

WHAT LEGAL PROTECTIONS DO VICTIMS OF BULLIES IN THE WORKPLACE HAVE?

WILLIAM MARTY MARTIN

YVETTE P. LOPEZ

HELEN N. LAVAN

DePaul University, Chicago, Illinois

ABSTRACT

Workplace bullying has evolved into an insidious, pervasive workplace issue. However, very few investigations have utilized comprehensive research methods to gain an understanding of how victims of bullying fare when pursuing their rights in courts. The plaintiffs are not suing for bullying; they are suing because the bullying violated some other law, such as an anti-discrimination law or some form of constitutional protection. Using policy capturing of litigated federal court cases, we find that victims of workplace bullying prevailed in 15.6% (82 out of 524) of the cases. The most frequently identified reasons for filing a cause of action were retaliation, harassment, discrimination, civil rights, constitutional amendments, state laws, and unlawful termination. The plaintiff success rate is an above-average rate because other studies have found even lower success rates for plaintiffs suing under similar laws for reasons unrelated to bullying. The present study provides guidance for victims of workplace bullies and their attorneys who are considering pursuing their rights upon being bullied in the workplace.

DEFINITION OF WORKPLACE BULLYING

Workplace bullying has come to be described by a variety of definitions and terms, and therefore defining bullying with any precision or consensus has

continued to be a challenge (Keashly & Jagatic, 2003; Saunders, Huynh, & Goodman-Delahunty, 2007). Yet the consistencies surrounding the existing definitions of workplace bullying include those involving intentional, intimidating, humiliating, undermining behavior that is persistently repeated over time and is meant to cause harm to a target who feels powerless to stop or prevent the abuse (Keashly & Neuman, 2004; Keashly & Nowell, 2003; Lutgen-Sandvik, Tracy, & Alberts, 2007; Von Bergen, Zavaletta, & Soper, 2006); it thereby creates a hostile work environment (Lutgen-Sandvik et al., 2007) for the victim. Despite the various descriptions, the use of varying terminology, and the agreements and disagreements surrounding the topic of workplace bullying, research has been consistent with regard to the seriousness and the severity of the costs associated with this type of problematic behavior (Yamada, 2004).

This study, however, focuses on the definition offered by one of the leading legal advocates for antibullying legislation in the United States, David Yamada (Lueders, 2008). Yamada's (2000) definition encompasses several of the more consistent elements making up other definitions of workplace bullying in the extant literature. Therefore, workplace bullying will be described, following Yamada, as "the intentional infliction of a hostile work environment upon an employee by a coworker or coworkers, typically through a combination of verbal and nonverbal behaviors" (Yamada, 2000: 3). Here it is presumed that a supervisor could be construed as a coworker and nonverbal behavior could be interpreted as physical behavior.

The creation of a hostile work environment is critical for victims of workplace bullying. As there is no existing U.S. federal or state law providing specific recourse for victims of workplace bullying (Yamada, 2000), several other existing laws have been used in an attempt to indirectly combat it (Harthill, 2009; Yamada, 2000). Therefore, in their efforts to combat workplace bullying, representatives of victims must work creatively to find ways to protect individuals who have suffered from such bullying, for example, through various existing antidiscrimination laws. However, it has been stated that "existing law has failed to play an adequate role in preventing bullying and providing relief to severely bullied employees" (Yamada, 2004: 2). Therefore, this study sets out to examine whether victims of workplace bullying do in fact have no protection or recourse, given the lack of a specific antibullying law, or whether the existence of other laws, specifically those dealing with harassment and discrimination, has, in fact, offered some protection or recourse in the form of monetary damages.

IMPACT OF WORKPLACE BULLYING ON THE VICTIM

The link between workplace bullying and its psychological and physiological consequences has been well established in the literature. In fact,

proponents of antibullying legislation have continued to focus on the numerous empirical research studies that have consistently illustrated the detrimental health problems that victims are shown to suffer (Lueders, 2008). Yet the severity of the symptoms is often associated with what previous research has viewed as degrees of bullying. The degrees of bullying are contingent on the frequency, intensity, and duration of bullying behaviors (Lutgen-Sandvik et al., 2007). Lutgen-Sandvik et al. (2007) describe workplace bullying by using a comparison with first-, second-, and third-degree burns. They posit that workplace bullying occurs along a continuum, and along the continuum the psychological and physiological effects associated with workplace bullying increase in accordance with the intensity, frequency, and duration of the bullying. For instance, at the highest level, bullying is likened to a “third-degree burn resulting in . . . deep scarring and permanent damage” (Lutgen-Sandvik et al., 2007). Therefore, the more exposed a victim is to workplace bullying, the more likely it is that he/she will suffer psychological and physiological consequences of it (Lutgen-Sandvik et al., 2007).

The psychological effects associated with experiencing workplace bullying include depression (Kivimaki et al., 2003; Niedhammer, David, & Degioanni, 2007), burnout (Einarsen, Matthiesen, & Skogstad, 1998), reduced self-esteem (Von Bergen et al., 2006), posttraumatic stress disorder (Leymann & Gustafsson, 1996), prolonged duress stress disorder (Scott & Stradling, 2001), alcohol abuse (Richman et al., 2001; Rospenda, 2002), and suicide (Leymann, 1990). In effect, Niedhammer et al. (2007) describe workplace bullying as a risk factor for the maintenance of mental health. The physiological effects include elevated blood pressure, increased risk of coronary heart disease (Kivimaki et al., 2005), and impairments in physical health including muscular-skeletal disorders, psychosomatic ailments, and sleeping problems (Keashly & Neuman, 2004).

The effects of bullying, however, are not limited to its psychological and physiological consequences. Additional effects may include interpersonal and familial consequences (Jennifer, Cowie, & Ananiadou, 2003; Rayner, Hoel, & Cooper, 2002; Tracy, Lutgen-Sandvik, and Alberts, 2006) as well as social isolation and financial problems due to absence from work (Von Bergen et al., 2006).

Consequently, the cumulative toll for targets of workplace bullying is horrendous, at best as evidenced by the authors of one qualitative research study of nurses (Hutchinson et al., 2006: 246):

The unrelenting, calculated and deliberate nature of the bullying resulted in profound psychological harm, physical illness, and professional and financial destruction for many of those interviewed. The patterns of bullying also continued past the point where it was clear the psychological will and physical health of the targets had been broken.

PREVALENCE OF WORKPLACE BULLYING IN THE UNITED STATES

Workplace bullying is a social phenomenon that unfortunately has become very common in today's workplace. The study of workplace bullying began in the 1980s in Sweden and spread to other Scandinavian and European countries by the mid-1990s (Zapf & Einarsen, 2001). More recent studies have helped expose the global relevance of workplace bullying (Harvey, Treadway, & Heames, 2007; Heames and Harvey, 2006; Lutgen-Sandvik et al., 2007), acknowledging this phenomenon as a prevalent concern in various countries around the world.

Interest in workplace bullying continues to grow internationally (Lutgen-Sandvik et al., 2007), and unfortunately the topic has continued to receive much more attention internationally than in the United States (Vega & Comer, 2005). This is somewhat disconcerting, considering that while workplace bullying is continuing to increase in organizations today (Heames & Harvey, 2006), it seems to be much more prevalent in the United States (Mikkelsen & Einarsen, 2001; Zapf & Einarsen, 2001) than elsewhere, due to the cultural values of the United States, which emphasize individuality, assertiveness, masculinity, achievement, and a relatively higher power disparity than found in Scandinavian cultural values. Thus, it might be anticipated that the characteristic of individuality would lead to individuals being less inclined to go to the aid of a victim. The characteristic of assertiveness could trigger an incident of workplace bullying through forcefulness. In general, the characteristic of masculinity would be associated with increased aggressive behavior. In terms of achievement, people with a high need for achievement may be focused on advancing themselves relative to others. As for the power disparity, there is research evidence that indicates bullying is more likely to occur when high levels of power imbalance are present (Ashforth, 1994; Ireland, 2000; Salin, 2003).

Based upon the American Workplace Survey conducted by Lutgen-Sandvik et al. (2007), it was estimated that workplace negativity is higher in the United States than in comparable Scandinavian populations, with 30–35% of U.S. workers experiencing a negative act at least once a week over a 6–12 month period. The distinction between workplace negativity and workplace bullying offered by Lutgen-Sandvik et al. (2007: 854) is that workers “did not always equate . . . negativity with the concept of bullying.” For instance, of those participants in their study who reported being bullied at work, only one-third of the members of the group identified themselves as targets of bullying (Lutgen-Sandvik et al., 2007). Consequently, while U.S. workers report persistent negativity in the workplace, it is presumed that U.S. workers “have naturalized bullying as a normal part of the job, that ‘bullying’ terminology has not made its way into popular American language” (Lutgen-Sandvik et al., 2007: 854). It is also presumed that perhaps because of the competitive nature often present within U.S.

culture, perceptions of being bullied may reflect feelings of weakness or passivity, indicating that U.S. workers may be less inclined to engage in self-labeling that presents them as having been bullied (Lutgen-Sandvik et al., 2007).

Given the advanced state of the discussion of workplace bullying in the international context, this study's focus is aimed specifically at its occurrence in the United States. Research in the United States alone has indicated that nearly 37% of the American workforce, approximately 54 million Americans, have succumbed to some form of workplace bullying (Workplace Bullying Institute, 2007). When combining the victims of workplace bullying with those who have witnessed workplace bullying, the numbers increase to nearly 49% of the American workforce, or approximately 71.5 million American workers (Workplace Bullying Institute, 2007). Other reports have indicated that the percentage of individuals in the United States who have experienced some form of bullying at one point or another in their work lives actually falls between 38% and 90% (Glendinning, 2001; Vega & Comer, 2005). The reason for such a wide variance may stem from the lack of a commonly agreed upon operational definition of workplace bullying (Schat, Frone, & Kelloway, 2006).

EXISTING LAW AND WORKPLACE BULLYING

As previously indicated, there is no existing U.S. federal or state law providing specific recourse for victims of workplace bullying (Yamada, 2000). With no direct legal protection available to victims, existing statutory and common-law protections have been examined (Yamada, 2004) and in some cases utilized to try to provide some recourse; however, despite their potential, existing laws have been deemed inadequate, further driving the push for new legislation (Yamada, 2004).

The most noteworthy statutory and common-law protections will be briefly reviewed here, including federal statutes, state statutes, constitutional protections, and common-law claims by which victims of workplace bullying may file a cause of action in the absence of federal and state workplace bullying statutes.

The federal statutes include the Civil Rights Act (including Title VII); the Americans with Disabilities Act (ADA); the Age Discrimination in Employment Act (ADEA); the Fair Labor Standards Act (FLSA); the Occupational Safety and Health Act (OSHA); the Whistleblower Protection Act; and two union-related statutes: the National Labor Relations Act (NLRA) and the Labor Management Relations Act (LMRA). Other federal statutes worthy of mention include the Employee Retirement Income Security Act (ERISA), the Family and Medical Leave Act (FMLA), the Fair Credit Act, and the False Claims Act.

Of note is Title VII of the Civil Rights Act of 1964, which is an anti-discrimination and antiharassment law. Workplace bullying victims may find recourse if the act of bullying can be attributed to one of the protected characteristics i.e. race, color, national origin, religion, and/or sex) (Harthill, 2009;

Yamada, 2000), thus potentially offering some element of protection. An additional antidiscrimination and antiharassment law that may offer protection to victims is the Americans with Disabilities Act. "Disability discrimination law can serve as a potential response to workplace bullying where the offending behavior creates or exacerbates a recognized disability" (Yamada, 2004: 8). Yet another antidiscrimination and antiharassment law is the Age Discrimination in Employment Act of 1967, which protects employees from status-based harassment related to age (Harthill, 2009; Yamada, 2000). These antidiscrimination statutes also provide protection against retaliation. Federal statutes unrelated to antidiscrimination and antiharassment issues include the Occupational Safety and Health Act of 1970, the Whistleblower's Protection Act, the National Labor Relations Act, and the Labor Management Relations Act.

Just as there is no specific law at the federal level, there is currently no law at the state level providing specific recourse for victims of workplace bullying (Yamada, 2000). However, legislators in several states like Hawaii, Oregon, Missouri, and Kansas have worked at or are working at introducing legislation specifically geared toward combating such bullying (Von Bergen et al., 2006). Additionally, in *Torres v. Parkhouse* (2001), the California Supreme Court took the initial step in tying workplace bullying to a protected class, in cases of racial and gender-based harassment (Von Bergen et al., 2006). Finally, Workers' Compensation provides a system for allowing employees who suffer injuries while at work a percentage or portion of their salary and help with medical expenses (Yamada, 2000). Victims of workplace bullying may potentially be covered by Workers' Compensation for work-induced injuries including the emotional, physical, and psychological distress that may be caused by the employment situation.

In addition to federal and state statutes, constitutional amendments are often used to seek legal protections from bullying. The most commonly used are the First, Fourth, and Fourteenth Amendments. The First Amendment provides protection for the freedom of religion, of speech, and of the press, and for the freedom to assemble and to petition. The Fourth Amendment provides protection from unreasonable searches and seizures. The Fourteenth Amendment provides for due process within each state. Less commonly, protection is sought under the Fifth Amendment, which provides for due process in general; the Eighth Amendment, which provides protection from excessive bail and fines or cruel and unusual punishment; and the Eleventh Amendment, which provides states with immunity to actions brought by citizens in federal courts against them.

Finally, common-law claims are also invoked by victims of workplace bullying and may potentially involve any one of the following: defamation, the doctrine of intentional infliction of emotional distress (IIED), breach of contract, and unlawful termination. IIED is one of the primary common-law torts used in the attempt to battle workplace bullying. This doctrine is a non-status-based legal theory that requires plaintiffs to prove support for the following elements: that the conduct of the defendant was intentional and reckless; that the conduct was

outrageous, extreme, and intolerable, thereby going beyond the limits of what would be considered generally acceptable behavior; that the conduct caused the plaintiff emotional distress; and that the resulting emotional distress was severe (Von Bergen et al., 2006; Yamada, 2000).

METHODOLOGY

Content analysis has been used to discern, that is, capture, the policies of the organizations in the litigated cases and in other organizational processes. Various studies have recently employed the methodology of using litigated case analysis as an integral part of their research methodology (Hall & Wright, 2008; Johnson et al., 2008; Kotkin, 2007; Kulik, Perry, & Pepper, 2003; Lahey, 2008; Lockwood, 2008; Lucero, Allen, & Middleton, 2006; Perry, Kulik, & Bourhis, 2004). The data for this research were acquired by using the Bureau of National Affairs' database of litigated cases. All usable cases for the years 2006 to 2008 were retrieved using the search strategy "(bully OR bullying AND employee)." The BNA database contains litigated cases from state and federal courts at all levels. The timeframe of the most recent three years was selected in order to discern a relatively recent perspective on litigation relating to bullying, that is, to discern what is going on currently in the legal arena. This search resulted in 524 usable cases, which comprise the data. The data were coded in the following way. If a given case contained a certain characteristic, it was coded as 1. If not, this case was coded as 0 on the relevant characteristic. For example, if the case was filed under the Age Discrimination in Employment Act, then the Age Discrimination in Employment Act was coded as 1. Or, for example, if there was retaliation present, it was coded as 1. Otherwise, it was coded as 0. Table 1 contains a list of case characteristics.

We were seeking to identify the legal protections for individuals who had been bullied. In addition to finding out which laws were involved in the litigation, we were interested in finding out what kinds of behavior were involved in the bullying. Whether there was discrimination, discipline, intimidation, unfair pay, or harassment involved in the bullying was also of interest to us. Additionally, since bullying is not protected under any specific law in the United States, we were interested in whether civil actions were heard, such as actions over defamation, the intentional infliction of emotional distress, or the invasion of privacy. We were also seeking to discern which party (the individual or the company) prevailed in the litigation. We also sought to find out whether financial damages were awarded. See Table 1 for full clarification of the variables.

RESULTS

There was a total of 524 usable responses for each item of relevance. An overwhelming majority (94.8%; n=497) of the legal cases indicated that there was

Table 1. Case Characteristics

Type of behavior	Laws	Civil actions
Claim of unfair treatment	Civil Rights Act	Defamation
Discrimination	ADEA	Intentional infliction of emotional distress
Retaliation	FLSA or EPA	Breach of contract
Unfair labor practice	NLRA	Unlawful termination
Exposure to hazard	OSHA	All torts (slander, termination, defamation, IIED) except invasion of privacy
Unfair labor practice, unionization	Worker's compensation	Invasion of privacy
Harassment	ERISA	
Discipline, suspension	FMLA	
Banned access	LMRA	
Intimidation	Fair Credit Act	
Interference	False Claims Act	
Unfair play	Whistleblowers Protection Act	
Failure to reinstate	State laws Constitutional amendments	

a claim of unfair treatment. This makes intuitive sense because of the nature of the sample, in which a requirement is an actionable cause.

There were many different reasons explaining why the plaintiffs in the 524 usable cases filed suit in the court system. Table 2 shows the 10 most frequent reasons for filing a cause of action. In descending order, from the most frequently identified reason to the least frequently identified reason among the top 10 most frequently identified reasons, are the following: retaliation (65.8%; n=345); harassment (58.1%; n=304); discrimination (52%; n=272); civil rights (48.3%; n=253); constitutional amendments (21.8%; n=114); state laws (13.7%; n=72); unlawful termination (11.8%; n=62); ADEA (9.4%; n=49); FMLA (5.7%; n=30); and FLSA/Equal Pay Act (EPA) (4.2%; n=22). Interestingly, all torts, including intentional infliction of emotional distress, accounted for only 2.2% of the cases.

Table 2. The Ten Most Frequent Reasons for Filing a Cause of Action

Reason	Number	Percentage
Retaliation	345	65.8%
Harassment	304	58.1%
Discrimination	272	52.0%
Civil rights	253	48.3%
Constitutional amendments	114	21.8%
State laws	72	13.7%
Unlawful termination	62	11.8%
ADEA	49	9.4%
FMLA	30	5.7%
FLSA/EPA	22	4.2%

Note: The claim of unfair treatment was purposely eliminated from Table 2, because virtually every claim included this reason.

Not surprisingly, the vast majority of reasons explaining why the plaintiffs pursued legal cases over workplace bullying are based upon federal statutes like Title VII and legal bases arising under Title VII, such as retaliation, harassment, and discrimination. Of note was the fact that constitutional amendments were identified in almost one out of four (21.8%) of the cases, which may suggest that workplace bullying represents a violation of a basic legal right as recognized by the U.S. Constitution. Of the constitutional amendments, the First, Fourth, and Fourteenth were the most prevalent.

Table 3 portrays the cases in which the individual prevailed. Surprisingly there were 82 such cases, because in the absence of a bullying law it would not be expected that this many individuals would prevail.

Of course, nearly every individual claimed unfair treatment—98.8%. Next in frequency was the claim of retaliation, which is probably what really generated the lawsuits. Specifically, what the present authors believe is that the workers who filed these lawsuits were those who had claimed their rights under various civil rights laws and who were then retaliated against.

One of the most vexing problems regarding protection for individuals who have been bullied in the workplace is the distinction between harassment, which in many cases is legally protected and which in this study was involved in 49.4% of the cases in which the individual prevailed, and bullying, which in most cases is not legally protected. Forty-seven percent of the individuals who prevailed filed lawsuits under various federal antidiscrimination laws, including

Table 3. Frequencies of Case Characteristics of Litigated Bullying Cases in Which the Individual Prevailed (n=82)

Reason	Number	Percentage
Claim of unfair treatment	81	98.8%
Retaliation	50	61.4%
Harassment	41	49.4%
Discrimination, Title VII, ADA, hostile environment	39	47.0%
Civil rights in general	37	44.6%
State laws	19	22.9%
Constitutional amendments	13	15.7%
Unlawful termination	13	15.7%

Note: "Discrimination" refers to individuals protected by antidiscrimination legislation. "Civil rights in general" refers to individuals not protected by antidiscrimination legislation. Case characteristics are not mutually exclusive and may appear in more than one category. For example, harassment and hostile environment may appear in the same case.

Title VII and the Americans with Disabilities Act. An additional 4.8% filed under the Age Discrimination in Employment Act. Civil rights laws in general accounted for 44.6% of the cases in which the individual prevailed. State laws accounted for 22.9% of the cases in which the individual prevailed. Fifteen percent of the individuals who prevailed claimed protection under various constitutional provisions. Cases in which an individual was terminated (15.7%) were more likely to be resolved in favor of an individual than cases in which there was unfairness in the form of unfair pay (7.2%) or unfair disciplinary action or suspension (4.8%).

The authors expected that intentional infliction of emotional distress would be claimed, as would various tort actions. However, this is not what we found. A union was involved only in 8.4% of the cases. However, it is possible that arbitration was used rather than litigation to resolve conflicts associated with a hostile environment or harassment in the unionized workplace.

DISCUSSION

Even though there is no common law or statutory cause of action dealing with workplace bullying, victims of workplace bullying have filed cause of action for harassment, discrimination, or some violation of civil rights. This was empirically demonstrated in our study. Of note is the fact that retaliation, which

is a subset of discrimination, was the number one reason why individuals filed a legal claim in the study.

The legal bases used by respondents in our study to file a legal claim over workplace bullying included not only federal antidiscrimination statutes but also state statutes and constitutional amendments. In this era of corporate downsizing, it is worth noting that more than 1 out of 10 (11.8%) of the respondents referenced unlawful termination. However, even in a period in which the workforce is aging, less than 1 in 10 (9.4%) referenced the ADEA.

Clermont and Schwab (2009) found that the success rate for the use of the ADA was almost 1 out of 10 (9.12%), with slightly more than 1 out of 10 (10.88%) for Title VII, slightly more than 1 out of 10 (11.67%) for the ADEA, and nearly 2 out of 10 (19.55%) for the FMLA. In this study, the overall success rate was found to be 15.6% (82 out of 524 cases).

The strengths of this study are that it is empirical and draws upon actual litigated cases involving workplace bullying. This in and of itself represents a significant contribution to the workplace bullying literature. Furthermore, this study also adds to the body of knowledge by providing researchers, policymakers, legal practitioners, human resources professionals, and plaintiffs with not only the legal theories used in all workplace bullying cases but also those workplace bullying cases in which the plaintiff prevailed. More specifically, plaintiff attorneys can rely upon retaliation claims, harassment claims, discrimination claims, Civil Rights claims, and even, Constitutional claims to “right the wrongs” of workplace bullying assuming that the facts of the case support these claims.

Future research should extend the case analysis or policy-capturing methodology to review not only litigated cases but also arbitrated cases. A cross-national study would also add to the existing literature, noting differences and similarities in both litigation outcomes and legal theories.

The recommendations arising from the study for individuals who are bullied are as follows. Individuals should exhaust all internal company complaint, reporting, investigating, and dispute resolution mechanisms prior to considering a legal course of action. If the process or the results are not satisfactory by the time the individual has exhausted all the internal mechanisms, then the individual should pursue legal action, even in the absence of a specific federal or state workplace bullying statute, given that the individual has at least an approximately 16% possibility of prevailing. In cases of retaliation, harassment, or discrimination, the possibility of prevailing is higher. Individuals should pursue their rights under both federal and state statutes, given that in 22% of the cases in which the individual prevailed, the cases were heard in state courts. It is recommended that the lawsuit not be based heavily on intentional infliction of emotional distress, since this issue was used successfully in an exceedingly small proportion (2.2%) of the cases in our study.

Our recommendations for attorneys are as follows. If bullying is claimed as evidence of a workplace violation, then a plaintiff is more likely to be successful

in the claim. Attorneys should be sensitive to the fact that juries are considering workplace bullying along with other workplace-related claims, for instance, discrimination. This not only has a judicial impact but a public policy impact as state legislatures consider passing statutes addressing workplace bullying. There are no federal or state statutes that exist today regulating workplace bullying, however there are drafts of such legislation in various states. If any of these legislative bills become law, then the law is within the purview of the judiciary.

In conclusion, even in the absence of a federal or state statute banning workplace bullying in the United States, plaintiffs have prevailed by making workplace bullying part of an existing statutory, constitutional, or tort law claim. Although no protection exists under current U.S. law for victims of bullying, victims of workplace bullying can use and have successfully used other legal claims.

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Direct reprint requests to:

William Marty Martin
Department of Management
DePaul University
1 East Jackson Blvd.
Chicago, IL 60604
e-mail: martym@depaul.edu