussing different models to deal with workplace
that some employers will be loath to commit to disciplining or terminating employees who engage in bullying behavior.

VII. NLRB DECISIONS MAKE IT DIFFICULT FOR EMPLOYERS TO ENFORCE ANTI-BULLYING POLICIES

But what about those employers who voluntarily undertake to ban bullying in the workplace? What about those who see the value in having a bully-free workplace where they can furnish each employee with an environment in which their personal dignity is respected? As discussed, such workplaces will likely engender more efficiency, loyalty, productivity, morale, and good external public relations than those in which bullying is ignored, or worse, encouraged. Additionally, as discussed, since statutory law is merely a compliance floor, and not a ceiling, companies are free, at least in theory, to hold their employees to higher standards of civility than the law requires. So, for example, although an actionable instance of sexual harassment requires that the sexually harassing behavior be severe or pervasive,97 an employer should be able to discipline or fire someone who engages in offensive, sexually-based behavior that falls short of the requisite level of severity or pervasiveness, just as the employer can discipline or fire that employee for any—or no—reason at all. Moreover, even if offensive behavior is not “because of” sex or any other protected class status, the employer should similarly be able to prohibit it.

Several recent holdings of the National Labor Relations Board (“NLRB”), however, have cast doubt upon this proposition. The decisions have made it somewhat easier for employers to voluntarily prohibit any arbitrarily chosen behavior than it is for them to voluntarily ban behavior that may rise to the level of bullying according to the Healthy Workplace Act. The NLRB has found that various employers’ actions in implementing anti-harassment and anti-bullying policies run afoul of the National Labor Relations Act.

A. Tension Between Section 7 and Anti-Bullying Policies

Section 7 of the National Labor Relations Act (“NLRA”) states, in relevant part, that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or

97. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (“When the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment, Title VII is violated.”) (citations omitted) (internal quotation marks omitted).
protection.” Indeed, Section 7’s protections extend to those employees who are unionized, as well as to those who are not, so long as the employees are covered under the Act itself. For example, because supervisors are not covered by the Act, they will not enjoy the protection of Section 7, but those employees who may bully supervisors in the course of complaining about their jobs will be protected by Section 7. As long as the behavior in question may be considered “concerted,” has an objective that is for “mutual aid or protection,” and does not “cross [the] line” in terms of being overly opprobrious, the behavior is protected under Section 7.

Insofar as a determination that an activity is “concerted” goes, despite the Board’s pronouncement that concerted activity must be “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself,” the Board’s conception of “concerted” is so expansive that even a lone employee may be deemed to be engaging in concerted activity when she acts to “seek to initiate or to induce or to prepare for group action” or brings “truly group complaints to the attention of management.” Collective employee activity is protected under the NLRA’s “mutual aid or protection” prong so long as the activity pertains in some way to “negotiating the terms and conditions of their employment.”

Under Section 8 of the NLRA, employers are forbidden from engaging in “unfair labor practices,” which include retaliating against employees who engage in the exercise of their Section 7 rights. Among the remedies that the Board is authorized to fashion are back pay, reinstatement, and attorney’s fees. With remedies meted out by the NLRB rather than a court

99. Id. at § 152(3) (specifying that when used in this subchapter “[t]he term ‘employee’ shall include any employee”).
100. See id. (specifying that the term employee, when used in this subchapter, does not include “any individual employed as a supervisor”); see also Howard Johnson Co. v. NLRB, 702 F.2d 1, 2 (1st Cir. 1983) (explaining that a supervisor is “not entitled to the protections given to statutory employees under the National Labor Relations Act”).
102. Atlantic Steel Co., 245 N.L.R.B. 814, 816 (1979) (“The decision as to whether the employee has crossed that line depends on several factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.”).
103. See id. (“[T]he Board and the courts have recognized (as did the Administrative Law Judge in passing) that even an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the [National Labor Relations] Act.”).
104. Prill v. NLRB, 835 F.2d 1481, 1483 (D.C. Cir. 1987) (citation omitted).
105. Id. at 1484 (citation omitted).
107. 29 U.S.C. § 158(a) (2006) (“It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.”).
108. Id. at § 160(c) (“If upon the preponderance of the testimony taken the Board shall be of
FLOOR TO CEILING

(though the Board's orders are not self-enforcing and parties seeking to enforce them need to approach a federal Court of Appeals), Section 7 is often forgotten about when people think about recourse and protections afforded to employees who feel that they have been unlawfully terminated. However, a torrent of recent NLRB decisions attempting to navigate the subject of social media and Section 7 of the NLRA have brought Section 7 protection back into the forefront of public consciousness—and have made it difficult, if not impossible, for employers who want to retain the prerogative to rid their workplaces of bullies.

B. Employees Rarely Lose Section 7 Protection as “Opprobrious” Standard Is High

Employee activity will lose its protection, however, at the point at which it “crosses the line” and is deemed to be “so disloyal, reckless, or maliciously untrue” that it no longer warrants protection by the Act. When evaluating anti-management sentiment or behavior for opprobriousness that renders the employee “unfit for further service,” the Board will take into account factors like “(1) the place of the discussion; (2) the subject matter of the discussion: (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.” Moreover, the Board has been known to factor the coarseness of the overall workplace culture into its analysis, finding, for example in one case, that the exception

the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him.”). The NLRB reasserted its inherent authority to award attorney's fees and litigation expenses in Camelot Terrace, 357 N.L.R.B. 161 (2011).

109. 29 U.S.C. § 160(e) (2006) (“The [National Labor Relations] Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which petition may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order.”).

110. Endicott Interconnect Techs. Inc. v. NLRB, 453 F.3d 532, 537 (D.C. Cir. 2006) (describing a long-time employee's public statements disparaging the company's technological capabilities and one of its managers; holding that such statements are so disloyal that they are not protected); cf. Five Star Transp. Inc. v. NLRB, 522 F.3d 46, 54 (1st Cir. 2008) (“In this case, the discriminatees' letters to the District were reasonably necessary to carry out their lawful aim of safeguarding their then-current employment conditions. This is because the Union had already contacted Five Star in an effort to be recognized as the drivers' bargaining representative, and Five Star had ignored its advances.”).

under which protection is lost "could hardly apply" to profane statements made "[i]n a plant where obscenity and profanity of speech are commonplace."\(^{112}\)

There has hardly been any Board analysis of whether employee behavior alleged to violate an employer’s anti-bullying or anti-harassment policy loses Section 7 protection, but that which there is casts doubt upon an employer’s ability to invoke such a policy to fire employees where plausible Section 7 protection is alleged. In 2012, the Board found that an employee was unlawfully suspended and fired in contravention of Section 7 of the NLRA where his employer took issue with his pro-union written comments left in the break room that the employer said made other employees feel offended, threatened, and intimidated in terms of their physical safety.\(^{113}\) In this case, the behavior at issue may or may not have even risen to the level necessary to be actionable under the Healthy Workplace Act,\(^{114}\) but the employer clearly wanted to exercise what it believed was its right to proscribe, but could not.

In 2007, the Board addressed the case of two employees accused of sending an offensive letter to a co-worker, which referred to the coworker in derogatory terms.\(^{115}\) The letter was found to be “sufficient to create a hostile work environment, and confirmed the existence of a strong antipathy towards her,” and potentially actionable under Title VII.\(^{116}\) Further, the employer had placed the employees on probation for violating the “Company’s Sexual and Other Harassment Policy.”\(^{117}\) Yet despite the impropriety of the conduct under discrimination law and the employer’s policy, the Board found that the employees’ “language was not sufficiently egregious to constitute activity unprotected by the [NLRA].”\(^{118}\)

---

112. Id. at 819.
114. See id. (“On September 10, in the midst of the [union] decertification campaign, three union newsletters with handwritten statements were found in the employee break room. The handwritten statement on the first newsletter read, ‘Dear Pussies, Please Read!’ The handwritten statement on the second newsletter read, ‘Hey cat food lovers, how’s your income doing?’ The third newsletter bore the handwritten statement, ‘Warehouse workers, RIP.’ As indicated, each handwritten statement was anonymous.”); see also Quick Facts About the Healthy Workplace Bill, HEALTHY WORKPLACE BILL, http://www.healthyworkplacebill.org/bill.php (last visited Apr. 18, 2013) (explaining that under the Healthy Workplace Bill, “abusive work environment” is defined precisely and “is a high standard for misconduct”).
116. Id.
117. Id. The policy “broadly prohibit[ed] harassment of any kind, . . . emphasi[z]ed that sexual harassment [wa]s specifically prohibit[ed] and mandate[d] a prompt investigation of all complaints of harassment, and provide[d] that the [employer could] discharge any employee immediately for harassment of any kind.” Id.
118. Id. at *31 (“No matter how derogatory, use of the terms ‘Godzilla,’ ‘witch,’ or ‘bitch,’ about a management style when speaking to coworkers does not rise to the level of egregious
These cases strongly indicate that behavior that satisfies the Healthy Workplace Bill's definition of abusive behavior is unprotected by Section 7. Conversely, behavior that does not rise to the Healthy Workplace Bill's standard of "abusive" remains protected under Section 7, regardless of the employer's belief that the employee's actions are reprehensible or inappropriate. Thus, a gap exists in which some bullying behavior can be protected by Section 7, and employers will be rendered powerless to prevent it, even if it is nonetheless deemed intolerable by a given employer. It is important to remember that the Atlantic Steel standard originally appeared to permit employers to refuse to tolerate behavior that denigrates not other employees or supervisors, but the company itself, thus losing its business.\textsuperscript{119} The Board observed in Atlantic Steel that NLRA protection will not be displaced because "an employee's language is inaccurate or questions the veracity of an employer."\textsuperscript{120} Because of the nature of what is protected under Section 7, these cases typically involve employee outbursts toward supervisors, and the Board has repeatedly found that such outbursts do not lose the Act's protection.\textsuperscript{121} Thus, according to the Supreme Court, "a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income" will be unprotected.\textsuperscript{122} On the other hand, the NLRB has held that "an employee's public criticism of an employer must evidence a malicious motive," and the "mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue."\textsuperscript{123} Also, "the fact that an employee's statements are hyperbolic or reflect bias does not render them unprotected."\textsuperscript{124}

In one 2010 case, the Board found that an outburst did not lose the Act's
protection where it consisted of the employee telling his supervisor "that he was an [fl]ing mother [fl]ing, 'an [fl]ing crook,' and 'an asshole,' and that he was stupid, nobody liked him, and everyone talked about him behind his back."125 This employee stood up in the small office, pushed his chair aside, and said that, if he was fired, [the supervisor] would regret it."126 The Board reasoned that:

Because [the] outburst, [which took place] at a meeting held in the context of his protected concerted activity . . . was brief and unaccompanied by insubordination, physical contact, threatening gestures, or threat of physical harm . . . we conclude that Aguirre's outburst, while vehement and profane . . . did not render him unfit for further service and thus did not exceed the bounds of statutory protection.127

The Board found that despite the judge having characterized the employee's "'cursing and derogating' . . . as 'belligerent,' 'menacing,' and 'at least physically aggressive if not menacing,'" these terms were, instead, "inconsistent with [the judge's] own factual findings and overstate its severity in light of the evidence."128 The Board determined that the actions were not so opprobrious as to divest the employee of the NLRA's protection.129 To the extent that this or any other employer desired to define behavior, like that at issue, as prohibited bullying, it would likely not be able to enforce the prohibition.

VIII. THE ROLE OF SOCIAL MEDIA AND CYBER-BULLYING

As technology and social media permit the workplace to follow workers home at the end of the day, it is clear that cyber bullying,130 which can be defined for present purposes as online behavior that would be captured by

125. Plaza Auto Ctr., 2010 WL 3246659 at *2.
126. Id.
127. Id. at *3-5.
128. Id. at *4.
129. Id.
130. See Natasha R. Manuel, Cyber-Bullying: Its Recent Emergence and Needed Legislation to Protect Adolescent Victims, 13 LOY. J. PUB. INT. L. 219, 220 ("Cyber-bullying has been defined as specifically aggressive, intentional and repeatedly harmful acts, through electronic means of contact with an individual."). Cyber-bullying includes the following acts: "Sending someone mean or threatening emails, instant messages, or text messages; excluding someone from an instant messenger buddy list or blocking their email for no reason; tricking someone into revealing personal or embarrassing information and sending it to others; breaking into someone's email or instant message account to send cruel or untrue messages while posing as that person; creating websites to make fun of another person such as a classmate or teacher; using websites to rate peers as prettiest, ugliest, etc." What is Cyberbullying?, NAT'L CRIME PREVENTION COUNCIL, http://www.ncpc.org/topics/cyberbullying/what-is-cyberbullying (last visited Apr. 20, 2013).
the Healthy Workplace Bill, can intertwine and eventually merge with workplace bullying. Again, despite the fact that employers should, in theory, retain the prerogative to prohibit bullying that disrupts and fractures the workplace, the NLRB recently showed that employers may not be able to exercise their at-will employment prerogative to enforce anti-bullying and harassment policies in an unfettered manner. 131

In December, 2012, the National Labor Relations Board (“NLRB”) affirmed the decision of an administrative law judge in a case in which five employees of Hispanics United of Buffalo (“HUB”) were terminated for Facebook postings about their job and co-workers that HUB deemed harassing and bullying. 132 The employees’ termination was sparked by a complaint from Lydia Cruz-Moore, who worked at HUB assisting domestic violence victims with tasks and projects like attending court hearings, finding jobs, and paying bills. 133 Cruz-Moore had been vocal in her criticism of other employees, who she felt, failed to provide good service to the organization’s clients. 134 One Saturday, a discussion of this criticism among employees, via text message and on the Facebook page of employee Mariana Cole-Rivera, escalated into the exchange of words that HUB found to have violated its harassment policies. 135 The following reiteration of the events is taken directly from the NLRB decision in this case:

[U]sing her own personal computer, Cole-Rivera then posted the following message on her Facebook page: Lydia Cruz, a coworker feels that we don't help our clients enough at [HUB]. I about had it! My fellow coworkers how do u feel? Four off-duty employees—Damicela Rodriguez, Ludimar Rodriguez, Yaritza Campos, and Carlos Ortiz—responded by posting messages, via their personal computers, on Cole-Rivera’s Facebook page; the employees’ responses generally objected to the assertion that their work performance was substandard. Cruz-Moore also responded, demanding that Cole-Rivera “stop with ur [sic] lies about me.” She then complained to Iglesias about the Facebook comments, stating that she had been slandered and defamed. At Iglesias’ request, Cruz-Moore printed all the Facebook comments and had the printout delivered to Iglesias. On October 12, the first workday after the Facebook postings, Iglesias discharged Cole-Rivera and her

131. See generally Robert Sprague, Invasion of the Social Networks: Blurring the Line Between Personal Life and the Employment Relationship, 50 U. LOUISVILLE L. REV. 1, 19 (2011) (“[E]mployers who discover information about, or statements made by, current employees through their online social network activities have wide latitude in dismissing those employees. But there are some restrictions on employers.”).
133. Id. at *1.
134. Id.
135. Id. at *1-2.
four coworkers, stating that their remarks constituted "bullying and harassment" of a coworker and violated the Respondent's "zero tolerance" policy prohibiting such conduct.136

At issue was whether the postings amounted to protected concerted activity under Section 7 of the National Labor Relations Act.137 The Board found that there was "no question that the activity engaged in by the five employees was concerted for the 'purpose of mutual aid or protection' as required by Section 7,"138 supporting its conclusion with the facts that:

[I]n her initial Facebook post, Cole-Rivera alerted fellow employees of another employee's complaint that they "don't help our clients enough," stated that she "about had it" with the complaints, and solicited her coworkers' views about this criticism. By responding to this solicitation with comments of protest, Cole-Rivera's four coworkers made common cause with her, and together, their actions were concerted . . . because they were undertaken "with . . . other employees."139

Moreover, the Board found, the employees "were taking a first step towards taking group action to defend themselves against the accusations they could reasonably believe Cruz-Moore was going to make to management."140

The Board went so far as to note that, "[E]ven absent an express announcement about the object of an employee’s activity, 'a concerted objective may be inferred from a variety of circumstances in which employees might discuss or seek to address concerns about working conditions. . . .'"141 Thus, similar harassing online postings, in which it merely could be inferred that employees who are discussing concerns about working conditions possess an undisclosed "concerted objective," should be protected. The key here is that because it is often easier for people to engage in humiliating behavior toward others and to adopt a "gang mentality" from behind a keyboard than it is in person,142 the Board's willingness to infer a protectable objective in situations like this means that a lot more bullying is going to be protected, and employers' hands will be tied.

The Board found that the comments made on Facebook were incapable

136. Id.
137. Id. at *1.
139. Id.
140. Id. (internal quotation marks omitted).
141. Id. at *3.
142. See generally Elizabeth Bernstein, Why Are We So Rude Online?, WALL ST. J., (Oct. 1, 2012), http://online.wsj.com/article/SB1000087239639044592404578030351784405148.html ("Anonymity is a powerful force. Hiding behind a fake screen name makes us feel invincible, as well as invisible.").
of being interpreted as bullying or harassment within the meaning of HUB's own anti-harassment policy, but, significantly, it said that even if they could be so interpreted, HUB "could not lawfully apply its policy 'without reference to Board law.'" Just as HUB in this case contended unsuccessfully that "it was privileged to discharge the five employees because their comments constituted unprotected harassment and bullying of Cruz-Moore, in violation of its 'zero tolerance' policy," so will other employers who voluntarily seek to undertake to go above and beyond the law's proscriptions and to rid themselves of bullies and bullying behaviors.

Moreover, in response to any potential argument that an employer's managerial discretion and ability to hire and fire at will to ensure a harmonious workplace ought to trump the expansive reach of activity alleged to be protected under Section 7, the Board reiterated its refrain that "legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to . . . discipline on the basis of the subjective reactions of others to their protected activity." If the workplace bullying legislation promulgated by the WBI had passed in any jurisdiction, or even been passed as a federal law, employers' intolerance for at least some activity that might warrant protection under the NLRA would have to be seen as more than a "subjective reaction"; the activity would, itself, be unlawful. But this is not the case, for the anti-bullying movement has not gained the traction that it had hoped to, and no workplace anti-bullying law exists. As the Board noted, employer discipline "imposed on this basis violates Section 8(a)(1)" of the NLRA. Section 8(a)(1) proscribes as an unfair labor practice when employers "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7.

But what about online bullying that amounts to protected activity harassment under Section 7 of the NLRA, but also to unlawful, protected-class-based harassment under Title VII of the Civil Rights Act of 1964, like sexual or racial harassment? The Board in Hispanics United of Buffalo observed that "there was no evidence that . . . any purported harassment was covered by the zero tolerance policy, which refers to 'race, color, sex, religion, national origin, age, disability, veteran status, or other prohibited basis'." This may have been the case in that instance, but what if the harassment alleged had, in fact, been a combination of employees discussing

144. Id.
145. Id. See also Consol. Diesel Co., 332 N.L.R.B. 1019, 1020 (2000) ("The Board has long held that legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to investigation and possible discipline on the basis of the subjective reactions of others to their protected activity.").
their job conditions and evaluations, unleashing anger on a co-worker or supervisor that arguably amounted to bullying, and unlawful harassment? Moreover, what if the employer had voluntarily undertaken to outlaw and ban bullying behavior, not proscribed by law, in its workplace? Would the employer's interest in ridding itself of bullying behavior have to cede to the Board's declaration that the act was protected?

As a preliminary matter, it is interesting to consider the potential tension and conflict between the protections afforded to employees by Section 7 and the prohibitions imposed upon employers by Title VII. Indeed, back in 1997, before social media had taken hold and became a prevalent means of employee interaction, Professor Cynthia Estlund wondered about the tension that would erupt between the NLRA and Title VII in instances in which "crude and insulting language may both represent part of a concerted effort by some workers to advance their shared interests and constitute or contribute to racial or sexual harassment." As she explained the tension existed inherently between the two statutes:

[T]he NLRA can be said to embody a realism about how workers interact, the emotions aroused by workplace conflicts, and the language those conflicts may provoke. Crude banter, harsh language, and "horseplay" are sometimes excused in the labor context as normal and endemic to the workplace and as an inadequate or pretextual justification for employer discipline. This is of course part of the culture that Title VII's harassment law has sought to change.

Viewing the statutes in the contexts in which they were passed, it is apparent that when the NLRA was passed in 1935, the idea of antidiscrimination principles being employed to ensure that women and minorities had equality of opportunity in the workplace was not within legislative or popular contemplation. Indeed, women and minorities were barely present at all in the American workplace, and commonplace were ads that specified that, only men and/or Caucasians were welcome to apply and workplaces that were rife with epithets. Rather, the goal of the legislation's

150. Id. at 737-38.
151. See generally Robert J. Rojas, Note, The NLRB's Difficult Journey Down the Information Super Highway: A New Framework for Protecting Social Network Activities Under the NLRA, 51 WASHBURN L.J. 663, 666 (2012) ("Congress passed the NLRA to remedy the inequities affecting American employees and stabilize the gross disparity in bargaining power between employers and employees.").
152. See generally Sally Daniels et al., Changing Attitudes Toward Women and Minorities, THE PUB. PERSP. at 47-48 (1998), available at http://www.ropercenter.uconn.edu/public-perspective/ppscan/91/91047.pdf ("African Americans were not, of course, the only minority group facing discrimination in the 1930s and 1940s, but they were arguably the group most
passage was to ensure that workers could band together to discuss, promote, or even demand better terms and conditions of employment and evade the oppression/retaliation of an employer who would seek to exploit them.\footnote{153} After all, the NLRA, according to Professor Estlund, "sought to free employees from despotic employer power so that they could join together and improve their own conditions of employment through collective bargaining backed by collective power."\footnote{154}

In contrast, the goal of Title VII, as Professor Estlund stated, was to rid the workplace of protected class-based discrimination.\footnote{155} Over time, harassment, whereby one's workplace environment became permeated with ridicule and humiliation based on his/her sex, race, or other protected class status, became recognized as a barrier to equality and an unlawful alteration of workplace terms and conditions.\footnote{156} Whereas the NLRA then attempts to negotiate the tension between employers and employees, Title VII contemplates strife between employees and those other employees whom they supervise, and makes it incumbent upon the employer to intervene and prevent, navigate, and punish discrimination that occurs as a result of this strife and prejudice.\footnote{157} As for how to reconcile a potential conflict between the two statutes, Professor Estlund has suggested something that she says is:

\begin{quote}
[A] bit formalistic but not implausible: Title VII's subsequent enactment simply trumps any conflicting manifestations of the
\end{quote}

affected by prejudices. Segregation, limited job opportunities, and other discriminatory practices, were fueled by attitudes that differ dramatically from those held by most Americans today . . . In 1948, nearly half of the public said there were some racial or ethnic minorities with whom they would prefer not to work. African Americans were most often singled out, but Mexicans, Filipinos, Chinese, Jews, and Italians were also named less than desirable co-workers by many Americans . . . In the 1930s and 40s a woman's 'place' was clearly in the home. Despite women's participation in the work force during World War II, attitudes about females in the work place remained negative after the war. Six in ten Americans said, in 1945, that married women whose husbands made enough to support them should not be allowed to hold jobs."; see also Elaine S. Abelson, "Women Who Have No Men to Work for Them": Gender and Homelessness in the Great Depression, 1930-1934, 29 FEMINIST STUD. 105, 120, 122 (2003) ("[Women] were often unable to find other sources of income, and were routinely discriminated against in public employment . . . [I]n the Philadelphia Public Employment Office . . . 68 percent of job orders for women specified white women.").

\footnote{153. See Cynthia L. Estlund, What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act, 140 U. PA. L. REV. 921, 923 (1992) ("[S]ection 7 of the NLRA and the public employee speech doctrine under the First Amendment—extend to most of this country's employees' rights to discuss and protest matters of concern to them free from retaliation by their employers.").}

\footnote{154. Estlund, supra note 149, at 739.}

\footnote{155. Id. at 729.}

\footnote{156. See id. at 734-35 ("[S]tatelement . . . on the basis of race, sex or religion . . . might contribute to an atmosphere of division and hostility that is likely to undermine cooperative endeavors that depend on trust and communication among coworkers, as well as workplace equality.").}

\footnote{157. Id. at 739.}
older NLRA vision of workplace discourse. Given the already long list of exceptions to Section 7 rights, it is hardly remarkable to conclude that Title VII adds a ban on discriminatory harassment to the list. And indeed, given the employer’s recognized power under the NLRA to limit workplace discourse where necessary to maintain “production or discipline,” it requires no great departure to allow the employer to restrict workplace discourse—even that which would otherwise qualify for Section 7 protection—in order to maintain an atmosphere of tolerance and equality.\textsuperscript{158}

Professor Estlund, however, also posited “an uneasy reconciliation” of the NLRA and Title VII:

The NLRA assumed a largely homogeneous workforce and did not aspire to combat the widespread employment discrimination and occupational segregation that produced that homogeneity. In that context, it was fair to assume that removing the threat of employer coercion and interference in worker activity would allow employees to unite and assert their shared interests. Once Title VII prohibited discrimination and segregation in employment, workforces began to be more or less heterogeneous: Women entered previously all-male workplaces and minorities entered previously all-white workplaces. The resulting diversity produced clashes among workers, often in the form of racial and sexual harassment, that threatened to undermine not only progress toward equality but also feelings of solidarity and shared values and common interests among workers.\textsuperscript{159}

Perhaps an even more pertinent question than what happens when protected Section 7 activity is also a violation of Title VII’s prohibition of workplace protected-class-based harassment is the question of what happens when protected Section 7 activity is perfectly lawful workplace bullying, and nothing more. The answer seems obvious—employers must tolerate it. But what about employers who voluntarily undertake to rid their workplaces of bullies and who craft their anti-harassment policies to go well above the statutory floor set by Title VII and prohibit behavior that amounts to what the model Healthy Workplace statute defines as workplace bullying—or even to less than that? The tension between the current state of the law under the NLRA and this group of employers is interesting, precisely because the employers cannot even claim that they are trying to stave off legal liability or vindicate the policies enshrined in legislation—because there is no legislation.

\textsuperscript{158} Id. at 738-39.
\textsuperscript{159} Id. at 740.
The point remains, however, that because the objective behind the model statute is so valid and so necessary, as a matter of public policy, employers who voluntarily seek to go beyond the parameters of the requirements currently imposed upon them by law and aspire to a higher standard of workplace relations, ought to retain that prerogative. The NLRB’s recent decisions appear to divest these employers of their core managerial discretion to afford employees a basic entitlement to a workplace free of the humiliation, ridicule, and cruelty that will erode their sense of personal dignity, productivity, loyalty, and general well-being. As one scholar recently wrote:

In an at-will employment state such as Texas, it would seem natural to advise an employer that it had the right to terminate an employee who called his supervisor a “scumbag” on Facebook and alluded to the supervisor’s “psychiatric” problems. The same advice seems logical if an employee posted on Facebook a picture of a company event, accompanied by demeaning and sarcastic remarks about the cheap nature of the event and the little respect it conveyed to the company’s clients, or if an employee called the company’s owner online an “[expletive deleted]” who “could not even do paperwork correctly.” And yet in each of these instances, an employer firing the employee in question could be liable for violating . . . the . . . NLRA . . . Section 7 of the NLRA applies to both union and non-union workplaces, and it protects the very conduct described above.\textsuperscript{160}

In another recent NLRB case involving the Facebook postings of an employee who referred to her supervisor as, among other things, a “dick” and “scumbag,” the Board found that the behavior was not so opprobrious as to lose the protection of the Act.\textsuperscript{161} The Board reasoned that the “postings did not interrupt the work of any employee because they occurred outside the workplace and during the non-working time of both Souza and her coworkers.”\textsuperscript{162} This is significant because it reaffirms the principle that protected concerted activity need not occur in the physical workplace or during paid hours.\textsuperscript{163} However, potential bullying behavior that is simultaneously perceived as protected activity that occurs outside the workplace and work hours may be seen as less disruptive, and thus less likely to lose the Act’s protection. The Board also noted that “the comments were made during an online employee discussion of supervisory action,” a

\begin{itemize}
  \item \textsuperscript{161} Am. Med. Response of Conn., Inc., N.L.R.B. Advice Memo., Case 34-CA-12576, at *9-10 (Oct. 5, 2010).
  \item \textsuperscript{162} \textit{Id.} at *9.
  \item \textsuperscript{163} \textit{Id.}
\end{itemize}
protected activity, and that "the name-calling was not accompanied by any verbal or physical threats," noting that it (the Board) had "found more egregious name-calling protected."\textsuperscript{164}

The Board also gave heavy consideration to the motivation for the postings. In the course of determining that the activity of making the postings would retain protection under Section 7 of the Act, the Board found they "were provoked by [an] unlawful refusal to provide her with a Union representative for the completion of the incident report and by his unlawful threat to discipline her."\textsuperscript{165}

\textbf{CONCLUSION}

At a time and place where bullying has come under so much fire generally, it is notable that there has been so much resistance to legislation that would prohibit workplace bullying. It seems as though the idea of adults bullying one another in the workplace does not cry out for a remedy in the same way that schoolyard bullying or even elder abuse/bullying may. And yet workplace bullying affects morale, productivity, and, perhaps most centrally, individuals' dignity. Individuals, for whom work now occupies an unprecedented portion of their time, their energies, and their identities, and for whom work now follows home via social media, after work social events, and other opportunities for co-worker interactions, may be more affected by bullying in the prime of their lives than they are as children or as elderly people.

And even as some employers have decided to go ahead and regulate their own workplaces in a way that is not mandated by any law because they find workplace bullying repugnant, another incursion into the anti-bullying movement now manifests itself. This setback now presents itself in the form of very recent NLRB decisions that indicate that an employer may not always lawfully exercise what it believes to be its prerogative to fire or even discipline employees for violating its own promulgated anti-harassment or anti-bullying policy.

There is no simple answer to the question of what should be done when the policy underpinnings of two such bedrock principles of employment law, protecting the discretion that at-will employment affords employers to rid their workplace environments of corrosive bullying behavior and protecting the rights of employees to engage in protected concerted activity with respect to their job conditions, come into conflict. The NLRA recently celebrated its seventy-fifth anniversary.\textsuperscript{166} On one hand, while there is no existing legislation that makes workplace bullying unlawful, there is no strong policy

\textsuperscript{164} Id. at *10.
\textsuperscript{165} Id.
\textsuperscript{166} The National Labor Relations Board, 75 Years, 1935-2010, NLRB.gov, http://www.nlrb.gov/75th/ (last visited Apr. 21, 2013).
against permitting workplace bullying to be derived from any law. While one might argue that the presumption of at will employment alone bespeaks a policy interest in affording employers unfettered discretion, this is only so long as employers run afoul of no law.

On the other hand, this issue may be reframed as whether, in fact, Section 7 is actually being violated in any given case. In many cases involving toxic bullying that offends internal regulation, a better interpretation of Section 7 and the circumstances under which its protection is lost might be that protection should give way sooner and more easily where an employer asserts, in good faith and pursuant to a clear and extant policy, that this intolerable bullying occurred. But none of this settles all cases in which these principles come into tension with one another. For now, it may need to be enough to recognize this pernicious and newest threat to what is already a fragile, tenuous situation.