Tackling Workplace Bullying in Tort: Emerging Extreme and Outrageous Conduct Test Averts Need for Statutory Solution

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Introduction

In 2013, Jonathan Martin, a starter for the Miami Dolphins professional football team, checked into a local hospital for psychological treatment after a year of repeated harassment by three teammates.[1] The players had made persistent graphic sexual remarks and obscene gestures about Martin's sister and mother.[2] Martin's teammates bombarded him with racial and vulgar insults like "nigger," "shinebox," "cunt," "bitch," and "faggot."[3] On one occasion, a lineman roughed up Martin in front of other players to humiliate him.[4] At least one teammate admitted wanting to "break" Martin by causing him to have an "emotional reaction."[5] Independent investigators from Paul Weiss concluded the conduct was workplace bullying.[6]

Martin experienced depression as a result of the harassment.[7] He contemplated suicide twice.[8] Martin missed the last eight games of the 2013 season and left the Dolphins for another team.[9] If workplace bullying can disrupt the mental health and employment of a six-foot

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1. *See* Paul, Weiss, Rifkind, Wharton & Garrison LLP et al., *Report to the National Football League Concerning Issues of Workplace Harassment at the Miami Dolphins*, at iv (Feb. 14, 2014), http://workplacebullying.org/multi/pdf/PaulWeissReport.pdf.
2. *See id.* at 9–12.
3. *Id.* at 11–12.
4. *See id.* at 42–43, 85–88.
5. *Id.* at 41–42.
6. *See id.* at 17–19.
7. *See id.* at 14–17.
8. *See id.* at 13–14.
9. Chris Strauss, *Jonathan Martin Takes Another Step Away from Dolphins' Scandal*, USA TODAY (Aug. 4, 2014), http://www.usatoday.com/story/sports/nfl/49ers/2014/08/08/jonathan-martin-takes-another-step-away-from-dolphins-scandal/13766211/.

five-inch, 313-pound Stanford-educated NFL lineman,[10] workplace bullying is a real problem in America.

Part I of this Article addresses the nature of workplace bullying, its scope, and the intentional infliction of emotional distress (IIED) tort, which bullying victims often rely on when seeking legal redress. Part I also describes foreign legislation addressing workplace bullying and a proposed statutory cause of action for workplace bullying in the United States. Part II.A explains that persistent workplace harassment occurring over time is actionable under IIED case law. Part II.A criticizes some courts that have erroneously narrowed IIED doctrine in workplace bullying cases, either by restricting the definition of extreme and outrageous conduct, or by requiring additional elements for the tort.

Part II.B argues that, despite these occasional judicial blunders, the emerging extreme and outrageous conduct standard in workplace bullying IIED cases warrants retaining the IIED remedy rather than seeking a statutory solution. The incipient standard authorizes courts to give IIED a more robust role in redressing workplace bullying. Common law IIED doctrine can flexibly balance the competing interests in workplace bullying cases to address its varying forms and can adjust to changing social views about workplace bullying. Part III asserts that the proposed U.S. statutory scheme discussed in Part I would add little value compared to the common law approach and would risk compromising Title VII harassment law, encourage frivolous suits, and fail to capture effectively the full range of workplace bullying.

I. America's Workplace Bullying Problem

Media attention has increased public awareness of workplace bullying. The hit film *The Devil Wears Prada* featured workplace bullying.[11] Television network news shows and National Public Radio have covered the issue.[12] YouTube is replete with videos presenting workplace bullying lectures.[13] Self-help books on workplace bullying

10. Paul, Weiss, Rifkind, Wharton & Garrison LLP et al., *supra* note 1.

11. *See* THE DEVIL WEARS PRADA (Twentieth Century Fox 2006) (based on Lauren Weisberger's 2003 novel of the same name).

12. *See ABC World News: Bullying on the Job* (ABC television broadcast Oct. 9, 2013), http://abcnews.go.com/WNT/video/bullying-job-20524429; *How to Best Manage Workplace Bullying* (NPR radio broadcast Nov. 14, 2013), http://www.npr.org/2013/11/14/245154300/how-best-to-manage-workplace-bullying; *Today Show: Workplace Bullies—Are Women the Worst Offenders?* (NBC television broadcast July 14, 2009), http://www.workplacebullying.org/2009/07/14/today/.

13. *See, e.g.*, search results for "Workplace Bullying," YOUTUBE, https://www.youtube.com/results?search_query=workplace+bullying (last visited Oct.13, 2015).

abound.[14] Newspapers, magazines, and blogs regularly address the topic.[15]

The phrase "workplace bullying" also has found its way into contemporary case law. In 2008, the Indiana Supreme Court used this phrase in *Raess v. Doescher*[16]—the first reported judicial reference to workplace bullying. The *Raess* plaintiff, a hospital employee, presented evidence that a surgeon approached him, showed clenched fists, screamed, swore, and threatened to strike him.[17] The court affirmed the lower court's rejection of the defendant's proposed jury instruction that workplace bullying was not an issue in the alleged assault claim.[18] The court also approved the admission of expert witness testimony by a psychologist with expertise in bullying, who characterized the surgeon's conduct as workplace bullying.[19]

A. Nature of Workplace Bullying

Workplace bullying is a relatively new area of academic research. Until the early 1990s, only Scandinavian scholars focused on the subject.[20] U.S. researchers confined themselves mainly to workplace physical

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14. *See, e.g.*, MARGARET R. KOHUT, THE COMPLETE GUIDE TO UNDERSTANDING, CONTROLLING AND STOPPING BULLIES & BULLYING AT WORK: A COMPLETE GUIDE FOR MANAGERS, SUPERVISORS, AND CO-WORKERS (2008); GARY NAMIE & RUTH NAMIE, THE BULLY AT WORK: WHAT YOU CAN DO TO STOP THE HURT AND RECLAIM YOUR DIGNITY ON THE JOB (2000); NOREEN TEHRANI, WORKPLACE BULLYING: SYMPTOMS AND SOLUTIONS (2012) (ebook); JONAS WARSTAD, BULLY EXPOSED: THE SECRETS OF DEALING WITH BULLIES AT WORK (2012).

15. *See, e.g.*, Bella English, *Dealing with Bullies in the Workplace*, BOSTON GLOBE (July 29, 2014), http://www.bostonglobe.com/lifestyle/2014/07/29/dealing-with-workplace-bullies/nWqpS2i9RTE7DyHSgmTieM/story.html; Baron C. Hanson, *Diagnose and Eliminate Workplace Bullying*, HBR BLOG NETWORK (July 13, 2011), http://blogs.hbr.org/2011/07/diagnose-and-eliminate-workplace/; Tara Parker-Pope, *When the Bully Sits in the Next Cubicle*, N.Y. TIMES, Mar. 25, 2008, at F5, http://www.nytimes.com/2008/03/25/health/25well.html?_r=0 ; Joyce E. A. Russell, *Career Coach: Dealing with Bullies in the Workplace*, WASH. POST (May 27, 2012, 6:20 PM), http://www.washingtonpost.com/business/capitalbusiness/career-coach-dealing-with-bullies-in-theworkplace/2012/05/25/gJQAHPT3uU_story.html.

16. 883 N.E.2d 790, 798–99 (Ind. 2008).

17. *Id.* at 794.

18. *Id.* at 798–99.

19. *Id.* at 795–97. Dr. Gary Namie, the expert witness in *Raess*, is an organizational psychologist and co-founder of the Workplace Bullying Institute. *Who We Are*, THE WORKPLACE BULLYING INST., http://www.workplacebullying.org/the-drs-namie/ (last visited Oct. 13, 2015). Dr. Namie is one of the leading proponents of the Healthy Workplace Act (discussed *infra* Part I.E); *see also* David Shadovitz, *Taking Aim at Workplace Bullies*, HUMAN RES. EXEC. ONLINE (July 10, 2014), http://www.hreonline.com/HRE/view/story.jhtml?id=534357295.

20. Ståle Einarsen et al., *The Concept of Bullying and Harassment at Work: The European Tradition*, *in* BULLYING AND HARASSMENT IN THE WORKPLACE: DEVELOPMENTS IN THEORY, RESEARCH, AND PRACTICE 3, 6 (2d ed., Ståle Einarsen et al. eds., 2011) [hereinafter BULLYING AND HARASSMENT IN THE WORKPLACE]; John Lipinski et al., *History of Bullying in the American Workplace*, *in* BULLYING IN THE WORKPLACE: CAUSES, SYMPTOMS, AND REMEDIES 17, 18 (John Lipinski & Laura Crothers eds., 2014) [hereinafter BULLYING IN THE WORKPLACE].

aggression and violence until roughly fifteen years ago when interest in the topic spread across Europe.[21]

Researchers in this new field have wrestled with various formulations of workplace bullying to develop a uniform definition.[22] They rely most frequently on the definition by psychologist Ståle Einarsen and his colleagues.[23] Einarsen suggested that workplace bullying is "harassing, offending, or socially excluding someone or negatively affecting someone's work . . . repeatedly and regularly . . . and over a period of time (e.g., about six months)."[24] Einarsen described workplace bullying as a process that intensifies over time and places the target in a poorer position.[25] Other scholars characterized the conduct as "direct or indirect, but highly unwanted, negative acts of a non-sexual and mainly non-violent nature."[26]

Einarsen argued that whether a minimum duration requirement is appropriate in defining workplace bullying "depends on the practical context."[27] In Einarsen's view, "bullying" is "systematic and prolonged negative behaviour," and "severe bullying" lasts at least six months.[28] As Einarsen noted, Heinz Leymann, a bullying research pioneer, found that a six-month minimum duration requirement was appropriate because that standard is commonly used to assess psychiatric disorders.[29]

Workplace bullying negatively affects exposed workers' health, including increased risks of depression, emotional exhaustion,[30] post-

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21. Loraleigh Keashly & Karen Jagatic, *North American Perspectives on Hostile Behaviors and Bullying at Work, in* BULLYING AND HARASSMENT IN THE WORKPLACE, *supra* note 20, at 41–42; Lipinski et al., *supra* note 20.

22. *See* Morton B. Nielsen et al., *The Impact of Methodological Moderators on Prevalence Rates of Workplace Bullying*, 83 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 955, 957 (2010); James B. Schreiber, *Measurement Issues in the "Phenomenon," in* BULLYING IN THE WORKPLACE, *supra* note 20, at 35.

23. Although Einarsen worked on this article with co-authors, Helge Hoel, Dieter Zapf, and Cary L. Cooper, for ease of reference, in textual sentences, we refer to this article by its lead author only.

24. Einarsen et al., *supra* note 20, at 22; *see also* Al-Karim Samnani, *"Is This Bullying?" Understanding Target and Witness Reactions*, 28 J. MANAGERIAL PSYCHOL. 290, 291 (2014); Noreen Tehrani, *Introduction to Workplace Bullying*, *in* WORKPLACE BULLYING: SYMPTOMS & SOLUTIONS 3–4 (Noreen Tehrani ed., 2012) (quoting Einarsen et al.); Kate van Heugten, *Resilience as an Underexplored Outcome of Workplace Bullying*, 23 QUALITATIVE HEALTH RES. 291, 291 (2012) (same).

25. Einarsen et al., *supra* note 20, at 22.

26. Nielsen et al., *supra* note 22, at 956–57.

27. Einarsen et al., *supra* note 20, at 13.

28. *Id.*

29. *See* Heinz Leymann, *The Content and Development of Mobbing at Work*, 5 EUR. J. WORK & ORGANIZATIONAL PSYCHOL. 165, 168 (1996), *construed in* Einarsen et al., *supra* note 20, at 12.

30. Bennet J. Tepper, *Consequences of Abusive Supervision*, 43 ACAD. MGMT. J. 178, 186 (1999); *see also* Jose M. Leon-Perez et al., *Identifying Victims of Workplace Bullying by Integrating Traditional Estimation Approaches into a Latent Class Cluster Model*, 29 J. INTERPERSONAL VIOLENCE 1155, 1169–71 (2013).

traumatic stress disorder,[31] suicide,[32] and problem drinking,[33] and may be associated with a heightened risk of cardiovascular disease.[34]

Workplace bullying also takes an organizational toll.[35] Organizational costs include absenteeism, turnover, low productivity, loss of goodwill, and increased litigation.[36] In 2007, researchers estimated that workplace bullying costs British employers £13.75 billion, or nearly $22.5 billion, annually.[37] This estimate is based on data regarding absenteeism, turnover, and productivity loss.[38]

B. Scope of Workplace Bullying

Workplace bullying is a significant contemporary problem. A meta-analysis of eighty-six international prevalence studies found that 14.6% of workers are bullied at work.[39] Earlier research of U.S. workers revealed an incidence rate between 9.4% and 28%.[40] Recent Spanish research combining measurement methods found that 12% of employees "had been occasionally subjected to work-related bullying; 5% had been exposed to a high number of negative behaviors in a systematic way, and thus these employees could be categorized as

31. *See* Alfredo Rodriguez-Muñoz et al., *Post-Traumatic Symptoms Among Victims of Workplace Bullying: Exploring Gender Differences and Shattered Assumptions*, 40 J. APPLIED SOC. PSYCHOL. 2616, 2617 (2010).

32. *See* Maurizio Pompili et al., *Suicide Risk and Exposure to Mobbing*, 31 WORK 237, 239 (2008).

33. *See* Kathleen M. Rospenda et al., *Prevalence and Mental Health Correlates of Harassment and Discrimination in the Workplace: Results from a National Study*, 24 J. INTERPERSONAL VIOLENCE 819, 839 (2009).

34. *See* Mika Kivimäki et al., *Justice at Work and Reduced Risk of Coronary Artery Heart Disease Among Employees*, 165 ARCHIVES INTERNAL MED. 2245, 2248–49 (2005) (correlating perception of supervisor unfair treatment and increased risk of coronary artery disease).

35. *See* Helge Hoel et al., *Organisational Effects of Workplace Bullying*, *in* BULLYING AND HARASSMENT IN THE WORKPLACE, *supra* note 20, at 143. Relatively little research has explored bullying's structural effects on organizations.

36. *Id.* at 140–41.

37. *See* Sabir I. Giga et al., DIGNITY AT WORK P'SHIP, *The Costs of Workplace Bullying* 3, 15–20 (2008), http://www.workplaceviolence.ca/wvsearch/sabir%20giga.

38. *See id.*

39. Nielsen et al., *supra* note 22, at 966–67. In "self-labeling method" studies, which survey subjects' perceptions without providing definitions, 18% of workers identified themselves as bully victims. *Id.* at 967. The prevalence rate dropped to 11% in self-labeling studies that prefaced the perception question with a bullying definition. *Id.* "Behavioral experience" studies question participants about whether they perceive themselves to have experienced a range of persistent bullying behaviors. *Id.* at 958. These studies generated a prevalence estimate of 15%. *Id.*; *accord* David G. Trijueque & Jose Luis G. Gómez, *Workplace Bullying: Prevalence and Descriptive Analysis in a Multi-Occupational Sample,* 14 PSYCHOL. SPAIN 15, 19 (2010) (14% prevalence rate using Spanish language version of behavioral experience questionnaire).

40. Pamela Lutgen-Sandvik et al., *Burned by Bullying in the American Workplace: Prevalence, Perception, Degree and Impact*, 44:6 J. MGMT. STUD. 837, 849, 852 (2007).

victims of workplace bullying. . . ."[41] Although data on the prevalence of workplace bullying vary widely,[42] the research consistently documents a serious employment hazard.

C. History: Intentional Infliction of Emotional Distress

Workplace bullying victims seeking legal relief often rely upon the intentional infliction of emotional distress (IIED) tort.[43] The IIED cause of action is relatively young.[44] The Restatement of Torts, first published in 1934, specified that an actor was not liable for intentionally inflicting emotional injury on another person unless the conduct constituted assault.[45] This limitation reflected the difficulty of measuring emotional damages, the intangibility and related remoteness of emotional harm, and the desire to discourage trivial and fraudulent claims.[46]

After the Restatement's publication, William L. Prosser wrote a seminal article asserting that, despite the then-prevailing rule, courts permitted recovery for intentionally inflicted mental anguish in cases involving malicious jokes, abusive and threatening statements, and the misuse of authority.[47] Prosser argued for the recognition of a new tort, the "intentional infliction of extreme mental suffering by outrageous conduct."[48] He urged courts to stop relying on "technical torts"

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41. Jose M. Leon-Perez et al., *Identifying Victims of Workplace Bullying by Integrating Traditional Estimation Approaches into a Latent Class Cluster Model*, 29 J. INTERPERSONAL VIOLENCE 1155, 1168 (2014).

42. Differences in measurement methods may explain this variance. Nielsen et al., *supra* note 22, at 956, 967.

43. *See* Frank J. Cavico, *The Tort of Intentional Infliction of Emotional Distress in the Private Employment Sector*, 21 HOFSTRA LAB. & EMP. L.J. 109 (2003). Of course, protected class members may also resort to federal and state anti-discrimination statutes. *See* cases cited *infra* Part II.A.2. The term "protected class" refers to classes of workers protected by state or federal employment anti-discrimination statutes. *See, e.g.*, Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1344–45 (2015) (referring to persons protected by the Pregnancy Discrimination Act as members of a "protected class"). Federal anti-discrimination statutes shield groups on various grounds. *See, e.g.*, 8 U.S.C. § 1324b(a) (2012) (national origin and citizenship status); 29 U.S.C. § 158(a)(3) (union membership); *id.* § 621 (age); 42 U.S.C. § 2000e-2a (race, color, religion, sex, and national origin); *id.* § 2000e(k) (pregnancy); *id.* 2000ff-1 (genetic information); *id.* § 12101 (disability). Some state anti-discrimination laws extend protections. *See, e.g.*, HAW. REV. STAT. §§ 378-2(1)(A), 378-2.5 (2015) (arrest and court records); IOWA CODE § 216.6A(2a) (2015) (sexual orientation and gender identity).

44. *See infra* text accompanying notes 50–51.

45. *See* RESTATEMENT OF TORTS § 46 (AM. LAW INST. 1934).

46. William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 874–77 (1939).

47. *See* Prosser, *supra* note 46, at 881–86; *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 reporters' notes, at 149–50 (AM. LAW INST. 2010 & 2012). Calvert Magruder also wrote a seminal article on the topic prior to Prosser. *See* Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1051–67 (1936).

48. Prosser, *supra* note 46, at 892.

such as assault and trespass in these types of cases and instead to acknowledge an independent tort.[49]

The American Law Institute (ALI) accepted Prosser's invitation in 1948 when it adopted the IIED tort for the first time.[50] ALI omitted Prosser's outrageousness element in its 1948 formulation but added a requirement of "extreme and outrageous" conduct to the tort when it published the Restatement (Second) of Torts in 1965.[51] The 1965 version provides:

> § 46. Outrageous Conduct Causing Severe Emotional Distress
>
> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.[52]

The drafters of section 46 noted that "[t]he extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests."[53] In addition, they specified that "mere insults, indignities, threats, annoyances, petty oppressions or other trivialities" did not establish IIED liability.[54] Courts in forty-nine states have adopted section 46.[55]

The Restatement (Third) of Torts: Liability for Physical and Emotional Harm retains the substance of the Restatement (Second) of Torts definition.[56] The comments list abuse of authority as one factor in determining whether conduct is extreme and outrageous.[57] The comments continue to exclude claims based on "ordinary insults."[58]

As Professor Mark Gergen observed,[59] sexual harassment-based IIED claims reflect the "moral quality" inherent in IIED analysis. Ger-

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49. *Id.* at 880, 892.

50. Restatement of Torts § 46 (Am. Law Inst., Supp. 1948).

51. *Compare id.*, *with* Restatement (Second) of Torts § 46 (Am. Law Inst. 1965).

52. Restatement (Second) of Torts § 46 (Am. Law Inst. 1965).

53. *Id.* at cmt. e.

54. *Id.* at cmt. d.

55. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 46 reporters' note, cmt. a (Am. Law Inst. 2010 & 2012).

56. *Id.* § 46. The Restatement (Third) provides:

> § 46. Intentional (or Reckless) Infliction of Emotional Harm
>
> An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm.

Id.

57. *Id.* § 46, cmt. d.

58. *Id.* In addition, the drafters specify "[n]othing in this Restatement restricts plaintiffs who assert occupational claims from proceeding under this Section." *Id.* § 46, cmt. n.

59. Mark P. Gergen, *A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation*, 74 Tex. L. Rev. 1693, 1709–10 (1996).

gen found that judicial treatment of sexual harassment-based IIED claims shifted dramatically in two generations.[60] Seventy years before, courts treated sexual propositions as if "there is no harm in asking."[61] Today's courts regularly recognize sexual harassment-based IIED claims.[62] Gergen believed this history demonstrated "how the outrage standard allows new moral values to be woven into the fabric of the common law."[63]

D. Foreign Anti-Bullying Legislation

Sweden,[64] France,[65] Belgium,[66] and Québec[67] have legislatively banned workplace bullying. Belgium and Québec explicitly authorize recovery of damages from employers and perpetrators.[68] French courts interpret their statute to allow damages.[69]

In France, prohibition of workplace bullying, which French call "moral harassment," is well-developed.[70] The 2002 Social Modernization Act[71] amended the French Labor Code to state:

> No employee shall suffer repeated actions that have the object or the effect of a degradation of his or her working conditions that are likely to violate his or her rights and dignity, to damage his or her physical and mental health, or to compromise his or her professional future.[72]

The French Penal Code criminalizes moral harassment and permits up to two years in prison and a €30,000 fine.[73] French employers

60. *Id.*

61. Magruder, *supra* note 47, at 1055; Gergen, *supra* note 59, at 1709 (citing Magruder).

62. *See* Gergen, *supra* note 59, at 1709–10 (describing the gradual increase of IIED claims asserted by plaintiffs during the 1970s and 1980s).

63. *Id.* at 1709–10; *see also* Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2172 (2007) (Title VII has altered tort law's view of sexual conduct in work environment).

64. KRÅNKANDE SÅRBEHANDLING I ARBETSLIVET [VICTIMIZATION AT WORK] (Arbetsmiljöverket [AFS] 1993:17) (Swed).

65. CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L 1152-1 to 1152-6 (Fr.).

66. Loi Relative à la Protection Contre La Violence et Le Harcèlement Moral ou Sexuel au Travail [Act Regarding Protection Against Violence and Moral or Sexual Harassment at Work] of June 11, 2002, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], June 22, 2002.

67. An Act Respecting Labor Standards, R.S.Q. 2015, c. N-1.1, §§ 123.6–.16 (Québec, Can.).

68. *See* Act Regarding Protection Against Violence and Moral or Sexual Harassment at Work, Art. 32decies-32duodecies (Belg.); An Act Respecting Labor Standards § 123.15 (Québec, Can.); *see also* Loïc Lerouge, *Moral Harassment in the Workplace: French Law and European Perspectives*, 32 COMP. LAB. L. & POL'Y J. 109, 137–43 (2010–2011) (comparing French and Belgian statutory schemes).

69. *See* Cour de cassation [Cass.] [Supreme Court for Judicial Matters] soc., June 21, 2006, Bull. civ. V, No. 223 (Fr.); *see also* Lerouge, *supra* note 68, at 123–24.

70. Lerouge, *supra* note 68, at 111.

71. *See id.*; CODE PÉNAL [C. PÉN.] art. 222-33-2.

72. C. TRAV. art. L 1152-1 (translated from French to English).

73. C. PÉN. art. 222-33-2.

may be separately civilly liable for damages to employees for moral harassment and failure to prevent it.[74] French law also provides mediation for the victim or claimed perpetrator[75] and immunizes from retaliation workers who complain of "moral harassment."[76] The 2002 law shifted the burden of proof so that the alleged perpetrator must establish that abuse did not occur.[77]

Spain[78] and Germany[79] lack statutory prohibitions of workplace bullying, but they protect victims with other legal sources. In the United Kingdom, courts have interpreted the U.K. Protection from Harassment Act[80] to prohibit workplace bullying.[81] It is no surprise that civil law countries in continental Europe—which create law only by statute—have codified workplace bullying law, while common law countries like the United States—in which courts can create law—rely on decisional workplace bullying law.[82] Scholars also have suggested that social history may help explain workplace bullying statutory schemes in several continental European countries. Europe's emphasis on workplace dignity and concomitant bullying remedies may arise from its history of class-based mistreatment of those with low social status,[83] including feudalism. In contrast, America's statutory harassment law, premised on avoiding discrimination, is rooted in its history of African American slavery.[84]

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74. Cass. soc., Bull. civ. V, No. 169.

75. C. TRAV. art. L. 1152-6.

76. *Id.* arts. L 1152-2 & 1153-3.

77. *Id.* art. L 1154-1.

78. *See* Manuel Velásquez, *The Spanish Code of Practice on Work-Related Bullying*, 10 COMP. LAB. L. & POL'Y J. 185, 211–21 (2010) (citing Code of Practice 69/2009).

79. Philipp S. Fischinger, *"Mobbing": The German Law of Bullying*, 32 COMP. LAB. LAW & POL'Y J. 153, 159–72 (2010) (citing German decisional labor and tort law and BÜRGERLICHES GESETZBUCH [BGB] [German Civil Code], §§ 278, 280, 823, 826, 831 (Ger.)). German causes of action include statutory complaints of harassment to employers, injunctive relief against employers or offenders, tort and contract claims against employers, and tort claims against offenders. *Id.* at 159–72, 174–75.

80. 1997, c. 40, § 1 (Eng.).

81. *See, e.g.*, Veakins v. Keir Islington Ltd., [2009] EWCA Civ 1288, No. 7ML01656 (appeal taken from England). The Protection from Harassment Act creates civil remedies for damages, including emotional distress damages, and the right to injunctive relief c.40. § 3(1)-(3) (Eng.). It also criminalizes harassment, punishable by prison time and/or a fine, and creates a separate offense for putting another in fear of violence. c.40 §§ 2, 4; *see also* Susan Harthill, *Bullying in the Workplace: Lessons from the U.K.*, 17 MINN. J. INT'L L. 247, 278 (2008).

82. *Cf.* JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERMODO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 1–3, 10 (3d ed. 2007) (describing nature and geographic location of civil and common law traditions); William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 683–84 (2000) (same).

83. Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law*, 9 COLUM. J. EUR. L. 241, 268–69 (2003).

84. *Id.* at 266–68. Friedman and Whitman also argue that Europe's "tradition of stable employment" and the United States' embrace of the employment-at-will doctrine contribute to their different approaches to workplace harassment. *Id.* at 266–67.

E. Proposed American Statutory Scheme

Perhaps inspired by continental European statutory remedies, the Healthy Workplace Campaign seeks to enact similar provisions throughout the United States.[85] The campaign lobbies states to adopt the "Healthy Workplace Bill," proposed by Professor David Yamada.[86]

Professor Yamada concluded that IIED claims provided insufficient remedies for bullying targets.[87] He found that "typical workplace bullying, especially conduct unrelated to sexual harassment or other forms of status-based discrimination, seldom results in liability for IIED."[88] Professor Yamada based his conclusion on a review of state court decisions between 1995 and 1998.[89] He proposed a statutory cause of action for workplace bullying in 2000.[90]

Building on this proposal, Professor Yamada later drafted the Healthy Workplace Bill.[91] Over time, Yamada has altered aspects of the bill, which proposes a private cause of action for workplace bullying.[92] Initially, the bill contained a $25,000 cap on emotional distress damages and barred punitive damages for claims not involving an "adverse employment action."[93] The current version of the bill removes the damages cap but limits emotional distress and punitive damages to cases involving an "adverse employment action"[94] or "extreme and outrageous" conduct.[95]

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85. *See The Movement*, HEALTHY WORKPLACE BILL, http://www.healthyworkplacebill.org/about.php [hereinafter HEALTHY WORKPLACE BILL] (last visited Apr. 30, 2015). Dr. Gary Namie directs the campaign. *Id.*

86. *Id.*

87. *See* David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status–Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475 (2000) [hereinafter Yamada, *Workplace Bullying*].

88. *Id.* at 494.

89. *Id.* at 494 n.109.

90. *See id.* at 524–36.

91. David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL'Y J. 251, 259 (Fall 2010) [hereinafter Yamada, *Progress Report*].

92. *Compare id.* app., *with* David C. Yamada, *Emerging American Legal Responses to Workplace Bullying*, 22 TEMP. POL. & CIV. RTS. L. REV. 329, app. (2013) [hereinafter Yamada, *Emerging American Legal Responses*] (different version of the Healthy Workplace Bill).

93. Yamada, *Progress Report*, *supra* note 91, app. § 7(b).

94. *See* Yamada, *Emerging American Legal Responses*, *supra* note 92, at app. The bill essentially adopts the judicial interpretation of "adverse employment action" under Title VII of the Civil Rights Act of 1964 discrimination case law. *Compare id.* app. § 2(b) ("termination, demotion, unfavorable reassignment, failure to promote, disciplinary action or reduction in compensation"), *with* Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998) ("significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits").

95. Yamada, *Emerging American Legal Responses*, *supra* note 92, app. § 7(b).

The bill would require employees to demonstrate an "abusive work environment."[96] Under the bill, an abusive work environment occurs when "an employer, or one or more of its employees, acting with an intent to cause pain or distress to an employee, subjects that employee to abusive conduct that causes physical harm, psychological harm or both."[97] "Abusive conduct" consists of "acts, omissions, or both, that a reasonable person would find abusive, based on the severity, nature or frequency of the conduct."[98] Abusive conduct includes, but is not limited to:

> repeated verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal, non-verbal, or physical conduct of a threatening, intimidating, or humiliating nature; or the sabotage or undermining of an employee's work performance. It shall be considered an aggravating factor that the conduct exploited an employee's known psychological or physical illness or disability. A single act normally will not constitute abusive conduct, but an especially severe and egregious act may meet this standard.[99]

Yamada borrowed the reasonableness standard from hostile work environment case law under Title VII of the Civil Rights Act of 1964 (Title VII).[100]

The bill would impose vicarious liability on employers if a coworker's conduct creates an abusive work environment.[101] The bill provides employers an affirmative defense modeled after the *Faragher/Ellerth* Title VII defense.[102] The bill also imposes individual liability on employee perpetrators.[103] Courts could order injunctive relief, including reinstatement, "removal of the offending party from the complainant's work environment," and payment of attorney fees, front pay, back pay, medical expenses, and other types of damages.[104]

The Healthy Workplace Bill was introduced in the California legislature in 2003.[105] Since then, the bill has been introduced in twenty-

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96. *Id.* app. § 3(a).
97. *Id.* app. § 2(a).
98. *Id.* app. § 2(a)(1).
99. *Id.*
100. *Id.* at 334 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993)); *see* Title VII, 42 U.S.C. § 2000e-2a (2012) (prohibition of discrimination on the basis of race, color, religion, sex, and national origin).
101. Yamada, *Emerging American Legal Responses*, *supra* note 92, app. § 4(a).
102. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998). This affirmative defense is available only to employers that have not taken a tangible employment action against the plaintiff, and the defense relieves employers from liability if they "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and the "employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807; *see also Ellerth*, 524 U.S. at 765.
103. Yamada, *Emerging American Legal Responses*, *supra* note 92, at app. § 4–5.
104. *Id.* app. § 7(a).
105. *Id.* at 338.

nine state legislatures and in Puerto Rico and the Virgin Islands.[106] No legislature has enacted the bill.[107] Instead, recent state anti-bullying legislation has addressed employee training and employer policies. California requires employers to include "abusive conduct" as a "component" of previously mandated sexual harassment training for supervisors.[108] Utah has a similar provision, but it applies to state executive branch employees only.[109] Tennessee requires public employers to maintain workplace bullying policies and offers immunity from suit for "negligent or intentional infliction of mental anguish" to compliant employers.[110]

II. Toward a Common Law Standard for Extreme and Outrageous Conduct in Workplace Bullying Cases

Historically, commentators have attacked the common law IIED cause of action as insufficient to redress workplace bullying.[111] However, most American courts in workplace bullying IIED cases deny defendants' dismissal and summary judgment motions if plaintiffs demonstrate a pattern of persistent harassment over a period of time—even if plaintiffs are not protected class members.[112] Typically, courts also acknowledge that even a single act of abusive employment behavior may be actionable if the conduct is sufficiently egregious.[113] Occasionally, courts err by imposing additional elements on the IIED tort and by applying too stringent a standard for extreme and outrageous conduct.[114] To ensure legal recourse for workplace bullying victims, litigants should advance, and courts should adopt, the developing IIED standard for evaluating these claims.

A. Persistent Harassment Occurring over Time

As courts have struggled to apply IIED—a relatively young tort—to cases of workplace abuse, governing principles have emerged.

106. HEALTHY WORKPLACE BILL, http://healthyworkplacebill.org/ (last visited Nov. 8, 2015).

107. *Id.*

108. CAL. CODE § 12950.1(b), (g) (West 2015). This legislation amended an earlier California statute requiring employers with more than fifty employees to provide supervisors with two hours of sexual harassment prevention training every two years. *Id.*; 2014 Cal. Legis. Serv. 306 (A.B. 2053) (West).

109. UTAH CODE ANN. § 67-19-44 (West 2015). The 2015 Utah law requires that the state human resources management department provide state executive branch employees training every two years on the definition and impact of workplace bullying, resources available for victims, and the grievance process. *Id.* at (3), (5). The law specifies that it neither creates a private cause of action nor relieves any person from liability. *Id.* at (7).

110. TENN. CODE ANN. § 50-1-501 to -504 (2015).

111. *See infra* notes 250–51 and accompanying text.

112. *See infra* Part II.A.1; see also *supra* note 43 for an explanation of the term "protected class members."

113. *See infra* Part II.A.3.

114. *See infra* Part II.A.5.

Courts consider repeated behavior as a whole rather than considering each instance of behavior in isolation.[115] Using this approach, "a pattern of deliberate, repeated harassment over a period of time" is actionable.[116] Many cases applying these guidelines involve protected class members, but some involve bullying targets not covered by state or federal anti-discrimination laws.

1. Bullying of Non-Protected Class Plaintiffs

Although only a handful of courts have stated specifically that persistent harassment over time may give rise to an IIED cause of action,[117] outcomes of many workplace bullying decisions reflect general acceptance of this view.[118] For example, in *Cabaness v.*

115. *See* Craig v. Yale Univ. Sch. of Med., 838 F. Supp. 2d 4, 10 (D. Conn. 2011) (considering plaintiff's allegations "in their totality within his specific situation"); Wright v. Otis Eng'g Corp., 643 So. 2d 484, 487 (La. Ct. App. 1994) (IIED cause of action may arise from "repetitive offensive conduct which would not likely cause serious damage as an isolated incident"); Schoen v. Freightliner LLC, 199 P.3d 332, 341–43 (Or. Ct. App. 2008) (addressing totality of the circumstances, including nature of conduct, its extent, and relationship between the parties); GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 616 (Tex. 1999) (there is "overwhelming" authority that conduct should be considered as a whole); Cabaness v. Thomas, 232 P.3d 486, 501 (Utah 2010) (viewing plaintiff's allegations "together").

116. White v. Monsanto Co., 585 So. 2d 1205, 1210 (La. 1991), *quoted in* Cheatham v. Allstate Ins. Co., 465 F.3d 578, 586 (5th Cir. 2006) (without original attribution); *see also* Cavico, *supra* note 43, at 181 ("Workplace conduct between an employee and the employer or among employees will rise to the level of tortious intentional infliction of emotional distress more frequently in situations involving a pattern of purposeful, repeated conduct over a long period of time.").

117. *Cf.* Groff v. Sw. Beverage Co., 997 So. 2d 782, 786 (La. Ct. App. 2008) (affirming summary judgment on IIED claim based on single incident in which supervisor yelled profanities at plaintiff and pounded desk); Lee v. Golden Triangle Planning & Dev. Dist., Inc., 797 So. 2d 845, 851 (Miss. 2001) (affirming summary judgment on IIED cause of action premised on plaintiff's termination).

118. *See* Subbe-Hirt v. Baccigalupi, 94 F.3d 111, 114–15 (3d Cir. 1996) (reversing summary judgment on IIED claim because plaintiff asserted her manager regularly taunted, berated, and demeaned her); Harris v. Procter & Gamble Cellulose Co., 73 F.3d 321, 324 (11th Cir. 1996) (affirming denial of summary judgment on IIED claim because plaintiff alleged his supervisors harassed and humiliated him, threatened to fire him, accused him falsely, and fired him); Bristow v. Drake St. Inc., 41 F.3d 345, 355 (7th Cir. 1994) (upholding IIED verdict for plaintiff because boss fired and promptly rehired plaintiff twelve to forty times, yelled at her, stalked her outside of work, and called her ten to thirty times per night); King v. Brooks, 788 P.2d 707, 708–09 (Alaska 1990) (reversing summary judgment in favor of employer because plaintiff asserted supervisor harassed him over a two-year period, twice wrongly accused him of false arrest, and altered his personnel records); Burke v. State, No. MMXCVD65000495, 2010 WL 797286, at *5–8 (Conn. Super. Ct. Feb. 2, 2010) (defendant's motion to strike plaintiff's IIED claim denied because plaintiff alleged co-worker directed foul language and loud, harsh criticism at him and shoved him into wall); Benton v. Simpson, 829 A.2d 68, 74–76 (Conn. Ct. App. 2003) (plaintiffs sufficiently pled IIED claim against supervisor who repeatedly lost his temper and made insulting, offensive remarks to employees); Simeon, Inc. v. Cox, 655 So. 2d 156, 158 (Fla. Dist. Ct. App. 1995), *rev'd on other grounds*, 671 So. 2d 158 (Fla. 1996) (upholding order granting leave to assert punitive damages claim for IIED based on allegations that supervisor constantly referred to plaintiff in vulgar terms, filed false theft reports against her, and threw bar stools and other items at her); Smith v. Iowa State Univ., 851 N.W.2d 1, 29–30 (Iowa 2014) (affirming

Thomas,[119] the plaintiff asserted an "ongoing and continuous pattern of abusive, intimidating, and harassing behavior from his supervisor."[120] The plaintiff's supervisor allegedly insulted the plaintiff throughout his twenty-year career, labeling him a "dumbass," "jackass," and "asshole."[121] The supervisor's behavior worsened after the plaintiff and others complained about the supervisor's harassment.[122] The supervisor intentionally and unnecessarily made the plaintiff's job more difficult and disregarded safety precautions affecting his work.[123] The Utah Supreme Court viewed the behavior as a whole, reasoning: "While any of these alleged insults or indignities on their own may not rise to the level of outrageous and intolerable conduct, taken together . . . we conclude that reasonable minds could differ regarding whether [the supervisor's] conduct was outrageous and intolerable."[124]

Similarly, in *Arnold v. Thermospas, Inc.*,[125] the Connecticut Superior Court considered two employees' claims that their boss "regularly" denigrated, physically threatened, and yelled at them.[126] The plaintiffs also asserted that their boss physically intimidated them by leaning over their chairs and preventing them from standing.[127] The court, considering all of the conduct, held the employees sufficiently pled IIED claims to survive the defendant's motion to strike.[128]

In *GTE Southwest, Inc. v. Bruce*,[129] the Texas Supreme Court affirmed an IIED jury verdict in favor of three employees.[130] In *Bruce*, the plaintiffs alleged that their supervisor "regularly heaped abusive profanity"[131] on them, frequently screamed at them over a two-year period, and repeatedly charged at them.[132] The court reasoned: "We agree with the overwhelming weight of authority in this state and around the country that when repeated or ongoing severe harassment

IIED award for plaintiff because of supervisor's "unremitting psychological warfare against [plaintiff] over a substantial period of time"); Schoen v. Freightliner LLC, 199 P.3d 332, 343 (Or. Ct. App. 2008) (affirming IIED jury verdict for plaintiff whose coworker verbally harassed her for five months, and human resources manager told plaintiff she was "worthless" after plaintiff complained of harassment).

119. 232 P.3d 486 (Utah 2010).
120. *Id.* at 500.
121. *Id.* at 493.
122. *Id.* at 500.
123. *Id.*
124. *Id.* at 501.
125. 863 A.2d 250 (Conn. Super. Ct. 2004).
126. *Id.* at 254.
127. *Id.* at 252, 254.
128. *Id.* at 254. The nature of the supervisor's alleged yelling and denigrating conduct is unspecified. *Id.* Accordingly, it is difficult to assess whether the court properly dismissed a third employee's IIED claim for failure to allege physical intimidation. *See id.*
129. 998 S.W.2d 605 (Tex. 1999).
130. *Id.* at 620.
131. *Id.* at 613.
132. *Id.* at 613–14.

is shown, the conduct should be evaluated as a whole in determining whether it is extreme and outrageous."[133]

The Eleventh Circuit also viewed bullying behavior in its totality in *Lightning v. Roadway Express, Inc.*[134] In *Lightning*, supervisors "mad-dogged" the plaintiff by repeatedly verbally abusing him, including calling him a "piece of shit," "sorry son of a bitch," and "sorry ass;" urging him to quit; and spitting on him.[135] One supervisor attempted to hit the plaintiff.[136] The appellate court affirmed a judgment in favor of the plaintiff on the IIED claim, noting that the employer-employee relationship could produce a "character of outrageousness" that would not otherwise exist.[137]

Retherford v. AT & T Communications[138] addressed the duration of bullying. In *Retherford*, the plaintiff asserted that over "months of persecution," three co-workers subjected her to being followed, to intimidating and sexual remarks, and to one co-worker's sexual advances.[139] One defendant drove a car threateningly close to the plaintiff, who was on foot.[140] The co-workers began their campaign against the plaintiff after she made a good-faith sexual harassment complaint.[141] Noting the "pattern of retaliatory harassment,"[142] the Utah Supreme Court reversed the trial court's grant of summary judgment in favor of the defendants on the plaintiff's IIED claims against the three co-employees and on the plaintiff's negligent retention claim against her employer.[143]

Similarly, in *Hernandez v. Partners Warehouse Supplier Services, LLC*,[144] the Northern District of Illinois relied on a pattern of harassing employer conduct to reject the defendant's motion to dismiss a

133. *Id.* at 616. After *Bruce*, the Texas Supreme Court limited workplace IIED claims to cases not encompassed by state anti-discrimination statutes. *See* Hoffman-La Roche Inc. v. Zeltwanger, 144 S.W.3d 438, 446–48 (Tex. 2004). To the extent the *Bruce* court's use of the word "severe" is more than dicta, which is debatable, Texas is apparently the only jurisdiction requiring that ongoing bullying conduct be severe for it to view the conduct in its entirety. *See Bruce*, 998 S.W.2d at 615; *see also* cases cited *supra* Part II.A.

134. 60 F.3d 1551, 1558 (11th Cir. 1995).

135. *Id.* at 1554–55.

136. *Id.* at 1558.

137. *Id.* (citing Bridges v. Winn-Dixie Atlanta, Inc., 335 S.E.2d 445, 448 (1985)).

138. 844 P.2d 949 (Utah 1992).

139. *Id.* at 978.

140. *Id.* at 956.

141. *Id.* at 978.

142. *Id.* at 975.

143. *Id.* at 974–79. The court would have dismissed the plaintiff's IIED claims as preempted by the Labor Management Relations Act, 29 U.S.C. § 185(a) (1992), to the extent they arose from defendants' efforts to make plaintiff's job more difficult because such allegations implicated the employer's collective bargaining agreement with the plaintiff's union. *Id.* at 971–72. However, the court found that the plaintiff sufficiently alleged other facts that did not implicate the collective bargaining agreement. *Id.*

144. 890 F. Supp. 2d 951, 963–64 (N.D. Ill. 2012).

former employee's IIED claim.[145] Following several sexual harassment complaints against a supervisor, the employer embarked on a campaign to intimidate the plaintiff from supporting the complainants.[146] The employer arranged for a police officer to threaten the plaintiff with arrest and had the plaintiff followed and photographed after work hours.[147] The employer's representatives twice broke into and searched the plaintiff's car.[148] The representatives threatened the plaintiff by making phone calls and sending text messages up to ten times daily for ten months.[149] The court ruled this pattern of conduct sufficient to allege "extreme and outrageous conduct" and denied the employer's motion to dismiss the complaint.[150]

2. Bullying of Protected Class Members

In cases involving bullying of protected class plaintiffs, the same trend appears as in non-protected class cases. Plaintiffs who show lengthy persistent harassment generally succeed with courts considering harassment in its entirety.[151] In *Pennell v. Vacation Reservation*

145. *Id.* at 963.
146. *Id.*
147. *Id.* at 963–64.
148. *Id.*
149. *Id.*
150. *Id.* at 963–65.
151. *See* Akers v. Alvey, 338 F.3d 491, 497 (6th Cir. 2003) (summary judgment denied due to allegations of lewd gestures, sexual questions, comments about plaintiff's body, and harasser's attempts to look down plaintiff's blouse); Ucar v. Conn. Dep't of Transp., No. 3:14-CV-0765, 2015 WL 1014560, at *3–4 (D. Conn. Mar. 6, 2015) (characterizing claim as "thin" but denying 12(b)(6) motion because plaintiff alleged supervisor conducted harassment campaign against him, and co-workers implied he was a terrorist because of his race and religion); Russell v. Russel Motor Cars, Inc., 28 F. Supp. 3d 414, 420 (D. Md. 2014) (denying employer's motion to dismiss claim because plaintiff alleged that manager made continuous sexual comments and threatened to fire her if she complained); Thorp v. Home Health Agency-Ariz., Inc., 941 F. Supp. 2d 1138, 1142 (D. Ariz. 2013) (denying employer's 12(b)(6) motion because plaintiff alleged employer engaged in religious and sexual harassment); Stanley v. Our Lady of Bellefonte Hosp., No. 11-110-DLB, 2012 WL 4329265, at *8 (E.D. Ky. Sept. 20, 2012) (plaintiff avoided dismissal because of allegations superiors spread false rumors about plaintiff, submitted false complaint to regulator, and incorrectly asserted plaintiff illegally used drugs); Hernandez v. Partners Warehouse Supplier Servs., LLC, 890 F. Supp. 2d 951, 963 (N.D. Ill. 2012) (repeated sexual propositions and unwanted touching sufficient to state claim); Hudson v. Dr. Michael J. O'Connell's Pain Care Ctr., 822 F. Supp. 2d 84, 98 (D.N.H. 2011) (plaintiff sufficiently pled claim by alleging quid pro quo sexual harassment and sexual comments and contacts); Craig v. Yale Univ. Sch. of Med., 838 F. Supp. 2d 4 (D. Conn. 2011) (African American medical resident's claim survived 12(b)(6) motion because he alleged defendant failed to follow progressive discipline policy, assigned him high-risk patients two years early, and gave him failing grades in classes he did not take); Roche v. Audio Visual Servs. Grp., No. 2:09-CV-01810-LDG-GWF, 2010 WL 3021575, at *2–3 (D. Nev. July 28, 2010) (plaintiff sufficiently pled claim based on employer's sexual advances, retaliation, and continued harassment); Campbell v. Wal-Mart Stores, Inc., 272 F. Supp. 2d 1276, 1302–03 (N.D. Okla. 2003) (summary judgment denied because plaintiff had evidence manager engaged in daily harassment, ridicule, and unwelcome contact and attempted to shift work to her); Bernard v. Doskocil Co., 861 F. Supp. 1006, 1015 (D. Kan. 1994) ("[A]lleged incidents of [racial] harassment stack up, brick upon brick, and, in the court's

Center, LLC,[152] the plaintiff alleged that her supervisor made fun of her dwarfism in a "running commentary" throughout her three days of employment.[153] The supervisor repeatedly called the employee "Shorty," stated "can't find you," allowed other employees to refuse to work with her, and then fired her.[154] The employee sued, alleging discrimination in violation of the Americans with Disabilities Act[155] and seeking damages for IIED.[156] The Eastern District of Virginia ruled the plaintiff stated a claim for IIED because the derisive comments were not isolated, but pervaded her work.[157]

In *Pollard v. E.I. DuPont De Nemours, Inc.*,[158] the Sixth Circuit also relied on persistent sexual harassment to affirm the district court's determination that the employer was liable for IIED.[159] The plaintiff's co-workers consistently called her vulgar terms, set off false alarms in areas she supervised, sabotaged her job performance, and cited Bible verses on women's duty to submit to men.[160] Despite numerous complaints to managers, the employer took no action.[161] The court concluded that the employer's disregard of its employees' outrageous conduct was so reckless as to constitute IIED.[162]

In race harassment cases, courts are also receptive to IIED claims based on a pattern of abuse. For example, in *McClease v. R.R. Donnel-*

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view, are enough."); Collins v. African Methodist Episcopal Zion Church, No. 04C-02-121, 2006 WL 1579718, at *3–4 (Del. Super. Ct. Dec. 13, 2006) (church's summary judgment denied because pastor made sexually harassing and intimidating phone calls to plaintiff for ten months); Wenigar v. Johnson, 712 N.W. 2d 190, 208 (Minn. Ct. App. 2006) (affirming denial of employer's new trial motion on disabled ex-employee's claim based on frequency and severity of abuse); Robel v. Roundup Corp., 59 P.3d 611, 620 (Wash. 2002) (affirming verdict for injured employee on claim because manager and co-workers called plaintiff vulgar names, told customers plaintiff lied about injury, and re-enacted injury scene). *But see* Kovaco v. Rockbestos-Surprenant Cable Corp., 979 F. Supp. 2d 252, 257 (D. Conn. 2013) (summary judgment in favor of employer even though terminated employee asserted that co-workers repeatedly called him "fucking Romanian," "Romanian Gypsy," "third-world countryman," and "old shit man" over five years); Greenhorn v. Marriott Int'l, Inc., 258 F. Supp. 2d 1249, 1262 (D. Kan. 2003) (claim based on supervisor's repeated unwelcome touching, forced kisses, and sexual comments dismissed, but claim survived to extent supervisor exposed himself and demanded oral sex).

152. 783 F. Supp. 2d 819 (E.D. Va. 2011).

153. *Id.* at 821.

154. *Id.*

155. 42 U.S.C. §§ 12101–12213 (2012).

156. *Pennell*, 783 F. Supp. 2d at 821.

157. *Id.* at 823–25.

158. 412 F.3d 657, 665 (6th Cir. 2005).

159. *See id.* at 664; *see also* Siebert v. Jackson Cnty., No. 1:14-CV-188-KS-MTP, 2015 WL 4647927, at *6 (S.D. Miss. Aug. 5, 2015); Russell v. Russel Motor Cars, Inc., 28 F. Supp. 3d 414, 420 (D. Md. 2014) (employer's summary judgment motion denied because plaintiff alleged a supervisor sexually harassed her daily for months by propositioning her, making explicit remarks, and offensively touching her).

160. *See Pollard*, 412 F.3d at 660–63.

161. *Id.* at 662.

162. *Id.* at 665.

ley & Sons Co.,[163] the African American plaintiff alleged that his supervisor and manager unceasingly used racial epithets.[164] The plaintiff also asserted that his supervisor expressed a desire to eliminate blacks from the workplace and engineered the termination of many black employees, including the plaintiff.[165] The Eastern District of Pennsylvania denied the defendants' motion to dismiss, relying on the plaintiff's claim of "continuous malicious conduct" and the "special relationship between the parties."[166] Similarly, in *Bakhit v. Safety Markings, Inc.*,[167] the District of Connecticut denied the defendants' motion to dismiss the plaintiffs' IIED claims because the plaintiffs alleged that co-workers made "widespread and prevalent" racial slurs and performed racist pranks, including asking one plaintiff to open an aspirin bottle so that a co-worker could say, "I just wanted to see [a] black man pick cotton."[168]

3. Single Incidents of Egregious Conduct

While the emerging judicial consensus has upheld IIED claims in cases of persistent and protracted harassment, courts recognize that a single particularly severe incident may also qualify.[169] Arguably, the

163. 226 F. Supp. 2d 695 (E.D. Penn. 2002).

164. *Id.* at 698.

165. *Id.*

166. *Id.* at 703. The court appears to be referring to the defendants' authority over the plaintiff. The plaintiff worked at the defendants' facility under defendants' contract with plaintiff's employer, a temporary employment agency. *Id.* at 697 n.2. Although the defendants did not directly employ the plaintiff, they presumably had the right to terminate his work. *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 46, cmt. e (AM. LAW INST. 1965) (extreme and outrageous conduct may arise from abuse of authority).

167. 33 F. Supp. 3d 99 (D. Conn. 2014).

168. *Id.* at 104–05; *see also* Turley v. ISG Lackawanna, Inc., 774 F.3d 140, 161–62 (2d Cir. 2014) (affirming award of damages against supervisor and employer because employee proved repeated and severe racial harassment by co-workers, many witnessed by a supervisor, to which the supervisor did not respond); Ucar v. Conn. Dep't of Transp., No. 3:14-CV-0765, 2015 WL 1014560, at *3–4 (D. Conn. Mar. 6, 2015) (characterizing claim as "thin" but denying 12(b)(6) motion based on allegations that supervisor conducted harassment campaign against plaintiff by maliciously alleging plaintiff misused state time).

169. *See* Petty v. Baptist Mem'l Health Care Corp., No. 2013-CA-02109-COA, 2015 WL 1015781, at *7–8 (Miss. Ct. App. Mar. 10, 2015) (genuine issue of material fact whether employer committed IIED by reporting plaintiff to nursing board because plaintiff performed a physician-ordered procedure; employer did not report other nurses for similar conduct; nursing board dismissed complaint); Clifton v. Van Dresser Corp., 596 N.E.2d 1075, 1079 (Ohio Ct. App. 1991); Motsenbacker v. Potts, 863 S.W.2d 126, 136 (Tex. Ct. App. 1993); *see also* Kjerstad v. Ravellette Publ'ns, Inc., 517 N.W.2d 419, 428–49 (S.D. 1993) (reversing directed verdict in favor of employer based on evidence that employer watched female employees in bathroom through hole in wall). *Compare* Wilson v. Kiss, 751 F. Supp. 1249, 1254 (E.D. Mich. 1990) (rejecting employer's 12(b)(6) motion because plaintiff alleged that employer demanded plaintiff perform criminal act or be terminated), *with* Cortezano v. Salin Bank & Trust Co., 680 F.3d 936, 938, 941 (7th Cir. 2012) (affirming summary judgment of claim based on one instance of employer's security officer screaming at plaintiff, calling plaintiff's husband "garbage" and a "piece of shit").

impact of the conduct in single-incident cases resembles the impact of lesser lengthy persistent harassment. Although less frequently litigated, these single-incident cases are part of the universe of workplace abuse of power.

A. False Accusations

Courts tend to view IIED claims favorably in single-incident cases involving employer false accusations against an employee. The more damaging the accusation, the more likely an employee's claim is to survive summary judgment or dismissal motion.[170] In *Kassem v. Washington Hospital Center*,[171] the D.C. Circuit reversed the district court's dismissal of the plaintiff's IIED claim. The plaintiff, a nuclear medical technologist, alleged that his employer falsely advised the Nuclear Regulatory Commission (NRC) that he had violated the law in retaliation for reporting the employer's violations of NRC regulations.[172] The court reasoned that the employer had engaged in more than "intra-workplace mistreatment" because it knowingly filed false charges, which could have led to criminal penalties and license revocation.[173] Likewise, in *Gionfriddo v. Town of Cromwell*,[174] the District of Connecticut rejected the defendant's 12(b)(6) motion because of allegations that the employer, despite knowing of the plaintiff's innocence, told the police he had stolen a laptop.[175]

170. *See* Kassem v. Wash. Hosp. Ctr., 513 F.3d 251, 256–57 (D.C. Cir. 2008) (reversing 12(b)(6) dismissal because plaintiff alleged employer filed false regulatory violation against employee that could have led to criminal penalties); Gionfriddo v. Town of Cromwell, No. 3:06 CV 0626(AVC), 2007 WL 1346919, at *3–4 (D. Conn. May 7, 2007) (denying motions to dismiss because defendants allegedly misused authority to procure plaintiff's arrest despite knowing plaintiff's innocence); Hearn v. Yale-New Haven Hosp., No. CV020466339S, 2007 WL 2938624, at *8–9 (Conn. Super. Ct. Apr. 2, 2007) (denying employer's 12(b)(6) motion to the extent was based on supervisor screaming at plaintiff about co-workers' false sexual harassment complaints and failing to put a stop to coworkers' taunting); Tenold v. Weyerhaeuser Co., 873 P.2d 413, 417 (Or. Ct. App. 1994) (affirming denial of employer's directed verdict motion because security supervisor granted employee permission to remove railroad ties and then accused employee of stealing them); *see also* Dean v. Ford Motor Credit Co., 885 F.2d 300, 307 (5th Cir. 1989) (evidence supported jury verdict in favor of plaintiff because supervisor placed allegedly missing company checks in employee's belongings); Caesar v. Hartford Hosp., 46 F. Supp. 2d 174, 180 (D. Conn. 1999) (motion to dismiss claim denied because plaintiff alleged that employer in bad faith falsely reported that employee abused a patient); Norman v. Gen. Motors Corp., 628 F. Supp. 702, 704 (D. Nev. 1986) (motion to dismiss denied because plaintiff contended employer accused employee of drug trafficking while knowing allegation was false); Crump v. P & C Food Mkts. Inc., 576 A.2d 441, 448–49 (Vt. 1990) (affirming denial of employer's judgment notwithstanding the verdict motion because employer falsely accused employee of theft and terminated employee).

171. *Kassem*, 513 F.3d at 257.

172. *Id.* at 253.

173. *Id.* at 256–57.

174. No. 3:06 CV 0626(AVC), 2007 WL 1346919, at *4 (D. Conn. May 7, 2007).

175. *Id.* at *3–4.

In a comparable case, *Tenold v. Weyerhaeuser Co.*,[176] the Oregon Court of Appeals affirmed a jury verdict in favor of the plaintiff.[177] In *Tenold*, the plaintiff obtained permission from the employer's security supervisor to take some railroad ties.[178] After the plaintiff did so, the security supervisor accused him of theft.[179] The court held this evidence supported the IIED verdict.[180]

Courts are especially likely to recognize IIED claims of false accusations that involve employer restraint of employee freedom of movement. In *Campbell v. Safeway, Inc.*,[181] the employer accused the plaintiff—based on scant evidence—of stealing $800.[182] During a three-hour meeting with the plaintiff, the employer's representatives, one of whom was blocking the door, threatened the plaintiff with arrest and beatings.[183] The District of Oregon denied the employer summary judgment, characterizing the conduct as "abusive."[184] Correspondingly, in *Leahy v. Federal Express Corp.*,[185] the Eastern District of New York held that the plaintiffs' claims survived a directed verdict motion because of evidence that their employer's representatives confined them to a room, brandished a gun, and questioned them about an alleged theft.[186]

In *Bodewig v. K–Mart, Inc.*,[187] another physical restraint case, a manager required the plaintiff to disrobe in front of a supervisor and customer to rebut the customer's theft accusation.[188] The Oregon Court of Appeals reasoned that the manager's conduct was "socially intolerable" and reversed the trial court's grant of the employer's summary judgment motion.[189]

B. TERMINATION OF AT-WILL EMPLOYEE

Many employee IIED claims in termination cases fail because the plaintiff is an at-will employee.[190] In some non-termination cases aris-

176. 873 P.2d 413 (Or. Ct. App. 1994) (en banc).
177. *Id.* at 417.
178. *Id.* at 415–16.
179. *Id.* at 415.
180. *Id.* at 417.
181. 332 F. Supp. 2d 1367 (D. Or. 2004).
182. *Id.* at 1378.
183. *Id.* at 1371–72.
184. *Id.* at 1378 (quoting Hall v. May Dep't Stores Co., 637 P.2d 126, 141–42 (Or. 1982)).
185. 609 F. Supp. 668 (E.D.N.Y. 1985).
186. *Id.* at 672–73.
187. 635 P.2d 657 (Or. Ct. App. 1981), *abrogated on other grounds*, McGanty v. Staudenraus, 901 P.2d 841, 849–53 (Or. 1995).
188. *Id.* at 660.
189. *Id.* at 661–62.
190. *See* Cheatham v. Allstate Ins. Co., 465 F.3d 578, 586 (5th Cir. 2006); Curd v. Hank's Disc. Fine Furniture, Inc., 272 F.3d 1039, 1042 (8th Cir. 2002); Martin v. Papillon Airways, Inc., 810 F. Supp. 2d 1160, 1167 (D. Nev. 2012); Welder v. Univ. of S. Nev., 833 F. Supp. 2d 1240, 1245–46 (D. Nev. 2011); Demissie v. 7-Eleven, Inc., No. 3:09-CV-1153,

ing from management actions, courts treat the employer conduct as a non-actionable, ordinary employment event. Management acts in this category include failing to hire applicants,[191] investigating claimed misconduct,[192] discipline,[193] job transfer,[194] schedule changes,[195] criticism,[196] and reports of suspected employee criminal activity.[197] Nonetheless, courts have been receptive to IIED claims if a termination or other management action is extreme and outrageous in light of its circumstances or context.[198]

For example, in *Moysis v. DTG Datanet*,[199] the Eighth Circuit affirmed a $200,000 jury award for the plaintiff, who was terminated the same day he was seriously injured in a car accident, just one week after he received a merit pay raise.[200] The plaintiff's supervisors justified termination with a fabricated customer complaint.[201] In affirming the jury award, the court relied on the facts that the supervisors knew the plaintiff sought to return to work after he recovered and led him to believe he could do so.[202]

2011 WL 3156162, at *6 (N.D. Tex. June 20, 2011); Lewis v. Schmidt Baking Co., No. 91-39-M, 1992 WL 691170, at *3–4 (N.D.W. Va. Nov. 19, 1992); Nicholas v. Allstate Ins. Co., 765 So. 2d 1017, 1021–30 (La. 2000); Nelson v. Target Corp., 334 P.3d 1010, 1016–18 (Utah Ct. App. 2014).

191. McDonald v. City of Saint Paul, 679 F.3d 698, 708–09 (8th Cir. 2012).

192. Abdul-Malik v. Airtran Airways, Inc., 678 S.E.2d 555, 559–60 (Ga. Ct. App. 2009).

193. United States *ex rel.* Gonzalez v. Fresenius Med. Care N. Am., 748 F. Supp. 2d 95, 105–06 (W.D. Tex. 2010), *aff'd*, 689 F.3d 470 (5th Cir. 2012).

194. Converse v. City of Okla. City, 649 F. Supp. 2d 1310, 1319–20 (W.D. Okla. 2009).

195. *Lewis*, 1992 WL 691170, at *3–4.

196. Cunningham v. Richeson Mgmt. Corp., No. 06-10320, 2007 WL 1170864, at *3 (5th Cir. Apr. 17, 2007).

197. Brown v. Indianapolis Hous. Agency, 971 N.E.2d 181, 188–89 (Ind. Ct. App. 2012). Employers' reports of suspected criminal conduct must be made in good faith to avoid liability. *Compare id.* at 187–88 (detailing employer's investigation of employee's conduct before preparing probable cause affidavit), *with* false-accusation cases cited *supra* notes 170–189.

198. *See* Moysis v. DTG Datanet, 278 F.3d 819, 827–28 (8th Cir. 2002); Archer v. Farmer Bros. Co., 70 P.3d 495, 500 (Colo. Ct. App. 2002), *aff'd*, 90 P.3d 228 (Colo. 2004); Agis v. Howard Johnson Co., 355 N.E.2d 315, 319 (Mass. 1976); *see also* Dreith v. Nat'l Football League, 777 F. Supp. 832, 839 (D. Colo. 1991) (manner of discharge, and employer's conduct leading to it, are primary factors to scrutinize), *declined to follow on other grounds by* Boone v. MVM, Inc., 572 F.3d 809, 815 n.2 (10th Cir. 2009); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46, cmt. e (AM. LAW INST. 2010 & 2012) (an employer that unnecessarily humiliates a terminated employee may be subject to liability); *cf.* Murphy v. Kmart Corp., No. CIV. 07-5080-JLV, 2011 WL 887908, at *6 (D.S.D. Mar. 14, 2011) (genuine issue of material fact as to whether defendant unfairly used corrective action and performance reviews to force long-time employee to resign).

199. 278 F.3d 819 (8th Cir. 2002).

200. *Id.* at 827–28.

201. *Id.* at 824.

202. *Id.* at 827–28.

Similarly, in *Archer v. Farmer Brothers Co.*,[203] the employer terminated the plaintiff five days after undergoing treatment for a serious heart condition.[204] While the plaintiff was on medical leave, two supervisors entered the plaintiff's relative's home, where the plaintiff was in bed, to give him a termination notice.[205] Affirming a verdict in favor of the plaintiff, the Colorado Court of Appeals concluded: "[A] reasonable person could find that defendants' conduct . . . so far exceeded the bounds of decency as to be atrocious and utterly intolerable in a civilized community."[206]

C. OTHER FACT PATTERNS

Other severe single acts may create employer IIED liability. In *Taylor v. Metzger*,[207] the New Jersey Supreme Court denied the defendant summary judgment because a supervisor called the plaintiff, an African American employee, a "jungle bunny" on one occasion.[208] The court reasoned that the power dynamics of the workplace added to the remark's extremity.[209] In *Motsenbocker v. Potts*,[210] the court affirmed a jury verdict in favor of the plaintiff who sold his business and became a consultant for the buyer in exchange for health insurance.[211] After the sale, the buyer raised the plaintiff's deductible to $50,000.[212] In concluding that the evidence supported the finding of extreme and outrageous conduct, the court relied on the fact that the company head knew the plaintiff had terminal cancer.[213]

In an analogous case, *Clifton v. Van Dresser Corp.*,[214] an employer terminated an employee's health insurance on the day she was scheduled for cancer surgery.[215] In *Clifton*, the Ohio Court of Appeals reversed summary judgment for the employer.[216] The court noted that the human resources director who canceled coverage knew of the

203. 70 P.3d 495 (Colo. Ct. App. 2002).
204. *Id.* at 500.
205. *Id.* at 498–500.
206. *Id.* at 500; *see also* Agis v. Howard Johnson Co., 355 N.E.2d 315, 319 (Mass. 1976) (reversing 12(b)(6) dismissal because factfinder could view as outrageous manager terminating employees by alphabetical order until an employee confessed to theft). In 1991, the Massachusetts legislature amended its workers' compensation statute to provide that an employee waives the right to sue an employer for emotional distress damages unless the employee gives the employer written notice that the employee retains this right "at the time of [the] contract for hire." 1991 Mass. Acts 915; *see also* MASS. GEN. LAWS ch. 152, § 24 (1991).
207. 706 A.2d 685 (N.J. 1998).
208. *Id.* at 687, 705.
209. *Id.* at 695.
210. 863 S.W.2d 126 (Tex. Ct. App. 1993).
211. *Id.* at 130.
212. *Id.* at 134.
213. *Id.*
214. 596 N.E.2d 1075 (Ohio Ct. App. 1991).
215. *Id.* at 1076–77.
216. *Id.* at 1079.

plaintiff's impending surgery and arranged for her union agent to notify her on the morning of the planned procedure.[217]

In another case of a single instance of egregious conduct, *Wilson v. Kiss*,[218] the court held the plaintiff's evidence that his employer demanded he engage in a criminal act or be terminated sufficient to survive summary judgment.[219] The plaintiff refused to require a customer to pay in German marks, something he considered a criminal attempt to obtain money under false pretenses.[220] The Eastern District of Michigan reasoned that employer's abuse of "a position of authority and power over the plaintiff" could support a finding of extreme and outrageous conduct.[221]

4. Employer Liability for Co-Worker Bullying

Bullying targets generally have not had difficulty holding employers responsible for abusive conduct by other employees. In many bullying cases that fall outside anti-discrimination statutes, employers simply have not contested this issue.[222] As a result, few courts have addressed whether employers are vicariously liable when one employee bullies another. In *GTE Southwest, Inc. v. Bruce*,[223] the Texas Supreme Court affirmed the jury's verdict that the plaintiffs' supervisor acted within the scope of employment, making the employer liable, when the supervisor intentionally inflicted emotional distress on the plaintiffs by constant screaming, profanity, and physically charging at them.[224] The court noted that the employer offered no evidence that the supervisor acted from personal animosity instead of a "misguided attempt to carry out his job duties."[225] The court also concluded

217. *Id.*

218. 751 F. Supp. 1249 (E.D. Mich. 1990).

219. *Id.* at 1254–55.

220. *Id.* at 1250–51.

221. *Id.* at 1255; *see also* Petty v. Baptist Mem'l Health Care Corp., No. 2013-CA-02109-COA, 2015 WL 1015781, at *7 (Miss. Ct. App. Mar. 10, 2015) (fact issue whether employer committed IIED by reporting plaintiff to nursing board for performing physician-ordered procedure, employer did not report other nurses for similar conduct, and nursing board dismissed complaint).

222. *See, e.g.*, Lightning v. Roadway Express, Inc., 60 F.3d 1551, 1558 (11th Cir. 1995) (rejecting employer's challenge to court's factual finding that supervisors' abuse of plaintiff constituted IIED); Williams v. City of Alexander, No. 4:12-cv-00187 KGB, 2013 WL 5970686, at *12 (E.D. Ark. Nov. 8, 2013), *aff'd in part*, 772 F.3d 1307 (8th Cir. 2014) (denying city's summary judgment motion on police officer's claim that police chief's false arrest intentionally inflicted emotional distress); Campbell v. Safeway, Inc., 332 F. Supp. 2d 1367, 1377–78 (D. Or. 2004) (denying employer's summary judgment motion on IIED claim based on threats and "browbeating" directed at plaintiff by store manager and security guard); Schoen v. Freightliner LLC, 199 P.3d 332, 340 (Or. Ct. App. 2008) (employer failed to preserve issue whether plaintiff's co-worker's intent could be attributed to employer).

223. 998 S.W.2d 605, 618 (1999).

224. *Id.* at 617–18.

225. *Id.* at 618.

that because the supervisor was the highest ranking manager at the plaintiffs' facility, it could impute his conduct to the employer.[226]

In the protected class context, courts are divided on whether an employer is vicariously liable for an employee's conduct toward a co-worker.[227] Protected class plaintiffs are more successful holding employers vicariously liable for co-worker conduct if there is evidence of employer fault.[228] In any event, protected class targets have other statutory claims against employers.[229]

Apart from respondeat superior, plaintiffs can rely on other legal theories to hold employers liable for co-worker bullying. For example, bullying targets have effectively used a ratification argument, which requires proof the employer knew of the bullying and failed to respond effectively.[230] Negligence is another approach plaintiffs use to secure

226. *Id.*; *see also* Travis v. Alcon Labs., Inc., 504 S.E.2d 419, 430–31 (W. Va. 1998) (employer could be vicariously liable for supervisor's verbal abuse of subordinate if supervisor acted within general authority and for employer's benefit). *But see* Beyene v. Hilton Hotels Corp., 815 F. Supp. 2d 235, 250–51 (D.D.C. 2011) (employer not vicariously liable for co-workers' repeated death threats to plaintiff because co-workers did not act for the employer's benefit, even though factfinder reasonably could deem conduct outrageous).

227. C*ompare, e.g.*, Burns v. Mayer, 175 F. Supp. 2d 1259, 1266–67 (D. Nev. 2001) (fact question whether employer was vicariously liable for co-workers' alleged sexual harassment because conduct occurred in work area in the course of co-workers' duties), *and* Robel v. Roundup Corp., 59 P.3d 611, 620–21 (Wash. 2002) (employer was vicariously liable for co-workers' and managers' verbal abuse of plaintiff because abuse occurred in the course of employment, during work hours, and on company premises), *with* Green v. Mobis Ala., LLC, 995 F. Supp. 2d 1285, 1310 (M.D. Ala. 2014) (summary judgment in favor of employer on employee's IIED claim because co-workers' sexual harassment was outside scope of employment), *and* Fisher v. Elec. Data Sys., 278 F. Supp. 2d 980, 995–96 (S.D. Iowa 2003) (summary judgment in favor of employer because employer not vicariously liable for supervisor's sexual touching of and comments to plaintiff, which were not reasonably related to supervisor's job).

228. *See, e.g.*, Turley v. ISG Lackawanna, Inc., 774 F.3d 140, 161–62 (2d Cir. 2014) (employer vicariously liable for co-worker IIED because supervisor failed to respond to plaintiff's complaints of racial harassment, and supervisor had business reasons not to suspend co-workers or engage in lengthy investigation to avoid hindering production); Warner v. Kmart Corp., No. 2005-0128, 2009 WL 1476476, at *15–17 (D.V.I. May 27, 2009) (fact question whether employer was vicarious liability for IIED because sexual harassers were supervisors and managers, and employer failed adequately to investigate complaints and maintain confidentiality); Norcon, Inc. v. Kotowski, 971 P.2d 158, 174 (Alaska 1999) (employer liable for IIED punitive damages because sexual harassment was so pervasive it showed employer's reckless indifference, and employer failed to disseminate anti-harassment policy).

229. *See supra* note 43.

230. *See* Greenhorn v. Marriott Int'l, Inc., 258 F. Supp. 2d 1249, 1257–58 (D. Kan. 2003) (employer may be liable for supervisor's harassment "if . . . plaintiff could demonstrate the employer's 'ongoing tolerance of a continuing course of tortious conduct.'") (citations omitted); Herrick v. Quality Hotels, Inns & Resorts, Inc., 24 Cal. Rptr. 2d 203, 208 (Cal. Ct. App. 1993) (employer ratified co-worker's threatening plaintiff with a gun because employer knew of co-worker's past behavior); Watson v. Dixon, 502 S.E.2d 15, 21 (N.C. Ct. App. 1998), *aff'd*, 352 N.C. 343 (2000) (employer ratified co-worker's sexual harassment of plaintiff by rebuffing her complaints for seven months).

employer liability.[231] In addition, savvy litigants have successfully alleged their employers were directly liable for IIED arising from co-worker workplace bullying.[232]

5. Missteps in Adjudicating Workplace Bullying IIED Claims

As scholars have noted, some courts have misapplied IIED doctrine to workplace bullying cases.[233] In one prominent example, *Holloman v. Keadle*,[234] the court affirmed summary judgment for an employer who repeatedly during a two-year period cursed at the plaintiff and called her a "slut," "whore," and "white nigger."[235] The employer told the plaintiff that he carried a gun and had mob connections and that a former employee's death was not accidental.[236] The court concluded the IIED claim failed because the employer did not know the employee was "peculiarly susceptible to emotional distress."[237] Doing so confused a factor that the Restatement (Second) of Torts recognizes may be sufficient for an IIED claim with a necessary requirement.[238] In another misapplication of the Restatement, some courts have required offensive physical contact as an element of workplace IIED claims.[239]

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231. *See* Pietsch v. McKissack & McKissack, 677 F. Supp. 2d 325, 330 (D.D.C. 2010) (employer's motion to dismiss negligent retention and supervision claims denied because plaintiff alleged co-worker committed IIED through unwanted sexual messages and comments); *cf.* Retherford v. AT & T Commun'cs, 844 P.2d 949, 972–74 (Utah 1992) (collective bargaining agreement did not preempt plaintiff's claim against employer based on co-workers' verbal harassment of plaintiff).

232. *See* Pollard v. E.I. Dupont de Nemours, Inc., 412 F.3d 657, 665 (6th Cir. 2005) (employer may be liable based on its failure to respond to plaintiff's numerous complaints of sexual harassment; noting supervisor attended party celebrating plaintiff's termination); Bohnert v. Roman Catholic Archbishop of S.F., 67 F. Supp. 3d 1091, 1099 (N.D. Cal. 2014) (denying motion to dismiss teacher's claim arising from employer's refusal to investigate or take corrective action when students took and disseminated graphic "upskirt" photo and video of plaintiff); Benitez v. Am. Standard Circuits, Inc., 678 F. Supp. 2d 745, 766–67 (N.D. Ill. 2010) (denying summary judgment on dispute whether employer was liable for supervisor's harassment when evidence showed employer was aware of conduct but took no remedial action).

233. *See* Cavico, *supra* note 43, at 173–74 (courts are "too fervent" in performing the "gatekeeper" function); William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 152–55 (Fall 2003) (courts should lower outrageous standard in employment arena); Yamada, *Workplace Bullying*, *supra* note 87, at 496 (reasoning in Holloman v. Keadle, 931 S.W.2d 413, 417 (Ark. 1996), is flawed).

234. *Holloman*, 931 S.W.2d at 417.

235. *Id.* at 414.

236. *Id.*

237. *Id.* at 417.

238. *Id.* at 415–16; *see also* RESTATEMENT (SECOND) OF TORTS § 46 cmt. f. (AM. LAW INST. 1965) ("The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress. . . ."); Manning v. Metro. Life Ins. Co., 127 F.3d 686, 690–91 (8th Cir. 1997), *overruled in part by* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) (under Arkansas law, argument that *Holloman* requires IIED plaintiffs to show their employers knew of their particular sensitivity is inconsistent with section 46 of the Restatement (Second) of Torts).

239. *See* Goggin v. Higgins, No. 8:13-CV-2068-T-24, 2013 WL 6244536, at *3 (M.D. Fla. Dec. 3, 2013) (IIED claim under Florida law dismissed as insufficiently outrageous

Other courts simply raise the bar for showing extreme and outrageous conduct too high. In *Green v. Bryant*,[240] the court held terminating an employee and retroactively canceling the employee's health insurance because she had been brutally raped was insufficiently outrageous to state an IIED claim.[241] In *Beaudoin v. Hartford Accident & Indemnity Co.*,[242] the plaintiff's supervisor repeatedly directed "screaming rages" at the plaintiff; called her dumb, stupid, and fat; cursed; falsely accused her of mistakes; and remarked about female inferiority during an eight-month period.[243] The Louisiana court dismissed the claim on the ground that the conduct was insufficiently outrageous.[244] In *Williams v. Worldwide Flight Services, Inc.*,[245] the plaintiff had alleged that his supervisor called him "nigger" and "monkey" in front of co-workers, threatened his job security constantly, stated he did not want the plaintiff's "black ass" there, directed another supervisor to falsify the plaintiff's disciplinary records, eliminated his breaks, and required him to work in dangerous weather.[246] The court held this did not constitute outrageous conduct.[247] These cases reflect a much too limited understanding of IIED in the workplace bullying context—one that fails to recognize that the tort can be established by a sufficiently severe single act as well as by less serious conduct over an extended period.[248]

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because plaintiff's allegation that defendant frequently grabbed and verbally abused her was not as outrageous as other Florida cases finding IIED); Vernon v. Med. Mgmt. Assoc., 912 F. Supp. 1549, 1559 (S.D. Fla. 1996) ("relentless" physical and verbal harassment are essential elements, and motion to dismiss IIED claim denied because plaintiff satisfied elements); Johnson v. Thigpen, 788 So. 2d 410, 413–14 (Fla. Dist. Ct. App. 2001) (persistent verbal abuse and repeated offensive physical contact sufficient to avoid defendant's directed verdict motion). Although the Pennsylvania Supreme Court has not addressed the question, the Pennsylvania intermediate appellate court and federal courts applying Pennsylvania law have held that physical harm is a required IIED element. *See* Mzamane v. Winfrey, 693 F. Supp. 2d 442, 512 (E.D. Pa. 2010); Merring v. City of Carbondale, 558 F. Supp. 2d 540, 548–49 (M.D. Pa. 2008); Fewell v. Besner, 664 A.2d 577, 582 (Pa. Super. Ct. 1995).

240. 887 F. Supp. 798, 800 (E.D. Pa. 1995).

241. *Id.* at 800, 803–04.

242. 594 So. 2d 1049, 1052 (La. Ct. App. 1992); *see also* Nesbitt v. Univ. of Md. Med. Sys., No. WDQ-13-0125, 2013 WL 6490275, at *8 (D. Md. Dec. 6, 2013) (allegations that supervisor tried repeatedly to threaten employee, yelled at employee in front of co-workers at least twelve times in one year, interrupted and insulted employee at weekly staff meetings, and publicly accused employee of looking at his rear were insufficiently outrageous).

243. *Id.* at 1050.

244. *Id.* at 1052.

245. 877 So. 2d 869, 870 (Fla. Dist. Ct. App. 2004).

246. *Id.* at 870–71.

247. *Id.*

248. *See* Cavico, *supra* note 43, at 182 (courts have a duty to apply IIED "more forcefully" in cases of workplace abuse); Corbett, *supra* note 233, at 152–55 (courts should lower standard for outrageousness in employment context).

While some courts inappropriately analyze workplace IIED claims, most courts get it right.[249] Nonetheless, commentators continue to criticize the value of IIED as a basis of relief for workplace bullying victims, asserting that plaintiffs have little success.[250] Many of the cases commentators cite to support this argument involve relatively mild conduct[251] or routine employment actions.[252] Other commentators fail to recognize that IIED's severe emotional distress element should not be a high hurdle for workplace bullying claimants who, because of the setting, often experience sufficiently severe or persistent abuse.[253] The perception that IIED lacks potency for workplace bullying victims may stem from its reflexive use in employment cases that also allege statu-

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249. *See supra* Parts II.A.1–4.

250. *See* Michael E. Chaplin, *Workplace Bullying: The Problem and the Cure*, 12 U. PA. J. BUS. L. 437, 456 (2010) (quoting Yamada, *Workplace Bullying*, *supra* note 87, at 494–503); Corbett, *supra* note 233, at 122; Robert J. Tepper & Craig G. White, *Workplace Harassment in the Academic Environment*, 56 ST. LOUIS U. L.J. 81, 89 (Fall 2011); Yamada, *Emerging American Legal Responses*, *supra* note 92, at 332; Yamada, *Progress Report*, *supra* note 91, at 257).

251. *See, e.g.*, Cheatham v. Allstate Ins. Co., 465 F.3d 578, 586 (5th Cir. 2006) (summary judgment for defendant upheld; plaintiffs alleged employer posted guard outside room in which it terminated employees and prevented them from promptly gathering belongings); Tepper & White, *supra* note 250, at 89 n.56 (citing *Cheatham*); *see also* Crowley v. N. Am. Telecomms. Ass'n, 691 A.2d 1169, 1172 (D.C. 1997) (allegations that supervisor refused to meet with plaintiff, excluded plaintiff from meetings, and subjected plaintiff to scorn and unfair termination insufficient to plead IIED); Turnbull v. Northside Hosp., Inc., 470 S.E.2d 464, 466 (Ga. 1996) (employer's "glaring at plaintiff with purported anger and contempt, crying, slamming doors, and snatching phone messages from plaintiff's hand" insufficient to survive summary judgment); Denton v. Chittenden Bank, 655 A.2d 703, 706–07 (Vt. 1994) (allegations that supervisor imposed unreasonable workload, complained that plaintiff lacked college degree, called plaintiff an "old man" in front of his son several times, and went to plaintiff's home while plaintiff was on medical leave insufficient to survive summary judgment), *discussed in* Yamada, *Workplace Bullying*, *supra* note 87, at 495.

252. *See* Earl v. H.D. Smith Wholesale Drug Co., No. 08-3224, 2009 WL 1871929, at *4 (C.D. Ill. June 23, 2009) (employer's accusation plaintiff acted unethically insufficient to establish IIED); Chaplin, *supra* note 250, at 459 n.102 (citing *Earl*); *see also* Lee v. Golden Triangle Planning & Dev. Dist., Inc., 797 So. 2d 845, 845 (Miss. 2001) (claim premised on plaintiff's demotion insufficient to survive summary judgment); Cavico, *supra* note 43, at 122–23 nn.86–97 (unsuccessful IIED claims based on workplace investigations, demotions, criticism, calling plaintiff a "nothing" and "nobody," increased workloads, terminations, and contract non-renewals "clearly illustrate the difficulty of demonstrating extreme and outrageous conduct in the employment setting"); Chaplin, *supra* note 250, at 456 n.98 (citing *Lee*). *But see* Dreith v. Nat'l Football League, 777 F. Supp. 832, 837–39 (D. Colo. 1991) (former professional football referee's allegations that National Football League unduly scrutinized his work, demoted him, and assigned him to an unfamiliar position so it could terminate him for poor performance were sufficient to state claim).

253. Another observer cited *Harris v. Jones*, 380 A.2d 611, 617 (Md. 1977), as evidence the severe emotional distress requirement is an unreasonable barrier to IIED relief for workplace bullying victims. *See* Yamada, *Workplace Bullying*, *supra* note 87, at 498–500. However, *Harris* is best viewed as simply demonstrating that plaintiffs must meet the burden of proving severe emotional distress. *See Harris*, 380 A.2d at 572–73 ("The intensity and duration of [plaintiff's] emotional distress is nowhere reflected in the evidence.").

tory claims, such as Title VII harassment claims.[254] While workplace bullying targets in statutorily protected classes usually have available statutory remedies even if their IIED claims fail,[255] IIED remains a useful cause of action for other workplace bullying victims.

B. Merits of the Emerging Extreme and Outrageous Conduct Standard in Workplace Bullying IIED Cases

People are uniquely vulnerable to bullying at work. As the Court of Appeals of Georgia stated:

> [B]y its very nature, [the workplace] provides an environment more prone to [bullying] because it provides a captive victim who may fear reprisal for complaining, so that the injury is exacerbated by repetition, and it presents a hierarchy of structured relationships which cannot easily be avoided. The opportunity for commission of the tort is more frequently presented in the workplace than in casual circumstances involving temporary relationships.[256]

Workplace bullying targets deserve an effective legal remedy. The IIED tort can serve that role if courts adopt the developing standard for defining extreme and outrageous conduct. As outlined in Part II.A, the standard taking shape treats workplace bullying as extreme and outrageous if a plaintiff shows persistent harassment that continues over time or a single, severe act of harassment. The first part of the standard—persistent harassment over time—is consistent with Ståle Einarsen's widely accepted definition of workplace bullying.[257] Although Einarsen does not include single egregious acts in his definition,

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254. *Cf.* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46, reporters' notes, at 162 (AM. LAW INST. 2010 & 2012) ("Many cases exemplify the tendency to add a weak or unmeritorious claim for intentional infliction of emotional harm to a suit where the real gist of the claim is another tort or a statutory right.") The Restatement cites four such employment cases. *Id.*

255. *See, e.g.*, Jeremiah v. Yanke Mach. Shop, Inc., 953 P.2d 992, 998–99 (Idaho 1998) (IIED award to Romanian employee reversed for lack of severe emotional distress evidence, but $92,350 award on Title VII and state national origin discrimination claims affirmed); Hoy v. Angelone, 691 A.2d 476, 483, 484 (Pa. Super. Ct. 1997), *aff'd*, 554 Pa. 134 (Pa. 1998) (IIED claim against sexually harassing supervisor dismissed, but jury verdict of $50,000 affirmed under state anti-discrimination statute); Franklin v. Enserch, Inc., 961 S.W.2d 704, 709 (Tex. Ct. App. 1998) (employer's summary judgment on IIED claim affirmed, but dismissal of sex discrimination claim reversed); Yamada, *Workplace Bullying*, *supra* note 87, at 502 & n.181 (citing *Yanke*, *Angelone*, and *Enserch*); *see also* Herrera v. Lufkin Indus., 474 F.3d 675, 683, 688 (10th Cir. 2007) (summary judgment granted on IIED claim but denied on Title VII racial harassment claim); Nijem v. Alsco, Inc., 796 F. Supp. 2d 883, 896–99 (M.D. Tenn. 2011) (summary judgment denied on Title VII hostile work environment and national origin discrimination claims but granted on IIED claim); Ward v. Conn. Dep't of Pub. Safety, No. 3:06-CV-01936, 2009 WL 179786, at *9, *14 (D. Conn. Jan. 21, 2009) (summary judgment granted on IIED claim but denied on Title VII racially hostile environment claim); Chaplin, *supra* note 250, at 457 n.99 (citing *Ward*); Tepper & White, *supra* note 250, at 89 n.56, 90 n.59 (citing *Nijem*).

256. Coleman v. Hous. Auth., 381 S.E.2d 303, 306 (Ga. Ct. App. 1989); Lightning v. Roadway Express, Inc., 60 F.3d 1551, 1558 (11th Cir. 1995) (quoting *Coleman*).

257. *See supra* Part II.A.

IIED jurisprudence has regularly done so.[258] The common law process has resulted in a matured understanding of what constitutes extreme and outrageous conduct in the workplace context.[259]

Courts should expressly embrace the emerging extreme and outrageous conduct standard to evaluate workplace bullying IIED claims. In cases involving both plaintiffs in protected classes and those who are not, courts properly deny defendants' motions to dismiss and motions for summary judgment when plaintiffs satisfy this test.[260] All state and federal courts should recognize and apply this standard.

1. Contours of the Standard

The developing standard, which recognizes both persistent harassment over time and single egregious acts as extreme and outrageous conduct,[261] resembles the Title VII hostile environment test. In *Harris v. Forklift Systems, Inc.*,[262] the Supreme Court established that a hostile work environment exists "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[263] As Professor William Corbett suggested, courts may look to case law construing "severe or pervasive" conduct in Title VII harassment cases to define extreme and outrageous conduct in workplace bullying IIED cases.[264]

Like the Title VII hostile environment standard, the developing test to determine whether workplace bullying is extreme and outrageous does not specify how long the misconduct must continue to be actionable.[265] If the harassment is sufficiently severe, a single incident

258. *See, e.g.*, cases cited *supra* Part II.A.3. If presented with the cases discussed in Part II.A.3, Einarsen would likely include them within the definition of workplace bullying.

259. *See* Denise G. Réaume, *Of Pigeonholes and Principles: A Reconsideration of Discrimination Law*, 40 OSGOODE HALL L.J. 113, 119 (2002) ("[T]he effort to formulate a rationale that goes beyond existing particular instances is a crucial step in the development of the law.").

260. *See supra* Part II.A. Courts have also made the converse clear: insults, rudeness, and personality conflicts are not actionable as IIED. *See, e.g.*, Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 636 (Iowa 1990) (citation omitted) ("When evaluating claims of outrageous conduct arising out of employer-employee relationships, we have required a reasonable level of tolerance. Every unkind and inconsiderate act cannot be compensable."). Many courts quote or paraphrase this quote, or paraphrase the RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (AM. LAW INST. 1965). *See* Guy v. Cent. Locating Serv. Ltd., 389 F. Supp. 2d 843, 857 (N.D. Ohio 2005) (Ohio law applied); Epelbaum v. Elf Atochem, N. Am., Inc., 40 F. Supp. 2d 429, 433–34 (E.D. Ky. 1999), *aff'd*, 225 F.3d 658 (6th Cir. 2000) (Kentucky law applied); Hughes v. Pair, 209 P.3d 963, 976 (Cal. 2009); Brown v. Ellis, 484 A.2d 944, 946 (Conn. Super. Ct. 1984).

261. *See supra* Part II.A.

262. 510 U.S. 17 (1993).

263. *Id.* at 21 (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65, 67 (1986)).

264. *See* Corbett, *supra* note 233, at 154.

265. *See* cases cited *supra* Parts II.A.1–2.

may constitute IIED.[266] Courts have found viable IIED claims arising from patterns of abuse occurring over varied time periods from three days[267] to twenty years[268] and durations in between.[269]

This variation accords with Einarsen's approach, which looks for "systematic and prolonged negative behaviour" rather than behavior over a specific period.[270] Although some psychological researchers prefer to extend the six-month duration criterion used in evaluating psychiatric impairment[271] to workplace bullying IIED claims, such a requirement is arbitrary in the legal context.[272] Moreover, the Restatements' "severe emotional distress" element does not require psychological or psychiatric injury.[273] Just like the Title VII harassment standard, the degree of severity required to show IIED should vary inversely with the harassment's pervasiveness.[274]

The IIED tort fits particularly well as a means to redress workplace bullying. The Restatements' drafters emphasized that abuse of actual or apparent authority over another affects whether conduct is extreme and outrageous.[275] This principle guides courts in formulating and using the emerging standard. Many courts already apply the drafters' comment on this point when addressing workplace bullying and other workplace IIED claims.[276] Pursuant to the drafters' com-

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266. *See supra* Part II.A.3.

267. Pennell v. Vacation Reservation Ctr., LLC, 783 F. Supp. 2d 819, 820–21 (E.D. Va. 2011).

268. Cabaness v. Thomas, 232 P.3d 486, 492–93 (Utah 2010).

269. *See, e.g.*, Pollard v. E.I. DuPont De Nemours, Inc., 412 F.3d 657, 659 (6th Cir. 2005) (excess of one year); Hernandez v. Partners Warehouse Supplier Servs., LLC, 890 F. Supp. 2d 951, 963–64 (N.D. Ill. 2012) (ten months); Schoen v. Freightliner LLC, 199 P.3d 332, 343 (Or. Ct. App. 2008) (five months); GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 613 (Tex. 1999) (two years); Robel v. Roundup Corp., 59 P.3d 611, 614 (Wash. 2002) (six weeks).

270. Einarsen et al., *supra* note 20, at 13.

271. *See* Leymann, *supra* note 29, at 168.

272. *Cf.* Harris v. Forklift Sys., 510 U.S. 17, 22 (1993) ("Title VII comes into play before the harassing conduct leads to a nervous breakdown.").

273. *See supra* Part I.C.

274. *See* Lauderdale v. Tex. Dep't of Criminal Justice, 512 F.3d 157, 163 (5th Cir. 2007); Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

275. RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 46 cmt. d (AM. LAW INST. 2010 & 2012); RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (AM. LAW INST. 1965).

276. *See* Williams v. City of Alexander, No. 4:12-cv-00187 KGB, 2013 WL 5970686, at *12 (E.D. Ark. Nov. 8, 2013) (workplace bullying including false accusations of crime); *see also* Osuagwu v. Gila Reg'l Med. Ctr., 938 F. Supp. 2d 1180, 1995 (D.N.M. 2013) (hospital's false reports on staff physician to state medical board and National Medical Database); Dixon v. State Farm Mut. Auto. Ins. Co., 433 F. Supp. 2d 785, 790 (N.D. Tex. 2006) (race harassment); Coffin v. Safeway, Inc., 323 F. Supp. 2d 997, 1003 (D. Ariz. 2004) (sexual harassment); Spahn v. Int'l Quality & Productivity Ctr., 211 F. Supp. 2d 1072, 1076 (N.D. Ill. 2002) (sexual harassment); Godfrey v. Perkin-Elmer Corp., 794 F. Supp. 1179, 1190 (D.N.H. 1992) (sexual harassment); Smith v. Iowa State Univ. of Sci. & Tech., 851 N.W.2d 1, 29 (Iowa 2014) (workplace bullying); Taylor v. Metzger, 706 A.2d 685, 511–12 (N.J. 1998) (citations omitted) (racial slur); LaBozzo v. Brooks Bros., Inc., No. 120538/01, 2002 WL 1275155, at *3 (N.Y. Sup. Ct. Apr. 25, 2002) (quoting

ments, supervisor harassment constitutes an abuse of authority.[277] Co-worker harassment also can be an abuse of power. Co-workers can make a job unbearable. As one commentator noted, "A worker who relies on his job for economic survival is effectively a captive audience for a harassing coworker."[278]

2. Advantages of the Emerging Standard

The common law is the natural home for a legal remedy for workplace bullying because its primary interest is "maintaining the forms of respect deemed essential for social life. . . ."[279] With a common law, rather than a statutory, remedy, society benefits from an ability to adapt to changing social needs. Public discourse on the harms of workplace bullying has exploded.[280] The common law's "moral quality," as Mark Gergen described it, means that judges' rulings will increasingly reflect the growing awareness of the gravity of workplace bullying.[281] Just as IIED doctrine became more receptive to sexual harassment cases over time, it will become more open to workplace bullying cases as social attitudes evolve.[282] Although Title VII and state counterpart statutes contributed to the changing social climate that benefited sexual harassment-based IIED claims, legislation is not a condition precedent to changing views, especially in a media-driven age.

The common law is also best suited to balance the competing interests of remedying workplace bullying and permitting employer managerial discretion. These competing interests shift over time, are ill-suited to precise identification, and are balanced most effectively in an open-ended process.[283]

William L. Prosser & W. Page Keaton, Torts § 12, at 61 (5th ed. 1984) (sexual harassment)); GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 612 (Tex. 1999) (workplace bullying); Retherford v. AT & T Commc'ns, 844 P.2d 949, 978 (Utah 1992) (sexual harassment); Robel v. Roundup Corp., 59 P.3d 611, 620 (Wash. 2002) (workplace bullying); Loya v. Wyo. Partners, 35 P.3d 1246, 1253 (Wyo. 2001) (termination); Kanzler v. Renner, 937 P.2d 1337, 1343 (Wyo. 1997) (sexual harassment). Each referenced case cited abuse of power as a factor in deciding whether challenged conduct was outrageous.

277. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 cmt. d (AM. LAW INST. 2010 & 2012); RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (AM. LAW INST. 1965).

278. Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 46 (1999) (arguing in favor of tort remedies for protected and non-protected class targets of workplace bullying).

279. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 971 (1989); *see* Réaume, *supra* note 259, at 141 (characterizing tort law as a forum for continuous identification of social duties and criticizing Canada's piecemeal statutory approach to discrimination law).

280. *See supra* Part I.

281. Gergen, *supra* note 59, at 1709.

282. *Id.* at 1709–10.

283. Réaume, *supra* note 259, at 142.

While responding to change and harmonizing clashing concerns, the IIED tort for workplace bullying also rebalances workplace relationships. Generally, the IIED tort is used more frequently in legal relationships between parties of unequal bargaining power, such as between employers and employees.[284] IIED can offer "private due process" to interactions between these parties.[285]

In addition, a common law approach to workplace bullying is preferable because it can address a multiplicity of fact situations as they arise. The common law's *raison d'être* is that legislators cannot predict "all the possible combinations of circumstances which the future may bring."[286] A statute lacks the needed "analytical flexibility" to address the wide range of potentially problematic conduct.[287] The workplace bullying IIED cases catalogued in this Article address police threats; verbal abuse; physical intimidation; retaliation; menacing driving; false accusations; sexual, racial, and disability harassment; egregious terminations, and canceling ill workers' health insurance.[288] In contrast to the jurisprudential straightjacket of a statutory right, "the [IIED] tort is as limitless as the human capacity for cruelty."[289] Instead of prohibiting particular acts, the tort offers general standards and gives courts discretion to administer individualized justice.[290]

The common law's role is "to discover and refresh social norms," not to generate them.[291] Given this role, common law may lag behind social developments. Yet, the common law will respond to major changes in social standards.[292] IIED is still a young tort[293] and is evolving in workplace bullying cases.[294] Proponents of an effective tort remedy for workplace bullying can improve legal development by litigating strategic test cases and publishing persuasive scholarship.[295]

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284. Daniel Givelber, *The Right to Minimal Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 63–64 (1982).

285. *Id.* at 43. Givelber explains that "private due process" requires the dominant party in an unequal bargaining relationship to use "minimal fair procedure" or "minimum levels of civility" in interacting with the non-dominant party. *Id.* at 68–69.

286. H.L.A. HART, THE CONCEPT OF LAW 128 (1961).

287. Corbett, *supra* note 233, at 95–96 ("cases may be so fact-driven that statutes will never be an effective method for addressing" workplace bullying).

288. *See* cases discussed *supra* Part II.A.

289. Howell v. N.Y. Post Co., 612 N.E.2d 699, 702 (N.Y. 1993); *see also* Chamallas, *supra* note 63, at 2178 (tort law can reach "multidimensional forms of harassment").

290. *See* Givelber, *supra* note 284, at 75 (IIED gives grounds for "situational justice").

291. Post, *supra* note 279, at 970.

292. *See* Ehrenreich, *supra* note 278, at 59.

293. *See supra* Part I.C.

294. *See supra* Part II.

295. *See* Ehrenreich, *supra* note 278, at 55 (courts increasingly permit recovery for "nonphysical, dignitary harms"); *id.* at 56 (arguing for increased advocacy by attorneys and scholars).

Defining extreme and outrageous workplace bullying as persistent harassment over time or an egregious single incident of harassment establishes an appropriate threshold. This bar is high enough to deter frivolous claims, such as those merely based on an overly critical boss, a co-worker's minor insults, or a termination perceived as unfair. By discouraging nuisance suits, the standard helps judges take workplace bullying IIED claims seriously.

At the same time, the threshold standard is broad enough to encompass cases that courts previously erroneously rejected. For example, the plaintiff in *Beaudoin v. Hartford Accident & Indemnity Co.*[296] would have been successful had the court applied the correct standard. In *Beaudoin*, during an eight-month period, the plaintiff's supervisor repeatedly screamed at her; called her dumb, stupid, and fat; used profanity; wrongly accused her of mistakes; and made comments about the inferiority of women.[297] This conduct qualifies as repeated harassment over an extended time period and should have constituted IIED. For the same reason, the plaintiff in *Williams v. Worldwide Flight Services, Inc.*[298] would have survived summary judgment if the court had applied the correct test. In *Williams*, the plaintiff alleged that his supervisor called him "nigger" and "monkey" in front of co-workers, constantly threatened to terminate him, stated he did not want his "black ass" there, and directed another supervisor to falsify the plaintiff's disciplinary records.[299] This alleged harassment persisted over an extended period.[300] The standard also permits a claim involving a single serious incident of abuse or harassment to avoid dismissal or summary judgment. For example, the employer in *Green v. Bryant*[301] terminated the plaintiff and retroactively canceled her health insurance immediately after she was brutally raped. This conduct was so egregious that it should have constituted extreme and outrageous conduct.[302] The proposed standard would prevent judges from being too vigorous in their "gatekeeper role."[303]

3. Limitations of the Emerging Standard

While the emerging standard avoids overly inclusive or rigidly narrow interpretations of extreme and outrageous conduct, it cannot correct the wrongs committed by courts that misapply other parts of IIED doctrine in workplace bullying cases. Litigants' ardent advocacy

296. 594 So. 2d 1049, 1052 (La. Ct. App. 1992); *see supra* text accompanying notes 242–44.

297. *Beaudoin*, 594 S.2d at 1050.

298. 877 So. 2d 869 (Fla. Dist. Ct. App. 1992).

299. *Id.* at 869–70.

300. *Id.*

301. 887 F. Supp. 798, 800 (E.D. Pa. 1995).

302. *Id.* at 798–99.

303. *See* Cavico, *supra* note 43, at 174.

in test cases can challenge courts that depart from the common law IIED principles articulated in the Restatements.[304] Jurisdictions that require employer knowledge of employee vulnerability, offensive physical contact, or other evidence to show extreme and outrageous acts ignore overwhelming contrary case law.[305] While state courts may reject the common law decisions of the majority of state courts, those that do so are failing to recognize the serious harmfulness of workplace bullying.[306]

III. Flaws in Proposed Statutory Remedies

Despite twelve years of lobbying, advocates have failed to gain passage of a statutory cause of action for workplace bullying in any

304. *See supra* note 295 and accompanying text.

305. *See supra* Part II.A.5. Some state courts have imposed another inappropriate limit on workplace bullying lawsuits. Eight jurisdictions hold workers' compensation laws bar IIED suits against employers. These states are Delaware, the District of Columbia, Maine, Massachusetts, Missouri, South Carolina, Rhode Island, and Wisconsin. *See* Hibben v. Nardone, 137 F.3d 480, 484 (7th Cir. 1998) (applying Wisconsin law); Lockhart v. Coastal Int'l Sec., Inc., 905 F. Supp. 2d 105, 116–17 (D.D.C. 2012); Sewell v. Vatterott Ed. Ctrs., Inc., No. 4:10CV00875AGF, 2011 WL 2838112, at *3–4 (E.D. Mo. July 18, 2011), *aff'd*, No. 11-3419, 2012 WL 1994684 (8th Cir. June 5, 2012); McCarty v. Verizon New England, Inc., 731 F. Supp. 2d 123, 131–32 (D. Mass. 2010), *aff'd*, 74 F.3d 119 (1st Cir. 2012); Riley v. Del. River & Bay Auth., 457 F. Supp. 2d 505, 515 (D. Del. 2008); Gordan v. Cummings, 756 A.2d 942, 945 (Me. 2000); Mateo v. Davidson Media Grp. R.I. Stations, LLC, No. PC-2010-2433, 2013 WL 1880370, at *5–6 (R.I. Super. Ct. Apr. 30, 2013); *see also* Dickert v. Metro. Life Ins. Co., 428 S.E.2d 700, 701–02 (S.C. 1993) (state workers' compensation statute precluded tort suit against employer for IIED and other claims and reversing summary judgment entered against supervisor); Taylor v. Cummins Atl. Inc., 852 F. Supp. 1279, 1282–83 (D.S.C. 1994), *aff'd*, 48 F.3d 1217 (4th Cir. 1995) (state workers' compensation law bars employee's claim against employer unless actor is employer's alter ego). In California, the workers' compensation statute bars IIED claims arising from conduct in the "normal course" of employment. *See* Miklosy v. Regents, 188 P.3d 629, 645–46 (Cal. 2008); *accord* Chamallas, *supra* note 63, at 2138–39 n.120 (citing cases). In these jurisdictions, workers lack or have limited common law remedies against employers for workplace bullying. The only way to give these employees full redress is to amend the workers' compensation statutes to permit an IIED claim for workplace bullying. This will require vigorous, determined lobbying and public education.

In addition, in some jurisdictions, state civil rights laws preempt IIED workplace bullying claims when the tort claim is brought with a statutory harassment claim. *See* Stoddard v. BE & K Inc., 993 F. Supp. 2d 991, 1005–06 (S.D. Iowa 2014) (granting employer summary judgment on plaintiff's IIED claim because it was based on same facts as sexual harassment claim under Iowa Civil Rights Act); Webb v. Humana Inc., 819 F. Supp. 2d 641, 651–52 (W.D. Ky. 2011) (Kentucky Civil Rights Act preempts plaintiff's tort claim brought in conjunction with state civil rights claim); Edwards v. Cascade Cty. Sheriff's Dep't, 223 P.3d 893, 905 (Mont. 2009) (Montana Human Rights Act is exclusive remedy for discrimination claim involving emotional distress); Hoffman v. La Roche Inc., 144 S.W.3d 438, 446–48 (Tex. 2004) (plaintiff may not assert IIED claim and statutory sexual harassment claim unless tort claim is based on independent conduct). *Compare* Maher v. Alliance Mortg. Banking Corp., 650 F. Supp. 2d 249, 268–69 (E.D.N.Y. 2009) (IIED claim unavailable if underlying conduct is "embraced" by New York Human Rights Law), *with* Funk v. F&K Supply, Inc., 43 F. Supp. 2d 205, 217–21 (N.D.N.Y. 1999) (New York Human Rights Law did not displace IIED claim in sexual harassment case).

306. *See generally supra* Part I.

jurisdiction.[307] Professor Yamada first proposed a statutory cause of action in 2000.[308] In 2003, the Healthy Workplace Bill was introduced for the first time in a state legislature (California).[309] Since then, most state legislatures have considered and rejected some version of the bill.[310]

The only workplace bullying laws enacted in the United States do not give employees a right to sue. The Tennessee statute[311] requires public employers to adopt an anti-bullying policy and immunizes those that do from suit for "any employee's abusive conduct that results in negligent or intentional infliction of mental anguish."[312] This law appears designed to prevent the type of IIED claims discussed in this Article. The California statute requires employers with fifty or more employees to provide supervisors training on "abusive conduct" and sexual harassment, but it does not add "abusive conduct" targets as a protected category under California human rights law.[313] Utah's narrower law mandates training for state executive branch employees, but it expressly does not create a private cause of action.[314]

Advocates of the Healthy Workplace Bill greatly narrowed the current 2012 version of the bill, perhaps in recognition of the political failures of the earlier versions. Under the current version, emotional distress and punitive damages are available against an employer only if an "adverse employment action" or "extreme and outrageous conduct" occurs.[315] The bill defines "adverse employment action" similarly to Title VII case law.[316] The bill does not define "extreme and outrageous conduct."[317]

The bill would add little to remedies already available under IIED doctrine. Workers who experience extreme and outrageous conduct as part of workplace bullying, whether via adverse employment actions or other behavior, may seek emotional distress and punitive damages under traditional IIED protections from extreme and outrageous conduct.[318] The bill does not lower the common law threshold for emotional distress damages because the bill does not define "extreme and outrageous conduct."[319]

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307. *See* HEALTHY WORKPLACE BILL, *supra* note 85.
308. *See* Yamada, *Workplace Bullying*, *supra* note 87, at 524–37.
309. *See* HEALTHY WORKPLACE BILL, *supra* note 85.
310. *Id.*
311. TENN. CODE ANN. § 50-1-501 to -504 (West 2015).
312. *Id.* § 50-1-504.
313. CAL. CODE § 12950.1(b), (g) (West 2015).
314. *See* UTAH CODE ANN. § 67-19-44 (West 2015).
315. Yamada, *Emerging American Legal Responses*, *supra* note 92, at app. § 7(b).
316. *Id.* at app. § 2(b).
317. *Id.* at app. § 2.
318. *See* cases cited *supra* Parts II.A.1–2, II.A.3(B).
319. Yamada, *Emerging American Legal Responses*, *supra* note 92, at app. § 2.

The Healthy Workplace Bill does include one-way fee shifting,[320] but this provision would likely do more harm than good. Fee shifting is designed to encourage private statutory enforcement.[321] Unfortunately, although fee recovery may induce meritorious claims, it also risks frivolous litigation.[322] Even if the bill's fee-shifting provision does not incentivize nuisance suits, Professor Margaret Lemos persuasively maintains that statutory fee shifting causes a "judicial backlash" in which judges assume that such statutory claims are meritless and motivated by fee recovery.[323] If judges perceive these claims as presumptively frivolous, they may respond by narrowly interpreting the statute's substantive terms.[324]

Another drawback of the current proposed bill, and its more robust earlier counterpart,[325] is that creating a statutory workplace bullying claim risks undermining Title VII protections. Congress enacted Title VII to alleviate discrimination against historically marginalized groups.[326] Providing a separate workplace bullying statutory remedy to all workplace harassment targets threatens to diminish Title VII's importance.[327] Put differently, it could "obscure the significance of harassment as a tool of discrimination."[328] There is evidence that anti-bullying statutes in other countries have conceptually subsumed anti-sex discrimination laws.[329] In these countries, sexual harassment may be viewed as merely one form of prohibited harassment. Since the advent of anti-mobbing laws in continental Europe, European law focuses much less on discrimination against particular groups and more on the dignity of all employees.[330] A similar result in the United States could hamper courts, employers, and workers from appreciating harassment's role in discrimination and workplace inequalities.[331] As Professor Corbett explained:

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320. *Id.* at app. § 7(a).

321. *See* Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 675–79 (2013) (one-way fee-shifting incentivizes private enforcement of statutes).

322. *But see* Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 809 (2011) (lack of evidence that one-way fee-shifting increases litigation volume).

323. *Id.* at 823.

324. *Id.* at 823–30 (citing Title VII's fee-shifting provisions and its accompanying case law as one example).

325. *See* Yamada, *Progress Report*, *supra* note 91, at app.

326. 42 U.S.C. § 2000-e (2012).

327. *Cf.* Ehrenreich, *supra* note 278, at 62 (arguing for tort remedy for workplace harassment; if Title VII remedies are not limited to targets of historical discrimination, its goals are trivialized).

328. Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1261 (2011). Professor Clarke asserts that anti-bullying legislation could weaken public education and employer training on sexual harassment, impose additional burdens on courts and regulatory agencies, and dilute sexual harassment doctrine. *Id.* at 1264–66.

329. *Id.* at 1260, 1262; Friedman & Whitman, *supra* note 83, at 251–62.

330. Friedman & Whitman, *supra* note 83, at 242–44.

331. Debora L. Parkes, *Targeting Workplace Harassment in Quebec: On Exporting a New Legislative Agenda*, 8 EMP. RTS & EMP. POL'Y J. 423, 449 (2004).

> Because of the importance of [anti-discrimination] laws to our society, we should be very cautious about using the anti-discrimination model for addressing emerging workplace problems. Deploying the method too often dilutes its potency. Instead, the method should be reserved for select instances of compelling public policy to protect discrete groups that historically have been discriminated against.[332]

Lacking legislative imprimatur, the evolving common law IIED standard in workplace bullying cases is unlikely to overshadow statutes protecting historic targets of systemic discrimination. Case law demonstrates that courts have decided workplace bullying IIED cases with responsiveness to issues of historical discrimination.[333]

Not only does a legislative approach to workplace bullying threaten Title VII's importance, it cannot effectively address all types of workplace bullying.[334] A statute with a vague workplace bullying definition may appear to be a manners mandate. Such legislation could trivialize workplace bullying in the public mind. New Hampshire Governor Maggie Hassan complained that the legislature sought "to legislate politeness, manners and the interpersonal relationships of coworkers" when she vetoed a proposed workplace bullying law in 2014. [335] Courts have long eschewed enforcement of mere workplace civility.[336]

Conclusion

Workplace bullying harms workers and society. Workplace bullying targets deserve a viable legal remedy. The common law is beginning to reflect the increasing social concern over this phenomenon. State and federal courts are generating a standard for evaluating whether workplace bullying constitutes extreme and outrageous conduct as required for the IIED tort. They are increasingly recognizing

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332. Corbett, *supra* note 233, at 140. Professor Corbett elaborated that status-blind harassment law endangers anti-discrimination law because it is based on the premise that the law must protect all people equally despite historical discrimination. *Id.* at 142–43. The distinction is highlighted by the current debate about the difference in meaning between "black lives matter" and "all lives matter."

333. *See supra* Part II.A.2 (discussing IIED claims involving protected class members); *see also supra* Part II.A.5 (citing cases rejecting IIED claims but recognizing statutory discrimination claims).

334. Corbett, *supra* note 233, at 124.

335. Press Release, New Hampshire Governor Maggie Hassan (July 28, 2014) (commenting on veto of 2014 N.H. Laws H.R. 591). H.R. 591 was not a formulation of the Healthy Workplace Bill. It sought to grant state employees the right to file administrative complaints for "abusive conduct." In addition, it would have required state employers to maintain a policy prohibiting abusive conduct and to provide annual employee training on the topic. *See* 14 N.H. Laws H.R. 591 §§ I, III, IX.

336. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (Title VII hostile work environment standards are designed to "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing'") (quoting BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 175 (1992)).

workplace bullying IIED claims grounded on (1) persistent harassment over time, viewed in its entirety; and (2) single incidents of egregious conduct. All U.S. courts should adopt this emerging common law test for IIED's extreme and outrageous element.

State legislatures should refrain from enacting statutes and allow this new standard to show that it can effectively redress workplace bullying. Maintaining workplace bullying remedies within the common law offers many advantages. A significant body of case law already exists that applies the new standard. In addition, Title VII hostile work environment cases defining severe and pervasive harassment guide courts interpreting "extreme and outrageous conduct." Maximizing IIED as a workplace bullying remedy also protects Title VII from dilution. IIED is sufficiently adaptable to balance the competing stakes in workplace bullying cases and to address workplace bullying's many shapes—from single atrocious acts to persistent patterns of concerted co-worker harassment. The common law's norm-reinforcing role permits it to respond to changing social needs.

Despite advocates' good intentions, statutory remedies are not the right solution to workplace bullying in the United States. Congress has not addressed workplace bullying, and state legislatures have shown little interest despite years of lobbying. The Healthy Workplace Bill, in its present form, adds little value to existing IIED doctrine. In addition, workplace bullying statutes risk burdening courts with nuisance lawsuits. Further, it is difficult for statutory language fully to capture and prohibit varying forms of workplace bullying. Courts applying IIED common law doctrine have the discretion to shape appropriate relief. Courts should adopt the emerging common law IIED standard and embrace IIED as a workplace bullying remedy.