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Susan Harthill

ABSTRACT:

Workers who are bullied at work suffer physically and mentally, and can even be driven to suicide. There ought to be a law against workplace bullying, and in some countries, there is. Despite a growing body of interdisciplinary work highlighting the prevalence and costs of workplace bullying in the United States, there are currently no U.S. state or federal laws expressly addressing the issue, despite the ground breaking work and legislative efforts of workplace bullying pioneers, David Yamada and Drs. Ruth and Gary Namie. The dismal fact for American workers is that the United States lags behind many other countries when it comes to addressing workplace bullying, both in terms of regulatory reform and self-governance initiatives. This is despite the fact that several studies in the United States have shown that workplace bullying causes ill-health for targets. Workplace bullying has been identified as a major cause of much work-related stress, and stress in turn is linked to many physical and psychological symptoms. For this reason, the prevention of workplace bullying should be viewed as an occupational safety and health concern.

Several countries have already taken this important step, by recognizing workplace bullying as an occupational safety and health hazard, and initiating preventative and restorative efforts as a result of new regulatory agendas addressing the problem. This Article reviews some of these overseas developments and attempts to draw some preliminary lessons from abroad, with the goal of forwarding the dialogue on whether advocates in the United States should reframe the issue of workplace bullying as an occupational safety and health matter. This Article builds on the author's prior work, by combining a proposal for regulatory recognition of workplace bullying as an occupational safety and health concern, with a comparative law approach. This is achieved through review and analysis of the safety and health regulatory and self governance initiatives in other countries, in order to assess whether advocates in the United States could also re-conceptualize the problem as an occupational safety and health matter.

*Workplace Bullying as an Occupational Safety and Health Matter: A
Comparative Analysis*

Susan Harthill*

I. INTRODUCTION

Workers who are bullied at work suffer physically and mentally, and can even be driven to suicide.¹ There ought to be a law against workplace bullying, and in some countries, there is.² Despite a growing body of interdisciplinary work highlighting the prevalence and costs of workplace bullying in the United States,³ there are currently no U.S. state or federal laws expressly addressing the issue, despite the ground breaking work and legislative efforts of workplace bullying pioneers, David Yamada and Drs. Ruth and Gary Namie.⁴ The dismal fact for American workers is that the United States lags behind many other countries when it comes to addressing workplace bullying, both in terms of regulatory reform and self-governance initiatives. This is despite the fact that several studies in the United States have shown that workplace bullying causes ill-health for targets.⁵

* Associate Professor of Law, Florida Coastal School of Law. Earlier versions of this Article were presented at the Fourth Annual Colloquium on Current Scholarship in Labor & Employment Law, Seton Hall University College of Law, and the Seventh Annual International Conference on Workplace Bullying and Harassment, in Cardiff, Wales, and I am grateful to the participants at these conferences for their comments. I have previously published an Article comparing the law of workplace bullying in the United Kingdom and United States and an Article focusing on the occupational safety and health aspects of workplace bullying. This Article builds on my earlier works, which is cited in some of the footnotes to this Article. The Author wishes to thank Frank Trovato [**and Ryan Dugan**], for their able research assistance. Finally, thank you to the Florida Coastal School of Law for its research support. All errors are mine.

¹ See, e.g., WorkSafe Victoria, News (Feb. 9, 2010), <http://www.worksafe.vic.gov.au/wps/wcm/connect/wsinternet/worksafe/sitetools/news/business-director-three-workers-convicted-fined-for-bullying>.

² See Part IV, *infra*.

³ See, e.g., Pamela Lutgen-Sandvik et al., *Burned by Bullying in the American Workplace: Prevalence, Perception, Degree and Impact*, 44 J. MGMT. STUD. 837, 851–52 (2007).

⁴ See, e.g., Gary Namie & Ruth Namie, *Workplace Bullying: How to Address America's Silent Epidemic*, 8 EMP. RTS. & EMP. POL'Y J. 315, 326 (2004); 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 to address workplace bullying).

⁵ See Part III.B, *infra*.

Workplace bullying has been identified as a major cause of much work-related stress, and stress in turn is linked to many physical and psychological symptoms.⁶ For this reason, the prevention of workplace bullying should be viewed as an occupational safety and health concern.⁷

Several countries have already taken this important step, by recognizing workplace bullying as an occupational safety and health hazard, and initiating preventative and restorative efforts as a result of new regulatory agendas addressing the problem.⁸ This Article reviews some of these overseas developments and attempts to draw some preliminary lessons from abroad, with the goal of forwarding the dialogue on whether advocates in

⁶ *See id.*

⁷ *See generally* Susan Harthill, *The Need For A Revitalized Regulatory Scheme To Address Workplace Bullying In The United States: Harnessing The Federal Occupational Safety And Health Act*, 78 U. CIN L. REV. 1250 (2010) (making the case for addressing the issue under the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–678 (2006)) [hereinafter OSH Act]). Occupational safety and health reform should be focused on prevention first, but should also address, *inter alia*, resolution of instances of bullying and remedial relief to targets. *See, e.g.*, David Yamada, *Workplace Bullying and the Law: Towards a Transnational Consensus?*, in EINARSEN, HOEL, ZAPF, & COOPER, *BULLYING AND EMOTIONAL ABUSE IN THE WORKPLACE: INTERNATIONAL PERSPECTIVES IN RESEARCH AND PRACTICE* 399 (2003) (observing that advocates of workplace bullying law should start by identifying policy objectives, which most commentators agree include prevention, prompt and fair resolution, protection, and relief). Using the general duty clause of the OSH Act would meet some, but not all, of Professor Yamada's suggested policy objectives. Prevention is obviously the main thrust of the OSH Act, and the statute includes a resolution procedure for complaints, investigation and citations, but the relief is limited and does not include compensatory relief to the target. However, counseling can be part of any relief awarded under an OSHA program, and many bullying targets simply want to be left alone to do their job; hence, compensatory relief may not be essential.

⁸ In addition to Canada and Australia, several Scandinavian countries and the United Kingdom have recognized workplace bullying as an occupational safety and health hazard, *See, e.g.*, Swedish National Board of Occupational Safety and Health Ordinances AFS 1993:2 & AFS 1993:17 (Sweden); Organization for Economic Co-Operation and Development ("OECD"), *The Inclusive Workplace Agreement: Past Effects and Future Directions*, at 4 (Nov. 2005) (Finland); R.S.Q. ch. N-1.1 (1977) (Quebec); Occupational Health and Safety (Harassment Prevention) Amendment of 2007, S.S. 66 (2007) (Saskatchewan); An Act to Amend the Occupational Health and Safety Amendment Act with respect to Violence and Harassment in the Workplace and Other Matters, R.S.O. 1990, CHAPTER O.1, sec. 32.0.1-32.0.7 (2009) (Ontario); Victoria, Occupational Health and Safety Act of 2004, VICT. REPR. STAT. § 21(1) (2007). Each of these laws are discussed more fully, *infra* Part IV. Some of these efforts, notably in the United Kingdom, tend to place emphasis on the broader category of occupational stress, of which workplace bullying is a subset. *See* Health and Safety Executive, *Stress, Legal Position Guidance*, <http://www.hse.gov.uk/stress/faqs.htm?ebul=stress/may-10&cr=03#leg> (discussed in Part IV.F, *infra*).

the United States should reframe the issue of workplace bullying as an occupational safety and health matter. This Article builds on the author's prior work, by combining a proposal for regulatory recognition of workplace bullying as an occupational safety and health concern, with a comparative law approach.⁹ This is achieved through review and analysis of the safety and health regulatory and self governance initiatives in other countries, in order to assess whether advocates in the United States could also re-conceptualize the problem as an occupational safety and health matter.

Part I offers some cautionary observations about comparative law. This Article is, after all, a comparative review, and brings with it the same baggage that all forays into foreign law inevitably carry. Although the comparative legal researcher must acknowledge cultural, political, legal differences between the United States and other countries,¹⁰ comparative law is "an essential component of effective and responsible law-making within each country."¹¹

Part II provides a summary review of workplace bullying, primarily to position the phenomena on an occupational safety and health platform. Part III describes the current positioning of workplace bullying law within the occupational safety and health laws of Australia, Canada, the Nordic countries of Sweden, Finland and Norway, and the United Kingdom, and attempts to delineate the most obvious areas of departure from current U.S. law. This Part confirms some common observations about the state of employment law outside of the United States, observing that unions have

⁹ See Susan Harthill, *Bullying In the Workplace: Lessons From the United Kingdom*, 17 MINN. J. INT'L L. 247 (2008) (explaining how the experience of the U.K. in combating workplace bullying can provide lessons for similar efforts in the United States, reviewing the impact of the 1997 Protection from Harassment Act as only one part of the response to the problem, alongside the efforts of trade unions, the British government and management, and drawing the conclusion that legislative initiatives in the United States are similarly only one part of what should be a multi-pronged approach); Harthill, *supra* note 7 (proposing a new regulatory alternative for the United States, viewing workplace bullying through the lens of the existing federal Occupational Safety and Health Act of 1970).

¹⁰ See Clyde Summers, *Comparative Labor and Employment Law and Policy in the Next Quarter Century: Comparative Labor Law in America: Its Foibles, Functions, and Future*, 25 COMP. LAB. L. & POL'Y J. 115, 124–26 (2005) (calling on comparative labor lawyers to not simply describe other systems but to ask the crucial question why the systems are different and recognize the potential for comparative law in evaluating and developing each country's own law and practices).

¹¹ Steven L. Willborn, *Onward and Upward: The Next Twenty-Five Years of Comparative Labor Law Scholarship*, 25 COMP. LAB. L. & POL'Y J. 183, 192 (2005).

played a role in the development and continuance of workplace bullying programs in other countries, but also finding that unions may not have been the essential catalyst that many presume. This Part also finds that employee representatives probably play an important role in furthering the agenda on this issue, either in the form of joint safety and health committees or employee representatives. This does not bode well for the private sector in the United States since it does not have a history of utilizing safety and health joint employer-employee teams, but might offer some guidance on the role that unionized workplaces can play. This Part also finds that the issue of workplace bullying can gain a footing on the safety and health agenda if framed within the broader concerns of violence or stress. This approach is not, however, without its problems, as the United Kingdom's experience tends to show that a focus on stress can subsume bullying.

The Article concludes that, first, the inclusion of workplace bullying in some occupational safety and health laws can be seen, in part, as a result of a shift in focus in occupational health and safety in recent years, away from the traditional focus on physical aspects of work-illness caused by physical, chemical, and biological hazards, to more modern health and safety concerns involving psychological health and wellbeing.¹² This trend is beginning to occur within the United States agencies responsible for occupational safety and health regulations, enforcement, and education - the Occupational Safety and Health Administration and the National Institute of Occupational Safety and Health.¹³

Second, the role of unions has often been supposed to play a significant role in advocating for initiatives aimed at preventing workplace bullying, and this is partially confirmed by this comparative review. The picture of the role of unions is, however, incomplete, and assumptions that unions are pivotal may need to be re-evaluated. Additionally, joint employee-employer safety and health committees may be an important part of initiatives and implantation; the U.S. OSH Act does not require such

¹² See, e.g., Anne Spurgeon, *Bullying from A Risk Management Perspective*, in Zapf et al., *supra* note 4, at 237. Helge Hoel has observed this trend in European Union countries generally - a focus on psychological as opposed to physical violence, a greater interest in exposure to repeated negative acts and behavior and an expansion of the scope of worker health and safety to incorporate dignity and respect. Although, it is not clear whether Hole regards this is a gradual movement for every country or a trend he has seen among many countries: See Helge Hoel, *Regulating For Negative Human Interaction: An Evaluation Of The Effectiveness Of Anti-Bullying Regulation(s)*, presented to International Labor Organization, Regulating for Decent Work Conference, Geneva, July 2009, at 1 (citations omitted), <http://www.ilo.org/public/english/protection/condtrav/pdf/rdwpaper18a.pdf>.

¹³ See generally Harthill, *Harnessing OSHA*, *supra* note 7.

committees but some employers, notably in the public sector, have joint safety and health committees and they may be taking on a more proactive role in those sectors. This may buttress a conclusion that a sector-based approach may be more successful, with a strengthened concentration on unionized workplaces.

II. A NOTE ON COMPARATIVE LEGAL ANALYSIS

Undertaking a comparative approach to workplace bullying law is fraught with difficulties. As an initial matter, the legal scholar undertaking the task of reviewing foreign law must understand and interpret that law correctly. The legal scholar must also attempt to understand the foreign law in the correct context because every country's law develops in the context of that country's unique culture, history, and past and current political climate.¹⁴ Understanding the development of the law of workplace bullying in other countries is no exception and should be approached cautiously. But that is not to say that comparative law is of limited value. Comparisons can be useful theoretically, to help frame the issue of workplace bullying in conceptual terms, as well as practically, in terms of analyzing the possibility of borrowing legislation. This Article primarily employs comparative law for the former purpose, to frame the problem of workplace bullying as an occupational safety and health matter, but also serves as a call for additional research.¹⁵

While it may be intellectually interesting to engage in comparative descriptions of workplace bullying law, some commentators think it has limited practical value. Some scholars have argued that plugging European law into U.S. law is virtually impossible because European harassment law flows from a dignitarian foundation, compared to the development of U.S.

¹⁴ See generally James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279 (2000) (decrying the lack of meaningful analysis of cultural, historical, social traditions in law review articles comparing European civility laws with American hate speech laws).

¹⁵ There are two areas where more work is needed: (1) in-depth analysis of whether the background of occupational safety and health law in other countries precludes the development of similar laws in the United States; and (2) more studies are needed on the effectiveness of occupational safety and health laws in other countries. The law of workplace bullying is relatively new in most countries, but some laws have been on the books for almost a decade. Empirical studies in countries with workplace bullying law or regulations can unearth a wealth of data, e.g., whether the prevalence of workplace bullying has declined since inception of the new law, whether and how perception or knowledge among key participants has changed, whether employees are successful in grievance proceedings, and whether implementation of a new standard has impacted business costs or profits.

harassment law from an anti-discrimination foundation.¹⁶ This observation, if accurate, is disheartening for advocates of change; it springs from the assumption that law is formed by societal values and concludes that if U.S. society does not value individual dignity, a dignity-based law is unlikely to appeal to U.S. legislators or other actors. If we assume for a moment that this proposition is correct, then it is still arguable that legislation might succeed in the United States if it is *reframed* or *re-conceptualized* as an occupational safety and health issue, dodging the pitfalls associated with aligning proposed solutions with any dignity-based individual rights. After all, if 64% of American workers *think* workplace bullying is wrong and *believe* that there is a law against it,¹⁷ perhaps U.S. societal values are not so misaligned with European values. “We must put, front and center, the fact that workplace bullying is a form of health endangering psychological abuse.”¹⁸ If we are able to put this fact at the forefront of the debate, then perhaps there is room for cautious optimism.

Moreover, whether European law can be “plugged” into U.S. law¹⁹ depends on how we view European law. If we view *all* European employment laws as grounded in notions of dignity, then perhaps the outlook is indeed gloomy. In this regard, some commentators seem to presume that Europe is homogenous with a unified approach.²⁰ But, if European bullying laws are all dignity-based and dependant on a rich tradition of civility and legal recognition of dignitary harms, then why do we see varying approaches to the development of the law? The reality is more complex. Europe is not homogenous and different countries –

¹⁶ See generally Harthill, *Lessons from the United Kingdom*, *supra* note 9. Other scholars have commented that the European research tradition on this issue has focused on mobbing and bullying, while the U.S. tradition has focused on the concept of emotional abuse. Helge Hoel, Stale Einarsen, Loreleigh Keashly, Dieter Zapf & Gary L. Cooper, *Bullying At Work: The Way Forward*, in Zapf et al., *supra* note 7, at 412. See also Whitman, *supra* note 14 (comparative analysis of German and French dignitary cultures, concluding that the future for civility-based laws, including harassment laws, are dimmer in the United States because of its very different historical development and egalitarian culture).

¹⁷ EMPLOYMENT LAW ALLIANCE, ABUSIVE BOSS POLL (2007), <http://www.employmentlawalliance.com/pdf/ELA%20Abusive%20Boss%20Charts031907.pdf> (nationwide poll of over 1,000 U.S. workers) [hereinafter EMPLOYMENT LAW ALLIANCE, ABUSIVE BOSS POLL].

¹⁸ David C. Yamada, *Workplace Bullying And American Employment Law: A Ten-Year Progress Report And Assessment*, 30 COMP. LAB. LAW & POL’Y J. ___ (forthcoming 2009).

¹⁹ Amanda E. Lueders, Note, *You’ll Need More Than A Voltage Converter: Plugging European Workplace Bullying Laws Into The American Jurisprudential Outlet*, 25 ARIZ. J. INT’L & COMP. LAW 197 (2008).

²⁰ Lueders, *supra* note 19.

European and non-European - have developed differing responses, based on a myriad of factors, cultural and otherwise. Again, by focusing on the workplace bullying protections that have evolved from the occupational safety and health perspective, and by moving the debate away from the dignity paradigm, perhaps there is room for a less gloomy outlook.

This Article starts with the working presumption that European-style laws are *not* homogeneous, and that occupational safety and health law is fertile soil for planting the seeds of a workplace bullying-prevention program. The differences between American traditions and those of other countries may mean that the United States *is* a less favorable environment for workers generally and therefore less likely to develop a workplace bullying law. Indeed, that much is obvious because the present state of affairs is that the United States has not enacted any such laws nor has the common law developed to embrace a right or remedy, while other countries have done so. Cultural differences may influence attitudes and perception and what may be viewed as intolerable behavior in one country may be perceived as tolerable in the United States.²¹ Indeed, critics of workplace bullying laws point to the competitive and market-driven perception of the U.S. labor market as a reason to defeat legislation.²² So, shall we throw up our hands in despair and say “never in America!” Obviously not. The environment is not as favorable but that does not mean we should stop trying. What follows, then, is a discussion of the main barriers to the development of workplace bullying law in the United States.

Some commentators have pointed to the unique U.S. default at-will rule, which contrasts sharply with the just cause protections that enable European workers to demand more workplace protections.²³ Undoubtedly, just cause protection does allow workers more voice, but without seeming to downplay the importance of sensitivity and consideration of cultural and regulatory norms, perhaps some of the perceived differences between the U.S. at-will employment relationship and the just cause protections that exist in other countries may not be as different as we suppose. As students in an Employment Law class quickly learn, the American worker has a

²¹ See, e.g., STALE EINARSEN, HELGE HOLE, & MORTEN BIRKELAND NIELSON, *WORKPLACE BULLYING* 16 (2003). The authors highlighted the culture of Norway characterized by “feminine values” with a low tolerance for aggressive behavior in contrast to cultures with “masculine values” that are more concerned with aggressive, competitiveness, material success and status. It need hardly be disputed which category the U.S. falls into.

²² A workplace bullying bill in New York has had some recent vocal opposition from the Major of New York, among others.

²³ Lueders, *supra* note 19.

number of important protections that have eroded the at-will rule, such as anti-discrimination laws, public policy/wrongful discharge laws, common law tort and contract protections, and whistle-blower protections that exist in hundreds of federal and state laws, all of which interpose a level of protection that brings the U.S. worker more into line with foreign counterparts.²⁴ The aim here is not to simplify and discount the differences between the two employment law norms, but to point out that it is not necessarily accurate to simply assert that the at-will rule effectively bars the development of a workplace bullying law – empirical studies may bear this out but the author is aware of none that specifically address whether the at-will rule leads to worker paralysis and employer dictatorship when it comes to this issue.

Another cause for gloom and doom is the dismal level of unionization in the United States. It is clear that European workers have more union protection and clout than their U.S. counterparts; unions have undeniably played a significant role in pushing for anti-bullying reform in some countries.²⁵ Indeed, commentators have concluded that union involvement is of central importance in moving this issue forward and workplace bullying initiatives have more chance of success in a unionized environment.²⁶ Mike Ironside & Roger Seifert, for example, consider workplace bullying as part of the day-to-day practice of managing labor, and view the issue from an organizational perspective – “management’s exercise of its collective will.”²⁷ Naturally flowing from this perspective,

²⁴ This is not to overstate the protections that these laws provide, but employment law protections are often overlooked in their entirety in discussions of the at-will nature of the American employment relationship. Conversely, the protections of the just cause relationship in other countries may sometimes be overstated; the mere existence of the just cause rule lends itself to an undeserved reverence. The U.K.’s Employment Rights Act 1996, for example, protects employees against unfair dismissal, but an employer *can* fairly dismiss for very broad and open-ended reasons, if the dismissal: (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, (b) relates to the conduct of the employee, (ba) is retirement of the employee, (c) is that the employee was redundant, or (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment. See Employment Rights Act 1996, sec. 94. As a former management-side U.S. employment lawyer, the author notes that it was a rare case when the employer did not assert one of the above reasons for discharging an at-will employee, regardless of whether the employer was facing an imminent lawsuit.

²⁵ See Harthill, *supra* note 4.

²⁶ See, e.g., Mike Ironside & Roger Seifert, *Tackling Bullying In The Workplace: The Collective Dimension*, in EINARSEN, HOEL, ZAPF, & COOPER, *supra* note 7, at 383.

²⁷ *Id.* at 384. Ironside and Seifert make the point that bullying is so widespread and endemic in private and public workplaces that it cannot be the result of a small number of

Ironside and Seifert regard collective response as essential to securing a response, and concluded from their study of the U.K. public sector that, perhaps not surprisingly, workplace with strong union representation are more likely to achieve success in “reducing both the extent and consequences of bullying.”²⁸ Notably, the authors proposed that improvements in workplace conditions are unlikely to come from management initiatives and any workplace bullying initiatives – even enforcement of a law – must come from collective employee action, preferably from a national union organization that is not tied to the employer.²⁹

Given studies such as this, and the involvement of unions in other countries’ efforts towards tackling the issue, the U.S. approach would undoubtedly benefit from union involvement. The low level of unionization naturally, does not bode well for advocates of change, even if unions can be co-opted. But, the fact is that unions have been weakened in all developed countries,³⁰ not just the U.S., and if the trade union movement embraces the problem of workplace bullying, it can have a profound impact even as the unions are weakened.³¹ The good news is that, in unionized workplaces, unions are typically involved in safety and health issues. Referring to the issue as one of health and safety also allows unions to approach the issue as one of management practices.³²

Despite all the perceived – and real – differences between the United

disturbed individuals and cannot therefore be remedied simply by removing the bullies; organizational action is needed and is only likely to come from collective action, not self-regulation. *Id.* at 396. For example, the commitment of resources to the issue is – or should be – a central subject of collective bargaining. *Id.* at 397.

²⁸ *Id.*

²⁹ *Id.* at 386.

³⁰ For an interesting perspective on the relative strengths of U.S. labor law in comparison to European labor law, see Steven L. Willborn, *Laval, Viking, and American Labor Law*. Professor Willborn’s article analyzed two decisions of the European Court of Justice regarding the legality of industrial action, and compared the results of these cases with the expected outcome in a U.S. court analyzing the same issue under the NLRA. *Id.* Professor Willborn observed some ways in which unions are more limited in Europe than in the U.S. and drew some useful lessons for comparative labor law, including the caution that an analytical framework that is too generalized does not always lead to expected results. *Id.*

³¹ See Helge Hoel & Denise Salin, *Organizational Antecedents of Workplace Bullying*, in Zapf, et al. *supra* note 7, at 203 (citing Duncan Lewis, *Workplace Bullying – A Case of Moral Panic*, in M. Sheehan, S. Ramsey & J. Patrick (eds.) *Transcending Boundaries: Integrating People, Processes and Systems*, Conference Proceedings, Griffith University, Brisbane, Australia (2000)).

³² *Id.*

States and other countries, there is still a useful point of comparison. Europe, Australia, Canada and the United States all have occupational safety and health laws designed to protect workers from physical harm in the workplace, administered and enforced via a regulatory framework. Workplace bullying is an issue that has attracted comparative research from other disciplines, and legal comparative study should follow suit. The question is whether the U.S. workplace bullying movement can learn from the development and current experience of European, Canadian, or Australian law, and if so, what? The differences between U.S. social values or legal traditions may be less important as globalization of employment law advances; “the global spread of increasingly similar working. . . conditions has raised equally similar legal problems in societies all over the world and – in their wake – a trend towards similar and often even identical legislative and judicial responses.”³³ Thus, even just a purely theoretical or conceptual endeavor, a comparative perspective can progress the debate in the U.S. simply by enriching our understanding of this phenomena. In this way, a comparative approach might assist advocates by understanding and perhaps reframing the issue in a way that can shape a regulatory response. Further, the U.S. movement can point to the developments in other countries to demonstrate that workplace bullying laws can be passed in developed countries with similar global labor concerns to the U.S., without any resultant loss to productivity or profits.³⁴

These cautionary aspects of comparative law should not, however, deter legal scholars from attempting to draw on the rich experience of other countries to obtain new perspectives on U.S. laws, drawing upon the development of the law elsewhere can inform and guide developments at home. European, Australian and Canadian law have evolved to incorporate protections for bullied workers and these laws are a vehicle for thinking about the gaps in U.S. law and whether these gaps can be filled through the mechanisms used in other countries. This Article will not endeavor to capture the culture, legal structural and regulatory framework, history and politics of all the countries referred to, but will merely act as a catalyst to spur more work on whether the occupational safety and health law is a

³³ Jörg Fedtke, *Legal Transplants*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 434, 435 (Jan Smits ed., 2006).

³⁴ In this respect, more studies are needed in those countries with workplace bullying legislation on the impact of regulation. At present, we know that the problem of workplace bullying has significant costs to businesses, *see, e.g.*, WAYNE F. CASCIO, *COSTING HUMAN RESOURCES: THE FINANCIAL IMPACT OF BEHAVIOR IN ORGANIZATIONS* 7–8 (2000), but more work is needed to review whether regulation is effective in reducing workplace bullying and whether the law has had any commensurate effect on productivity or profitability.

useful vehicle for the workplace bullying movement. The important thing is that action be taken to prevent and correct workplace bullying. The cultural norm difference is probably most influential at the initial stage of persuading regulatory decision-makers that workplace bullying is a safety and health risk. Recent developments within the OHS Administration and NIOSH may indicate that movement is forthcoming.³⁵ But once workplace bullying is properly re-framed/defined as a safety and health risk, differences in cultural norms are less important. Alternatively, rather than framing the problem as an assault on human dignity, a U.S. approach would probably fare better by reframing the issue as a problem that leads to organizational losses (decreased productivity, absences due to sickness, attrition, health care costs etc.).

The bottom line is this - despite the complex and perhaps unfathomable divergences between traditions, academics in this field benefit from shared insight into the phenomena that should include a comparative occupational safety and health perspective. Drawing upon the experience of other countries can only enrich the debate in the United States.

III. BULLYING: DEFINITIONS, PREVALENCE AND HEALTH COSTS

Workplace bullying has been defined as “the repeated, malicious, health-endangering mistreatment of one employee (the Target) by one or more other employees (the bully, bullies).”³⁶ To be identified as bullying, the behavior has to occur regularly, repeatedly, and over a period of time.³⁷ Common workplace bullying behavior includes assigning unreasonable or impossible targets or deadlines, constant criticism, removing responsibilities and replacing them with trivial tasks, shouting and verbal abuse, persistently picking on people, withholding information, and blocking promotions.³⁸ The Federal Bureau of Investigation places workplace bullying on a continuum of workplace violence, a continuum that includes “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.”³⁹

³⁵ See Harthill, *Harnessing OSHA*, *supra* note 7.

³⁶ GARY NAMIE & RUTH NAMIE, *THE BULLY AT WORK: WHAT YOU CAN DO TO STOP THE HURT AND RECLAIM YOUR DIGNITY ON THE JOB* 3 (2003); *see also* DUNCAN CHAPPELL & VITTORIO DI MARTINO, *VIOLENCE AT WORK* 20 (3d ed. 2006).

³⁷ *Id.*; *see also* Namie & Namie, *supra* note **Error! Bookmark not defined.**, at 326.

³⁸ See Harthill, *Lessons from the U.K.*, *supra* note 9, at 255–56.

³⁹ See FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, *WORKPLACE VIOLENCE: ISSUES IN RESPONSE* 13 (2004), <http://www.fbi.gov/publications/violence.pdf>.

In the United States, 32%⁴⁰ to 44% of workers report being bullied.⁴¹ The federal agencies charged with occupational safety and health estimate that two million U.S. workers annually are victimized by some type of workplace violence,⁴² and over 24% of companies surveyed in 2004 reported that some degree of bullying had occurred there during the previous year.⁴³ Workplace bullying leads to significant physical and psychological trauma and ill-health; bullying can cause clinical depression, symptoms associated with posttraumatic stress disorder, increased risk of heart disease, among other health problems.⁴⁴ Numerous studies have identified and estimated the effects of exposure to workplace bullying and harassment on targets *and* witnesses.

Physical symptoms can include musculo-skeletal disorders, psychosomatic problems, increased risk of incident cardiovascular disease, and may be correlated with increased blood pressure.⁴⁵ Other studies confirm that bullying leads to stress related physical problems including cardiovascular problems, adverse neurological changes, immunological impairment, fibromyalgia, and chronic fatigue syndrome.⁴⁶ Psychological injury also occurs among targets,

40. Pamela Lutgen-Sandvik et al., *Burned by Bullying in the American Workplace: Prevalence, Perception, Degree and Impact*, 44 J. MGMT. STUD. 837, 851–52 (2007). This study that found that nearly 30% of workers polled met the criteria for being bullied, but only 10% labeled themselves as bully targets. *Id.*

41. EMPLOYMENT LAW ALLIANCE, ABUSIVE BOSS POLL (2007), <http://www.employmentlawalliance.com/pdf/ELA%20Abusive%20Boss%20Charts031907.pdf> (nationwide poll of over 1,000 U.S. workers) [hereinafter EMPLOYMENT LAW ALLIANCE, ABUSIVE BOSS POLL].

42. OSHA WORKPLACE VIOLENCE FACT SHEET, *supra* note 29. OSHA has adopted the NIOSH definition of violence, which includes nonphysical forms of harassment and intimidation but it has not released any data on the prevalence of workplace bullying as a subset of workplace violence.

43. Nat'l Inst. For Occupational Safety & Health, Ctr. for Disease Control, 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.*

⁴⁴ GARY NAMIE & RUTH NAMIE, THE BULLY AT WORK: WHAT YOU CAN DO TO STOP THE HURT AND RECLAIM YOUR DIGNITY ON THE JOB 55-58 (2003) (describing effects of workplace bullying on targets); Gary Namie & Ruth Namie, *Workplace Bullying: How to Address America's Silent Epidemic*, 8 EMP. RTS. & EMP. POL'Y J. 315, 320 (2004) (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 “WBI” self-reporting survey revealed the following stress-related effects of bullying: severe anxiety (76%), disrupted sleep (71%), loss of concentration (71%), post-traumatic stress disorder (47%), clinical depression (39%), and panic attacks (32%). Namie & Namie, *Silent Epidemic*, *supra*.

45. See Harthill, *Harnessing OSHA*, *supra* note 7, at 1261-1263 (collating studies) (citations omitted).

46. Workplace Bullying Inst., Physical Health Impairment,

such as depression, anxiety, and, as mentioned, PTSD.⁴⁷

A 2003 article by Keashly and Jagatic collated research findings from North American studies and literature, including a comprehensive review of studies of the effects of exposure to workplace bullying.⁴⁸ Rather than duplicate those studies here, the reader is directed to Keashly and Jagatic's comprehensive review of the literature identifying numerous ill-health physical and psychological effects, ranging from depression to PTSD.⁴⁹ The authors highlight the fact that long-term effects need to be considered – more extensive ill-health effects, such as decreased psychological well-being and psychosomatic functioning, will result if the immediate effects of workplace bullying are not alleviated.⁵⁰ Consequently, the authors called for more North American research on the range and type of effects over a longer period of time.⁵¹ On the positive side, the authors noted that the North American literature has conceptualized workplace as a “chronic workplace stressor” allowing research into workplace bullying to connect into the rich body of research and existing models in the organizational stress literature.⁵² The authors posited that the existence of such a rich and well-developed body of work on the effects of workplace bullying makes this issue “one of those rare situations in which the research can help drive public opinion, rather than the other way around.”⁵³

IV. OCCUPATIONAL SAFETY AND HEALTH APPROACHES TO WORKPLACE BULLYING IN OTHER COUNTRIES

Workplace violence, which includes bullying, is a global problem; the

<http://www.workplacebullying.org/targets/impact/physical-harm.html> (last visited June 15, 2010); *see also* Namie & Namie, *Silent Epidemic*, *supra* note 41, at 320.

47. Workplace Bullying Inst., Psychological-Emotional-Mental Injuries, <http://www.workplacebullying.org/targets/impact/mental-harm.html> (last visited June 16, 2010) (30% of targeted women and 21% of men reported PTSD). Workplace bullying has now also been linked to sleep disorders. The American Academy of Sleep Medicine, 2010, www.sleepeducation.com.

⁴⁸ Loreleigh Keashly & Karen Jagatic, *By Any Other Name: American Perspectives on Workplace Bullying*, in Zapf et al., *supra* note 7, at 32.

⁴⁹ *Id.* In particular, the reader is referred to Table 2.3 at pages 54-55.

⁵⁰ *Id.* at 56.

⁵¹ *Id.* *See also* Stale Einarsen & Eva Gemzoe, *Individual Effects Of Exposure to Bullying At Work*, in Zapf et al., *supra* note 7, at 128, 136 (collecting studies of health effects, including PTSD, on targets and observers/witnesses and calling for more research on causal connection between workplace bullying and health outcomes).

⁵² Keashly & Jagatic, *supra* note 48, at 57.

⁵³ *Id.* (highlighting the work of activists such as Drs. Gary and Ruth Namie).

International Labour Organization (“ILO”)⁵⁴ has issued reports indicating the extent of the problem.⁵⁵ The ILO’s Third European Survey on Working Conditions found that three million workers experienced violence from other workers, three million workers experienced sexual harassment, and thirteen million were subject to intimidation and bullying.⁵⁶ This Article will review regulatory developments in Canada, Australia, the Nordic countries of Sweden, Finland and Norway, and the United Kingdom; each of these countries has attempted to grapple with the problem of intimidation and bullying through the occupational safety and health route.

A. Canada

Like the United States, Canada is a federal system, with a federal government and ten provinces. Canadian federalism operates differently, however, in that the provinces regulate the employment relationship; although Canada has a federal Labour Code, it is limited to federal regulation of only certain industries, such as mining, navigation, government employment, and only covers ten percent of the Canadian workforce.⁵⁷ Because Canadian employment law – which includes health and safety laws – is provincial, the picture of workplace bullying laws is therefore a patchwork of various laws, and is further complicated by the existence of both civil law and common law traditions in Canada. Quebec, one of the provinces that have enacted bullying legislation, is a civil system but most other provinces are English-based common law jurisdictions, including Ontario and Saskatchewan, the other two provinces that have new workplace bullying laws.⁵⁸

1. Canadian Federal Law

⁵⁴ The International Labour Organization is a United Nations agency, which, *inter alia*, tracks global statistics and trends. Int’l Lab. Org., Violence at Work, at <http://www.ilo.org/ppublic/english/protection/safework/violence>.

⁵⁵ VITTORIO DiMARTINO, VIOLENCE AT THE WORKPLACE: THE GLOBAL CHALLENGE, available at <http://www.ilo.org/ppublic/english/protection/safework/violence/violwk/violwk.pdf>.

⁵⁶ *Id.*

⁵⁷ Canada Labor Code § 2 (listing areas of exclusive federal jurisdiction); Canada, Labour, Employment Standards, http://www.hrsdc.gc.ca/eng/labour/employment_standards/index.shtml (last visited July 8, 2010) (90% of Canadian workforce covered by provincial and territorial labor and employment laws).

⁵⁸ For useful background on federal Labor Code and how occupational safety and health laws work in Canada, see <http://www.emirrorsolutions.ca/workplaceviolence/thm-bullying/legal.html>.

Canada's labor laws and some employment laws, including occupational safety and health law, are consolidated in the federal Labour Code,⁵⁹ which covers only certain industries comprising approximately ten percent of the Canadian workforce. Occupational health and safety law is in Part II of the Canada Labor Code and has a general duty clause, that provides: "Every employer shall ensure that the health and safety at work of every person employed by the employer is protected."⁶⁰ The federal OSH law does not address workplace bullying specifically, but the specific employer duties include "tak[ing] the prescribed steps to prevent and protect against *violence* in the work place"⁶¹ An attempt to amend the Labour Code to add a workplace bullying law has been introduced, via the Workplace Psychological Harassment Prevention Bill, but died in 2004.⁶² The Bill was limited in coverage, applicable to federal employees only, and sanctions, imposing fines of up to \$10,000 for psychological harassment.⁶³

In 2006, the federal government appointed a commission to review issues such as workplace violence and harassment. The commission recommended that "psychological harassment (bullying) should be dealt with as part of a broader program of violence prevention under Part II of the Canada Labour Code."⁶⁴ Subsequently, in 2008, the Canada Occupational Health and Safety Regulations added a regulation addressing "violence prevention in the workplace."⁶⁵ Section 20.2 defines "workplace violence" as "constitute[ing] any action, conduct, threat or gesture of a person towards

⁵⁹ Canada Labour Code, Part II R.S.C. 1985, c. L-2, s. 124.

⁶⁰ Canada Labour Code, Part II R.S.C. 1985, c. L-2, s. 124.

⁶¹ *Id.* at § 125(z.16) (emphasis added). The Canadian Centre for Occupational Health and Safety Act 1977-78 created a federal agency, the Canadian Centre for Occupational Health and Safety (CCOHS), operated by Health Canada. The CCOHS is an educational body; the purpose of the Act was "to promote the fundamental right of Canadians to a healthy and safe working environment by creating a national institute concerned with the study, encouragement and cooperative advancement of occupational health and safety, in whose governing body the interests and concerns of workers, trade unions, employers, federal, provincial and territorial authorities, professional and scientific communities and the general public will be represented"

⁶² C-451.

⁶³ *Id.*

⁶⁴ See Harry Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century*, Federal Labour Standards Review, 2006, available at <http://ssrn.com/abstract=953049> (recommendations by appointed commission for amending Canadian Labor Code for federal workers, including a recommendation that "psychological harassment (bullying) should be dealt with as part of a broader program of violence prevention under Part II of the *Canada Labour Code*).

⁶⁵ CANADA OCCUPATIONAL HEALTH AND SAFETY REGULATIONS UNDER THE CANADA LABOUR CODE Part XX, *Violence Prevention in the Work Place*" SOR/86-304 (May 2008).

an employee in their work place that can reasonably be expected to cause harm, injury or illness to that employee.”⁶⁶ The 2008 Violence Prevention regulation also requires employers to develop and post a violence prevention policy, setting out employer obligations, which include the following obligations:

- (a) to provide a safe, healthy and violence-free work place;
- (b) to dedicate sufficient attention, resources and time to address factors that contribute to work place violence including, but not limited to, bullying, teasing, and abusive and other aggressive behaviour and to prevent and protect against it;
- (c) to communicate to its employees information in its possession about factors contributing to work place violence; and
- (d) to assist employees who have been exposed to work place violence.⁶⁷

In order to meet their obligations, employers are required to take several measures, including identifying factors that contribute to workplace violence⁶⁸ and assessing the potential for work place violence.⁶⁹ The employer is required to review these work place violence prevention measures, and make any necessary adjustments at least every three years.⁷⁰ Important features of any violence (or harassment/bullying) prevention program is obviously informing and training employees on the issue, and the 2008 Violence prevention regulations accordingly provide that the employer “shall provide information, instruction and training on the factors that contribute to work place violence that are appropriate to the work place of each employee exposed to work place violence or a risk of work place violence.”⁷¹ The employer’s obligations under the regulation must be carried out in consultation with the policy committee, the work place committee or

⁶⁶ SOR/86-304 § 20.2 (2008).

⁶⁷ SOR/86-304 § 20.3 (2008).

⁶⁸ SOR/86-304 § 20.4. In identifying factors, the regulation requires employers to take into account, at a minimum, the following: (a) its experience in dealing with those factors and with work place violence; (b) the experience of employers in dealing with those factors and with violence in similar work places; (c) the location and circumstances in which the work activities take place; (d) the employees' reports of work place violence or the risk of work place violence; (e) the employer's investigation of work place violence or the risk of work place violence; and (f) the measures that are already in place to prevent and protect against work place violence. *Id.*

⁶⁹ SOR/86-304 § 20.5.1. Under Section 20.6 (1), once the employer has assessed the potential for work place violence, the employer is required to develop and implement systematic controls to eliminate or minimize the risk “to the extent reasonably practicable.” *Id.* at § 20.6.1.

⁷⁰ SOR/86-304 § 20.7(1).

⁷¹ SOR/86-304 § 20.10(1).

the health and safety representative.⁷² These joint committees are an important feature of Canadian OSH law, and are notably absent under the U.S. Occupational Safety and Health Act of 1970.

2. The Role of OSH Joint Employer-Employee Committees in Canada and the United States

Safety and health legislation in many countries often provides for the formation of joint employer-employee safety and health committees, and/or the appointment of employer safety officers or representatives. This is the case in Canada, for example, but not in the United States. The functions of a safety and health committee will obviously vary among legislation, but will typically include compliance with existing and new laws/regulations and developing safety and health rules, procedures, and may even include safety inspections.⁷³

For example, under Saskatchewan's OSH law, which was recently amended in 2004 to include workplace bullying coverage, employers have a duty to establish committees where 10 or more workers of one employer work.⁷⁴ The employer shall: "(a) establish an occupational health committee at the place of employment; and (b) designate persons as members of the occupational health committee in accordance with this section."⁷⁵ The Act contains very specific guidelines regarding the composition of an occupational health committee, but also allows some discretion – for example, the committee "must consist of at least two and no more than 12 persons."⁷⁶ Significantly, at least half of the committee members must represent non-management workers, and the worker representatives must be elected by the constituent workers, and have been appointed in accordance with any applicable trade union rules.⁷⁷

The efficacy of such committees is not well-studied, but might be an important missing link in any U.S. efforts. Under the U.S. OSH Act, employees are viewed as an integral part of occupational safety and health law with a significant role to play in the goals and aims of the law, however,

⁷² SOR/86-304 § 20.1.

⁷³ 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).

⁷⁴ See Occupational Health and Safety (Harassment Prevention) Amendment of 2007, S.S. 66 (2007).

⁷⁵ *Id.* § 15(1)

⁷⁶ *Id.* § 15(2)-(4).

⁷⁷ *Id.* § 15(2)-(4).

the language of the OSH Act is aspirational in nature and there are no provisions specifically requiring the establishment of joint safety and health committees or their equivalent. Thus, the OSH Act declares its purpose and policy to provide safe and healthful working conditions by, *inter alia*, “encouraging” employers and employees to reduce hazards, “to stimulate” both employers and employees to create new programs, and envisioning “separate but dependant responsibilities and rights” for employees, and finally, “encouraging” joint labor-management efforts.⁷⁸ Despite these policy pronouncements, the OSH Act lacks any mandate that employers institute joint employer-employee safety and health committees.⁷⁹ The role of such committees in the development of workplace bullying prevention programs is potentially significant. Thus, although the OSH Act includes provisions designed to ensure employee participation in safety and health, these provisions do not require any meaningful engagement of employees as a stakeholder in safety and health programs. At present, employee participation and involvement in occupational safety and health is minimal.⁸⁰

There are, however, initiatives at the state level in the United States. Beginning in the 1990s, some states mandated establishing “safety and health committees” at large companies.⁸¹ These safety and health committees were comprised of managers and workers who could jointly discuss and make recommendations regarding safety issues.⁸² Such programs could be designed to include workplace bullying programs, providing for education and training in this regard, and allowing employee “voice”⁸³ 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

⁷⁸ OSHA §§ 2(b), 2(b)(2), 2(b)(13), 29 U.S.C. § 651(b).

⁷⁹ The OSH Administration has attempted to include such committees in programs such as the VPP program described in Harthill, *Harnessing OSHA*, *supra* note 7.

⁸⁰ Harthill, *Harnessing OSHA*, *supra* note 7, at 155. The Act provides employees 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. *Id.* (citing OSHA § 8(f)(1), 29 U.S.C. § 657(f)(1) (2006)). However, few employees file such complaints, despite the protection of an antiretaliation provision. *Id.* (citing OSHA § 11(c)(1), 29 U.S.C. § 660(c)(1)).

⁸¹ See Alison D. Morantz, *Has Devolution Injured American Workers? State and Federal Enforcement of Construction Safety*, 25 J.L. ECON. & ORG. 183, 200 n.6 (2009). (cited in Harthill, *Harnessing OSHA*, *supra* note 7, at 126).

⁸² Morantz, *supra* note 81. 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.*

⁸³ Lobel, *supra* note Error! Bookmark not defined..

program, but in providing an outlet for grievances. Meanwhile, Canadian provinces have begun to tackle the problem, and tackling it through occupational safety and health laws.

3. Quebec

Many of the ten Canadian provinces have occupational health and safety laws or regulations that deal with violence prevention, along the same lines as federal law discussed *supra*. Three provinces have enacted bullying-specific legislation: Quebec, Ontario, and Saskatchewan.⁸⁴ Of these three, Ontario and Saskatchewan are occupational safety and health laws, while Quebec is a moral harassment, dignitarian-based law.

In 2004, Quebec became the first Canadian province to legislate workplace bullying standards, addressing psychological harassment in the workplace through amendments to its Labour Standards Act.⁸⁵ Psychological harassment is defined as “any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures that affect an employee's dignity or psychological or physical integrity that results in a harmful work environment for the employee.” In addition, a single “serious” incident of psychological harassment with a lasting harmful effect on an employee may also be actionable.⁸⁶ The Quebec law grants every employee the “right to a work environment free from psychological harassment,” and requires employers to take reasonable action to prevent and stop harassment.⁸⁷ The legislation is enforced by Quebec's Employment Standards Commission, and aggrieved employees may obtain remedies including reinstatement, modification to the employee's disciplinary record, back pay, expenses for psychological support, and punitive and other damages.⁸⁸

Quebec's Commission Des Normes Du Travail (CNW) reviewed the complaints filed under the Act in 2007, on the third anniversary of the Act's

⁸⁴ Manitoba has introduced a bill to amend its Workplace Safety and Health Act to add bullying. The Workplace Safety And Health Amendment Act (Harassment And Violence In The Workplace) defines workplace-related harassment and workplace violence, and requires employers to prepare and annually review policies respecting same, to take steps to prevent occurrences of workplace-related harassment and workplace violence, to investigate allegations, and allows workers the right to refuse to work in certain circumstances. Bill 219 (2009).

⁸⁵ *See* R.S.Q. ch. N-1 (1977).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* Employees must file a complaint within 90 days of the last incident, *id.*

passage. In three years, 6,850 complaints by non-unionized employees were filed under the Act.⁸⁹ The CRW found that 95% of complaints alleged repetitive harassment and that 97% of complaints were settled in the early stages of the process and were not referred to the Employment Standards Commission.⁹⁰ The CNW's analysis of its findings emphasized the importance of prevention, highlighting the fact that many complainants had either not attempted to work through the employer's reporting program or had unsuccessfully attempted to do so.⁹¹ Significantly, the CNW found that 97% of these complaints were settled within the context of the CNW complaint processing procedure and subsequently, very few were referred to the next stage (although there is no U.S. equivalent of this process, one could posit that settlement at the initial agency-processing level equates to an avoidance of further litigation).

As is the case with other legislation, more studies on the effectiveness of this law, what works and what does not work, are sorely needed. Lessons for the United States in drafting a law are hard to draw when the effectiveness of potential models is still an unknown quantity – although hopefully this situation will change as time passes and each jurisdiction has experience with its new laws. Quebec's law is certainly an intriguing model but much less exportable to the United States due to multivariate factors, such as Quebec's civil law tradition, the high levels of unionization in Quebec, and the fact that Quebec's law is not an OSH-based law and seems to have had its genesis in the French moral harassment law, a dignitarian-based law.⁹²

4. Saskatchewan: The Harassment Prevention Amendment of 2007

In 2007, Saskatchewan became the second Canadian province to outlaw workplace bullying, by amending its Occupational Health and Safety Act ("OHSA") to expand the definition of harassment.⁹³ The Saskatchewan

⁸⁹ Commission Des Normes Du Travail, *Psychological Harassment in the Workplace – Prevention Remains The Solution for Quebec's Employers!*, June 4, 2010, <http://www.newswire.ca/en/releases/archive/June2007/04/c8475.html>. To put these figures into perspective, Quebec has a population of approximately 7 million, of whom ___ million are in the workforce.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² For a full review of Quebec's law and analysis of its exportability to the United States and other Canadian jurisdictions in light of Quebec's social and legal context, see generally Debra Parkes, *Targeting Workplace Harassment In Quebec: On Exporting A New Legislative Agenda*, 8 EMP. RTS. & EMP. POL'Y J. 423, 448-453 (2004).

⁹³ See Occupational Health and Safety (Harassment Prevention) Amendment of 2007,

OHSA defines “occupational health and safety” as:

the promotion and maintenance of the highest degree of physical, mental and social well-being of workers; (ii) the prevention among workers of ill health caused by their working conditions; (iii) the protection of workers in their employment from factors adverse to their health; and (iv) the placing and maintenance of workers in working environments that are adapted to their individual physiological and psychological conditions; and (v) the promotion and maintenance of a working environment that is free of harassment.⁹⁴

“Harassment” is defined as:

any inappropriate conduct, comment, display, action or gesture by a person:(i) that either: (a) is based on race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin; or (b) subject to subsections (3) and (4), adversely affects the worker’s psychological or physical well-being and that the person knows or ought reasonably to know would cause a worker to be humiliated or intimidated; and (ii) that constitutes a threat to the health or safety of the worker.⁹⁵

The amendments limit harassment to: “(a) repeated conduct, comments, displays, actions or gestures must be established; or (b) a single, serious occurrence of conduct, or a single, serious comment, display, action or gesture.”⁹⁶ “Harassment does not include “any reasonable action that is taken by an employer, or a manager or supervisor employed or engaged by an employer, relating to the management and direction of the employer’s workers or the place of employment.”⁹⁷

The general duty clause in the Saskatchewan law is much broader than its U.S. federal counterpart, but obligating employers to:

ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer’s workers; consult and co-operate with any occupational health committee or the occupational health and safety representative at the place of employment for the purpose of resolving concerns on matters of health, safety and welfare at work; (c) ensure, insofar as is reasonably practicable, that the employer’s workers are not exposed to harassment at the place of employment; co-operate with any other person exercising a duty imposed by this Act o the

S.S. 66 (2007) (Section 2(1), 3(c), 44(1)(nn), 48(1), 48.1(1)(2)(3)(4) & (5), 49(1), 56.1(1)(2)(3) & (4), 58(2) amended).

⁹⁴ *Id.* § 2(1)(p)(i).

⁹⁵ *Id.* § 2(1)(l).

⁹⁶ *Id.* § 2(3)(a)-(b).

⁹⁷ *Id.* § 2(4).

regulations; and(e) comply with this Act and the regulations.⁹⁸

The points of departure from the U.S. general duty clause are many, including the fact that the Saskatchewan law goes further in specifically obligated employers to ensure that employees are not exposed to workplace harassment.⁹⁹ Similar to the U.S. general duty clause, employees have a corresponding duty to “take reasonable care” to protect their own health and safety the health and safety of their co-workers, but are also mandated to “refrain from causing or participating in the harassment of another worker.”¹⁰⁰

The Saskatchewan law also obligates employers to establish health and safety services, programs, and committees. “An employer’s duty to provide an occupational health and safety service is designated pursuant the type of work being carried on, the number of workers employed and the degree of hazard at the place or places of employment.”¹⁰¹

Along with occupational health and safety services, employers have a duty to provide occupational health and safety programs. “An occupational health and safety program must be established and designed with: (a) the occupational health committee; the occupational health and safety representative; or (c) the workers, where there is no occupational health committee and no occupational health and safety representative.”¹⁰² The programs must include all documents, information, and matters that are prescribed in the regulations, as well as, having to be in writing and must be made available to the occupational health committee, the occupational health and safety representative, and the workers or an occupational health officer on request.¹⁰³

As previously mentioned, Saskatchewan OSH law also requires employers to establish an occupational health committee, with between 2 and 12 members, at least half of whom must be elected non-management representatives, at least committees where 10 or more workers of one employer work.¹⁰⁴

⁹⁸ *Id.* § 3.

⁹⁹ *Id.* § 3 (c).

¹⁰⁰ *Id.* § 4(a)-(c).

¹⁰¹ *Id.* § 12(1)-(2).

¹⁰² *Id.* § 13(2).

¹⁰³ *Id.* § 13(3)-(4).

¹⁰⁴ *Id.* § 15(2)-(4).

The Saskatchewan law enforces the duties contained in either the general duty clause or specific standards through a series of fines or potential imprisonment for violations. Every person who is guilty of an offence mentioned in clause 57(d), (e) or (g) that does not cause and is not likely to cause the death of or injury to a worker is liable on summary conviction to a fine not exceeding \$2,000.¹⁰⁵ Every person who fails to comply with clause 57(g) is liable on summary conviction, in addition to any other fine or penalty imposed pursuant the Act, to a fine not exceeding \$5,000 and to a further fine not exceeding \$500 for each day or portion of a day during which the offence continues.¹⁰⁶

Other fines set out for guilty offences are categorized into first offences and second offences. A first offence that is single and isolated offence warrants a fine not exceeding \$10,000, and a continuing offence warrants the same but to a further fine not exceeding 1,000 for each day or portion of the day during which the offence continues.¹⁰⁷ A second or subsequent offence that is single and isolated warrants a fine not exceeding \$20,000, and a continuing offence warrants the same but to a further fine of \$2,000.¹⁰⁸

OSHA calls for higher fines when offences that does not cause but is likely to cause serious injury or death to a worker. A single offence can be fined up to but not exceeding \$50,000, and second offences warranting a maximum of \$100,000.¹⁰⁹ Any death resulting due to an offence is liable to summary conviction to a maximum fine of \$300,000.¹¹⁰ If death results, potential imprisonment may occur for a term not exceeding two years.¹¹¹

¹⁰⁵*Id.* § 58(1). Section 57 includes offences of intentionally obstructing an occupational health officer in the exercise of the officer's powers or the performance of the officer's duties, intentionally making or causing to be made a false entry in any register, book, notice or other document, including deleting or destroying any entries, and failing to comply with an order, decision, or direction made pursuant to the Act or the regulations. *Id.* § 57(d)(e)(g).

¹⁰⁶*Id.* § 58(2)(a)-(b).

¹⁰⁷*Id.* § 58(4)(a). The offences subject to fines are failing to discharge a duty to which is person is subject pursuant the Act, contravenes a regulation, fails to comply with any requirement or contravenes any prohibition imposed by a notice of contravention, including any requirement or prohibition contained in the notice of contravention as modified on appeal, takes discriminatory action against a worker, and contravenes any other provision of the Act. *Id.* § 57 (a)-(c)(f)(h).

¹⁰⁸*Id.* § 58(4)(b).

¹⁰⁹*Id.* § 58(6)(a)-(b).

¹¹⁰*Id.* § 58(7).

¹¹¹*Id.* § 58(8).

Further, OSHA includes vicarious liability for offences by corporations.¹¹²

Obviously, using Saskatchewan as a model would require an overhaul of existing U.S. OSH Act – increased penalties, revised language to clarify the general duty clause includes mental health/injury in addition to physical harm, mandatory committees. Since this is very unlikely to happen, a more modest proposal is to utilize the committee requirement as a voluntary program, since even the most ambitious interpretation of employee’s involvement under the U.S. OSH Act does not require any joint committee requirements.

5. Ontario

Member of the Provincial Parliament, Andrea Horwath, introduced Bill 29 in 2007 to amend Ontario’s health and safety laws to add workplace harassment protections.¹¹³ Bill 29 passed a first reading in December 2007, but stalled in light of the government’s own version, Bill H 168, which became the amendment to Ontario’s OSHA. MPP Horvath criticized Bill 168 as inadequately protecting workers, in part because it was not geared specifically toward bullying.¹¹⁴ Nevertheless, the Ontario government’s version does recognize workplace violence and harassment as a health and safety concern. The amendment to Ontario’s OSHA became effective on June 15, 2010 and defines “workplace harassment” as “engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome.”¹¹⁵

¹¹² *Id.* § 61. In a prosecution of an offence pursuant the Act, any act or neglect on the part of a manager, agent, representative, officer, director or supervisor of the accused, whether or not the accused is a corporation, is deemed to be the act or neglect of the accused.

¹¹³ Bill 29, Occupational Health and Safety Amendment Act (Harassment and Violence), 2007, available at http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=1938 (last visited July 12, 2010).

¹¹⁴ Testimony at the Introduction of H 168, Ontario Parliament, Statement of MPP Andrea Horvath, Apr. 20, 2009, <http://www.workplacebullyinglaw.org/states/pdf-docs/horwath.pdf>. For a discussion of the background to the passage of Bill 128, see Frances R. Gallop, *Ontario’s Bully-Busting Bill: What It Means For Employers*, available at <http://www.filion.on.ca/uploads/File/pdf/seminar2009/FRG-2009.pdf> (last visited July 12, 2010).

¹¹⁵ An Act to Amend the Occupational Health and Safety Amendment Act with respect to Violence and Harassment in the Workplace and Other Matters, R.S.O. 1990, CHAPTER O.1, sec. 32.0.1-32.0.7 (2009), available at http://www.ontla.on.ca/bills/bills-files/39_Parliament/Session1/b168ra.pdf. “Workplace violence” is defined as:

Ontario's workplace violence and harassment law applies to Ontario employers who are regulated by the OSHA law, where more than five (5) employees are "regularly employed."¹¹⁶ The Act requires employers to take several steps towards prevention of workplace harassment and violence, and requires employers to establish strategies to deal with workplace violence. First, as part of their initial obligations under the Act, employers must conduct an assessment to determine the risk of workplace violence in the workplace, based on the nature of the workplace and the type of work performed.¹¹⁷ Further, employers must implement workplace violence and harassment policies and procedures to control any risks that were identified in the initial assessment, and must establish a process for reporting and investigation of any incidents of workplace violence or harassment.¹¹⁸

Additionally, the Ontario employer may have some disclosure obligations that relate to an employee's known history; employers and supervisors may be required to disclose personal information to a worker about individuals with a known history of violent behavior under certain circumstances – "if (i) the worker is likely to encounter the individual(s) in the course of his or her work, and (ii) there is a risk that the worker will be exposed to physical injury."¹¹⁹

Because the new Act was an amendment to Ontario's existing OSHA, there are also some requirements that dovetail with existing OSHA obligations. For example, OSHA provides employees with the right to refuse to work where conditions create a physical risk; under the new regulations workers can also refuse to work if conditions of workplace violence exist that are likely to endanger the worker.¹²⁰ Similarly, the penalties for non-compliance with the amendments are those applicable to

(a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker, (b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker, (c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* The Act was concerned also with domestic violence, and includes an employer's obligations that extend beyond the workplace; if an employer "ought reasonably" be aware of domestic violence that could likely expose a worker to injury in the workplace, the employer must take steps to ensure the safety of the worker. *Id.*

¹²⁰ *Id.* § 43(3)(b.1).

other OSHA violations, which included fines of \$500,000 for corporations.¹²¹ Also, as is the case under the existing OSHA law, corporate directors and officers have personal liability to take “all reasonable care to ensure that the corporation complies” with the OSHA, including the new workplace violence and harassment requirements.¹²² As is the case under most Canadian OSH laws, Ontario’s OSHA had a pre-existing requirement for employers (with some exceptions) to establish joint employer-employee safety and health committees or appoint a safety and health representative;¹²³ such a committee will necessarily be involved in the implementation of the amendments.

Thus, we see an emergence of workplace bullying laws in Canada that cannot be wholly disregarded as foreign and non-exportable. While it may be true that moral harassment laws, like the French/Quebec legislation, may not find traction in the U.S., this view does not apparently contemplate Canadian (and, as discussed *infra*, Australian) laws that view workplace bullying as a safety and health issue. Certainly, it could be argued that countries with a dignitarian tradition are more apt to recognize and legislate to correct harm to a worker’s psychological health because the social norms are in place to abhor such harassment as a moral outrage, leading to impetus to include bullying as a health and safety issue and reducing opposition. Nevertheless, explaining the more favorable reception to such laws by reference to the background dignitarian social norms provides an incomplete picture because it ignores the role of safety and health and the background norm of expectations that workers have a right to safe workplace endemic to these countries and to the United States. Europe, Canada and the United States share a well-established and grounded social norm that regards a safe and healthy workplace as a basic workers’ rights, reflected in internal legislation. Extending this concern to psychological bullying may well be easier in a country where the background norms include a dignitarian view of every individual’s right to be free from harassment, but such a view does not adequately explain why many anti-bullying laws find a natural home within existing safety and health legislation and the accompanying frameworks.

¹²¹ *Id.*

¹²² *Id.* As with other OSHA violations, if an employer fails to comply with the harassment and violence requirements, and an employee is injured or dies due to workplace harassment or violence, the employer may be subject to criminal sanctions for “recklessly breaching” their duty under the Canadian Criminal Code to take reasonable steps to ensure the safety of workers.

¹²³ Ontario Occupational Health and Safety Act, R.S.O. 1990, c. O.1, ss. 8, 9.

B. Australia

Like the United States and Canada, Australia is a federation with six states and two territories. Similarly, Australia has an English common-law tradition. Unlike the United States, Australia has a strong unionized workforce and a labor-based political party (the Australian Labor Party), and therefore probably has more political will to enact employee-friendly laws and/or interpret OHS law in an employee-friendly manner.

The federal government has an occupational safety and health law covering Commonwealth employees,¹²⁴ and each state and territory has its own OSH legislation, some of which address mental injury or mental health (this is in addition to specialized OSH laws, such as maritime and mining). Work Safe Australia was created as an independent statutory agency in 2009 to improve national occupational health and safety outcomes. Although it apparently lacks any current legal force, the agency is developing a model OSH law, the model Work Health and Safety Bill,¹²⁵ which is due to be implemented by the Commonwealth, all states and territories by December 2011. The model Bill defines “health” as physical and psychological health, thereby incorporating prevention of workplace bullying within the employer’s general duty clause (termed “primary duty”), but the Bill does not specifically address workplace bullying. Thus, like Canada, workplace bullying OSH laws have previously been left in the hands of state and territory governments and are consequently at varying degrees of development. The leading state in this issue is Victoria, which has successfully utilized the general duty clause of its OHS and served as a pioneer in the field for other states.¹²⁶

1. Victoria

Victoria- Section 21(1) of the Occupational Health & Safety Act states that “an employer shall provide and maintain so far as is practicable for employees a working environment that is safe without risks to health.”¹²⁷

¹²⁴ Occupational Health and Safety (Commonwealth Employment) Act 1991, <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/frameLodgmentAttachments/6B7B489C5CD9F006CA2570F1007FFCF5>.

¹²⁵ Safe Work Australia, Model Work Health and Safety Bill, May 11 2010 draft, http://www.safeworkaustralia.gov.au/NR/rdonlyres/7ACDA647-5F2F-4F6B-A30D-9F7C862F5F71/0/ModelWorkHealthAndSafetyAct_Revised_11May2010.pdf.

¹²⁶ New South Wales, for example, has adopted Victoria’s guidelines on prevention of workplace bullying, discussed *infra*.

¹²⁷ Victoria, Occupational Health and Safety Act of 2004, VICT. REPR. STAT. § 21(1) (2007).

“Health” under the Victoria law includes both physical and “psychological” health.¹²⁸ Neither the OHS Act nor the implementing regulations¹²⁹ specifically address workplace bullying or harassment, but the general duty clause, coupled with the inclusion of psychological health under the Act, provides at least minimal coverage. Indeed, the general duty clause was recently invoked in a landmark workplace bullying case, *___ v. Café Vamp*, discussed *infra*.

In addition to the general employer duty to maintain a safe and healthy working environment, an employer’s duty under the Act includes adequate “supervision, instruction, information and training necessary for employees to do their work safely” and to consult with an employee who is appropriately trained and acts as an occupational health and safety representative.¹³⁰ The regulating agency for the state of Victoria is WorkSafe Victoria, which created the 2003 Guidance Note on the Preventing and Responding to Bullying at Work.¹³¹ WorkSafe Victoria defines bullying as “repeated, unwanted behavior directed towards a worker or group of workers that creates a risk to health and safety.”¹³² It is the agency’s position that bullying is covered under the Victoria OHS Act’s general duty clause.¹³³

Although WorkSafe Victoria’s research has “consistently” shown that 14% of workers in Victoria experienced bullying,¹³⁴ there are very few cases on bullying under Victoria’s OSH law, and most have involved physical violence.¹³⁵ A recent case in Victoria, however, involved the prosecution of a business, the company’s director, and three employees under Victoria’s Occupational Health and Safety Act. The charges were brought by WorkSafe Victoria following a coroner’s verdict that Brodie Panlock committed suicide caused by workplace bullying.¹³⁶

¹²⁸ *Id.* § 5(1).

¹²⁹ Occupational Health and Safety Regulations 2007, S.R. No. 54/2007.

¹³⁰ Victorian Workcover Authority, page 16 (Victorian Workcover Authority (2001) *Proposed Code of Practice for the Prevention of Bullying and Violence in the Workplace*).

¹³¹ WorkSafe Victoria, www.worksafe.vic.gov.au, *Preventing and Responding to Bullying At Work*, July 30, 2009, <http://www.worksafe.vic.gov.au/wps/wcm/connect/wsinternet/WorkSafe/Home/Forms+and+Publications/Publications/Preventing+and+addressing+bullying+at+work>.

¹³² *Id.* at 3.

¹³³ *Id.* at 2.

¹³⁴ WorkSafe Victoria, www.worksafe.vic.gov.au, “Bullying.”

¹³⁵ *Id.*

¹³⁶ WorkSafe Victoria, www.worksafe.vic.gov.au, “News,” Feb. 9, 2010, <http://www.worksafe.vic.gov.au/wps/wcm/connect/wsinternet/worksafe/sitetools/news/business-director-three-workers-convicted-fined-for-bullying>.

In the *Café Vamp* case, teenage waitress Brodie Panlock was relentlessly bullied by her co-workers and the manager allowed the conduct to continue, until Brodie eventually committed suicide.¹³⁷ The coroner's inquest found that she had committed suicide because of the bullying, and in February 2010, following guilty pleas, the business, manager and, Brodie's co-workers were sentenced under the OHS Act.¹³⁸ The business was charged under Section 21(2a) of the OHS Act for a violation of the general duty clause, and fined \$110,00 (Australian dollars); the manager was charged under Sections 21(2a) and 21(2e), and section 144 of the OSH Act,¹³⁹ and fined a total of \$30,000; the three employees were all charged under Section 25 of the OHS Act¹⁴⁰ and charged \$10,000, \$30,000 and \$45,000.¹⁴¹

The *Café Vamp* case could be the equivalent of the Helen Green case in the United Kingdom, both cases placing employers on high alert of potential liability for failure to prevent and correct workplace bullying.¹⁴² The *Café Vamp* case is an example of an OSH law's general duty clause

¹³⁷ *Id.* The coroner found that Brodie was treated in an "extremely aggressive and intimidating" manner and that her co-workers were "relentless in their efforts to demean her." The Sydney Morning Herald, *Workers Fined \$115,000 Over Bullying of Café Waitress*, Feb. 8, 2010, <http://www.smh.com.au/national/workers-fined-115000-over-bullying-of-cafe-waitress-20100208-nlrj.html>.

¹³⁸ WorkSafe Victoria, www.worksafe.vic.gov.au, "News," Feb. 9, 2010, <http://www.worksafe.vic.gov.au/wps/wcm/connect/wsinternet/worksafe/sitertools/news/business-director-three-workers-convicted-fined-for-bullying>.

¹³⁹ Section 21(2a) provides that an employer violates the general duty clause, section 21(1) if it fails to "provide or maintain plant or systems of work that are, so far as is reasonably practicable, safe and without risks to health." Section 21(2e) provides that it is a violation of the general duty clause if an employer fails to "provide such information, instruction, training or supervision to employees of the employer as is necessary to enable those persons to perform their work in a way that is safe and without risks to health." Section 144 provides for the liability of corporate officers for offenses by the corporate body.

¹⁴⁰ Section 25 provides for corresponding employee duties to take reasonable care for their own health and safety at work, as well as to "take reasonable care for the health and safety of persons who may be affected by the employee's acts or omissions at a workplace." Section 25 provides criminal penalties for violations of the employee's duty of care.

¹⁴¹ WorkSafe Victoria, www.worksafe.vic.gov.au, "News," Feb. 9, 2010, <http://www.worksafe.vic.gov.au/wps/wcm/connect/wsinternet/worksafe/sitertools/news/business-director-three-workers-convicted-fined-for-bullying>.

¹⁴² At the time of sentencing, Worksafe Victoria reported that it was prosecuting at least two other cases of workplace bullying and investigating several other cases. WorkSafe Victoria, www.worksafe.vic.gov.au, "News," Feb. 9, 2010, <http://www.worksafe.vic.gov.au/wps/wcm/connect/wsinternet/worksafe/sitertools/news/business-director-three-workers-convicted-fined-for-bullying>.

being used to not only guide employers in their duties under the Act, but to penalize responsible parties.

The U.S. OSH Act does have similar criminal penalties. Of course, the difference between the U.S. law and Victoria's OHS Act is the inclusion of psychological health in the definition of health. While the focus on physical injury in the general duty clause is clearly a significant hurdle, the author has previously laid the groundwork for an interpretation of the general duty clause that allows for the inclusion of workplace bullying.¹⁴³

A ten year review of the Victoria legislation found that the use of OHS law has enabled the state to make a significant impact on workplaces, in terms of shifting employer, union, and community attitudes towards accepting bullying as an occupational health and safety matter.¹⁴⁴ Instructive for U.S. efforts, WorkSafe Victoria was able to effectively use international research and literature as a basis to educate and further these changes in the state's understanding of the issue as an occupational safety and health matter.¹⁴⁵

2. Other Developments

Other Australian states, such as New South Wales and Queensland, appear to be at the same stage of development as Victoria.¹⁴⁶ In Queensland, a Workplace Bullying Taskforce issued a 2001 report that focused on the problem.¹⁴⁷ The report also noted the difficulty in prosecuting bullying cases under the Act, but this difficulty that may have been reduced after the tragic case of Brodie Panlock, in addition to a recent report of prevalence of bullying at work in Queensland that has brought the issue to the fore: "An alarming number of Queensland employees have considered suicide or self-harm after being bullied or harassed at work,

¹⁴³ Harthill, *Harnessing OSHA*, *supra* note 7.

¹⁴⁴ Oonagh Marian Elizabeth Barron, *What Have We Learnt? Ten Years of OHS Laws and Workplace Bullying in Australia*, abstract submitted to 7th Annual International Conference on Workplace Bullying and Harassment, Cardiff, Wales, June 2010.

¹⁴⁵ *Id.*

¹⁴⁶ New South Wales has adopted Victoria's guidelines on the prevention of workplace bullying but no cases appear to have been prosecuted under the New South Wales OHS, although some bullying cases have been successful when brought in the context of unfair dismissal and tort claims. See generally *Beyond Bullying*, http://www.beyondbullying.com.au/bb_case.html (list and links to cases) (last visited July 15, 2010).

¹⁴⁷ Queensland, *Workplace Bullying: Issues Paper* (2001) at 33, http://www.deir.qld.gov.au/workplace/resources/pdfs/harassment_code2004.pdf

prompting the workplace ombudsman to recommend changes to the law.”¹⁴⁸

Thus, Australian OHS law is at a more advanced stage than in the United States, although still in a somewhat fledgling state. As an initial matter, because state and Commonwealth OHS laws define “health” as both physical and psychological health, the textual language of the law is open to the interpretation that workplace bullying is an occupational health matter that falls within the employer’s general duty requirements. In contrast, the language of the U.S. OSH Act’s general duty clause does not readily lend itself to the interpretation without a more nuanced analysis that requires looking beyond the plain language of the statutory text.¹⁴⁹ Further, Australian regulators have taken the affirmative step to assert and recognize that the state OHS law’s general duty provision covers workplace bullying, and initiated policy guidance on prevention and investigation. Finally, Victoria’s regulators have taken the ultimate step in prosecuting an employer and employees for violation of the state’s general duty clause(s) in a case leading to suicide. By December 2011, a national model OHS Act is expected to be adopted throughout Australia and it remains to be seen what effect this will have on workplace bullying regulations. Reviews of the effectiveness of state initiatives is sorely needed, looking not only on the impact of the use of OHS law on the prevention and reduction of workplace bullying, but also to review what, if any, impact bullying regulation has had on businesses’ bottom lines (profits, loss, attrition, work absences, and other measures). Until then, perhaps the only lesson that can be gleaned for the United States is that OSH law can be successfully utilized to develop regulatory policies and guidelines.

C. *The Nordic Countries: Sweden, Finland, and Norway*

1. Sweden

Sweden is frequently viewed as the leader in recognizing and combating the problem of workplace bullying, in part because Sweden was the first country to attempt to regulate the problem, issuing two safety and health regulations in 1993.¹⁵⁰ Undoubtedly, the regulation was spurred by the

¹⁴⁸ Courtney Trenwith, *Queensland Workers Bullied To Despair*, July 6, 2010, Brisbane Times, <http://www.brisbanetimes.com.au/queensland/queensland-workersbullied-to-despair-20100706-zydc.html>.

¹⁴⁹ See generally Harthill, *Harnessing OSHA*, *supra* note 7.

¹⁵⁰ AFS 1993:2; AFS 1993:17. Perhaps causing some confusion among commentators, the Swedish ordinance has sometimes been referred to as a “moral harassment” law. See,

work of a Swedish workplace bullying pioneer, Heinz Leymann.¹⁵¹

The Swedish regulatory system is similar to the OSH framework in the United States, in that the Swedish government has enacted an OSH statute and a regulatory agency issues implementing ordinances, with an Inspectorate that fulfils the same type of inspection and citation responsibilities as the OSH Administration.¹⁵² Two Swedish safety and health ordinances address workplace bullying: the Ordinance on Violence and Menaces in the Working Environment,¹⁵³ and the Ordinance on Victimization at Work.¹⁵⁴

These 1993 ordinances were issued by the Swedish National Board of Occupational Safety and Health pursuant to Section 18 of the Work Environment Ordinance.¹⁵⁵ The Ordinance on Violence and Menaces is the broader regulation, dealing with “risks of violence or threats of violence.”¹⁵⁶ Violence is not specifically defined in this ordinance, but the general recommendations of the Board explain that “[v]iolence ranges from murder

e.g., 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). The problem is largely due to the various terms that are used to describe workplace bullying; workplace bullying is largely a U.S. and U.K. term, moral harassment is largely a French term, while other European countries have referred to the same phenomena as mobbing. For this reason, this Article avoids a discussion of French law simply because it is entitled a moral harassment law and does not appear to have an occupational safety and health basis or focus. While most commentators are, in general terms, describing the same phenomena, the label is tremendously important. Referring to foreign law as a “moral harassment” law fuels the idea that all European law is grounded in notions of human dignity and therefore cannot easily be imported into the U.S. because the U.S. lacks a dignitarian tradition. But, it is just as likely that a victimization law that finds a home in an OSH law is just that – the law stems from the recognition that bullying is an occupational safety and health hazard. Of course, this could be an endless chicken and egg debate – were bullying laws placed for adoption in a safety and health regulatory framework because that was a convenient fit even though the birthmother of the law was respect for human dignity? Or were bullying laws birthed through OSH laws?

¹⁵¹ *Id.*

¹⁵² The statute is the Work Environment Act, and the agency tasked with issuing regulations was previously the National Board of Occupational Safety and Health, now called the Work Environment Authority. <http://www.av.se/inenglish/lawandjustice/>.

¹⁵³ A.F.S. 1993:2 (Jan. 14, 1993).

¹⁵⁴ A.F.S. 1993:17 (Sept. 21, 1993).

¹⁵⁵ S.F.S. 1977:1166, Section 18 of the Work Environment Ordinance. In 2001, the Swedish Work Environment Authority was formed by amalgamating the ten districts of the Labour Inspectorate and the National Board of Occupational Safety and Health.

¹⁵⁶ AFS 1993:2, § 1.

to harassment in the form of threatening letters or phonecalls.”¹⁵⁷ The Ordinance on Victimization more specifically addresses workplace bullying, termed “victimization at work.”¹⁵⁸ Victimization at work is defined as “recurrent reprehensible or distinctly negative actions which are directed against individual employees in an offensive manner and can result in those employees being placed outside the workplace community.”¹⁵⁹ The Swedish National Board of Occupational Safety and Health’s Guidance provisions further explain that “victimization” is a collective term for the phenomena of “adult bullying, mental violence, social rejection, and harassment.”¹⁶⁰ The Board cogently described types of victimization behavior that today are well known and documented by numerous studies;¹⁶¹ slandering an employee, deliberately withholding work-related information or supplying incorrect work information, deliberately sabotaging work performance, insulting ostracism, offensive “administrative penal sanctions.”¹⁶²

The Board recommendations also provided examples of the safety and health consequences of victimization at work, thereby justifying the need for the ordinance.¹⁶³ The Board identified consequences that are now well-established but were ground-breaking in 1993; examples of consequences among individual employees include high stress level, physical illness, and “mental reactions.”¹⁶⁴ Examples of consequences among the working group include reduced efficiency and productivity, high sickness absenteeism, and large personnel turnover.¹⁶⁵ The Board’s recommendations, like their U.S. OSHA counterpart, are prophylactic in nature, emphasizing the preventative work environment policy and employer preparedness for psychological, social and organizational aspects of the work environment to the same extent as employer obligations regarding the physical working

¹⁵⁷ *Id.* “Background: General Recommendations on the implementation of the provision.”

¹⁵⁸ AFS 1993:17.

¹⁵⁹ *Id.* at §1.

¹⁶⁰ *Id.* Guidance on Individual Sections.

¹⁶¹ *See supra* Part III.

¹⁶² *Id.* Offensive administrative sanctions are further defined as abuse of power liable to cause high, prolonged stress or other abnormal mental strains on the individual. *Id.* This again demonstrating the requisite link between the victimization and safety and health risks.

¹⁶³ *Id.* Background to General Recommendations.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* Some studies have questioned the correlation between bullying and sickness absenteeism. *See, e.g.,* Helge Hoel, Stale Einarsen & Gary Cooper, *Organizational Effects of Bullying*, in Zapf et al., *supra* note 7, at 146-149 (listing studies from Norway, Finland, the U.K. and Australia).

conditions.¹⁶⁶

Although the Swedish legislation has been viewed as a model by advocates in other countries,¹⁶⁷ the Swedish ordinance has several shortcomings. Helge Hoel and Stale Einarsen recently undertook a qualitative study because 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, and yet surprisingly, the effectiveness of the legislation and its potential for combating the problem on the ground had not been evaluated.¹⁶⁸ Hoel and Einarsen identified several shortcomings indicating that the Swedish law has not necessarily resulted in effective regulation of behavior.¹⁶⁹ The shortcomings were: (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.¹⁷⁰ As posited in an earlier article, the Swedish experience provides lessons for any emerging U.S model.¹⁷¹

Although Hoel and Einarsen concluded that the Swedish regulation has had a positive initial and ongoing impact in raising awareness of the problem, it had not necessarily led to changes in behavior due to a combination of problems.¹⁷² Some of these shortcomings can be viewed as structural (i.e., part of the design of the regulation itself), such as lack of sanctions and lack of a private cause of action, but other problems are related to the culture and politics of Sweden, such as lack of a litigation culture, resulting in employer apathy.¹⁷³

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

¹⁶⁶ *Id.* Special Measures and Routines.

¹⁶⁷ Helge Hoel & Stale Einarsen, *Shortcomings of Antibullying Regulations: The Case of Sweden*, 19 EUR. J. WORK & ORGANIZATIONAL PSYCHOL. 30 (2010). 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.*

¹⁶⁸ Hoel & Einarsen, *Shortcomings; Sweden*, *supra* note 167. 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.*

¹⁶⁹ Hoel & Einarsen, *Shortcomings; Sweden*, *supra* note 167.

¹⁷⁰ *Id.*

¹⁷¹ Harthill, *Harnessing OSHA*, *supra* note 7.

¹⁷² Hoel & Einarsen, *Shortcomings; Sweden*, *supra* note 167.

¹⁷³ *Id.*

structure, such as low inspection rates and employer apathy resulting from a lack of sanctions and penalties at both the governmental and private level.¹⁷⁴ One surprising finding was that the trade unions had been ambiguous about ensuring the effectiveness of the regulation, caught between representing employee and employer interests as well as prioritizing traditional workplace issues over workplace bullying.¹⁷⁵ This supports the view of the relative importance of trade union involvement in a successful campaign to raise awareness and effectively regulate responses, from the initial advocacy stage to an ongoing role in ensuring effective compliance. Hoel & Einarsen's conclusion provides important guidance for the United States; workplace bullying requires an integrated, approach utilizing legislation, self-regulation, and engaging employers, unions and employees.¹⁷⁶

Comparing the United States to Sweden, or any Scandinavian/Nordic country, is particularly fraught with difficulty because of the vast differences in culture, politics, and legal traditions. Nevertheless, the observations of Hoel and Einarsen can provide some useful insight into what works and what does not work in an OSH-based regulatory regime. Problems with effectuating the Swedish ordinances due to the ineffective role of the inspectorate can be likened to the ineffectiveness of the OSHA inspectors in the United States, however, the American OSH Act does have an advantage over its Swedish counterpart because the Act allows sanctions in the forms of penalties and fines. Both laws lack a private cause of action, which was viewed as problematic by Hoel and Einarsen in the Swedish case. On the bright side, Hoel and Einarsen concluded that the Swedish ordinance raised awareness of the phenomena and this is something that the United States sorely needs; buy-in of any new law from the key constituents is unlikely until perception and recognition of the problem must be raised.¹⁷⁷ In the final analysis, a multi-pronged approach is essential and

¹⁷⁴ As explored in Harthill, *Harnessing OSHA*, *supra* note 7, 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. *Id.* (citing Hoel & Einarsen, *Shortcomings; Sweden*, *supra* note 167).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* For further recommendations, the reader is directed to the Hoel & Einarsen study.

¹⁷⁷ Inclusion of an OSH-type law may not have the advantages of a new cause of action but nevertheless can serve a very useful purpose – awareness of the problem. Just giving the problem *legal* recognition can serve an important function. *See* Parkes, *supra* note at 442 (citing Elizabeth Schnedier regarding assertion of new rights by domestic violence victims). Also, placing a new law within an OSH framework removes it from the realm of “individual” behavior – bullies are just a few bad apples – and placing it firmly in

the lesson to be learned from the Swedish experience is that OSH is a start but not the end.

2. Finland and Norway

Finland and Norway have also introduced OSH-based workplace bullying laws in the past decade. Finland introduced the Occupational Safety and Health Act in 2002 (effective January 2003).¹⁷⁸ The Act requires employers to address and correct “harassment and other inappropriate treatment” in the workplace.¹⁷⁹ The Finnish system tracks the familiar regulatory OSH system with command-and-control legislation, with a government agency fulfilling the role of inspection, compliance and penalty assessment.¹⁸⁰

The Finnish view of occupational safety and health is holistic “In Finland, besides healthy and safe working conditions, occupational safety and health also covers the conditions and terms of employment, mental wellbeing, management and the efficient functioning of organisations, and productivity.”¹⁸¹ The Finnish Act also adopted the ILO’s principle of a tripartite system, with the government, employers, and employees taking participating in planning, adopting and implementing occupational safety and health actions.¹⁸² The Finnish system relies on labor agreements to provide for employee representation at worksites, but in the absence of any

the realm of “organizational” behavior - a problem that *employers* have to address because it is structural/systemic.

¹⁷⁸ Finnish Occupational Safety and Health Act, 738, ch. 5, sec.28 (2002) (requiring employers to take measures in cases of “harassment and other inappropriate treatment” at work, that has the potential to endanger the health and well-being of targets). The effectiveness of the Act and the measures identified is in need of review; a 2008 study found that Finland had the highest rates of workplace bullying in Europe. http://yle.fi/uutiset/news/2008/09/finland_leads_europe_in_workplace_bullying_320640.html.

¹⁷⁹ Finnish Occupational Safety and Health Act, 738, ch. 5, sec.28 (2002); Denise Salin, *Organizational Measures Taken Against Workplace Bullying: The Case Of Finnish Municipalities*, *Swedish School of Economics & Business Administration* No. 521 (2006).

¹⁸⁰ See generally Ministry of Social Affairs and Health, *Occupational Safety and Health in Finland*, 8-9, 10-11 (2007),

http://www.stm.fi/c/document_library/get_file?folderId=39503&name=DLFE-7149.pdf.

¹⁸¹ Ministry of Social Affairs and Health, *Occupational Safety and Health in Finland*, 4 (2007),

http://www.stm.fi/c/document_library/get_file?folderId=39503&name=DLFE-7149.pdf.

¹⁸² Ministry of Social Affairs and Health, *Occupational Safety and Health in Finland*, 12 (2007),

http://www.stm.fi/c/document_library/get_file?folderId=39503&name=DLFE-7149.pdf.

union agreement, employers with ten or more employees must have an employee safety and health representative.¹⁸³ Although only seven in one hundred workplaces have ten or more workers,¹⁸⁴ many workplaces are unionized and governed by collective agreement. Nevertheless, the impact and importance of employee representatives in the Finnish system is difficult to assess. The significance of unions and employee representatives in enacting the Finnish law is even more difficult to assess because the occupational safety and health law appeared to emerge in conformance with European Union and ILO directives.¹⁸⁵

Countries like Finland and Sweden may be more receptive to the inclusion of workplace bullying within their occupational safety and health systems because of a broader conception of occupational safety and health; Nordic countries tend to view a good working environment as including not just occupational safety and health but also “terms of employment and the psychic well-being of the employees.”¹⁸⁶ The Finnish OSH administration has acknowledged that the concept of safety and health has therefore been extended to include mental well-being, as well as “contentment with the work, skills and motivation, good organization and management.”¹⁸⁷ Finland’s OSH guidelines are illustrative of this holistic view:

The occupational safety and health administration, in close cooperation with the labor market organizations [sic], affects the functioning of the workplaces and working environment by increasing the employees’ occupational safety, well-being, health and results of their activities.¹⁸⁸

Norway has taken a slightly different path to recognize OSH coverage of workplace bullying. In 2001, the government of Norway and social partners entered into the Inclusive Workplace Agreement (“IW-Agreement”), a tripartite agreement covering the period 2001-2005.¹⁸⁹ The IW-Agreement was a response to Norway’s high levels of absence due to sickness and correspondingly high levels of workers receiving disability

¹⁸³ *Id.* at 9-10.

¹⁸⁴ *Id.* at 24.

¹⁸⁵ The European Union position is that an existing health and safety directive already covers workplace bullying. See European Union Council Directive 89/391, June 12, 1989, 1989 O.J. (L183).

¹⁸⁶ Brochure of the Ministry of Social Affairs and Health 2004:5, *Occupational Safety and Health in Finland*, Ministry of Social Affairs and Health, Tampere 2004.

¹⁸⁷ *Id.*

¹⁸⁸ “Operational Principle of the Occupational Safety and Health Administration.” *Id.* at 5.

¹⁸⁹ Organization for Economic Co-Operation and Development (“OECD”), *The Inclusive Workplace Agreement: Past Effects and Future Directions*, at 4 (Nov. 2005).

benefits.¹⁹⁰ The aim of the IW-Agreement was to focus responsibility to the workplace for reducing the flow of workers into disability benefits, necessarily focusing on reducing sickness absence.¹⁹¹ Norway's anti-bullying campaign, launched in 2004, was part of this IW-Agreement.¹⁹² As with the IW-Agreement, the objective was to focus responsibility on workplace bullying on the workplace principals, employers, employees and representatives.

Thus, the Nordic countries have developed a more holistic concept of occupational safety and health, one which includes physical, mental, and social well-being, but further research is needed to determine whether this expanded concept of the working environment occurred prior to, contemporaneously with, or as a result of the inclusion of protection from workplace bullying. Further research is also needed on the effectiveness of Finland and Norway's anti-bullying measures.¹⁹³

D. *The United Kingdom*

The United Kingdom has adopted a multi-pronged approach to address, correct, and redress workplace bullying, utilizing stalking legislation, common law principles, union campaigns, and safety and health programs focused on work-related stress.¹⁹⁴ In 1997, the UK enacted the Protection from Harassment Act ("PHA"), which provides criminal and civil penalties for harassment in a number of different contexts, including the

¹⁹⁰ *Id.*

¹⁹¹ *Id.* The IW-Agreement had three objectives: to reduce sickness absence by at least 20%, to increase employment of workers with disabilities, and to increase the retirement age to prolong working life. *Id.* Einarsen and Hoel, in reviewing the IW-Agreement, however, have observed a relatively weak link between sickness absences and workplace bullying. Stale Einarsen, Helge Hole, & Morten Birkeland Nielson, *Workplace Bullying*, at page 47 (citing a Norwegian study that found only one percent of sickness absences were due to bullying).

¹⁹² Stale Einarsen, Helge Hole, & Morten Birkeland Nielson, *Workplace Bullying*, at page 2. Five percent of Norwegian workers self-report bullying, about 50% by supervisors. *Id.* at page 15 (citing Einarsen, Raknes, Matthesen & Hellesoy).

¹⁹³ For an example of a descriptive account of prevention and intervention measures taken in Finland, see Denise Salin, *Organizational Measures Taken Against Workplace Bullying: The Case Of Finnish Municipalities*, *Swedish School of Economics & Business Administration* No. 521 (2006). Although not an analysis of effectiveness of these measures, the Salin report identifies some empirical data reporting a negative correlation between having an anti-bullying policy and the prevalence of workplace bullying. *Id.* at 7. The Salin report also identified the problem of lack of data collected by businesses on effectiveness, and acknowledged the need for, and difficulties in, assessing effectiveness. *Id.* at 20-21.

¹⁹⁴ See generally Harthill, *Lessons From The United Kingdom*, *supra* note 9.

workplace.¹⁹⁵ The PHA is not a safety and health legislation, but is a general anti-harassment law initially aimed at combating stalking. It was not initially seen as a workplace law, but because of its broad language, it has been interpreted to include workplace bullying. In 2005, England's highest court held that the doctrine of vicarious liability applied to cases of workplace harassment – in effect making the employer liable for workplace bullying.¹⁹⁶

In addition, the United Kingdom views work-related stress as a safety and health concern, and workplace bullying is viewed by the British government as a stress issue. For this reason, developments in the United Kingdom are note worthy, particularly since the developments seem to be part of a wider, holistic approach that brings together some of the elements that Hoel and Einarsen posit are missing in the Swedish model.

1. OSH Laws, Regulations, and Administrative Standards

The U.K.'s equivalent to the U.S. OSH Act is the Health and Safety at Work Act of 1974 ("HSWA"),¹⁹⁷ and the regulations there under are the Management of Health and Safety at Work Regulations of 1999 ("MHSWR").¹⁹⁸ The HSWA imposes a statutory duty on employers "to ensure, so far as it reasonably practicable, the health, safety and welfare of all his employees."¹⁹⁹ The MHSWR impose a duty on employers to "consider the risks to employees (*including the risk of reasonably foreseeable violence*); decide how significant these risks are; decide what to do to prevent or control the risks; and develop a clear management plan to achieve this."²⁰⁰ The HSWA allows an employee a private cause of action for violations of the regulations.²⁰¹ Further, because the language of the

¹⁹⁵ Protection from Harassment Act, 1997, c. 40, § 1 (Eng.).

¹⁹⁶ *Majrowski v. Guy's and St. Thomas's NHS Trust*, [2005] EWCA (Civ) 251, at ¶ 41 (Eng.); see generally Harthill, *Lessons From The United Kingdom*, *supra* note 9. The most famous PHA workplace bullying case in the UK is the 2007 case of Helen Green where Ms. Green's total damage award of £800,000 included emotional distress damages. *Green v. DB Group Servs. (U.K.) Ltd.*, [2006] EWHC 1898 (Q.B.); see also Harthill, *Lessons From The United Kingdom*, *supra* note 9.

¹⁹⁷ Health and Safety at Work Etc. Act 1974, c. 37 *et seq.*

¹⁹⁸ The Management of Health and Safety at Work Regulations 1999, S.I. 1999/3242 (emphasis added).

¹⁹⁹ Health and Safety at Work Act 1974, c. 37, sec. 2.(1).

²⁰⁰ Health and Safety Executive, Work-Related Violence, <http://www.hse.gov.uk/violence/law.htm>.

²⁰¹ See HSWA sec. 47(2) ("Breach of a duty imposed by health and safety regulations . . . shall, so far as it causes damage, be actionable except in so far as the regulations provide otherwise."). A 2003 amendment to Management of Health and Safety at Work

HSWA is sufficiently broad, cases of workplace bullying can be brought under the HSWA without concern for proving likelihood of any physical injury.²⁰²

The Health and Safety Executive (“HSE”) is an independent government agency responsible for enforcing the HSWA and health and safety standards.²⁰³ It is the position of the HSE that employers have a duty under the HSWA and MHSWR to assess and control the risk of stress-related illnesses arising from work activities.²⁰⁴ In addition to its warning pronouncements regarding the scope of an employer’s general duty clause obligations to deal with workplace violence and stress, the HSE has relied upon a social partnership approach, issuing guidelines and tools for employers to utilize on a voluntary basis.²⁰⁵ In 2004, the HSE launched education efforts and standards regarding work-related stress, in the form of the HSE Management Standards on Work-Related Stress (“Management

Regulations (MHSWR) removed an exclusion of civil liability for breach of the regulations, and it therefore appears that a bullied employee could try to bring a civil lawsuit against an employer for breach of the general duty clause. The Health and Safety Executive stress management standards, discussed *infra*, could be used as a guideline if such a suit is brought.

²⁰² See HSWA, sec. 47(6) (“In this section “damage” includes the death of, or injury to, any person (including any disease and any impairment of a person’s physical or mental condition).”). The Health and Safety Executive reports that some civil cases have been successfully brought under the HSWA and HSWR, but none of these cases involved workplace bullying. Health and Safety Executive, Stress, *Legal Position Guidance*, <http://www.hse.gov.uk/stress/faqs.htm?ebul=stress/may-10&cr=03#leg> (citing *Wheeldon v HSBC* (2000); *Melville v Home Office*; *Hartman v South Essex Mental Health and Community Care NHS Trust* (2005)). *But see Connor v. Surrey County Council*. The English High Court awarded a head teacher £387,788 in damages, not including interest and past loss, on her claims against her employer for psychiatric injury, resulting from bullying. The plaintiff utilized both common law claims of negligence and breach of the duty of trust, and statutory claims under the PHA of 1997 and the MHSWR. The plaintiff endured two years of anxiety and low morale, and the court concluded that her employer ought to have considered that the plaintiff was at risk of psychiatric injury from stress, part of which resulted from workplace bullying (or in this case, mobbing). The Court found that the employer disregarded the plaintiff’s health and welfare and that of her staff. *Id.*

²⁰³ See generally The Health and Safety Executive, “About Us,” <http://www.hse.gov.uk/aboutus/inthepublicinterest/index.htm> (last visited July 16, 2010). The functions of the HSE were delegated from a predecessor agency, the Health and Safety Commission (“HSC”), which merged with HSE in 2008; therefore references in text will be to HSE to reduce confusion. Legislative Reform (Health and Safety Executive) Order 2008, [SI 2008/960](#).

²⁰⁴ Health and Safety Executive, Stress, *Legal Position Guidance*, <http://www.hse.gov.uk/stress/faqs.htm?ebul=stress/may-10&cr=03#leg>.

²⁰⁵ See Harthill, *Lessons From the United Kingdom*, *supra* note 9, at 7.

Standards”).²⁰⁶

Employers are required by law to consult with employees on occupational safety and health matters in the United Kingdom, under a complex system of regulations; the type of employee representative or committee depends on whether the workplace is unionized or non-unionized, or both.²⁰⁷ In general, employers must consult with employees, either through a committee, employee representative, or employees individually, on the following matters:

- the introduction of any measure which may substantially affect their health and safety at work, for example the introduction of new equipment or new systems of work (such as the speed of a process line and shift-work arrangements);
- arrangements for getting competent people to help them comply with health and safety laws (a competent person is someone who has sufficient training and experience or knowledge and other qualities that allow them to help an employer meet the requirements of health and safety law);
- the information they must give their employees on the risks and dangers arising from their work, measures to reduce or get rid of these risks and what employees should do if they are exposed to a risk;
- the planning and organisation of health and safety training; and
- the health and safety consequences of introducing new technology.²⁰⁸

It is difficult to assess what, if any, role employee safety and health representatives and committees have had in advancing workplace bullying as a safety and health concern, or in implementing prevention and intervention measures in the British workplace, although the Trade Union Congress²⁰⁹ claims that unions were in part responsible for the HSE's recognition that stress is a major cause of work-related ill-health.²¹⁰

²⁰⁶Health and Safety Executive, *Stress, Legal Position Guidance*, <http://www.hse.gov.uk/stress/faqs.htm?ebul=stress/may-10&cr=03#leg>. See also *id.*

²⁰⁷Health and Safety Executive, *Consulting Employees on Health and Safety: A Brief Guide to the Law* (October 2008), <http://www.hse.gov.uk/pubns/indg232.pdf>. The governing regulations for unionized workplaces are the Safety Representatives and Safety Committees Regulations 1977 (as amended), and for non-unionized workplaces are the Health and Safety (Consultation with Employees) Regulations 1996 (as amended).

²⁰⁸Health and Safety Executive, *Consulting Employees on Health and Safety: A Brief Guide to the Law* (October 2008), <http://www.hse.gov.uk/pubns/indg232.pdf>.

²⁰⁹The Trades Union Congress represents 58 unions, which represent nearly 7 million employees. Trades Union Congress, *About Us*, http://www.tuc.org.uk/the_tuc/index.cfm.

²¹⁰Trades Union Congress, *Health and Safety Executive's Management Standards for Work-Related Stress, A Guide for Safety Representatives*,

2. The Health and Safety Executive and Management Standards On Work-Related Stress

The Management Standards provide several tools for employers, but a shortcoming of these standards is that they focus on stress generally, not workplace bullying. Nevertheless, the HSE Management Standards do provide guidance to employers to self-evaluate the risk of work-related stress within their organization, assess their performance against a benchmark, and develop interventions to achieve the goals identified.²¹¹ HSE's Management Standards are a useful educational tool for employers, particularly because they provide information on the costs associated with stress; again, a shortcoming of the Standards is that not only are they voluntary, but they focus on stress. Of course, workplace bullying is a major cause of work-related stress, but the value of the Standards is considerably diluted because it is non-mandatory and does not expressly address workplace bullying.

Indeed, the Standards may have had little if any impact on workplace bullying in the past decade - HSE has recognized that the Management Standards have offered little guidance for intervention in cases of workplace bullying. Beginning in 2006, HSE prepared a series of planned reports to review current research on workplace bullying and to identify gaps in current knowledge to further define areas of HSE research,²¹² but the status of workplace bullying as an occupational health and safety concern remains peripheral and static.²¹³

The OSH experience in the U.K. is therefore mixed. First, the focus of the HSE has been on stress, not workplace bullying. Second, even with an acknowledgement that workplace bullying is a form of stress-related illness that requires employer intervention, HSE has relied on a voluntary approach that may not be effective. It is difficult to assess the effectiveness of these voluntary OSH intervention and awareness strategies standing alone,

http://www.tuc.org.uk/h_and_s/tuc-10147-f0.cfm.

²¹¹ The HSE's position is that stress and stress-related illness are not a reportable injury under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations of 1995 ("RIDDOR"). *Id.* (stating that the "question of whether to include occupational stress as a RIDDOR reportable disease was considered during the development of the current Regulations. On the advice of HSC's Occupational Health Advisory Committee, it was not included.")

²¹² Beswick, Gore & Palferman, *supra* note __, at 2.

²¹³ EU partnership "Preventing Workplace Harassment and Violence."
<http://www.workplaceharassment.org.uk/>

because they do not stand alone; the U.K. approach combines occupational safety and health guidance with legislative protection and private litigation through the PHA and union and grass roots dignity at work campaigns.

On the other hand, transporting the U.K. model to the U.S. is relatively simple – throw everything against the wall and hope that something sticks. Thus, the combination of the WBI grass roots campaign, eventual passage of the HWB and an OSH regulation or guidance, may eventually lead to more wide-spread awareness of the problem and perhaps even redress. The only ingredient missing in this workplace bullying soup is union involvement. Certainly, the battle has been a long one and the tea leaves tell us that it will continue to be a long one.

V. TENTATIVE CONCLUSIONS AND CALL FOR FURTHER RESEARCH

Common features that emerge from the review of OSH legislation in other countries are: union involvement at some stage of the process, although it is not clear at what stage; joint employer-employee safety and health committees; inclusion of a broader OSH concern with workplace violence and/or work-related stress; and a broad definition of health that encompasses mental health. Further observations are that, in a federated system, states take on their assigned role as laboratories, leading the way in recognizing new workplace protections.

The first common feature, union involvement, is often believed to be an essential part of anti-bullying legislation, and certainly unions have had some involvement in workplace bullying safety and health initiatives in the countries surveyed. There is no clear picture, however, on the exact nature of their involvement and whether union action is a necessary agent of legal change, although Hoel and Einarsen have shown that union engagement – or lack of it - is probably significant once legislation is passed. Again, without fully understanding the emergence of workplace bullying safety and health regulation and the role unions have played in that emergence, and the role of unions in sustaining regulatory initiatives at the workplace-level, it is difficult to assess whether similar efforts in the United States will flounder without union input at the front end and/or back end. But, union involvement does not seem to be any *impediment* to change and is therefore to be encouraged.

There are some fledgling signs that unions in the United States are beginning to engage in the workplace bullying conversation, primarily from the safety and health perspective, which is consistent with the role that

unions have traditionally played in occupational safety and health. The American Federation of Teachers (“AFT”) is an example of a union that has pushed for recognizing workplace bullying as a safety and health concern among staff and teachers – perhaps not surprising that the concern has segued from the school yard to the workplace. An AFT survey of union members asked about co-worker violence and found that 34-60% reported at least one negative act in the prior six (6) months, broken down as follows:

- humiliated or ridiculed (20-33%);
- insulting/offensive remarks made (15-38%);
- intimidated / threatening behavior (10-23%);
- ignored or shunned (23-40%);
- excessive teasing/sarcasm (10-21%);
- shouted or raged at (15-27%).²¹⁴

The AFT has also produced training health and safety program materials for its members on workplace bullying, borrowing resources and materials from The Workplace Bullying Institute and British trade union counterparts.²¹⁵

The New York State Public Employees Federation (“PEF”) has been working on similar efforts, launching a major Stop The Violence campaign in 2005.²¹⁶ Perhaps in response to union pressure, in 2006 New York enacted the Workplace Violence Prevention Law.²¹⁷ The New York law and the 2009 implementing regulations²¹⁸ require public employers to develop and implement workplace violence prevention programs that cover all employees at each of their worksites.²¹⁹ The law requires state employers such as state agencies, to develop comprehensive workplace

²¹⁴ *Id.* The AFT has also reported on efforts by the University of Connecticut Professional Employees Association, which is part of a multi-union and employer committee that has been discussing ways of addressing workplace “incivility.” *Id.*

²¹⁵ American Federation of Teachers, Health and Safety Program, *Work Shouldn't Hurt: Workplace Bullying Not To Be Tolerated*, AFT PSRP Conference, April 2010, http://www.aft.org/pdfs/psrp/conf10materials/PSRPCConf10_58.pdf. In addition, starting in January 2009, hospitals accredited by the AFT's Joint Commission were required to prepare a code of conduct that defines acceptable/unacceptable behaviors and sets up a process to manage behaviors and complaints. AFT Health Care Professionals website – HealthWire newsletter, Jan-Feb 2009, http://www.aft.org/pdfs/healthwire/HW_janfeb09.pdf.

²¹⁶ New York State Public Employees Federation, Stop Workplace Violence, <http://www.pef.org/stopworkplaceviolence>.

²¹⁷ N.Y. LAB. LAW § 27-b (McKinney 2006).

²¹⁸ N.Y. COMP. CODES R. & REGS. tit. 880.6 (2009).

²¹⁹ N.Y. LAB. LAW § 27-b; N.Y. COMP. CODES R. & REGS. tit. 880.6.

violence prevention programs, significantly requiring such development to include the full participation of public employee union representatives.²²⁰ “Violence” is at once broadly and narrowly defined; the definition seems to refer to aggressive acts that may include non-physical harassment, but the statute is drafted overall to address physical threats and acts of violence.²²¹ Nevertheless, the New York law has embarked on a path that can segue into workplace bullying.

Similarly, joint employer-employee safety and health committees are emerging in the state setting, as evidenced by the New York Workplace Violence Prevention Law which requires union participation even though not fully embracing a requirement for ongoing committees. Some states have gone further; Oregon, for example, requires public *and private* employers to establish and administer a safety committee, or hold safety meetings, to communicate and evaluate safety and health issues.²²²

Another common feature of some of the countries surveyed, is that the safety and health laws, regulations and voluntary standards can be viewed as a sub-set, or off-shoot, of a broader, more generalized focus – the broad focus in the U.K. was stress and in the Nordic countries and Canada it was violence. Workplace bullying is of course a source of stress and is clearly linked to several stress-related illnesses, and violence is simply a broad term for physical and psychological assault that also causes physical and mental injury or illness. In the United States, OSHA and NIOSH have both started to focus on these broader areas of stress and violence, and at least NIOSH has a fledging idea that workplace bullying is a form of violence.²²³ This latter development should be approached with caution because subsuming workplace bullying within the larger concerns of stress or violence might ultimately fail to recognize bullying at all as a discrete problem potentially requiring specific definition, intervention and other programs, and/or remedies.

The lessons for the United States from this comparative review are – not surprisingly – that we need a multi-pronged approach but the OSH aspect should be part of that approach and not side-lined. At the very least, the Swedish experience suggests that OSH laws are effective at increasing awareness. But, of course, it is clear that awareness of risk and the hope of self-regulation is not an incentive to change workplace behavior – employers need both the carrot and the stick. An OSH-style regulation and

²²⁰ See, e.g., N.Y. COMP. CODES R. & REGS. tit. 880.6, (e)(1), (f)(3), (g)(1), (h)(1).

²²¹ See, e.g., *id.* at 880.6(d)(7), (d)(11).

²²² OR. ADMIN. R. 437-001-0765.

²²³ See generally Harthill, *Harnessing OSHA*, *supra* note 4.

awareness programs can be effective in starting employers down the right track, perhaps beginning at the state level with union involvement either from a workplace violence perspective or a work-related stress perspective, and utilizing joint safety and health committees where possible. Although state-by-state development is slow and incremental, it may be the best viable option to begin to tackle this devastating problem.