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# IS LITIGATION YOUR FINAL ANSWER? WHY THE HEALTHY WORKPLACE BILL SHOULD INCLUDE AN ADR PROVISION

*Florence Z. Mao\**

## I. INTRODUCTION

On the morning of May 2, 2005, Marlene Braun wrote in a two-page e-mail to a coworker, “I cannot bear the thought of coming into the office this morning or ever again . . . I cannot take any more abuse . . . and any more of the humiliation I have had to endure for the past year.”<sup>1</sup> Moments later, Marlene used a .38 blue steel revolver to shoot and kill her dogs before turning the gun to her head and pulling the trigger.<sup>2</sup>

Marlene had served as monument manager at the Carrizo Plain National Monument in Bakersfield, California and had been a federal employee at the Bureau of Land Management (“BLM”) for nineteen years.<sup>3</sup> One year before Marlene’s death, the BLM office in Bakersfield acquired a new director who

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\* J.D. Candidate, Brooklyn Law School, 2014; B.A., Barnard College, Columbia University, 2008. I thank my family and friends for their unconditional support and encouragement, and members of the *Journal of Law and Policy* for their time, patience, and thoughtful feedback. Special thanks to my mother, Christina Gong, for inspiring my love of learning.

<sup>1</sup> OFFICE OF INSPECTOR GEN., U.S. DEP’T OF INTERIOR, REPORT OF INVESTIGATION: CARRIZO PLAIN INCIDENT 15 (2006), *available at* [http://www.workplacebullying.org/multi/pdf/braun\\_oig\\_report.pdf](http://www.workplacebullying.org/multi/pdf/braun_oig_report.pdf).

<sup>2</sup> *Id.*; *see also* KAMuston, *Fault Lines*, DAILY KOS (May 11, 2007, 3:34 AM), <http://www.dailykos.com/story/2007/05/11/333443/-Fault-Lines>.

<sup>3</sup> *An Act Concerning State Employees and Violence and Bullying in the Workplace: Hearing on Substitute H.B. 5464 Before the H. Comm. on Labor & Pub. Emps.*, 2010 Leg. (Conn. 2010) [hereinafter *Hearing 2010*] (statement of Katherine Hermes, Conn. Healthy Workplace Advocates); OFFICE OF INSPECTOR GEN., *supra* note 1, at 3.

strongly disagreed with Marlene's plan to regulate land use and cattle grazing in an effort to preserve native plant species at the Monument.<sup>4</sup> During that year, Marlene and her new supervisor engaged in a series of heated interactions.<sup>5</sup> In one incident, when she attempted to explain her position to him, he repeatedly yelled, "Did you hear what I said?"<sup>6</sup> The next day he continued to shout at her in front of other employees.<sup>7</sup> Marlene later wrote that she "felt like a bully had just beaten [her] up," and she was so upset that she vomited.<sup>8</sup> Another time, her supervisor threatened her when he blocked her on a narrow road with his truck, exited the vehicle, and told her that she had "brought this on herself."<sup>9</sup> Despite having a previously spotless employment record, after another conflict, her supervisor suspended her for five days without pay.<sup>10</sup> Even worse, Marlene appealed the suspension, but was denied.<sup>11</sup> In less than a year, Marlene received five written reprimands.<sup>12</sup>

While Marlene was once a healthy individual,<sup>13</sup> during the last year of her life she lost forty pounds, grew anxious and depressed,<sup>14</sup> and took prescription tranquilizers and sleeping pills.<sup>15</sup> When Marlene requested medical leave for the first time

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<sup>4</sup> Julia Cart & Maria L. La Ganga, *Suicide Casts a Shadow on Conservation Battle*, L.A. TIMES (Aug. 20, 2005), <http://articles.latimes.com/print/2005/aug/20/local/me-carrizo20>.

<sup>5</sup> OFFICE OF INSPECTOR GEN., *supra* note 1, at 6.

<sup>6</sup> KAMuston, *supra* note 2. Marlene privately documented conflicts with her supervisor in a thirty-five-page chronology, including instances of being "yelled at." See Cart & La Ganga, *supra* note 4.

<sup>7</sup> KAMuston, *supra* note 2.

<sup>8</sup> *Id.*

<sup>9</sup> *An Act Concerning Bullying in the Workplace: Hearing on S.B. 60 Before the S. Comm. on Labor & Pub. Emps.*, 2008 Leg. (Conn. 2008) [hereinafter *Hearing 2008*] (statement of Katherine Hermes, Workplace Bullying Inst.).

<sup>10</sup> KAMuston, *supra* note 2; Cart & La Ganga, *supra* note 4.

<sup>11</sup> KAMuston, *supra* note 2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See *Hearing 2008*, *supra* note 9.

<sup>15</sup> KAMuston, *supra* note 2.

in her career, her supervisor denied the request.<sup>16</sup> In a suicide note to her best friend, Marlene wrote that the new director had made her life “utterly unbearable,”<sup>17</sup> and she could no longer suffer the abuse and humiliation.<sup>18</sup>

Unfortunately, Marlene’s experience with her supervisor is not atypical of “Targets”<sup>19</sup> of workplace bullying. Targets often suffer psychological, emotional, and physical harm as a result of the abuse.<sup>20</sup> For example, Targets can suffer from severe psychological harm akin to posttraumatic stress disorder<sup>21</sup> and, in a number of cases, may even resort to suicide.<sup>22</sup> A survey conducted by the Workplace Bullying Institute (“WBI”) in 2012 found that eighty percent of respondents experienced anxiety from workplace bullying, and forty-nine percent reported being diagnosed with clinical depression.<sup>23</sup> Moreover, twenty-nine percent of respondents considered suicide, and sixteen percent had an actual plan to commit it.<sup>24</sup> Despite the psychological and physical toll that workplace bullying has on American workers, currently there is no state or federal law that adequately addresses the phenomenon and protects workers against it.<sup>25</sup> The

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<sup>16</sup> See *Hearing 2008*, *supra* note 9.

<sup>17</sup> *Hearing 2010*, *supra* note 3; Cart & La Ganga, *supra* note 4.

<sup>18</sup> OFFICE OF INSPECTOR GEN., *supra* note 1, at 1.

<sup>19</sup> Gary and Ruth Namie, the leading researchers of workplace bullying and author of several books on the subject, use the word “Target” instead of “victim” out of respect for the affected individuals. See GARY NAMIE & RUTH NAMIE, *BULLYPROOF YOURSELF AT WORK!* 10–12 (1999) [hereinafter NAMIE & NAMIE, *BULLYPROOF YOURSELF*].

<sup>20</sup> For further discussion regarding the harmful effects of workplace bullying, see *infra* Part II.

<sup>21</sup> See Heinz Leymann & Annelie Gustafsson, *Mobbing at Work and the Development of Post-Traumatic Stress Disorders*, 5 *EUR. J. WORK & ORGANIZATIONAL PSYCHOL.* 251, 252–54 (1996).

<sup>22</sup> *The Toll of Workplace Bullying on Employee Health: WBI Survey*, WORKPLACE BULLYING INST. (Aug. 12, 2009), <http://www.workplacebullying.org/2012/08/09/2012-d/>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Many European countries have passed anti-workplace-bullying legislation. See Susan Harthill, *Bullying in the Workplace: Lessons from the United Kingdom*, 17 *MINN. J. INT’L L.* 247, 263–66 (2008) (discussing anti-

only plausible avenues of relief available to Targets are to file a claim under either the common law tort of intentional infliction of emotional distress (“IIED”) or under Title VII of the Civil Rights Act of 1964 for a hostile work environment. These legal options, however, may be insufficient to address the often subtle nature of workplace bullying.<sup>26</sup>

As a result, Professor David Yamada of Suffolk Law School, a leading proponent of creating a distinct cause of action for workplace bullying and the architect of the Healthy Workplace Bill, has written extensively on the need for status-blind legislation to address workplace bullying.<sup>27</sup> Since workplace bullying, like sexual harassment, is subtle in nature, Yamada modeled the bill largely after the hostile work environment doctrine under sexual harassment case law.<sup>28</sup> The Healthy Workplace Bill would create a civil cause of action for victims of workplace bullying and hold employers liable for creating or maintaining an abusive work environment.<sup>29</sup> As of March 2013, twenty-four states—New York, Illinois, and

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workplace-bullying laws in Europe and Canada); Amanda E. Lueders, Note, *You'll Need More Than a Voltage Converter: Plugging European Workplace Bullying Laws into the American Jurisprudential Outlet*, 25 ARIZ. J. INT'L & COMP. L. 197, 207–11 (2008).

<sup>26</sup> See *infra* Part II.C.

<sup>27</sup> See, e.g., David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL'Y J. 475 (2004) [hereinafter Yamada, *Crafting a Legislative Response*]; David C. Yamada, *Employment Law as if People Mattered: Bringing Therapeutic Jurisprudence into the Workplace*, 11 FLA. COASTAL L. REV. 257 (2010) [hereinafter Yamada, *Therapeutic Jurisprudence*]; David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523 (2009) [hereinafter Yamada, *Human Dignity*]; 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, *Status-Blind Hostile Work Environment*]; David C. Yamada, *United States: Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL'Y J. 251 (2010) [hereinafter Yamada, *Ten-Year Progress Report*].

<sup>28</sup> See Yamada, *Status-Blind Hostile Work Environment*, *supra* note 27, at 524–25.

<sup>29</sup> See Yamada, *Crafting a Legislative Response*, *supra* note 27, at 517–20.

Oregon among them—have introduced the bill in state legislatures, but none has succeeded in passing it into law.<sup>30</sup> Opponents of the Healthy Workplace Bill primarily argue that such legislation would negatively impact the economy and flood the courts with frivolous lawsuits.<sup>31</sup>

A provision in the Healthy Workplace Bill encouraging the alternative dispute resolution (“ADR”) processes of mediation and arbitration as potential alternatives to litigation will increase the likelihood of its passage through state legislatures and provide Targets with more efficient and cost-effective solutions. Part II defines workplace bullying, examines its effects on employers and employees, and discusses possible avenues of relief currently available. Part III explores the text of the Healthy Workplace Bill and its progress in various state legislatures. Part IV discusses the use of mediation in employment disputes and the Equal Employment Opportunity Commission’s (“EEOC”) mediation program. Part V looks at existing court-connected and nonprofit arbitration programs. Reflecting upon the success of mediation and arbitration in other forms of employment disputes, Part VI examines the potential for inclusion of such programs in the Healthy Workplace Bill. Adopting these measures would address many concerns of the bill’s opponents—namely, crowding of court dockets—and encourage its swift passage.

## II. WORKPLACE BULLYING

### *A. Definition and Prevalence of Workplace Bullying*

Bullying has received increased media attention in recent years; however, because of its subtle nature, many have struggled to establish a uniform definition that accurately captures the phenomenon.<sup>32</sup> Nonetheless, the growing awareness

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<sup>30</sup> HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/> (last visited Apr. 5, 2013).

<sup>31</sup> See Yamada, *Ten-Year Progress Report*, *supra* note 27, at 269–70.

<sup>32</sup> See, e.g., Emily Bazelon, Op-Ed., *Defining Bullying Down*, N.Y. TIMES (Mar. 11, 2013), <http://www.nytimes.com/2013/03/12/opinion/defining-bullying-down.html>.

of workplace bullying has prompted the development of various definitions in an attempt to address the issue. For example, the WBI defines workplace bullying as “the repeated, health-harming mistreatment of one or more persons (Target) by one or more perpetrators (supervisors or coworkers)” that can consist of verbal abuse, threatening or humiliating conduct, interference with work-related tasks, and even sabotage.<sup>33</sup> Similarly, Professor Yamada defines workplace bullying as “the intentional infliction of a hostile work environment upon an employee by a coworker or coworkers, typically through a combination of verbal and nonverbal behaviors.”<sup>34</sup> Others have characterized workplace bullying as “persistent,”<sup>35</sup> “unreasonable,”<sup>36</sup> and “malicious.”<sup>37</sup> These definitions have three unifying themes: (1) the bullying activity is persistent and intentional; (2) the Target suffers a combination of psychological, physical, and economic harm as a result; and (3) the bullying activity creates an overall hostile work environment.

Workplace bullying is distinguishable from general incivility and status-based harassment.<sup>38</sup> Unlike general aggression or incivility, which involve isolated instances of rudeness or crass

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<sup>33</sup> *The WBI Definition of Workplace Bullying*, WORKPLACE BULLYING INST., <http://www.workplacebullying.org/individuals/problem/definition/> (last visited Apr. 5, 2013).

<sup>34</sup> Yamada, *Status-Blind Hostile Work Environment*, *supra* note 27, at 481.

<sup>35</sup> Pamela Lutgen-Sandvik, *Water Smoothing Stones: Subordinate Resistance to Workplace Bullying 1* (Aug. 2005) (unpublished Ph.D. dissertation, Ariz. State Univ.), *available at* <http://www.unm.edu/~plutgen/Resistance%20to%20Workplace%20Bullying%20Lutgen-Sandvik%20Dissertation%202005.pdf>.

<sup>36</sup> WASH. STATE DEP'T OF LABOR & INDUS., *WORKPLACE BULLYING AND DISRUPTIVE BEHAVIOR: WHAT EVERYONE NEEDS TO KNOW*, SHARP Report # 87-2-2011, at 1 (Apr. 2011) [hereinafter *WHAT EVERYONE NEEDS TO KNOW*], *available at* <http://www.lni.wa.gov/Safety/Research/Files/Bullying.pdf>.

<sup>37</sup> Lutgen-Sandvik, *supra* note 35, at 1.

<sup>38</sup> See Lynn M. Andersson & Christine M. Pearson, *Tit for Tat? The Spiraling Effect of Incivility in the Workplace*, 24 ACAD. MGMT. REV. 453, 466 (1999). Status-based harassment refers to harassment based on a person's protected status under Title VII of the Civil Rights Act of 1964, such as gender, race, or age. See 42 U.S.C. § 2000e-2 (2011).

behavior, workplace bullying involves *repetition, duration, and escalation*, creating an ongoing pattern of abusive behavior.<sup>39</sup> Workplace bullying is also unique in that it can consist of both covert and overt tactics.<sup>40</sup> Examples include excessive monitoring or micromanaging, being sworn at, unwarranted or invalid criticism, being humiliated and yelled at in front of others, exclusion from important meetings, social isolation, and being given unrealistic deadlines.<sup>41</sup> While an uncivil worker may be rude and boorish, this behavior is generally not targeted at anyone and is not personalized.<sup>42</sup> Conversely, bullying is a “laser-focused, systematic campaign of interpersonal destruction” that “escalate[s] in abusiveness.”<sup>43</sup> Therefore, workplace bullying goes far beyond general incivility and rudeness; it is the repeated and targeted abuse of an individual that has devastating consequences for that person.

Bullies may take the form of either a supervisor or coworker.<sup>44</sup> One study by the National Institute for Occupational Safety and Health found that bullying by coworkers was more common than bullying by bosses.<sup>45</sup> Another survey found that coworkers were bullies in forty-three percent of cases, compared to supervisor involvement in thirty-six percent of cases.<sup>46</sup> In

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<sup>39</sup> See WHAT EVERYONE NEEDS TO KNOW, *supra* note 36, at 1; Lutgen-Sandvik, *supra* note 35, at 24.

<sup>40</sup> See WHAT EVERYONE NEEDS TO KNOW, *supra* note 36, at 3.

<sup>41</sup> See *id.* at 1; *Early Signs of Bullying*, WORKPLACE BULLYING INST., <http://www.workplacebullying.org/individuals/problem/early-signs/> (last visited Apr. 5, 2013).

<sup>42</sup> See Gary Namie, *Workplace Bullying: Escalated Incivility*, IVEY BUS. J., Nov.–Dec. 2003, at 1 [hereinafter Namie, *Escalated Incivility*].

<sup>43</sup> GARY NAMIE & RUTH NAMIE, *THE BULLY-FREE WORKPLACE: STOP JERKS, WEASELS, AND SNAKES FROM KILLING YOUR ORGANIZATION* 6 (2011) [hereinafter NAMIE & NAMIE, *BULLY-FREE WORKPLACE*]; *The WBI Definition of Workplace Bullying*, *supra* note 33.

<sup>44</sup> Press Release, Nat'l Inst. for Occupational Safety & Health, CDC, Most Workplace Bullying Is Worker to Worker, Early Findings from NIOSH Study Suggest (July 28, 2004), available at <http://www.cdc.gov/niosh/updates/upd-07-28-04.html>.

<sup>45</sup> *Id.*

<sup>46</sup> Loreleigh Keashly & Joel H. Neuman, *Bullying in the Workplace: Its Impact and Management*, 8 EMP. RTS. & EMP. POL'Y J. 335, 344 (2004).



2010, the WBI and Zogby International (“WBI-Zogby”) released a comprehensive survey measuring the prevalence of workplace bullying in the United States.<sup>47</sup> Based on this online survey of 2,092 adults, approximately 53.5 million Americans, or thirty-five percent of the workforce, have been bullied at work, and fifty percent have been affected by workplace bullying either as a Target or a witness to the behavior.<sup>48</sup> The WBI-Zogby survey results reveal that workplace bullying is a pervasive phenomenon with harmful effects that are widely felt by a large portion of the American workforce.<sup>49</sup>

*B. Negative Consequences of Workplace Bullying for Employees and Employers*

When bullying exists in the workplace, it can have serious economic, psychological, and emotional consequences for both the employee and employer. Targets experience psychological effects such as stress, depression, loss of sleep, and low self-esteem, as well as feelings of shame, guilt, and embarrassment.<sup>50</sup> In more severe instances, they may develop posttraumatic stress disorder, which, if left untreated, may cause an individual to react violently against either the bully or another coworker.<sup>51</sup> Targets may also manifest physical symptoms, such as stress headaches, high blood pressure, digestive problems, and even reduced immunity to infection.<sup>52</sup>

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<sup>47</sup> The survey asked respondents, “At work, what is your experience with any or all of the following types of repeated mistreatment: sabotage by others that prevented work from getting done, verbal abuse, threatening conduct, intimidation or humiliation?” *U.S. Workplace Bullying Survey*, WORKPLACE BULLYING INST. 2 (2010), [http://workplacebullying.org/multi/pdf/WBI\\_2010\\_Natl\\_Survey.pdf](http://workplacebullying.org/multi/pdf/WBI_2010_Natl_Survey.pdf).

<sup>48</sup> *Id.* The survey had a margin of error of +/- 2.2 percentage points. *Id.* at 1.

<sup>49</sup> *See generally id.*

<sup>50</sup> NAMIE & NAMIE, BULLYPROOF YOURSELF, *supra* note 19, at 69.

<sup>51</sup> *See id.* at 69–70; *see also* Leymann & Gustafsson, *supra* note 21, at 252–54 (discussing the diagnostic criteria and symptoms of posttraumatic stress disorder).

<sup>52</sup> NAMIE & NAMIE, BULLYPROOF YOURSELF, *supra* note 19, at 70.

An employee suffering from the stress and fatigue of workplace bullying will generally become less productive and efficient.<sup>53</sup> In turn, the employer could suffer direct, indirect, and opportunity costs.<sup>54</sup> For example, employers may see a significant increase in medical and workers' compensation claims due to work-related stress as well as increased legal fees and settlement costs.<sup>55</sup> Other direct costs include hiring temporary staff to fill in for those who call in sick or eventually quit, the loss of ex-workers who take valuable company knowledge with them, and additional expenses in recruitment and training.<sup>56</sup> Moreover, an abusive environment may lead to indirect costs for the employer by creating a general atmosphere filled with "fear and mistrust, resentment, hostility, feelings of humiliation, withdrawal, play-it-safe strategies, and hiding mistakes."<sup>57</sup> Other indirect costs could include high turnover rates, poor customer service, frequent absenteeism, and acts of sabotage and revenge.<sup>58</sup> Finally, an employer may incur opportunity costs resulting from a worker's disengagement and disinterest.<sup>59</sup> For instance, a 2002 survey of 9,000 federal employees revealed that workplace harassment over a two-year period cost the U.S. government more than \$180 million in lost time and productivity.<sup>60</sup> Therefore, the effects of workplace

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<sup>53</sup> See Yamada, *Status-Blind Hostile Work Environment*, *supra* note 27, at 483.

<sup>54</sup> *Id.*

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

<sup>56</sup> See Judith Lynn Fisher-Blando, *Workplace Bullying: Aggressive Behavior and Its Effect on Job Satisfaction and Productivity* 8 (Feb. 2008) (unpublished Ph.D. dissertation, Univ. of Phx.) (citing A. NEEDHAM, *WORKPLACE BULLYING: THE COSTLY BUSINESS SECRET* (2003)) (on file with author).

<sup>57</sup> Yamada, *Status-Blind Hostile Work Environment*, *supra* note 27, at 483-84 (quoting EMILY S. BASSMAN, *ABUSE IN THE WORKPLACE: MANAGEMENT REMEDIES AND BOTTOM LINE IMPACT* 141 (1992)).

<sup>58</sup> See *id.* at 484 (citing BASSMAN, *supra* note 57, at 142-44).

<sup>59</sup> See *id.*

<sup>60</sup> *Workplace Bullying's High Cost: \$180 Million in Lost Time, Productivity*, ORLANDO BUS. J. (Mar. 18, 2002), <http://www.bizjournals.com/orlando/stories/2002/03/18/focus1.html?page=all>. Similarly, another survey showed that workplace bullying led to reduced employee

bullying can impose long- and short-term costs on employers resulting from lost productivity and low morale in the organization.

*C. Current Legal Remedies to Address Workplace Bullying*

Currently, American common law does not recognize a tort of workplace bullying, and no state or federal statute directly addresses the issue either.<sup>61</sup> Existing common law and statutory remedies are insufficient to address the particular nature of workplace bullying.<sup>62</sup> For example, under Title VII of the Civil Rights Act of 1964, it is unlawful for an employer to discriminate against or harass any individual because of his or her protected status, such as race, religion, sex, or national origin.<sup>63</sup> Targets of workplace bullying, however, could be subjected to a status-blind, “equal-opportunity abusive work environment.”<sup>64</sup> In fact, workplace bullying frequently includes same-sex and same-race harassment.<sup>65</sup> Research has shown that

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productivity and increased employee attrition. The survey revealed that “[t]wenty-eight percent lost work time avoiding the [bully], fifty-three percent lost work time worrying about [a past] incident or future interactions with the [bully] . . . forty-three percent contemplated changing jobs to avoid the [bully], and twelve percent actually changed jobs. . . .” Yamada, *Status-Blind Hostile Work Environment*, *supra* note 27, at 484 (quoting Christine M. Pearson, *Incivility and Aggression at Work: Executive Summary* (July 1998) (unpublished ms.)). Similarly, another survey showed that twenty-two percent “lost work time avoiding the [bully],” twenty-four percent “lost work time worrying about incidents and future interactions,” and thirty-five percent “changed jobs to avoid the [bully].” *See* Fisher-Blando, *supra* note 56, at 132.

<sup>61</sup> *See* Yamada, *Status-Blind Hostile Work Environment*, *supra* note 27, at 484.

<sup>62</sup> Other scholars have also argued that statutory and common law remedies are inadequate to address workplace bullying. *See, e.g.*, Michael E. Chaplin, *Workplace Bullying: The Problem and the Cure*, 12 U. PA. J. BUS. L. 437 (2010); Yamada, *Status-Blind Hostile Work Environment*, *supra* note 27.

<sup>63</sup> *See* 42 U.S.C. § 2000e-2(a) (2011).

<sup>64</sup> Yamada, *Status-Blind Hostile Work Environment*, *supra* note 27, at 508.

<sup>65</sup> *See* Namie, *Escalated Incivility*, *supra* note 42, at 2.

at least half of all bullying is woman-on-woman.<sup>66</sup> Even though the Supreme Court has ruled that same-sex harassment is actionable under Title VII,<sup>67</sup> it may be difficult to prove. In addition to showing that same-sex harassment was “because of” a plaintiff’s sex,<sup>68</sup> he or she must establish that the sexual conduct was both overt and unwelcomed.<sup>69</sup> Moreover, nonsexual conduct may be “too remotely related to a tangible job benefit” to bring a prima facie case.<sup>70</sup> Therefore, unless a Target can prove that the bullying conduct was overtly sexual in nature and “because of” his or her sex, he or she cannot bring a claim for hostile work environment<sup>71</sup> and is left with no legal redress.

Professor Susan Harthill of Florida Coastal School of Law has suggested expanding the Occupational Safety and Health Act (“OSHA”) to cover bullying as a recognized workplace health and safety hazard.<sup>72</sup> OSHA requires employers to maintain a workplace free from physically harmful hazards and to “comply with occupational safety and health standards.”<sup>73</sup> At the same time, Harthill acknowledges that OSHA, in its current form, is

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<sup>66</sup> *Id.*

<sup>67</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

<sup>68</sup> 42 U.S.C. § 2000e-2(a) (2011). The hostile work environment doctrine mostly revolves around questions of sexual harassment. Yamada, *Status-Blind Hostile Work Environment*, *supra* note 27, at 511. Although the Supreme Court has not reviewed the hostile work environment doctrine in the context of racial or same-race harassment, in *Harris v. Int’l Paper Co.*, 765 F. Supp. 1509, 1512–13 (D. Me. 1991), the court recognized a racial harassment claim based on unwanted racially discriminatory conduct that created a hostile work environment. *Id.*

<sup>69</sup> Yamada, *Status-Blind Hostile Work Environment*, *supra* note 27, at 511 (citing Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *YALE L.J.* 1683, 1713).

<sup>70</sup> *Id.* (quoting Schultz, *supra* note 69, at 1721).

<sup>71</sup> *See* 42 U.S.C. § 2000e-2(a) (2011). *See generally* Yamada, *supra* note 27 (arguing for status-blind legislation to combat workplace bullying).

<sup>72</sup> *See* Susan Harthill, *The Need for a Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act*, 78 *U. CIN. L. REV.* 1250, 1298–99 (2010) (arguing that OSHA should reflect hazards like workplace bullying because it is “likely to cause serious physical harm” under the general duty clause of the Act).

<sup>73</sup> 29 U.S.C. § 654(a)(1)–(2) (2011).

ineffective because (1) its monetary sanctions are not heavy enough to compel employers to prevent or combat workplace bullying in their organizations, and (2) it would be impossible for OSHA inspectors to conduct adequate investigations of every instance of workplace bullying.<sup>74</sup> Furthermore, as Yamada points out, Targets do not have a private cause of action under OSHA.<sup>75</sup>

Similarly, the common law tort of intentional infliction of emotional distress (“IIED”) does not provide an adequate response to workplace bullying. In particular, the subtle nature of workplace bullying usually does not rise to the level of “extreme and outrageous conduct” required by the tort.<sup>76</sup> Professor Michael Chaplin of California State University has suggested that courts consider tailoring IIED to bullying in the workplace because Targets suffer undeniable emotional harm.<sup>77</sup>

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<sup>74</sup> See Harthill, *supra* note 72, at 1297. Under OSHA, the maximum fine that an employer can incur for a “willful” violation is \$70,000. *Id.*; see also Yamada, *Status-Blind Hostile Work Environment*, *supra* note 27, at 522; Stephen J. Beaver, Comment, *Beyond the Exclusivity Rule: Employer’s Liability for Workplace Violence*, 81 MARQ. L. REV. 103, 127–30 (1997) (arguing that OSHA is inadequate to address the issue of workplace violence).

<sup>75</sup> Yamada, *Status-Blind Hostile Work Environment*, *supra* note 27, at 522.

<sup>76</sup> Most courts rely upon the definition of IIED as outlined in the RESTATEMENT (SECOND) OF TORTS, which reads:

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.

Yamada, *Status-Blind Hostile Work Environment*, *supra* note 27, at 493 (quoting RESTATEMENT (SECOND) OF TORTS § 46(1) (1965)); see also Howell v. N.Y. Post Co., 612 N.E.2d 699, 702 (N.Y. 1993) (dismissing all IIED claims because plaintiff failed to allege conduct that was “sufficiently outrageous”); Magidson v. Wachovia Bank, NA, No. 1:07CV505, 2007 WL 4592230, at \*4 (M.D.N.C. Dec. 27, 2007) (“North Carolina courts have been reluctant to extend intentional infliction of emotional distress liability in the workplace.”); Yamada, *Status-Blind Hostile Work Environment*, *supra* note 27, at 493–508 (examining cases in which workplace bullying claims failed because the plaintiff failed to show “extreme and outrageous conduct”).

<sup>77</sup> See Chaplin, *supra* note 62, at 461–62.

Under the proposed modified tort of Intentional Infliction of Workplace Abuse (“IIWA”), the Target would only need to show that he or she was exposed to bullying conduct that was “intentional or reckless” consisting of “two or more negative acts on a weekly basis for at least six months,” which resulted in “mental or physical harm.”<sup>78</sup> Chaplin has argued that since tort law may readily evolve to address different claims in changing circumstances, IIWA is a more appropriate solution to workplace bullying.<sup>79</sup> Unfortunately, he admits that “courts are not inclined to adopt new causes of action.”<sup>80</sup> Moreover, Chaplin suggests IIWA as a solution partly due to the Healthy Workplace Bill’s failure to be passed.<sup>81</sup> Though IIWA is a creative solution, it may be unnecessary for courts to wait for the right factual situation to adopt the modified tort if the Healthy Workplace Bill is passed into law.

A recent case may signify a willingness among courts to utilize common law civil assault to address workplace bullying. In *Raess v. Doescher*,<sup>82</sup> the Indiana Supreme Court affirmed a jury award for civil assault<sup>83</sup> for a Target of workplace bullying. In that case, the plaintiff Doescher was a cardiovascular perfusionist during a medical procedure performed by the defendant Dr. Raess.<sup>84</sup> When the two men entered into a work-related argument, Dr. Raess’s face turned red, and with his fists balled at his side, he angrily walked towards Doescher, who

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<sup>78</sup> *Id.* at 462–63.

<sup>79</sup> *Id.* at 466.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 453.

<sup>82</sup> *Raess v. Doescher*, 883 N.E.2d 790 (Ind. 2008).

<sup>83</sup> Civil assault is an act intended to cause harmful or offensive contact, causing the victim to fear such contact. *See* RESTATEMENT (SECOND) OF TORTS § 21 (1965).

<sup>84</sup> *Raess v. Doescher*, 858 N.E.2d 119, 121 (Ind. Ct. App. 2006), *vacated*, 883 N.E.2d 790 (Ind. 2008). During open heart surgeries or other heart procedures, a cardiovascular perfusionist operates circulation equipment when a patient’s circulatory or respiratory functions need to be artificially supported or temporarily replaced. *See Cardiovascular Perfusionist*, MAYO SCH. OF HEALTH SCI., <http://www.mayo.edu/mshs/careers/cardiovascular-perfusionist> (last visited Apr. 5, 2013).

backed up against the wall.<sup>85</sup> Believing that the surgeon intended to “smack the [shit] out of [him],” Doescher raised his hands in defense.<sup>86</sup> Instead, Dr. Raess walked past Doescher and exited the room after screaming, “You’re over. You’re history. You’re finished.”<sup>87</sup> At trial, Doescher testified that he “felt assaulted” by Dr. Raess’s behavior<sup>88</sup> and retained Dr. Gary Namie of the WBI to testify as an expert witness.<sup>89</sup> The Indiana Supreme Court affirmed the trial court’s decision to admit Dr. Namie’s testimony<sup>90</sup> and the jury verdict that Dr. Raess was liable for civil assault.<sup>91</sup>

Dissenting Justice Boehm, however, believed that the trial court erred in admitting Dr. Namie’s testimony.<sup>92</sup> Before trial, Dr. Raess had moved to exclude Dr. Namie’s testimony because “workplace bullying” was not a recognized tort and had no legal definition, but the trial court denied the motion without explanation.<sup>93</sup> Justice Boehm believed that without a legal context for workplace bullying, Dr. Namie’s testimony—that Dr. Raess was a “workplace abuser” and the incident was “an episode of workplace bullying”—amounted to “highly prejudicial name-calling.”<sup>94</sup> Although some commentators are hopeful that the result of *Raess* will help protect Targets from workplace bullying,<sup>95</sup> Justice Boehm’s dissent and the trial court’s decision to exclude the term “workplace bullying” from jury instructions demonstrate judicial reluctance to adopt tort relief directly addressing the phenomenon and highlight the need for workplace bullying to be legally recognized and statutorily defined.

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<sup>85</sup> *Raess*, 858 N.E.2d at 121.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Raess*, 883 N.E.2d at 801 (Boehm, J., dissenting).

<sup>90</sup> *Id.* at 797 (majority opinion).

<sup>91</sup> *Id.* at 799.

<sup>92</sup> *Id.* at 800 (Boehm, J., dissenting).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 801.

<sup>95</sup> See Jordan F. Kaplan, Comment, *Help Is on the Way: A Recent Case Sheds Light on Workplace Bullying*, 47 HOUS. L. REV. 141, 172–73 (2010).

## III. THE HEALTHY WORKPLACE BILL

A. *The Model Act*

In 2000, Professor Yamada proposed a model act to address workplace bullying under a theory called “Intentional Infliction of a Hostile Work Environment (IIHW).”<sup>96</sup> The new cause of action would advance the important policy goals of prevention, self-help, compensation, and punishment.<sup>97</sup> He suggested drawing upon the statutory text and case law under Title VII of the Civil Rights Act of 1964 and the elements of common law IIED as guidance for crafting a statute to address workplace bullying.<sup>98</sup> Furthermore, he argued that the hostile work environment doctrine could extend to all workers regardless of any protected status.<sup>99</sup> To address criticisms that plaintiffs might rush the courthouse with frivolous claims, Yamada argued limiting IIHW to a private cause of action because the plaintiffs’ bar would serve an effective gatekeeping function.<sup>100</sup> Presumably if a plaintiffs’ attorney represents his client on a contingency fee basis, he is less likely to bring a weak case.<sup>101</sup>

In 2004, Yamada crafted the model legislation for the Healthy Workplace Bill.<sup>102</sup> The model act’s primary policy objectives are to promote prevention and compensation while discouraging frivolous and marginal claims.<sup>103</sup> The cause of action, definitions of terms, and affirmative defenses are mostly drawn from hostile work environment doctrine and common law IIED.<sup>104</sup> The model act creates a private right of action<sup>105</sup> and

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<sup>96</sup> Yamada, *Status-Blind Hostile Work Environment*, *supra* note 27, at 524–25.

<sup>97</sup> *Id.* at 524.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 523–24.

<sup>100</sup> *See id.*

<sup>101</sup> *See id.*

<sup>102</sup> *See* Yamada, *Crafting a Legislative Response*, *supra* note 27, at 498.

<sup>103</sup> *See id.*

<sup>104</sup> *See* Yamada, *Status-Blind Hostile Work Environment*, *supra* note 27, at 524–25.

<sup>105</sup> *See* Yamada, *Crafting a Legislative Response*, *supra* note 27, at 521.



makes it unlawful for an employer to subject an employee to an “abusive work environment,” defined as “when the defendant, acting with malice,<sup>106</sup> subjects the complainant to abusive conduct<sup>107</sup> so severe that it causes tangible harm to the complainant.”<sup>108</sup> The model act explicitly states that a single act would not constitute “abusive conduct,” unless it is “especially severe and egregious.”<sup>109</sup>

Furthermore, under the proposed legislation, liability is not limited to the bully as an individual.<sup>110</sup> The employer can be held vicariously liable for both an employee’s abusive conduct and bullying between coworkers.<sup>111</sup> However, employers are provided two affirmative defenses.<sup>112</sup> The first affirmative defense is available when the employer “exercised reasonable care to prevent and correctly prompt any actionable behavior,” and the employee “unreasonably failed to take advantage of appropriate preventative or corrective opportunities provided by the employer.”<sup>113</sup> The second affirmative defense is available when the employee’s “complaint is grounded primarily upon a negative employment decision made consistent with an

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<sup>106</sup> “[M]alice” is defined as “the desire to see another person suffer psychological, physical, or economic harm without legitimate case or justification” and may be inferred from the bully’s conduct, including “outward expressions of hostility” and “harmful conduct inconsistent with an employer’s legitimate business interests,” among others. *Id.* at 518.

<sup>107</sup> “Abusive conduct” is “conduct that a reasonable person would find hostile, offensive, and unrelated to an employer’s legitimate business interests.” *Id.* In considering whether conduct is “abusive,” the trier should “weigh the severity, nature, and frequency” of the bully’s conduct, such as intimidation, humiliation, and repeated verbal abuse.” *Id.*

<sup>108</sup> *Id.* For the full text of the model act as proposed by Yamada in 2004, see *id.* at 517–21.

<sup>109</sup> *Id.* at 519.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Affirmative defenses under the model act are similar to those provided to employers in sexual harassment cases. For more information, see U.S. EQUAL EMP’T OPPORTUNITY COMM’N, NO. 915.002, ENFORCEMENT GUIDANCE ON VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999), available at <http://www.eeoc.gov/policy/docs/harassment.html>.

<sup>113</sup> Yamada, *Crafting a Legislative Response*, *supra* note 27, at 520.

employer's legitimate business interests, such as a termination or demotion based on [the] employee's poor performance; or . . . [the employer's] reasonable investigation about potentially illegal or unethical activity."<sup>114</sup>

A Target has several avenues for redress under the model act.<sup>115</sup> These include reinstatement, injunctive relief, and/or monetary compensation for back pay, front pay, medical expenses, emotional distress, and attorney's fees.<sup>116</sup> Where an employer is vicariously liable for the actionable conduct of a Target's coworker, and there was no negative employment decision, emotional distress damages are capped at \$25,000.<sup>117</sup> The statute of limitations is only one year, and the Target would not be able to file for workers' compensation benefits.<sup>118</sup>

Since drafting the model act, Yamada has written extensively on theories that support legal redress for workplace bullying. In particular, he has advocated for a humanistic approach to the law that promotes dignity in the workplace.<sup>119</sup> Indeed, the model act could fill the void in existing law to reduce instances of workplace bullying and improve the health of American workers.

### *B. Current State of Anti-Workplace-Bullying Legislation*

While Yamada's model act has served as the basis for anti-workplace-bullying legislation in twenty-four states, such laws have yet to pass.<sup>120</sup> In 2003, California became the first state to introduce a version of the Healthy Workplace Bill in its state legislature, but it subsequently died in committee.<sup>121</sup> Shortly

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<sup>114</sup> *Id.*

<sup>115</sup> *See id.* at 520–21.

<sup>116</sup> *Id.*

<sup>117</sup> *See id.* at 521.

<sup>118</sup> *Id.*

<sup>119</sup> *See Yamada, Human Dignity, supra* note 27, at 524.

<sup>120</sup> As of March 2013, twenty-four states have introduced anti-workplace-bullying legislation. HEALTHY WORKPLACE BILL, *supra* note 30.

<sup>121</sup> *See California, HEALTHY WORKPLACE BILL*, <http://www.healthyworkplacebill.org/states/ca/california.php> (last visited Apr. 5, 2013).

after, legislatures in Oklahoma,<sup>122</sup> Hawaii,<sup>123</sup> Massachusetts,<sup>124</sup> Oregon,<sup>125</sup> and Washington<sup>126</sup> followed suit. Of the twenty-four states, some have proposed bills calling for the state to study the problem of workplace bullying,<sup>127</sup> while others have limited the

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<sup>122</sup> See *Oklahoma*, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/states/ok/oklahoma.php> (last visited Apr. 5, 2013). The bill (H.B. 2467) was first introduced in 2004 but died in committee. The bill was reintroduced in 2007 (H.B. 1467) and 2009 (H.B. 1685) but suffered the same result. *Id.*

<sup>123</sup> See *Hawaii*, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/states/hi/hawaii.php> (last visited Apr. 5, 2013). In 2005, 2007, and 2012, both the House and Senate of Hawaii introduced versions of the bill, and all have died in committee. *Id.*

<sup>124</sup> See *Massachusetts*, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/states/ma/massachusetts.php> (last visited Apr. 5, 2013). Since 2005, House Representative Ellen Story has repeatedly introduced a petition for the state to study and develop a mandated program for employers to combat workplace bullying. A Joint Committee on Labor and Workforce Development held a public hearing on January 27, 2010, but no further action has been taken. On February 13, 2013, Representative Story reintroduced the bill (H.B. 1766) yet again. *Id.*

<sup>125</sup> See *Oregon*, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/states/or/oregon.php> (last visited Apr. 5, 2013). House Representatives Jackie Dingfelder and Diane Rosenbaum introduced two versions of the Healthy Workplace Bill, which both died in committee. *Id.* In 2007, Senator Avel Gordly introduced a version of the bill, and a public hearing was held before the Senate Commerce Committee, but the bill failed to advance. In 2009, Senator Ginny Burdick introduced another bill, but it died in committee. *Id.*

<sup>126</sup> See *Washington*, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/states/wa/washington.php> (last visited Apr. 5, 2013). In the 2005–06 legislative session, a version of the bill passed the Commerce and Labor Committee but died after never being heard by Appropriations. *Id.* In 2007, House Representatives introduced a version of the Healthy Workplace Bill designed to protect only state workers. In 2009, another version of the bill was introduced that only required policies aimed at state employees of the three regional universities to be written. In 2011, the House (H.B. 1928) and Senate (S.B. 5789) each introduced a version of the bill. *Id.*

<sup>127</sup> See, e.g., *Massachusetts*, *supra* note 124; *Connecticut*, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/states/ct/connecticut.php> (last visited Apr. 5, 2013); *New York*, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/states/ny/newyork.php> (last visited Apr. 5, 2013).

scope of employees who would be protected under the law.<sup>128</sup> Although not every bill introduced is identical to Yamada's model legislation, each is intended to eliminate the problem of workplace bullying.

To date, only Illinois and New York have successfully passed the bill through one chamber of their respective state legislatures.<sup>129</sup> In 2010, the Illinois Senate passed a version of the Healthy Workplace Bill; however, it died in the House Rules Committee in 2012.<sup>130</sup> In 2010, the New York Senate passed a version of the Healthy Workplace Bill, but it stalled in the State Assembly.<sup>131</sup> Recently, in February 2013, New York Assemblyman Steve Englebright and Senator Diane Savino, along with seventy-four sponsors, reintroduced the bill in their respective chambers.<sup>132</sup> Even though almost half of the states in America have introduced anti-workplace-bullying legislation, Targets remain without legal redress.

### *C. Criticisms of the Healthy Workplace Bill*

Although workplace bullying is a problem that affects approximately half of the American workforce, the Healthy Workplace Bill has failed to pass in every state legislature in which it has been introduced.<sup>133</sup> Critics have argued that the legislation's definition of bullying conduct is too vague and exposes employers to potentially unlimited liability. For example, Suzanne Lucas, author of the blog *Evil HR Lady*, opposes the restrictions on, and interference with, an employer's

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<sup>128</sup> See *Connecticut*, *supra* note 127.

<sup>129</sup> See *Illinois*, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/states/il/illinois.php> (last visited Apr. 5, 2013); *New York*, *supra* note 127.

<sup>130</sup> See *Illinois*, *supra* note 129.

<sup>131</sup> See *New York*, *supra* note 127.

<sup>132</sup> Assemblyman Englebright introduced A.B. 4965 on February 13, 2013, and Senator Savino introduced S.B. 3863 on February 25, 2013. The Senate version of the bill was referred to the Senate Labor Committee, of which Senator Savino serves as chair. *Id.*

<sup>133</sup> See *supra* Part III.B.

business decisions.<sup>134</sup> First, she argues that anti-workplace-bullying legislation will make employers hesitant to hire employees when a claim could too easily be made for a boss “being mean,” especially because bullying behavior may be difficult to clearly define.<sup>135</sup> Second, she claims that such legislation will not provide sufficient incentive for supervisors and coworkers to stop their bullying behavior.<sup>136</sup> Finally, she argues that anti-workplace-bullying legislation would interfere with the freedom of employers and human resources managers to run their organizations without having to constantly fear that their employment decisions could lead to legal action.<sup>137</sup>

Other critics have echoed the concern about employer liability. Small business owners argue that the model act’s vague language would place them at risk of costly lawsuits.<sup>138</sup> Additionally, two Manhattan Institute researchers, Edmund McMahon and James Copland, believe that anti-workplace-bullying legislation would strike at the heart of the “employment at-will” doctrine.<sup>139</sup> The “at-will” doctrine means that “an employer is free to discharge individuals ‘for good cause, or bad cause, or no cause at all,’ and the employee is equally free to quit, strike or otherwise cease work.”<sup>140</sup> Thus, the argument goes that an anti-workplace-bullying law would essentially allow every discharged employee to bring suit against his or her

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<sup>134</sup> See Suzanne Lucas, *Why Workplace Bullying Should Be Legal*, CBS NEWS (Mar. 23, 2011 9:00 AM), [http://www.cbsnews.com/8301-505125\\_162-44941976/why-workplace-bullying-should-be-legal/](http://www.cbsnews.com/8301-505125_162-44941976/why-workplace-bullying-should-be-legal/).

<sup>135</sup> *Id.*

<sup>136</sup> *See id.*

<sup>137</sup> *See id.*

<sup>138</sup> See, e.g., Workplace Bullying Inst., *2012 Biz Lobby Opposition to Healthy Workplace Bill*, YOUTUBE (Jan. 21, 2012), <http://www.youtube.com/watch?v=wMekFHpb018>.

<sup>139</sup> See E.J. McMahon & James Copland, Op-Ed., *New York’s Latest Job Killer: A New Bill Would Give Workers Broad Rights to File Suit When Fired*, N.Y. DAILY NEWS (Mar. 19, 2010), <http://www.nydailynews.com/opinion/new-york-latest-job-killer-new-bill-give-workers-broad-rights-file-suit-fired-article-1.446041>.

<sup>140</sup> *See id.*

former employer.<sup>141</sup> These critics argue that enacting the Healthy Workplace Bill would essentially be a “job killer.”<sup>142</sup>

Public officials are also concerned about the ramifications of workplace-bullying legislation. In 2012, soon after the New York Senate passed its version of the bill, New York City Mayor Michael Bloomberg’s administration sided with business owners and issued a statement opposing it.<sup>143</sup> Similarly, in January 2012, during a public hearing before the Washington Senate Labor, Commerce and Consumer Protection Committee, the Office of the Attorney General adamantly opposed passage of the bill, citing its vague definition of “abusive conduct” and arguing that workplace conflicts should not be resolved in courts.<sup>144</sup>

Indeed, passage of the Healthy Workplace Bill may have serious consequences for employers who have difficulties instituting adequate policies to avoid liability. One method to address these concerns is to incorporate more specific characterizations of workplace bullying into the bill’s definitions of “malice” and “abusive conduct.” For example, the bill could further define workplace bullying as conduct that is “intentional, repetitive, and escalates” over a specified period of time.

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<sup>141</sup> *See id.*

<sup>142</sup> *Id.*

<sup>143</sup> *See* R.M. Schneiderman, *State Anti-Bully Law Would Let Workers Sue for Nastiness*, WALL ST. J. METROPOLIS BLOG (May 14, 2010, 6:18 PM), <http://blogs.wsj.com/metropolis/2010/05/14/state-anti-bully-law-would-let-workers-sue-for-nastiness/>.

<sup>144</sup> During that same hearing, Washington State Senator Janea Homquist Newbry voiced concerns over the bill’s vague terms and definitions and the subjective nature of allowing a plaintiff to sue an employer for refusing to promote him or her for any reason. *See 2012 Biz Lobby Opposition to Healthy Workplace Bill*, *supra* note 138. Similarly, in July 2012, lawmakers of the West Virginia Joint Judiciary Committee also voiced concerns over the “poorly-defined” terms that would “open doors to problems.” David Beard, *Lawmakers Question Legislation’s Proponents*, DOMINION POST, July 25, 2012, at 2-A, available at <http://www.workplacebullying.org/multi/pdf/dompost072512.pdf>. They were also concerned about how an employee’s preexisting mental and physical health issues would factor into the lawsuit and whether an employer should be liable for coworker bullying when the employer had no knowledge of the problem. *Id.*

Alternatively, lawmakers could preserve the model act's current definitions but create a legislative history that provides more insight or examples as to what constitutes workplace bullying and how employers may address it.<sup>145</sup> Since factual circumstances surrounding workplace bullying will vary from case to case, it is important that the Healthy Workplace Bill allows flexibility in interpretation. Moreover, both employers and employees should have access to legal redress beyond a lengthy and costly litigation process. They should be encouraged to pursue dispute resolution outside of court to efficiently resolve workplace-bullying disputes.

#### IV. STATE-LEVEL MEDIATION IN EMPLOYMENT DISPUTES

The subtle and unique nature of workplace bullying is often compared to sexual harassment.<sup>146</sup> Accordingly, Yamada crafted the Healthy Workplace Bill around theories and case law underlying the hostile work environment doctrine under Title VII.<sup>147</sup> Before sexual harassment law evolved in the 1980s and 1990s, the concept of sexual harassment in the workplace was often cast into doubt for its vague and broad definitions.<sup>148</sup> At that time, Professor Kingsley R. Browne, who specialized in

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<sup>145</sup> When statutory text is ambiguous or unclear, courts will often look to legislative history for background context as authoritative evidence of the enacting legislature's "specific intent" behind the statute. William E. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT. L. REV. 365, 370-71 (1990). Legislative history is generally composed of committee reports, floor debates, sponsor statements, and other materials. See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 972 n.d (4th ed. 2007). For further discussion and analysis of the role of legislative history in statutory interpretation, see generally *id.*

<sup>146</sup> See Yamada, *Status-Blind Hostile Work Environment*, *supra* note 27, at 524-25.

<sup>147</sup> See *id.*

<sup>148</sup> See Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 408 n.57 (1996) (outlining various statements made by men in the media fearing that they might inadvertently be liable for sexual harassment because they are confused about its definition).

employment discrimination law, argued that the law gave “little notice” of what constituted sexual harassment speech.<sup>149</sup> Indeed, much of sexual harassment case law has revolved around defining the kind of “conduct” that would create a sexually hostile environment.<sup>150</sup> Similarly, in the workplace-bullying context, contemporary scholars and commentators face the challenge of defining what constitutes “abusive conduct” that would create a status-blind hostile work environment claim.

Unfortunately, unlike sexual harassment, workplace bullying has not received federal statutory or judicial recognition.<sup>151</sup> The first necessary step towards achieving this goal is to pass state legislation and allow courts to interpret the law. In order to pass the legislation, however, drafters must make the Healthy Workplace Bill more palatable to gain sufficient support. Therefore, rather than creating a sole private right of action, drafters should include an ADR provision in the Healthy Workplace Bill, which would provide a more cost-effective and efficient alternative to an expensive and prolonged lawsuit that neither the employer nor the employee wants.

#### A. ADR: A Brief Overview

ADR processes are methods of dispute resolution that take place outside of courts.<sup>152</sup> Forms of ADR include negotiation, arbitration, mediation, summary jury trial, mini trial, and early neutral evaluation.<sup>153</sup> The goals behind ADR are to reduce court congestion, minimize cost and delay, tailor a dispute resolution process to the unique needs of each party, facilitate access to justice, and utilize a collaborative approach to dispute

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<sup>149</sup> *Id.* at 408 (quoting Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 502 (1991)).

<sup>150</sup> *See id.* at 416–17.

<sup>151</sup> *See supra* Part III.

<sup>152</sup> See LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* 1–2 (abridged 4th ed., 2009). For further discussion and analysis of ADR processes, see generally *id.*

<sup>153</sup> *See id.* at 14–16.



resolution.<sup>154</sup> In recent decades, courts and federal agencies have increasingly favored ADR processes for their efficiency and cost-effectiveness.<sup>155</sup> In fact, some ADR processes are suggested, offered, or mandated by state and federal courts.<sup>156</sup> Many commentators believe that parties obtain better quality solutions and a more satisfying outcome than they would in a trial.<sup>157</sup> This

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<sup>154</sup> See *id.* at 11; Frank E.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1, 3 (1986).

<sup>155</sup> Known as the “ADR movement,” since the 1970s, ADR has increasingly gained support from lawyers and nonlawyers. RISKIN ET AL., *supra* note 152, at 11. In 1991, the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), held that an employee was bound by the mandatory arbitration clause in his employment contract to arbitrate his statutory employment claim. See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1986) (applying an arbitration agreement to antitrust claims arising under the Sherman Antitrust Act because “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute”). Under the Federal Arbitration Act (“FAA”), arbitration agreements are enforceable if they are “written provision[s] in any maritime transaction or a contract evidencing a transaction involving commerce.” See 9 U.S.C. § 2 (2011). The 1996 Administrative Dispute Resolution Act (“ADRA”) permanently authorizes federal agencies to use ADR to resolve complaints filed by federal employees. 5 U.S.C. § 572 (2011). “In 2000, the EEOC required all federal agencies to establish or make available an ADR program during the pre-complaint and formal complaint stages of the EEO process.” *Federal Sector Alternative Dispute Resolution*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/federal/adr/index.cfm> (last visited Apr. 6, 2013). Most recently, in January 2011, the United States District Court for the Southern District of New York began mandating early mediation through the court’s ADR program for all employment discrimination cases, except those filed under the Fair Labor Standards Act (“FLSA”). See Peter J. Dugan, *Southern District of New York Mandates Early Mediation in Employment Discrimination Cases*, EMP. L. ALERT (Mar. 18, 2011), <http://www.employmentlawalert.com/2011/03/articles/alternative-dispute-resolution/southern-district-of-new-york-mandates-early-mediation-in-employment-discrimination-cases/>.

<sup>156</sup> For further discussion of ADR processes in state courts, see *infra* Part V.

<sup>157</sup> See, e.g., ROBERT F. COCHRAN, JR. ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* 198–202 (1999), reprinted in RISKIN ET AL., *supra* note 152, at 54–55.

Note will primarily focus on the two most commonly used ADR processes to resolve employment disputes—mediation and arbitration.<sup>158</sup>

### *1. Mediation*

Actual processes can vary greatly, but generally, mediation is a voluntary, informal, and confidential process in which a neutral third party helps two or more parties resolve a dispute.<sup>159</sup> Mediators assist parties to guide the dialogue, generate options, maintain a flow of information, and agree on a resolution.<sup>160</sup> Mediation is less time-consuming than going to court because hearings often last for one day,<sup>161</sup> whereas the litigation process may not resolve a dispute for years.<sup>162</sup> Even though parties must

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<sup>158</sup> See Susan A. FitzGibbon, *Arbitration, Mediation, and Sexual Harassment*, 5 PSYCH. PUB. POL'Y & L. 693, 697 (1999) (citing U.S. GEN. ACCOUNTING OFFICE, ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE, 1997 WL 709361, at \*14–15 (reporting eighty percent of employers use mediation and nineteen percent use arbitration to resolve disputes with nonunion workers)).

<sup>159</sup> RISKIN ET AL., *supra* note 152, at 14, 203–230 (discussing and analyzing models of mediation, including facilitative, transformative, and understanding-based mediation). In a facilitative mediation, the mediator guides parties to discuss the conflict and promote mutual understanding. See Briana L. Seagriff, Note, *Keep Your Lunch Money: Alleviating Workplace Bullying with Mediation*, 25 OHIO ST. J. ON DISP. RESOL. 575, 591 (2010). In a transformative mediation, mediators encourage and support the parties in improving the quality of conflict interaction to reach a positive outcome. See ROBERT A. BARUCH BUSH & JOSEPH FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT (rev. ed. 2005), reprinted in RISKIN ET AL., *supra* note 152, at 222. In understanding-based mediation, mediators help parties reach a mutually agreeable solution by encouraging parties to understand the substance of the conflict and collaboratively make decisions in the dispute resolution process. See GARY FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING (2008), reprinted in RISKIN ET AL., *supra* note 152, at 224–26.

<sup>160</sup> See RISKIN ET AL., *supra* note 152, at 221–22; Seagriff, *supra* note 159, at 591.

<sup>161</sup> See FitzGibbon, *supra* note 158, at 717.

<sup>162</sup> See, e.g., Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making it the Norm, Rather than the Exception*, 87 DEN. U. L.

pay mediator fees, attorney's fees, and costs of acquiring a meeting room, the shorter duration of a mediation hearing leads to lower overall costs to resolve the dispute.<sup>163</sup> Moreover, many private organizations and state courts offer free mediation services.<sup>164</sup> Once the parties reach a settlement, the terms are memorialized in a signed writing and become an enforceable legal contract.<sup>165</sup>

## 2. Arbitration

Like mediation, arbitration is confidential.<sup>166</sup> Unlike mediation, however, arbitration is a more formal adjudicatory process in which an impartial third party considers evidence submitted by the parties to make a legally binding and enforceable decision.<sup>167</sup> Before an arbitration hearing, parties can jointly agree on an informal or formal discovery process.<sup>168</sup> In general, evidential and procedural rules in arbitration are more flexible than in litigation.<sup>169</sup> At the hearing, parties may present evidence as in a court of law, including witness testimony and

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REV. 513, 522–23 (2010) (discussing how, in a federal civil case, the pretrial discovery process and motion practice can delay trial for more than two years).

<sup>163</sup> See FitzGibbon, *supra* note 158, at 717.

<sup>164</sup> For example, the New York Peace Institute is a nonprofit organization that offers free mediation services. See *Facts About Mediation*, N.Y. PEACE INST., <http://www.nypeace.org/mediation-services/> (last visited Apr. 6, 2013). The New York City Civil Court also offers free court-connected mediation. See *Resolving Your Case Through Mediation in Civil Court of the City of New York*, N.Y. STATE UNIFIED COURT SYS. (Mar. 16, 2010), <http://www.courts.state.ny.us/courts/nyc/civil/pdfs/mediation.pdf> [hereinafter *Resolving Your Case*].

<sup>165</sup> See FitzGibbon, *supra* note 158, at 702.

<sup>166</sup> Frederick L. Sullivan, *Accepting Evolution in Workplace Justice: The Need for Congress to Mandate Arbitration*, 26 W. NEW ENG. L. REV. 281, 311 (2004).

<sup>167</sup> RISKIN ET AL., *supra* note 152, at 369–70.

<sup>168</sup> See *ADR Frequently Asked Questions*, JAMS, <http://www.jamsadr.com/adr-faqs/> (last visited Apr. 6, 2013).

<sup>169</sup> See Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?*, 39 HARV. J. ON LEGIS. 281, 283 (2002).

exhibits.<sup>170</sup> After the proceeding, parties may request a transcript of the hearing and file post-hearing briefs.<sup>171</sup> Public arbitration through courts is based on statutes and case law, whereas private arbitration is based on contract, either before or after the dispute has arisen.<sup>172</sup> In some instances, a party may appeal an arbitrator's decision in state court.<sup>173</sup> A party may also petition the arbitrator if he believes that a procedural mistake has been made, but typically a court will not review the merits of an arbitrator's decision.<sup>174</sup> In cases of private arbitration, an arbitrator's decision is appealable if the parties agree in advance.<sup>175</sup>

Many types of state-level mediation and arbitration programs are available. Nonprofit organizations, like JAMS, the American Arbitration Association ("AAA"), and Center for Conflict Resolution,<sup>176</sup> and many state courts offer free or low-cost mediation and arbitration services.<sup>177</sup> Additionally, many states

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<sup>170</sup> See RISKIN ET AL., *supra* note 152, at 374.

<sup>171</sup> *Id.*

<sup>172</sup> See *id.* Most states have adopted arbitration statutes modeled after the Uniform Arbitration Act ("UAA"). *Id.* at 369.

<sup>173</sup> *Appealing Decisions*, CTR. FOR CONFLICT RESOLUTION, <https://ccr.byu.edu/content/appealing-decisions/> (last visited Apr. 6, 2013). However, time limits often apply: for example, in Utah, a party has ninety days after the arbitrator issues the decision to appeal to a state court. *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> See *JAMS Optional Arbitration Appeal Procedure*, JAMS, <http://www.jamsadr.com/rules-optional-appeal-procedure/> (last visited Apr. 6, 2013).

<sup>176</sup> Many states have their own Center of Conflict Resolution, such as Minnesota and Washington, and cities, too, like Chicago. See CTR. FOR CONFLICT RESOLUTION – MINN., <http://crcminnesota.org> (last visited Apr. 6, 2013); CTR. FOR CONFLICT RESOLUTION IN CHI., <http://www.ccrchicago.org> (last visited Apr. 6, 2013); *Dispute Resolution Centers*, WASH. STATE COURTS, [http://www.courts.wa.gov/court\\_dir/?fa=court\\_dir.dispute](http://www.courts.wa.gov/court_dir/?fa=court_dir.dispute) (last visited Apr. 6, 2013).

<sup>177</sup> For example, the New York City Civil Court and the Los Angeles County Court offer free mediation programs. See *Resolving Your Case*, *supra* note 164; *Department of Consumer Affairs*, CNTY. OF L.A., <http://dca.lacounty.gov/tsMediation.html> (last visited Apr. 6, 2013). The Washington State Courts also offer Dispute Resolution Centers that provide free services or use an income-based sliding fee scale. See *Dispute Resolution*

offer court-connected arbitration programs for mandatory and voluntary arbitration hearings.<sup>178</sup> As workplace disputes are often resolved through arbitration or mediation, ADR programs may present a viable forum for addressing workplace-bullying claims.

### *B. The EEOC Mediation Program*

Since the EEOC mediation program exemplifies a government-instituted, out-of-court process that is consistent with an enacting legislature's intent to maximize ADR methods, it can provide guidance to drafters and sponsors of the Healthy Workplace Bill on how to implement a similar state-level scheme for workplace-bullying claims.<sup>179</sup> Under Title VII of the Civil Rights Act of 1964, the EEOC is obligated to investigate every charge of employment discrimination and litigate in federal court to enforce the statute.<sup>180</sup> For example, from 1997 to 2012, sexual harassment claims made up approximately thirty percent of all charges filed with the EEOC.<sup>181</sup> After the agency determines that there is reasonable cause to believe that the charge is true, it may file suit in federal court on behalf of the public interest.<sup>182</sup> However, the EEOC files less than two percent

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*Centers, supra* note 176.

<sup>178</sup> For example, Oregon state law requires civil actions involving claims for damages of less than \$50,000 to go to arbitration. *See What Is Arbitration?*, OR. COURTS, <http://courts.oregon.gov/OJD/programs/adr/pages/whatisarbitration.aspx> (last visited Apr. 6, 2013). Arizona Superior Courts have a mandatory, nonbinding arbitration program as a component of its civil court system for disputes valued under \$50,000. *See What Is Arbitration?*, JUDICIAL BRANCH OF ARIZ., MARICOPA CNTY., <http://www.superiorcourt.maricopa.gov/SuperiorCourt/CivilDepartment/Arbitration/> (last visited Apr. 6, 2013).

<sup>179</sup> *See Mediation*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/mediation/> (last visited Apr. 6, 2013).

<sup>180</sup> 42 U.S.C. § 2000e-6(e) (2011); *see also* Yamada, *Status-Blind Hostile Work Environment, supra* note 27, at 529.

<sup>181</sup> *See Charge Statistics FY 1997 Through FY 2012*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Apr. 6, 2013).

<sup>182</sup> *See The Charge Handling Process*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/employers/process.cfm> (last visited Apr. 6,

of its antidiscrimination claims in federal court.<sup>183</sup> One reason that the EEOC files so few claims may be due to its incredibly successful mediation program.<sup>184</sup>

In 1991, the EEOC launched a pilot mediation program in four field offices as a response to the increasing number of charges filed with the agency.<sup>185</sup> In 1995, after the EEOC's ADR Task Force found mediation to be a successful and sustainable method of resolving employment discrimination disputes, the agency decided to fully implement the mediation program.<sup>186</sup> Since then, the mediation program has seen great success, resolving sixty to seventy-six percent of charges submitted to the EEOC each year.<sup>187</sup>

Before the EEOC investigates a discrimination charge or files suit, the agency offers parties the opportunity to participate in the mediation program to reach an out-of-court resolution.<sup>188</sup> The program is voluntary and confidential.<sup>189</sup> The program's goals are to lessen a victim's intimidation from filing a charge by providing a less expensive and contentious method for dispute resolution and to free up the EEOC's resources for investigating and litigating other employment discrimination

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<sup>183</sup> See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 290 n.7 (2002).

<sup>184</sup> In 2012, the EEOC mediation program achieved a seventy-seven percent settlement rate. See *EEOC Mediation Statistics FY 1999 Through FY 2012*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, [http://www.eeoc.gov/eeoc/mediation/mediation\\_stats.cfm](http://www.eeoc.gov/eeoc/mediation/mediation_stats.cfm) (last visited Apr. 6, 2013).

<sup>185</sup> Matthew A. Swendiman, Note, *The EEOC Mediation Program: Panacea or Panicked Reaction?*, 16 OHIO ST. J. ON DISP. RESOL. 391, 397 (2001).

<sup>186</sup> *Id.*; see also Press Release, U.S. Equal Emp't Opportunity Comm'n, Commission Votes to Incorporate Alternative Dispute Resolution into Its Charge Processing System; Defers Decisions on State and Local Agencies (Apr. 28, 1995), available at <http://www.eeoc.gov/eeoc/newsroom/release/archive/4-28-95.html>.

<sup>187</sup> See *EEOC Mediation Statistics FY 1999 Through FY 2012*, *supra* note 184.

<sup>188</sup> See *Questions and Answers About Mediation*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/mediation/qanda.cfm> (last visited Apr. 6, 2013); *The Charge Handling Process*, *supra* note 182.

<sup>189</sup> See *Mediation*, *supra* note 179.

matters.<sup>190</sup> Once the parties agree to mediation, the case is assigned to a neutral mediator,<sup>191</sup> who is an internal EEOC mediator or third-party mediator contracted to mediate cases.<sup>192</sup> The mediation is free for both parties.<sup>193</sup> If the parties reach an agreement, their written and signed settlement is enforceable under contract law.<sup>194</sup> If the dispute cannot be resolved through mediation, the EEOC will resume investigation of the initial charge or file suit in federal court.<sup>195</sup>

Some scholars and commentators advocate using mediation for employment disputes,<sup>196</sup> including workplace bullying.<sup>197</sup> Because of the privacy and confidentiality in the mediation process, it is particularly suitable for resolving disputes in which parties want to preserve a long-term relationship, like an employment relationship.<sup>198</sup> When mediators encourage mutual

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<sup>190</sup> See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, NO. 915.002, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S ALTERNATIVE DISPUTE RESOLUTION POLICY STATEMENT §§ I-II.A (2002), available at <http://www.eeoc.gov/policy/docs/adrstatement.html>.

<sup>191</sup> The Standards of Conduct for Mediators establish the professional conduct of mediation and consists of standards for mediator impartiality, confidentiality, conflict of interest, and other factors to ensure the ethical practice of mediation. See FitzGibbon, *supra* note 158, at 716 (citing John D. Feerick, *Standards of Conduct for Mediators*, 79 JUDICATURE 314 (1996)).

<sup>192</sup> See *Questions and Answers About Mediation*, *supra* note 188.

<sup>193</sup> *Id.*

<sup>194</sup> See *id.*; *The Charge Handling Process*, *supra* note 182.

<sup>195</sup> See *Facts About Mediation*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/mediation/facts.cfm> (last visited Apr. 6, 2013).

<sup>196</sup> See Allison Balc, *Making It Work at Work: Mediation's Impact on Employee/Employer Relationships and Mediator Neutrality*, 2 PEPP. DISP. RESOL. L.J. 241 (2002) (concluding that mediation is a cost- and time-effective alternative to litigation that employers are increasingly utilizing); FitzGibbon, *supra* note 158, at 714 (asserting that mediation offers to resolve sexual harassment disputes faster and may exert a conduct-regulating effect on the workplace).

<sup>197</sup> See Seagriff, *supra* note 159 (advocating for employers' adoption of internal mediation procedures to resolve workplace bullying disputes without going to court or losing profit and productivity).

<sup>198</sup> See FitzGibbon, *supra* note 158, at 718 (citing Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 307–09

understanding, provide for an open dialogue, and help generate resolution options, not only can parties resolve the current conflict situation, but they can also avoid future controversies.<sup>199</sup> Moreover, mediators are impartial third parties who have experience in the mediation process and who have special knowledge and understanding of the particular claims.<sup>200</sup> In addition, mediation does not involve credibility determinations, which could have negative consequences for future employment prospects.<sup>201</sup> Finally, parties pursuing mediation will likely expend less time and money to resolve the dispute, reducing the burden of employees with little to no resources.<sup>202</sup>

Opponents, however, argue that the mediation process could impose “undue settlement pressures” on the weaker party.<sup>203</sup> As mediation is a nonadjudicative and less formal process, the weaker party may feel intimidated and forced to accept an unfair agreement.<sup>204</sup> Moreover, the mediator may not always recognize the power imbalance between parties.<sup>205</sup> As for the EEOC mediation program, civil rights activists argued that language barriers could restrict access for some plaintiffs pursuing charges.<sup>206</sup> Since mediation is a voluntary and collaborative

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(1971)); Seagriff, *supra* note 159, at 598.

<sup>199</sup> See RISKIN ET AL., *supra* note 152, at 222–26; Sander, *supra* note 154, at 13–14.

<sup>200</sup> See FitzGibbon, *supra* note 158, at 717 (citing Christopher A. Barreca et al., *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship*, DISP. RESOL. J., Oct.–Dec. 1995, at 37–39); Seagriff, *supra* note 159, at 596–99 (discussing how having a neutral third-party facilitator can help resolve workplace bullying disputes).

<sup>201</sup> FitzGibbon, *supra* note 158, at 718 (citing Sara Adler, *Sexual Harassment Claims Lend Themselves to Mediation*, L.A. DAILY J., Feb. 18, 1994, at 7).

<sup>202</sup> See *id.* at 717; Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 567–68 (1997).

<sup>203</sup> See Wissler, *supra* note 202, at 573.

<sup>204</sup> *Id.*

<sup>205</sup> See *id.*

<sup>206</sup> See Swendiman, *supra* note 185, at 402–03.



process,<sup>207</sup> however, a party who feels intimidated may address these concerns with the mediator or refuse to accept the agreement altogether. Accordingly, the party may still pursue other alternatives, like litigation or arbitration, which are more formal adjudicatory processes.<sup>208</sup> Finally, concerns about language barriers impeding access to justice are valid, but they “will continue to exist regardless of the use of ADR.”<sup>209</sup>

### *C. Mediation for Workplace Bullying Claims*

Given the success of mediation in federal employment discrimination disputes,<sup>210</sup> this ADR method can also be an effective solution to workplace bullying because it emphasizes efficiency and fairness in resolving deeply personal conflicts, providing Targets closure to a very painful situation. Drs. Gary and Ruth Namie, renowned researchers of workplace bullying and authors of several books on the topic, have opposed mediation as a potential avenue for redress, arguing that there is an inherent power imbalance between the bully and his Target.<sup>211</sup> Their rejection of mediation, however, overlooks the Target’s need for a fair and efficient solution. Whereas Targets in litigation may wait years before their cases are resolved, in mediation, collaboration between the Target, bully, and employer can more quickly generate effective solutions. For example, as part of a settlement agreement, an employer could agree to discharge the bully and implement an in-house antibullying grievance procedure. This would simultaneously provide continued employment for the Target while incentivizing the employer to prevent future instances of workplace bullying.<sup>212</sup> Since settlement terms are legally enforceable, if an

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<sup>207</sup> See *supra* Part IV.A.1.

<sup>208</sup> See also *supra* Part IV.B.

<sup>209</sup> Swendiman, *supra* note 185, at 404.

<sup>210</sup> See *supra* Part IV.B.

<sup>211</sup> NAMIE & NAMIE, BULLY-FREE WORKPLACE, *supra* note 43, at 138–39.

<sup>212</sup> See Moira Jenkins, *Practice Note: Is Mediation Suitable for Complaints of Workplace Bullying?*, 29 CONFLICT RESOL. Q. 25, 28 (2011) (“As the conflict escalates and one or more parties becomes more aggressive,

employer breaches the agreement, the Target could file suit and seek relief under contract law.

In addition, early mediation could clear up any misunderstanding or miscommunication before the bully, employer, or Target spends too much time and resources on litigation. Moreover, the collaborative nature of the mediation process, and its goal of preserving the employer-employee relationship, align with Yamada's humanitarian and dignitarian approach to crafting the Healthy Workplace Bill.<sup>213</sup> In fact, one study found that some employees supported their employers' use of in-house ADR procedures, such as mediation, to resolve workplace-bullying disputes.<sup>214</sup> Employees with fewer resources might prefer to utilize available state-level free or low-cost mediation programs. During mediation, if the Target feels "undue settlement pressures" as a weaker party, he may opt out of the process and still have the option of pursuing a more formal and adversarial process, such as arbitration or litigation.<sup>215</sup>

Since the federal government has seen immense success with ADR programs in resolving employment discrimination claims, drafters of the Healthy Workplace Bill should include language endorsing out-of-court alternatives to resolve workplace-bullying disputes. An ADR provision in the Healthy Workplace Bill could include language similar to Section 118 of the Civil Rights Act of 1991.<sup>216</sup> In Yamada's model act,<sup>217</sup> "Section 8—

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. . . the mediator will have to be particularly aware of the power differences between the parties, . . . and the importance of follow-up built into the settlement agreement.").

<sup>213</sup> See Yamada, *Human Dignity*, *supra* note 27, at 539 (arguing that employment law focused on human dignity helps to "define both rights and responsibilities that promote healthy and productive workplaces").

<sup>214</sup> See Suzy Fox & Lamont E. Stallworth, *Employee Perceptions of Internal Conflict Management Programs and ADR Processes for Preventing and Resolving Incidents of Workplace Bullying: Ethical Challenges for Decision-Makers in Organizations*, 8 *EMPL. RTS. & EMPLOY. POL'Y J.* 375, 394-96, 398.

<sup>215</sup> See Jenkins, *supra* note 212, at 28-29.

<sup>216</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.). Section 118 of the Civil Rights Act of 1991 states, "Where appropriate and to the extent

Procedures” states, “1. Private right of action. This Chapter shall be enforced solely by a private right of action.”<sup>218</sup> Drafters, however, could make the following revision:

Section 8—Procedures

1. Private right of action and alternative dispute resolution. This Chapter may be enforced by a private right of action. Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, mediation, and arbitration, is encouraged to resolve disputes arising under this Chapter.

It is important to recognize, however, that as state law, the Healthy Workplace Bill would not be enforced by the EEOC but rather by state fair employment agencies.<sup>219</sup> Currently, those agencies only have jurisdiction over discrimination claims,<sup>220</sup> and like the EEOC, they are overloaded and suffer substantial delays in investigating claims.<sup>221</sup> In fact, a claim investigated by the EEOC takes on average up to two years, whereas an investigation into a claim filed at some state anti-discrimination agencies may take up to twenty-two months to commence, and

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authorized by law, *the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration*, is encouraged to resolve disputes arising under the Acts of provisions of Federal law amended by this title.” *Id.* (emphasis added).

<sup>217</sup> See Yamada, *Crafting a Legislative Response*, *supra* note 27, at 517–21.

<sup>218</sup> *Id.* at 521.

<sup>219</sup> Many state EEO enforcement agencies have implemented ADR programs to resolve statutory-based labor and employment disputes. Fox & Stallworth, *supra* note 214, at 383.

<sup>220</sup> Most states have a Civil Rights Commission or Department of Labor to enforce state employment discrimination laws. For more information, see *State Laws on Employment-Related Discrimination*, NAT’L CONFERENCE OF STATE LEGISLATURES (Oct. 2010), <http://www.ncsl.org/documents/employ/DiscriminationChart-III.pdf>.

<sup>221</sup> See Lamont Stallworth & Linda Stroh, *Who Is Seeking to Use ADR? Why Do They Choose to Do So?*, 51 DISP. RESOL. J. 30, 30 (1996). State anti-discrimination agencies struggle to investigate and resolve claims in a timely manner due to heavy caseloads, budget cuts, and staff reduction. *Id.*

more than four years before the agency issues a final investigatory determination.<sup>222</sup> Fortunately, many state employment agencies have readily available ADR processes to help resolve these claims at an early stage.<sup>223</sup> Accordingly, using these existing ADR procedures to resolve workplace-bullying claims is equally viable. Furthermore, state employment agencies could share this added burden with court-connected ADR programs or by contracting nonprofit ADR organizations.<sup>224</sup> Therefore, the Healthy Workplace Bill could encourage a more cost-effective and efficient resolution of workplace-bullying claims by utilizing existing state-level ADR programs. Given the lengthy investigatory procedures of state employment agencies, it is even more important that the Bill maximizes ADR procedures to resolve disputes.

#### V. STATE-LEVEL ARBITRATION IN EMPLOYMENT DISPUTES

Depending on the factual situation, Targets may prefer to use arbitration to resolve their workplace-bullying conflict if they believe that mediation would not generate a satisfactory resolution, or if the bully and employer are particularly hostile to finding a collaborative solution. While in some circumstances, Targets may prefer litigating a case, they nonetheless should be provided with the opportunity to pursue a less formal and costly process through arbitration. Currently, many workplace-related disputes are resolved through arbitration under mandatory arbitration clauses of employment contracts.<sup>225</sup> Although

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<sup>222</sup> *Id.* at 30–31.

<sup>223</sup> For example, Indiana's Civil Rights Commission and Colorado's Civil Rights Division have Alternative Dispute Resolution Units that mediate employment discrimination claims. See *Alternative Dispute Resolution/Mediation*, COLO. DIV. OF CIVIL RIGHTS, <http://www.colorado.gov/cs/Satellite?c=Page&childpagemame=DORA-DCR%2FDORALayout&cid=1251629148334&pagemame=CBONWrapper> (last visited Apr. 6, 2013); *Alternative Dispute Resolution (ADR)*, IND. CIVIL RIGHTS COMM'N, <http://www.in.gov/icrc/2386.htm> (last visited Apr. 6, 2013).

<sup>224</sup> For a discussion of court-connected and private arbitration programs, see *infra* Part V.A.

<sup>225</sup> See Nicole Karas, Note, *EEOC v. Luce and the Mandatory Arbitration Agreement*, 53 DEPAUL L. REV. 67, 71–73 (2003); Sullivan,

arbitration is more formal and adversarial than mediation, it is less time-consuming and expensive than litigation.<sup>226</sup> Since many state-court-connected and private arbitration programs exist, Targets should have the opportunity to utilize these programs.

*A. Arbitration Programs Offered by State Courts or  
Nonprofit Organizations*

Some state courts have a court-connected ADR scheme that includes mediation and arbitration programs.<sup>227</sup> Court-connected arbitration programs vary from state to state.<sup>228</sup> Many state statutes, however, mandate court-connected arbitration for certain types of cases, such as family law matters and civil actions involving claims for damages valued at less than \$50,000.<sup>229</sup> Mandatory court-connected arbitration is intended to reduce litigation costs and mitigate docket crowding.<sup>230</sup> In some states, the judge or the parties must choose a lawyer to arbitrate the case.<sup>231</sup> After the arbitration hearing, the arbitrator will issue

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*supra* note 166, at 296–304 (“Congress has promulgated substantive employment laws and the federal court has developed its common law, which supports arbitration as not only an alternative to litigation, but as a legitimate means of resolving employment-related disputes outside of the litigation context.”).

<sup>226</sup> For further discussion of the benefits of arbitration, see *infra* Part V.B.

<sup>227</sup> Barbara McAdoo & Nancy Welsh, *Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution and the Experience of Justice*, in ADR HANDBOOK FOR JUDGES 1, 1 (Donna Stienstra & Susan Yates eds., 2004), available at <http://ssrn.com/abstract=1726213>.

<sup>228</sup> *Id.*

<sup>229</sup> See, e.g., NEV. REV. STAT. § 38.250 (2012); OR. REV. STAT. § 36.400 (2011); CAL. CIV. PROC. CODE § 1141.11(a) (West 2007); 42 PA. CONS. STAT. § 7361 (2013). However, New York County’s mandatory arbitration program requires all claims seeking damages in an amount up to \$10,000 first be decided by an arbitrator. FERN A. FISHER, CIVIL COURT OF THE CITY OF N.Y., HOW TO TRY OR DEFEND A CIVIL CASE WHEN YOU DON’T HAVE A LAWYER 12 (Nov. 2005), available at <http://www.courts.state.ny.us/publications/guideforproses.pdf>.

<sup>230</sup> See *Mandatory Arbitration*, OR. STATE BAR (Aug. 2009), [http://www.osbar.org/public/legalinfo/1216\\_MandatoryArbitration.htm](http://www.osbar.org/public/legalinfo/1216_MandatoryArbitration.htm).

<sup>231</sup> See *id.* In the Washington Superior Courts, “the parties may select an

a decision and award to the prevailing party.<sup>232</sup> In some courts, a new trial can be requested.<sup>233</sup> Because many state courts impose limits on monetary awards and the types of cases eligible for mandatory court-connected arbitration,<sup>234</sup> Targets who have claims that exceed that amount or who reside in a jurisdiction that declines to hear workplace-bullying claims may opt for private arbitration.

Private arbitration procedures can be instituted by the employer<sup>235</sup> or a nonprofit organization.<sup>236</sup> Parties may choose an

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arbitrator by stipulation”; however, if they fail to choose an arbitrator within fourteen days after the case enters the arbitration calendar, the court will select an arbitrator. WASH. SUPER. CT. MANDATORY ARB. R. 2.3. The case will then fall under the jurisdiction of the court. *See id.*; WASH. SUPER. CT. MANDATORY ARB. R. 1.3. In New York County, however, “an arbitrator is often a retired judge.” FISHER, *supra* note 229, at 12.

<sup>232</sup> *See, e.g.*, WASH. SUPER. CT. MANDATORY ARB. R. 6.1 (“The award shall be in writing and signed by the arbitrator. The arbitrator shall determine all issues raised by the pleading, including a determination of damages.”); NEV. ARB. R. 17 (“Within 7 days after the conclusion of the arbitration hearing . . . the arbitrator shall file the award with the commissioner, and also serve copies of the award on the attorneys of record, and on any unrepresented parties.”); *What Is Arbitration?*, OR. COURTS, *supra* note 178 (“The arbitrator should issue a decision within 20 days after the hearing is finished.”).

<sup>233</sup> *See, e.g.*, WASH. SUPER. CT. MANDATORY ARB. R. 7.1 (“Any aggrieved party not having waived the right to appeal may request a trial de novo in the superior [court].”); FISHER, *supra* note 229, at 12 (“If either of the parties . . . disagrees with the decision, that party has the right to demand a new trial before a Judge or jury.”); *Arbitration Guide*, JUDICIAL BRANCH OF ARIZ., MARICOPA CNTY., <http://www.superiorcourt.maricopa.gov/SuperiorCourt/CivilDepartment/Arbitration/Index.asp> (last visited Apr. 6, 2013) (“When an arbitration award is appealed, the case is sent back to the assigned judge for a new trial.”).

<sup>234</sup> *See, e.g.*, NEV. REV. STAT. § 38.250 (2012); OR. REV. STAT. § 36.400 (2011); CAL. CIV. PROC. CODE § 1141.11(a) (West 2007); 42 PA. CONS. STAT. § 7361 (2013).

<sup>235</sup> *See* Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 30–32 (discussing employers’ growing use of private arbitration systems in recent decades).

<sup>236</sup> *See Arbitration Defined*, JAMS, <http://www.jamsadr.com/arbitration-defined/> (last visited Apr. 6, 2013) (“[Arbitration] is often ‘administered’ by a private organization . . .”).

impartial arbitrator who has expertise in employment disputes.<sup>237</sup> Private arbitration can be mandatory or voluntary. In a voluntary arbitration, either party may choose to initiate arbitration.<sup>238</sup> If an employment contract contains a mandatory arbitration clause, the workplace-related dispute must be resolved in private arbitration.<sup>239</sup> Moreover, arbitration can be binding or nonbinding. Most arbitration proceedings are binding and legally enforceable, and the result is appealable only in extremely limited circumstances, such as fraud or collusion.<sup>240</sup> In a nonbinding arbitration, if either party is dissatisfied with the arbitral decision, he may still file a complaint in court.<sup>241</sup>

### *B. Arguments for Arbitration to Resolve Employment Disputes*

Proponents of arbitration in workplace disputes argue that it provides a more cost-effective, timesaving, and accessible resolution. In fact, some argue that arbitration could improve the “rank-and-file employee’s” access to justice through reduced costs.<sup>242</sup> Some have even suggested that, for employees earning below \$60,000, arbitration is, unlike litigation, a “plausible dispute resolution option.”<sup>243</sup> Indeed, studies have shown that an

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<sup>237</sup> *Id.* The AAA maintains a roster of employment arbitrators and mediators and offers arbitration services. See AM. ARBITRATION ASS’N, ALTERNATIVE DISPUTE RESOLUTION SERVICES FOR NEGOTIATED EMPLOYMENT CONTRACTS 2 (2009), available at [http://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_008048](http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_008048).

<sup>238</sup> AM. ARBITRATION ASS’N, REPRESENTING YOURSELF IN EMPLOYMENT ARBITRATION: AN EMPLOYEE’S GUIDE 1 (2006), available at [http://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_004412](http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004412) [hereinafter REPRESENTING YOURSELF].

<sup>239</sup> See Feingold, *supra* note 169, at 283.

<sup>240</sup> *Arbitration Defined*, *supra* note 236; see also REPRESENTING YOURSELF, *supra* note 238, at 1, 6.

<sup>241</sup> See *Arbitration Defined*, *supra* note 236.

<sup>242</sup> Maltby, *supra* note 235, at 63. (“By reducing the costs, private arbitration holds the potential for bringing justice to many to whom it is currently denied.”).

<sup>243</sup> Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP.

employee-plaintiff is more likely to prevail in arbitration than litigation,<sup>244</sup> and while a comprehensive study is unavailable, data suggests that legal fees in employment-related disputes can range between \$3,000 and \$14,000,<sup>245</sup> whereas litigation legal fees can cost at least \$50,000.<sup>246</sup> In addition, research by the Rand Institute showed that “the cost of employment litigation is increasing at a rate of fifteen [to] twenty-four percent per year.”<sup>247</sup> Statistics also show that arbitration proceedings usually conclude within twelve months.<sup>248</sup> By contrast, an employment-related litigation can last two-and-a-half years at the trial stage, and at least one and a half years to conclude by pretrial settlement or motion.<sup>249</sup> Moreover, arbitration protects the privacy of the parties,<sup>250</sup> which is crucial to the employee’s future prospects of employment.

Scholars have also recognized modern changes in the workplace that align with the use of private arbitration. Researchers have found that the long-term employer-employee relationship has given way to more “flexible work relations” where employees expect to have a “boundaryless career,” in which they move within and across various firms and organizations.<sup>251</sup> In arbitration, employers and employees address

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POL’Y J. 405, 419 (2007).

<sup>244</sup> An AAA survey conducted from 1993–95 revealed that “employees who arbitrated their claims won sixty-three percent of the time,” whereas employees who litigated their claims in federal district courts prevailed only 14.9% of the time. Maltby, *supra* note 235, at 46 (citation omitted). Moreover, a survey of EEOC trials between 1974 and 1983 showed that employee-plaintiffs had a 16.8% success rate. *Id.*

<sup>245</sup> *Id.* at 54–55.

<sup>246</sup> *Id.* at 56 (“The cost of litigating an employment dispute is at least \$10,000, even if the case is resolved without trial. If a trial is required, the cost increases to at least \$50,000. Costs of this magnitude represent several years’ pay for most employees and far exceed their ability to pay under the best of circumstances.”); Sullivan, *supra* note 166, at 309.

<sup>247</sup> Maltby, *supra* note 235, at 62.

<sup>248</sup> Sullivan, *supra* note 166, at 309.

<sup>249</sup> *Id.*

<sup>250</sup> *See id.* at 311; *see also* Boyd A. Byers, *Mandatory Arbitration of Employment Disputes*, 67 J. KAN. B. ASS’N 18, 19 (1998).

<sup>251</sup> Katherine Van Wezel Stone, *Dispute Resolution in the Boundaryless*



and resolve the dispute before a third-party neutral decision-maker, who is removed from the normal chain of command.<sup>252</sup> This form of procedural justice reinforces both the employer and employee's perception of fairness and trust in the relationship.<sup>253</sup> It can also "inject an external standard of fairness" to address "abuses of hidden authority" in the workplace.<sup>254</sup>

Supporters of arbitration also contend that employers are not at an advantage in arbitration merely because they repeatedly access the service.<sup>255</sup> Known as the "repeat player effect," critics of arbitration assert this theory to demonstrate the power imbalance between an employer who routinely uses arbitration to resolve employment disputes and an employee who is accessing the service for the first time.<sup>256</sup> However, studies neither prove nor disprove the "repeat player" theory.<sup>257</sup> One study revealed that even in a highly impartial private arbitration system, employees still prevailed in forty-three percent of cases over a three-year period.<sup>258</sup> Another study found that, in mandatory private arbitration where the AAA, a nonprofit organization, did not dismiss the claim as meritless, there was no evidence of the "repeat player effect" against employees, including those of

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*Workplace*, 16 OHIO ST. J. ON DISP. RESOL. 467, 471-72, 477 (2001).

<sup>252</sup> *Id.* at 471-72.

<sup>253</sup> *Id.* at 479-82.

<sup>254</sup> *Id.* at 487. "Hidden authority" can come in the form of cliques between coworkers or patronage networks that impose invisible authority onto the workplace. *Id.* at 486-87.

<sup>255</sup> See Sullivan, *supra* note 166, at 319-20.

<sup>256</sup> *Id.* at 319 n.235; see also Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1650. For further discussion of the "repeat player effect," see *infra* Part V.C.

<sup>257</sup> Professor Lisa Bingham of Indiana University conducted several studies on cases decided between 1993 and 2000, and could not empirically prove the "repeat player" theory or its causes. See Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 785-87 (2003).

<sup>258</sup> Maltby, *supra* note 235, at 50. The study focused on a private arbitration system established by the securities industry that "has been highly criticized for its impartiality." *Id.*

middle and lower income.<sup>259</sup> Since arbitration provides a cost-effective and procedurally sound method for resolving employment disputes, Targets with valid and substantiated workplace-bullying claims should be given the opportunity to utilize it without resorting to an expensive and lengthy litigation.

### *C. Arguments Against Arbitration to Resolve Employment Disputes*

Opponents of arbitration often raise due process concerns. First, a party may only challenge an arbitral award for judicial review when arbitrators “exceed[] their powers” in interpreting law or fact, or for arbitral misconduct.<sup>260</sup> Both are rarely successful.<sup>261</sup> On the other hand, courts have found that “procedural safeguards” exist within state arbitration statutes to prevent violation of due process.<sup>262</sup> Second, opponents contend that the arbitration-related costs make the process inaccessible to employees with fewer resources.<sup>263</sup> For example, the costs of filing for arbitration and paying for the arbitrator’s hourly rates may deter them from pursuing their claim.<sup>264</sup> Since most cases

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<sup>259</sup> Hill, *supra* note 257, at 805–09. In cases that were not deemed meritless, the win/loss ratio for employees was 0.96. *Id.* at 808.

<sup>260</sup> Stephen Wills Murphy, Note, *Judicial Review of Arbitration Awards Under State Law*, 96 VA. L. REV. 887, 898–903 (2010).

<sup>261</sup> *See id.*

<sup>262</sup> *Id.* at 903.

<sup>263</sup> Reginald Alleyne, *Arbitrators’ Fees: The Dagger in the Heart of Mandatory Arbitration for Statutory Discrimination*, 6 U. PA. J. LAB. & EMP. L. 1, 30, 30–32 (2003); Melissa G. Lamm, Comment, *Who Pays Arbitration Fees?: The Unanswered Question in Circuit City Stores, Inc. v. Adams*, 24 CAMPBELL L. REV. 93, 112 (2001)

<sup>264</sup> Employment arbitrator fees are generally based on hourly rates ranging from \$200 to \$400. Parties who use the American Arbitration Association (“AAA”) to resolve their employment disputes could pay several different kinds of fees, including a filing a fee of \$125, a postponement/cancellation fee of \$120, and administrative fees ranging from \$500 to \$13,000, depending on the scope of the claim. *See* Alleyne, *supra* note 263, at 30–31; *see also* Ryan P. Steen, Comment, *Paying for Employment Dispute Resolution: Dilemmas Confronting Arbitration Cost Allocation Throw the Arbitration Machine into Low Gear*, 7 J. SMALL & EMERGING BUS. L. 181, 182 (2003).

are disposed of in less time than in litigation, the overall expenses incurred by employee-plaintiffs would still be considerably less.<sup>265</sup> Moreover, if the claim is valid, employee-plaintiffs are more likely to recover an arbitration award in less time.<sup>266</sup> Third, opponents contend that the “inadequate” rules of discovery in arbitration may prevent the employee-plaintiff from fully uncovering evidence, since employers control pertinent information.<sup>267</sup> Equally, since arbitration discovery rules are more flexible and less well defined than federal evidence rules, an employer may also be at a disadvantage in the absence of highly relevant evidence to establish defenses.<sup>268</sup> Therefore, arbitration discovery rules pose challenges to both parties in the fact-finding process.

Critics also contend that under the “repeat player” theory, employers prevail more often because they routinely use arbitration to resolve disputes. For instance, private arbitration organizations, which have financial incentives to keep an employer’s business, are more likely to favor the employer in a proceeding.<sup>269</sup> Employers also develop continuing relationships with the same arbitrators.<sup>270</sup> However, many nonprofit arbitration

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<sup>265</sup> See Pat K. Chew, *Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied?*, 46 WAKE FOREST L. REV. 185, 198 (2011) (citing a study that concluded that “arbitrations resolved disputes in a timelier manner than litigation”); see also *supra* Part V.B.

<sup>266</sup> Chew, *supra* note 265.

<sup>267</sup> Martin H. Malin, *Privatizing Justice—But by How Much? Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589, 594 (2001).

<sup>268</sup> See Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 437–40 (2000) (“The right to ‘[t]ake depositions early in litigation and use the plaintiff’s own words to prove that the challenged reason [for an adverse employment decision] was nondiscriminatory’ is essential, because ‘if you know your rules of evidence, you can win a case just on evidentiary issues.’”).

<sup>269</sup> Sternlight, *supra* note 256, at 1650. Companies often enter into agreements with arbitration organizations and name them as the provider of arbitration services involving certain types of disputes. *Id.*

<sup>270</sup> Sarah Rudolph Cole, *Uniform Arbitration: “One Size Fits All” Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 774 (2001); Malin, *supra* note 267, at 603.

organizations exist to resolve claims without consideration of future business.<sup>271</sup> And while research suggests that the “repeat player” theory does put the employee-plaintiff at some disadvantage,<sup>272</sup> the studies are inconclusive. Indeed, the “repeat player” effect also applies to litigation proceedings, as parties who are frequently in court will develop informal relations with judges.<sup>273</sup> Therefore, a continuing relationship between a party and adjudicator could equally bias litigation and arbitration proceedings.

#### *D. Arbitration for Workplace Bullying Claims*

The frequent use of arbitration to resolve labor and employment disputes<sup>274</sup> makes it susceptible to translation in the workplace-bullying context. Since the Healthy Workplace Bill is state legislation,<sup>275</sup> a Target can file for an arbitration hearing through state courts to obtain a faster and less expensive resolution.<sup>276</sup> Arbitration programs could possibly benefit short-term or part-time employees, who earn less income and cannot afford to bring suit.<sup>277</sup> If the damages are valued at less than \$50,000, many state courts could utilize their existing mandatory

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<sup>271</sup> For example, the AAA and National Academy of Arbitrators are nonprofit arbitration organizations. See *About American Arbitration Association*, AM. ARBITRATION ASS’N., <http://www.adr.org/aaa/faces/s/about> (last visited Apr. 6, 2013); NAT’L. ACAD. OF ARBITRATORS, <http://www.naarb.org> (last visited Apr. 6, 2013).

<sup>272</sup> See, e.g., Colvin, *supra* note 243, at 428–32 (discussing studies that suggest a repeat player effect, but maintaining that more statistically significant research with larger sample sizes are necessary to prove or disprove the theory).

<sup>273</sup> See Bahaar Hamzehzadeh, Note, *Repeat Player Vs. One-Shotter: Is Victory All That Obvious?*, 6 HASTINGS BUS. L.J. 239, 243–44 (2010) (“The heightened level of familiarity with institutional actors allows repeat players to occasionally disobey court rules or obtain information that is not readily accessible to the public.”). For further discussion of the “repeat player effect” in litigation, see generally *id.*

<sup>274</sup> See FitzGibbon, *supra* note 158, at 697.

<sup>275</sup> See *supra* Part III.

<sup>276</sup> See *supra* Part V.A.

<sup>277</sup> See *supra* Part V.A.

arbitration programs to resolve the dispute.<sup>278</sup> Otherwise, if damages are valued at more than \$50,000, Targets can still elect to pursue arbitration with nonprofit organizations.<sup>279</sup> Those with fewer resources and who want to move past the conflict as quickly as possible should only choose to file suit as a last resort given the costs associated with litigation. Moreover, nonprofit arbitration organizations are widely available to provide impartial proceedings at affordable rates. Finally, procedural safeguards in state arbitration statutes exist to protect Targets from an abuse of due process in proceedings. In the event that a bully or employer refuses to utilize arbitration, Targets are still afforded a private right of action under the Healthy Workplace Bill.

## VI. CONCLUSION

Workplace bullying is a real and serious problem affecting millions of workers.<sup>280</sup> It is therefore crucial that the Healthy Workplace Bill be passed into law. Adding an ADR provision to the Bill would ease state legislators' and opponents' concerns about plaintiffs "flooding" courts with frivolous claims and exposing employers to unlimited liability. Since workplace-bullying incidents are very fact-specific,<sup>281</sup> allowing both litigation and ADR procedures as potential avenues of relief will give Targets and employers more flexibility to resolve disputes. Mediation and arbitration could resolve disputes quickly and with less expense, which is important for most employees and for small employers with fewer resources. Parties who pursue ADR would also reduce the likelihood that state court dockets become overloaded with workplace bullying claims.<sup>282</sup> To address workplace-bullying claims through ADR processes, states could utilize existing institutions and programs, such as private ADR organizations, the state labor department, or court-

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<sup>278</sup> See *supra* note 229.

<sup>279</sup> See *supra* Part V.A.

<sup>280</sup> See *supra* Part II.

<sup>281</sup> See *supra* Part II.

<sup>282</sup> See *supra* Part IV.

connected mediation and arbitration programs.<sup>283</sup> Therefore, the Healthy Workplace Bill's dual purposes of maintaining dignity in the workplace<sup>284</sup> and preventing workplace bullying<sup>285</sup> could equally be achieved through ADR procedures and should not be limited solely to a private cause of action.

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<sup>283</sup> See *supra* Parts IV–V.

<sup>284</sup> See Yamada, *Human Dignity*, *supra* note 27 (arguing that employment law focused on human dignity helps define both rights and responsibilities that promote healthy and productive workplaces); Yamada, *Therapeutic Jurisprudence*, *supra* note 27 (arguing that therapeutic jurisprudence, which focuses on the law's impact on emotional life and psychological well-being, should play an important role in promoting a "dignitarian" framework in shaping employment law).

<sup>285</sup> See Yamada, *Status-Blind Hostile Work Environment*, *supra* note 27, at 492–93.