

# Ongoing Work in Progress: Understanding and Responding to Workplace Bullying

Valparaiso University School of Law  
Work-in-Progress Presentation  
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*Dear Members of the VU Law Faculty:*

*Earlier this year, Dean Lyon kindly arranged for the School of Law to host my visit as a visiting scholar in residence from September 21 through October 10, enabling me to work on writing projects away from the normal distractions at my own university, pursuant to a fall research sabbatical. This also happens to be the 35th year anniversary of my graduation from VU's College of Arts and Sciences, and Homecoming Weekend will be spent in the company of fellow VU classmates. So, this visit is both an opportunity to make progress on my work and a chance to reconnect with friends.*

*My work-in-progress presentation will start by summarizing some 16 years of intensive scholarship, public education, and legislative advocacy on the legal, organizational, and individual ramifications of workplace bullying, i.e., deliberate, often-repeated, health-harming mistreatment of an employee by a supervisor or co-worker(s), through direct and indirect means. I will then discuss how discoveries from neuroscience on the effects of psychological trauma may help to explain the damage done by severe bullying at work – an area of inquiry that I am just beginning during this sabbatical.*

*I discuss how I have been conducting much of my work in a new law review article, "Intellectual Activism and the Practice of Public Interest Law," available via my SSRN page: [http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=506047](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=506047).*

*I am grateful for this opportunity to share my work with you, and I once again thank the School of Law for hosting my visit.*

*-David Yamada*

# I. Workplace Bullying 101

## A. Definition

Deliberate, often-repeated, health-harming mistreatment of an employee by a supervisor or co-worker(s), through direct and indirect means.

It is not:

- A bad day at the office
- A conflict or disagreement between co-workers
- An unpleasant instance of incivility or disrespectful behavior

## B. Common bullying behaviors

- false accusations of mistakes and errors
- hostile glares and other intimidating non-verbal behaviors
- yelling, shouting, and screaming
- exclusion and the “silent treatment”
- withholding resources and information necessary to the job
- behind-the-back sabotage and defamation
- use of put-downs, insults, and excessively harsh criticism
- unreasonably heavy work demands designed to ensure failure

C. **Frequency** -- According to 2014 Workplace Bullying Institute/Zogby national scientific survey, 7 percent of respondents were currently experiencing workplace bullying, and 27 percent had experienced it during their work lives.

## D. Who are the Targets?

- Subordinates more than peer-level or supervisors
- Women more than men
- High, medium, and low performers

## E. Who are the Aggressors?

- Supervisors more than peer-level or subordinates
- Men more than women
- Situational vs. psychopath (est. 1% of population) or almost psychopath (est. 10% of population)

## F. Harm to Organizations

- Lower morale and productivity
- Higher absenteeism and “presenteeism” (i.e., withdrawal)
- Higher attrition
- Higher risks of workplace violence
- Higher employee benefit costs & potential liability
- On rare occasions, bad publicity

**G. Harm to Workers and their Families**

- stress disorders of all types, including symptoms associated with PTSD
- clinical depression
- cardiovascular disease
- impaired immune systems
- gastrointestinal symptoms
- suicidal ideation
- life-altering decisions about whether to stay in or leave a job
- residual impacts on children, spouses, other family members

**II. Potential Legal Protections for Employees, Liability Risks for Employers, and Employee Benefit Impacts**

**A. Employer Liability Issues:**

- Discriminatory harassment – e.g., bullying motivated by target’s protected class status, with behavior evidencing bias;
- Disability discrimination – e.g., where bullying creates or exacerbates a mental disability;
- Retaliation and whistleblowing claims – especially bullying as a form of retaliation for filing an unlawful employment practice claim or reporting illegal conduct;
- Tort liability – many claims are subject to workers’ compensation exclusivity
  - a. Intentional Infliction of Emotional Distress
  - b. Defamation
  - c. Assault, Battery, and False Imprisonment
- Employer policies and handbooks – especially where policies cover generic harassment.

Bottom line so far: These potential claims and sources of protections have proven wholly inadequate as legal responses to workplace bullying. Many, if not most targets do not have grounds for legal relief.

**B. Labor Relations**

- CBAs: Provisions re abusive supervision
- CBAs: Bullying as constructive discharge
- CBAs: Bullying as good/just cause for discharge
- Concerted activity
- Mainly public sector: Workplace violence policies, municipal/county anti-bullying policies, grand jury investigative reports

**C. Employee Benefits (Private and Public)**

- Workers’ Compensation -- Covers injuries arising out of and in the course of employment, in some states including intentionally inflicted emotional harm, although so-called “mental>mental” claims are often contested.
- Health Insurance Premiums – Greater use of health insurance for stress-related physical and psychiatric illnesses.

- Unemployment Insurance – Intolerable working conditions may constitute constructive discharge exception to “voluntary quit” standard.
- Disability Benefits – Individual is eligible when she can show fundamental impairment in performing normal life activities.
- Family and Medical Leave – Bullying targets invoking FMLA rights to get away from abuse.

#### **D. Legally-Related Developments**

- Introduction of the Healthy Workplace Bill (see below)
- County grand jury reports
- Municipal and county anti-bullying policies & proclamations
- Ballot measures
- Workplace bullying policies covering public workers
- EPLI policies
- Professional associations (e.g., Joint Commission)
- Legal scholarship

#### **E. Healthy Workplace Bill**

In terms of proposals for law reform, the most significant development has been state legislative consideration of versions of the Healthy Workplace Bill, model legislation I have authored that provides targets of severe workplace bullying with a claim for damages and creates liability-reducing incentives for employers to act preventively and responsively toward bullying behaviors.

- Introduced in some 30 states since 2003;
- California (2014), Tennessee (2014), and Utah (2015) -- Enacted laws that draw from the language of the HWB to provide for workplace bullying training and policies;
- Bills currently active in approx. 10 state legislatures;
- Massachusetts – In the 2015-16 session, the HWB had 58 sponsors and advanced to Third Reading in the House (eligible for floor vote);
- Illinois and New York – In 2010, versions of the HWB were passed by their respective state senates;
- Grassroots “Healthy Workplace Advocates” groups, growing labor support, and business sector opposition.

### **III. Psychological Trauma and Neuroscience: Bullied Workers and the Challenges of Storytelling and Documenting Harm**

#### **A. Psychological Torture**

In a study by communications professors (Tracy, Lutgen-Sandvik, and Alberts, 2006), targets of workplace bullying described their experiences:

- Bullying targets' accounts were "saturated" with references to "beating, physical abuse, and death."
- One target said that she had been "maimed" and "character assassinated," while others used terms such as "'beaten,' 'abused,' 'ripped,' 'broken,' 'scarred,' and 'eviscerated.'"
- The bullying process was described alternatively as a "game or battle," a "nightmare," "water torture," and a "noxious substance."
- In describing themselves, targets used terms such as "slave or animal," "prisoner," "child with "an abusive father," and "heartbroken lover."

## **B. Emerging Insights from Neuroscience**

- In *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* (2014), pioneering trauma expert Dr. Bessel van der Kolk explains the latest research on how traumatic experiences may impact the brain, including sharp cognitive impairments that undermine an individual's ability to present information in an ordered manner. Put simply, an individual dealing with psychological trauma may be able to share emotions and impressions about the experience, while being unable to tell the essential story behind it.
- I have been interacting with targets of severe workplace bullying and mobbing behaviors for some 18 years. I have witnessed, over and over again, how some individuals encounter great difficulty explaining specific timelines and events. Many of them tell me that they are experiencing symptoms consistent with Post Traumatic Stress Disorder.
- Effective legal advocates are good storytellers. The process of developing this story starts from the very first meeting between attorney and client. But what happens when a client's experience of psychological trauma makes it difficult for a lawyer to build a coherent understanding of a prospective case? How can a client's wrought emotional state make it difficult to put together a simple chronology and description of events related to a legal dispute and resulting harm, including pain & suffering and emotional distress?
- I now believe that insights from neuroscience help to explain why some individuals face such difficulties in providing coherent narratives of their abusive work experiences.
- This presentation will present my initial ideas for research and writing on this topic, and I welcome feedback from others on how to develop this new aspect of my work.

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## To Learn More

### Articles and writings

Most of my scholarly articles are freely downloadable at:

[http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=506047](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=506047), including:

- David C. Yamada, *Intellectual Activism and the Practice of Public Interest Law*, SOUTHERN CALIFORNIA REVIEW OF LAW AND SOCIAL JUSTICE (2016);
- David C. Yamada, *Workplace Bullying and Ethical Leadership*, JOURNAL OF VALUES-BASED LEADERSHIP (2008);
- David C. Yamada, *Emerging American Legal Responses to Workplace Bullying*, TEMPLE POLITICAL & CIVIL RIGHTS LAW REVIEW (2013);
- David C. Yamada, *The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection*, GEORGETOWN LAW JOURNAL (2000).

*Minding the Workplace* blog at: <http://newworkplace.wordpress.com>

- Commentary on employee relations, workplace bullying, dignity at work, employment law & policy, etc.
- Named one of the Top 50 workplace blogs by a leading organizational psychology website, with some 840,000 page views since its launch in late 2008.

### Resource Webpage

- American Psychological Association, Center for Organizational Excellence -- I served as a subject matter expert to the APA on the development of this webpage on workplace bullying, including an animated educational video, website and blog links, and book list:

<https://www.apaexcellence.org/resources/special-topics/workplace-bullying>

### Brief Bio

**DAVID C. YAMADA** is a Professor of Law and Director of the New Workplace Institute at Suffolk University Law School in Boston. Professor Yamada is an internationally recognized authority on the legal, public policy, and organizational implications of workplace bullying. He wrote the first comprehensive analysis of workplace bullying and American employment law (*Georgetown Law Journal*, 2000), and his model anti-bullying legislation (named the “Healthy Workplace Bill”) has become the template for American law reform efforts in this realm. He is a frequent keynote speaker and presenter at national conferences and is widely quoted and cited in articles on workplace bullying. Professor Yamada’s educational background includes a J.D. from New York University School of Law, an M.A. in Labor & Policy Studies from SUNY-Empire State College, and a B.A. from Valparaiso University. His c.v. may be reviewed at: [http://www.suffolk.edu/documents/Law%20Faculty/CV\\_D.Yamada.pdf](http://www.suffolk.edu/documents/Law%20Faculty/CV_D.Yamada.pdf).