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The Need for a Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act.

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ABSTRACT

This paper explores the potential for harnessing the OSH Act and the OSHA regulatory apparatus to tackle the widespread problem of workplace bullying. Workplace bullying is a phenomenon that has attracted a considerable amount of domestic and international inter-disciplinary attention. It can be described as psychological or emotional abuse occurring regularly, repeatedly, and over a period of time. Common types of overt behavior include constant criticism, shouting and verbal abuse, persistently picking on the victim, and repeatedly assigning unreasonable or impossible targets or deadlines.

In an earlier article, I explained how the experience of the United Kingdom in combating workplace bullying can provide lessons for similar efforts in the United States. See Susan Harthill, *Bullying In the Workplace: Lessons From the United Kingdom*, 17 MINN. J. INT'L L. 247 (2008). This paper builds on that article, but shifts focus solely to the U.S. by proposing a new regulatory alternative, viewing workplace bullying through the lens of existing federal occupational safety and health law, regulations and guidelines, and utilizing new governance theory to identify and harness informal mechanisms to bolster the efficacy of the existing federal occupational safety and health regulatory apparatus.

This paper first analyzes workplace bullying as an occupational safety and health concern covered by the OSH Act, thereby already obligating employers to take feasible measures to prevent and abate this problem. First, I examine whether the OSH Act can be interpreted to obligate employers to provide a workplace free from workplace bullying, through the general duty clause of the Act. Then, because some courts and even the OSH Administration itself have expressed a preference that workplace hazards, including workplace violence generally, be addressed through specific regulations and not by reliance on the general duty clause, I also argue that the OSH Administration could promulgate a specific standard addressing the problem, given the evidence of the prevalence, costs and health impact of workplace bullying.

The paper also argues that the problem of workplace bullying requires a multi-pronged approach. I argue that a top-down, stand-alone regulation and enforcement approach is insufficient. Drawing upon new governance principles, an integrated approach is required, combining top-down

traditional enforcement with a collaborative, cooperative effort, utilizing the OSH Administration, NIOSH, employers, unions and employees in a form of self-regulation.

Utilizing OSHA to address workplace bullying is not without its drawbacks, and I address those shortcomings and potential solutions. I conclude that, despite its shortcomings, OSHA's existing regulatory scheme should incorporate workplace bullying because OSHA is a singularly appropriate vehicle for such efforts and because prevention of workplace bullying through an existing scheme complements efforts to enact new legislation specifically addressing the problem.

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The Need for a Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act.

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INTRODUCTION

Several countries have recognized the need to provide legal redress for workers who are targeted for non-status-based psychological harassment, commonly called workplace bullying, and those countries have initiated preventative and restorative efforts as a result of new regulatory agendas addressing the problem. A variety of approaches have been utilized, with some countries enacting new workplace bullying legislation,¹ while other countries have applied existing legislation to address the problem.² Other countries have taken a slightly different approach, by

* Associate Professor of Law, Florida Coastal School of Law. The author presented this article in July 2009 at the International Labour Organization, Regulating for Decent Work Conference, in Geneva, Switzerland, and would like to thank the participants for their comments. I have previously published an article comparing the law of workplace bullying in the United Kingdom and United States. This Article focuses on the occupational safety and health aspects of workplace bullying and builds on my earlier work, which is cited in some of the footnotes to this Article. The Author wishes to thank Joey Hernandez, Justin Funck and Frank Trovato, for their able research assistance. Finally, thank you to the Florida Coastal School of Law for its research support. All errors are the authors.

¹ See, e.g., French Social Modernization Law (2002), C. TRAV. Arts. L. 122-46 to L. 122-154, available at www.legifrance.gouv.fr. For an analysis of the French model, see Maria Isabel S. Guerrero, Note, *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, 495 (2004) (proposing new European Union moral harassment directive modeled on existing European Union directives and French and Swedish anti-harassment laws); Rachel A. Yuen, Note, *Beyond the Schoolyard: Workplace Bullying and Moral Harassment Law in France and Quebec*, 38 CORNELL INT'L L.J. 625, 647-648 (2005) (comparing moral harassment laws in France and Quebec and concluding that that similar legislation in the rest of North America is unlikely).

² Courts in the United Kingdom, for example, have applied anti-stalking legislation to cases of workplace bullying. See Protection from Harassment Act, 1997, c. 40, § 1 (Eng.); *Majrowski v. Guy's and St. Thomas's NHS Trust*, 2005 EWCA Civ 251 (Court of Appeal) (holding employer vicariously liable for workplace bullying under the PHA). See also Helge Hoel & Stale Einarsen, *Regulating for Negative Human Interaction: An Evaluation of the Effectiveness of Anti-Bullying Regulation(s)*, __ European Journal of Work and Organizational __ (forthcoming 2009) (summarizing varying legal approaches: identifying France, Belgium, Quebec and South Australia as examples of countries enacting new

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viewing workplace bullying as an occupational safety and health hazard.³ The United States lags behind all these countries, in terms of both governmental regulatory reform and self-governance initiatives. Despite a growing body of national and international inter-disciplinary work highlighting the prevalence, causes and costs of workplace bullying, there are currently no state or federal laws expressly addressing the issue.⁴ In an earlier article, I explained how the experience of the United Kingdom in combating workplace bullying can provide lessons for similar efforts in the United States.⁵ This article builds on that earlier work and proposes a new regulatory alternative for the United States, viewing workplace bullying through the lens of existing federal occupational safety and health law, regulations and guidelines. In addition, this Article utilizes new governance theory to identify and harness informal mechanisms to bolster the efficacy of the existing federal occupational safety and health regulatory apparatus.

The Occupational Safety and Health Act of 1970 (“OHSA” or “OSH

legislation specifically targeted at the problem; Norway and Finland as examples of countries which made adjustments to their health and safety laws; and countries such as the United Kingdom and Ireland that have used existing laws to address the problem).

³ For example, Sweden has enacted legislation as part of its occupational safety and health laws to address status-blind workplace harassment. Swedish National Board of Occupational Safety and Health: Ordinance (AFS 1993:2) on Violence and Menaces in the Working Environment, 14 Jan. 1993 and Ordinance (AFS 1993:17) on Targetization at Work, 21 Sept. 1993. For an analysis of the effectiveness of different regulatory efforts, focusing on the Swedish regulation which is widely viewed as a successful model, see Hoel & Einarsen, *Regulating for Negative Human Interaction*, *supra* note 2. Norway and Finland have also taken the occupational safety and health route to address the problem. See Hoel & Einarsen, *supra* note 2. Quebec and Saskatchewan have also utilized their occupational safety and health codes. See R.S.Q. ch. N-1.1 (1977) (Quebec); Occupational Health and Safety (Harassment Prevention) Amendment of 2007, S.S. 66 (2007) (Saskatchewan). For an analysis of the Quebec legislation, see Debra Parkes, *Targeting Workplace Harassment In Quebec: On Exporting A New Legislative Agenda*, 8 EMP. RTS. & EMP. POL'Y J. 423, 448-453 (2004) (reviewing new Quebec harassment legislation and examining social and legal context rendering the developments less “exportable” to other Canadian and American jurisdictions). In the U.K., the Health and Safety Commission (“HSC”), the agency responsible for health and safety regulation, has relied upon a social partnership approach, issuing guidelines and tools for employers to utilize on a voluntary basis, such as the 2004 HSE Management Standards on Work-Related Stress.

⁴ Although 16 states have introduced an anti-bullying law, the Healthy Workplace Bill, no state has yet passed the law. See Workplace Bullying Institute, Legislative Campaign, <http://www.workplacebullyinglaw.org/index.html>.

⁵ See Susan Harthill, *Bullying In the Workplace: Lessons From the United Kingdom*, 17 MINN. J. INT'L L. 247 (2008) (compiling and reviewing sources).

Act”)⁶ is an existing law that could be utilized and/or strengthened to incorporate coverage of bullying as a recognized workplace safety and health hazard, as has occurred in some European countries and Canadian provinces.⁷ OSHA has the major advantage of being an established statutory scheme with an existing regulatory apparatus. The OSH Act requires employers to comply with safety and health standards⁸ and has a broad general duty clause that requires employers to maintain a safe workplace.⁹ Additionally, the OSH Act operates via two long-standing federal agencies with which employers and employees are already familiar - the Occupational Safety and Health Administration (“OSH Administration”) and National Institute for Occupational Safety and Health (“NIOSH”). The OSH Administration develops regulations, interprets the law, and enforces safety and health law and regulations, and NIOSH provides research, education, and training in the field.¹⁰ These two federal agencies not only constitute regulatory bodies through which to channel efforts to include workplace bullying within OSHA coverage, but their existence and familiarity in the field of occupational safety and health enhances the potential for procurement efforts to address bullying as a workplace safety and health concern in the U.S. workplace.

This Article first analyzes workplace bullying as an occupational safety and health concern covered by the OSH Act, thereby already obligating employers to take feasible measures to prevent and abate this problem. As an initial matter, this Article examines whether the OSH Act can be interpreted to obligate employers to provide a workplace free from workplace bullying, through the general duty clause of the Act.¹¹ Then, because some courts and even the OSH Administration itself have expressed a preference that workplace hazards, including workplace violence generally, be addressed through specific regulations and not by reliance on the general duty clause, I also argue that the OSH Administration could promulgate a specific standard addressing the

⁶ Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 650, *et seq.* (2006)). For ease of reference, references hereafter will be to the OSH Act internal citation and not the U.S. Code citation.

⁷ See, e.g., Swedish Ordinances AFS 1993:2 & AFS 1993:17, *supra* note 3; Quebec R.S.Q. ch. N-1.1, *supra* note 3; Saskatchewan S.S. 66, *supra* note 3.

⁸ OSHA § 5(a)(2).

⁹ OSHA § 5(a)(1).

¹⁰ OSHA § 2(b)(3) (authorizing Secretary of Department of Labor); OSHA § 22 (creating NIOSH) (note that NIOSH has no rulemaking or enforcement powers and is advisory only, although the OSH Administration can take its lead from NIOSH developments in emerging fields and topics, such as workplace bullying).

¹¹ OSHA §5(a)(1).

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problem, given the evidence of the prevalence, costs and health impact of workplace bullying.

The Article also argues that the problem of workplace bullying requires a multi-pronged approach. The Article argues that a top-down, stand-alone regulation and enforcement approach is insufficient. Scholars such as Ian Ayres and John Braithwaite have described a movement towards deregulation that causes a concern about employer non-compliance with laws like OSHA, reviewing the thrust of existing regulatory regimes and introducing proposals aimed at developing new models of regulatory compliance and incentives.¹² Professor Orly Lobel has specifically developed and applied an alternative model of this new governance principle to OSHA, arguing that regulations taking the traditional form of punishing employers for violating established standards is insufficient on its own and needs to be supplemented by cooperation from key constituents (unions, employees, employers, government) using compliance incentives and the like.¹³ This dynamic and flexible model has in fact been used by the OSH Administration since the 1980s, discussed more fully, *infra*, although the success of such programs, as with OSHA itself, has been called into question.¹⁴ Drawing upon these new governance principles, an integrated approach to workplace bullying is required, combining top-down traditional enforcement with a collaborative, cooperative effort, utilizing the OSH Administration, NIOSH, employers, unions and employees in a form of self-regulation.

Utilizing OSHA to address workplace bullying is not without its drawbacks. OSHA has some inherent disadvantages as a tool for preventing workplace bullying. The OSH Act has been generally criticized as an ineffective statute because it has inadequate penalties and low compliance rates, and the OSH regulatory regime has generally come under

¹² IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* (1992) (arguing that regulation needs to find a new way to combine command-and-control regulation with deregulation). *See also* Hoel & Einarsen, *Regulating for Negative Human Interaction*, *supra* note 2. The Hoel & Einarsen study reviewed the limited effectiveness of the ground-breaking Swedish anti-bullying law, concluding that legislation alone is insufficient and a holistic approach is needed that combines regulation with intervention and prevention measures on a number of levels, including the organization, society, the individual and the group. *Id.* Although this study highlighted some factors unique to the Swedish situation (for example, bullying tends to be horizontal versus vertical, and lack of litigation incentives), *id.*, the conclusion is equally applicable to any regime.

¹³ *See generally* Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071 (2005) [hereinafter *Governance of Workplace Safety*].

¹⁴ *Id.* (collecting and summarizing criticisms).

attack as underfunded and understaffed.¹⁵ Further, the OSH Act has an in-built headwind as a tool to provide redress for individuals who are targets of workplace bullying because it lacks a private cause of action and is enforceable only by the Secretary of Labor, through the OSA Administration. Nevertheless, this Article proposes that OSHA's existing regulatory scheme should incorporate workplace bullying because that scheme is a singularly appropriate vehicle for such efforts and because prevention of workplace bullying through an existing scheme complements efforts to enact new legislation, such as the Healthy Workplace Bill, that provides a private cause of action for workplace bullying.

Part I of the Article will review the current inter-disciplinary findings on workplace bullying, focusing on studies and data that define and quantify the impact of workplace bullying on workers and workplace safety and health. Part II will provide an overview of OSHA, outlining the Act, and the role of the OSH Administration and NIOSH, and Part III will review existing OSHA regulations and guidelines as they pertain to workplace violence generally and workplace bullying specifically. This section will also outline the argument that workplace bullying is an occupational safety and health hazard that is encompassed within OSHA's substantive liability and enforcement provision - the general duty clause - and will further make the case for a new standard regulating the problem. Part IV will outline the shortcomings of the OSH Act generally and more specifically will review potential problems in harnessing the Act to engage the problem of workplace bullying. Part IV will then provide an analysis of how these shortcomings can be overcome, by recognizing employer obligation under the OSH Act to provide a bullying-free workplace, using that statutory obligation as an essential building block, but one that is just the starting point for a holistic approach that must include collaborative and innovative approaches.¹⁶ In conclusion, the Article will propose that a shift

¹⁵ *Id.*

¹⁶ This article advocates a holistic approach to OSHA regulation of workplace bullying but looking beyond OSHA, a holistic approach to workplace bullying is also needed that recognizes that OSHA is just one component in what needs to be a comprehensive movement tackling the problem. The Healthy Workplace Bill, *supra* note 4, is another complementary approach, along with developments in the common law. Compare David C. Yamada, *The Phenomenon of 'Workplace Bullying' and the Need for a Status-Blind Hostile Work Environment Protection*, 88 GEO. L. J. 475 (2000) (making the case for new legislation, culminating in the Healthy Workplace Bill) with William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 107 (2003) (opposing new legislation such as that proposed by Professor Yamada, arguing that the common law is the appropriate tool for developing new torts such as bullying). See also Martha Chamallas, *Discrimination And Outrage: The Migration From Civil Rights To Tort Law*, 48 WM AND MARY L. REV. 2115, 2122-24 (2007) (exploring whether discriminatory

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in focus is needed, away from an overly restrictive emphasis on governmental enforcement and regulation, and towards a holistic new governance approach that identifies innovative solutions and engages key stakeholders in acknowledging workplace bullying as an occupational safety and health hazard and instituting multi-pronged preventative and corrective programs.

In July 2009, President Obama named David Michaels as the new Assistant Secretary of the OSH Administration. Professor Michaels is viewed as employee-friendly, perhaps deservedly so; in a 2005 article, he lamented OSHA's retreat from regulation in the face of industry campaigns to undermine regulatory efforts by using scientific uncertainty about the health impact of substances that may cause worker ill-health.¹⁷ Professor Michaels opined that Congress gave the OSH Administration "a great deal of leeway in identifying hazards and setting protective exposure limits to enable the agency to act *before* large numbers of individuals became sick."¹⁸ He noted that OSHA officials have been reluctant to invoke the general duty clause in recent years, even though the OSH Act and the courts have confirmed the agency's authority to do so in the absence of any standard.¹⁹ The fact that OSHA is reluctant to enforce the general duty clause is coupled with the agency's failure to promulgate new standards, creating a lack of regulation. Professor Michaels also noted that instead of using the general duty clause or issuing new standards, the OSH Administration has instead recently focused on entering into alliances and agreements with businesses, unions and trade associations.²⁰ "Given the inability or unwillingness of the nation's regulatory apparatus to address workplace hazards, litigation by [injured] workers is a logical alternative. In

and harassing conduct in the workplace should be considered outrageous conduct, actionable under the tort of intentional infliction of emotional distress, and advocating limited migration of norms from civil rights into tort law, but primarily addressing gender and race based harassment); Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 5 (1988) (exploring the possibility of channeling existing cultural resistance against supervisory abuse by low-paid minority workers into tort law and creating a "worker-centric" tort of outrage); *but see* Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U.L. REV. 387, 391 (1994) (arguing against the "tortification" of employment law as an ineffective tool to vindicate workers' rights, including harassment).

¹⁷ See David Michaels & Celeste Monforton, *Scientific Evidence in the Regulatory System: Manufacturing Uncertainty and the Demise of the Formal Regulatory System*, 13 J.L. & POL'Y 17 (2005).

¹⁸ *Id.* at 22 (citations omitted).

¹⁹ *Id.* at 25, 29.

²⁰ *Id.* at 29-30.

fact, it may be the only means of compelling employers to protect their workers.”²¹ Professor Michaels is now in the position of being able to guide the OSH Administration in a new direction, and the time has never been riper for pushing the agency to harness its Congressional mandate and address workplace bullying.

I. BULLYING: DEFINITIONS, PREVALENCE AND COSTS

A. *Defining Workplace Bullying as a Category of Workplace Violence*

Workplace violence can take the form of physical assault, including murder, rape, and robbery, and can be divided into categories depending on the relationship between the target and the worker.²² Law enforcement has joined with occupational specialists to recognize that workplace violence is a specific category of violent crime that should be responded to by employers using a variety of employment-related techniques.²³ The Federal Bureau of Investigation has recognized that although workplace violence is commonly viewed by laypersons as encompassing only homicide and physical attacks, occupational specialists view physical assaults as only one end of the continuum of workplace violence, a “continuum that also include[s] domestic violence, stalking, threats, harassment, bullying, emotional abuse, intimidation, and other forms of conduct that create anxiety, fear, and a climate of distrust in the workplace.”²⁴

The OSH Administration’s definition of workplace violence will be discussed more fully in Part III, *infra*, but can be summarized as conduct ranging from verbal threats to homicide, occurring within or away from the workplace.²⁵ The OSH Administration recognizes four categories of workplace violence: violence by strangers, customers or clients, co-workers, and relationship violence.²⁶ Although workplace bullying can take the form

²¹ *Id.* at 31.

²² I have chosen to use the term “target” over the more loaded term “victim.”

²³ See Federal Bureau of Investigation, U.S. Department of Justice, *Workplace Violence: Issues in Response* (2004), available at <http://www.fbi.gov/publications/violence.pdf> [hereinafter *FBI Workplace Violence: Issues in Response*].

²⁴ *Id.* The FBI report recognized that all forms of workplace harassment and intimidation are part of the workplace violence problem and that prevention programs that do not consider harassment in all forms are unlikely to be effective. *Id.*

²⁵ Occupational Safety and Health Admin., Factsheet on Workplace Violence (2002), available at http://www.osha.gov/OshDoc/data/General_Facts/factsheet-workplace-violence.pdf [hereinafter *OSHA Workplace Violence Factsheet*].

²⁶ OSHA, *Workplace Violence Hazard Awareness*, Long Island Coalition for Workplace Violence Awareness and Prevention, Facts and Information, Part I (Feb. 1996),

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of physical violence, it is more likely to take the form of psychological assault, and can be labeled as “psychological violence.”²⁷

The focus of this Article is on non-physical, status-blind psychological harassment between co-workers, typically referred to in the literature as workplace bullying but also called mobbing, particularly in Europe.²⁸ Workplace bullying has been defined as: “repeated offensive behavior through vindictive, cruel, malicious or humiliating attempts to undermine an individual or group of employees.”²⁹ To be identified as bullying, the behavior has to occur regularly, repeatedly, and over a period of time.³⁰

The most common bullying behavior is to assign unreasonable or impossible targets or deadlines.³¹ Other common types of bullying behavior may include constant criticism, removing responsibilities and replacing them with trivial tasks, shouting and verbal abuse, persistently picking on people, withholding information, and blocking promotions.³² Bullying occurs across all occupations, races, and genders, and between supervisors, co-workers, or clients. Studies indicate that the bully is most frequently a supervisor, slightly more women are targets than men, and that bullying is more common in certain occupations and under certain management styles.³³ Bullying occurs when a variety of risk factors are present, such as individual factors like the perpetrator’s child development and personality, organizational factors, and societal factors.³⁴ For example, pioneers of the U.S. workplace bullying movement, Gary and Ruth Namie, have identified several organizational characteristics that increase the risk of workplace bullying, ranging from uncritical adoption of an obsession with outcomes to

http://www.osha.gov/workplace_violence/workplaceviolence.PartI.html. See also Injury Prevention Research Center, *Workplace Violence: A Report to the Nation*, at 4 (University of Iowa, 2001), available at <http://www.public-health.uiowa.edu/IPRC/resources/workplace-violence-report.pdf> (categorizing four types of workplace violence: criminal intent, customer/client, worker-on-worker, and personal relationships).

²⁷ Gary Namie & Ruth Namie, *Workplace Bullying: How to Address America’s Silent Epidemic*, 8 EMP. RTS. & EMP. POL’Y J. 315, 326 (2004).

²⁸ See generally Maria Isabel S. Guerrero, Note, *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, 495 (2004).

²⁹ DUNCAN CHAPPELL & VITTORIO DI MARTINO, *VIOLENCE AT WORK* 259–72 (3d ed. 2006).

³⁰ *Id.* See also Namie & Namie, *supra* note 27, at 326.

³¹ See Harthill, *supra* note 5, at 255-256 (citations omitted).

³² *Id.* at 256 (citations omitted).

³³ *Id.*

³⁴ *Id.* (citations omitted).

recruitment, promotion, and reward systems that focus on personality traits like aggressiveness while ignoring emotional intelligence.³⁵

B. Prevalence of Workplace Bullying: A Summary of Recent Studies

In an earlier article, I reviewed at length research from the United Kingdom and the United States on the prevalence of workplace bullying,³⁶ and new studies continue to establish that the phenomena is widespread. Going back to 2000, researchers sponsored by the British Occupational Health Research Foundation published the first nation-wide survey of bullying in Britain.³⁷ The survey concluded that more than ten percent of people reported having been bullied within the last six months, rising to twenty-four percent when the period was extended to the last five years. Almost forty-seven percent of people reported that they had witnessed bullying taking place within the last five years.³⁸ By 2007, this number appeared to decrease; just under four percent of British workers reported being bullied or harassed at work in the past two years.³⁹

In the U.S., more recent smaller scale studies have reported estimates ranging from thirty-two percent⁴⁰ to forty-four percent of workers being bullied.⁴¹ The lower estimate was reported in a 2007 U.S. study that found that nearly thirty percent of workers polled met the criteria for being bullied, but only ten percent labeled themselves as bully targets.⁴²

³⁵ Namie & Namie, *supra* note 27, at 328.

³⁶ Harthill, *supra* note 5.

³⁷ HELGE HOEL & CARY L. COOPER, DESTRUCTIVE CONFLICT AND BULLYING AT WORK (2000), at 5, <http://www.csren.gov.uk/UMISTreportHelgeHoel1.PDF>. The U.K. Hoel & Cooper survey was sponsored by the British Occupational Health and Safety Commission, which has been proactive in issuing guidelines for employers in handling workplace stress.

³⁸ *Id.*

³⁹ Heidi Grainger & Grant Fitzner, DEPARTMENT OF TRADE AND INDUSTRY, EMPLOYMENT RELATIONS RESEARCH SERIES: THE FIRST FAIR TREATMENT AT WORK SURVEY, REPORT, 2007, at 6, *available at*: <http://www.dti.gov.uk/files/file38386.pdf> (last visited July 20, 2009) [hereinafter "DTI Report"].

⁴⁰ Pamela Lutgen-Sandvik, Sarah J. Tracy & Jess K. Alberts, *Burned by Bullying in the American Workplace: Prevalence, Perception, Degree, and Impact*, 44 J. MGMT. STUD. 835, 851–52 (2007).

⁴¹ Employment Law Alliance Report, *Abusive Boss Poll*, Mar. 21, 2007, <http://www.employmentlawalliance.com/pdf/ELA%20Abusive%20Boss%20Charts031907.pdf> (last visited July 20, 2009) (nationwide poll of over 1,000 U.S. workers) [hereinafter Employment Law Alliance, *Abusive Boss Poll*].

⁴² Lutgen-Sandvik & Alberts, *supra* note 40 at 851–52 (2007).

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In June 2003, the Society for Human resource Management (“SHRM”) conducted a workplace violence survey of 270 human resources professionals from among its members, and found that more than one-half of those responding expressed some level of concern that workplace violence might occur at their organization.⁴³ The most commonly reported forms of violence were inappropriate language, verbal abuse, and verbal threats of violence.⁴⁴

More recently, a 2007 nationwide U.S. poll of over 1,000 U.S. workers by the Employment Law Alliance found that forty-four percent of workers reported they have worked for a supervisor or employer who they consider abusive and that sixty-four percent said that they believe an abused worker should have the right to sue to recover damages.⁴⁵ At the higher end of the spectrum, an older study found that seventy-one percent of workers studied reported that they had experienced incivility at work, such as disrespect and social exclusion.⁴⁶ This study’s very broad definition of bullying included acts of incivility, such as unintended acts attributable to oversight and ignorance,⁴⁷ and therefore may not be reflective of the rates of bullying that can be effectively addressed through legislation, but the findings of high levels of low-level bullying are significant when one considers the researchers’ caution that this type of lower level mistreatment can lead to organizational violence.⁴⁸

The OSH Administration has estimated that approximately 2 million U.S. workers annually are victimized by some type of workplace violence, although it has not released any data on the prevalence of workplace bullying as a sub-set of workplace violence.⁴⁹ Although the OSH

⁴³ Society for Human Resource Management, *Workplace Violence Survey*, at (vii)-(viii) (Jan. 2004), available from SHRM Research Department, 1800 Duke Street, Alexandria, VA 22314 [hereinafter SHRM 2004 Survey].

⁴⁴ *Id.* at 2-3. The survey author suggested that the concern about violence could be due to stressful work environments and/or due to reports of violence in the broader society. *Id.*

⁴⁵ Employment Law Alliance, *Abusive Boss Poll*, *supra* note 41. The types of abusive conduct reported included: supervisors/employers behaving abusively by making sarcastic jokes/teasing remarks, rudely interrupting, publicly criticizing, giving dirty looks to or yelling at subordinates, or ignoring them as if they were invisible. *Id.*

⁴⁶ Lila M. Cortina, V.J. Magley, J.H. Williams, & R.D. Langhout, *Incivility in the Workplace: Incidence and Impact*, 6 J. OCCUPATIONAL HEALTH PSYCHOL. 64, 75 (2001).

⁴⁷ *Id.* at 64.

⁴⁸ *Id.* at 65. *See also* Frances E. Zollers & Elletta Sangrey Callahan, *Workplace Violence and Security: Are There Lessons For Peacemaking?*, 36 VAND. J. TRANSNAT’L L. 449, (2003) (citing to Cortina’s study and discussing how incivility at work and lack of attention to individual nurturing can lead to workplace violence).

⁴⁹ OSHA Workplace Violence Factsheet. OSHA has adopted the NIOSH definition of

Administration's sister agency, NIOSH, has studied stress at work, it has yet to release full data on its study of workplace stress as it relates to bullying. Early findings released in 2004 reported that over twenty-four percent of companies surveyed reported that some degree of bullying had occurred there during the previous year.⁵⁰ The NIOSH study was a small-scale study of 516 private and public organizations,⁵¹ and also found that in the most recent incident of bullying that had occurred, thirty-nine percent involved an employee as the aggressor, twenty-four percent involved a customer, and almost fifteen percent involved a supervisor.⁵²

New research has also shown that workplace bullying appears to be more harmful for employees than sexual harassment.⁵³ Defining workplace bullying as including incivility, belittling comments, persistent criticism of work and withholding resources, researchers at the University of Manitoba reviewed 110 studies conducted over 21 years; the studies compared employees' experience of sexual harassment with other forms of workplace aggression, comparing, *inter alia*, the effect on workers' stress, anger and anxiety levels, as well as their physical and mental health.⁵⁴ Hershcovis and Barling found that workplace bullying had more severe consequences, with bullied workers reporting more job stress and higher levels of anger and anxiety than employees who were sexually harassed.⁵⁵ The authors of the study posited that bullying may be more harmful because it is more insidious, difficult to report and carries no sanction.⁵⁶

Clearly, workplace bullying is a chronic problem in the American workplace that must be addressed. The Hershcovis and Barling study is not

violence, which includes non-physical forms of harassment and intimidation. *See infra* note 25, and accompanying text.

⁵⁰ NIOSH, UPDATE: MOST WORKPLACE BULLYING IS WORKER TO WORKER, EARLY FINDINGS FROM NIOSH STUDY SUGGEST (July 28, 2004), <http://www.cdc.gov/niosh/updates/upd-07-28-04.html>. The study defined bullying as "repeated intimidation, slandering, social isolation, or humiliation by one or more persons against another." *Id.*

⁵¹ NIOSH reported that the respondents for the study were human resources professionals or other knowledgeable individuals and that the organizations ranged in size from five employees to 20,000 employees each. *Id.*

⁵² *Id.* In the most recent incident, 55.2 percent involved the employee as the "victim," 10.5 percent the customer, and 7.7 percent the supervisor. *Id.*

⁵³ M. Sandy Hershcovis & Julian Barling, *Comparing the Outcomes of Sexual Harassment and Workplace Aggression: A Meta-Analysis*, presented at the Seventh Annual Work, Stress, & Health Conference, Washington, D.C. (2008), on file with the author.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

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the only study highlighting the serious health implications of workplace bullying, and the next section will focus on workplace bullying as an occupational safety and health concern.

C. The Impact of Workplace Bullying on the Targeted Individual's Physical and Psychological Health

In an earlier article, I outlined the economic and non-economic costs of workplace bullying, including costs to the target, the employing enterprise, and society.⁵⁷ This Article focuses on the costs of workplace bullying to the employee and employer as an occupational safety and health issue – such costs include mental and physical ill health; stress caused by workplace bullying causes a multitude of problems and may become sufficiently severe to lead to post-traumatic stress syndrome.⁵⁸ Employees who witness co-worker bullying may also suffer from some of these physical and psychological symptoms; studies have found that employees who witness

⁵⁷ Harthill, *supra* note 5. Costs to the employing enterprise include attrition - bullied employees frequently respond to the situation by quitting - outlay and time costs (materials and supervisor time in orienting replacements), absenteeism (including overtime costs incurred because of absenteeism), and profit lost during the replacement process. Economist Wayne Cascio has estimated typical turnover costs for a bullied employee in the U.S. to be \$50,000 per exiting employee across all jobs and industries. *Id.* (citing WAYNE F. CASCIO, *COSTING HUMAN RESOURCES: THE FINANCIAL IMPACT OF BEHAVIOR IN ORGANIZATIONS* 7-8 (2000)). In the U.K., a 2003 study calculated the cost of a “typical” case of workplace bullying in a British local authority as £28,000, including the costs absence, replacement, and lost management time. *Id.* Cost data from the U.K. and Europe is more extensive. Giga, Hoel & Lewis have estimated that in 2007, workplace bullying cost U.K. society £682.5million. Sabir Giga, Helge Hoel & Duncan Lewis, *Costs of Workplace Bullying*, at 3 (2008) (on file with author) (citing J. Beswick, J. Gore, J. and D. Palferman, *Bullying at work: a review of the literature* Derbyshire: Health and Safety Laboratories (2006)). They extrapolated this cost estimate using the cost of work days lost to sickness absence, about 30% of which are associated with stress and violence; work-related stress costs society between £3.7 billion and £3.8 billion a year (at 1995/6 prices), and bullying is likely to account for between 10-20% of this cost. *Id.* at 25-26. The International Labour Organization reported that, in 2002, stress and violence account for approximately 0.5% to 3.5% of Gross Domestic Product (GDP) per year in the European Union. *Id.* at 22.

⁵⁸ Namie & Namie, *supra* note 27, at 320 (citing Heinz Leymann & Annelie Gustafsson, *Mobbing at Work and the Development of Post-Traumatic Stress Disorders*, 5 *EUR. J. WORK & ORG. PSYCHOL.* 251 (1996)). The Namies reported that a 2003 Workplace Bullying Institute self-reporting survey revealed the following stress-related effects of bullying: severe anxiety (76 percent), disrupted sleep (71 percent), loss of concentration (71 percent), post-traumatic stress disorder (47 percent), clinical depression (39 percent), and panic attacks (32 percent). *Id.*

bullying also report increased stress.⁵⁹

Physical symptoms can include musculo-skeletal disorders such as body aches and backaches, and psychosomatic problems, such as stomach problems, headaches, nausea, and insomnia.⁶⁰ Workplace bullying has also been associated with an increased risk of incident cardiovascular disease,⁶¹ and may be correlated with increased blood pressure.⁶² According to a 2007 study of over 7,000 U.S. workers by the Workplace Bullying Institute, forty-five percent of bullied workers suffer stress-related physical or psychological health problems, including PTSD, with thirty-three percent suffering for more than one year.⁶³ The study confirmed the findings of other studies that bullying leads to stress related physical problems including cardiovascular problems, such as hypertension, strokes, and heart attacks, adverse neurological changes, such as neurotransmitter disruption, hippocampus shrinkage, immunological impairment, leading to more frequent infections of greater severity, fibromyalgia, and chronic fatigue syndrome.⁶⁴

In addition to the physical health problems caused by bullying, numerous studies in the U.S. and abroad link bullying with psychological

⁵⁹ Lutgen-Sandvik, Tracy & Alberts, *supra* note 40, at 835–60. *See also* HOEL & COOPER, *supra* note 6, at 25 (U.K. study reporting effect of bullying on observers).

⁶⁰ Lorealeigh Keashly & Joel H. Neuman, *Bullying in the Workplace: Its Impact and Management*, 8 EMPL. RTS. & EMP. POL'Y J. 335, 348 (2004) (citing N. Bowling et al., *Antecedents and Consequences of Workplace Harassment: A Review and Meta-Analysis*, paper presented at symposium for the Society of Industrial/Organizational Psychology (2004)).

⁶¹ Keashly & Neuman, *supra* note 60, at 349 (citing M. Kivimaki et al., *Workplace Bullying and the Risk of Cardiovascular Disease and Depression*, 60 OCCUP. & ENVTL. MED. 779 (2003)). Kivimaki et al. reported the prevalence of bullying was 5% in a first survey and 6% in a second survey, and after adjustment for sex, age, and income, the odds ratio of incident cardiovascular disease for targets of prolonged bullying compared to non-bullied employees was 2.3, and the odds ratio (after adjustments) for incident depression was even more significant, at 4.2. *See* M. Kivimaki, M. Virtanen, M. Vartia, M. Elovainio, J. Vahtera & L. Keltikanga-Jarvinen, *Workplace Bullying and the Risk of Cardiovascular Disease and Depression*, 60 OCCUP. & ENVTL. MED. 779 (2003); *see also* N. Wager, G. Fieldman & T. Hussey, *The Effect on Ambulatory Blood Pressure of Working Under Favourably and Unfavourably Perceived Supervisors*, 60 OCCUP. ENVTL. MED. 468, 474 (2003), <http://www.occenvmed.com> (stress caused by perception of an unpleasant supervisor at work can have a clinically significant impact on workers' cardiovascular functioning).

⁶² Keashly & Neuman, *supra* note 60, at 349.

⁶³ Workplace Bullying Institute 2007 Zogby International Study, *Physical Health Impairment, How Bullying Can Affect Your Body*, <http://www.workplacebullying.org/targets/impact/physical-harm.html>.

⁶⁴ *Id.* *See also* Namie & Namie, *supra* note 27, at 320.

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and emotional injury, such as “heightened levels of anxiety, depression, burnout, frustration, helplessness, negative emotions . . . and lowered self-esteem.”⁶⁵ In the WBI study, more than eighty percent of targets reported psychological injuries such as debilitating anxiety and panic attacks, and thirty-nine percent reported new or exacerbated clinical depression. Thirty percent reported PTSD.⁶⁶

The impact of workplace bullying on the target’s health is, unfortunately, only one component of the overall picture that emerges of the occupational safety and health implications of the problem – other behavioral effects may include work withdrawal behaviors, substance abuse, and may even lead to suicide.⁶⁷ Moreover, it is well established that workplace bullying causes stress; in turn, stress is considered a leading cause of workplace violence.⁶⁸

The empirical data is therefore clear that workplace bullying in the U.S. is a recognizable problem, impacting anywhere from ten percent to forty-four percent of workers and can lead to some significant physical and mental health consequences for both employers and employees. Regardless of whether the physical costs to the target are direct or result from the stress caused by bullying, bullying is a *physical* health hazard in the workplace, and as such it falls within the ambit of the U.S. occupational safety and health regulatory regime.

II. EXISTING U.S. LAWS: THE OCCUPATIONAL SAFETY AND HEALTH LAW OF 1970

In the United States, several laws provide potential recourse for targets of workplace bullying, ranging from Title VII hostile work environment protection to state common law causes of action, such as intentional

⁶⁵ Keashley & Neuman, *supra* note 60, at 346.

⁶⁶ Workplace Bullying Institute, *Psychological-Emotional-Mental Injuries*, <http://www.workplacebullying.org/targets/impact/mental-harm.html> (thirty percent of targeted women and twenty-one percent of men reported PTSD).

⁶⁷ Keashley & Neuman, *supra* note 60, at 347 (recognizing that studying the behavioral effects of bullying is difficult due to reporting problems and identifying limits on research utilizing self-reports of intended behaviors rather than the actual behaviors themselves).

⁶⁸ Zollers & Callahan, *supra* note 48, at 460-61 (citing Jan Norman, Security Problems in Workplace Increasing, Orange County Reg., Dec. 12, 2001, Lexis, News Group File (noting one expert’s opinion that “there’s a direct correlation between stress and violence”); Joel H. Neuman & Robert H. Baron, *Workplace Violence and Workplace Aggressor: Evidence Concerning Specific Forms, Potential Causes, and Preferred Targets*, 24 J. MGMT. 391, 402-06 (1998)).

infliction of emotional distress. Yet, to date, none of these laws have proven effective in combating workplace bullying. Rather than replicating the laws here, the reader is referred to Professor Yamada's groundbreaking work exploring the gaps in U.S. law and arguing for a new status-blind harassment law, called the Healthy Workplace Bill.⁶⁹ The Healthy Workplace Bill has been introduced in 16 states, is active in 10 states, and is tracked closely by the Workplace Bullying Institute, a grass roots lobbying campaign created by workplace bullying pioneers Ruth and Gary Namie.⁷⁰

The Healthy Workplace Bill is obviously the central focus of ongoing efforts to legislatively address workplace bullying at the state level, but thus far no federal laws have been introduced or apparently contemplated. Although the states are viewed as the nation's laboratories and when one state enacts the Healthy Workplace Bill, other states may follow that lead, federal initiatives should not be overlooked because not only does federal law lead to greater uniformity, but employers are more likely to comply with a uniform law, particularly one that has in-built compliance and penalty mechanisms. Pursuit of a new federal version of the Healthy Workplace Bill is not the only option – utilization of existing laws and existing federal agencies also offers great potential. Indeed, it can be argued that pursuit of new legislative initiatives at the federal level is ineffective given the time and expense of such efforts and, arguably, the lack of a powerful lobbying body on the issue of workplace bullying. Rather, utilizing existing laws and a vast administrative network may be the more sensible vehicle for change.⁷¹

⁶⁹ Yamada, *supra* note 16, at 493-522 (reviewing potential applicability of laws like Title VII, the National Labor Relations Act, OSHA, and common law causes of action, but ultimately concluding that these laws are inadequate to prevent and correct workplace bullying).

⁷⁰ See Workplace Bullying Institute, Legislative Campaign, <http://www.workplacebullyinglaw.org/indx.html>. The Health Workplace Bill provides a definition of workplace bullying, a private cause of action for victims of repeated harassment, employer defenses and a damages cap. *Id.* Adaptation of the Healthy Workplace Bill as an appropriations bill to study the prevalence and impact of the problem provides an intriguing model for state-level occupational safety and health law. The Massachusetts bill, for example, requires the state Division of Occupational Safety to “conduct a study analyzing the direct and indirect costs of workplace psychological harassment for workers and their families as reflected in healthcare and insurance rates.” The bill also mandates that the Division develop a program requiring larger employers to establish internal policies addressing psychological harassment. See Mass. H.B. 1850 (2007), available at <http://workplacebullyinglaw.org/states/legis-ma2.html>.

⁷¹ See David Weil, *Crafting A Progressive Workplace Regulatory Policy: Why Enforcement Matters*, 28 COMP. LAB. L. & POL'Y J. 125, 126 (2007) (arguing that a progressive workplace regulatory policy should not rely on new legislative initiatives, but should draw on established laws and policies, including the “vast administrative apparatus

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The OSH Act is a potential vehicle. This section will discuss the current OSHA statutory framework, and Part III will discuss whether and how workplace bullying may fit within the existing framework. After discussing the potential for using the OSH Act and its attending regulatory regime to address the problem of workplace bullying, Part IV will address the shortcomings of this approach, primarily the overarching criticism of OSHA as an ineffective regulatory regime, and discuss whether any strategies might be successfully applied to overcome these shortcomings, such as employing a new governance approach combining regulatory enforcement with collaborative mechanisms.

A. OSHA's Statutory Framework

1. Congressional Findings and Purpose In Enacting OSHA

Congress enacted OSHA in 1970 with the stated purpose “to assure safe and healthful working conditions for working men and women.”⁷² Congress further elaborated on its findings, stating that: “personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.”⁷³ Congress envisioned that its purpose would be achieved, *inter alia*, by enforcing standards developed under the Act and “by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes.”⁷⁴ Congress provided the mechanisms by which the Act would achieve the goal of providing safe and healthful working conditions, envisioning a partnership between employers and employees, by “encouraging” and “stimulating” both parties to reduce workplace health hazards, in part by instituting new and perfecting existing programs,⁷⁵ and by “providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions.”⁷⁶

Congress apparently intended OSHA to be an organic and innovative

that already exists to implement those policies.”).

⁷² OSHA § 1; *see also* OSHA § 2(b) (declaring purpose “to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . .”).

⁷³ *Id.* § 2(a).

⁷⁴ *Id.* § 1.

⁷⁵ *Id.* § 2(b)(1), (2).

⁷⁶ *Id.* § 2(b)(1), (2).

law, in part by “providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems.”⁷⁷ Congress also stated that research was needed in health problems, “in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety.”⁷⁸

Naturally, a major component of the Act was the creation of a rule-making body to develop and promulgate occupational safety and health standards, and such standards were to be enforced via civil and criminal penalties.⁷⁹ Thus, Congress authorized the Secretary of Labor to set mandatory occupational safety and health standards, and created the Occupational Safety and Health Review Commission to perform adjudicatory functions under the Act.⁸⁰ Both the Department of Labor, which created the OSH Administration, and the OSH Review Commission will be discussed more fully, *infra*.

2. State Occupational Safety and Health Plans and OSHA Preemption of Other State Laws

Although the OSH Act provides the federal default rule, individual states are permitted to opt out of the federal regime and develop their own state OSH plan.⁸¹ Under the OSH Act, the federal government pays for fifty percent of the cost of a state plan.⁸² Because a state occupational safety and health law must be “at least as effective” as the federal program,⁸³ state occupational safety and health laws typically mirror the federal law, although they may offer more protection to workers.⁸⁴ Although the focus

⁷⁷ *Id.* § 2 (b)(5).

⁷⁸ *Id.* § 2(b)(6).

⁷⁹ OSHA § 17. OSHA exempts some sectors from coverage, such as mining, agriculture and public employment. OSHA § 3(5). Other laws at the federal, state, or local level may overlap and may provide coverage for occupational safety and health, however, a listing of such laws is beyond the scope of this article.

⁸⁰ *Id.* §2(b)(3).

⁸¹ OSHA § 18.

⁸² OSHA § 23(g). Twenty-one states have opted to develop and enforce their own state plans. See Alison D. Morantz, *Has Devolution Injured American Workers? State and Federal Enforcement of Construction Safety*, 25 J. L. ECON. & ORG. __ (forthcoming 2009) (listing states). For a current listing of state plans and links to the programs, see OSHA, State Occupational Safety and Health Plans, <http://www.osha.gov/dcsp/osp/index.html> (last visited Aug. 3, 2009).

⁸³ OSHA § 18(b)-(h) & §23.

⁸⁴ As can be expected with a concurrent regulatory regime, delegation of occupational

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of this article is on the federal OSH Act and federal agencies, state occupational safety and health laws potentially offer a fertile ground for experimenting with an occupational safety and health approach to workplace bullying.

California's occupational safety and health statute ("CalOSHA"),⁸⁵ for example, provides that "[e]very employer shall furnish employment and a place of employment that is safe and healthful for the employees therein."⁸⁶ In contrast to federal OSHA, California's general duty provision broadly requires a safe and healthful workplace and does not limit the employer's general duty to providing a workplace free of hazards that "are causing or are likely to cause *death or serious physical harm*."⁸⁷ Although CalOSHA does not mention workplace violence or bullying, California courts have held that the provisions of that statute "clearly make it an employer's legal responsibility to provide a safe place of employment for their employees . . . [s]uch responsibility appears to include the duty to adequately address potential workplace violence."⁸⁸ California's Occupational Safety and Health Administration has also issued guidelines stating that workplace violence is an occupational safety and health issue, which must be addressed in the employer's injury prevention program.⁸⁹

safety and health responsibility to the states has its supporters and detractors. *See* Morantz, *supra* note 82. (contrasting the supporters' view that state regimes are more responsive, innovative, and well-informed, while detractors stress potential risks and inefficiencies of state programs). The relative advantages and disadvantages of a state versus federal regime are beyond the scope of this article, although the perceived advantages of state-run programs as being more innovative, flexible, and utilizing non-adversarial techniques, *id.*, bear further exploration in relation to adoption of anti-bullying guidelines.

⁸⁵ Cal. Lab. Code §§ 6400, *et seq.*

⁸⁶ *Id.* at § 6400(a); *see also* Cal. Lab. Code § 6401 ("Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, and methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful. Every employer shall do every other thing reasonably necessary to protect the life, safety, and health of employees."); Cal. Lab. Code § 6402 ("No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe and healthful."); Cal. Lab. Code §§ 6403, 6404 (same). California Code of Regulations also requires employers to implement Injury and Illness Prevention Programs, but does not specifically mention workplace violence or bullying. 8 Cal. Code. Reg. § 3203.

⁸⁷ OSHA § 5(1) (emphasis added).

⁸⁸ *Franklin v. Monadnock Co.*, 59 Cal. Rptr.3d 692, 696-697 (Ct. App. 2007) (holding that employee stated a claim for wrongful discharge in violation of public policy, where employee was discharged for complaining internally and externally about co-worker's threats of violence. Public policy stemmed from CalOSHA's requirement that employers maintain a safe and health workplace and policy of encouraging employees to report credible threats of violence in the workplace).

⁸⁹ *See* California Department of Indus. Relations, Division of Occupational Safety and

Thus, state occupational safety and health laws, like CalOSHA, may provide broader workplace protection that can be more easily utilized to address workplace bullying, particularly where the emphasis is not on *physical* health hazards. In addition to state OSHA plans, other state statutes or common law can supplement these efforts, even in states that follow the federal OSH Act. The OSH Act does not preempt state law in the field of occupational safety and health - the OSH Act recognizes concurrent state power to act with regard to occupational safety and health either legislatively or through the common law:

Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.⁹⁰

To the extent that a specific employer has neglected their duty to abate a workplace bullying situation that is resulting in an unhealthy workplace, concurrent state law may apply obligating employers to maintain a safe and healthful workplace.⁹¹ This, of course, in addition to any laws unrelated to

Health, Model Injury & Illness Prevention program for Workplace Security (March 1995), available at http://www.dir.ca.gov/dosh/dosh_publications/worksecurity.html. The California Labor Code is supplemented by Code of Civil Procedure section 527.8, which allows employers to seek injunctive relief on behalf of employees to address “unlawful violence or a credible threat of violence” by an individual, including a co-worker. Cal. Code of Civ. P. § 527.8(a).

⁹⁰ OSHA § 4(b)(4).

⁹¹ An intriguing example is *Shimp v. New Jersey Bell Tel. Co.*, 368 A.2d 408 (N.J. Super. Ct. 1976). The court issued an injunction requiring the employer to create a smoke-free workplace because second hand smoke was causing health problems for the plaintiff, who was allergic to cigarette smoke. *Id.* The court held that an employee has a *common-law right* to a safe working environment, and that it is reasonable to expect an employer to foresee health consequences and to impose on it a duty to abate the hazard, ordering the employer to provide safe working conditions for the plaintiff. *Id.* at 411-16. The court also held that that the New Jersey Workmen's Compensation Act did not bar issuance of injunctive relief against occupational hazards, because that law only bars common law tort claims for monetary damages arising from work-related injuries. *Id.* at 412 (stating that “[t]here is no provision in the act making it the exclusive method of protecting the worker against an occupational hazard. The act becomes the exclusive remedy for the employee when the hazard has ripened to injury.”). *See also* Alfred W. Blumrosen et al., *Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions*, 64 CAL. L. REV. 702, 712, 715 (1976) (discussing use of injunctions to compel workplace safety and stating that “employer liability acts and workmen's compensation laws modified the common law only with respect to damages.” However, courts may require the worker to first exhaust any federal or state procedures before pursuing injunctive relief in court). The

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safety and health, such as the Healthy Workplace Bill (if enacted), and common law torts such as intentional infliction of emotional distress.

3. Employer Duties under the OSH Act: The General Duty Clause and the Occupational Safety and Health Administration Standards

Section 5 of the OSH Act sets forth a covered employer's duties. The first clause, section 5(a)(1) is called OSHA's "general duty clause" and provides that each employer must furnish its employees with a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm."⁹² In addition, under the second clause, section 5(a)(2), employers "shall comply with occupational safety and health standards promulgated under this Act."⁹³ If no specific OSHA standard has been promulgated to address a hazard, the general duty clause provides the default rule,⁹⁴ and citations will be issued if four elements are met: (1) the employer failed to keep his workplace free of a "hazard;" (2) the hazard was "recognized" either by the cited employer individually or by the employer's industry generally; (3) the recognized hazard was *causing or was likely to cause death or serious physical harm*; and (4) there was a feasible means available that would eliminate or materially reduce the hazard.⁹⁵

The Act authorized the Secretary of the Department of Labor to set the mandatory occupational safety and health standards referred to in section

author thanks Alfred W. Blumrosen for bringing this case to her attention and sharing his materials on the *Shimp* case. For state law variations on injunctive relief under other laws, such as anti-stalking legislation, *see, e.g.*, North Carolina Workplace Violence Prevention Act (N.C.G.S. §§ 95-260 et seq.).

⁹² OSHA § 5(a)(1).

⁹³ *Id.* at §5(a)(2). The OSH Act uses the term "standard" to refer to regulations promulgated by the agency and provides the rule-making procedure that must be followed. OSHA § 6(b).

⁹⁴ *See* Standard Interpretation Letter from Joseph A. Dear, Acting Assistant Secretary of the OSH Administration, to Congressman Cass Ballenger (Dec. 23, 1996), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22281 [hereinafter 1996 Standard Interpretation Letter]. The OSH Administration regulatory standards addressing specific recognized hazards are discussed more fully, *infra*.

⁹⁵ *See* Standard Interpretation Letter from Richard E. Fairfax, Dir., Directorate of Enforcement Programs, Occupational Health and Safety Admin., to Morgan Melekos (Sept. 13, 2006), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATION_S&p_id=25504, also available at 2006 WL 4093048 [hereinafter 2006 Standard Interpretation Letter]; *see also* *Bariod Div. of NL Industries, Inc. v. Occupational Safety and Health Review Comm'n*, 660 F.2d 439, 444 (10th Cir. 1981) (listing elements of general duty clause, internal citations omitted).

5(a)(2).⁹⁶ This broad grant of authority allows the Secretary to promulgate regulations that “serve[] the objectives of the Act”⁹⁷ and imposes a duty on employers to comply with regulations promulgated after notice and comment rulemaking. The Department of Labor established the OSH Administration to discharge those duties.

Before the OSH Administration can issue a regulation, it must first make a determination that the proposed regulation would reduce or eliminate a “significant risk” for workers exposed to the hazard that the proposed regulation is designed to address.⁹⁸ The Supreme Court has instructed that the risk must be sufficiently quantified “to enable the Secretary [of Labor] to characterize it as significant in an understandable way.”⁹⁹ But, the Supreme Court has acknowledged that the OSH Administration must be permitted flexibility in quantifying health risks, indicating that it did not want to place the agency in a “mathematical straitjacket.”¹⁰⁰ OSHA standards must be promulgated, modified, or revoked in accordance with the notice and comment requirements of the Administrative Procedure Act (“APA”).¹⁰¹ Under the APA, an agency seeking to promulgate a rule must first provide the public with notice of, and an opportunity to comment upon, a proposed version of it.¹⁰²

Thus, employers can be cited for violation of a specific occupational safety and health standard if the OSH Administration has promulgated a standard addressing the particular hazard at issue.¹⁰³ If the agency has not promulgated a specific standard, an employer can nevertheless be cited for violation of the general duty clause, provided the requisite elements are established.¹⁰⁴ The enforcement and penalty provisions of the Act, applicable to violations of either clause of section 5(a) are set forth in the next section.

4. OSHA’s Enforcement and Penalty Provisions

⁹⁶ OSHA § 2(b)(3).

⁹⁷ OSHA § 6(b)(1).

⁹⁸ *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 639 (1980).

⁹⁹ *Id.* at 646.

¹⁰⁰ *Id.* at 655.

¹⁰¹ 5 U.S.C. § 553; OSHA § 6(b); *see also* *Chamber of Commerce v. Dep’t of Labor, OSHA*, 174 F.3d 206, 211 (D.C. Cir. 1999) (explaining that substantive OSHA standards must follow the APA notice and comment requirements unless they are procedural or a general statement of policy).

¹⁰² 5 U.S.C. § 553.

¹⁰³ OSHA § 5(a)(2).

¹⁰⁴ OSHA § 5(a)(1).

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The OSH Administration enforces the duties contained in either the general duty clause or the specific standards through a process of compliance inspections and citations for violations. The OSH Act provides the requisite authority for inspections and investigations, and has detailed record keeping requirements.¹⁰⁵ If an inspector believes that an employer has violated the general duty clause or a standard, rule or regulation, he must issue a written citation, providing details of the violation and providing the employer with a reasonable time to abate the violation.¹⁰⁶ If an employer is cited under OSHA section 9, it may also be issued a penalty, although the employer can contest the citation and/or penalty.¹⁰⁷ Failure to correct the violation within the requisite time may also result in a penalty, which also may be contested.¹⁰⁸ The OSH Act created an Occupational Safety and Health Review Commission to carry out adjudicatory functions under the Act.¹⁰⁹ The Commission has the power to issue orders, based on findings of fact, affirming, modifying, or vacating, citations for violation of standards or a proposed penalty, or directing other appropriate relief.¹¹⁰ Final orders of the Commission are subject to judicial review.¹¹¹

Another major obstacle for bullying targets is the lack of a private civil enforcement mechanism – an employee subjected to an OSHA violation can make a complaint but the enforcement and penalties are under the auspices of the Department of Labor (“DOL”), OSHA division.¹¹² Employees can report violations, either by requesting an inspection or by reporting a violation during an inspection.¹¹³ The employee or employee representative, who are viewed as active safety and health participants

¹⁰⁵ OSHA § 8.

¹⁰⁶ OSHA § 9.

¹⁰⁷ OSHA § 10.

¹⁰⁸ OSHA § 10(b).

¹⁰⁹ OSHA § 2(b)(3), OSHA § 12.

¹¹⁰ OSHA §10(c).

¹¹¹ OSHA § 11.

¹¹² OSHA § 14. OSHA also includes a retaliation provision that provides protection for employees reporting violations. Under OSHA section 11(c)(1), employees are protected from discharge or other forms of “discrimination” because they engaged in opposition or participation activities by filing a complaint or participating in proceedings relating to the Act, or because the employee exercised any rights afforded under the Act. OSHA § 11(c)(1). An employee who believes they are suffering from retaliatory conduct must file a complaint with the Secretary of Labor and the redress “all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.” OSHA § 11(c)(2). While the anti-retaliation provision and availability of monetary relief are key provisions to encourage employees to come forward with complaints of safety or health violations, the fact remains that the employee has no private recourse and must rely on the Department of Labor to enforce his/her rights in court.

¹¹³ OSHA § 8(f)(1), (2).

under the Act,¹¹⁴ can request an inspection through the OSH Administration if they “believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists.” Prior to or during an inspection, employees have more lee-way – they may notify the inspector “of *any violation* of this Act which they have reason to believe exists in such workplace.”¹¹⁵ Further, OSHA includes a retaliation provision that provides protection for employees reporting violations.¹¹⁶

The maximum civil penalty for a “serious violation” of the general duty clause or OSHA standards regulations is \$7,000 per violation.¹¹⁷ Willful or repeated violations carry a maximum penalty of \$70,000 per violation.¹¹⁸ Criminal penalties for OSHA violations are only imposed if the violation is willful and results in death.¹¹⁹ OSHA’s penalty provisions have been the subject of harsh criticism,¹²⁰ and are cited in combination with limited OSHA resources and low inspection rates by those who deem OSHA to be an administrative failure.¹²¹ Although critics have focused on OSHA’s failings with respect to low inspection rates and safety violations that have resulted in death or serious injury, other commentators have reached the opposite conclusion, observing that OSHA has resulted in high compliance rates.¹²²

5. The Regulatory Apparatus: The Occupational Safety and Health Administration and NIOSH

¹¹⁴ See, e.g., OSHA § 5(b) (identifying employee duties).

¹¹⁵ OSHA § f(2) (emphasis added).

¹¹⁶ OSHA § 11(c)(1).

¹¹⁷ OSHA § 17(b). A “serious violation” is a citation for hazards that pose a substantial probability to cause serious physical harm or death to an employee. *Id.* § 17(k).

¹¹⁸ OSHA §17(a).

¹¹⁹ OSHA §17(e). The penalty for conviction is a maximum fine of \$10,000 or six months imprisonment. *Id.* Some prominent critics of OSHA have called for a strengthening of OSHA’s criminal penalties to provide a greater deterrence and increase compliance. See, e.g., David M. Uhlmann, *Prosecuting Worker Endangerment: The Need for Stronger Criminal Penalties for Violations of the Occupational Safety and Health Act*, American Constitution Society for Law and Policy, September 2008, available at [www.http://ssrn.com/abstract=1262922](http://www.ssrn.com/abstract=1262922) (making the case for, *inter alia*, enhanced penalties, extending the criminal provisions to include cases involving “serious bodily injury and knowing endangerment,” and extending individual liability to certain supervisors).

¹²⁰ See generally Lobel, *The Governance of Workplace Safety*, *supra* note 13, at 1082-1084 (citations omitted).

¹²¹ *Id.*

¹²² See, e.g., David Weil, *If OSHA is So Bad, Why is Compliance So Good?* 27 RAND J. OF ECON. 618 (1996) [hereinafter *If OSHA Is So Bad*].

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The OSH Act utilizes two mechanisms to regulate employer behavior. The first mechanism is traditional enforcement, using inspection and penalties, and the second mechanism relies on a more collaborative approach, using consultation programs, OSHA-employer partnerships, guidelines and tool kits.¹²³ Thus, in creating the Act, Congress created both the OSH Administration and NIOSH, with both agencies utilizing the collaborative and cooperative techniques to inform and guide employment practice. The OSH Administration's traditional enforcement power is described in Parts II.A.3-4, *supra*, and the OSH Administration's voluntary compliance programs are discussed in Part II.B., *infra*.

In enacting OSHA, Congress also created NIOSH, under the auspices of the Department of Health and Human Services ("DHHS"), to carry out the Act's policy, primarily by fulfilling the research and training aspects of the Act.¹²⁴ The Act expressly authorized the Secretary of the DHHS to conduct "research, experiments, and demonstrations relating to occupational safety and health, including studies of psychological factors involved, and relating to innovative methods, techniques, and approaches for dealing with occupational safety and health problems."¹²⁵ The Act also expressly authorized the DHHS Secretary to conduct educational and informational programs to carry out the purposes of the Act.¹²⁶

NIOSH can undertake its own research, review existing research of contract research to organizations outside the agency. NIOSH can take several years to review and analyze data about a hazard, and if it ultimately issues any recommendations, they are approved by both the Director of NIOSH and the DHHS General Counsel and forwarded to the Secretary of Labor.¹²⁷ Although NIOSH has no authority to promulgate standards and no enforcement power, it is clearly a guiding player in the development of new standards, rules and guidelines.¹²⁸ NIOSH's

¹²³ OSHA section 23 includes provision for grants to the states, ninety percent funded by the federal government. The OSH Administration, for example, offers an "on-site consultation program" which allows states to offer free consultations and/or training programs at an employer's request, targeted at small and medium-sized businesses. See OSHA On-Site Consultation, available at <http://www.osha.gov/dcsp/smallbusiness/consult.html>.

¹²⁴ OSHA § 22. Under section 22(d), NIOSH research may be initiated at the request of the Secretary of Health and Human Services or upon the NIOSH director's initiative, or at the request of an employer.

¹²⁵ OSHA § 20.

¹²⁶ OSHA § 21(a)(1), (2).

¹²⁷ OSHA § 22(d).

¹²⁸ To facilitate cooperation between NIOSH and OSHA, the agencies have entered into an agreement that covers the development of standards, compliance assistance and the

like. 44 Fed. Reg. 22,834 (1979).

¹²⁹ 51 Fed. Reg. 33, 669-70 (1986). For a detailed description of the VPP, see Lobel, *The Governance of Workplace Safety*, *supra* note 13, at 1105-06.

¹³⁰ Depending on the level of safety achieved, employers can attain various levels of participation status which in turn reduces OSHA's level of compliance inspections.

¹³¹ See Lobel, *The Governance of Workplace Safety*, *supra* note 13, at 1105-06. Other programs include a Safety and Health Achievement Recognition Program (the SHARP program) and the Strategic Partnership Program, both aimed at businesses in high hazard industries. These programs include on-site consultation programs and cooperative relationships. See Lobel, *supra* note 13, at 1106; 29 CFR 1908.7(c)(4) (1996).

¹³² See ILISE L. FEITSHANS, BRINGING HEALTH TO WORK, *Recent Developments in Four Nations*, 45 (1997) (citing comments by Cathy Oliver, Chief, OSHA Division of Voluntary programs). See also 54 Fed. Reg. 3904-3916 (1989) (highlighting success of VPP programs as impetus behind agency's issuance of management guidelines for all industries).

¹³³ OSHA, Alliance Program, <http://www.osha.gov/dcsp/alliances/index.html>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ OSHA *Voluntary Safety and Health Program Management Guidelines*, 54 Fed. Reg. 3904-3916 (Jan. 26, 1989), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=12909&p_table=FEDE_RAL_REGISTER.

¹³⁷ OSHA, Training, <http://www.osha.gov/dcsp/ote/index.html>.

¹³⁸ OSHA § 23.

¹³⁹ See OSHA On-Site Consultation, available at <http://www.osha.gov/dcsp/smallbusiness/consult.html>. High-hazard worksites are given priority for services under this program. *Id.*

¹⁴⁰ See OSHA On-Site Consultation, available at <http://www.osha.gov/dcsp/smallbusiness/consult.html>.

¹⁴¹ *Id.*

¹⁴² See generally Morantz, *supra* note 82. The Morantz study confirmed that state-plan states tend to rely more heavily on non-traditional enforcement, for example, state-plan states receive twenty-five percent higher on-site consultations than federal plan states. *Id.* at 16-17. State-plan states are also more lax in traditional enforcement and although they have more inspections than federal-plan states, they issue less citations and lower fines. *Id.*

¹⁴³ See *id.* at 78.

¹⁴⁴ *Id.* Although there are no comprehensive studies of the efficacy of such committees on outcomes generally, Morantz found that the presence of such laws did *not* independently affect injury and death rates in her study of the custom woodworking industry. *Id.* at 29 n.17.

¹⁴⁵ Now called the Government Accountability Office.

¹⁴⁶ Lobel, *The Governance of Workplace Safety*, *supra* note 13, at 1085 (citing GAO findings).

¹⁴⁷ Lobel, *The Governance of Workplace Safety*, *supra* note 13, at 1095 (citing GAO 2004 report).

¹⁴⁸ Lobel, *The Governance of Workplace Safety*, *supra* note 13, at 1095 (citing to OSHA website).

¹⁴⁹ Lobel, *supra* note 13, at 1111-13. See also FEITSHANS, *supra* note 132, at 46. Feitshans explains that VPP is viewed by labor as a free-ride for businesses, with very little input from employees. *Id.* On the other hand, VPP is criticized by employers who see it as

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activities have focused on health hazards, and NIOSH is therefore the agency most likely to engage in research on workplace bullying.

B. OSHA's Voluntary Compliance Programs

The OSH Administration has been developing a holistic, integrative approach for several years by supplementing its traditional enforcement activities with voluntary compliance programs. One of the early programs

another form of regulation; small businesses complain that because it does not apply to small businesses it therefore favors large businesses, and large businesses complain that it is too difficult to implement because each worksite is different. *Id.* Lobel notes some of the same criticisms, notably the lack of employee involvement, *see* Lobel, *supra* note 13, at 1114, which is similarly seen as crucial by other commentators, *see* FEITSHANS, *supra* note 132, at 46 (citing concerns by a union leader that VPP programs need a lot of union oversight to work effectively and in non-union settings lack employee input and are therefore employer-oriented).

¹⁵⁰ Lobel, *supra* note 13, at 1114.

¹⁵¹ *Id.* Voice mechanisms can lead to a perception of control over the harassment situation and even if the mechanism is not used, it may act as a “buffer” for some of the adverse effects of harassment. Hershcovis & Barling, *supra* note 53. This voice buffer is not currently available for workplace bullying because of the lack of regulation and lack of mechanisms in place in most organizations to report this type of harassment. *Id.* (positing that voice mechanisms for sexual harassment may have an impact on the severity of the effect on the target but recognizing that more research is needed to correlate perception of control with impact).

¹⁵² Lobel surveys Congressional attempts to overhaul OSHA, focusing on President Clinton's 1995 “New OSHA” initiative, which included a Cooperative Compliance Program to encourage dangerous workplaces to enter into OSHA partnerships or risk targeted enforcement. Lobel, *supra* note 13, at 1116-17. These wide-ranging efforts to overhaul OSHA are beyond the scope of this article and the reader is referred to Professor Lobel's comprehensive summary. The program failed in part because it was not promulgated in accordance with notice and rule making procedures under the Administrative Procedures Act, 5 U.S.C. § 553, and was invalidated on that basis by the U.S. Court of Appeals for the District of Columbia. *Id.* at 54-55 (citing *Chamber of Commerce v. Dep't of Labor, OSHA*, 174 F.3d 206 (D.C. Cir. 1999)).

¹⁵³ This is part of larger question of how to measure the impact of preventative measures on safety and health in general and stress in particular. In part, long-term studies of workplace stress, with a delineated focus on bullying, are needed. OSHA experts have long made this same point - new methodologies are needed to study the impact of compliance programs that seek to change corporate behavior. FEITSHANS, *supra* note 132, at 48.

¹⁵⁴ Although a senior OSHA official has indicated OSHA's intention to use the general duty clause to cite employers for workplace violence hazards, to date this effort has not received the attention from the agency that it deserves. Remarks of Jordan Barab, Acting Assistant Secretary for the Occupational Safety and Health Administration (May 12, 2009) (comments during the American federation of State, County, and Municipal Employees' Nurses Congress), available at 77 U.S.L.W. 2687 (May 15, 2009).

¹⁵⁵ OSHA § 3(8).

was the Voluntary Protection Program (“VPP”), begun in the 1980s. The VPP exempts employers from routine inspections based on the employer’s safety programs and safety record.¹²⁹ Employers participating in the VPP at the “Star” level,¹³⁰ for example, must design an approved safety and health program, implement prevention and control procedures and a system of notification and responses to hazards, and demonstrate injury rates that are lower than the industry average.¹³¹ The VPP model boasts success in reducing injury and lost work days at VPP work sites by 50 percent of the national average, and OSHA has touted the added benefits of VPP as improving production, reducing absenteeism, and lowering workers’ compensation costs.¹³²

Another program that might provide an appropriate fit for workplace bullying is the Alliance Program.¹³³ Rather than focusing on firm-level safety and health, the Alliance Program applies more broadly on the industry level.¹³⁴ OSHA describes this program as working such as “businesses, trade or professional organizations, unions and educational institutions, to leverage resources and expertise to develop compliance assistance tools and resources and share information with employers and employees to help prevent injuries, illnesses and fatalities in the workplace.”¹³⁵

The OSH Administration also issues voluntary general training and information programs, such as the Voluntary Safety and Health Program Management Guidelines,¹³⁶ some of which are relevant to workplace violence and stress, and are discussed more fully in Part III. The agency also operates an OSHA Training Institute and Training Grant Program,¹³⁷ both of which could be harnessed to provide training and counseling in workplace bullying, but both of which lack any incentives or enforcement mechanism in the event of employer failure to self-regulate.

Although OSHA’s guidelines seem to have been based on the success of the VPP program, these programs do not utilize any VPP-type firm-level incentives such as reduced inspections or reduced penalties; these programs tend to focus on industry-wide practices rather than dealing with a specific business. As such, they are more flexible and can apply to a variety of work settings (union, non-union, small or large businesses) but obviously lack incentive-based teeth or “exit” in the event of non-compliance or other problems.

At the state level, OSHA section 23 provides for federal grants to the states for occupational safety and health programs, funding up to ninety

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percent of the program.¹³⁸ One such program is the OSH Administration's "on-site consultation program" which allows states to offer free consultations and/or training programs at an employer's request, targeted at small and medium-sized businesses.¹³⁹ The service is, as the program name suggests, a consultation service that usually takes place at the employer's work-site, it is free for employers and delivered through the state government. Through this program, employers can learn "about potential hazards at their worksites, improve their occupational safety and health management systems, and even qualify for a one-year exemption from routine OSHA inspections."¹⁴⁰ Because it is voluntary, it is not part of the OSHA inspection program and no citations or penalties are attached.¹⁴¹ States tend to rely more heavily on non-traditional enforcement¹⁴² and this could be another resource for states to use in addressing workplace bullying.

Other initiatives at the state level include state laws beginning in the 1990s that mandated the establishment of "safety and health committees" at large companies.¹⁴³ These safety and health committees were comprised of managers and workers, who could jointly discuss and make recommendations regarding safety issues.¹⁴⁴

The Government Accounting Office ("GAO")¹⁴⁵ has reported that the OSH Administration is increasingly utilizing these voluntary collaborative programs, devoting an increasing portion of its budget to them.¹⁴⁶ These collaborative approaches appear to have been successful; the GAO issued a 2004 report concluding that these collaborative techniques had improved safety and health outcomes, with participation reducing injury and illness rates,¹⁴⁷ and the OSH Administration reports similar findings.¹⁴⁸

Despite the apparent success of these programs, OSHA's increasing reliance on these voluntary and largely self-regulating approaches has nevertheless come under attack. The obvious cause for concern is that any movement away from traditional enforcement is seen as a deregulatory effort by government in the face of employer-backed pressure.¹⁴⁹ Without any incentives for employers to participate, or sanctions for non-compliance or failure, these mechanisms lack teeth and allow employers to avoid safety and health obligations; this is described by Lobel as the "exit" problem.¹⁵⁰ Moreover, lack of employee or union involvement in structuring alliances has led to dissatisfaction from workers; this is described by Lobel as a problem of "voice."¹⁵¹ The main problem with alliances, voluntary guidelines and the like is naturally their lack of teeth; because they are not promulgated through the proper rule-making

procedure, they lack any ties to either punitive measures or incentives, hence the criticism that they lack any real value as a tool for changing workplace behavior or culture.

Any attempt to harness OSHA's collaborative mechanisms or to create a new strategy or program must consider the problems of lack of exit and voice by involving employees and union, and grass root organizations such as the Workplace Bullying Institute, and by incorporating a mixture of incentives for employers who develop a workplace bullying program, as well as providing recourse through enforcement of the general duty clause for violation of the duty to keep the workplace free from this hazard.¹⁵² OSHA has in fact already established this two-pronged approach in such programs as VPP, combining regulatory enforcement with voluntary compliance. A compliance program addressing workplace bullying (or other types of workplace violence) must follow the best practices established by existing OSHA programs and effectively capture the exit and voice issues identified by scholars such as Orly Lobel. Measuring the success of any VPP-type programs obviously raises difficult questions as to how to quantify success – one major objective of such a program would be to change corporate culture but how is this quantified? OSHA would need to develop a methodology to measure performance and success, such as the number of businesses adopting a workplace bullying policy or implementing a training and information program.¹⁵³

III. APPLYING THE REGULATORY REGIME OF OSHA AND NEW GOVERNANCE PRINCIPLES TO WORKPLACE BULLYING

Given OSHA's broad federal mandate, there seems to be little doubt that the OSH Administration and NIOSH could identify workplace violence as a considerable safety and health concern, and bullying as a sub-set of that concern. Bullying has been understood for many years to be a form of workplace violence by the International Labour Organization and by other countries. It is not a huge leap for the OSH Administration to interpret the general duty clause to cite employers who do not address bullying in the workplace,¹⁵⁴ and it is not beyond the realm of possibility for OSHA to promulgate a standard addressing workplace bullying. At a minimum, OSHA and NIOSH should initiate employer/employee guidelines on the issue. Workplace bullying is a safety and health concern – OSHA regulation should be part of the solution.

Although the general duty clause's clear focus is on physical injury,

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research shows that workplace bullying can lead to physical harms. Moreover, the Act's broad mandate to the administrative agencies to develop standards, under OSHA section 2(a)(2), is not so limited. For example, OSHA defines the term "occupational safety and health standard" as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."¹⁵⁵ Because the objectives of the Act are to provide safe and healthful working conditions, apparently without limitation to only those conditions that may cause death or physical injury, the Secretary arguably has broad authority to promulgate regulations addressing workplace bullying. This conclusion is further buttressed by the mechanisms through which Congress envisioned the purposes of the Act would be attained.

A. The Occupational Safety and Health Administration and NIOSH – Existing Standards and Guidelines That Address Workplace Bullying

Although the OSH Administration has not promulgated any standards specifically addressing workplace bullying,¹⁵⁶ it has issued letters of interpretation and guidance documents that address the wider problem of workplace violence. In addition, the agency has issued some helpful statements in the context of a proposed record-keeping and reporting rule in 2001. These interpretations, guidelines and other agency statements provide a framework from which to develop an overview of the agency's policy position and potential receptiveness to including workplace bullying as a workplace health hazard, which in turn could help direct and guide creation and implementation of a new compliance program.

In 2001, the OSH Administration revised certain record-keeping requirements.¹⁵⁷ Under the 2001 revised rule, work-related violence that causes stress or mental illness, such as depression or anxiety disorder, can be considered an occupational injury that requires recording and

¹⁵⁶ See, e.g., 2006 Standard Interpretation Letter (stating that "OSHA is the organization within the Department of Labor that addresses hazards in the workplace, including workplace violence" and recognizing that no such standards exist). See also Dayna B. Royal, *Take Your Gun To Work and Leave it in the Parking Lot: Why the OSH Act Does Not Preempt State Guns-at-Work Laws*, 61 FL. L. REV. __ n.228 (forthcoming 2009) (citing OSH Administration recognition that no standards address workplace violence); see generally *Efforts to Prevent Workplace Violence Slow in Coming from Federal OSHA Program*, 23 O.S.H. Rep. (BNA) 334 (Aug. 25, 1993).

¹⁵⁷ See 29 C.F.R. Part 1904.

reporting.¹⁵⁸ In order for a mental illness to be recordable, the employee must voluntarily provide the employer with an opinion from a physician or other licensed health care professional with appropriate training and experience (psychiatrist, psychologist, psychiatric nurse practitioner, etc.) stating that the employee has a mental illness that is work-related, and the case must meet one or more of the general recording criteria.¹⁵⁹

The comments received in the rule-making process and the OSH Administration's responses reveal the agency's views on whether psychological injury and illness caused by work-related violence falls within the ambit of the OSH Act. The proposed rule would have limited the recording/reporting requirement for mental illness work-related incidents to apply only to post-traumatic stress disorder,¹⁶⁰ but the OSH Administration decided to extend the final rule after reviewing the comments and record on the issue.¹⁶¹ The agency explained that limiting the requirement to only those instances where PTSD resulted:

[I]s not consistent with the statute or the objectives of the recordkeeping system, and is not in the best interest of employee health. The OSH Act is concerned with both physical and mental injuries and illnesses, and in fact refers to "psychological factors" in the statement of Congressional purpose in section 2 of the Act (29 U.S.C. 651 (b)(5)).¹⁶²

In removing the proposed PTSD limitation, the agency expressly acknowledged that Congressional intention was to include mental injury and illness in the Act's coverage, and that a textual reading of the Act confirms that mental (or psychological) injury and illness are covered under the Act, to the extent they are work-related.

Comments received in response to the 2001 proposed rule also help illuminate the viewpoints of the agency and interested commentators from industry on the issue of violence generally, and are likely to be indicative of the response that could be expected should the OSH Administration attempt to promulgate a specific regulation addressing workplace violence in general or bullying.

¹⁵⁸ See 29 C.F.R. 1904.5(b)(2)(ix) & 1904.7. The final rule with comments and the OSH Administration's responses was published at 66 F.R. 5916 (2001).

¹⁵⁹ 29 C.F.R. 1904.5(b)(2)(ix).

¹⁶⁰ Further, the proposed rule included an exception for *Cases Resulting From Acts of Violence by Family Members or Ex-spouses When Unrelated to Employment, Including Self-inflicted Injuries*. 66 FR 5916 (2001), Proposed Exception B-6.

¹⁶¹ 29 C.F.R. 1904. The final rule departed substantially from the proposed rule and only excepts self-inflicted injuries from the recording/reporting requirements. *Id.*

¹⁶² 66 FR 5916 (2001), Proposed Exception B-6.

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As noted by OSHA, the comments fell into four categories:

(1) those urging OSHA to require the recording of all cases of violence occurring at the establishment; (2) those recommending that no violence cases at the establishment be recorded; (3) those recommending recordation only of violence cases perpetrated by certain classes of individuals; and (4) those urging OSHA to require the recording of cases involving violence related to employment without regard to the perpetrator.¹⁶³

Two comments from businesses were noteworthy. The Quaker Oats Company opposed any inclusion of workplace violence as a work-related hazard, opining that workplace violence “in any form is a personal criminal act,”¹⁶⁴ vehemently asserting that “in no way, shape or form should violence be labeled under hazards in the workplace or even [be] monitored by OSHA.” This business leader does not apparently consider workplace violence an issue of industrial safety or any of OSHA’s business.¹⁶⁵

Other businesses reiterated the same view, that workplace hazards do not include violence or tortuous behavior by employees or others who may enter the workplace. The National Restaurant Association, perhaps concerned with violent or tortuous behavior by customers more than between co-workers, stated a commonly held view that employers simply cannot control individual behavior.¹⁶⁶ The Association directly contradicted the OSH Administration’s reading of the Act, stating that Congress passed the Act to deal with hazards that the employer could identify and possibly protect – apparently believing that an employer cannot identify or control unpredictable social behavior, which should be a matter left to law enforcement and state tort law.¹⁶⁷

¹⁶³ 66 FR 5916 (2001), Proposed Exception B-6.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (comments by the Quaker Company). The company categorically stated that: “A person who may turn to violent behavior from family, personal, or job dispute is a matter of NLRB [National Labor Relations Board], law enforcement or state employment statutes, not industrial safety.”

¹⁶⁶ *Id.* (comments by the National Restaurant Association).

¹⁶⁷ *Id.* The Association accused the agency of attempting to overrule by regulation OHS Review Commission precedent on the issue of workplace violence, citing the case of Secretary of Labor v. Megawest Financial, Inc., OSHRC Doc. No. 93-2879 (June 19, 1995). See 66 FR 5916 (2001), Proposed Exception B-6 (comments by the National Restaurant Association). *Megawest Financial, Inc.*, is discussed more fully, *infra*. For purposes of this commentary, a decision by the Review Commission should not control the OSH Administration’s authority to issue standards under OSHA section 5(a)(2).

On the other hand, some commentators recognized that violence at work *is* sometimes work-related and therefore within OSHA's purview and within the employer's power to control.¹⁶⁸ Ultimately, the agency agreed with a broader reading of the Act that is consistent with Congressional findings and purposes, as well as the actual text of the statute. The agency cogently explained how workplace violence is indeed a work-related injury or illness:

OSHA believes that injuries and illnesses resulting from acts of violence against employees at work are work-related under the positional theory of causation. The causal connection is usually established by the fact that the assault or other harmful event would not have occurred had the employee not, as a condition of his or her employment, been in the position where he or she was victimized. Moreover, occupational factors are directly involved in many types of workplace violence, such as assaults engendered by disputes about working conditions or practices, or assaults on security guards or cashiers and other employees, who face a heightened risk of violence at work. Accordingly, OSHA does not accept the premise, advanced by some commenters [sic], that workplace violence is outside the purview of the statute.¹⁶⁹

In 1992 and 1996, the OSH Administration issued Standard Interpretation letters regarding workplace violence, and interpreted employers' obligations under the general duty clause to include taking feasible steps to minimize the risk of violence "in a workplace where the risk of violence and serious personal injury are significant enough to be 'recognized hazards'."¹⁷⁰ The agency stated its position that an employer could be cited for an OSH Act violation under the general duty clause where it failed to abate such a hazard.¹⁷¹ Although these interpretations specifically addressed guns in the workplace, and workplace violence includes physical harm that would unquestionably fall within the OSH Act's ambit, it is clear that psychological bullying is a form of workplace violence that the OSH Administration could also engage. The agency's

¹⁶⁸ See, e.g., remarks of the National Oilseed Processors Association, although asking for a broader exception, stating that violence at work is work-related "when it is associated with a work issue and committed by an employee or other person linked to the business, e.g., a customer." 66 FR 5916 (2001), Proposed Exception B-6.

¹⁶⁹ *Id.* at 1595-96.

¹⁷⁰ See Standard Interpretation Letter from Roger A. Clark, Dir., Directorate of Enforcement Programs, Occupational Safety and Health Admin., to John R. Schuller (Dec. 10, (1992), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATION_S&p_id=20951 [hereinafter 1992 Standard Interpretation Letter]; 2006 Standard Interpretation Letter, *supra* note 95 (quoting the 1992 Standards Interpretation Letter).

¹⁷¹ *Id.*

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pronouncements on workplace violence do not appear to limit its understanding of workplace violence to incidents that involved physical harm, and the agency is adept at drawing upon Congress's broad purpose.

OSHA has also developed training materials for specific industries – Health Care and Social Service Workers, late night retail establishments, and hospitals.¹⁷² These are based on the agency's general management guidelines, which were published in 1989. These general guidelines resulted from the OSH Administration's recognition of the strong correlation between reduction of workplace hazards and effective management training of worker safety and health protection.¹⁷³ The OSH Administration specifically recognized that effective management training must address *all* work-related hazards, whether or not they are regulated by government standards, and acknowledged that effective management also improves employee morale and productivity, reducing workers' compensation costs and other "less obvious" costs of work-related illness.¹⁷⁴ The empirical and policy based reasoning behind these general guidelines applies with equal force to management involvement and effective training in worker protection from the workplace hazard of bullying.¹⁷⁵

In 1996, the agency issued general guidance to employers on workplace violence awareness and prevention.¹⁷⁶ In its 1996 Workplace Violence Awareness and Prevention Guidelines, the OHS Administration recognized that workplace violence includes harassment and threats, in addition to death or physical injury,¹⁷⁷ apparently adopting NIOSH's definition of workplace violence:

¹⁷² OSHA, Salt Lake Technical Centre, <http://www.osha.gov/SLTC/etools/hospital/hazards/workplaceviolence/viol.html>.

¹⁷³ OSHA, *Voluntary Safety and Health Program Management Guidelines*, 54 Fed. Reg. 3904 (Jan. 26, 1989).

¹⁷⁴ *Id.*

¹⁷⁵ For a discussion of the role of training, in addition to communication and other mechanisms such as dispute resolution, in addressing workplace violence *see generally* Frances E. Zollers & Elletta Sangrey Callahan, *Workplace Violence and Security: Are There Lessons for Peacemaking?*, 36 VAND. J. TRANSNAT'L L. 449 (2003). Zollers and Callahan adopt a comprehensive definition of workplace violence that includes psychological harm. *Id.* at 452.

¹⁷⁶ OSHA, *Workplace Violence Awareness and Prevention*, February, 1996, available at http://www.osha.gov/workplace_violence/wrkplaceViolence.Table.html (last visited May 11, 2009).

¹⁷⁷ 1996 OSHA *Workplace Violence Awareness and Prevention*, Part I, *Facts and Information*, at 1, available at http://www.osha.gov/workplace_violence/wrkplaceViolence.PartI.html.

[A]ny physical assault, threatening behavior or verbal abuse occurring in the work setting. It includes but is not limited to . . . *psychological traumas* such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as being followed, sworn at or shouted at.¹⁷⁸

OSHA also recognized that the perpetrator of workplace violence can be a current, former or even prospective co-worker or supervisor, and that violence can occur in the workplace or off premises.¹⁷⁹ Most significantly, the 1996 OSHA guidance appears to accept an interpretation of the general duty clause as encompassing violence as a workplace hazard, thereby imposing an affirmative legal obligation on employers to keep the workplace free of such hazards. The guidelines advise that employers who become aware of threats or intimidation “or other potential indicators showing that the potential for violence in the workplace exists or has the potential to exist” are on notice of the risk and “may be required to implement a workplace violence prevention program.”¹⁸⁰ The agency stated that employers have both a legal and moral obligation to provide a safe workplace, and embraced the notion that:

To prevent loss of life and injuries and to limit financial losses and potential liability, employers should institute policies and procedures to prevent violence from occurring in their workplaces. These policies may include means to identify the potential for violence, procedures to prevent the occurrence of violence and, in the event prevention fails and an incident of violence occurs, plans to respond and mitigate further damage.¹⁸¹

Of course, whether the general duty clause is implicated in a workplace bullying incident must be decided on a case-by-case basis; the OSHA inspector considering a complaint would need to determine the recognizability and foreseeability of the hazard, and the feasibility of the means of abatement. This article merely seeks to explore the possibility of pursuing the general duty clause as a means to redress workplace bullying, and concludes that this is within the parameters of OSHA generally and Section 5(a)(1) in particular.

As part of the 1996 Workplace Violence Guidelines, the OSH Administration recommended that every employer establish, implement and maintain a prevention program and policy including training and dispute

¹⁷⁸ *Id.* at 3 (emphasis added). OSHA compared the law enforcement community definition, which includes harassment. *Id.* at n.6.

¹⁷⁹ *Id.* at 4.

¹⁸⁰ *Id.* at 4.

¹⁸¹ *Id.* at 4.

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resolution and active involvement of EAP personnel.¹⁸² The agency has identified four general components for an effective safety and health program targeting workplace violence: (1) management commitment and employee involvement; (2) work site analysis; (3) hazard prevention and control; and (4) safety and health training; and (5) evaluation.¹⁸³ In addition, the OSHA guidelines require that employers institute several recommended management steps, including, for example, allocating sufficient resources to the prevention of violence, developing a system of accountability for implementing a violence prevention program, and creating a zero-tolerance policy for workplace violence, among others.¹⁸⁴ Of course, prevention efforts such as a zero-tolerance policy can only be effective if appropriate personnel are trained in the existence and implementation of the policy.¹⁸⁵

The OSH Administration has even prepared a sample Workplace Violence Prevention program, and policy for employers to follow.¹⁸⁶ Finally, the OSH Administration was a member of a coalition that developed an informational and instructional document for use by employers and employees, which largely mirrored the OSHA guidelines.¹⁸⁷ In sum, the OSH Administration's guidelines, interpretations, and other

¹⁸² *Id.* Part II, at 1, *Elements of a Workplace Violence Prevention program*, available at http://www.osha.gov/workplace_violence/wrkplaceViolence.PartII.html.

¹⁸³ OSHA, Recommendations for Workplace Violence Prevention programs in Late-Night Retail Establishments (1998), <http://www.osha.gov/Publications/osha3153.html>.

¹⁸⁴ See 1996 OSHA *Workplace Violence Awareness and Prevention*, Part I, *Facts and Information*, at 1, available at http://www.osha.gov/workplace_violence/wrkplaceViolence.PartI.html; see also OSHA, Recommendations for Workplace Violence Prevention programs in Late-Night Retail Establishments (1998), <http://www.osha.gov/Publications/osha3153.html>. See also SHRM 2004 Survey, *supra* note 43, at 3, 12-13 (survey of human resource professionals who reported that zero tolerance policies are favored by organizations hoping to deter liability for acts of violence in the workplace).

¹⁸⁵ *Id.* at 12-13 (finding disconnect between the number of organizations with zero-tolerance policies and training in the policies for human resource and other personnel. Also finding that large organizations are more likely to have zero-tolerance policies than smaller businesses). See also OSHA 2002 Workplace Violence Factsheet (stating that the best protection employers can offer is a zero tolerance policy towards workplace violence, but noting it is critical that employees know the policy and understand that all claims of workplace violence will be investigated and remediated. Also stating that the general duty clause can be used by the OSH Administration to cite employers who do not take "reasonable steps" to prevent or abate a recognized violence hazard).

¹⁸⁶ 1996 OSHA *Workplace Violence Awareness and Prevention*, Part III, available at http://www.osha.gov/workplace_violence/wrkplaceViolence.PartIII.html.

¹⁸⁷ Long Island Coalition for Workplace Violence Awareness and Prevention, *Workplace Violence Awareness & Prevention*, February 1996, available at http://www.osha.gov/workplace_violence/wrkplaceViolence.intro.html. The coalition included OSHA, New York states agencies, insurers, employers, and unions. *Id.*

official pronouncements evidence the agency's general willingness to pursue a broad interpretation of the general duty clause, and the agency's authority to tackle workplace violence and associated *psychological* illness and injury as an occupational health hazard.

NIOSH has been more proactive with respect to workplace conditions that most directly implicate bullying, as opposed to workplace violence generally. NIOSH, although created by the OSH Act, falls under the auspices of the Centers for Disease Control and Congress chose not to cede any rule-making or enforcement authority to NIOSH; NIOSH guidelines and studies are to be viewed as advisory. Nevertheless, NIOSH is the innovative arm of the OSH Act's safety and health apparatus, and is ahead of its sister-agency, the OSH Administration, in addressing workplace bullying. In the 1990's, NIOSH worked as part of a collaborative initiative to develop NORA – the National Occupational Research Agenda. NORA's goal is to guide safety and health research for the future, for NIOSH and “the entire U.S. occupational safety and health community.”¹⁸⁸ As part of that initiative, NIOSH worked with external partners from industry, labor and academia, to develop a research agenda on work organization, which includes work organization and health issues such as stress.¹⁸⁹

Although NIOSH had previously identified workplace violence as an occupational hazard,¹⁹⁰ in 1999, NIOSH studied and identified workplace *stress* as a workplace hazard for the first time, issuing Publication 99-101.¹⁹¹ Although the 1999 study did not provide any policy direction or guidance,¹⁹² this early effort was eventually followed by more studies and publications,¹⁹³ all part of NIOSH's Job Stress Research Program which

¹⁸⁸ National Institute for Occupational Safety and Health Research Agenda, <http://www.cdc.gov/niosh/NORA/>.

¹⁸⁹ National Institute for Occupational Safety and Health Research Agenda, <http://www.cdc.gov/niosh/topics/stress/#nora>.

¹⁹⁰ National Institute for Occupational Safety & Health, *Violence in the Workplace, Risk Factors and Prevention Strategies*, Current Intelligence Bulletin 57, Risk Factors and Prevention Strategies, Division of Safety Research, June 1996, available at <http://www.cdc.gov/niosh/violcont.html>.

¹⁹¹ NIOSH, *Stress . . . At Work*, Publication 99-101 (1999), available at <http://www.cdc.gov/niosh/atwork.html>.

¹⁹² Yamada, *Workplace Bullying*, *supra* note 16, at n. 315.

¹⁹³ See NIOSH, *Working With Stress* (2002), available at <http://www.cdc.gov/niosh/docs/video/stress1.htm>. NIOSH studies and guidelines on violence and stress include the following: “Violence in the Workplace, Risk Factors and Prevention Strategies”, National Institute for Occupational Safety & Health, Current Intelligence Bulletin 57, Risk Factors and Prevention Strategies, Division of Safety Research, June 1996, available at <http://www.cdc.gov/niosh/violcont.html>; *Stress at Work*

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has the primary goals of understanding work organization factors on stress, illness and injury, and to “identify ways to redesign jobs to create safer and healthier workplaces.”¹⁹⁴ One of the Job Stress Research Program’s research topics is psychological violence in the workplace and in 2004, NIOSH published the results of a study specifically addressing workplace bullying.¹⁹⁵ NIOSH has thus tended to view workplace bullying as an occupational hazard related to stress and may have moved away from viewing it as a sub-set of workplace violence.

NIOSH’s job stress study defined bullying as “repeated intimidation, slandering, social isolation, or humiliation by one or more persons against another.”¹⁹⁶ As stated earlier, the study was a small-scale study and found that approximately 24 percent of companies reported some degree of bullying had occurred within the organization during the preceding year, and was most commonly worker-to-worker, or horizontal bullying.¹⁹⁷ The 2004 preliminary results recommended that further research was needed before NIOSH could offer more definitive recommendations – the only recommendation offered was a weak suggestion that efforts to institute organizational change should not focus on supervisor or client bullying, but should focus on steps to reduce co-worker bullying, but did not provide any further guidance on what those steps might look like.¹⁹⁸ To date, NIOSH does not appear to have followed up on its own recommendations.

B. Cases addressing OSHA and Workplace Violence or Bullying

Case law addressing workplace bullying as an occupational safety and health concern is non-existent, and case law addressing workplace violence generally is sparse, perhaps due in part to the lack of attention this problem has received from the legal community. An Administrative Law Judge heard an appeal of an OSHA citation for workplace violence in *Sec’y of Lab. v. Megawest Financial Inc.*¹⁹⁹ In response to employee complaints

(1999), available at <http://www.cdc.gov/niosh/atwork.html>; *Violence on the Job* (2004), available at <http://www.cdc.gov/niosh/docs/video/violence.html>; *Working with Stress* (2002), available at <http://www.cdc.gov/niosh/docs/video/stress1.html>; *Occupational Violence*, available at <http://www.cdc.gov/niosh/injury/traumaviolence.html>.

¹⁹⁴ NIOSH, *Stress at Work*, <http://www.cdc.gov/niosh/topics/stress/>.

¹⁹⁵ NIOSH, *Update: Most Workplace Bullying Is Worker To Worker, Early Findings From NIOSH Study Suggest* (July 28, 2004), <http://www.cdc.gov/niosh/updates/upd-07-28-04.html>.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ 1995 OSAHRC LEXIS 80, OSHRC Docket No. 93-2879 (May 8, 1995).

that the employer had failed to institute safety measures to protect the office staff in a residential apartment complex from violent conduct of the residents, namely “threats or belligerent conduct and, on a few occasions, [] physical attack.”²⁰⁰ An OSH inspector investigated the complaint and ultimately cited the employer under the general duty clause for failure to keep the workplace free from the serious recognized hazard of violence.²⁰¹

On appeal, the ALJ Nancy Spies first recognized that the general duty clause only covers “incidents giving rise to serious physical injuries or death.”²⁰² She then acknowledged that the employer’s duty with respect to workplace violence was a new question for OSHA, although recognizing that studies were beginning to highlight the problem of workplace violence and that “conduct may range from harsh uncivil language to threats or to serious physical attacks and homicides.”

Noting that there were no OSHA standards addressing workplace violence, Judge Spies opined that perhaps there should be, stating a preference for agencies such as OSHA to utilize formal rule-making procedures in order to give employers the opportunity to comment and formulate the rule and to provide to employers fair notice of what is expected.²⁰³ Addressing the four elements, Judge Spies found that OSHA had established the first element under the general duty clause, that the threats of physical violence presented a hazard to employees, OSHA failed to establish the second element, that the cited employer or the employer's industry *recognized* the hazard.²⁰⁴ Judge Spies recognized that violence in the workplace is a serious concern, but struggled with OSHA’s departure from its usual role. She recognized the truism that the OSH Act has traditionally dealt with “hazards that arise from some condition inherent in the environment or the processes of the employer's workplace,”²⁰⁵ pointing out that the Act typically addresses the hazards of “falling, of electrocution, of amputation, of suffocation, of overexposure to lead, and to noise” with standards regulating the heights of guardrails, the depths of trenches, and

²⁰⁰ *Id.* at 7.

²⁰¹ *Id.* at **1-2.

²⁰² *Id.* See also Nat’l Realty & Constr. Co., Inc. v. Occupational Safety & Health Comm’n, 489 F.2d 1257, 1266 (D.C. Cir. 1973).

²⁰³ *Megawest Financial*, 1995 OSAHRC LEXIS 80 at *17, n.6 (citing Simpson, Gumpertz, & Heger, Inc. 15 BNA OSHC 1851, 1863 (No. 89-1300, 1992)).

²⁰⁴ *Megawest Financial*, 1995 OSAHRC LEXIS 80 at *29. Because the judge determined that OSHA had not established the second element, it did not address the remaining elements, that the hazard was likely to cause death or serious physical harm, and feasible means existed to eliminate or materially reduce the hazard. *Id.* at 32.

²⁰⁵ *Id.* at *24.

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the like.²⁰⁶ Apparently, Judge Spies was unable to reconcile the OSHA's traditional focus on physical hazards with this innovative argument that violence generated in the working environment is also a workplace hazard. OSHA countered by stating what I have been urging throughout this article - violence in the workplace should not be considered fundamentally different from those hazards traditionally covered under the Act's § 5(a)(1).²⁰⁷

Nevertheless, the judge concluded that that the violence hazard is not recognized either by that employer or the industry generally, resting her conclusion on her assertion that the employer cannot reasonably be expected to control the condition or practices. She stated that employers cannot be expected to control the free-will of their employees, and can control third parties even less.²⁰⁸ She held that a high standard of proof is required before the employer will be found to have recognized the hazard, and that a previous incident of violence or notice of the danger is insufficient to meet that high standard – begging the question of what would suffice to meet this nebulous high standard? She similarly held that the hazard of workplace violence is not recognized in the apartment management industry.²⁰⁹ Although “[p]ublicized studies, enactment of legislation, industry publications, or similarly disseminated information known to an applicable industry are all relevant to industry recognition” she concluded that none of these conditions were present.²¹⁰ The obvious implication of this decision for any future test cases is that OSHA and NIOSH must undertake and publicize more studies of workplace violence, including bullying, and disseminate information through the collaborative channels discussed, *infra*, thereby bolstering its position that the hazard is recognized in all industries.

The federal courts have similarly not had occasion to address OSHA's coverage of workplace bullying, or workplace violence, and to the extent the courts have addressed the issue, the outcome has been problematic for proponents of coverage. In *Ramsey Winch, Inc. v. Henry*, the Tenth Circuit

²⁰⁶ *Id.* at **24-25.

²⁰⁷ The OSH Administration emphasized, *inter alia*, that the employees had previously been subjected to physical attack, that the employer was on notice of the hazard, the attacks were serious, surrounding apartment complexes already used abatement measures, including employee training. *Id.* at **12-13.

²⁰⁸ *Id.* at **26-27.

²⁰⁹ *Id.* at *29.

²¹⁰ *Id.* at *30. Interestingly, she referenced NIOSH's *Alert*, warning employers of high-risk businesses of the potential for homicide, but the apartment management industry was not identified as a high-risk employer. *Id.* at *31.

addressed the question of whether the general duty clause includes workplace violence, in the context of addressing whether the OSH Act preempted an Oklahoma law prohibiting property owners (including employers) from imposing bans on the storage of firearms locked in vehicles on the owner's property.²¹¹ The district court agreed with the plaintiff business owners/employers that the Oklahoma law was conflict preempted by the OSH Act's general duty clause, ruling that gun related violence is a recognized hazard under the clause and therefore any ban against gun-hazard safety measures would conflict with the federal law.²¹² The Tenth Circuit reversed, holding that there was no evidence that Congress or the OSH Administration recognized storage of firearms in locked vehicles as a hazard, and because OSHA had not issued any standard, and the prohibition was generally applicable as opposed to an occupational protection, the law was not preempted.²¹³

The *Ramsey Winch* case could be viewed as a precedent that indicates the courts' unwillingness to read the general duty clause broadly enough to cover workplace violence, but the case is distinguishable from a claim that the general duty clause covers workplace bullying because it involved gun control laws. The OSH Administration itself has made it clear that it has consciously decided not to promulgate any standard banning firearms from the workplace,²¹⁴ undoubtedly due to the controversial nature and possible Second Amendment confrontation involved in gun control measures. Nevertheless, the case indicates that federal courts are not as willing to find workplace violence covered by the general duty clause, instead preferring the OSH Act to promulgate a specific standard.²¹⁵ Some commentators agree, arguing that the agency should not fall back on the general duty clause as a way of circumventing the promulgation of specific standards.²¹⁶ Such an approach tends to nullify the general duty clause and arguably reads the clause out of the statute – if recognized hazards are only covered if the OSH Administration promulgates a specific standard, and the general duty clause only covers *unrecognized* hazards, the plain meaning of the clause is set aside.

²¹¹ 555 F.3d 1199 (10th Cir. 2009).

²¹² *Id.* at 1204.

²¹³ *Id.* at 1205-1207.

²¹⁴ *Id.* at 1206 (citing 2006 Standard Interpretations Letter).

²¹⁵ *Id.* at 1206 (noting that courts prefer enforcement of the OSH Act through a standard because standards provide notice to the employer). For an extensive analysis of whether OSHA preempts state gun laws, see generally Royal, *supra* note 156.

²¹⁶ *See, e.g.,* Royal, *id.* (arguing that general duty clause is intended to fill the gap for unrecognized hazards, not to circumvent standards, and should not be used to imply OSH Act preemption of gun laws on basis of gun violence being a recognized hazard).

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The OSH Administration has not, in fact, promulgated any specific standards addressing workplace violence generally or bullying in particular, which is in line with the agency's recent avoidance of issuing new rules.²¹⁷ Instead, the OSH Administration seems to have made a conscious decision to adopt the informal approach of issuing non-mandatory guidelines, discussed in detail in the next section. This approach has the advantage of avoiding the problems associated with the formal rule-making process, but has the disadvantage of being viewed as even more toothless than a formal standard – after all, if the agency is understaffed and lacks enough inspectors to investigate possible violations, employers are hardly likely to be concerned about the agency attempting to police or enforce voluntary guidelines.

While a formal standard addressing workplace bullying would have the obvious advantage of requiring employers to comply with the standard, properly promulgated standards also tend to come under attack as either too vague or too detailed – resulting in more employer opposition. Additionally, before OSHA can promulgate a *preventative* standard, as opposed to issuing a citation for a hazard under the general duty clause, it must first establish the existence of a “significant risk.”²¹⁸ This prerequisite does not pose an insurmountable hurdle in the case of workplace bullying, because a plethora of studies have now demonstrated that the risks of workplace bullying are significant, although risks may need to be identified as significant on a sector-by-sector basis. Nevertheless, a combination, or holistic approach utilizing both formal standards and voluntary guidelines is the recommended approach, as discussed, *infra*.

²¹⁷ See Michaels & Monforton, *supra* note 17, at 29-30.

²¹⁸ *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607 (1980); *Cotton Dust, Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981).

C. *The OSH Administration's Informal Approach as an Alternative to Promulgating Specific Regulations on Workplace Violence: A Step in the Right Direction?*

As David Michaels, the incoming Assistant Secretary of the OSH Administration has recognized, indeed bemoaned, the OSH Administration has increasingly turned to the adoption of voluntary guidelines, cooperative compliance programs and alliances.²¹⁹ OSHA guidelines have the advantage of avoiding the rule-making procedure, and they can be tied to traditional punishment/enforcement if OSHA undertakes to refrain from citing an employer under the general duty clause if they have followed the applicable guideline and taken appropriate preventative and corrective steps. This methodology can come under attack, as illustrated by the *Chamber of Commerce* case when the D.C. Court of Appeals invalidated a compliance program that was tied to enforcement incentives.²²⁰

The OSH Administration in the past has been quick to recognize this limitation and has issued clear statements divorcing the guidelines on workplace violence in late-night retail and health care industry from any promise to refrain from enforcing the general duty clause,²²¹ thereby removing, or at least minimizing, opportunity to challenge the guidelines for failure to conform to the APA rule-making protocol. In response to criticism of the draft guidelines from a Congressman in 1996, the Acting Director explained that the guidelines were not subject to the APA's rule-making constraints because they were not mandatory, clearly trading away any enforcement/incentive leverage that the guidelines might otherwise have had: "These guidelines are our recommendations to employers and workers who may be at risk; they are advisory in nature, . . . [and] cannot and will not be enforced as though they were standards promulgated after notice-and-comment rulemaking."²²² The OSH Administration made it clear that the guidelines did not create any *new* duties under the Act, and

²¹⁹ Michaels & Monforton, *supra* note 17, at 29-30.

²²⁰ *Chamber of Commerce v. Dep't of Labor, OSHA*, 174 F.3d 206, 211 (D.C. Cir. 1999) (invalidating the OSH Administration's Cooperative Compliance Program requiring dangerous workplaces to enter into OSHA partnerships or risk targeted enforcement, finding that the program constituted a substantive OSHA standard which must follow the APA notice and comment requirements).

²²¹ 1996 Standard Interpretation Letter, *supra* note 94; *see also* OSHA Memorandum from Richard E. Fairfax, Director of Enforcement Programs, to Regional Administrators (June 7, 2004), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATION_S&p_id=24894 [hereinafter 2004 Fairfax Memorandum].

²²² 1996 Standard Interpretation Letter, *supra* note 94.

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that failure to adopt the guidelines would not constitute a violation of the general duty clause.²²³

However, while careful to distinguish between the advisory role of guidelines and the mandatory nature of the general duty clause,²²⁴ this 1996 Standard Interpretation left the possibility of enforcement through the general duty clause on the table, by reminding the recipient that employers are obligated to maintain a safe and healthful workplace under Section 5(a)(1), provided the requisite elements are met.²²⁵ Finally, it bears noting that the guidelines were drafted as part of a collaborative effort involving “professionals from the Department of Labor, NIOSH, the states, industry groups, organized labor, and a victims' rights group.”²²⁶

Thus, while the workplace violence guidelines were not intended to have the force of a rule or standard promulgated under Section 5(a)(2), it seems relatively clear that the OSH Administration intended to retain wide latitude in using the general duty clause to cite employers who violated that clause by failing to abate this particular hazard, where the means of abatement were available. In such a fashion, OSHA was able to side-step the formalities of declaring a new rule and yet retain deterrence/incentive power at a more informal, and therefore flexible, level. Having done so with respect to workplace violence in the late-night retail establishment and health care industries, the OSH Administration can do so again with workplace bullying more generally or on a sector basis.²²⁷

²²³ *Id.*

²²⁴ *Id.* The Acting Director was careful to label the guidelines as voluntary, describing them as “nothing more than a compilation of studies prepared by experts in a particular field.” *Id.* The principles behind later night retail guidelines were apparently based on the laws, regulations, and guidelines of the states of Florida, Washington, and California, and were described as “best practices.” *Id.*

²²⁵ 1996 Standard Interpretation Letter, *supra* note 94 (“These four elements are: 1) the employer failed to keep his workplace free of a “hazard”; 2) the hazard was “recognized” either by the cited employer individually or by the employer's industry generally; 3) the recognized hazard was causing or was likely to cause death or serious physical harm; and 4) there was a feasible means available that would eliminate or materially reduce the hazard.”)

²²⁶ 1996 Standard Interpretation Letter, *supra* note 94.

²²⁷ The 1996 Standard Interpretation Letter, *id.*, also addressed other concerns raised by Congressman Ballenger, including the concern that the Guidelines will be used to establish new standards of care in state personal injury or wrongful death tort suits. OSHA’s response was that the Act does not govern such liabilities and that the workplace violence guidelines squarely fell within OSHA’s stated purpose “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions,” which Mr. Dear firmly opined included the right to establish guidelines addressing a recognized hazard that was unregulated at that time (and in fact remains so

In 2004, the Director of Enforcement was similarly clear that these workplace violence guidelines are voluntary, and primarily a tool for employers and employees to use for educational purposes, stating:

[T]hese guidelines are not new standards or regulations and do not create any new OSHA duties for employers. An employer's failure to implement a guideline is, therefore, not a violation, or evidence of a violation of the general duty clause of the OSH Act [29 U.S.C. 654(a)(1)]. Furthermore, the fact that OSHA has developed industry-specific guidelines is not evidence of an employer's obligations under the general duty clause; and the fact that a measure is recommended in any OSHA guideline document but not adopted by an employer is not evidence of a violation of the general duty clause.²²⁸

Avoiding rule-making has the distinct disadvantage of conceptually separating the employer's responsibility from any deterrent or incentive-based rule, thereby marginalizing the problem and enabling employers to ignore the guidelines entirely. Nevertheless, even if OSHA has not directly tied compliance with the workplace violence guidelines to sanctions (or the incentive that OSHA will refrain from inspection or issuing citations), OSHA can utilize positive incentives through well-established informal means. Indeed, this retreat to the informal has been OSHA's strategy since the 1980s.

Thus, to summarize the current state of workplace bullying as a perceived occupational health hazard by the OSH Administration and NIOSH; the two agencies have issued three guidelines that address workplace violence generally. These guidelines do not specifically address workplace bullying but can be easily understood to do so, or can be modified to expressly address psychological violence in this context. In addition, the OSH Administration has utilized the collaborative process on at least one occasion by working with Long Island violence coalition to develop training materials. The agency's avoidance of rule-making in general and lack of any specific standards addressing workplace violence and bullying as sub-set of that violence would have seemed to be a major problem until the election of President Obama and the appointment of a new employee-friendly Assistant Secretary at the helm, one who seems (on paper at least) to be attuned to the agency's penchant for avoiding regulation and may be ready to change the agency's direction. Given the fledgling interest that the OSH Administration and NIOSH have shown in the problem, there may be hope that one or both of these agencies is primed

today). See 1996 Standard Interpretation Letter, *supra* note 94.

²²⁸ 2004 Fairfax Memorandum, *supra* note 221 (emphasis in original).

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to address workplace bullying, if not through formal rule-making, then through one of the collaborative mechanisms described herein. If the agency were to recognize the problem of workplace bullying as an occupational safety and health hazard under the OSH Act, the question remains whether this would be a panacea. The next section will attempt to address this question, addressing the shortcomings of the OSH Act and its regulatory apparatus, as it pertains specifically to the application to workplace bullying.

IV. APPLICATION OF OSHA TO WORKPLACE BULLYING

A. Criticisms of OSHA Generally

The OSH Act has been the subject of intense public and scholarly debate ever since its enactment in 1970.²²⁹ Criticisms of the Act are to some extent irreconcilable, or at the very least create a conundrum. On the one hand, businesses object to the Act as too demanding and too detailed, and complain that the cost of compliance is too high.²³⁰ On the other hand, worker advocates argue that the Act lacks teeth because it has limited fines and criminal penalties, and complain that the OSH Administration is underfunded and understaffed, leading to low inspection rates and low compliance.²³¹

Given these criticisms of the OSH Act, why turn to the OSH Act's regulatory system as a panacea for workplace bullying? First, the picture that is often painted of the OSH Act and its effectiveness is clearly full of contradictions. Given these dipolar opposite views of the Act and the OSH agency from the employer and employee sides of the fence, the question arises of whether either of these views is correct since they both cannot be a complete picture of the Act and its effectiveness. Further, although it is clear from empirical studies that the OSH Administration suffers from low inspection rates and the Act's penalty provisions are more limited than comparable federal laws,²³² it does not necessarily follow that these flaws

²²⁹ See generally Lobel, *supra* note 13, at 1086-87 (describing the opponents' view of the federal OSH system).

²³⁰ *Id.* at 1086-87 (citing studies and commentary on OSH Act's intrusiveness into business, the minutia of the safety standards, and levying of fines for standards that are unreasonable).

²³¹ *Id.* at 1081-86.

²³² *Id.* at 1082 (citations omitted). For examples of the inconsistency between the OSH Act penalties and those of other federal laws, see Cass Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1155, 1190-91 (2002) (cited in Lobel, *The Governance of Workplace Safety*, *supra* note 13, at 1082).

result in low compliance rates by employers, and it does not necessarily follow that these flaws, even if they result in lower compliance rates, consequently result in poor safety and health outcomes at the firm level.

While these concerns about the OSH Act's lack of teeth and the OSH Administration's inability to inspect worksites, the real issue is whether these shortcomings result in poor safety and health outcomes on the ground, at workplaces. Do low rates of inspection and low penalties result in low employer compliance, and does low compliance result in poor safety and health outcomes for workers? The empirical problems of studying outcomes may mean these questions are unanswerable, at least until new methodologies are developed for measuring compliance and safety/health outcomes. OSHA's impact on worker safety and health conditions, at least as measured by injury rates, is also controversial.²³³ For workplace bullying, this is a particularly acute problem because the goal of an effective bullying program would be to prevent bullying by changing the workplace culture, and workplace behaviors are notoriously difficult to study from an empirical perspective.

Professor David Weil has conducted an empirical analysis of OSHA's effectiveness in impacting business compliance behavior. His starting point was the seemingly contradictory criticisms that accuse OSHA of being either an "onerous ogre" imposing high costs on business or a "toothless tiger" unable to improve working conditions due to the low number of inspections and low fines.²³⁴ Weil found that the data supported the toothless tiger view, but this view cannot be reconciled with the opposing view that OSHA is a tyrannical and costly ogre burdening employers with high compliance costs.²³⁵ Using the custom woodworking industry to test his compliance model, Weil concluded that OSHA has been, and can be, successful in changing employer behavior to comply with the safety and health standard.²³⁶ Compliance can therefore be achieved even with low inspection rates and limited penalties, although Weil observed that the benefits of compliance in his study were limited to establishments that had actually received some OSHA scrutiny through inspection or otherwise.²³⁷ OSHA inspection is therefore not necessarily the driving force behind compliance; Weil observed that other factors predict compliance, such as

²³³ See, e.g., Morantz, *supra* note 82, at 82 (citing studies from 1992, 1995 and 2002 finding OSHA has had little effect on injury rates).

²³⁴ See Weil, *If OSHA is so Bad*, *supra* note 122, at 618-19.

²³⁵ *Id.*

²³⁶ *Id.* at 638.

²³⁷ *Id.* at 638.

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government pressure, the cost of compliance, the employer's internal gains from compliance (such as direct savings in lost time, decreased turnover, worker compensation costs).²³⁸ It should be noted that Weil did not address the question of whether employer compliance with specific OSHA standards resulted in the desired safety or health outcomes.²³⁹

In sum, commentators differ as to the link between OSHA's traditional enforcement mechanisms (inspection and penalties) and non-traditional enforcement mechanisms (consultation and training), and compliance, and there is debate over what impact employer compliance has on actual safety and health outcomes in the workplace. Despite these problems and unresolved issues regarding the efficacy of the federal (and state) scheme, it is at least clear that some enforcement is better than none.²⁴⁰

B. OSHA's Disadvantages As A Tool for Tackling Workplace Bullying

Aside from the general criticisms of the OSH Act as an ineffective regulation, utilizing the OSH Act as a tool to combat workplace bullying also has shortcomings peculiar to that phenomena. The most obvious disadvantage from the perspective of an aggrieved employee is the lack of a private cause of action, resulting in a bullied employee being forced to rely on an overburdened government agency to enforce the general duty clause (or any applicable standard, should one be promulgated) through the inspection and citation process. As Professor Yamada has argued, adding workplace bullying to the agency's enforcement agenda "would guarantee enforcement difficulties, especially because it is patently unrealistic to believe that OSHA inspectors would be able to conduct adequate investigations of workplace bullying."²⁴¹

²³⁸ *Id.* at 630-31.

²³⁹ *Id.* at 638.

²⁴⁰ See Weil, *If OSHA is so Bad*, *supra* note 122.

²⁴¹ Yamada, *Workplace Bullying*, *supra* note 16. See also Ann E. Phillips, NOTE, *Violence in the Workplace: Reevaluating the Employer's Role*, 44 *BUFF. L. REV.* 139, 144-45 (1996) (arguing that budget restrictions and minimal enforcement activities and fines prohibit OSHA from taking an active role in protecting employees from violence, concluding that OSHA lacks teeth in addressing problems of homicides and violence in the workplace); Stephen J. Beaver, COMMENT, *Beyond the Exclusivity Rule: Employer's Liability for Workplace Violence*, 81 *MARQ. L. REV.* 103, 127-130 (1997) (arguing for comprehensive federal legislation addressing workplace violence, reviewing potential for OSHA 1996 Guidelines, and critiquing OSHA as inadequate to address the issue).

Second, even were the OSH Administration to issue a citation for workplace bullying, the limited employer sanctions provided by the OSH Act would provide little economic incentive for employers to take preventive action. For example, a "willful" violation of OSHA can result in a fine of no more than \$70,000 and as little as \$7,000.

Another obstacle to utilizing the general duty clause to cite employers for failure to maintain a workplace free from workplace bullying is the statutory language that only requires employers to keep their workplaces free from hazards that "are causing or are likely to cause death or serious physical harm."²⁴² This duty has been viewed as problematic for workplace bullying, and workplace violence more generally, because of the requirement that the hazard causes *physical* harm, since workplace bullying more typically causes non-physical, psychological, harm. Indeed, OSHA's statutory text and regulations promulgated there under are viewed as being primarily designed to respond to *physical* hazards in the workplace, particularly those in manufacturing and construction.²⁴³ Of course, the new world of work in the United States is a world where service industry and technology dominate over traditional manufacturing and construction industries,²⁴⁴ and OSHA should reflect the new world of work has new hazards like workplace bullying.²⁴⁵ Indeed, the OSH Administration itself has in recent years recognized that it needs to move with the times. For example, the OSH Administration's 2003-2008 plan states that "these demographic and workplace trends complicate the implementation of occupational safety and health programs and argue for enforcement, training, and delivery systems that are different from those that have been relied upon to date."²⁴⁶

Instances where the target experiences physical effects from being bullied, such as high blood pressure, heart attacks, strokes, potentially meet the standard of "serious physical harm" within the meaning of the general duty clause. Most bullying is, however, psychological harassment that may not have any physical manifestations for the target. Some have argued that

²⁴² OSHA § 5(1).

²⁴³ See, e.g., DAVID R. MCCAFFREY, *OSHA AND THE POLITICS OF HEALTH REGULATION* (1982); THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, *WORKERS AT RISK: THE FAILED PROMISE OF OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION* (1993).

²⁴⁴ See, e.g., OSHA 2003-2008 management plan, available at http://www.osha.gov/StratPlanPublic/strategicmanagement_plan-final.html [hereinafter OSHA 2003-2008 Plan].

²⁴⁵ See, e.g., Yamada, *supra* note 16 (discussing how the modern American workplace is primed for bullying).

²⁴⁶ OSHA 2003-2008 Plan.

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because the employer's duty to keep the workplace safe from "physical harm" does not address the psychological harms caused by workplace bullying, OSHA is ineffectual.²⁴⁷

The general duty clause, however, should not be read so narrowly. The clause only requires that the workplace hazard is "*likely to cause serious physical harm.*" It does not require that physical harm be established in each particular situation where an employee is exposed to workplace bullying, it only requires that such harm is *likely*. OSHA generally, and the general duty clause specifically, is a *prophylactic* law meant to prevent and deter occupational safety and health hazards. Although it provides for penalties in the event of violations, it is not meant to apply as an individualized remedy only for those employees who have suffered serious physical harm and who can demonstrate that harm in litigation - hence the omission of a private cause of action. If the general duty clause were read in that manner, it would eviscerate the prophylactic nature of the Act. The general duty clause refers to hazards generally that are capable (or "likely") to cause such harm; OSHA does not require that harm be established in every case. Because workplace bullying demonstrably causes physical harm, or in the parlance of the general duty clause it is "likely" to cause serious physical harm, the Act covers this type of workplace harm and should be interpreted to obligate all employers to maintain a workplace free from such harm.

An alternate solution would be to amend the general duty clause to expressly include non-physical harms, bringing that clause into line with the general purposes behind OSHA. Another solution would focus on the administrative apparatus already in place and the second clause of OSHA's employer duty clause to harness the OSH Administration's rule-making power to promulgate safety and health regulations that include workplace bullying, stress and other non-physical workplace hazards. OSHA's broad grant of authority allowing the agency to promulgate regulations that "serve[] the objectives of the Act"²⁴⁸ imposes a duty on employers to comply with properly-promulgated regulations. Since the objectives of the Act are to provide safe and healthful working conditions, apparently without limitation to only those conditions that may cause death or physical injury, the agency arguably has broad authority to promulgate regulations addressing workplace bullying. This conclusion is further buttressed by the mechanisms through which Congress envisioned the purposes of the Act would be attained, as described above.

²⁴⁷ See Yamada, *supra* note 16.

²⁴⁸ OSHA § 6(b)(1).

Indeed, as demonstrated above, the OSH Administration has a long-standing position that a safe workplace is one that is free from all forms of violence, including harassment, threats and intimidation that do not rise to the level of physical harm. Further, NIOSH has begun to explore and expand on this well established principle. These preliminary steps can be harnessed and nurtured to develop both new regulations and new educational and training guidelines that employers and employees can use to work toward a bullying-free place of employment.

C. Incorporating the New Governance Structure – A Holistic Approach

In an earlier article, I explored the development of the British approach to workplace bullying, an approach that combined traditional legal enforcement (through the Protection from Harassment Act), and social partnerships between unions and employers, leading to a multi-pronged approach combining legislation, government funding, union activism and employer self-regulation.²⁴⁹ Government funding was channeled through a British trade union which worked with employers to study the problem and identify resources and solutions.²⁵⁰ The main thrust of this social partnership was the Dignity at Work campaign, which included Dignity at Work partnerships between a major British union and large businesses.²⁵¹ Although workplace bullying remains a problem in the U.K.,²⁵² the levels of reported incidence may be declining,²⁵³ and a tripartite system is now in place, consisting of legislation combined with cooperative partnerships between unions and employers and employees.²⁵⁴

U.S. labor scholars have begun to explore whether such a holistic, or multi-pronged approach could be successful in U.S. labor regulation, labeling this paradigm as “administrative governance” or “third-way

²⁴⁹ Harthill, *supra* note 5.

²⁵⁰ *Id.*

²⁵¹ The Dignity at Work Campaign continues, but the partnership has ended, apparently having achieved its objectives. See UNITE, The Union, Dignity at Work, http://www.unitetheunion.com/resources/equalities/equalities_campaigns/dignity_at_work.aspx.

²⁵² Giga, Hoel & Lewis, *supra* note 57.

²⁵³ Compare the results of the 2000 Hoel & Cooper study, *supra* note 37, with the results of the 2007 DTI Report, *supra* note 39.

²⁵⁴ Harthill, *supra* note 5. This is not to suggest that the U.K has found a perfect solution to the problem of workplace bullying, and in fact a comprehensive analysis of the effectiveness of the U.K.’s multi-pronged approach is sorely needed, to determine whether rates of reported bullying have decreased and if so, why.

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governance based policies.”²⁵⁵ New governance legal scholars argue for a shift away from traditional top-down, command-and-control regulation, in favor of a more interactive, flexible, cooperative approach to governance that looks beyond public sources of law to sources of private regulation.²⁵⁶ Labor law scholars have applied this theory to the regulation of the workplace, both in the United States and transnationally.²⁵⁷ Professor Orly Lobel has applied the theory to the regulation of occupational safety and health, arguing that OSHA must apply the new “governance” based policies, which provide a new framework to integrate substantive top-down regulation with private, market-based choices.²⁵⁸

Rather than tracking the many variations and developments of new governance thought, in sum, new governance theory proposes multi-level, collaborative problem solving, recognizing that fixed rule, regulatory methods are not applicable to today’s modern workplace, and that integrative regulatory approaches work best. Workers need to be involved at the workplace level as part of a deliberative process but there must be an “exit” from the process if there is risk of non-compliance. Key players in this scheme are the government, unions, employers, cooperatives, trade

²⁵⁵ See, e.g., generally Lobel, *Governance of Workplace Safety*, *supra* note 13 (exploring the dual nature of contemporary workplace governance as including both regulatory control and market approaches that emphasize flexibility, and studying the new workplace structure through the prism of occupational safety and OSHA).

²⁵⁶ See, e.g., AYRES & BRAITHWAITE, *supra* note 12 (arguing that regulation needs to find a new way to combine command-and-control regulation with deregulation); see also Bradley C. Karkkainen, *New Governance in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 Minn. L. Rev. 471 (2004) (reviewing the approaches of the new governance school); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 355 (2004) (describing movement away from government alone, including non-governmental, informal mechanisms whereby both public and private actors exercise control over social, political, and economic outcomes).

²⁵⁷ See, e.g., Charles Sabel, Dara O'Rourke & Archon Fung, *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace* (World Bank, Social Protection Discussion Paper No. SP 0011, 2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253833 (on file with the Columbia Law Review) (expanding new governance to argue for a complex system of private monitoring of firms, information sharing, and ranking); Ralf Rogowski & Ton Withagen, *Introduction to REFLEXIVE LABOR LAW 16* (Ralf Rogowski & Ton Withagen eds., 1994) (arguing for an approach to labor law that includes regulation and “regulated self-regulation”); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self Regulation*, 105 COLUM. L. REV. 319 (2005) (arguing for an approach that includes “monitored self-regulation”).

²⁵⁸ Lobel, *Governance of Workplace Safety*, *supra* note 13.

associations and other business associations, and grass root organizations – such as the Workplace Bullying Institute.

This approach mirrors the approach adopted in the United Kingdom,²⁵⁹ at least with respect to workplace bullying. The substantive top-down regulation is the Protection from Harassment Act, an anti-stalking law that has been successfully applied to provide monetary redress to targets of workplace bullying.²⁶⁰ The ‘carrot’ that complements this traditional enforcement “stick” is a flexible, market-based partnership between unions, employers and employees. Rather than focusing on just one approach, the British experience has already begun to utilize “the third way governance-based” approach.

The need for new governance principles to be incorporated into the regulation of workplace bullying has been demonstrated by the Swedish experience. Given the increased interest and recognition of the problem of workplace bullying, Hoel and Einarsen undertook to evaluate the effectiveness of Sweden’s workplace bullying legislation.²⁶¹ Although Sweden was the first country to enact specific legislation to deal with workplace bullying in 1993 and is widely regarded as a model in the field, Hoel and Einarsen were surprised to find that the effectiveness of the legislation and its potential for combating the problem on the ground had not been evaluated and therefore undertook a qualitative study of the Swedish regulation with the goal of evaluating its effectiveness.²⁶² The

²⁵⁹ It can be argued that the British model was not a deliberative effort, at least initially, because the Protection from Harassment Act (legislation that was utilized by bullied workers) was not primarily enacted to deal with workplace bullying. Nevertheless, Parliament was concerned with the problem of harassment at work and was on the path to a legislative prescription for dignity at work when the evolution of the Protection from Harassment Act into the arena of workplace overtook those efforts. Subsequent governmental action and collaborative partnerships were, indeed, deliberately focused on combating workplace harassment utilizing the combined approach. *See generally* Harthill, *supra* note 5.

²⁶⁰ Protection from Harassment Act, 1997, c. 40, § 1 (Eng.). *See also* Majrowski v. Guy’s and St. Thomas’s NHS Trust, [2005] EWCA Civ 251 at ¶ 56. (Court of Appeal, LJ Auld) (applying PHA to hold employer vicariously liable for workplace harassment); Green v. DB Group Services (UK) Ltd., [2006] EWHC 1898 (Q.B.) (awarding record setting damages under PHA to employee target of workplace bullying).

²⁶¹ Hoel & Einarsen, *Regulating for Negative Human Interaction*, *supra* note 1. The Hoel & Einarsen study was based on interviews with Swedish experts on the regulation and bullying, including key players such as employer representatives, trade unions, and enforcement authorities. *Id.*

²⁶² Hoel & Einarsen, *Regulating for Negative Human Interaction*, *supra* note 1. Impetus for the study was also spurred by evidence from within Sweden that protection for victims of workplace bullying was weaker than has been generally supposed. *Id.*

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Hoel & Einarsen study found that the Swedish law had several shortcomings: (1) the law itself; (2) the response of employers; (3) the response of trade unions; (4) the response of the bodies responsible for enforcement; and (5) weaknesses in the victims' opportunities for redress.²⁶³ The Swedish experience provides significant lessons for any emerging U.S model, and some of the shortcomings of the Swedish law that have led to the perceived ineffectiveness of the regulation found by Hoel and Einarsen can arguably be traced to a failure of the typical regulatory enforcement structure. For example, the labor inspectors were not adequately trained and prepared for their role in enforcing the new law, and had only limited sanctions at their disposal (issuing a fine if the employer failed to comply with a citation called an "improvement notice").²⁶⁴

Another feature of the Swedish model that potentially resulted in a less effective regulatory structure was the lack of employer responsiveness, which Hoel & Einarsen found to be partially due to the absence of employer liability through litigation, and the absence of any internal investigative procedures.²⁶⁵ Hoel & Einarsen concluded that reliance on legislation alone to address the problem of workplace bullying is misplaced; the authors of the study suggested that workplace bullying requires an integrated, approach utilizing legislation, self-regulation, and engaging employers, unions and employees.²⁶⁶ This "holistic" approach comports with the new governance theory of the workplace and fits within OSHA's current approach to workplace safety and health.

While the impediments to a complete overhaul of OSHA's regulatory regime may seem insurmountable, albeit laudable,²⁶⁷ this Article seeks to

²⁶³ *Id.*

²⁶⁴ *Id.* The Swedish sanction would seem to be analogous to an OSH inspector's ability to cite an employer for a violation of the General Duty Clause and this weakness would need to be addressed in a model OSHA compliance program. The author is working on a model regulation and compliance program which will take this weakness into account.

²⁶⁵ *Id.*

²⁶⁶ *Id.* The authors recommended that legislation needs to be combined with other approaches to ensure prevention and intervention at the firm level, with organizational level prevention efforts involving the employer, employees, and employee groups. *Id.* For further recommendations, the reader is directed to the Hoel & Einarsen study and the author's own compliance program is drafted in accordance with these recommendations (forthcoming).

²⁶⁷ See generally Lobel, *supra* note 13. Professor Lobel argues that the OSH Administration has been experimenting unsuccessfully with cooperative approaches. These efforts have been unsuccessful, she argues, because the OSH Administration has failed to ensure: (1) that workers have an adequate "voice" in the development and management of worker safety; and (2) that parties have an "exit" from the cooperative

explore the existing OSHA approach to workplace violence and to position workplace bullying within that existing framework, proposing that the OSH Administration already has within its grasp a third way governance solution to this problem. A single top-down enforcement approach that relies on substantive rules to regulate worker safety and health is doomed because it alienates key players (employers, unions, and employees),²⁶⁸ evidenced by the failures of OSHA as viewed from both the business perspective (OSHA as the “onerous ogre”) and workers (OSHA as the “toothless tiger”).²⁶⁹

As Lobel observes, OSHA-commentators have focused on OSHA’s traditional agency enforcement – the agency’s substantive rules and standards and its regulatory apparatus which focuses on the traditional enforcement mechanisms of inspection and penalties.²⁷⁰ As we learned from the U.K. experience in addressing workplace bullying,²⁷¹ such an approach overlooks the myriad tools at the agency’s disposal, such as the VPP program. The new governance paradigm can be applied to the development of a targeted OSHA program tailored to address workplace bullying, with an emphasis on prevention, investigation and resolution at the internal level. Such an approach must include education and training of all key players with the goal of prevention and management, but must be complemented by recognition that the general duty clause applies to workplace bullying.

In conjunction with developing a compliance program, a methodology for measuring compliance outcomes and the success of the program in addressing workplace bullying is also needed. The OSH Administration might, for example, tie financial incentives to compliance. And, existing approaches or new compliance approaches must be refined to ensure that they are suitable for all sectors of employment, and can be replicated in other sectors, such as small businesses, and must ensure that the measures are cost effective in all sectors.

An integrated consultative approach must also take into account the relative strengths of different stakeholders – for example, in some sectors the union will be stronger and more likely to be a stakeholder but in many sectors the union is not a player. Even in non-unionized works sites, however, employees are supposed to play a significant role in safety and

programs, back into enforcement, if these programs do not prevent risk. *Id.*

²⁶⁸ *Id.* at 1076 (explaining why a top-down approach fails to leverage or engage private action).

²⁶⁹ Weil, *If OSHA is So Bad*, *supra* note 122, at 618-19.

²⁷⁰ Lobel, *supra* note 13, at 1076.

²⁷¹ Harthill, *supra* note 5.

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health. The OSH Act includes provisions that are designed to ensure employee participation in safety and health, and employees need to be re-engaged as a key stakeholder in any safety and health program. At the present time, employee participation and involvement in occupational safety and health is minimal. Although the Act provides employees with a right to complain to the OSH Administration about suspected violations, either by reporting and triggering an inspection, or by reporting during a scheduled inspection,²⁷² few employees file such complaints, despite the protection of an anti-retaliation provision.²⁷³ Employees need to know more about their rights under the OSH Act, and a well designed workplace bullying program would not only include provision for education and training in this regard, but should ensure employee “voice,”²⁷⁴ through the OSH Administration and NIOSH structures, as well as through institutional structures. A safety and health committee is one solution to ensuring employee voice – every employer should have a safety committee that ensures not only employee participation in designing and implementing a safety and health program, but in providing an outlet for grievances.²⁷⁵

Professor Weil has developed a new strategic sector-based approach for workplace regulations.²⁷⁶ Professor Weil’s study looked at the possible ripple effects of enforcing the Fair Labor Standards Act in a targeted manner, looking at the possibilities of using targeted inspections for a trickle effect at a local level.²⁷⁷ Weil explained that a major challenge to workplace regulation today is that existing regulations are out of synch with the changing technology and new workplace risks. A sector-based approach has the advantage of addressing the new vulnerable sectors, and for workplace bullying it would also have the advantage of taking into account

²⁷² OSHA § 8(f)(1).

²⁷³ OSHA § 11(c)(1).

²⁷⁴ Lobel, *The Governance of Workplace Safety*, *supra* note 13.

²⁷⁵ Canada’s federal Occupational Safety and Health Act, for example, mandates safety committees for employers with twenty or more employees. *See* Occupational Health and Safety Act, R.S.C. c. L-2, s. 135 (1985). The OSH administration has attempted to include such committees in programs such as the VPP program described, *supra*. In addition, although beyond the scope of this article, an effective workplace bullying program should include a complaint resolution procedure that includes alternate dispute resolution mechanisms.

²⁷⁶ Weil, *Regulating Vulnerable Work: A Sector-Based Approach*, paper presented at the International Labour Organization, Regulating for Decent Work Conference, available at <http://www.ilo.org/public/english/protection/condtrav/publ/rdwpapers.htm> [hereinafter *Regulating Vulnerable Work*]. NIOSH is also developing a sector-based approach as part of its research agenda. *See* National Institute for Occupational Safety and Health, Research Agenda, the Sector-Based Approach, <http://www.cdc.gov/niosh/NORA/sector.html>.

²⁷⁷ *Id.*

variations in the type of bullying across types of businesses. For example, vertical/ hierarchical bullying may be more common than horizontal bullying in the medical and legal professions, and may call for a different approach.²⁷⁸

In sum, any approach to workplace bullying as an occupation safety and health concern must harness both the public and private forms of regulation; the efficacy of ‘hard’ law (the OSH Act and its enforcement mechanisms) must be bolstered, or complemented, by ‘soft’ law, but not supplanted by self-regulation. The OSH Administration must start by harnessing the general duty clause, and/or promulgating a specific standard, and then revise its guidelines and voluntary compliance to address the problem, followed with a program that monitors, gathers and generates information, and supplies remediation where problems are found, consisting not just of the current system of fines and penalties, but involving more innovative mediations that bring all constituents together.

Cooperation and collaboration should not, however, be overemphasized to the exclusion of traditional enforcement mechanisms. The pitfall of emphasizing collaborative programs is that employers must remain liable and accountable for worker safety and health – traditional enforcement (the “stick”) must still provide a significant behavioral influencer.²⁷⁹ As OSHA currently stands, there is no such deterrent influencing employer response to the problem of workplace bullying and this – substantive, traditional, regulation - is the building block for any further progress in tackling workplace bullying. In other words, it is essential that the OSH Administration recognize that the workplace bullying is a workplace hazard within the coverage of the general duty clause – failure to lay this foundational building block could derail any agency attempts to design and implement workplace bullying guidelines, consultative programs, and any other collaborative techniques. As demonstrated in Part III, *supra*, the OSH

²⁷⁸ See, e.g., Lyn Turney, *Mental Health and Workplace Bullying: the Role of Power, professions and “On-The-Job” Training*, Australian e-Journal for the Advancement of Mental Health, 2(2) (2003), www.ausinet.com/journal/vol2iss2/turney.pdf. (focusing on bullying in the professions and challenging the focus on bullied targets and perpetrators, analyzing instead power relationships and organizational structures). Weil also posited that the strategic approach will vary depending on the behaviors in the particular sector. Weil, *Regulating Vulnerable Work*, *supra* note 276.

²⁷⁹ Lobel, *supra* note 13, at 1075 (discussing the danger of collaborative programs becoming a “safe-haven” for employers who wish to avoid OSHA regulation, and new governance becoming an excuse for deregulation).

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Administration and NIOSH have already begun the important work of building an anti-bullying program,²⁸⁰ but more is needed.

CONCLUSION

The criticisms that have been leveled against OSHA focus on the agency's enforcement ability, given that it is underfunded and understaffed with low compliance rates. Other commentators have proposed a shift in focus, away from the traditional top-down and adversarial role of regulatory authority and towards new governance structures.²⁸¹ The new governance approach combines the old regulatory approach with a new approach, emphasizing social partnerships, cooperation, and industrial democracy.²⁸² The cure for OSHA's ills may well be a move away from the old style regulatory regime towards a new combined approach that recognizes the need for enforcement through traditional rules and penalties, with a cooperative, holistic approach. Including workplace bullying within both approaches is the next logical step forward in creating a safe and healthy working environment for all workers.

²⁸⁰ OSHA's approach is therefore in keeping with a general shift towards such programs and away from the traditional emphasis on notice-and-comment safety and health rules and standards. *See, e.g.,* Lobel, *supra* note 13 (noting OSHA's shifting emphasis in recent years). Unfortunately, some have argued that OSHA has been unsuccessful in combining the traditional enforcement techniques with these new programs, *id.*, in part because the Administrative Procedure Act distinction between substantive and procedural rule making and OSHA's abandonment of voluntary programs in the face of business opposition and litigation.

²⁸¹ *See generally* Lobel, *supra* note 13.

²⁸² *Id.* This approach also addresses the criticism that OSHA is an ineffective tool for tackling workplace bullying because it lacks a private cause of action. Redesigning governance in this manner reduces the emphasis on conflict and adversarialism and takes the focus away from litigation, thereby reducing reliance on private enforcement actions which are piecemeal in any event.