

*The Need For A Revitalized Regulatory Scheme To Address Workplace Bullying In The United States: Strengthening the Federal Occupational Safety and Health Act.*

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**I. INTRODUCTION**

Workplace bullying is a phenomenon that has attracted a considerable amount of domestic and international inter-disciplinary attention. Sociologists, organizational psychologists, and legal scholars have identified and categorized types of workplace conduct that constitute bullying, surveyed its prevalence, and analyzed the individual and societal costs of workplace bullying. Despite this body of inter-disciplinary work, the United States has no laws addressing workplace bullying. The common law has remained static, and legislative efforts to enact a new status-blind harassment law have stalled.<sup>1</sup>

In an earlier article, I explained how the experience of the United Kingdom in combating workplace bullying can provide lessons for similar efforts in the United States.<sup>2</sup> This article builds on that earlier work and proposes a new regulatory alternative for the U.S., viewing workplace bullying through the lens of existing federal occupational safety and health law, regulations and guidelines. The Occupational Safety and Health Act of 1970 (“OHSA” or “OSH Act”)<sup>3</sup> is an existing law that could be strengthened and/or utilized to incorporate coverage of bullying as a recognized workplace safety and health hazard, as has occurred in some European countries and Canadian provinces.<sup>4</sup>

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<sup>1</sup> See generally Susan Harthill, *Bullying In the Workplace: Lessons From the United Kingdom*, 17 MINN. J. INT’L L. 247 (2008) (compiling and reviewing sources). Although 16 states have introduced an anti-bullying law, the Healthy Workplace Bill, no state has yet passed the law. See Workplace Bullying Institute, Legislative Campaign, <http://www.workplacebullyinglaw.org/index.html>.

<sup>2</sup> Harthill, *supra* note 1.

<sup>3</sup> 29 U.S.C. § 650, *et seq.* (2000), OSHA § 1. For ease of reference, references hereafter will be to the OSHA internal citation and not the U.S. Code citation.

<sup>4</sup> For example, France and Sweden have enacted legislation to address status-blind workplace harassment. Swedish National Board of Occupational Safety and Health: Ordinance (AFS 1993:2) on Violence and Menaces in

OHSA has the major advantages of being an established regulatory regime which already mandates employer compliance and has an existing regulatory apparatus with enforcement power, as well as having the authority and resources to develop employer/employee education, training and guidance. The OHS Act operates via two well-established federal agencies – the Occupational Safety and Health Administration (“OSH Administration”), which develops regulations, interprets the law, and enforces safety and health law and regulations, and the National Institute of Occupational Safety and Health (“NIOSH”), which provides research, education, and training in the field.<sup>5</sup> These agencies not only provides a regulatory body through which to channel efforts to include workplace bullying within OSHA coverage, but enhances the potential for procurement efforts to address bullying as a safety and health concern in the U.S. workplace.

Utilizing OSHA to address workplace bullying is not without its drawbacks. OSHA has some inherent disadvantages, such as the lack of a private cause of action. The OSH Act and the OSH Administration have also been criticized as an ineffective regulatory regime with inadequate penalties and low compliance rates.<sup>6</sup> Nevertheless, this article proposes that OSHA’s existing regulatory scheme should incorporate workplace bullying, working towards a

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the Working Environment, 14 Jan. 1993 and Ordinance (AFS 1993:17) on Targetization at Work, 21 Sept. 1993; French Social Modernization Law (2002), C. TRAV. Arts. L. 122-46 to L. 122-154, *available at* [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr). Quebec and Saskatchewan have also utilized their occupational safety and health codes. *See* R.S.Q. ch. N-1.1 (1977) (Quebec); Occupational Health and Safety (Harassment Prevention) Amendment of 2007, S.S. 66 (2007) (Saskatchewan). In the U.K., the Health and Safety Commission (“HSC”), the agency responsible for health and safety regulation, has relied upon a social partnership approach, issuing guidelines and tools for employers to utilize on a voluntary basis such as the 2004 HSE Management Standards on Work-Related Stress.

<sup>5</sup> OSHA § 2(b)(3) (authorizing Secretary of Department of Labor); OSHA § 22 (creating NIOSH).

<sup>6</sup> *See generally* Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance o Workplace Safety*, 57 ADMIN. L. REV. 1071 (2005) (collecting and summarizing criticisms).

dignitarian workplace that goes beyond the ‘core’ labor standards of the ILO’s Declaration on Fundamental Principles and Rights at Work.<sup>7</sup>

## II. BULLYING: DEFINITIONS, PREVALENCE AND COSTS

Workplace violence can take the form of physical assault, including murder, rape, and robbery, and can be divided into categories depending on the relationship between the target and the worker.<sup>8</sup> The focus of this paper is on non-physical workplace bullying between co-workers.

The phenomenon of workplace bullying, its prevalence, causes and costs, has been well documented and there is a growing body of inter-disciplinary work focusing on this phenomena both in the U.S. and abroad. Workplace bullying can broadly be defined as: “repeated offensive behavior through vindictive, cruel, malicious or humiliating attempts to undermine an individual or group of employees.”<sup>9</sup> To be identified as bullying, the behavior has to occur regularly, repeatedly, and over a period of time.<sup>10</sup> U.S. pioneers in studying and tackling workplace bullying, Gary and Ruth Namie, liken workplace bullying to domestic violence, explaining that:

Bullying closely resembles the phenomenon of domestic violence. Both were shrouded in silence before being brought to public attention. . . . Trauma experienced by bullied targets is *caused* by work, by an intentional, systematic campaign launched by one or more people against a target just as a battering spouse causes harm to the target.<sup>11</sup>

Although workplace bullying can take the form of physical violence, it is more likely to take the form of *psychological assault*. The most common bullying behavior is to assign

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<sup>7</sup> Int’l Labour Organization (“ILO”), Declaration of Fundamental Principles and Rights at Work, 86th Session, Geneva, June 1998. Although the ILO has issued reports and directives on workplace bullying, it has not issued any directives binding on the U.S. The ILO, for example, has not issued a convention or recommendation expressly addressing generalized workplace bullying, although there are a number of conventions addressing sexual and racial harassment and general rights to dignity.

<sup>8</sup> I have chosen to use the term “target” over the more loaded term “victim.”

<sup>9</sup> DUNCAN CHAPPELL & VITTORIO DI MARTINO, VIOLENCE AT WORK 259–72 (3d ed. 2006).

<sup>10</sup> *Id.*

<sup>11</sup> Gary Namie & Ruth Namie, *Workplace Bullying: How to Address America’s Silent Epidemic*, 8 EMP. RTS. & EMP. POL’Y J. 315, 326 (2004).

unreasonable or impossible targets or deadlines.<sup>12</sup> Other common types of bullying behavior may include constant criticism, removing responsibilities and replacing them with trivial tasks, shouting and verbal abuse, persistently picking on people, withholding information, and blocking promotions.<sup>13</sup>

Bullying occurs across all occupations, races, and genders, and between supervisors, co-workers, or clients. Studies indicate that the bully is most frequently a supervisor, slightly more women are targets than men, and that bullying is more common in certain occupations and under certain management styles.<sup>14</sup> Bullying occurs when a variety of risk factors are present, such as individual factors like the perpetrator's child development and personality, organizational factors, and societal factors.<sup>15</sup> For example, Gary and Ruth Namie have identified several organizational characteristics that increase the risk of workplace bullying, ranging from uncritical adoption of an obsession with outcomes to recruitment, promotion, and reward systems that focus on personality traits like aggressiveness while ignoring emotional intelligence.<sup>16</sup>

The phenomena has been the subject of efforts to quantify the amount of workers who have either experienced bullying, as target or perpetrator, or witnessed it. A 2000 U.K. study, sponsored by the British Occupational Health Research Foundation, estimated that 10.6% of British workers had been bullied within the last six months, rising to 24.7% when the period was extended to the last five years, and 46.5% had witnessed bullying taking place within the last five years.<sup>17</sup> In the U.S., smaller scale studies have reported estimates ranging from 32%<sup>18</sup> to 44%.<sup>19</sup>

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<sup>12</sup> See Harthill, *supra* note 1, at 255-256 (citations omitted).

<sup>13</sup> *Id.* at 256 (citations omitted).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (citations omitted).

<sup>16</sup> Namie & Namie, *supra* note 11, at 328.

<sup>17</sup> HELGE HOEL & CARY L. COOPER, DESTRUCTIVE CONFLICT AND BULLYING AT WORK 5 (2000), <http://www.csren.gov.uk/UMISTreportHelgeHoel1.PDF>.

<sup>18</sup> Pamela Lutgen-Sandvik, Sarah J. Tracy & Jess K. Alberts, *Burned by Bullying in the American Workplace: Prevalence, Perception, Degree, and Impact*, 44 J. MGMT. STUD. 835, 851-52 (2007).

The economic and non-economic costs of workplace bullying include costs to the target, the employing enterprise, and society. Employee costs are an occupational safety and health issue because they include mental and physical ill health, such as stress and depression; stress caused by workplace bullying causes a multitude of problems and may become sufficiently severe to lead to post-traumatic stress syndrome.<sup>20</sup> Stress-related effects of bullying include severe anxiety, disrupted sleep, loss of concentration, post-traumatic stress disorder, clinical depression, and panic attacks.<sup>21</sup> Stress-related *physical* health complications include cardiovascular problems (such as hypertension, strokes, heart attacks), adverse neurological changes (neurotransmitter disruption, hippocampus shrinkage), immunological impairment (more frequent infections of greater severity), and fibromyalgia and Chronic Fatigue Syndrome.<sup>22</sup>

### III. EXISTING U.S. LAWS: THE OCCUPATIONAL SAFETY AND HEALTH LAW OF 1970

In the United States, several laws provide potential recourse and yet none have proven effective in combating workplace bullying. Rather than replicating the laws here, the reader is referred to Professor Yamada's groundbreaking work exploring the gaps in U.S. law and arguing for a new status-blind harassment law, called the Healthy Workplace Bill.<sup>23</sup> The bill has been introduced in 16 states and is active in 10 states.<sup>24</sup>

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<sup>19</sup> Employment Law Alliance Report, *Abusive Boss Poll*, Mar. 21, 2007, <http://www.employmentlawalliance.com/pdf/ELA%20Abusive%20Boss%20Charts031907.pdf> (last visited Mar. 3, 2008) (nationwide poll of over 1,000 U.S. workers).

<sup>20</sup> Namie & Namie, *supra* note 11, at 320 (citing Heinz Leymann & Annelie Gustafsson, *Mobbing at Work and the Development of Post-Traumatic Stress Disorders*, 5 EUR. J. WORK & ORG. PSYCHOL. 251 (1996)).

<sup>21</sup> Namie & Namie, *supra* note 11, at 320.

<sup>22</sup> Workplace Bullying Institute, 2009, *Physical Health Impairment, How Bullying Can Affect Your Body* <http://www.workplacebullying.org/targets/impact/physical-harm.html>.

<sup>23</sup> David C. Yamada, *The Phenomenon of 'Workplace Bullying' and the Need for a Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475 (2000).

<sup>24</sup> See Workplace Bullying Institute, Legislative Campaign, <http://www.workplacebullyinglaw.org/index.html>. One version of the HWB provides an intriguing model for state-level OSHA laws. The bill requires the Division of Occupational Safety to "conduct a study analyzing the direct and indirect costs of workplace psychological harassment for workers and their families as reflected in healthcare and insurance rates." The bill also mandates that

The HWB is obviously the central focus of ongoing efforts to legislatively address workplace bullying at the state level, but thus far no federal laws have been introduced or apparently contemplated. Federal-level efforts are essential because, although the states are the experimenting grounds and when one state enacts the HWB more may follow that lead, federal initiatives will lead to uniformity and employers will have no choice but to comply or risk penalties. Pursuit of a new federal law is not the only option – utilization of existing laws and existing federal agency offers great potential. Indeed, it can be argued that pursuit of new legislative initiatives is ineffective given the time and expense and, perhaps, the lack of a lobbying body for this issue. Rather, utilizing existing laws and a vast administrative network may be the more sensible vehicle for change.<sup>25</sup>

#### A. OSHA Statutory Framework

Congress enacted OSHA with the stated purpose “to assure safe and healthful working conditions for working men and women.”<sup>26</sup> Congress further elaborated its finding that: “personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.”<sup>27</sup>

Congress envisioned that its purpose would be achieved, *inter alia*, by enforcing standards developed under the Act and “by providing for research, information, education, and training in

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the Division develop a program requiring larger employers to establish internal policies addressing psychological harassment. See Mass. H.B. 1850 (2007), available at <http://workplacebullyinglaw.org/states/legis-ma2.html>.

<sup>25</sup>See David Weil, *Crafting A Progressive Workplace Regulatory Policy: Why Enforcement Matters*, 28 COMP. LAB. L. & POL’Y J. 125, 126 (2007) (arguing that a progressive workplace regulatory policy should not rely on new legislative initiatives, but should draw on established laws and policies, including the “vast administrative apparatus that already exists to implement those policies.”).

<sup>26</sup> OSHA § 1; see also OSHA § 2(b) (declaring purpose “to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . .”).

<sup>27</sup> OSHA § 2(a).

the field of occupational safety and health; and for other purposes.”<sup>28</sup> Congress specifically envisioned a partnership between employers and employees, by “encouraging” and “stimulating” both parties to reduce workplace health hazards, in part by instituting new and perfecting existing programs.<sup>29</sup> Congress apparently intended OSHA to be an organic and innovative law, in part by “providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems.”<sup>30</sup> Naturally, a major component of the Act was the creation of a rule-making body to develop and promulgate occupational safety and health standards, and such standards were to be enforced via civil and criminal penalties.<sup>31</sup>

### 1. Employer Duties

OSHA’s “General Duty Clause” provides that each employer must furnish its employees with a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm.”<sup>32</sup> In addition, employers “shall comply with occupational safety and health standards promulgated under this Act.”<sup>33</sup> If no specific OSHA standard has been promulgated to address a hazard, the General Duty Clause provides the default standard, and citations will be issued if four elements are met:<sup>34</sup> (1) the employer failed to keep his workplace free of a “hazard;” (2) the hazard was “recognized” either by the cited employer individually or by the employer’s industry generally; (3) the recognized hazard was *causing or was likely to*

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<sup>28</sup> OSHA § 1.

<sup>29</sup> OSHA § 2(b)(1), (2).

<sup>30</sup> *Id.* at § 2(b)(5).

<sup>31</sup> OSHA § 17.

<sup>32</sup> OSHA § 5(1).

<sup>33</sup> *Id.* at §5(2).

<sup>34</sup> See OSHA Standards Interpretation 10/23/1996, available at [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=22281](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22281) OSHA regulatory standards addressing specific recognized hazards are discussed more fully, *infra*.

cause death or serious physical harm; and (4) there was a feasible means available that would eliminate or materially reduce the hazard.<sup>35</sup>

The maximum civil penalty for a “serious violation” of the General Duty Clause or OSHA standards regulations is \$7,000 per violation.<sup>36</sup> Willful or repeated violations carry a maximum penalty of \$70,000 per violation.<sup>37</sup> Criminal penalties for OSHA violations are only imposed if the violation is willful and results in death.<sup>38</sup> OSHA’s penalty provisions have been the subject of harsh criticism,<sup>39</sup> and are cited in combination with limited OSHA resources and low inspection rates by those who deem OSHA to be an administrative failure.<sup>40</sup> Although critics have focused on OSHA’s failings with respect to inspection rates and safety violations that have resulted in death or serious injury, other commentators have observed that OSHA has resulted in high compliance rates.<sup>41</sup> Another major obstacle for bullying targets is the lack of a private civil enforcement mechanism or penalty – an employee subjected to an OSHA violation can make a complaint but the enforcement and penalties are under the auspices of the Department of Labor (“DOL”), OSHA division.<sup>42</sup>

## 2. The Regulatory Apparatus: The Occupational Safety and Health Administration and NIOSH

The Act authorized the Secretary of the DOL to set mandatory occupational safety and health standards<sup>43</sup> – this broad grant of authority allows the Secretary to promulgate

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<sup>35</sup> See OSHA Standards Interpretation Letter 9/13/2006; see also *Bariod Div. of NL Industries, Inc. v. Occupational Safety and Health Review Comm’n*, 660 F.2d 439, 444 (10th Cir. 1981) (listing elements of General Duty Clause, internal citations omitted).

<sup>36</sup> OSHA § 17(b).

<sup>37</sup> OSHA § 17(a).

<sup>38</sup> OSHA § 17(e). The penalty for conviction is a maximum fine of \$10,000 or six months imprisonment. *Id.*

<sup>39</sup> See generally Lobel, *supra* note 6, at 1082-1084 (citations omitted).

<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., David Weil, *If OSHA is so bad, why is compliance so good?* 27 RAND J. OF ECON. 618 (2006).

<sup>42</sup> OSHA § 14.

<sup>43</sup> OSHA § 2(b)(3). The Act also created an Occupational Safety and Health Review Commission to carrying



regulations that “serve[] the objectives of the Act”<sup>44</sup> and imposes a duty on employers to comply with regulations promulgated after notice and comment rulemaking. The DOL established the OSH Administration to discharge those duties. Because employers can be cited for violation of *either* the General Duty Clause, *or* a specific OSHA standard, employers are therefore obligated to comply with the specific occupational safety and health standards promulgated by OSHA.<sup>45</sup>

In enacting OSHA, Congress also created NIOSH, under the auspices of the Department of Health and Human Services (“DHHS”), to carry out the Act’s policy, primarily by fulfilling the research and training aspects of the Act.<sup>46</sup> The Act expressly authorized the Secretary of the DHHS to conduct “research, experiments, and demonstrations relating to occupational safety and health, including studies of psychological factors involved, and relating to innovative methods, techniques, and approaches for dealing with occupational safety and health problems.”<sup>47</sup> The Act also expressly authorized the DHHS Secretary to conduct educational and informational programs to carry out the purposes of the Act.<sup>48</sup>

#### **IV. APPLYING THE REGULATORY REGIME OF OSHA TO WORKPLACE BULLYING**

Given OSHA’s broad federal mandate, there seems to be little doubt that the OSH Administration and NIOSH could identify workplace violence as a considerable safety and health concern, and bullying as a sub-set of that concern. Bullying has been understood for

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out adjudicatory functions under the Act. *Id.*

<sup>44</sup> OSHA § 6(b)(1).

<sup>45</sup> OSHA § 5(a)(2).

<sup>46</sup> OSHA § 22.

<sup>47</sup> OSHA §20.

<sup>48</sup> OSHA § 21(a)(1), (2).

<sup>49</sup> OSHA § 3(8).

many years to be a form of workplace violence by the ILO and by other countries. It is not a huge leap for the OSH Administration to interpret the General Duty Clause to cite employers who do not address bullying in the workplace, and it is not beyond the realm of possibility for OSHA to promulgate a standard addressing workplace bullying. At a minimum, OSHA and NIOSH should initiate employer/employee guidelines on the issue. Workplace bullying is a safety and health concern – OSHA regulation should be part of the solution.

Although the General Duty Clause’s clear focus is on physical injury, research shows that workplace bullying can lead to physical harms. Moreover, the Act’s broad mandate to the administrative agencies to develop standards, under OSHA section 2(a)(2), is not so limited. For example, OSHA defines the term “occupational safety and health standard” as “a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.”<sup>49</sup> Because the objectives of the Act are to provide safe and healthful working conditions, apparently without limitation to only those conditions that may cause death or physical injury, the Secretary arguably has broad authority to promulgate regulations addressing workplace bullying. This conclusion is further buttressed by the mechanisms through which Congress envisioned the purposes of the Act would be attained.

A. The Occupational Safety and Health Administration and NIOSH – Existing Regulations

Although the OSH Administration has not promulgated any regulations specifically addressing workplace bullying, it has issued letters of interpretation and guidance documents that

address the wider problem of workplace violence.<sup>50</sup> In 1992 and 1996, the OSH Administration issued an enforcement policy regarding workplace violence interpreting employers' obligations under the General Duty Clause to include taking feasible steps to minimize the risk of "violence and serious personal injury."<sup>51</sup> In 1996, the agency issued guidance to employers on workplace violence awareness and prevention.<sup>52</sup> In the guidelines, the OHS Administration recognized that workplace violence includes harassment and threats, in addition to death or physical injury,<sup>53</sup> apparently adopting NIOSH's definition of workplace violence:

[A]ny physical assault, threatening behavior or verbal abuse occurring in the work setting. It includes but is not limited to . . . *psychological traumas* such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as being followed, sworn at or shouted at.<sup>54</sup>

OSHA also recognized that the perpetrator of workplace violence can be a current, former or even prospective co-worker or supervisor, and that violence can occur in the workplace or off premises.<sup>55</sup> Most significantly, the 1996 OSHA guidance appears to accept an interpretation of the General Duty Clause as encompassing violence as a workplace hazard, thereby imposing an affirmative legal obligation on employers to keep the workplace free of such hazards. The guidelines advise that employers who become aware of threats or intimidation "or other potential indicators showing that the potential for violence in the workplace exists or has the potential to exist" are on notice of the risk and "may be required to implement a workplace violence

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<sup>50</sup> Although a senior OSHA official has indicated OSHA's intention to use the General Duty clause to cite employers for workplace violence hazards but to date, this effort has not received the attention from the agency that it deserves. Remarks of Jordan Barab, Acting Assistant Secretary for the Occupational Safety and Health Administration, May 12, 2009, comments during the American federation of State, County, and Municipal Employees' Nurses Congress. Available at 77 U.S.L.W. 2687 (May 15, 2009).

<sup>51</sup> See Standards Interpretation 9/13/2006 (quoting the Standards Interpretation 12/10/1992), available at [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=25504](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25504).

<sup>52</sup> OSHA, *Workplace Violence Awareness and Prevention*, February, 1996, available at [http://www.osha.gov/workplace\\_violence/wrkplaceViolence.Table.html](http://www.osha.gov/workplace_violence/wrkplaceViolence.Table.html) (last visited May 11, 2009).

<sup>53</sup> *Id.* Part I, *Facts and Information*, at 1, available at [http://www.osha.gov/workplace\\_violence/wrkplaceViolence.PartI.html](http://www.osha.gov/workplace_violence/wrkplaceViolence.PartI.html).

<sup>54</sup> *Id.* at 3 (emphasis added). OSHA compared the law enforcement community definition, which includes harassment. *Id.* at n.6.

<sup>55</sup> *Id.* at 4.

prevention program.”<sup>56</sup> The agency stated that employers have both a legal and moral obligation to provide a safe workplace, and embraced the notion that:

To prevent loss of life and injuries and to limit financial losses and potential liability, employers should institute policies and procedures to prevent violence from occurring in their workplaces. These policies may include means to identify the potential for violence, procedures to prevent the occurrence of violence and, in the event prevention fails and an incident of violence occurs, plans to respond and mitigate further damage.<sup>57</sup>

The OSH Administration went so far as to recommend that every employer establish, implement and maintain a prevention program and policy including training and dispute resolution and active involvement of EAP personnel.<sup>58</sup> The OSHA has even prepared a sample WVP program, and policy for employers to follow.<sup>59</sup> Finally, the OSHA was a member of a coalition that developed an informational and instructional document for use by employers and employees, which largely mirrored the OSHA guidelines.<sup>60</sup>

OSHA has also developed training materials for specific industries – Health Care and Social Service Workers, late night retail establishments, and hospitals.<sup>61</sup> These are based on OSHA’s general management guidelines, which were published in 1989. These general guidelines resulted from OSHA’s recognition of the strong correlation between reduction of workplace hazards and effective management training of worker safety and health protection.<sup>62</sup> OSHA specifically recognized that effective management training must address *all* work-related hazards, whether or not they are regulated by government standards, and acknowledged that

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<sup>56</sup> *Id.* at 4.

<sup>57</sup> *Id.* at 4.

<sup>58</sup> *Id.* Part II, at 1, *Elements of a Workplace Violence Prevention program*, available at [http://www.osha.gov/workplace\\_violence/wrkplaceViolence.PartII.html](http://www.osha.gov/workplace_violence/wrkplaceViolence.PartII.html).

<sup>59</sup> *Id.* at Part III, available at [http://www.osha.gov/workplace\\_violence/wrkplaceViolence.PartIII.html](http://www.osha.gov/workplace_violence/wrkplaceViolence.PartIII.html).

<sup>60</sup> Long Island Coalition for Workplace Violence Awareness and Prevention, *Workplace Violence Awareness & Prevention*, February 1996, available at [http://www.osha.gov/workplace\\_violence/wrkplaceViolence.intro.html](http://www.osha.gov/workplace_violence/wrkplaceViolence.intro.html). The coalition included OSHA, New York states agencies, insurers, employers, and unions. *Id.*

<sup>61</sup> <http://www.osha.gov/SLTC/etools/hospital/hazards/workplaceviolence/viol.html>.

<sup>62</sup> OSHA, *Voluntary Safety and Health Program Management Guidelines*, published in the *Federal Register* on Thursday, January 26, 1989 (54 FR 3904), available at [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_id=12909&p\\_table=FEDERAL\\_REGISTER](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=12909&p_table=FEDERAL_REGISTER)

effective management also improves employee morale and productivity, reducing workers' compensation costs and other "less obvious" costs of work-related illness.<sup>63</sup> The empirical and policy based reasoning behind these general guidelines applies with equal force to management involvement and effective training in worker protection from the workplace hazard of bullying.<sup>64</sup>

NIOSH has been the most proactive arm of the OSHA regulatory agencies with respect to workplace conditions that most directly implicate bullying, as opposed to more physical forms of violence. Although NIOSH had previously identified workplace violence as an occupational hazard,<sup>65</sup> in 1999, NIOSH studied and identified workplace *stress* as a workplace hazard for the first time, issuing Publication 99-101.<sup>66</sup> Although the 1999 study did not provide any policy direction or guidance,<sup>67</sup> this early effort was eventually followed by more studies and publications.<sup>68</sup> In 2004, NIOSH published the results of a study specifically addressing workplace bullying.<sup>69</sup> The study defined bullying as "repeated intimidation, slandering, social isolation, or humiliation by one or more persons against another."<sup>70</sup>

#### B. Application of OSHA to Workplace Bullying – OSHA Shortcomings

OSHA's General Duty Clause only obligates employers to maintain a workplace "free from recognized hazards that are causing or are likely to cause *death or serious physical harm* to [its]

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<sup>63</sup> *Id.*

<sup>64</sup> For a discussion of the role of training, in addition to communication and other mechanisms such as dispute resolution, in addressing workplace violence *see generally* Frances E. Zollers & Elletta Sangrey Callahan, *Workplace Violence and Security: Are There Lessons for Peacemaking?*, 36 VAND. J. TRANSNAT'L L. 449 (2003). Zollers and Callahan adopt a comprehensive definition of workplace violence that includes psychological harm. *Id.* at 452.

<sup>65</sup> National Institute for Occupational Safety & Health, *Violence in the Workplace, Risk Factors and Prevention Strategies*, Current Intelligence Bulletin 57, Risk Factors and Prevention Strategies, Division of Safety Research, June 1996, available at <http://www.cdc.gov/niosh/violcont.html>.

<sup>66</sup> NIOSH, *Stress . . . At Work*, Publication 99-101 (1999), available at <http://www.cdc.gov/niosh/atwork.html>.

<sup>67</sup> Yamada, *Workplace Bullying*, *supra* note 23, at n. 315.

<sup>68</sup> *See* NIOSH, *Working With Stress* (2002), available at <http://www.cdc.gov/niosh/docs/video/stress1.htm>.

<sup>69</sup> NIOSH, *Update: Most Workplace Bullying Is Worker To Worker, Early Findings From NIOSH Study Suggest* (July 28, 2004), <http://www.cdc.gov/niosh/updates/upd-07-28-04.html>.

<sup>70</sup> *Id.*

employees.”<sup>71</sup> Indeed, OSHA’s statutory text and regulations promulgated there under were primarily designed to respond to *physical* hazards in the workplace, particularly those in manufacturing and construction. Instances where the target experiences physical effects from being bullied, such as high blood pressure, heart attacks, strokes, potentially meet the standard of “serious physical harm” within the meaning of the General Duty Clause. Most bullying is, however, psychological, harassment that may not have any physical manifestations for the target. Some have argued that because the employer’s duty to keep the workplace safe from “physical harm” does not address the psychological harms caused by workplace bullying, OSHA is ineffectual.<sup>72</sup>

One solution would be to extend the General Duty Clause to include non-physical harms, bringing that clause into line with the general purposes behind OSHA. Another solution would focus on the administrative apparatus already in place and the second clause of OSHA’s employer duty clause to harness the OSH Administration’s rule-making power to promulgate safety and health regulations that include workplace bullying, stress and other non-physical workplace hazards. OSHA’s broad grant of authority allowing the agency to promulgate regulations that “serve[] the objectives of the Act”<sup>73</sup> imposes a duty on employers to comply with properly-promulgated regulations. Since the objectives of the Act are to provide safe and healthful working conditions, apparently without limitation to only those conditions that may cause death or physical injury, the agency arguably has broad authority to promulgate regulations addressing workplace bullying. This conclusion is further buttressed by the mechanisms through which Congress envisioned the purposes of the Act would be attained, as described above.

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<sup>71</sup> OSHA § 5(a)(1).

<sup>72</sup> See Yamada, *supra* note 23.

<sup>73</sup> OSHA § 6(b)(1).

Indeed, as demonstrated above, the OSH Administration has a long-standing position that a safe workplace is one that is free from all forms of violence, including harassment, threats and intimidation that do not rise to the level of physical harm. Further, NIOSH has begun to explore and expand on this well established principle. These preliminary steps can be harnessed and nurtured to develop both new regulations and new educational and training guidelines that employers and employees can use to work toward a bullying-free place of employment.

## V. CONCLUSION

The criticisms that have been leveled against OSHA focus on the agency's enforcement ability, given that it is underfunded and understaffed with low compliance rates. Other commentators have proposed a shift in focus, away from the traditional top-down and adversarial role of regulatory authority and towards new governance structures.<sup>74</sup> The new governance approach combines the old regulatory approach with a new approach, emphasizing social partnerships, cooperation, and industrial democracy.<sup>75</sup> The cure for OSHA's ills may well be a move away from the old style regulatory regime towards a new combined approach that recognizes the need for enforcement through traditional rules and penalties, with a cooperative, holistic approach. Including workplace bullying within both approaches is the next logical step forward in creating a safe and healthy working environment for all workers.

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<sup>74</sup> See generally Lobel, *supra* note 6.

<sup>75</sup> *Id.* This approach also addresses the criticism that OSHA is an ineffective tool for tackling workplace bullying because it lacks a private cause of action. Redesigning governance in this manner reduces the emphasis on conflict and adversarialism and takes the focus away from litigation, thereby reducing reliance on private enforcement actions which are piecemeal in any event.