

## WORKPLACE HARASSMENT IN THE ACADEMIC ENVIRONMENT

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### ABSTRACT

Over the last decade, claims of workplace harassment have received greater attention.<sup>1</sup> Sometimes called “workplace bullying,” such harassment is commonly defined as behavior by a perpetrator that may involve repeated verbal abuse, offensive conduct that may threaten, humiliate, or intimidate a target, or efforts to sabotage a target’s performance.<sup>2</sup> As commonly defined, the subject behavior is intentional, results in physical or psychological harm to the target, and makes the target’s job performance more difficult.<sup>3</sup> At times, perpetrators, who may include administrators and faculty members, combine their efforts to abuse and harass the target, a phenomenon known as “mobbing.”<sup>4</sup> Both federal and state statutory law currently provide remedies

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1. See David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL’Y J. 251, 251–53 (2010).

2. *Definition of Workplace Bullying*, WORKPLACE BULLYING INST., <http://www.workplacebullying.org/individuals/problem/definition> (last visited Nov. 7, 2011).

3. Michael E. Chaplin, *Workplace Bullying: The Problem and the Cure*, 12 U. PA. J. BUS. L. 437, 445 (2010); Katherine Lippel, *The Law of Workplace Bullying: An International Overview*, 32 COMP. LAB. L. & POL’Y J. 1, 2–3 (2010) (contrasting the scholarly definition of workplace bullying, which addresses frequency and duration of negative behavior and excludes isolated events or equal strength interactions, with the lay definition of bullying as negative behavior that harms the target).

4. Audrey Williams June, *‘Mobbing’ Can Damage More Than Careers, Professors Are Told at Conference*, CHRON. OF HIGHER EDUC. (June 11, 2009), <http://chronicle.com/article/Mobbing-Can-Damage-More-Than/47736/>. The distinction between bullying and mobbing has been explained:

Workplace mobbing is like bullying, in that the object is to rob the target of dignity and self-respect. Here, however, it is not a single swaggering bully that the target is up against, but the juggernaut of collective will. The message to the target is that *everybody* wants you out of here. Bullies often play leading roles in mobbing cases, whether as targets or perpetrators.

for such behavior where it is motivated by discriminatory animus and the target is a member of a protected class (such as gender or national origin).<sup>5</sup> But no U.S. jurisdiction currently recognizes a cause of action against this sort of behavior when it is not linked to discrimination—in contrast to several European countries that provide remedies for workplace bullying untethered to discriminatory animus. Even though legislation to provide a remedy for such behavior has been introduced in several states, it has not been enacted, and it is often accompanied by strong opposition from employer interests.<sup>6</sup> Courts have likewise been reluctant to expand the law to accommodate such claims.<sup>7</sup>

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Kenneth Westhues, *Summary for the Workplace Mobbing Conference* (Waterloo Anti-Mobbing Instruments, Novotel, Brisbane), Oct. 14–15, 2004, at 1, available at <http://arts.uwaterloo.ca/~kwesthues/wami.pdf>. Thus, mobbing is group harassment, “a process of abusive behaviors inflicted over time.” *Sousa v. Roque*, 578 F.3d 164, 167 (2d Cir. 2009). Despite the original distinction between workplace bullying and mobbing, the two terms often are used interchangeably. Jordan F. Kaplan, *Help Is on the Way: A Recent Case Sheds Light on Workplace Bullying*, 47 HOUS. L. REV. 141, 144 (2010).

5. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006); Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans With Disabilities Act*, 65 U. PITT. L. REV. 597, 601 (2004).

6. For example, the Society for Human Resource Management reportedly opposed such legislation in New York on the grounds that it is generally “bad for business” and specifically that (1) human resource professionals are dedicated advocates for employees; (2) employers have adequate incentives to combat workplace harassment because it affects the health and morale of the workforce (as well as the image and profitability of the employers); (3) employers have studied the issue and many have codes of conduct and dispute resolution mechanisms to address it; and (4) such legislation would undermine existing efforts to combat the problem, strain employer-employee relationships, and increase the cost of doing business—given that employers will be called upon to defend frivolous lawsuits from unscrupulous employees or incur liability for lost wages, medical expenses, emotional distress, punitive damages and attorney’s fees. See G. Namie, *SHRM Opposes Anti-Bullying Healthy Workplace Bill*, HEALTHY WORKPLACE BILL (June 18, 2010, 4:34 PM), <http://healthyworkplacebill.org/blog/?p=144>.

7. See *Thomas v. N. Telecom, Inc.*, 157 F. Supp. 2d 627, 635 (M.D. N.C. 2000) (noting that workplace conduct rarely supports a claim for intentional infliction of emotional distress (“IIED”)); see also *Crocker v. Griffin*, No. COA09-1000, 2010 WL 1961258, at \*4–5 (N.C. Ct. App. May 18, 2010) (action brought by four former employees listing twenty-eight acts of supervisor involving “yelling, shouting, or saying insulting or demeaning things” did not state an IIED claim). One court has affirmed a verdict in favor of a plaintiff on an assault theory while allowing an expert witness to testify as to the presence of workplace bullying. *Raess v. Doescher*, 883 N.E.2d 790, 796 (Ind. 2008). No one rationale completely supports the result in the case. The panel majority determined that the plaintiff failed to properly object to the expert’s testimony on workplace bullying and therefore any error was forfeited. *Id.* at 797. It further determined that the phrase “workplace bullying” was a general descriptive term that could be a form of IIED. *Id.* at 799. Another member of the panel majority found the plaintiff’s objection sufficient, but any error in admissibility harmless because the expert’s testimony went to the merits of an IIED claim which the jury rejected. *Id.* (Sullivan, J., concurring in result). A dissenting member of the panel determined that the objection had been preserved, and that the testimony concerning workplace bullying was erroneous and not harmless. *Id.* at 801–02 (Boehm, J., dissenting).

This Article discusses the development of harassment claims that might be pursued in a judicial forum, with an emphasis in the academic context. It suggests that special characteristics, including a decentralized environment, a focus on academic pursuits, and a hierarchical intellectual environment, may allow such behaviors to go unchecked at an academic institution.<sup>8</sup> At the same time, it cautions that categorizing behavior as workplace bullying is necessarily a nuanced determination and that, therefore, any statutory or administrative measures must take care to protect academic freedom. The free exchange of ideas in teaching and research (and faculty and departmental governance) bears the potential at all times to offend powerful and not-so-powerful internal and external interests alike. Accordingly, any measure designed to deal with workplace bullying must recognize this concern and preserve intellectual and creative discourse. That said, like discrimination, behavior that takes the form of harassment or bullying simply has no place on a college campus. Thus, this Article urges academic institutions to raise awareness of workplace harassment and suggests remedial mechanisms to counteract and prevent this problem.

#### INTRODUCTION

Generally, “workplace bullying” is defined as 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.”<sup>9</sup> A popular website on workplace bullying explains that workplace bullying manifests in a variety of ways, including verbal abuse, interference with work, or persistent conduct that threatens, humiliates, or intimidates.<sup>10</sup> Such harassment may involve a single perpetrator or a group.<sup>11</sup> It is usually typified by repeated negative acts intended to oppress or annoy the target. It results in physical or psychological harm to the target and interferes with job performance. A 2010 survey indicates that thirty-five percent (thirty-seven percent in 2007) of American workers have been targets of workplace bullying; nine percent currently are targets.<sup>12</sup> Workplace bullying is four times more prevalent than workplace discrimination, which is prohibited by law.<sup>13</sup>

Several researchers have sought to identify the characteristics of workplace bullies, their typical targets, and the factors that contribute to workplace

8. See Piper Fogg, *Academic Bullies*, CHRON. OF HIGHER EDUC., Sept. 12, 2008, at B10.

9. David C. Yamada, *The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 481 (2000).

10. *Definition of Workplace Bullying*, *supra* note 2.

11. *Id.*

12. WORKPLACE BULLYING INST., 2010 U.S. WORKPLACE BULLYING SURVEY (2010), available at [http://workplacebullying.org/research/2010NatlSurvey/2010\\_Survey\\_Flyer.pdf](http://workplacebullying.org/research/2010NatlSurvey/2010_Survey_Flyer.pdf) (2010) [hereinafter 2010 BULLYING SURVEY].

13. *Id.*

bullying. One commentator attributes the increasing frequency of workplace bullying in America to “the growth of the service-sector economy, the global profit squeeze, the decline of unionization, the diversification of the workforce, and increased reliance on contingent workers.”<sup>14</sup> Furthermore, in addition to identifying factors that contribute to workplace bullying, at least three common traits of the workplace bully have been identified.<sup>15</sup> First, bullies in the workplace are generally men in supervisory or senior roles relative to their targets—a recent study suggests the breakdown is sixty-two percent men and thirty-eight percent women.<sup>16</sup> Second, their goal is to limit or sabotage their targets’ “ability to succeed” at work.<sup>17</sup> Third, motivated by their “own feelings of inadequacy,” bullies look to target “agreeable, vulnerable, and successful coworkers.”<sup>18</sup> Same-gender bullying is more prevalent (sixty-eight percent); women bullies target women eighty percent of the time.<sup>19</sup>

Why would a university tolerate a bully? The obvious answer might be that the university is unaware of the problem. Another might be that bullies are perceived as adding value, particularly in departments that harbor conflict and are hyper-competitive.<sup>20</sup> After all, aggressive and underhanded behavior is frequently portrayed as desirable in popular culture. Still another might be that the university simply views the problem as insignificant (or perhaps as one of deference to management prerogative or the rights of the perpetrator). The likelihood of a targeted employee obtaining relief under existing law is quite limited, so the incentive to take action may be low.

## I. CURRENT CASE LAW

There is very little case law in the United States discussing workplace bullying. In 2008, the Indiana Supreme Court decided *Raess v. Doescher*, a case that considered the concept of “workplace bullying.”<sup>21</sup> The court

14. Yamada, *supra* note 9, at 486; *see also* David C. Yamada, *Employment Law as if People Mattered: Bringing Therapeutic Jurisprudence into the Workplace*, 11 FLA. COASTAL L. REV. 257, 258–59 (2010) [hereinafter *Therapeutic Jurisprudence*] (suggesting that a “markets and management” mentality has dominated American employment law and may be responsible for prevalence of abusive behaviors like workplace bullying).

15. *See* Yamada, *supra* note 9, at 482–83.

16. 2010 BULLYING SURVEY, *supra* note 12; Yamada, *supra* note 9, at 482–83.

17. Yamada, *supra* note 9, at 483.

18. *Id.* On this point, it is important to note that workplace bullying, at least in the theoretical context, involves how the victim felt, not what the perpetrator intended. DARLA J. TWALE & BARBARA M. DE LUCA, FACULTY INCIVILITY: THE RISE OF THE ACADEMIC BULLY CULTURE AND WHAT TO DO ABOUT IT 27 (2008).

19. 2010 BULLYING SURVEY, *supra* note 12.

20. Chaplin, *supra* note 3, at 442; *see* ROBERT I. SUTTON, THE NO ASSHOLE RULE 55–56 (2007).

21. *Raess v. Doescher*, 883 N.E.2d 790, 799 (Ind. 2008).

discussed “workplace bullying” in the context of expert testimony and a tendered jury instruction, although it did not have occasion to discuss workplace bullying as a cause of action.<sup>22</sup> In that case, the employee (Mr. Doescher), filed suit against a cardiovascular surgeon (Dr. Raess), after a verbal altercation that took place at an Indiana hospital.<sup>23</sup> The employee “sought compensatory and punitive damages for assault, intentional infliction of emotional distress [(“IIED”)], and tortious interference with employment.”<sup>24</sup> Despite the surgeon’s objections, the employee relied on the expert testimony of Dr. Gary Namie of the Workplace Bullying Institute to characterize the surgeon as a bully and to label the incident as one of workplace bullying.<sup>25</sup> Only the assault and IIED claims went to the jury, which in a split verdict awarded the employee \$325,000 in compensatory damages on the assault claim and found in favor of the surgeon on the IIED claim.<sup>26</sup>

On direct appeal, the Indiana Court of Appeals held that the trial court abused its discretion in (a) allowing Dr. Namie to testify that the surgeon was a workplace bully, and (b) not instructing that workplace bullying was not an issue in the case.<sup>27</sup> The employee sought review of the court of appeals’s decision. In reversing the court of appeals, the Indiana Supreme Court did not have occasion to decide whether “workplace bullying” presented a legal cause of action, but concluded that “workplace bullying” as a “general term[] used to characterize a person’s behavior, is an entirely appropriate consideration in determining . . . issues before the jury.”<sup>28</sup> The court noted that even though “workplace bullying” was not an element of the assault claim or IIED claim, and even though the employee did not prevail on the IIED claim, “workplace bullying could be considered a form of intentional infliction of emotional distress.”<sup>29</sup> According to the court, “workplace bullying” is a general term used to characterize a person’s behavior so it was relevant to the claims.<sup>30</sup> Moreover, a witness who was both a clinical psychologist and neuropsychologist, diagnosed the employee with post-traumatic stress disorder

22. *Id.* at 795–98.

23. *Id.* at 793. The court of appeals decision provides context; before the altercation, the doctor had been concerned about perfusionist staffing and coverage issues. *Id.* at 794.

24. *Id.* at 793.

25. *Id.* at 795–96.

26. *Raess*, 883 N.E.2d at 793.

27. *Raess v. Doescher*, 858 N.E.2d 119, 124 (Ind. Ct. App. 2006), *aff’d on reh’g*, 861 N.E.2d 1216 (Ind. Ct. App. 2007), *rev’d*, 883 N.E.2d 790 (Ind. 2008) (emphasis added).

28. *Raess*, 883 N.E.2d at 799.

29. *Id.* (internal quotation marks and citations omitted). A concurring opinion concluded that Dr. Namie’s testimony only pertained to the IIED claim. *Id.* (Sullivan, J., concurring in result). The conclusion that workplace bullying could be a form of IIED is supported by the few cases which have found in favor of employees on IIED claims based upon such conduct.

30. *Raess*, 883 N.E.2d at 799.

and paranoid thinking, and testified that such reactions were typical of persons bullied in the workplace.<sup>31</sup> The Indiana Supreme Court did not need to address the issue of the admissibility of Dr. Namie's testimony given its holding of the lack of an adequate contemporaneous objection,<sup>32</sup> but assuming an adequate objection, one member of the court would have found harmless error in admitting the testimony<sup>33</sup> and another would have reversed based upon prejudice.<sup>34</sup> The dissenting opinion echoes the concerns of the court of appeals: the testimony was of minimal probative value given the single incident and amounted to name-calling unhelpful to the jury because Dr. Namie was not qualified to say how the surgeon's behavior affected the plaintiff.<sup>35</sup> The opinions of the court of appeals and the supreme court are instructive because they demonstrate the issues that would confront any court considering workplace bullying: what are the elements of any such tort, how relevant is such evidence to existing torts, how should a trial court properly balance the admission of such evidence against the danger of unfair prejudice given the available proof, and the like.

Another case demonstrates facts suggestive of workplace bullying, though the term is never used. In *Beavers v. Johnson Controls World Services, Inc.*, the employee sought to recover from the employer and a supervisor on claims of prima facie tort, the tort of outrage, and IIED arising out of the supervisor's conduct.<sup>36</sup> Specifically, the employee alleged that her supervisor had engaged in conduct that caused severe mental harm, which resulted in her hospitalization in a mental health facility.<sup>37</sup> To support her claim, the employee relied on evidence that she received harsh criticism from the supervisor and was required to retype a memo on office procedure three times (aimed at an error she committed at the supervisor's direction).<sup>38</sup> The employee was forced to delay her vacation when the supervisor refused to sign

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31. *Id.* at 801–02 (Boehm, J., dissenting).

32. Although Dr. Raess claimed that he “repeatedly objected” to Dr. Namie’s testimony at trial, the court held that his trial objections did not preserve his argument on appeal because he asserted a different argument on appeal. *Id.* at 796. On appeal, Dr. Raess argued that the trial court erred in allowing Dr. Namie to testify as an expert because he was not qualified under Indiana Rule of Evidence 702 to give scientific expert testimony. *Id.* The court explained, however, that “[a]t no time during his trial objections did [Dr. Raess] claim that the subject matter of Dr. Namie’s testimony lacked scientific reliability.” *Id.* at 797. Because “an objection on grounds other than those raised on appeal, is ineffective to preserve an issue for appellate review,” the court concluded that Dr. Raess’s appellate argument was barred by procedural default. *Id.*

33. *Id.* at 799 (Sullivan, J., concurring).

34. *Id.* at 801 (Boehm, J., dissenting).

35. *Raess*, 883 N.E.2d at 801 (Boehm, J., dissenting).

36. *Beavers v. Johnson Controls World Servs., Inc.*, 881 P.2d 1376, 1379 (N.M. 1994).

37. *See id.*

38. *Id.* at 1378–79.

a leave slip, only to appear at work and find that he had made arrangements for a substitute (while expressing surprise at her appearance).<sup>39</sup> The employee's claims for IIED and outrage were dismissed; however, on her claim of prima facie tort, the court instructed the jury that the plaintiff must show

that Defendants performed one or more intentional, lawful acts; that Defendants intended that the act or acts would cause harm to Plaintiff or knew with certainty that harm would necessarily result; that the acts did in fact proximately cause harm; and that Defendants' conduct was not justifiable under the circumstances.<sup>40</sup>

The jury returned a verdict in favor of the employee, awarding her \$76,000.<sup>41</sup>

On appeal, the New Mexico Court of Appeals reversed, holding that New Mexico's judicial recognition of prima facie tort was not retroactive and the events in question preceded that recognition.<sup>42</sup> The employee sought review, and the New Mexico Supreme Court reversed the decision of the court of appeals and remanded on the retroactivity issue, specifically noting that it was not passing on the sufficiency of the evidence regarding intent to harm or lack of justification.<sup>43</sup> Although the supreme court did not pass on the merits of the employee's claim, it is obvious that claims for workplace harassment are not new and may fit under other federal and state theories, including denial of equal protection,<sup>44</sup> prima facie tort, assault, workers' compensation, and the like.

## II. THE U.S. APPROACH

The American judicial system has been reluctant to recognize a cause of action for workplace bullying, tending to approach the problem as a "human resources" issue within the workplace.<sup>45</sup> Instead, employment law in the United States has focused more on providing a remedy for, and avoiding, discriminatory practices "against historically disempowered people" in the job market.<sup>46</sup> For example, federal employment law (Title VII) prohibits

39. *Id.* at 1379.

40. *Id.* at 1379–80.

41. *Beavers*, 881 P.2d at 1380.

42. *Id.* (citing *Beavers v. Johnson Controls World Servs., Inc.*, 859 P.2d 497, 498 (N.M. Ct. App. 1993)).

43. *Id.* at 1378 n.2.

44. A state may not "omit altogether or give a diminished form of legal protection from verbal or physical assaults to individuals in certain disfavored classes." *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 961–62 (7th Cir. 2002) (Wood, J., dissenting) (teacher claimed that school district denied him equal protection by treating his complaints of harassment differently than non-homosexual teachers).

45. Yamada, *supra* note 9, at 492.

46. Amanda E. Lueders, Note, *You'll Need More Than a Voltage Converter: Plugging European Workplace Bullying Laws into the American Jurisprudential Outlet*, 25 ARIZ. J. INT'L

employers from discriminating in the terms and conditions of employment based upon “race, color, religion, sex, or national origin.”<sup>47</sup> The Americans with Disabilities Act (ADA) prohibits workplace “discriminat[ion] against a qualified individual with a disability because of the disability”<sup>48</sup> just as the Age Discrimination in Employment Act (ADEA) prohibits such “discriminat[ion] against any individual . . . because of such individual’s age.”<sup>49</sup> As a result of these statutory provisions, a showing of “status-based harassment or discrimination” must be made to establish entitlement to a legal remedy.<sup>50</sup> No matter how clear the harassment, it must be attributed in whole or in part to disparate treatment based upon gender or some other protected category.<sup>51</sup> Thus, cases are replete with employers claiming an “equal opportunity harassment” defense because the perpetrator targeted those within and without

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& COMP. L. 197, 202–03 (2008); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417–18 (1975) (noting goal of Title VII was to provide equal employment opportunities and remove barriers to employment for protected classes as well as to make victims of employment discrimination whole).

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

48. 42 U.S.C. § 12112(a) (2006).

49. 29 U.S.C. § 623(a)(1) (2006).

50. Yamada, *supra* note 9, at 536; Yamada, *supra* note 1, at 258. These Acts also prohibit retaliation for reporting discrimination or engaging in activity opposed to discrimination. 29 U.S.C. § 623(d) (2006) (ADEA); 42 U.S.C. § 2000e-3(a) (2006) (Title VII); *Crawford v. Metro. Gov’t of Nashville & Davidson Cnty.*, 129 S. Ct. 846, 850–52 (2009) (construing § 2000e-3(a)); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (construing § 2000e-3(a)).

51. In *Pappas v. J.S.B. Holdings, Inc.*, the employee complained of workplace bullying and harassment. 392 F. Supp. 2d 1095, 1100 (D. Ariz. 2005). In determining whether her claim for hostile work environment sexual harassment could survive summary judgment, the court stated:

That the evidence of record can support a finding that [she] was repeatedly subjected to discourteous, boorish, mean-spirited treatment by certain of her co-workers that resulted in an acrimonious and frustrating work situation for her cannot be reasonably disputed.

The issue is, however, whether the totality of the evidence is sufficient to create a triable issue as to whether [she] was in some manner subjected to discrimination based on sex.

*Id.* at 1104. This requirement significantly limits the utility of Title VII to combat general workplace harassment. *See Bowman v. Shawnee State Univ.*, 220 F.3d 456, 464 (6th Cir. 2000) (“While [the plaintiff] may have been subject to intimidation, ridicule, and mistreatment, he has not shown that he was treated in a discriminatory manner because of his gender.”); *Vore v. Ind. Bell Tel. Co.*, 32 F.3d 1161, 1164–65 (7th Cir. 1994) (unpleasant work environment caused by one employee simply is not enough under Title VII without racial animus); *see also Vito v. Bausch & Lomb Inc.*, 403 F. App’x 593, 595–96 (2d Cir. 2010) (plaintiff’s complaints of a hostile work environment were at best workplace bullying devoid of discriminatory motive and not actionable). Additionally, some courts decline to aggregate general harassment with the protected category harassment, thus the protected category harassment must be sufficiently severe and pervasive to constitute a hostile work environment. *See Bowman*, 220 F.3d at 463–64 (In a hostile environment based on gender claim, the non-gender harassment must be “but for” the employee’s gender to be considered in the totality of the circumstances analysis.).



protected categories.<sup>52</sup> That said, the construct of a “hostile work environment,” though it must be a result of status-based discrimination, has obvious parallels with workplace bullying.<sup>53</sup>

Some targets of workplace harassment have attempted to remedy instances of workplace bullying with such common law tort theories as prima facie tort or IIED.<sup>54</sup> For example, one can recover under IIED if he or she can show the aggressor’s conduct “has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”<sup>55</sup> However, courts have been reluctant to award damages for IIED claims in the workplace when they are “unrelated to sexual harassment or other forms of status-based discrimination.”<sup>56</sup> Generally, IIED claims fail in cases involving workplace bullying because the “cases lack two of the required elements for IIED liability—either that the complained-of conduct was not severe or outrageous or that the employee did not suffer severe emotional distress.”<sup>57</sup> Although one

52. See, e.g., *Beckford v. Dep’t of Corr.*, 605 F.3d 951, 960 (11th Cir. 2010); *Holman v. Indiana*, 211 F.3d 399, 403 (7th Cir. 2000).

53. Under federal law, a hostile work environment claim requires membership in a protected group and a showing of unwelcome harassment due to the protected characteristic such as race or gender. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66–67 (1986); *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002). The harassment must be sufficiently severe or pervasive so as to alter the terms and conditions of employment and create an abusive working environment. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). This means that the environment would be reasonably perceived as hostile (objective component) and was so perceived by the plaintiff (subjective component). *Id.* at 21–22. Finally, the facts must suggest direct or vicarious liability for the employer. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764–65 (1998) (discussing employer liability and potential defenses); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998) (same).

54. Yamada, *supra* note 9, at 493.

55. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965). The *Restatement (Second) of Torts* illustrates the tort of IIED as involving “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another.” *Id.* § 46.

56. Yamada, *supra* note 9, at 494; see also *Cheatham v. Allstate Ins. Co.*, 465 F.3d 578, 586 (5th Cir. 2006) (applying Mississippi law and noting that employment disputes are rarely viable IIED claims); *Pollard v. E.I. DuPont De Nemours, Inc.*, 412 F.3d 657, 664–65 (6th Cir. 2005) (IIED direct liability sustained based upon “outrageous discriminatory conduct”); *Nijem v. Alisco, Inc.*, No. 3:10-00221, 2011 WL 2490748, at \*16 (M.D. Tenn. June 6, 2011) (finding that employment discrimination claims are rarely accompanied by sufficiently outrageous conduct to support an IIED claim).

57. Yamada, *supra* note 9 at 494; see, e.g., *Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365, 376 (6th Cir. 1999) (finding that employer’s conduct was not outrageous, even if based on discrimination); see also Yamada, *supra* note 1, at 257 (noting employment-related IIED plaintiffs often fail to allege the requisite level of extreme and outrageous conduct and emotional distress). Even assuming that a plaintiff has a viable IIED claim, such common law tort claims often are barred by the exclusivity provisions of workers’ compensation statutes, which generally

commentator has suggested that removing tort-law barriers to workplace harassment claims is preferable to a statutory approach,<sup>58</sup> modifying tort law one court at a time would be an enormous undertaking given the relative infrequency that courts overrule precedent.

For example, in *Herrera v. Lufkin Industries, Inc.*, a federal district court ruled that the defendant's repeated references to the plaintiff as "the Mexican," among other racially motivated acts, were not sufficient to establish a claim of IIED.<sup>59</sup> The Tenth Circuit affirmed, despite its determination that there was a "triable issue as to whether [the defendant] created a racially hostile work environment actionable under Title VII."<sup>60</sup> The court concluded that "only the most egregious conduct" is actionable under IIED.<sup>61</sup> Thus, it seems that a plaintiff alleging IIED in an employment situation may face a higher hurdle than one who claims merely under protected-class status.<sup>62</sup> Another difficulty is that statutory employment discrimination claims may be the exclusive remedy when the alleged discrimination is based upon protected status.<sup>63</sup>

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provide that workers' compensation is the exclusive remedy for injuries arising in the course of employment. *E.g.*, *Hibben v. Nardone*, 137 F.3d 480, 483–84 (7th Cir. 1998).

Although one would hope it would be nonexistent, the academic context may involve a faculty member bullying certain students. In *Smith v. Atkins*, the court affirmed a defamation verdict against a law school professor based upon his harassment of a student. 622 So. 2d 795, 796 (La. Ct. App. 1993). The court not only affirmed the defamation verdict, but also concluded that the student had suffered IIED and increased the damage award to \$5,000 from \$1,500. *Id.* at 800. On the other hand, a different court held that allegations that an instructor interfered with a student's educational plans by revoking pre-approved credits were insufficient to state an IIED claim. *Britt v. Chestnut Hill Coll.*, 632 A.2d 557, 558, 562 (Pa. Super. Ct. 1993). Likewise, the termination of a tenured professor without due process or a hearing was insufficient for an IIED claim, but did merit a denial of qualified immunity insofar as the denial of due process. *Newman v. Kock*, 274 S.W.3d 697, 701–02, 707–08 (Tex. App. 2008).

58. Sarah Morris, *The Anti-Bullying Legislative Movement: Too Quick to Quash Common Law Remedies*, 65 BENCH & B. OF MINN., Nov. 2008, at 22, 25.

59. *Herrera v. Lufkin Indus., Inc.*, 474 F.3d 675, 687–88 (10th Cir. 2007).

60. *Id.* at 688; *see also* *Clemente v. State*, 206 P.3d 249, 255 (Or. Ct. App. 2009) ("In every case in which this court or the Supreme Court has allowed an IIED claim asserted in the context of an employment relationship to proceed to a jury, the employer engaged in conduct that was not only aggravating, insensitive, petty, irritating, perhaps unlawful, and mean—it also contained some further and more serious aspect." (footnote and citation omitted)).

61. *Herrera*, 474 F.3d at 688.

62. *See* *Yamada*, *supra* note 9, at 503.

63. *See* *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 816, 818 (Tex. 2005) (explaining that IIED is a gap-filler tort and that an IIED claim was not independent of the state human rights act); *Hoffman-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 450 (Tex. 2004) (determining IIED claim was not independent of state human rights act claim and could not support an award of damages in excess of statutory cap in the act); *see also* *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 802–04 (Tex. 2010) (holding that assault, negligent supervision, and retention claims seeking to hold an employer liable are preempted by a tailored statutory scheme). Given that bullying claims often will be paired with federal Title VII and state human rights act claims, IIED

Because of the lack of legal remedies, employment lawyers may be reluctant to represent or advise targets of harassment unless protected-class discrimination is involved.<sup>64</sup>

### III. STUDENT BULLYING AND THE INTERNATIONAL APPROACH

Courts in the United States have declined to recognize a cause of action for targets of an abusive work environment beyond what has already been established by statute and the common law. Thus, federal and state law generally prohibit employment discrimination based upon protected status.<sup>65</sup> While no jurisdiction has enacted a workplace bullying statute, most jurisdictions (thirty-nine states) have enacted statutory provisions ranging from requiring school districts to study and formulate a policy to address student-on-student bullying, to prohibiting of all forms of bullying and retaliation for reporting it.<sup>66</sup> These acts usually define bullying and implicitly have dealt with

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claims may be foreclosed. *See Williamson v. Am. Nat'l Ins. Co.*, 695 F. Supp. 2d 431, 457 (S.D. Tex. 2010). From this, it seems a logical argument that any common law tort for workplace bullying would be preempted by statutory remedies for employment discrimination.

64. *See Therapeutic Jurisprudence*, *supra* note 14, at 281.

65. *See supra* notes 47–53 and accompanying text.

66. *See* ALASKA STAT. §§ 14.33.200, 14.33.210 (2010); ARIZ. REV. STAT. ANN. § 15-341(A)(37) (Supp. 2010); ARK. CODE ANN. § 6-18-514 (2007); COLO. REV. STAT. § 22-32-109.1(2)(a)(X), (b)(VIII) (2010); CONN. GEN. STAT. § 10-222d (2011); DEL. CODE ANN. tit. 14, § 4112D (2007); FLA. STAT. § 1006.147; GA. CODE ANN. § 20-2-751.4 (2009); IDAHO CODE ANN. § 33-512(6) (2008); 105 ILL. COMP. STAT. § 5/27-23.7 (2010) (prohibition of bullying); IND. CODE § 20-33-8-13.5 (2007); IOWA CODE § 280.28 (2011); KAN. STAT. ANN. § 72-8256 (Supp. 2010); LA. REV. STAT. ANN. § 17:416.17 (Supp. 2011) (elementary school program that may address bullying); ME. REV. STAT. ANN. tit. 20, § 1001(15)(H) (2008); MD. CODE ANN., EDUC. §§ 7-424, 7-424.1 (LexisNexis 2008); MASS. GEN. LAWS ch. 71, § 37O (Supp. 2010); MINN. STAT. § 121A.0695 (2008); MO. REV. STAT. § 160.775 (Supp. 2010); NEB. REV. STAT. § 79-2,137 (2008); NEV. REV. STAT. §§ 388.122–.123, 388.132–.135, 388.139 (2009); N.H. REV. STAT. ANN. §§ 193-F:2 to F:6 (Supp. 2010); N.J. STAT. ANN. §§ 18A:37-13 to -17 (West Supp. 2011); N.C. GEN. STAT. §§ 115C-407.15 to .18 (2009); OHIO REV. CODE ANN. §§ 3301.22, 3313.666–.667 (Supp. 2011); OKLA. STAT. tit. 70, § 24-100.2 to -100.5 (Supp. 2010); OR. REV. STAT. § 339.351–.364 (2009); 24 PA. CONS. STAT. ANN. § 13-1303.1-A (West Supp. 2011); R.I. GEN. LAWS § 16-21-26 (Supp. 2010); S.C. CODE ANN. § 59-63-110 to -160 (Supp. 2010); TENN. CODE ANN. § 49-6-1014 to -1019 (2009); TEX. EDUC. CODE ANN. §§ 37.001(a)(7) (West 2006 & Supp. 2010), 37.083 (West 2006), 25.0342 (West 2006 & Supp. 2010); UTAH CODE ANN. §§ 53A-11a-102 to -402 (LexisNexis Supp. 2011); VA. CODE ANN. § 22.1-279.6 (2006); VT. STAT. ANN. tit. 16, §§ 11(a)(32), 165(a)(1), 565 (Supp. 2010); WASH. REV. CODE §§ 28A.300.285, 28A.600.480 (2010); W. VA. CODE ANN. §§ 18-2C-1 to -5 (LexisNexis 2008 & Supp. 2011); WISC. STAT. § 118.46 (2009–10); WYO. STAT. ANN. §§ 21-4-311 to -315 (2011).

These statutes certainly reflect the sentiment that no student should be subject to harassment at the hands of school faculty, staff, or peers. Why that sentiment has not manifested itself in legislation to protect employees in the workplace is an obvious question. Some reasons for the difference in protection may be that (1) elementary and secondary students are in a captive environment given compulsory school attendance, (2) the state acts in a *parens patriae* capacity

many issues that would arise in drafting a workplace harassment statute. They are certainly important as potential resources in drafting anti-harassment statutes in their respective states.<sup>67</sup> That said, it is doubtful that these provisions create a cause of action.<sup>68</sup> On the federal front, the Office of Civil Rights of the Department of Education has provided guidance in the form of a “Dear Colleague” letter sent to universities and schools as to when student-on-student bullying may violate federal civil rights law, the legal obligation to protect students in protected categories, and examples of appropriate responses in certain situations.<sup>69</sup> Federal legislation has been introduced that would require school entities to develop policies and programs to prevent and respond to bullying and harassment.<sup>70</sup> A real concern is that the latest of such measures

over those students, and (3) such student targets are less able to fend for themselves than adult workers. The Supreme Court has long recognized that these factors may justify a greater level of control than would be permissible over adults. *See, e.g., Morse v. Frederick*, 127 S. Ct. 2618, 2626–27 (2007) (First Amendment); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) (Fourth Amendment); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (First Amendment); *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.9 (1985) (Fourth Amendment); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (First Amendment). Indeed, courts have long differentiated between permissible regulation of expression in the elementary and secondary context and the smaller amount allowed in a university setting. *E.g., McCauley v. Univ. of the V.I.*, 618 F.3d 232, 242–47 (3d Cir. 2010). Although there are free expression concerns, those advocating a legislative response to bullying in the public schools may have been more successful characterizing it as a public health issue. *Therapeutic Jurisprudence*, *supra* note 14, at 287.

67. The Secretary of Education recently offered technical assistance to entities seeking to craft laws or policies to reduce student-on-student bullying. Policy Letter from Arne Duncan, Sec’y, U.S. Dep’t of Educ., to Governors & Chief State School Officers (Dec. 16, 2010), *available at* <http://www2.ed.gov/policy/gen/guid/secletter/101215.html>. Attached was a summary of key components of such a policy and examples of state-law provisions. *Id.* enclosure.

68. *See, e.g., OR. REV. STAT.* § 339.364 (2009) (no cause of action created); *R.I. GEN. LAWS* § 16-21-26(l) (Supp. 2010) (same); *S.C. CODE ANN.* § 59-63-150(A) (Supp. 2010) (same); *UTAH CODE ANN.* § 53A-11a-402 (LexisNexis Supp. 2011) (same); *WYO. STAT. ANN.* § 21-4-315 (2011) (same).

69. Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., Office of Civil Rights, to colleague (Oct. 26, 2010), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>. The question of whether an institution’s response should be grounded in a view of bullying as a generally unacceptable behavior or based upon the specific actual or perceived characteristics of the victim has created some controversy. One group, taking the former position, advocates for a model policy at the state or local level omitting mention of protected categories and incorporating limits consistent with First Amendment protection of verbal expression. Letter from Brian Raum, Austin R. Nimocks & Daniel Blomberg, Counsel, Alliance Defense Fund, to Martin R. Castro, Chairman, U.S. Comm’n on Civil Rights, ex. 1, Model Anti-Bullying Policy §§ II(A), III, V (May 12, 2011), *available at* <http://oldsite.alliancedefensefund.org/userdocs/USCCRBbullyingpolicy.pdf>.

70. Safe Schools Improvement Act of 2011, S. 506, 112th Cong. § 3 (2011); Safe Schools Improvement Act of 2011, H.R. 1648, 112th Cong. § 3 (2011); Tyler Clementi Higher Education

does not contain an objective component and could restrict speech; the Supreme Court has interpreted Title IX as proscribing student-on-student harassment where the harassment is not only severe and pervasive, but also objectively offensive so as to deprive a student of equal access to education.<sup>71</sup>

The approach to enacting these measures is largely based upon promoting student health and safety (as well as promoting equal educational opportunity), a lesson that is not lost on those favoring enactment of a statutory response to workplace harassment, often called a “healthy workplace law.”<sup>72</sup> Though health and safety law in the United States largely protects against physical hazards and injuries, it has been slow to recognize that workplace harassment may involve both physical and psychological harm.<sup>73</sup> Many other Western nations have enacted statutes to protect workers from workplace bullying.<sup>74</sup> Many countries in Europe, including the United Kingdom, Sweden, France, Germany, Belgium, and Poland, have adopted some form of “anti-bullying” legislation.<sup>75</sup> Additionally, Canada has recognized the detrimental effects of bullying in the workplace and has amended its Labour Code to require employers to develop workplace-violence-prevention policies, which provide

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Ant-Harassment Act of 2011, S. 540, 112th Cong. § 2 (2011); Tyler Clementi Higher Education Anti-Harassment Act of 2011, H.R. 1048, 112th Cong. § 2 (2011); *see also* Bullying Prevention and Intervention Act of 2011, H.R. 83, 112th Cong. § 2 (2011); Anti-Bullying and Harassment Act of 2011, H.R. 975, 112th Cong. § 2 (2011).

71. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). A plaintiff pursuing a private action for damages also must show that the educational unit acted with deliberate indifference, a very high standard of proof. *Id.* A plaintiff also may pursue a federal civil rights claim based upon a violation of equal protection; Title IX is not an exclusive remedy. *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 797 (2009). For disabled students, another theory may be relief under the Individuals with Disabilities Education Act where the harassment is likely to affect the student’s opportunity for an appropriate education. *T.K. v. N.Y.C. Dep’t of Educ.*, 779 F. Supp. 2d 289, 316–17 (E.D.N.Y. 2011). It seems clear that any statute concerning harassment which limits the expressive content of speech must comport with the First Amendment. *See Morse v. Frederick*, 127 S. Ct. 2618, 2625 (2007); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 209–10 (3d Cir. 2001). Such restrictions in the public school setting might be justified on any number of rationales, including that the speech (1) interferes with the rights of other students, (2) would substantially disrupt school operations, (3) would bear the imprimatur of the school and is contrary to legitimate pedagogical concerns, or (4) advocates unlawful activity (including harassment). *See Morse*, 127 S. Ct. at 2626–27; *Saxe*, 240 F.3d at 211–14.

72. *See Yamada, supra* note 1, at 278 (“We must put, front and center, the fact that workplace bullying is a form of health-endangering psychological abuse.”).

73. David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523, 564–65 (2009).

74. *See Lueders, supra* note 46, at 207–10 (describing various Western nations’ legislative responses to workplace bullying).

75. Kaplan, *supra* note 4, at 150–153; Lueders, *supra* note 46, at 207–210.

protection from workplace bullying.<sup>76</sup> Though each country's approach varies, global recognition of the problem as one involving public health is emerging.

An important case from the United Kingdom resulted in a Deutsche Bank employee receiving an award of £800,000 as a result of a "workplace bullying" action.<sup>77</sup> Under the United Kingdom's Protection from Harassment Act, Helen Green sued Deutsche Bank, her employer, for her coworkers' harassing acts.<sup>78</sup> Specifically, Ms. Green alleged that her coworkers frustrated her ability to work by "moving her papers . . . hiding her mail, removing her from document circulation lists, [and] ignoring and excluding her."<sup>79</sup> Ms. Green also produced evidence that her workload increased unreasonably and that her coworkers laughed at and made rude comments about her.<sup>80</sup> As a result, Ms. Green fell into depression and sought counseling.<sup>81</sup> In 2006, a British court ruled in favor of Ms. Green, holding Deutsche Bank vicariously liable for the actions of its employees.<sup>82</sup>

#### IV. ACADEMIC HARASSMENT

Bullying or harassment encompasses a multitude of verbal and nonverbal behaviors ranging from the impolite to the truly disrespectful.<sup>83</sup> Academic harassment can take many forms, from more overt aggressive behavior directed towards a colleague including name-calling, rude expressions and gestures, and intimidation, to the less overt, including circulating damaging rumors and attempting to undermine a colleague's career through official and unofficial actions. Although one commonly thinks of harassment as affirmative acts of aggression, another distinction is helpful: "aggressor bullies and victim bullies."<sup>84</sup> By way of example, the aggressor bully might be a dean who threatens to increase teaching loads unless the faculty subscribes to a new vision of applied research, at the expense of ongoing research. It could be a mid-level administrator who withholds teaching assignments and locations for the adjunct faculty until immediately prior to the start of the term as a means of

76. Canada Occupational Health and Safety Regulations (Violence Prevention in the Work Place), SOR/86-304, § 20.3.

77. Susan Harthill, *Bullying in the Workplace: Lessons from the United Kingdom*, 17 MINN. J. INTL. L. 247, 284 (2008); Green v. DB Group Servs. (UK) Ltd., [2006] EWHC 1898 (Q.B.).

78. Harthill, *supra* note 77, at 284–85.

79. *Id.* at 284.

80. *Id.* at 284–85.

81. *Id.* at 247–48.

82. *Id.* at 284.

83. See SUTTON, *supra* note 20, at 10 (listing "The Dirty Dozen" actions used by harassers); Christopher S. Simon & Denise B. Simon, *Bully for You; Full Steam Ahead: How Pennsylvania Employment Law Permits Bullying in the Workplace*, 16 WIDENER L.J. 141, 143–45 (2006) (listing 44 behaviors).

84. C.K. GUNSALUS, THE COLLEGE ADMINISTRATOR'S SURVIVAL GUIDE 123 (2006).

control. It could be a colleague who glares at another when no one else is around, but is cordial if others are near. It could be a colleague who practices bullying within a discipline, targeting those with research points of view out of favor with the general community and undermining their work. In contrast, the victim bully might be a faculty member who constantly pressures for various perquisites because he is a “star” and he perceives that the powers that be have bestowed some inequity upon him. This bully is high maintenance and may enjoy conflict. That said, and remembering the importance of the victim or target’s perspective, it is doubtful that the latter conduct would constitute actionable harassment without more.

Though it is impossible to catalogue all of the behaviors that might comprise academic harassment, a bully in the academic context crosses the line into uncivilized behavior where others would be inhibited.<sup>85</sup> Of course, everyone has the potential to depart from civility, particularly when under pressure. Thus, it is important to emphasize that academic harassment is characterized not by isolated incidents, but rather by consistently negative interactions.

Several factors unique to the academic environment may allow such harassment to go unchecked. First, the academic environment is difficult for a newcomer to break into (a department may have members that have interacted for years) and it is rare that expectations concerning standards of civility are communicated consistently. Second, academic institutions are decentralized organizations and monitoring of professional day-to-day behavior is rare.<sup>86</sup> Third, given the inner-directed nature of most academic activities, it is often far easier to ignore such a problem than to deal with it. For most employees, a natural human tendency is to avoid conflict rather than confront it. Fourth, an academic may belong to several work groups—including a department, college, governance committees, as well as discipline-related professional entities—and simply may not have the time or inclination to deal with a problem. Fifth, academic success is largely an individual effort—successful research and teaching, while at times collaborative, depend upon sustained, individual effort, and a faculty member may still be able to perform notwithstanding the harassment. Sixth, the larger concepts of academic freedom and collegiality often cause colleagues to accept a wide range of professional demeanor.<sup>87</sup> Seventh, many in academic administrative roles are there only for a short time and have little managerial experience.<sup>88</sup> Finally, an

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85. *Id.* at 122.

86. *See id.* at 124.

87. *Id.*

88. Kenneth W. Borland, *The Relationship Between Faculty and Academic Administration in Governance Functions*, in 4 EDUCATIONAL POLICY IN THE 21ST CENTURY 85, 89 (Michael T. Miller & Julie Caplow eds., 2003) (discussing the brief tenures of academic administrators);

academic enterprise has a very hierarchical structure (full professor, associate professor, assistant professor, lecturer, and adjunct professor), and those of lesser rank are often dependent upon those of higher rank and unwilling to confront bad behavior for fear of retaliation.<sup>89</sup> For example, a full or associate professor may be instrumental in tenure decisions concerning assistant professors, or a department chair may decide the terms and conditions under which lecturers and adjunct professors work, including course assignments, course load, and compensation.

At the same time, several factors suggest that such harassment is a “low-incidence, high-severity” problem in the academic context.<sup>90</sup> First, most faculty members have experienced other institutions of higher learning and are aware of acceptable conduct. Particularly in hiring, most departments seek to avoid difficult colleagues with whom they may have to work for many years.<sup>91</sup> Second, taking the longer view, faculty members cooperate knowing that they must work with others given the various committees and task forces that accomplish the academic mission and governance of the institution. Taking the shorter view, the academic workforce is highly qualified and mobile; most academic personnel have options (though that may be changing in an era of reduced public funding for higher education) should a situation become intolerable due to harassment. Third, even given some harassment, the time spent interacting with any one academic may be limited, particularly for those not in senior or administrative roles. Moreover, the academic environment is often fluid (deans and department chairs do change) so harassment may be a short-term phenomenon. Fourth, an academic career offers a great deal of autonomy with reference to an external discipline. This may deter the harasser or at least provide a network of support for the target.

Without question, harassment can have a destructive effect on the academic environment. Often the harasser will be largely unsupervised and free to inflict harm.<sup>92</sup> A new faculty member certainly will have many challenges and demands on his or her time; dealing with a bully should not be one of them.<sup>93</sup> The energy needed to deal with a harasser may affect

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Michael A. Fitts, *The Non-Management Side of Academic Administration*, 41 U. TOL. L. REV. 283, 283 (2010) (noting academic administrators’ frequent lack of traditional management experience).

89. In this regard, a test for bad behavior particularly in the academic context might be whether the person “aim[s] his or her venom at people who are *less powerful* rather than at those people who are more powerful?” SUTTON, *supra* note 20, at 9.

90. GUNSALUS, *supra* note 84, at 124.

91. SUTTON, *supra* note 20, at 2.

92. GUNSALUS, *supra* note 84, at 122–23.

93. For example, in *Recio v. Evers*, a tenured professor was placed on probation and required to attend counseling based upon a complaint by a newly-hired professor that the tenured professor sent her a string of demanding e-mails that appeared to have a sexual content. 771 N.W.2d 121,



productivity, the safety of the workplace and the employee's physical and mental well-being, as well as institutional integrity.<sup>94</sup> Preventive and educational efforts may yield better results than waiting for such conduct to occur.<sup>95</sup>

## V. PROPOSED RESPONSES

Much debate exists about the most effective way to combat bullying in the American workplace. Those who seek an end to "workplace bullying" propose a statutory solution, similar to laws enacted in other countries, which would promote "prevention, self-help, compensation, and punishment."<sup>96</sup> One proposal is a cause of action called "intentional infliction of a hostile work environment," which would require a plaintiff to

establish by a preponderance of the evidence that the defendant employer, its agent, or both, intentionally subjected the plaintiff to a hostile work environment. A hostile work environment is one that is deemed hostile by both the plaintiff and by a reasonable person in the plaintiff's situation. Employers are to be held vicariously liable for hostile work environments intentionally created by their agents.<sup>97</sup>

Such an approach would incorporate both a subjective and objective evaluation of the allegedly hostile conduct consistent with federal law. The subjective element would require a plaintiff to believe that a defendant's conduct was the cause of, or contributed to, the creation of a hostile work environment, while the reasonable person standard would discourage frivolous claims.<sup>98</sup> Furthermore, the reasonable person standard would permit recovery for a broad

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129–30 (Neb. 2009). The tenured professor was described by those in the department as "obsessive, a bully, aggressive, irrational, . . . demanding, creates conflict, stalking, retaliates, rages, verbal violence, explosive, forceful and creates a hostile work environment." *Id.* at 130. An acrimonious department meeting, years after the e-mails, precipitated the complaint; the court noted that the record made it clear that department members "did not get along with one another." *Id.* at 129. The tenured professor sued the junior professor for interference with a business relationship, but the court held that the sexual harassment complaint was truthful and therefore could not be the basis such a claim. *Id.* at 137.

94. See GARY NAMIE & RUTH NAMIE, *THE BULLY AT WORK* 11 (2000). In *Yancick v. Hanna Steel Corp.*, the Seventh Circuit considered a claim in a federal race-discrimination case that a co-employee intentionally caused an industrial accident severely injuring the target. No. 10-1368, 2011 WL 3319568, at \*14 (7th Cir. Aug. 3, 2011). The court determined that the co-employee "was an equal opportunity bully" (rather than one motivated by race) and concluded that the evidence was insufficient to show that the accident was racially motivated. *Id.* at \*14–15. Still, the case stands out as another reminder of the limits of federal anti-discrimination law and the danger a bully may pose in the workplace.

95. GUNSALUS, *supra* note 84, at 125.

96. Yamada, *supra* note 9, at 524.

97. *Id.*

98. See *id.*

range of abuses rather than limiting the cause of action only to statutorily defined behaviors.<sup>99</sup> Relief under such an approach would reflect the compensation and punishment goals of the statute.<sup>100</sup> Damages likely would be modeled on those available under employment discrimination statutes, which “allow for back pay, front pay, reinstatement, punitive damages, and injunctive relief.”<sup>101</sup> Where an employee does not suffer any tangible adverse employment actions (such as discharge or demotion), an employer may defend on the basis that it took steps to prevent or promptly correct the harassment and the employee unreasonably failed to take advantage.<sup>102</sup> Significantly, the defense would be only available to the employer; co-workers and supervisors who perpetrated the harassment still could be sued.<sup>103</sup>

Another proposal—the Model Healthy Workplace Bill<sup>104</sup>—makes it unlawful to subject an employee to an abusive work environment and provides for vicarious liability for an employer,<sup>105</sup> though it is apparent that both employers and employees can be defendants.<sup>106</sup> An abusive work environment occurs when a defendant, acting with malice, subjects an employee to abusive conduct so severe that it causes psychological or physical harm that is documented or supported by expert evidence.<sup>107</sup> Requiring malice and tangible harm are the primary means of deterring marginal claims.<sup>108</sup> Still, the definitions are broad: conduct includes acts and omissions, and while abusive conduct must be unrelated to an employer’s legitimate interests, it includes “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.”<sup>109</sup> Whether abusive conduct has been shown depends upon the “severity, nature, and frequency of the defendant’s conduct,” though a single act may be deemed such conduct if

99. See Lueders, *supra* note 46, at 230.

100. Yamada, *supra* note 9, at 528–29.

101. *Id.* at 528.

102. *Id.* at 527–28.

103. *Id.* at 528.

104. David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL’Y J. 475 app. (2004).

105. *Id.* app. §§ 3–4.

106. *Id.* app. § 7(2) (limiting employer liability in certain circumstances and explaining section does not apply to “individually named co-employee defendants”).

107. *Id.* app. §§ 2(3), (3)(c)–(d); see also *id.* at 500 (discussing the subjective prong of the Healthy Workplace Bill).

108. Yamada, *supra* note 1, at 262, 269. The Bill does not require a plaintiff to prove a subjective perception of abuse, instead relying upon the requirement of tangible harm which most likely encompasses such a perception. *Id.* at 263.

109. Yamada, *supra* note 104, app. §§ 2(3), (3)(a), (3)(c).

“especially severe and egregious.”<sup>110</sup> The Bill contains traditional affirmative defenses under employment discrimination law involving actions other than adverse employment actions: an employer will not be liable where the employer took reasonable care to prevent and promptly correct the actionable behavior and where the targeted employee unreasonably failed to take advantage of such opportunities.<sup>111</sup> Another affirmative defense is where the employer takes an adverse action against an employee based on legitimate business interests, such as performance issues, or reasonably investigates potentially unlawful or unethical activity.<sup>112</sup> The Bill is enforced by a private right of action (without any administrative prerequisite to proceeding in state court) and provides a one-year limitation period from the last act of the harassment.<sup>113</sup> Relief reflects the goals of compensation and deterrence, and includes injunction, removal of the perpetrator from the work environment, reinstatement, back pay, front pay, medical expenses, emotional distress damages, punitive damages, and attorney’s fees.<sup>114</sup>

In the United States, legislation to combat workplace harassment has been introduced in twenty-one states, but none has been adopted as law.<sup>115</sup> Advocates of such legislation base their proposals on the Model Healthy Workplace Bill,<sup>116</sup> discussed above, which creates a private right of action for victims of workplace harassment. The cause of action would expand employment harassment protections to non-protected status classes, thereby filling a gap in federal and state civil rights protections.<sup>117</sup> The Bill contains a definition of an “abusive workplace” and the requirement that a claimant

110. *Id.* app. § 2(3)(c).

111. *Id.* app. § 5(A); *see also* Yamada, *supra* note 1, at 264 (discussing one of the affirmative defenses available under the Bill).

112. Yamada, *supra* note 104, app. § 5(B).

113. *Id.* app. § 8.

114. *Id.* app. § 7.

115. *Healthy Workplace Bill: Legislative History in the United States*, NEW YORK HEALTHY WORKPLACE ADVOCATES, <http://www.nyhwa.org/7.html> (last visited Nov. 7, 2011). The states include California, Connecticut, Hawaii, Illinois, Kansas, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Utah, Vermont, Washington, West Virginia, and Wisconsin. *Id.* The New York senate passed a Healthy Workplace Bill, but the bill did not make it out of the state assembly. *See* Adam Cohen, *New Laws Target Workplace Bullying*, TIME (July 21, 2010), <http://www.time.com/time/nation/article/0,8599,2005358,00.html?xid=rss-fullnation-yahoo>.

116. Lueders, *supra* note 46, at 227; *see also* *Quick Facts About the Healthy Workplace Bill*, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/bill.php#facts> (last visited Nov. 7, 2011) (providing a description and overview of the Model Healthy Workplace Bill). For an example of a bill introduced, *see* A. 673, 214th Leg. (N.J. 2010), *available at* [http://www.njleg.state.nj.us/2010/Bills/A1000/673\\_I1.pdf](http://www.njleg.state.nj.us/2010/Bills/A1000/673_I1.pdf).

117. *Quick Facts About the Health Workplace Bill*, *supra* note 116.

provide medically acknowledged proof of harm to health.<sup>118</sup> This may include physical or psychological damages.<sup>119</sup> In theory, the act attempts to protect both employees and employers who have adopted policies to combat abusive workplaces.<sup>120</sup>

In contrast, critics of a workplace-harassment act claim it will increase frivolous litigation and employer liability.<sup>121</sup> The availability of such claims is tantamount to more regulation of employers. Critics also fear that such vague legislation would provide little guidance to potential defendants, who can include employers as well as employees.<sup>122</sup> They argue that the workplace is a self-correcting entity,<sup>123</sup> in that at-will employment allows victimized employees to terminate their contracts as soon as “the net value of the employment contract turns negative.”<sup>124</sup> As a result, the market self-corrects because bad employers who suffer losses are forced to correct these problems internally, and good employees are drawn to employers with good reputations, who then prosper.<sup>125</sup> Critics also point to the public awareness of the harms of workplace harassment and suggest that internal prevention efforts, including an anti-harassment policy with clear outcomes, may yield better results.<sup>126</sup>

It seems clear that state adoption of a Model Healthy Workplace Bill would work a significant change in the employment area in terms of access to the courts and liability for individual defendants.<sup>127</sup> First, under federal anti-discrimination law, an employee must file an administrative charge with the Equal Employment Opportunity Commission (“EEOC”) within 180 or 300 days (depending upon the state) after the unlawful employment practice occurs.<sup>128</sup> The purpose of the administrative exhaustion requirement is to

118. *Id.*

119. *Therapeutic Jurisprudence*, *supra* note 14, at 286.

120. See *Quick Facts About the Healthy Workplace Bill*, *supra* note 116 (enumerating the Healthy Workplace Bill’s attempts to protect both parties).

121. Yamada, *supra* note 9, at 532–33.

122. Lueders, *supra* note 46, at 236; Victoria Pynchon, *New York Anti-Bullying Law A Big Bad Idea*, ON THE DOCKET: INSIDE THE COURTROOM (May 28, 2010, 10:15 AM), <http://www.forbes.com/sites/docket/2010/05/28/new-york-anti-bullying-law-a-big-bad-idea/>.

123. See Yamada, *supra* note 9, at 532.

124. *Id.* (quoting Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 966 (1984)).

125. See *id.* Thus, an employer could conceivably adopt an anti-harassment policy that could modify an at-will employment arrangement. See, e.g., *Baker v. Echostar Commc’ns Corp.*, No. 06-cv-01103-PSF-BNB, 2007 WL 4287494, at \*12–13 (D. Colo. Dec. 4, 2007).

126. See *supra* note 6 (describing the Society for Human Resource Management’s criticism of pending anti-bullying legislation).

127. Brian K. LaFratta, *Crackdown on Bullies: Bills in Several States Would Give Employees Tools to Fight Abusive Conduct in the Workplace*, NAT’L L.J., Sept. 29, 2008, at S1.

128. 42 U.S.C. § 2000e-5(e)(1) (2006); *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 118 (2002).

allow the EEOC to investigate and attempt conciliation.<sup>129</sup> If the matter is not resolved administratively, the employee receives a notice of a right to sue in federal court.<sup>130</sup> Contrast that with a state cause of action that would require no administrative exhaustion and may be pursued directly in state court pro se.<sup>131</sup> This could be a definite advantage to employees, as federal courts are perceived as being more formal and more complex for litigation.<sup>132</sup>

State courts also may be less likely to grant summary judgment or judgment on the pleadings in favor of employer defendants than federal courts.<sup>133</sup> And of course, federal anti-discrimination claims have caps on damages based on employer size.<sup>134</sup> The model act caps employer liability at \$25,000 per unlawful employment practice (with no punitive damages) for emotional distress damages in the absence of an adverse employment decision; given an adverse employment decision, the damages could be unlimited.<sup>135</sup> The model act also may bring in more defendants (employer and harasser employees) whereas under federal law, it is the employer that is sued.<sup>136</sup>

129. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

130. 42 U.S.C. § 2000e-5(f)(1); see, e.g., *Alexander*, 415 U.S. at 44, 47; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973).

131. Of course, states have anti-discrimination statutes also, but probably require administrative exhaustion.

132. Oddly enough, the lack of an administrative mechanism in the Bill is designed to discourage weak claims by denying agency representation to pro se litigants and by making the plaintiff's bar a gatekeeper—those with weak cases will find it difficult to obtain an attorney. Yamada, *supra* note 104, at 505; see also Yamada, *supra* note 1, at 266 (discussing the Bill's enforceability by private right of action). This rationale seems counter-intuitive given that plaintiffs are certainly able to file pro se.

133. See Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 522, 522–23 nn.25–26 (2010) (describing the perception that state courts are more favorable to plaintiffs and federal courts are more favorable to defendants in such situations). Since 1986, federal courts have been encouraged to use summary judgment to eliminate factually unsupported claims. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–51 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325–26 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Likewise, recent case law encourages federal courts to grant motions to dismiss for failure to state a claim where the complaint states merely a conceivable claim, not a plausible one. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950–51 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In evaluating a motion to dismiss, the court will take a complaint's factual allegations as true in deciding whether it meets the “plausibility test,” but not its legal conclusions. *Iqbal*, 129 S. Ct. at 1949–50; *Twombly*, 550 U.S. at 555.

134. 42 U.S.C. § 1981a(b)(3) (2006). The caps on compensatory and punitive damages range from \$50,000 to \$300,000 depending upon the employer's number of employees. *Id.*

135. Yamada, *supra* note 104, app. § 7(2).

136. See, e.g., *Spiegel v. Schulmann*, 604 F.3d 72, 79 (2d Cir. 2010) (per curiam) (noting that the retaliatory provision of Title VII does not allow for individual liability); *Fantini v. Salem State Coll.*, 557 F.3d 22, 28–31 (1st Cir. 2009) (finding there is no individual employee liability

How would such a measure affect the academic environment? As a starting point, many institutions have adopted the American Association of University Professors' (AAUP) statement of professional ethics, which proscribes harassment or discriminatory treatment of colleagues and students.<sup>137</sup> As with most work environments, differentiating workplace harassment from legitimate performance-related judgments and managerial prerogative is essential. An academic environment is all about knowledge creation and this involves content-based choices and criticism that might be mistaken for harassment. Conflict based upon competing ideas is often part of the creative process; conflict based upon relentless personal attacks is not.<sup>138</sup> Additionally, academia comprises many diverse personalities, and styles of interaction certainly differ. Tolerance is essential; colleagues do not have to like one another. But, if the internal dissension proves too much and the research and teaching mission is compromised, a university may intervene notwithstanding the personal positions of the faculty.<sup>139</sup> Of course, the university must do so consistent with First Amendment concerns and the due process rights of the tenured faculty.<sup>140</sup>

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under Title VII); *Dearth v. Collins*, 441 F.3d 931, 933 (11th Cir. 2006) (per curiam) (finding that a Title VII claim may not be brought against an individual employee).

137. *Statement on Professional Ethics*, in AM. ASS'N OF UNIV. PROFESSORS, AAUP POLICY DOCUMENTS & REPORTS 171, 171–72 (10th ed. 2006).

138. Yamada, *supra* note 1, at 270 (rejecting the idea “that malicious, psychological abuse of an employee is all part of healthy competition, a form of social Darwinism that separates the wheat from the chaff and frees people to excel”).

139. *See Webb v. Bd. of Trs. of Ball State Univ.*, 167 F.3d 1146, 1150 (7th Cir. 1999) (explaining that universities may intervene when tensions become overwhelming).

140. Thus, in *Hulen v. Yates*, four members of an accounting and taxation department at a state university were transferred to different departments after being warned that efforts to revoke a colleague's tenure might be met with adverse action. 322 F.3d 1229, 1233 & n.1 (10th Cir. 2003) (per curiam). The plaintiff had tenure and taught tax, but was transferred to the management department and only allowed to teach two tax classes per year. *Id.* at 1233. The Tenth Circuit held that the plaintiff had a property interest in his departmental assignment entitling him to due process, which he received, but remanded the case for a trial on his First Amendment retaliation claims. *Id.* at 1243–44, 1249. Although the court determined that the plaintiff spoke out on a matter of public concern and his interests in speaking out were not outweighed by the university's interest in departmental harmony, *id.* at 1238–39, the case predates *Garcetti v. Ceballos* which held that public employee speech pursuant to official duties is not protected under the First Amendment, 547 U.S. 410, 421 (2006).

In a somewhat similar case, an accounting department faculty member was relieved from teaching responsibilities after complaints of negative and disruptive behavior by colleagues. *DePree v. Saunders*, 588 F.3d 282, 285–86 (5th Cir. 2009). The faculty member claimed retaliation based upon his complaints to the accreditation body (AACSB) and denial of a liberty and property interest in his employment. *Id.* at 286. The Fifth Circuit concluded that the university president was entitled to qualified immunity on the First Amendment retaliation claim because the law was not clearly established that being relieved of teaching duties (while maintaining tenure, salary, and rank) constituted adverse action. *Id.* at 287–88. The court also

A larger concern is not to compromise academic freedom with minor or groundless complaints. Faculty members are entitled to freedom in teaching, research and publication, and speaking out as citizens without fear of adverse employment action.<sup>141</sup> This professional conception of academic freedom also may enjoy some constitutional protection.<sup>142</sup> Accordingly, some leeway concerning faculty conduct is necessary to protect academic freedom and give it sufficient breathing room.<sup>143</sup> Professional disagreements can get quite heated, but at what point does pressing an issue constitute harassment? Likewise, faculty appointments on the tenure track require critical judgment that could easily be deemed unjustified or abusive by an unsuccessful candidate.<sup>144</sup> Of course, academic freedom has always carried with it a professional responsibility for ethical behavior in performing research, publication, and teaching functions.<sup>145</sup> Likewise, it should carry a responsibility not to engage in repeated, destructive, and discriminatory conduct aimed at a colleague or other university constituents.<sup>146</sup>

Some limits probably are essential. Federal law is replete with the maxim that the purpose of anti-discrimination law is not to create a general civility code.<sup>147</sup> And with good reason—such a code would be difficult to enforce and could very well chill expression.<sup>148</sup> Additionally, Title VII was never intended

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concluded that the action could not support a due process claim as the faculty member did not have a property interest in specific duties without a contractual or statutory provision to the contrary. *Id.* at 289–90.

141. 1940 *Statement of Principles on Academic Freedom and Tenure*, in AM. ASS'N OF UNIV. PROFESSORS, AAUP POLICY DOCUMENTS & REPORTS 3, 3 (10th ed. 2006).

142. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

143. See *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991).

144. Loreleigh Keashly & Joel H. Neuman, *Faculty Experiences with Bullying in Higher Education: Causes, Consequences, and Management*, 32 ADMIN. THEORY & PRACTICE 48, 56 (2010); see, e.g., *Keri v. Bd. of Trs. of Purdue Univ.*, 458 F.3d 620, 625–26 (7th Cir. 2006) (regarding the non-reappointment of assistant professor in fifth year). Academic freedom concerning appointment of faculty is probably the area where courts defer most—so it may well be that courts would continue to do so even given a new tort of workplace harassment.

145. William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in THE CONCEPT OF ACADEMIC FREEDOM 59, 71 (Edmund L. Pincoffs ed., 1975); see *Pugel v. Bd. of Trs. of Univ. of Ill.*, 378 F.3d 659, 668 (7th Cir. 2004) (finding that the university's interest in the integrity of its intellectual mission and research outweighed teaching assistant's interest in presenting fabricated data).

146. See *Trejo v. Shoben*, 319 F.3d 878, 881–83, 887 (7th Cir. 2003) (holding that assistant professor's demeaning comments were not entitled to First Amendment protection); Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of Garcetti v. Ceballos to Public University Faculty*, 59 CATH. U. L. REV. 125, 154 (2009) (noting that abusive behavior in an academic setting is not entitled to First Amendment protection).

147. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

148. See *Therapeutic Jurisprudence*, *supra* note 14, at 285–86.

to turn courts into a “super-personnel department.”<sup>149</sup> Hence, under federal law, the harassment must be severe or pervasive enough so as to alter the terms and conditions of the victim’s employment.<sup>150</sup> There also is a subjective and an objective component—not only must the harassment be perceived as such by the complaining individual, but a reasonable person would also have the same perception.<sup>151</sup> This inquiry is based upon the totality of the circumstances, including the frequency and severity of the harassment, whether it is threatening or humiliating, and whether it interferes with job performance.<sup>152</sup>

The Tenth Circuit recently considered two faculty members’ claims of retaliation for reporting discrimination. In *Somoza v. University of Denver*, the court determined that the faculty members could not prove that a reasonable person would have been dissuaded from reporting discrimination, an objective requirement under federal law.<sup>153</sup> The court suggested that the faculty members “may have had to withstand colleagues that do not like them, are rude, and may be generally disagreeable people,” but the court could not “mandate that certain individuals work on their interpersonal skills and cease engaging in inter-departmental personality conflicts.”<sup>154</sup> While not trivializing the subjective discomfort, the court held that “various instances of incivility, rudeness, and allegedly offensive statements regarding their ethnicity and national origin” simply were not enough under the objective test.<sup>155</sup> The case is instructive because it involves typical department strife—faculty hiring, interaction among members, and resource allocation.

Another recurring issue is vicarious liability: in what circumstances should the academic institution be liable for the conduct of the harasser when the employee has suffered no tangible employment action (e.g., demotion or loss of pay)? Current law allows the institution an affirmative defense to liability and damages, given a hostile work environment created by a supervisor, when the institution can prove it took prompt corrective action when informed of the problem and the employee unreasonably failed to take advantage of measures designed to prevent the harassment.<sup>156</sup> Such policies encourage institutions to adopt and educate employees about internal protocol for handling and resolving such claims.

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149. *Downing v. Tapella*, 729 F. Supp. 2d 88, 93–94 (D.D.C. 2010).

150. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

151. *Id.* at 21–22.

152. *Id.* at 23.

153. *Somoza v. Univ. of Denver*, 513 F.3d 1206, 1218 (10th Cir. 2008).

154. *Id.*

155. *Id.* at 1219.

156. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998).



The academic setting also presents unique issues due to the variety of employment relationships relative to the institution. Tenured faculty members serve in a “for cause” employment relationship, while non-tenure track faculty and staff generally serve in an “at will” capacity. This difference may manifest itself in the opportunity for workplace bullying, an institution’s response, and the response of the victim. Policies may not apply uniformly to all groups. For instance, at the authors’ university the “Dispute Resolution” policy providing for a variety of specified resolution processes is applicable to “employees”—defined as “staff, coworkers, and supervisors.”<sup>157</sup> “Supervisors” include “faculty who supervise staff.”<sup>158</sup> Faculty are not afforded a formal process, although the university has a voluntary faculty dispute resolution program which utilizes faculty mediators and is non-binding.<sup>159</sup>

The faculty handbook makes it clear that evaluations are based upon teaching, scholarly work, service, and personal characteristics.<sup>160</sup> Personal characteristics include “emotional stability or maturity” and “demonstrated collegiality and interactional skills so that an individual can work harmoniously with others.”<sup>161</sup> Faculty members also are evaluated based upon ethical behavior, which plainly has an effect on the institution;<sup>162</sup> just as the university subscribes to the principles of academic freedom, so too to the ethical proscription against harassment of students and colleagues as well as discrimination.<sup>163</sup> The faculty handbook also provides for a Faculty Ethics and Advisory Committee, which advises and consults the President of the University and others regarding action to be taken where a faculty member is accused of ethical violations.<sup>164</sup> It contains some very general areas of unacceptable interaction; however, it does not detail specific remedies.<sup>165</sup> This disparity may reflect a self-policing aspect of faculty membership.

157. *University Business Policies and Procedures Manual: 3220 Dispute Resolution Policy*, UNIV. OF N.M., <http://www.unm.edu/~ubppm/ubppmanual/3220.htm> (last visited Nov. 7, 2011).

158. *Id.*

159. See UNIV. OF N.M., OMBUDS/DISPUTE RESOLUTION SERVICES FOR FACULTY, *available at* [http://ombudsfac.unm.edu/ODR\\_Brochure\\_final\\_080210.pdf](http://ombudsfac.unm.edu/ODR_Brochure_final_080210.pdf).

160. UNIV. OF N.M., FACULTY HANDBOOK § B1.2(a), *available at* <http://www.unm.edu/~handbook/Faculty%20Handbook.pdf>.

161. *Id.* § B1.2.4.

162. *Id.*

163. *Id.* § B1.1(a)-(b); *id.* app. V, § II (“[Professors] avoid any exploitation, harassment, or discriminatory treatment of students.”); *id.* app. V, § III (“Professors do not discriminate against or harass colleagues.”).

164. *Id.* § A61.8.

165. See UNIV. OF N.M., *supra* note 160, § C05 (describing acts of misconduct and sanctions for committing such acts). Under consideration at the authors’ university is a faculty disciplinary policy which would provide a mechanism to discipline faculty for violations of university policy.

Given the documented personnel and organizational costs of workplace harassment,<sup>166</sup> a strong argument can be made that a university ought to adopt an anti-harassment policy before it is necessitated by law.<sup>167</sup> Moreover, a university can craft a policy that places a high value on free expression. Probably the most difficult task is defining harassment; such a definition should be specific so as to limit the discretion of those applying it. Any policy must address whether an additional right is being created (unlikely) and whether it is intended to limit any other administrative remedies concerning bullying (also unlikely). It should contain both a subjective and objective test for harassment. It should differentiate between professional academic freedom and prohibited harassment and make clear that it is to be interpreted consistent with First Amendment values.<sup>168</sup> It should include an anti-retaliation provision protecting those who report or assist in the detection and prevention of bullying. In addition to legislative proposals discussed above, there are examples of such policies adopted in the educational context.<sup>169</sup> Such a policy probably can be added to existing anti-discrimination policies and utilize similar procedures, including prompt investigations and attempted conciliation.<sup>170</sup> Faculty can be made aware of such a policy through training and as a component of performance evaluations.<sup>171</sup>

Not losing sight of the First Amendment is especially important in an academic environment. Recently, the Ninth Circuit considered a claim that a community college was responsible for a hostile work environment by failing to enforce its anti-harassment policy against a math professor who aired some of his views on race via e-mail and a website maintained by the college.<sup>172</sup> The court had no trouble concluding that the Equal Protection Clause contains a right to be free of harassment based upon protected status and that a public

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166. The costs of retaining a bully may include employee turnover and absenteeism, lost productivity, higher health care costs, and increased workers' compensation and discrimination claims. To the extent that these matters take time and personnel (lawyers) to resolve, or result in damage awards (albeit under a different theory than workplace bullying), the organization is employing resources on a non-productive endeavor. See Michael Sheehan, *Workplace Bullying: Responding with Some Emotional Intelligence*, 20 INT'L J. OF MANPOWER 57, 59–62 (1999).

167. Carol Rick Gibbons et al., *Don't Get Pushed Around: What Employers Should Do to Address Bullying Behavior in the Workplace*, ACC DOCKET, Apr. 2010, at 84, 90.

168. For an example of such direction in the context of a school anti-bullying law, see N.C. GEN. STAT. § 115C-407.18(a) (2009), which provides that it “shall not be construed to permit school officials to punish student expression or speech based on an undifferentiated fear or apprehension of disturbance or out of a desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”

169. See SIOUX CITY CMTY. SCH. BD., CODE NO. 403.5, WORKPLACE BULLYING (2009), available at [http://www.sioxcityschools.org/pages/uploaded\\_files/403%205.pdf](http://www.sioxcityschools.org/pages/uploaded_files/403%205.pdf).

170. See Gibbons, *supra* note 167, at 90.

171. *Id.* at 90–91.

172. *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 705–06 (9th Cir. 2010).

employer is required to take prompt action to stop the harassment (although discipline of the harasser is not required).<sup>173</sup> But the court concluded that the professor's speech was not unlawful harassment; rather, it was protected speech on an issue of public concern.<sup>174</sup> Content regulation (suppression based solely on an unpopular viewpoint) is generally prohibited by the First Amendment, and the court deferred, upon academic freedom grounds, on the speech and the college's decision not to take any action against the professor.<sup>175</sup> The court's decision was heavily influenced by First Amendment values, as incorporated by the Fourteenth Amendment to the states, as to protected speech and academic freedom.<sup>176</sup>

Harassment law generally involves regulating conduct, but when it regulates speech the First Amendment is implicated and some line-drawing is inevitable. It is clear that anti-harassment policies are subject to the First Amendment.<sup>177</sup> Given the interest in equal opportunity, one such formulation is to allow the regulation when the harassing speech is directed only at the plaintiff, not the public at large.<sup>178</sup> Another approach is that such regulation is permissible in the employment context because harassment is simply beyond First Amendment protection.<sup>179</sup> In any event, any workplace harassment

173. *Id.* at 707.

174. *Id.* at 708. A somewhat similar case, though not concerning academic freedom in the workplace, concerns a high school student's right to wear a T-shirt with the message "Be Happy, Not Gay." *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 875 (7th Cir. 2011). A school official banned display of the slogan as contrary to a school rule prohibiting spoken or written derogatory comments based upon sexual orientation. *Id.* The Seventh Circuit held that such a ban violated two students' First Amendment rights given the lack of evidence of substantial disruption caused by the message and affirmed nominal damage awards in favor of the students. *Id.* at 880–82. Of course, an academic employer has substantial leeway in regulating the off-topic speech of faculty directed at students, *see Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 672 (7th Cir. 2006), but the words of the panel resonate: "[P]eople in our society do not have a legal right to prevent criticism of their beliefs or even their way of life." *Zamecnik*, 636 F.3d at 876–77 (rejecting a "hurt feelings" defense to the violation of constitutional rights).

175. *Rodriguez*, 605 F.3d at 709; *see also Texas v. Johnson*, 491 U.S. 397, 414 (1989) (establishing that the government may not prohibit speech merely because society disagrees or is offended).

176. *Rodriguez*, 605 F.3d at 709.

177. *DeJohn v. Temple Univ.*, 537 F.3d 301, 316 (3d Cir. 2008).

178. *See, e.g., Eugene Volokh, Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1845–46 (1992) (proposing that an interest in assuring equality in the workplace justifies restricting speech directed at a particular employee).

179. *See, e.g., Miranda Oshige McGowan, Certain Illusions About Speech: Why the Free-Speech Critique of Hostile Work Environment Harassment Is Wrong*, 19 CONST. COMMENT. 391, 397–98 (2002) (arguing that harassment law is designed to prevent economic disruption and that the harassing expression does not implicate First Amendment protection).

policy in the university setting ought to have a sense of place—recognizing that a university traditionally has been open to new ideas.<sup>180</sup>

Assuming that a university adopted an anti-harassment policy, how might it be challenged on First Amendment grounds? If it was a faculty member (suppose the faculty member received a reprimand for allegedly harassing a colleague about a grant), the faculty member might grieve it in accordance with university policies pertaining to academic freedom and free expression. To the extent that the faculty member contested it on First Amendment grounds, one roadblock would be that only employee speech on a matter of public concern is protected; workplace speech pertaining to private matters generally is not.<sup>181</sup> Another roadblock is *Garcetti v. Ceballos*, which held that public employee speech that is pursuant to job responsibilities simply is not protected by the First Amendment.<sup>182</sup> *Garcetti* left open whether speech related to teaching and research might be protected under an academic freedom rationale, but the contours of any such exception are not clear.<sup>183</sup> *Garcetti* continues a trend recognizing managerial prerogative and that when the government regulates as an employer it has far greater latitude. It represents a formidable barrier (along with the doctrine of qualified immunity)<sup>184</sup> to challenging managerial action based upon denial of free speech.

180. See *Lyle v. Warner Bros. Television Prods.*, 132 P.3d 211, 231–32 (Cal. 2006) (Chin, J., concurring) (noting that the First Amendment may protect speech central to creative process where workplace product is itself expression).

181. *Connick v. Myers*, 461 U.S. 138, 147 (1983). The Supreme Court has extended the public concern requirement to the right to petition, which includes the filing of grievances. *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011).

182. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *Renken v. Gregory*, 541 F.3d 769, 773–74 (7th Cir. 2008).

183. *Garcetti*, 547 U.S. at 425. The Ninth Circuit recently granted qualified immunity to various university faculty members based on a former professor's claims that he was denied a merit salary increase in retaliation for his criticism of the hiring and promotion of other professors, as well as the hiring of lecturers. *Hong v. Grant*, 403 F. App'x 236, 237–38 (9th Cir. 2010). The district court held that the professor's statements were pursuant to his official duties as a faculty member and therefore not protected. *Hong v. Grant*, 516 F. Supp. 2d 1158, 1168 (C.D. Cal. 2007). In the alternative, the district court determined that the speech was not on a matter of public concern and likewise unprotected. *Id.* at 1169–70. The Ninth Circuit did not decide whether the speech was protected and instead granted qualified immunity on the basis that the law was not clearly established in 2004, let alone today, that faculty members had a right to comment on discretionary administrative matters free from retaliation. *Hong*, 403 F. App'x at 237–38 (citing *Garcetti*, 547 U.S. at 425 (declining to decide whether there is an “academic exception” for speech related to teaching or research)).

184. An individual defendant may raise a qualified immunity defense so as to defeat civil liability for damages. Once raised, a plaintiff must establish that the facts as alleged establish a constitutional violation and that the constitutional right in question was clearly established, *viz.*, that a reasonably-informed public official would have been aware that his or her specific conduct violated that right. See *Pearson v. Callahan*, 129 S. Ct. 808, 815–16 (2009). Qualified immunity

## CONCLUSION

Current statutory and common law tort actions provide certain restricted avenues of legal redress for those who have been subjected to harassment by their coworkers and/or employers. It seems clear that federal discrimination statutes are inadequate to perform that task because of their requirement that the harassment be a product of class-based discriminatory animus. Some form of administrative mechanism for developing interpretive guidance and attempted administrative resolution of workplace harassment complaints ought to precede court involvement; currently, that function is performed by the EEOC for many discrimination complaints.<sup>185</sup> A federal response has the advantage of uniformity, particularly for employers, although the costs of implementing such a system are not insubstantial. At the same time, the United States embraces an at-will employment model and places a high value on freedom of expression; there may be merit to the idea that workplace harassment—barring the presence of a discriminatory or tortious act—should be addressed at the institutional level (via prevention) or through alternative dispute resolution, which could be incorporated into a general employment policy.<sup>186</sup> After all, universities as large employers always have the potential to become defendants in employment-related lawsuits—a preventive law orientation would consider the legal exposure and address it through adoption of an anti-harassment policy, a procedural mechanism to enforce it, and education and training of the workforce, much as has been done for protected-status discrimination and harassment.<sup>187</sup> Even if institutional exposure is low because of the lack of federal and state law providing a cause of action, a university might still want to consider such a policy as an option to promote dignity and respect in the workplace, and perhaps avoid regulation in the future.<sup>188</sup> The progress made in eliminating discrimination based upon protected class status should not foreclose other efforts to improve the

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does not apply to institutional defendants. *Owen v. City of Independence, Mo.*, 445 U.S. 622, 638, 657 (1980).

185. See Lueders, *supra* note 46, at 237. The number of charges handled by the EEOC for FY 2010 was 99,922. *Charge Statistics*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Nov. 7, 2011). Those dissatisfied with the EEOC's resolution may file a complaint in federal court, however, employment discrimination cases have declined as a percentage of the federal docket (from ten to six percent) and some view the federal courts as inhospitable to such claims. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 103–04 (2009).

186. See Lueders, *supra* note 46, at 239–41; Lippel, *supra* note 3, at 5 (noting that legislative enactments are the product of political compromise and should not serve as guides for prevention efforts).

187. See *Therapeutic Jurisprudence*, *supra* note 14, at 275–76.

188. See Yamada, *supra* note 1, at 277.

workplace and eliminate destructive and harmful behavior.<sup>189</sup> The effect of such a proposal on academic freedom is certainly worth considering before enactment, but carefully drawn procedures to address workplace harassment in the academic environment should promote academic freedom for faculty.

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189. See Yamada, *supra* note 73, at 563–65. But see Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1252–66 (2011) (suggesting, *inter alia*, that anti-bullying laws might dilute current gender protection law and enforce gender stereotypes).