

**STRENGTHENING THE HEALTHY WORKPLACE ACT—
LESSONS FROM TITLE VII AND IIED LITIGATION
AND STORIES OF TARGETS' EXPERIENCES**

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ABSTRACT

Workplace bullying is a severe and pervasive problem in the United States. Bullying in the workplace is destructive to organizations and more importantly strips targets of their most basic human rights. Little has been done to address this problem in the United States. Current legislative, common-law, and administrative remedies in the United States do little to address the problem. Yamada has introduced the Healthy Workplace Bill as a proposed solution to this problem, and 13 states have at least brought this bill to the stage of a legislative proposal. However, the bill as currently written suffers from many of the same problems as the current harassment laws and intentional infliction of emotional distress (IIED) laws in the United States. This bill sets too high a standard in terms of the bully's conduct, the harm to the target, and the reporting requirement placed on the target. Further, the requirement of showing malice and the focus on repetitive acts will leave many targets of workplace bullying with no legal recourse. In order to fully address the problem of workplace bullying, I propose a law developed around the experiences of targets of workplace bullying.

Workplace bullying is a severe and pervasive problem. It is devastating to its targets. No employee should have to endure bullying in the workplace. As Namie and Namie (2003) have stated, "Work shouldn't hurt." Unfortunately, in the

American workplace little has been done to address workplace bullying. Laws that prohibit workplace harassment and other bad behavior in the workplace (i.e., intentional infliction of emotional distress) fall well short of providing adequate remedies for targets of bullying. However, there has been some increase in the momentum for legislation at the state level to address the problem. David Yamada has been the legal proponent and scholar drafting and pushing proposed legislation to address workplace bullying. According to the Workplace Bullying Institute (2010), sixteen states have introduced some form of legislation, and the vast majority of legislative proposals have mirrored the bold proposal by David Yamada known as the Healthy Workplace Bill. Legislation such as that proposed by Yamada is desperately needed, and this bill would indeed close many of the gaps in the current coverage for targets of workplace bullying. However, there are still many concerns with regard to this bill. If it were to be passed as currently proposed, it would leave many targets of bullying with no recourse. While Yamada's bill is indeed a bold proposal, it is imperative that any bill protect as many targets of workplace bullying as possible and that such a bill focus on protecting the human rights of these targets. The purpose of this article is to strengthen the Healthy Workplace Bill.

In this article, I present background information on the severity and pervasiveness of workplace bullying. Next, I analyze the current legal protections, or lack thereof, afforded to targets of bullying in the United States. I then explore Yamada's proposed Healthy Workplace Bill. By relating this bill to problems with the current laws and the experiences of targets of workplace bullying, I develop several paths to improving the current bill. Through an examination of judicial interpretations of the Title VII and other Equal Employment Opportunity (EEO) prohibitions of workplace harassment, and the judicial interpretations of IIED claims, many lessons can be learned about the potential interpretations of the current Healthy Workplace Bill. Further, these lessons as well as the experiences of targets of bullying can help to reshape the bill to better protect workers' rights to dignity in the workplace and to better eliminate workplace bullying. The goal of this article is to begin to develop a proposed bill that will protect as many targets of workplace bullying as possible.

BACKGROUND ON WORKPLACE BULLYING

Any solution to workplace bullying will require the development of an adequate definition of workplace bullying. However, currently applied definitions can be used to begin to understand the phenomenon. While Randall (2005: 3) explains that an "agreed definition of bullying do[es] not exist," according to Farrington (1993: 384), "there is widespread agreement that bullying includes several key elements: physical, verbal or psychological attack or intimidation that is intended to cause fear, distress or harm to the victim; an imbalance of power . . . absence

of provocation . . . repeated incidents.” However, even these in terms of these elements there is much that can be debated.

Many people define workplace bullying by looking at specific acts that would be considered bullying. According to Randall (2005: 3), “people believe it is sufficient to list behaviors to define bullying” or to list categories of behaviors rather than specific behaviors (Einarsen, Hoel, Zapf, & Cooper, 2003). However, no matter how bullying is defined, all of the researchers agree that it is a severe and pervasive problem.

Workplace bullying forces employees out of jobs, leads to absenteeism due to increased stress and avoidance of the bully, and leads to workplace injuries and illnesses. A 1998 survey of targets of workplace bullying found that 53% of targets lost work time as a result of the bullying, 37% reduced their commitment to the organization, 28% lost work time trying to avoid the bully, 22% decreased their effort at work, and 12% actually changed jobs as a direct result of the bullying (Yamada, 2004). According to a UK study, 25% of bullying victims eventually quit their jobs (Coleman, 2004). A 1998 International Labour Organization (ILO) report concluded that stress at work cost the United States \$80 billion per year (Gardner & Johnson, 2001). In fact, according to Coleman (2004), 20% of all workplace disease claims in the United States can be linked to stress.

Most importantly, workplace bullying violates the human rights of its targets. According to Gardner and Johnson (2001: 28), “bullying causes stress-related illnesses that shatter many careers. Anxiety, stress and excessive worry head the list of health consequences for targets, thereby interfering with their ability to be productive at work.” Keashley and Neuman (2004: 346) found that “exposure to bullying is associated with heightened levels of anxiety, depression, burnout, frustration, helplessness, negative emotions such as anger, resentment, and fear, difficulty concentrating, and lowered self-esteem and self-efficacy.” Bullying has also been linked to symptoms consistent with posttraumatic stress syndrome, suicidal thoughts, and attempts to commit suicide. There is also clear evidence that some victims of bullying do in fact in the end commit suicide (Rayner, Hoel, & Cooper, 2002). According to Davenport, Schwartz, and Elliot (2002: 33), “For the victim, death—through illness or suicide—may be the final chapter in the mobbing [bullying] story.” According to Einarsen (1999: 16), bullying may be “a more crippling and devastating problem for employees than all other work-related stress put together.” While these prior studies give a fine general overview of workplace bullying, in order to truly understand the phenomenon or to come as close to an understanding as possible, we must conduct an in-depth, qualitative analysis of workplace bullying. It is through such rich, deep research using qualitative in-depth interviews, focus groups, and written narratives of targets of workplace bullying that I will analyze this activity. The stories shared by 16 targets of workplace bullying through in-depth interviews and focus groups will be used to gain an increased understanding of workplace bullying.

The Limitations of Current Legal Protections in the United States

While steps have been taken to combat workplace bullying in many countries, through legislation (i.e., in France, Canada, and Sweden) and the common law (the United Kingdom, Australia, Canada, and Germany), little has been done in the United States despite the severity of the problems created by workplace bullying. While the U.S. legal system has never specifically addressed workplace bullying, there are two areas of law that currently exist in the United States to deal with aggressive, menacing, or harassing behavior at work. First, under Title VII of the Civil Rights Act, under the Americans with Disabilities Act (ADA), under the Age Discrimination in Employment Act (ADEA), and under most state human rights laws, harassment based on protected status such as race or gender is unlawful. The second type of protection against such behavior comes via state common law, most notably in the form of claims of IIED and, potentially, in the form of other tort claims. However, neither of these types of protection is adequate to eliminate bullying from the workplace.

While the actions that entail workplace harassment often mirror actions that constitute bullying, these similarities are not enough to assure that victims of workplace bullying will be afforded adequate protection under the EEO laws. The definition of unlawful workplace harassment in the U.S. legal system is far from an adequate definition of workplace bullying. The focus of U.S. workplace harassment law is not to prevent bullying or to protect all employees' right to dignity at work. The focus on discrimination in the U.S. harassment laws leaves the majority of targets of workplace bullying unprotected. According to Namie and Namie (2003), fewer than 25% of workplace bullying targets are targeted based on a legally protected status. However, to bring a Title VII claim, the plaintiff must have been discriminated against based on a protected status, leaving 75% of bullying cases outside the coverage of the EEO laws. In *Oncala v. Sundowner* (1998: 85), the Supreme Court cites the concurring opinion in *Harris v. Forklift Systems* (1993) to make this point: "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not opposed." There is a clear requirement that the harassing behavior be based on a protected status for a plaintiff to sustain a claim under any of the EEO laws.

Because the law around workplace harassment is so focused on discrimination rather than dignity, it would appear that employers could avoid liability for workplace harassment by assuring that any harassers in their employ make sure to harass all employees. In fact, the Eighth Circuit Court upheld a ruling that made this fairly explicit, accepting as a defense the fact that the abusive behavior was directed at both male and female employees (*Hesse v. Avis Rental*, 2005). This standard suggests that the U.S. employment system not only fails to protect the majority of harassment and bullying victims but also gives employers an

incentive to bully all employees to prevent the perception that they are bullying only one class of employees.

Workplace bullying is a harm to the target's dignity, and any measure to address workplace bullying must focus on this harm. Unfortunately, it is clear that protecting worker dignity is not the goal of, or at least has not been interpreted as the goal of, the U.S. laws against workplace harassment. This lack of protection of perhaps the most fundamental human right, the right to dignity, is not the only well-established and recognized human right that is unprotected under the U.S. legal system. In fact, the U.S. system of employment laws has never had much of a place for any human rights standards. According to James Gross (2004: 1), "the concept of human rights, particularly workers' rights as human rights, has never been an important influence in the making of U.S. labor law."

The focus on discrimination is not shared by all nations. According to Friedman and Whitman (2003: 242), when addressing what "evil" the law of harassment looks to combat, the answer in Europe is increasingly "violations of individual dignity." While there is no reason that U.S. interpretations could not follow this same path, under the current system, the U.S. EEO laws will protect only targets who have been singled out based on a protected status (i.e., race, color, national origin, religion, gender, age, or disability).

For the 25% of bullying victims who may have a viable claim because they have been bullied based on a protected status, the legal hurdle may still be too high. Many courts in the United States make it very clear that the protection against unlawful harassment is not a protection of civility in the workplace; in fact, in many cases it seems to be no protection at all. For instance, Judge Posner, in *Baskerville v. Culligan International Co.* (1995: 431), found that "only a woman of Victorian delicacy—a woman mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity—would find . . . a gesture intended to simulate masturbation, grunting sounds as she walked by her alleged harasser, and a statement that one public address announcement really meant that all pretty girls run around naked . . . more distressing than the heat and cigarette smoke of which the plaintiff did not complain." Posner made this determination concerning the female plaintiff's level of distress despite the fact that a jury had concluded that the actions constituted harassment under Title VII. Not only were these lewd and hostile actions clearly inappropriate in a working environment, and not only did they clearly constitute bullying, but also Judge Posner's condescending and degrading language was clearly inappropriate in the courtroom. But this case may not even be the most damning for those claiming sexual or other unlawful forms of harassment.

In *Hartsell v. Duplex Products* (1997), the Fourth Circuit agreed with the Western District Court of North Carolina that an environment in which supervisors had informed an employee that they had made every female in the office cry and would also make her cry, called a female sales assistant the supervisor's slave, pointed out a "buxom" catalog model and asked why they did not have sales

assistants like that, referred to the plaintiff's husband as a "stay at home wife," and asked the plaintiff, "Why don't you go home and fetch your husband's slippers like a good little wife, that's exactly what my wife is going to do for me" was not an actionably hostile working environment. Further, this determination was never made by a jury. Instead, the defendants were granted a summary judgment at the lower court level, and the appellate court upheld this decision. In other words, these judges decided not only that this was not actionable harassment but also that no reasonable jury could find that it was severe and/or pervasive enough to create a hostile working environment. The courts in this case clearly went beyond the protection of innocent, innocuous working behaviors. It is difficult to see what place the behaviors and statements listed above could have in a working environment. The statements by these supervisors were clearly degrading to the target and did not afford her a reasonable level of esteem or dignity.

Hartsell has been cited favorably by other courts on at least 36 occasions since 1997. In one such case, *Leson v. ARI of Connecticut* (1999), the U.S. District Court for the District of Connecticut cited the *Hartsell* standard in granting a summary judgment for an employer where the plaintiff employee alleged a male supervisor had called her "honey" and "sweetie" during training sessions; touched her knees, forearms, head, and shoulders during training sessions; had her engage in a training session in which she played the love interest of two men; and when she complained told her that if she was going to be so sensitive she would eventually hit a glass ceiling. The terms "honey" and "sweetie" are not terms of esteem when used in the workplace. Touching another person without permission is an affront to that person's dignity and person, and no employee should have to be subjected to this behavior in order to earn a living. Again, this court went well beyond the protection of innocent working behaviors. In *Lenihan v. Boeing Co.* (1998), the U.S. District Court for the Southern District of Texas cited *Hartsell* and *Baskerville* to find that the allegations by the plaintiff in this case did not constitute a sufficiently "hellish" environment and did not meet the standard for severity or pervasiveness as set out in the *Baskerville* and *Hartsell* cases.

The standard for legally objectionable behavior in these jurisdictions is an extremely high standard. There are many behaviors that violate workers' human rights to dignity, esteem, voice, and so forth that the judges in these cases have cast aside as trivial or meaningless. These judges clearly have not considered the right to dignity of plaintiff employees. Instead, their focus continues to be on the economics of the organizations involved or perhaps, going even further, on a completely hands-off approach to regulating employers, as so many of these behaviors provide no economic benefit to the organization. Employees may not only be stripped of their dignity in a workplace that falls below a "hellish" level, but they may also be suffering serious physical, psychological, and emotional consequences. Further, in some cases, the judges themselves readily admit that the standard is high. "Under Title VII, the standard for establishing that

the offending behavior constituted sexual harassment is rather high” (*Singleton v. Department of Correctional Education*, 2004: 122).

Even if a plaintiff is able to meet the high burdens of proving discrimination and the high standard of objectionable conduct, Title VII is still ineffective in many jurisdictions due to the heightened requirement of showing an extreme level of adverse outcome. Looking at the Fifth Circuit’s decision in *Hockman v. Westward Communications* (2004: 326), the court applied an extremely stringent requirement of showing not only a job effect but a rather severe job effect, stating that the plaintiff would have to show that the harassment was so “severe and pervasive that it destroys a protected class member’s opportunity to succeed in the workplace” just to survive a summary judgment. This standard suggests that anyone who has succeeded at work despite the hostile environment would not have an actionable claim. This language was cited again by the Fifth Circuit in *Williams v. the U.S. Dept. of the Navy* (2005) and in *Jordan v. Memorial Hermann Southeast Hospital* (2007), in both cases to support a summary judgment against a plaintiff.

The effects of workplace bullying may be seen in the job. However, the effects are also seen outside work. In a study by Mikkelsen and Einarsen (2001), 73.6% of the targets of reported bullying led to diminished relationships with friends and family and diminished leisure, household, and sexual activities. However, unless these targets can also show a job effect, they will not have an actionable claim under Title VII if the *Hockman* standard is applied.

While the interpretation of workplace harassment under Title VII of the Civil Rights Act, the ADEA, and the ADA does not provide an adequate remedy for workplace bullying, the protections under U.S. common law likewise offer little hope for targets of workplace abuse. According to the *Restatement of Torts* (1977: § 46), “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” A simple review of the elements in this definition of the claim of outrage, or IIED claims, indicates a clear gap between the abuse that is covered under this standard and the typical abuse of workplace bullying. Many devastating types of bullying and abusive work behaviors are not prohibited under this common-law standard, and in fact only the most extreme and obvious cases of workplace bullying would be covered.

First, the level of conduct that the target must prove is too high to address many instances of bullying. As I have already shown, even in the case of unlawful harassment, where there is no requirement that the harassing behavior be “outrageous,” the level of conduct that a plaintiff must prove to have an actionable claim can be extremely high, leaving many targets of bullying without a claim. The West Virginia Supreme Court ruled that “the first element of the cause of action is a showing by the plaintiff that the defendant’s actions toward the plaintiff were atrocious, intolerable, and so extreme and outrageous as to

exceed the bounds of decency. The defendant's conduct must be more than unreasonable, unkind or unfair; it must truly offend community notions of acceptable conduct " (*Travis v. Alcon*, 1998: 375). The Third Circuit Court of Appeals, a neighboring jurisdiction, suggested in *Cox v. Keystone Carbon Co.* (1988: 395) that "it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress." What is perhaps promising for targets of workplace bullying is the fact that the Supreme Court of Indiana has accepted that bullying could "be considered a form of intentional infliction of emotional distress" (*Raess v. Doescher*, 2008: 799). However, even in this case, the court was very clear that workplace bullying was not specifically an element of the claim and did not take any steps to create a tort claim for workplace bullying.

Second, by its very definition, an IIED claim requires the plaintiff to prove the defendant's intent. A plaintiff must show "that the defendant acted with an intent to inflict emotional distress upon the plaintiff, or acted in a reckless manner such that it was certain or substantially certain that emotional distress would result from his conduct" (*Travis v. Alcon*, 1998: 378–379).

To sustain a claim under the tort of outrage or IIED, a plaintiff must show a third element of such a claim—severe emotional distress. While not every jurisdiction requires testimony from an expert witness to prove severe emotional distress (*Travis v. Alcon*, 1998), many others do, and go even further. For instance, the Pennsylvania Supreme Court (*Kazatsky v. King David Memorial Park, Inc.*, 1987) has ruled that the plaintiff's own testimony regarding his/her severe emotional distress is not enough proof to meet his/her burden of proving this element of the claim. In *Love v. Georgia Pacific Corporation* (2001), the Supreme Court of West Virginia mentioned that emotional distress may not be enough to sustain a claim, even when there is expert testimony and the plaintiff is receiving treatment and has been prescribed an antidepressant. This standard suggests that perhaps the courts are looking for some type of severe emotional breakdown in order to sustain a claim for IIED. The Western District Court of Virginia (*Glover v. Oppleman*, 2001) made it very clear that claims of IIED will most often fail because the harm is not severe enough.

Even if the target has been able to show that the behavior in question "shocks the conscience," that the actor intended to cause harm or recklessly cause harm, and the harm was a severe level of emotional distress, the target may still not be able to collect any form of compensation because the employer will not be held liable for these acts. The employer may be vicariously liable only where the actions are done in furtherance of the employer's interest (*Liadis v. Sears, Roebuck and Co.*, 2002), or, under a second standard, the employer will be liable only if the actions are done within the scope of their job duties (*Nees v. Julian Goldman Stores, Inc.*, 1928). Further, in many circumstances, employers will be liable only under the state workers' compensation laws. In West Virginia, claims outside of workers' compensation for negligent infliction of emotional distress are

barred by Code Section 23-2-6 of the West Virginia Workers' Compensation Act. Likewise, in California (*Bracke v. County of L.A.*, 2003; *Shoemaker v. Myers*, 1990), most claims of emotional distress in the employment context are also barred by the exclusive remedy provision of the state workers' compensation act.

THE HEALTHY WORKPLACE BILL

The current legal system in the United States clearly falls short in protecting targets of workplace bullying. As mentioned earlier, David Yamada has arguably been the leading American legal scholar in addressing workplace bullying. In 2000, Yamada first proposed a legislative response to workplace bullying and began to stress the need for protection from "status-blind" hostile behaviors. He followed this up in 2004 with what has become known as the Healthy Workplace Bill. This proposed bill would make it "an unlawful employment practice . . . to subject an employee to an abusive working environment" (Yamada, 2004: 519). This abusive environment is proposed to be defined as an environment where the "defendant, acting with malice, subjects the complainant to abusive conduct so severe that it causes a tangible harm to the complainant" (Yamada, 2004: 519). Abusive conduct is defined as "conduct that a reasonable person would find hostile, offensive and unrelated to an employer's legitimate business interests" (Yamada, 2004: 519). The proposed legislation set out several affirmative defenses, including a defense modeled after the Supreme Court's *Faragher* defense (*Faragher v. Boca Raton*, 1998) against workplace harassment, a defense against claims that arise out of negative employment decisions with a legitimate business interest and against claims that arise out of an employer's investigation of "illegal or unethical activity." The *Faragher* defense will be discussed in detail later in this article. Yamada's act would be policed through private causes of action with the available remedies including back pay, reinstatement, and front pay, with a statute of limitations of one year. However, in circumstances where there is no negative employment decision against the plaintiff, the damages would be limited to emotional distress not to exceed \$25,000 (Yamada, 2004).

While Yamada is clearly the leader in pushing for legislative reform to address workplace bullying, his proposal has been subject to critique. While Lueders (2008) makes some valuable suggestions to improve the bill, including her proposal for administrative oversight, which might indeed provide greater remedial access to targets than the judicial system does, much of Lueders' critique is nothing more than a defense of the current unbalanced power structure between employer and employee. Lueders (2008: 226) argues that it is clear that the Healthy Workplace Bill "creates a broad and arguably vague cause of action with few institutional safeguards to reduce the strain on the courts or to protect the potential defendants from the expense and burden of defending or settling marginal or meritless claims." Unfortunately, Lueders' critique of the proposed legislation takes the same market-based view of the employment law system that

Yamada (2009) warns against and simply parrots the typical employer and free marketer concerns about any proposed employment legislation. For instance, Lueders (2008) suggests that because the American legal system is focused on remedying past wrongs (e.g., slavery) and is built to work in a system where employment is mobile; that a law focused on dignity would not work in the United States as it might in Europe (where the system is built on the assumption of stable employment and based on the traditional feudal system). However, Lueders' argument actually does nothing more than describe the U.S. employment law system. Further, Lueders does nothing to explore or consider the consequences to workers of perpetuating this system, which is focused on past forms of discrimination and supports a mobile working environment. There is no reason why the U.S. system could not be reworked to protect personal rights in much the same way as it currently protects property rights. While Lueders is correct that the European system is based on dignity and the U.S. system is based on discrimination, this is nothing more than a policy choice and there is no reason why we cannot add a law to protect worker dignity. Further, while the current employment system in the United States is a mobile system, the fact that employees move from one job to another does not mean that they have any less entitlement to dignity in their various jobs or even that employees prefer the mobile environment. In fact, the system of transitory employment is a rather new phenomenon in the American workplace. Lueders (2008: 233) goes so far in defending the market system as to suggest that "sometimes anti-social behavior is good for business" is a sophisticated argument against the bill. Again, this argument ignores the rights of workers and the impact of "the great corporate intimidator" (Lueders 2008: 234) on employees. Lueders presents little consideration of how much business success is needed to legitimize each instance of workplace violence, depression, heart disease, or suicide resulting from bullying behavior. Lueders further suggests that the definition of bullying must be narrowed to prevent frivolous claims. However, as discussed below, the current definition under the bill may indeed already be too narrow.

METHODOLOGY: STRENGTHENING THE HEALTHY WORKPLACE BILL BY EXPLORING TARGETS' EXPERIENCES

While the Yamada bill is definitely a step in the right direction, in order to develop a bill that fully addresses the concern with workplace bullying, we must understand the perspective of targets of workplace bullying. In the final part of this article, I will utilize the stories of 16 targets of workplace bullying to further assess the current legal options as well as Yamada's proposed bill. I will analyze these stories to determine whether either the current law or the proposed bill would offer an adequate remedy for those targets of workplace bullying who volunteered to share their stories of workplace abuse with me. Finally, I will use

these experiences to identify gaps in coverage and to present a path to strengthening the current legal protections and the Healthy Workplace Bill.

In the course of a larger research study, 16 targets of workplace bullying participated in in-depth interviews, and each participant also participated in a focus group of 4–5 participants. In the interviews, participants were asked to share their own definitions of workplace bullying. They were also asked to describe their own experiences with workplace bullying. This included the events they considered to be bullying, the potential reasons for or causes of these events, the outcomes of the events, and the participants' view of potential remedies. These in-depth interviews lasted from 45 minutes to 1½ hours. During the focus group meetings, participants shared their experiences with workplace bullying. The groups focused on developing a definition of workplace bullying and also on exploring potential remedies for it. Each focus group meeting lasted approximately four hours.

There are a number of reasons why this study was conducted as a qualitative study. First, the phenomena to be studied here—the meaning of workplace bullying and solutions to it—are in need of rich, deep study. According to Creswell, when a “concept or phenomenon needs to be understood because little research has been done on it, then it merits a qualitative approach” (Creswell 2003: 22). Workplace bullying research, in particular, research on remedying workplace bullying, is very limited, and there is a need for a deeper understanding. According to Rayner et al., if we are to begin to explore remedies for workplace bullying, “future work is likely to move away from large surveys to qualitative work involving interviews and case studies. Such methodologies can gather information of a richer kind from which we can build theories and then test them” (Rayner et al., 2002: 186). The aim in this study is to gain a deeper understanding of targets' perceptions of bullying and the potential application of remedial measures, particularly the proposed Health Workplace Bill.

Second, this study is focused on solutions and actions, as is all participatory/advocacy research. The type of theory development involved in qualitative research is “substantive theory,” which “has as its referent specific, everyday real world situations . . . and hence usefulness to practice often lacking in the theories that cover more global concerns” (Meriam, 1998: 17). Thus, qualitative theory development is closely aligned to the goal of the advocacy approach to research, that of finding real-world solutions to actual problems identified.

Third, in critical management research, each individual's point of view is important. As data are accumulated through quantitative methods, individual voices and stories are lost. The efficacy of the various solutions to workplace bullying should be evaluated using the diverse viewpoints and experiences of all the research participants, not simply the most common viewpoints and experiences. Further, as stated throughout this article, it is my position that freedom from workplace bullying is a human right and we must therefore look to eliminate all instances of such bullying.

According to Seidman (2006: 55), there are two criteria for determining the correct number of research participants in a qualitative interview study. The first is sufficiency. In this case, my question was whether the current definitions of workplace bullying adequately covered the experiences of the targets of workplace bullying. Identifying just one experience that fell outside the current definitions could have been considered sufficient. Such an identification occurred during the very first interview. In fact, in each successive interview I found more and more problems with the current definitions of workplace bullying. By the time I reached the interview with the tenth research participant, I thought that I might have reached the second criterion set out by Seidman—saturation. I found that in each interview I continued to hear unique experiences, but by this point I felt that enough common themes had emerged to, for my purposes, achieve “completeness” of information. However, I had already scheduled interviews with four other volunteers. Further, I wanted to make sure I had enough interviewees to set up focus groups. Two additional interviewees approached me, wanting to share their experiences. I did, of course, interview these individuals. However, at this point I did not actively recruit any additional participants.

Requirement of Repetitive Events

The first concern with the language of Yamada’s proposal is the proposed bill’s focus on the repetitive nature of workplace bullying. Once the focus on the right to dignity in the workplace has been declared, there is little concern as to whether the bullying takes place repeatedly over time or is a single act or behavior. Instead, the concern is whether the target’s rights are violated. These rights can be violated by a single incident, a series of behaviors, a pattern of behavior, or a pattern of escalating behavior. While pervasiveness of incidents may indeed make them more likely to damage the target’s psyche, morale, and dignity, making a determination as to whether the incidents have been systemic or even repeated will not be seen as relevant to the human-rights-based definition of workplace bullying. Many acts of workplace bullying may strip a target of his/her right to dignity in the workplace without being repetitive.

One target of workplace bullying shared just such an incident, which occurred when she called in for a day off from her normal schedule. She had been employed with a local branch of a national chain of hotels since the opening of the hotel in which she worked (approximately 18 months). She had never called in for a day off in all this time, while she knew of many other employees who had done so. She called in for one day off to attend her friend’s wedding. Upon her return to work, she found a “SUSPENDED FOR TWO WEEKS” notation next to her name on the schedule. This schedule was accessed by all employees of the hotel, and in fact, most of this individual’s coworkers knew of her suspension before she did. She was the first person ever to be suspended at this hotel. In her words, she felt “humiliated.” Many of her coworkers told her that they would

never have returned to work if the same thing had happened to them. She described this incident as part of a pattern of “mistreatment” directed toward her by the assistant manager, but she also stated that this incident alone did indeed make her feel humiliated. There was no need for the incident to be repeated in order for this to be perceived as bullying.

For another research participant, a single encounter with a manager from another department was enough to amount to workplace bullying. In this case, the research participant asked to borrow a file from the other department. The manager proceeded to “flip out,” yelling at this individual. The manager continued to walk out of the department with the file, yelling at the research participant as she walked. She continued past coworkers, customers, and the general public, all the while yelling at the participant. This research participant said she had never felt so angry and humiliated—stating that not even a schoolyard bully had ever made her feel that way. Again, this single incident was severe enough to rise to the level of workplace bullying from this target’s perception.

While these experiences may fall under Yamada’s exception for single incidents, we can learn from many court rulings on workplace harassment, discussed above, that the courts or at least some courts are likely to interpret this exception very narrowly. Yamada’s exception seems to be much like the regular balancing standard of severity and pervasiveness that is present in the interpretations of workplace harassment. However, as discussed below, the lower courts have taken the interpretation of this language to extreme levels, allowing only the most extreme examples of harassment to survive summary judgment. There is nothing to suggest that Yamada’s exception would be interpreted any differently from this severe or pervasive standard, and thus many targets of unacceptable workplace bullying would remain without any legal recourse. While there has to be some balancing of severity and pervasiveness, a better standard to use would be to look at the outcomes of the actions. Again, from a positive rights standpoint, the question should be whether the action has violated the targets’ human rights to dignity, voice, esteem, and so on, in the workplace.

The High Standard of Severity

Yamada’s proposal not only focuses excessively on the potentially repetitive nature of workplace bullying but also establishes an over-high standard of severity to prove that workplace bullying is unlawful. Specifically, Yamada’s proposal requires that the bullying conduct be so severe that “it causes a tangible harm to the complainant.” This language mirrors the court’s language in the *Harris v. Forklift Systems* (1993) case, which was the basis for Yamada’s original proposal in 2000. In that case, specifically, the Supreme Court (*Harris v. Forklift Systems*, 1993: 21–22) ruled that an environment that “a reasonable person would find hostile or abusive” would be actionable and that courts should look at such factors as “the frequency of the . . . conduct, its severity, whether it is physically threatening

or humiliating.” Under the Healthy Workplace Bill, Yamada (2000) proposes that “a trier of fact should weigh the severity, nature and frequency of the conduct.” However, Yamada’s requirement goes even beyond the standard for claims of workplace harassment. In *Meritor Savings Bank v. Vinson* (1986), the Supreme Court established a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury; as long as the environment would reasonably be perceived—and is perceived—as hostile or abusive, there is no need for the environment also to be psychologically injurious. Yamada for some reason takes the more extreme path of requiring an actual showing of psychological or physical harm. This is particularly disconcerting in light of many of the lower court decisions in workplace harassment cases that seem to have gone well beyond the middle path established by the Supreme Court. Cases such as the *Hartsell* (1997) case, the *Baskerville* (1995) case, and the *Lenihan* (1998) case have been discussed above. The lessons to be learned from the interpretations of the “severe and pervasive” standard suggest that this language in the Healthy Workplace Bill will be interpreted to create an extremely high hurdle for targets of workplace bullying.

Yamada is not alone in setting too high a standard for workplace bullying. Other researchers also set a standard that is simply too high. For instance, Tracy, Lutgen-Sandvik, and Alberts (2006) exclude low-grade incivility from the definition of bullying. However, if this low-grade incivility has the effect of violating employee rights to dignity at work, then such incivility should also fit within the definition of workplace bullying. As Cortina (2008) suggests, workplace incivility leads to lower job satisfaction, lower creativity, greater stress, and even higher levels of substance use. Cortina (2008: 56) describes workplace incivility as “low intensity deviant behavior with ambiguous intent to harm the target, in violation of workplace norms for mutual respect. Uncivil behaviors are characteristically rude and discourteous, displaying a lack of regard for others.” If we turn to schoolyard bullying to help us to define bullying, we see that what would perhaps fit into the definition of low-grade incivility—“low intensity deviant behaviors with ambiguous intent to harm the target, in violation of workplace norms for mutual respect”—could, indeed, also fit into any reasonable definition of bullying (Cortina, 2008: 56). According to Simmons (2002: 3), for societal and cultural reasons, “girls use backbiting, exclusion, rumors, name-calling, and manipulation to inflict psychological pain,” rather than using the prototypical boys’ schoolyard style of bullying. The behaviors used by girls would be more likely to fit under workplace incivility than under the typical definition of bullying. However, according to Simmons (2002) the typical “incivility” that many girls suffer at the hands of their school “friends” has lifelong negative effects on the targets at work and at home, including a lack of confidence, anxiety, and a fear of messing up. These same types of “chronic, low-key stressors can ‘wear down’ an individual, both psychologically and physically” (Cortina, 2008: 57), whether they take place at home, at school, or at work.

Further, Cortina (2008) hypothesizes that workplace incivility may indeed be a new form of covert discrimination in the workplace.

The experiences shared with me by targets of workplace bullying suggest that Cortina's assessment is much more accurate than that of either Yamada or Tracy. One research participant shared a very interesting thought on the level of severity of her bullying. She related to me that she felt guilty even about complaining about the bullying behavior, due to what outsiders might think. In particular, she stated that her coworker's leaning over the conference table, pointing his finger, and talking to her in a mean voice might seem "minor" to someone else looking on, but to her it is not minor. The same could probably be said for all of the plaintiffs' complaints that were so easily minimized by judges looking down from above, in many cases in complete opposition to the determinations made by a jury of the plaintiffs' peers.

Many of the behaviors described as bullying or mistreatment by the research participants could also fit into the definition of workplace incivility. A university administrator said that her colleagues ignored her and left her out of training sessions, in a fashion similar to that of the school bullies described by Rachel Simmons. One research participant worked as a waitress at a local restaurant while going to school full-time. At her place of employment, she was required to be what the owner defined as "Poky-Perfect." This meant her hair, her attire, her jewelry, her shoes, and her makeup all had to live up to the owner's expectations. If she was not found to be "Poky-Perfect" on any given day, whether at the beginning, in the middle, or at the end of her shift, her boss might ignore her or compliment others, intentionally refusing her any recognition.

For a university faculty member, his seniors' failure to recognize work that he had accomplished or to show appreciation when he had been forced to do additional work beyond the scope of his duties constituted a definite source of unhappiness at work that eventually led to the faculty member's early retirement. A professional staff member at the same university described how continued incivility, as when her supervisor ignored her attempts to say good morning or good-bye, led to a hostile environment. While other actions also contributed to the bullying environment, this incivility from the participant's supervisor was enough to make her working life miserable and to affect her at work and even at home.

During two of the three focus groups' meetings, the specific question of the level of conduct that would be unlawful was addressed. Participants were asked who should establish the standard for what rises to the level of workplace bullying. The general consensus was that it made little sense for this decision to be made by employers, bullies, or even judges. Rather, the most frequently mentioned method for establishing the standard was that in some way the method would have to be collaborative and that employees and targets of workplace bullying would definitely need to be a part of that process.

The method established by the focus groups for establishing the standard seems very similar to the jury system. In this type of system, plaintiffs would be able to

explain why they thought they had been bullied. The employer then, of course, would get his/her chance to provide reasons why specific actions were not bullying, and then both sides would be assessed by a jury of peers that would most likely include individuals with working experience and also quite likely with managerial or supervisory experience, rather than being assessed by a judge who has been the king of the courtroom and who has rarely, if ever, experienced bullying from the position of the target. However, as we have seen in many of the rulings on unlawful harassment, either jury decisions are thrown out by a judge or the jury is never allowed to decide.

Problem with Proving Intent

Another problem with Yamada's proposal lies in the requirement of proving intent (another similarity between the Healthy Workplace Bill and an IIED claim). Whether or not the intent of the perpetrator should be a required element in defining bullying is a hotly debated issue. As Einarsen et al. (2003: 12) have stated, it is usually impossible to "verify the presence of intent." The difficulty in determining the existence of intent may be one reason why, according to Randall (2005: 3), "many behavioral psychologists are . . . opposed to the infusion of intent in definitions of this sort." Further, if preserving employees' dignity is a concern, whether an action was intended to threaten, coerce, and so forth, is not nearly as relevant as the outcome of the behavior. Perhaps a better place for the discussion of intent would be in the remedy phase. For instance, if the perpetrator of an act had no intent to commit the act, then it might not make sense to hold the perpetrator responsible in the same way as if he/she had intended the act or intended the resultant harm. While punishing a bully who truly acted in an unintentional manner might do no good, one still wants to make sure the action has stopped. Further, the innocent victim who has suffered some loss should be compensated accordingly.

For one of the research participants, intent may be the deciding factor in whether she would consider an act bullying. This participant stated that she witnessed a supervisor call employees in for a 7 a.m. group meeting to discuss the employees' attitudes. She stated that in the case of this supervisor, the action was taken merely out of ignorance and was not bullying. In the participant's opinion, the manager had no idea how to manage people, but in other circumstances, as in the case of a more experienced manager, this activity might have been bullying. Of course, whether the manager was brand new or had 30 years of experience, for the employees, the effects of the meeting would most likely be the same. This same participant said that another manager's decision to conduct a "chair check" each morning at 7:50 a.m. (10 minutes before start time) was indeed bullying behavior. In this case, the manager was "experienced enough to know better."

For other research participants, intent was not relevant in defining actions as bullying. For instance, an optometrist's office manager described her boss as

just being mean. The optometrist would come into the office in the morning and sometimes huff and puff and slam doors. She would be belligerent to her employees, and they would often try to hide from her. The office manager clearly stated that this was an example of workplace bullying. However, at least in part she attributed it to a lack of managerial skills that “exists with all optometrists.” While some intent to harm may have been involved, the office manager stated that all optometrists lack the people side of management, although she still considered the behavior bullying.

The Poky-Perfect waitress and a food service worker from a rest home both experienced a sexually harassing environment while working in a particular place for a very short time. For both, their environment was hostile enough to make them quit, but in both cases, they stated that the sexually hostile environment simply represented the way the industry was. Neither of these participants thought there was an intent to create a hostile environment, yet the environment affected them to the extent of forcing them to quit. Even though the targets themselves did not feel there was bullying, the inappropriate, unnecessary behaviors they experienced forced them to leave their place of employment.

Although intent should not be an element of the definition of workplace bullying, it should still play an important role in relation to workplace bullying. Intent becomes a factor in determining how to eliminate such bullying. If the supervisor conducting the seat check and the optometrist berating her employees truly did not understand that they might be bullying their employees or that they lacked leadership skills, then perhaps leadership training would address the issue. However, training would do little good if the supervisor intended to bully the targets and intended to damage their dignity. In that case, the target would need to have clearer recourse. In either case, the bullying, whether intended or not, has a negative effect on the employee’s esteem and well-being. Therefore, intent should not be a factor in defining bullying, but it may be a mitigating or aggravating circumstance in finding that bullying occurred and in remedying the bullying.

Problems with Reliance on the *Faragher* Defense

Yamada’s proposal as it is currently written also relies on close similarity to a *Faragher* defense for employers. In the *Faragher v. Boca Raton* (1998) and *Burlington Industries v. Ellerth* (1998) rulings, the Supreme Court laid out a two-pronged employer affirmative defense for unlawful supervisory harassment that has not led to a tangible adverse job effect. Under this standard, an employer can defend against liability if he/she can show that “the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise” (*Faragher v. Boca Raton*, 1998: 807). Many lower courts have interpreted this standard as placing a high burden on targets of workplace harassment to

follow their employer's reporting guidelines. As can be seen from earlier interpretations of employer liability, the court decisions that use this standard to further limit employer liability are misinterpreting the two-pronged defense. In *Minix v. Jeld-Wen* (2007: 582), the court made it clear that plaintiff employees must show that they had followed the reporting requirements as laid out by their employers:

In this case, when Thornton complained about Fetner to Mendoza—who . . . was not her immediate supervisor and did not hold a management position mentioned in the anti-harassment policy—she . . . complained to an individual “not designated [by Jeld-Wen] to receive or process sexual harassment complaints.” . . . Accordingly, we conclude that Thornton's complaint to Mendoza did not put Jeld-Wen on actual notice of Fetner's sexual harassment, and the company cannot be held directly liable on that ground.

For this court it did not matter if the plaintiff notified an agent of the employer or even if the employer had actual knowledge or should have known of the harassment. In *Walton v. Johnson and Johnson* (2003: 1289–1291), the court seems to have turned much of the burden for reporting the harassment and assuring that it is remedied back onto the plaintiff employee:

The fact that Walton advised her supervisor that his advances were unwelcome is relevant, of course, but she did not argue in the district court that, based on these warnings, she had reason to believe that the advances would stop, particularly after those warnings had already proven to be unsuccessful.

Here the court has placed an additional burden on the targets of workplace harassment. Even if the targets have confronted their harasser, they must now be able to show they had good reason to expect the harassment would stop, even where the harasser is in a supervisory position.

Not only did the plaintiff in this case report the harassing conduct within just five days after the last incident, but she had reported the incident earlier to members of management (*Walton v. Johnson and Johnson*, 2003). Still, the court in this case found the plaintiff to be unreasonable in failing to meet her duty to report the harassing behavior to a company-designated person, even going as far as to suggest that targets of harassment must contribute to the harassment in order for it even to occur. The court, while recognizing the fear that exists among targets, minimizes this fear and the difficulty in reporting actions, and expects targets to overcome this fear with little or no hesitation. The very nature of bullying is that it is a method of instilling fear and controlling employee behavior. This includes instilling the fear even of reporting the bullying itself and the fear of reporting any other problems with the management of the organization.

The reality is that the decision to report harassment and bullying in the workplace is a difficult decision even under the best of circumstances. It may take time for many targets to build up the courage to report such incidents. According to Namie and Namie (2003: 281), reporting to Human Resources (HR), coworkers,

or the bully's boss is much more likely to have a negative than a positive impact on the target. Further, targets of bullying often feel shame and fear that prevents them from reporting the incidents. This, of course, in no way means the targets accept the incidents. However, under the many federal courts' interpretations of both the unwanted requirement for protected-status-based harassment to be actionable and the interpretation of the *Faragher* defense, a failure to report and even to report via a specific avenue may lead the court to dismiss the plaintiff's case.

In my conversations with the targets of workplace bullying, failure to report the bullying was a common theme. Thirteen out of the sixteen research participants suggested that in at least some of their experiences there was no reason to report the bullying because nothing would be done. In two of the situations described, the bully was the owner of the business. In six of the situations, the targets pointed to examples in which incidents had been reported to their employer and nothing had been done. One of the participants suggested that filing a grievance with her employer would be "career suicide." Fear of reprisals (either direct or indirect) for reporting was mentioned by 12 of the research participants. Several of the participants pointed to very specific past incidents that led to these conclusions. Two of the participants had reported incidents in the past, and nothing positive came from these reports. Three others had suggested they saw specific incidents reported by others, and either nothing was done or the situation became worse after the incidents were reported. Two faculty members suggested that their complaints on any subject often led to unfavorable committee assignments. Incidents also went unreported, as targets felt they should not complain. One participant felt that she did not deserve to file a complaint. In fact, she claimed that she felt ashamed to be complaining at all, even during our conversations. She felt that perhaps the harassing or bullying behavior was just part of work and that others were much worse off. Two participants felt that they should not complain about the sexually tinged discussions in a restaurant, because that was just the way things were and the other employees did not mind. However, all of these targets felt that something should have been done about the bullying they endured. They all wanted to have some avenue of redress, which they felt was unavailable at the time.

The standards set by at least some of the federal courts seem to ignore the reality of the difficulty that targets have in reporting harassment and bullying. Further, these standards ignore the reality that an employer may receive notice of harassing behavior in ways other than a report through a formal system. The fact that so many victims fail to report harassing behavior through employer systems should suggest to the courts that these systems have failed. However, the importance here is that these courts have placed a high burden on the targets of harassment even under the *Faragher* standard. Adopting this same standard under antibullying legislation would most likely lead to the same result for targets of bullying, and again targets of workplace bullying who have been stripped of their dignity and other human rights would be left without legal recourse.

IMPLICATIONS AND RECOMMENDATIONS— A POSITIVE RIGHT TO DIGNITY IN THE WORKPLACE

Workplace bullying is a severe and pervasive problem in the American workplace. Bullying is damaging to organizations and devastating to targets. Workplace bullying strips targets of their most fundamental human rights, including the rights to dignity, esteem, and voice in the workplace. While measures have been taken internationally to address workplace bullying through legislation or the common law, nothing has been done to address workplace bullying in the United States. The Healthy Workplace Bill as proposed by David Yamada goes well beyond any current protection offered through the U.S. legal system to targets of workplace bullying. While Lueders would suggest this bill would open up avenues of recourse to many potential claims, a simple review of the current laws and the stories told by targets of workplace bullying suggest just the opposite. The reality is that the Healthy Workplace Bill if passed in its current form will leave many targets of workplace bullying with no legal recourse.

The lower court interpretations of the severe and pervasive standard of conduct for workplace harassment suggest that in many jurisdictions, the language of the the Healthy Workplace Bill will be interpreted as requiring a very severe level of conduct in order for a claim to survive. When we look at the research by Cortina, Simmons, and others and we examine the stories of targets of workplace bullying, we see that this standard will leave many targets of workplace bullying with no recourse when their human rights to dignity, esteem, voice, and so on in the workplace are violated. In fact, the language of the bill, if interpreted as we have seen lower courts interpret hostile environment claims, will leave the majority of targets of workplace bullying with no legal protection.

Further, Yamada's high standard for the showing of harm in the proposed bill would only kick in well after the targets of workplace bullying had been stripped of their dignity in the workplace and perhaps had suffered devastating effects outside work. This element of a claim under the bill goes well beyond the requirements of a hostile environment claim, where courts in many cases have set an extremely high standard for a showing of harm. The standard in the bill in terms of the harm that must be shown is closer to the requirement under an IIED claim, a requirement that leaves very few targets with any legal protection.

The requirement of showing of malice and the focus on repetitive acts under the Healthy Workplace Bill would also remove many legitimate claimants from coverage. Finally, the reliance on a *Faragher* type of defense would simply place too great a burden on the targets of workplace bullying and would allow employers to develop a shield against claims of workplace bullying that would do little to restore dignity in the workplace.

Again, there is clearly a need to address the epidemic of workplace bullying in the United States. However, it is imperative that we be careful in drafting any type of legislation to address this issue. The Healthy Workplace Bill provides

a good foundation upon which new legislation may be built. However, in order to build this new legislation, it is imperative that we listen to the stories of targets of workplace bullying and that we take a realistic view of the current legal system, which so often favors employers' interests over employees' workplace and even human rights.

As Yamada (2009) has suggested, there is a need to shift the focus of the current employment law system in the United States from a focus on the market to a focus on worker dignity. As evidenced above, workplace bullying is a violation of employees' human right to dignity. Anti-workplace bullying legislation should focus on this right to dignity. The first step is to indicate the human rights we are protecting. Bullying can be discriminatory, can lead to health and safety concerns, and generally violates the right to dignity. So to begin with, we must draft a law that recognizes these rights, a bill stating that it is designed to assure protection of employees' human rights in the workplace, with particular attention focused on the right to dignity at work.

In recognition of the right of every employee to be free from all forms of discrimination at work, to work in a safe and healthy environment, and a workplace environment that affords them the dignity to which all human beings are entitled. . . .

Next we must recognize that employers are responsible for their working environments. However, at the same time, we must hold bullies accountable as well. In other words, freedom from bullying includes both a negative right (requiring others to refrain from action) and a positive right. The negative right requires that other individuals refrain from bullying and the positive right requires that employers provide an environment that is free from bullying:

It shall be unlawful for any individual to engage in unwanted, unwelcome, offensive, and objectionable behavior that abuses any source of power and has the effect of or intent to intimidate, control, or otherwise strip a target of her/his right to esteem, growth, dignity, voice, or other human rights in the workplace, or cause the target of such actions mental or physical harm. Further, employers shall have a general duty to provide a workplace free from such behavior. All employers who allow such behavior to occur in their workplace or do not take the steps necessary to prevent, detect, and eliminate such behavior in their workplace shall be in violation of this law.

Further, a number of enforcement regulations would need to be issued in order to prevent judicial rulings from weakening this law in the way that judicial rulings have weakened Title VII's protection against workplace harassment. For instance, these regulations would include a specification that we would look at the behavior from the victim's perspective, since the question becomes one of whether the victim's rights have been violated, not of whether the actor has committed an unlawful act. Second, the bill would have to include the explicit right to a jury decision. This would need to go further than the current jury rights under Title VII

and would explicitly leave the determination as to whether bullying has occurred to a jury rather than a judge. In harassment cases, too many judges have placed their own judgment of the case above the jury's determination, in most cases at the expense of the plaintiff employee. In all of the cases mentioned earlier in this article, judges were putting their own opinions ahead of jury determinations. The new bill would have to explicitly guarantee targets the right to a trial by jury.

A bill to protect targets of workplace bullying must focus on the positive right to dignity in the workplace. The bill must explicitly state and recognize this right. With this as the starting point, employees should be protected from any behaviors that violate this right. The concern should not be whether the behaviors are repetitive, whether they are defined as severe enough by the courts, or whether they lead to a negative job effect. The question is whether the actions violate the target's right to dignity. In order to protect against this standard being interpreted too loosely, employers should of course have the opportunity to defend the behaviors. Further, the bill must address the concerns of targets of workplace bullying. Plaintiffs are simply not in a position to prove the intent of defendants. When a plaintiff is unable to prove intent, this does not mean that the effect of the behaviors is any less severe or any less of a violation of the plaintiff's right to dignity. Again, the intent may indeed be relevant to the remedy phase of a claim, but it should not be a required element for a claim of workplace bullying. Finally, the bill must recognize the difficulty of the process of reporting a claim of bullying. If the employer knows or should have known of the bullying, the employer should be responsible for remedying it. While some would interpret the *Faragher* defense as setting out just this standard, clearly many courts interpret the reporting requirement of plaintiffs much more stringently. As such, the bill should avoid adopting the language of *Faragher* and explicitly state the employer's liability for bullying of which the employer or an agent of the employer had actual or constructive knowledge.

There is still a need for a clearer, deeper understanding of workplace bullying from the targets' perspectives. Additional in-depth qualitative research should be conducted to help to develop additional alternatives to the Healthy Workplace Bill. Each of these alternatives should be analyzed bearing in mind the goal of protecting workers' rights to dignity. Any law should start with a focus on the targets of workplace bullying, their rights, and the effects that workplace bullying have on them. The goal of the bill should be to assure employees' rights to dignity in the workplace, and the language of the bill and the elements for a claim under the bill should be aligned with this goal. Employees have a right to dignity in the workplace; in fact, it is human dignity that is the basis of their human rights. When these human rights are violated, the bill should assure that employees have a legally protected way to remedy this violation. This article is meant to provide a first step toward the way forward to more encompassing workplace legislation that will protect targets of workplace bullying. There is still much work that must be done to develop the most effective path to eliminating such bullying.

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