YOU'LL NEED MORE THAN A VOLTAGE CONVERTER: PLUGGING EUROPEAN WORKPLACE BULLYING LAWS INTO THE AMERICAN JURISPRUDENTIAL OUTLET

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I. INTRODUCTION

Over the last twenty years, European labor and employment law has introduced a new cause of action for non-status-based employment harassment.[1] Under non-status-based employment harassment laws, or bullying laws, complainants need not prove they are members of protected classes or that they experience harassment based on their memberships in such classes.[2] Rather, the cause of action turns upon the harassment itself.[3]

American social scientists, legal scholars, and activists have watched the European developments with interest.[4] Many think European-style workplace bullying laws would ameliorate hostile American workplaces and change the American work culture they perceive values profits over people, and business hegemony over human health.[5] To this end, supporters of workplace bullying laws have formed organizations to proliferate advice on how to manage a bullying work environment.[6] Newspapers dedicate columns to the issue and specialists train companies to address bullying.[7] Some

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1. *See* discussion *infra* Part II.C.3.
2. *See* discussion *infra* Part II.A-B.
3. *See* discussion *infra* Part II.A-B.
4. *See* discussion *infra* Part II.A.
5. *See* discussion *infra* Part II.A.
6. *See*, *e.g.*, Bully Online, http::://www.bullyonline.org/workbully; Workplace Bullying Institute, http://www.bullyinginstitute.org.
7. *See* Sharon Emery, *Workplace Can Be Bully's Playground Problem Reduce Productivity, Leads to Absenteeism*, GRAND RAPIDS PRESS, August 17, 2006, at C1; *Some Stand Up to Workplace Bullies Employers' Challenge is to Figure Out Why Bullying is Occurring*, GRAND RAPIDS PRESS, August 31, 2006, at C3; Carolyn Said, *Bullying Bosses Could be Busted: Movement*

companies even use personality evaluations to diagnose "psychopathic type leaders" in order to identify potential bullies.[8] Grassroots organizers have taken to state legislatures to promote model legislation titled "The Healthy Workplace Bill," which would create a state law cause of action similar to the European laws.[9] Although no states have passed the Healthy Workplace Bill or similar legislation, the anti-bullying community remains hard at work and hopeful that such laws will pass soon.[10]

The purpose of this note is neither to support nor to decry workplace bullying laws as a whole, but rather to highlight the problems of implementing such laws, particularly in the framework of the Healthy Workplace Bill. Workplace bullying laws, like all laws, have substantive advantages and disadvantages. The primary objective of this note is to identify, explain, and suggest solutions to the institutional disadvantages of workplace bullying laws in America. To meet this objective, it is essential to recognize that workplace bullying laws are European causes of action that developed in legal cultures that differ dramatically from American legal culture.[11] Americans cannot expect to simply plug European laws into American jurisprudence without making modifications--if sufficient modifications are even possible--to account for the ways Americans envision work and the courts and the ways the American legal system addresses dispute resolution.[12]

Section II provides a background of anti-bullying legislation. It defines the concept of workplace bullying, differentiating it from existing American causes of action such as EEOC complaints and tort suits for intentional infliction of emotional distress (IIED). Section II also discusses the rise of workplace bullying as a topic in the cultures

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Against Worst Workplace Abusers Gains Momentum with Proposed Laws, S.F. CHRONICLE, January 21, 2007, at F1.

8. Michael G. Harvey, Joyce T. Heames, Glenn R. Richey, Nancy Leonard, *Bullying: From the Playground to the Boardroom*, 12 J. OF LEADERSHIP & ORG. STUDIES, 4, 1-5 (June 22, 2006).

9. *See generally* Workplace Bullying Institute Legislative Campaign, http://www.workplacebullyinglaw.org [hereinafter, WBI Legislative Campaign] (website providing resources and information for anti-bullying legislation campaigns); David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMPLOYEE RTS. & EMP. POL'Y J. 475 (2004) [hereinafter Yamada, *Crafting a Legislative Response*] (containing discussion of legislative drafting as well as full text of model Healthy Workplace Bill, upon which proposed U.S. legislation is based); *infra* Appendix 1.

10. *See* WBI Legislative Campaign, *supra* note 9.

11. *See* discussion *infra* Part III.B.

12. *See* discussion *infra* Part IV.

into which anti-bullying laws were born. This section, through case studies, emphasizes historical European attitudes towards work and worker protection. Section III highlights the ways in which Europe handles bullying within its legal framework, emphasizing the importance of alternative dispute resolution (ADR) in the cultures in which anti-bullying laws have established a foothold. Section IV focuses upon The Healthy Workplace Bill, the model legislation for workplace bullying laws in America. This section points to the weaknesses in the model legislation, particularly in its failure to create meaningful institutional safeguards to prevent abuse of a broad cause of action. This section also suggests methods by which proposed anti-bullying laws could incorporate institutional safeguards such as ADR and agency oversight to mitigate potential strains on the court and litigants.

II. BACKGROUND

A. The Targets of Anti-Bullying Legislation

Before one can properly discuss the prudence of employment bullying legislation or recommend a process by which a nation should implement such legislation, one must first understand what employment bullying is *and what it is not*.[13] David Yamada, the leading legal advocate for anti-bullying legislation in America,[14]

13. Employment bullying is also known as psychological harassment, mobbing, generalized workplace abuse, psychological violence, sub-lethal non-physical harassment, and moral harassment. For the sake of simplicity, this note shall only refer to it as workplace bullying. While these terms are generally used interchangeably, American anti-bullying law proponent Brady Coleman has recently dedicated scholarship to the concept of "mobbing," which he argues has a distinctive group exclusion component. *See generally* Brady Coleman, *Shame, Rage, and Freedom of Speech: Should the United States Adopt European 'Mobbing' Laws?*, 35 GA. J. OF INT'L & COMP. L. 53 (2006). Because other scholars and the Healthy Workplace Model Legislation, which this note addresses, do not emphasize the distinction between many-versus-one harassment and one-on-one harassment, this note will treat as synonyms employment bullying and mobbing, which refer to harassment of a target by one or more aggressor.

14. *See* Yamada, *Crafting a Legislative Response*, *supra* note 9, 498-507 (2004) (Yamada's model legislation, which is adopted by a number of state legislators that propose anti-bullying legislation); WBI Legislative Campaign, *supra* note 9 (U.S. grassroots site for promoting, implementing and tracking the progress of The Healthy Workplace Bill).

defines workplace bullying 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."[15] Other social scientists describe employment bullying with varying degrees of specificity.[16] Gary and Ruth Namie[17] describe workplace bullying as "the deliberate, hurtful and repeated mistreatment of a [t]arget . . . by a bully . . . that is driven by the bully's desire to control [another person]."[18] One can view bullying as an emotional assault process.[19] "It begins when an individual becomes the target of disrespectful and harmful behavior. Through innuendo, rumors, and public discrediting, a hostile environment is created in which one individual gathers others to willingly, or unwillingly, participate in continuous malevolent actions to force a person out of the workplace."[20] Because Yamada is at the forefront of the legal push for anti-bullying laws in America, and also because he believes his definition encompasses other researchers' definitions, this note shall use Yamada's definition of employment bullying.[21]

There are three common features of employment bullying.[22] First, bullies tend to be males and institutionally superior employees.[23]

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15. 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) (introduction to seminal U.S. article on employment bullying) [hereinafter Yamada, *Phenomenon of "Workplace Bullying"*].

16. *See* Linda Clarke, *Harassment, Sexual Harassment, and the Employment Equality (Sex Discrimination) Regulations 2005*, 35 INDUS. L.J. 161, 162 (2006); Brady Coleman, *Pragmatism's Insult: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence*, 8 EMP. RTS & EMP. POL'Y J. 239, 241-53 (2004); William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 119-20 (2003); Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73, 76-78 (2001); Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241, 249 (2003); Paula L. Grubb et al, *Workplace Bullying: What Organizations are Saying*, 8 EMP. RTS. & EMP. POL'Y J. 407, 409-10 (2004).

17. The Namies, a psychologist and a psychotherapist, are considered leaders in psychological research of workplace bullying issues in the United States.

18. Yamada, *Phenomenon of "Workplace Bullying," supra* note 15, at 480.

19. *Id.* at 481.

20. *Id.*

21. *Id.*; Yamada, *Crafting a Legislative Response*, *supra* note 9, at 476.

22. Yamada, *Phenomenon of "Workplace Bullying," supra* note 15, at 482.

Second, while bullying behaviors range from overt acts like screaming and public derision to covert action such as glaring or the silent treatment, these actions undermine the victim's ability to succeed at work.[24] Finally, victims are frequently amiable, successful workers whom bullies target because of the bullies' feelings of inadequacy.[25]

Proponents of anti-bullying legislation argue the American workplace is rife with bullying.[26] They blame the rise of workplace bullying on five national and global trends.[27] First, the American service sector grew markedly over the last sixty years.[28] Service sector employees have frequent interactions with their colleagues and have more opportunities to develop and act upon personal conflicts than employees in non-service sector industries.[29] Second, global competition fosters a "downsizing mentality."[30] Companies with downsizing mentalities reduce their workforces, eliminating both laborers and supervisors; managers who survive layoffs must find ways to increase production with fewer workers.[31] As a result, middle-level managers develop a "siege mentality," in which these managers feel compelled to be harsh so they can meet upper-level managers' expectations and maintain their own positions.[32] The decline of

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23. *Id.* at 482- 483.
24. *Id.*
25. *Id.* at 483.
26. *Id.* at 485-86. *See generally* Coleman, *supra* note 16 (discussing social science research about employment bullying); Corbett, *supra* note 16 (noting the inadequacies of existing employment law in the context of employment bullying); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1 (1999) (arguing that existing harassment and discrimination law and scholarship are inadequate to address the realities of harassment in the workplace); Fisk, *supra* note 16 (discussing the significance of humiliation at work); Loraleigh Keashly & Joel H. Neuman, *Bullying in the Workplace: Its Impact and Management*, 8 EMP. RTS. & EMP. POL'Y J. 335 (2004) (chronicling social science research on impacts of bullying); Gary Namie & Ruth Namie, *Workplace Bullying: How to Address America's Silent Epidemic*, 8 EMP. RTS. & EMP. POL'Y J. 315 (2004) (documenting the emergence and necessity of the anti-bullying movement in the United States).
27. Yamada, *Phenomenon of "Workplace Bullying," supra* note 15, at 486.
28. *Id.*
29. *Id.* at 487.
30. *Id.* at 488.
31. *Id.*
32. *Id.*

unionization also contributes to employment bullying.[33] Whereas the institutional structure of a union allows workers to formally address unacceptable supervisory techniques, and provides informal dispute resolution via the intervention of a conscientious shop steward, non-unionized employees do not have an institutional structure to safeguard against abusive management tendencies and workplace hostilities.[34] Increased diversity in the workplace, if not properly managed, can also lead to bullying.[35] When employers fail to properly manage a diversifying workforce, employees tend to associate with others they see to be like themselves, and communally dislike those they perceive to be different.[36] Finally, employers' increased reliance on contingent workers encourages an employer to view employees as interchangeable commodities instead of persons with whom he or she must foster interpersonal relationships.[37]

B. What Anti-Bullying Legislation is Not

1. Discrimination by Another Name?

Anti-bullying legislation is not just another term for employment discrimination.[38] United States workplace harassment laws follow a discrimination model, which focuses upon discrimination against legally-protected groups such as women and racial minorities, in hiring, advancement, and firing decisions.[39] In contrast, anti-bullying laws follow a European model of employment law that emphasizes the dignity of the worker.[40] Some scholars explain the difference in European and American harassment laws by interpreting the history of the geographic regions.[41] In America, workplace laws focus on discrimination against traditionally marginalized groups

33. Yamada, *Phenomenon of "Workplace Bullying," supra* note 15, at 488.
34. *Id.* at 489.
35. *Id.* at 490.
36. *Id.*
37. *Id.* at 491.
38. *See generally* Yamada, *Phenomenon of "Workplace Bullying," supra* note 15 (seminal U.S. law review article on bullying).
39. 42 U.S.C. § 2000 (e); Friedman & Whitman, *supra* note 16, at 244-45.
40. Friedman & Whitman, *supra* note 16, at 246.
41. *See generally id.* (discussing the differences between European and U.S. employment law).

because the law attempts to remedy a past evil.[42] American law seeks to remedy a past marred by sexism, slavery, religious intolerance, and racial discrimination.[43] Therefore, the United States enacts laws to forbid discrimination against historically disempowered people.[44] American law protects these classes of people in hiring and firing decisions because Americans traditionally experience a more fluid job market.[45] "Discrimination is a problem that is . . . naturally emphasized in a mobile society."[46]

In the same manner, continental Europe focuses its laws on the day-to-day dignity of the worker for reasons that reflect its history and traditions.[47] Namely, European law addresses its feudalistic past.[48] Instead of isolated groups receiving disparate treatment because of innate characteristics such as race or gender, European inequality rested on small privileged classes lording their status over the majority.[49] Continental Europe also experiences work in a different way than America.[50] Europeans do not assume a mobile society.[51] Rather, there is a tradition of a stable workforce and continued loyalty between workers and employers.[52] Thus, European employment law emphasizes the ongoing conditions of work and the dignity of the persons involved in the workplace rather than the potential for discrimination at hiring and firing stages.[53]

Anti-bullying laws are not another way of describing traditional American discrimination laws; they follow the European model of employment legislation.[54] Whereas a successful Title VII claim must include evidence of discrimination based on a protected category such as race, religion, or gender, workplace bullying legislation gives any worker a cause of action, regardless of his or her membership in a protected group.[55] Workplace bullying legislation also does not require the offending conduct be predicated on

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42. *Id.* at 266.
43. *Id.*
44. *Id.*
45. *Id.*
46. Friedman & Whitman, *supra* note 16, at 266.
47. *Id.* at 267.
48. *Id.*
49. *Id*. at 267-68.
50. *Id.* at 266.
51. *Id*.
52. Friedman & Whitman, *supra* note 16, at 266.
53. *Id.* at 267.
54. *See generally* Yamada, *Phenomenon of "Workplace Bullying," supra* note 15 (describing the premise of workplace bullying laws).
55. *Id*. at 514-15, 529-31.

discriminatory intent.[56] Under Title VII, a woman being harassed in the workplace must prove that others mistreat her *because* she is a woman or *because* she is a member of another protected class.[57] A successful claimant under an anti-bullying statute need only prove that she is a victim of harassment, but she need not make any claims as to why her coworkers harass her.[58]

2. Intentional Infliction of Emotional Distress

In theory, the tort of intentional infliction of emotional distress (IIED) addresses the harms that anti-bullying legislation addresses.[59] However, courts have been reluctant to apply IIED to the workplace. Most successful claims of workplace IIED have been in cases in which a status-based recovery theory would also apply.[60] Yamada criticizes the Restatement of Torts, which expressly excludes "mere insults, indignities, threats, annoyances, petty oppressions, and trivialities," for giving courts an excuse to dismiss workplace bullying from the realm of IIED.[61] IIED, as the courts and the Restatement define it, does not protect workers from employment bullying.[62] Rather, "[b]y failing to adequately protect employees from abusive employer conduct, the law has created, in effect, a boxing match in which workers take the punches but may not fight back."[63]

IIED does not defend against the same harms that anti-bullying legislation addresses.[64] While employment bullying certainly may be intentionally inflicted emotional distress, an IIED suit, as the courts and the Restatement define it, would not necessarily address the harms of bullying.[65] Anti-bullying legislation protects employees from the insults, petty oppressions, and indignities of the workplace that are unrelated to membership in a protected class.[66]

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56. *Id*.
57. *See id*. at 513-15.
58. *Id*. at 515.
59. Yamada, *Phenomenon of "Workplace Bullying," supra* note 15, at 508.
60. *Id*. at 508.
61. *Id*. *See generally* RESTATEMENT (SECOND) OF TORTS § 46 (1965).
62. *See* Yamada, *Phenomenon of "Workplace Bullying," supra* note 15, at 508-09.
63. *Id*. at 509.
64. *See id*. at 508-09.
65. *Id*. at 509.
66. *See id*.

C. The Road to Anti-Bullying

1. Findings of Health Researchers

The anti-bullying movement began in the field of psychiatry.[67] Heinz Leymann, a German psychiatrist, was the first person to document the psychological trauma of bullying in the workplace.[68] He titled the phenomenon "mobbing" and opened the world's first "work trauma clinic" in Sweden to address the problem.[69] In 1992, British journalist Andrea Adams introduced the problem to England and coined the term "Workplace Bullying" in her work *Bullying at Work*.[70] By the mid-1990s, Gary and Ruth Namie, the American psychological parents of the anti-bullying movement, began their research into bullying in America.[71] The Namies published books on the subject and founded the nonprofit Workplace Bullying and Trauma Institute (WBTI).[72]

Health researchers have identified a number of mental and physical problems that they link to workplace bullying. Some psychologists identify workplace bullying as a particularly virulent chronic workplace stressor.[73] They argue that it is more harmful than many other chronic stressors because "targets are more likely to view this mistreatment as not inherent in the demands of the job and hence, unnecessary."[74] A number of studies link bullying to "heightened levels of anxiety, depression, burnout, frustration, helplessness, negative emotions such as anger, resentment, and fear, difficulty concentrating, and lowered self esteem."[75] Additionally, some evidence shows that victims of workplace bullying exhibit symptoms consistent with Post-Traumatic Stress Disorder (PTSD), such as

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67. *See generally* Namie & Namie, *supra*, note 26 (discussing social science underpinnings of the anti-bullying legislation movement).

68. *Id*. at 316.

69. *Id*.

70. *Id. See generally* Andrea Adams, *Bullying at Work*: *How to Confront it* (1992).

71. Namie & Namie, *supra* note 26, at 317-18.

72. *Id.* (the WBTI studies issues relating to workplace bullying and provides resources for employees that have experienced bullying).

73. Keashly & Neuman, *supra* note 26, at 345.

74. *Id*.

75. *Id*. at 346.

hypervigilance, rumination, and nightmares.[76] Victims of bullying suffer physically as well.[77] Physical symptoms include musculoskeletal disorders (body aches), stomach problems, headaches, nausea, insomnia, and increased blood pressure.[78] A recent study shows that victims of workplace bullying, like sufferers of PTSD and chronic fatigue syndrome, have lower than average levels of cortisol, a hormone that helps the body return to homeostasis after exposure to stress.[79]

2. Impact on the Workforce

Limited studies exist regarding the impact of workplace bullying on group dynamics.[80] To some extent, non-bullied employees who witness bullying incidents exhibit more stress than subjects who do not witness bullying.[81] Subtle tensions in the employee-supervisor relationship can serve as job-related stressors.[82] When employees fear a mercurial boss, potential targets will react in similar manners as actual victims of workplace bullying.[83] Some researchers even hypothesize that, in fearful workplaces, employees will be less likely to be creative or innovative and will be less likely to communicate problems to supervisors.[84]

Based on a view of overall structure and productivity, abusive employers pay a price in increased medical and workers' compensation claims as well as in lawsuits arising out of a hostile work

76. *Id.*

77. *Id*. at 348-49.

78. *Id*.

79. *See, e.g.,* Ase Marie Hansen et al., *Bullying at work, health outcomes, and physiological stress response*, 60 J. PSYCHOSOMATIC RESEARCH 63 (Jan. 2005) (in analyzing the relationship between bullying, self-reported health outcomes, and psychological stress responses, researchers found that concentration levels of cortisol in bullying victims were similar to the concentration levels other studies had found in sufferers of PTSD and chronic fatigue).

80. Keashly & Neuman, *supra* note 26, at 350.

81. *Id*.

82. *Id*.

83. *Id*.

84. *Id.* at 350-51. Keashly and Neuman support this hypothesis through anecdotal evidence of plane crashes in which flight crews, fearful of the pilots' reactions, failed to correct pilot errors, resulting in fatalities.

environment.[85] Indirect costs include resentment, the hiding of mistakes, high turnover, absenteeism, sabotage, revenge, and poor customer relationships.[86] At least one study has shown that, among bullied employees, 28% lost work time avoiding the bully; 53% lost work time worrying about the bully; 37% reduced their commitment to the organization; 22% decreased their work efforts; 10% decreased the time they spent at work; 46% contemplated changing jobs; and 12% actually changed jobs.[87]

Proponents of anti-bullying legislation cite these negative health and business concerns, shown through empirical research, to plead their case for the enactment of bullying legislation in America.[88]

3. Not the First Ones on the Road: Europe's Legislative Curb on Bullying

While employment bullying is a new concept in America, it is certainly not new in continental Europe.[89] Sweden was the first European nation to adopt an anti-bullying law.[90] In 1993, Sweden adopted an ordinance of the National Board of Occupational Safety and Health containing provisions against victimization at work.[91] This ordinance forbids "recurrent reprehensible or distinctly negative actions which are directed against individual employees in an offensive manner and can result in those employees being placed outside the workplace community."[92]

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85. Yamada, *Phenomenon of "Workplace Bullying," supra* note 15, at 483.

86. *Id.* at 483-84.

87. *Id*. at 484.

88. *See, e.g.* Workplace Bullying Institute www.bullyinginstitute.org; Bully Busters www.bullybusters.org (websites advocating grassroots efforts to promote anti-bullying legislation in America) (last visited Mar. 10, 2007).

89. *See generally* Friedman & Whitman, *supra* note 16 (describing the advent of European anti-bullying laws).

90. *Id*. at 254.

91. Ordinance of the Swedish National Board of Occupational Safety and Health containing Provisions on measures against Victimi[z]ation at Work, Sept. 21, 1993, AFS 1993:17 [hereinafter Swedish Ordinance against Victimi[z]ation at Work] *translation available at* http://www.bullyonline.org/action/victwork.htm. *See generally infra* Appendix 2.

92. Swedish Ordinance against Victimi[z]ation at Work, *supra* note 91, § 1.

In the 1990s, publications prompted legal changes elsewhere in Europe.[93] Germany followed Sweden's legal example and began to recognize claims of workplace harassment.[94] Unlike Sweden, German jurists instituted common law changes to recognize the harm.[95] German jurists categorized employment bullying as an offense to personality.[96] The German right to personality includes more than the right to privacy; it is "the right to develop oneself."[97]

In 1998, Marie-Fance Hirigoyen published a book on the subject of *harcelment moral*, moral harassment.[98] Hirigoyen's work catapulted the issue of workplace bullying to the forefront of French political thought.[99] In 2002, France passed its "Law on Social Modernisation," which includes a provision forbidding workplace bullying. [100] France defines moral harassment as a violation of dignity, a danger to health, and a species of discrimination.[101] The law provides both a civil and a criminal penalty for violations of the Law on Social Modernisation.[102]

Other nations have taken legal steps to combat workplace bullying both through legislation and through the common law.[103] The Portuguese parliament considered legislation to prevent "moral harassment" at work, with some members of Parliament advocating criminal penalties for violations.[104] Belgium passed an anti-bullying law in 2001.[105] Also in 2001, the Danish Working Environment

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93. Friedman & Whitman, *supra* note 16, at 254.
94. *Id.*
95. *Id.*
96. *Id*. at 255-56.
97. *Id*.
98. *Id.* at 260-61.
99. FRIEDMAN & WHITMAN, *supra* note 16, at 261.
100. *Id.*
101. *Id.*
102. *Id.*
103. *See generally* FRIEDMAN & WHITMAN, *supra* note 16 (describing the advent of European anti-bullying laws); M. Graser et. al. *Legislative Recognition in France of Psychological Harassment at Work*, 22 MED. & LAW 239 (2003) (describing anti-bullying laws in France); Maria Isabel S. Guerrero, *The Development of Moral Harassment (or mobbing) Law in Sweden and France as a Step Towards EU Legislation*, 27 B.C. INT'L & COMP. L. REV. 477 (2004) (relating the anti-bullying movement to potential E.U. action); Robert A. Yuen, *Beyond the Schoolyard: Workplace Bullying and Moral Harassment Law in France and Quebec*, 38 CORNELL INT'L L.J. 625 (2005) (describing anti-bullying laws in France and Quebec).
104. Coleman, *supra* note 16 at 261.
105. *Id.* at 262.

Authority entered an agreement with Danish management and labor unions to intervene in psychologically-abusive working environments.[106] From 2001 to 2002, Spain experienced marked media and popular attention to workplace harassment; in 2002, it began considering a criminal case based upon workplace humiliation.[107] Italy's workers gained protection against workplace bullying via a collective bargaining agreement in 2003.[108] Also in 2003, Poland amended its labor code "to combat workplace bullying and harassment."[109] The Canadian province of Quebec has joined continental Europe in prohibiting, "any vexatious behaviour in the form of repeated or unwanted hostile conduct, verbal comments, actions or gestures that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee."[110]

The actions of individual European states have not gone unnoticed by larger international governing agencies.[111] The European Union recently addressed the problem of employment bullying.[112] In 2000, the European Foundation for the Improvement of Living and Working Conditions conducted a study of employment harassment in EU member states.[113] The results of this study prompted the European Parliament to call for a measure against moral harassment for all EU member states.[114] In 2002, the European Agency for Safety and Health at Work held a conference to discuss work related stress.[115] The official position of the European Commission is that the 1989 European Union Safety and Health Framework Directive (89/391/EEC) forbids employment bullying.[116] Despite this, some scholars believe the EU will enact more legislation to clearly outlaw employment bullying.[117]

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106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Debra Parkes, *Targeting Workplace Harassment in Quebec: On Exporting a new Legislative Agenda* 8 EMP. RTS. & EMP. POL'Y J. 423, 435 (2004).

111. Guerrero, *supra* note 103, at 478-79.

112. *Id*

113. *Id*. at 478. *See generally* Council Directive 89/391 of June 12, 1989, 1989 O.J. (L183) ("[O]n the introduction of measures to encourage improvements in the safety and health of workers at work.").

114. *Id*.

115. *Id*.

116. *Id*.

117. Guerrero *supra* note 103, at 478.

Most recently, Canada and England have implemented provisions against workplace harassment.[118] In 2003, Canada proposed, but failed to enact, a national law called the Workplace Psychological Harassment Prevention Act.[119] England was long thought to be behind the curve in terms of anti-bullying legislation.[120] However, the existing English Protection from Harassment Act of 1997 recently burst onto the international news scene.[121]

In 2006, an employee of Deutsche Bank named Helen Green successfully sued her employer because she was harassed at work.[122] Ms. Green's coworkers tormented her and eventually drove her to a nervous breakdown.[123] She recovered approximately 800,000 British pounds.[124] Even though Green's case did not turn upon the 1997 Act,[125] but rather on a theory of common law negligence,[126] most of the world took notice.[127] Hazel Donaldson, one of the barristers representing Ms. Green, notes that under the 1997 Act, claimants may recover more easily than they can at common law.[128] First, victimized employees do not need to prove that harm was foreseeable.[129] Second, the victim does not need to develop a psychiatric disorder, but may

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118. Coleman, *supra* note 16, at 263.

119. Parkes, *supra* note 110, at 424.

120. Coleman, *supra* note 16, at 263.

121. UK St. 1997: 1166.; *see infra* Appendix 3.

122. Green v. DB Group Services (UK) Ltd, [2006] EWHC (QB) 1898 (Eng.).

123. Peter Cullen, *Boss pays for workplace bullying*, DOMINION POST (N.Z.) August 30, 2006, at 6.

124. Charlotte Owen, Reports Commentary, *Caution Called for Following Bullying Ruling*, POST MAGAZINE (UK), September 21, 2006, at 32.

125. *See* discussion *infra* Part III.B.4.

126. Hazel Donaldson, *Harssment Act Allows for Easier Claims*, LAWYER (UK), September 11, 2006 at 8.

127. Newspaper articles and editorials about bullying in general and the Green case in particular flooded the United Kingdom. The story ran in newspapers across continental Europe as well as in Australia and New Zealand. *See, eg*: Cullen, *supra* note 123; *Firms Must do More to Help Bully Victims*, BIRMINGHAM POST (UK), Aug. 18, 2006, at 27; David Laister, *Green Light for Bullying Victims*, GRIMSBY EVENING TELEGRAPH (UK), Aug. 22, 2006, at 17; Marie Murray, *Hidden Scourge of Workplace Bullying*, IRISH TIMES, Sept.19, 2006, at 5; Owen, *supra* note 124; *A Bully Can Cost You a Fortune,* DORSET ECHO, Aug. 30, 2006 (Eng.), *available at* http://archive.thisisdorset.net/ (follow the (2006) "August" hyperlink, then follow the "30" hyperlink, then follow the "A bully can cost you a fortune" hyperlink).

128. Donaldson, *supra* note 126.

129. *Id*.

recover for anxiety alone.[130] After Ms. Green's high-profile victory, it is safe to say that employment bullying has gained a foothold in English law. One may even reasonably argue that England will soon mirror continental Europe in its treatment of workplace bullying and harassment.

III. A EUROPEAN WAY OF HANDLING A EUROPEAN LAW

Bullying as a concept and anti-bullying as a legislative movement are fairly new in the United States.[131] In 2000, Professor David Yamada was the first American legal scholar to address workplace bullying.[132] Gary and Ruth Namie, the psychologists responsible for much of the anti-bullying movement, have only been academically involved in workplace bullying since the early to mid 1990s.[133] Attempts to regulate bullying with state legislation have been proposed only within the last four years.[134]

Thirteen states have tried to address the problem of workplace bullying with legislation.[135] But Hawaii is the only state to actually pass any sort of legislation: S.R. 62 (2006), a resolution strongly encouraging employers to create policies to prevent workplace bullying.[136] California's AB 1582 (2003-2004) died in committee.[137] Oklahoma's H.B. 2467 (2004) never received a floor vote.[138] Oregon's H.B. 2410 and H.B. 2639 (2005) each died in committee, as did SB 1035 (2007).[139] Washington's H.B. 1968 (2005-2006) died in committee and was not placed on the calendar.[140] Massachusetts's H. 3809 (2005-2006) was introduced, but the legislature did not act upon it.[141] Missouri's H.B. 1187 (2006) was not calendared by the

130. *Id.*

131. *See generally* Yamada, *Phenomenon of "Workplace Bullying," supra* note 15 (Yamada's seminal law review article, published in 2000, is the first published piece of legal scholarship on the topic in the United States).

132. *Id.*

133. Namie & Namie, *supra* note 26, at 317-19.

134. Workplace Bullying Institute, http://www.bullyinginstitute.org/studies.html (follow "Bullying in the US: what's legal, what's not" hyperlink) (last visited Mar. 8, 2007).

135. The Workplace Bullying Institute, http://www.bullybusters.org.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. Workplace Bullying Institute, http://www.bullybusters.org.

Workplace Safety Committee.[142] Kansas's H.B. 2990 (2006) was not calendared by the House Labor Committee.[143] New York's S8018 and A11565 (2006) were introduced and referred to committee.[144] Most recently, Montana's H.B. 213 was defeated in committee and a Connecticut's S.B. 371 died in the Judiciary Committee in 2007.[145] New York, Connecticut, and Vermont have active anti-bullying bills in their state legislatures during the 2008 term. [146]

Although anti-bullying legislation does not currently hold a prominent position on the American agenda, it is likely to become increasingly important. The United States can observe the decisions of European nations that have adopted or are actively moving towards laws against employment bullying.[147] Additionally, American grassroots campaigns are gaining steam as multiple states have proposed anti-bullying legislation.[148] The abusive workplace is also entering the popular consciousness through mass media on the Internet, in books, and in feature films.[149]

This note is predicated on the assumption that anti-bullying legislation is likely to gain popularity in the United States. Assuming that anti-bullying legislation takes hold in the United States, the next step is finding the best way to draft and handle a potentially explosive new area of employment law. Because anti-bullying legislation is essentially a European creature, America should heed the examples of European implementation, particularly European reliance upon alternative dispute resolution.

A. A Brief Introduction to Alternative Dispute Resolution

Alternative dispute resolution (ADR) is a method by which disputants resolve their conflicts outside the courtroom through the

142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. Parkes, *supra* note 119, at 435; Guerrero, *supra* note 103, at 478-79.
148. Workplace Bullying Institute, http://www.bullybusters.org.
149. For example, *The Devil Wears Prada,* the successful 2003 Lauren Weisberger novel and 2006 film adaptation, chronicles the life of a recent college graduate who takes a job as the personal assistant to an infamously demanding and difficult magazine editor. Also, the popular career-building website, http://www.monster.com, now has a permanent online forum regarding workplace bullying.

means of settlement negotiations, facilitation, mediation, fact-finding, mini-trials, and arbitration.[150] Some proponents of ADR tout its pragmatic efficacy.[151] ADR techniques reduce litigation across the board and also refine issues if litigation is unavoidable, resulting in quicker, cheaper litigation.[152] Additionally, ADR boasts superior speed and a smaller financial burden than traditional litigation.[153]

Some ADR proponents focus upon the coherence of ADR to principles of restorative justice.[154] Restorative justice describes "specific practices, but also a set of principles and even a philosophical approach to life."[155] It differs from retributive justice, which seeks punishment; rather, "[i]t is justice that puts energy into the future, not into what is past. It focuses on what needs to be healed, what needs to be repaid. . . . It looks at what needs to be strengthened if such things are not to happen again."[156] Restorative justice focuses upon repairing human relationships and the community.[157] Its supporters criticize retributive justice systems for leaving neither victim nor offender better off at the conclusion of the judicial process.[158]

ADR schemes have broad appeal in the civil arena because they offer an attractive benefit to both restorative justice enthusiasts and business-savvy corporate players.[159] However, some note that the positive outcomes of ADR--efficacy and restorative justice--are occasionally at odds with one another.[160] Restorative justice thinkers sometimes accuse corporate interests of co-opting the ADR process so that it has become a process in which the repeat player (usually the larger business entity) enjoys a distinctive advantage over a weaker

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150. Suzy Fox & Lamont E. Stallworth, *Employee Perceptions of Internal Conflict Management Programs and ADR Processes for Preventing and Resolving Incidents of Workplace Bullying: Ethical Challenges for Decision-Makers in Organizations*, 8 EMP. RTS. & EMP. POL'Y J. 375, 382 (2004).

151. Arnold M. Zack, *Conciliation of Labor Court Disputes*, 26 COMP. LAB. L. & POL'Y J. 401, 417-18 (2005).

152. *Id*. at 418

153. *Id*.

154. *See generally* James Coben & Penelope Harley, *Intentional Conversations about Restorative Justice, Mediation and the Practice of Law,* 25 HAMLINE J. PUB. L. & POL'Y 235 (2004) (discussing the relationship of restorative justice and alternative dispute resolution).

155. *Id*. at 240.

156. *Id*. at 245.

157. *Id*.

158. *Id*. at 246.

159. *Id*. at 255-257.

160. Coben & Harley, *supra* note 154, at 257-58.

party (usually the employee).[161] Regardless of the reasons that justice systems adopt ADR methods, its popularity has waxed large and shows no signs of waning.[162] Aside from negotiation, the closely related triad of mediation and conciliation and arbitration are the primary forms of ADR.[163]

1. Mediation

Mediation is a process of ADR whereby a third party helps resolve a dispute by drawing the parties towards a mutually-acceptable agreement.[164] Usually, this agreement can assume any structure to which the parties agree; the mediator may intervene to suggest creative remedies.[165] Many courts require mediation before litigation.[166] One can view mediators as "activist neutral[s] interjecting new ideas and proposals beyond those offered by the parties themselves in an effort to bring closure."[167]

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161. *Id*. at 256-57. *See* William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 274-275 (2002). An in-depth analysis of the debate between efficiency and restorative justice proponents exceeds the scope of this note. However, one should remain cognizant of the tension within the ADR world when one considers the application of ADR to legal and social problems.

162. Coben & Harley, *supra* note 154, at 256-58. *See generally* Nadja Alexander, *Global Trends in Mediation*, 13 WORLD ARB. & MEDIATION REP. 272, (2002) (noting popularity of mediation across the world); Karyn A. Doi, *America's Anti-Violence Campaign: The Use of Mediation to Reduce the Incidence of Workplace Violence* 12 RISK: ISSUES HEALTH & SAFETY 133 (2001) (discussing the use of mediation in potentially volatile workplaces); Cheryl Dolder, *The Contribution of Mediation to Workplace Justice*, 33 INDUS. L.J. 320 (2004) (describing the effects of mediation on workplace disputes); Arnold M. Zack, *Conciliation of Labor Court Disputes*, 26 COMP. LAB. L. & POL'Y J. 401 (2005) (describing ADR principles in European Labor Courts)..

163 RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 13-14 (4th ed. 2005); Zack, *supra* note 162, at 402-04.

164. FREER & PERDUE, *supra* note 163, at 13.

165. *Id*. at 14.

166. *Id.*

167. Zack, *supra* note 162, at 404.

2. Conciliation

Conciliation is a distinct term with different meanings in different justice systems.[168] Conciliation and mediation differ primarily in scope and purpose.[169] The goal of mediation in some countries is final resolution, whereas the goal of conciliation is the narrowing of issues prior to litigation.[170] In some nations, conciliation implies that a judge, as opposed to a third party, facilitates discussions.[171] Although formal differences exist between the two, many ADR theorists and lawmakers use the words mediation and conciliation interchangeably.[172] ADR scholars admit that the third party, regardless of his or her title, performs both the hands-off conciliation function and the proactive mediation role depending upon situation.[173]

3. Arbitration

In arbitration, a third party, other than a court, resolves conflicts between parties.[174] As in traditional litigation, one party emerges as a winner of the dispute and one party emerges as the loser.[175] Nonetheless, arbitration differs from litigation primarily in the amount of time and money that it requires, making it a true alternative to litigation.[176] Relaxed rules of discovery and evidence, in addition to an informal trial structure, reduce the costs to parties.[177]

Arbiters, like judges sitting without juries, receive evidence and make rulings on matters of law.[178] In some cases, such as sports contract negotiations, the arbiter chooses between the parties' proposals or may choose to fashion a completely separate agreement.[179] Unlike the outcomes of trials before judges, which parties may appeal,

168. *Id*. at 403-04.
169. *Id.*
170. *Id*. at 404. Ireland and the United States follow this schematic.
171. *Id*. at 403. Belgium, France, and Austria cohere to this model.
172. *Id*. at 404 (in the United States, legislative history shows that the House of Representatives and the Senate used different words in their respective creations of the U.S. Federal Mediation and Conciliation Service, and compromised by using both terms in the title of the final law).
173. Zack, *supra* note 162, at 404.
174. FREER & PERDUE, *supra* note 163, at 14.
175. *Id*.
176. *Id.*
177. *Id*.
178. *Id.*
179. *Id.*

arbitration awards are generally final and a party may only appeal the decisions in a few circumstances; usually, a party may not appeal when an arbiter incorrectly applies a law.[180]

Generally, arbitration is not mandatory.[181] Rather, parties contract to settle disputes via arbitration and formulate processes by which to choose and pay an arbiter.[182] Sometimes arbitration agreements include clauses in which parties relinquish rights such as the jury trial and the opportunity to seek non-compensatory damages.[183] Critics of arbitration object to the lawlessness of the arbitration process.[184] Because courts rarely review arbitration awards and because arbiters are not judges, critics complain that arbitration binds parties "without law."[185] Critics also suggest that "repeat players" enjoy a structural advantage in arbitration because they are more adept at choosing arbiters; this means that individual employees, who are likely to only be involved in one arbitration, would be at a disadvantage against their "repeat customer" employers.[186]

While alternative dispute resolution remains an alternative to standard court proceedings, it is forging an inroad into mainstream litigation in America.[187] Some courts require a form of ADR before parties may proceed with litigation.[188] Collective bargaining agreements yield mandatory arbitration clauses in labor disputes.[189] In some states, medical malpractice claims are subject to mandatory arbitration.[190] Even creative judges and lawyers have adopted ADR techniques to resolve conflicts within the course of litigation.[191]

As will be discussed in greater detail in Section IV, ADR may be particularly beneficial in the resolution of bullying disputes. Because anti-bullying laws would create a new cause of action that could potentially flood the courts with claims, ADR might be a way to relieve the strain. Furthermore, the restorative justice element of ADR could become instrumental in revitalizing workplaces and correcting rather than simply punishing bullies. Finally, our European neighbors,

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180. FREER & PERDUE, *supra* note 163, at 14.
181. *Id*.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id*.
186. FREER & PERDUE, *supra* note 163, at 15.
187. *See id*. at 13-15.
188. *Id*. at 15.
189. *Id*. at 14.
190. *Id*.
191. *Id*. at 15.

from whom anti-bullying legislation proponents borrow ideas, work in a legal context that relies upon ADR and other efficiency-enhancing methods, which mitigate pressures on the formal judiciary.

B. Adjudication of Bullying in Europe

European methods of dispute resolution differ from the litigation-focused American system.[192] Over the last decade, European nations have demonstrated a willingness to turn to ADR methods to resolve labor and employment issues.[193] Indeed, European lawmakers have begun to draft legislation that mandates or at least recommends ADR methods.[194] Austria, Belgium, Finland, France, Hungary, Iceland, Ireland, Norway, Slovenia, Spain, Sweden, and the United Kingdom each have a conciliation structure for workplace disputes and provides for the Labor Court or the government to encourage ADR as an alternative or precursor to a trial.[195] Although Germany does not have an institutional structure for ADR, nearly half of German employment cases settle by out-of-court agreements or at the parties' initial hearing with the judge, who evaluates the case.[196] To better understand the impact of ADR on bullying claims, one must examine the systems by which nations with anti-bullying claims resolve employment disputes. This note will examine dispute resolution in Sweden, the first nation to enact anti-bullying laws; in France and Germany, the continental nations now enforcing them; and in the United Kingdom, the newcomer to the realm of anti-bullying.[197]

1. Sweden

In contrast to much of the rest of the world, Sweden's judiciary plays a comparatively small role in the mechanics of

192. *See* Per Henrik Lindblom, *Individual Litigation and Mass Justice: a Swedish Perspective and Proposal on Group Actions in Civil Procedure*, 45 AM. J. COMP. L. 805, 805-08 (1997); Zack, *supra* note 162, at 401-05. *See generally* Alexander, *supra* note 162.

193. Zack, *supra* note 162, at 401.

194. *Id*. at 402.

195. *Id*. at 402, 407 n.6.

196. *Id*. at 407 n.7.

197. *See generally* Swedish Ordinance against Victimi[z]ation at Work, *supra* note 91; Friedman & Whitman, *supra* note 16, at 254; Protection from Harassment Act 1997: 1166 (U.K.).

governance.[198] Swedish political history explains the limited power of its courts.[199] Early in the 20th century, citizens harbored suspicions of the courts' willingness to support a social-democratic welfare state.[200] Rather than relying upon the judiciary, Sweden utilizes state supervision and a broad spectrum of ADR and behavior modification methods to safeguard citizens' rights.[201]

ADR has long enjoyed a prominent position in the Swedish justice system.[202] Parties utilize the courts so infrequently in ADR-amenable cases that some claim that resorting to litigation is the true "alternative" form of dispute resolution.[203] Sweden introduced a globally prominent dispute resolution resource, the ombudsman, to the modern world.[204]

Sweden's anti-bullying law reflects this reliance upon ADR.[205] The Ordinance on Victimization at Work [the Ordinance], Sweden's anti-bullying law, defines bullying behaviors, requires employers to prevent these behaviors "as far as possible," and mandates workplace structures by which employers address complaints.[206] The Swedish National Board of Occupational Safety and Health oversees the implementation of the Ordinance by providing "General Recommendations" and training materials for employers and companies.[207] However, the statutory language does not provide a specific remedy for bullying.[208] Few bullying cases appear in the Swedish courts and "it is unclear whether anyone in Sweden has ever been condemned for [bullying] under this law."[209]

It is critical to recognize the way that Sweden's anti-bullying law fits in the general structure of Swedish law. The courts do not play

198. Lindblom, *supra* note 192, at 805.

199. *Id*.

200. *Id*. at 805-06.

201. *Id.* at 805.

202. *Id*. at 815.

203. *Id*.

204. Kristine L. Hayes, *Prepostal Prevention of Workplace Violence: Establishing an Ombuds Program as One Possible Solution*, 14 OHIO ST. J. ON DISP. RESOL. 215, 226-227 (1998). Sweden's introduction of the ombudsman perhaps underscores a cultural commitment to extra-judicial dispute resolution and cooperative problem solving.

205. *See* Guerrero, *supra* note 103, at 486-87.

206. Swedish Ordinance against Victimi[z]ation at Work, *supra* note 91, § 2; Guerrero, *supra* note 103, at 486.

207. Guerrero, *supra* note 103, at 487.

208. *Id*. at 487.

209. *Id*.

a major role in adjudicating civil claims.[210] Rather, the citizenry relies upon administrative agencies and direct democracy to protect its rights.[211] Bullying claims do not overwhelm (and may not even enter) the Swedish court system.[212] Instead, the law delegates the responsibility to private and public employers, and the government assists in regulation.[213]

2. France

Increasing democratization in French society has contributed to the genesis of a populace that is unwilling to accept non-negotiated decisions and insists upon two-way talks.[214] After a major mid-1990s labor strike, in which the French economy stalled when the prime minister failed to negotiate with workers, French governmental officials have consciously increased ADR.[215] ADR centers, emphasizing resolution of employment conflicts, have recently opened in France.[216] The French enjoy a legal system in which court-connected ADR is a possibility in dispute resolution.[217]

While French ADR may seem like a new concept, some scholars maintain that the French have endorsed ADR in many forms over the last two centuries.[218] French revolutionary thinkers drafted the Decree of August 16, 1789, which made conciliation procedures mandatory in all ordinary civil court cases.[219] In laws drafted in 1855 and 1906, legislators required civil judges to seek conciliation.[220] During the twentieth century, movements towards mandatory conciliation declined.[221] However, during the 1970s, conciliation

210. Lindblom, *supra* note 192, at 805.

211. *Id.* at 807.

212. Guerrero, *supra* note 103, at 487.

213. *Id*. at 487-88.

214. Alain Lempereur, *Negotiation and Mediation in France: the Challenge of Skill-Based Learning and Interdisciplinary Research in Legal Education*, 3 HARV. NEGOT. L. REV. 151, 153 (1998).

215. *Id*. at 156-57.

216. Dolder, *supra* note 162 at 326.

217. Christian Duve, *European ADR*, 9 No. 4 DISP. RESOL. MAG. 10, 10 (Summer 2003).

218. Emmanuel Gaillard & Jenny Edelstein, *Mediation in France*, 55 JAN DISP. RESOL. J. 74, 74 (JAN. 2001).

219. *Id.*

220. *Id.*

221. *Id.*

became popular once again.[222] Currently, mandatory conciliation structures exist to resolve labor disputes; mediation is even a possibility for some criminal matters.[223] "[C]onciliation and mediation in France today are neither dusty institutions of mainly historical interest, nor merely part of a passing ADR fad. Rather, these dispute resolution mechanisms are being used by parties, and in particular by the French judiciary, with reasonable frequency and success."[224]

Unlike Sweden, whose ADR and agency systems dwarf the judiciary, French courts have been active in handling cases arising out of mobbing claims.[225] Although France did not institute its Social Modernization Law until 2002, its courts recognized causes of action based on the phenomenon later labeled moral harassment or mobbing as early as 1960.[226] French courts ruled in favor of a terminated employee whose work responsibilities were reduced without cause and, in another case, in favor of a manager whose employer took away his phone and secretary and assigned him the task of sweeping a warehouse floor.[227] By the late 1990s, after the publication of Marie Hirigoyen's book, which brought bullying into the French consciousness, but before the enactment of the Social Modernization Law, courts mentioned "psychological harassment" as a breach of the employment contract.[228] In 2001, a French penal court found an employer guilty of bullying behaviors.[229]

The 2002 law provides both a civil and a criminal cause of action for employees who become the victims of employment bullying.[230] In 2002, an employee brought and lost the first criminal case under the new Social Modernization Law.[231] While France does not rely as heavily upon ADR and agency procedures as does Sweden, its ADR history is deeply entrenched, and a mandatory first step towards labor court disputes. Furthermore, while the Social Modernization Law is new, the ideas behind it have existed in France for decades. The law is less a legal revolution than it is a codification of existing principles within French employment law. Additionally, because ADR is possible in penal cases, those who violate the Social

222. *Id*. at 74-75.
223. *Id.* at 75.
224. Gaillard & Edelstein, *supra* note 218, at 78.
225. Guerrero, *supra* note 103, at 488-493.
226. *Id.* at 488.
227. *Id.* at 488-89.
228. *Id.* at 489.
229. *Id.* at 490.
230. *Id.* at 491-92.
231. Guerrero, *supra* note 103, at 492.

Modernization Law have a recourse other than automatic penal liability. France has an established ADR system, and anyone filing in labor court (which covers employment claims) must utilize ADR. In contrast to the proposed American anti-bullying laws, the French Social Modernization Law is not a new potential liability, but rather a logical codification of entrenched principles of French law.

3. Germany

Unlike Sweden and France, Germany does not have a codified law against employment bullying.[232] Because Germany is a civil law nation, access to courts is different from access in common law nations.[233] German attorneys do not structure their fees based upon hourly rates. Rather, they earn their fees based upon the value of the case.[234] Legal aid schemes and legal cost insurance facilitate German access to the courts.[235]

Despite this easy access to the courts, ADR is making a transition from academia to the reality of practice.[236] One of the most successful realms of German ADR is victim-offender-mediation [VOM].[237] VOM has led to situations in which disputants bypass the police and the court system directly to mediators.[238] Many German states have enacted legislation to require mediation.[239] In 2002, legislators amended the German Code of Civil Procedure to provide for court referral to ADR.[240]

The manner in which bullying entered the German legal consciousness contributes to its absorption into the dispute resolution system in Germany. Employment harassment was not a sudden change in the law through statute, but rather a thread that jurists wove into the fabric of German law.[241] In German law, protection from bullying at work falls under the uniquely German protection of "personality."[242] Protection of personality is more than a German way of saying "right to

232. Friedman & Whitman, *supra* note 16, at 254.
233. Alexander, *supra* note 162, at 275.
234. *Id.*
235. *Id.*
236. *Id.* at 275-76.
237. *Id.* at 276.
238. *Id.*
239. Alexander, *supra* note 162, at 277.
240. *Id.*
241. Friedman and Whitman, *supra* note 16, at 255-56.
242. *Id.* at 256.

privacy" or the "right to be left alone," although both concepts are within personality.[243] Rather, personality is "the right to freely develop one's self."[244] This includes the right to control one's public image.[245]

Deeply connected with the right to protect one's personality is the fundamental German right to be free from insults.[246] Insults are violations of German penal law.[247] The rights to protection of personality and freedom from insult permeate the workplace as well as private life.[248] "'Respect the employee as a person!' is now the indefeasible maxim of the protection of personality in the workplace."[249]

Therefore, because Germany has a developed and fluid law of protection of personality, the "newly fashionable" concern over workplace bullying has merged somewhat seamlessly into the German legal world.[250] German labor law handbooks devote pages to bullying.[251] Industry has taken notice and attorneys have started clinics for victims of bullying and have helped their corporate clients safeguard themselves against bullying claims.[252]

Despite its smooth assimilation into German law, structural constraints have kept anti-bullying claims from becoming behemoths that subsume the court system.[253] As discussed earlier, the German legal system is skewed towards early resolution of disputes and this perhaps contributes to keeping bullying cases small.[254] Furthermore, although litigants can refuse to work while still receiving pay and benefits, if the court finds that the claim was unjustified, the accusing employee faces serious repercussions such as termination.[255]

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243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. Friedman & Whitman, *supra* note 16, at 257.
248. *Id.*
249. *Id*.
250. *Id*.
251. *Id*.
252. *Id*. at 259
253. *See* Friedman & Whitman, *supra* note 16, at 258.
254. *Id.*
255. *Id.* at 258 n.70. Recall the generalized attitudes regarding employment in Europe and the way that these attitudes differ from American customs: whereas termination in American society is commonplace and expected as a part of the fluid workforce, European employment relations are assumed to be long term. Termination in the German cultural context is more serious than termination in America.

Sweden, France, and Germany serve as examples of anti-bullying law in practice. The striking feature of each nation's story is the way that a new civil cause of action did not wreak havoc upon the judicial system. However, one may argue that pre-existing legal structures kept bullying under control. The courts are often considered weak and are rarely utilized in Sweden.[256] Swedish ADR systems engulf much of the formal law.[257] Similarly, ADR is highly developed and has a rich history in France.[258] France's Social Modernization law, though fairly new, rests on principles that have been present in French legal thought and decisions for over forty years.[259] Like Sweden and France, Germany has both structural hurdles to litigation explosion and the doctrine of personality, so judges were able to ease employment bullying into German law.[260] However, continental Europe's success with employment bullying laws should not lull America into believing that the structural transition to anti-bullying laws will be easy. We need only look to our cousin in the practice of common law, Great Britain, to see the uglier side of anti-bullying suits.

4. Great Britain

During the summer of 2006, employment bullying entered British legal culture in a big way. Helen Green, an employee at Deutschebank in England, successfully sued her employer for workplace bullying.[261] The court awarded Ms. Green £800,000 when it found that her employer was vicariously liable for the harassment that her coworkers heaped upon her. [262] Her coworkers' behavior included screaming "you stink!" and blowing "raspberries" from across the office.[263] The court held that Ms. Green had been subjected to a "relentless campaign of mean and spiteful behavior designed to cause her distress."[264]

256. Lindblom, *supra* note 192, at 805-06.
257. *Id*. at 815
258. Guerrero, *supra* note 103, at 488-93.
259. *Id*. at 488.
260. *See* Friedman & Whitman, *supra* note 16, at 256-59.
261. Green v. DB Group Services (UK) Ltd, [2006] EWHC (QB) 1898 (Eng.); Owen, *supra* note 124, at 1.
262. Owen, *supra* note 124, at 1.
263. *A Bully Can Cost You a Fortune*, *supra* note 127.
264. Green v. DB Group Services (UK) Ltd, [2006] EWHC (QB) (Eng.).

The case was highly publicized.[265] Commentators suggested that Helen Green's case was a "[g]reen light for bullying victims."[266] Attorneys took to the media to explain the case and to exhort companies to be more cautious about the situations in their workplaces.[267] Hazel Donaldson, one of Ms. Green's attorneys noted that Ms. Green was successful because witnesses corroborated her story and because her complaints were well documented.[268]

While Helen Green's case drew much media attention because of its high payout, it was equally engaging from a legal standpoint because it marked a loosening of standards for recovery under a statutory cause of action.[269] In 1997, Great Britain passed the Protection from Harassment Act.[270] This Act prohibits courses of conduct that a person "knows or ought to know amounts to harassment" of another.[271] The law provides civil and criminal penalties for harassment.[272] Although the Protection from Harassment Act provides sweeping prohibitions of harassing behavior, vicarious liability for employers is not within the text of the statute.[273] In fact, as one of Ms. Green's attorneys noted, until shortly before her case came before the court, it was uncertain if the Protection from Harassment Act would be at all useful against Deutsche Bank.[274]

Although the Protection from Harassment Act had been on the books since 1997, no court had held an employer vicariously liable for the harassing acts of its staff until July of 2006.[275] In *Majrowski v. Guy's and St. Thomas's NHS Trust*, the House of Lords upheld a lower court's ruling that an employer could be vicariously liable for employee

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265. *See, eg.* Donaldson, *supra* note 126, at 1-2; Laister, *supra* note 127, at 17; Sanderson, *supra* note 127, at 17; *A Bully Can Cost You a Fortune*, *supra* note 127.

266. Laister, *supra* note 127, at 17.

267. *See, eg.*, *id.*; *A Bully Can Cost You a Fortune*, *supra* note 127.

268. Donaldson, *supra* note 126, at 2.

269. *See id.*

270. Protection from Harassment Act 1997, ch. 40 (Eng.).

271. *Id.* s. 1(1)(b).

272. *Id.* s. 2. The Protection from Harassment Act of 1997 is a generalized harassment statute and encompasses more than just employment harassment. Criminal penalties for harassment were not instituted in the Helen Green case and discussion of cases that would trigger the criminal penalty lie outside the scope of this note.

273. *Id*.

274. *See* Donaldson, *supra* note 126.

275. *Id*.

harassment.[276] While the court's decision clarified, rather than changed the statute, the increased scope of the 1997 Act is significant because legal scholars believe recovery is easier under the Act than it is under general negligence theory.[277] First, unlike in a negligence case, under the Act, a claimant does not have the burden of proving that her employer should have foreseen that its employees' actions would cause harm.[278] Second, unlike in a negligence claim, which would require proof of psychiatric harm, the claimant can recover for anxiety alone.[279] While the Helen Green case is useful as an anecdotal example of the uproar caused by changes in law, particularly in the case of changing liability rules, it more strikingly contrasts the results of anti-bullying laws with those on the continent. Bullying cases do not make headlines in Sweden, France, and Germany the way that Helen Green impacted England.[280] Perhaps this is because, as this note suggests, the continental nations have legal systems that are better primed to handle employment bullying through ADR, and by limiting access to the courts via cultural de-emphasis and systematic disincentives.[281]

Employment bullying is a new area of law. The oldest laws regarding bullying only date back to the 1990s.[282] Perhaps the freshness of the law in this area is the cause of few representative cases and unclear protocol regarding the proper way to resolve bullying issues. In fact, of the countries discussed, only England has seemed to have any public reaction to decisions regarding bullying.

While its newness can account for much of the undeveloped body of law in this area and the lack of publicized legal decisions, another plausible explanation is the structures by which these countries resolve bullying problems. As discussed before, the courthouse is rarely a litigant's first stop. Rather, ADR mechanisms, specialized tribunals, and tough consequences for failing claims slow disputants' journey to formal adjudication.

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276. Majrowski v. Guys and St. Thomas's NHS Trust [2006] UKHL 34 (UK).

277. Donaldson, *supra* note 126, at 2.

278. *Id.*

279. *Id.*

280. *See, eg.,* Guerrero, *supra* note 103, at 487.

281. *See* discussion *supra* Part III.

282. *See, e.g.,* Swedish Ordinance against Victimi[z]ation at Work, *supra* note 91.

IV. PLUGGING A EUROPEAN APPLIANCE INTO AN AMERICAN OUTLET: ADAPTING BULLYING LAWS TO ACCOUNT FOR AMERICAN LEGAL REALITIES

Whether or not it is deserved, Americans have a reputation for being unduly litigious, petty, and prone to seeing the legal system as a chance for a big payout.[283] With this reputation, one should be apprehensive about creating a new cause of action and handing it to the American public, particularly a cause of action like bullying. In this section, it will become apparent that proposed anti-bullying legislation, as demonstrated by David Yamada's Model Healthy Workplace Bill, creates a broad and arguably vague cause of action with few institutional safeguards to reduce the strain on the courts or to protect potential defendants from the expense and burden of defending or settling marginal or meritless claims.[284] Furthermore, this section will propose potential solutions, such as alternative dispute resolution, to vouchsafe the benefits of a well-intentioned employment protection statute without creating a nightmare for the court system.

Legitimate victims of workplace bullying do exist and should be free to pursue their livelihoods in safe, harassment-free environments.[285] Yamada and the supporters of anti-bullying laws deserve much credit for turning to our European neighbors for ideas and for introducing the idea of non-status-based harassment prohibitions. However, these European laws were formed in the context of specific national legal cultures.[286] As Section III described, each nation with employment bullying laws handles these cases in a unique manner.[287] None of these nations provides the relatively

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283. America's reputation for litigiousness is big business in the entertainment and news media. Writers devote significant time to developing storylines and articles about plaintiffs and their attorneys. Politicians also focus their attention on the role civil liability plays in social problems. *See e.g.* Stuart Taylor, Jr. and Evan Thomas, *Civil Wars*, NEWSWEEK, Dec. 15, 2003, at 43; Dan Zegart, *The Right Wing's Drive for Tort Reform*, THE NATION, Oct. 25, 2004, at 13. In a *Seinfield* episode, as the result of his own stupidity, Kramer burns himself on hot coffee and hires a lawyer named Jackie Chiles, a parody of litigator Johnnie Cochran. The message of the episode is that plaintiffs in civil suits are greedy and foolish and that their lawyers are charlatans. *Seinfield: The Maestro* (NBC television broadcast Oct. 5, 1995).

284. *See* Yamada, *supra* note 9, at 517-21.

285. *See generally* Yamada, *supra* notes 9 and 15; Namie and Namie, *supra* note 26.

286. *See* discussion *supra* Part III.

287. *See* discussion *supra* Part III.

unfettered access to the courts American citizens enjoy.[288] Therefore, it is appropriate to change bullying laws to suit American realities. Just as one cannot use a German hair dryer in an American home without a voltage adapter, we cannot expect a European law to plug into American jurisprudence without adaptations.

A. The Healthy Workplace Bill and What it Lacks

Professor David Yamada, the academic father of anti-bullying legislation in America, has crafted a model Healthy Workplace Bill to address the phenomenon of workplace bullying.[289] Yamada and the Workplace Bullying Institute encourage grassroots workers and legislatures to endorse the bill format.[290] The following are relevant definitions, relief, and procedure portions of the Model legislation:[291]

> Section 2—Definitions
> [. . .]
> 3. Abusive work environment. An abusive work environment exists when the defendant, acting with malice, subjects the complainant to abusive conduct so severe that it causes tangible harm to the complainant.
>
> a. Conduct. Conduct is defined as all forms of behavior, including acts and omissions of acts . . . .
>
> c. Abusive Conduct. Abusive Conduct is conduct that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. In considering whether abusive conduct is present, a trier of fact should weigh the severity, nature, and frequency of the defendant's conduct. Abusive conduct may include, but is not limited to: repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets;

288. *See* discussion *supra* Part III.

289. *See* Yamada, *supra* note 9, at 517-521.

290. *See generally id.*; Workplace Bullying Institute, www.bullybusters.org.

291. The model Healthy Workplace Bill consists of nine sections and is printed in its entirety in Appendix 1.

> verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating; or the gratuitous sabotage or undermining of a person's work performance. A single act normally will not constitute abusive conduct, but an especially severe and egregious act may meet this standard.
> d. Tangible harm. Tangible harm is defined as psychological harm or physical harm.
>
> > i. Psychological harm. Psychological harm is the material impairment of a person's mental health, as documented by a competent psychologist, psychiatrist, or psychotherapist, or supported by competent expert evidence at trial.
> > ii. Physical harm. Physical harm is the material impairment of a person's physical health or bodily integrity, as documented by a competent physician or supported by competent expert evidence at trial . . . .

Section 4—Employer Liability

An employer shall be vicariously liable for an unlawful employment practice, as defined by this Chapter, committed by its employee . . . .

Section 7—Relief

1. Relief generally. Where a defendant has been found to have committed an unlawful employment practice under this Chapter, the court may enjoin the defendant from engaging in the unlawful employment practice and may order any other relief that is deemed appropriate including, but not limited to, reinstatement, removal of the offending party from the complainant's work environment, back pay, front pay, medical expenses, compensation for emotional distress, punitive damages, and attorney's fees.

> 2. Employer liability. Where an employer has been found to have committed an unlawful employment practice under this Chapter that did not culminate in a negative employment decision, its liability for damages and emotional distress shall not exceed $250,000, and it shall not be subject to punitive damages. This provision does not apply to individually named co-employee defendants.
>
> Section 8—Procedures
> 1. Private right of action. This Chapter shall be enforced solely by a private right of action.
> 2. Time limitations. An action commenced under this Chapter must be commenced no later than one year after the last act that comprises the alleged unlawful employment practice.[292]

These key sections of the model legislation form the bases for the following discussion and critique of the proposed legislative solution to workplace bullying.

1. The Cause of Action

In this Model Bill, Yamada has drafted an inclusive prohibition against some of the more common features of bullying such as name-calling and sabotage while leaving the statute loose enough to include actions that he does not specifically mention.[293] He also attempts to limit the scope of bullying claims so that they do not become civil penalties for slights or uncharacteristic outbursts. Generally, a cause of action only arises when behavior is persistent and significant.[294]

While this is not an impermissibly broad statute that provides money damages for 'being mean,' it has the potential for abuse just like any broadly-written provision. For some, the line between insults and constructive criticism could become blurred. One person's intended friendly teasing is another person's persistent pattern of harassment and

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292. Yamada, *Crafting a Legislative Response to Workplace Bullying*, *supra* note 9, at 517-21. *See infra* Appendix 1.

293. *See* discussion *supra* Part IV*;* Yamada, *Crafting a Legislative Response to Workplace Bullying*, *supra* note 9 at 517-21.

294. *See* Yamada, *Crafting a Legislative Response to Workplace Bullying*, *supra* note 9 at 517-21.

abuse. A thorough analysis of the benefits and risks of employment bullying laws on the whole is beyond the scope of this note. For the purposes of this discussion, it is enough to conclude that the Healthy Workplace Bill would create a broad prohibition designed to target specific abuses like insults and workplace sabotage without limiting recovery to victims of specifically enumerated behavior.[295]

As Yamada drafted the bill broadly to make it inclusive, there are few lower boundaries to what constitutes workplace bullying.[296] Other than the general requirement that a behavior be persistent and significant for a plaintiff to recover, the bill gives little guidance regarding what is and is not permissible behavior.[297] More troubling than the lack of guidance is the way the broad standards may preclude most pre-trial adjudication. When a statute is written so broadly that nearly anything that bothers an employee could be a cause of action, judges will necessarily have difficulty with standard motions such as summary judgment.[298] This stacks the deck heavily in favor of the employee. Trials are expensive and time-consuming.[299] Without clear standards, judges will be left to craft the details of the law or forced to submit most claims to a jury trial.[300] If judges opt to allow most claims to go to trial because the statute is broad, defendants will have a greater incentive to settle rather than to pursue a defense.[301] Alternatively, if judges are left to shape the contours of anti-bullying legislation, the law

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295. *See id. See infra* Appendix 1.

296. *See* Yamada, *Crafting a Legislative Response to Workplace Bullying*, *supra* note 9 at 517-21.

297. *See id.*

298. *See* John H. Bauman, *Implied Causes of Action in the State Courts*, 30 STAN. L. REV. 1243, 1252-53 (1978). Bauman compares the power of state courts under state law causes of action with federal courts' abilities to interpret Congressional statutes. He notes that state courts can expand the meaning of a statute more freely than a federal court. Therefore, I conclude that a broadly-written law, such as the one Yamada presents in the Healthy Workplace Bill, will be subject to state court expansion that could preclude the possibility of summary judgment for a defendant.

299. The sheer volume of ADR systems available indicates that trials are not the employer defendant's best choice financially.

300. *See* Bauman, *supra* note 298, at 1252-53 (noting the freedom that state court judges have in shaping even statutorily-created causes of action).

301. *See* Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 979 (1998) ("[P]arties settle lawsuits based on tactics and expenses as much—if not more than—their predictions of how a judge would apply law to fact").

could become just as restrictive as the IIED jurisprudence to which anti-bullying proponents object.[302]

2. Relief and Procedures

With the exception of the $250,000 damages cap for employer liability, the model legislation does not create any structural disincentives to filing suit.[303] While a good statute will not discourage persons from availing themselves of its remedies, a bar to instant litigation could prove useful, particularly with a cause of action such as the one proposed in The Healthy Workplace Bill. As discussed above, the cause of action is broad and inclusive, intended to do the most good.[304] However, by casting a wide net, the cause of action will conceivably attract a number of meritless claims. The model legislation provides no way to curb the tide of anti-bullying litigation.[305] It does not create an agency or give an existing agency the authority to review claims before a plaintiff files lawsuit.[306] It also does not encourage or require dispute resolution outside the courts.[307]

Even the $250,000 cap to employer liability does not offer a meaningful deterrence. It could function as an incentive for all suits, worthless and legitimate alike. As noted above, the statutory prohibitions favor the plaintiff due to their broad scope. If faced with a

302. *See* Yamada, *The Phenomenon of "Workplace Bullying," supra* note 15, at 509.

303. *See* Yamada, *Crafting a Legislative Response to Workplace Bullying*, *supra* note 9, at 517-21 (the full text of the Healthy Workplace Bill). The bill does require that plaintiffs avail themselves of employer-created dispute resolution programs before filing suit. However, this requirement is not discussed in this note because not all employers have dispute-resolution programs and individual programs in existence vary in form and efficacy. Meaningful discussion of these programs would fall outside the scope of this note.

304. *See supra* Part IV.A.1.

305. *See* Yamada, *Crafting a Legislative Response to Workplace Bullying*, *supra* note 9, at 517-21.

306. *See id*. Contrast the Healthy Workplace Bill with federal EEOC claims in which potential plaintiffs must first obtain right to sue letters. While the efficacy of such a system is debatable—a debate that goes beyond the limited scope of this note—it is an initial "bar to the courthouse door" to slow worthless claims.

307. *See* Yamada, *supra* note 9 at 517-21.

situation in which the claim will almost certainly go to trial,[308] an employer has a strong interest in settling the claim because litigating to avoid a $250,000 judgment may be more expensive than settling.[309]

B. Remedying the Model Legislation

1. Throw Out the Whole Idea

The anti-bullying movement does not fit seamlessly into American culture.[310] As noted in Section III, European conceptions of work and personhood do not reflect American attitudes.[311] Neither employees nor employers consider their relationship one of loyalty and lifetime commitment.[312] Rather, the American workforce functions like a marketplace commodity.[313] It is not abnormal for Americans to change careers several times during their lifetimes.[314] When the workforce is dynamic instead of static, laws preserving the employer-employee relationship can be seen as unnecessary.[315] Many Americans would respond, 'if you don't like your job, leave!'

While the aforementioned criticisms may seem compelling, they are the same failing arguments one could make against traditional workplace discrimination claims. Free-market analysis of the workforce also makes sense, conceptually, but overlooks the realities of many workers. Some workers lack the resources to change jobs and sometimes comparable jobs are unavailable.[316]

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308. As discussed earlier, the Healthy Workplace Bill creates a situation that, through a broadly-drafted state law cause of action, is likely to reduce the success of defendants' motions for summary judgment. *See* Bauman, *supra* note 298, at 1252-53.

309. *See* discussion *supra* Part IV.4.A.1.

310. *See supra* Part III.

311. *See supra* Part III.

312. *See supra* Part III.

313. *See supra* Part III.

314. Nerissa Pacio, *Shifting Career Gears*, SAN JOSE MERCURY NEWS (Cal.), Feb. 4, 2007, at AE (quoting Andy Van Kleunen, the executive director of the Workforce Alliance, a non-profit organization that advocates for the American worker).

315. *See supra* Part III.

316. *See, e.g.,* Kristen Keith & Abagail McWilliams, *The Returns to Mobility and Job Search by Gender*, 52 INDUS. & LAB. REL. REV. 460 (1999) (the authors discuss the difficulty of seeking employment, particularly the increased difficulties women face in changing jobs or returning to work after periods of unemployment).

A more sophisticated argument against anti-bullying legislation comes from recognizing that sometimes anti-social behavior is good for business.[317] Some social scientists argue that a bullying boss can be useful to shake up complacent employees.[318] Industry powerhouses, such as Apple's Steve Jobs, film mogul Harvey Weinstein, and Motorola's Ed Zander, do not enjoy the reputation of being pleasant bosses.[319] Rather, they drive their underlings to work hard and employ every means at their disposal to accomplish tasks correctly.[320]

These leaders employ "political intelligence" rather than "emotional intelligence."[321] Their aptitude lies in recognizing the weaknesses and insecurities of others.[322] These politically intelligent leaders leverage their knowledge of others to effectively and mechanically organize workers as tools to accomplish corporate results.[323] Many tactics of successful intimidators match the behaviors that Yamada and others describe as bullying.[324] Intimidators frequently yell, invade personal space, act unpredictably, and use the silent treatment to their advantage.[325]

Supporters of the intimidators' management style are quick to note their success.[326] Steve Jobs' former employees hail his demanding nature, saying, "[H]e was the most difficult human beings I've ever worked for—but he was also one of the most technologically brilliant. No one . . . had a clearer sense of where [the technology] was going [than he did]."[327] Research shows that intimidators are "magnets for the best and brightest" workers and those who regard demands as inspiration to achieve and opportunities to learn.[328] Even felled titans such as Disney's Michael Eisner receive recognition for their

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317. *See generally* Roderick M. Kramer, *The Great Intimidators*, 84 HARV. BUS. REV. 88 (2006) (Kramer challenges the contemporary "emotional intelligence"-focused management theory and offers examples of intimidating corporate leaders who achieve great success with their abrasive style).

318. *Id*. at 90.

319. *See id*.

320. *See id*. at 90-91.

321. *Id.*

322. *Id*. at 91.

323. Kramer, *supra* note 317, at 91.

324. *See* Yamada, *supra* note 15, at 481-82; Kramer, *supra* note 317, at 92-95.

325. Kramer, *supra* note 322, at 92-94.

326. *Id*..

327. *Id*. at 95.

328. *Id*.

accomplishments.[329] Although Eisner's fall—the result of greed and corruption—dominates his public image, observers recall that he took on a weak animation and amusement park company in 1984 and transformed it into one of the most powerful global companies, increasing its market worth from $1.8 billion in 1984 to $57.1 billion in 2006.[330]

The pro-intimidator position does not necessarily contradict the anti-bullying position. The great corporate intimidator, unlike Yamada's workplace bully, does not bully for the sake of crushing others:[331]

> [T]he great intimidators are not your typical bullies. If you're just a bully, it's all about humiliating others in an effort to make yourself feel good. Something very different is going on with the great intimidators. To be sure, they aren't above engaging in a little bullying to get their way. With them, however, the motivating factor isn't ego or gratuitous humiliation; it's vision. The great intimidators see a path through the thicket, and they are impatient to clear it. They chafe at impediments, even those that are human.[332]

Unlike Yamada's prototypical bully, the great intimidator pushes others to accomplish a goal.[333] Though one can distinguish the two conceptually, distinguishing them legally is considerably more difficult. One of the potential inadequacies of The Healthy Workplace Bill is that it punishes equally the average mid-level antisocial bully and the visionary CEOs of billion-dollar enterprises. There is no "genius exception" in the Healthy Workplace Bill.

A "genius exception" is not a likely solution to the Healthy Workplace Bill.[334] While persons like Steve Jobs and Ed Zander would

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329. *Id*. at 96.

330. *See id.*

331. Kramer, *supra* note 322, at 90.

332 *Id.*

333. *Id*. at 90-91.

334. Such an exception may prove prohibitively difficult to draft as well as uncomfortable from a fairness perspective. Americans expect equal protection and would be resistant to exemptions that place some of the most powerful leaders above scrutiny. However, something akin to a "genius exception" may prove necessary as a defense for a state bullying law to comply with existing anti-discrimination laws designed to protect persons with disabilities. Highly-functioning individuals with mental and social disabilities

probably not experience liability under a state employment bullying law,[335] the laws may thwart the next generation of innovative geniuses.[336]

2. Make Some Adjustments

Although the "intimidator" argument is powerful, if states decide anti-bullying legislation is worth the cost of its implementation,[337] the Healthy Workplace Bill should be adjusted to make it fairer and to avoid excessive costs to the legal system. As proponents of workplace bullying legislation note, there are many good justifications to dissuade a corporate culture that encourages unhappy employees to find work elsewhere.[338] Creating healthy workplaces has both short term and long-term benefits.[339] In the short term, content employees will be better employees.[340] Employees who do not live in fear will be more alert and productive as well as less likely to take sick days and excessive time off.[341] They will feel appreciated and have the desire to work.[342] Employees who feel safe amongst their coworkers and supervisors will be likely to engage in teamwork to produce a better result.[343] In the long term, happier employees will result in lower

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regularly enter the workplace. For example, persons with Asperger Syndrome, a variant of autism, are often highly-intelligent and capable of performing in the highest echelons of their fields, but often lack the ability to communicate socially or to empathize with others. *See* Barbara L. Kirby, What is Asperger Syndrome?, Online Asperger Syndrome Information and Support (OASIS), http://www.aspergersyndrome.org/ (follow the hyperlink "What is AS?").

335. Employees working directly with such high-profile bosses are likely to be high-level managers who have fought to obtain posts next to greatness and who made conscious decisions to be with a temperamental boss. Furthermore, in the upper levels of the business world, an underling might be hesitant to legally challenge a corporate lion for fear of being labeled a troublemaker and destroying his or her chances to advance elsewhere.

336. Big businesses do not start out big. The next generation's Microsoft led by the next generation's Bill Gates may be headquartered in a garage right now. While this company is still rising, laws such as the Healthy Workplace Bill could stifle its advancement by curbing its visionary leader.

337. Great intimidators are, of course, the exception and not the rule.

338. *See generally* Yamada, *The Phenomenon of "Workplace Bullying," supra* note 15.

339. *Id.*

340. *Id.* at 483.

341. *Id*. at 483-84.

342. *Id*.

343. *Id*.

turnover rates.[344] Lower turnover correlates with lower training and recruiting costs as well as a reduction in the loss of resources related to a new employee learning his or her job.[345]

If the benefits of workplace bullying legislation outweigh its disadvantages, the model Healthy Workplace Bill should be adjusted to prevent overwhelming of the courts and to promote fairness in the process. The best way to do this would be to implement changes that encourage resolutions without litigation.

a. Tighten the Statutory Language

One potential solution is to tighten the language of the Healthy Workplace Bill. Stricter language would necessarily bar some plaintiffs from a cause of action. However, it would also provide defendants with fair notice about what behavior is and is not appropriate.[346] While the existing language ensures that most victims of workplace bullying will have a chance to recover, it is also a vague statute that provides little guidance for potential defendants to order their lives and behaviors.[347]

If the language were revised to make the cause of action clearer and provide employers with better guidance, everything about the Healthy Workplace Bill would be improved. First, the cause of action would be clearer, necessarily weeding out baseless claims. Second, the law would be fairer because potential defendants would know both what to expect and know what to do to avoid liability. Third, these safeguards would help in a political way. As noted above, the Healthy Workplace Bill has never passed in an American state.[348] However, if the language were revised to provide more fairness for likely employers, perhaps more state legislators would be comfortable supporting the law. As the Workplace Bullying Institute notes, pro-business legislators seem most resistant to workplace bullying laws.[349]

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344. Yamada, *The Phenomenon of "Workplace Bullying," supra* note 15, at 483-84.

345. *Id.*

346. Professor Yamada anticipates this criticism and responds to it by saying that, in time, jurisprudence will develop that allows companies to plan their activities. In the meantime, he is satisfied to allow potential defendants to be subject to ambiguous law that yields unpredictable liability. *See id*. at 533.

347. *See* Yamada, *supra* note 9, at 517-21.

348. *See* discussion *supra* Part III.

349. *Guide to Citizen Lobbying*, http://www.bullybusters.org/advocacy/citizenlobby.html (last visited March 16,

If workplace bullying bills offered some concessions to business interests, the bills could still accomplish many of their goals while bringing more legislators on board.[350]

b. Institute Administrative Oversight

Administrative oversight could help prevent a workplace bullying bill from becoming an omnibus civility code. Just because anti-bullying proponents are taking a lesson from Europe in instituting workplace bullying legislation does not mean they should forget the features of American employment law. The Equal Employment Opportunity Commission (EEOC) oversees much of existing American employment law.[351] A plaintiff wishing to sue his or her employer for discrimination must first obtain a right to sue letter from the EEOC.[352] The purpose of the EEOC right to sue letter is to prevent worthless claims from utilizing judicial resources.[353] While the EEOC is not the agency to handle a state-law bullying claim, the EEOC-framework could serve as a model for implementing anti-bullying laws at the state level.

Creating an administrative agency is a significant step, especially at the state law level, perhaps explaining why it was left out of the model legislation.[354] However, administrative oversight could play a significant role in reducing frivolous suits. The failure to create

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2007) (Resource on the Workplace Bullying Institute website that provides advice and strategies to grassroots organizers in favor of the Healthy Workplace Bill and other anti-bullying legislation).

350. Negotiation is usually a job for the legislature, but entering with a bill that compromises could overcome initial procedural hurdles rather than scare off pro-business legislators right away.

351. DAWN D. BENNETT-ALEXANDER & LAURA B. PINCUS, EMPLOYMENT LAW FOR BUSINESS 66-67 (2d ed. 1998).

352. *Id*. at 67.

353. However, debates do exist regarding the merits of the EEOC and its oversight of employment law. The EEOC's role in employment law is somewhat controversial. Some note that denial of a right to sue letter is almost non-existent. Such a debate is beyond the scope of this note. For a thorough discussion of the efficacy of administrative overview of employment decisions. see generally Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1 (1996).

354. *See* WILLIAM F. FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, ADMINISTRATIVE PROCEDURE AND PRACTICES: PROBLEMS AND CASES, 531-32 (3d ed. 2006) (explaining that states have sought to contain the power of administrative agencies).

a new agency within the model legislation may not be a major impediment to agency oversight of this law because many states already have administrative agencies that could handle claims under the Healthy Workplace Bill.[355] Another potential benefit of administrative oversight is the ability to clearly define the contours of bullying litigation.[356] An administrative agency could promulgate rules and standards to facilitate the implementation of laws resulting from the Healthy Workplace Bill.[357]

Employment bullying claims necessitate expert knowledge regarding health, safety, and the realities of American business.[358] These cohere with the general reasons for creating an administrative agency or delegating an issue to an existing agency.[359] Administrative agencies exist to help the other branches of government regulate highly-specific matters that require additional knowledge and expertise.[360] By delegating to an administrative agency, state legislatures could avoid crafting a state law claim that does not really address the heart of bullying or laws that unreasonably restrict business interests.[361] Not only could the law be better by drawing upon the expertise of an administrative agency, administrative control could also provide an additional hurdle to litigation so as to reduce the strain on the court system.[362]

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355. *See id*. at 13-14 (table contains examples of state agencies, including agencies that administer laws relating to employment and health, both of which relate to anti-bullying legislation).

356. *Id*. at 12-17.

357. *See id*.

358. Administering laws such as the Healthy Workplace Bill would require knowledge both of health and safety (to determine whether a plaintiff could present a prima facie bullying case) as well as business (to create guidelines that do not impermissibly hamper business interests).

359. *See* FUNK, *supra* note 354, at 12-17.

360. *Id*.

361. However, concerns remain about industry capture and the potential for an administrative agency to be wholly one-sided. For example, an agency controlled by pro-industry concerns may narrow the cause of action so much as to render it impotent. Or, an agency becomes so willing to allow claims to go forward that it just a rubber stamp for employees wishing to sue.

362. An agency responsible for anti-bullying legislation could institute prerequisites to litigation like the EEOC right to sue letter.

c. Incorporate Alternative Dispute Resolution (ADR)

Perhaps the best potential improvement to The Healthy Workplace Bill would be a mention of alternative dispute resolution mechanisms beyond requiring that employees exhaust in-house remedies at their workplaces. This does not necessarily need to be mandatory referrals to mediation, arbitration, or conciliation, although such a provision would be useful. The model legislation could be improved by a simple requirement that employers institute dispute resolution procedures so that problems could be solved before resorting to the courts. Formal ADR procedures would also prove helpful.[363]

ADR is particularly attractive in the context of anti-bullying legislation. Recall the European experiences with bullying laws.[364] Countries that successfully implemented anti-bullying legislation have judicial systems that actively reduce litigation through dispute resolution outside litigation.[365] In Sweden, almost all disputes are resolved outside the courts.[366] German judges have powers to end litigation that American judges lack.[367]

Not only have other countries had success with ADR and bullying, contemporary social science research reflects that such a solution would be useful in America.[368] Suzy Fox and Lamont Stallworth, two psychologists who are also anti-bullying legislation proponents, conducted a study of ways to handle workplace bullying.[369] Their results led them to conclude that employees would respond favorably to ADR.[370] In their studies, they have found that employees want a culture in which they can have the power to voice their grievances in an attempt to obtain resolution.[371] While the Fox-Stallworth study did not find overwhelming support for mediation or other specific ADR procedures, the authors predict that their subjects did not fully understand the concept of mediation and that their

363. Fox & Stallworth, *supra* note 150, at 383. At the federal level, the United States Supreme Court has issued opinions in favor of ADR schemes and the EEOC has promulgated statements supporting the use of ADR and administrative dispute resolutions.

364. *See supra* Part III.

365. *See supra* Part III.

366. *See supra* Part III.B.1.

367. *See supra* Part III.B.3.

368. Fox & Stallworth, *supra* note 150, at 403.

369. *Id.*

370. *Id*. at 404.

371. *Id*. at 394.

opinions would improve as mediation becomes more mainstream.[372] Other social scientists have reached similar conclusions and added that the efficacy of any pre-litigation attempt to resolve a bullying dispute will depend upon the victim's perceptions about the employer's disposition on the issue.[373] If the employee believes that she will be taken seriously and that the company will not condone bullying behavior, she will be more likely to utilize internal reporting systems.[374]

Encouraging ADR not only reduces the cost of litigation by avoiding unnecessary judicial procedures, it fits with the logic of anti-bullying laws.[375] Anti-bullying laws seek to preserve the employment relationship.[376] Going to court is one certain way to increase tension and hinder the development of a functional employee-employer relationship (if the relationship continues at all).[377] ADR, on the other hand, provides parties with the opportunity to fix bad situations and restore the relationship.[378] It is cost-effective from a management standpoint.[379] It is also positive from the standpoint of a worker who simply wants to improve her working environment.[380] With ADR, she can address problems without being publicly painted as a trouble-maker on the job.[381] David Yamada titled his model legislation "The Healthy Workplace Bill," which implies healing, not retribution.[382] Yamada even argues that the goal of the anti-bullying movement is to preserve existing employment relationships whenever possible.[383] While prospective penalties may facilitate humane decision-making and conscious behavior on the part of employers, the law, by incorporating ADR, can serve as a proactive tool to restore existing relationships.[384]

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372. *Id*. at 402.

373. Keashly & Neuman, *supra* note 26, at 356.

374. *Id*.

375. *See* Yamada, *The Phenomenon of "Workplace Bullying," supra* note 15, at 492-93.

376. *Id*.

377. Even in the presence of anti-retaliatory provisions, it is hard to see how a history of litigation would be conducive to a normal employment relationship.

378. *See supra* Part III.A.

379. *See supra* Part III.A.

380. *See supra* Part III.A.

381. *See supra* Part III.A.

382. *See* Yamada, *Crafting a Legislative Response*, *supra* note 9, at 517-21.

383. Yamada, *The Phenomenon of "Workplace Bullying," supra* note 15, at 383-84.

384. *See* discussion *supra* Part III.A.

ADR allows employees to work together with their coworkers and supervisors to create a truly healthy workplace.[385]

ADR seems to offer something for everyone. Employers can avoid the expense, bad publicity, and time commitment that come with traditional litigation.[386] Employees in bad situations can resolve problems without the embarrassment, risks, and inevitable damage to the employment relationship that a lawsuit would entail. The legal system benefits through a reduction in cases filed in courts.

V. CONCLUSION

While one can debate the merits of anti-bullying legislation as a cause of action, it is a potential solution to unhappy workplaces. However, if lawmakers decide to implement such legislation, they would do well to recall its European heritage and adjust accordingly. The European nations that have instituted anti-bullying laws, in all their various incarnations, have had significantly different legal and employment cultures than America. Europeans view going to work in a much different way than do Americans. Americans work within a job culture that assumes a free market, in which people change employment if they are unhappy whereas Europeans work in a relationship that must be preserved. The laws of each nation reflect its respective attitudes towards employment. Furthermore, the European nations discussed herein have systems whereby they discourage traditional litigation as the primary form of dispute resolution.

If American states adopt anti-bullying legislation, they should do so with the examples of European nations in mind, but should tailor the laws to suit American legal culture. First, the model legislation should be clarified to prevent it from becoming an all-purpose and overly broad civility code. This will encourage fairness towards potential defendants as well as assist the courts in handling the flow of claims under a new cause of action. Another potential solution is delegation to an administrative agency. Agency control could establish standards and guidelines that both make the law clearer and reduce unnecessary claims in the courts. Finally, ADR systems offer the most promising device by which to save the Healthy Workplace Bill and other anti-bullying legislation. Formalized ADR will both reduce the

385. *See supra* Part III.A.

386. Recall the myriad articles that the Helen Green case elicited in England as well as the general cost of litigation.

strain on the court as well as encourage a favorable outcome for potential litigants, both employee and employer.

Regardless of where one falls on the issue of bullying legislation and its substantive merits, one should recognize that new causes of action increase the courts' burdens. Therefore, it is in everyone's best interest to craft statutory causes of action, particularly broad causes of action, with care. A carefully drafted piece of legislation will employ techniques to make the new law manageable. The Healthy Workplace Bill could become such a piece of legislation with a few modifications that would both reduce the strain on the court system and encourage fairness to all parties.

APPENDIX 1

The Healthy Workplace Bill

Section 1 – Findings and Purposes

A. Legislative Findings

The Legislature finds that:

1. the social and economic well-being of the State is dependent upon healthy and productive employees;

2. surveys and studies have documented between 16 and 21 percent of employees directly experience health-endangering workplace bullying, abuse, and harassment, and that this behavior is four times more prevalent than sexual harassment alone;

3. surveys and studies have documented that abusive work environments can have serious and even devastating effects on targeted employees, including feelings of shame and humiliation, stress, loss of sleep, severe anxiety, depression, post-traumatic stress disorder, suicidal tendencies, reduced immunity to infection, stress-related gastrointestinal disorders, hypertension, and pathophysiologic changes that increase the risk of cardiovascular disease.

4. surveys and studies have documented that abusive work environments can have serious consequences for employers, including reduced employee productivity and morale, higher turnover and absenteeism rates, and significant increases in medical and workers' compensation claims;

5. unless mistreated employees have been subjected to abusive treatment at work on the basis of race, color, sex, national origin, or age, they are unlikely to have legal recourse to redress such treatment;

6. legal protection from abusive work environments should not be limited to behavior grounded in protected class status as that provided for under employment discrimination statutes; and,

7. existing workers' compensation plans and common-law tort actions are inadequate to discourage this behavior or to provide adequate redress to employees who have been harmed by abusive work environments.

B. Legislative Purpose

It is the purpose of this Chapter:

1. to provide legal redress for employees who have been harmed, psychologically, physically, or economically, by being deliberately subjected to abusive work environments;

2. to provide legal incentive for employers to prevent and respond to mistreatment of employees at work.

Section 2 – Definitions

1. Employee. An employee is an individual employed by an employer, whereby the individual's labor is either controlled by the employer and/or the individual is economically dependent upon the employer in return for labor rendered.

2. Employer. An employer includes individuals, governments, governmental agencies, corporations, partnerships, associations, and unincorporated organizations that compensate individuals in return for performing labor.

3. Abusive work environment. An abusive work environment exists when the defendant, acting with malice, subjects the complainant to abusive conduct so severe that it causes tangible harm to the complainant.

a. Conduct. Conduct is defined as all forms of behavior, including acts and omissions of acts.

b. Malice. For purposes of this Chapter, malice is defined as the desire to see another person suffer psychological, physical, or economic harm, without legitimate cause or justification. Malice can be inferred from the presence of factors such as: outward expressions of hostility; harmful conduct inconsistent with an employer's legitimate business interests; a continuation of harmful, illegitimate conduct after the complainant requests that it cease or demonstrates outward signs of emotional or physical distress in the face of the conduct; or attempts to exploit the complainant's known psychological or physical vulnerability.

c. Abusive conduct. Abusive conduct is conduct that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. In considering whether abusive conduct is present, a trier of fact should weigh the severity, nature, and frequency of the defendant's conduct. Abusive conduct may include, but is not limited to: repeated infliction of verbal abuse such as the use of

derogatory remarks, insults, and epithets; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating; or the gratuitous sabotage or undermining of a person's work performance. A single act normally will not constitute abusive conduct, but an especially severe and egregious act may meet this standard.

d. Tangible harm. Tangible harm is defined as psychological harm or physical harm.

i. Psychological harm. Psychological harm is the material impairment of a person's mental health, as documented by a competent psychologist, psychiatrist, or psychotherapist, or supported by competent expert evidence at trial.

ii. Physical harm. Physical harm is the material impairment of a person's physical health or bodily integrity, as documented by a competent physician or supported by competent expert evidence at trial.

4. Negative employment decision. A negative employment decision is a termination, demotion, unfavorable reassignment, refusal to promote, or disciplinary action.

5. Constructive discharge. A constructive discharge shall be considered a termination, and, therefore, a negative employment decision within the meaning of this Chapter. For purposes of this Chapter, a showing of constructive discharge requires that the complainant establish the following three elements: (a) abusive conduct existed; (b) the employee resigned because of that abusive conduct; and, (c) prior to resigning, the employee brought to the employer's attention the existence of the abusive conduct and the employer failed to take reasonable steps to correct the situation.

Section 3 – Unlawful Employment Practice

It shall be an unlawful employment practice under this Chapter to subject an employee to an abusive work environment as defined by this Chapter.

Section 4 – Employer Liability

An employer shall be vicariously liable for an unlawful employment practice, as defined by this Chapter, committed by its employee.

Section 5 – Defenses

A. It shall be an affirmative defense for an employer only that:

1. the employer exercised reasonable care to prevent and correct promptly any actionable behavior; and,

2. the complainant employee unreasonably failed to take advantage of appropriate preventive or corrective opportunities provided by the employer.

This defense is not available when the actionable behavior culminates in a negative employment decision.

B. It shall be an affirmative defense that:

1. the complaint is grounded primarily upon a negative employment decision made consistent with an employer's legitimate business interests, such as a termination or demotion based on an employee's poor performance; or,

2. the complaint is grounded primarily upon a defendant's reasonable investigation about potentially illegal or unethical activity.

Section 6 – Retaliation

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

Section 7 – Relief

1. Relief generally. Where a defendant has been found to have committed an unlawful employment practice under this Chapter, the court may enjoin the defendant from engaging in the unlawful employment practice and may order any other relief that is deemed appropriate, including, but not limited to, reinstatement, removal of the offending party from the complainant's work environment, back pay, front pay, medical expenses, compensation for emotional distress, punitive damages, and attorney's fees.

2. Employer liability. Where an employer has been found to have committed an unlawful employment practice under this Chapter that did not culminate in a negative employment decision, its liability for damages for emotional distress shall

not exceed $250,000, and it shall not be subject to punitive damages. This provision does not apply to individually named co-employee defendants.

Section 8 – Procedures

1. Private right of action. This Chapter shall be enforced solely by a private right of action.

2. Time limitations. An action commenced under this Chapter must be commenced no later than one year after the last act that comprises the alleged unlawful employment practice.

Section 9 – Effect on Other State Laws

1. Other state laws. Nothing in this Chapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any law of the State.

2. Workers' compensation and election of remedies. This Chapter supersedes any previous statutory provision or judicial ruling that limits a person's legal remedies for the underlying behavior addressed here to workers' compensation. However, a person who believes that s/he has been subjected to an unlawful employment practice under this Chapter may elect to accept workers' compensation benefits in connection with the underlying behavior in lieu of bringing an action under this Chapter. A person who elects to accept workers' compensation may not bring an action under this Chapter for the same underlying behavior.

APPENDIX 2

Sweden's Law: Victimization at Work

Ordinance of the National Board of Occupational Safety and Health containing Provisions on measures against Victimization at Work, together with General Recommendations on the implementation of the Provisions.

The following Provisions are issued by the National Board of Occupational Safety and Health pursuant to Section 18 of the Work Environment Ordinance (SFS 1977:1166).

Scope and definitions

Section 1

These Provisions apply to all activities in which employees can be subjected to victimization. By victimization is meant recurrent reprehensible or distinctly negative actions which are directed against individual employees in an offensive manner and can result in those employees being placed outside the workplace community.

General provisions

Section 2

The employer should plan and organize work so as to prevent victimization as far as possible.

Section 3

The employer shall make clear that victimization cannot be accepted in the activities.

Routines

Section 4

In the activities there shall be routines for the early detection of signs of, and the rectification of such unsatisfactory working conditions, problems of work organization or deficiencies of co-operation as can provide a basis for victimization.

Section 5

If signs of victimization become apparent, counter-measures shall without delay be taken and followed up. In doing so, a special investigation shall be made to ascertain whether the causes of shortcomings of

co-operation are to be found in the way in which work is organized.

Section 6

Employees who are subjected to victimization shall quickly be given help or support. The employer shall have special routines for this.

Entry into force

These Provisions enter into force on 31st March 1994.

General Recommendations of the Swedish National Board of Occupational Safety and Health on the Implementation of the Provisions on measures against Victimization at Work

The following General Recommendations are issued by the National Board of Occupational Safety and Health on the implementation of its Ordinance (AFS 1993:17) on measures against Victimization at Work.

Background

Underlying causes of destructive behaviour in the form of victimization. The background to victimization can, for example, be shortcomings in the organization of work, the internal information system or the direction of work, excessive or insufficient workload or level of demands, shortcomings of the employer's personnel policy or in the employer's attitude or response to the employees. Unsolved, persistent organizational problems cause powerful and negative mental strain in working groups. The group's stress tolerance diminishes and this can cause a "scapegoat mentality" and trigger acts of rejection against individual employees.

The fact that causes of the problems are to be looked for in conditions at the workplace is especially apparent when several persons have been ostracized over a longer period, one by one, through various kinds of victimization.

Sometimes, of course, there may also be causes of victimization or attempts at ostracization which are to be found in individual persons' choice of action or behaviour. Sometimes, though, one can find that, even in these cases, the root cause is unsatisfactory work situations in which individual employees, in their anxiety or hopelessness, find cause for more and more overtly displaying their displeasure and acting in a way which can harm or provoke others around them.

Consequences of victimization

Serious consequences of victimization can become apparent, for example, in the following ways:

Among individual employees:

- Increasing friction in the form of aversion, irritability or pronounced indifference.
- Deliberate breaking of rules or exaggerated adherence to rules, reduced performance.
- High stress level, low stress tolerance with over-reactions, sometimes traumatic crisis experience.
- Physical illness, substance abuse problems or mental reactions, e.g. sleep disturbances, loss of self-confidence, anxiety, "brooding", depression or manic symptoms, sometimes powerful aggression and severe tiredness.
- Inability to look ahead or unreasonable demands for vindication.
- Thoughts of suicide or violence to oneself.
- If the victimization does not cease immediately (and if the basic problems of the workplace are not investigated and dealt with), there is a risk of the symptoms becoming permanent in a chronic state which can require prolonged medical and psychological expert help.

Among the working group:

- Reduced efficiency and productivity.
- Erosion of existing rules or freezing of rules.
- Mounting criticism of the employer, lack of confidence, a general sense of insecurity.
- Increasing friction, e.g. lack of understanding for other ways of doing things, withdrawals from the group or from duties, attempts to cease power or the formation of powerful cliques..
- High sickness absenteeism, substance abuse problems, large personnel turnover and a growing number of applications for leave of absence.
- Low tolerance of stresses and strains, and general symptoms of dissatisfaction.
- Magnification of minor problems.
- A continuing search for new scapegoats.

The ability and readiness of the working group to take part in

the solution of internal problems will increase, palpably diminish or disappear, depending on how the conflict is observed and treated by the employer. If nothing at all is done, the risk situation will grow worse as time passes.

Guidance on individual Sections

Definitions

Guidance on Section 1

Victimization in the form of various kinds of reprehensible behaviour can be committed both by employees and by the employer personally or his representatives. The phenomena commonly referred to, for example, as adult bullying, mental violence, social rejection and harassment - including sexual harassment - have come to be seen more and more as problems of working life in their own right and will be collectively referred to here as *victimization*. These are difficult and sensitive problems. What is more, they can have serious and harmful effects on individual employees and on entire working groups if carelessly assessed and handled. Harmful effects on exposed persons may be revealed by both mental and physical pathological states - sometimes chronic - and also by social rejection from working life and the workplace community.

The following are some instances of victimization:

- Slandering or maligning an employee or his/her family.
- Deliberately withholding work-related information or supplying incorrect information of this kind.
- Deliberately sabotaging or impeding the performance of work.
- Obviously insulting ostracism, boycott or disregard of the employee.
- Persecution in various forms, threats and the inspiration of fear, degradation, e.g. sexual harassment.
- Deliberate insults, hypercritical or negative response or attitudes (ridicule, unfriendliness etc.).
- Supervision of the employee without his/her knowledge and with harmful intent.
- Offensive "administrative penal sanctions"

> which are suddenly directed against an individual employee without any objective cause, explanations or efforts at jointly solving any underlying problems. The sanctions may, for example, take the form of groundless withdrawal of an office or duties, unexplained transfers or overtime requirements, manifest obstruction in the processing of applications for training, leave of absence and suchlike. Offensive administrative sanctions are, by definition, deliberately carried out in such a way that they can be taken as a profound personal insult or as an abusive power and are liable to cause high, prolonged stress or other abnormal and hazardous mental strains on the individual. The attitudes involved in offensive acts are, briefly, characterized by gross lack of respect and offend against general principles of honourable and moral behaviour towards other people. The actions have a negative effect, in both the short and long term, on individuals and also on entire working groups.

For the sake of clarity, it should be added that occasional differences of opinion, conflicts and problems in working relations generally should be regarded as normal phenomenas - always provided, of course, that the mutual attitudes and actions connected with the problems are not intended to harm or deliberately offend any person. Victimization does not occur until personal conflicts lose their reciprocity and respect for people's right to personal integrity slips into unethical actions of the kind mentioned above and individual employees are dangerously affected as a result.

General measures for the prevention of victimization

Guidance on Section 2

The Ordinance of the National Board of Occupational Safety and Health on Internal Control of the Working Environment (AFS 1992:6) defines the responsibility devolving on the employer under Chap. 3, Section 2 a of the Work Environment Act. That responsibility includes many different aspects of the working environment.

The following are some examples of general and

overarching measures which the employer can take for the prevention of victimization at work[:]

- Design a distinct work environment policy which among other things also declares the employer's general aims, intentions and attitude to the employees.
- Design routines for ensuring that psychological and social work environment conditions, including personal response, work situation and work organization, will be as good as possible.
- Take steps to prevent people meeting with a negative response at work, e.g. by creating norms which encourage a friendly and respectful climate at the workplace. It is above all the employer and the employer's representatives who must set an example to others in creating a good working climate.
- Give managers and supervisory personnel training and guidance on matters relating to the rules of labour law, the effect of different working conditions on people's experiences, interaction and conflict risks in groups and skills for rapid response to people in situations of stress and crisis. It is important, not least with a view to their own work situation and working environment, that managers directly involved in the supervision of personnel should have sufficient insight and knowledge in these fields.
- Provide a good introduction which will enable the employee to adjust well to the working group. It is also important that the rules applying at the workplace should be made quite clear.
- Give each employee the best possible knowledge of the activities and their objectives. Regular information and workplace meetings will help to achieve this.
- Give all employees information about and a share in the measures agreed on for the prevention of victimization.
- Try to ensure that duties have substance and meaning and that the capacity and knowledge of the individual are utilized.
- Give the employees opportunities of improving

their knowledge and developing in their jobs, and encourage them to pursue this end.

Guidance on Section 3

Important principles for all persons in working life include the following:

Offensive behaviour or treatment can never be accepted, no matter who is involved or who is the target. It is especially important that the employer should take active steps to prevent any employee being subjected to victimization by other employees. Managers and supervisory staff have a key part to play in shaping the atmosphere and the norms which are to prevail at workplaces. One necessary principle is that the employer must never subject an employee to victimization, e.g. through abusive power or any other unacceptable behaviour or response. The employee's position of dependence has a very important bearing on employer-employee contacts. Misunderstandings can occur very easily, and the employer, therefore, should always take an attitude which inspires confidence. The best chances of achieving a good atmosphere and workable norms occur when the employer, through his or her own behaviour, creates a reliable basis for a two- way dialogue, communication, and a genuine desire to solve problems. This generally causes the risks of victimization to diminish or disappear. It is important that norms for co-operation should be concretized and specially clarified in the work environment policy and in the introduction of new employees, and that they should be continuously followed up. It is important that employees should have a part in measures which are taken to solve the overriding problems of the workplace. This means that, in cases where the employer and employees have together decided which principles are to apply to the planning of work and to co-operation at the workplace, all employees should be familiar with those principles and should know how to relate to them.

Special measures and routines

Guidance on Section 4

Preventive and early inputs and measures are critically important. Accordingly, when organizational problems or discrimination occur, the employer must be told as soon as possible, so as to be able to take suitable measures. Nobody should help to conceal victimization, even if risks of conflicting loyalties are liable to occur. All problems at the workplace should be dealt with quickly, relevantly and in a respectful manner. Solutions should be looked for through talks and measures aimed at improving the working conditions of those concerned. If criticism is levelled at an employee, the latter should be told of the criticism and given an opportunity of replying to it. Personal opinions and loosely founded assumptions about an employee or the way in which the employee does his or her job should not be made a basis of discrimination. In cases where it is quite obvious that an employee has actually provoked the aversion of others, the employer should draw the employee's attention to his or her duty of helping to create a good working environment and a good atmosphere at work. At the same time, the employer needs to be aware that provocative behaviour can be a sign of unsatisfactory situations at work and must take the initiative in achieving a concrete solution of these problems. It is important to take an objective, positive, problem-solving attitude to the problems put forward, to listen to all concerned and to support the weakest. Policy decisions over the head of the person concerned are liable to make that person's situation a great deal worse. As a part of preventive work environment policy, employers must consciously create preparedness for dealing with the psychological, social and organizational aspects of the working environment, to the same extent as questions of a physical or technical nature. This is also part of the employer's duty under the Work Environment Act. See also the Board's Ordinance on Internal Control of the Working Environment (AFS 1992:6) and General Recommendations on Psychological and Social Aspects of the Working Environment (AFS 1980:14). The employer should have routines of such a kind, for contacts with individual employees, that the existence of frictions in working relations can be observed or ascertained at an early stage. This makes it important for work to be arranged in such a way that the supervisory staff can get to know each member of the working

group, and will have the opportunity of regular talks with group members.

Guidance on Section 5

It is very seldom indeed that friction is due to one person only. The causes should as a rule be looked for in the way in which work is organized and not laid at the door of the individual employee. At the same time, it is important that each employee should be aware of his or her own ability and duty to help create a good climate at work. Solutions to problems can primarily be looked for through the development of working methods, work allocation, communication and suchlike. As an aid to this end, an analysis of the way in which work is organized as regards, for example, duties, requirements and authority, can form a basis for discussions and planning. Occupational health services can be a useful resource in this connection and can support the process of problem-solving. Victimization is in itself a risk to more employees than those who are directly involved and, while it lasts, often imposes a heavy mental burden on other persons as well. What is more, the difficulties of finding and dealing with basic problems increase with the passing of time and commensurately with the deadlocking of personal positions and pin points in connection with the accusations, excuses and counter-accusations which are frequently exchanged when victimization becomes noticed. It is important, therefore, that the employer should take immediate action to deal with abuses which can trigger or already has triggered victimization. One appropriate first step is a confidential talk with the person subjected to victimization. It is important that this interview should proceed with respect and in a frank, open atmosphere. When talking to the persons involved, one should be aware of the danger of allowing oneself to be influenced by negative standpoints. People's natural attitude in situations like this is often to construct a powerful defence for their actions, and as mentioned earlier, views can be characterized among other things by rigid positions, group pressures and loyalties. Often, therefore, the blame for victimization is put on the person subjected to it. At the same time one has to realize that many people dislike the way in which a fellow- employee is being treated and will gladly play a part in breaking the destructive pattern of things. Gathering the entire working group for a

discussion is not to be recommended except as the final stage of action planning with a view to achieving practical improvements in working routines and in the working situation of the group as a whole. The prospects of achieving good consensus solutions diminish the longer an employee is away from work or the problems are left untackled. Negative personal opinions can become inflexible on both sides, with the result that good ways back to work are no longer to be found. In certain cases the problems may in time develop into a complete deadlock, with perpetual new misunderstandings and, finally, if the worst comes to the worst, the complete elimination of the employee from working life. It can be hard for an employer to take an objective view of all aspects of the problems, and so it is often advisable to call in a consultant for this purpose, e.g. through the occupational health services.

Help and support for individual and working group
Guidance on Section 6

An employee who has been sicklisted on account of the health effects of victimization should be supported in returning to work as quickly as possible. Normalization of everyday life and personal and emotional support are the most important means of counteracting severe after-effects in people who have been through traumatic experiences.

Swift readjustment is greatly dependent on contact being maintained with the individual (whether sicklisted or not) and on the individual having good opportunities for talking privately, both to fellow-employees and to the employer, about what has happened. In these talks one can discuss various possible reasons for what happened, try to find ways of improving and changing the working environment, and assess the economic or practical resources available in relation to what is desired. Invitations or exhortation to consult a psychologist or suchlike can sometimes be interpreted as a personal offence, and so it is important that wishes of this kind should be expressed by the individual concerned. Sometimes it may be necessary to consider the possibilities of defusing acute disagreements or intractable interpersonal problems at the workplace by making an offer of training or transfer to other duties. This recourse can be used, for example, in order to protect an employee from further discrimination or risks of injury. If so, it is extremely important that the solutions

offered should have substance and meaning and that, accordingly, the employee will have an opportunity for further development at work and good social contacts. Furthermore, the deliberations should take place in direct consultation with the employee personally and with reference to the employee's perceived potentialities and preferences. One important principle is that the measures taken should, as far as possible, entail no impairment of working conditions. In addition to the help which can be offered to an individual employee, it is very important to deal with the practical problems which, in most cases, underlie the "scapegoat mentality" in a group, so that the group will find ways of achieving better co-operation in future. There is a serious risk of events repeating themselves, with new cases of victimization as a result, unless the basic, work-related problems are discussed carefully and a common determination is found to take measures for their elimination. The longer the basic problems remain unsolved, the greater the risk of serious consequences becomes and the greater will be the number of persons affected at the workplace. More often than not, the employees in a group have a close knowledge of the organizational problems which need to be dealt with. It is important that those problems should be made clear when there is victimization of individuals. Otherwise there is a serious risk of the offended individual and his or her problems being regarded as the sole, paramount topic. In cases where the process in the working group has gone too far for constructive measures to succeed at the workplace concerned, qualified expert assistance may be needed for causal analyses, proposals for solutions and individual and group discussions. In relevant cases, resources of occupational health services may be of great assistance here as well.

APPENDIX 3

Relevant Sections of England's Protection from Harassment Act of 1997 (Ch. 40 s. 1-4)

Section 1 - Prohibition of harassment.

(1) A person must not pursue a course of conduct--

(a) which amounts to harassment of another, and

(b) which he knows or ought to know amounts to harassment of the other.

(1A) A person must not pursue a course of conduct--

(a) which involves harassment of two or more persons, and

(b) which he knows or ought to know involves harassment of those persons, and

(c) by which he intends to persuade any person (whether or not one of those mentioned above)--

(i) not to do something that he is entitled or required to do, or

(ii) to do something that he is not under any obligation to do.;

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other.

(3) Subsection (1) [or (1A)] does not apply to a course of conduct if the person who pursued it shows--

(a) that it was pursued for the purpose of preventing or detecting crime,

(b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or

(c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

Section 2 - Offence of harassment.

(1) A person who pursues a course of conduct in breach of [section 1(1) or (1A)] is guilty of an offence.

(2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both.

Section 3 - Civil remedy.

(1) An actual or apprehended breach of [section 1(1)] may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.

(2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.

(3) Where--

(a) in such proceedings the High Court or a county court grants an injunction for the purpose of restraining the defendant from pursuing any conduct which amounts to harassment, and

(b) the plaintiff considers that the defendant has done anything which he is prohibited from doing by the injunction, the plaintiff may apply for the issue of a warrant for the arrest of the defendant.

(4) An application under subsection (3) may be made--

(a) where the injunction was granted by the High Court, to a judge of that court, and

(b) where the injunction was granted by a county court, to a judge or district judge of that or any other county court.

(5) The judge or district judge to whom an application under subsection (3) is made may only issue a warrant if--

(a) the application is substantiated on oath, and

(b) the judge or district judge has reasonable grounds for believing that the defendant has done anything which he is prohibited from doing by the injunction.

(6) Where--

(a) the High Court or a county court grants an injunction for the purpose mentioned in subsection (3)(a), and

(b) without reasonable excuse the defendant does anything which he is prohibited from doing by the injunction,

he is guilty of an offence.

(7) Where a person is convicted of an offence under subsection (6) in respect of any conduct, that conduct is not punishable as a contempt of court.

(8) A person cannot be convicted of an offence under subsection (6) in respect of any conduct which has been punished as a contempt of court.

(9) A person guilty of an offence under subsection (6) is liable--

(a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or

(b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.

Section 3A - Injunctions to protect persons from harassment within section 1(1A)

(1) This section applies where there is an actual or apprehended breach of section 1(1A) by any person ("the relevant person").

(2) In such a case--

(a) any person who is or may be a victim of the course of conduct in question, or

(b) any person who is or may be a person falling within section 1(1A)(c), may apply to the High Court or a county court for an injunction restraining the relevant person from pursuing any conduct which amounts to harassment in relation to any person or persons mentioned or described in the injunction.

(3) Section 3(3) to (9) apply in relation to an injunction granted under subsection (2) above as they apply in relation to an injunction granted as mentioned in section 3(3)(a).

Section 4 - Putting people in fear of violence.

(1) A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.

(3) It is a defence for a person charged with an offence under this section to show that--

(a) his course of conduct was pursued for the purpose of preventing or detecting crime,

(b) his course of conduct was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or

(c) the pursuit of his course of conduct was reasonable for the protection of himself or another or for the protection of his or another's property.

(4) A person guilty of an offence under this section is liable--

(a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or

(b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.

(5) If on the trial on indictment of a person charged with an offence under this section the jury find him not guilty of the offence charged, they may find him guilty of an offence under section 2.

(6) The Crown Court has the same powers and duties in relation to a person who is by virtue of subsection (5) convicted before it of an offence under section 2 as a magistrates' court would have on convicting him of the offence.