LITIGATION CLAIMS FOR EMPLOYEES WHO HAVE BEEN SUBJECTED TO SEVERE WORKPLACE BULLYING

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I. ABOUT WORKPLACE BULLYING

What is workplace bullying?

Workplace bullying can be **defined** as the "repeated, malicious, health-endangering mistreatment of one employee . . . by one or more employees." See GARY NAMIE & RUTH NAMIE, THE BULLY AT WORK 3 (2003, rev. ed.).

Common bullying behaviors include: false accusations of mistakes and errors; hostile glares and other intimidating non-verbal behaviors; yelling, shouting, and screaming; exclusion and the "silent treatment"; use of put-downs, insults, and excessively harsh criticism; and unreasonably heavy work demands. See Loraleigh Keashly & Karen Jagatic, U.S. Perspectives on Workplace Bullying, in BULLYING AND EMOTIONAL ABUSE IN THE WORKPLACE: INTERNATIONAL PERSPECTIVES IN RESEARCH AND PRACTICE 36-37 (Stale Einarsen, et al., eds., 2003); NAMIE & NAMIE, supra, at 18.

How does bullying harm targeted employees?

Common **psychological effects** include: stress, depression, mood swings, loss of sleep (and resulting fatigue), and feelings of shame, embarrassment, guilt, and low self-esteem. Some targets have developed symptoms consistent with Post-Traumatic Stress Disorder. NAMIE & NAMIE, supra, at 55, 62-64.

Common **physical effects** include stress headaches, high blood pressure, digestive problems, and reduced immunity to infection. Id. at 56, 60.

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II. INTENTIONAL TORT THEORIES

A. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A favored tort law theory for seeking relief against emotionally abusive treatment at work has been intentional infliction of emotional distress ("IIED"). Typically, plaintiffs have sought to impose liability for IIED on both their employers and the specific workers, often supervisors, who engaged in the alleged conduct. The tort of IIED is typically defined this way:

1. The wrongdoer's conduct must be intentional or reckless;
2. The conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality;
3. There must be a causal connection between the wrongdoer's conduct and the emotional distress; and
4. The emotional distress must be severe.

Kroger Co. v. Willgruber, 920 S.W.2d 61 (Ky. 1996).

"Garden Variety" Bullying and IIED

An extensive survey and analysis of state case law, concentrating on the period 1995-98, revealed that typical workplace bullying, especially conduct unrelated to sexual harassment or other forms of status-based discrimination, seldom results in liability for IIED. In many instances, trial courts granted defense motions for dismissal or summary judgment, and the appellate courts affirmed. The most frequent reason given by courts for rejecting workplace-related IIED claims was that the complained-of behavior was not sufficiently extreme and outrageous to meet the requirements of the tort. Here are some examples:

Not Sufficiently Extreme and Outrageous

- In Turnbull v. Northside Hospital, Inc., 220 Ga. App. 883, recon. den., cert. den. (1996), the Georgia Court of Appeals found that alleged conduct including "glaring at plaintiff with purported anger and contempt, crying, slamming doors, and snatching phone messages from plaintiff's hand was childish and rude," but that "it is not the type of behavior for which the law grants a remedy." The court found persuasive the absence of cursing, derogatory remarks about the plaintiff, and verbal and physical threats.

- In Denton v. Chittendon Bank, 655 A.2d 703 (Vermont 1994), the Vermont Supreme Court affirmed summary judgment entered for an employer and a supervisor where the plaintiff alleged that the supervisor "embarked on an insulting, demeaning, and vindictive course of conduct toward [the plaintiff] that included ridicule, invasions of privacy, intentional interference with ability to car pool, competitiveness in afterwork

sports, and an unreasonable workload." Liability should not be extended for "a series of indignities," wrote the court, adding that "(a)bsent at least one incident of behavior" such as retaliation or an act of extreme humiliation, "incidents that are in themselves insignificant should not be consolidated to arrive at the conclusion that the overall conduct was outrageous."

- In Mirzaie v. Smith Cogeneration, Inc., 1998 WL 184582 (Okla.App. 1998),[*] the Oklahoma Court of Civil Appeals affirmed a trial court's dismissal of an IIED claim where the plaintiff had alleged that his supervisor, among other things, yelled at him in front of other company executives, called him at 3:00 a.m. and "browbeat him for hours," required him to "needlessly cancel vacation plans," refused to allow the plaintiff to spend a day at the hospital with his wife after the birth of their son, intentionally called plaintiff's wife by the plaintiff's former wife's name, and delivered the notice of termination two hours before the plaintiff's wedding. There was nothing "in this working milieu," said the court, "that would elevate the recited facts to the 'outrageous' level."

- One of the most wrongheaded interpretations of IIED doctrine in the employment context came in Hollomon v. Keadle, 326 Ark. 168 (1996), an Arkansas Supreme Court case that involved a female employee, Hollomon, who worked for a male physician, Keadle, for two years before she voluntarily left the job. Hollomon claimed that during this period of employment, "Keadle repeatedly cursed her and referred to her with offensive terms, such as 'white nigger,' 'slut,' 'whore,' and 'the ignorance of Glenwood, Arkansas.'" Keadle repeatedly used profanity in front of his employees and patients, and he frequently remarked that women working outside of the home were "whores and prostitutes." According to Hollomon, Keadle threatened her with severe bodily harm "if she quit or caused trouble." Hollomon claimed that she suffered from "stomach problems, loss of sleep, loss of self-esteem, anxiety attacks, and embarrassment." On these allegations, the Arkansas Supreme Court affirmed summary judgment for the defendant Keadle. Skirting the question of whether Keadle's conduct was outrageous on its face, the Court held that Hollomon's failure to establish that Keadle "was made aware that she was 'not a person of ordinary temperament' or that she was 'peculiarly susceptible to emotional distress by reason of some physical or mental condition or peculiarity,'" was fatal to her claim.

Insufficient Emotional Distress

Plaintiffs also can lose their IIED claims because they did not show the requisite level of severe emotional distress, as this case shows:

[*] By ruling of the Oklahoma Court of Civil Appeals, this case should not be regarded as a reported case for use as judicial precedent. Thus, it is summarized here for illustrative purposes only.

- Harris v. Jones, 380 A.2d 611 (Md. Ct.App. 1977), is a compelling illustration of the difficulty of establishing severe emotional distress. Plaintiff Harris was an assembly-line worker who suffered from a lifelong stuttering problem. During a five-month period, Harris' supervisor and co-workers continually mimicked, verbally and physically, his speech impediment. As a result of this behavior, "Harris was 'shaken up' and felt 'like going into a hole and hide.'" Jones' wife said that his nervous condition worsened during this time. At trial, the jury found for Harris, but the trial court reversed the judgment, holding that the plaintiff's emotional distress lacked the requisite severity to allow recovery. The Maryland appeals court then affirmed the trial court's reversal of the verdict. Even though agreeing with Harris that Jones' conduct was cruel and insensitive, the court found that the humiliation suffered by Harris was not, "as a matter of law, so intense as to constitute the 'severe' emotional distress required to recover" for IIED.

More Promising Factual Scenarios

Although typical workplace bullying alone usually does not result in IIED liability, the presence of an aggravating factor may rescue what otherwise is likely to be an unsuccessful claim. These factors are discussed immediately below:

Status-Based Discrimination and Harassment

The most successful types of workplace-related IIED claims are those grounded in allegations of severe status-based harassment or discrimination. This may be of crucial significance in cases where the typically short statute of limitations governing a statutory harassment or discrimination claim has expired. Here are several cases where plaintiffs have been able to bring an IIED claim:

- In Soto v. El Paso Natural Gas Co., 942 S.W.2d 671 (Tex. Ct.App. 1997), the Texas Court of Appeals reversed summary judgment entered for the defendant on both IIED and statutory harassment counts where the supervisory employee's alleged conduct included fondling and ridiculing a female employee following her return to work from a second mastectomy and reconstructive surgery.

- In Kanzler v. Renner, 937 P.2d 1337 (Wyo. 1997), the Wyoming Supreme Court reversed summary judgment entered for the defendant where the alleged conduct included the defendant rubbing his crotch on the plaintiff's leg.

- In Takaki v. Allied Machine Corp., 951 P.2d 507 (Haw. Ct.App. 1998), the Hawaii Court of Appeals reversed summary judgment entered for the defendant on both IIED and statutory discrimination counts where, among other things, the supervisor frequently called the plaintiff a "lousy f--king Jap."

- Discriminatory animus may elevate even a marginal IIED claim, as was the case in Taylor v. Metzger, 706 A.2d 685 (N.J. 1999), where the New Jersey Supreme Court held that the utterance of a single racial slur ("jungle bunny") could, under certain circumstances, constitute extreme and outrageous conduct.

Despite these holdings, it is important to note that many IIED claims based upon allegations of harassment or discrimination are dismissed, even where accompanying statutory claims based on the same facts are upheld. For example:

- In Jeremiah v. Yanke Machine Shop, Inc., 953 P.2d 992 (Idaho 1998), the Idaho Supreme Court upheld a hostile work environment claim based on national origin while dismissing an IIED claim where at trial the plaintiff presented evidence that he was subjected to demeaning epithets and harassment regarding his national origin. The court avoided addressing whether the behavior was extreme and outrageous, instead finding that because the plaintiff was merely "seriously frustrated" by the treatment, he did not meet the requisite level of severe emotional distress to maintain his IIED claim.

- In Hoy v. Angelone, 691 A.2d 476 (Pa. Super.Ct. 1997), a Pennsylvania trial court dismissed an IIED claim following a jury verdict for the plaintiff, after the plaintiff had testified that she was subjected to various forms of abusive treatment, including sexual propositions, necessitating psychiatric help. The court found that absent a factor such as retaliation for refusing sexual advances, sexual harassment does not constitute outrageous conduct sufficient to support an IIED claim.

Retaliation

When abusive behavior appears to be motivated by a desire to retaliate against an employee who has reported illegalities or irregularities, a court may find that it constitutes extreme and outrageous conduct.

- In Vasarhelyi v. New School for Social Research, 230 A.D.2d 658 (N.Y. App.Div. 1996), a New York appeals court reinstated an IIED claim brought by a former university controller and treasurer who had questioned the university president's handling of reimbursements for his personal and business expenses. The court found that the plaintiff had pleaded a valid IIED claim where, after she complained about the president's actions, she had been subjected to intense, lengthy interrogation, humiliation over her English language ability, questions about her personal relationships, and the "impugning both her honesty and her chastity."

- Similarly, in Polk v. Inroads/St. Louis, Inc., 951 S.W.2d 646 (Mo. App. 1997), a Missouri appeals court reinstated an IIED claim where the plaintiff was subjected to "a calculated plan to cause . . . emotional harm" after she exposed misrepresentation by her

supervisor.

In-House Investigations

Although courts generally allow employers to conduct reasonable investigations of possible illegal activity without incurring IIED liability, it may be possible to argue successfully that this privilege does not extend to threatening or coercive interrogation.

- In Tandy Corp. v. Bone, 678 S.W.2d 312 (Ark. 1996), the Arkansas Supreme Court held that a jury should hear an IIED claim where, during an investigation into internal theft, the defendant's security personnel subjected a worker to curses and threats and refused to allow him to take a prescribed medicine. The court suggested that liability may be found if the defendant was aware of the employee's medical condition.

Preemption by Workers' Compensation

Finally, attorneys must consider the effect of workers' compensation laws on IIED claims. Jurisdictions are split on whether state workers' compensation acts preclude IIED claims against employers. For example, compare Cole v. Fair Oaks Fire Protection Dist., 729 P.2d 743 (Cal. 1987) (finding that workers' compensation bars employee's IIED claim); with McSwain v. Shei, 402 S.E.2d 890 (S.C. 1991) (holding that workers' compensation act does not bar employee's IIED claim).

Even where an IIED claim against an employer is precluded by workers' compensation, it may be possible (although, in many cases, not practicable) to bring an action against a specific, offending co-worker. See e.g., Brown v. Nutter, McClennen & Fish, 696 N.E.2d 953 (Mass. App. Ct. 1998) (holding that co-workers "are not immunized from suit by the workers' compensation act for tortious acts which they commit outside the scope of their employment, which are unrelated to the interest of the employer").

Key questions

1. Is an IIED claim against an employer preempted by workers' compensation?
2. Is an IIED claim against a specific, offending co-worker preempted by workers' compensation?
3. Does your case fit into one of those categories – discrimination/harassment, retaliation – where IIED claims are more successful?
4. If you are in a jurisdiction that permits IIED claims against employers, what is the state of the law on agency and vicarious liability issues related to employer liability?

B. INTENTIONAL INTERFERENCE WITH THE EMPLOYMENT RELATIONSHIP

Another tort law theory that potentially may be invoked as a response to workplace bullying is intentional interference with the employment relationship, which is defined this way:

1. The plaintiff had an employment contract with an employer;
2. A third party knowingly induced the employer to break that contract;
3. The third party's interference was both intentional and improper in motive or means; and,
4. The plaintiff was harmed by the third party's actions.

Shea v. Emmanuel College, 425 Mass. 761 (1997).

One commentator has aptly stated that because of confusion and inconsistency in the case law interpreting this doctrine, "employers and employees have little upon which to rely in evaluating claims premised upon tortious interference." Tortious Interference with Business Relations: "The Other White Meat" of Employment Law, 84 MINNESOTA LAW REVIEW 863, 914 (2000). However, particularly in cases where it is feasible to sue an individual employee, this may be a viable cause of action. More specifically, in some states one can argue that the "third party" is a supervisor or co-worker who is acting outside of the scope of his employment relationship when he bullies an employee. See e.g., O'Brien v. New England Telephone & Telegraph Co., 422 Mass. 686 (1996) (holding that a supervisor could be liable for engaging in a course of abusive, bullying conduct towards the plaintiff that was unrelated to the company's corporate interests).

However, there are potential difficulties in raising this cause of action. First, not all state courts agree that a current employee qualifies as the "third party" necessary to invoke this legal theory. E.g., Miles v. Bibb Co., 177 Ga.App. 364 (1985), reh. den., cert. dism. (1986) (holding that neither supervisor nor human resources director was a third party unauthorized to discharge plaintiff). Second, the law may not allow a bullied employee to sue the employer under this theory, as the Oregon Court of Appeals reasoned in Lewis v. Oregon Beauty Supply Co., 77 Or.App. 663, recon. den. (1986), when it held that a "company cannot be liable for interference with an employment relationship to which it is a party."

Key questions

1. Can a bullying employee be considered a "third party" as defined by this cause of action?
2. How are agency and vicarious liability issues treated under this cause of action with regard to employer liability?
3. Does workers' compensation preclude claims directly against an employer?

C. OTHER INTENTIONAL TORTS

Common law torts such as **assault**, **battery**, and **false imprisonment** may be applicable to certain bullying cases. However, unless such a case is accompanied by severe physical and/or mental harm, it may be impractical to bring an action. In rare cases, **defamation** claims may be viable as well. Furthermore, the preemptive effect of workers' compensation statutes must certainly be considered in this context.

III. DISCRIMINATION CLAIMS

Harassment Law and the "Disaggregation" Problem

Harassment that is grounded in a target's membership in a protected class is actionable under both federal and state discrimination statutes. In particular, hostile work environment theory offers some potential relief to employees who are subjected to abusive treatment at work on the basis of protected class membership. For example, in Lule Said v. Northeast Security, 2000 WL 33665354 (MCAD 2000), the Massachusetts Commission Against Discrimination took "judicial notice of the emerging body of law relative to 'workplace bullying'" in awarding damages to an employee who endured severe religious harassment because he practiced Islam.

However, lawyers who are considering the use of statutory discrimination law as a potential means of legal relief for bullied employees are advised to consider the problem of "disaggregation" and whether it applies in their jurisdiction. Yale law professor Vicki Schultz analyzed the evolution of sexual harassment law under Title VII and concluded that "the most prominent feature of hostile work environment jurisprudence" is the "disaggregation of sexual advances and other conduct that the courts consider 'sexual' in nature from other gender-based mistreatment that judges consider nonsexual." Vicki Schultz, Reconceptualizing Sexual Harassment, 107 YALE LAW JOURNAL 1683, 1713-1714 (1998). In other words, in considering sexual harassment lawsuits that allege the creation of a hostile work environment, the courts often disregard any harassing conduct that is not of a sexual nature. This line of analysis not only means that many horrible cases of sexual harassment are not considered in their factual entirety, but also precludes the application of hostile work environment theory in bullying situations motivated by discriminatory animus where the hurtful conduct is of a primarily nonsexual nature.

Fortunately, some federal courts, in part responding to Schultz's critique, are including evidence of non-sexual harassment in hostile work environment claims. See e.g., Williams v. General Motors Corp., 187 F.3d 553 (6th Cir. 1999) (non-sexual conduct can contribute to hostile work environment); Durham Life Ins. v. Evans, 166 F.3d 139 (3rd Cir. 1999) (same).

Key question

Per Professor Schultz's analysis, in hostile work environment claims, how does the jurisdiction treat evidence of generic harassment allegedly grounded in discriminatory animus?

Disability Discrimination

Disability discrimination statutes may offer some relief when abusive behavior has induced or exacerbated a recognized mental disability. Research conducted by University of Miami law professor Susan Stefan has revealed that claims under the Americans with Disabilities Act by employees involving psychiatric disabilities tend to fit into one of four common profiles:

1. Employees who had worked satisfactorily for an extended period of time until the appointment of a new supervisor and whose claims clearly arose from escalating interpersonal difficulties with their supervisors.

2. Employees whose psychiatric disabilities arose from other work environment issues, including women who were sexually harassed; individuals subjected to hostile work environments as a result of disability, gender, race, or sexual preference; whistleblowers; and people whose disabilities were related to other claims of employer abuse or unfair treatment.

3. Employees whose disabilities were related to increasing stress, increased hours on the job, or the demands of new positions or new responsibilities. . . .

4. Employees disciplined for misconduct, usually sexual harassment, who claimed that their behavior resulted from a mental disability or that being disciplined showed that their employer perceived them as being mentally disabled.

Susan Stefan, "You'd Have to Be Crazy to Work Here": Worker Stress, The Abusive Workplace, and Title I of the ADA, 31 LOYOLA LOS ANGELES LAW REVIEW 795, 797-98 (1998).

However, as Stefan further explains, many employees "are losing their ADA cases because abuse and stress are seen as simply intrinsic to employment, as invisible and inseparable from conditions of employment as sexual harassment was twenty years ago." Id. at 844. In addition, the Supreme Court's holding in Sutton v. United Airlines, Inc., 119 S.Ct. 2139 (1999), that measures taken to mitigate a condition "must be taken into account" in determining whether an individual is "disabled" within the meaning of the statute makes it more difficult for bullied employees to successfully invoke the ADA. An employee suffering from psychological illness due to work abuse possibly could be treated effectively with medication, but this might also mean that he is not statutorily "disabled" due to the success of the mitigating measure.

IV. RETALIATION AND WHISTLEBLOWING GENERALLY

Anecdotal information collected by the Workplace Bullying & Trauma Institute suggests that retaliation engaging in some type of whistleblowing behavior or for rebuffing sexual advances is a leading motivation behind workplace bullying. Engaging in union organizing activity also may encourage retaliatory behavior. Obviously, the **anti-retaliation provisions** of various protective employment statutes should be consulted to see if they apply. In addition, retaliatory actions that culminate in a discharge (actual or perhaps even constructive), may raise not only statutory violations, but also the **public policy exception** to at-will employment and other wrongful discharge claims.

V. LABOR AND COLLECTIVE BARGAINING STATUTES

Federal and state labor and collective bargaining statutes may be a source of protection for bullied employees. The critical distinction, of course, is whether a client is covered by a collective bargaining agreement (CBA). However, it is possible that even non-union employees may have limited recourse under federal or state labor laws.

If your client is covered by a collective bargaining agreement, then her substantive and procedural rights will be defined largely by its provisions. It is beyond the scope of this article to explore all of the labor law ramifications concerning workplace bullying, but several points are worth briefly raising. First, unions could be encouraged to bargain for provisions that protect members against abusive supervision. Second, even in the absence of specific protections against abusive supervision, the general rights granted in a CBA may provide legal protections for a bullied union member. Third, effective shop stewards can serve a valuable mediating role in a bullying situation. Finally, both the union's and management's legal obligations become tangled when a bullying situation arises between union members, or between a bullying union member and a targeted supervisor.

Union and non-union employees alike may be able to invoke Section 7 of the National Labor Relations Act, which grants employees the right to engage in **concerted activity** for "mutual aid or protection." 29 U.S.C. Sec. 157. Section 8 of the NLRA states that employers may not "interfere with, restrain, or coerce" employees who are exercising this right. 29 U.S.C. Sec. 158. Potentially, a group of non-union employees concerned about workplace bullying could approach their employer about it. Such activity presumably would be protected under Section 7, and any employer retaliation for engaging in the activity would be prohibited under Section 8.

However, the most common workplace bullying scenario involves a single targeted employee, often in a subordinate relationship to a bullying supervisor. In such a situation, the target's nonlitigious choices include doing nothing, confronting the bully, reporting the objectionable behavior to the bully's superior, or in some way consulting and enlisting the assistance of her coworkers. Only the last scenario fits easily within the concerted activity provisions of the NLRA.

Jurisdictional Requirements

Workplace bullying frequently occurs in white collar and service sector settings. Accordingly, the NLRA's limitations on the categories of workers who are statutorily protected may be relevant considerations. Expressly excluded from the NLRA's protections are supervisors, independent contractors, domestic and agricultural workers, and family member employees. 29 U.S.C. Sec. 152(3). The Supreme Court read the supervisory exemption so broadly in NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571 (1994) that even registered nurses were deemed excluded from statutory protection merely because they supervised nurses' assistants. In addition, the Court has held that managerial and confidential employees are excluded as well. See NLRB v. Yeshiva Univ., 444 U.S. 672 (1980) (exempting managerial employees); NLRB v. Hendricks Co. Rural Elec. Membership Corp., 454 U.S. 170 (1981) (exempting confidential employees).

Key questions

1. Is your client covered by a CBA?
2. Even if your client is not covered by a CBA, does her situation allow her to invoke Section 7's right to engage in concerted activity?
3. Is your client exempt from the NLRA's protections by virtue of his employment status, e.g., manager or supervisor?

VI. FREE-SPEECH PROTECTIONS

In some instances, the best way to deal with bullying behavior is to confront the bully before the situation escalates. Unfortunately, if we assume that confronting the bully would be construed legally as a form of speech, the law offers only limited protections to people who have engaged in this brand of self-help.

Public employee speech is protected by the First Amendment, but only to the degree that it addresses matters of public concern. See Connick v. Myers, 461 U.S. 138 (1983). This is a difficult standard to meet for most everyday bullying scenarios, though it could have some application to whistleblower or retaliation situations.

For **private employees**, there is little hope of invoking a constitutional right to free speech. A body of case law, consistent in result though very muddled in analysis, holds that employees enjoy no federal or state constitutional protection against incursions on free speech by private actors. One state, Connecticut, provides general statutory protection for employee speech, though its application to bullying situations is apparently untested. For more information on speech protections for private sector employees, see David C. Yamada, Voices From the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace, 19 BERKELEY JOURNAL OF EMPLOYMENT & LABOR LAW 1 (1998).

VII. OCCUPATIONAL SAFETY AND HEALTH REGULATIONS

At first glance, federal and state occupational safety and health laws would seem like natural sources to turn to in seeking legal protections for bullied employees. After all, the federal Occupational Safety and Health Act of 1970 was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. Sec. 651(b). However, the main concern of OSHA was the prevention of physical injuries, especially those occurring in the industrial sector, and "OSHA's original emphasis on manufacturing and construction sites" remains the primary focus of the Occupational Safety and Health Administration. See MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY & HEALTH LAW 4-5 (1998). While workplace safety advocates and others lobby for OSHA and its state counterparts to pay greater attention to occupational stress and other harmful conditions in the service-sector workplace, there currently is little in the statutes and accompanying regulations that will help employees subjected to emotionally abusive work environments.

VIII. AN OVERARCHING ISSUE: CONSTRUCTIVE DISCHARGE

For severely bullied employees, the most frequently chosen self-help option is to leave their jobs. From a legal standpoint, this raises the question of whether these so-called "voluntary" departures can be construed as constructive discharges for purposes of alleging statutory or common-law wrongful discharge claims. Constructive discharge is defined as a "voluntary termination of employment by an employee" where working conditions were such that "an objective, reasonable person would find [them] so intolerable that voluntary termination is the only reasonable alternative." Montana Code Ann. Sec. 39-2-903. Although workplace bullying and the legal definition of constructive discharge seemingly go hand in hand, courts and agencies vary widely on how narrowly or broadly constructive discharge should be construed.

IX. PROSPECTS FOR LAW REFORM

- Since 2003, the **Healthy Workplace Bill**, model anti-bullying legislation that I authored and is being promoted by the Workplace Bullying & Trauma Institute, has been introduced in four states, California, Hawaii, Oregon, and Oklahoma. The bills have died in committee in each of these states, but they may be refiled. In addition, several other states are considering legislative measures related to bullying. For a copy of the Healthy Workplace Bill, please contact me.

- The **National Institute for Occupational Safety and Health** is taking a much greater interest in workplace bullying and abuse. In February 2005, NIOSH hosted an international roundtable discussion of experts on workplace bullying and psychological aggression at its Cincinnati office. Although NIOSH is not a policy-making body, its work on this topic may help to inform discussions about more governmental regulatory involvement in the future.

- **Internationally**, there is a growing level of legal and legislative activity concerning bullying. Many other countries, including Canada, England, Sweden, France, Germany, and Australia, have enacted, or are considering adoption of, anti-bullying protections. In some of these nations, references to workplace bullying can be found in judicial and administrative decisions. In addition, the **International Labor Organization** and the **European Union** have acknowledged that bullying is a serious workplace problem.

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HELPFUL SOURCES

Steven B. Bisbing, Psychological Claims in Employment Litigation, 16 EMPLOYEE ADVOCATE, No. 1, p. 15 (Spring 2000). This very helpful article complements nicely many of the broader treatments of workplace bullying.

Alex B. Long, Tortious Interference with Business Relations: "The Other White Meat" of Employment Law, 84 MINNESOTA LAW REVIEW 863 (2000). For attorneys who are wrestling with the thicket of questions surrounding claims for intentional interference with the employment relationship, this article will provide a very helpful overview.

GARY NAMIE & RUTH NAMIE, THE BULLY AT WORK (2003, rev. ed.). This book is designed to help targets of workplace bullying, but it is an invaluable resource to anyone who is trying to understand this phenomenon.

Susan Stefan, "You'd Have to be Crazy to Work Here": Worker Stress, The Abusive Workplace, and Title I of the ADA, 31 LOYOLA LOS ANGELES LAW REVIEW 795 (1998). This article discusses how the ADA may be used as a legal weapon against work abuse. Somewhat dated in view of recent Supreme Court decisions on the ADA, but still useful.

David C. Yamada, The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection, 88 GEORGETOWN LAW JOURNAL 475 (2000). This article also contains an extensive discussion and analysis of IIED case law. It may be of particular help to attorneys who have IIED cases at the pre-trial motion or appellate stages.

David Yamada, Brainstorming About Workplace Bullying: Potential Litigation Approaches For Representing Abused Employees, 16 EMPLOYEE ADVOCATE, No. 3. P. 49 (Fall 2000). More practical than the law review article cited above. This outline draws heavily from that article.

Forthcoming

This spring the EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL, co-sponsored by Chicago-Kent College of Law and Workplace Fairness, will publish a symposium issue (Vol. 8, No. 2) on

workplace bullying featuring contributions from scholars and practitioners in law, social psychology, organizational behavior, and workplace safety.

Workplace Bullying & Trauma Institute

Drs. Gary and Ruth Namie, authors of THE BULLY AT WORK, have been significantly responsible for raising awareness of bullying the United States. Their Institute, based in Bellingham, Washington, hosts a very informative website, www.bullyinginstitute.org. Gary Namie has served as a consultant and expert witness on a number of legal cases involving bullying scenarios. I serve as an affiliated scholar and board member with the Institute on a *pro bono* basis.