Arbitrators' Review of Bullying in the Workplace

Stacy A. Hickox* & Michelle Kaminski**

Introduction

Bad behavior calls for consequences. Bad behavior in the workplace, characterized as bullying, can include physical assault, threats, interference with work, and persistent verbal attacks. Workplace bullying places a heavy burden on targeted employees and harms employers in terms of higher absenteeism, health care usage, and turnover, as well as lost productivity. Targets of bullying may seek redress through legal claims against the bully and their employer, but litigation only provides damages for bullying that rises to the level of outrageous conduct. Without any comprehensive legislation prohibiting bullying in the workplace in the United States, litigation alone does not adequately provide for changes in the workplace to prevent future bullying, changes that might allow the target to remain at work and others to enjoy a civil workplace. Employers can choose to discipline bullies, but such discipline often is subject to the review of arbitrators empowered to interpret and apply employers' policies under a collective bargaining agreement or an employment arbitration program. While arbitration has been criticized as a means to enforce employee rights, in this article we argue it to be a potentially more effective tool than litigation.

The first part of this paper explores the significant impact of bullying. Despite the physical and psychological harm to the targets and the negative impact on workplace culture and productivity, many employers have not adopted specific policies prohibiting bullying behavior and often fail to fully address bullying behavior when it is reported. Therefore, targets may seek other options for redress.

The second and third parts of this paper review both judicial approaches to bullying behavior and labor and employment arbitration as an alternative. Only a small percentage of targets of workplace bullying take their cases to court, and those may be the most extreme cases.

The third part of this paper discusses an in-depth review of 135 arbitration awards, most of which determined whether an employer had just cause to discipline a bully.[1] These claims arise under a

*Stacy A. Hickox, J.D., Associate Professor, School of Human Resources and Labor Relations, Michigan State University. Many thanks to HRLR graduate Haley Shoan for her work on this research.

**Michelle Kaminski, Ph.D., Associate Professor, School of Human Resources and Labor Relations, Michigan State University.

collective bargaining agreement that protects alleged bullies against unwarranted discipline, and under increasingly common employment arbitration programs covering non-unionized employees.[2] The fourth part of the paper compares the two approaches—litigation and arbitration. The fifth and final section highlights some unique and creative approaches to the reduction of bullying as demonstrated in arbitration awards and makes recommendations for employers and unions.

I. The Extent and Impact of Bullying

The extent and significant impact of bullying behavior in American workplaces calls for attention to better methods to prevent such behavior. The Workplace Bullying Institute has defined workplace bullying as "repeated, harmful mistreatment" of one or more employees, known as targets, which can include conduct that is "threatening, intimidating, or humiliating," or interferes with work.[3] Examples can include "demeaning behavior, . . . isolation, . . . work sabotage, . . . harm to reputation . . . and abusive supervision."[4] Bullying typically involves such behavior that is "repeated[] and regular[] . . . and over a period of time . . . ."[5] Experts have suggested that bullying should be measured by both its intensity and frequency,[6] including conduct that is repetitive, oppressive, and causes harm.[7]

Some would include discriminatory harassment as one form of bullying, but, for the purposes of this analysis, we only consider abusive conduct that did not result from a target's membership in a group that is protected against discrimination. This analysis does not review statutory protections for discrimination or include arbitration awards addressing claims of employees who have been disciplined for

1. *See infra* notes 173–74 and accompanying text for further explanation of just cause.

2. Gerald Sauer, *Arbitration Is a Flawed Forum That Needs Repair*, LAW360 (Feb. 6, 2020, 4:01 PM), https://www.law360.com/access-to-justice/articles/1239175/arbitration-is-a-flawed-forum-that-needs-repair?nl_pk=4f093590-9352-4a3e-9477-41b3c58c5266&utm_source=newsletter&utm_medium=email&utm_campaign=access-to-justice&read_more=1 [https://perma.cc/D48L-PT35] (experts estimating that, by 2024, almost eighty-three percent of private, nonunionized employees in United States will be subject to mandatory arbitration).

3. *Tutorial 2—What It Is*, WORKPLACE BULLYING INST. (2020), http://www.workplacebullying.org/individuals/problem/definition [perma.cc/M8KA-CJDF].

4. Suzy Fox & Lamont E. Stallworth, *Building a Framework for Two Internal Organizational Approaches to Resolving and Preventing Workplace Bullying: Alternative Dispute Resolution and Training*, 61 CONSULTING PSYCH. J.: PRAC. & RSCH. 220, 224 (2009).

5. Sarah E. Morris, *Tackling Workplace Bullying in Tort: Emerging Extreme and Outrageous Conduct Test Averts Need for Statutory Solution*, 31 ABA J. LAB. & EMP. L. 257, 260 (2016).

6. James E Bartlett & Michelle E Bartlett, *Workplace Bullying: An Integrative Literature Review*, 13 ADVANCES IN DEVELOPING HUM. RES. 69, 70 (2011).

7. E. Christine Reyes Loya, *Low-Wage Workers and Bullying in the Workplace*, 14 HASTINGS RACE & POVERTY L.J. 231, 233 (2017).

harassment (as defined by Title VII and the other anti-discrimination statutes) for two main reasons. First, several other studies have analyzed the role of arbitrators in reviewing the claims of harassers.[8] Second, targets of discriminatory harassment enjoy at least some protection under federal and state anti-discrimination statutes, including the potential for injunctive relief and accommodations. This protection has been analyzed extensively by both the Equal Employment Opportunity Commission and various experts.[9] In contrast, because anti-discrimination protections only apply to harassment based on and because of the target's membership in a protected class,[10] many bullying targets lack protection from those statutes.[11] Targets of bullying that is not demonstrably based on membership in a protected class are limited to the relief provided under common law and some health and safety statutes, as described below.

Regardless of the definition applied, we recognize that bullying is widespread in American workplaces.[12] More than sixty million Americans report being affected by workplace bullying: anywhere from nineteen percent to forty-four percent of American workers have been bullied, and another nineteen percent have witnessed bullying behavior.[13] Among targets of bullying, twenty-nine percent remain silent, while only seventeen percent seek formal resolution.[14] This failure to report bullying may result from employers' lack of responsiveness to

8. Stacy A. Hickox & Michelle Kaminski, *Measuring Arbitration's Effectiveness in Addressing Workplace Harassment*, 36 Hofstra Lab. & Emp. L.J. 293, 294 (2019); Carrie G. Donald & John D. Ralston, *Arbitral Views of Sexual Harassment: An Analysis of Arbitration Cases, 1990–2000*, 20 Hofstra Lab. & Emp. L.J. 229, 301 (2002); Robert Perkovich & Anita M. Rowe, *"What Part of 'Zero' Don't You Understand?": The Arbitration of Sexual Harassment Discipline and "Zero Tolerance" Policies*, 36 Willamette L. Rev. 749, 762–69 (2000).

9. Equal Emp. Opportunity Comm'n, EEOC-NVTA-2017-2, Promising Practices for Preventing Harassment (Nov. 21, 2017), https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment [https://perma.cc/X593-7W3Q]; Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 Harv. Women's L.J. 3, 3 (2003).

10. *See, e.g.*, Johnson v. City Univ. of New York, 48 F. Supp. 3d 572, 576 (S.D.N.Y. 2014) (dismissing complaint where treatment not alleged to be because of membership in any protected group).

11. Loya, *supra* note 7, at 241–42; David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 Geo. L.J. 475, 503 (1999); Jerry Carbo, *Strengthening the Healthy Workplace Act—Lessons from Title VII and IIED Litigation and Stories of Target Experiences*, 14 J. Workplace Rts. 97, 100 (2009).

12. Susan Harrington, Samantha Warren & Charlotte Rayner, *Human Resource Management Practitioners' Responses to Workplace Bullying: Cycles of Symbolic Violence*, 22 Organization 368, 369 (2015).

13. Gary Namie, Workplace Bullying Inst., 2017 U.S. Workplace Bullying Survey 1 (2017), https://workplacebullying.org/download/2017-wbi/?wpdmdl=2024&refresh=60df8543e752a1625261379; Loya, *supra* note 7, at 234.

14. Namie, *supra* note 13, at 12.

the conduct, or a fear of retaliation, a negative reaction to reporting it.[15] Based on this data, it is fair to say that bullying is widespread and yet often remains unaddressed in American workplaces.

Workplace bullying can produce a variety of harms for the targets, including "mental and physical health problems, post-traumatic stress, burnout, increased intentions to leave," and reduced job satisfaction and organizational commitment.[16] Negative health effects can include sleep disruption, loss of concentration or memory, mood swings, and states of agitation or anger.[17] Moreover, the strain caused by bullying can cause psychological issues, including post-traumatic stress disorder,[18] as well as debilitating anxiety (reported by eighty percent), panic attacks (fifty-two percent), and clinical depression (forty-nine percent).[19]

At work, targets of bullying lose focus, waste time worrying, are less helpful, and may reduce work effort or time at work, suffer a decline in work performance, and lose commitment to the organization.[20] Bullying also can cause resentment, leading employees to become "actively disengaged."[21] The work of teams of a target can also be negatively affected by increasing friction and unpleasantness as well as encouraging risk avoidance, which may affect customers or clients negatively and make it harder to hire or retain good talent.[22] In the long term, targets suffer forced transfers, constructive discharge without reasonable cause (twenty-four percent), or simply quit to reverse one's decline in health and sanity (forty percent).[23] These effects are magnified for low-wage workers.[24]

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15. *Id.* at 13; *see also* GARY NAMIE & RUTH F. NAMIE, THE BULLY-FREE WORKPLACE 73 (2011) (stating that when bullying is reported to employers, fifty-three percent of employers did nothing, and forty percent conducted a biased or inadequate investigation).

16. Loya, *supra* note 7, at 235; Morten Birkeland Nielsen & Ståle Einarsen, *Outcomes of Exposure to Workplace Bullying: A Meta-Analytic Review*, 26 WORK & STRESS 309, 312–13 (2012).

17. Bartlett & Bartlett, *supra* note 6, at 77–78; GARY NAMIE, WORKPLACE BULLYING INST., THE WBI WEBSITE 2012 INSTANT POLL D—IMPACT OF WORKPLACE BULLYING ON INDIVIDUALS' HEALTH 1–2 (2012), http://www.workplacebullying.org/multi/pdf/WBI-2012-IP-D.pdf; William Martin & Helen LaVan, *Workplace Bullying: A Review of Litigated Cases*, 22 EMP. RESP. & RTS. J. 175, 179–80 (2010).

18. Gary Namie, *The Challenge of Workplace Bullying*, 34 EMP. RELS. TODAY 43, 46 (2007).

19. NAMIE, *supra* note 17, at 3.

20. Christine Porath & Christine Pearson, *The Price of Incivility*, HARV. BUS. REV., Jan.–Feb. 2013, at 114, 117 (2013); Charles Chekwa & Eugene Thomas, Jr., *Workplace Bullying: Is It a Matter of Growth?* 8 J. DIVERSITY MGMT. 45, 47 (2013).

21. GAYLE CINQUEGRANI, BULLYING BOSS CAN HARM EMPLOYER ON THE JOB—AND IN THE COURTROOM (Bloomberg BNA 2017).

22. WORKPLACE PERFORMANCE SOLUTIONS, INC., CREATING A CULTURE OF CIVILITY PRESENTATION (ThinkWise accessed Nov. 13, 2017).

23. *See* NAMIE, *supra* note 13, at 18.

24. Loya, *supra* note 7, at 236–40.

Employers may believe that protections against bullying undermine high performance expectations and competition between employees.[25] In fact, competition or even conflict between employees does not necessarily constitute workplace bullying.[26] But when a supervisor or coworker's behavior escalates into actual bullying, as defined above, the effects outlined above lead to negative consequences for employers.[27] Overall, bullying can "undermine[] legitimate business interests,"[28] including, as described, decreased productivity and individual employee performance,[29] reduced motivation, and a decline in an organization's "flexibility and adaptability."[30] While not always recognized by employers, bullying can lead to higher turnover among both targets and observers of bullying[31] and negatively impact recruiting new talent because of a reputation for condoning bullying.[32] These costs to both the targets of bullying and their employers warrant closer attention to the factors that lead to the occurrence of bullying.

Research on workplace bullying has tended to focus on organizational triggers, including leadership deficits, as well as the demands and resources for a particular job.[33] Experts have suggested a variety of training and dispute resolution systems to address these factors.[34] In contrast, experts on bullying prevention dedicate relatively little atten-

25. David C. Yamada, *Emerging American Legal Responses to Workplace Bullying*, 22 Temp. Pol. & Civ. Rts. L. Rev. 329, 341–42 (2013); Loraleigh Keashly & Karen Jagatic, *North American Perspectives on Hostile Behaviors and Bullying at Work*, *in* Bullying & Harassment in the Workplace: Developments in Theory, Research & Practice 41, 59 (Ståle Einarsen, Helge Hoel, Dieter Zapf & Cary L. Cooper eds., 2d ed. 2011).

26. Gary Namie, Ruth Namie & Pamela Lutgen-Sandvik, *Challenging Workplace Bullying in the United States: An Activist and Public Communication Approach*, in Bullying & Harassment in the Workplace, *supra* note 25, at 447, 450.

27. Morris, *supra* note 5, at 261; Loya, *supra* note 7, at 236.

28. George L. Blum, Annotation, *Liability for Workplace Bullying That Does Not Involve Class-Based Discrimination*, 27 A.L.R.7th art. 3, §2 (2017).

29. Susan L. Nardone & James J. LaRocca, *Bullying in the Workplace*, N.J. Law., Dec. 2014, at 30, 31.

30. Bartlett & Bartlett, *supra* note 6, at 75; Michael G. Harvey, Joyce T. Heames, R. Glenn Richey & Nancy Leonard, *Bullying: From the Playground to the Boardroom,* 12 J. Leadership & Org. Stud. 1, 2–3 (2006); *see also* Teresa A. Daniel & Gary S. Metcalf, Stop Bullying at Work: Strategies and Tools for HR, Legal & Risk Management Professionals 41 (2d ed. 2016) (noting that bullying causes losses of $300 billion in increased medical costs, workers' compensation charges, lost productivity absenteeism, and turnover).

31. Bartlett & Bartlett, *supra* note 6, at 76; Ellen Pinkos Cobb, *Workplace Bullying Protections Differ Globally*, Soc'y for Hum. Res. Mgmt. (June 24, 2014), http://www.shrm.org/hrdisciplines/global/articles/pages/workplace-bullying-protections-differ-globally.aspx [https://perma.cc/N67L-CY5C].

32. Keashly & Jagatic, *supra* note 25, at 59.

33. Mogens Agervold & Eva Gemzoe Mikkelsen, *Relationships Between Bullying, Psychosocial Work Environment and Individual Stress Reactions*, 18 Work & Stress 336, 342–45 (2004); Helge Hoel & Cary L. Cooper, *Working with Victims of Workplace Bullying*, *in* Good Practice in Working with Victims of Violence 101, 101 (Hazel Kemshall & Jacki Pritchard eds., 2000); Michelle R. Tuckey, Sergio Chrisopoulos & Maureen F. Dollard, *Job Demands, Resource Deficiencies, and Workplace Harassment: Evidence for Micro-Level Effects*, 19 Int'l J. Stress Mgmt. 292, 293–96 (2012).

34. Fox & Stallworth, *supra* note 4, at 232–37.

tion to remedies or punishment, typically only noting generally that the punishment of bullies should be "commensurate with frequency, severity, and historical patterns."[35] For example, in a lengthy discussion of appropriate organizational responses to bullying, one expert included the relatively general recommendation that employers should have "informal and formal sanctions available for employees found to have been perpetrators of workplace bullying/mobbing."[36]

Despite this lack of attention to punishment and enforcement of behavioral standards, the level of bullying in an organization depends in large part on that organization's standard operating procedures, norms of behavior, and rules of conduct delineating what is unacceptable or acceptable behavior.[37] Without such organizational norms or standards, "aggressive individuals are prone to define their own set of 'acceptable behaviors.'"[38]

Despite the need for explicit norms, employers often fail to take any affirmative action to address bullying behavior.[39] Research shows that punitive measures are taken against only five to six percent of workplace bullies.[40] One study found that, even when a complaint was made, only twenty-three percent of employer investigations resulted in positive changes for targets; in contrast, for forty-six percent, nothing changed after conducting an inadequate investigation.[41] A 2014 survey likewise found that only twenty-eight percent of employers showed concern for the targets, enforced policies and procedures against bullying, or condemned bullying behavior, compared to twenty-five percent of employers who denied that the conduct occurred, sixteen percent who discounted it, fifteen percent who rationalized it, and sixteen percent who defended or even encouraged it.[42] These studies demonstrate employers' common reluctance to impose discipline or other consequences on a bully, even where a targeted worker has complained.

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35. Gary Namie & Ruth Namie, *U.S. Workplace Bullying: Some Basic Considerations and Consultation Interventions*, 61 CONSULTING PSYCH. J.: PRAC. & RSCH. 202, 214 (2009).

36. Maureen Duffy, *Preventing Workplace Mobbing and Bullying with Effective Organizational Consultation, Policies, and Legislation*, 61 CONSULTING PSYCH. J.: PRAC. & RSCH. 242, 258 (2009).

37. Joyce Thompson Heames, Michael G. Harvey & Darren Treadway, *Status Inconsistency: An Antecedent to Bullying Behavior in Groups*, 17 INT'L J. HUM. RES. MGMT. 348, 355–58 (2006).

38. Harvey, Heames, Richey & Leonard, *supra* note 30, at 6; Heames, Harvey & Treadway, *supra* note 37, at 358.

39. Denise Salin, *Organisational Responses to Workplace Harassment: An Exploratory Study*, 38 PERS. REV. 26, 30 (2009).

40. Harrington, Warren & Rayner, *supra* note 12, at 370.

41. NAMIE, *supra* note 13, at 14; *see also* NAMIE & NAMIE, *supra* note 15, at 73 (reporting that fifty-three percent of employers did nothing, and forty percent conducted a biased or inadequate investigation).

42. GARY NAMIE, WORKPLACE BULLYING INST., 2014 WBI U.S. WORKPLACE BULLYING SURVEY 8 https://workplacebullying.org/multi/pdf/WBI-2014-US-Survey.pdf.

Even an employer that adopts written anti-harassment policies may fail to take either reconciliatory or punitive measures against a bully.[43] An employer's failure to address bullying can perpetuate bullying by signaling to supervisors and coworkers that the employer tolerates bullying behavior.[44] Elimination of bullying requires "the willingness and authority to terminate chronic bullies from the organization," as well as supporting the targets of bullying.[45] The evidence above suggests that internal organizational processes in many organizations are insufficient to stop bullying and prevent future occurrences. Targets of bullying need other avenues to address their claims. Therefore, it is important to understand how both courts that review the claims of targets and arbitrators who review the discipline of alleged bullies make their decisions.

II. Judicial Response to Bullying

Claims by employees seeking to address bullying typically arrive in the judicial system as tort claims under state law. Judicial remedies for bullying claims that do not invoke anti-discrimination protections are limited to payment of compensation to the target by the bully and/or the employer, but only if some actionable behavior can be proven. Workers' compensation programs may also provide benefits for a target, if their harm is recognized as compensable and arose out of and in the course of their employment. Occupational safety and health statutes focus on fines to incentivize employers to maintain a safe workplace, including the absence of bullying, but do not provide damages for harm suffered by a target and cannot direct an employer to end bullying. Targets who develop a disability because of bullying can seek accommodations under disability anti-discrimination protections, but some relief from bullying, such as transfer away from a bully, may be considered not reasonable and, therefore, not required. This review of potential relief for targets of bullying from common law and statutory protection provides an important context for the review of arbitration awards addressing bullying behavior in the subsequent part of this paper.

A. Limitations of Court-Ordered Tort Remedies for Bullying

Targets rely primarily on state tort claims to seek damages for the harm caused by bullying, unless the bullying behavior is linked to the target's membership in a group that is protected against

43. Salin, *supra* note 39, at 39.

44. Keashly & Jagatic, *supra* note 25, at 60; Denise Salin & Helge Hoel, *Organisational Causes of Workplace Bullying*, *in* Bullying & Harassment in the Workplace, *supra* note 25, at 227, 230.

45. Harvey, Richey, Heames & Leonard, *supra* note 30, at 8–9.

discrimination.[46] With very little federal or state statutory protection against non-discriminatory bullying, approximately eighty percent of bullying targets are left with insufficient or no legal recourse.[47] Targets must rely on potential remedies under state common law, including, for example, assault, battery, or intentional infliction of emotional distress (IIED). These claims are rarely pursued; successful claims are almost nonexistent, compared to discrimination claims.[48] Even when a target pursues a tort claim, the decisions outlined below demonstrate that assault, battery, and IIED claims require substantial proof of intent and significant harm to the target to support monetary damages.[49] Plaintiffs rarely succeed because of the high standard required for IIED claims.

1. Lack of Injunctive Relief

Tort claims alleging assault, battery, and/or IIED provide no direct means to remove a bully from a workplace or to stop bullying because those claims typically do not include any injunctive relief to end the bullying.[50] Similarly, injunctive relief has consistently been denied for plaintiffs in defamation claims so long as monetary damages will suffice.[51] In contrast, anti-discrimination laws allow for injunctive relief,[52] and, in rare circumstances, courts may award injunctive relief if the facts show that the employer will not otherwise take adequate remedial measures in response to future harassment.[53] While in theory a civil suit for assault, battery, or IIED could seek injunctive relief against

46. David Yamada, *Workplace Bullying and the Law: A Report from the United States*, *in* JAPAN INST. FOR LAB. POL'Y & TRAINING REPORT NO. 12, WORKPLACE BULLYING AND HARASSMENT 165, 166 (2013), https://www.jil.go.jp/english/reports/documents/jilpt-reports/no.12.pdf#page=171 [https://perma.cc/C234-DDQR]; *see, e.g.*, McCann v. Tillman, 526 F.3d 1370, 1378–79 (11th Cir. 2008) (racially derogatory comments failed to establish severe and pervasive harassment).

47. Dan Calvin, Note, *Workplace Bully Statutes and the Potential Effect on Small Business*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 167, 180 (2012); *see also* Martha Weisel, *Bullying in the Workplace: Not Every Wrong Has a Legal Remedy*, 67 LAB. L.J. 520, 522 (2016) (noting that allegations of IIED "rarely, if ever, are successful in the context of the employment relationship").

48. *See* Marina Sorkina Amendola, *Intentional Infliction of Emotional Distress: A Workplace Perspective,* 43 VT. L. REV. 93, 120 (2018) (situations of bullying often "fall between the cracks of . . . IIED claims").

49. *See infra* discussion of intent and harm at notes 69–99 and accompanying text.

50. *See* Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123, 148–58 (1990) (review of intentional infliction of emotional distress decisions which provided for damages but no injunctive relief).

51. David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 15 (2013).

52. Equal Emp. Opportunity Comm'n v. KarenKim, Inc., 698 F.3d 92, 98–101 (2d Cir. 2012); 42 U.S.C. § 2000e-5(g)(1)(injunctive relief appropriate where employer "has intentionally engaged in or is intentionally engaging in such unlawful employment practice charged in the complaint").

53. *KarenKim, Inc.*, 698 F.3d at 99–100; *see, e.g.*, Lewis v. Am. Sugar Ref., Inc., No. 14-cv-02302, 2018 U.S. Dist. LEXIS 139223, at *8–9 (S.D.N.Y. Aug. 15, 2018) (denial of

future bullying behavior,[54] a request for injunctive relief would be moot without a "reasonable expectation that the conduct will recur."[55]

Despite this potential for equitable relief, the assault and IIED claims reviewed here consistently fail to provide any injunctive relief against future bullying behavior where the claim did not invoke anti-discrimination protections.[56] Thus, if the target has left her job to avoid the bullying or has been discharged in retaliation for complaining about the bullying, an assault or IIED claim will not result in her reinstatement or a court order to end the bullying behavior. Even if money damages are awarded against the bully but not the employer, such relief will not necessarily influence an employer's response to bullying in the future.

2. Difficulty in Proving Intent

Assault, battery, and IIED claims all require proof of the bully's unlawful intent to inflict immediate injury to the target.[57] The torts of assault and battery typically require proof of the bully's intent "to cause a harmful or offensive touching" of the target, or an imminent "apprehension of such contact."[58] For an example of a successful claim, an employee survived an appeal of a successful jury verdict where the bully "aggressively and rapidly advanced on the plaintiff with clenched fists, piercing eyes, beet-red face, popping veins, . . . screaming and swearing at him, back[ed] the target up against a wall," instilling a belief in the target that the bully was going to hit him.[59] The Indiana Supreme Court concluded that, in this rare instance, the targeted employee presented substantial evidence that assault had occurred and that the bully acted with the requisite intent, supporting $325,000 in compensatory damages.[60] This decision received national attention as "evidence of a growing liability risk that counsels employers to take workplace bullying more seriously," even though the employer was not held liable.[61] In contrast to this unusual example of success, most

injunctive relief not abuse of discretion without evidence of high potential for future retaliation).

54. Allee v. Medrano, 416 U.S. 802, 810–11 (1974).

55. United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953).

56. *See infra* decisions referenced at notes 58–83 and accompanying text.

57. *See, e.g.*, People v. Williams, 29 P.3d 197, 203 (Cal. 2001) (mens rea required for criminal assault charge); Tevis v. Spare Time, Inc., No. C074938, 2017 BL 369767, at *15–16 (Cal. Ct. App. Oct. 16, 2017) (one outburst not establishing outrageous misconduct directed at her).

58. Restatement (Second) of Torts, §§ 13, 18, 21 (Am. L. Inst. 1965).

59. Raess v. Doescher, 883 N.E.2d 790, 794 (Ind. 2008); *see also* Banziger v. City of Franklin, No. 1:17-cv-00755-JMS-DML, 2017 U.S. Dist. LEXIS 150848, at *6–7 (S.D. Ind. Sept. 18, 2017) (rejecting motion to dismiss assault claim based on angrily pointing a finger in another's face).

60. *Raess,* 883 N.E.2d at 794–95.

61. David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment,* 32 Comp. Lab. L. & Pol'y J. 251, 272 (2010).

assault and battery claims against a bully have been dismissed based on a lack of proof of unlawful intent.[62]

Similarly, the intent required for an IIED claim is difficult to prove[63] because the target must establish that the bully intends to cause that distress or was at least reckless in causing it.[64] Because intent can be ambiguous, an IIED claim may depend upon the context in which the bullying behavior occurs, including duration and organizational norms.[65] Thus, if an organization lacks specific prohibitions or fails to punish bullying, the target will find it more difficult to prove that the bullying was intentionally outrageous. In addition, the target of bullying must establish that the bully caused severe or extreme emotional distress for the target.[66] If the employer lacks an adequate system for reporting, or if past inaction discourages reporting, the target may be unable to show causation or that her harm was serious enough because she did not complain at the time.

3. Proof of Outrageousness

Even if a target can establish a bully's intent, causation, and serious enough harm, a target's failure to show that bullying behavior is extreme and outrageous results in the dismissal of many IIED claims.[67] To satisfy this requirement, a bully's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[68] Both federal and state courts often dismiss IIED claims because "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" do not constitute "extreme and

62. *See* William M. Martin, Yvette P. Lopez & Helen N. LaVan, *What Legal Protections Do Victims of Bullies in the Workplace Have?*, 14 J. WORKPLACE RTS. 143, 153 (2009) (finding a success rate of 2.2% among IIED claims); *see, e.g.*, Guthrie v. Conroy, 567 S.E.2d 403, 408–09 (N.C. Ct. App. 2002) (bully's conduct not "atrocious, and utterly intolerable in a civilized community").

63. Weisel, *supra* note 47, at 522–23; Loya, *supra* note 7, at 243–44.

64. Yamada, *supra* note 61, at 257; *see, e.g.*, Standard Fruit & Vegetable Co. v. Johnson, 985 S.W.2d 62, 66 (Tex. 1998) (claim dismissed without intent to cause severe emotional distress); Garcia v. Randolph-Brooks Fed. Credit Union, No. SA-18-CV-00978-OLG, 2019 U.S. Dist. LEXIS 64747, at *14 (W.D. Tex. Apr. 16, 2019) (no liability for IIED based on "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities").

65. Keashly & Jagatic, *supra* note 25, at 53.

66. *See, e.g., Standard Fruit & Vegetable Co.*, 985 S.W.2d at 65.

67. Yamada, *supra* note 25, at 332.

68. RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST. 1965); *see, e.g.*, Kearney v. Orthopaedic & Fracture Clinic, No. A14-1835, 2015 Minn. App. Unpub. LEXIS 905, at *17 (Minn. Ct. App. Sept. 8, 2015) (insensitive and unpleasant bullying not outrageous or atrocious); Arnold v. Thermospas, 863 A.2d 250, 254 (Conn. Super. Ct. 2004) (yelling & threatening not outrageous, but physical restraint could be); Feltmeier v. Feltmeier, 798 N.E.2d 75, 80 (Ill. 2003) (noting "mere insults, indignities, threats, annoyances, petty oppressions" not outrageous).

outrageous conduct."[69] For example, yelling and screaming that is rude and insensitive typically will not establish sufficient outrageous behavior.[70]

Bullying will not be considered extreme and outrageous if it only disturbs the "emotional tranquility in the workplace" [71] or constitutes "pervasive" and "ordinary" misbehavior in the workplace.[72] For example, sending a note with "mere abusive language and insults"[73] to a coworker or subjecting a coworker to "isolating behavior, insensitive comments, and hostile and unpleasant conversations" were not deemed to be outrageous and extreme behaviors.[74] Thus, only bullying conduct that is neither "typically encountered nor expected in the course of one's employment" will be sufficient to support an IIED claim.[75] Under this standard, a target of bullying will find it more difficult to support an IIED claim in a workplace where bullying often goes unpunished. At the same time, an employer that reacts promptly to a complaint of bullying by investigating and disciplining the bully and relocating the target can establish that the bullying conduct was not extreme and outrageous.[76]

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69. GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 612 (Tex. 1999); *see also* Van Stan v. Fancy Colours & Co., 125 F.3d 563, 569 (7th Cir. 1997) (insensitive method of discharge of person with mental illness not outrageous); Turnbull v. Northside Hosp., 470 S.E.2d 464, 466 (Ga. Ct. App. 1996); Denton v. Chittenden Bank, 655 A.2d 703, 706 (Vt. 1994) (dismissing claim based on "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities").

70. *See* Restatement (Second) of Torts § 46 cmt. j (Am. L. Inst. 1965) ("Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people."); *see, e.g*, Jimenez v. CRST Specialized Transp. Mgmt., 213 F. Supp. 3d 1058, 1065–66 (N.D. Ind. 2016) (IIED claim dismissed because any contact was "momentary and minor" despite questions of fact remaining whether bully pushed target in chest with enough force to cause him to move backwards); McCreary v. Libbey-Owens-Ford Co., 132 F.3d 1159, 1167 (7th Cir. 1997) (noting that "isolated and brief incident" of yelling and refusal to reassign target is not extreme and outrageous); White v. Monsanto Co., 585 So. 2d 1205, 1211 (La. 1991) (setting aside damages based on momentary flare of supervisor's temper); Schneider v. TRW, Inc., 938 F.2d 986, 992 (9th Cir. 1991) (yelling and screaming by supervisor not outrageous).

71. Amendola, *supra* note 48, at 119.

72. Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress,* 41 Stan. L. Rev. 1, 16 (1988).

73. St. Pierre v. E. Me. Med. Ctr., No. 1:12-cv-0265-NT, 2013 U.S. Dist. LEXIS 141324, at *19–20 (D. Me. Sept. 30, 2013).

74. Kearney v. Orthopaedic & Fracture Clinic, P.A., No. A14-1835, 2015 Minn. App. Unpub. LEXIS 905, at *17–18 (Minn. Ct. App. Sept. 8, 2015); *see also* Groth v. Grove Hill Med. Ctr., P.C., No. 3:14-CV-01563, 2015 U.S. Dist. LEXIS 92106, at *15–17 (D. Conn. July 15, 2015) (coworker's loud and abusive language, fabrication of reason for discharge not establishing IIED).

75. GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 617 (Tex. 1999).

76. Sousa v. Rocque, No. 3:11-cv-1839-WWE, 2012 U.S. Dist. LEXIS 149419, at *16 (D. Conn. Oct. 17, 2012).

IIED claims are often conflated with claims of battery, by requiring physical violence against the target.[77] For example, while yelling at and physically threatening subordinates in a workplace were not extreme and outrageous, physically assaulting and restraining a target prevented dismissal of a related IIED claim.[78] Without physical harm or threats thereof connected with assault and battery, it is unusual for courts to deny a motion to dismiss an IIED claims, unless the bullying behavior goes "well beyond the parameters of the typical workplace dispute."[79] In one case, a principal's false accusation of marijuana use by a teacher, exposing her to "social approbation of a high degree," supported a refusal to dismiss that teacher's IIED claim.[80] In some jurisdictions, an IIED claim may be supported if a supervisor "clearly abuses" his power over the targeted employee,[81] or where the bullying creates a pattern of persistent verbal and physical abuse.[82] Persistence is required even in these more employee-friendly courts, as one court explained that an IIED claim may be supported by "a continuous and ongoing pattern of . . . extreme, intolerable, and outrageous conduct."[83] Unless the target of bullying brings a claim in one of these more sympathetic jurisdictions, it will be difficult for her to establish the outra-

77. *See, e.g.*, DeLorco v. Waveny Care Ctr., Inc., No. 3:16-CV-01594, 2018 U.S. Dist. LEXIS 145148, at *29–33 (D. Conn. Aug. 27, 2018) (IIED claim dismissed where target experienced anxiety and fear without sufficient intensity and duration of harm even where physically threatening acts occurred).

78. Arnold v. Thermospas, Inc., 863 A.2d 250, 254 (Conn. Super. Ct. 2004); Burke v. Connecticut, No. MMXCVD65000409S, 2010 Conn. Super. LEXIS 282, at *10–24 (Conn. Super. Ct. Feb. 2, 2010) (court refused to strike claim of employee who was shoved and kicked); Turner v. Farnia, No. CV075007479, 2010 Conn. Super. LEXIS 2088, at *24–25 (Conn. Super. Ct. Aug. 17, 2010) (no dismissal of claim by employee who was hit in face, head, and jaw).

79. Honaker v. Smith, 256 F.3d 477, 491 (7th Cir. 2001).

80. Brown v. Kouretsos, No. 15C11076, 2016 U.S. Dist. LEXIS 77727, at * 14–15 (N.D. Ill. June 15, 2016).

81. *Honaker*, 256 F.3d at 491; GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 612 (Tex. 1999); *see also* Bridges v. Winn-Dixie Atlanta, Inc., 335 S.E.2d 445, 448 (Ga. Ct. App. 1985) (employer-employee relationship may produce "a character of outrageousness that otherwise might not exist"); Wilk v. Abbott Terrace Health Ctr., Inc., No. CV065001328S, 2007 Conn. Super. LEXIS 2220, at *33 (Conn. Super. Ct. Aug. 15, 2007); Brown v. Hearst Corp., No. 3:14-cv-1220-VLB, 2015 U.S. Dist. LEXIS 111512, at *24 (D. Conn. Aug. 24, 2015) (claims not dismissed where abusive supervisors had "actual or apparent authority" over the target, or "power to affect" target's interests).

82. *See* Charest v. Sunny-Aakash, LLC, No. 8:16-CV-2048-T-30JSS, 2016 U.S. Dist. LEXIS 135251, at *13 (M.D. Fla. Sept. 30, 2016) (relentless pattern of threats, harassment, and inappropriate sexual behavior); Johnson v. Thigpen, 788 So.2d 410, 414 (Fla. Dist. Ct. App. 2001) (persistent acts of verbal abuse combined with offensive, unwelcome physical contact); Vernon v. Med. Mgmt. Assocs. of Margate, Inc., 912 F. Supp. 1549, 1559–60 (S.D. Fla. 1996) (offensive, non-negligible physical contact and persistent verbal abuse and threats of retaliation can establish IIED); Benton v. Simpson, 829 A.2d 68, 71 (Conn. App. Ct. 2003) (claim based on six to nine insulting, offensive remarks); Schoen v. Freightliner LLC, 199 P.3d 332, 341–42 (Or. Ct. App. 2008) (five months of verbal harassment and demeaning treatment).

83. Cabaness v. Thomas, 232 P.3d 486, 500 (Utah 2010), *modified by* Gregory & Swapp, PLLC v. Kranendonk, 424 P.3d 897, 905 n.35 (Utah 2018).

geousness required in an IIED claim without some evidence of physical harm or at least the threat thereof.

B. Limited Potential for Employer Liability

Even if the bully's conduct was intentional and assaultive or otherwise outrageous, a bullying target's tort claim does not necessarily result in the liability of the bully's employer without proof of vicarious liability or independent wrongdoing by the employer.[84] This limitation on employer liability has been justified by the need to allow an employer to manage its operations.[85] Such limitations on employer liability have been criticized as allowing abusive behavior in the workplace without requiring that employers explain why "some amount of intentionally inflicted pain is acceptable."[86] Without the potential for significant liability for bullying behavior of their employees, employers have less incentive to address bullying that occurs in their workplaces.

One route to vicarious liability for employee conduct is if the conduct is "the kind the employee is employed to perform."[87] Because bullying typically is not part of an employee's job duties, it is difficult to hold an employer liable under this approach.[88] Courts often hold an employer harmless where the bullying conduct of its manager was not "within the course and scope" of that employee's authority or employment.[89] To establish employer liability, the bullying must serve the employer's interests and occur within "authorized time and space limits."[90] Thus, employers typically will only be held liable if the bullying behavior occurred under the employer's control, where the bully abused power delegated by the employer, or where the employer encouraged[91] or failed to address known bullying behavior.[92] Thus, an employer could be held liable for a bully's actions in

84. Amendola, *supra* note 48, at 100, 112.

85. Johnson v. Merrell Dow Pharms., Inc., 965 F.2d 31, 34 (5th Cir.1992); Hawkins v. PepsiCo, Inc., 203 F. 3d 274, 282 (4th Cir. 2000).

86. Austin, *supra* note 72, at 7.

87. Boston v. U.S. Steel Corp., 816 F.3d 455, 467 (7th Cir. 2016).

88. Amendola, *supra* note 48, at 113–14; *see, e.g.*, Melendez v. Figler, No. 161439/2015, 2018 N.Y. Misc. LEXIS 830, at *11, *14 (Sup. Ct. Mar. 5, 2018) (bullying behavior committed "solely for personal reasons," "clearly was not committed in furtherance" of employer's interests.)

89. Wrenn v. G.A.T.X. Logistics, Inc., 73 S.W.3d 489, 493–94 (Tex. Ct. App. 2002); *see also* Goolsby v. Kroger LP, No. 3:15-CV-0631-D, 2016 U.S. Dist. LEXIS 1398, at *5 (N.D. Tex. Jan. 7, 2016) (claim against employer dismissed based on absence of evidence that bully's conduct fell within scope of his general authority).

90. Bagent v. Blessing Care Corp., 862 N.E.2d 985, 992, 994 (Ill. Ct. App. 2007) (citing Restatement (Second) of Agency § 228 (Am. L. Inst. 1958)).

91. Partipilo v. Jewel Food Stores, Inc., No. 16C4450, 2017 U.S. Dist. LEXIS 63739, at *18 (N.D. Ill. Apr. 27, 2017).

92. GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 617–18 (Tex. 1999); *see also* Amendola, s*upra* note 48, at 108–15 (summarizing decisions on employer liability).

the rare situation where the employer provided "de facto" authorization for the bully's acts.[93]

In addition to the limited potential liability for intentional tort claims, an employer might be liable to targets of bullying under the theory of negligent infliction of emotional distress, based on an employer's duty to protect its employees against intentional infliction of emotional distress by other employees.[94] Such a claim will only be successful if the bully's conduct was unreasonable and created an "unreasonable risk of foreseeable emotional harm" to the target/plaintiff,[95] overcoming the widespread belief that "individuals in the workplace reasonably should expect to experience some level of emotional distress, even significant emotional distress, as a result of conduct in the workplace."[96] For example, two different school employees' claims of negligent infliction of emotional distress survived motions to dismiss based on allegations that the school breached its duty to protect its employees against imminent, serious harm,[97] particularly where the employer could foresee that the bully's conduct could create stress and anxiety so as to cause the target physical harm.[98] Without an intent to cause or foreseeability of harm, however, an employer will not be liable for harm inflicted by a bully.

Like a claim for negligent infliction of emotional distress, a claim of negligent supervision could result in an employer's liability for bullying if the employer "is negligent or reckless in the employment of improper persons or instrumentalities in work involving risk of harm to others."[99] Thus, a target of bullying would need to prove that her employer breached a "duty to forbid or prevent negligent or other tortious conduct" by the bully and that its breach of that duty proximately caused the target's injury, which caused an "actual loss or damage."[100] Under this standard, the target would still need to prove an underlying tort by the bully, as described above. In addition, the employer

93. Pollard v. DuPont, 412 F.3d 657, 665 (6th Cir. 2005); Estrada v. First Transit, Inc., No. 07-cv-02013-WYD-KMT, 2009 U.S. Dist. LEXIS 122363, at *43–44 (D. Colo. Mar. 6, 2009); Dossat v. F. Hoffman-La Roche Ltd., 600 F. App'x 513, 514 (9th Cir. 2015).

94. Curran v. JP Morgan Chase, N.A., 633 F. Supp. 2d 639, 641 (N.D. Ill. 2009); Jimenez v. Thompson, 264 F. Supp. 2d 693, 696 (N.D. Ill. 2003).

95. Olson v. Bristol-Burlington Health Dist., 863 A.2d 748, 753 (Conn. App. Ct. 2005).

96. Perodeau v. City of Hartford, 792 A.2d 752, 769 (Conn. 2002); McCalla v. Yale Univ., No. 3:17-CV-1044, 2017 U.S. Dist. LEXIS 177297, at *7 (D. Conn. Oct. 26, 2017).

97. Brown v. Kouretsos, No. 15C11076, 2016 U.S. Dist. LEXIS 77727, at *18 (N.D. Ill. June 15, 2016); Frogley v. Meridian Joint Sch. Dist. No. 2, 314 P.3d 613, 624–25 (Idaho 2013).

98. *Frogley*, 314 P.3d at 62425.

99. RESTATEMENT (SECOND) OF AGENCY § 213 (AM. L. INST. 1958); Haverly v. Kaytec, Inc., 738 A.2d 86, 91 (Vt. 1999); *see also* Saine v. Comcast Cablevision of Ark., Inc., 126 S.W.3d 339, 342 (Ark. 2003) (claim must show that "employer knew or, through the exercise of ordinary care, should have known that the employee's conduct would subject third parties to an unreasonable risk of harm").

100. *Haverly*, 738 A.2d at 91.

must have known, or should have known, that the bully had a propensity for bullying conduct.[101] Although the employer need not foresee the particular injury to the target, it must foresee an "appreciable risk of harm to others" based on the bully's previous conduct.[102] Unless the employer engages in its own actionable negligent behavior,[103] the bully's conduct must violate the law to hold the employer liable.[104] This standard makes it difficult for employees to succeed with such claims unless the bullying occurred because of the target's membership in a protected class.

Targets of bullying generally have been unsuccessful in holding employers liable under some public policy exception to employment at will which would require protection against bullying. An Ohio court, for example, refused to "recognize a claim for a violation of public policy on the basis of bullying."[105] Without such job security protection, courts have been reluctant to recognize such an exception, under the Supreme Court's general guidance that protections against discrimination did not intend to require that employers adopt or enforce a "general civility code."[106] In contrast, a teacher with statutorily guaranteed tenure survived a motion to dismiss her wrongful discharge claim based on her endurance of bullying at her school.[107] A small sample of employees have argued successfully that employer policies constitute an enforceable promise to employees, and more employers are adopting policies against workplace bullying.[108] For example, an employee manual's provision entitled "Work Place Violence" containing affirmative promises and clear policies against harassment was found to have created an implied contract, enforceable under the covenant of good faith and fair dealing.[109] The same case stated that an exception to employment at will is only created by an employer's affirmative promises to protect its employees, such that a city's policy that it "will not tolerate verbal or physical conduct by any employee which harasses" can create an enforceable contract right.[110] Such claims are similar to prohibitions

101. Kenneth R. v. Roman Catholic Diocese of Brooklyn, 654 N.Y.S.2d 791, 793 (App. 1997).

102. *Saine*, 126 S.W.3d at 342.

103. Med. Assurrance Co. v. Castro, 302 S.W.3d 592, 597 (Ark. 2009).

104. Melendez v. Figler, No. 161439/2015, 2018 N.Y. Misc. LEXIS 830, at *13 (Sup. Ct. Mar. 5, 2018).

105. Jaber v. First Merit Corp., 81 N.E.3d 879, 892 (Ohio Ct. App. 2017).

106. Faragher v. Boca Raton, 524 U.S. 775, 788 (1998).

107. Lemon v. Williamson Co. Schs., No. M2018-01878-COA-R3-CV, 2019 Tenn. App. LEXIS 468 at *7-20 (Sept. 23, 2019).

108. Yamada, *supra* note 61, at 273.

109. Cabaness v. Thomas, 232 P.3d 486, 504 (Utah 2010), *modified by* Gregory & Swapp, PLLC v. Kranendonk, 424 P.3d 897, 905 n.35 (Utah 2018). *But see* Zisumbo v. Ogden Reg'l Med. Ctr., 801 F.3d 1185, 1197 (10th Cir. 2015) (plaintiff failed to identify specific provisions of code of conduct that created enforceable obligation of employer to its employees).

110. *Cabaness*, 232 P.3d at 504.

against bullying through arbitration, discussed below, which are enforced through discipline of the bully by the employer.

This review demonstrates that, because of the difficulty of proving assault, battery, IIED, and other claims and because of the limits of employer liability, the viability of addressing workplace bullying via tort claims against a bully and/or his employer is extremely constricted. The threat of such claims may be sufficient for employers to address the most severe, persistent forms of bullying, but will not extend to shorter term or less violent forms of bullying that still impact the targets' well-being and the health of the overall workplace. Moreover, an employer's tolerance of abusive behavior in the past may make it more difficult for a target to show that the bullying behavior is outrageous and therefore should result in damages. While the potential for damages may inspire employers to address known bullying behavior before it becomes outrageous, even a successful tort claim will not result in an order that the employer remove the bully or reinstate a target who has fled that abusive workplace.

C. Alternative Statutory Remedies

Like tort claims, workers' compensation systems and occupational safety and health standards under federal and state legislation do not provide, and sometimes block, adequate remedies to prevent workplace bullying. Injuries that might otherwise support an IIED claim can be incorporated into a state's workers' compensation system which provides an exclusive remedy for workplace injuries.[111] Thus, a viable workers' compensation claim, based on work-related injuries that were not intended by the employer, would bar a tort action by the target against the employer.[112] Importantly, an employer's intentional acts may only be excluded from the limitations of a workers' compensation system if the bully acted intentionally as the "alter ego of the corporation and not merely a foreman, supervisor or manager."[113]

If the target cannot show that the bullying resulted in a disability related to the workplace, instead basing her claim on allegations of humiliation, embarrassment, public ridicule, and personal indignity, she may be successful in showing that she did not suffer an injury covered by workers' compensation, and therefore be allowed to proceed with an IIED claim.[114] Additionally, a workers' compensation system

111. Yamada, *supra* note 46, at 172.

112. *See, e.g.*, Cole v. Chandler, 752 A.2d 1189, 1195–96 (Me. 2000) (worker's compensation blocks IIED claim even if mental distress was caused by intentional acts of coworkers); Hamilton v. Sanofi-Aventis U.S., Inc., 628 F. Supp. 2d 59, 64 n.3 (D.D.C. 2009) (worker's compensation covers injuries "directly traceable" to conditions of employment).

113. *Hamilton*, 628 F. Supp. 2d at 63.

114. *See, e.g.*, Newman v. District of Columbia, 518 A.2d 698, 705–06 (D.C. Ct. App. 1986) (IIED claim grounded on alleged discrimination based on sexual orientation not preempted by exclusivity provision of worker's compensation statute); King v. Kidd, 640

may not bar a target's recovery against individual bullies who have acted "outside the scope of their employment."[115]

Even if the claim proceeds under a workers' compensation system, however, the target runs the risk of denial, because mental trauma claims are rarely recognized by a workers' compensation system, depending on how "disability" is defined by a particular workers' compensation system.[116] A successful worker's compensation claim would provide a target with a percentage of lost wages and medical expenses, but not reinstatement or any injunctive relief to address the bullying directly. Financial liability for a target's worker's compensation may indirectly influence an employer to address bullying, but only if the target has a viable claim.

Federal and state occupational safety and health laws provide some additional statutory protection against bullying behaviors, under employers' duty to provide a "reasonably safe workplace."[117] For example, Minnesota statutes providing that "every person in the state has a right to live free from violence" and the public policy interests of a violence-free workplace[118] helped support the claim of an employee who was bullied and then retaliated against for reporting that bullying.[119] However, federal and state OSHA regulations typically focus on physical hazards and may not provide compensation for harm resulting from psychological or stress-related hazards.[120] Even if bullying does violate standards prohibiting physical harm, violations could result in employer fines, but fail to provide for damages for the target.[121] Thus, OSHA has been criticized as failing to provide for deterrence of workplace bullying.[122]

A.2d 656, 663–64 (D.C. Ct. App. 1993) (IIED claims related to sexual harassment not preempted by worker's compensation statute).

115. *See, e.g.*, Brown v. Nutter, McClennen & Fish, 696 N.E.2d 953, 956 (Mass. App. Ct. 1998). *But see* Silvestris v. Tantasqua Reg'l High Sch., No. 13-P-0248, 2013 Mass. App. Unpub. LEXIS 1233, at *2 (Dec. 31, 2013) (IIED claim barred by worker's compensation statute where employee who caused harm was acting within course of employment).

116. *See, e.g.*, McCrea v. D.C. Police & Firefighters Ret. & Relief Bd., 199 A.3d 208, 213 (D.C. Ct. App. 2019) (mental illness claims that are the result of workplace sexual harassment not compensable as injuries under the workers' compensation system).

117. Occupational Safety and Health Act (OSHA) of 1970 § 5, 29 U.S.C. § 654; Restatement of Emp. L. § 4.05 (Am. L. Inst. 2015).

118. Minn. Stat. §§ 1.50, 609.72 (2019).

119. Fran Sepler, *Workplace Bullying: What It Is and What to Do about It*," J. Collective Bargaining in the Acad., Issue 10, 2015, art. 42, at 8, http://thekeep.eiu.edu/jcba/vol0/iss10/42 [perma.cc/S8YT-LTJ4] (citing Absey v. Echosphere LLC, No. 62 CV-10-6691, 2012 Minn. Dist. LEXIS, at *10 (Jan. 17, 2012)).

120. Patricia Meglich-Sespico, Robert H. Faley & Deborah Erdos Knapp, *Relief and Redress for Targets of Workplace Bullying*, 19 Emp. Resps. & Rts. J. 31, 38 (2007); Yamada, *supra* note 11, at 521.

121. Yamada, *supra* note 61, at 259, 274; Susan Harthill, *The Need for a Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act*, 78 Univ. Cin. L. Rev. 1250, 1270–71 (2010).

122. Harthill, *supra* note 121, at 1305.

The model Healthy Workplace Bill offers a statutory solution to workplace bullying that has not been readily adopted in the United States.[123] This model bill is the product of the Healthy Workplace Campaign and the efforts of its national director, Dr. Gary Namie, and law professor David C. Yamada, which began in 2002.[124] The proposed bill prohibits employers from allowing an "abusive work environment," in which an employee is subjected to abusive conduct that a "reasonable person would find hostile" and that causes tangible harm.[125] A target can obtain both compensatory damages and injunctive relief against future bullying behavior, but an employer can avoid liability by "exercising reasonable care" to prevent or address bullying behavior.[126] The bill emphasizes definitions of bully-related behavior that is prohibited and focuses less attention on appropriate employer responses to bullying.[127] Both California and Tennessee have adopted legislation to address bullying, with California requiring training to prevent abusive conduct and Tennessee requiring adoption of a policy against abusive conduct.[128] These first attempts to legislate regarding bullying directly, however, do not include an independent cause of action for targets.[129] Unless and until states or the federal governments adopt more specific statutory prohibitions against bullying behavior that include a private right of action to ensure enforcement, targets are left with the limited relief under assault and IIED claims, in addition to employer policies and collective bargaining agreements (CBAs) enforced mainly through arbitration, as discussed below.

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123. *See, e.g.*, Samantha Jean Cheng Chu, *The Workplace Bullying Dilemma in Connecticut: Connecticut's Response to the Healthy Workplace Bill*, 13 CONN. PUB. INT. L.J. 351, 354–55 (2014) (discussion of Connecticut's resistance to adopting some form of the Healthy Workplace Bill).

124. David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL'Y J. 475, 477 (2004); *id.* at 517–21 (containing the Model Healthy Workplace Bill).

125. *Id.* at 518–19.

126. *Id.* at 520.

127. *See id.* at 518–20 (providing detailed definitions of terms related to prohibited conduct and describing employer responsibility as the need to "exercise[] reasonable care to prevent an correct promptly any actionable behavior" in the form of an affirmative defense).

128. David Yamada, *Workplace Bullying and the Law: U.S. Legislative Developments 2013–15*, 19 EMP. RTS. & EMP. POL'Y J. 49, 52–54 (2015).

129. Rickey E. Richardson, Reggie Hall & Sue Joiner, *Workplace Bullying in the United States: An Analysis of State Court Cases*, 3 COGENT BUS. & MGMT. 1, 4 (2016); Carly B. Plaskin, *Sexual Harassment Training in California Must Now Include the "Prevention of Abusive Conduct"—AB 2053*, NAT'L L. REV. (Feb. 5, 2015), http://www.natlawreview.com/article/sexual-harassment-training-california-must-now-include-prevention-abusive-conduct-ab [https://perma.cc/Q2ML-4VJP]; Op. Tenn. Att'y Gen. No. 15-01 (Jan. 6, 2015), http://attorneygeneral.tn.gov/op/2015/op15-01.pdf [https://perma.cc/RWL6-MHVC].

D. Accommodations for Targets

The common law and statutory remedies discussed above may provide damages for the target or impose some fines on an employer, but they do not provide for a direct order to end the bullying so that the target can continue working. Given that bullying can lead to both physical and psychiatric disabilities,[130] which would be recognized under the Americans with Disabilities Act (ADA),[131] targets should be provided with reasonable accommodations unless the employer establishes that such accommodations would impose an undue hardship on the operation of its business.[132] However, many courts have been reluctant to require that employers provide a wide range of accommodations for targets of bullying.

Reasonable accommodation can include job restructuring or reassignment of non-essential job duties or reassignment to a vacant position,[133] which could help to alleviate a bullying situation.[134] Even so, targets of bullying often have been unsuccessful in obtaining a transfer to escape bullying.[135] Changes in management style, even a style that constitutes bullying, have been deemed unreasonable because working under a harassing supervisor or with bullying coworkers are deemed essential parts of the job, and bullying behavior has been characterized as a "natural, necessary, and defensible prerogative of superior rank," requiring "stamina and resilience" from victims. [136] Such accommodations are viewed as interfering with employers' prerogative to make personnel decisions.[137] Thus, relief from bullying is often rejected as a reasonable accommodation, despite recognition that bullying is a "pervasive phenomenon that causes and perpetuates economic and social harm as well as emotional injury."[138]

130. Stacy A. Hickox & Angela Hall, *Atypical Accommodations for Employees with Psychiatric Disabilities*, 55 Am. Bus. L.J. 537, 563 (2018).

131. 42 U.S.C. § 12101.

132. *Id.* § 12112(b)(5)(A); Myers v. Cuyahoga Cnty., 182 F. App'x 510, 516 (6th Cir. 2006).

133. 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o)(2) (2020).

134. Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 Colum. L. Rev. 1357, 1387–89 (2009).

135. Hickox & Hall, *supra* note 130, at 555–57 (2018); Debbie N. Kaminer, *Mentally Ill Employees in the Workplace: Does the ADA Amendments Act Provide Adequate Protection?*, 26 Health Matrix 205, 243 (2016); *see, e.g.*, Bradford v. City of Chicago, 121 F. App'x 137, 140 (7th Cir. 2005) (no transfer as accommodation to avoid stress); Gaul v. Lucent Techs., Inc., 134 F.3d 576, 581 (3d Cir. 1998) (request to be transferred from individual causing employee stress is unreasonable as matter of law under ADA).

136. Boldini v. Postmaster Gen., 928 F. Supp. 125, 131 (D.N.H. 1995).

137. Whalen v. City of Syracuse, No. 5:11-CV-0794, 2014 U.S. Dist. LEXIS 95835, at *20 (N.D.N.Y. July 15, 2014).

138. Austin, *supra* note 72, at 4.

Consequently, employers have not been required to provide "a workplace environment of civility" as an accommodation.[139] Thus, even if bullying leads to or aggravates a disability, targets have been unable to obtain accommodations to avoid the bullying behavior, even if the court recognizes that the bullying behavior violated an employer's policies or was intolerable.[140]

This review of judicial responses to bullying indicates that the targets of bullying are relatively unlikely to be satisfied with the results available to them through litigation. Often, only the most egregious cases are accepted for consideration. Further, the limited availability of either money damages or accommodations from the judicial process, and the general absence of injunctive relief that would prevent future bullying, emphasize the need for alternative avenues for resolution of workplace bullying claims. Arbitration provides an alternative avenue to address bullying—either under a CBA or employer policies—by reviewing the consequences for bullies, rather than focusing on damages for the targets. Arbitration is widely available as a formal dispute resolution procedure, and thus it is important to evaluate how arbitration decisions compare to judicial responses to workplace bullying.

III. Arbitrators' Review of Bullies' Behavior

This review of arbitration awards concerning grievances filed by employees accused of bullying sheds new light on arbitrators' role in addressing workplace bullying. CBAs and employer policies often prohibit behaviors associated with bullying, such as violent behavior. Employers rely on these policies in administering discipline, but it is an arbitrator's review of these employer decisions that often determines whether the bully remains in the workplace. Therefore, it is important to understand the circumstances that lead to the reinstatement of a bully, even those whom an employer has decided to discharge. These decisions on the consequences for bullying are significant for the target of bullying, who must face the bully who is returned to work by a sympathetic arbitrator. More broadly, arbitrators' reversals of these consequences may be allowing or even encouraging future bullying behavior by the bully who is returned to work or by other potential bullies in that workplace.

Rather than pursuing a claim through the courts, targets of bullying may instead use their employers' policies or, if unionized, the CBA, to remedy the situation. Unfortunately, the publicly available repository of arbitration cases includes relatively few cases based on the claims of targets of bullying. This is perhaps reflective of the limited

139. Hickox & Hall, *supra* note 130, at 564–65; Susan Stefan, *"You'd Have to Be Crazy to Work Here": Worker Stress, the Abusive Workplace, and Title I of the ADA*, 31 LOY. L.A. L. REV. 795, 801 (1998).

140. Hickox & Hall, *supra* note 130, at 553–54.

number of CBAs that contain grievable language about bullying. However, virtually all CBAs explicitly recognize that discipline imposed on an employee is subject to the grievance procedure. As a result, there are a substantial number of publicly available arbitration cases based on the claims of accused bullies who argue that they were disciplined without just case.[141] These cases provide an opportunity to assess the arbitrator's role in determining the consequences imposed on bullies, including their removal from the workplace. Arbitrators often hear claims of employees who were disciplined for bullying behavior, identified here as grievants, under a just-cause standard adopted as part of a CBA,[142] or through employment arbitration incorporated into an employer's policies and procedures.[143] In these cases, the arbitrator is reviewing the appropriateness of the discipline imposed by the employer under the applicable just-cause language in the relevant CBA and incorporated work rules, or a policy adopted unilaterally by an employer in a nonunionized workplace.

A. Arbitration as a Dispute Resolution Process

The system of labor arbitration began as a way to resolve workplace disputes between union and management in a less disruptive manner.[144] Prior to the adoption of arbitration, grievances were often settled by work stoppages.[145] Today, arbitration provides a third-party, quasi-judicial approach to settling workplace disputes.[146] Arbitration has been promoted as a way to give targets multiple ways to address workplace bullying and for employers to avoid the costs arising from workplace bullying.[147] Relying on an employer's anti-bullying policies that may prohibit otherwise legal behavior, arbitration may be "superior to courts at elaborating and implementing those norms," particularly to address bullying that may not be addressed through litigation.[148] But, despite its potential to uphold an employer's decision to discipline a bully, questions remain about the appropriateness of relying on arbitration as a tool to address workplace bullying, including whether

141. *See infra* Part III. B. for a discussion of just cause.

142. Adolph M. Koven & Susan L. Smith, Just Cause: The Seven Tests 23 (3d ed. 2006).

143. Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 Emp. Rts. & Emp. Pol'y J. 405, 411 (2007).

144. Morton Gitelman, *The Evolution of Labor Arbitration*, 9 DePaul L. Rev. 181, 187 (1960).

145. *Id*.

146. *Id.* at 189.

147. Fox & Stallworth, *supra* note 4, at 227, 231.

148. W. Mark C. Weidemaier, *From Court-Surrogate to Regulatory Tool: Re-Framing the Empirical Study of Employment Arbitration*, 41 Univ. Mich. J. L. Reform 843, 866 (2008).

"arbitrators can meaningfully redress claims based on fairness norms that are not presently embodied in law."[149]

Arbitration decisions are only reviewable in the courts under extremely limited circumstances. However, one such occasion led one court to express the common concern that arbitrators' reinstatement of harassers could "embolden" future employees to "engage in pernicious misconduct," which could also include bullying.[150] In addition, arbitrators' reinstatement of bullies could discourage targets of bullying from reporting that behavior, "knowing that their employer will do little to protect them from even well-documented and pervasive misconduct."[151] This fear could be justified if arbitrators tend to reduce the punishment of bullies to something less than discharge, or find no just cause for any discipline, thereby undermining the employer's ability to discipline bullies and deter future bullying.

Before comparing arbitration decisions about bullying to litigation outcomes, it is useful to consider how outcomes in discrimination claims vary between arbitration awards and in discrimination litigation. Arbitration has been criticized more generally based on findings that employees "both win less often and win less money when disputing claims in arbitration rather than in litigation."[152] One 2016 study of arbitration awards in California, for example, showed a win rate for employees of eighteen to twenty percent, depending on how a "win" is defined.[153] In contrast, a second 2019 study of awards by the same researchers computed employee win rates across various arbitration system providers from twenty-two to fifty-nine percent.[154] Other experts have found that employees do at least as well in employment arbitration compared to litigation.[155] For comparison, unions prevailed in thirty-six percent of the labor arbitration awards addressing employment discrimination.[156]

Non-unionized employers may be adopting arbitration programs to "avoid inefficiencies created by disputes, increase morale, and reduce

149. *Id.* at 868.

150. N.Y.C. Transit Auth. v. Phillips, 75 N.Y.S.3d 133, 137 (App. Div. 2018).

151. *Id.* at 137–38.

152. Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 155, 179 (2019).

153. David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457, 479 (2016).

154. Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 56 (2019).

155. Richard A. Bales, *Normative Consideration of Employment Arbitration at* Gilmer's Quinceañera, 81 TULANE L. REV. 331, 347 (2006); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1560 (2005).

156. Ariana R. Levinson, *What the Awards Tell Us about Labor Arbitration of Employment-Discrimination Claims*, 46 UNIV. MICH. J. L. REFORM 789, 837 (2013).

turnover," rather than just a desire to win.[157] Some suggest that arbitration programs have become "front-line mechanisms for enforcing important public norms such as anti-discrimination,"[158] which indicates that arbitration could arguably help to reduce workplace bullying as well. Arbitration may be beneficial for employers facing bullying claims like assault, because an arbitrator may be better equipped than a jury to resolve the sometimes complex factual disputes in such a claim.[159] Mandatory arbitration's ability to protect employers against exposure to large and unpredictable jury verdicts represents a significant advantage for them.[160]

Some argue that arbitration is particularly inappropriate for claims attempting to expand upon the rights available under existing law, that present evidentiary challenges, may not involve significant monetary relief, or involve significant personal and emotional tolls, especially if brought by an individual employee.[161] Claims based on rights arising from an employee manual rather than individually negotiated employment contracts may also be more difficult.[162] Arbitrators may be less inclined than courts to issue "progressive decisions" that favor employees to avoid the risk of being vacated by judicial review or to risk loss of future business.[163] But it may also be true that arbitrators do not feel as tightly bound by judicial precedent compared to a trial court, as demonstrated by the limited number of arbitrators who reference applicable case law in the awards that we reviewed. In addition, our review demonstrates that arbitrators often apply a just-cause standard rather than legal precedent, which can lead to different results in grievances filed by employees accused of bullying.

B. Just Cause Defined

Arbitration cases related to bullying typically involve the claim that the accused bully was disciplined without just cause. The "seven tests of just cause" is a well-established and widely used set of a criteria used by arbitrators to determine if discipline imposed by management was consistent with the CBA. The seven tests are derived from

157. Sherwyn, Estreicher & Heise, *supra* note 155, at 1581.

158. Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 337 (2005).

159. Michael Elkon, *When Employees Solve Problems with Their Fists*, FISHER PHILLIPS (Oct. 1, 2014), http://www.laborlawyers.com/when-employees-solve-problems-with-their-fists [https://perma.cc/ECE2-8FA8].

160. Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 454–58 (2000).

161. Sternlight, *supra* note 152, at 183.

162. Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 237 (1998).

163. Sternlight, *supra* note 152, at 188.

an often-cited 1966 arbitration award, *Enterprise Wire*.[164] These seven questions help determine whether an employer lacked just cause in imposing discipline:

(1) Did the employee have forewarning of the "possible or probabl[e] disciplinary consequences of the employee's conduct?"

(2) Was the violated rule or order reasonably related to the employer's "orderly, efficient, and safe operation" and expected employee performance?

(3) Did the employer "make an effort to discover whether the employee did in fact violate or disobey a rule or order?"

(4) Was the employer's investigation fair and objective?

(5) Did the employer's decision-maker rely on "substantial evidence or proof?"

(6) Did the employer apply its rule and impose the penalty "evenhandedly and without discrimination to all employees?" and

(7) Was the level of discipline for the grievant "reasonably related" to the seriousness of the offense and the "record of the employee in his service with the company?"[165]

If any of these tests are not met, the discipline may be reduced or overturned by the arbitrator.

The application of just-cause principles may result in the reinstatement of alleged bullies, just as an employer may choose to retain them despite potential liability under tort laws. Under a just-cause analysis, arbitrators focus on whether the employee engaged in conduct supporting the discipline and whether the punishment imposed by the employer is appropriate under the employer's policy or CBA and work rules. The present analysis of how just-cause principles are applied to bullies challenging their discipline helps to answer the question of whether bullying in the workplace can and should be addressed through labor or employment arbitration.

C. Analysis of Arbitration Awards

A total of 135 arbitration awards were reviewed to understand how arbitrators approach grievances filed by employees who engaged in bullying-type behaviors in the workplace, as well as the limited number of grievances filed by targets of bullying. Awards were included if the grievant was accused of, or was the victim of, violence or threats made against or by supervisors or coworkers, and other discourteous behavior, such as the use of profanity in the workplace. Awards were not included if the grievant's misconduct targeted clients or customers because of our focus on how well arbitrators address workplace bullying

164. Enter. Wire Co. v. Enter. Indep. Union, 46 Lab. Arb. Rep. (BL) 359, 361–62 (1966) (Daugherty, Arb.).

165. *Id.* at 363–64.

of employees. Employers included both private- and public-sector organizations. These awards were reported in *Bloomberg-BNA* between 2009 and 2018, so this study excludes unreported awards. No arbitration awards arising from individual employee–employer arbitration agreements were reported, but the analysis should be applicable to such agreements that include a just-cause provision.

Of the 135 arbitration awards analyzed, 128 resulted from grievances filed by employees accused of bullying-related behavior; only seven were filed by targets of such behavior. This analysis focuses on the 114 grievances filed by alleged bullies who were discharged, eighty-one of whom were accused of committing violence or threats of violence, and thirty-three awards concerning other bullying-type behavior by the grievant, such as the use of profanity or some other inappropriate behavior.

Table 1 (found in the Appendix) provides the outcomes of grievances challenging the discipline or discharge of grievances by the category of grievants' behavior, as outlined above. Overall, forty percent of the grievances of bullies were sustained, and the remaining sixty percent of the punishments (most often discharges) were upheld by the arbitrator. Those accused of violence or threats were somewhat less likely to have their grievances sustained (thirty-eight percent), while the grievances by employees accused of profanity or some other type of discourtesy, without any violence or threats, were somewhat more likely (forty-eight percent) to have their grievances sustained. Among the forty-six sustained grievances, the arbitrator removed any punishment and awarded full back pay with reinstatement for twenty-two percent of the grievants accused of bullying-related behavior, with full relief slightly more common for those accused of violence or threats. An arbitrator rarely reduced a discharge to a warning, although this result was provided equally regardless of the type of bullying behavior. Among the twenty-eight (of forty-six or sixty-one percent) of grievants who were reinstated with some punishment imposed by the arbitrator, both term suspensions and reinstatement with no back pay were slightly more common among those who engaged in profanity or some other type of discourteous behavior. Imposition of a specific term of suspension was more common for both types of bullies, compared to reinstatement with no back pay. Interestingly, only one grievant who engaged in violence or threats was transferred as a condition of reinstatement.

Because arbitrators are charged with interpreting a policy or CBA, almost all awards identify an employer-initiated work rule or a rule in a contract clause (referenced collectively as "rules" here) that had been violated by the grievant. Of the 114 awards reviewed, sixty-seven (fifty-nine percent) referenced a rule against threats or violence, and forty-four (thirty-eight percent) referenced some other work rule related to bullying, such as the use of profanity or a discourtesy to

coworkers, while only one specifically referenced a no-bullying rule. Some awards referenced more than one type of rule, while only four awards did not specify a work rule that was violated. To better understand these outcomes, we engaged in an analysis of arbitrators' reasoning under just-cause principles. In addition, we discuss whether the arbitrator's review of a bully's discipline adequately takes the interests of the target into consideration.

1. Application of Just-Cause Principles

This review of arbitration awards concerning grievants accused of bullying reflects variations in the influence of the seven tests for just cause. The first and second tests concerning the employee's forewarning or foreknowledge of the disciplinary consequences of his conduct and the relationship between the employer's rule and the operation of the business and employee performance were often considered. Regarding the third, fourth, and fifth tests, while a lack of evidence that the grievant engaged in the alleged conduct often led to the grievance being sustained, the conduct of the investigation itself was rarely influential. Under the sixth test, the arbitrator sometimes considered whether the employer applied its policies against bullying evenhandedly and without discrimination. Perhaps most influential was the seventh test, concerning mitigating and aggravating circumstances, showing whether the degree of discipline administered was appropriate.

In applying the first test of just cause, the provision of forewarning to the employee, arbitrators in these grievances by accused bullies often noted whether the work rule or contract provision related to bullying behavior provided notice to employees that such behavior could result in discharge. This "notice" is an important component of just cause under general arbitration principles and was mentioned in a majority of the awards. This approach was upheld by a federal court reviewing an arbitrator's award that reinstated a hospital technician who had been discharged for workplace violence, in which the court accepted the arbitrator's reasoning that, despite the hospital's zero-tolerance policy, the applicable CBA did not state that a violation would result in discharge.[166] The court explained that "[t]he arbitrator arguably grounded his opinion in the terms of the contract . . . , which require just cause for firing and allow for progressive discipline and mandate that any discipline be applied in a considered, not arbitrary, fashion."[167]

Notice was often discussed as partial justification for upholding discharge as the discipline for bullying behavior. Of the eighty-one grievants charged with threats or violence, forty-three (fifty-three percent) of the awards noted that the contract provision or work

166. Pocono Med. Ctr. v. SEIU Healthcare Pa., No. 3:10-cv-1334, 2011 U.S. Dist. LEXIS 76109, at *14–15 (M.D. Pa. July 14, 2011).

167. *Id*.

rule provided notice that discharge was a possible discipline for such behavior, while thirty-seven did not discuss whether the rule provided such notice. Of the thirty-three grievants charged with other bullying related behavior, fifteen (forty-six percent) of the awards noted that employees were notified that discharge was a potential punishment for such behavior. Thus, the notice provision of the first test of just cause played an important role in arbitrators' decisions.

A related aspect of the first test is whether the behavior of which the grievant is accused fits the definition of the problematic behavior provided in the notice. Surprisingly, most arbitrators gave little attention to defining what behavior constitutes a threat or other bullying-related behavior as defined by the CBA, given the ambiguity surrounding what behavior constitutes bullying. Arbitrators often failed to discuss whether the employer's policies provided a sufficiently clear definition of prohibited conduct. Only 9 out of 114 (eight percent) of the awards included such a discussion. In one award, however, the arbitrator applied some objective criteria to determine whether or not the grievant's statements could be "reasonably considered to be threatening, harassing, intimidating or violent" as prohibited in the parties' contract.[168] The arbitrator, relying on a federal appellate case,[169] considered five evidentiary factors to determine whether the grievant's words should be considered a threat.[170]

The second test of just cause requires some relationship between the rule allegedly violated by a grievant and the employer's interests, as discussed above. In the awards reviewed, arbitrators discussed the reasonableness of those work rules in 58 out of 114 (fifty-one percent) of the awards concerning grievants charged with bullying-related behavior. In charges of violence or threats, arbitrators found the rule to be reasonable in all but 4 of those awards. For example, one arbitrator noted the reasonableness of a work rule proscribing "fighting, inciting fighting, threats and abusive language,"[171] and a second award upheld a discipline based in part on the reasonableness of a city's progressive discipline policy that prohibited "abusive or offensive language or gestures toward subordinates, [or] other employees."[172] Similarly, an arbitrator justified the discharge of an employee who engaged in verbal threats in part because

168. Exide Techs. v. Int'l Bhd. of Elec. Workers, Local 700, 129 Lab. Arb. Rep. (BL) 857, 860–61 (2009) (Walker, Arb.).

169. Metz v. Dep't of Treasury, 780 F.2d 1001, 1002 (Fed. Cir. 1986).

170. *Exide Techs.*, 129 Lab. Arb. Rep. (BL) at 861.

171. Huntington Ingalls Indus. v. Teamsters Local 991, 136 Lab. Arb. Rep. (BL) 723, 729 (2016) (Wayland, Arb.).

172. City of Piqua v. AFSCME Ohio Council 8, Local 984, 137 Lab. Arb. Rep. (BL) 1888, 1893 (2017) (Goldberg, Arb.).

> [a] zero tolerance policy of workplace violence is a work rule that is reasonably related to the orderly, efficient and safe operation of the Company's business. The Company has a duty to provide a safe workplace for its employees and cannot tolerate threats of harm and physical altercations between its employees.[173]

Rules were sometimes found to be reasonable even if the rule did not clearly define the violence or threats that were prohibited, such as a work rule simply prohibiting "threatening, bullying, or intimidating or intentional" comments.[174] Thus, the second test of just cause also played an important role, with arbitrators generally finding the employers' rules related to bullying and violence to be reasonable.

The third, fourth, and fifth tests of just cause related to the quality of the employer's investigation. Of these, it is the fifth test regarding the evidence that was commonly cited in reviewed awards. Arbitrators often considered the sufficiency of the evidence showing that the alleged bully engaged in the behavior at issue. Compared to IIED claims discussed above, a bully's discipline under an employer policy or CBA may be upheld if he engaged in prohibited behavior, regardless of his intent. As a method of dispute resolution, arbitrators often engaged in an analysis of the evidence of the alleged bullying behavior, demonstrating the fact-intensive "he said, she said" nature of many of these claims.[175] In addition, claims of bullying by a supervisor are often misinterpreted as performance issues.[176] Many arbitrators weigh the credibility of the grievant compared to the other witnesses who provide information about the bullying-related behavior that led to the discipline or discharge in question.[177] It has been suggested that the relaxed evidentiary rules common to arbitration hearings result in the admission of information that could benefit grievants alleging discrimination, but no specific claim has been made regarding its benefit to alleged bullies.[178]

In this review of awards concerning alleged bullies, the arbitrator weighed and found the evidence sufficient in forty-five of eighty-one (fifty-six percent) of the awards concerning grievants charged with violence or threats, compared to eleven (fourteen percent) of the awards where the evidence was insufficient, and twenty-five (thirty-one per cent) awards which did not discuss the sufficiency of the evidence. Of the thirty-three grievants charged with use of profanity or some other discourtesy, the arbitrator found the evidence to be sufficient in seventeen (fifty-two percent) of the awards, and insufficient in just four

173. *Huntington Ingalls Indus.*, 136 Lab. Arb. Rep. (BL) at 729.

174. Ameron Haw. v. Haw. Teamsters & Allied Workers, Local 996, 132 Lab. Arb. Rep. (BL) 134, 145 (2013) (Brown, Arb.).

175. Harrington, Warren & Rayner, *supra* note 12, at 375.

176. *Id*. at 377.

177. KOVEN & SMITH, *supra* note 142, at 311–13.

178. Levinson, *supra* note 156, at 822.

(twelve percent) of the awards, and did not discuss the weight of the evidence in the other thirty-four percent of the awards. The vital role of the arbitrator in interpreting the facts is illustrated in an award in which the grievant's annoying and insensitive comments were found to not be prohibited by an employer policy or work rule against "threatening, bullying or intimidating" behavior, but a later statement about a coworker intentionally hurting himself did violate the rule.[179]

Not surprisingly, for all of the types of misconduct, if the evidence was insufficient to establish that the bullying behavior occurred or that it violated a policy, then the grievance typically was sustained. In contrast, objective evidence that the bullying occurred often sufficed to uphold the harasser's discipline. For example, testimony of the grievant and another witness provided clear and convincing evidence to uphold lesser discipline of an employee who was discharged for fighting because he poked and pushed a coworker during an altercation.[180]

Arbitrators also often make factual inferences from the evidence presented. For example, a statement by the grievant about shooting people to get management's attention was sufficient to establish a "clear and unmistakable threat" made by the grievant. [181] One arbitrator went so far as to consider "the frequent news reports about violence in the workplace" in determining whether the bullying employee's words reasonably tended "to threaten or intimidate another employee."[182]

Like sufficiency of the evidence, the sixth test of just cause calling for consistent enforcement of a work rule or CBA provision is an important principle in applying a just-cause standard.[183] Disparate enforcement of an employer's policies is a "matter of fundamental fairness," according to one arbitrator.[184] Therefore, it is not surprisingly that twenty-eight percent of the awards concerning bullying considered past enforcement of a rule against bullying-related behavior. If the rule had not been enforced consistently against another employee, as in twenty-four of the awards (twenty-one percent), the arbitrator sometimes sustained the grievance, as in twelve out of twenty-four (fifty percent) of these awards.

An employer's consistent enforcement of rules and assessment of discipline for employees who engage in similar misconduct supports findings of just cause, "unless a reasonable basis exists for variations

179. *Ameron Haw.*, 132 Lab. Arb. Rep. (BL) at 144.

180. Ecolab Inc. v. Int'l Ass'n of Machinists & Aerospace Workers, Local 124, 128 Lab. Arb. Rep. (BL) 922, 924 (2010) (Kravit, Arb.).

181. Almatis, Inc. v. United Steelworkers, Local 14465, 136 Lab. Arb. Rep. (BL) 1240, 1244 (2016) (Nicholas, Arb.).

182. U.S. Steel Corp. v. United Steelworkers, Local 1299, 136 Lab. Arb. Rep. (BL) 325, 328 (2014) (Bethel, Arb.).

183. Koven & Smith, *supra* note 142, at 371–77.

184. Ohio Power Co. v. Util. Workers Union of Am., Local No. 111, 129 Lab. Arb. Rep. (BL) 1753, 1759 (2011) (Fullmer, Arb.).

in the assessment of punishment (such as different degrees of fault, or mitigating or aggravating circumstances affecting some but not all of the employees)."[185] Arbitrators of grievances by accused bullies followed a similar approach. For example, one arbitrator reduced a three-day suspension to a written warning for a faculty member, where the dean involved in the exchange of emails with the grievant also used profane language but only received a written warning.[186] Similarly, the grievance of a grievant was sustained, and her discharge was reduced to a five-day suspension, where the other employee involved in the altercation was given a five-day suspension.[187]

This influence of consistent imposition of discipline can make it difficult for an employer to justify disciplining an employee who has engaged in bullying-related behavior that has been tolerated in the past. For example, discipline was deemed too harsh a punishment for a grievant who had used inappropriate language, where seven other employees had not been discharged for similar conduct in the past.[188] However, some arbitrators have recognized that an employer has the authority to prospectively enforce a rule that has not been fully enforced in the past, such as the award that upheld the discharge of an employee for making physical contact with a coworker, despite the employer's alleged failure to enforce the rule against fighting in the past.[189]

If the past incidents are not considered comparable by the arbitrator, then the employer is still free to interpret a work rule in line with other just-cause principles.[190] Arbitrators have compared the conduct of the grievant to the other employee who engaged in somewhat similar behavior and would deny the grievance if the grievant's conduct was determined to be more serious or injurious. For example, the discharge of a grievant was upheld based on use of offensive language toward subordinates, even though past usage of similar language by a subordinate toward a supervisor did not result in discharge, based on

185. Emp. Redacted v. Educ. Ass'n Redacted, 2015 Lab. Arb. Rep. Supp. (BL) 199271 (2015) (Glazer, Arb.).

186. *Id.*

187. Huntington Ingalls Indus. v. Teamsters Local 991, 136 Lab. Arb. Rep. (BL) 723, 730 (2016) (Wayland, Arb.).

188. Safeway, Inc. v. United Food & Com. Workers, Local 1496, 135 Lab. Arb. Rep. (BL) 473, 478–79 (2015) (Landau, Arb.).

189. *See, e.g.*, Dana Driveshaft Mfg., Inc. v. United Auto Workers, Local 1765, 137 Lab. Arb. Rep. (BL) 1817, 1823 (2017) (Belkin, Arb.) (employer could choose to enforce rule that was negotiated and known to grievant).

190. *See, e.g.*, W. Rock Co. v. United Steel, Paper & Forestry, Rubber Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, Local 498, 136 Lab. Arb. Rep. (BL) 229, 231 (2016) (Heekin, Arb.) (past incidents of violence or threats not "directly comparable"); U.S. Steel Corp. v. United Steelworkers, Local 1299, 135 Lab. Arb. Rep. (BL) 325, 327 (2014) (Bethel, Arb.) (distinguishing threat made by another employee).

"enough differences in the circumstances."[191] In ten of the awards, the arbitrator found that other employees had been treated similarly in the past, also supporting the dismissal of six of those grievances.

Like consistent enforcement of a work rule, progressive discipline principles are often incorporated in a CBA and enforced by arbitrators.[192] Progressive discipline requires both substantive and procedural due process, and the punishment "should fit the crime."[193] Under a policy of progressive discipline, an employer might lack just cause to discharge an employee who has engaged in bullying-related behavior for the first time. For example, a university was required to meet with a faculty member who was suspended in part based on workplace violence to determine the appropriate length of suspension under the principles of progressive discipline.[194] Progressive discipline policies can also support the employer's imposition of discipline, as in an arbitrator's decision to uphold the discharge of an employee who committed additional bullying behavior after the imposition of a last-chance agreement for similar behavior.[195]

Despite notions of progressive discipline, arbitrators in some of the awards reviewed upheld a discharge for first-time behavior if the severity of the grievant's behavior justified discharge. Among the thirty-eight (thirty-three percent of 114) awards in which progressive discipline principles were discussed, the arbitrator found that progressive discipline was followed in thirty (seventy-nine percent) of those awards. In the eight awards where the arbitrator found that progressive discipline was not followed, the discharge was still upheld in five out of eight of those awards. For example, the discharge of a grievant was upheld based on a first offense, where the arbitrator noted that it was not unusual to discharge an employee at that workplace for a first offense of harassment.[196]

These decisions demonstrate that, while traditional factors of just cause, such as the sufficiency of the evidence, can sometimes influence an arbitrator's decision to reinstate, other factors such as adherence to progressive discipline principles and prior consistent enforcement can support the discipline which was imposed. Thus, an employer seeking arbitral approval of discipline imposed on a bully will need to ensure not only that sufficient evidence supports the accusation of bullying,

191. City of Piqua v. AFSCME Ohio Council 8, Local 984, 137 Lab. Arb. Rep. (BL) 1888, 1896 (2017) (Goldberg, Arb.).

192. *See generally* Koven & Smith, *supra* note 142, at 453–66.

193. *Id.* at 454.

194. Fac. Ass'n Redacted v. Emp. Redacted, 2015 Lab. Arb. Rep. Supp. (BL) 195304 (2015) (Burdick, Arb.).

195. Green Diamond Res. Co. v. Int'l Ass'n of Machinists & Aerospace Workers, IAM Local Lodge W98, 135 Lab. Arb. Rep. (BL) 753, 756 (2015) (Gentile, Arb.).

196. Emp. Redacted v. UAW Local Redacted, 2016 Lab. Arb. Rep. Supp. (BL) 205126 (2016) (Roumell, Arb.).

but that progressive discipline has been followed, if appropriate, and that any rules against bullying behavior have been enforced consistently in the past. In addition, outcomes are often influenced by the seventh test of just cause, regarding mitigating and aggravating circumstances, discussed more fully in the next section.

2. Impact of Mitigating & Aggravating Circumstances

Under the seventh test of just cause, arbitrators determine the appropriateness of the punishment imposed on bullies. This consideration of both mitigating and aggravating circumstances[197] is an important determinant in addressing workplace bullying because these factors often affect the employer's determination regarding a proven bully's removal from the workplace. Characteristics of the grievant that can either be mitigating or aggravating include job tenure, past performance or discipline, behavior of others that may have instigating the grievant's misconduct, and a grievant's disability. Overall, arbitrators considered mitigating or aggravating circumstances in fifty-six out of 114 (forty-nine percent) of the awards addressing bullying-related behavior by the grievant.

Some arbitrators considered a mitigating or aggravating factor that applied to a particular grievant, combined with the other just-cause principles discussed above. For example, the discharge of an employee who lightly pushed a coworker who was also engaged in "escalating" behavior was reduced to a three-day suspension based on the absence of any prior discipline, combined with the lack of notice of disciplinary consequences for violence in the workplace and the relative lack of severity of the behavior.[198]

Table 2 (see Appendix) outlines the consideration of mitigating or aggravating circumstances in addressing the appropriateness of the discipline for different types of bullying-related behavior by a grievant. Job tenure of the grievant was the most common reason to reduce or remove the grievant's discipline. Of the thirty-four cases in which tenure was considered, the grievance was sustained in twenty cases (fifty-nine percent). In an extreme example, an arbitrator reversed the discharge of a bullying employee with forty-six years of service without previous incidents of violence.[199] Similarly, an employee of twenty-eight years was returned to work after more than a year, without back pay, after throwing juice in the face of a coworker during a verbal dispute, with the arbitrator commenting that her "almost thirty (30) years of

197. KOVEN & SMITH, *supra* note 142, at 463–67.

198. Arrow Gear Co. v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. 8, 127 Lab. Arb. Rep. (BL) 1370, 1375 (2010) (Cohen, Arb.).

199. W. Rock Co. v. United Steel, Paper & Forestry, Rubber Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, Local 498, 136 Lab. Arb. Rep. (BL) 229, 230 (2016) (Heekin, Arb.).

work earns consideration."[200] A long job tenure does not necessarily protect a bully's employment, however. For example, one arbitrator refused to reduce the discharge of an employee under a work rule prohibiting use of abusive language, threat of bodily harm, and intimidation of a coworker based on his clean lengthy job tenure, because to do so would be a clear example of an arbitrator "brandishing his chosen form of punishment for that of management."[201] In contrast, short job tenure can be considered an aggravating factor.[202]

Like seniority, the grievant's work performance was influential in a significant number of awards, more often acting as a mitigating factor rather than an aggravating factor. In the fifteen cases in which the arbitrator cited good job performance, the grievance was sustained eight times, or fifty-three percent of the time. Threatening behavior of a teacher, for example, was insufficient to support his discipline, in part because he had positive performance evaluations and was "accomplished in many fields of study and an enthusiastic teacher."[203] Similarly, an employee's discharge for making a threatening remark was overturned based in part on his "work record of professionalism, kindness, happiness, helpfulness and dedication."[204] In another example, a grievant's hard work and dependability combined with the absence of any prior allegations of physical aggressiveness were mitigating factors for a grievant who pushed a coworker despite his unofficial reputation as being difficult to work with.[205]

Like seniority, performance will not always protect a bully's employment. For example, a positive performance record of ten years of great work and attendance was insufficient to reduce the penalty for a grievant who violated an employer's workplace-violence policy, where the arbitrator noted that "it is not the arbitrator's role to substitute his judgment for that of management."[206] Past performance issues can support the employer's decision to discipline a grievant, but an arbitrator may still reduce a discharge to lesser discipline. For example, erratic behavior associated with a teacher's alcohol consumption was

200. Pa. Elec. Co. v. Util. Workers Union of Am., Local 180, 130 Lab. Arb. Rep. (BL) 543, 552 (2012) (Paolucci, Arb.).

201. Almatis, Inc. v. United Steelworkers, Local 14465, 136 Lab. Arb. Rep. (BNA) 1240, 1245 (2016) (Nicholas Arb.).

202. *See, e.g.*, Armstrong World Indus. United Steelworkers, Local 461, 129 Lab. Arb. Rep. (BL) 232, 237 (2011) (Smith, Arb.) (noting grievant's "short service needs to be considered").

203. Individual Grievant Redacted v. Emp. Redacted, 2015 Lab. Arb. Rep. Supp. (BL) 199061 (2015) (Stutz, Arb.).

204. Union Redacted v. Emp. Redacted, 2016 Lab. Arb. Rep. Supp. (BL) 205116 (2016) (Stutz, Arb.).

205. Arrow Gear Co. v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. 8, 127 Lab. Arb. Rep. (BL) 1370, 1374–75 (2010) (Cohen, Arb.).

206. Eaton Corp. v. United Autoworkers, Local 2262, 137 Lab. Arb. Rep. (BL) 1869, 1875 (2017) (Belkin, Arb.).

referenced in connection with the imposition of a long-term suspension (reduced from discharge) based on his prior inappropriate behavior, also while drinking.[207]

The grievant's past misconduct, or lack thereof, was also considered in about half of awards. Where the grievant had no history of prior discipline, the grievance was sustained in seven out of ten cases (seventy percent). But when previous discipline was considered, the grievance was sustained in only six of eighteen (thirty-three percent) of cases. If a grievant has engaged in a "detrimental behavioral pattern," for example, the arbitrator is more likely to uphold discharge as a discipline, such as the dismissal of a grievance filed by an employee who had been discharged for inappropriate language after two prior incidents of similar behavior.[208] Note that some CBAs may prevent an arbitrator from considering previous misbehavior prior to a certain time in determining whether the employer had just cause.[209] In contrast, a grievant was reinstated after an alleged physical and verbal confrontation, despite her alleged history of routinely engaging in both verbal and physical aggressive, abusive, and confrontational behavior over her fifteen-year tenure, in large part because she had no prior documented discipline for such behavior.[210]

It is interesting to note that a grievant's past misbehavior or even discipline, often for similar behavior, was considered in many of the awards that considered the circumstances surrounding the bullying behavior by the grievant. This aligns with the observation that, in harassment claims, arbitrators may be reluctant to uphold discharge as the discipline for a first offense, even under a "zero tolerance" policy.[211]

By focusing so much attention on the mitigating circumstances presented by the bully, however, arbitrators may be doing little to prevent future bullying-related behavior by that same worker. While some mitigating factors may be good predictors of future behavior, such as past, related misconduct, the seniority and work performance factors may not be an accurate predictor of whether the grievant will engage in similar misbehavior in the future. At the same time, an arbitrator's consideration of aggravating factors related to the bullying behavior at issue may be a good predictor of future predilection to bully.

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207. Educ. Ass'n Redacted v. Emp. Redacted, 2014 Lab. Arb. Rep. Supp. (BL) 165847 (2014) (Shaller, Arb.).

208. Safeway, Inc. v. UFCW Local No. 1564, 132 Lab. Arb. Rep. (BL) 1605, 1607 (2013) (Nicholas, Arb.); *see also* Emp. Redacted v. Teamsters Local Redacted, 137 Lab. Arb. Rep. (BL) 1344, 1350 (2017) (Whelan, Arb.).

209. *See, e.g.*, McQuay Int'l v. Sheet Metal Workers' Int'l Ass'n, Local 480, 132 Lab. Arb. Rep. (BL) 574, 579 (2013) (Tidwell, Arb.) (previous misconduct was "older than the CBA allows to be considered").

210. Emp. Redacted v. Commc'n Workers of Am. Dist. Redacted, 2017 Lab. Arb. Rep. Supp. (BL) 200886 (2017) (Barnard, Arb.).

211. KOVEN & SMITH, *supra* note 142, at 472.

3. Interests of Targets

Arbitration of grievances of bullies may not give sufficient voice to the target of the bullying during the arbitration process. As one expert observed, any ADR process used to address bullying "should include significant emphasis on the effects of the bullying/mobbing on the victim/target by both the organization and the perpetrators."[212] While targets may be witnesses in arbitration hearings, they typically have no input into the settlement or request for relief in the grievance/arbitration process. A union may have a voice in the process if arbitration occurs under the CBA, but the union likely represents the accused bully rather than the target in that process. The union's duty of fair representation to the accused bully can influence its consideration of the target's interests in the outcome of the arbitration, even if the target is also a union member, if she has not filed a grievance. While the employer may be seeking to avoid potential liability by disciplining the alleged bully, this interest does not necessarily equate to choosing the outcome that is best for the targeted employee. Therefore, it is important to consider whether an arbitrator takes the target's interests into account when resolving the grievance of an alleged bully.

This review finds that arbitrators only give limited attention to the interests and concerns of the bullying target in applying just-cause principles to those situations. In forty-six of the 114 (forty percent) awards where the alleged bully was discharged, the arbitrator sustained the grievance and ordered the return of the grievant to work, albeit often after a suspension of some length. In only sixteen of all the awards reviewed, however, did the arbitrator discuss the interests of the target of the bullying behavior. And in only five of those sixteen awards was the grievance denied (e.g., where the grievant's question about whether he needed to "start shooting people" instilled fear in his coworker,[213] and where the grievant's comments about coworkers' national origin made them feel "uncomfortable").[214] In upholding the discharge of one bullying employee, the arbitrator pointed out that the grievant's threatening comments "clearly affected [the coworker] in a negative manner" and that the discharge was part of "an effort to promote a more harmonious workplace."[215] Similarly, another arbitrator discussed how threats can be a "distraction" that makes the target a "less efficient worker."[216]

212. Duffy, *supra* note 36, at 258.

213. U.S. Steel Corp. v. United Steelworkers, Local 1299, 135 Lab. Arb. Rep. (BL) 325, 328 (2014) (Bethel, Arb.).

214. SEIU Local Redacted v. Emp. Redacted, 2017 Lab. Arb. Rep. Supp. (BL) 200693 (2017) (Siegel, Arb.).

215. Almatis, Inc.v. United Steelworkers, Local 14465, 136 Lab. Arb. Rep. (BL) 1240, 1245 (2016) (Nicholas, Arb.).

216. Superior Beverage Grp. v. Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers, Local 377, 127 Lab. Arb. Rep. (BL) 1710, 1721 (2010) (Franckiewicz, Arb.).

Other arbitrators treated the victim's interests as a type of mitigating factor, as in the award reducing the discharge of a grievant charged with making threats to a five-day suspension where the victim "did not feel threatened."[217] Similarly, another arbitrator reduced a discharge of a grievant whose comments were "annoying and perhaps insensitive," where the targeted coworker only felt "irritate[d]."[218] Thus, in eighteen awards, the arbitrator considered the interests of the victim or target but still ordered the employer to return the grievant to work.

4. Grievances of Targets

This review of arbitration awards revealed only seven cases out of the total of 135 awards that were initiated by the targets of bullying. Several of them were accused of bullying behavior as well, potentially making them both a target and a perpetrator. The shortage of reported arbitration awards may indicate an unwillingness of bullying targets to file grievances to address bullying. It may also stem from the fact that many employers have no policy about bullying, or have a policy that is not subject to the grievance procedure. However, virtually all CBAs allow for the use of the grievance procedure to challenge the imposition of discipline or discharge, meaning that those who are disciplined for bullying have a near-automatic right to file a grievance. Another potential reason for the small number of cases could be that those arbitration awards may be unreported in a public forum.

Of the seven awards in which the grievant alleged that she was the target of bullying, four alleged that the grievant was the target of threats, while three alleged the use of profanity or other discourteous words towards the grievant. In five of the seven awards, the grievant who alleged that she was a target of bullying had been discharged and alleged that she had been bullied as part of her defense. Of those five awards, three of those grievant/targets were reinstated with some punishment less than discharge. For example, one targeted grievant was reinstated but was still given a "final written warning" for using "gross profanity" with a coworker during a confrontation in which the coworker also used profanity and engaged in "somewhat threatening behavior," where the grievant was on the last step of progressive discipline, whereas the coworker had no previous discipline record and had only been given a written warning.[219]

The grievances of the remaining two targeted grievants were dismissed, upholding their discharges. For example, the discharge of one grievant was upheld even though he alleged that his threats of gun

217. Huntington Ingalls Indus. v. Teamsters, Local 991, 136 Lab. Arb. Rep. (BL) 723, 730 (2016) (Wayland, Arb.).

218. Ameron Haw. v. Haw. Teamsters & Allied Workers, Local 996, 132 Lab. Arb. Rep. (BL) 134, 142 (2013) (Brown, Arb.).

219. Durham Sch. Servs. Co. v. Teamsters, Local 270, 130 Lab. Arb. Rep. (BL) 1153, 1158, 1162 (2012) (Toedt, Arb.).

violence towards coworkers were in response to the racial harassment of him, despite the arbitrator's recognition that the employer failed to investigate the allegation of harassment, because the employer conducted a "fair and thorough investigation" into the grievant's threats.[220]

In the remaining two awards, where the target was not discharged, the grievance was dismissed. One arbitrator failed to accept grievant's allegation that she was constructively discharged, despite evidence of threats she had received.[221] The second arbitrator hearing a claim of a targeted grievant who was not discharged found evidence to support the grievant's claim that her supervisor engaged in "hostile and abusive behavior" that was threatening to her and others, beyond behavior that could be attributed to "management style."[222] Even so, the arbitrator dismissed the grievance alleging a violation of the agency's "Violence in the Workplace" policy because the agency reacted to the threats by counseling the abusive supervisor, implementing a performance appraisal process, and requiring his attendance at two managerial skill programs, which modified his behavior.[223] The arbitrator concluded that "the remedial actions taken by the Agency have resolved the problem, and nothing further is warranted."[224] This award, although only one example, demonstrates the potential limitations on relying on arbitrators to adjudicate the claims of alleged victims of bullying behavior, particularly when the bully is a supervisor.

While arbitrators may not be well-equipped or empowered to hear grievances of the targets of bullying, the principles of just cause can lead to appropriate results that will reduce bullying in the workplace. If an employer's policy notifies its employees that bullying behavior will not be tolerated, and that rule is related to the employer's interests and is enforced consistently, then arbitrators will rely on that policy to uphold the discipline imposed on a bully by the employer. An arbitrator applying his or her fact-finding skills can make a fair determination as to whether the grievant's conduct violated those policies. Lastly, an arbitrator's consideration of mitigating and aggravating circumstances may accurately predict future behavior of a proven bully, at least where those circumstances are related to that behavior.

Overall, the application of just-cause analysis to grievances filed by harassers and bullies provides some insight into how such behavior can be addressed in the workplace. These arbitration awards focus more on the provision of general notice to employees, with most failing

220. Aleris Int'l Inc. v. United Steelworkers, Local 9443-01, 138 Lab. Arb. Rep. (BL) 659, 669–70 (2018) (Weatherspoon, Arb.).

221. City of Detroit v. Police Officers Ass'n of Mich., 137 Lab. Arb. Rep. (BL) 1495, 1503–04 (2017) (Obee, Arb.).

222. Fed. Emergency Mgmt. Agency v. Am. Fed'n of Gov't Emps., Local 4060, 137 Lab. Arb. Rep. (BL) 757, 764 (2017) (Saunders, Arb.).

223. *Id.* at 766.

224. *Id*.

to devote any significant attention to a clear definition of prohibited bullying-related behavior. Instead, arbitrators spend significant time determining whether the grievant actually engaged in the alleged behavior, based on credibility determinations and weighing of conflicting evidence. This highlights the need for employers to create policies that clearly identify acceptable and unacceptable behaviors.

IV. Comparison of Arbitration and Litigation of Bullying Claims

Sections II and III above address how judges and arbitrators respond to claims of workplace bullying. Both of these approaches have significant limitations. But we believe that, currently, arbitration is more likely to meet the needs of the targets of bullying. As discussed above, successful litigation is hampered by the lack of national legislation prohibiting workplace bullying. Typically, claims are filed alleging assault, battery, or IIED. Often, only the most extreme cases of bullying result in litigation. The target faces significant hurdles in establishing intent to injure or cause harm or to prove that the behavior is extreme or outrageous. In addition, the target incurs legal expenses. Even if they win, targets may not be satisfied with the outcome. Targets are often most interested in bringing the bullying to an end and preventing it from occurring in the future. But litigation does not offer injunctive relief. Nor does it typically hold the employer liable for the behavior, and so the employer has no obligation to prevent future occurrences. Finally, litigation does not typically provide accommodation in the employment setting—such as reassigning a bullying supervisor or coworker to a location away from the target. For all these reasons, we believe that litigation is currently an avenue that is unlikely to meet the needs of the targets of bullying. If new legislations prohibiting workplace bullying were to be adopted, this could change.

In contrast, while arbitration also has limitations, it has a number of advantages as well. One of the major current limitations of arbitration is that many employers do not have policies that effectively prohibit workplace bullying. Some employers have no policies at all. Some have policies that do not clearly definite unacceptable behavior and so are difficult to enforce. Others have policies that are aspirational and provide no enforcement mechanisms at all. Arbitrators are limited to enforcing contract provisions as they are written and cannot amend policies based on their own judgment. Thus, while litigation is limited nationwide by a lack of anti-bullying legislation, arbitration is limited on an employer-by-employer basis, depending on the effectiveness of the particular policy.

Just as litigation might find in favor of an accused bully, so too, arbitration might sustain the grievance of an accused bully. In both cases, this outcome might embolden bullies to continue their objectionable

behaviors. And, in both cases, it might discourage future targets from filing claims. However, in the case of arbitration, the consistent application of the seven tests of just cause can guide an employer who seeks to eliminate bullying, by helping to clarify rules and boundary conditions for using discipline as a tool. This may or may not help an individual target of bullying, but it can help to prevent future occurrences of bullying in the workplace.

Arbitration has some advantages that litigation does not. One is cost. In labor arbitration, a grievant typically does not incur any legal costs personally. The union provides an advocate for a disciplined employee, although the union's role may be conflicted if the target is also represented by the same union. Second, arbitration can deal with workplace issues, like bullying, that are not covered by law. Third, some arbitrators, as discussed below, can provide a more creative solution to the issue. Fourth, in arbitration, the target does not have to prove intent of the bully to harm. Instead, the decision is based on whether the evidence establishes that the behavior occurred, regardless of intent. Fifth, unlike litigation, arbitration holds employers liable for the offending behavior in the workplace. The employer has the power to stop current bullying and prevent it in the future, and the prospect of losing repeated arbitration cases potentially can motivate the employer to take action and work to create a bully-free work environment.

Finally, for reasons discussed above, there are few published arbitration decisions based on the claims of a target. However, it must be noted that all the cases discussed here—even the large number that were based on the accused bully challenging their discipline or discharge—have at their foundation an underlying claim by a target. The target complained, and management investigated and then disciplined the accused bully. The bully then grieved their discipline. In this sense, although these arbitration cases are not based on the claim of the target, it is the target's initial complaint that starts the dispute resolution process. In this indirect sense, arbitration does address the complaints of the targets. And, while such information is not publicly available, it would be instructive to know what percentage of discipline or discharge cases for bullying are accepted by the alleged bully and allowed to stand. Such acceptance may occur because the union or the grievant believes that they are likely to lose the case in arbitration. The role of both the union and the employer in this process could be clarified by clearer guidance in a CBA or employer policy regarding what constitutes bullying behavior and what the appropriate discipline should be, including whether both the bully's characteristics and the target's interests should be considered.

For all these reasons, we believe that the arbitration process is currently superior to litigation for the goal of reducing workplace bullying. Both of these options would be significantly enhanced if legislation

prohibiting workplace bullying were to be passed. That would provide plaintiffs an effective avenue of recovery in the courts. Arbitration could be made more effective by consideration of the following recommendations to support the prohibition of workplace bullying.

V. Recommendations and Conclusion

The persistence of bullying in the workplace calls for a new approach by both employers and the adjudicatory bodies which address such behavior. Currently, the slight possibility of a successful tort claim against a bully or an employer that allows bullying to occur is insufficient to reduce bullying in the workplace. A bullying-free workplace could be promoted by legislation to require anti-bullying policies, or to make it easier for targets to brings claims. It may be possible for targets of bullying to bring claims against their employers under an arbitration program designed to enforce anti-bullying policies or collective bargaining language. When a substantial number of such claims by targets become publicly available, we recommend that future research analyze whether they provide adequate relief for targets.

Our review of existing arbitration awards concerning the grievances of accused bullies provides insight into arbitrators' effectiveness in reviewing the discipline imposed on bullies by their employers. This review shows that arbitrators' interpretation and enforcement of employers' policies against bullying behavior can provide an opportunity for consequences that will effectively address workplace bullying. But these policies are only effective if they clearly prohibit bullying behavior and if they are enforced. Arbitrators who are empowered to interpret and apply such policies should adhere to clear guidelines for appropriate behavior in those policies. In addition, our review shows that arbitrators can adopt creative approaches to ensure that workplace bullying does not continue.

Accommodations for targets of bullying offer an effective approach to addressing bullying in the workplace. A minority of courts require a broad range of accommodations for employees who develop a disability as the result of being targeted by bullying or harassment. If arbitrators were to include similar solutions in addressing bullying, targets of bullying would enjoy more opportunities to remain and be productive in their workplaces. We know that bullying behaviors are "concrete, widespread, systemic, destructive, and avoidable," which supports "political and judicial reform."[225] Until that reform occurs, creative solutions through arbitration to address bullying as violations of employer polices and CBAs may be the best alternative to make workplaces safe.

225. Austin, *supra* note 72, at 51.

A. Creative Remedies to Address Bullying

The awards of some arbitrators addressing bullying-related behavior by grievants provide a broader approach to appropriate remedies for such behavior. For example, to protect a target into the future, an arbitrator may order that bullying behavior stop, even if committed by a supervisor rather than a member of a bargaining unit.[226] Conversely, by placing conditions on a grievant's return to work, the arbitrator could address the concerns of both the victim and the employer in situations where the bullying-related behavior was insufficient under just-cause standards to support the grievant's discharge. For example, arbitrators have conditioned the reinstatement of a grievant on participation in the employer's employee assistance program (EAP)[227] or a "substance use and anger management evaluation" when deciding if a grievant is "fit to return to duty" after a suspension with no back pay.[228] Similarly, another arbitrator ordered that a grievant who had posted "extremely offensive language and racial slurs" participate in an anger management class at his own expense prior to his reinstatement after a suspension without back pay.[229]

Before being returned to work, proven bullies are sometimes required to provide medical documentation to support their reinstatement by an arbitrator.[230] In particular, bullies with mental health issues that may have contributed to their bullying behavior have been required to establish their readiness to return to work without bullying others. For example, the discharge of one grievant with bipolar disorder who was accused of cursing at his supervisor could only be reversed if he stated his intention to regularly take his medication and submitted assurances from his doctor that he is "able to return to work" and understands the importance of his medication.[231] Similarly, arbitrators have reinstated bullying grievants, but allowed the employer to require periodic mental examinations to assure the employer that the grievants are mentally and physically fit to resume working.[232]

Arbitrators also have dismissed the grievances of targets where the employer has executed reasonable responses to the bullying-related behavior against a grievant. For example, an arbitrator dismissed the

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226. Levinson, *supra* note 156, at 841.

227. Emp. Redacted v. Union Redacted, 2016 Lab. Arb. Rep. Supp. (BL) 199484 (2016) (Glazer, Arb.).

228. Educ. Ass'n Redacted v. Emp. Redacted, 2014 Lab. Arb. Rep. Supp. (BL) 165847 (2014) (Shaller, Arb.).

229. Emp. Redacted v. Union Redacted, 2015 Lab. Arb. Rep. Supp. (BL) 199038 (2015) (Jordan, Arb.).

230. Levinson, *supra* note 156, at 840.

231. Schnucks Mkts. v. United Food & Com. Workers, Local 655, 131 Lab. Arb. Rep. (BL) 1087, 1090–91 (2012) (Gear, Arb.).

232. *See, e.g.*, Save Mart Supermarkets v. UFCW Union, Local 8 Golden State, 126 Lab. Arb. Rep. (BL) 1018, 1022 (2009) (Riker, Arb.).

grievance of a target who was bullied by her supervisor, where the employer placed the alleged bully on a 360-degree appraisal and evaluation program, required him to meet weekly with his director, and attend both executive coaching sessions and conflict- resolution training, which proved to be effective.[233] The arbitrator explained that, in response to the bullying behavior, the employer "acted quickly, aggressively and effectively in putting forth a remedial action program that ultimately lead [sic] to his changed behavior."[234] These approaches parallel the courts' responses to requests for accommodations by targets of bullying.

Rather than allowing employers to avoid accommodations for targets of bullying, courts should require the provision of a "normal" workplace as an accommodation. The EEOC has advised that "[i]n some circumstances, supervisors may be able to adjust their methods as a reasonable accommodation by, for example, communicating assignments, instructions, or training by the medium that is most effective for a particular individual (e.g., in writing, in conversation, or by electronic mail)."[235] One group of experts recommends, for example, that human resources professionals can avoid direct confrontation with a bullying supervisor by recharacterizing their behavior as "inappropriate management" to open up a discussion about "'more appropriate' ways of behaving."[236] Follow-up counseling of the bully can also help to alleviate the behavior, at least in less serious instances.[237]

Accommodations for targets of bullying should be based on a goal of tolerating only the "normal" stresses of a workplace,[238] not a workplace where bullying is expected and tolerated. Employers should allow the target of bullying by a supervisor or a coworker to transfer away from a bully as an accommodation, unless the employer can demonstrate that her transfer would cause the employer an undue hardship.[239] Such an approach would equate protection from more bullying to preventing exposure to toxic chemicals, because both can cause or aggravate a disability.[240] If arbitrators were empowered and inspired to adopt these

233. Fed. Emergency Mgmt. Agency v. Am. Fed'n of Gov't Emps., 137 Lab. Arb. Rep. (BL) 757, 761, 766 (2017) (Saunders, Arb.).

234. *Id.* at 766.

235. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-199702, EEOC ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES (Mar. 25, 1997).

236. Harrington, Warren & Rayner, *supra* note 12, at 383.

237. Salin, *supra* note 39, at 29.

238. Peeler v. Boeing Co., No. C14-0552RSL, 2015 U.S. Dist. LEXIS 147791, at *7 (W.D. Wash. Oct. 30, 2015); findings of fact, conclusions of law at 2016 U.S. Dist. LEXIS 24744, at *21 (W.D. Wash. Feb. 29, 2016).

239. Ryan v. Shulkin, No. 1:15-CV-02384, 2017 U.S. Dist. LEXIS 202467, at *28 (N.D. Ohio Dec. 8, 2017); Tevis v. Spare Time, Inc., 2017 BL 369767, at *21–22 (Cal. Ct. App. Oct. 16, 2017).

240. Zatz, *supra* note 134, at 1389.

creative solutions to workplace bullying, both targets and employers would benefit.

B. Preventative Policies

An arbitrator's review of the disciplinary consequences for bullies directly relies on the employer's policies prohibiting bullying behavior. Policies adopted by employers or incorporated in CBAs should define bullying behavior clearly and ensure that bullies are appropriately sanctioned.[241] As one expert stated, "[T]he most powerful form of shaping or extinguishing behavior is through the establishment of clear expectations, modeling appropriate behavior and aligning recognition and reward with the standards set."[242] Bullying should be prohibited regardless of whether the target belongs to a group protected against discrimination. As one expert pointed out, it "doesn't make sense" to disregard bullying behavior that is not directed at a target because of her membership in a protected class.[243] Employers have begun to adopt policies that prohibit bullying behavior along with discriminatory harassment.[244] For example, Fulton County, Georgia, has adopted an anti-bullying policy based on the model Healthy Workplace Bill.[245] Similarly, the Association of Corporate Counsel has recommended that employers "consider establishing a policy that prohibits workplace bullying either by creating a new policy or by expanding the employer's current harassment policy."[246]

Some employers may be concerned that adoption of anti-bullying policies will create an exception to employment at will in favor of alleged bullies.[247] However, if employers have a genuine interest in addressing bullying, adoption of clear and concrete workplace policies will support their discipline of bullies, as shown by this review of arbitration awards enforcing such policies.

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241. Namie, *supra* note 18, at 49; Loya, *supra* note 7, at 251; Gary Namie, Workplace Bullying Inst., The WBI Website 2012 Instant Poll B—Employer Workplace Bullying Policies 1 (2012), https://workplacebullying.org/research-wbi [perma.cc/7CJY-24NA].

242. Sepler, *supra* note 119, at 12.

243. Martin Berman-Gorvine, *Consistently Enforce Policies to Stop Bullying*, Daily Lab. Rep. (BL) (Jan. 4, 2017, 4:32 PM), https://news.bloomberglaw.com/daily-labor-report/consistently-enforce-policies-to-stop-bullying [perma.cc/RZ2U-UHT6].

244. Kerri Lynn Stone, *Floor to Ceiling: How Setbacks and Challenges to the Anti-Bullying Movement Pose Challenges to Employers Who Wish to Ban Bullying*, 22 Temp. Pol. & Civ. Rts. L. Rev. 355, 364–65 (2013).

245. Yamada, *supra* note 25, at 343.

246. Carol R. Gibbons, Rodney A. Satterwhite & Latoya C. Asia, *Don't Get Pushed Around: What Employers Should Do to Address Bullying Behavior in the Workplace*, Ass'n of Corp. Couns. Docket, Apr. 2010, at 84, 90; *see also* Stone, *supra* note 244, at 365; Renee L. Cowan, *"Yes, We Have an Anti-Bullying Policy But.:" HR Professionals' Understandings and Experiences with Workplace Bullying Policy*, 62 Commc'n Stud. 307, 314 (2011).

247. Stone, *supra* note 244, at 370; David Yamada, New Workplace Inst., Potential Legal Protections and Liabilities for Workplace Bullying 12 (2007), http://www.academia.edu/161810/Potential_Legal_Protections_and_Liabilities_for_Workplace_Bullying [perma.cc/WTA4-G5NH].

To be effective, organizational policies and procedures to address bullying should include a "detailed description of its specific objectives outlining both the individual and the shared responsibilities of the employer and its employees."[248] Policies should include specific examples of both "acceptable and unacceptable" behaviors.[249] For instance, a manager's "style" should not include "placing employees in a state of fear of injury."[250] Clear policies make it more difficult for employers to excuse a bully's behavior by saying they did not know it was unacceptable.[251] Employers' policies also should define bullying precisely and "declare its unacceptability,"[252] including specific levels of discipline for different levels of bullying behavior. Such clarity not only discourages bullying, but also protect alleged bullies against unfair discipline.

Clearer policies also will avoid conflict with the National Labor Relations Act's protection of concerted activity.[253] An employer's civility rule can constitute an unfair labor practice if it "explicitly restricts" communication among employees concerning terms and conditions of employment.[254] Thus, employers should adopt policies that are not vague or overbroad.[255] Under a clear policy, employers can continue to discipline bullies even if the bullying behavior might otherwise be categorized as concerted activity, at least when the behavior includes insubordination, physical contact, or threats.[256] Clear policies also lead to more consistent application and enforcement, which can help employers avoid discrimination claims by the bully.[257]

Effectiveness, including the encouragement of reporting, is promoted by a policy with a "detailed description of the procedures used

248. Namie, Namie & Lutgen-Sandvik, *supra* note 26, at 463.

249. Reggie Hall & Sue Lewis, *Managing Workplace Bullying and Social Media Policy: Implications for Employee Engagement*, 1 ACAD. BUS. RSCH. J. 128, 135 (2014); Stone, *supra* note 244, at 367.

250. Elkon, *supra* note 159.

251. Martin Berman-Gorvine, *HR Plays Crucial Role in Easing Workplace Conflict*, DAILY LAB. REP. (BL) (July 7, 2017, 4:29 PM), https://www.bloomberglaw.com/document/XEBM6H8G000000 [https://perma.cc/87MG-XUVF].

252. Namie, *supra* note 18, at 49.

253. Joseph Ambash & Melanie Webber, Fisher Phillips, Taking the Bully by the Horns Webinar (Sept. 19, 2017) (recording link available, https://www.fisherphillips.com/newsroom-events-taking-the-bully-by-the-horns-identifying [https://perma.cc/8249-M33G]).

254. Stone, *supra* note 244, at 374–75; *see, e.g.*, Martin Luther Mem'l Home, Inc., 343 N.L.R.B. 646, 647 (2004) (rule prohibiting "abusive or profane language" not unlawful on its face).

255. Christopher Alvarez, *"Civil" War at the Workplace: Enforcing Civility Rules in Light of Federal Roadblocks*, FISHER PHILLIPS (June 30, 2017), https://www.fisherphillips.com/resources-newsletters-article-civil-war-at-the-workplace-enforcing-civility.

256. Stone, *supra* note 244, at 376; *see, e.g.*, St. Margaret Mercy Healthcare Ctrs., 350 N.L.R.B. 203, 204 (2007) (concerted activity loses protection if violent or "of such serious character as to render the employee unfit for further service).

257. Berman-Gorvine, *supra* note 243.

to file, investigate, and resolve a bullying complaint in a timely manner."[258] Policies on corrective action for bullies should "ensure that all organizational members understand the actions that should take place if bullying occurs."[259] Punitive measures "send a clear signal" to the bully and others in the organization about the unacceptability of bullying behavior.[260] Employer policies on bullying should also outline a procedure for reporting by targets or observers.[261] Reporting targets and observers should be assured of their job security through a concrete and enforceable "anti-retaliation provision and assurances of timely investigations, due process, an appeals process, and confidentiality."[262]

An employer policy to address bullying also should provide for implementation of corrective action where warranted.[263] As one expert noted, "[P]olicies will not succeed in preventing workplace harassment and bullying if they are not properly enforced."[264] In the related area of preventing harassment, for example, human resources consulting firms advise employers to administer "discipline that is prompt, consistent, and proportionate to the severity of the harassment," and would even evaluate supervisors and managers based on implementation of "metrics for harassment response and prevention."[265] Similarly, the Society for Human Resource Management (SHRM) has suggested that employers seeking to address harassment should take "appropriate action to remediate or prevent the prohibited conduct from continuing."[266]

Potential bullies "need to have a reason to fear real consequences."[267] Thus, an employer's policy should specify a "hierarchy of bad behaviors," with "proportionate corrective action based on how bad the conduct is," and less severe discipline for conduct that falls into a

258. Meglich-Sespico, Faley & Knapp, *supra* note 120, at 35, 39; Maarit Vartia & Stavroula Leka, *Interventions for the Prevention and Management of Bullying at Work*, *in* Bullying & Harassment in the Workplace, *supra* note 25, at 359, 365.

259. Bartlett & Bartlett, *supra* note 6, at 81.

260. Salin, *supra* note 39, at 29.

261. Stone, *supra* note 244, at 367.

262. *Id.*

263. *See, e.g.*, Unison, Harassment at Work, A Unison Guide 19–20 (2016), https://www.unison.org.uk/get-help/knowledge/discrimination/bullying-and-harassment [https://perma.cc/CG8K-R6NS] (scroll down to Resources and click on the linked pdf, "Harassment at Work"); *id.* at 28–34 (containing a draft policy).

264. Loya, *supra* note 7, at 252.

265. Chai R. Feldblum & Victoria A. Lipnic, U.S. Equal Emp. Opportunity Comm'n, Select Task Force on the Study of Harassment in the Workplace 79 (2016), https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf.

266. *Why Your HR Department Can't Stop Sexual Harassment*, Daily Lab. Rep. (BL) (Oct. 30, 2017, 9:56 AM), https://www.bloomberglaw.com/document/XCRSRHGS000000 [https://perma.cc/RQ4E-DHAB].

267. Martin Berman-Gorvine, *When Anti-Harassment Policy Isn't Enough, Fix Corporate Culture*, Daily Lab. Rep. (BL) (Nov. 24, 2017, 8:05 AM), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/daily-labor-report/XDRGTUA8000000.

"grey area."[268] In general, the intervention to address bullying should be tailored to the specific organization's needs and resources.[269] Policies to address bullying should outline penalties for those employees who violate these policies,[270] providing notice to employees that any violation of the policy may result in discipline, up to and including discharge.[271] For example, using the analysis of IIED claims as a guide, an isolated instance nonviolent bullying may not warrant discharge, whereas a more pervasive or violent form of bullying might.

Not all employers adopt or enforce anti-bullying policies. Some experts have recognized the need for employers to consider the appropriateness of their responses to harassment,[272] which suggests that a similar review of appropriate responses would help prevent bullying behavior. Questions of enforcement of policy are left to the employer in an unorganized workplace, but the union and the applicable CBA play a significant role in a unionized workplace.

C. Collective Bargaining

CBA provisions can be negotiated to protect employees against abusive supervision,[273] as well as protection against bullying by coworkers or other third parties.[274] In a CBA, a union can negotiate for a fair process and secure advantage as a repeat player in that process.[275] In fact, collective action to address bullying by both supervisors and others can be an important means of workers' collectivism.[276] While assuring the fairness of the process for both the accused and targets, collective bargaining presents an opportunity to address and eradicate bullying behaviors in the workplace, based on employers' and unions' common interest in providing a safe and productive place for employees to work.[277] Unionized, targeted employees may not always trust their union to handle claims of workplace bullying, particularly

268. Jonathan Segal, Construing a Continuum of Harassing Behaviors, Daily Lab. Rep. (BL) (Jan. 22, 2017, 5:30 AM), https://news.bloomberglaw.com/daily-labor-report/construing-a-continuum-of-harassing-behaviors [https://perma.cc/Q4VL-JQVW].

269. Vartia & Leka, *supra* note 258, at 375.

270. Hall & Lewis, *supra* note 249, at 135.

271. Alvarez, *supra* note 255; Stone, *supra* note 244, at 367.

272. Chris Opfer, *Weinstein Saga Has Business Leaders Calling Their Lawyers*, BLOOMBERG L. (Oct. 20, 2017, 6:59 AM), https://news.bloomberglaw.com/business-and-practice/weinstein-saga-has-business-leaders-calling-their-lawyers [https://perma.cc/4W3V-PPV7].

273. Yamada, *supra* note 61, at 271.

274. Dan Calvin, *Workplace Bullying Statutes and the Potential Effect on Small Business*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 167, 172 (2012).

275. Ann C. Hodges, *Employee Voice in Arbitration*, 22 EMP. RTS. & EMP. POL'Y J. 235, 242 (2018); Sarah Rudolph Cole, *Let the Grand Experiment Begin:* Pyett *Authorizes Arbitration of Unionized Employees' Statutory Discrimination Claims*, 14 LEWIS & CLARK L. REV. 861, 863 (2010).

276. David Beale, *An Industrial Relations Perspective of Workplace Bullying*, *in* BULLYING & HARASSMENT IN THE WORKPLACE, *supra* note 25, at 283, 288.

277. Yamada, *supra* note 46, at 174.

if the bully is also a union member, but targets also have recognized that "[u]nions are more necessary than ever to protect worker health and safety. Employers' power must be checked."[278] In fact, a Workplace Bullying Institute survey found that employees believed that if unions lost the right to bargain for working conditions, more bullying could be expected.[279]

Both parties to a CBA will benefit if policies against bullying are discussed during contract negotiations. Policies against bullying will be more effective if employees have a voice in their creation.[280] Inclusion of anti-bullying provisions in a CBA not only protects employees from unfair discipline, but also against mistreatment by both supervisors and coworkers.[281] Under most CBA's, an employee cannot file a grievance against another employee, but a typical policy would allow an employee to file a grievance against management for allowing the bullying to continue—regardless of whether the bullying was committed by a supervisor or a coworker. Such protections help address the power imbalance between workers and management.[282] In addition, a union's negotiation of fair arbitration processes can alleviate some of the concerns associated with employment arbitration outlined above. Along with unions, worker organizations have begun to include addressing workplace harassment in their agendas,[283] which can and should be expanded to address bullying as well.

Like the recommendations for employer policies outlined above, a CBA's grievance process is only effective and fair if the CBA specifies which bullying behaviors are prohibited.[284] Such protections can include protection against abusive supervision as well as bullying by coworkers. For example, an agreement between two unions and the Commonwealth of Massachusetts protected against abusive supervision but also requires employees to show "mutual respect" and states

278. Gary Namie, Workplace Bullying Inst., The WBI Website 2011 Instant Poll—A, Unions & Workplace Bullying 1 (2011), http://www.workplacebullying.org/ download /unions-and-workplace-bullying/?wpdmdl=2633&refresh=60e4da56dd8a91625610838.

279. Gary Namie, Workplace Bullying Inst., The WBI Website 2011 Instant Poll—C, More Bullying When Bargaining Rights Are Lost 4 (2011), https://www.workplace bullying.org/download/more-bullying-when-bargaining-rights-are-lost/?wpdmdl =2638&refresh=60e4d9cad5ebe1625610698.

280. Charlotte Rayner & Duncan Lewis, *Managing Workplace Bullying: The Role of Policies in Bullying & Harassment in the Workplace: Developments*, *in* Bullying & Harassment in the Workplace, *supra* note 25, at 327, 330–31; Vartia & Leka, *supra* note 258, at 365.

281. Austin, *supra* note 72, at 46.

282. Beale, *supra* note 276, at 290.

283. *See, e.g.*, Adam Chandler, Perspective, *The Fast-Food Industry's Dismal Labor Practices Are Just the Tip of the Iceberg*, Wash. Post (June 3, 2019), https://www.washington post.com/outlook/2019/06/03/fast-food-industrys-dismal-labor-practices-are-just-tip-ice berg [https://perma.cc/QU4W-DB8Z].

284. Meglich-Sespico, Faley & Knapp, *supra* note 120, at 35.

that bullying is "unacceptable and will not be tolerated."[285] Clarity regarding the prohibited conduct and the accompanying punishment, as well as consistent enforcement of such a policy, supports more consistent and enforceable discipline in the future.[286] As one arbitrator explained, an employer's failure "to exercise adequate control results in behavior which it considers to be reprehensible only in degree but not in kind, an employee may not be as severely disciplined as if the Employer diligently and uniformly" enforced the policy in question.[287] Our review of awards also demonstrates that more specific language can benefit accused bullies whose conduct does not rise to the level of the specific prohibited conduct.

Anti-bullying CBA provisions should, like an employer's anti-bullying policy, "give a clear notice to its employees that the type of conduct involved here has been found to be a violation . . . and subject to severe discipline."[288] Even if a CBA provision is not labeled "anti-bullying," CBAs could include protections against bullying by supervisors in a section on workplace safety or just-cause protection. Our review of arbitration awards demonstrates how parties have adopted various guidelines for workplace conduct applicable to bargaining unit members through provisions against physical or verbal abuse. A CBA can also include protections for the target of bullying, including the ability to avoid future bullying if the bully remains at work, heightened scrutiny of discipline against a target who has reported bullying, and other protections against retaliation for filing a complaint.[289]

To support a culture that does not condone bullying behavior, parties to a CBA should agree upon the appropriate level of punishment for various types of bullying behavior. For example, a physical assault likely would warrant a more severe punishment than the use of discourteous language. The parties should also consider the other factors used by some courts hearing IIED claims, such as the level of authority of the bully over the target and the continuity of the bullying, in categorizing punishment for different bullying behaviors. The parties to a CBA should specifically negotiate if and when mitigating or aggravating circumstances will be considered in determining the appropriate response to bullying behavior. For example, parties to a CBA can decide whether job tenure or past performance should be part of a just-cause determination in setting the discipline to be imposed on a bully. If the

285. Yamada, *supra* note 46, at 174–75.

286. *See, e.g.*, Equistar Chems. v. Int'l Union of Operating Eng'rs, Local 399, 126 Lab. Arb. Rep. (BB) 1480, 1496–97 (2009) (Goldstein, Arb.) (general atmosphere including horseplay supported reduction of discharge to thirty-day suspension).

287. *Id.* at 1496.

288. Sara Lee Foods v. Int'l Union of Operating Eng'rs, Local 101-S, 128 Lab. Arb. Rep. (BL) 129, 137 (2010) (Pratte, Arb.).

289. *See, e.g.*, Emp. Redacted v. Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO, Local Redacted, 2017 Lab. Arb. Rep. Supp. (BL) 200677 (2017) (Horowitz, Arb.).

parties decide that mitigating or aggravating circumstances should be considered at least for some types of bullying behavior, those situations and the circumstances should be clearly defined.[290] Such specificity regarding appropriate responses to bullying can help alleviate the concern that arbitration will lead to inappropriate reinstatement of proven bullies, while still protecting the interests of employees accused of bullying.

Conclusion

By considering creative and more explicit policies and CBA provisions to address bullying, employers and unions can help address the persistence of such behaviors in the workplace. Some arbitrators have adopted creative remedies to assure that a bully who returns to work will likely not continue bullying behavior. Employers and unions can adopt guidelines for arbitrators that require consideration of such safeguards before returning a bully to work. In addition, allowing for accommodations can help to address the concerns and interests of the target of such behavior. More broadly, employers or the parties to a collective bargaining agreement can agree to more specific descriptions of prohibited behavior and appropriate levels of punishment to put employees on more specific notice than provided by many "zero tolerance" policies. Empowering arbitrators to enforce these more specific prohibitions against bullying will address the harm that results from bullying behavior, while still protecting workplace job security process rights.

290. Rayner & Lewis, *supra* note 280, at 335.

Appendix

Table 1: Outcomes of Grievances Filed by Bullies Who Were Discharged

Type of Behavior by Grievant	Total No. of Grievances by Discharged Employees	No./% of Grievances Sustained	Punishment Vacated in Sustained Grievances (no./%)	Discharge Reduced to Warning (no./%)	Discharge Reduced to Suspension (no./%)	Reinstated with No Back Pay (no./%)
Violence or Threats	81	31/81 (38%)	7/31 (23%)	4/31 (13%)	12/31 (39%)	6/31 (19%)
Profanity/ Discourtesy **only**	33	15/33 (45%)	3/15 (20%)	2/15 (13%)	7/15 (47%)	3/15 (20%)
Total	114	46/114 (40%)	10/46 (22%)	6/46 (13%)	19/46 (41%)	9/46 (20%)

Table 2: Consideration of Mitigating and Aggravating Circumstances

Type of Behavior by Grievant	Awards Considering Any Circumstances (no./%)	Job Tenure (no./% of awards considering any)	Past Performance (no./%)	Past Discipline/ Misbehavior (no./%)	Behavior of Others (no./%)	Disability of Grievant (no./%)
Violence or Threats	44/81 (54%)	26/44 (59%)	11/44 (25%)	21/44 (48%)	11/44 (25%)	3/44 (7%)
Profanity/ Discourtesy	12/33 (36%)	8/12 (67%)	5/12 (15%)	7/12 (58%)	0/12 (0%)	1/12 (8%)
Total	56/114 (49%)	34/56 (61%)	16/56 (29%)	28/56 (50%)	12/56 (21%)	4/56 (7%)