BULLYING IN THE WORKPLACE: TOWARDS A UNIFORM APPROACH IN SOUTH AFRICAN LABOUR LAW

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Ad majorem gloriam Dei

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BY

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Declaration

I the undersigned Dina Maria Smit hereby declare that the work contained in this study for the degree of Doctor of Laws at the University of the Free State is my own independent work, and that I have not previously, in its entirety or in part, submitted this work to any university for a degree. I furthermore cede copyright of this thesis to the University of the Free State.

Signed at Bloemfontein on this the 30th Day of January 2014.

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Dina Maria Smit

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CHAPTER 1: GENERAL ORIENTATION TO THE THESIS[1]

1.1 Introduction and background

> *A modern workplace is not a heavenly garden of smiling buddhas focused on the welfare of others. More often than not it presents the contrary picture of a highly stressful and robust environment …*[2]

Workplace bullying has attracted a considerable amount of domestic and international interdisciplinary attention, from legal scholars and sociologists to organisational and ordinary psychologists,[3] but South Africa lags behind much of the rest of the world in this regard. The prevalence of bullying has been surveyed and analysed; conduct to fit the notion of bullying has been identified, and even the individual and societal costs of bullying behaviour have been studied in different jurisdictions. What is lacking, however, is a common definition for, and a uniform approach to, bullying.

The international notion seems to be that bullying can be roughly defined as "repeated offensive behaviour through vindictive, cruel, malicious or humiliating attempts to undermine an individual or group of employees".[4] Whether a single act of bullying or multiple acts are needed to comply with this international perception is open for debate, as there is no agreed definition for workplace bullying in South Africa, despite the fact that even the courts have used the word 'bullying' in South Africa to denote offensive behaviour.[5]

As the title suggests, the broad aim of this study is to investigate the legal phenomenon of bullying in the workplace and the existing as well as potential legal avenues available to protect victims in South Africa from this conduct, which used to be known as "schoolyard bullying". Bullying is no longer limited to the schoolyard, however, and the bully no longer needs to be big and bold – all that is needed is a stroke of meanness, which may present itself in many forms. Bullying has been described in many ways, the most succinct of which probably is "the systematic abuse of power … persistent and repeated actions which are intended to intimidate

[1] This thesis reflects the legal position as on 1 November 2013.
[2] *Visser and Amalgamated Roofing Technologies t/a Barloworld* (2006) 27 ILJ 1567 (CCMA): 1569.
[3] Harthill 2008: 248.
[4] Harthill 2008: 249, with reference to the Healthy Workplace Bill.
[5] For instance, see *NUPSAW obo Gule & another/Young Sang Industrial Co (Pty) Ltd* [2007] JOL 20748 (MEIBC).

or hurt another person … (it) embraces direct and indirect behaviour, such as name-calling, rumour-mongering, social exclusion, extortion …"[6]

Bullying involves a power imbalance, also called the 'power-perpetrator dimension', but is not limited to vertical aggression: Even peers can bully one another, and subordinates can also muster enough power to bully a supervisor.[7] Bullying feeds into the greater violence problems in countries, and the importance of a systematic and targeted preventative response cannot be overstressed, especially as a study by the International Labour Organisation[8] in 2003 showed that 80% of South African employees had been exposed to hostile behaviour in their workplaces.[9]

1.2 Academic and practical reasons for the selection of the topic

Bullying in the workplace is one of the fastest-growing threats in the new millennium and among the most-reported complaints worldwide, according to the ILO.[10] Fewer than 10% of all bullying incidents involve physical aggression, and worldwide research indicates that emotional and psychological abuse represents the greatest threat to workers in workplaces.[11] Contrary to the impression created by the media, namely that workplace violence is spiralling out of control; extreme acts of violence such as those in Fort Lauderdale, where a dismissed employee opened fire on his colleagues, killing five and seriously injuring others are relatively rare. However, workplace aggression is far more prevalent, and may prove extremely damaging to individuals and organisations.[12]

According to Salin, bullying leads to higher employee absenteeism, an increased intent to leave the organisation, higher turnover and propensity to leave, as well as direct and indirect costs to be carried by employers.[13] Victims also suffer symptoms of severe post-traumatic stress disorder (PTSD), and not only direct victims are affected, but innocent witnesses to the bullying could also potentially lodge claims

[6] Smith 1997: 249.
[7] Salin 2003: 1216.
[8] Hereinafter referred to as the ILO.
[9] ILO 2003b.
[10] Query & Hanley 2010: 1.
[11] Query & Hanley 2010: 1.
[12] Neuman & Baron 1998: 391, with reference to the *New York Times*, 10 Feb 1996.
[13] Salin 2001: 426.

against the employer[14] and could succeed based on the doctrine of vicarious liability. It seems as if workplace violence involving homicide and assault is but the proverbial tip of the ice berg, mainly due to the underreporting of the less severe forms of violence at work, purely because they are less dramatic and visible.[15] Moreover, according to a study done in 2007, more than two million employees and managers leave their jobs solely due to workplace unfairness and bullying, costing corporate America approximately $64 billion annually.[16] In this regard, it has been said that bullying is being reinforced by the very nature of the "capitalist employment relationship."[17] In South Africa too, workplace bullying has caught popular media attention, and articles on the topic frequently appear in newspapers[18] and magazines.[19] Legal interventions, however, seem to be lacking.

Research on this phenomenon has passed the 20-year mark and has grown and developed tremendously over this period.[20] The focus has shifted since the 1980s, when Leymann, a professor from Scandinavia, started his investigations into conflict in the workplace and sparked interest in the concept of bullying at work.[21] Research on workplace bullying was limited to the Nordic countries up until the 1990s, mainly revolving around the negative effects of "mobbing", as it was then called.[22]

Books written on the subject did not address the legal implications, but were written from the perspective of psychology and industrial psychology. Since the 1990s, however, Europe has started to take an interest in this phenomenon, and a book on workplace bullying written by journalist Andrea Adams in 1992 sparked media interest after the airing of a BBC radio programme on the topic. Suddenly, practitioners and legal scholars started to take cognisance of the phenomenon.

Other countries soon followed suit, which is where the shift in research started.[23] Where the research originally focused on the nature of the 'bully', it now started to shift to an examination of the dynamics of the victim, which in turn led to

[14] World Health Organisation (hereinafter referred to as WHO) 2002.
[15] Neuman & Baron 1998: 393.
[16] Query & Hanley 2010: 4.
[17] Branch, Ramsay & Barker 2013: 7.
[18] Ward 2012; Kohut 2012.
[19] As Juffrou geboelie word, Rooi Rose 2011: 163.
[20] Samnani & Singh 2012: 582.
[21] Einarsen, Hoel, Zapf & Cooper 2003: 4.
[22] Einarsen *et al* 2003: 4.
[23] Einarsen *et al* 2003: 4.

examinations of context and culture,[24] with the latest movement focusing on research pertaining to the maze of legal interventions available.

A number of different labels have been used to conceptualise bullying at work, and various taxonomies of hostile behaviour have been tendered to describe it.[25] The notion is however recognised worldwide as a serious problem within the working environment[26] and a severe workplace stressor.[27] With bullying-at-work prevalence figures as high as 95% in some countries[28] and an estimated 78% of employees who reported workplace bullying in South Africa in 2004,[29] this is a pervasive problem that needs to be addressed from a labour law perspective.

Prevalence studies of workplace bullying in the international arena are plentiful, but information pertaining to the South African position is either completely lacking or so limited or sector-specific that a clear picture of the current position in the country can hardly be formed. Available statistics on the prevalence of workplace bullying in South Africa indicate that, in 2006, 77% of workers reported having experienced workplace bullying.[30] In 2012, it was reported that 31% of employees in six sectors across the country reported bullying.[31] A study conducted by the ILO, under the auspices of the United Nations, investigated workplace violence in the health sector in South Africa,[32] and found that nearly 80% of respondents experienced hostile behaviour in the workplace during their working life.[33] This is viewed as such a serious problem worldwide that the European Commission has lodged an investigation into the prevention of violence at work as part of its current programme on safety, hygiene and health at work.[34]

Despite the abovementioned findings and recommendations, this field has not been sufficiently explored by legal scholars and practitioners, and no published doctorate

[24] Randle 2006: 8.
[25] Monks, Smith, Naylor Barter, Ireland & Coyne 2009: 151,152.
[26] Monks *et al* 2009: 151,151.
[27] Monks *et al* 2009: 151,152.
[28] Samnani & Singh 2012: 582.
[29] WHO 2002.
[30] Workplace Dignity Institute http://www.worktrauma.org/wdi/about_wdi.htm (accessed on 29 January 2013).
[31] Cunniff & Mostert 2012: 5,9.
[32] ILO 2003a.
[33] WHO 2002, which indicates that 61% of South Africans reported at least one incident of physical or psychological violence in the year prior to the study.
[34] ILO 2003c.

on the subject matter from a legal perspective could be found in South Africa. Even articles on the subject are hard to find, especially in as far as the legal aspects are concerned. This highlights the relevance of this research.

This phenomenon also does not seem to be covered by existing legal avenues, especially victimisation-based constructs,[35] which may present a legal lacuna. There is uncertainty about existing legal remedies to deal with workplace bullying in South Africa, and the current laws on unfair discrimination do not adequately prohibit or deal with workplace bullying.[36] As bullying cannot be described as harassment or victimisation on a protected ground, it may be seen as *sui generis.* According to the South African jurisdiction on unfair labour practices, the bullying has to be tied to limited categories, such as promotion, demotion, training and the granting of benefits. Should the bullying fall outside this scope, there is no legal remedy available for workplace bullying.

Ortega and colleagues[37] found that the more pervasive the bullying, the more pronounced its effects. Thus, early intervention is of the utmost importance.

The new Protection from Harassment Act,[38] which has not been drafted to prohibit workplace bullying specifically, but to deal with stalking, similar to its equivalent in the United Kingdom, may grant some relief to the victims of bullying at work, provided that the bullying amounts to harassment. It at least also covers cyberbullying (if it amounts to harassment). Yet, it is not the best vehicle to use in the workplace. Only protection orders may be granted in terms of this act, which will see a warrant of arrest hanging over the head of the perpetrator for five years or more, during which time the complainant and perpetrator still have to work together.

Legal scholars and practitioners will benefit from this research, as it is clear that workplace bullying is rife, has negative effects on the individual as well as teams within enterprises and organisations, and has legal implications for those failing to address this peril in the workplace.

[35] Tepper & Henle 2011: 488.
[36] Le Roux, Rycroft & Orleyn 2010: 65.
[37] 2009: 200,203.
[38] 17 of 2011, which took effect in April 2013.

The negative effects of workplace bullying on individuals, ranging from depression, poor self-image and suicide to high employee turnover and escalating costs for employers, have formed the subject of many articles.[39] These served as the point of departure for this thesis.[40] The media also actively report on this phenomenon and see bullying as a method of getting ahead and gaining power, control and career advancement.[41]

According to Yamada, bullying is a multidimensional problem, and it is generally in employees' best interest that their employers put preventative measures in place to ensure fair and dignified treatment at work in a bully-free environment, with a guarantee that complaints will be dealt with fairly and speedily.[42] On the other hand, Yamada also asserts, it is in employers' best interest to prevent bullying and the resultant loss of employee productivity and loyalty, as well as to minimise law suits that may follow.[43] Urgent action would even be in the best interest of the already overburdened legal system, which can ill afford wasting time on unfounded or minor complaints about workplace bullying.

1.3 The legal problems presented by workplace bullying

The problem with bullying is that perpetrators often modify their negative behaviour to such an extent that they remain outside the provisions of current legislation.[44] For want of a uniform legal definition of workplace bullying, the *notion* is understood to be a form of purposeful humiliation that contributes to depression, poor job satisfaction, propensity to leave the employer, and employees' inability to function effectively in the workplace.[45] This, in turn, leads to increased absenteeism, high turnover, illness and poor work performance, which cost companies millions per year and could expose employers to further costs through lengthy litigation.[46] The possibility of employers being held liable for damages in terms of the doctrine of

[39] Bible 2012: 32
[40] Bible 2012: 32.
[41] Piore 2012: 2.
[42] Yamada 2004a: 482.
[43] Yamada 2004a: 482-483.
[44] Von Bergen, Zavaletta & Soper 2006: 31.
[45] Simon & Simon 2006: 142.
[46] Bible 2012: 36.

vicarious liability or the provisions of health and safety legislation exacerbates matters. At a loss of roughly $30 000 to $100 000 per bullying case in the United States, coupled with the fact that research has shown that existing legal avenues fall short in both preventative measures and dealing with bullying in the workplace *ex post facto*,[47] the need to prevent, prohibit and deal with workplace bullying is self-explanatory.

An investigation into the meaning of workplace bullying implies an understanding of all its features and a delineation of the various definitions in different jurisdictions. This calls for a thorough investigation, not only into the different aspects of the workplace bullying phenomenon, but also existing common-law and statutory remedies available to victims thereof.

Legislating manifestations of interpersonal mistreatment might look strange on the face of it, but the problem of abusive supervision, bullying or whatever else it may be called is real and troubling. Simply giving it a new name may not add value, but could merely muddy the waters even further.[48] In Sweden, the question is specifically asked whether it is possible to regulate so-called "intangible issues related to human interaction and relationships such as bullying",[49] despite Sweden being the first country to have legislated bullying through health and safety laws.

Although Sweden was not chosen as a comparative jurisdiction for purposes of this thesis, mainly due to the language barrier and the fact that horizontal bullying is more rife there than linear bullying, with the converse being the case in South Africa, the lessons learnt following the promulgation of their Ordinance against Victimisation[50] could be helpful to arrive at a uniform understanding of the matter in South Africa, and could guide us in terms of regulation in this regard. Despite their having legislated bullying, however, prevalence figures in Sweden have increased. This has been investigated by especially Hoel and Einarsen[51] to establish the loopholes and failures of current bullying laws. Their findings will be explored as part of the comparative and evaluative study in this thesis.

[47] Bible 2012: 46.
[48] Tepper & Henle 2011: 478-488.
[49] Hoel & Einarsen 2010: 46.
[50] Ordinance AFS 1993: 17 (Swedish National Board of Occupational Safety and Health, 1994), as per Hoel & Einarsen 2010: 32.
[51] 2010: 30-50.

It must be stressed that it is a point of departure in this research that workplace bullying is a pervasive problem in South Africa; that the negative effects of workplace bullying are clear and severe, and that proactive interventions are needed to curb this problem. Of equal importance are the *ex post facto* mechanisms to effectively deal with bullying in employment should the proactive measures fail. An investigation into the effectiveness of current legal avenues available to victims of workplace bullying and employers forms another important part of this thesis, as does the exploration of alternative mechanisms for dispute resolutions.

It must be kept in mind that, due to the relatively new consciousness of this field of study in South Africa, the need to agree on a uniform definition is of extreme importance. That would in part answer the primary problem statement, namely whether existing legislation is sufficient to protect victims against workplace bullying, or whether workplace bullying needs to be eradicated or minimised by a new legal dispensation that brings about a uniform understanding of bullying in South Africa. Whether bullying should be placed on the legal continuum of harassment or be regarded as a mere dignity violation is another important consideration, which no study has addressed thus far. In some countries, such as Australia and Sweden, bullying is viewed as a health and safety matter, whilst in the United Kingdom, anti-stalking legislation is used to deal with the matter. In the United States, calls have been made for separate legislation through the Healthy Workplace Bill, but different pieces of legislation are currently used to deal with the issue.

For legal scholars and practitioners to conclude that workplace bullying is a pervasive problem in South Africa, which has to be prevented, minimised or catered for *ex post facto* (either by means of new legislation, codes of conduct, utilisation of existing legal mechanisms or otherwise), certain studies need to be conducted. Of note is the fact that some South African authors[52] have categorised bullying as a form of harassment in the workplace, but the latest trend in other jurisdictions is to acknowledge workplace bullying as a separate legal concept or a dignity violation[53] –

[52] Le Roux *et al* 2010: 1.

[53] France, for example, sees bullying as a moral harassment and protects the psychological health of employees via legislation. See Hoel & Einarsen 2010: 31.

hence the increasing move towards regulating this phenomenon separately from the legal avenues currently available to victims.[54]

A study of the legal deficiencies to combat this phenomenon cannot be conducted in a void and since few legal scholars and practitioners have knowledge about the underlying psychology of workplace bullying, it warrants an investigation into the 'softer' side of workplace bullying to empower employees and employers to understand this worldwide problem. Although this thesis by no means aims to focus on the psychology of the problem, an analysis of the research in that regard serves to aid the greater community and legal scholars to better understand the problem to be addressed.

Different types of workplace bullying have manifested over time, of which the legal fraternity needs to take cognisance. The investigation into the different types of workplace bullying embarked upon in this research would assist legal scholars to agree or disagree on the need to regulate this type of conduct, which negatively affects the employer-employee relationship. The legal struggle to decide to which forum a dispute originating from workplace bullying should be referred is of major concern, as there are various possibilities, and the formulation of the statement, claim or phrasing of the dispute would dictate which forum would have jurisdiction to hear the allegations.

Harassment claims in South Africa could generally be brought before tribunals either by means of claims based on alleged discrimination, unfair labour practices and victimisation,[55] whilst criminal avenues to be explored or damages claimed would form the subject matter of the civil courts. However, it is still not clear whether workplace bullying should be regarded as a form of harassment in South Africa, or should rather be seen as part and parcel of employers' obligation to provide a safe and healthy work environment, or even if bullying could be seen to form part of discrimination law. This will also be investigated and conclusions and recommendations forwarded for consideration.

[54] Tepper & Henle 2011: 489.
[55] Le Roux *et al* 2010: 14.

The rights afforded by the South African Constitution[56] protect parties from discrimination in many ways, and grant the right to dignity, security and freedom of the person, as well as the right to a safe and healthy working environment, among others. An entire suite of legislation was passed to give effect to these constitutional imperatives,[57] and this research also sets out to examine some of those laws in order to conclude whether they could be seen as effective means to prohibit, minimise or deal with workplace bullying *ex post facto.*

Protecting the dignity of employees is paramount in a workplace, and since one of the negative effects of workplace bullying is the impairment of the basic right to human dignity, either vertically or horizontally, merely following internal grievance procedures or incapacity measures seems insufficient to both prohibit and deal with the problem.[58] Defining a 'workplace' is of equal importance, as innocent bystanders and those in different types of work relationships could be negatively affected by the consequences of bullying, not necessarily as victims, but as witnesses. The role of all stakeholders, including trade unions, will therefore be discussed as part of collective labour law, and a short evaluation of employers' common-law duties to protect those in employment relations will be undertaken.

Weighing increased absenteeism, depression, suicide, propensity to leave, low productivity and low staff morale up against the existence of an internal policy is another field to be explored, as is the possibility of expanding the current code of good practice.[59]

Proactive steps by practitioners are often based on the financial bottom line in organisations, as enterprises ultimately pursue financial goals. An ILO study aptly called "The cost of violence/stress at work and the benefits of a violence/stress-free working environment" shows the negative impact of violence at work. This study specifically referred to workplace bullying and the negative effect it could have on employers' finances.[60] In recent litigation, a Welsh teacher received compensation of

[56] The Constitution of South Africa, 1996.
[57] For example the Basic Conditions of Employment Act 75 of 1997, Employment Equity Act 55 of 1998, Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
[58] Hoel & Cooper 2010: 47.
[59] Amended Code of Good Practice on the Handling of Sexual Harassment Cases, published under GN 1357 in GG 27865 of 4 August 2005.
[60] ILO 2000: 25.

over £250 000 for work-related stress, while in the United States, more than 3 000 claims for compensation are lodged annually for stress-related psychiatric injuries – in California alone.[61] Breaking this down into costs to the individual, the total figure for accidents and work-related illness in the United Kingdom was £5,6 billion over a period of just one year.[62]

The southern parts of Australia have separate legislation to eradicate bullying from the workplace. The Works Councils are involved in this process and have recently adopted a draft code[63] aimed at eradicating and preventing workplace bullying, which applies to the entire Australia and contains many of the provisions already in place in Southern Australia. This has not yet been passed as law, as public comment has only recently closed. Thus, national legislation is still awaited in this jurisdiction.

It seems as if current legislation in the United States is less than successful. America's occupational health and safety laws do not provide much relief for bullied victims, in that they do not oblige employers to ensure an emotionally healthy work environment, and generally do not extend to psychological and stress-related hazards in the workplace.[64] The United Kingdom, on the other hand, has passed legislation in this regard and also affords compensation for civil claims of psychological damage suffered due to workplace abuse.

This study is comparative in nature and in addition sets out to be a critical qualitative literature study. The comparative jurisdictions have not been randomly selected. Although the issue of workplace bullying is a fairly new field of study in South Africa, the United States has come a long way in attempting not only to understand this phenomenon, but also to regulate it. Regulation occurs in the different states in the absence of federal law. The current legal movement to address this pervasive problem in the United Kingdom is widely acclaimed, and South Africa's new Protection from Harassment Act[65] draws heavily on that jurisdiction's act of the same

[61] ILO 2000: 39.
[62] ILO 2000: 39.
[63] Safe Work Australia 2013b: 6.
[64] Meglich-Sespico, et al 2007: 38.
[65] 17 of 2011.

name.[66] Australia has also begun to legislate workplace bullying in line with other countries in Europe.

This study will show that the most effective way of combatting workplace bullying is by means of an active partnership between all role players concerned, and that remedies can only be applied once the problem has been recognised and is openly addressed.[67]

The comparative method used for this research should not be seen as a flirtation with 'alien law',[68] but as a source of law of increasing importance.[69] In the words of Monateri: "Shedding their traditional adherence to twentieth-century positivist and national paradigms, domestic courts are deliberately and explicitly making use of comparative law to an unprecedented extent."[70] This study aims to use comparative studies done, some based on empirical research, as a tool for policymakers to consider changes to the South African legal regime,[71] thereby also evaluating the desirability of specific legal changes[72] to combat workplace bullying in South Arica. Existing and potential avenues of relief and redress[73] will be addressed from an international and local perspective.

The development or expansion of legal mechanisms to curb bullying in the workplace, or 'workplace violence' as it is often referred to by writers, needs to be considered, as it could serve as a tool for employers in South Africa to manage workplace bullying, while at the same time protecting employees from being bullied by either their employers or colleagues. Authors in the legal fraternity are in agreement that prevention is better than cure, and that harm to the target/victim and the perpetration of ill behaviour require timeous intervention,[74] "but so far, the legal system in many jurisdictions have failed, in that bullying behaviour has not been

[66] 1997.
[67] ILO 2003b.
[68] Monateri 2012: 25.
[69] Monateri 2012: 26.
[70] Monateri 2101: 26.
[71] Section 39 of the Constitution of South Africa refers to the obligation of a court, tribunal or forum to consider international law when interpreting the Bill of Rights, as well as taking into consideration foreign law whilst promoting the purport, spirit and objects of the Bill of Rights and yet at the same time, taking noting other rights and freedoms conferred or recognised by the common law, customary law or legislation to the extent that they are consistent with the Bill of Rights.
[72] Monateri 2012: 315.
[73] Meglich-Sespico *et al* 2007: 31.
[74] Lippel 2010: 7.

deterred and insufficient mechanisms are in place to compensate its victims".[75] It has been said that the legislature's silence sends out the wrong message to employers and society, in that, in the very least, the dignity of employees and employers need to be protected in a safe working environment. Researchers have shown that legislative and other policy interventions that name the phenomenon (irrespective of whether it is called harassment, emotional abuse, mobbing or bullying) and convey the political message that it is wrong, are more likely to bring about the implementation of active preventative measures and mechanisms to provide redress for targets.[76] There is an urgent need to establish a legal framework to deal with bullying in the workplace, as it threatens the physical and psychological health and well-being of not only employees, but also the very organisation for which they work.

- The primary aim of this study is thus to investigate the legal phenomenon of bullying in the workplace and to delineate the various definitions as they present in the different jurisdictions. This would lead to an investigation whether existing common-law and statutory remedies available to victims of workplace bullying are sufficient to protect such victims in a quest to a uniform understanding of workplace bullying
- The secondary aims of this study can thus be formulated as an investigation, evaluation and formulation of terms associated with workplace bullying
- Defining "workplace" and "workplace bullying" as it presents itself in the different jurisdictions
- Determining the effectiveness of current legal avenues to be explored by the victims of workplace bullying
- Ascertaining whether bullying should be brought under claims based on discrimination, unfair labour practices, criminal avenues, harassment or a safe working environment
- Ultimately to inquire as to whether a new legal dispensation is needed to eradicate or minimise the negative effects of workplace bullying

[75] Bible 2012: 32.
[76] Lippel 2010: 13.

The broad methodology[77] followed in this thesis entails a general discussion on workplace bullying and the development of definitions for it, followed by a discussion on its negative effects. The legal positions of the selected foreign jurisdictions are then presented, after which it will be assessed whether the current legal avenues are sufficient to address this peril. The question will also be addressed whether South Africa could draw on the successes and failures of the foreign jurisdictions, to move towards a uniform understanding of workplace bullying.

[77] The reference system used in this work is that of the *Journal for Juridical Science*.

CHAPTER 2: UNDERSTANDING WORKPLACE BULLYING

2.1 Introduction and aim of this chapter

> *Work is, by its very nature, about violence to the spirit as well as the body. It is, above all (or beneath all), about daily humiliations. To survive the day is triumph enough for the walking wounded among the great many of us.*[1]

Referring to employees as "the wounded" may sound theatrical, but is unfortunately true where workplace bullying is not effectively addressed.[2] Employees are not the only ones suffering at the hands of bullies; even employers can be 'wounded' if bullying is rife at their workplaces. For this reason, this chapter aims to explain workplace bullying, thereby affording legal scholars, academics, trade unions, employees and employers the opportunity to fully understand the concept. It may seem as if this chapter is devoted to psychology and industrial psychology. However, among the reasons why workplace bullying is so rife is partly a lack of understanding of the notion itself as well as the underlying motives for it. In an attempt to arrive at a uniform understanding of workplace bullying, we need to dig deeper than the current and future legalities surrounding this phenomenon.

There is no universally accepted definition for workplace bullying, and different definitions present themselves in different jurisdictions.[3] Even authors prefer to use their own definitions, but at least there seems to be a broadly similar understanding of the concept in the international arena.[4] While the lack of a single definition poses its own problems, it does allow different jurisdictions to tailor-make their own prohibitions, as culture and gender play such an important role in the bullying experience.

Workplace bullying is also referred to as "work abuse", "workplace aggression", "workplace harassment" and "psychological harassment",[5] and legal scholars and practitioners seem to have given up on settling on a single term, rather opting to benefit from each other's work.[6] Einarsen and colleagues[7] describes bullying as

[1] Studs Terkal, as cited in Namie & Namie 2011: 1.
[2] Vega & Comer 2005: 101.
[3] Bulutlar & Öz 2009: 274.
[4] Yamada 2004a: 479; Chappell & Di Martino 2006: 21.
[5] Bulutlar & Öz 2009: 274.
[6] Yamada 2004a: 479.

repeated and unwanted actions and practices directed against one or more workers, and which are carried out either deliberately or unconsciously, but cause humiliation, offence and distress and could interfere with performance of work or cause unpleasant working conditions. Leymann[8] believes that bullying is primarily psychological in nature.[9,10] Vega and Comer,[11] in turn, view bullying as a pattern of destructive and demeaning actions that strongly resemble the activities of the traditional schoolyard bully. Query[12] refers to workplace bullies as "conquerors", who are interested in power and control only. Workplace bullying could be overt or covert and either emotional or unemotional, and is a process whereby aggressive behaviour escalates to stigmatisation and, eventually, severe trauma for the bullied victim. Einarsen refers to the difficulty in pinning down bullying, as it is indirect or often very discreet.[13]

Bullying is not a once-off clash,[14] but consists of repetitive actions to the detriment of the victim and the organisation. Employers' managerial prerogative is protected and is not regarded as bullying. Bullying also differs from harassment, in that there is no obvious bias towards race, gender and disability, especially from an American perspective.[15] The Australian Draft Guide on Workplace Bullying clearly stipulates that bullying does not refer to procedural performance management, and is not harassment or discrimination, which is managed separately from bullying in that jurisdiction.[16] See chapters 3,4, and 5 in this regard. The new proposed amendments to the Employment Equity Act in South Africa aims to amend the current section 6 of the EEA by adding "…..on any other arbitrary ground." to the list of prohibitions listed under the current section 6 of the EEA dealing with unfair discrimination.[17]

This chapter will first provide a short historical background on the matter, and will then deal with the antecedents and consequences of workplace bullying pertaining to

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[7] Einarsen, Hoel, Zapf & Cooper 2011: 9. See chapter 1.
[8] With reference to Olweus 1987.
[9] 1996: 165.
[10] As stated in Einarsen *et al* 2011: 9, chapter 1.
[11] 2005: 101.
[12] 2010: 2.
[13] Einarsen *et al* 2011: 21.
[14] Branch *et al* 2012: 2.
[15] Von Bergen *et al* 2006: 30.
[16] Safe Work Australia 2013a: 1-9.
[17] Employment Equity Amendment Bill [B 31B-2012]: 3.

employers and employees. An investigation will be lodged into the different types of workplace bullying, and once-off and sporadic bullying behaviour will be compared to regular bullying. Bystander or witness bullying, group bullying and organisational bullying will also be discussed.

It is accepted that workplace bullying is commonplace,[18] and prevalence figures will serve to confirm this. This chapter will draw on the research of many legal scholars and practitioners in different jurisdictions, and will indicate that words such as "mobbing", "harassment" and "bullying" can be used interchangeably[19] to refer to the phenomenon of workplace bullying.

Regardless of the form, workplace bullying can inflict serious harm on targeted employees, and stress, depression, mood swings, guilt and low self-esteem are but a few of the negative consequences suffered, which could in turn affect work performance[20] and have a negative effect on the employer. Due to the severe personal and organisational effects, bullying detracts from the development and maintenance of a vital, diverse and productive workforce.[21] There is a causal link between the onset of bullying behaviour and health problems experienced by victims, or 'targets' as they are called in the United States. Not only are psychological problems reported due to bullying, but certain signs of physical illness also present themselves. Researchers in the field specifically refer to cardiovascular disease and musculoskeletal disorders.[22]

While employees suffer due to workplace bullying, employers are also negatively affected by its results, which will be discussed as well. The definition of 'workplace' will also receive attention. In addition, bullying cannot be discussed without referring to the interaction between bullying and sexual harassment, which is also included in this study.

Cyberbullying is a new avenue to be explored, and is regarded as a specific type of bullying in the workplace. Cyberbullying could be explored as a separate dissertation due to its relevance and relative lack of legal regulation. Reference will be made to

[18] Yamada 2004a: 481.
[19] Branch *et al* 2013: 1.
[20] Yamada 2004a: 480.
[21] Branch *et al* 2013: 1.
[22] Yamada 2004a: 480, with reference to National Institute for Occupational Safety and Health 1999.

the similarities and differences between face-to-face workplace bullying and bullying in cyberspace, as the principles remain the same. This will however be discussed briefly so as not to distract attention from the main research question of this thesis. Possible solutions will be put forward and a comparative study on cyberbullying in employment will be conducted to provide the full picture of the different types of bullying found in employment.

The problem with bullying is that perpetrators often modify their negative behaviour to such an extent that they remain outside the provisions of current legislation.[23] The fact is that preventative action to curb bullying in the workplace is possible and essential to meet the challenge of a violence-free working environment.[24] Only by recognising that workplace bullying is part and parcel of the greater violence problem of countries, and is embedded in the wider economy, employment relationships and organisational, gender and cultural factors, this phenomenon could be successfully managed or minimised.[25]

Liefhooge and MacDavey[26] believe that there are two approaches to workplace bullying: one that deconstructs it as a form of violence linked to school-bullying literature, mainly using aggression theories, and another that asserts that bullying is to be treated as an extreme social stressor, drawing on stress models as a way of explaining and accounting for the problem. This distinction, however, becomes immaterial in the search for a legal way forward.

Should the question arise as to why there is such an interest in bullying as a separate legal phenomenon, it is tendered that Samnani and Singh[27] as well as Tepper and Henle[28] are correct in their view that workplace bullying, as a notion, is sufficiently distinct and meaningful to be treated separately from other forms of workplace mistreatment. Einarsen and colleagues[29] refer to the fact that the bullying phenomenon has moved from organisational psychology to an interdisciplinary field,

[23] Von Bergen *et al* 2006: 31.
[24] Chappell & Di Martino 2006: 24.
[25] Chappell & Di Martino 2006: 24.
[26] 2001: 375.
[27] 2012: 582.
[28] 2011: 490.
[29] 2011: 9, chapter 1.

and that the legal position pertaining to workplace bullying calls for further investigation and a uniform understanding.

The question as to whether existing mechanisms can successfully deal with workplace bullying, or whether some of other form of legal intervention is the way forward, can only be addressed once a uniform understanding of the phenomenon has been reached and the legal mechanisms in other jurisdictions have been evaluated.

2.2 Background

> *Bullying stems from the kick some people get at seeing other people squirm and eventually falling at their feet*.[30]

This quote from *Corporate Hyenas at work*[31] aptly describes the conduct of many employers in the workplace, and the comparison to hyenas in the wild is not without reason. The authors compare workplace bullies to hyenas, "who would smirk and party in a hysterical cacophony without any compassion whatsoever for the victim,"[32] much like the negative bullying actions we are about to explore. Later on, other authors such as Cilliers[33] latched onto this, labelling bullies as "snakes in suits" and "hyenas"[34] and referring to the interaction between bully and victim as "a complex interconnected dyad,"[35] resembling a so-called "dance of death".[36]

It is known that stress forms part of our everyday lives and is thus included in our working lives as well, but "… because abuse and stress are seen as simply so intrinsic to employment, as invisible and inseparable from conditions of employment as sexual harassment was twenty years ago,"[37] our understanding, management and handling of bullying in the workplace is still in its infancy. As virtually everyone in

[30] Marais & Herman 1997: 32.
[31] Marais & Herman 1997: 32.
[32] Marais & Herman 1997: 43.
[33] Cilliers 2012: 6.
[34] Cilliers 2012: 6, with reference to Hare 2006 and Herman 1997.
[35] 2012: 6.
[36] 2012: 4.
[37] Stefan 1998: 795,844.

formal employment reports to someone more senior, it is understandable that human relationships become strained.

Unfortunately, abuse often presents itself where the power disparity between subordinate and manager is not managed properly, or where strong power needs are expressed to climb the hierarchal corporate ladder.[38] Added to this, Bassman mentions the enormous pressure on companies to perform, which creates the perfect breeding ground for workplace abuse.[39] Pietersen[40] as well as Visagie and colleagues[41] agree that bullying is no longer a childhood rite of passage, and that due to the tendency to use aggressive or unreasonable behaviour to achieve one's ends, bullying is an ever-increasing and multifaceted phenomenon that will have to be managed in the 21st century.

It takes special skills to be a proper leader and influence people. These 'people skills' are often lacking, with leaders managing their employees through threat and intimidation,[42] again creating a breeding ground for bullying behaviour. This thesis will endeavour to set out the rights and responsibilities of both employees and employers in this regard, although most literature views bullying from the employee's perspective.

It is true, however, that employers suffer just as much, especially financially or on their financial "bottom line", as put by Yamada[43] and Bassman.[44] Workplace bullying in large companies often leads to increased expenses and loss of profits.[45] Companies not only incur *direct* costs due to stress and disability claims, increased medical costs and lawsuits, but can also incur more *indirect* costs, such as poor quality of work, high turnover rates, absenteeism, poor customer relations and even

[38] Aquino & Douglas 2003: 198, noting that the "desire to achieve high status is amongst the most ubiquitous and powerful of all human motives", as it leads to a disproportionately large share of the symbolic and material things towards which people strive.
[39] 1992: 24.
[40] 2007: 59, Visagie, Havenga, Linde & Botha 2012: 62.
[41] Visagie *et al* 2012: 62.
[42] Bassman 1992: 17.
[43] 2010: 481.
[44] 1992: 137-138, chapter 10.
[45] Bassman 1992: 137.

sabotage.[46] These indirect costs further include the costs of lower employee commitment, lack of effort, loss of working time and a lack of creativity.[47]

The victim dynamic may also be embedded in childhood experiences. This causes the buried injustices of the past to erupt in the present, namely the workplace, with flight or fight becoming the victim's coping mechanisms.[48] The result is the parasitic "dance of death" described by Cilliers[49] in which bullies project guilt onto their victims, who then start blaming themselves for the bullying, which in turn leads to feelings of isolation,[50] exacerbated by colleagues who tend to be pacifying yet passive.[51] Bullying should however not be viewed from a mere subjective interpersonal perspective,[52] but could also be exacerbated by upper management's lack of response or inertia.[53]

In South Africa, we are still in our infancy as far as research and possible solutions pertaining to workplace bullying are concerned. Despite the consistent message that bullying has a negative effect on employers and employees, and that systematic exposure to sometimes flagrant and otherwise overt negative behaviour is devastating and traumatic,[54] workplace bullying has not been studied extensively in a South African milieu. Even though publications on bullying in South Africa have seen the light,[55] we are still in dire need of a uniform definition as well as firm guidelines from the legal fraternity as to the continuum – i.e. victimisation, harassment, health and safety, or a dignity violation – on which bullying should be placed. There is also a need for guidelines as to what constitutes bullying, as well as applicable remedies.

[46] Bassman 1992: 137
[47] Bassman 199: 137.
[48] Visagie *et al* 2012: 3.
[49] 2012: 4.
[50] Visagie *et al* 2012: 4.
[51] Visagie *et al* 2012: 3.
[52] Namie & Lutgen-Sandvik 2010: 344, stating that one should be careful not to view workplace bullying as only involving the bully and victim. It is not merely a personal, two-way issue, because bullies have accomplices – either those who publicly support the bully or those privately participating behind the scenes.
[53] Interestingly, in Lutgen-Sandvik, Tarcy & Alberts 2007: 838, the authors differentiated between bullying as a superordinate phenomenon, as occurring in a counterproductive workplace, as an organisational injustice and an intermediate phenomenon, with acts such as emotional abuse, mobbing and social undermining. He differentiated this from specific forms of workplace abuse, with deeds such as discrimination, ethnic harassment and sexual harassment. Lastly, he referred to bullying as a subordinate phenomenon, listing incivility, petty tyranny, social ostracism and verbal abuse.
[54] Einarsen *et al* 2011: 7.
[55] See chapter 6 *infra*.

Despite a plethora of actions available to victims of injustices in South African workplaces, nothing specifically relates to workplace bullying.

The United Kingdom[56] deals with bullying in legislation and tort, while South Australia places bullying on the continuum of health and safety. Other jurisdictions regard workplace bullying in different ways and even define it differently. However, it does seem as if a common notion of workplace bullying exists in the international arena, from which South African scholars may borrow, if necessary.

Numerous stakeholders, including employers, employees and legal systems, are implicated in workplace bullying,[57] and once employers understand that it is in their best interest to stop bullying, millions of employees suffering from workplace bullying will get the relief they deserve[58] and employers will gain a motivated and performing workforce.

2.3 Historical developments

Although workplace bullying already manifested itself in primitive times, Visagie and colleagues mention that research on this phenomenon has tripled since the 1990s.[59] It has been researched in, inter alia, education,[60] universities,[61] nursing[62] and cyberspace,[63] and is mentioned in popular media and academic journals.[64] However, its historical origin is not as widely known.

It is readily accepted that, as a lexicon, workplace bullying entered the United States through Europe, where a family therapist, Heinz Leymann, in the 1980s explored the phenomenon of workplace conflicts after having seen many such patients in his practice.[65] He used the word “mobbing” to describe the hostile behaviour at work,

[56] Hereinafter referred to as the UK.
[57] Yamada 2004a: 482.
[58] Yildiz 2007: 114; Namie & Namie 2011: XVI.
[59] 2012: 1.
[60] De Wet 2010: 1450.
[61] Lewis 2004, as cited in Visagie *et al* 2012: 1.
[62] Lewis 2006, as cited in Visagie *et al* 2012: 1.
[63] Staude-Müller, Hansen & Voss 2012.
[64] Pietersen 2007: 59.
[65] Yamada 2010: 254.

which connoted the wild behaviour of larger animals attacking smaller animals,[66] relating it to "workplace hostility perpetrated by one or a few individuals mainly toward one individual".[67] Yamada believes that Leymann's writings are among the seminal work on psychological abuse in the workplace.[68] Also of interest here is that Samnani and Singh found that the bullying behaviours they had studied on the playground were equally apparent in the workplace.[69]

Chappell and Di Martino[70] distinguish bullying from mobbing. However, it is argued that this is a superficial distinction, as mobbing is merely another form of collective violence. Mobbing in a workplace refers to multiple workers joining together to subject another employee to abusive treatment,[71] and is the term used to describe bullying in Scandinavian nations, some European countries such as Spain, and even Australia.[72] Einarsen[73] agrees. Nevertheless, in 1976, a book called *The Harassed Worker* by psychiatrist Carol M. Brodsky appeared, describing a range of cases where subtle employee mistreatment were mentioned as a reason for the employees' severe and traumatic suffering, while they themselves were unable to retaliate.[74] Today, we would label that as bullying.

In 2011, Einarsen and colleagues[75] made mention of how bullying had moved from the "taboo" terrain of the workplace to become *the* "research topic" in the 1990s,[76] when a female journalist from Britain, Andrea Adams, used a radio broadcast to bring the topic of bullying to the public's attention. This led to the publication of her controversial book *Bullying at work: How to confront and overcome it* in 1992, which was probably the first publication ever dealing with workplace bullying.[77] In 1997, according to Vega and Comer,[78] the world's first non-political, non-profit charity

[66] Both Leymann 1996: 168 and Tepper & Henle 2011: 490 mention that his concept was borrowed from an etiologist, Konrad Lorenz (1966).
[67] Tepper & Henle 2011: 490; Leymann 1996: 168.
[68] 2010: 254.
[69] Samnani & Singh 2012: 582.
[70] 2006: 21.
[71] Yamada 2004a: 479.
[72] Chappell & Di Martino 2006: 21.
[73] Einarsen *et al* 2011: 4.
[74] Einarsen *et al* 2011: 6.
[75] Einarsen *et al* 2011: 6.
[76] Einarsen *et al* 2011: 4.
[77] Yamada 2010: 254.
[78] 2005: 102.

dealing with workplace bullying was established by the same Ms Adams, which established the model for further, similar organisations.

The term 'workplace bullying' reached the United States domain in the late 1990s. The "erosion of well-being" and "chronic mistreatment at work" were concepts explored primarily by those in human resources or psychology.[79] Drs Gary and Ruth Namie[80] entered the scene in America and chose the term 'workplace bullying' after having studied the works of several other authors on the topic. They decided on the word 'bullying', because they believed that it would best resonate with the public.[81] The first American conference on workplace bullying was hosted by the Namies in 2000, and they also launched a Bullybuster website following the publication of their first book on the subject in 1999.[82] They have written numerous books and articles on this topic, were instrumental in the development of the Workplace Bullying Institute,[83] and are strong proponents of the Healthy Workplace Bill,[84] which has been used to prohibit and deal with workplace bullying[85] since 2002.

The HWB was a direct result of what Yamada[86] calls the "tipping point" of the American public's cry for help. The American experience led to 18 states introducing some sort of anti-workplace bullying legislation, although none have been promulgated. Save for the provinces of Quebec, Saskatchewan, Ontario and Manitoba, North American employers do not face any legal repercussions when ignoring reports of workplace bullying.[87] The Namies believe that good and compliant employers will be exempt from liability in terms of the HWB, should it be passed, and that non-compliant employers will face liability if they fail to establish policy in this regard, and that the fear of this will propel them into action.[88]

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[79] Yamada 2010: 255.

[80] A husband-and-wife team, each with a PhD in Psychology. Dr Ruth Namie experienced workplace bullying first-hand during formal employment, which sparked her interest in the matter. Namie & Namie 2011: XV.

[81] Yamada 2010: 255; Namie & Namie 2011: XI,XV.

[82] Yamada 2010: 255.

[83] Hereinafter referred to as the WBI.

[84] Hereinafter referred to as the HWB. Developed by Yamada and discussed at length in chapter 3 of this thesis. The HWB aims to prohibit and deal with workplace bullying. The New York and Illinois senates passed it in 2010, which implies that they are halfway with introducing the HWB into their respective states in the absence of federal legislation in this regard.

[85] Namie & Namie 2011: XVI.

[86] Yamada 2010: 251.

[87] Namie & Namie 2011: XVI.

[88] Namie & Namie 2011: XVI.

In the United States, bullying is currently treated as a form of discrimination if such actions fall under a closed "class" list, or are else dealt with under tort. In the absence of federal legislation, states are free to treat it as they deem fit, pending action taken in terms of the HWB and the utilisation of existing mechanisms to curb bullying in the workplace.

The United Kingdom utilises anti-stalking legislation to combat bullying, while Australia views bullying as a health and safety matter. This seems to indicate the legal variations as bullying become recognised in different jurisdictions, as well as the need for a uniform approach.

2.4 Defining workplace bullying

2.4.1 Background

The word 'bully' automatically conjures up the image of the school bully who, through aggression, bullied inferior victims into submission. In a workplace, there are several synonyms for bullies, such as "aggressors, mobbers, offenders, backstabbers, saboteurs, harassers, nitpickers, control freaks, obsessive critics, terrorists, tyrants, perpetrators and abusers".[89] However, there is no uniform or single agreed definition for workplace bullying.[90] Different jurisdictions and legal scholars and practitioners within different jurisdictions favour different definitions.[91] Yet, the notion of workplace bullying seems to be more or less the same, and the terminology depicting bullying behaviour is now used interchangeably by scholars and practitioners alike.[92]

Salin[93] refers to researchers predominantly in the UK, Australia, Ireland and Northern Europe who label negative behaviour as 'bullying', whereas in Germany, the word 'mobbing' is preferred to denote the same conduct.[94] In North America, several names are used to describe workplace bullying, while terms such as employee abuse, workplace aggression, victimisation and incivility are used at the same time.

[89] Namie & Namie 2011: 3.
[90] Von Bergen *et al* 2006: 15; Visagie *et al* 2012: 63; Agtervold 2007: 163; Branch *et al* 2013: 1; Samnani & Singh 2012: 582.
[91] Branch *et al* 2013: 2.
[92] Kaplan 2010-2011: 144.
[93] 2003: 1215.
[94] Salin 2003: 1215.

The Namies prefer the word 'bully', as nearly all nations recognise or have some cultural variation of it, and because it is used as a shorthand form, without demonising the perpetrator, who obviously did something wrong.[95] Branch and colleagues[96] agree and believe that workplace bullying is the most consistent term used, but at the same time stresses that terms such as mobbing and harassment can also be used to denote workplace bullying.[97] It is suggested that in South Africa the word 'bully' should be adopted, as it is a well-known term and captures the behaviour well, given our historical background.

It is important to note that the words 'victim' and 'target' are used interchangeably throughout this study. Authors such as the Namies believe that it is wrong to refer to those on the receiving end of workplace bullying as 'victims', as it implies that no recovery is possible; therefore, they prefer the word 'target'.[98] However, various jurisdictions and even American authors use these terms interchangeably.

Einarsen and colleagues[99] view bullying as a phenomenon "where many employees suffer from severe mistreatment at work by superiors or co-workers in the form of systematic exposure to sometimes flagrant or otherwise subtle forms of aggression, which is mainly characterised by persistency and long-term duration". They add that the effects thereof pertaining to health, motivation and well-being are traumatic and devastating, also for those who witness the bullying behaviour.[100]

Leymann, who is regarded as the father of the 'bully' concept, originally referred to bullying as psychological abuse,[101] and defined it as a type of psychological terror, in which "the victim is subjected to a systematic, stigmatising process and encroachment of his or her civil rights".[102] Leymann tried to define bullying in terms of objective criteria as opposed to subjective reports, and found that employees are hesitant to report that they had been bullied due to the stigma attached to it.[103]

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[95] Namie & Namie 2011: 3.
[96] Branch *et al* 2013: 2.
[97] Salin 2003: 1215, with reference to Hoel & Cooper 2000, Einarsen 1996, Neuman & Baron 1998, Duffy *et al* 2002, Bennet & Robinson 2003.
[98] Branch *et al* 2013: 5, with reference to Magley *et al* 1999.
[99] 2011: 7, chapter 1.
[100] Einarsen *et al* 2011: 7, chapter 1.
[101] Yildiz 2007: 114, with reference to Leymann 1996: 171.
[102] Yildiz 2007: 114, with reference to Leymann 1996: 165.
[103] Agtervold 2007: 163, with reference to Leymann 1996.

In turn, Samnani and Singh found that research primarily points to four broad features of bullying that can be extracted from the multiple definitions available, namely:[104]

- frequency (referring to the number of times that bullying is experienced);
- persistency (referring to the duration of time that the behaviour is experienced);
- hostility (referring to the underlying negativity of the perpetrators); and
- a power imbalance (which refers to the disparity in power between the target and perpetrator, and not only to hierarchical power).[105]

Agtervold[106] cites Hoel, Rayner and Cooper,[107] listing four elements of bullying in order to define the negative behaviour associated with the phenomenon as:

- "frequency and duration";
- "the reaction of the target";
- "the balance of power"; and
- "the intent of the perpetrator",

and adds that the latter two are the weakest points in defining bullying.[108]

Einarsen and colleagues[109] note that definitions of bullying emphasise two important features, namely:

- repeated and enduring aggressive behaviours, which are
- intended and/or perceived by the victim to be hostile.

2.4.2 Does bullying entail repeated acts, or is a single serious act sufficient to constitute bullying?

According to Einarsen and colleagues,[110] bullying is not a single deed or an isolated event, but rather refers to behaviour that is persistently negative and directed at one

[104] 2012: 582, with reference to Einarsen *et al* 2011.
[105] Samnani & Singh 2012: 582.
[106] 2007: 163.
[107] 1999: 196-198.
[108] Agtervold 2007: 163.
[109] 2011: 11.

or more employees.[111] This, however, is not a uniform view. For instance, Yamada[112] has added a single serious act to the regime of bullying, as did Le Roux and colleagues.[113]

Salin[114] agrees with Einarsen and colleagues,[115] and stresses that single negative acts are not considered bullying, as longevity and duration set bullying apart from normal conflict. Einarsen and colleagues[116] refer to empirical studies indicating that bullying is not an 'either/or' phenomenon, but a gradually evolving process, which at first may be subtle, devious and immensely difficult to recognise.

Fox and Stallworth[117] agree and postulate that the element of pervasiveness is imperative for conduct to be labelled bullying, in that it would then enable conduct such as incidental or unintended incivility to be distinguished from bullying, which would limit frivolous claims. Persistence or a pattern of negative behaviours characterises bullying,[118] often seeing escalation over time. Mikkelsen and Einarsen[119] stress that a prolonged exposure to negative acts is a defining characteristic of bullying, while Einarsen and colleagues[120] also stress that bullying typically incorporates repeated and enduring behaviours that are intended to be hostile and/or perceived by the recipient as hostile, and is thus not about a single or isolated incident.

Escartin and colleagues[121] have lately expressed their disagreement with writers who claim a uniform understanding of bullying. They stress the distinction between direct and indirect aggressive behaviour, and distinguish between different categories of conduct, some focusing on the indirect aggressive behaviour of the perpetrator and the work environment, and others relating to the effects these have on victims. It is

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[110] 2011: 11.
[111] Einarsen *et al* 2011: 11.
[112] Yamada, the Healthy Workplace Bill, available on http: //www.workplacebullying.org/2012/07/11/dy/n (accessed 6 September 2013) See definition of "workplace bullying".
[113] 2010: 55.
[114] 2003: 1215.
[115] 2011: 11.
[116] 2011: 21.
[117] 2010: 931.
[118] Branch *et al* 2013: 2.
[119] 2002: 88.
[120] 2011: 11, chapter 1.
[121] 2010: 520.

however tendered that, for purposes of this study, their views relate more to the proper measuring of bullying, and not the general notion thereof.

Visagie and colleagues[122] point out the differences between bully and victim dynamics, and found that the bullies manifest themselves as masochists, sadists, narcissists, rivals and enviers, which is mainly entrenched in their childhood experiences and a need to control others. This lies at the heart of bullying, and although it exhibits psychopathic tendencies, it is not classified as such.[123]

Salin[124] refers to bullying as "repeated and persistent negative acts towards one or more individuals, which involve a perceived power imbalance and create a hostile environment", and furthermore categorises it as a form of interpersonal aggression or hostile or anti-social behaviour. For the sake of legal clarity in this thesis, the studied phenomenon will merely be called bullying.[125]

Some researchers[126] have questioned whether a uniform definition is at all possible due to cultural and other factors. Yet, a single, agreed definition would assist the legal fraternity and lead to better implementation of policies.[127]

2.4.3 Intent of the perpetrator: Is it a prerequisite?

Intent may be an element of bullying at times, since bullying connotes the wilful or conscious desire to hurt or threaten someone,[128] but it is not recognised as a prerequisite.[129] Agtervold believes that individual victims may feel bullied, although the 'bully' had no intention of bullying them, which means that what may be perceived as bullying may be a mere rational action by the company or organisation.[130] Earlier authors such as Lewis and colleagues[131] note that aggressive workplace behaviour incorporates the element of intent, as the intimidating behaviour

[122] 2012: 3.
[123] Visagie *et al* 2012: 3, with reference to Babiak & Hare 2006.
[124] Salin 2003: 1215.
[125] Lutgen-Sandvik *et al* 2007: 840.
[126] Branch *et al* 2013:2 with reference to Fevre 2010 and Rayner 2002. Also see p 70, 71 *infra*.
[127] Branch *et al* 2013: 2.
[128] Visagie *et al* 2012: 63.
[129] Visagie *et al* 2012: 65.
[130] Agtervold 2007: 163.
[131] Lewis, Coursol & Wahl 2002: 110.

is designed to demean the target.[132] The measuring of bullying invariably relates to a subjective perception of the bullied employee, although this is fairly controversial.[133]

The European perspective on this element of bullying seems to be that intent is not considered an essential element of bullying, as it is almost impossible to determine intent in bullying cases.[134]

Einarsen and colleagues[135] refer to "considerable disagreement" with regard to intent in defining bullying. South African scholars will therefore need to agree on this aspect in order to arrive at a uniform understanding of this pervasive problem.

2.4.4 Examples of workplace bullying definitions

A number of definitions will be discussed to afford the reader clarity on the plethora of definitions available. Where applicable, differences will also be referred to.

Einarsen and Skogstad[136] define workplace bullying as "a situation where one or several individuals over a period of time persistently perceive themselves to be on the receiving end of negative acts from one or several persons, in a situation where he or she experiences difficulty in defending him or herself against the negative acts".[137] Citing Agtervold, Cilliers[138] states that literature on bullying prior to 2000 tended to describe bullying as a deliberate intent to cause physical or emotional distress through the aggressive exercise and misuse of power for psychological gratification at the expense of others.

The victim is described as an individual or group, and the perpetrator as an individual in an elevated hierarchal power position.[139] It is only recently that bullying has been associated with the dark side of leadership, and it is now contended that bullying can be institutionalised and that the manifestation of bullying behaviour is merely a

[132] They refer to Bjorkovist 1994, Davenport 1999, Keashly 1994 and Leymann 1990 to support the view that 'intent' is seen to be a *conditio sine qua non* for bullying.
[133] Visagie *et al* 2012: 64; Einarsen 1999: 18.
[134] Einarsen *et al* 2011: 18, 19, with reference to Hoel *et al* 1999.
[135] 2011: 18.
[136] Einarsen & Skogstad 1996: 185.
[137] Einarsen & Skogstad 1996: 185.
[138] Cilliers 2012: 2.
[139] Visagie *et al* 2012: 2.

representation of organisational culture.[140] Einarsen[141] asserts that bullying is probably a combination of a social climate where hostility prevails, and indicative of an organisational culture where bullying and harassment are tolerated. Where bullies know that their behaviour is not permitted or supported, either directly or indirectly, they will refrain from bullying, as they would fear becoming victims of counter-attacks or severe punishment by the organisation.

In defining workplace bullying, Matthiesen and Einarsen[142] have adapted Olweus's definition of school bullying to read as follows: "[Workplace bullying is] a situation in which one or more persons systematically and over a long period of time perceive themselves to be on the receiving end of negative treatment on the part of one or more persons, in a situation in which the person(s) exposed to the treatment has difficulty in defending themselves against this treatment." Helge Hoel, one of the pioneers in research on workplace bullying, along with fellow researchers Faragher and Cooper, prefers to see bullying as "a situation where one or several individuals persistently over a period of time perceive themselves to be on the receiving end of negative actions from one or several persons, in a situation where the target of bullying has difficulty in defending him or herself against these actions".[143] Of interest in these definitions is the heavy reliance on the subjectivity of the victim who alleges bullying in the workplace.

In 2006, Von Bergen and colleagues[144] defined workplace bullying as "harassment that inflicts a hostile work environment upon an employee by a co-worker or co-workers, typically through a combination of repeated, inappropriate and unwelcome verbal, non-verbal and/or low-level physical behaviours that a reasonable person would find threatening, intimidating, harassing, humiliating, degrading or offensive".

In contrast, according to Le Roux and colleagues,[145] bullying in a South African milieu refers to any unfavourable or offensive conduct that has the effect of creating a hostile work environment. These authors also proposed to use a framework in the absence of a uniform definition of bullying, and tendered that bullying comprises

[140] Visagie *et al* 2012: 2.
[141] 1999: 23.
[142] 2007, as cited in Branch *et al* 2013: 290.
[143] Hoel, Faragher & Cooper 2004: 368.
[144] 2006: 16.
[145] Le Roux *et al* 2010: 53.

"unwanted conduct in the workplace which is persistent or serious, and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences".[146]

It is noted that the proposed definition that allows for a single serious act to be branded as 'bullying' is almost isolated in the literature, and it is therefore argued that this part of the South African legal dispensation be revisited, as it does not conform to the international notion of bullying, which requires the behaviour to be repetitive and persistent.[147]

The ILO does not define workplace bullying as such, but allows for country-specific definitions, taking into consideration culture and other factors. The closest to a uniform definition for bullying put forward by the ILO is found in the definition for workplace *violence*, which describes it[148] as "all actions, incidental or behaviour which is beyond reason, or acceptance; by which a person is hurt, threatened, humiliated if injured by another, as a direct result of carrying out their professional activity".[149]

Other writers such as Salin,[150] who did a lot of research in Scandinavia, also refers to Einarsen's work and defines bullying as repeated and persistent negative acts towards one or several individuals, which involve a victim-perpetrator dimension and create a hostile work environment.

Although many definitions in several jurisdictions present themselves in the literature, a single definition for workplace bullying remains markedly absent, hampering the solutions proposed in countries worldwide.

[146] Le Roux *et al* 2010: 55.
[147] In a personal interview with Prof Alan Rycroft, he shared the view that bullying as such connotes multiple acts. Prof Darcy du Toit, on the other hand, did not share this view and compared bullying with sexual harassment, where a single act could lead to a finding of sexual harassment. These conversations took place at the University of Cape Town on 7 and 8 May 2013. Prof Rochelle Le Roux is of the opinion that a single serious act could constitute bullying – although it may be rare, the possibility does exist in her opinion.
[148] Workplace violence; not bullying as such.
[149] Serantes & Suárez 2006: 230.
[150] Salin 2001: 425.

2.5 Features of workplace bullying

According to Von Bergen and colleagues,[151] bullying belongs on the continuum of workplace violence, thus ranging from incivility to physical violence. Bullying is not a single-factor phenomenon; Salin correctly points out that it is indeed multi-causal.[152] According to Einarsen and colleagues,[153] Leymann suggested that bullying events should occur at least once a week in order to be called 'bullying', but Einarsen is quite correct to state that this is a difficult criterion to apply, in that the spreading of one rumour could have the same effect, even if it is not repeated every week.[154] However, most authors measure bullying over prolonged periods of time: Leymann, for example, suggested measuring negative behaviour over a six-month period.[155] The requisite long duration of abuse for it to qualify as bullying has survived much criticism based upon Leymann's argument that many psychiatric disorders are assessed over an equally lengthy period.[156]

Einarsen mentions that the mean duration of bullying is rather lengthy;[157] Cowie and colleagues[158] agree, although not necessarily with the fixed duration of six months. Various empirical studies indicate a timeframe of 12-62 months.[159] In Einarsen's most recent article,[160] after revisiting the Negative Acts Questionnaire,[161] it was pointed out that this method was both reliable and valid as a measure of exposure to workplace bullying.[162] In 1990, Leymann suggested a criterion of one incident per week over a period of at least six months.[163] As a matter of interest, it needs mentioning that earlier authors, such as Adams (1992) and Randall (1997)[164] as well as Le Roux and colleagues in South Africa,[165] were of the opinion that a single incident of negative behaviour could lead to the action being labelled workplace

[151] Von Bergen *et al* 2006: 15.
[152] Salin 2003: 1217.
[153] 2011: 11.
[154] Einarsen *et al* 2011: 11, chapter 1.
[155] Leymann 1996: 168.
[156] Leymann 1996: 168.
[157] 2011: 12, chapter 1.
[158] Cowie, Naylor, Rivers, Smith & Pereira 2002: 35, with reference to Einarsen & Skogstad 1996.
[159] For more regarding proposed time periods, see Hoel *et al* 1999: 197-230.
[160] Einarsen 2013: 38
[161] Hereinafter referred to as the NAQ-R.
[162] Einarsen 2013: 38.
[163] Cowie *et al* 2002: 36.
[164] As cited in Cowie *et al* 2002: 35.
[165] 2010: 35.

bullying. Currently, however, there is definite consensus that bullying occurs over a matter of months and years, as opposed to days and weeks, based on international standards.[166] It will be argued in this regard that the view expressed by Le Roux and colleagues in their 2010 book, namely that a single serious incident could constitute bullying, is not in line with the international notion. Definitions of bullying worldwide require the abuse to be repetitive.[167]

The Namies[168] have divided bullies into four categories:

- "the screaming Mimi: the stereotype bully who 'toxifies' the workplace with mood swings and the induction of fear";
- "the constant critic: the hyper-critical nit-picker with an obsession over other's performance";
- "the two-headed snake: the defamer who wants to climb the corporate ladder through spreading rumours and divide-and-conquer schemes"; and
- "the gatekeeper bully: the bully who is obsessed with control and power and ensures the failure of the target".

These types of bullies should be kept in mind throughout the following theoretical discussion, as they are easy to identify and could probably be found in many organisations. Legal solutions should therefore be structured around such 'non-legal' information as well.

Bullying can occur from the so-called top to bottom, or downward bullying as it is often referred to; it can present itself as horizontal bullying, thus from one colleague to another, and it can be from the bottom to the top, thus from subordinate to superior, which is also referred to as upward bullying.[169] Kaplan[170] states that the bullying of subordinates by supervisors is different to that between co-workers or bullying of supervisors by subordinates, mainly due to the relative status of the bully

[166] Einarsen *et al* 2011: 12.
[167] Kaplan 2010-2011: 145.
[168] Namie & Namie 2004: 316.
[169] Branch *et al* 2013: 2; Pietersen 2007: 59.
[170] 2010: 145.

and the victim. Status inconsistency, whether perceived or real, has been shown to be stress-inductive,[171] which is directly linked to bullying.

Thus, this can occur at all levels of an organisation[172] with interesting power scenarios, which are often referred to as the "power phenomenon".[173] The power element often referred to in bullying research has to be understood in especially horizontal and upward bullying. Whilst it is easy to conceive a manager bullying a subordinate due to the inherent power disparity acknowledged by law, power is not only derived from formal appointments or a hierarchical position. Branch and colleagues[174] as well as Einarsen and colleagues[175] believe that personal power may be derived from a person's access to information that colleagues might not have, or from access to informal sources of power, such as the sharing of information, expertise gained or power granted through networks of people. Since bullying denotes a dynamic interaction of organisational and social interactions as opposed to interpersonal conflict, bullies can tap into the informal or formal sources of power available in the workplace,[176] which could then lead to both horizontal and upwards bullying.

Vega and Comer[177] describe this as a cycle of demoralisation, as the victim starts to feel incompetent to combat or even confront the bully, which of course makes it all the more difficult to utilise existing grievance procedures, should there be any. Eventually, the victim gives up and resigns.[178] The targets' difficulty in defending themselves can be attributed to an imbalance of power, either informal or formal, within their workplaces.[179] Einarsen[180] stipulates that the power difference, whether actual or perceived, makes the victim vulnerable, which is a specific trait seen in bullying behaviour. All actors in the workplace have access to power, and could in this manner become part of the bullying phenomenon.[181]

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[171] Bacharach, Bamberger & Mundell 1993: 22.
[172] Branch *et al* 2013: 2.
[173] Einarsen 1999: 18.
[174] 2013: 3.
[175] Einarsen, Hoel & Notelaers, 2009: 26.
[176] Branch *et al* 2013: 4.
[177] 2005: 105.
[178] Vega & Comer 2005: 106.
[179] Branch *et al* 2013: 4.
[180] 1999: 18.
[181] Branch *et al* 2013: 4, with reference to Lutgen-Sandvik 2006.

Tepper,[182] however, believes that intent is a prerequisite for "abusive supervision", and measures the outcome of the bullying behaviour instead of the intent to harm, thereby differing from constructs that view bullying as a form of violence.[183] Intent, according to Salin, is not a necessary element of bullying, but he stresses the victim's subjective perception,[184] which clearly shows a difference of opinion in this regard.

Bullying does not refer to a personality clash, as it is often described; it is not a misunderstanding; it is not trivial,[185] and is not 'horseplay' or 'joking', which is characterised by an absence of hostility.[186] The very nature of bullying is different, in that one person harasses another, and according to Von Bergen and colleagues, is characterised by a pattern of "deliberate, hurtful and menacing behaviours".[187] Salin[188] refers to the frequency and longevity of the acts in order to distinguish between 'bullying' and 'normal conflict', and stresses that a single act is not bullying and that bullying is different from other types of interpersonal aggression, as it presents itself between members in the same organisation and does not involve outsiders.[189]

It is widely accepted that the occasional difference of opinion, conflicts and problems at work should be regarded as normal phenomena in the world of work, with the added proviso that the mutual attitudes are not meant to hurt. Bullying also does not include reasonable action taken by the employer to transfer, demote, discipline, counsel, retrench or dismiss an employee,[190] and should not be used as a defence when the managerial prerogative is exercised.

A common denominator is that bullying behaviour humiliates, intimidates and or undermines a person, and is repeated over time.[191] Tepper[192] uses the word "abusive supervision" to describe bullying behaviour, and aptly uses the illustration of

[182] Tepper 2007: 265.
[183] Tepper 2007: 265,266.
[184] Salin 2003: 1216, with reference to Hoel & Cooper 2001.
[185] Branch *et al* 2012: 2, with reference to Einarsen 2011.
[186] Von Bergen *et al* 2006: 15.
[187] Von Bergen *et al* 2006: 15, with reference to Chanen.
[188] 2003: 1215.
[189] 2003: 1215.
[190] Von Bergen *et al* 2006: 19.
[191] Von Bergen *et al* 2006: 16.
[192] Tepper 2007: 264.

the boss who has a bad day and takes it out on the workforce, which is not regarded as bullying, unless the negative conduct continues over time.[193] Kaplan[194] mentions that although typical bullying behaviour, such as giving an employee the silent treatment, lying, being rude or disrespectful, is seemingly innocuous, it is the repetitive nature thereof that is oppressive and harmful or leads to negative experiences by victims. The ILO Report, as cited in Chappell and Di Martino, refers to bullying as "repeated offensive behaviour though vindictive, cruel, malicious or humiliating attempts to undermine an individual or group of employees".[195] Einarsen regards the repeated and enduring negative acts perpetrated as the core dimension of bullying.[196] Chappell and Di Martino[197] add that bullying is often rather covert as opposed to overt, and is usually escalative in nature.

Workplace bullying is often referred to by other names, such as corporate bullying, workplace violence, harassment, mobbing,[198] work rage[199] and abusive supervision.[200] It is accepted worldwide that an unequal distribution of power or perceived power between victims and perpetrators[201] lies at the heart of this phenomenon, and bullying often sees the victim ending up in an inferior position.[202] According to Tepper, 75% of bullying incidents at work are perpetrated by hierarchically superior agents against subordinate targets, although the phenomenon is not confined to hierarchical hostility, as already mentioned earlier on.[203] Branch and colleagues specifically mention that the concept of power goes way beyond the notion of an abuse of authority,[204] and it is argued that this very concept sets bullying apart from other workplace transgressions – a view shared by Salin.[205]

[193] Tepper 2007: 264.
[194] 2010: 146.
[195] Chappell & Di Martino 2006: 20.
[196] Einarsen 2000: 381.
[197] 2006: 20.
[198] Chappell & Di Martino 2006: 21.
[199] Le Roux *et al* 2010: 53.
[200] Tepper 2007: 267.
[201] Cunniff & Mostert 2012: 3.
[202] Chappell & Di Martino 2006: 21.
[203] Tepper 2007: 267.
[204] Branch *et al* 2013: 4.
[205] 2003: 1216.

The power disparities need not be formalised and/or be due to formal power differences. It could thus be created by institutional and contextual factors as well.[206] Salin refers to the characteristic power disparity present in bullying as the "victim-perpetrator" dimension and, thus, does not view conflict between parties of equal strength as bullying.[207] Power differences associated with traditional gender roles and minority status may also affect bullying, and it has been shown that disabled employees whose salaries are being subsidised by the state report more instances of bullying.[208] The relevance of the so-called power disparity is also illustrated by the fact that bullying tends to be more widely reported in institutions such as the army and prisons, where dominance and power imbalances appear particularly pronounced.[209]

Bullying also presents itself in the form of public humiliation, verbal abuse, social exclusion, intimidation, inaccurate accusations, the spreading of rumours, ignoring of people for long periods, and undermining victims' professional status.[210] Einarsen and colleagues believe that bullying occurs if someone is exposed to systematic and prolonged negative behaviour, while severe bullying is noted when it continues for six months or more.[211] In practice, bullying could manifest itself in excessive monitoring of another's work, assigning unreasonable deadlines and unmanageable workloads, and assigning menial tasks or no tasks at all.[212]

Mikkelsen and Einarsen[213] mention several cases of employees exposed to occasional negative acts over periods of time, but stress that this is not perceived as bullying, even though the employees may be deeply affected by the acts, especially if the conduct is humiliating in nature. One should therefore be careful not to label the occasional negative act as bullying.

[206] Salin 2003: 1219.
[207] 2003: 1216.
[208] Salin 2003: 1219.
[209] Salin 2003: 1219.
[210] Einarsen *et al* 2009: 26; Cunniff & Mostert 2012: 1.
[211] Einarsen *et al* 2011: 13, chapter 1.
[212] Gamian-Wilk 2013: 132.
[213] 2001: 406.

2.6 Other interesting facts about workplace bullying

According to Salin,[214] bullying is to be understood as the result of interaction between enabling conditions, earlier referred to as antecedents, and an additional motivating or triggering factor. Triggering factors can be seen as enablers for bullying behaviour, creating fertile breeding ground for bullying, while motivating circumstances can be described as conditions in which it may be rational for one person to bully another.[215]

In Turkey, it was found that 47% of highly qualified employees had been bullied, with younger employees having been bullied more often.[216] Internationally, most researchers have found that younger employees experience a higher level of bullying.[217] This was confirmed by a South African study conducted in 2009.[218] At the top of the list of negative behaviours experienced by victims are assigning them tasks that are beyond their competence levels, ignoring their views, as well as verbal abuse.[219]

In South Africa, a study by Cunniff and Mostert[220] showed that different racial groups experience bullying differently. Black people, although the ethnic majority, experience bullying more often than other racial groups, which contradicts international study findings that indicated that minority groups usually experience a higher level of bullying.[221] Salin refers to a study that indicated that minorities, such as certain (non-white) racial groups as well as disabled employees whose salaries are subsidised by the state, are more likely to experience bullying.[222] Fox and Stallworth[223] studied the racial dimensions of bullying at work in the United States and found that, in their sample group, 97% reported having been bullied "quite often", and that supervisory bullying was reported more than peer bullying. According to this study, all three minority racial groups reported higher incidence of racial/ethnic bullying than

[214] 2003: 1226.
[215] Salin 2003: 1226.
[216] Yildiz 2007: 125.
[217] Magerøy, Lau, Riise & Moen 2009: 345.
[218] Cunniff & Mostert 2012: 2.
[219] Yildiz 2007: 125.
[220] 2012: 2.
[221] Lewis & Gunn 2007: 653,654, stating that ethnic minorities experience bullying more often than respondents from ethnic majorities.
[222] 2003: 1219.
[223] 2005: 452.

whites,[224] indicating that African Americans showed a greater tendency towards being bullied relative to the other minority and non-minority groups.[225]

Traditional gender roles could also lead to a perception of possessing less power, and a higher incidence of bullying is reported in countries where women are regarded as less powerful than their male colleagues.[226] Researchers are divided as to whether females in general are more prone to being bullied. Samnani and Singh,[227] with reference to Lewis and Gunn,[228] found bullying to be rifer among females, while studies by Einarsen in 1996 indicated little or no difference. What does stand firm, however, is that males are typically only targeted by other males, while females are bullied by both males and other females.[229]

In Finland, it was found that one sixth of respondents reported having been bullied by subordinates in the workplace, and that women were more vulnerable than men to become victims of bullying.[230] Salin[231] found that, in many countries, women reported victimisation more often than men, and that the perception exists that females have less power and status than men, which could explain higher victimisation rates. This is however not a universal experience.

Of particular interest is a study conducted by Gholipur and colleagues[232] in Tehran, Iran, which indicated that women endured bullying much more than their male counterparts. Given that country's history, it comes as no surprise that this study found that females' lack of awareness about their rights in the workplace,[233] the absence of an accurate definition of bullying, the unfamiliarity of the notion of workplace bullying as well as general disregard for females in the workplace, coupled with harsh displays of masculinity,[234] are antecedents of the high prevalence rates of bullying of females in Tehran.

[224] Fox & Stallworth 2005: 453.
[225] 2005: 453.
[226] Salin 2003: 1219.
[227] 2012: 583
[228] 2007: 641-642.
[229] Samnani & Singh 2012: 583.
[230] Salin 2001: 432.
[231] 2003: 1219.
[232] Gholipur, Sanjari, Bod & Kozekanan 2011: 234.
[233] 2011: 240.
[234] 2011: 234.

In a Norwegian study, it was found that males tended to bully other males, while females were more inclined to bully fellow females in the workplace; that the majority of bullies were men; that older employees were more at risk of being bullied, with the exception of university employees older than 50, who were found not likely to be bullied, and that large, male-dominated industrial organisations reported a higher incidence of bullying.[235] Interestingly, Grubb and colleagues[236] reported that 44% of not-for-profit organisations reported bullying, as opposed to 17% of for-profit organisations, while the figure for unionised companies was 46%. Therefore, the role of the union and the type of company will also have an impact on the solutions proposed.

Those in more visible and exposed positions, such as minorities, were also found to report higher levels of bullying in organisations.[237] According to Salin, organisational power differences are often linked with related phenomena, such as sexism, racism[238] and so-called vulnerable groups who require protection against bullying in the workplace.

Cunniff and Mostert found that where there is role conflict, poor management and organisational chaos, bullying appears to be rifer.[239] It is also noteworthy that during workplace change, subordinates may perceive a manager to lack power, which could lead to upwards bullying.[240] In general, it has been shown that employees in very stressful jobs with huge responsibilities and low autonomy are more prone to be perpetrators of bullying.[241] Thus, it is suggested that stress is not only a negative consequence of bullying behaviour in the workplace, but indeed also an antecedent for it.[242]

Salin found that middle managers were often bullied, but that officials and clerks lower down on the corporate ladder were bullied far more,[243] which again stresses the aspect of power disparity. It seems that more employees are bullied by their

[235] Strandmark & Hallberg 2007: 333.
[236] Grubb, Roberts, Grosch & Brightwell 2004: 407.
[237] Salin 2003: 1219.
[238] Salin 2003: 1219.
[239] 2012: 13.
[240] Branch *et al* 2013: 4.
[241] Baillien, De Cuyper & De Witte 2011: 201.
[242] Samnani & Singh 2012: 583, with reference to Hoel *et al* 1999.
[243] Salin 2001: 432.

superiors. In Norway, it was found that 54% of victims were bullied by their superiors; yet, in Germany, Austria and the United Kingdom, that figure increased to 70-80%.[244] Apprentices have been shown to be exceptionally vulnerable to bullying, in that they fear to lose their position, believe that they have no power, and do not wish to escalate the conflict.[245]

Larger societal factors, such as downsizing, globalising and liberalising markets as well as an increasing need for efficiency, further contribute to bullying.[246]

Bullying cannot be fully understood without studying its victims. Research has shown that victims tend to be more neurotic than their colleagues,[247] with differing opinions as to whether a single victim profile can be put forward.[248] Of note is the fact that, according to Samnani and Singh,[249] with reference to Zapf and Einarsen,[250] there are two types of targets, namely the vulnerable and the provocative, while extroverts tend to be more provocative, and introverts would rather fall under the vulnerable category.[251] Provocative employees, through their own provocation, often become the victims of bullying,[252] while employees who suffer from low self-esteem are also more likely to fall prey,[253] with the bullying itself exacerbating feelings of low self-esteem, which continues a destructive cycle.

From a psychological perspective, victims agreed that their lack of self-esteem, shyness and lack of conflict management skills contributed to the problem, while according to Einarsen,[254] only a few blamed external problems such as an overtly stressful environment or social climate at work for the bullying behaviour, but rather tended to self-reflect. This, of course, has a direct impact on how workplace bullying is measured, as will be discussed later on.

[244] Einarsen 1999: 19, with reference to Einarsen & Skogstad 1996 and Zapf (in press at the time).
[245] McCormack, Djurkovic & Casimir 2013: 414,415.
[246] Salin 2003: 1228, with reference to Lee 2000.
[247] Samnani & Singh 2012: 583.
[248] Samnani & Singh 2012: 583.
[249] 2012: 583.
[250] 2011.
[251] Samnani & Singh 2012: 583.
[252] Samnani & Singh 2012: 584.
[253] Samnani & Singh 2012: 583; Matthiesen & Einarsen 2001: 481, with reference to Einarsen 1994.
[254] 1999: 20.

In Turkey, Göçen and colleagues[255] found that intercompany mobbing was fairly prevalent – something which has not received much attention in other parts of the world.[256] They refer to similar strategies used for intercompany mobbing, including "impropriety at auctions, damaging the reputation of the victim companies or the market, economic oppression done by large companies against small companies and oppression of the victim company through the use of mergers and agreements".[257] It is suggested that intercompany mobbing/bullying could form a new field of bullying research, although it falls outside the scope of this thesis.

2.7 Types of workplace bullying

According to Von Bergen and colleagues,[258] bullying usually presents itself as a form of psychological violence, both in nature and impact,[259] and normally consists of an array of low-level aggression[260] committed over time. Leymann[261] rightly points out that these may be everyday occurrences, but can have a devastating effect when occurring on a regular basis, of which he earlier identified 45 different activities that can form part of the 'mobbing' process.[262] Le Roux and colleagues share other authors' views that bullying can hardly be divorced from an abuse of power, referring to either internal or external customers.[263] According to Branch and colleagues, reaching absolute agreement on what bullying behaviours are or might be would be almost impossible, as issues such as context, intensity and the existence of patterns of behaviour are so important.[264]

Chappell and Di Martino found that bullying acts may thus comprise of making life difficult for those who have the potential to be better at the bully's job than the bully him/herself, punishing others for being too competent by way of constant criticism or

[255] Göçen, Yirik, Yilmaz & Altunas 2013: 1276.
[256] 2013: 1277.
[257] Göçen *et al* 2013: 1278.
[258] 2006: 15.
[259] 2006: 15.
[260] Von Bergen *et al* 2006: 15.
[261] Einarsen 1999: 18, with reference to Leymann 1990.
[262] Leymann 1996: 170, with reference to his own works of 1992 and 1993.
[263] Le Roux *et al* 2010: 54.
[264] Branch *et al* 2013: 2.

by assigning them menial tasks.[265] Continuously shouting at staff and an insistence that the bully's way is always right are examples of bullying, provided that they occur repeatedly and over time.[266] Lewis refers to threats of job loss, public humiliation, withholding of information and yelling as examples of bullying behaviour, and stresses that it can be covert or overt and can be aggressive in a verbal or non-verbal way.[267]

Einarsen and colleagues[268] mention persistent insults or offensive remarks, persistent criticism, and personal or even physical abuse as examples of bullying behaviour. Although bullying may manifest itself physically, it does however seem to be rare. This was confirmed by a Norwegian study, in which 88% of participants reported having been exposed to bullying in the six months prior to the study, of whom a mere 2,4% reported having been subjected to physical bullying or threats of physical abuse.[269]

Bullying can be committed downwards (from superior to subordinate),[270] upwards (from subordinate to superior)[271] or horizontal/lateral (between co-workers).[272] According to Escartin and colleagues, co-workers can derive power from internal networks or interdependency of job tasks, while subordinates can derive their power from group-based support such as trade unions.[273]

Throughout, however, it must be kept in mind that the subjective perception of being bullied can vary substantially[274] and has a direct impact on the perception of bullying behaviours.

The most prevalent type of bullying behaviour used is intimidation, undervaluation of skills, and humiliation.[275] De Wet[276] refers to two categories of bullying, namely

[265] 2006: 21.
[266] Chappell & Di Martino 2006: 21.
[267] Lewis *et al* 2002: 110.
[268] 2011: 13, chapter 1.
[269] Einarsen & Raknes 1997, as cited in Einarsen *et al* 2011: 14.
[270] Strandmark & Hallberg 2007: 333.
[271] Escartin, Zapf, Arrieta & Rodrigues-Carballeira 2011: 184.
[272] Salin 2003: 1215.
[273] 2011: 184, with reference to LaVan & Martin 2008.
[274] Branch *et al* 2013: 2.
[275] De Wet 2010: 1453, with reference to Hadiken & O'Driscoll 2002.
[276] 2010: 1453, with reference to Rayner & Hoel 1997 and Quine 2001.

threats to professional status – including belittling someone's opinion, public humiliation, and accusations of a lack of effort – and threats to personal standing.

Zapf, as cited in Einarsen,[277] categorised bullying behaviour into the following five types:

- Work-related bullying, which may include changes to work to make tasks difficult to perform
- Social isolation
- Personal attacks or attacks on the private lives of victims
- Being yelled at in public
- Physical violence or threats thereof

The various aforementioned types of bullying manifest in different ways, and will subsequently be discussed under separate headings.

2.7.1 Direct/overt bullying

According to Cunniff and Mostert,[278] overt bullying entails face-to-face behaviour, including acts of verbal abuse such as belittling remarks, public humiliation, criticism, inaccurate accusations and intimidation.[279] Einarsen and colleagues agree, adding insulting remarks, excessive teasing, spreading of gossip or rumours, hurling persistent criticism, playing practical jokes and engaging in intimidation as examples of person-related bullying.[280] Tepper[281] found that 75% of all workplace bullying is perpetrated by hierarchically superior agents against subordinate targets, while industrial psychologists found that abusive supervision, akin to bullying, will mainly be directed against 'safe' targets, i.e. those who are vulnerable and unwilling or unable to defend themselves, being mainly their direct reports, such as line managers or supervisors.[282]

[277] 1999: 17.
[278] 2012: 3.
[279] Einarsen *et al* 2009: 26.
[280] 2011: 13, chapter 1.
[281] Tepper 2007: 267, with reference to Hoel & Cooper 2000.
[282] Tepper 2007: 269.

According to Le Roux and colleagues,[283] slandering of an employee, sabotaging or impending the performance of another's work, ostracising, boycotting or disregarding and insulting the victim employee are all examples of victimisation at work, which tallies with the bullying experience.

Ostracism is often aimed at expelling the employee from work and the community, and should not be underestimated as a means of bullying – in fact, it has been shown to be one of the most frequent forms of bullying reported by victims.[284]

2.7.2 Indirect/covert bullying

Indirect or covert bullying refers to a more subtle kind of bullying, and aims to manipulate relationships and harm people at an emotional level, according to Einarsen and colleagues.[285] Bullying deeds like gossiping, the spreading of rumours, exclusion of victims from social gatherings, the failure to inform employees of decisions that could affect them directly, manipulation of information that victims receive and the neglect of the victims' working conditions are examples of covert bullying.

Even the so-called 'queen bee syndrome' is a form of bullying, in that female managers specifically refuse to promote or hire other high-flying females due to jealousy and the belief that they 'got there' without help, and that other females should do the same.[286]

2.7.3 Sporadic vs. once-off bullying

Bullying is described as an escalating process during which negative interactions have to occur regularly and repeatedly, for instance once a week over a six-month period, according to Chappell and Di Martino.[287] However, both Le Roux and

[283] Le Roux *et al* 2010: 54.
[284] Gamian-Wilk 2013: 133.
[285] Einarsen *et al* 2009: 25. See also Cunniff & Mostert 2012: 3.
[286] This syndrome is discussed in full in chapter 6 of this thesis.
[287] 2006: 21.

colleagues[288] and Yamada[289] believe that a single serious incident may also be branded as 'bullying'.

Contrary to the above, Hoel and colleagues[290] and Lewis and colleagues[291] have concluded that a key element of bullying is that it should occur on a regular basis, often daily, and that there should be an observable pattern of this behaviour over time instead of an isolated, belligerent act. Thus, bullying should be a consistent sequence of antagonistic actions towards the target. It can however be conceived that a once-off serious, negative deed towards one or more employees, witnessed by other employees, could result in bullying behaviour, as witnesses to bullying experience the same consequences as those being bullied.[292] The same could be said of repeated acts of bullying, however. These findings were supported by Mikkelsen and Einarsen.[293] As multiple employees normally bear witness to once-off acts, it can of course also be argued that this type of behaviour does in fact constitute multiple actions.

Furthermore, Chappell and Di Martino[294] argue that a 'conflict' cannot be called bullying if the incident is isolated, or if two parties of equal strength are in conflict.

2.7.4 Subtle vs. serious bullying

Altogether 10-15% of Swiss suicides arise from bullying in the workplace, according to Chappell and Di Martino. Often, the bullying in these instances does not comprise serious acts, but rather continuous negative acts, such as continuous negative remarks or constant criticism, either through isolation from the group or by gossiping and/or the spreading of false information.[295]

According to Keashly and Newman, less serious bullying could manifest itself as "[g]laring in a hostile way, treating in a rude/disrespectful way, interfering with work

[288] 2010: 62.
[289] Healthy Workplace Bill, see the definition of "workplace bullying" available on http: //healthyworkplacebill.org/blog (accessed 16 June 2013).
[290] 1999, as cited in Lewis *et al* 2002: 110.
[291] 2002: 110.
[292] Branch *et al* 2013: 12, with reference to Mayhew *et al* 2004.
[293] 2001: 394.
[294] 2006: 21.
[295] Chappell & Di Martino 2006: 23.

activities, giving the 'silent' treatment, giving little or no feedback on performance, not giving praise where it is needed, failing to furnish necessary information, lying and preventing an individual from expressing oneself".[296]

Einarsen refers to predatory bullying, where the victim did nothing to deserve the bullying behaviour, but happens to be in a situation where a predator or bully is showing off his power.[297] 'Petty tyranny' is often used to describe a situation where the victim is actually undeserving of any aggression, which is often referred to as being "firm and fair"[298] and part of an organisation's management style or culture. Being exposed to a destructive and aggressive leadership style, being singled out as a scapegoat, and the acting out of prejudice are types of bullying that have not only led to suicide, but also expulsion from work or the working life, or at least being driven from the entity concerned.[299]

2.7.5 Individual bullying

It is not uncommon for an individual to be targeted by the bully, and covert psychological threats are easily masked as initiation rites or presented as jokes.[300] Mischke[301] correctly concludes that emotional blackmail is akin to exploitation and very likely just another form of bullying.

Einarsen and colleagues[302] also refer to dispute-related bullying, where conflict eventually leads to bullying, and stresses that there may be a fine line between interpersonal conflict and bullying. Factors that turn interpersonal conflict into bullying are the duration and method of the behaviour as well as parties' ability to defend themselves.[303]

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[296] Keashly & Newman 2003: slide 24.
[297] Einarsen *et al* 2011: 25.
[298] Einarsen *et al* 2011: 25.
[299] Einarsen *et al* 2011: 25, 26.
[300] Von Bergen *et al* 2006: 15.
[301] Weekly comment to the IR Network available on http://www.irnetwork.co.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=irnetwork:10.1048/enu (accessed 11 May 2012).
[302] 2011: 26.
[303] Einarsen *et al* 2011: 26.

Claiming to be a bully victim is often an effective strategy in the workplace where interpersonal conflicts are present,[304] and should be distinguished from the normal managerial prerogative.

A good example of this in the South African context is *Harding v Petzetakis (Pty) Ltd*,[305] where the Labour Court found that praising an employee to such an extent that the employee feels indispensible, robbing him from 42 days' accumulated leave in the process, fragmenting his annual leave, overburdening him with work and then giving him the same salary increment as everyone else, is regarded as unfair treatment *aka* bullying (although not termed 'bullying' in the court case).

2.7.6 Group bullying

The conceptual differentiation between mobbing (which used to connote the ganging-up of multiple employees against others) and bullying (which originally described situations of individual harassment) has led to assimilation between these terms, mainly due to the seemingly similar negative effects on those on the receiving end.[306] Ramsay and colleagues[307] state that there is a general perception that more than one person can be involved in bullying: Interestingly, 31% of targets reported having been bullied individually, while 54% experienced bullying along with a group at work, and 14,9% experienced bullying as an entire workforce.[308]

Added to that are the findings of Leymann,[309] which indicated that just over 40% of bullying targets were subjected to bullying attacks by multiple perpetrators, being two to four persons. Zapf and colleagues[310] also confirm that multiple perpetrators may be involved in bullying, and that 15% to 25% of cases they studied had involved more than four perpetrators.

[304] Einarsen *et al* 2011: 26.
[305] *Harding v Petzetakis (Pty) Ltd* (2011) 20 LC 8.29.3.
[306] Chappell & Di Martino 2006: 22.
[307] Ramsay, Troth & Branch 2011: 802
[308] Ramsay *et al* 2011: 802, with reference to Hoel, Cooper & Faragher 2009.
[309] 1996: 175.
[310] 2003, as cited in Ramsay *et al* 2011: 802.

A further antecedent for group bullying is status inconsistency, according to Heames and colleagues.[311] This refers to a situation where individuals notice status incongruence or conflicting rank between two or more individuals, which, according to Heames, is a major cause for bullying.[312] Einarsen and colleagues[313] describe bullying as a dyadic interplay between people, where neither situational nor personal factors alone are to be blamed or are sufficient to explain why the interplay has developed.

Although it is not the purpose of this thesis to elaborate on industrial psychology, it needs to be mentioned that an understanding of group behaviour is essential to understand bullying. For purposes of this study, suffice it to state that formal and informal groups exist within a workplace, and that shared beliefs about acceptable and unacceptable behaviour – so-called social rules – are central to workplace bullying.[314] The transgression of these social rules could easily be called bullying, while the subjective nature of measuring bullying could also see organisations or individuals easily branded as bullies.

2.7.7 Bystander or witness bullying

Samnani and Singh[315] found that bullying in groups can lead to further bullying, with the witnesses of bullying mimicking the behaviour of the perpetrator. The negative effects of bullying are still felt by the team or witnesses long after the deeds were committed, and teams reported a feeling of isolation irrespective of having been branded a bullying victim or perpetrator.[316] Research has shown that workplace bullying has negative consequences for both the victims and those who witness it, and it is thus clear that the consequences of bullying extend much further than the direct targets only.[317] Hoel and colleagues[318] refer to this ripple effect of bullying, reporting higher levels of absenteeism, higher levels of stress, less job satisfaction

[311] Heames, Harvey & Treadway 2006: 350.
[312] Heames *et al* 2006: 350.
[313] 2011: 24.
[314] Ramsay *et al* 2011: 805, with reference to Edmonson 2002.
[315] 2012: 584. Also see Salin 2003: 1216.
[316] Samnani & Singh 2012: 584.
[317] Samnani & Singh 2012: 586, with reference to Lutgen-Sandvik 2007.
[318] Hoel, Glaso, Hetland, Cooper & Einarsen 2010: 454, with reference to Hoel & Cooper 2000 and Rayner, Hoel & Cooper 2002.

and high turnover rates among those who have been exposed to bullying as witnesses or bystanders.

Lutgen-Sandvik and colleagues alluded to the fact that even non-bullied witnesses report elevated negativity and stress and decreased work satisfaction and overall rating of their work experience.[319] This view is also supported by Hoel and colleagues,[320] who add that a mere 16% of witnesses claimed to be unaffected by the bullying they had witnessed.[321] Namie and Namie[322] mention that the larger the group, the less likely someone will interfere. If this is extrapolated to the bullying environment, it could explain why employees witnessing bullying seldom intervene on behalf of the victim.

Bystander bullying can be divided into different categories, according to D'Cruz and Noronha:[323]

- "Bully-bystanders", who become involved in bullying behaviour
- "Avoidant bystanders", who deny responsibility
- "Victim bystanders", who become victimised in the process
- "Helpful bystanders", who attempt to defuse the situation

Not only are the witnessing of bullying or the feelings of powerlessness to help victims antecedents of depression, stress, lower motivation, efficiency and morale in the working life of bystanders, but the fear of being the next who will be targeted makes matters worse. Legal avenues explored should take cognisance of the role of bystanders and should empower these bystanders to recognise bullying, alert them to their role in legitimising bullying, and informing them of their roles in relation to bullying while also protecting themselves.[324]

[319] 2007: 855.
[320] 2004: 369.
[321] Hoel *et al* 2004: 370, with reference to Rayner 1999.
[322] 2011: 64.
[323] 2011: 270, with reference to Temlow 2004.
[324] D'Cruz & Noronha 2011: 270.

This should remind organisations, managers and researchers to look beyond the dyadic interaction between bully and target, also taking into account the broader negative impact of bullying on work groups and organisations.[325] Bullying is therefore not a mere interpersonal issue, but "is an organisational dynamic that impacts all who are exposed – whether as primary or secondary victims".[326]

2.7.8 Organisational bullying

Bullying by supervisors can be devastating to the relationship of trust between the different employee levels in an organisation,[327] but is often tolerated by companies as an effective way of increasing productivity and an efficient means of increasing performance, and has therefore become acceptable in high-performing organisations.[328] Liefhooge and MacDavey[329] view bullying in organisations as "mobbing", in the sense that it is unresolved, escalated conflict within an organisation. Allowing conflict to escalate or permitting "petty tyranny" seems to be fertile breeding ground for bullying behaviour within an organisation. However, the organisation does not 'bully' employees, but rather legitimises the bullying behaviour by insisting on compliance at all costs – after all, leadership and organisational policies and issues cannot 'harass' an employee; only fellow human beings can.[330]

It is only of late that it is contended that employees in a bullying milieu are merely playing out larger, systemic organisational issues, thus simply acting within an already toxic environment.[331] Visagie and colleagues hold that organisational culture, structure, processes and systems could foster bullying behaviour,[332] and that instead of punishing the bully as an individual, the systems psychodynamics approach should be followed, which views bullying as a macro-systemic competition for power, privilege and status played out in an interpersonal and intergroup behavioural dynamic.[333]

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[325] D'Cruz & Noronha 2011: 270.
[326] Lutgen-Sandvik *et al* 2007: 855, with reference to Barling 1996.
[327] Cunniff & Mostert 2012: 3.
[328] Samnani & Singh 2012: 585.
[329] 2001: 376, with reference to Zapf 1999.
[330] Liefhooge & MacDavey 2001: 376.
[331] *Cilliers* 2012: 3
[332] 2012: 63.
[333] Visagie *et al* 2012: 64.

Underlying bullying behaviour is the pursuit to protect one's place in the work system, which leads to a destructive matching of power against others as well as high levels of anxiety.[334] Namie and Namie[335] agree with this view and state that bullying by managers often happen because they are either simply following orders to clean up the 'mess' in their department or they think it is the right thing to do, i.e. an accepted management style.

Giorgi[336] has shown that organisational climate and bullying are indirectly related, as observed at a large university in Italy. To support his findings, Giorgi refers to similar studies conducted in Norway and in different types of organisations, such as fire-fighting brigades and education, all delivering the same results. It can thus be accepted that organisational climate is a moderator for bullying and not only a consequence,[337] and negatively affects the health of employees directly due to bullying, but also indirectly via organisational climate.[338] This will play a role in the development of anti-bullying solutions.

According to Visagie and colleagues,[339] bullying in an organisation occurs at an individual (micro) level, a collegial (meso) level as well as in the overall (macro) system, being embedded within the entire organisation. In their study, the latter was more prevalent where management firmly drove performance and employees were unsure of the criteria for success, or where there was a complete absence of performance management systems and a clear lack of care and respect for people was shown.[340] An added factor could be that some managers were never taught how to manage, and truly believed that aggression was what was expected of them.[341]

Salin describes organisations that reward bullying behaviour either as a means to rid the organisation of poor performers, or to downsize companies without having to pay severance packages.[342] Einarsen and colleagues share this view, noting that some victims commit suicide, are permanently expelled from their working life or are at

[334] Visagie *et al* 2012: 64.
[335] 2011: 66.
[336] 2012: 264,263.
[337] Giorgi 2012: 270.
[338] Giorgi 2012: 271.
[339] 2012: 71.
[340] Visagie *et al* 2012: 71.
[341] Namie & Namie 2011: 66.
[342] 2003: 1224,1225.

least driven out of their places of work.[343] Workplace policies can also serve as a breeding ground for bullying behaviour where performance-related pay virtually 'institutionalises' the practices of workplace bullying.[344] On the other hand, De Cuyper[345] found that a lack of policies against workplace bullying could also lead to job insecurity, which encourages bullying and creates the impression that bullying is allowed at an organisational level.

Salin states that the promotion of employees has been shown to often increase bullying behaviour, with the behaviour picking up shortly after promotion to a higher position, as soon as the promoted employee realises that his/her own rating is based on the performance of his/her subordinates.[346] This stresses the importance of management training as well as clear and well-implemented promotion policies and performance management systems in workplaces.

In companies and countries with lower power levels and demonstrated power distance (such as Sweden and Norway), lower levels of bullying are reported. This is in stark contrast to the United States and the UK, where the so-called "femininity aspect" is lacking, thus implying that Nordic countries tend to value interpersonal relationships more than America, where competition and individualism are very high priorities.[347]

However, top-to-bottom bullying is not the only form of bullying in the workplace; co-worker (horizontal) bullying is just as prevalent. Acts of humiliation, sadism, practical jokes played on victims, isolation and gossip are typical of this type of bullying in organisations, and taking into account that work conditions and organisational issues are seen as environmental factors that could give rise to interpersonal conflict, which may in turn escalate into bullying,[348] organisations need to take care not to create a breeding ground for bullying.

[343] 2011: 25.
[344] Salin 2003: 1224, with reference to Leymann 1996.
[345] De Cuyper, Baillien & De Witte 2009: 207.
[346] 2003: 1224.
[347] Samnani & Singh 2012: 586.
[348] Liefhooge & MacDavey 2001: 376.

2.7.9 Work-related bullying

Einarsen and colleagues[349] argue that work-related bullying includes setting unreasonable deadlines or assigning unmanageable workloads,[350] excessive monitoring of work, or the assignment of menial or even no tasks. It is extremely difficult to decide whether a person is bullied in terms of work, workload and the assignment of tasks,[351] and it is possible that bullying could be used as a defence against allegations of poor work performance. Care should be taken when drafting policies in this regard to prevent this from happening.

Query rightly asks the question: "If waterboarding is an 'enhanced' interrogation technique, does that make bullying an 'enhanced' management technique?"[352] Both Query and Hanley[353] and Einarsen and colleagues[354] found that, even though it is difficult to differentiate between a tough management style and bullying, bullies are seen as conquerors who are only interested in power and control, performers who enjoy belittling subordinates, or manipulators who lie, cheat, take credit due to others, and never accept responsibility for their errors.[355] Unfortunately, these persons determine the culture in organisations and should be stopped.

2.7.10 Cyberbullying[356]

Cyberbullying is dealt with in this dissertation mainly because of its relevance in today's work environment. The information and communications technology[357] revolution could change the face of traditional bullying and adds to the duty of care[358] assigned to employers.[359]

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[349] 2011: 13, chapter 1.
[350] Baillien *et al* 2011: 201.
[351] Einarsen *et al* 2011: 13, chapter 1.
[352] Query & Hanley 2010: 1.
[353] 2010: 2.
[354] 2011: 25.
[355] Query & Hanley 2010: 2.
[356] See *infra* p 16 and 17 for an explanation on why cyberbullying is dealt with in so much detail in this thesis.
[357] Hereinafter referred to as ICT.
[358] See also para 6.5 for a full discussion in this regard.
[359] Privitera & Campbell 2009: 399.

Introduction and background

Cellphones and the internet afford users spontaneity through mobile communication, and the internet enhances communication across the globe, but the misuse of these electronic means can prove more devastating than the enjoyment thereof, says Grigg.[360] It is a fact that more and more people use social networking sites on a daily basis, and derogatory remarks about their employers, fellow workers and superiors are often noted. In 2005, there were more than three billion internet and cellphone users,[361] and with the rapid growth in technology, many employers are constantly exposed to various sorts of cybercrime or cyberbullying.[362] Rapid growth has been noted in the number of people interacting by means of modern technologies, which could at the same time serve as new or alternative ways for bullies to target their victims.[363] These statistics include employees who use modern technologies as everyday instruments in employment. As it has become a global concern, this issue requires urgent attention.[364]

Of interest is the fact that there seems to be a direct link between ordinary, face-to-face bullying in the workplace and cyberbullying. An Australian study in the manufacturing industry showed that 34% of the sample had been exposed to bullying deeds over six months, and that a third of those had been exposed to cyberbullying as well,[365] which equates to 11% (using Leymann's model and definition of bullying). Other studies report varying figures. Jäger and colleagues,[366] for example, refer to a prevalence figure of 29% of young people who consider themselves to have been cyberbullied.

It is a known fact that the aim of cyberbullies is to victimise other persons. This has a different impact on different persons:[367] Some would merely ignore the message,

[360] 2010: 143.
[361] Privitera & Campbell 2009: 395.
[362] Privitera & Campbell 2009: 395.
[363] Privitera & Campbell 2009: 395.
[364] Privitera & Campbell 2009: 396.
[365] Privitera & Campbell 2009: 398.
[366] Jäger, Amado, Matos & Pessoa 2010: 170.
[367] Cassim 2013: 2,3.

block it or report the problem; others may suffer depression, anxiety or withdraw to themselves.[368]

Those who experienced cyberbullying also reported face-to-face bullying.[369] One of the most important features of cyberbullying as opposed to face-to-face bullying, however, is that it enables aggressors to be physically distanced from their victims and the impact of their actions.[370] In 2010, altogether 52% of the European population had access to ICT, which have a great impact on everyday lives[371] and also lives at work. Ortega and colleagues[372] found that the most common experience when being cyberbullied is anger, as opposed to the embarrassment more commonly experienced in face-to-face bullying.

The question has been asked whether the internet is a curse or a blessing,[373] and rightly so. Henry[374] remarks that due to the proliferation of the internet and width of its reach, bigoted messages can be sent with great ease to a much larger audience than ever before. Despite the overlap with traditional bullying, certain aspects are unique to cyberbullying, such as the fact that the perpetrator can conceal his or her identity and that it can transcend the boundaries of time and space.[375] As harassment now increasingly occurs via electronic media, most of these messages can be retrieved outside the workplace – hence the suggestion that the negative consequences of virtual workplace harassment are more widespread than those of traditional forms of harassment, or bullying.[376]

Some of these actions could bring the name of the employer into disrepute and be construed as bullying, irrespective of whether these remarks were made during working hours or in the workplace. In the South African case *Sedick & another v Krisnay (Pty) Ltd*,[377] for example, the commissioner found the summary dismissal based on internet postings about so-called “bad new managers” to be fair.

[368] Cassim 2013: 3.
[369] Privitera & Campbell 2009: 398.
[370] Jordan & Austin 2012: 445.
[371] Jäger *et al* 2010: 169.
[372] 2009.
[373] *Sedick & another v Krisnay (Pty) Ltd* par 57, 60.
[374] 2009: 235.
[375] Jäger *et al* 2010: 170.
[376] Ford 2013: 409.
[377] 2011 20 CCMA par 60.

Defining cyberbullying

Cyberbullying is perhaps best described as the use of "modern communication technology to send derogatory or otherwise threatening messages directly to the victim or indirectly to others; to forward personal and confidential communication or images of the victim for others to see, and to publicly post denigrating messages".[378] In the UK, cyberbullying has been defined as "an aggressive intentional act carried out by a group or individual, using electronic forms of contact, repeatedly and over time against a victim who cannot easily defend himself".[379] Badenhorst[380] refers to the existence of several definitions of cyberbullying in South Africa, most of which include acts involving bullying and harassment through the use of electronic devices or technology.

Grigg[381] believes that cyberbullying shares certain criteria with traditional bullying, such as intentional harm caused to the victim, the imbalance of power and the repetition of victimisation, and ascribes the difference between traditional workplace bullying and cyberbullying to the means in which the bullying is committed, thus via electronic devices. Grigg's view is however not universal, and authors such as Menesimi and Nocenti[382] call for a separate definition for cyberbullying. Nocentini and colleagues[383] believe that defining cyberbullying poses a problem, especially in jurisdictions where culture plays a vital role (as with traditional workplace bullying) and where different names and labels are allocated to the same behaviour.[384]

Types of cyberbullying

As half of all employees have e-mail accounts and 96% have internet access, it is no easy task to prohibit and manage cyberbullying in employment.[385] Summarising the

[378] Privitera & Campbell 2009: 396.
[379] Grigg 2010: 143, with reference to Smith *et al* 2008: 376.
[380] 2011: 2.
[381] 2010: 143.
[382] As cited in Grigg 2010: 143.
[383] Nocentini, Calmaestra, Schultze-Krumbholz, Scheithauer, Ortega & Menesini 2010: 130.
[384] Nocentini *et al* 2010: 130.
[385] Giumetti *et al* 2013: 298.

categories of cyberbullying as explained by Nocentini and colleagues,[386] it broadly comprises four main types:

- Written-verbal behaviours (phone calls, text messages, e-mails, instant messaging and others)
- Visual behaviour, such as postings and the sending or sharing of compromising pictures
- Exclusion, i.e. purposefully excluding someone from an online group
- Impersonation, including stealing and revealing of personal information

It is thus clear that cyberbullying does differ from face-to-face bullying, and should be managed as part of, yet also separate from, the greater bullying phenomenon in modern workplaces.

Badenhorst[387] refers to Burton and Mutongwiso, who identified six types of cyberbullying, namely harassment,[388] denigration,[389] impersonation or identity theft,[390] outing,[391] cyberstalking,[392] happy slapping[393] and sexting.[394] Once again, the nature of cyberbullying sets it apart from regular workplace bullying, although in principle, it forms part of the greater violence problem at work.

[386] 2010: 130.
[387] 2011: 2.
[388] Frequently sending a cruel or threatening message to a person's e-mail account or mobile phone.
[389] Sending or posting malicious gossip or rumours about a person to damage his or her reputation or friendships.
[390] When someone breaks into another's e-mail or social networking account and poses as that person.
[391] Sharing someone's secrets, embarrassing information or images online.
[392] Similar to traditional stalking, involving threats or harm or intimidation through repeated online harassment or threats.
[393] Where people walk up to a person and slap him/her whilst others capture the violence using a mobile phone camera.
[394] Sending a nude or semi-nude photo or video and/or sexually suggestive messages via mobile phone or texting or instant messaging, thereby combining texting and sex. Could involve children, which could be classified as child pornography in South Africa, and is criminalised.

Elements of cyberbullying

- The power differential

It is accepted that an imbalance of power is needed to constitute bullying. In cyberbullying, this may present a problem. VandeBosch and Van Cleemput[395] point out that this would necessarily refer back to a real-life experience of power. Grigg[396] refers to a situational advantage that a bully may have over a victim as reflecting the power differential, and refers to Campbell, who also believes that cyberbullying simply refers to old behaviour occurring in new forms.[397] Nocentini and colleagues[398] add that a victim's inability to force internet service providers to delete harmful content or the perpetrator's higher levels of media literacy or higher social status within a virtual community may give rise to a perceived power imbalance.

- Repetition

The necessary element of repetition is problematic, because in cyberbullying, some deeds are only carried out once, and may therefore not be repeated.[399] However, it is argued that although the offensive material is sent only once, the repetitive element presents itself each time the material is viewed by the audience, and therefore, the target and audience exposed to cyberbullying experience the same negative effects than with traditional bullying.[400] It has been said that the impact of cyberbullying is often more traumatising than physical bullying due to the extreme public nature thereof.[401] According to Privitera and Campbell,[402] the two main electronic devices used to bully in the workplace are online computers (with access to e-mail and the websites) and smartphones. Nocentini and colleagues[403] refer to the element of repetition in a cyberworld as the possibility that postings may be reviewed and forwarded repeatedly. In this way, a single act of cyberbullying could lead to countless incidents of victimisation or bullying.

[395] 2008: 499.
[396] 2010: 143.
[397] Grigg 2010: 145.
[398] 2010: 131.
[399] Grigg 2010: 145.
[400] Grigg 2010: 143.
[401] Badenhorst 2011: 3.
[402] 2009: 396.
[403] 2010: 131.

- Intent

It is still uncertain whether intent to harm is a prerequisite for even traditional bullying. However, should specific jurisdictions make intent a *conditio sine qua non*, the argument in cyberbullying is that due to the specific nature of this type of bullying, it would be very difficult to identify the perpetrator's intent.[404]

A study by Nocentini and colleagues[405] proved that, in identifying cyberbullying, intent is of lesser importance than the negative acts experienced. The participants in this study relied heavily on the effect(s) on the victims – much more than on the requirement of intent. Giumetti *et al* believe that electronic media attract lesser adherence to social norms and may produce communication that is either intended and/or perceived to be rude – therefore, as with face-to-face bullying, incivility through electronic media is likely to have serious negative consequences.

Special features of cyberbullying

Nocentini and colleagues[406] mention the new cyber-specific criteria of anonymity and publicity, and the fact that the victim is oblivious to the identity of the bully may reduce the need for a power imbalance as a criterion.[407] The typically large and public audiences of cyberbullying incorporate these two criteria, and may define cyberbullying more accurately than other common definitions.[408] Although the study by Nocentini and colleagues found that anonymity and publicity are not seen as requirements to label negative electronic behaviour as cyberbullying, they are important, as they denote the severity and nature of the attack.[409]

Research by Grigg[410] also yielded a long list of 'cyberbullying deeds', which included the words "anonymous, fraudulent, aggressive, unwanted messages, spreading rumours, hacking into someone's e-mail account, threats, harassment, attacks, unwanted phone calls, and malicious, abusive messages". No age or gender

[404] Nocentini *et al* 2010: 131.
[405] 2010: 139.
[406] 2010: 131.
[407] 2010: 131.
[408] Nocentini *et al* 2010: 131.
[409] Nocentini *et al* 2010: 139.
[410] 2010: 148.

differences were noted in the way in which the study participants perceived these acts,[411] and cyberbullying deeds were extended to include the uploading of viruses and the changing of passwords to pose as the original owners in order to send unwanted messages and target businesses.[412]

The legal position pertaining to cyberbullying

- United States of America

In the United States,[413] the First Amendment guarantees freedom of speech, which restricts government's ability to regulate online speech through both civil and criminal law.[414] Subsequent attempts to pass laws to regulate online speech have been declared unconstitutional,[415] which has left both the employer and victims without protection and remedies from a federal source. Popular media have referred to the increase in cyberbullying as employees resort to texts and e-mails to attack their colleagues.[416]

The law in the USA distinguishes between the following:

- Cyberstalking, which is regulated by state civil codes and penal codes[417] and involves threatening behaviour in line with the criminal definition
- Cyberharassment, which is different from cyberstalking in that it may not involve threats. Some states have included references to harassment committed via electronic means in their general harassment statutes, while others have their own stand-alone cyber harassment statutes.[418]
- Cyberbullying, which although used interchangeably, refers to bullying via electronic means by schoolchildren[419]

[411] Grigg 2010: 148.
[412] Grigg 2010: 151.
[413] Hereinafter referred to as the USA.
[414] Henry 2009: 236.
[415] Henry 2009: 236.
[416] Ward 2012: 1.
[417] See California Civil Code § 1708 7 and Penal Code §646.9.
[418] See California Penal Code §§ 422 and 635.2.
[419] See California Education Code §§ 32661, 32270, 48900.

Two novel approaches have seen the light in the USA. Firstly, non-governmental organisations' endeavours to protect against hate speech have led to the establishment of the Southern Poverty Law Centre and the Anti-Defamation League. These organisations use the internet as a weapon against hate and hate groups, and work through internet service providers as watchdog to identify hate speech and play a role in its removal.[420]

Secondly, after several attempts to regulate sexual offences on the internet, even pertaining to child pornography, the USA government eventually had the Prosecutorial Remedies and other Tools to End the Exploitation of Children Today Act[421] passed in 2003, which survived First Amendment challenges and criminalises "offers to provide or requests to obtain contraband, child obscenity and child pornography involving actual children".[422]

Online hate speech may only be prosecuted by the USA government if it poses a real threat of imminent harm to an identifiable victim, which explains why this rarely happens.[423] Anti-Defamation League website filters could be used in the battle against online bullying, and the removal of offensive material could serve as an *ex post facto* remedy,[424] but as it is not proactive in nature, it may prove insufficient in the workplace.

Online bullying goes far beyond hate speech, and employers are thus left to deal with online bullying on a state-by-state basis or, for lack of state legislation, have to resort to policies and procedures adopted in employment practices to deal with cyberbullying. Even though several states have adopted legislation dealing with school bullying, this should not be confused with bullying at work.

[420] Henry 2009: 236.
[421] Hereinafter called the PROTECT Act.
[422] Henry 2009: 237.
[423] Henry 2009: 238,239, with reference to the Maine Civil Hate Crime Act and *HUD v Wilson* 2000, in which damages to the amount of a million dollars were awarded due to cyberharassment.
[424] Henry 2009: 246.

- United Kingdom

In the UK, it has been said that cyberbullying in the workplace is becoming more widespread as communication technologies advance: Between 14% and 20% of employees apparently experience cyberbullying on at least a weekly basis, which is a similar rate than that for conventional workplace bullying.[425] According to Molluzzo and colleagues,[426] cyberbullying has turned into the "abuse of choice" of the "cyberimmersion" generation.

One in ten employees in the UK believes that cyberbullying is a problem at work, according to a survey done by the Dignity and Work Partnership in 2007. Harassment in the UK is prohibited by the Protection from Harassment Act of 1997 and the Equality Act of 2010. However, should cyberbullying not fall within this ambit (with the exception of schools), there appears to be no specific legislation dealing with it – also not in employment. Cyberbullying may lead to tort action[427] taken against the perpetrator, but this is hardly a proactive measure to curb cyberbullying in employment.

Smith[428] has identified a link between school bullying and adult bullying, and studies done on school bullying and school cyberbullying should therefore not be summarily dismissed when dealing with workplace harassment. Cyberbullying and cybercrime may also overlap and both should therefore be prohibited and managed in a work setting.

An employer who does not take the necessary steps against cyberbullying in employment and fails to keep up with technological changes in the workplace may incur vicarious liability.

- Australia

In Australia, there is no commonwealth protection against cyberbullying as such. Legislation dealing with cyberbullying in employment is diverse and mainly from an

[425] Ward 2012: 2.
[426] Molluzzo, Lawier & Manneh 2012: 1.
[427] Gilani, Cavico & Mutjaba 2012: 4.
[428] 1997: 250.

occupational safety and health perspective. Some states, especially South Australia, have enacted legislation against workplace bullying,[429] which also refers to aspects of cyberbullying.

Anti-stalking legislation is also used by territories to deter cyberbullying in employment.[430] Australian courts are however reluctant to hold intermediaries such as Telstra, Australia Post and My Space responsible for bullying in cases where these entities were unaware of the bullying via electronic means.[431]

Even the misuse of social media from home for work-related purposes may lead to the fair dismissal of an employee, as illustrated in *Damian O'Keefe v William Muirs Pty Ltd t/a Troy Williams the Good Guys*.[432] In this matter, it was found that due to the employee's Facebook posting and threat about not having been paid, he was rightfully dismissed. The company had a policy on workplace bullying and communication, although no clear policy on social media.

In *Glen Stutsel v Linfox Australia Pty Ltd*,[433] however, the contrary was found. In the absence of a policy on online workplace bullying and due to the fact that the "malicious postings" with a racial undertone had been posted on maximum-privacy settings, the employee was exonerated. As the postings were regarded as the letting off of steam with a group of the employee's Facebook friends (of whom the claimants were not part), he was reinstated to his previous position.[434]

Employers in Australia are thus advised to draft policies in this regard to prohibit and deal with cyberbullying in employment.

Vicarious liability for the employer can follow and civil action may be taken against the perpetrators. Again, however, in the absence of clear policies and procedures, this does not prevent cyberbullying in employment.

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[429] Australian Human Rights Commission 2011.
[430] For example the Crimes Act of 1900. In the past, territories refused to train apprentices due to cyberbullying. Also see the Vocational Education and Training Act in the State of Victoria 1990.
[431] Caslon Analytics www.caslon.com/au/cyberbullyingnote6.htm (accessed on 3 December 2013).
[432] [2011] FWA 5311, as cited in Felthan & Nichol 2012.
[433] [2011] FWA 8444, as cited in Felthan & Nichol 2012.
[434] Felthan & Nichol 2012. Also see Fair Work Act 2009 s 394, "Unfair dismissal"; *Glen Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 par 64,65.

- South Africa

In South Africa, there is no specific legislation dealing with cyberbullying, and victims have to rely on remedies offered by the criminal and/or civil law, either as employees and employers or as learners and educators.[435]

Badenhorst[436] states that, depending on the nature of the negative cyberacts, a perpetrator may be charged with *crimen iniuria*, assault, criminal defamation or extortion,[437] while civil-law responses include orders to keep the peace, interdicts and defamation claims. Where sexting occurs and children are involved, either as perpetrators or 'models', it could lead to a transgression of the Films and Publications Amendment Act,[438] which prohibits child pornography in a broad sense, or could lead to a conviction, as child pornography is defined in terms of the Sexual Offences and Related Matters Amendment Act.[439]

The Electronic Communication and Transaction Act[440] regulates bullying where it overlaps with the distribution of personal information, but where not, any specific legislation is available to deal with such issues. Subramanien and Whitear-Nel[441] caution employers to manage employees' access to the work internet appropriately, for failure could result in significant risk, such as liability for civil claims or even criminal conduct in South Africa. 'Phishing', a term used to describe fraudulent electronic communication, often via e-mail, has lately been linked to identity theft, while 'spearfishing' is now linked to theft of corporate trade-related information.[442] Employers need to take care and take proactive steps in this regard.

Employers in South Africa may be held vicariously liable for their employees' actions, and no reason can be submitted as to why bullying deeds would be exempt from vicarious liability, as it has been shown that vicarious liability extends to acts such as

[435] Badenhorst 2011: 7.
[436] 2011: 9.
[437] Badenhorst 2011: 8.
[438] 3 of 2009.
[439] 2007.
[440] 25 of 2002, hereinafter referred to as the ECT Act.
[441] 2013: 9.
[442] Subramanien & Whitear-Nel 2013: 11.

defamation, harassment or even the downloading of copyrighted material from the internet onto a work computer.[443]

Possible solutions for cyberbullying in employment

Codes of practice need to be updated to keep up with modern technologies, and workplaces need to implement policies and procedures,[444] including a ban on cyberbullying and provision for *ex post facto* transgression. Protection through these policies should extend to both the victim and the employer. Websites could be restricted during the day by means of a restricted-access protocol during working hours, although it could be argued that employees would simply find another way of connecting.[445] It has been tendered that policies be developed to deal with ownership issues, private use, expectations of privacy, and prohibited use,[446] to ease the difficulties of cyberbullying in employment.

It is clear that unless cyberbullying acts amount to cybercrimes, little protection is granted to both employer and employee, and internal policies should therefore ban or at least minimise cyberbullying.

2.8 Antecedents and effects of workplace bullying

2.8.1 Antecedents of workplace bullying

According to Tambur and Vadi,[447] "the causes of bullying are mainly divided into two groups – those related to individual antecedents and those related to organisational antecedents". Samnani and Singh[448] believe that a number of factors at the organisational level can be seen as antecedents for bullying behaviour, namely:

- "leadership and management style;

[443] Subramanien & Whitear-Nel 2013: 11,12. The possibility of employers being held vicariously liable for inappropriate internet use is not limited to liability for defamation or harassment in South Africa, and employers should therefore protect themselves against such misuse, which could take the form of bullying.
[444] Privitera & Campbell 2009: 399.
[445] Cilliers 2012: 3.
[446] Subramanien & Whitear-Nel 2013: 20.
[447] Tambur & Vadi 2012: 758.
[448] 2012: 584.

- organisational culture and ethical climate;
- organisational policies; and
- situational factors".

Giorgi[449] also refers to organisations or cultures where masculinity or the masculine culture, as opposed to a feminine culture, is an antecedent for bullying.

Individual antecedents are not the main reason for workplace bullying, according to Tambur and Vadi,[450] but refer back to organisational factors such as organisational design, poor leadership, low departmental morale, deficiencies in work design and poor conflict management.[451] Hostile, stressful and unethical work environments are the main contributors to bullying in the workplace, while poor leadership and work control as well as role conflict would typically exacerbate the problem.[452]

Tepper and Henle[453] refer to individual bullying as a form of interpersonal mistreatment, which should not necessarily be treated separately from existing forms of mistreatment in the workplace, unless the investigation relates to groups against individuals.[454] They differentiate between incivility and victimisation, add "revenge" to the scenario of bullying, and strongly support investigations into single perpetrators who bully groups as a form of mobbing,[455] thereby acknowledging the gap in literature dealing with single individuals bullying groups.

This could easily present itself in the workplace where a manager could bully an entire workforce reporting to him/her by bullying an employee as an individual or bullying the group. Exposure to such actions as a witness should not be ignored, as such exposure has the same long-term negative effect on victims as direct bullying behaviours would have on the victim.[456] Research has shown that managers are the most frequent perpetrators of bullying, which is typically a downward process, according to Hoel and colleagues.[457]

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[449] 2012: 263.
[450] 2012: 758.
[451] Leymann 1996: 177.
[452] Einarsen, Raknes & Matthiesen 1994: 395.
[453] 2011: 488.
[454] Tepper & Henle 2011: 490.
[455] Tepper & Henle 2011: 490.
[456] Branch *et al* 2013: 12, with reference to Mayhew *et al* 2004.
[457] 2010: 454,456.

Dissatisfaction and frustration with working conditions and the organisational climate have been put forward as reasons or antecedents for bullying:[458] A lack of clear goals, little control over one's own job, role conflict and ambiguity could easily lead to bullying, as could dissatisfaction with the social climate and internal communication.[459] Ayoko[460] found that low levels of openness were linked to bullying behaviour as well as destructive reactions to bullying. Bulutlar and Öz[461] have also noted competition regarding status and job position as well as the aggressor's uncertainty about him or herself as potential antecedents.

In addition, Salin[462] found that managers are also often bullied, which is mainly due to high pressure to perform and increased internal competition. Even highly qualified employees are not safeguarded against bullying, and it is assumed that professionals perceived to be less powerful, such as women, would suffer more.[463]

Organisational antecedents formulated by Agtervold,[464] citing Hoel and Salin,[465] indicate that a series of organisational factors may increase the risk of bullying, including "(1) work changes as a result of the introduction of information technology, mergers, etc.; (2) organizational conditions, such as pressure of work and high performance demands on the work-force, role uncertainty and role conflicts, etc.; (3) an organizational culture in which bullying is regarded as part of the culture; (4) management styles, in which autocratic management styles in particular can be regarded as a direct forerunner of bullying". The culture and climate of an organisation are prevailing factors in eliciting bullying,[466] and should be kept in mind when developing a solution.

Le Roux and colleagues[467] correctly refer to the practical difficulty in distinguishing between bullying and normal managerial styles in profit-orientated businesses. It is often unclear exactly when business behaviour tips over into bullying.

[458] Salin 2003: 1222.
[459] Salin 2003: 1222.
[460] 2007: 105,118.
[461] 2009: 274.
[462] 2001: 427.
[463] Salin 2001: 427.
[464] 2009: 267.
[465] Salin 2003: 1218.
[466] Buluthar & Öz 2009: 275.
[467] 2010: 55.

Research has shown that leadership styles have also been branded antecedents of bullying, particularly the so-called laissez-faire style.[468] This refers to managers who have in effect abdicated their leadership role, absolving themselves from their responsibilities and duties and/or being absent and thereby not meeting their superiors and even subordinates' legitimate expectations.[469] According to Skogstad and colleagues,[470] citing Kelloway and colleagues,[471] this type of leadership may be the root cause of role conflict, role ambiguity and the perception of low-quality interpersonal treatment by the leader, which in turn leads to workplace stressors[472] such as bullying. Hoel and colleagues[473] add that an autocratic leadership style may also be considered negative and a source of bullying in itself.

Thus, a lack of adequate leadership presents fertile breeding ground for bullying behaviour,[474] as could the appointment of a new manger or promotion of a co-worker. O'Moore and colleagues[475] found that two thirds of bullying victims reported bullying after having assumed a new position.

Not only do destructive leadership styles with clear aggression prove to be a breeding ground for bullying; passive and indirect manifestations of poor leadership have the same negative effects in the organisation.[476] Hoel and colleagues[477] found that leaders do not necessarily bully with intent, but may also unknowingly instigate perceptions of bullying.

As bullying is more prevalent in larger organisations, where it takes a long time to reach decisions, which in turn reduces the risk that the bully will be caught, punished or condemned from a social point of view, implies that there is a relatively low cost

[468] Hoel *et al* 2010: 463; Salin 2003: 1220.
[469] Skogstad, Einarsen, Torsheim, Aasland & Hetland 2007: 80.
[470] 2007: 81.
[471] 2005.
[472] Skogstad *et al* 2007: 81.
[473] 2010: 456, with reference to O' Moore *et al* 1998.
[474] Skogstad *et al* 2007: 86.
[475] 1998, as cited in Salin 2003: 1225.
[476] Skogstad *et al* 2007: 81, with reference to Neuman & Baron 2005: 20.
[477] 2010: 455.

attached to bullying,[478] which adds to its manifestation. The fact that bullying in groups leads to even more bullying[479] must also not be underestimated, as the mimicking of bullying behaviours by team members leads to an increase in bullying within teams and organisations. This was confirmed by Glomb and Liao.[480]

An imbalance of power has also been noted as an antecedent of bullying, but tends to be problematic, as it is not clear who decides whether or not such power imbalance indeed exists.[481] Some researchers tend to lean towards reliance on the employee's subjective perspective, being unable to defend him or herself against the perpetrator's actions, to decide whether or not a power imbalance is present.[482] Le Roux and colleagues[483] rightly refer to authors who are unable to divorce bullying from an abuse of coercive power, whether by individuals in the internal work environment or external clients, which is thus also deemed as an antecedent for bullying behaviour in the workplace.

Agtervold[484] mentions a fear of organisational change as another antecedent of bullying, while Skogstad and colleagues[485] refer to management styles as indicators of workplace bullying, and the Australian authors Ramsay and colleagues[486] focus on the role of work stressors such as tension and work uncertainty as precipitating factors. Added to the mix is organisational culture as an antecedent to bullying,[487] which relates to the proverbial turning of a blind eye to bullying in pursuit of the company's greater financial goals. It was also found that, in the absence of policies prohibiting bullying and/or punishment for bullying, these practices may be interpreted as acceptable in the organisation: Brodsky,[488] according to Einarsen *et al*,

[478] Salin 2003: 1220.
[479] Samnani & Singh 2012: 584.
[480] 2003: 493.
[481] Cowie *et al* 2002: 36.
[482] Cowie *et al* 2002: 36, with reference to Einarsen & Hoel 1997.
[483] 2010: 54.
[484] 2009: 273.
[485] 2007: 81.
[486] 2011: 800.
[487] Salin 2003: 1220, 1221.
[488] 1976: 3.

for example, mentions that bullying may be seen as an effective means of accomplishing tasks,[489] which could encourage further bullying.[490]

Management would label these practices “tough management”, as opposed to calling it what it really is, namely bullying.[491] Striving for excellence at any cost may foster such a culture in an organisation, and the careless encouragement of toughness among employees could contribute to a bullying-conducive environment.[492] Gamian-Wilk[493] found that bullied employees displayed a lower level of compliance than their non-bullied counterparts, and did not stay longer at work, were reluctant to agree to both task-related jobs and social requests, which invariably led to further bullying and, eventually, failure of the enterprise.

External factors or internal turmoil are not the only contributors to workplace bullying, however. Research by Einarsen[494] has shown that the victim’s personality may also contribute to bullying: Some researchers found victims to have low self-esteem[495] or to be anxious in a social environment, while others found them to be conscientious, literal-minded, somewhat unsophisticated, and overachievers with an unrealistic view of their own abilities. This is not a universal view, however. Glasø and colleagues[496] also conducted studies to determine the personality factors of bullying victims, and found that the victims should not be seen as representative of one personality type, but that victim personality profiles should be divided into subgroups. Bullied victims scored higher than non-bullied employees in the intellect division, and displayed high creativity, resourcefulness and openness to experiences, which indicated that there is no such thing as a victim profile that points to particular vulnerability.[497] It must be stated, however, that recent research has shown that personality factors play a limited role in bullying, and that environmental factors play a much greater part in the

[489] Salin 2003: 1220,1221.
[490] Salin 2003: 1220,1221.
[491] Einarsen *et al* 2011: 25, with reference to Brodsky 1976, who termed the guise under which bullying is sometimes committed as “firm and fair”.
[492] Samnani & Singh 2012: 585, with reference to Salin 2003.
[493] 2013: 137.
[494] 2000: 389.
[495] Gamian-Wilk 2013: 131, with reference to Harvey & Keashly.
[496] Glasø, Matthiesen, Nielsen & Einarsen 2007: 317.
[497] Glasø *et al* 2007: 317.

bullying experience at work.[498] Persson and colleagues' finding[499] that employees who had been bullied displayed more neuroticism, aggressiveness and impulsiveness than their non-bullied counterparts does however indicate the need for ego-supportive actions in conjunction with collective action in combatting bullying.

An area that has not been fully explored is the role of culture as an antecedent for bullying.[500] What is known is that, in some countries, bullying behaviour is regarded as an acceptable way of managing work tasks, and that hierarchically based power differentials may be more acceptable in some countries than in others.[501] A cross-cultural study conducted by Escartin and colleagues[502] indicated that employees from Central America emphasised the physical component of bullying more than their Southern European counterparts, but that the common denominators across cultures explained the essence of the notion of bullying at work. Interestingly, both Southern European and Central American employees defined bullying mainly as a hierarchical phenomenon,[503] which would have an effect on strategies proposed to deal with workplace bullying.

The latest study in this regard was done in 14 countries by Power and colleagues in 2013[504] and found that attitudes as to the acceptability of bullying varied tremendously among the different nations. The vast difference in prevalence rates – such as 2% in Italy and Bulgaria, 17% in Finland, and 12% in the Netherlands – could indicate either actual levels of bullying, or could reflect cultural differences with regard to the acceptability of certain behaviours, especially where the self-labelling method was used to indicate the level of bullying in an organisation.[505] A further reason for fluctuation between jurisdictions could be industry-specific, as McCormack and colleagues[506] have indicated that trainees in the building sector, for example, were particularly hesitant to report bullying for fear of losing their apprenticeships, and rather chose not to confront their bullies, as they did not want to be seen as

[498] Wheeler, Halbesleben & Shanine 2010: 554.
[499] Persson, Hogh, Hansen, Nordander, Ohlsson, Balogh, Österberg & Ørbaek 2009: 387.
[500] Samnani & Singh 2012, with reference to Loh *et al* 2010.
[501] Neuman & Baron 1998: 410; Samnani & Singh 2012: 586, with reference to Loh *et al* 2010.
[502] 2011: 199,178.
[503] Escartin *et al* 2011: 199.
[504] 2013: 376.
[505] Power *et al* 2013: 276.
[506] 2013: 415.

'weak'.[507] The study done by Power and colleagues also reflected cultural differences in the acceptance of bullying, and found that physical bullying was regarded as less acceptable than other forms of bullying.[508] Highly performance-driven countries (such as in Asia) showed an increased tolerance for bullying, while the more 'human-orientated' countries in Latin America were more disapproving of bullying.[509]

Still, however, antecedents for bullying behaviour, whether at a group level, an organisational level or an individual level, cannot on their own and without an enabling incident lead to bullying. Ultimately, this combination needs to be addressed in possible legal solutions to the problem.

2.8.2 Negative effects of workplace bullying on the employee

According to Salin,[510] Tracy and colleagues[511] and Einarsen and colleagues,[512] bullying may have severe consequences for both the job satisfaction and health of victims and organisations. Stress and post-traumatic stress disorder have been noted as common negative effects suffered by bullied employees,[513] while severely bullied employees experience suicidal thoughts, and some even end up committing suicide.[514] Research has shown that bullied employees leave their profession, suffer from eating and sleeping disorders, and also experience psychological effects such as anxiety, depression and lowered self-esteem.[515] These effects are discussed in more detail below.

Physical harm

Yamada[516] believes that the everyday experience of bullying at work has negative health consequences, and refers to a report on the increase in cardiovascular

[507] McCormack *et al* 2013: 414,415.
[508] Power *et al* 2013: 378,379.
[509] Power *et al* 2013: 378,379.
[510] Salin 2001: 426.
[511] Tracy, Lutgen-Sandvik & Alberts 2006: 178.
[512] 2011: 11, chapter 1.
[513] Lewis, Sheehan & Davies 2008: 287.
[514] Einarsen *et al* 2011: 25.
[515] Matthiesen & Einarsen 2001: 470,476; Salin 2001: 426.
[516] 2009: 531; National Institute for Occupational Safety and Health 1999.

disease and musculoskeletal disorders. Yildiz[517] adds to this list headaches, migraine, sweating, palpitations, nausea, bowel/stomach problems, blood pressure problems, sleeping disorders, low energy levels, lack of appetite or overeating as physiological effects of bullying. Hoel and colleagues[518] rely on earlier work by Björkovist,[519] who found that in nearly all cases interviewed, victims reported insomnia, nervous symptoms, melancholy, sweating, shaking and feeling sick as physical symptoms.

Naturally, therefore, bullying leads to increased health-care costs for the employee, the employer as well as society at large, and does not affect the psyche alone.

Emotional harm

Branch and colleagues[520] note that workplace bullying has been identified as a risk factor in clinical depression and suicide attempts,[521] clinical levels of anxiety, post-traumatic stress disorder and higher levels of job-induced stress.[522] Yamada[523] refers to higher levels of psychological disorders due to bullying, while Yildiz[524] adds nervous breakdowns, panic attacks, depression, loss of confidence and self-esteem, reduced ability to concentrate, vagueness, lack of motivation, suicidal thoughts, feelings of hurt and burnout to the list. Hoel and colleagues[525] found that victims suffered from anxiety, depression, panic attacks, anger and loss of confidence as psychological symptoms. Anxiousness and low self-esteem have also been proven to be side effects.[526]

Leymann[527] and Vega and Comer[528] have also made the link between bullying and post-traumatic stress disorder[529] as one of its long-term effects. According to

[517] Yildiz 2007: 115.
[518] 2004: 368.
[519] 1994.
[520] As cited in Einarsen *et al* 2011: 25.
[521] Einarsen *et al* 2011: 25.
[522] 2012: 12.
[523] 2009: 531.
[524] 2007: 115.
[525] 2004: 368.
[526] Einarsen 2000: 388.
[527] 1996: 174.
[528] 2005: 106.

Mikkelsen and Einarsen,[530] PTSD is far more serious than depression, as sufferers continue to relive the bad experience, either in their dreams or thoughts or when they experience psychological distress, or tend to avoid the traumatic stimulus altogether. Of course, this is extremely problematic in a work environment where the bully cannot be avoided. Intense fear and feelings of helplessness or horror are known symptoms of PTSD. Research has shown that victims of bullying may suffer from PTSD even more than five years after they were bullied, which indicates that PTSD may be chronic, even if the sufferers were not exposed to physical harm, which usually leads to this disorder.[531] This is particularly important in the South African legal milieu when a decision has to be made about whether bullying is sufficiently covered by the South African Compensation for Occupational Injuries and Diseases Act[532] or the Occupational Health and Safety Act.[533]

Economic harm

In a 2010 USA workplace bullying survey under the auspices of the Workplace Bullying Institute, the Namies found that 41% of bullied women and 36% of bullied men had quitted their jobs, and that nearly 2,9 million Americans were able to ascribe their job losses to bullying.[534] In the difficult financial times experienced worldwide, this cannot be ignored. The researchers also noted that the "loss of professional status affects income by way of denied opportunities – promotion given to others, demotions used as punishment and rejection of earned vacation as well as other forms of paid time off".[535]

Lutgen-Sandvik and colleagues[536] probably best captured the essence of workplace bullying in noting: "Targets of bullying at work anticipate the workday with dread and a sense of impending doom. They steal through the workplace on a state of high alert, in anticipation of the next attack …"

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[529] Hereinafter referred to as PTSD.
[530] 20002: 88, 89.
[531] Mikkelsen & Einarsen 20002: 89.
[532] 130 of 1993.
[533] 85 of 1993
[534] 2011: 26.
[535] Namie & Namie 2011: 26.
[536] 2007: 838.

2.8.3 Negative effects of workplace bullying on the employer

Of course, organisations suffer too where bullying is prevalent. Once a hostile working environment has been established, bullying will affect optimal organisational functioning through loss of productivity, increase in absenteeism and the cost of intervention programmes.[537] Yildiz[538] refers to some employees' aggressive behaviour, their inability to manage their anger and tolerate criticism – all because of bullying. Bad relations between employees and loss of respect for managers and supervisors are not uncommon.[539] A decrease in performance and productivity, workdays lost due to bullying, and legal action taken against the employer complete this negative picture.[540] The Namies specifically refer to bullies who expose the organisation to litigation risks: In the USA, bullying has been noted to contribute to emotional stress,[541] with good people often "want[ing] out".[542]

Einarsen and colleagues[543] mention the major cost implications for the employer where bullying is left unchecked. This is in line with the International Labour Organisation's report on the cost of violence/stress at work and the benefits of a violence/stress-free working environment,[544] in which it was indicated that severe bullying had been linked to cases of post-traumatic stress disorder, which cost companies millions per year. In the space of one year, it led to more than 3 000 claims for compensation based on stress-related incidents in California, with health insurance of the individual rising by approximately 50%.[545] In 1993, the increase in health-care costs for the employer in the USA was established at 14%, and the employer's bill for employee social security insurance amounted to ECU 30,5 billion.[546,547] One disability management company in America recently estimated that

[537] Branch *et al* 2013: 14.
[538] 2007: 115.
[539] Yildiz 2007: 115.
[540] Yildiz 2007: 115.
[541] 2011: 33.
[542] Namie & Namie 2011: 33.
[543] 2011: 7, chapter 1.
[544] ILO 2000: 22.
[545] ILO 2000: 239,240.
[546] European currency unit replaced by the euro.
[547] ILO 2000: 42.

18% of all claims were based on psychological stress due to workplace bullying, most of which was perpetrated by a manager.[548]

Earlier work by Tepper[549] indicated that abusive supervision, akin to bullying, affected 13,6% of American workers and cost USA corporations an estimated $34,8 billion annually.[550] According to Vega and Comer,[551] bullying is often tacitly accepted by and in organisations, especially by their leadership, which can create an environment of "psychological threat" that diminishes corporate productivity and inhibits individual and group commitment. Heames and colleagues[552] reported in 2002 that the USA suffered a loss of $180 million per year due to time lost and lower productivity as a result of bullying. Namie and Namie[553] also refer to workdays lost by companies when victims take all their available annual leave, followed by sick leave. On average, this amounted to 149 days lost per claim.[554]

In addition, bullying leads to the turnover of the wrong people. In a bullying survey by the Namies in 2001 bullies themselves listed "independence of the victims" as well as their refusal to be or act subservient as main criteria in selecting certain individuals to bully.[555] This proves that bullying chases away the best and brightest employees as opposed to the so-called "expendable dollar".[556]

Griffin[557] conducted a study in Australia which showed that group bullying, or "incivility", had a negative effect on individuals' intention to stay in or leave their employment, and regarded group bullying as a form of "vicarious exposure"[558] of the individual to incivility in a group context. Griffin also found that retention of employees was both important and costly for organisations, and that there was a direct correlation between the intention of individuals to stay and actual turnover,[559] which

[548] Namie & Namie 2011: 35.
[549] Tepper 2007: 261.
[550] Tepper 2007: 262, with reference to Tepper, Henle & Lambert 2006.
[551] 2005: 101.
[552] Heames *et al* 2006: 348.
[553] 2011: 34.
[554] Namie & Namie 2011: 32.
[555] Namie & Namie 2011: 32.
[556] 2011: 32.
[557] Griffin 2010: 311.
[558] Griffin 2010: 310.
[559] Griffin 2010: 311.

stresses that the subjective intention of individuals, and not only actual resignations, needs to be managed.

Even society in general suffers from workplace bullying, in that alienation, disaffection and court involvement have both social and economic implications.[560] Companies who fail at addressing workplace bullying should take into consideration costs involved in absence due to ill health,[561] premature retirement, replacement costs, grievance and litigation compensation and costs, damage to equipment and production resulting from accidents and mistakes due to the ill effects of bullying, reduced performance/productivity and, lastly, the loss of public goodwill and reputation, as stated by Hoel and colleagues.[562]

Namie and Namie[563] mention the tarnishing of an organisation's reputation where bullying is rife, because it makes it harder to recruit good employees and, once branded in the USA as one of the "worst places to work", it becomes almost impossible to launch new initiatives, as employee trust and loyalty were eroded by having permitted bullying.[564] Generally, employees would become cynical, resentful or apathetic towards the company, which will have an equally negative effect on the company than unaddressed bullying and would expose the organisation to the risk of violence[565] due to its inability to keep its employees safe.[566]

2.9 Prevalence of workplace bullying

2.9.1 Background

Agtervold,[567] Tambur and Vadi[568] as well as Branch and colleagues[569] agree that prevalence figures would differ from one study to the next and one country to the next, due to cultural differences as well as differences in the definitions and

[560] Vega & Comer 2005: 107.
[561] Namie & Namie 2011: 34.
[562] ILO 2000: 42-44.
[563] 2011: 34.
[564] Namie & Namie 2011: 35.
[565] Namie & Namie 2011: 31.
[566] Namie & Namie 2011: 35.
[567] 2007: 164.
[568] 2012: 754.
[569] 2013: 2.

measuring instruments used. This view is supported by other scholars,[570] and prevalence figures should therefore merely serve as an indicator of the phenomenon and the problem faced by organisations. Workplace bullying, according to Cowie and colleagues,[571] has been identified as a serious issue in the workplace, and trade unions, professional organisations and human resources departments have all become more aware of the negative effects of bullying behaviour such as behaviours threatening professional status; belittling; humiliation; threats to personal standing, for instance name-calling and insults; isolation of the victim; overwork presented as undue pressure and impossible deadlines given, and destabilisation, such as failure to give credit where credit is due.[572]

There are two forms of measuring the prevalence of bullying, both of which have given rise to some controversy,[573] and both are also bound by human reaction, either relying on reports by humans as a subjective experience, or measured as objective behaviour[574] that breaches the agreed criteria of acceptable behaviour and constitutes harassment.[575] Einarsen and colleagues refer to the subjective element as targets' perceptions of their experience, as opposed to the objective experience, which needs to be validated or verified by third parties.[576]

It has been found that scores for bullying where the self-labelling of a bullying victim is required are lower than the prevalence figures of exposure to negative or so-called bullying acts, which of course needs to be kept in mind when prevalence figures are compared.[577] Fevre and colleagues[578] set out to gather international support for taking an integrated approach to the measuring of bullying, and identified three gaps in existing literature, namely:

- the lack of a representative sample of the population;
- the use of self-completed questionnaires or online surveys, which could lead to bias; and

[570] Strandmark & Hallberg 2007: 333; Cowie *et al* 2002: 24.
[571] 2002: 34.
[572] Cowie *et al* 2002: 34, 35.
[573] Salin 2001: 433.
[574] Agtervold 2007: 164.
[575] Visagie *et al* 2012: 64.
[576] Einarsen *et al* 2009: 26.
[577] Tambur & Vadi 2012: 757.
[578] Fevre, Robinson, Jones & Lewis 2010: 72.

- the use of the Negative Acts Questionnaire without testing the validity or reliability of the items tested.[579]

They proposed the use of qualitative data to refine survey questions and to improve the reliability and validity of the data.[580]

Despite criticism, Visagie and colleagues[581] argue that workplace bullying remains a mainly subjective perception, where the perception of bullying is a direct result of the meaning that the particular victim attaches to the experience. Einarsen[582] and Tepper[583] agree.

It is still debated in South Africa whether bullying is a dignity violation or a form of harassment, let alone whether a subjective or objective measuring instrument has to be used to measure its prevalence. However, bullies use their positions of power and prefer to work within the trappings of respectability, often "do[ing] their dirty work in secret".[584] Also, since likeminded people stick together, one is bound to find collusion in the workplace, as bullying cannot occur in a vacuum.[585]

It has been established that by means of the objective method, more employees will be found to have been exposed to bullying behaviour than with the self-reporting method.[586] The question remains whether objective criteria or only subjective experiences should be measured,[587] which makes it all the more important to be very careful when interpreting prevalence figures.

The Negative Acts Questionnaire[588] is a standardised, established measuring instrument that was developed and tested in the international arena by several legal scholars and authors, and can measure self-identification as well as the operational method of determining the prevalence of bullying.[589] There are also several other versions, such as the LIPT scale developed by Leymann, which measures bullying

[579] 2010: 71.72.
[580] Fevre *et al* 2010: 82.
[581] 2012: 64.
[582] 1999: 18.
[583] 2007: 264,265.
[584] Stalcup 2013: 1146.
[585] Stalcup 2013: 1145.
[586] Visagie *et al* 2012: 70.
[587] Agtervold 2007: 164.
[588] Hereinafter called the NAQ.
[589] Visagie *et al* 2012: 67; Einarsen, Raknes & Matthiessen 1994, as cited in Visagie *et al* 2012: 67.

over more or less a six-month period where the victims experienced at least one negative act per week during said period.[590] Agtervold, however, stresses that most prevalence figures are based on the victim's own reports, since bullying could occur unintentionally.[591] Currently, the NAQ, which was developed by Einarsen and colleagues, as well as the WB-C[592] are used to measure bullying.[593]

A European Union survey in 2006 indicated that 9% of workers in Europe (12 million) had been subjected to bullying in the 12 months prior to the survey.[594] Other studies indicated that between 5% and 10% of the European workforce reported bullying at work.[595] Statistics from Scandinavia showed a lower bullying rate of 3% to 4%, while Finnish and British studies revealed a higher rate of approximately 10%.[596] Bernstein[597] reported that up to 90% of employees in the USA suffered abuse in the workplace at some time, while the Namies indicated that 66% suffered abuse at the hands of their employers.[598] In their research, Branch and colleagues[599] reported that between 10% and 15% of the workforce in Europe had been exposed to bullying according to the most recent statistics. It is thus clear that prevalence figures should merely be regarded as an indication of the pervasive problem of bullying.

2.9.2 United States of America

At the time of a survey conducted by the Workplace Bullying Institute in the United States, 13,7 million adults were being bullied in that country.[600] Bullying has turned into an epidemic, according to the Namies, but despite the International Labour Organisation's declaration in 2006 that violence at work had reached epidemic levels, bullying as a form of workplace violence is still legal in America.

[590] Agtervold 2007: 164.
[591] 2007: 164.
[592] Fox & Stallworth 2005.
[593] Samnani & Singh 2012: 582.
[594] Von Bergen *et al* 2006: 16.
[595] Hoel *et al* 2010: 453.
[596] Vartia 1996: 214, as cited in Von Bergen *et al* 2006: 17.
[597] As cited in Von Bergen *et al* 2006: 16.
[598] As cited in Von Bergen *et al* 2006: 16.
[599] 1997-1998: 12. For further prevalence figures, see Zapf & Einarsen 2011, as cited in Branch *et al* 2013.
[600] Namie & Namie 2011: 35.

According to researchers such as Lutgen-Sandvik and colleagues,[601] a prevalence rate of nearly 50% have been reported, with at least 30% relating to bullying more than once a week. Bullying has also been found to be 20% more prevalent in the USA than in Scandinavia.[602] North America reported similar figures to those of Europe,[603] being between 5% and 10% of the population.[604]

2.9.3 United Kingdom

In 2000, Hoel and Cooper conducted a study that comprised 70 organisations with 5 288 individuals, and found that 10,6% of individuals reported having been bullied in the six months prior to the study, and 24,7% in the five years prior to the study.[605] Nielsen and colleagues[606] refer to the fact that every tenth employee in the UK will report exposure to bullying at work.

Between 3% and 4% of employees will suffer severe bullying, while 9% to 15% of employees may experience occasional bullying in Europe.[607] Between 10% and 20% of employees may occasionally experience negative behaviour, which may not necessarily conform to the definition of bullying, but is indicative of the same stressful working environment.

2.9.4 Australia

There are no specific reliable prevalence figures available for Australia, and no research data on bullying for the entire country.[608] Data reliability is complicated by several issues,[609] including a lack of national surveillance systems, culture

[601] 2007: 843.
[602] Lutgen-Sandvik *et al* 2007: 842-843.
[603] Branch *et al* 2013: 2.
[604] Einarsen *et al* 2011: 11, chapter 1.
[605] Ramsay *et al* 2011: 802.
[606] Nielsen, Matthiesen & Einarsen 2010: 955.
[607] Einarsen *et al* 2011: 89.
[608] Safe Work Australia 2013d: 6.
[609] Caponecchia & Wyatt 2011: 32.

differences, different understandings of workplace bullying, and both under-reporting and over-reporting.[610]

In a national survey in 2007, it was shown that 74% of new job seekers had allegedly been bullied at work in the past, and that 22% left their previous employment due to bullying. Another 25% said that they had been bullied in the six months prior to the survey, while more than 50% had allegedly been bystanders or witnesses to bullying.[611]

Of interest is that public-sector authorities in Australia have started to monitor workplace bullying as part of their regular staff surveys,[612] which is an idea from which South Africa could also benefit.

Caponecchia and Wyatt believe that, on average, 10% of employees are being bullied in Australia, which means that bullied employees thus constitute a large portion of the workforce, and rightly stress the importance of reliable data to ease interventions.[613] Recent research conducted by Safe Work Australia,[614] however, refers to prevalence figures ranging from 3,5% to 21,5%.[615] It seems as if 6,8% of employees were bullied at work in the six months prior to the survey, with 3,5% exposed to bullying for longer than that.[616]

In their report on workplace bullying, Safe Work Australia suggests that bullying statistics would not vary significantly if the Southern Australian states of Victoria and Queensland were incorporated into the surveys,[617] and it is generally accepted that the figures tendered above are an accurate estimate of bullying figures throughout Australia.

[610] Caponecchia & Wyatt 2011: 32.
[611] Caponecchia & Wyatt 2011: 33.
[612] Caponecchia & Wyatt 2011: 33.
[613] Caponecchia & Wyatt 2011: 34.
[614] Safe Work Australia 2013d: 6.
[615] Independent research was done through the National Hazard Exposure Worker (NHEW) surveillance survey, the Australian Workplace Barometer (AWB) project, the Personality and Total Health (PATH) through Life project, the People at Work (PAW) project, the Productivity Commission of 2010, and the State of Service survey run annually by the Australian Public Service Commission. All of the above culminated in Safe Work Australia 2013d.
[616] Safe Work Australia 2013d: 6.
[617] Safe Work Australia 2013d: 6.

2.9.5 South Africa

The most recent study by Visagie and colleagues used the NAQ to measure bullying in a South African mining company, and found that 27,7% of employees reported having been bullied over the six-month period prior to the study; thus, one out of 10 reported themselves as having been victims of bullying in the workplace.[618] Almost 29% of employees reported having been bullied in the five years prior to the study, which shows a clear increase in prevalence.[619] This is in line with the international experience as found by Hoel and Cooper.[620]

In terms of witness bullying, 46,5% of employees reported having witnessed bullying, which relates to the figure of one out of every two employees who confirmed having been exposed to bullying at work as a witness.[621] The numbers increased dramatically when the prevalence of bullying was measured by means of the objective method. and 39,6% of participants reported at least one negative act on a weekly basis, which is more than the 15% expected based on the guideline set by Mikkelsen and Einarsen in 2001.[622]

2.9.6 Other jurisdictions

In Turkey, it was found that 47% of highly educated employees reported having been psychologically bullied.[623] Nielsen and colleagues[624] mention a bullying rate of 51% in Turkey, while prevalence levels of 22% were reported Spain. An ILO study in 2002 found that 800 000 employees had been victims of bullying.[625] In Iran, it was found that 40% of staff had been bullied, while 68% observed bullying over a two-year period, 68% of whom suffered from post-traumatic stress disorder.[626]

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[618] Visagie *et al* 2012: 68.
[619] ILO 2000.
[620] ILO 2000.
[621] Visagie *et al* 2012: 69.
[622] Visagie *et al* 2012: 69, with reference to Mikkelsen & Einarsen 2001.
[623] Yildiz 2007: 125.
[624] Nielsen *et al* 2010: 955.
[625] Namie & Namie 2011: 35.
[626] Gholipur *et al* 2011: 235.

According to Salin,[627] 8,8% of the respondents in Finland were bullied for an average period of 2,7 years. This confirms the pervasive and continuous nature of bullying. Two fifths of these reported managers as the perpetrators, a third were bullied by fellow colleagues, and a sixth by subordinates, thereby confirming the three kinds of bullying mentioned in this thesis, namely linear bullying (from superior to subordinate), lateral/horizontal (between co-workers) and upwards bullying (from subordinates to superior).

Salin also found that the numbers of observers or witnesses of bullying were very high at 30%, and that women were bullied more often than expected.[628] Public-sector employees reported a higher incidence of bullying than the private sector.[629] This could be explained by the finding of Strandmark and Hallberg,[630] namely that the double hierarchy of politics and professional leadership in public-service organisations possibly fuels the typical struggle for power in the workplace, which may then escalate to bullying.

2.10 Defining "workplace"

2.10.1 United States of America

The Supreme Court of Appeal defined the term 'workplace' in *Dennis M O'Connor et al v M J Ortega*[631] as being "those areas ... that are related to work and are generally within the employer's control".

In *Dennis M O'Connor et al v M J Ortega*,[632] it was stated that the workplace included "those areas that are related to work and are generally within the employer's control,"[633] and in a hospital, would include the cafeteria, hallways, offices, desks and file cabinets, even if the employee placed personal items in them.[634] Even a bus

[627] 2001: 435.
[628] Salin 2001: 435.
[629] Salin 2001: 435.
[630] 2007: 338.
[631] 480, U.S 709, 107 S.Ct 1492 715.
[632] 480 U.S. 709, 107 S.CT 1492.
[633] *Dennis M O'Connor et al v Magno J. Ortego* 480 U.S. 709, 107 S.CT 1492 175,176.
[634] *Dennis M O'Connor et al v Magno J. Ortego* 480 U.S. 709, 107 S.CT 1492 175,176.

owned by a transportation company that carried people to a casino was found to be a workplace of the bus driver in *M Gibbs v Shuttelking, Inc.*[635]

2.10.2 United Kingdom

In the UK, a legal definition for workplace is found in the Income Tax Earnings and Pensions Act of 2003.[636] This act differentiates between a temporary and a permanent workplace, both referring to a place at which the employee's attendance is necessary for the performance of his or her duties.[637] A temporary workplace is broadly defined as a place "which the employee attends in the performance of duties for the purpose of performing a task of limited duration or for some other temporary purpose".[638] A permanent workplace is defined as a place "the employee regularly attends in the performance of the duties of employment and is not a temporary workplace",[639] "if it forms the base from which those duties are performed or the tasks to be carried out in the performance of those duties are allocated there".[640] Interestingly, "a place is not regarded as a temporary workplace if the employee's attendance is

(a) in the course of a period of continuous work at that place-
    (i) lasting more than 24 hours, or
    (ii) comprising all or almost all of the period for which the employee is likely to hold the employment, or

at a time when it is reasonable to assume that it will be in the course of such period".[641]

This seemingly broad definition was confirmed by that provided in the *Brown* versus East Lothian Council case,[642] which referred to regulation 2(1) of the Workplace

[635] 162 S.W.3d 603: 613 par 29.
[636] Hereinafter referred to as ITEPA.
[637] ITEPA, s 339 (1).
[638] ITEPA, s 339(3).
[639] ITEPA, s 339(2).
[640] ITEPA, s 339(4).
[641] ITEPA, s 339(5).
[642] *Brown v East Lothian Council* 2013 S.L.T. 721 par 14.

(Health and Safety and Welfare) Regulations[643] in defining 'workplace' as "... any premises or part of premises which are not domestic premises to which such person has access while at work and … any room, lobby, corridor, staircase, road or other place used as a means of access to or egress from that place of work or where facilities are provided for use in connection with the place of work other than a public road"

No legal definition for workplace could be found in the Protection from Harassment Act of 2007, but section 226 A(21) of the Trade Union and Labour Relations (Consolidated) Act of 1993 defines workplace as the place where an employee works:

(a) "in relation to an employee who works at or from a single set of premise, those premises and
(b) in relation to any other employee, the premises with which his employment has the closest connection".

2.10.3 Australia

In South Australia, section 8 of the Work Health and Safety Act of 2012 broadly defines a workplace as follows:

(1) "A workplace is a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.

(2) In this section—

place includes—

(a) a vehicle, vessel, aircraft or other mobile structure; and

(b) any waters and any installation on land, on the bed of any waters or floating on any waters."

[643] 1992 9 SI 1992/3004, regulations 5 & 12.

2.10.4 South Africa

In a South African context, a workplace is not only the place where work is done. In *Biggar v City of Johannesburg, Emergency Management Services*,[644] the Labour Court found that racist abuse at a residential complex controlled by the employer was sufficient reason to dismiss the respondent, and the fact that the discrimination had not occurred in the physical workplace was found to be immaterial and it was stressed that the employer's duty extended to the entire residential complex under its control.

Workplace is defined as follows in section 213 of the Labour Relations Act:[645]

> (a) in relation to the public service-
>
> (i) for the purposes of collective bargaining and dispute resolution, the registered scope of the Public Service Co-ordinating Bargaining council or a bargaining council in a sector in the public service , as the case may be: or
>
> (ii) for any other purpose, a national department, provincial administration, provincial department or organisational component contemplated in section 7(2) of the Public Service Act, 1994, or any other part of the public service that the Minister for Public Service and Administration, after consultation with the Public Service Co- coordinating Bargaining Council, demarcates as a workplace …
>
> (c) in all other instances means the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where the employees work in connection with each independent operation, constitutes the workplace for that operation".

Section 1 of the Basic Conditions of Employment Act[646] also defines a workplace as any place where an employee works, which is also fairly broad.

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[644](2011) 20 LC 6.12.1, reported as [2011] 6 BLLR 577 (LC) par 20.
[645] 66 of 1995.
[646] 75 of 1997.

It is suggested that the respective definitions of "workplace" be accepted as is since every jurisdiction seems to carry their own definition, taking into account their own culture and legalities and are no suggestions made to alter these definitions for the purpose of dealing with workplace bullying.

2.11 Workplace bullying and sexual harassment

It is virtually impossible to deal with workplace bullying without referring to the development of sexual harassment law in the international arena. Salin[647] stresses that bullying shows many similarities with sexual harassment, although the so-called "sexual element" is absent. Sexual harassment and bullying often overlap due to organisational power differences that are rooted in societal power differences.[648]

In Scandinavia, sexual harassment is seen as a specific form of bullying, while in work harassment, sexuality is used as a means of oppression.[649] As far back as 1995, Halfkenny referred to sexual harassment in South Africa as a barrier to women's equality, and cited the then Interim Constitution, which guaranteed every person the right to privacy and respect for, and protection of, his or her dignity, "arguably guaranteeing the right to be free from unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work".[650] It is trite law that these principles also found a home in the final 1996 Constitution.

Victims of sexual harassment, much like victims of bullying, suffer psychological problems, physical problems, stress, lost time at work and economic harm as a result,[651] and the fact that the negative effects of sexual harassment (even it if translated into the bullying milieu) are less visible than, for example, the effects of toxic chemicals does not make it less debilitating.[652]

[647] 2003: 1216.
[648] Salin 2003: 1219.
[649] Einarsen 2000: 380.
[650] Halfkenny 1995: 1.
[651] Halfkenny 1996: 4
[652] Halfkenny 1996: 224.

As in bullying cases, the perpetrator, being male or female, is usually in a position of power or authority, and laws, policies and collective agreements may or may not cover harassment by customers and clients.[653]

The original legal approach to sexual harassment was also fragmented, in that it was either covered by equal-opportunity legislation, was specifically prohibited, or dealt with under labour legislation, while in some countries, it was seen to be a violation of criminal statute, tort or treated as a delictual misconduct or even as unfair dismissal.[654] This also reflects the current problem in dealing with bullying behaviour.

In the United States, sexual harassment is not defined by federal law, although the USA was the first country to have recognised sexual harassment. It is however recognised as a form of discrimination based on sex under Title VII of the Civil Rights Act of 1964.[655]

The federal government of Canada promulgated a Human Rights Act, which established a Human Rights Commission to deal with sexual harassment cases involving federal government employees or those in a federal undertaking. Every province and territory has its own Human Rights Commission and separate codes, which prohibit discrimination based on sex. In those provinces where it is not prohibited *per se*, the general prohibition is wide enough to prohibit sexual harassment.[656]

In *Janis Blackmon v Wal-Mart Stores East*,[657] it was found, as in many bullying cases, that when the employer has a sufficient policy in place and immediately took the necessary steps once they became aware of the sexual harassment, the employer's remedial action was sufficient to avoid liability. In this case, for example, the perpetrator was dismissed within two weeks after the employer had become aware of the sexual harassment. The Canadian Labour Code also imposes an affirmative duty on employers to ensure a sexual harassment-free workplace,[658] as

[653] Halfkenny 1996: 4.
[654] Halfkenny 1996: 5.
[655] Halfkenny 1996: 6
[656] Halfkenny 1996: 8.
[657] 358 Fed. Appx.101: 2009 U. S. APP Lexis 29349: 108 Fair Empl. Prac.Cas. (BNA) 145[1].
[658] Halfkenny 1996: 9.

does the South African Code of Good Practice on the Handling of Sexual Harassment Cases.[659]

It is interesting that the South African legislature chose to develop the aforementioned code of good practice, imposing an affirmative duty on employers to ensure a workplace free of sexual harassment, rather than utilising occupational health and safety legislation, which provide for the health and safety representatives' duties to, among others, identify potential hazards, investigate employee complaints relating to health and safety matters, and make representations on these aspects.[660] These functions, according to Halfkenny,[661] can assist in the prevention of workplace harassment. In countries such as Namibia, Zimbabwe and Lesotho sexual harassment is explicitly covered under labour law, or allow for an interpretation that would deal with sexual harassment as a form of discrimination,[662] while the European community relies on a code of good practice prohibiting sexual harassment in the workplace.[663]

In *Ntsabo v Real Security CC*,[664] appeal judge Pillay remarked that sexual harassment is often seen as a form of sexual discrimination, but that the "debate is still raging … without clear persuasive direction".[665]

No real reason could be found as to why the legislature specifically decide to deal with sexual harassment separately from other forms of harassment. Surely, racial and other types of harassment cannot be seen as less important; yet, no separate statistics are being held for any other type of harassment in South Africa. The development of a separate code dealing with sexual harassment cannot be ascribed to a specific need, nor can it be explained legally, and it is therefore assumed that the code was developed in line with an international movement to address sexual harassment. It may be argued that the generally subordinate position of females in South Africa gave rise to the legislature's decision to deal with sexual harassment separately. On the other hand, men can also be sexually harassed, as could the

[659] GN 1357, GG 27865 dated 4 August 2005.
[660] Occupational Health and Safety Act 85 of 1993, s 8(2).
[661] Halfkenny 1996: 224.
[662] Halfkenny 1996: 13.
[663] Halfkenny 1996: 11.
[664] (2003)24 ILJ 2341 (LC) 2376.
[665] *Ntsabo v Real Security CC* (2003) 24 ILJ 2341 (LC) 2377.

disabled. This, therefore, does not in itself present a valid reason why sexual harassment is treated so differently in the South African legal dispensation in the absence of separate statistics being held.

Returning to workplace bullying, however, the question remains as to what South Africans aim to do about it, especially in view of the active drive worldwide to ensure bully-free workplaces. The next chapter will deal with the legal position pertaining to workplace bullying in the USA as one of the chosen foreign jurisdictions in this thesis to help guide South Africans towards a solution.

CHAPTER 3: LEGAL PERSPECTIVES ON WORKPLACE BULLYING IN THE UNITED STATES OF AMERICA

3.1 Introduction and background

"Like it or not, intended or otherwise, American law casts a giant shadow over international commercial affairs",[1] hence the choice of the American legal position on workplace bullying as one of the comparative jurisdictions studied in this thesis. However, despite the apparent plethora of potential legal avenues to be explored by the targets of workplace bullying in the American legal dispensation, none seems to be reliably able to advance the goals of prevention, adequate compensation, dispute resolution and punishment.[2]

This chapter is discussed in great length as this jurisdiction has tended to the phenomenon of workplace bullying for many years, without managing to get legislation accepted on a Federal or State basis. The language did not pose problematic as did several of the foreign jurisdictions where legislation had been passed such as in the Northern hemisphere.

Much has been written in the past 20 years about employees being bullied by employers, but lately, the question has been posed as to why organisations are so slow to react in preventing this kind of behaviour, and even whether it is necessary to cater separately for it. Part of the answer, according to Sidle,[3] is that companies tend to take a band-aid approach, trying to contain the harm after the fact. Although the phenomenon of workplace bullying and the underlying behaviour and the harm it causes[4] have been around for a long time, the concept of workplace bullying really only entered the American vocabulary in the late 1990s.

Yamada believes that the targets of workplace bullying in the American legal system are without effective redress, apart from being able to bring their claims of mistreatment based on a protected-class status suit or the uneven mix of common-law/tort remedies available, which do not promise adequate relief.[5] As stated by

[1] Bonfield 2006: 1.
[2] Yamada 2004a: 498.
[3] Sidle 2009: 89.
[4] Yamada 2004a, with reference to Bassmann 1992.
[5] Yamada 2004a: 498.

Lippel,[6] the mere naming of the phenomenon itself is controversial, let alone its prevention and the granting of relief. Mobbing, or bullying as it is otherwise known, results in symptoms characterised as stress-related health diseases, and many of the defining symptoms are associated with anxiety disorders, clinical depression and post-traumatic stress disorder.[7] Bible agrees that, thus far, the legal system has been inadequate not only in defining bullying behaviour, but also in preventing it and compensating its victims.[8] Not only do employees suffer at the hands of bullies,[9] but employers are known to pay up to $350 000 per case for litigation costs related to workplace bullying. Even in the medical fraternity, it has been shown that disruptive behaviour can foster medical errors, which is why a new leadership standard (LD.03.01.0) has been instituted dealing explicitly with disruptive and inappropriate behaviour, for medical organisations to retain their accreditation.[10]

Employers are not sufficiently encouraged to deal with workplace bullying, and the consequent minimal fear of being held responsible should it occur leads to the conclusion that separate legislation is needed to respond to serious bullying. For this reason, Yamada[11]developed the Healthy Workplace Bill.[12] In the preamble to this bill, it is clearly stated that it aims to promote the primary policy objective of preventing workplace bullying as well as affording compensation to its victims.[13] Considering that bullying is characterised by a desire to control the target as well as deliberate and repeated mistreatment, it in fact encompasses all types of misconduct.[14]

For purposes of this chapter, bullying is defined as “the repeated, malicious, health-endangering mistreatment of one employee … by one or more employees or employer/s”.[15] As in chapter 2, the terms ‘target’ and ‘victims’ will be used interchangeably.

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[6] Lippel 2010-2011: 1.
[7] Browne & Smith 2008: 133.
[8] Bible 2012: 32.
[9] Bible 2012: 36
[10] Joint Commission 2008.
[11] Yamada 2004a: 498-520.
[12] Hereinafter referred to as the HWB.
[13] Yamada 2004a: 498.
[14] Bible 2012: 33.
[15] Yamada 2004a: 476, with reference to Namie & Namie 2003: 111. The Namies played a central role in introducing the term ‘workplace bullying’ to the USA, and their institute, the Workplace Bullying and Trauma

This chapter aims to provide an elaborate discussion of the background and content of the American legal system, primarily to illustrate the vast differences compared to other jurisdictions. This will then serve as background for the evaluation of existing legal mechanisms to combat workplace bullying in the USA. The common-law position and tort law will be discussed, as well as occupational health and safety mechanisms. Emphasis will be placed on the common-law remedies available to targets of workplace bullying, as well as the possible successor failure of claimants.

The chapter will also provide a discussion on the statutory remedies available to targets of workplace bullying, assessing their pros and cons. Both federal and state law will be examined, and the rights and obligations of employers in terms of legislation as well as certain lacunae will be outlined. Court cases will be cited to draw attention to the disparities between different states, which would influence the success of claims brought for workplace bullying by targets/victims in various states.

Other possible means to combat bullying, such as ethics, the role of the organisation and internal policies drafted, will be examined, as well as culture changes. Although these potential anti-bullying measures may not be seen as having a legal origin, they are an important part of the prevention of this phenomenon.

Finally, the HWB will be discussed as a possible remedy and preventative measure in respect of workplace bullying, including the views of both supporters and critics of the bill. Thus far, 21 states have introduced the HWB, and although no laws had been enacted at the time of writing this thesis, the fact that the bill was still active in 2012[16] indicates the seriousness with which it has been received.

3.2 The legal system in the United States

The highest source of law in the USA is the Constitution of the United States of America, as well as laws and treaties of the USA adopted for ratification and enactment – together, these are called the supreme law of the USA.[17] The equal-protection clause of the Constitution of America of 1964 primarily regulates all the

Institute, has been the leading organisation in educating employee advocates, policy makers and the general public on the importance of legal reform pertaining to this phenomenon.

[16] Bully-Free Workplace http: //www.bullyfreeworkplace.org/id7.html (accessed on 4 March 2013).

[17] Bonfield 2006: 21.

principles of fairness, and subsequent legislation must be interpreted in light of it. Federal law prohibits workplace harassment when it is based on a legally protected trait such as race, and states must take corrective action when employees are being taunted based on such a protected trait.[18]

Federal law is admittedly regarded as supreme, and only the Constitution can limit its scope. Federal law is often referred to as the legislature of the state.[19] The embodiment of the legislature is to be found in Congress and their respective powers. Federal government, however, merely possesses the powers allocated to it via the Constitution.[20] It is stated that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people".[21]

The president of the United States is the only politician who can claim a mandate from the so-called 'people', but cannot make the law; he merely executes it.[22] States are thus allowed to make their own laws where there is no federal law and the subject matter does not fall within the realm of federal law. States may therefore enact their own laws if those laws afford employees better working conditions than those provided for in federal law, or as stated above only in the absence of federal law.[23]

There is a strong movement to garner support in states for the adoption of anti-bullying bills, which centre around the creation of remedies that combine much of common-law tort theory with statutory law concerning harassment based on protected-class status.[24] As yet, however, there is no uniform approach to anti-bullying mechanisms.

The common law, derived from English law, finds application in all states bar one, Louisiana, and thus also serves as a source of law. According to the *Michigan Bar Journal*, "American employment law grew out of the medieval English common law

[18] Martucci & Sinatra 2009: 78.
[19] Bonfield 2006: 21.
[20] Tenth Amendment.
[21] Tenth Amendment.
[22] Bonfield 2006: 41.
[23] Martucci & Sinatra 2009: 78.
[24] Einarsen *et al* 2003: 410.

of master and servant,"[25] which implies that contracts entered into lasted for a year (most probably to ensure that employees would stay on to harvest the crops) and that employees were not free to leave when presented with better offers. Employees enjoyed no legal protection upon dismissal: The employer could for example dismiss employees 11 months into the contract, without paying them anything. This rule was later relaxed and employees who got dismissed were paid for the work they had already done.[26]

The industrial revolution also revolutionised contracts of employment, and employment law became more impersonal and abstract, mirroring the law of contract, especially after the abolishment of slavery, which led to the 'at will' employment doctrine (sometimes referred to as the Wood's rule).[27] This doctrine specified that parties were free to agree to terms and conditions of contracts without protection granted to any party, as employers could hire and fire and employees could accept and quit jobs as they liked.[28] The general rule was based on the liberty to contract as one wished, which the courts protected religiously, striking down any attempt to regulate or set firm standards, except in case of an inherent occupational danger or where children and women were forbidden to work, as they were not at that time regarded as equal before the law.[29] Only by the late 19th century, the 'at will' principle started to elicit criticism, and courts started to respond[30] to the unequal bargaining power inherent in the employment relationship.

As Bonfield said, "the genius of judge-made law is directly related to the wisdom of judges",[31] and federal courts do hear both criminal prosecutions and civil disputes in the district courts, courts of appeal or the supreme court. A single judge rules on matters of the law in trials, although most criminal trials are heard by a jury, as provided for by Congress. A jury could conduct certain civil matters, although

[25] Touissant v Blue Cross 2009: 15.
[26] *Touissant v Blue Cross* 2009: 15.
[27] *Touissant v Blue Cross* 2009: 16.
[28] *Touissant v Blue Cross* 2009: 15.
[29] *Touissant v Blue Cross* 2009: 15.
[30] *Touissant v Blue Cross* 2009: 16.
[31] Bonfield 2006: 27.

interested parties may waive the right to trial by jury, in which case the judge will serve as the adjudicator on the facts and laws of the matter before him or her.[32]

The right to appeal is open to any final judgement in a federal court, and an appeal is made to one of the 12 regional courts of appeal. If the appeal is granted, it would be heard in one of the regional courts of appeal, as the 94 district courts (stemming from the 94 judicial districts in the federation) are organised into circuits for the purpose of convenience and regional jurisdiction. Speciality courts[33] deal with specific matters, while the United States Supreme Court sits at the apex dealing with complex matters, where four judges could rule that a review is merited or when an important constitutional issue was raised by the parties.[34]

Of particular interest are the tort-law principles embedded in the USA, in that the law of torts would determine whether individuals should receive compensation from others for injuries sustained to their person and or property. Another way to describe torts would be to say that torts are civil wrongdoings that fall under private law, as would the law of contract – a domain largely regulated by the common law, as it deals with damages payable by the tortfeasor to the injured party; a form of remuneration with the purpose to reimburse the tort victim.[35]

Employment law[36] is a complex triad of federal, state and common law.[37] The concept of 'at will' employment merely entails both parties' broad rights of dismissal or resignation without notice to the other party in the absence of a contract to the contrary, but a strong union presence leads to better regulation of these employment relations, with "wrongful termination" now being recognised as a tort in some states[38] and health and safety matters regulated by both federal and state law. State-

[32] Bonfield 2006: 55.
[33] Intellectual property cases are heard by a special court of appeal for the federal circuit. Trade and industry cases are heard by a special court created by Congress, while jurisdictional matters pertaining to federal contracts and claims against the federal government are dealt with by specialty courts, as per Bonfield 2006: 55.
[34] Bonfield 2006: 55.
[35] Bonfield 2006: 114.
[36] Which will form the basis for most of this thesis, because of its relevance to workplace bullying, harassment and discrimination laws in employment.
[37] Bonfield 2006: 217.
[38] Bonfield 2006: 218,219.

administered schemes provide alternative relief in the form of compensation to employees injured at work.[39]

This is an easier route to follow than normal civil remedies, in that injured employees do not need to prove either employer negligence or their own duty of care.[40] Incapacitated employees may claim from benefit schemes (which are not compulsory to offer to employees) or from the compulsory contributions made to social security schemes. Research has shown that the vast majority of cases based on discrimination in the workplace lead to actual or perceived psychiatric disability.[41] Victims tend to be highly qualified and their performance ratings were consistently above average or high over long periods of time, with only a few cases reflecting behaviour compliant with mental illness stereotypes.[42]

Employment discrimination law is a dynamic area of labour law in the USA, and Title VII of the Civil Rights Act of 1964, supplemented by the subsequent 1991 legislation, covers all employers with more than 15 workers, prohibiting discrimination against workers on specific, listed grounds, namely race, colour, religion, gender (although no specific mention is made of sexual orientation)[43] and national origin.[44] Thus, there seems to be a statutory lacuna in cases where employers employ fewer than 15 employees.

The Age Discrimination in Employment Act[45] protects employees against discrimination based on age, while the Americans with Disabilities Act[46] prevents employers from discriminating against workers based on "physical or mental impairments" if they would otherwise be qualified workers. Of note here is the notion that discrimination in itself is prohibited, with no reference to *unfair* discrimination like in South African labour law. Also, the word 'employee' is rarely used.

The American legal system prefers the word 'worker' in a labour law context. Back-pay, reinstatement and prospective pay may be awarded where discrimination had

[39] Bonfield 2006: 219.
[40] Bonfield 2006: 219.
[41] Stefan 1998: 797,800.
[42] Stefan 1998: 797,800.
[43] Bonfield 2006: 220.
[44] Bible 2012: 40.
[45] 29 U.S.C § 621 (2011).
[46] 42 U.S.C §12101 (2011).

been found after first having utilised the administrative remedies, excluding instances where intent to discriminate can be proven, in which instance the commissions created to evaluate the merits on claims of discrimination could proceed to either state or federal court.[47]

Generic harassment, which would include workplace bullying, is not specifically covered by federal law, and in *Oncale v Sundowner Offshore Services Inc.*,[48] the Supreme Court warned that transgressions under Title VII of the Civil Rights Act of 1964[49] do not purport to set in motion a general anti-bullying or so-called "civility code" for the American workplace. Criminal transgressions could be adjudicated by either federal or state law.[50]

There seems to be a clear link between criminal and tort law,[51] because wrongful acts could be both in tort and criminal. As in most countries, the burden of proof is much higher in criminal cases than in civil cases, and a person could be acquitted of a crime, but be required to compensate in tort.[52]

One of the problems regarding workplace bullying is the wide range of terms used to refer to workplace bullying.[53] In the absence of a single, uniform definition, this study had to incorporate concepts of workplace bullying, including though not limited to workplace incivility,[54] emotional abuse,[55] mobbing,[56] workplace harassment[57] and psychological violence.[58] The question may be raised whether all this attention is warranted for a problem that is sometimes regarded as social rather than legal. Yet, 263 articles about workplace violence appeared between 1987 and 1996, 83% of which were published between 1994 and 1996 – not to mention the array of

[47] Bonfield 2006: 221.
[48] 523 U.S.75, 118 S. Ct.1998.
[49] 42 U.S.C. §§ 200 (e). Et seq.
[50] Martucci & Sinatra 2009: 78.
[51] Bonfield 2006: 117.
[52] Bonfield 2006: 117.
[53] As referred to in chapter 2.
[54] Samnani & Singh 2012: 582.
[55] Keashly 1998: 85.
[56] Einarsen *et al* 2003: 3.
[57] Einarsen *et al* 2003: 1.
[58] Hoel & Einarsen 2010: 31.

textbooks devoted to this problem as well as the sensational media reporting on workplace violence in the USA specifically.[59]

3.3 The legal position pertaining to workplace bullying

3.3.1 Introduction and background

Drs Gary and Ruth Namie coined the term 'workplace bullying' in the USA and laid the foundation for the Workplace Bullying Institute.[60] Bible found that workplace bullying consists of deliberate and repeated mistreatment of a target (victim), which is driven by a need for control over the target and includes all types of mistreatment at work.[61] Bullying in the USA is regarded as a form of interpersonal aggression or hostile, anti-social behaviour in the workplace.[62] Of importance here are two aspects: firstly, that a single incident of mistreatment at work cannot be regarded as bullying at work, and secondly, that the element of intent is needed for the behaviour to be interpreted as bullying in the USA.

In an earlier definition by the Namies, the element of intent does not refer to the actions as such, but to their effects: "Workplace bullying 'is the deliberate, hurtful and repeated mistreatment of a target (the recipient) by a bully (the perpetrator) … as long as the actions have the effect, intended or not, of hurting the target (if felt by the target)'."[63] There is far lesser emphasis on the perpetrator's intent than on the target's subjective perception,[64] and there are clear suggestions that the law as such offers an insufficient set of comprehensive remedies to prevent and remedy workplace bullying.[65]

The question of intent has been a prominent issue in the search for a description of the notion of workplace bullying.[66] Equally so has the question been raised whether a single incident could be regarded as workplace bullying. Samnani and Singh

[59] Neuman & Baron 1998: 392.
[60] Hereinafter referred to as WBI.
[61] Bible 2012: 33, and with reference to Namie 2000.
[62] LaVan & Martin 2008: 148.
[63] Einarsen *et al* 2003: 33, with reference to Namie & Namie 2000.
[64] LaVan & Martin 2008: 148.
[65] LaVan & Martin 2008: 147.
[66] Also see chapter 2 of this thesis.

believe that even a single incident of workplace bullying could lead to post-traumatic stress, as the incident is relived in the victim's mind, and could progress from victim to perpetrator in certain circumstances.[67] Hence, workplace bullying could possibly comprise a single deed. From a practical perspective, it is argued that one person could also commit a single deed towards multiple victims.

In the following discussion, the Namies' definition will prevail, coupled with the view that emotional abuse is but another term for workplace bullying.[68] Bullying is characterised by hostile verbal and non-verbal behaviour directed at a person in such a way that the target's sense of him or herself as a competent person and worker is negatively affected.[69] Fisk calls it humiliation.[70]

From the literature, it is clear that the modern American workplace is a fertile breeding ground for bullying. Bible[71] supplies five reasons for this. Firstly, the growth of the service sector to over 70% of the economy has caused a tremendous increase in face-to-face and voice-to-voice interaction, which has in turn led to the increased surfacing of personality differences, especially considering economic pressures.[72] Secondly, the global marketplace requires greater outputs with fewer resources, which allows "natural bullies" to thrive in their "natural state".[73] Thirdly, the decline in union membership in the USA has made the balance of power tip in favour of employers in the absence of a proper balancing of the scales regarding power. In the fourth instance, increased diversification of the workplace,[74] if not managed well, could encourage workplace bullying. Finally, Bible agrees with Yamada's view,[75] namely that as the more traditional working relationship has given way to more part-time work, along with the accompanying lack of loyalty to one employer that characterises contingent work, the American workplace has become more susceptible to bullying.

[67] Samnani & Singh 2012: 583.
[68] LaVan & Martin 2008: 148 also refer to workplace bullying as mobbing, employee abuse, workplace aggression, victimisation, interpersonal defiance, social undermining and workplace incivility.
[69] Keashly 1998: 86; Namie & Namie 2004: 315.
[70] Fisk 2001-2002: 77.
[71] Bible 2012: 35.
[72] Sanders, Pattison & Bible 2012: 3.
[73] Sanders *et al* 2012: 3.
[74] Sanders *et al* 2012: 4
[75] Yamada 2013.

The effectiveness of prevention, punishment, relief/compensation and restoration in respect of the bullying victim as well as self-help possibilities all need to be investigated, in the absence of federal legislation. For want of legislative or judicial causes of action, targets need to fit their claims and dissatisfaction into existing legal categories,[76] which is exactly where the problem lies.[77] Employees in the USA were successful in a mere 15% of cases brought on grounds of workplace bullying, mainly because of the stringent requirements to prove the exacting elements of their claims.[78]

An easy route to follow from a legal point of view would be to institute criminal action where the bullying is of such a nature that a physical attack is imminent. However, more often than not, workplace bullying is much more subtle[79] and the tort of assault will not afford relief, no matter how obnoxious the behaviour.[80] This, however, does not remove the employer's responsibility for correcting and preventing bullying, as employers determine the size and composition of the workforce, the culture of the workplace and every aspect of the working environment.[81]

There are many definitions and terms for workplace bullying in the USA,[82] but the most favoured definition seems to be the one developed by Yamada that led to the development of the HWB, which is meant to assist legislatures in drafting anti-bullying legislation.[83] Yamada defined workplace bullying as follows: "Abusive conduct is conduct that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests."[84] In considering whether abusive conduct is present, a trier of fact should weigh the severity, nature and frequency of the defendant's conduct. Abusive conduct may include though is not limited to "repeated infliction of verbal abuse, such as the use of derogatory remarks, insults and epithets; verbal or physical conduct that a reasonable person would find threatening, intimidating or humiliating, or the gratuitous sabotage or undermining of

[76] Bible 2012: 37.
[77] Sanders *et al* 2012: 4.
[78] Bible 2012: 37.
[79] Kaplan 2010-2011: 145.
[80] Bible 2012: 37.
[81] Namie & Namie 2009a: 207.
[82] Kaplan 2011: 144.
[83] Kaplan 2011: 144.
[84] Yamada 2004a: 499.

a person's work performance". A single act would normally not constitute abusive conduct, but an especially severe act may.[85]

Certain time limits have been allocated to instances of workplace bullying, and according to Meglich-Sespico and colleagues,[86] bullying is associated with long-term, persistent torment that is intended to "wear down" the target. Researchers such as Leymann[87] have adopted a six-month period of misbehaviour as a yardstick to indicate bullying. The Namies[88] even went as far as to attach a time limit of roughly 22 months to negative and abusive behaviour before it could be labelled workplace bullying.

There are two schools in the USA: those who argue that existing legal avenues are sufficient to cater for the bullying victim and that interpersonal conduct should not be regulated,[89] and those who campaign for separate legislation due to the specific nature of workplace bullying.[90]

Those opposing separate legislation believe that legislating bullying, being human behaviour, would be far too paternalistic,[91] will involve unnecessary governmental control and interference in the workplace, and will lead to a plethora of legislation.[92] Supporters of separate legislation argue that the HWB is not a new concept introduced into law, but simply adopts the embedded principles for a Title VII claim, acknowledged by the Supreme Court of the USA, however removing the requirement that the conduct must be based on a protected trait, such as sex.[93] Proponents further argue that the existing law falls short of addressing the problem of deterring workplace bullying and affording real relief to targets.[94]

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[85] Yamada 2004a: 499. This is contrary to the Namies' opinion that a single act is not sufficient to constitute bullying. This contradiction will be further discussed later on. See Namie & Namie 2009b: 3, which states that bullying is "repeated, health-harming mistreatment of a person by one or more workers that takes the form of verbal abuse; conduct or behaviours that are threatening, intimidating or humiliating …".
[86] Meglich-Sespico *et al* 2007: 32.
[87] Leymann 1996: 166.
[88] Kaplan 2011: 145; Namie & Namie 2000: 6, where it is stated that bullying is rarely illegal. Harassment or discrimination not based on gender, race, age or any of the other Title VII Civil Rights Act protected-class categories is invisible to the eyes of the law in the US.
[89] Browne & Smith 2008: 149.
[90] Yamada 2004a: 499.
[91] Browne & Smith 2008: 149.
[92] Bible 2012: 44.
[93] Bible 2012: 44; Yamada 2010: 253.
[94] Bible 2012: 44.

It is argued that a lack of policy on the prohibition of workplace bullying encourages bullying behaviour. In the absence of punishment for the negative behaviour and coupled with the low success rate when using existing legal mechanisms, this could lead to the malicious psychological abuse of employees,[95] and should be prohibited.

It has been argued that specific workplace bullying law will create an influx of frivolous litigation;[96] that existing laws such as tort and discrimination law afford sufficient protection,[97] and that a separate legislative dispensation will interfere with a healthy competitive marketplace, and that protection against malicious, harmful mistreatment at work is contrary to high performance expectations for workers, which will represent a form of social Darwinism, activating a process of natural selection in which people who can excel will stay, while the others will perish in the working environment. Morris[98] argues that case law has shown that some states are effectively addressing workplace bullying via existing common-law remedies,[99] and that this is the route to be followed rather than creating new legislation: "[D]eveloping a legislative remedy may be neither realistic nor appropriate. Given the current economic backdrop, state legislatures are unlikely to add anti-bullying liability to employers' regulatory burden."[100] This view is strongly rejected[101] by the campaigners for the HWB, and in January 2013, 23 states[102] introduced the bill, supported by active media campaigns.

Although there are numerous legal avenues to alleviate the negative effects of workplace bullying in the USA, none allows the active and proactive prohibition of such conduct. There is a clear distinction between *ex post facto* legal address based in common law, and redress afforded by statute. Meglich-Sespico and colleagues[103] have stated that if bullying targets believe that there is no effective way of getting relief from their organisations, they have little option but to resort to external sources

[95] Yamada 2010: 270.
[96] Davis 2008: 1-3.
[97] Morris 2008: 5.
[98] Morris 2008: 5.
[99] In *Raess v Doescher*, 883 N Ed. 2 d 790, 799 (Ind 2008), the Indiana Supreme Court awarded $325 000 for assault based on mere imminent fear. In *GTE Southwest, Inc. v Bruce*, 998 S.W2d 605, 613-614 (Tex 1999), an award was made based on intentional infliction of emotional distress after a supervisor had shouted at staff, and $275 000 was awarded to three plaintiffs.
[100] Morris 2008: 5.
[101] Van Dyck & Mullen 2007: 3.
[102] Namie 2013.
[103] 2007: 36.

to obtain relief. This points to a lack of an effective legal response and uniform approach.

Despite a strong push for separate legislation sparked by Yamada and his drafting of the HWB,[104] no legislation has been passed either federally or in states to prohibit or deal with workplace bullying. Although 23 states[105] have adopted some or other version of the bill, none of the proposed or tabled bills have been passed, despite pending legislation in another eight states.[106]

Based on 2007 statistics, the Namies estimated that 54 million American employees had been bullied at work, with another 19 million at risk of being bullied.[107] It can thus be regarded as a silent epidemic.[108]

In the absence of legislative or judicial cause of action for workplace bullying, however, targets have no choice but to try and fit the facts of their claims or cases into existing legal categories. In most cases, they have been unable to prove the exacting elements of their claims, which caused employers to win 73,3% of the time.[109] Title VII of the Civil Rights Act of 1964 has made it illegal to base employment decisions such as hiring, promotion or dismissal on employees' race, colour, religion, sex or national origin, with 'age' added to this list through the Age Discrimination in Employment Act of 1967.[110] Pregnant women[111] and those with disabilities[112] have subsequently gained protection under legislation, and courts have ruled that sexual harassment was a form of discrimination, although not specifically mentioned in Title VII.[113] None of the aforementioned acts cover traditional bullying cases.

The following sections will thus explore the existing mechanisms available to lodge claims of workplace bullying in the USA, and their feasibility.

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[104] Yamada 2004a: 498-504.
[105] Altogether 18 states have proposed legislation based on some or other version of the HWB, according to Bible 2012: 42. According to the HWB website, 21 states have proposed various versions of the HWB in March 2013.
[106] Kaplan 2011: 160.
[107] Namie & Namie 2009b: 5.
[108] Namie & Namie 2009b: 5.
[109] Bible 2012: 37.
[110] Vega & Comer 2005: 105.
[111] Pregnancy Discrimination Act 97 of 1978.
[112] Americans with Disabilities Act 1990.
[113] Vega & Comer 2005: 105.

3.3.2 Criminal law and workplace bullying

Criminal acts are more frequently prosecuted under state law than under the federal system, although numerous instances exist where the criminal conduct concerned fall within the domain of both state and federal crimes.[114] The type of offence often dictates whether the crime will be heard by the state, which will have its own criminal law embodied in a criminal code, often adopted from the Model Penal Code.[115] Criminal liability calls for an act (or sometimes even an omission if there was a legal duty to act), accompanied by a blameworthy state of mind, and the *actus reus* must have been made with *mens rea*; the act must have been voluntary, and intent should be clear.[116] Most negligent conduct is not criminalised, with the exception of negligent homicide.[117]

Bullying, on the other hand, lies on a continuum "anchored by on-the-job incivilities on the one end and physical violence on the other".[118] The difference between felonies and misdemeanours was created by the common law, with felonies punishable by death, and misdemeanours by some or other form of corporal punishment.[119]

The government's prosecutor has to prove *actus reus* and *mens rea* beyond a reasonable doubt, which is a very high burden of proof and not always suitable for claims pertaining to workplace bullying, and affirmative defences[120] could be raised, which are to be proven by the person who raises them.

The question may be asked as to why a discussion on the criminal law of the USA is embarked on as part of a study of workplace bullying. Often, however, workplace bullying could be of such a serious nature that it could be prosecuted under criminal law, such as where the bullying manifests itself physically or as a threat. It is important to note that physical intimidation and/or contact are bullying behaviours,

[114] Bonfield 2006: 229.
[115] Bonfield 2006: 229.
[116] Bonfield 2006: 231.
[117] Bonfield 2006: 231.
[118] Von Bergen *et al* 2006: 14.
[119] Bonfield 2006: 233.
[120] This relates to criminal liability, and the defendant acknowledges the commissioning of the crime, but contends that additional facts will exonerate the defendant, for example self-defence, insanity, duress, necessity and entrapment. See Bonfield 2006: 239-242.

and action under civil assault does not require actual physical assault – only threats of physical conduct.[121]

Assault charges are not a solution to claims of workplace bullying due to the specific nature of the conduct, unless of course the actions concerned were criminal in intent and action.[122] LaVan and Martin remark that assault and battery fall under the umbrella of criminal law, which governs most cases of workplace bullying, especially after bullying has been identified as a type of workplace violence.[123]

Most cases of workplace bullying are not brought under criminal law, however, and if they are so serious as to warrant prosecution under either federal or state criminal law, the legal requirements are clear and commonly known to all parties.

3.3.3 Civil law and workplace bullying

More often than not, victims of workplace bullying would follow the civil route of assault because of the physically intimidating nature of some bullying behaviours.[124] These could be described as acts intended to cause harmful or offensive contact, or the imminent apprehension of such contact.[125] Claims based on civil assault have succeeded where intentional infliction of emotional damage[126] claims have failed, in that the act that was intended to cause harmful or offensive contact, causing the victim to fear such contact,[127] had been proven to have such effect from an objective perspective.

In this instance, the findings in *Raess v Doescher*[128] are important. Claims lodged based on civil assault are a sure avenue to be explored by victims of workplace bullying, but are often unsuccessful or overlooked as a potential remedy, not being a

[121] Kaplan 2011: 172.
[122] Sanders *et al* 2012: 3, discussing the three *Raess v Doescher* cases. The trial court dismissed the interference claim and the jury rejected the IIED claim, but the plaintiff was awarded damages on assault charges.
[123] LaVan & Martin 2008: 151.
[124] American Law Institute 1965: 37.
[125] American Law Institute 1965: 37.
[126] Hereinafter referred to as IIED.
[127] Kaplan 2011: 171.
[128] 858 N.E. 2d 119; 2006 Ind. App. LEXIS 2471; L.E.R Cas. (BNA) 1005 119-121.
861 N.E.2d 1216; 2007 Ind. App. Lexis 350 1216-1218.
883 N.E. 2d 790, 2008 Ind. LEXIS 313; 155 Lab. Cas. (CCH) p 60,601 790-800.

preventative mechanism for workplace bullying. In *Guthrie v Conroy*,[129] it was determined that an employer could be held liable for the civil assault of employees by co-workers if the employer was aware of the behaviour or a vice-principal was involved, but it remains an open question whether this tort could be used successfully in a case explicitly involving workplace bullying.[130]

3.3.4 The common law/tort and workplace bullying

Common-law responses to workplace bullying are limited to a few isolated cases involving extreme behaviour.[131] A deconstruction of the possible avenues available to targets of workplace bullying and the rates of success based on claims of workplace bullying will now follow.

Cognisance needs to be taken of the fact that common-law claims may be invoked by targets of workplace bullying, and could include defamation, the IIED doctrine, breach of contract and unlawful termination.[132]

Intentional infliction of emotional distress and workplace bullying

This is a favoured tort theory for seeking relief from being abused in the workplace, according to Yamada,[133] who also stresses that this may be an ideal vehicle where one individual sues another.[134] This action will fail where groups are involved, which presents a lacuna in itself.

For a target or victim of workplace bullying to succeed with a claim under the common law in the form of tort law, he or she has to show extreme behaviour from the side of the perpetrator. This is where most claims fail.[135] Most commonly, a victim would claim for tort lodged under the IIED doctrine, but the high bars set in

[129] *Guthrie v Conroy*, 152 N.C.App.15,567 S.E. 2d 403 412 (N.C. Ct App. 2002). A lampshade was put over the victim's head, potting soil was thrown at her and suggestive gestures made to her. After she reported this to the employer, nothing was done.
[130] Kaplan 2011: 164.
[131] Kaplan 2011: 156.
[132] Martin, Lopez & LaVan 2009: 148.
[133] Yamada 2004a: 485.
[134] Yamada 2004a: 489.
[135] Sanders *et al* 2012: 6.

terms of the extreme behaviour test lead to failure of claims, in that most bullying behaviours are more discreet. Sanders and colleagues[136] refer to the rationale that unless the distress is so severe as to "emotionally destroy" the victim, "it is presumed to be part of living together".[137]

The law would only interfere where the distress inflicted is so severe that no reasonable man could be expected to endure it.[138] The definition of IIED has been borrowed from the *Restatement of the law* definition, which is what the courts also use. It reads as follows: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability."[139] Liability only follows where "the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society".[140]

Liability does not only entail mere insults, indignities, annoyances, petty oppressions or trivialities.[141] Examples of unsuccessful claims incorporate calling a person a "white nigger", "slut" and cursing a plaintiff.[142] Case law[143] confirms that liability for IIED does not refer to mere insults, childish behaviour, annoyances or trivialities, as the law would not grant a remedy for such behaviour.

The victim also needs to prove that the perpetrator's conduct was intentional or reckless;[144] that the negative conduct was outrageous and intolerable, in that it went against the grain of accepted standards of decency and morality; that there was a causal link between the emotional distress suffered and the conduct concerned, and that the suffered emotional distress was severe.[145]

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[136] 2012: 7.
[137] Sanders *et al* 2012: 7.
[138] Yamada 2010: 257.
[139] American Law Institute 1965: 71.
[140] American Law Institute 1965: 73.
[141] American Law Institute 1965: 73.
[142] *Holloman v Keadle*, 931 S.W. 2d 413 (ARK. 1996) 170.
[143] *Turnbull v Northside Hospital, Inc.*, 470 S.E 2d 464, 468 (1996), in which the Georgia Court of Appeals found that glaring at the plaintiff with anger and contempt, crying, slamming doors and snatching phone messages from her hand might be rude, but are not actionable under law.
[144] Yamada 2004a: 485.
[145] Yamada 2003, as cited in Einarsen *et al* 2003: 399; Yamada 2004a: 485.

These requirements have been applied by the courts.[146] IIED claims for workplace bullying have been found to be an unsuccessful avenue to explore in matters of workplace bullying that do not relate to sexual harassment.[147]

In some states such as Texas, this tort is regarded as a 'gap filler' for the "limited purpose of allowing recovery in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognised theory of redress".[148]

In *Holloman v Keadle,*[149] the Supreme Court in Arkansas ruled that the fact that the respondent was not made aware of the claimant's fragile state of mind pertaining to emotional distress was detrimental to the case. This omission was fatal to her claim of having been ridiculed, threatened with the defendant's presumed connections with the mob, and the fact that he had openly carried a gun.[150] The perpetrator also made remarks that women working outside their homes were "whores and prostitutes". In addition, proof was furnished that the claimant suffered from sleeplessness, loss of self-esteem and anxiety attacks. Yet, her claim was unsuccessful.[151] This case, according to Yamada, is an example of one of the most wrongheaded interpretations of the IIED doctrine in an employment context.[152]

Yamada believes that IIED claims lodged due to workplace bullying will not succeed. In this case, the court decided in favour of the defendant due to the applicant's failure to establish that the defendant had been made aware of the fact that the applicant was not of ordinary temperament or was particularly susceptible to emotional distress. This goes to show just how important interpretation could be. Yamada[153] argues that the court wrongly interpreted and applied the second restatement of torts, which states that the peculiar vulnerability of a plaintiff is a contributing factor in determining whether the behaviour concerned is outrageous –

[146] *Kroger v Willgruber* 920 S.W.2d 61. Ky., 1996, also reported as 920 S.W.2d 61, 132 Lab.Cas. P 58, 135, 11IER Cases 1087 62.
[147] Einarsen *et al* 2011: 477.
[148] Von Bergen *et al* 2006: 26.
[149] *Holloman v Keadle*, 931 S.W. 2d 413 (ARK. 1996) 176.
[150] Yamada 2004a: 485.
[151] Einarsen *et al* 2011: 478.
[152] Yamada 2004a: 485.
[153] 2004a: 486, 487.

not a determining factor. This decision also serves to prove that IIED is not an efficient legal mechanism to use when claiming for workplace bullying.

In the *locus classicus* case of *Raess v Doescher*,[154] a former hospital employee sued the hospital under IIED due to bullying perpetrated by one of its surgeons. The Superior Court of Indianapolis ordered the heart surgeon to pay the claimant an amount of $325 000 based on claims raised for assault, IIED and intentional interference with his employment relationship.[155] The defendant lodged an appeal, alleging that there was "no such thing as workplace bullying",[156] and the court reversed the jury's verdict and found the surgeon not guilty of IIED, because it could not be shown that the conduct concerned was outrageous and extreme. The court convicted the surgeon on grounds of civil assault during an argument in which the surgeon had turned red in the face prompted by anger, and had shouted "you're over, you're history and you're finished" while marching up to the door where the applicant was standing. The victim believed that Dr Raess was going to assault him and raised his hands in defence. Following the incident, the victim became depressed and anxious[157] and did not return to his position as a heart and lung operator in the theatre where Dr Raess worked. Summary judgement was granted on the intentional interference claim.[158]

Dr Raess objected heavily to the evidence that was to be led on workplace bullying, and argued that workplace bullying was not the issue, nor was there any basis in law to bring a claim based on it.[159] The trial court, however, allowed evidence that the surgeon's behaviour was akin to workplace bullying,[160] although it did not allow evidence that the surgeon was a bully.[161] On appeal, it was decided that the latter evidence was prejudicial and that it was a reversible error. However, it was held that

[154] 858 N.E. 2d 119; 2006 Ind. App. Lexis 2471; L.E.R Cas. (BNA) 1005 119-121.
861 N.E.2d 1216; 2007 Ind. App. Lexis 350 1216-1218.
883 N.E. 2d 790, 2008 Ind. LEXIS 313; 155 Lab. Cas. (CCH) p 60,601 790-800.
[155] Kaplan 2011: 165.
[156] *Raess v Doescher*, 883 N.E.2d 790, 793 (Ind.2008) 798
[157] Kaplan 2011: 165.
[158] *Raess v Doescher*, 858 N.E. 2d 119,121 Ind. Ct. App vacated, 883 N. E. 2d 790 (Ind 2006).
[159] *Raess v Doescher*, 883 N.E.2d 790, 793 (Ind.2008) 798.
[159] Kaplan 2011: 163.
[160] Dr Namie testified as follows: "I conclude that, based on what I heard and what I read, [the defendant] is a workplace abuser, a person who subjected [the plaintiff] to an abusive work environment …" – *Raess v Doescher*, 883 N.E.2d 790, 793 (Ind.2008) 796.
[161] *Raess v Doescher*, 883 N.E.2d 790, 793 (Ind.2008) 796.

the phrase ‘workplace bullying’ was an appropriate way of describing a person’s behaviour as part of deciding the issues before the court, and it was found that assault had been proven. Thus, the Indiana Supreme Court[162] reversed the appeal court’s judgement on the assault claim, and reinstated the jury’s award.

The value of this judgement lies in the fact that the concept of bullying is now slowly but surely being recognised in American courts, although not necessarily from a lawmaker’s perspective.[163] Still, however, the judgement in the *Raess* cases could lead to anti-bullying legislation in future.

Although this cannot necessarily be regarded as a breakthrough for bullying claims brought under the IIED doctrine, as that claim was ultimately dismissed, it was recognised that prolonged harassment could become outrageous and extreme if repeated over time.[164] Yamada stresses the fact that nothing in the three *Raess* cases suggested that Dr Namie’s testimony was admissible, and therefore, the legal impact of these cases could only be described as modest: No new legal claim was established; it did not expand existing tort law to such an extent so as to pave the way for other plaintiffs, but has certainly grabbed the attention of the media, which branded this as a victory for the victims of workplace bullying, although it cannot be substantiated from a legal perspective.[165] In short, thus, *Raess* did not improve the chances of success when lodging bullying claims under the auspices of the IIED doctrine.[166]

In *Mirzaie v Smith Cogeneration Inc*., the Oklahoma Court of Civil Appeals dismissed an IIED claim and argued that the related facts did not elevate the situation to the “outrageous level” as required, despite the fact that the supervisor had yelled at the plaintiff in front of other company executives, called him at 03:00 in the morning; required him to cancel his vacation plans without reason; refused him time off to spend at hospital at the birth of his son, and delivered the notice of his dismissal to the plaintiff a mere two hours before his wedding.[167]

[162] *Raess v Doescher*, 883 N.E.2d 790, 793 (Ind.2008) 293.
[163] Kaplan 2011: 171.
[164] Kaplan 2011: 170.
[165] Yamada 2011: 272.
[166] Kaplan 2011: 170.
[167] *Mirzaie v Smith Cogeneration Inc*. 962 P.2d: 678 Okla. Civ. App. Div.1, 1988 682-683.

The most successful claims relating to workplace bullying brought under the auspices of IIED seem to be those brought under severe status-based harassment or discrimination claims.[168] In *Takaki v Allied Machine Corporation*, the Hawaii Supreme Court overturned the initial decision of the court, and found for the plaintiff after he had been abused because of his national origin and had frequently been called a "f… Jap". This claim was based on both the doctrine of IIED as well as statutory discrimination.[169] It seems as if some bullying claims are embedded in status-based discrimination claims; plaintiffs can bring claims based on statutory discrimination transgressions as well as IIED, but IIED claims often fail, even where statutory claims are upheld based on the same facts.[170]

In *O'Brien v New England Telephone & Telegraph Co.*,[171] the Massachusetts Supreme Judicial Court held that a supervisor may be held liable for bullying a plaintiff, but only if it was unrelated to the company's corporate interests. At least, this created an avenue for the targets of work-related bullying to sue supervisors if they did not act within their scope of employment. The defendant unsuccessfully argued that his treatment of the 'at will' employee, i.e. the plaintiff, had been consistent with his "supervisory responsibilities".[172] Even the jury agreed that the defendant's conduct had exceeded his "rightful role as … supervisor".[173]

Negligent infliction of emotional distress and workplace bullying

As an alternative claim to the aforementioned, claims could be brought under tort for the negligent infliction of emotional distress.[174] This tort requires that the defendant's conduct had to have created an unreasonable risk of emotional distress, which had

[168] Yamada 2004a: 488.
[169] *Takaki v Allied Mac. Corp*., 87 Hawai'i 57,951 P 2d 507 (Haw. Ct. App.1998) 517-518.
[170] Yamada 2004a: 488.
[171] 422 Mass.686, 664 N. E. 2d 843, 132 Lab. Cas. P 58, 150, 11 IER Cases 1221 686.
[172] *O'Brien v New England Telephone and Telegraph Co.* 422 Mass.686, 664 N. E. 2d 843, 132 Lab. Cas. P 58, 150, 11 IER Cases 1221 689.
[173] *O'Brien v New England Telephone and Telegraph Co.* 422 Mass.686, 664 N. E. 2d 843, 132 Lab. Cas. P 58, 150, 11 IER Cases 1221 690.
[174] NIED.

to have been foreseeable and severe enough to cause illness or bodily harm, and *causa* must be shown between the action and stress.[175]

This tort, however, is not recognised in every jurisdiction,[176] a notion to which case law attests.[177]

Intentional interference with the employment relationship/contracts and workplace bullying

This is another tort theory that may potentially be invoked where the redress sought is to sue an individual fellow employee on grounds of workplace bullying. It is similar to constructive discharge[178] when viewed from a legal perspective. Both section 766 and 766A[179] of the second restatement of torts could be used to sue the person interfering with the contract of employment, but the courts may experience difficulty accepting workplace bullying claims under these torts, as the 3rd Circuit Court has found that section 766 addresses disruptions caused by an act directed not at the plaintiff, but at a third person.[180] This, for instance, would be where the defendant causes the promisor to breach its contract with the plaintiff. Section 766A is aimed at addressing disruptions caused by an act directed at the plaintiff, such as the defendant who prevents or impedes the plaintiff's own performance.[181] It is evident that claims brought under section 766A,[182] which is usually used to bring claims of workplace bullying under tort, are much more difficult to prove.

Von Bergen and colleagues believe that this tort theory may be invoked as a response to workplace bullying if it can be proven that the plaintiff had an employment relationship with the employer; that a third party knowingly induced the employer to breach the contract; that the third party's interference was both intentional and improper in motive or means, and that the plaintiff was harmed by the

[175] Kaplan 2011: 163.
[176] Kaplan 2011: 157.
[177] *Twyman v Twyman*, 855 S.W 2d 619, 61 USLW 2748 621.
[178] LaVan & Martin 2008: 151.
[179] Restatement of Torts (second) 1997 §766 and §766A, as discussed by Von Bergen *et al* 2006: 28.
[180] Von Bergen *et al* 2006: 28.
[181] Von Bergen *et al* 2010: 28, and referred to in the Restatement of Torts (second) 1997 §766 and 766A.
[182] Restatement of Torts (second) 1997, §766A, as discussed by Von Bergen *et al* 2006: 28.

third party's actions.[183] Taking into account the requirements as stated above, Yamada rightly argues that claims brought under this tort are more feasible where an individual employee is being sued based on the argument that the 'third party' is a supervisor or employee acting outside the scope of his or her employment by bullying the employee.[184]

However, the question arises whether it could really be argued that the fellow employee or supervisor is the third party interfering in the employment relationship, and thus acting outside the scope of his/her employment relationship.[185] Von Bergen and colleagues[186] believe that – despite the courts' recognition that employers may be liable based on the doctrine of vicarious liability, in that the supervisor's intentions are to prevent or interfere with the plaintiff or employee's contractual performance to the employer – this could not be seen to have been done within the scope of employment, because those actions are directed to be adverse to the company's interests, thereby placing it outside the scope of his or her employment.[187]

Recent findings by the courts in the USA show promise that, in the absence of federal or state law, actions based on bullying could be brought under this tort. In *O'Brien v New England Telephone and Telegraph Company*,[188] the Massachusetts Supreme Court held that a supervisor could be held personally liable for interfering with the employment relationship, even if it was completely unrelated to the interests of the employer. The court found that the supervisor had acted with malice unrelated to the interests of the corporate, which caused the plaintiff to commit the misconduct that led to her dismissal.[189] It was argued that, in this case, the ability to pay the plaintiff as an individual being sued under this tort is a separate issue, which should not be used to muddy the waters.[190]

This theory has received its share of criticism, and not all courts are keen to recognise a current employee as the so-called 'third party' to invoke this claim, and

[183] Restatement of Torts (second) 1997, §766A, as discussed by Von Bergen *et al* 2006: 28.
[184] Yamada 2004a: 489.
[185] Yamada 2010: 258.
[186] 2006: 28.
[187] Von Bergen *et al* 2006: 28.
[188] 422 Mass.686, 664 N. E. 2d 843, 132 Lab. Cas. P 58, 150, 11 IER Cases 1221 689.
[189] *O'Brien v New England Telephone and Telegraph Co.* 422 Mass.686, 664 N. E. 2d 843, 132 Lab. Cas. P 58, 150, 11 IER Cases 1221 690.
[190] *O'Brien v New England Telephone and Telegraph Co.* 422 Mass.686, 664 N. E. 2d 843, 132 Lab. Cas. P 58, 150, 11 IER Cases 1221 690.

state law may not necessarily allow a bullied employee to sue his or her own employer under this theory.[191]

Due to confusion and inconsistency in case law interpreting this tort, both employers and employees have little with which to evaluate their success should plaintiffs bring their bullying claims under this tort.[192]

Constructive discharge and workplace bullying

The notion of constructive discharge entails that an employee's resignation could be ascribed to the employer if the resignation was based on such intolerable working conditions that the employee was forced to resign.[193] In short, this means that if the abuse in the workplace becomes sufficiently overwhelming[194] and the victim quits his or her job, this would be seen to have been constructive discharge.[195] Of course, this claim will not succeed, unless internal avenues have been fully explored first, as it is so open to abuse by employees.[196]

Courts are aware of this possibility, and have found that in cases where employees leave on their own accord, the entire scenario has to be scrutinised and that the subjective feelings of the so-called victims are not the measure to be considered,[197] but that a reasonable objective test should prevail. Courts had to take cognisance of the fact that stress-free working environments are not guaranteed and that a reasonable person would not necessarily quit due to a stressful working environment.[198] Constructive discharge is a free-standing tort, although most cases involving constructive discharge arise in a Title VII context. The reason why it is discussed separately from Title VII transgressions, however, is that even though the overwhelming majority of cases involving constructive discharge are linked to Title VII claims, constructive discharge is a common-law cause of action and can stand on

[191] Yamada 2010: 258.
[192] Yamada 2004a: 489.
[193] Von Bergen *et al* 2006: 24.
[194] Sanders *et al* 2012: 10.
[195] Bible 2012: 41.
[196] Bible 2012: 41.
[197] *Honor v Booz- Allen and Hamilton, Inc.*, 383 F 3d 180 (4th circuit 2004) C.a. 4 (Va.) 2004 187.
[198] *Honor v Booz- Allen and Hamilton, Inc.*, 383 F 3d 180 (4th circuit 2004) C.a. 4 (Va.) 2004 185.

its own. Courts are cautious of claims of this nature, as they can so easily be abused and must therefore "be carefully cabined".[199]

As will appear from the discussion below, case law shows that constructive discharge coupled with intentional interference with contracts could give employees a viable, status-free cause of action against workplace bullying, and is thus a possible option for victims of workplace bullying.[200]

In *Pennsylvania State Police v Suders*,[201] the Supreme Court in the State of Pennsylvania held that an employer may be held liable under Title VII of the Civil Rights Act on the grounds of a hostile work environment created, if that results in a "constructive discharge" of an employee. This finding was based on the presented facts that, due to a so-called "humiliating" demotion, extreme pay cut and other similar actions, the plaintiff would have faced unbearable working conditions, and that her subsequent resignation qualified as a fitting response.[202] In addition to the confirmation of the principle, the Equal Employment Opportunity Commission ruled that an employer is liable for constructive discharge (albeit in circumstances of sexual harassment) if intolerable working circumstances caused a reasonable employee to quit, irrespective of whether or not there was an intention to cause the victim to resign, and held that in such circumstances, the employer could face liability under Title VII on grounds of imposing "intolerable working circumstances".[203]

In *Walker v UPS of America, Inc*,[204] the 10th Circuit Court of Appeals found that "constructive discharge occurs when the employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign".[205]

This cause of action does not cater for trivial matters or subjective feelings: Although demotion could sometimes lead to constructive discharge, employees' dissatisfaction

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[199] Sanders *et al* 2012: 10.
[200] Von Bergen *et al* 2006: 30.
[201] 542 U.S. 129,124 S.Ct. 2342,159 L.Ed.2d 204 (2004) 2359.
[202] 542 U.S. 129, 124 S.Ct. 2342, 93 Fair Empl.Prac.Cas. (BNA) 1473, 85 Empl. Prac. Dec. P 41,672, 159 L.Ed.2d 204, 72 USLW 4493, 04 Cal. Daily Op. Serv. 5110, 2004 Daily Journal D.A.R. 7002, 17 Fla. L. Weekly Fed. S 391 2345.
[203] US Equal Employment Opportunity Commission[n.d]. *About the EEOC: Overview*. Available on http://www.eeoc.gov/eeoc/ (accessed 20 October 2013).
[204] 76 Fed. Appx. 881 (10th circuit. 2003) 889.
[205] *Walker v UPS of America*, Inc., 76 Fed. Appx. 881 (10th circuit. 2003) 890.

with work assignments, a perception of unfair criticism, or unpleasant or difficult working conditions are not sufficient for a successful action.[206] According to Sanders and colleagues,[207] workers are not guaranteed a stress-free environment, and feelings of unfair criticism or unpleasant working conditions are rarely intolerable enough so as to lead to a successful claim under constructive discharge.

It is noteworthy that the constructive discharge action was affirmed by the Supreme Court.[208] According to Von Bergen,[209] workplace bullying claims could be presented so as to fit the common-law claims for constructive discharge, which are closely linked to claims of intentional interference[210] with contracts, in the absence of legislative regulation.

Sanders *et al*[211] refer to instances where negative acts were prolonged. An example would be *Amirmokri v Balt.Gas and Elec. Co.*,[212] where the applicant was subjected to daily epithets about his Iranian origin in order to embarrass him publicly. He eventually developed a stomach ulcer and resigned.[213]

Bible[214] believes that the standard set to succeed with a claim based on constructive discharge is extremely high, although a workplace bullying victim could rely on this free-standing tort, even if the abuse suffered was not linked to a 'protected trait'.[215]

3.4 Statutory remedies and workplace bullying

Public-sector employees may bring claims under the First, Fourth and Fourteenth Amendments to the Federal Constitution, but very few such cases[216] have actually proceeded.[217] Typically, the First Amendment would provide for the protection of free speech, religion and the freedom of the press, as well as the freedom to assemble

[206] *Honor v Booz-Allen and Hamilton, Inc.,* 383 F.3d 180 C.A. 4 (Va) (4th Cir.2004) 187.
[207] 2012: 10.
[208] *Arbaugh v Y & H Corporation*, 546 U.S. 500, 126 S.Ct. 1235 U.S., 2006 515.
[209] 2012: 10.
[210] Von Bergen *et al* 2006: 29.
[211] 2012: 10.
[212] 60 F.3d 1126, 1132 (4th circuit), as cited in 2012: 10.
[213] *Amirmokri v Balt.Gas and Elec.Co.* 60 F.3d 1126, 1132 (4th circuit), as cited in 2012: 10.
[214] Bible 2012: 41.
[215] Bible 2012: 41.
[216] Martin *et a*l 2009: 149-151.
[217] Bible 2012: 42.

and to petition.[218] The Fourth Amendment would cater for protection from unreasonable searches and seizures, while the Fourteenth Amendment provides for due process within individual states.[219]

A study of 524 cases in the USA, conducted by Martin and colleagues, showed that the most frequently identified reasons for filing claims were retaliation, harassment, discrimination, the infringement of civil rights, constitutional amendments, state laws and unlawful termination.[220] Despite its potential, existing law seems to be inadequate.[221]

The following sections will deal with those acts that are strongly linked to claims relating to workplace bullying.

3.4.1 National Labor Relations Act

The National Labor Relations Act[222] relates to workplace bullying, firstly, through the right of freedom of association, and secondly, the right to engage in concerted activity that relates to bargaining for "mutual aid or protection", regardless of whether or not employees are union members.[223] This merely implies that unionised employees could bargain and conclude collective agreements that would address bullying and/or abusive supervision in the workplace, and even in the absence of provisions dealing with abusive supervisors, the general nature of the collective agreement may provide legal protection for bullied members.[224]

Yamada remarked that non-union members are not without protection through this act, in that the concerted-activity provision could protect all targets of workplace bullying.[225] Victims of workplace bullying who do not belong to a trade union could approach an employer with their bullying concerns on the premises that the bullying

[218] Martin *et al* 2009: 148.
[219] Martin *et al* 1009: 148.
[220] Martin *et al* 2009: 143.
[221] Martin *et al* 2009: 147.
[222] 29, U.S.C. §§151-169 (2004), (hereinafter referred to as the NLRA).
[223] Yamada 2004a: 475.
[224] Yamada 2004a: 475.
[225] Yamada 2004a: 475.

behaviour is reported to management by way of a concerted effort[226] (if it is engaged with, or on the authority of, other employees and not solely by and on behalf of the employee him/herself),[227] as individual action does not resort under this act.

Although it caters for the anti-bullying needs of some employees, this form of federal protection excludes several categories of employees. Notably absent are supervisors, independent contractors, domestic and agricultural workers as well as family member employees.[228] In addition, the courts have excluded managerial and confidential employees.[229] In 1994, Cobble[230] found that approximately 50 million workers were excluded from the protection granted by this act.[231]

Although states did make some effort to eradicate workplace bullying from employment practices, there are still no state laws that specifically address workplace bullying, and victims still have to try to fit the proverbial round ball into a square hole. Case law confirms this.[232] However, the efforts made by the state to eradicate workplace bullying do not go unnoticed, especially the drafting of the HWB[233] and its tabling before Congress in various forms.

In *Torres v Parkhouse Tire Service*, the Supreme Court of California hinted that anti-bullying legislation may be warranted, and although they tied bullying to a protected class, the court commented as follows: “In any event, aggressive physical bullying is one of the common tools of racial and gender-based harassment and sometimes leads to injury, whether or not injury is specifically intended. That the legislature

[226] Yamada 2004a: 475.
[227] National Labor Relations Act, 29 U.S.C. §157 (2004).
[228] National Labor Relations Act, 29 U.S.C. §152 (3).
[229] *NLRB v Yeshiva Univ*., 444 U.S. 672, 100 S.Ct. 8. M. (BNA) 2526, 63 L Ed.2.d 115, 87 Lab. Cas. P 11, 819 691, in which it was held that full-time members of a private university were excluded from the act, although there were dissenting judges. Also see *NLRB v Hendricks County Rural Elec. Membership Corp*., 454 U.S. 170 (1981), 102 S. Ct. 216 200.
[230] 1994: 295. Therefore, in 1994, 43% of the workforce were excluded from the act.
[231] Both local and state efforts are noted. In 2003, local efforts to ban bullying from the workplace by the Province of Rhode Island caused the city council to adopt an ordinance to ban bullying citywide. See Ryan McBride, “The Bully Business: City Could Revive Anti- Bullying Bill for the Workplace” Providence (T1) Bus. News, Oct 22, 2005, available on http: //www.bullyinginstitute.org/press/pbn 102205 (accessed 10 June 2013).
[232] *Raess v Doescher*, 883 N.E. 2d 790, 2008 Ind. LEXIS 313; 155 Lab. Cas. (CCH) p 60,601 790-800.
[233] Healthy Workplace Bill New York State http: //www.healthyworkplacebill.org/ states/ny/newyork.php (accessed on 7 March 2013).

might wish to deter this obnoxious behaviour by the threat of civil liability should not trouble us."[234]

The first anti-bullying law was passed in 2003 in North America (although it disappeared again with the 2004 elections).[235] This law, which was aptly called the Workplace Psychological Harassment Prevention Act of 2003,[236] enabled employees who experienced psychological harassment (bullying) to file complaints with the Quebec Labour Standards Commission. The act provided for fines of up to $C10 000 for hostile, inappropriate and unwanted conduct, verbal comments or gestures as well as any abuse of authority, including intimidation, threats, blackmail or coercion.[237] A similar amendment was proposed through the Canadian Labour Code, and all current Canadian laws describe remedial procedures and employer responsibilities more clearly than earlier laws.[238]

Many states in the USA have adopted different versions of the HWB, but none have passed legislation in this regard. Most states have taken cognisance of the fact that legislation would make workplace bullying an unlawful employment practice, which would allow victims to bring civil actions.[239]

Given the reality that all bullying claims currently need to be presented so as to fit existing legal avenues, the possibility of lodging claims based on other American statutes will be examined next.

3.4.2 Anti-discrimination and harassment statutes

Einarsen and colleagues[240] refer to the potential overlap of bullying and harassment, which would present some interesting issues pertaining to the legal system in the USA, as protected-class status remain "the dominant paradigm of how legal issues

[234] *Torres v Parkhouse Tire Service*, Inc. 26 Cal.4th 995, 30 P.3d 57 111 Cal. Rptr. 2d 564 (2001) 67. Judge Werdegar dissented from the majority opinion in this case, and essentially found that the statute (Labor Code s 3601) cannot give rise to two opposite meanings, on the one hand requiring an element of intent to harm and on the other hand finding that "there may be some circumstances" in which s 3601 does not require an intent to injure. He believed that only one interpretation of the statute was legally sound.
[235] Von Bergen *et al* 2006 20.
[236] Quebec Labour Standards Act, at s 81.18 (RSQ, chapter N-1.1) (Div V.2.) 32.
[237] Quebec Labour Standards Act, at s 81.18 (RSQ, chapter N-1.1) (Div V.2.) 32.
[238] Namie & Namie 2009a: 206.
[239] Von Bergen *et al* 2006: 21.
[240] 2011: 480.

of worker harassment and mistreatment are framed".[241] Protected-class status is absent from South African law, and thus requires a brief explanation.

Both federal and state anti-discrimination statutes prohibit employment discrimination, but only if based on certain protected traits or classes, namely "race, sex, disability, age, marital or parental status, pregnancy, family responsibility and political or religious belief",[242] whilst sexual harassment is dealt with under a separate act.[243]

Yamada originally stated in 2004[244] that harassment grounded in a target's statutorily protected class may be actionable and could offer some relief to employees who are being bullied at work. However, in 2010, Yamada[245] qualified his initial opinion, stating that although many claims for workplace bullying had been brought under this section, they were doomed to fail because bullying was not specifically covered under these statutes, and that even if bullying was directed against a person because of his or her gender, it would not suffice because the plain text of the legislation covered only verbal and physical conduct of a sexual nature.[246]

Specifically, the creation of a hostile working environment[247] through workplace bullying could afford redress for victims, mainly due to their protected-class membership.[248] A lacuna is however noted where generic harassment (i.e. not embedded in protected-class membership) presents itself, because most cases of workplace bullying do not reside in class suits.[249] Sanders and colleagues[250] describe harassment as a type of discrimination barred by Title VII of the 1964 Civil Rights Act, and a hostile work environment is described as an environment

[241] Einarsen *et al* 2011: 480.
[242] Einarsen *et al* 2003: 400.
[243] The Federal Sex Discrimination Act 1984 (Commonwealth) defines sexual harassment as when a person makes an unwelcomed sexual advance or an unwelcome request for sexual favours to the person harassed, or engages in other unwelcome conduct of a sexual nature in relation to the person harassed, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.
[244] Yamada 2004a: 491.
[245] Yamada 2004a: 490.
[246] Yamada, as cited in Einarsen *et al* 2003: 402.
[247] Yamada 2004a: 491.
[248] Sanders *et al* 2012: 8.
[249] Yamada 2010: 258.
[250] 2012: 8.

"permeated with discriminatory intimidation, ridicule and insult".[251] In *Meritor Savings Bank, FSB v Vinson*, the Supreme Court held that a hostile working environment exists when the workplace is full of "discriminatory intimidation, ridicule and insult so severe or pervasive that it alters the conditions of the victim's employment and creates an abusive working environment".[252]

It is thus clear that the doctrine of a hostile working environment is closely associated with sexual harassment, and may therefore afford protection to some employees who are bullied at work – not because of the bullying behaviour, but because of their protected-class membership. This would however leave the victims of bullying without remedy if their complaints are not related to their class membership. The Massachusetts Commission against Discrimination took judicial notice of the drive to legislate bullying when it awarded damages to an employee who had endured severe religious harassment for being an active Muslim.[253] Yamada is not too excited about this, though, as he sees the judgement as unusual, since bullying behaviour has, for most parts, not been regarded as grounds for relief in status-based harassment claims.[254]

The judicial practice of 'disaggregation' also posed a problem in practice, as courts tended to ignore the harassment aspect where the conduct was not explicitly sexual in nature when the claim was brought under the theory of a hostile work environment.[255] This means that if the deeds were non-sexual, yet driven by the gender *animus*, bullying victims were without remedy, as these claims were considered not actionable.[256] This severely affected female targets' prospects of success with bullying claims where the conduct concerned was non-sexual.

[251] Sanders *et al* 2012: 8.
[252] *Meritor Savings Bank, FSB v Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 40 Fair Empl. Prqac. Cas. (BNA). 40 Empl. Prac. Dec. P 36,159.91 L Ed.2d 49, 54 USLW 4703: (1986) 65-67.
[253] Yamada 2004a: 491, with reference to *Lule Said, Complainant v Northeast Security, Inc., Respondent* 2000 WL 33665354, Docket No. 91-BEM-1540 August 14, 2000, also reported as 2000 WL 33665354 (MCAD) 10, where it was stated that "freedom of religion is a founding principle" of the American nation, and that those who fled England did so because of religious oppression before settling in Massachusetts many years ago.
[254] Yamada 2004a: 491.
[255] Yamada 2004a: 491.
[256] Yamada 2004a: 492.

Yet, disaggregation no longer seems to be a problem following the 1998 decision of the USA Supreme Court,[257] which has established the principle that the conduct does not need to be motivated by sexual desire or even have sexual overtones to be actionable; a cause of action could thus be established where the behaviour was hostile towards one specific gender in the workplace.[258] However, the requirement still exists that a target has to prove that the culprit used gender-specific terms towards one or more members of one sex, or treated one sex more harshly than another.[259]

3.4.3 Americans with Disabilities Act[260]

This act sets out to, among others, protect qualified individuals with disabilities against discrimination in employment on the grounds of their disabilities.[261] Stefan[262] argues that the common belief that Title I of the act[263] protects individuals from employment discrimination is nothing but a delusion if the disability is grounded in psychiatric or perceived psychiatric disability. Based on the knowledge that victims of workplace bullying often present with symptoms associated with psychiatric problems, this area needs to be investigated.

The Americans with Disabilities Act[264] broadly defines the employment context, and includes the prohibition of discrimination in the terms and conditions of employment, including recruitment, hiring, promotions, transfer, employee benefits, training, fringe benefits, layoffs and termination.[265] Of note is the fact that circuit courts are split on whether former employees are able to sue under Title I of the ADA (which deals with

[257] *Oncale v Sundowner Offshore Serv. Inc*., 523 U.S. 75, 118 S.Ct. 998, 76 Fair Emp . Prac. Cas. (BNA) 221, 72 Empl. Prac. Dec. P 45, 175, 140 L Ed 2d 201, 98 Daily Op serv. 1511, 98 Daily Journal D.A.R. 2100, 98 CJ C.A.R. 949 (1998) 75.
[258] Bible 2012: 40.
[259] *Reeves v C H Robinson Worldwide, Inc*., 594 F 3d 798, C.A. 11 (Ala) (11th Cir 2010), also reported in 594 F 3d 798 807.
[260] 42 U.S.C. §§ 12101-12213 (2004), as amended by 42 U.S.C (2011).
[261] 42 U.S.C. §12112(a).
[262] 2001: 271.
[263] Stefan 2001: 284 states that Title I of the ADA 42 U.S.C. §12112(a) prohibits discrimination based on disability in the employment context specifically.
[264] Hereinafter called the ADA.
[265] 42 U.S. C.§ 12112(a).

employment specifically). In 1998,[266] it was held that former employees may sue, but in 1996,[267] a contradictory finding was made. Stefan[268] rightly argues that some of these psychiatric disabilities could have been brought about by the employment milieu, for example increasing job expectations, abuse at work and stressful interaction with supervisors, which are the types of claims lodged in terms of Title I of the ADA.

The Equal Employment Opportunity Commission[269] is the agency charged by Congress with interpreting and enforcing provisions of, among others, the ADA. Most employers with at least 15 employees are governed by EEOC laws (20 employees in cases of age discrimination). Most labour unions and employment agencies also fall under these laws, which apply to all types of workplace situations, including hiring, firing, promotions, harassment, training, wages and benefits.[270] The EEOC issued detailed regulations on the interpretation of Title I of the ADA, which just serves to show how important the act is, despite the fact that circuit courts are split on a number of issues on which the EEOC has taken a stand.[271]

In the past, all claims brought under the ADA were coded under one heading, but the EEOC has lately started to collect data about employment discrimination in different categories,[272] such as anxiety disorder, depression, manic depressive disorder, schizophrenia and others. Of course, there are numerous other psychiatric disorders, some of which could be brought about by workplace bullying,[273] but "the scarcity of claims brought by people with diagnoses of borderline personality disorder and multiple personality disorder suggests that the levels of stigma and discrimination against people with these diagnoses are so high that people with these diagnoses either do not want to disclose the diagnosis, cannot obtain counsel, or have given up on any chance of having discriminatory activity against them punished".[274]

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[266] *Ford v Schering-Plough*, 145 F.3d 60 (3d Circuit.1998) C .A.3 (N.J.) 601.
[267] *Gonzales v Garner Food Services Inc*., 89 F 3d 1523, also reported at 89 F 3.d 1523, 65 USLW 2110, 20 Employee Benefits, Cas. 1601 1535.
[268] 2001: 185.
[269] Hereinafter called the EEOC.
[270] US EEOC n.d.
[271] Stefan 2001: 275.
[272] US EEOC n.d.
[273] See chapter 2 for a full discussion of the negative effects of workplace bullying.
[274] Stefan 2001: 278.

To be regarded as disabled for the purposes of an ADA claim, a person has to show that he or she has a physical or mental impairment that substantially limits one or more major life activities, or has a record of, or is regarded as having, such an impairment.[275] Stefan alludes to the fact that psychiatric disability is regarded as more of a discomfort in other people caused by the revelation that a person is disabled due to psychiatric problems, rather than an actual belief that the affected person cannot perform his/her duties or conduct major life activities.[276] Bible,[277] in turn, regards this as a very stringent requirement, because targets of workplace bullying must have reached a very acute psychiatric stage[278] due to bullying or other factors in order to meet the standard of disability required to succeed with their claims under the ADA.

Yamada[279] agrees with Stefan that this might be a possible cause of action available to victims of workplace bullying where the offending behaviour creates or exacerbates a recognised disability.[280] Sanders and colleagues, however, agree with Yamada that the ADA is an ineffective tool for combating workplace bullying.[281] The question arises as to whether psychiatric disabilities could resort under this act. Stefan[282] demonstrated that, under certain circumstances, the ADA could indeed house psychiatric disability, which could make the ADA an appropriate vehicle to successfully bring bullying claims.[283] Stefan argues that, despite fear to extend the ADA to include those diagnosed with psychiatric disabilities, most employment suites brought were based on discrimination cases involving people with actual or perceived psychiatric disabilities who were highly qualified, had been working at the particular workplace for a long time, had had great performance ratings and displayed none of the feared bizarre behaviour associated with the stereotypes of mental illness.[284]

[275] 42 U.S.C §12101 (2011); Sanders *et al* 2012: 10.
[276] Stefan 2001: 272.
[277] 2012: 41.
[278] Bible 2012: 41.
[279] 2004a: 492.
[280] Yamada 2004a: 492.
[281] Sanders *et al* 2012: 10.
[282] Stefan 1998: 795.
[283] Stefan 1998: 797-799.
[284] Stefan 1998: 796.

In addition, Stefan found that employees' claims under the ADA fell into one of the following four categories:[285]

- "Employees who performed well over a reasonable time until a new supervisor was appointed and whose claims arose from escalating interpersonal difficulties with their supervisors
- Employees whose psychiatric disabilities arose from issues in the workplace, such as women having been sexually harassed, employees who had been exposed to hostile working environments as a result of disability, gender, sexual preference, whistle-blowers and those whose claims related to employer abuse or other forms of unfair treatment
- Employees, whose disabilities were related to increasing stress, increased working hours, the demands of new positions or new responsibilities
- Employees disciplined for misconduct (often sexual harassment) and who claim that their behaviour resulted from a mental disability or alternatively, that disciplinary action taken proves to show that the employer is of the opinion that they are mentally unstable"[286]

Yamada[287] believes that the first three categories mentioned above are particularly relevant to workplace bullying.

Victims of workplace harassment (theoretically also including workplace bullying) may succeed with a claim under this act where an existing recognised disability is either created or exacerbated,[288] as Yamada has stated. This includes both physical and psychiatric disabilities. However, once again, upon closer examination, many claims have been unsuccessful, as the courts regard stress as intrinsic to employment[289] and invisible and inseparable from conditions of employment (as sexual harassment used to be viewed).[290]

The mere fact that a claimant needs to prove disability to invoke protection under this statute poses a problem in a bullying milieu, in that the escalation of an abusive

[285] Stefan 1998: 798,799.
[286] Stefan 1998: 799.
[287] 2004a: 493.
[288] Yamada 2010: 258.
[289] Yamada 2010: 258.
[290] Yamada 2010: 258; Stefan 1998: 797.

working environment cannot be prohibited or managed by invoking the protection of the ADA,[291] as it will be much too late – the working environment would have been toxic for a very long time in order to have led to the disability that needs to be proven to succeed with a claim under the ADA.

Although individual responses to stress play a central role in bullying, research by Einarsen and colleagues[292] has shown that although most targets of bullying try to stop the bullying and concomitant stress, they are destined to fail. Initially, they would try to appease the bully, confront him or her, and then report the bullying to a superior, failing which, they would try to gather the support of their colleagues, and if that did not work, they would contact their union, by which time the victim would be considering leaving (or has left) the employer's service,[293] very often long before the definition of disability has been complied with.

According to Stefan,[294] if this aspect is considered, along with the fact that courts do not need to consider whether acts or omissions were discriminatory in nature if a plaintiff fails to meet the definition of disability under the ADA, it can insulate employer conduct from judicial review.[295]

Courts would often find that the plaintiff is not disabled when the claim is based on disability as a result of stress or abuse or even difficulties experienced with supervisors.[296] The backdrop to this finding is the view taken that resilience to withstand stressful working conditions is a prerequisite for performance, and that job-related stress cannot be considered a disability for the purpose of the ADA.[297]

In *Weiler v Household Finance Corp*,[298] it was held that the perpetrator's conduct was still not sufficient to enable the plaintiff to succeed with a claim under the ADA, despite the fact that the supervisor had discussed the plaintiff's various therapies with others, was loud-mouthed and lunged his chair close to her, got louder in front

[291] Yamada 2004a: 493.
[292] 2011: 117.
[293] Einarsen *et al* 2011: 118.
[294] 2001: 276.
[295] Stefan 2001: 276.
[296] Stefan 1998: 804.
[297] *Dewitt v Carsten*, 941 F.Supp.1232 N D Ga.1996, also reported at 941 F Supp 1232 1236, in which it was found that job-related stress does not qualify as a disability under the ADA.
[298] No 93 C 6454. (N.D. III. June 10, 1994) Not reported in Supp. F 1994, WL 262175 2, and confirmed a year later in *Weiler v Household Finance Corp* Not reported in F. Supp., 1995 WL 452977 4.

of other employees and discussed her physical and mental disabilities out loud. The court reasoned that the ADA was not promulgated to protect employees from general stress experienced at work; that everyone experienced difficult circumstances at work, and that personality conflict with her supervisor, as set out above, even leading to depression and anxiety, was insufficient to claim a disability as required under the ADA.[299] The court further argued that a disability was an intrinsic part of a person, following the person wherever he or she went, and that in the circumstances of this case, the problem lay with the supervisor's conduct, and was thus indicative of a mere personality conflict between two people.[300] From this reasoning, therefore, it is clear that workplace bullies will not easily be deterred by lodging claims under the ADA.

One judge[301] seems to have taken a different stance, however. In *Palmer v Circuit Court of Cook County*,[302] it was stated that "if a personality conflict triggers a serious mental illness that is in turn disabling, the fact that the trigger was not itself a disabling illness is no defence". Stefan[303] agrees that this remark is important. The key in psychiatric disability cases is to evaluate the manifestation of the disability rather than the aetiology thereof.[304] This judgement has unfortunately not been followed, and Stefan[305] argues that it was not understood by other judges and could thus not serve as a directional case.

Nevertheless, the courts do not regard plaintiffs who claim disability based on workplace stress, as disabled for purposes of an ADA claim. Courts take a seemingly blanket approach and reject these claims,[306] irrespective of whether the plaintiffs have been put on medication or even institutionalised.[307] The ADA would

[299] See *Weiler v Household Finance Corp* Not reported in F. Supp., 1995 WL 452977 4 in this regard.
[300] *Weiler v Household Finance Corp*., No 93 C 6454, 1994 WL 262175 (N.D. III. June 10, 1994) 1; *Weiler* v *Household Finance Corp*. Not reported in F. Supp., 1995 WL 452977 July 27, 1995) 5.
[301] Judge Richard Posner. This decision, however, attracted a lot of attention, as although he originally agreed with the postulation (27 Jul 1995) that the plaintiff was not disabled, because the disability claim had arisen from interpersonal conflict, he ended up apparently singing a different tune, something which, according to Stefan 1998: 817, other judges have failed to understand, partly due to the apparent contradiction.
[302] 117 F.3d. 351 C.A. 7 (III) (7th Circ. 2997), also reported as 117 F.3d 351, 6 A.D. Cases 1569, 23 A.D.D 193, 10 NDLRP p 141: 351-353 at352.
[303] 1998: 817.
[304] Stefan 1998: 817.
[305] Stefan 1998: 817.
[306] *Mundo v Sano Health Plan of Greater New York* 966 F. Supp.171, 8 A.D. Cases 937, 24 A.D.D. 355, 10 NDLR P 1066 173; *Dewitt v Carsten*, 941 F.Supp.1232 N D Ga.1996, also reported at 941 F Supp. 1232 1232-1241.
[307] *Adams v Alderson*, 723 F.Supp 1531 D.D.C 1989 1530-1531 1531.

only afford relief to bullied victims if the bullying has created or exacerbated a disability.[308]

In *Mundo v Sano Health Plan of Greater New York*,[309] the court was referred to the EEOC's definition for mental disability, which states that a mental impairment refers to any psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, with specific reference to learning disabilities, none of which the plaintiff in this case could prove. Of note is judge Block's finding that "an inability to tolerate stressful situations is not an impairment for purposes of the ADA".[310]

Stefan differs from this approach, and argues that disability claims embedded in stress (as with claims of psychiatric disability resulting from interpersonal difficulties with supervisors and workplace abuse) should warrant an investigation into the causes thereof. It should not only be considered whether the stress suffered in the workplace is a recognised disability, but rather whether the stress has caused or is a symptom of a disability covered under the ADA.[311] Unfortunately, however, even though this thinking appears to be sound, it does not alleviate the problem that claims based on workplace stress or workplace stress-related psychiatric disability are randomly rejected by the courts, and can therefore not be considered a successful legal avenue to be explored by targets of workplace bullying if the prime symptom is stress or stress-related psychiatric problems.

An exception to the aforementioned is where psychiatric disability arises from a different source than interpersonal conflict, such as from diabetes. In *Gilday v Mecosta County*,[312] the plaintiff was dismissed because he was rude to co-workers and customers, and could not get along with them. After his dismissal, the plaintiff claimed under the ADA and stated his diabetes as a cause of action, citing his fluctuating blood sugar levels as the reason for his displays of frustration, aggression

[308] Sanders *et al* 2012: 9.
[309] *Mundo v Sano Health Plan of Greater New York* 966 F. Supp.171, 8 A.D. Cases 937, 24 A.D.D. 355, 10 NDLR P 1066 173.
[310] *Mundo v Sano Health Plan of Greater New York* 966 F. Supp.171, 8 A.D. Cases 937, 24 A.D.D. 355, 10 NDLR P 1066 172-173.
[311] Stefan 1998: 819.
[312] *Gilday v Mecosta County* 124 F.3d 760 C.A (6th Cir.1997), also reported as 124 F 3d 760, 7 A.D. Cases 1268, 24 A.D.D 111, 10 NDLP P 321, 1997 Fed. App 0262P 762, 768.

and irritability. He requested a transfer to a less stressful position as "reasonable accommodation" for his particular circumstances, which was granted.

However, the question remains as to how workplace bullying would be affected by this judgement. It is postulated that if workplace bullying victims happen to suffer from an underlying or known physical illness, which is then exacerbated by a hostile working environment or workplace bullying, claims under the ADA may well be considered.

The odd cases that succeeded in the courts related to psychiatric disabilities that clearly had not originated from the workplace, such as physical symptoms associated with the side effects of medication taken for psychiatric illness.[313] Stress-related illnesses resulting from working with nuclear energy[314] as well as claustrophobia[315] have succeeded under the ADA.

Workplace bullying claims could not easily be presented to fit the bill, especially considering that employees with psychiatric disabilities who file ADA claims relate their claims to their difficulty in tolerating stress, and the courts have shown no sympathy and have found that, as a matter of law, they are not disabled for purposes of ADA claims.[316]

Stefan[317] takes an interesting position, namely that the courts are often wrong by not taking sufficient notice of workplace stress. According to her, psychiatric disabilities can in most instances be triggered or exacerbated by environmental stimuli (such as stress and stressful interaction with others) and can thus present symptoms that are very similar to many physical disabilities.[318] It is noted that although many claims under the ADA fall short, sufferers of psychiatric conditions, whether brought on by

[313] Stefan 1998: 815.
[314] *Pritchard v Southern Co. Services* 102 F.3d 1118 (11th Cir. 1996) 6. A.D. Cases 206, 19 A.D.D. 905, 10 Fla. L. Weekly Fed. C 653 102. It was also found in this case that any discrimination that the plaintiff might have suffered on grounds of her alleged disability lay against her employer, and not individuals.
[315] *Neveau v Boise Cascade Corp.,* 902 F Supp. 207 (D.Or.1995*) 5.* Cases 366, 7 NDLR P 340 211. The Oregon court held that "employment" meant a limitation or impairment that substantially affects the performance of the work involved.
[316] Stefan 1998: 817.
[317] 1998: 817.
[318] Stefan 1998: 817.

either their inability to deal with stress or due to workplace stress, succeed with their claims for disability benefits.[319]

In addition to showing that they are disabled in order to receive protection under the ADA, plaintiffs also need to prove that they are qualified individuals.[320] In short, this simply means that they have to prove that they are able to, with or without reasonable accommodation, perform the essential duties for which they were appointed,[321] including the ability to get along with others.[322] Certain soft issues have been elevated to essential functions of the job, and getting along with bosses and co-workers is one of them, according to case law.[323] Based on the requirements for a successful claim under the ADA, courts have either decided that the stress was associated with the specific job and that the plaintiff could perform other jobs, which did not render the plaintiff disabled, or that the stress itself simply did not qualify as a disability.[324]

Despite this bleak picture, the courts have ruled favourably where the issue at stake was whether the ADA covered claims of a hostile environment.[325] According to Stefan, a number of "ADA claims, both psychiatric and physical, involve the interaction between race or gender discrimination and disability".[326] Race or gender discrimination allegedly causes or aggravates physical psychiatric problems[327] and the interaction between these and a hostile work environment has been known for a long time. It is thus postulated that claims of workplace bullying based on a hostile working environment embedded in race or gender could be brought under the ADA if

[319] Stefan 1998: 820.
[320] Stefan 1998: 820.
[321] Americans with Disabilities Act, 42 U.S.C. §12111(8).
[322] Stefan 1998: 821. This criterion is extensively used to denote that the employee is unable to get along with anyone, not only with the supervisor. This is a very high bar to overcome and also seems unfair, in that the courts, in evaluating disability, do not regard this as a major life activity, but it seems to be vital in evaluating whether the plaintiff is otherwise qualified to do the job. This is a clear disparity.
[323] *Misek–Falkoff v International Business Machines Corp.* 854.F.Supp. 215, 3 A.D. Cases 449, 5 A.D.D. 569, 5 NDLR 154 227.
[324] *Dewitt v Carsten*, 941 F.Supp.1232 N D Ga.1996, also reported at 941 F Supp 1232 1235-1236.
[325] *Rio v Runyon*, 972 F.Supp. 1446, 7 A.D. Cases 1739, 25 A.D.D. 594 (S.D. Flo 1997) 1459, where it was found that the "conduct [must] have been sufficiently severe or pervasive to have created a work environment that was perceived (subjectively) by Plaintiff as abusive, but it also must have been objectively hostile or abusive". This is in contrast to the decision in the Fifth Circuit Court in *McConathy v Dr Pepper/Seven Up Corp*., 131 F 3d.558, 39 Fed. R. Rev. 3d 737, 48 Fed R Evid. Serv. 718, 7 A.D. Cases 1104, 11 NDLR P 299 563 (1998), in which it was explicitly held that it was still an open question whether the ADA indeed caters for hostile environment claims.
[326] Stefan 1998: 828.
[327] Stefan 1998: 828.

the other requirements have been met.[328] Legal counsel would have to make a choice whether they wish to base their claim on discrimination or the ADA, so as not to run the risk of being accused of taking a "kitchen sink approach".[329]

It does not fall within the scope of this thesis to discuss American disability law in full, but it is noteworthy that there seems to be an overlap between disability claims payable under medical disability (worker's compensation) and disability benefits. The courts are split on this issue.[330] Should workplace bullying claims be framed under psychiatric disability, legal counsel would need to be aware of this, and state law would give an indication of the potential for success.

The fear is that the granting of disability benefits to victims of bullying will create a notion that the problem lies with the victim and not with the working environment, as in the case of *Nichols v Frank.*[331] In this matter, a deaf-mute woman was compelled to perform deeds of a sexual nature with her supervisor, as he was the only one in the workplace who understood sign language. This caused her severe emotional stress, which in turn made her marriage fail. She then suffered from post-traumatic stress disorder, partly due to the fact that she had had to perform oral sex on him even before he would grant her time off to tend to her divorce proceedings. She sued the employer for sex discrimination and won the case, despite having received disability benefits under the Federal Employees Compensation Act. When the employer appealed, it was found that the post-traumatic stress disorder (categorised as a disease according to the Diagnostic and Statistical Manual of the American Psychiatric Association) from which she suffered could be differentiated from the impact of sex discrimination. It was found that her employment had caused the former instead of the latter.[332]

In this regard, Stefan stated: "Whether concurrent or cause and effect, it is clear that in the real life of workers, sexual or racial harassment is inextricably intertwined with stress, anxiety and depression, in a dynamic that drains the worker and whose accumulated effects may drive him or her into temporary or permanent psychiatric

[328] Stefan 1998: 829.
[329] Stefan 1998: 829.
[330] Also see *Mears v Gulfstream Aerospace Corp*. 905 F Supp. 1075 S D. Ga, 1995 1082.
[331] 42 F.3d 503 (9th Circuit 1994) C.A. (Or) 1994.
[332] *Nichols v Frank* 42 F.3d 503, 66 Fair Empl. Prac. (BNA) 614, 65 Empl. Prac. Dec. P 43, 410. (9th Circuit 1994) 515.

disability. Any claim for disability benefits, however, may erase or at least threaten the discrimination claim" in American law.[333]

It is a fact of American working life that the courts guard employers' managerial prerogative. Requests from employees to work in a less abusive workplace, as a way of reasonably catering for their disabilities, have often been met with disdain. As the judge in *Lewis v Zilog Inc.*[334] remarked, if transfers should be granted to employees under the ADA, it would inherently undermine employers' ability to control their workforce.

Bible,[335] therefore, joins rank with Yamada,[336] and believes that because of the strict requirements to be regarded as disabled, along with the risk of social and professional outing upon acknowledgement of being disabled, the ADA does not prove to be an effective tool to bring bullying claims in the USA legal dispensation.[337]

3.4.4 Occupational health and safety legislation and policies

Occupational health and safety legislation[338]

Although the Federal Occupational Safety and Health Act[339] aims to ensure "safe and healthful working conditions and to preserve … human resources",[340] one has to keep in mind that its enactment was initially primarily directed at protection from physical injuries.[341] Claims under this type of legislation may afford victims redress, but the compensation payable will not end up in their pockets, as the monies payable as penalties go to the state and not the prejudiced employee.

Both state and federal law govern health and safety standards in the workplace, and the Department of Labor is empowered to set safety standards in the workplace and

[333] Stefan 1998: 834.
[334] *Lewis v Zilog, Inc.,* 908 F Supp. 931, N D. Ga 1995 946.
[335] Bible 2012: 41.
[336] Yamada 2004a: 516.
[337] Bible 2012: 41.
[338] Federal Occupational Safety and Health Act of 1970, 29 U.S.C.
[339] 1970, 29 U.S.C.
[340] 65(b).
[341] Yamada, cited in Einarsen *et al* 2003: 406, in which it is stated that the main concern of the act initially was the prevention of physical injuries on mainly manufacturing and construction sites.

may enforce them through inspection.[342] Workers are protected by state-administered schemes catering for compensation where workplace-related injuries occurred, without having to prove either the negligence of the employer or a lack of own due care.[343] Workers often use this mechanism instead of engaging in long civil law suits. This makes this area of law one of the most important avenues to explore as potential relief for workplace bullying.

Different workplace safety and health statutes have been promulgated in the various states, as the Federal Occupational Safety and Health Act of 1970[344] was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources".[345] It has to be kept in mind that this act was originally promulgated to cater for the prevention of physical injuries – according to Yamada cited in Einarsen and colleagues,[346] especially in the manufacturing and industrial sector – and to this day, it remains the focus of the federal agency tasked with the enforcement of the administration.[347]

The absence of direct compensation payable to victims under this act makes this legal avenue less than ideal[348] as a remedy to sufferers of workplace bullying. There is light on the horizon, however, in that the OSHA research arm, the National Institute for Occupational Safety and Health,[349] has included workplace bullying in its studies of workplace violence and aggression. Lately, workplace stress as received more attention, which would hopefully encourage the formulation of legislation or policies against workplace bullying.[350]

Yamada[351] states that although bullying lobbyists and other workplace safety advocates are lobbying for greater attention to occupational stress and abusive working environments within the scope of workplace safety and health statutes, there

[342] Bonfield 2006: 219.
[343] Bonfield 2006: 219.
[344] Public Law 91-596, as amended 1 January 2004; hereinafter referred to as OSHA.
[345] S 651(b), as amended in 2004.
[346] Einarsen *et al* 2003: 406.
[347] Einarsen *et al* 2003: 406.
[348] Yamada 2004a: 493.
[349] Hereinafter referred to as NIOSHA.
[350] Yamada 2004a: 493.
[351] Einarsen *et al* 2003: 406.

is currently little in the statutes and accompanying regulations to assist the victims of workplace bullying in the USA.[352]

Exploring this avenue is thus not ideal for employees seeking redress for workplace bullying.[353]

Occupational health and safety policies

Although not laws as such, these policies are discussed here to give a complete picture of health and safety matters as well as the impact of workplace bullying on employers' obligation to create a safe and healthy work environment.

According to Grubb and colleagues,[354] NIOSHA has included bullying as a predecessor to workplace violence and aggression, which has led to discussions about the impact of bullying on worker health.

In light of the movement to legalise workplace bullying, this may prove to be part of a multi-pronged approach to curb workplace bullying in the American law pertaining to workplace bullying,[355] giving due consideration to the dignity argument, namely that the need to regulate workplace bullying stems from basic human dignity and should not be regarded as an overreaction to tough management, healthy competition or economic necessity,[356] but should be seen for what it is, namely a form of psychological abuse so devastating that it has shattered many targets' careers and livelihoods and has caused depression and post-traumatic stress reactions.[357]

3.4.5 Worker's compensation

In USA law, worker's compensation is a no-fault system that provides for limited benefits to workers who suffer accidents in the course and scope of employment. Both medical expenses and a part of their salary are afforded to such injured

[352] Yamada, as cited in Einarsen *et al* 2003: 406.
[353] Yamada 2010: 259.
[354] 2004: 409.
[355] Yamada 2010: 275.
[356] Yamada 2009: 540.
[357] Yamada 2010: 277.

employees. It needs to be mentioned from the outset, however, that this is not a proactive measure to curb workplace bullying, but a possible reactive remedy available to bullying targets.[358]

There is little incentive for employers to prevent bullying in the workplace based on claims brought under worker's compensation, as these claims do not have the same financial implications as discrimination claims, for instance.[359]

However, states are split on the question of whether this is an exclusive remedy for intentional, work-induced emotional distress injuries.[360] Note should be taken that, according to Namie,[361] relevant health impact reviewers tend to deny claims of stress-related diseases when it can be shown that conditions were pre-existing, even when medically managed. The targets will need to show that they were partially or fully incapacitated because of their working environment – a task not easy to accomplish.[362]

The Namies are clear that the word 'target' is preferred to 'victims',[363] and regard protection as a misnomer, rather arguing that it should be seen as the "right to sue".[364]

Thus, claims brought under worker's compensation seem to be insufficient as a proactive measure against bullying, and carry an excessively high burden of proof.

3.4.6 Anti-retaliation and whistle-blower provisions

It has been stated that the rebuffing of sexual advances or the reporting of unethical business practices are examples of activities that could invite bullying behaviour, and it is known that retaliation after some sort of exposure or complaint is one of the most frequently reported bullying tactics.[365] The question then arises as to how employees

[358] Yamada 2004a: 490.
[359] Yamada 2004a: 490.
[360] Yamada 2004a: 490.
[361] Namie 2003.
[362] Yamada 2004a: 490.
[363] Namie & Namie 2000: 4.
[364] Namie & Namie 2000: 6.
[365] Yamada 2004a: 496.

who make these disclosures could invoke protection, as there seems to be no uniform approach.

The New York Whistle-Blower's Law[366] requires the allegations to be true and proof will have to be tendered before protection can be claimed. However, Title VII of the Civil Rights Act contains an anti-retaliation provision for anyone who has opposed any practice, made an unlawful employment practice under this title, or has made an investigation, proceeding or hearing under this title.[367] Targets of this form of bullying would then either have to prove that the allegations or disclosures made were the truth, or at least that there was a firm belief in the truth of the disclosure, depending on the state law. However, this does not seem to offer sufficient anti-bullying protection.

The mere awareness of workplace bullying is one thing, but understanding this complexity and multifaceted phenomenon is quite another.[368] The fact that the victims of workplace bullying are more often ignored than the victims of schoolyard bullying[369] or domestic violence should make the legislature sit up and take note. Victims' reports of workplace bullying have been equated to the "bleating of a disgruntled employee"[370] and are often ignored. Mann and Kohut are right in saying that "[b]ullying continues because we allow it".[371]

3.5 Workplace bullying and claims under Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act aims to protect individuals from discrimination by employers, albeit based on a strict list, namely "race, color, religion, sex or national origin".[372] It is thus argued that should a bullying victim fall in one of these protected

[366] N Y Lab.Law § 740: N Y Code - Section 740: Retaliatory personnel action by employers.
[367] *Bordell v General Elec. Co*., 667 N E 2d. 922: 23 (N.Y 1996).
[368] Lewis *et al* 2008: 281.
[369] Interestingly, a clear link has been shown to exist between school bullying and adult bullying behaviour, including workplace aggression and bullying. Clearly, adulthood does not always mitigate proclivity towards bullying, and in many instances, the adult bully used to be the school bully. For further details in this regard, see Magnuson & Norem 2009: 34-51. The eradication of bullying from employment may thus be founded in earlier school days, as found by the aforementioned authors.
[370] Mann & Kohut 2012: 1.
[371] 2012: 1.
[372] Yamada 2010: 258.

classes, some relief could be found. However, if the bullying is not related to one of these aforementioned statuses, it becomes irrelevant whether the victim is a member of a protected class or not.

In 2006, Von Bergen[373] raised the question whether the Title VII sexual harassment cause of action could possibly be extended to include workplace bullying. Given the clear requirements to succeed with an harassment claim against an employer based on vicarious liability, one has to evaluate whether the actions or omissions could have led to a hostile working environment, or whether it could be seen to have been sexual *quid pro quo* harassment if the harassment was based on sex. The former is of particular importance to this study and will be evaluated further.

3.6 Sexual harassment and workplace bullying

Although a full discussion on sexual harassment and the law pertaining to it falls outside the scope of this thesis, the *locus classicus* court decisions and the requirements to be met for a successful claim of sexual harassment still need to be mentioned, since it would assist in addressing the primary research question, namely whether existing legal mechanisms provide sufficient protection to bullying victims.

There is a close link between sexual harassment claims and the notion of workplace bullying claims, since both can be framed to fall under Title VII of the Civil Rights Act. Firstly, therefore, claims of sexual harassment will be investigated to indicate their requirements, after which a discussion will follow on whether the cause of action under Title VII can be extended to include workplace bullying.

This question has also been raised in South African law, namely whether there is a real need for workplace bullying to be regulated separately from sexual harassment claims and/or whether the Code of Good Practice on the Handling of Sexual Harassment Cases, which regulates sexual harassment claims in the workplace, could merely be extended to cover workplace bullying as well. Of course, this question can only be answered once it has been established whether workplace bullying is a form of harassment or a *sui generis* transgression in South African law.

[373] Von Bergen *et al* 2006: 24.

For an employee to succeed with an harassment claim against an employer based on discrimination, it has to be shown that the plaintiff was a member of a protected class, i.e. race, colour, religion, sex or national origin, and that he or she was subjected to unwelcome harassment. The harassment concerned must have been based on a protected characteristic, in addition to the fact that it needs to be proven to have been sufficiently severe or pervasive to create a hostile or abusive working environment. At the same time, it has to be proven that a basis of employer liability exists,[374] leading to tangible employment action such as discharge, demotion or undesirable reassignment.[375]

Generally, when an harassment claim is embedded in sexual harassment, it takes either the form of the creation of a hostile environment, or is termed *quid pro quo* harassment, where economic benefits or tangible discrimination[376] such as promotions or raises were granted to only those who gave sexual favours in return.

It is clear that the EEOC guidelines support the view that even non-economic benefits would resort under a Title VII transgression, which is confirmed by case law. Nevertheless, strict liability for employers in such cases would only follow if the harassment culminated in a so-called tangible employment action, such as discharge, demotion or undesirable reassignment, as was held in the well-known cases of *Faragher v City of Boca Raton*[377] and *Burlington Industries v Ellerth*.[378]

This entails that an employee who refuses a superior's unwelcome and threatening sexual advances, yet suffers no tangible job consequences, may still lodge a monetary claim against the employer based on the supervisor's conduct, without having to show that the employer was negligent or at fault. In such an instance, the employer may raise an affirmative defence to liability or damages.[379] The bottom line, however, is that the courts have held that an employer can be held vicariously liable for sexual harassment committed by its supervisory employees, and the USA

[374] *Harris v Forklift Systems*510 U.S. 17,114 S. Ct.367, 126 L Ed 2d 195 (1993).Systems, 510 U.S. 17,114 S. Ct. 367,126 I Ed.2d 295 (1993) 367-373 at 295.
[375] Von Bergen *et al* 2006: 24.
[376] *Meritor Savings Bank, FSB v Vinson* 477 U.S. 57, 64 (1993).
[377] 524 U.S. 775, 11 St.2275, 141 L.Ed 2nd 662 1998 765.
[378] 524 U.S. 742, 11 S.Ct 2257, 141 L Ed 2d 633 1998 765.
[379] *Burlington Industries v Ellerth* 524 U.S. 742, 11 S.Ct 2257, 141 L Ed 2d 633 1998 765.

Supreme Court has held that sexual harassment in the form of the creation of a hostile work environment is a violation of Title VII.[380]

An affirmative defence could take the form of either showing that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behaviour, or establishing that the victim unreasonably failed or chose not to make use of any preventative or corrective opportunity provided by the employer or to avoid harm otherwise.[381]

Of the utmost importance here is to note that a single act of sexual harassment is a sufficient basis to lay a claim based on a Title VII transgression,[382] and it has been found that the more serious the act of sexual harassment, the lesser the need to show repetitiveness of the action or a series of incidents. This, of course, is contrary to the definitions and notions of workplace bullying, which specifically denotes repetitive behaviour.

This leads to the next question, namely why bullying may fall under harassment law, which has traditionally been reserved for claims of sexual harassment. American case law[383] has left a possible loophole to expand the application of Title VII to workplace bullying not based on sex.

For a claim to succeed and an employer to be held liable on grounds of the doctrine of vicarious liability, the plaintiff will have to show that he or she was a member of a protected class and was subjected to unwelcome conduct; that the harassment concerned was based on a protected trait, and that it was sufficiently severe or pervasive to create a hostile or abusive working environment, as well as that a basis of employer liability exists.[384] It is clear, however, that sufficient circumstantial evidence, either qualitative or quantitative, will have to be presented, also proving

[380] Einarsen *et al* 2011: 405; *Burlington Industries v Ellerth*, 524 U.S. 742 (1998).
[381] Von Bergen *et al* 2006: 25, with reference to *Burlington Industries v Ellerth* 765.
[382] *Barret v Omaha National Bank* (1983) 584 F Supp 22 30; Von Bergen *et al* 2006: 35.
[383] *EEOC et al v National Education Association,* 422F.3d 840 (9th Circuit.2005), also reported as 422 F 3d 840, 96 Fair Empl.Prac. Cas. 9 (BNA) Prac. Dec. P 42.053, 05 Cal. Daily Op. serv. 7999, 2005 Daily Journal D.A.R. 10, 85 846.
[384] Von Bergen *et al* 2006: 24.

that the suffering was experienced differently by male and female employees, even in the absence of sexual *animus*.[385]

Only time will tell if a hostile working environment can be created by workplace bullying, which by nature is offensive, repetitive and often systematic, and clearly leads to a hostile working environment.[386]

In conclusion, it has to be stressed that bullying is not the same offence as harassment, in that there is no obvious bias towards race, gender or disability, and bullies are usually clever enough to keep their prejudices under wraps.[387]

3.7 Policies and procedures and workplace bullying

For want of separate legislation, employers began to develop broad-based anti-harassment policies in the workplace, similar to those developed a number of years ago to combat sexual harassment. These have proven to be successful, as can be seen from the decrease in the reporting of serious sexual harassment claims.[388]

Von Bergen and colleagues[389] as well as Yamada[390] believe that further headway could be made by implementing broad harassment policies, despite criticism levelled against overly broad policies, and that these could provide recourse to bullied employees in the absence of specific legislation, very similar to earlier developments in respect of sexual harassment. Accreditation and membership bodies may adopt standards that directly or indirectly require employers to address workplace bullying. A prime example of this is the health sector, which has issued a standard on intimidating and disruptive behaviours at work as part of the work done by the Joint Commission in 2008. Those leadership standards now form part of the accreditation provisions.[391]

[385] *EEOC et al v National Education Association,* 422F.3d 840 (9th Circuit.2005) 845.
[386] Von Bergen *et al* 2006: 25.
[387] Von Bergen *et al* 2006: 30.
[388] Von Bergen *et al* 2006: 31.
[389] 2006: 32.
[390] Yamada 2004a: 496.
[391] Yamada 2010: 274, with reference to Joint Commission 2008: 1.

These policies often incorporate, and should incorporate, progressive discipline in order to send an early warning to bullies that they could be dismissed if their behaviour is not changed to conform to acceptable norms.[392] Therefore, once employers add bullying behaviour to their list of sanctionable workplace conducts, they may be legally obliged to enforce such policy, and could incur liability for failing to do so.[393]

Kossek and colleagues[394] have suggested that cultural change should be strived for by incorporating a zero-tolerance policy for bullying in the employer's code of ethics, advocating the ultimate removal of bullies from the world of work, irrespective of whether they perform their duties well or not, as this would send a clear message that workplace bullying is unacceptable. Implementing policies and procedures may prove to be a solution for workplace bullying due to the inadequacies of the law.[395] It has to be kept in mind that employers could be held vicariously liable for the transgressions of their employees under certain circumstances, and that the remedies could include reinstatement, emotional distress damages and punitive damages,[396] which could have a huge impact on the employer's financial bottom line.

Kohut[397] refers to organisations that will continue to "discount, discredit and deny the grievances of bullies" and says: "There is an old lawyer's saying that if you have the facts on your side, you pound the facts. If you have the law on your side, you pound the law. If you have neither the law nor the facts on your side, you pound the table."[398] He is an active proponent for legal accountability, and believes that the implementation of policies in organisations could prove to be an interim anti-bullying measure.

Since the 1980s, state courts have started to recognise the enforceability of written employment policies.[399] Should an employer add a zero-tolerance bullying section to its list of prohibited conduct in the workplace, it may be legally obliged to enforce it.

[392] Kossek, Kalliath & Kalliath 2012: 745.
[393] Yamada 2004a: 497.
[394] 2012: 745.
[395] Kohut 2008: 238.
[396] Martucci & Sinatra 2009: 77.
[397] 2008: 238.
[398] Kohut 2008: 238.
[399] *Toussaint v Blue Cross & Blue Shield of Michigan* 408 Mich 579, 292 NW2d 880 (1980) 902.

Companies that fail to adhere to their own policies face liability.[400] Judge Charles Levin, who wrote the majority decision in *Toussaint v Blue Cross & Shield of Michigan*,[401] found that even in the absence of a contract of employment, the mere handing of the employment manual/handbook to the employee after a successful interview, which manual states that employees would only be fired for "just cause", amounts to an "implied contract". The mere guidelines contained in the employee manual/handbook give rise to permanent employment,[402] which stresses the value of the employee handbook as a tool within a business. Judge Levin concurred with the appeal court's statement that a bargained-for term of employment (in this case, the undertaking that the applicant would remain in service up until the age of 65, and the reference in the employee handbook to "just cause" dismissals as opposed to the existing 'at will' employment contract, as argued by the respondents) "was a limitation on the right to discharge Plaintiff at will".[403]

Therefore, should the question be raised as to what the value would be of adding a workplace bullying prohibition, the answer is clear: Companies would have a legal right and obligation to enforce their own policies, and it would send the message that bullying-related lawsuits are taken seriously.[404] The development and incorporation of zero-tolerance anti-bullying policies will be discussed in full under possible solutions in chapter 7 of this dissertation.

Intervention strategies have only recently become an academic research subject.[405] Suffice it to say that some companies, such as the Massachusetts Institute of Technology[406] and Google,[407] have started to incorporate such policies where incivility conduct had occurred.[408] If handled correctly and accepted by employees, employers as well as trade unions, policies and procedures seem to offer at least some temporary relief.

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[400] Yamada 2010: 273.
[401] 408 Mich 579, 292 NW2d 880 (1980) 902.
[402] Toussaint v Blue Cross 2009: 16.
[403] *Toussaint v Blue Cross & Blue Shield of Michigan* 408 Mich 579, 292 NW2d 880 (1980) 902.
[404] Yamada 2010: 273.
[405] In this regard, see Saam 2010: 52. Research in Germany revealed that interpersonal management strategies available to targets are not effective in preventing a bullying situation in the workplace.
[406] 2009.
[407] Martucci & Sinatra 2009: 156.
[408] Google Anti bullying policy available at https: //www.docs.google.com/document/d/1Lvjn4MoyGGZdntZxwjoJchzt8sbIxGpjgjmC1F3MyAA/edit?pli=1 (accessed 7 March 2013.) and http: //www.google.com/+/policy/content.html (accessed 9 October 2013).

3.8 Executive orders

The public sector may derive benefit from the passing of executive orders such as in Massachusetts[409] in 2002. These orders applied to all state offices and employees, and required the creation of a zero-tolerance policy against workplace violence in any form. It also required state employers to respond quickly to reports of workplace violence, provided that the definition would not be limited to pure physical contact and harm,[410] and could thus cater for some instances of workplace bullying.[411]

3.9 The Healthy Workplace Bill

One of the most important developments in prohibiting bullying in the workplace in the United States has been the development of the HWB[412] by Yamada.[413] As American employment relations are so rife with potential interpersonal conflict and the concomitant costs to employers and employees, Yamada believes that law plays an important part in setting minimum boundaries of appropriate conduct, encouraging preventative measures and providing compensation, and establishing mechanisms of dispute resolution, all of which eventually led to the drafting of the HWB.[414]

The bill aims to make unlawful the subjecting of an employee to an "abusive work environment",[415] and was meant to fill a statutory void by eliminating the status-based requirement[416] for action taken against workplace discrimination. In short, the HWB sets out to punish workers who behave like bullies and, at the same time,

[409] Yamada 2010: 275 with reference to Executive order No 442, Establishing a Policy of Zero Tolerance for Workplace Violence, by Hon. Jane M Swift.
[410] "Workplace violence is defined as behaviour that includes but is not limited to intimidation, or threats communicated by any means: physical assault and/or battery, property damage or other disruptive or aggressive behaviour that causes a reasonable person to be in fear of their own safety or that of a colleague or that causes the disruption of workplace productivity." Yamada 2010: 275, with reference to Executive order No 442, Establishing a Policy of Zero Tolerance for Workplace Violence, by Hon. Jane M Swift.
[411] Yamada 2010: 275.
[412] Yamada 2004a.
[413] One of the most prominent leaders in this field of development.
[414] Yamada 2004: 478.
[415] Kaplan 2010-2011: 160.
[416] Kaplan 2010-2011: 159.

punish employers who tolerate or encourage bullying behaviour in the workplace.[417] Thus, it provides bullying targets with a civil cause of action, and once an abusive work environment[418] or retaliation has been shown, the bully's actions could be declared an unlawful employment practice. Action could also arise against the employer based on the doctrine of vicarious liability,[419] and be levelled against a fellow employee.[420] Remedies for targets may include injunctive relief, front and back pay, expenses, emotional distress, punitive damages and attorney fees.[421]

The HWB also provides affirmative defences, and the employer could be exonerated from liability in specific circumstances if the bullying behaviour did not result in an adverse employment action.[422] In addition, it permits the damaged bullying target to institute any claims available in civil action, and the removal of the offending party may also be considered. A capped amount of $25 000 is in place for emotional distress if no adverse employment action was created,[423] although the HWB contains no capped amount for damages.

The bill creates three additional affirmative defences to specifically protect employer prerogatives, namely for complaints "based upon an adverse employment decision reasonably made for poor performance, misconduct or economic necessity", "based on a reasonable performance evaluation" and "based on a defendant's reasonable investigation about potentially illegal or unethical activity".[424] These should be sufficient to protect employers' prerogative in maintaining discipline without fear of constant legal action taken against them, and should discourage the use of the HWB to create a cause of action.[425]

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[417] Kaplan 2010-2011: 143.
[418] HWB § 3(a)-(b), available on *Healthy Workplace Bill*. Available on http://healthyworkplacebill.org/blog (accessed 4 March 2013) and http://www.workplacebullying.org/2012/07/11/dy/n (accessed 6 September 2013).
[419] HWB § 4(a), available on *Healthy Workplace Bill*. Available on http://healthyworkplacebill.org/blog (accessed 4 March 2013) and http://www.workplacebullying.org/2012/07/11/dy/n (accessed 6 September 2013).
[420] HWB § 5(a), available on *Healthy Workplace Bill*. Available on http://healthyworkplacebill.org/blog (accessed 4 March 2013) and http://www.workplacebullying.org/2012/07/11/dy/n (accessed 6 September 2013).
[421] Bible 2012: 43.
[422] Bible 2012: 43; HWB § 2(c): "including termination, inclusive of constructive dismissal, demotion, unfavourable reassignment, failure to promote, disciplinary action taken or reduction in compensation".
[423] Bible 2012: 43.
[424] Yamada 2010: 267.
[425] Yamada 2010: 267.

The bill has four main goals, namely to prevent bullying; to encourage the implementation of self-help measures for targets who want to help themselves; to afford relief to bullied targets, granting compensation where bullying could not be prevented and effecting restoration after the removal of the bully from the workplace, and to encourage the creation of a mechanism to punish the employer if bullies were put in positions that enabled them to abuse their power.[426]

However, the HWB has had its fair share of criticism, mostly revolving around the fear of legislating good manners, being too vague, creating uncertainty among employees as to the exact behaviours prohibited, and being superfluous.[427] Some critics believe that existing laws are sufficient to curb this phenomenon.[428] Specific criticism has also been levelled that the bill will lead to an increase in frivolous litigation,[429] while ideological concerns[430] have been raised that the free market and healthy competition will be undermined.

Management-sided lawyers such as Van Dyck and Mullen[431] have levelled criticism about a proposed interference with the managerial prerogative as well as some practical concerns.[432] Concerns have been raised that the HWB will inhibit productivity and employers' freedom to hire and fire at will, and that it would chill critical workplace communication: "The United States has always prided itself on its rugged, even idiosyncratic, individualism. At a time when corporate America at least purports to celebrate diversity in the workplace, it is ironic that legislation is being considered which, if passed, would serve to clone workplace behaviour … it is those who push us to excel to whom we often owe our greatest debt or gratitude. By labelling 'pushing' as 'bullying', there exists a profound risk that high expectations go by the boards and employees are denied real opportunities for advancement."[433] Van Dyck and Mullen go on to state their strong views against utilising the courts for matters of incivility, namely that "laws are not created to assuage hurt feelings".[434] Also of note are the harsh words of Tannenbaum, the face of anti-bullying lobbyists:

[426] Bible 2012: 37.
[427] Yamada 2010: 269; Morris 2008: 65.
[428] Kaplan 2010-2011: 160.
[429] Van Dyck & Mullen 2007: 2; Davis 2008: 1-3.
[430] Van Dyck & Mullen 2007: 3.
[431] Van Dyck & Mullen 2007: 3.
[432] Yamada 2010: 269.
[433] Van Dyck & Mullen 2007: 3.
[434] Van Dyck & Mullen 2007: 3.

"[T]his country was built by mean, aggressive sons of bitches. Would Microsoft have made so many millionaires if Bill Gates hadn't been so aggressive?"[435]

These various points of criticism could explain why none of the proposed bills have been passed and why legislation is pending in another eight states.[436]

The following synopsis of the HWB will serve as a backdrop for a further discussion on the adoption and adaptations of the HWB in several American states. Yamada's views on some of the criticism levelled against the HWB will also be briefly discussed.

In its original form, the HWB[437] consists of nine sections. The preamble states prevalence rates at between 37% and 59% of employees who directly experience health-endangering workplace bullying, abuse and harassment. The bill states that bullying is four times more prevalent than sexual harassment, with the latest 2008 statistics indicating a bullying prevalence rate of 57% and a bystander bullying rate of 50%. It is clear that Americans perceive bullying to be a huge problem in their country.[438] The HWB then goes on to name the negative effects of bullying, including feelings of shame, humiliation, severe anxiety, hypertension and the display if symptoms of post-traumatic stress. Article 4 of the preamble elaborates on the effects for employers, such as reduced employee productivity, high turnover and an increase in a variety of employee claims.

Section 2 of the bill tenders a reason for the development of the HBW, namely that mistreated employees who had been subjected to abusive treatment at work and who could not show that the conduct was motivated by race, colour, sex, sexual orientation, national origin or age were unlikely to succeed with any action taken. The bill has thus been drafted, as legal protection should not be limited to behaviour grounded in protected-class status as per discrimination statutes, and existing worker's compensation plans and common-law tort actions are insufficient to

[435] Browne & Smith 2008: 149.
[436] Kaplan 2010-2011: 160.
[437] Namie 2013.
[438] Sanders *et al* 2012: 2.

discourage bullying or to grant relief if employees have been harmed by an abusive working environment.[439]

The purpose of the HWB is to provide legal relief for employees who have been harmed, psychologically, physically or economically, by having been deliberately subjected to abusive working environments, and provides for legal incentives for employers to prevent and respond to claims of abusive mistreatment at work.[440] An abusive work environment is defined as "when the defendant, acting with *malice*, subjects an employee to abusive conduct *so severe* that it causes *tangible harm* to the employee".[441] Abusive conduct is defined as conduct that would include both acts and omissions that a reasonable person would find hostile based on its severity, nature and frequency, including although not limited to remarks, insults, epithets, verbal or physical conduct of a threatening, intimidating or humiliating nature, the sabotage or undermining of an employee's work performance, or attempts to exploit an employee's known psychological or physical vulnerability. Malice is defined as the desire to cause pain, injury or distress to another,[442] and tangible harm[443] as either physical harm (described as the material impairment of a person's physical health or bodily integrity) as established by competent evidence,[444] or psychological harm (described as being the material impairment of a person's mental health) as established by competent evidence.[445]

Section 2 further defines adverse employment action[446] as including termination of employment, demotion, unfavourable reassignment, failure to promote, disciplinary action taken or effecting a reduction in compensation. Constructive discharge is defined as a termination and, thus, an adverse employment action. This is where an employee reasonably believes that he or she was subjected to abusive conduct and that that was the reason for his or her resignation, and that prior to the resignation,

[439] Yamada 2010: 271.
[440] HWB s (b)(1), as cited in Yamada 2010: 281.
[441] HWB s (b)(2), as cited in Yamada 2010: 281; own emphasis.
[442] HWB s (2)(2), as cited in Yamada 2010: 281.
[443] HWB s (2)(1)(2), as cited in Yamada 2010: 282.
[444] HWB s (2)(2)(2), as cited in Yamada 2010: 282.
[445] HWB s (2)(b)(1), as cited in Yamada 2010: 282.
[446] HWB s (2)(2)(c), as cited in Yamada 2010: 281.

he or she had brought the abusive conduct to the attention of the employer, who failed to take reasonable steps to rectify the situation.[447]

Of particular interest in section 2 is subsection (2)(1),[448] which states that a single act would normally not constitute abusive conduct, but that an especially severe and egregious act may meet the standard. Moving towards a uniform understanding, this aspect is extremely important.

Critics of the HWB believe that the passing of the bill would open a floodgate of claims, but Yamada argues that the specific requirements of malice and proof of actual harm are, in a legal sense, high bars to cross.[449] Coupled with the set cap of $25 000 to be awarded for emotional distress in instances where no negative employment decision was made, and preservation of the normal managerial prerogatives such as holding performance reviews, it is clear that employees will not be able to raise claims as they wish.[450]

Section 3 of the bill declares the subjecting of an employee to an abusive environment as well as retaliation unlawful employment practice, and also provides a definition for retaliation.[451]

In this regard, critics of the HWB[452] argue that existing law, especially tort law and discrimination law, affords victims sufficient protection from workplace bullying. Yamada, however, believes that such allegations are far removed from the truth, in that only claims that threaten or involve physical violence or "expressly raise mistreatment based upon protected class membership fall comfortably within existing tort law".[453] Discrimination law requires a plaintiff to show that the conduct concerned was motivated by a protected-class status, which is often not possible to show in bullying cases.[454] In addition, in many states, worker's tort claims are pre-empted by their compensation claims.[455]

[447] HWB s (2)(2)(d), as cited in Yamada 2010: 282.
[448] Yamada 2010: 281.
[449] Yamada 2010: 268.
[450] Yamada 2010: 269.
[451] HWB s 3, as cited in Yamada 2010: 282.
[452] Morris 2008: 5.
[453] Yamada 2010: 269.
[454] Yamada 2010: 269.
[455] Yamada 2010: 269.

The distinction between direct and indirect discrimination in the United Stated of America is complex and does not form an integral part of this thesis, but it does warrant being referring to in short. Direct discrimination refers to specific actions taken because of identity group membership (for example, a refusal to appoint because of gender or race etc.) and indirect discrimination relates to situations where rules or practices disadvantage members of identity groups more than they do the majority group.[456]

Section 4 sets out employer liability and defence, and purports to hold an employer vicariously liable for an unlawful employment practice committed by any of its employees. Where no adverse employment action can be shown, an affirmative defence to the employer would only be available if the employer exercised reasonable care to prevent and promptly correct any actionable behaviour, and if the complainant unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer.[457]

Section 5[458] deals with employee liability and defence, with the gist being that an employee may be held individually liable for an unlawful employment practice as defined. The only affirmative defence open to an employee would be if he/she committed the unlawful employment practice under threat of an adverse employment action at the employer's direction.

Section 6 proceeds to discuss affirmative defences,[459] after which section 7 turns to the relief offered: "Where a defendant has been found to have committed an unlawful employment practice under this Chapter, the court may enjoin the defendant from engaging in the unlawful employment practice and may order any other relief that is deemed appropriate, including, but not limited to, reinstatement, removal of the offending party form the complainant's work environment, back pay, front pay, medical expenses, compensation for emotional distress, punitive damages and

[456] ASAD M 2010: 2.
[457] HWB s 4, as cited in Yamada 2010: 283.
[458] As cited in Yamada 2010: 283.
[459] As cited in Yamada 2010: 283. Refers to an affirmative defence if the complaint is based on an adverse employment action reasonably made for poor performance, misconduct or economic necessity, or on a reasonable performance evaluation, or on an employer's reasonable investigation about potentially or unethical activity.

attorney's fees."[460] Section 7 of the bill further aims to hold the employer liable where the employer has been found to have committed an unlawful employment practice that did not culminate in an adverse employment action, and caps the amount for damages and emotional distress at $25 000. No punitive damages could be claimed, although this provision does not apply to individually named employee defendants.[461]

Section 8 of the bill aims to create an avenue for a strictly private right of action, and legal action has to commence no later than one year after the last act that constituted the unlawful employment practice.[462] Note should also be taken of the effect of the proposed HWB on other legal relationships.[463]

The remedies provided for in this bill would be in addition to any remedies provided for under any other law. Nothing in section 9 would relieve any person from any liability, duty, penalty or punishment provided for by any other law, except if an employee receives worker's compensation for medical costs for the same injury or illness pursuant to both section 9 and the worker's compensation law, or compensation under both section 9 and that law in cash payments for the same period of time not working as a result of the compensable injury or illness or the unlawful employment practice. The payment of worker's compensation should be reimbursed from compensation paid under section 9.[464]

Yamada identifies the major stakeholders as being employers, employees, targets of bullying, alleged bullies and the legal system.[465] Employers have an interest in preventing bullying[466] due to the loss of employee productivity and loyalty, the potential high cost of lawsuits, and the need to resolve workplace bullying disputes quickly and internally.[467] Employees, as targets of bullying, have an interest in adequate monetary compensation for economic, psychological and physical injuries suffered and the guarantee that the situation will not repeat itself. They also have a need to have their claims investigated quickly within the embedded principles of

[460] As cited in Yamada 2010: 283.
[461] HWB s 7(b), as cited in Yamada 2010: 283.
[462] HWB s 8, as cited in Yamada 2010: 281.
[463] As per s 9 of the HWB.
[464] As cited in Yamada 2010: 284.
[465] 2004a: 482.
[466] Yamada agrees with Namie & Namie 2000: 111, where the latter authors define workplace bullying as "the repeated, malicious, health-endangering mistreatment of one employee … by one or more employees"; Namie & Namie 2004: 315.
[467] Yamada 2004a: 483.

fairness.[468] Alleged bullies have an interest, in that they should be allowed to be exonerated if the claims are unfounded, and if not, their transgressions would be punished in line with the severity of their behaviour.[469] Finally, the legal system has an interest in not being overburdened by minor or unmerited claims as well as the fair and expeditious resolution of disputes.[470]

Various forms of Yamada's model act have been introduced in American states since 2003, but most have died a silent death.[471] Some of these adaptations are of interest in our quest to determine whether existing legal mechanisms are sufficient to address workplace bullying should South Africa decide to draw on the American experience and the HWB. The following section provides a brief overview of these.

3.9.1 American states and the Healthy Workplace Bill

California was the first state to introduce anti-bullying legislation that mirrored the HWB, and proposed to make it unlawful to subject an employee to an abusive working environment. It stressed the possibility of vicarious liability for an employer, and created affirmative action defences, firstly, if the employer exercised reasonable care to prevent workplace bullying and the employee unreasonable failed to make use of such mechanisms; secondly, if a negative employment decision was based on the employer's legitimate business interest, and thirdly, when a complaint should be based on the employer's reasonable investigation of potentially illegal or unethical activity.[472]

Employer liability in the absence of a negative employment action would be capped at $25 000 for emotional distress proven, and no punitive damages would be available. Should a negative employment action be created, an employee could be reinstated, receive back and/or front pay, removal of the offending employee,

[468] Yamada 2004a: 483.
[469] Yamada 2004a: 483.
[470] Yamada 2004a: 483,484.
[471] Martucci & Sinatra 2009: 78.
[472] G.A. 1582, 2003-04 Reg.Sess. (Ca 2003).

punitive damages, medical expenses and/or emotional distress damages from the employer, within the one-year statutory limit.[473]

California's State Assembly Bill 1582 – Model Act to Provide Legal Redress for Targets of Workplace Bullying, Abuse and Harassment, without Regard to Protected Class Status – was filed in February 2003 by the state legislature, and was the first of its kind to protect victims of workplace bullying.[474] This bill was not enacted, but Oklahoma and Oregon followed suit with very similar bills.[475]

Connecticut introduced anti-bullying legislation in 2007 and 2008.[476] It also created a private cause for action for workplace bullying, but has no cap for emotional distress suffered without negative employment action having been taken. Of note is the broad definition for employee, namely "any person, firm, business, educational institution, non-profit agency, corporation, limited liability company, the state, any political subdivision of the state, any governmental agency or any other entity that employs persons".[477] A one-year statutory limitation applies, in line with the HWB.[478]

Hawaii introduced similar legislation in 2005,[479] which lasted the longest in Senate, namely until 2007.[480] Unlike other bills, this House and Senate Bill included provisions for educating employers and employees in the workplace,[481] and the Hawaii Senate issued a Senate Concurrent Resolution urging Hawaiian employers to develop and implement standards of conduct and policies for managers and employees to reduce workplace bullying and promote healthful and safe work environments.[482]

The New York Assembly proposed legislation that would direct the Department of Labour not only to study workplace abuse and harassment, but also to report its findings and recommendations to reduce abuse and harassment in the workplace to

[473] Martucci & Sinatra 2009: 79.
[474] Yamada 2004a: 476.
[475] Yamada 2004a: 477.
[476] Senate Bill 371 followed by Senate Bill 60.
[477] Simon & Simon 2006-2007: 79.
[478] Martucci & Sinatra 2009: 79.
[479] S. 2353, 22 d Leg. Hawaii Proposed Legislation S. 2353, 22 d Leg. (Haw. 2004); HR 1806, 24th Leg (Haw 2007).
[480] Hawaii Proposed Legislation S. 2353, 22 d Leg. (Haw. 2004); HR 1806, 24th Leg (Haw 2007).
[481] Simon & Simon 2006-2007: 159.
[482] S. Con.Res 106, 23rd Leg., Reg.Sess. (Haw. 2006), in H.R. 1806, 24th Leg. Hawaii Proposed Legislation S. 2353, 22 d Leg. (Haw. 2004) & HR 1806, 24th Leg (Haw 2007).

the legislature and governor, which bill has been referred to the Labour Committee.[483]

The state of Pennsylvania adheres to the doctrine of 'at will' employment, which entails that the employer may dismiss an employee without notice or explanation, save certain exceptions embedded in state, case law and federal law.[484] Bullying as such will not fall under any of the civil-law rights, and therefore represents a clear lacuna, despite unemployment compensation law and the Worker's Compensation Act that could alleviate employees' financial misery if their dismissals were not based on any fault of their own.[485] The Pennsylvania courts have not formally adopted IIED as a cause of action,[486] but the legislature has passed an act directed at the protection of public employees,[487] which is loosely based on the HWB.

Of interest in Kansas is that all remedies provided for by that state's bill are in addition to those provided for in the state's Worker's Compensation Act, but the employee has to exercise a choice where he or she wants to claim from, as the one cancels out the possibility of claiming under the other at a later stage.[488]

Washington, in turn, introduced the HWB in 2008 in an almost identical form to that proposed in California, however requiring a plaintiff to exhaust all administrative remedies before filing suit.[489]

Martucci and Sinatra[490] believe that although no state has passed legislation as yet, both employers and counsel should understand what the laws would provide for, if enacted.[491]

There are a plethora of other statutes on which bullying victims may rely if they are able to frame their bullying claims so as to meet the requirements of the various acts. Of the most important forms of federal protection are 'bullying actions' framed under

[483] New York Assemb. Bill A11565, 229th Leg. Sess. (N.Y. 2006).
[484] Simon & Simon 2006: 160.
[485] Simon & Simon 2006: 161.
[486] Simon & Simon 2006: 163.
[487] Public Employee Relations Act, (Act of July 1970, P.L. 563, No. 195, as amended) (43 PS., sections 11101.101.2301 inclusive) §955(a).
[488] Martucci & Sinatra 2009: 80.
[489] Martucci & Sinatra 2009: 82, with reference to H.R. Substitute 2142, 60th Leg., Reg. Sess. (Wash.2008).
[490] Martucci & Sinatra 2009: 83.
[491] Martucci is a partner in Shook, Hardy & Bacon LLP, where he serves as the practice group leader of the National Employment Litigation and Policy Group.

the Age Discrimination in Employment Act,[492] the Fair Labor Standards Act,[493] the Employee Retirement Income Security Act,[494] the Family and Medical Leave Act,[495] the Fair Credit Reporting Act[496] and the False Claims Act.[497] These acts will however not be discussed in this thesis, as bullying actions framed under them account for less than 20%[498] of all bullying claims brought in the USA, and legal sanctions have been provided for by the acts themselves.

3.10 Other means to address workplace bullying

3.10.1 Mediation

It has been suggested that a mediation programme in the workplace might be of assistance to deal with workplace bullying, but the question has rightly been asked whether all parties involved would voluntarily submit themselves to such a programme, given the typically power-hungry bully and the equally powerful employer.[499]

Consultants in private practice, such as Annunzio,[500] believes that the new face of the workplace bully is clear: "While the corporate bully may not look or acts like the playground thug, the victim's response in either case is to hunker down and get out of the way. The schoolyard bully uses physical violence; the executive bully uses fear or the threat of humiliation to silence critics or contrarian voices. Executive bullies don't all have the same personality. The most pernicious type of corporate bully is the one who comes across as polished and sophisticated. Everything about him sends the message that he is the smartest guy in the room – the one who will make the decisions and get the credit. Although he may ask for others' opinions and

[492] 29 U.S.C. §621 (2011).
[493] 29 U.S.C. ch. 8 (2011).
[494] 29 U.S.C. §§ 1001-1453 (2011).
[495] 29 U.S.C. § 2601 (2011).
[496] 15 U.S.C. § 1681 (2011).
[497] 31 U.S.C. § 3729 (2011).
[498] Namie & Namie 2009b: 10.
[499] Martucci & Sinatra 2009: 79.
[500] Annunzio 2012: 1.

give lip service to their ideas, it's clear to everyone that it's 'my way or the highway'."[501]

The success of mediation[502] would partly rely on applicable sanctions set out in the policy, and the anti-bullying policy should form part of the employee handbook. The problem that needs to be considered in this regard, however, lies in the fact that executives would be exempt, as the personnel/employee handbook does not apply to them.[503]

3.10.2 The role of the organisation

It has been contended that organisations have a responsibility to eradicate bullying from employment, not necessarily by means of policy alone, but by scrutinising the procedural and cultural practices that they sustain; "being on the alert for those practises that lay the ground for bullying (as subjective violence) to occur".[504] Ethical underpinning of employee relations is paramount to a bully-free working environment, as bullying is often referred to as unethical behaviour.[505]

According to LaVan and Martin,[506] the legal base in itself is insufficient from an ethical perspective.[507] The authors refer to Schumann's principles as requirements to curb workplace bullying, including utilitarian principles, rights principles, caring and virtue principles.[508]

It has been found that bullying flourishes in organisations that are characterised by highly chaotic and disorganised operations, categorised by poor planning, and marked by the absence of proper procedures for employee performance

[501] Annunzio 2012: 1.
[502] Mediation as a possible solution to workplace bullying will be discussed in full in chapter 7. Suffice it to state at this point, therefore, that mediation alone would not be enough, as bullies, being people who need to exert power, are attracted to hierarchical organisations that can foster their needs. Also see Simon & Simon 2006-2007: 155.
[503] Simon & Simon 2006-2007: 155.
[504] Rhodes, Pullen, Vickers, Clegg & Pitsis 2010: 110.
[505] LaVan & Martin 2008: 160.
[506] 2008: 160.
[507] This aspect will also be discussed in chapter 7 as a possible solution to the problem, and is mentioned in this section merely to afford scholars a full picture of the possible avenues to explore to eradicate bullying from employment practices.
[508] LaVan & Martin 2008: 160.

management.[509] Yet, on the other hand, it has been shown that some supervisory bullies bully merely for the sake of bullying, not for the benefit of getting the job done.[510] It is suggested, however, that supervisory bullying as such could be curbed where the power relationship is guarded more effectively, by instituting clear policies against bullying, ensuring proper grievance channels and developing better-equipped guardians – if not to deter bullying, then at least to afford proper redress for the victims of workplace bullying.[511]

3.10.3 Labour unions and legal protection for collective employee action

Although this presents an avenue to be explored, especially through the protection of union employees and collective bargaining (afforded by the National Labor Relations Act),[512] collective employee action does not seem to provide a sufficient vehicle to combat workplace bullying, due to the very nature of bullying.[513] Although collective employee action is protected by the aforementioned legislation, and there is an increase in response to workplace bullying by unions (as the voice of the people), concerns raised about bullying at the bargaining table and in grievances are insufficient, as bullying concerns are often raised by one member of a trade union against another member of the same union, which often leads to the perception that collective action cannot operate effectively under these circumstances.[514] It is also concerning that union membership has dropped dramatically in the USA, which leaves most employees without representation.[515]

Sidle[516] noted in 2009 that unions have a notable role to play in managing bullying. His research in the field of supervisory bullying indicated that crimes occurred where there were motivated perpetrators (the supervisory bullies in his study), suitable targets (employees) and no guardians (such as strong unions, effective policies or attentive managers), concluding that where people were empowered to stop bullying,

[509] Sidle 2009: 90.
[510] Sidle 2009: 90.
[511] Sidle 2009: 91.
[512] 29 U.S.C.
[513] Yamada, as cited in Einarsen *et al* 2003: 406.
[514] Einarsen *et al* 2003: 407.
[515] Yamada in Einarsen *et al* 2003: 40.
[516] Sidle 2009: 90.

it could prevent workplace bullying by managers. It is upsetting to note that strong unions sometimes developed precisely because of supervisory bullying, and that even the presence of a strong union is sometimes not enough to stop supervisory bullying due to the embedded culture of bullying in organisations.[517]

To enable a collective consciousness about workplace bullying within an organisation, the prevailing legal frameworks for the existence of unions and various forms of collective bargaining and employee action should guide us towards a uniform understanding of the phenomenon.

3.10.4 Potential transnational legal approaches and international trade agreements

Yamada[518] notes that the effect of market globalisation may warrant international discussion around workplace bullying, as is found in the most recent work done by the International Labour Organisation.[519] Multinational trade agreements could become the basis for imposing legal obligations on the signatories thereto in order to prohibit workplace bullying within their own borders.[520] Fear of lowering labour standards in the name of free trade is not a foreign notion to such signatories.

No directive has been passed that specifically relates to workplace bullying, but directives relating to workplace safety and health in general[521] as well as discrimination[522] have been adopted.

In conclusion: it seems as if the legal system in the USA does not sufficiently cater for the effects of workplace bullying, neither preventing it in the workplace, nor affording effective relief to victims, despite the array of legal possibilities.[523] Sanders and colleagues[524] refer to Yamada[525] in commenting that bullying is regarded as the most neglected form of serious worker mistreatment in American employment law –

[517] Sidle 2009: 91.
[518] Cited in Einarsen *et al* 2003: 405.
[519] Yamada, as cited in Einarsen *et al* 2003: 405.
[520] Einarsen *et al* 2003: 408.
[521] The European Union has been praised for their directives passed. See Einarsen *et al* 2003: 408.
[522] Einarsen *et al* 2003: 408.
[523] LaVan & Martin 2008: 158.
[524] 2012: 3.
[525] 2012: 3.

yet, the USA fails to address it. In the words of Sanders and colleagues:[526] "While it may be immoral and unprofessional, it is not universally illegal in the United States for managers to threaten, insult, humiliate, ignore or mock employees. Nor is it illegal to gossip and spread rumours, withhold information, to take credit for someone else's work." The same applies to South Africa, and we need to take urgent steps to curb this pervasive problem.

The next chapter will deal with the legal position pertaining to workplace bullying in the United Kingdom, Australia and other foreign jurisdictions.

[526] 2012: 1, with reference to Daniel 2009.

CHAPTER 4: LEGAL PERSPECTIVES ON WORKPLACE BULLYING IN THE UNITED KINGDOM, AUSTRALIA AND OTHER JURISDICTIONS

4.1 Introduction and background

> *In the societies of the highly industrialised western world, the workplace is the only remaining battlefield where people can "kill" each other without running the risk of being taken to court.*[1]

This chapter will investigate the way in which jurisdictions other than America deal with bullying in the workplace, particularly the UK and Australia, taking into account their different legal systems. The discussion of the aforementioned jurisdictions will be preceded by a brief summary of their respective legal systems.

Reaching a uniform approach to workplace bullying is no easy task, partly due to different terms used to describe the same negative action. Interestingly, however, researchers use the terms 'mobbing', 'harassment', 'bullying', 'moral harassment' and 'victimisation' interchangeably, although the word 'bullying' is preferred in the UK.[2]

Role players in Europe who collaborate in developing initiatives to combat work-related violence, including workplace bullying, are the European Parliament, the ILO, the Foundation for the Improvement of Living and Working Conditions,[3] the World Health Organisation[4] and social partners.[5] Ishmael and Alemoru[6] refer to a British Retail Consortium, which reported that more than 14 000 employees were exposed to physical violence at the workplace, 106 000 received threats of violence, while approximately another 300 000 suffered verbal abuse at work.[7] The authors believe that abuse, violence and crime affect a broad spectrum of organisations, from the corner shop to multinationals, and that its effect on individuals are devastating,[8]

[1] Heinz Leymann as cited in Namie & Namie 2009b: 255.
[2] European Agency for Safety and Health at Work 2010: 20.
[3] European Foundation for the Improvement of Living and Working Conditions 2007.
[4] Hereinafter referred to as the WHO.
[5] European Agency for Safety and Health at Work 2010: 90.
[6] 1999: 47.
[7] Ishmael & Alemoru 1999: 47.
[8] Ishmael & Alemoru 1999: 47.

calling for a more effective way to manage and assess the problem of violence at work.[9]

In turn, Australian law pertaining to workplace bullying has seen the involvement of Safe Work Australia in 2012 and 2013, which led to the compilation of the draft model Code of Practice for Preventing and Responding to Workplace Bullying.[10] The period for public comment on this draft has now closed.

The draft code encompasses a number of documents, the more relevant of which for the purposes of this dissertation are the draft model Code of Practice for Preventing and Responding to Workplace Bullying,[11] a Worker's Guide,[12] public comment on the draft code,[13] and the Consultation Regulation Impact Statement for the draft code.[14]

The compilers of the draft model Code of Practice for Preventing and Responding to Workplace Bullying used the existing work, health and safety acts of the jurisdictions of South Australia[15] and the Ireland Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work. They also drew from the academic writings by authors such as Caponecchia.[16]

While, in Australia, bullying has been placed on the continuum of health and safety, with a corresponding obligation imposed on both employers and employees to ensure a physically and psychologically healthy work environment,[17] the UK, as part of the greater Europe, has placed it on the continuum of a dignity violation.[18] Harthill[19] explains a dignity violation as the breach of a deep-rooted tradition of respect for all, including in the work environment.[20] Even though bullying has been placed on the 'dignity continuum' in the UK, however, it is still viewed as part of the greater violence-at-work problem.[21] This problem was investigated by the European

[9] Which, by means of inference, would include bullying.
[10] Safe Work Australia 2013b.
[11] Safe Work Australia 2013b.
[12] Safe Work Australia 2013d: 1-9.
[13] Safe Work Australia 2013c.
[14] Safe Work Australia 2013d: i-62.
[15] Victoria, New South Wales and Queensland, as per Safe Work Australia 2013d: 18.
[16] Safe Work Australia 2013d.
[17] Australian Work Health and Safety Act of 2012 and the Work Health and Safety Regulations of 2012.
[18] Harthill 2008: 250.
[19] 2008: 250.
[20] Harthill 2008: 250.
[21] European Agency for Safety and Health at Work 2010: 18.

Union, and culminated in the 2010 *European Risk Observatory Report* on workplace violence and harassment throughout Europe.

Victims of bullying often require income replacement, counselling and other types of assistance, especially those victims who leave their employment or have been dismissed[22] as a result of bullying in the workplace. Many do not wish to take legal action, but still suffer from the effects of bullying, and Einarsen and colleagues[23] believe that compensation for personal and economic injustices, including worker's compensation, unemployment assistance, healthcare provisions, mental health counselling and even disability payments related to workplace bullying, should be available to said targets.

Employment discrimination laws may be a vehicle to utilise in cases of workplace bullying, especially where the negative behaviour is motivated by race, sex or membership of a protected class, and the potential co-existence of these laws may raise interesting issues similar to those in the USA.[24] However, Einarsen and colleagues[25] believe that there is "plenty of room in our various legal regimes to include bullying along with status-based mistreatment". It should be kept in mind in all jurisdictions that disability discrimination laws may also overlap with anti-bullying regimes where the bullying causes or aggravates an existing mental illness.[26] The same applies to retaliation that presents itself as bullying. One could easily confuse a bullying claim with a legal claim, or both could come into play, depending on the specifics of individual jurisdictions.[27]

After an investigation by Kieseker and Marchand and the finding in their 1999 report that bullying was not sufficiently addressed via existing Australian legislation, anti-bullying management in Australia has made some real progress.[28] They assessed existing discrimination laws, occupational health and safety laws and unfair dismissal claims and concluded that until bullying was labelled an offense in terms of legislation, costs associated with bullying would continue to escalate, and they

[22] Einarsen *et al* 2011: 480.
[23] 2011: 480.
[24] Einarsen *et al* 2011: 480.
[25] 2011: 480.
[26] Einarsen *et al* 2011: 480.
[27] Einarsen *et al* 2011: 480.
[28] Einarsen *et al* 2011: 471.

actively lobbied for the passing of legislation in this regard.[29] Some states and territories in Australia have since started to address workplace bullying in some or other form, mainly through the use of workplace safety agencies.[30]

4.2 The legal system and position pertaining to workplace bullying in the United Kingdom

4.2.1 The legal system in the United Kingdom

Many will argue that the primary function of English law is the preservation of public order with the intricate involvement of other role players.[31] However, it stands firm that the law merely sets boundaries for acceptable behaviour, and prescribes sanctions for deviations from these norms. Although the UK does not have a written constitution[32] such as the United States, Australia or South Africa, this does not seem to have a detrimental effect on the English legal system, with fundamental law regulating the way in which the UK political system operates. It must be noted, however, that there is a strong push for the British to take the next step and adopt a written constitution.[33]

Partington believes that constitutional arrangements are unusual, in that the most important constitutional principles are found in unwritten practices called constitutional conventions, which are added to by an increasing number of fundamental statutory provisions.[34] Harthill notes that English law is derived from statutes, treaties, case law and the laws of the European Union.[35] The UK's membership of the European Union and other international bodies such as the Council of Europe and the United Nations add to the body of rules developed in the UK.[36] British 'constitutionalism' is based on the sovereignty of parliament, the rule of law and the separation of powers.[37]

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[29] Einarsen *et al* 2011: 471.
[30] Einarsen *et al* 2011: 471, as will be seen later in this chapter.
[31] Partington 2006: 14.
[32] Partington 2006: 15.
[33] Partington 2006: 15,16.
[34] 2006: 32.
[35] 2008: 269.
[36] Harthill 2008: 269; Partington 2006: 32.
[37] Partington 2006: 34.

The Human Rights Act of 1998, which took effect in October 2000, affords protection of human rights and civil liberties, and represents a formalised statement of human rights to fill the void that had existed until recently in this regard.[38] Common law also features strongly. The UK is essentially a common-law country where common law is continuously being developed, especially by the courts,[39] where many of the principal doctrines of law have been established. Higher-court decisions through statutory interpretation, as well as the courts' contributions to procedural law, have further aided in developing the common law.[40]

It must be kept in mind that the current political ideology is a *representative democracy*, which is expressed through regular elections that afford authority to the elected members of parliament to govern on behalf of the people.[41] The British parliament is regarded as the principal law-making body in the UK, and its legislative programme is "at the heart of the law-making process".[42] It produces not only primary, secondary and tertiary legislation, but also the so-called 'soft law' or 'quasi-legislation', which in essence entails codes of good practice or guidelines.[43]

In the UK, a statute starts out as either a private or a public bill (not to be confused with a private member's bill introduced by a backbencher), originating either in the House of Commons or the House of Lords, where the bill is read twice, followed by the necessary debate and, if passed, moves to the other house for a similar procedure.[44] The bill receives royal assent[45] if it passes both houses,[46] and is subject to judicial application and interpretation. It has been argued that the UK's participation in the European Union has caused a shift away from a common-law system.[47] Other international institutions and bodies of international law, such as in the fields of telecommunication and aviation, add to the body of rules in the UK,

[38] Partington 2006: 15.
[39] Harthill 2008: 269.
[40] Partington 2006: 58.
[41] Partington 2006: 34.
[42] Partington 2006: 38.
[43] Partington 2006: 39.
[44] UK Parliament n.d.; Harthill 2008: 269.
[45] The monarchy has no veto power and last refused royal assent in 1707, according to Harthill 2008: 269.
[46] Harthill 2008: 269.
[47] Harthill 2008:269.

although it seems that international labour directives and codes have had little influence on the development of anti-bullying law in that jurisdiction.[48]

Under the Employment Rights Act,[49] employees should be given a written statement of certain terms and conditions of employment within two months of commencement of duties. In addition, there is often an employee handbook, which would contain further terms and conditions and would typically set out where policies and procedures, including anti-bullying policies, could be found.[50] Implied contract terms could be derived from common law or statutory terms, business efficiency or custom and practice. The Rights of Third Parties Act of 1999[51] allows for third parties to enforce a term of contract against the employer only, where the contract indicates that they should receive a benefit in terms thereof.[52]

Several judicial bodies exist in the UK, including the Law Commission, which was established by an act of parliament in 1965 to keep the law of England and Wales under review, and the Department for Constitutional Affairs Research Unit as well as the Legal Services Research Centre and Legal Services Commission, which are aimed at assisting the lawmakers in the UK.[53] The legal system caters for criminal justice as well as civil and commercial justice, and the UK has embraced alternative dispute resolution, which includes arbitration, mediation and early neutral evaluation.[54]

A differentiation is noted between wrongful termination and unfair dismissal. The former is where the employer dismisses an employee who is in breach of the contract of employment (i.e. terminating the contract without providing the employee with the required notice), for which claims could be brought before the county court, high court or employment tribunal.[55] Unfair dismissal[56] refers to instances where the

[48] Harthill 2008: 269.
[49] Of 1996, hereinafter referred to as ERA.
[50] Jausas 2011: 601.
[51] Also known as Contracts Act of 1999, available on http://www.legislation.gov.uk/ukpga/1999/31/contents (accessed 9 December 2013).
[52] Jausas 2011: 603.
[53] Partington 2006: 215.
[54] Partington 2006: 215,213.
[55] Jausas 2011: 607.
[56] Unfair dismissal claims can only be brought if the employee had at least one year of continuous service and was dismissed for any other reason than the six listed in section 98 of the ERA.

contract of employment is terminated due to a breach thereof. Claims for both types of dismissals could be brought under UK law.

Jausas[57] states that the maximum amount awarded for compensation in wrongful dismissal cases are £25 000, while remedies for unfair dismissals range from reinstatement to re-employment and the awarding of damages that are fair and just. The disciplinary and grievance procedures that had to be adhered to prior to 6 April 2009 were extremely strict, but the statutory system was repealed and replaced by the Code of Practice 1: Disciplinary and Grievance Procedures[58] published by the Advisory, Conciliation and Arbitration Service.[59] Even in the absence of statutory force, employment tribunals are obligated to at least consider the guidance offered by the code, and employers would be well-advised not to deviate from its suggestions.[60]

Dismissals must have a valid reason, and a fair procedure must be followed in line with the guidelines of the code, which are similar to the provisions stipulated in schedule 2 to the Employment Act of 2002.[61] Non-compliance with the code could see the employee or employer's claim lessened by up to 25% in accordance with what is deemed just and equitable[62] – a principle that South Africa could borrow in drafting anti-bullying policy.

Grievances are concerns, complaints or problems raised by employees with their employers,[63] and could typically be raised in bullying claims. According to UK employment law since 1996, there is no need to raise a grievance claim before an unfair dismissal claim is brought, although failure to do so could be seen as unreasonable and may lead to a deduction of up to 25% in any compensation awarded. It is also important to note that the three-month period within which a claim for unfair dismissal must be brought is not stayed by lodging a grievance.[64]

[57] 2011: 609.
[58] Hereinafter referred to as the code.
[59] Hereinafter referred to as Acas, see www.acas.org.uk.
[60] Jausas 2011: 665.
[61] Jausas 2011: 665.
[62] Employment Act of 2008, s 1.
[63] ACAS code, see www.acas.org.uk, as cited in Jausas 2011: 667.
[64] ACAS code foreword.

An appeal hearing is possible under UK law where the aggrieved party feels that his or her grievance has not been adequately addressed.[65] Should a grievance be raised during a disciplinary hearing, the hearing should be suspended pending the grievance hearing, unless they are related and could be dealt with concurrently.[66] Section 45 of the ACAS code excludes grievances raised on behalf of two or more employees by a recognised trade union.

UK disability law is also important in managing bullying in the workplace, in that not only physical impairments are noted by the Equality Act of 2010, but employees with psychological impairments are also protected against discrimination in employment.[67] Jausas believes that anxiety, stress or depression will only be recognised as a mental impairment if corroborated by informed medical evidence and it thus amounts to a clinically well-recognised illness.[68] It is foreseen that the negative effects of bullying would probably fall under these provisions, except for mental illness that is "clinically well recognised" by the WHO, including bipolar disorders.[69]

4.2.2 The legal position pertaining to workplace bullying in the United Kingdom

Introduction and the role of politics

The jurisdiction of the UK is seen as a worthy comparative jurisdiction for the purposes of this dissertation, as the UK has since 1997 actively endeavoured to eradicate workplace bullying through various means, and has well-developed anti-stalking law[70] in place against which benchmarking can occur. Not only was interest sparked at grassroots level, but political players, organisations and those at the legislative levels joined hands to urge employers to adopt policies prohibiting workplace bullying.[71] Einarsen and colleagues[72] refer to other legal and policy

[65] ACAS code 39, 40.
[66] ACAS code 45.
[67] Equality Act of 2010, s 6.
[68] 2011: 670.
[69] Jausas 2011: 670.
[70] Harthill 2008: 251; also see the Protection from Harassment Act of 1997 in this regard.
[71] Harthill 2008: 251.
[72] 2011: 480.

considerations that also come into play and could have a bearing on anti-bullying movements throughout foreign jurisdictions, such as the granting of a safety net of no-fault employee benefits and the interaction between anti-bullying mechanisms and employment discrimination laws.

Defining and explaining workplace bullying in the United Kingdom

Employers' self-regulation of bullying in the UK workplace is no small miracle, especially in the absence of any specific law regarding workplace bullying.[73] Researchers in the UK seem to agree with most other international researchers on a definition for workplace bullying, and the definition offered by Yamada in the Healthy Workplace Bill[74] can thus be used to describe this pervasive problem in the UK as well.[75]

Lewis and colleagues argue that the boundaries between bullying, mobbing, toxicity, incivility, violence and aggression are blurred and merely describe different types of tension between the workforce and stakeholders.[76] They further believe that this blurring is extended to definitions of bullying.[77] Although there is no uniform definition in the UK for workplace bullying, it is clear that some authors agree with Yamada in the Healthy Workplace Bill that a single serious incident represents workplace bullying,[78] while others agree with authors such as Chappel and Di Martino that the negative behaviour has to occur regularly, repeatedly and over a period of time[79] to be labelled workplace bullying.

The Namies describe bullying in the UK as "psychological violence".[80] According to Lewis and colleagues, a consistent feature of bullying is regular, on-going and detrimental incidents of inappropriate behaviour towards one or more individuals, which may vary from physical violence to more subtle managerial tactics.[81] At this

[73] Caponecchia & Wyatt 2011: 78.
[74] Namie 2013.
[75] Harthill 2008: 255.
[76] Lewis *et al* 2008: 283.
[77] Lewis *et al* 2008: 283.
[78] A USA perspective as discussed in chapter 3.
[79] Chappell & Di Martino 2006: 10.
[80] Harthill 2008: 255.
[81] Lewis *et al* 2008: 283.

point, it suffices to say that the UK lacks a uniform definition for bullying, but the notion of bullying in the workplace seems to be similar to that in the rest of the world.[82]

As in the rest of the world, UK prevalence figures vary considerably due to different measuring instruments used as well as cultural and other differences, but what does stand firm is that it is a pervasive problem in the UK as well. A 2000 study conducted in Britain showed that one in ten people had been bullied in the six months prior to the study, which increased to one in four when the period was extended to the five years preceding the study. Even more alarming, however, was the fact that 46,5% of the respondents had been witnesses to bullying in the five years prior to the research.[83]

In a follow-up study to the 2007 Zogby study, it was reported that 8,8% of employees in the United States were being bullied at the time of the study and 15,5% were witnesses to bullying.[84] In contrast, it was found that altogether 50% of UK employees were experiencing some or other form of bullying in employment.[85] A study in 2010 indicated a UK prevalence rate of 10,6% in the six months prior to the study, and showed that in 66,8% of cases, the bullying had been ongoing for over a year, with a total of 74% of targets having been bullied by a person in a managerial position.[86] The study also indicated that in the UK, men tended to bully other men and females were more likely to bully other females, although 30,4% of female targets reported having been bullied by men.[87]

The cost of workplace bullying is high, whether to the organisation, employees, employers or society,[88] and the UK is no exception. Commissioned by the ILO, Hoel and colleagues[89] calculated that costs related to absenteeism and replacement due to bullying may amount to £2 billion per year in Great Britain, while some estimate the amount to be as high as £3,7 billion annually. Einarsen and colleagues[90] refer to

[82] See chapter 2 for a full discussion of the definition for workplace bullying.
[83] Hoel n.d.
[84] Hoel n.d.
[85] Workplace Bullying Institute 2010.
[86] Hoel, Cooper & Faragher 2001: 448-450.
[87] Hoel *et al* 2001: 450.
[88] Einarsen *et al* 2011: 139.
[89] Einarsen et al 2011: 139 with reference to Hoel *et al*.
[90] 2011: 141.

the cost of sickness absenteeism, turnover and replacement, the impact on productivity and performance, the cost of grievances, compensation and litigation and, lastly, the loss of public goodwill and reputation.

Bullying in the UK health-care sector is particularly rife. Cresswell and colleagues[91] refer to bullying among obstetrics and gynaecology trainees, and state that "doing nothing" is no longer an option, proposing a standardised nationwide scheme allowing anonymous reporting of incidents at each hospital.[92]

Organisational costs are an important rationale for counteracting bullying in the workplace,[93] whether in the absence or presence of the dignity argument.

4.2.3 Anti-bullying legislation, policies and procedures

Background and the role of politics

The UK has been at the forefront of the anti-workplace bullying movement ever since 1997, when a new political party, the New Labour Party, entered the scene. A "Dignity at Work" campaign was initiated, which led to the introduction of the Dignity at Work Bill[94] in the British parliament[95] driven by trade unions and grassroots organisations.[96] The aim of the campaign (and bill) was to encourage employee representatives and employers to build a culture in which respect for all individuals is seen as an inherent part of required conduct in the workplace.[97] A study by the Dignity at Work campaign found that two million workers claimed that they had been bullied over a six-month period, and confirmed that 5% of UK workers had experienced some or other form of workplace bullying.[98] The fact that the bill was never passed due to lack of government support is not problematic, as its demise was not the result of an insufficient 'traditional dignity' approach for workers, but

[91] Cresswell, Ghina, Iodhi, Nauta & Yoong 2013: 330.
[92] Cresswell *et al* 2013: 330.
[93] Einarsen *et al* 2011: 143.
[94] 1996 H.L.Bill [31] (Eng).
[95] Harthill 2008: 252.
[96] Harthill 2008: 252.
[97] Dignity at Work Partnership http://www.dignityatwork.org/default.htm (accessed on 28 August 2013). Also see the address by the chair of the partnership.
[98] Dignity at Work Partnership http://www.dignityatwork.org/default.htm (accessed on 28 August 2013).

rather the existence of other statutory means to the same end, especially the Protection from Harassment Act of 1997.[99]

Nevertheless, the election of the New Labour Party to parliament in 1997 fuelled anti-bullying awareness: The UK Department of Trade & Industry completed a project worth £1,8 million to eradicate bullying and harassment at work, which was seen as the world's largest dignity project at the time.[100] In addition, documents and guidelines were developed in conjunction with trade unions and employers to tackle bullying in UK workplaces.[101]

The year 1997 was however not only a significant year in British politics, but also for creating anti-bullying awareness. Tony Blair's election as head of the Labour Party was a so-called "Third Way" between the Thatcher legacy of free-market individualism, which discouraged intervention in the labour market, even opting out of signing the Maastricht Treaty and the European Union Charter of the Fundamental Social Rights of Workers[102] and underpinning employment protection rights,[103] and the old Keynesian approach, which heavily regulated the labour market.[104] The Labour Party included in their election manifesto a commitment to address workplace bullying, and signed the Social Charter in 2002.[105] Although this charter did and does not refer to workplace bullying by name, it does refer to "moral obligations to guarantee the respect of certain social rights … related to labour market, vocational training, equal opportunities and the working environment".[106]

Guidelines in the UK include[107] a definition of violence and harassment at work. The guidelines aim to increase employers, workers and their representatives' awareness and understanding of workplace harassment and violence,[108] aiming to provide

[99] Hereinafter called PHA; Harthill 2008: 252.
[100] Harthill 2008: 252.
[101] Harthill 2008: 252.
[102] Hereinafter called the Social Charter.
[103] Harthill 2008: 269.
[104] Harthill 2008: 269.
[105] Harthill 2008: 270.
[106] Harthill 2008: 270.
[107] Dignity at Work Partnership http://www.dignityatwork.org/downloads.asp (accessed on 20 August 2013).
[108] Dignity at Work Partnership http://www.dignityatwork.org/downloads.asp (accessed on 20 August 2013).

employers, employees and their representatives with an action-orientated framework to identify, prevent and manage harassment and violence at work.[109]

Even though, before the passing of specific legislation in this regard, there was a certain measure of protection available to employees who had been bullied at work, and the courts did afford the necessary protection to these victims.[110] The country was ready to recognise new rights for bullied workers by 1997.[111]

Another political development relevant to workplace bullying law occurred in 2002, when New Labour introduced employment regulations that included an employment tribunal created through the Employment Protection (Consolidation) Act of 1978.[112] Random dismissals are not allowed in the UK and a 'good cause' rule must be followed, after which aggrieved employees could pursue their employment disputes through the specialised employment tribunal. The 2002 Employment Act compels employers to follow a government-set standard internal procedure before bringing a claim before the tribunal.[113] Procedures deal with dismissals, discipline as well as grievance issues, including a minimum three-step process, namely a statement of the grounds for action or grievance, a meeting between the parties, and the right to appeal, being mandatory steps before a claim may be lodged.[114]

As mentioned, bullied employees were afforded protection by the courts long before the enactment of the PHA, and the courts have more recently also been instrumental in recognising new rights for claims brought under the act. Most notably, claims for bullying brought under the PHA are often based on the doctrine of vicarious liability.[115] However, the passing of legislation in the form of anti-stalking law in the UK gave that jurisdiction special experience in the field of workplace bullying. It has

[109] EU Framework Agreement http://www.etuc.org/IMG/pdf/BROCHURE_harassment7_2_.pdf (accessed on 20 August 2013): 40.
[110] Harthill 2008: 251.
[111] Harthill 2008: 251.
[112] Employment Protection (Consolidation) Act, 1978 c.44 § 128, schedule 9.
[113] Harthill 2008: 270-271.
[114] Employment Act of 2002 c. 22, schedule 2, and Employment Act of 2002 (Dispute Resolution) Regulations, 2004 S.I 2004/752 (UK), as altered by the Employment Act of 2008 with specific reference to the principles of procedural fairness and dispute resolution.
[115] Harthill 2008: 251.

to be said, however, that the UK, which includes England, Northern Ireland, Scotland and Wales, has no specific law dealing with workplace bullying.[116]

The PHA according to Harthill,[117] was originally aimed at granting civil and criminal redress against the classic forms of stalking, until it was realised that the language was broad enough to apply to harassment in the workplace. The act is extensively used by bullied employees in the workplace, and functions as a well-developed anti-bullying law where workers' dignity-based rights are not recognised.[118] In addition to providing for criminal sanctions, the PHA also imposes civil liability where a defendant engaged in a "course of conduct which amounts to harassment of another and which he knows or ought to know amounts to harassment of another".[119] Harthill[120] states that the courts have been instrumental in recognising the application of vicarious liability to the employer as a new right for claim under the PHA.

Interestingly, claims brought under the PHA are not referred to the employment tribunal, mainly as the PHA is regarded as anti-stalking law and not employment law. The regulations accompanying the 2002 Employment Act specifically provide that they do not apply where one party has subjected the other to harassment.[121]

According to Einarsen and colleagues,[122] the judicially approved application of the PHA to cover employment bullying created a statutory tort remedy for the targets of bullying in the UK, thereby "undercutting momentum for passage of a 'Dignity at Work' bill, the main legislative proposal to address bullying specifically". The Dignity at Work Bill makes provision for civil liability of the employer for allowing bullying or similar acts, including "behaviour on more than one occasion which is offensive, abusive, malicious, insulting or intimidating", and aims to protect the targets or

[116] Caponecchia & Wyatt 2011: 78.
[117] 2008: 251.
[118] Harthill 2008: 251.
[119] Einarsen *et al* 2011: 475.
[120] 2008: 251.
[121] Harthill 2008: 271.
[122] 2011: 476.

victims of bullying in a similar way than the targets of sexual or racial harassment.[123] This bill has not become law as yet.[124]

Also noteworthy are the recommendations issued to organisations by the Dignity at Work Partnership, namely to adopt a zero-tolerance policy; to develop a clear business case due to the high cost implications of bullying at work; to draft policies to set standards of acceptable and unacceptable conduct; to establish strong leadership and indicate to subordinates that bullying is taken seriously; to be people-focused as opposed to target-oriented; to ensure early intervention in bullying matters; to afford training to all stakeholders, raise awareness of the problem, and see to clear role and responsibility management. In the words of the Dignity at Work Partnership: "Bullying is best tackled through a partnership of management, trade union representatives and human resource practitioners."[125]

Cognisance should be taken of statutory developments prohibiting bullying in the UK, but also of existing occupational health and safety legislation, as employers have an obligation in terms of the Health and Safety at Work Act[126] to ensure as far as reasonably practicable the health, safety and welfare of all their employees at work.[127] Einarsen and colleagues[128] argue that the broad phrasing of the aforementioned statute opens doors to regulatory interventions concerning bullying, and although bullying is recognised as a cause of work-related stress, the role of Britain's Health and Safety Executive is largely an educative one through which publications and websites on bullying have seen the light, and the applicability of this act is largely untested.[129]

In the absence of any specific legislation or broader legal principles dealing with bullying as such in the UK, several other legal principles and acts relate to bullying, including the Protection from Harassment Act of 1997, the Health and Safety Act of

[123] Einarsen *et al* 2011: 476.
[124] Einarsen *et al* 2011: 476.
[125] Dignity at Work Partnership http://www.dignityatwork.org/default.htm (accessed on 28 August 2013): 4.
[126] Of 1974.
[127] Einarsen *et al* 2011: 476.
[128] Einarsen *et al* 2011: 476.
[129] Einarsen *et al* 2011: 476.

1974, tort and common law, contracts of employment as well as anti-discrimination laws.[130]

Under both UK common law and UK health and safety legislation, employers are obligated to ensure a safe and healthy working environment for their employees. The Health and Safety at Work Act can however not be used as a basis for civil proceedings.[131] According to Hoel,[132] this is a potential avenue available to victims of bullying, combined with the regulations, including the Management of Health and Safety at Work Regulations of 1990, read with the statutory provisions in the Health and Safety Act of 1974.

The role of the European Union and the European Framework Agreement[133]

The role of the European Union[134] should not be underestimated in any anti-bullying movement. This multinational body is supposed to adopt regulatory structures that will both affect commerce and afford social protection for employees among member states. The EU has recognised the significance of workplace bullying, and a committee report in 2002[135] endorsed the development of anti-bullying legislation. The EU afforded considerable attention to bullying in 2003 as part of its studies on violence and harassment,[136] the results of which culminated in the 2007 Framework Agreement on Harassment and Violence at Work,[137] which was drafted to prevent and manage workplace bullying, sexual harassment and workplace violence.

European companies are obliged to adopt zero-tolerance policies to manage and deal with these offending behaviours, and have to develop in-house procedures to deal with bullying and sexual harassment, should this arise. Other features such as

[130] Hoel 2013: 66.
[131] Caponecchia & Wyatt 2011: 79.
[132] Hoel 2013: 66.
[133] This section is discussed here as it had a strong influence on the legal developments in the UK pertaining to workplace bullying, even leading to amendments of existing legislation in the quest to ensure fairness at work. The Dignity at Work drive can also be attributed to the role of the European Union and the Framework agreements.
[134] Hereinafter referred to as the EU.
[135] Di Martino, Hoel & Cooper 2003: 7.
[136] Einarsen *et al* 2011: 479.
[137] EU Framework Agreement http://www.etuc.org/IMG/pdf/BROCHURE_harassment7_2_.pdf (accessed on 20 August 2013): 40; Framework Agreement on Harassment and Violence at Work http://ec.europa.eu/employment_social/dsw/public/actRetrieveText.do?id=8446 (accessed on 27 August 2013).

confidentiality and due-process provisions are also prescribed by the Framework Agreement.[138] A specially designed website[139] was established to host the joint guidance and to measure implementation by means of surveys, in which it was indicated that 86% of the 250 respondents had policies in place and 60% felt that the guidance received assisted them to improve their approach to bullying in the workplace.[140]

The implementation of the Framework Agreement was not without its problems, however, and the 2011 report indicated that social dialogue structures and processes within a national context were of the utmost importance in implementing the Framework Agreement as a basis for joint action.[141] Cognisance was taken of the fact that measures taken at national level to implement the agreement differed due to the different national industrial relations systems, the relevance of the issue in the area of implementation, and the extent to which it had already been dealt with at a national level.[142]

Of note is the development of a social norm that workplace bullying is unacceptable, which resulted in organisational change, with most employers self-regulating their workplaces through policies and procedures in line with the European Autonomous Framework Agreement on Harassment and Violence at Work.[143] This agreement prohibits different forms of violence and harassment that could affect workplaces, clearly labelling "psychological harassment, amongst colleagues, between superiors and subordinates or by third parties such as clients, customers, patients, etc., ranging from minor cases of disrespect to more serious acts, including criminal offences" as prohibited conduct.[144]

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[138] Framework Agreement on Harassment and Violence at Work http://ec.europa.eu/employment_social/dsw/public/actRetrieveText.do?id=8446 (accessed on 27 August 2013).
[139] www.workplaceharassment.org.uk.
[140] Framework Agreement on Harassment and Violence at Work http://ec.europa.eu/employment_social/dsw/public/actRetrieveText.do?id=8446 (accessed on 27 August 2013); EU Framework Agreement http://www.etuc.org/IMG/pdf/BROCHURE_harassment7_2_.pdf (accessed on 20 August 2013): 40.
[141] EU Framework Agreement http://www.etuc.org/IMG/pdf/BROCHURE_harassment7_2_.pdf (accessed on 20 August 2013): 34.
[142] Framework Agreement Report http://www.etuc.org/IMG/pdf/BROCHURE_harassment7_2_.pdf (accessed on 20 August 2013): 36.
[143] Harthill 2008: 252,253.
[144] Framework Agreement Report http://www.etuc.org/IMG/pdf/BROCHURE_harassment7_2_.pdf (accessed on 20 August 2013): 34, annex 1 p 40.

The Dignity at Work website contains the following with reference to a case study of British Tobacco,[145] a large international firm.

> *BT has a workforce of 108 000 in some 70 countries. The company's Director of People & Policy, Caroline Waters, says that in BT, bullying and harassment are seen as unacceptable because they increase stress, decrease productivity and damage people. This company has had an anti-bullying policy for over ten years. In 2005, it launched its 'Let's Cut It Out!' campaign, which raised awareness of the issue and provided managers and employees with an anti-bullying toolkit. This toolkit included a behavioural assessment tool, a series of docudramas which explored bullying in real life workplaces, and support for people who felt they were being bullied. It also provided techniques for employees and managers when challenging their own or others' bullying behaviours. Two years ago, the company stepped up a gear with its campaign by launching a new policy. BT's Chairman, Sir Christopher Bland, spoke at the launch event of his own experiences of being bullied by senior politicians, in the army and in boarding school. He openly acknowledged that he had bullied others in the past, and made a commitment to continue to challenge himself over his own behaviour. Awareness of 'Let's Cut it out!' has been generated and maintained in a variety of ways, including video e-mails to all employees via the online newspaper, a poster campaign and wrist bands. Line managers were already trained facilitators, but they underwent separate, specialist training in how to maintain awareness of BT's values and how to respond to instances of bullying and harassment.*[146]

This is a great example of how bullying could be managed and prohibited by larger companies.

In 2010, the EU published a document called *Workplace Violence and Harassment: A European Picture*, also referred to as the European Risk Observatory Report, as

[145] Also referred to as BT.

[146] Dignity at Work Partnership http://www.dignityatwork.org/uploads/files/HRroleLeaflet.pdf (accessed on 20 August 2013).

part of the work done by the European Agency for Safety and Health at Work.[147] In this document, the EU places bullying on the continuum of workplace violence.[148] The report indicates that the targets of bullying are as diverse as people in general, and that there is no common target profile of personality.[149] According to the report, at least three of the following have to be present for bullying to be noted from a European perspective: "problems in work design (i.e. role conflict); incompetent management and leadership; a socially exposed position of the target; negative or hostile social climate, and a culture that permits or rewards harassment in an organisation".[150] The report acknowledges the economic impact of bullying and harassment, and states that psychological consequences can be even more serious than physical wounds, and that the consequences of work-related violence "are as wide as the whole framework of risks related to it".[151] The report was compiled from information furnished by 29 European countries,[152] and can thus be said to represent the greater Europe.

A new civil tort of harassment

By the beginning of the 1990s, victims of bullying enjoyed the protection of the courts in bullying claims through the emergence of a new common-law tort of general harassment subsequent to the appeal court decision in *Burris v Azadani*,[153] in which the dictum was stated that harassment is a tort.[154] Of importance is that UK law recognised the principle that courts would restrain behaviour even if it was not criminally actionable, to protect a plaintiff's legitimate interest in freedom from harassment.[155]

Civil law was not the only arm of the legal system that showed development pertaining to harassment: The criminal law of harassment also saw developments, such as the judicial recognition of actionable "psychological assault", although its

[147] 2010.
[148] European Agency for Safety and Health at Work 2010: 9.
[149] European Agency for Safety and Health at Work 2010: 11.
[150] European Agency for Safety and Health at Work 2010: 11.
[151] European Agency for Safety and Health at Work 2010: 11.
[152] European Agency for Safety and Health at Work 2010: 15.
[153] 1995 4 ALL E.R: 802, in which an injunction was upheld against a defendant who had stalked a woman and her children.
[154] Harthill 2008: 273.
[155] Harthill 2008: 273, with reference to Lawson-Cruttendon & Addison's *Black's Law Dictionary*.

origin is found in stalking law.[156] Intent has to be proven in showing intentional wrongdoing when utilising subsequent anti-harassment criminal law,[157] which is quite difficult to do in bullying claims. Still, however, this avenue remains an important one for victims to explore.

The Employment Rights Act of 1996

Bullied employees may also utilise the British law governing unfair dismissals, with specific reference to the Employment Rights Act.[158] This act allows for mainly improper conduct, poor performance and redundancy as valid reasons for fair dismissals, and protects against unfair dismissals.[159] As in South African law, provision is made for so-called 'constructive' dismissals, in which a resignation is voluntarily tendered or employment is voluntarily abandoned due to the employer's breach of a fundamental express or implied term of the contract of employment.[160]

Einarsen and colleagues believe,[161] as was also confirmed by case law,[162] that subjecting an employee to severe mistreatment such as bullying could be seen to be a breach of contract by the employer, thus emphasising the value of the contract of employment. This is confirmed by Hoel,[163] who states that employees may not be unfairly dismissed and that it creates a claim for constructive dismissal if employees are forced to leave their employment against their will in the case of a breakdown of trust and confidence from the side of the employer. Hoel[164] refers to the fact that some court cases confirm that bullying and harassment could lead to a claim under the Employment Rights Act based on constructive dismissal, but, with reference to Di Martino, also states that the courts are not united in this approach.[165]

[156] Harthill 2008: 273.
[157] Note that proving intent is not necessary in PHA claims, according to Harthill 2008: 274.
[158] Of 1996.
[159] See Fair Work Act of 2009, "Unfair dismissal"; *Glen Stutsel v Linfox Australia Pty Ltd,* docket number: U2011/8497: par 64.65.
[160] Einarsen *et al* 2011: 476.
[161] 2011: 476.
[162] *Abbey National PLC v Janet Elizabeth Robinson* (2000) WL 1741415 7.
[163] 2013: 68.
[164] 2013: 68.
[165] Hoel 2013: 68.

In *Abbey National PLC v Janet Elizabeth Robinson*,[166] an employment appeals tribunal upheld a finding of constructive dismissal based on bullying[167] and harassment. The applicant found the working environment insufferable and resigned due to what the tribunal found to be "insensitive, unsatisfactory and unreasonable" working conditions.[168] In *Roger Storer v British Gas PLC*,[169] the appeals court reinstated a claim of constructive dismissal, as the claimant suffered from post-traumatic stress disorder due to victimisation and bullying by his superior. In *Ezekiel v the Court Service*,[170] it was held that a bully at work was properly dismissed under the Employment Rights Act[171] due to his severe bullying and mistreatment of several co-workers. These examples illustrate the courts' view that bullying or harassment could be prosecuted under this act.

In 2005, in *Majrowski v Guy's and St Thomas's NHS Trust*,[172] the court of appeal confirmed that chapter 40 of the Protection from Harassment Act of 1997 applies to workplace bullying, and that an employer could be vicariously liable for harassment committed by an employee (subject to normal vicarious liability rules). In the 2011 case *Marinello v Edinburgh City Council*,[173] the aforementioned principles were supported. Here, the applicant alleged that he suffered from anxiety and a depressive disorder which conformed to the DSM IV[174] scale due to continuous bullying and harassment by his two superiors[175] in contravention of section 8 of the PHA. The court found in his favour and stipulated that harassment included "causing a person alarm or distress".[176] This once again demonstrates how the PHA and Employment Rights Act[177] may be used to deal with bullying ex post facto where it indeed occurred.

[166] *Abbey National PLC v Janet Elizabeth Robinson* (2000) WL 1741415 9 EAT.
[167] To a certain degree and not mentioned specifically.
[168] *Abbey National PLC v Janet Elizabeth Robinson* (2000) WL 1741415 7.
[169] *Roger Storer v British Gas PLC* WL 191091(CA 2000) 36, in which the matter was submitted to be heard by another tribunal.
[170] *Ezekiel v the Court Service* WL 1274032 (EAT).
[171] Of 1996.
[172] [2005] EWCA Civ 251 Case number B 2/2004/0631 22 and 28.
[173] 2011 WL 1151714 1-13.
[174] An internationally accepted standard to measure depression and other mental illnesses.
[175] *Marinello v Edinburg City Council* 2011 WL 1151714 1.
[176] *Marinello v Edinburg City Council* 2011 WL 1151714 11.
[177] Of 1996.

Later decisions dealt with the distinction between bullying and a harsh management style. In *Price v Surrey CC*,[178] it was said that "[b]ullying is a sustained form of psychological abuse and often emanates from a senior person taking what they feel is a 'strong line' with employees".[179] There is however a fine line between strong management and bullying, which line is crossed when the targets of bullying are persistently denigrated so that they begin to show signs of distress and physical, mental or psychological injury. The difference between workplace bullying and other work-related problems lies in the fact that it is not defined by the intention of the perpetrator, but rather the deed itself and its impact on the recipients or targets.[180] In *Price v Surrey CC*, it was found that bullying could not be proven, although the female respondent's management style could be criticised, and the appeal was subsequently dismissed.[181]

Pritam[182] regards the legal building blocks for bullying claims in the UK as scattered and argues that, in the absence of a single legal definition for bullying, claims could be brought under one or more of four legal categories, namely constructive dismissal, discriminatory harassment, civil or criminal harassment under the PHA, or personal injury claims.[183] Constructive dismissal refers to a claim for a fundamental breach of contract, making the employee's position untenable and leading to a resignation and subsequent claim for notice money and compensation under unfair dismissal.[184] Discriminatory harassment involves a display of unwanted conduct on the grounds of sex, race/nationality, disability, religion/belief, sexual orientation or age with the purpose or effect of violating a person's dignity, or by creating a hostile, intimidating, degrading, humiliating or offensive environment, which causes the target some form of detriment, and where a clear causal link has been shown between the 'protected class' and the behaviour of the perpetrator.[185] For civil or criminal harassment under the PHA, the behaviour concerned must have gone from the "regrettable" to the "unacceptable", and must be of an order which would sustain

[178] 2011 WL 5077766 EAT 12.
[179] *Price v Surrey CC* 2011 WL 5077766 EAT 12
[180] *Price v Surrey CC* 2011 WL 5077766 EAT 12.
[181] *Price v Surrey CC* 2011 WL 5077766 EAT 57.
[182] 2010: 18.
[183] Pritam 2010: 18.
[184] Pritam 2010: 18.
[185] Pritam 2010: 18.

criminal liability.[186] Personal injury claims may be brought in the civil courts or before an employment tribunal to recover compensation for an employer's negligence in allowing the bullying situation to develop, thereby causing mental or physical injury. In extraordinary cases, claims for breach of health and safety legislation may arise.[187]

The Protection from Harassment Act of 1997[188]

- General

According to Harthill,[189] the PHA has created a new statutory civil tort and two criminal offenses, and authorised courts to award damages and issue injunctions in harassment cases. This act, which took effect on 16 June 1997,[190] was enacted largely as a response to personal stalking,[191] and is still referred to as the "Stalker's Act". However, it has found wide application and covers all types of harassment, not just stalking, and even made its way into the workplace.[192] Even though it is estimated that fewer than 30 of the 30 314 cases brought under the PHA are workplace-related, it is certain that the PHA is a tool available to the British worker to fight against workplace bullying.[193]

The backdrop to the enactment of the PHA is the fact that the element of intent, as required by criminal law for a conviction on a stalking charge, proved to be too high a bar.[194] Following certain high-profile acquittals in this regard precisely based on the inability to prove intent, a gap was identified in both the criminal and civil law pertaining to stalking.[195] Commentators agree that criminal law is not the vehicle to use in stalking-type behaviour, according to Harthill.[196]

[186] Pritam 2010: 18.
[187] Pritam 2010: 18.
[188] This act must not be confused with the South African act of the same name, Act 11 of 2011.
[189] 2008: 274.
[190] C.40 §1.
[191] Einarsen *et al* 2011: 475.
[192] Harthill 2008: 274.
[193] Harthill 2008: 280. As separate statistics are not held for workplace bullying cases brought under the PHA, this is an estimate based on a search done in 2008 through Nexis. See Harthill 2008: 279.
[194] Harthill 2008: 275.
[195] Harthill 2008: 275.
[196] 2008: 275.

At the same time, even though the courts recognised psychological harm caused by harassment, it was dealt with in a piecemeal fashion.[197] The National Anti-Stalking and Harassment Campaign[198], which focused on classic forms of stalking such as obsessive pursuit, was consequently launched, and the notion of harassment was investigated. The study culminated in the paper "Stalking – The Solutions" published by the Home Office in July 1996, which dealt with stalking as a form of harassment[199] and thus extended the scope of stalking far beyond obsessive pursuit.

The legislature responded to these initiatives with the drafting of the Protection from Harassment Bill, although it was never intended to be a tool to combat workplace bullying. Although not debated or intended to find application in workplace bullying cases, it was clearly broad enough to encompass harassment in the workplace[200] – in fact, in the words of Hon. Maclean, "[a]ll forms of harassment – whether stalking, racial abuse, neighbour or work disputes".[201]

In section 1, the act itself refers to the prohibition of harassment, either against one other person or against two or more people, unfortunately without defining harassment, but merely stating that "… the person whose course of conduct is in question ought to know that it amounts to [or involves] harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to [or involved] harassment of the other".[202]

To understand the applicability of the PHA in bullying cases, one must keep in mind that the act creates both criminal and civil liability[203] where a person "pursues a course of conduct which amounts to harassment of another, and which he knows or ought to know amounts to harassment of another".[204] The PHA creates an affirmative defence if the defendant can show "that the conduct was pursued for the

[197] Harthill 2008: 275.
[198] Hereinafter referred to as NASH.
[199] Harthill 2008: 276.
[200] Harthill 2008: 276.
[201] 287 Parliamentary Debate H.C (6th ser.) (1996) 781-988, as cited in Harthill 2008: 276. Also see the comments of Hon. Maddock in the same debate, on 802 ("Although the Bill is generally perceived to be about stalking, its tentacles are likely to spread far wider …").
[202] §1(2).
[203] Harthill 2008: 274.
[204] §1(1).

purpose of preventing or detecting a crime or under any enactment of the rule of law or in the particular circumstances, such pursuit was reasonable".[205]

Although originally directed against the perpetrator of the alleged harassment, and not employers, both the courts and employment tribunals interpreted the PHA to impute liability to employers for their employee's bullying behaviour,[206] and employees are using this as a vehicle to recover large amounts of money from their employers.[207]

Hoel[208] also indicates that section 3 specifically creates applicability for this act in the employment setting, and rulings by the courts have allocated large sums of money to the victims of bullying due to "injured feelings". In the much-publicised case *Green v DB Group Services (UK) Ltd*,[209] it was highlighted (in 2006) that the PHA could be applied to workplace bullying scenarios.

In this case, a secretary was subjected to sustained emotional abuse: Not only did the employer remove her from mailing lists and unreasonably increased her workload, but her colleagues excluded her from social functions, continuously ignored her and also made crude and inappropriate remarks. Her complaints to management were ignored, until she developed a major depressive disorder and was put on suicide watch. The court found the employer vicariously liable and awarded damages, thereby affording judicial approval for the use of the PHA in employment situations, possibly also creating[210] a de facto statutory tort remedy for workplace bullying.

- The Protection from Harassment Act as a civil remedy for workplace bullying

In the absence of a clear definition for harassment in the PHA, it has been up to the courts to interpret what constitutes harassment under the act. A mere general

[205] C.40, §1(3).
[206] *Majrowski v Guy's and St Thomas's NHS Trust,* 2005 EWCA (CIV) 251 73, and, on appeal, reported under *Majrowski v Guy's and St Thomas' NHS Trust* [2005] QB 848 880 and 113. Also Harthill 2008: 275.
[207] Harthill 2008: 275.
[208] Hoel 2013: 67-77.
[209] EWHC 1898 (QB 2006) 172.
[210] Einarsen *et al* 2011: 376.

prohibition is found, namely "a course of conduct which amounts to harassment of another and which [the perpetrator] knows or ought to know amounts to harassment of the other".[211]

Harthill believes that the 'reasonable man' test could find application here, as confirmed by section 1(2) of the PHA, but it is clear that the focus of this section is on the effect on the victim, and not so much on the types of conduct that produce the effect.[212] The act does however require "conduct on at least two occasions",[213] including speech.[214] Language in the PHA suggests that a single incident of harassment may be sufficient for a guilty finding under civil law, as the civil-law remedy states that "an actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question".[215]

Harthill[216] states that British courts follow the standard of "pervasiveness", which is similar to the 'hostile work environment' in the United States, and thus, the fewer and more distant the incidents, the lesser the chances of convincing the judiciary of harassment or stalking. Should the bringing of a suit by the victim of harassment in civil proceedings lead to a guilty finding,[217] damages,[218] including compensatory as well as emotional distress damages, may be awarded. Damages may be awarded for (among other things) anxiety caused by the harassment, as well as for any resultant financial loss.[219]

Of interest and importance is the fact that employees could bypass employment tribunals to hear employment harassment claims, and could lodge a civil claim in the county or high court based on workplace bullying in terms of the PHA, also without resorting to the use of normal employment tribunals.[220] This advantage, as many see

[211] C. 40, §1(1).
[212] Harthill 2008: 277.
[213] §7(3).
[214] §7(4).
[215] §3(1).
[216] 2008: 278, with reference to *Daniels v Comm'r of Police of the Metropolis* [2006] EWHC 1622 (QB) 5(e).
[217] C. 40 §3(1).
[218] C. 40 §3(2).
[219] C. 40 §3(2); Harthill 2008: 278.
[220] Harthill 2008: 278.

it, is due to the application of the PHA to hear harassment claims both inside and outside the employment context.[221] It must be kept in mind that the PHA focuses exclusively on the psychological effect of the negative conduct,[222] and not necessarily on the type of conduct.

- The Protection from Harassment Act as a criminal remedy for workplace bullying

According to the PHA, harassment is a criminal offence in certain situations.[223] The act provides for imprisonment for a term of up to six months, or a fine, or both. Section 4 of the PHA deals with an additional offence, namely that of putting people in fear of violence, which could lead to a more severe prison sentence and/or fine. A court may also issue a restraining order on a person convicted under any of the criminal sections of the PHA, in addition to imprisonment and/or fines.[224] If the injunction is breached, the perpetrator could be subjected to further penalties. The PHA makes the breaching of a civil injunction a criminal offence by providing for the issuing of a warrant of arrest for the defendant.[225] In addition, section 3(6) of chapter 40 of the PHA describes it as an offence if anything is done that is prohibited by the injunction.

The UK courts adopted a textual interpretation of the new law, and it became clear that whatever the original intent of the legislature, the words were clear and covered harassment of any sort, provided that the elements thereof have been proven.[226] These elements were established in a non-workplace-related case in 2003,[227] namely that "the conduct must be calculated (i.e. likely) to produce the consequence that the claimant is alarmed or stressed; [it] must be oppressive and unreasonable; [it] must have foreseeably caused distress, [although] more than foreseeability is needed".[228]

[221] Harthill 2008: 278.
[222] Harthill 2008: 278.
[223] C. 40 §2(2).
[224] C. 40 §4(4).
[225] C. 40 §3(3)(b).
[226] Harthill 2008: 280.
[227] *Sharma v Jay* [2003] EWHC 1230 22.
[228] *Sharma v Jay* [2003] EWHC 1230 22.

In time, it was duly questioned whether an employer bears liability for the torts of his employee, as English law, similar to USA and South African law, accepts the doctrine of vicarious liability.[229] Vicarious liability is the imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons. Indirect or imputed legal responsibility for the acts of another, such as an employer's liability for an employee's acts, forms the basis of the principle of vicarious liability.[230] It was questioned whether liability in English law made provision for statutory vicarious liability, since this doctrine had its origin in the common law. However, in *Majrowski v Guy's & St Thomas's NHS Trust*,[231] the court ruled in favour of the applicant based on workplace bullying and harassment, although embedded in statutory vicarious liability.[232]

In the *Majrowski*[233] case, the applicant was subjected to excessive criticism and isolation, abuse in front of others, and unrealistic goal-setting, among other things. The applicant sued his employer under the theory that the employer is civilly vicariously liable for harassment in breach of the PHA, committed by one of its employees in the course of his employment.[234] The court acknowledged the expansion of the doctrine of vicarious liability, and moved from "in the course of employment" to the broader principle of "the sufficiency of the connection between the breach of duty and the employment and/or whether the risk of such breach was one reasonably incidental to it",[235] thereby adapting the common law.

The court further referred to several built-in safeguards for employers to curb unnecessary litigation. These are that the PHA prohibits "a course of conduct", and requires more than a single act; that claimants must establish an objective standard by which to determine that the conduct constitutes harassment, and that employer liability must be "just and reasonable in the circumstances", using the aforementioned test of "close connection".[236] The meaning of harassment under the

[229] Harthill 2008: 281.
[230] Harthill 2008: 281, with reference to Lawson-Cruttendon & Addison's *Black's Law Dictionary*.
[231] *Majrowski v Guy's & St Thomas's NHS Trust* [2005] EWCA Civ 251 (Court of Appeal) 73.
[232] Harthill 2008: 282.
[233] *Majrowski v Guy's & St Thomas's NHS Trust* [2005] EWCA Civ 251 (Court of Appeal) 1 and 73.
[234] *Majrowski v Guy's & St Thomas's NHS Trust* [2005] EWCA Civ 251 (Court of Appeal) 1.
[235] Harthill 2008: 283.
[236] *Majrowski v Guy's & St Thomas's NHS Trust* [2005] EWCA Civ 251 (Court of Appeal) 57.

PHA was also addressed and was found to be "a word which has a meaning which is generally understood. It describes conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable".[237]

In *Green v DB Group Services (UK) Ltd*,[238] in which the employer was sued for negligence as well as in terms of the PHA, Green was awarded damages.[239] The court summarised cognisable harassment as conduct that "occurred on at least two occasions; targeted the claimant; [was] calculated in an objective sense to cause distress, and is objectively judged to be oppressive, unreasonable and negligent".[240]

Of importance here is the fact that the court found the employer vicariously liable under the PHA, but did not award separate damages under the act. The court noted that those damages could be covered under her common-law negligence claim, but still awarded £35 000 for pain and suffering, £25 000 for her disadvantage in the labour market, £128 000 for past loss of earnings (she eventually suffered from a major depressive disorder) and £640 000 for future loss of earnings,[241] acknowledging emotional distress.[242]

In 2011, in *Lyon v Ministry of Defence*,[243] it was found that an air force corporal was bullied over nine months to such an extent that he suffered serious psychiatric injuries in the form of major depression. He was awarded damages for pain, suffering and loss of amenity as well as aggravated damages. The court cautioned

[237] *Majrowski v Guy's & St Thomas's NHS Trust* [2005] EWCA Civ 251 (Court of Appeal) 82, with reference to *Thomas v News Group Newspapers Ltd*. [2001] EWCA Civ. 1233 30.
[238] [2006] EWHC 1898 (QB).
[239] Judge Owen remarked on 172: "By section 3 of the Protection from Harassment Act 1997 damages may be awarded for anxiety caused by the harassment and for any financial loss resulting from it. But I do not propose to make a separate award under the Act, as the anxiety caused by the harassment is a factor that I shall take into account in the assessment of general damages in the common law claim, as that it is clear that the breakdowns were preceded by periods of increasing anxiety caused by the bullying and harassment to which she was subjected. The financial loss resulting from the harassment is subsumed in the claim for consequential loss and damage."
[240] *Green v DB Group Services (UK) Ltd* 2006 WL 2248794 QB 14; *Majrowski v Guy's & St Thomas's NHS Trust* [2005] EWCA Civ 251 (Court of Appeal) 152.
[241] *Majrowski v Guy's & St Thomas's NHS Trust* [2005] EWCA Civ. 251 (Court of Appeal) 172-190.
[242] Harthill 2008: 285
[243] 2011 WL 2748481 in the county court Unreported 5.

not to duplicate damages awarded under the PHA and vicarious liability if an award for compensation has been made under any one of the act or common law.[244]

Harthill[245] refers to the emergence of a cause of action under the PHA as an effective weapon against workplace bullying in the UK courts, and states that the courts have applied anti-stalking law to workplace bullying by "fleshing out the vague statutory definition of 'harassment' and applying the doctrine of vicarious liability".[246] This surely provides the victims of workplace bullying with a suitable remedy.

The Public Interest Disclosure Act of 1998

Chapter 23 of the Public Interest Disclosure Act of 1998[247] protects employees who made protected disclosures from suffering a detriment by any act or deliberate failure to act by his employer, and allows for complaints in this regard to be brought before an employment tribunal.[248]

A worker may take his employer to a tribunal for any detriment (dismissal, redundancy or other employment detriment suffered) after the worker has made a disclosure relating to a criminal offence, breach of a legal obligation such as a duty of care where the health and safety of an employee is likely to be endangered (e.g. bullying), miscarriage of justice, or environmental damage.[249]

The Health and Safety at Work Act of 1974

Under the Health and Safety at Work Act of 1974, an employer is obliged to ensure the health, safety and welfare of all his employees at work, as far as reasonably practicable.[250] Section 2(6) of the act compels employers to consult safety representatives with a view to promoting and developing measures to ensure employees' safety at work, as well as checking the effectiveness of such measures.

[244] 2011 WL 2748481 in the county court Unreported 5.
[245] 2008: 285.
[246] Harthill 2008: 285.
[247] S 2.
[248] S 3 (by means of inference, thereby protecting against bullying following a public disclosure).
[249] Bully Online http://bullyonline.org/action/legal.htm (accessed on 9 September 2013).
[250] S 2 (1), 2(2).

This principle should also be kept in mind when tendering solutions to the South African bullying problem.

Einarsen and colleagues[251] noted that although, at face value, this avenue seems to be an excellent one to explore for workplace bullying claims, it is still reasonably untested in UK law. Britain's Health and Safety Executive,[252] which is the agency appointed by government to enforce the Health and Safety at Work Act, recognises bullying as a cause of work-related stress, but currently acts as a mere educator through websites and publications.[253] Researchers in the UK take a risk management approach to bullying in the workplace, simply because bullying is regarded as a workplace stressor in the UK.[254] Since the act cannot be used as a basis for civil proceedings, utilisation of the common law is an option to be explored in bullying claims.

4.2.4 Common law and the contract of employment

As far as bullying behaviour is concerned, claims under the common law may only be made if an employer fails to protect an employee against victimisation that caused a physical and/or psychiatric injury.[255] The employer has a common-law duty to ensure a safe and healthy work environment for employees.[256]

In *Wolters v University of the Sunshine Coast,*[257] the court confirmed the existence of a common-law duty to take reasonable care to avoid psychiatric injury, and that the contract of employment between the plaintiff and defendant implied certain rights, duties and liabilities.[258] Although negligence on the side of the university could not be proven, the university was still liable to the defendant for breach of contract, as they failed to investigate and take proper steps against a security officer who verbally abused a subordinate during a power outage at the university, to such an extent that

[251] 2011: 476.
[252] Created by section 11 of the Health and Safety at Work Act of 1974.
[253] Einarsen *et al* 2011: 476.
[254] Caponecchia & Wyatt 2011: 79.
[255] Caponecchia & Wyatt 2011: 79.
[256] *Green v DB Group Services (UK) Ltd* [2006] EWHC 1898 (QB) 2, where the view was expressed that the employers owe their employees a duty of care to ensure reasonable safety in the workplace as far as possible.
[257] *Wolters v University of the Sunshine Coast* (2012) QSC 298 WL 49549439 par 1-199.
[258] *Wolters v University of the Sunshine Coast* (2012) QSC 298 WL 49549439 par 70.

she suffered a psychiatric injury, which prevented her from returning to work. Previous incidents had also occurred where the defendant, as an employee of the university, instilled fear in especially female employees. The supreme court found that the university's failure to attend to the claimant's grievance and to investigate the incident constituted a breach of its common-law duty of care as well as the employment contract.

For a claim to succeed based on negligence embedded in bullying, it has to be proven that the verbal conduct led to a foreseeable psychiatric injury, which could not be done in *Wolters*, although it was recognised that workplace stress or bullying could lead to psychiatric injury. Judge Applegarth referred to the decision in *Nationwide News v (Pty) Ltd v Naidu*,[259] where it was said that "it may well be the case that it is now well established that workplace stress, and specifically bullying, can lead to recognised psychiatric injury. That does not, however, lead to the conclusion that the risk of such injury always requires a response for the purpose of attributing legal responsibility. Predictability is not enough".[260] The judge did however confirm in the supreme court decision that an employer can be liable for failure to protect an employee against bullying and harassment, but that the mere existence of such conduct does not determine the issue of breach of duty and that, even though this case confirms the possibility of liability,[261] each case still has to be adjudicated on its own facts and merits.

In *Swan v Monash Law Book Co-Operative*,[262] a plaintiff sued for pain and suffering and pecuniary loss due to bullying and harassment to which she was exposed in the course of her employment due to the employer's failure to provide her with a safe workplace.[263] The supreme court heard evidence about her "breakdown" based on "tone of voice and body language", which had led to her "injury", eventually being diagnosed with physical symptoms as well as a "chronic adjustment disorder with anxious and depressed mood as a consequence of workplace harassment"[264] during

[259] 2007 71 NSWLR 471 478[23].
[260] 2007 71 NSWLR 471 478 [23].
[261] *Wolters v University of the Sunshine Coast* (2012) QSC 298 WL 49549439 par 74 South Australia.
[262] (2013) VSC 326 WL 3220357.
[263] (2013) VSC 326 WL 3220357 par 1.
[264] (2013) VSC 326 WL 3220357par 216.

her employment as a retail assistant.[265] The court found in her favour and stressed that she discharged the onus to prove on a balance of probabilities that the defendant's negligence materially contributed to her illness, and added that as the plaintiff's "natural character and personality made no contribution to her illness", it therefore did not warrant a reduction in damages to be awarded.[266] By means of inference, it is thus tendered that personality factors such as a propensity for depression could lead to a reduction in damages to be awarded. A pre-existing psychological illness could also be exacerbated by the employer, and could thus influence the damages awarded.

Failure to adhere to an implied term in the contract, such as that both parties to the contract (whether written or unwritten) had to act in a trustworthy manner, could lead to breach of contract, which often leads to bullying.[267]

4.2.5 Unfair and constructive dismissals

The Employment Rights Act[268] protects employees from arbitrary dismissals. These mainly refer to poor performance, improper conduct and redundancy, and are among the main reasons that may justify dismissals.[269] Of particular importance in bullying scenarios is the possibility of constructive dismissal where the employee would resign or leave employment after the breach of an express or implied term of the contract of employment.[270]

Bullying of an employee may lead to such a breach of contract. This is demonstrated by the decisions of the courts in *Abbey National PLC v Janet Elizabeth Robinson*[271] and *Roger Storer v British Gas PLC.*[272] In the former matter, it was found that the employee had been harassed and bullied to a degree that she found insufferable,

[265] (2013) VSC 326 WL 3220357 par 15.
[266] (2013) VSC 326 WL 3220357 par 249.
[267] Bully Online http:///www.bullyonline.org/action/legal.htm (accessed on 9 September 2013).
[268] Of 1996.
[269] Einarsen *et al* 2011: 476.
[270] Einarsen *et al* 2011: 476.
[271] WL 1741415 (EAT 2000) 2, where it was stated that Robinson's resignation had been triggered by the last of a series of mishandled incidents, the cumulative effect of which meant that it was unreasonable to expect her to tolerate anything more; "the last straw", as it were.
[272] WL191091 (CA 2000) par 3, 10.

while in the latter matter, the bullied employee suffered symptoms of post-traumatic stress due to victimisation and bullying.[273] In *Ezekiel v the Court Service*,[274] it was found that an employee was properly dismissed under the Employment Rights Act of 1996 due to having engaged in severe bullying of co-workers.[275]

4.2.6 Anti-discrimination legislation

Section 26 of the Equality Act of 2010 states that a person A harasses person B if A engages in unwanted conduct related to a relevant protected characteristic,[276] and if the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.[277] B's subjective perception, other relevant factors, and whether it could have been expected that the negative conduct would have an ill effect, will be taken into consideration to assess whether the conduct indeed had such negative effects.[278]

Vicarious liability for an employer based on third-party harassment will only come into play if the incident occurred on at least two occasions and if it was brought to the employer's attention, but he failed to take the necessary steps to stop the bullying as a form of harassment. This a fairly new avenue to be explored. Korczynski and Evans,[279] for example, call for the protection of employees due to third-party harassment, and believe that policies provide insufficient protection against this type of harassment.

According to Hoel, however, the Equality Act of 2010 cannot be applied to someone who falls outside a protected group or cannot claim protected status.[280]

[273] Einarsen *et al* 2011: 476.
[274] WL 12274032 (EAT) par 3-6.
[275] Einarsen *et al* 2011: 477.
[276] Sex, race, sexual orientation, religion and belief, and age and gender reassignment, as per Hoel 2013: 66.
[277] Hoel 2013: 66.
[278] Hoel 2013: 66.
[279] 2013: 13,14.
[280] Hoel 2013: 66, with reference to 'harassment'.

4.2.7 Interventions by employers and government agencies

Hoel[281] mentions that although some employers may have been slow to come to terms with bullying in the workplace, 75% of employers in the UK now have anti-bullying policies.[282] The Health Survey for England,[283] for instance, investigates bullying by means of a risk assessment, and although not legally enforceable, aims to assist employers to deal with workplace bullying.[284] Although this approach is still in its infancy,[285] it is another way to create awareness and assist stakeholders in workplace bullying matters.

4.2.8 The Dignity at Work Bill of 1996[286]

This bill aims to provide injunctive relief and damages, including "injury to feelings",[287] but has not been enacted, despite the drumming-up of support for its adoption. The bill provides for claims that should to be brought via employment tribunals as opposed to the courts under the PHA, and is also a civil cause of action for harassment. It has expanded employees' rights by providing for a 'retaliation' or 'victimisation' clause, and allows the doctrine of vicarious liability to be invoked against a non-compliant employer.[288]

It further aims to afford every employee the right to dignity at work[289] and stipulates that an employer would infringe the right to dignity at work if an employee suffers harassment or bullying or any act or omission or conduct that causes him or her to be alarmed or distressed.[290] The bill includes a list of prohibited conduct that is not acceptable in the workplace.[291] Section (1)(2) lists these prohibited acts as "behaviour which, on more than one occasion, is offensive, abusive, malicious,

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[281] 2013: 68.
[282] Hoel 2013: 69.
[283] University College London http://www.ucl.ac.uk/hssrg/studies/hse (accessed on 10 December 2013). The Health Survey for England conducts annual health surveys among people living in England.
[284] Hoel 2013: 70.
[285] Hoel 2013: 71.
[286] H.L. Bill [31].
[287] S 6.
[288] Harthill 2008: 286.
[289] S 1(1).
[290] S 1(2).
[291] Please note that the list is merely inclusive of, and not limited to, the prohibited actions or omissions. The items on the list remind of the different types of bullying behaviour already discussed in chapter 2 of this thesis.

insulting or intimidating; unjustified criticism on more than one occasion; punishment imposed without reasonable justification, or changes in the duties or responsibilities of the employee to the employee's detriment without reasonable justification".

The bill's journey through parliament reflected that political change, social norms and legal developments pertaining to workplace bullying had been shelved, as existing legislation, such as the PHA, was seen to be an effective and sufficient vehicle to deal with workplace bullying.[292] However, proponents for the bill argued that the current laws, such as the Sex Discrimination Act,[293] were inadequate and exposed employers to a wide range of liabilities in the absence of tools or guidance on how to deal with bullying early on.[294] It was also argued that existing laws caused confusion about the types of conduct that were prohibited and the forms of legal redress that were available and at what forums. Nevertheless, the bill was not met with sufficient government support.[295] What is positive, however, is that the legislature acknowledged British employees' rights to dignity, and called for bullying and other forms of degrading treatment to come to an end.[296] British government acknowledged that bullying is a major concern, and agreed with the prevalence figures, costs and the need to address bullying in the workplace. They remained adamant, however, that existing legislation effectively addresses this phenomenon, and that the role of government should be to raise awareness of the matter and to lead the way in self-regulation through codes of practice.[297] Government subsequently made good on their promise and funded the world's largest anti-bullying project through the Dignity at Work campaign to deal with workplace harassment and bullying.[298]

The code of conduct of the National Training Organisation has overseen the development of the National Occupational Standards for the Management and

[292] Harthill 2008: 287.
[293] Of 1975.
[294] Harthill 2008: 288, with reference to comments by Baroness Gibson as reflected in 633 Parl. Deb., HL (6th ser.) (2002) 331.
[295] Harthill 2008: 288.
[296] Harthill 2008: 288, with reference to Parliamentary Debate 402 H.C. (6th ser.) 2003 21 WH (comment by Mr Brian Wilson).
[297] Harthill 2008: 288,289.
[298] Dignity at Work Partnership http://www.dignityatwork.org/news/amicus-press-release.htm (accessed on 20 August 2013); Harthill 2008: 289.

Prevention of Work-Related Violence. Employers are provided with guidelines against which to map their policies and procedures on the issue, while the guidelines can also serve as a directive for organisations to measure the suitability of training programmes.[299] The Dignity at Work project also seeks to provide employers with tools to deal with bullying,[300] since it has been shown that legislation on its own seems to be insufficient to combat bullying, and that a multi-pronged approach is needed.[301]

4.3 The legal system and position pertaining to workplace bullying in Australia

4.3.1 Background and introduction

The first English settlers comprising of 700 convicts and 300 free persons landed at Sydney Cove, Australia, in 1788 and brought with them English law applicable to their situation and the new colony.[302] Despite legal uncertainty, the colony of Australia inherited a "great body of statute, common law and equity law" that was in force in England in 1828.[303] The Imperial Act of 1828 not only clarified the position in the new colony, but also allowed for governors of the colonies to accept the existing legislation as is, or to amend it in accordance with the new situation.[304]

The state of Victoria separated from New South Wales, Australia, and became a separate colony in 1851. It was granted a separate government with legislative powers in 1855.[305] Now, they were not only able to make their own laws, but were also granted a supreme court with both civil and criminal powers. In 1901, Victoria was joined by five other colonies to form the Commonwealth of Australia.[306]

As will be seen from this section of the dissertation, South Australia, including the state of Victoria, still functions independently to a certain degree.

[299] European Agency for Safety and Health at Work 2010: 97.
[300] European Agency for Safety and Health at Work 2010: 97.
[301] European Agency for Safety and Health at Work 2010: 42.
[302] Bates 1975: 7.
[303] Bates 1975: 7.
[304] Bates 1975: 7.
[305] Bates 1975: 7.
[306] Bates 1957: 7 par 114.

4.3.2 The legal system in Australia

The Australian legal system is based on a fundamental belief in the rule of law, justice and the independence of the judiciary. Bates[307] refers to the three main sources of English law on which Australian law is based, namely custom, judicial precedent and legislation. Principles such as procedural fairness, judicial precedent and the separation of powers are fundamental to Australia's legal system.[308] The common-law system, as developed in the United Kingdom, forms the basis of Australian jurisprudence, which is distinct from the civil-law systems that operate in Europe, South America and Japan, which are derived from Roman law.[309]

The chief feature of the common-law system is that judges' decisions in pending cases are informed by the decisions of previously settled cases,[310]similar to the law of precedent found in South Africa and the UK.

The Commonwealth of Australia was established in 1901, when the then six colonies became states within the Australian Federation. The constitution of the Commonwealth of Australia placed certain restrictions on the powers of state parliaments.[311] The Australian constitution of 1901 established a federal system of government, under which powers are distributed between the federal government and the states. It defined exclusive powers (investing the federal government with the exclusive power to make laws on matters such as trade and commerce, taxation, defense, external affairs, and immigration and citizenship) and concurrent powers (where both tiers of government are able to enact laws).

Under federal law, each state and territory has worker's compensation systems and, in addition to the Commonwealth government, also a separate system for

[307] 1975: 8 par 202.
[308] Australian Department of Foreign Affairs and Trade http://www.dfat.gov.au/facts/legal_system.html (accessed on 29 August 2013).
[309] Australian Department of Foreign Affairs and Trade http://www.dfat.gov.au/facts/legal_system.html (accessed on 29 August 2013).
[310] Australian Department of Foreign Affairs and Trade http://www.dfat.gov.au/facts/legal_system.html (accessed on 29 August 2013).
[311] Derham, Maher & Waller 1977: 6.

Commonwealth workers.[312] The states and territories have independent legislative power in all matters not specifically assigned to the federal government.[313] Where there is any inconsistency between federal and state or territory laws, federal laws prevail and apply to the whole of Australia.[314]

The high court of Australia interprets and applies the law of Australia, and decides cases of federal significance, including constitutional challenges, while the lower courts (magistrate's courts or courts of petty sessions) deal with cases of lesser offences.[315]

In effect, Australia has nine legal systems, namely the eight state-and-territory systems plus one federal system. These are the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia.[316]

However, it is the state and territory criminal laws that mainly affect the day-to-day lives of most Australians.[317] Recent amendments to the Victorian Crimes Amendment Bill (Bullying 2011) broadened the definition of behaviours that are considered bullying, and introduced a potential ten-year jail sentence for convicted offenders.[318] Demir and colleagues[319] refer to the possibility that other states may follow suit, although legislation differ from state to state. The law pertaining to South Australia is of particular relevance to bullying in the workplace, and will be discussed later in this chapter. The South Australia Occupational Health, Safety and Welfare Act of 1986 mentioned and defined bullying as such, but was repealed with the promulgation of the new 2012 South Australian Work Health and Safety Act, as

[312] Smit 2008: 375.
[313] Australian Department of Foreign Affairs and Trade http://www.dfat.gov.au/facts/legal_system.html (accessed on 29 August 2013).
[314] Australian Department of Foreign Affairs and Trade http://www.dfat.gov.au/facts/legal_system.html (accessed on 29 August 2013).
[315] Australian Department of Foreign Affairs and Trade http://www.dfat.gov.au/facts/legal_system.html (accessed on 29 August 2013).
[316] Australian Government http://australia.gov.au (accessed on 30 August 2013).
[317] Australian Department of Foreign Affairs and Trade http://www.dfat.gov.au/facts/legal_system.htm (accessed on 29 August 2013).
[318] Demir, Rodwell & Flower 2013: 393.
[319] 2013: 393.

amended by the 2013 Work Health and Safety Amendment Act.[320] However, the 1986 act will still be discussed, as its principles could lead to a better understanding of bullying in Australia, and states in South Australia still have their own acts and guiding documents dealing with workplace bullying.

Both state and territory courts may be invested with federal jurisdiction and the jurisdiction of the federal court is vast, covering almost all civil matters arising under Australian federal law, some summary criminal matters, as well as a wide appellate jurisdiction.[321] Australian state and territory courts have jurisdiction in all matters brought under state or territory law, and even some arising from federal law, but only where jurisdiction was conferred by federal parliament.[322] It must be kept in mind that laws are made by federal and state parliaments,[323] while an independent judiciary interprets and applies them, but that all defendants are at the same time considered innocent until proven guilty.[324] Each of the federal and state systems incorporates three separate branches of government – legislative, executive and judicial. Parliaments make the laws, the executive government administers the laws, and the judiciary independently interprets and applies them.[325]

Employment and workplace law led to the fair work ombudsman's appointment. The ombudsman is the gateway to Australia's workplace rights and rules, while the best-practice guides produced by the ombudsman assist employers of small to medium-sized businesses in implementing best-practice initiatives.[326] The Fair Work System and Fair Work Commission[327] complement the Fair Work Act,[328] which is Australia's national employment relations law. The Fair Work Amendment Bill of 2013 is

[320] This act commenced on 27 June 2013.
[321] Australian Department of Foreign Affairs and Trade http://www.dfat.gov.au/facts/legal_system.html (accessed on 29 August 2013).
[322] Australian Department of Foreign Affairs and Trade http://www.dfat.gov.au/facts/legal_system.html (accessed on 29 August 2013).
[323] Australian Government http://australia.gov.au (accessed on 29 August 2013).
[324] Australian Department of Foreign Affairs and Trade http://www.dfat.gov.au/facts/legal_system.html (accessed on 29 August 2013).
[325] Australian Department of Foreign Affairs and Trade http://www.dfat.gov.au/facts/legal_system.html (accessed on 29 August 2013).
[326] Australian Government http://australia.gov.au (accessed on 30 August 2013).
[327] Fair Work Act 28 of 2009, as amended (Commonwealth) c 5, part 5-1.
[328] 28 of 2009, as amended. See compilation of the act, as amended and dated 14 August 2013. The Fair Work Act of 2012 was passed by parliament and implemented several changes, including new rules pertaining to dismissals.

currently open for comment, and will implement further amendments to the Fair Work Act of 2012, which already saw several changes.

The amended Fair Work Act[329] came into play in *Jones v Queensland Tertiary Admissions Centre Ltd (no 2)*,[330] where it was stated that a person could not take adverse action against another because the other person had a "workplace right", and that once an employee has established that an adverse action had been taken in terms of section 361 of the act, the onus shifted to the employer to prove that the adverse action had not been taken because of the employee's workplace right.[331]

Workplace health and safety is dealt with via legislation and national codes of practice.[332] Safe Work Australia is an independent statutory agency with the primary responsibility to improve occupational health and safety as well as worker's compensation arrangements across Australia.[333] Several commissions supplement existing health and safety legislation, including the Safety, Rehabilitation and Compensation Commission[334] (hereinafter referred to as the SRCC) and the Seafarers Safety, Rehabilitation and Compensation Authority.[335, 336]

4.3.3 The legal position pertaining to workplace bullying in Australia

Introduction

I practically turned myself inside out to gain his approval but went nowhere in the company. He ignored my input at meetings, sneered and talked through my presentations. Friends in the business passed on quite vicious rumours about me. I know he started them, but have no proof. At my annual appraisal, all he said was, 'I suggest that you look for another job.'(Simone)[337]

[329] 28 of 2009 (Commonwealth).
[330] 196 IR 241, 2010 WL 1697464 [2010] FCA 399 par 23.
[331] 196 IR 241, 2010 WL 1697464 [2010] FCA 399 par 23.
[332] Australian Government http://australia.gov.au (accessed on 30 August 2013).
[333] Australian Government http://australia.gov.au (accessed on 30 August 2013).
[334] Hereinafter called the SRCC.
[335] Hereinafter called SEACARE.
[336] Australian Government http://australia.gov/au (accessed on 30 August 2013).
[337] Freeman Consulting, Australia, available on http://www.sheilafreemanconsulting.biz/bullying.htm (accessed 11 January 2014.)

Workplace bullying is nothing new in the Australian workplace, and scholars have been studying this phenomenon for over 20 years.[338] It is however not a black-and-white field, as bullying is often used in conjunction with other terms such as conflict, harassment and violence, and these could even occur together. While some authors regard bullying as a form of harassment,[339] others view it as a form of violence.[340] Some even regard it as sex harassment, which is covered by the Sex Discrimination Act of 1984.[341]

Bullying has been named 'the new kid on the block': Although legal scholars and practitioners as well as the legislature have been studying and dealing with harassment and discrimination for some years, bullying has only of late been recognised as a workplace problem, with some states, especially South Australia, having now actively started to combat this phenomenon.[342]

Researchers such as Branch and colleagues have indicated that workplace bullying may be reinforced by the very nature of the "capitalist employment relationship",[343] which seeks to control employees through hierarchical structures or increase in pressure to gain compliance and increase productivity and promote a culture of "fear".[344]

Defining and explaining workplace bullying in Australia

Although prevalence figures of workplace bullying in Australia are estimated at a low 3,5%, it still costs Australian employers millions of dollars per year.[345]. Caponecchia and Wyatt[346] estimate the costs associated with absenteeism and bullying at $10,1 billion per year for employers, while workplace bullying costs the economy $14 billion annually. These costs exclude the costs of retraining employees, low morale of the workforce as well as employee turnover. Different figures have emanated from the

[338] Branch *et al* 2013: 280.
[339] Caponecchia & Wyatt 2011: 20, with reference to Hill 2006.
[340] Caponecchia & Wyatt 2011: 20, with reference to Hockley 2002, Mayhew 2004.
[341] As amended and including amendments of the Amendment Act 169 of 2012.
[342] Caponecchia & Wyatt 2011: 27.
[343] Beale & Hoel 2011: 9.
[344] Branch *et al* 2013: 286.
[345] Einarsen *et al* 2011: 139.
[346] 2011: 39.

Productivity Commission's survey,[347] which estimated the cost of bullying to Australian businesses at between $6 and $36 billion per year.

The fact that the terms 'bullying' and 'mobbing' are often used interchangeably poses a problem in Australia, according to Caponecchia and Wyatt.[348] The word 'bullying' is used to describe repeated unreasonable behaviours by one person towards another, while 'mobbing' is used to describe repeated unreasonable behaviour by a group towards an individual or group. The meaning of "unreasonable" in this context essentially relies on the 'reasonable person' test, and is sometimes seen as problematic, as people often cite "that it depends on a person's perception".[349]

WorkSafe Victoria[350] and Caponecchia and Wyatt[351] agree that the term 'workplace bullying' might be misleading, as there are several definitions for it, and that the emphasis should be on the criteria in order to cause harm[352] rather than on a list of prohibited deeds. It is noteworthy that the Victorian Occupational Health and Safety Act of 2004 has since been promulgated in Victoria, and that WorkSafe Victoria also issued new guidelines in October 2012, characterising bullying as "persistent and negative behaviour directed at an employee that creates a risk to health and safety".[353]

In Australia, multiple actions or omissions are required for conduct to be regarded as bullying, although it is acknowledged that a single incident may alert one to bullying behaviour or may form part of a series of behaviours that could constitute bullying, thus agreeing with most foreign jurisdictions that the negative acts should be repeated to be regarded as bullying.[354] McCormack and colleagues[355] clearly state that workplace bullying encompasses a range of targeted negative behaviours that are repeated and ongoing, and agree with the definition of bullying tendered by

[347] Productivity Commission Australia, available on http://www.pc.gov.au/ (accessed 7 January 2014).
[348] 2011: 4.
[349] Caponecchia & Wyatt 2011: 5.
[350] 2005.
[351] 2009: 440.
[352] Caponecchia & Wyatt 2011: 3.
[353] WorkSafe Victoria 2012.
[354] Caponecchia & Wyatt 2011: 6.
[355] 2013: 406.

Einarsen and colleagues,[356] who also refer to bullying as repeated and ongoing actions (e.g. weekly over a lengthy period such as six months).

Australians prefer not to include the power imbalance requirement in their definitions, firstly because it is so obvious that a power imbalance is present in bullying, and secondly, because it could create the wrong impression that bullying could only occur from the top to the bottom, thereby disregarding co-worker bullying or bullying from the bottom to the top.[357]

Workplace bullying is an occupational hazard in the health-care industry: In 2013, almost a quarter of all employees in this sector reported that they had been bullied.[358] A study done in 2013 by McCormack and colleagues indicated that building and construction apprentices are equally exposed to a wide range of bullying behaviours, and that they tend not to confront the bully for fear of losing their apprenticeship or aggravating the bullying in employment.[359]

According to Caponecchia and Wyatt,[360] the development of a definitive list of "bullying behaviours" has been abandoned by researchers, partly because both acts and omissions can constitute bullying behaviour and are difficult to define and identify.[361] Still, the fact that 56% of Australians had witnessed bullying in the 12 months prior to Caponecchia and Wyatt's study, and that bystanders or witnesses reported similar symptoms to those suffered by bullying victims themselves, is no small problem.[362]

[356] McCormack *et al* 2013: 407, with reference to Einarsen *et al* 2011: 22. The definition reads as follows: "Bullying at work means harassing, offending or socially excluding someone or negatively affecting someone's work. In order for the label bullying (or mobbing) to be applied to a particular activity, interaction or process, the bullying behaviour has to occur repeatedly and regularly (e.g. weekly) and over a period of time (e.g. about six months). Bullying is an escalating process, in the course of which the person confronted ends up in an inferior position and becomes the target of systematic social acts. A conflict cannot be bullying if the incident is an isolated event or if two parties of approximately equal strength are in conflict."
[357] Caponecchia & Wyatt 2011: 9.
[358] Demir *et al* 2013: 392.
[359] 2013: 417.
[360] Caponecchia & Wyatt 2011: 4, with reference to Rayner 2007.
[361] Caponecchia & Wyatt 2011: 4, with reference to Rayner 2007.
[362] Caponecchia & Wyatt 2011: 54.

4.3.4 Legislation

Introduction

In the wake of 2005, South Australia took a leading role in enacting protection against workplace bullying by amending its existing Occupational Health, Safety and Welfare Act[363] to include bullying as inappropriate conduct governed by the employer's duty of care towards its employees.[364]

Occupational health and safety legislation

Australians regard workplace bullying as a health and safety problem, because it may harm a person's physical and psychological well-being.[365] Failure to adequately manage bullying in the workplace could lead to prosecution and the imposition of a fine in South Australia.[366] Currently, the South Australian government engages in extensive training for the public, and has even hired additional inspectors to deal with bullying-at-work complaints.[367]

Although occupational health and safety laws may differ slightly in the different states, the essence is that employers have a duty of care towards employees, meaning that employers have to take active steps to ensure a healthy workplace as far as reasonably practicable, and to ensure that every employee is engaged in a safe work system.[368] In various Australian states, codes of practice or guidance documents were developed to support anti-bullying legislation. These include those developed by WorkSafe Victoria,[369] the Australian Capital Territory Work Safety Commissioner in 2010, the workplace health and safety documents adopted by

[363] For example see Occupational Health, Safety and Welfare Amendment Act of 2005 (Queensland).
[364] Einarsen *et al* 2011: 471.
[365] Caponecchia & Wyatt 2011: 72.
[366] Einarsen *et al* 2011: 471.
[367] Einarsen *et al* 2011: 471.
[368] Caponecchia & Wyatt 2011: 73.
[369] 2012, where it is stated that workplace bullying can be an offence under occupational health and safety law if it has created a risk to an employee's (or another person's) health and safety, and the employer has failed to take all reasonable practicable steps to prevent and address it and/or an employee has acted in a way that fails to take reasonable care for the health and safety of others at a workplace.

Queensland in 2004, and Western Australia's adoption of a policy to address workplace bullying through WorkSafe.[370]

Other states chose a more educative approach as opposed to the expansion of legislation in the south, and opted for the incorporation of existing regulatory standards to curb bullying. Queensland's adoption of the Prevention of Workplace Harassment Code of Practice, referred to above, provided information and practical advice on how to prevent workplace harassment. The aforementioned code contains a broad definition for harassment, including "repeated behaviour other than sexual harassment that is unwelcome and unsolicited and considered to be offensive, intimidating, humiliating or threatening" to both the target and the reasonable person.[371] It also identifies best practices for preventing and dealing with bullying complaints, and contains explanatory notes on responsibilities under the state's occupational safety and health laws.[372]

The new Work Health and Safety Act of 2012 and the Work Health and Safety Regulations of 2012, which took effect on 1 January 2013,[373] no longer mention the word 'bullying' specifically, and all the bullying provisions as per the state of Victoria have been added to the Code of Practice for Preventing and Responding to Workplace Bullying.[374] The code is currently still in draft format, but the model work health and safety laws have been adopted in all jurisdictions other than Western Australia and Victoria.[375] The draft model code aims to provide practical guidance to persons conducting a business or undertaking on how to prevent and manage workplace bullying, while a separate Guide for Workers has also been developed and subjected to public participation.[376] The new code will be discussed separately.

[370] Caponecchia & Wyatt 2011: 73.
[371] Prevention of Workplace Harassment Code of Practice of 2004 (Queensland); Einarsen *et al* 2011: 472.
[372] Einarsen *et al* 2011: 472; Prevention of Workplace Harassment Code of Practice of 2004 (Queensland).
[373] Safe Work South Australia n.d.
[374] "This draft model Code of Practice for *Preventing and Responding to Workplace Bullying* supports the model Work Health and Safety (WHS) Act and Regulations developed by Safe Work Australia under the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety",* as per Safe Work South Australia n.d.
[375] Safe Work Australia 2013c.
[376] Safe Work Australia 2013c.

South Australia's Occupational Health, Safety and Welfare Act of 1986 (since repealed)

The abovementioned act specifically defines what bullying is,[377] what it is not,[378] and even directs the inspectorate through section 55(3) to, once a complaint of bullying has been lodged, investigate and try to resolve the matter, and if that should prove unsuccessful after consultation, to refer the matter to the Industrial Commission for Conciliation or Mediation.[379] Although the South Australian Occupational Health, Safety and Welfare Act[380] applies to South Australia only, it could aid in developing a uniform understanding of workplace bullying.

According to section 55(a)(2), bullying does not include reasonable action taken in a reasonable manner by an employer to transfer, demote, discipline, counsel, retrench or dismiss an employee, or a decision taken by an employer based on reasonable grounds not to award or provide a promotion, transfer or benefit in connection with an employee's employment. Reasonable administrative action taken in a reasonable manner by an employer in connection with an employee's employment, as well as reasonable action taken in a reasonable manner under an act affecting an employee, would also not be regarded as bullying.

This principle was confirmed in *Thompson v Comcare*,[381] where an employee who had suffered from an "adjustment disorder with mixed anxiety and depressed mood, acute"[382] experienced a further setback after a performance review as part of the regular performance management system of the company. The negative performance feedback caused him to be diagnosed with a "major depressive

[377] S 55(a)(1): "For the purposes of this section, bullying is behaviour – (a) directed towards and employee or group of employees, that is repeated and systematic, and that a reasonable person, having regard to all the circumstances, would expect to victimise, humiliate, undermine or threaten the employee or employees to whom the behaviour is directed; and (b) that created a risk to health and safety." This act has since been repealed by the South Australia Work, Health and Safety Act of 2012, which does not refer to bullying as such, prohibits discriminatory conduct in part 6, s 104- 110, and allows for civil and criminal action to be brought.
[378] S 55(a)(2): "However, bullying does not include – (a) reasonable action taken in a reasonable manner by an employer to transfer, demote, discipline, counsel, retrench or dismiss an employee: or (b) a decision by an employer, based on reasonable grounds, not to award or provide a promotion, transfer, or benefit in connection with an employee's employment: or (c) reasonable administrative action taken in a reasonable manner by an employer in connection with an employee's employment; or reasonable action taken in a reasonable manner under an Act affecting an employee."
[379] Caponecchia & Wyatt 2011: 74.
[380] Of 1986, s 55(a)(2).
[381] (2012) AATA 752 WL 7990528, Administrative Appeals Tribunal par 9.
[382] (2012) AATA 752 WL 7990528, Administrative Appeals Tribunal par 9.

disorder, recurrent episode".[383] The claimant claimed that the performance review contributed to his psychological illness, and that the respondent thus failed to provide a safe working environment, while the respondent's defence was that they merely acted in accordance with the company's performance management policies.[384]

The plaintiff lacked performance in certain areas, and the company merely took "reasonable administrative action in a reasonable manner".[385] The tribunal agreed that the 'injury' was due to reasonable administrative action taken in a reasonable manner, and found the employer not guilty or liable for any compensation.[386] The matter *Stefanoski v Telstra Corporation Ltd*[387] further confirmed that taking reasonable disciplinary action in a reasonable way cannot be regarded as bullying and harassment.

Criteria for what would not constitute bullying could be extremely useful when drafting policy documents,[388] and could in a sense protect the managerial prerogative and put managers' minds at ease. This could be especially relevant to South Africa, where little work has been done in the field of workplace bullying, and could contribute to a uniform approach.

Apart from legislation in different states in South Australia, the country has no specific laws dealing with workplace bullying. However, other laws may prove helpful, such as the worker's compensation laws, industrial relations law pertaining to, for example, unfair dismissals resulting from bullying, and the common law where damages are sought.[389]

Anti-discrimination legislation

Where the terms 'bullying' and 'discrimination' are used interchangeably, it could cause confusion, as discrimination and harassment are treated slightly differently in the different states. In some states, information pertaining to discrimination could be

[383] (2012) AATA 752 WL 7990528, Administrative Appeals Tribunal par 6.
[384] (2012) AATA 752 WL 7990528, Administrative Appeals Tribunal par 80.
[385] (2012) AATA 752 WL 7990528, Administrative Appeals Tribunal par 96.
[386] (2012) AATA 752 WL 7990528, Administrative Appeals Tribunal par 96.
[387] (2013) AATA 50 WL 367500, Administrative Appeals Tribunal of Australia par 123.
[388] Caponecchia & Wyatt 2011: 17.
[389] Caponecchia & Wyatt 2011: 17.

found under anti-discrimination laws, while in other states, it resorts under "equal opportunity".[390]

The New South Wales Anti-Discrimination Act[391] mentions sex, homosexuality, marital status, age, transgender status, status as a carer, race and ethno-religious background or colour and disability as potential grounds that could lead to a finding of discrimination if someone was treated unfairly because of his or her membership of any of these particular groups. Fundamentally, the difference between bullying and discrimination lies in the types of behaviour that constitute discrimination: These behaviours do not need to be repeated, as in the case of bullying; they have to relate to particular characteristics of the victim, unlike bullying, and they have to involve the unfair treatment of an individual, which may or may not be similar to bullying.[392] Bullying and harassment are also not regarded as the same concept in Australia: Harassment behaviour does not have to be repeated; also has to be based on certain characteristics of the target,[393] unlike bullying, and is described as unsolicited behaviour that offends, humiliates or intimidates and focuses on some particular characteristics of the targeted individual.[394]

Caponecchia and Wyatt[395] note that not all bullying behaviour spills over into violence, and that the legal avenues to be explored for bullying and violence therefore differ. When viewed from this perspective, it is thus questionable how the view on bullying in Australia can be paired with that of the ILO, who regards bullying as part of the greater violence problem in society. The ILO describes violence as "any action, incident or behaviour that departs from the reasonable conduct in which a person is assaulted, threatened harmed or injured in the course of or as a direct result of his or her work".[396]

The question could be raised as to why these distinctions are important. The answer is quite simple: Employees could experience bullying even if they do not possess any of the characteristics outlined as grounds for harassment or discrimination, and

[390] Caponecchia & Wyatt 2011: 23.
[391] 1977.
[392] Caponecchia & Wyatt 2011: 23.
[393] Sex, homosexuality, marital status, age, transgender status, status as a carer, race and ethno-religious background or colour and disability, as per Caponecchia & Wyatt 2011: 24.
[394] Caponecchia & Wyatt 2011: 22.
[395] 2011: 25.
[396] ILO 2003b.

in the absence of anti-bullying mechanisms, these people would be without any protection.[397] It is imperative for employers in Australia to develop a risk management strategy for workplace bullying to ensure effective management of the unique aspects of the phenomenon, especially where it overlaps with harassment, violence or discrimination, or where bullying occurs in isolation (i.e. where it is not being regarded as violence, nor overlaps with harassment or discrimination).[398]

4.3.5 Policies, procedures and guidelines

Einarsen and colleagues[399] refer to the state of Victoria, which utilised their occupational safety and health agency to produce a guide to prevent workplace bullying and the greater violence-at-work problem. These actions by the state culminated in legal options and advice to employers and employees pertaining to workplace bullying. In this guide, bullying is explained against the backdrop of the state's workplace safety laws, criminal law provisions as well as the definition for sexual harassment liability.[400] Acts or omissions short of bullying could be harassment, discrimination, violence, conflict or some or other combination of these that might be related to bullying, but also distinct from it.[401] Behaviour that does not meet the criteria for bullying, harassment, discrimination and violence can still be offensive and could represent poor workplace behaviour, which could be countered via proper policies and procedures.[402]

However, the fact that some employers in some states, in the absence of legislation dealing with workplace bullying, compile policies prohibiting bullying and harassment, and often expand their current harassment policies to incorporate bullying, does pose a problem. It is not always apparent whether the difference between these two concepts is fully grasped.[403] Not all acts of harassment are

[397] Caponecchia & Wyatt 2011: 27.
[398] Caponecchia & Wyatt 2011: 28.
[399] 2011: 472.
[400] Einarsen *et al* 2011: 472.
[401] Caponecchia & Wyatt 2011: 10.
[402] Caponecchia & Wyatt 2011: 10.
[403] Caponecchia & Wyatt 2011: 21.

repeated and unreasonable, and cause or have the potential to cause harm,[404] and may therefore not be the best way to address bullying.

4.3.6 Codes of conduct

In many instances, the behaviour concerned does not meet the criteria for bullying, but also does not need to be tolerated in the workplace. There are several possibilities to deal with this type of behaviour, says Caponecchia and Waytt.[405] Some of these behaviours could still amount to bullying if they were distributed across several targets, all of whom had not experienced bullying behaviours long enough or frequently enough. This could be managed through codes of conduct. An example of this is found in *Geoffrey Purser v Commonwealth Attorney*,[406] where a senior legal officer was dismissed for breaching the code of conduct of the Australian public service after having been verbally abusive towards staff and unreasonably criticised work performance. The code of conduct required that a person or fellow employee had to be treated with courtesy and respect. In this instance, there were many serious failures to comply with the code as well as section 13(3) of the Public Service Act of 1999. The dismissal was consequently confirmed by the commissioner, and the applicant's appeal also failed.[407]

4.3.7 Common law and the contract of employment

Australia is a common-law country. Even in the absence of national legislation prohibiting bullying, existing common law offers some relief to the victims of workplace bullying, as employers have a contractual duty of care for the safety of their employees under tort law.[408] This encompasses negligence and other claims for personal injuries, and could incorporate bullying claims as well.

As in most Commonwealth countries, the contract of employment is governed by the general principles of contract, being an agreement to render services in return for

[404] Caponecchia & Wyatt 2011: 22.
[405] Caponecchia & Wyatt 2011: 10.
[406] PR932560 [2003] AIRC 615, as cited in Caponecchia & Wyatt 2011: 10,11.
[407] Caponecchia & Wyatt 2011: 11.
[408] Einarsen *et al* 2011: 472.

monetary compensation.[409] The contract of service allows for the doctrine of vicarious liability to be invoked in the employer/employee relationship where the torts were committed in the course of employment.[410] Similar to English law, employees have certain duties in this relationship, while the employer has corresponding duties to pay wages and ensure workers' safety, among others.[411]

Caponecchia and Wyatt[412] see workplace bullying as a psychological hazard[413] that poses a stressor at work, and could thus be intentional or unintentional.[414] They also prefer to refer to 'the bully' as "the person who uses bullying behaviour" and 'the victims' as "targets of bullying behaviour",[415] since negative behaviours can be harmful to everyone.

According to Caponecchia & Wyatt[416] there are encouraging signs that the combination of employer's liability under common law and statutory obligations could allow for psychological injury claims due to bullying to be brought. They refer to *Arnold v Midwest Radio Limited*,[417] where the employee suffered from a pre-existing psychological problem that was exacerbated by repeated verbal abuse from her supervisor. The Queensland court found in the employee's favour and recognised the viability of actions "brought by employees claiming to have suffered psychological or psychiatric damage as a result of being unnecessarily exposed to stressful situations in the course of their employment".[418]

In *Brown v Maurice Blackburn Cashman (a firm)*,[419] a solicitor claimed that she had been bullied, undermined and harassed by a fellow employee after her return from maternity leave, despite having requested her employer to intervene.[420] The applicant claimed damages for personal injuries suffered in the course of her

[409] Bates 1975: 139.
[410] Bates 1975: 139.
[411] Bates 1975: 140.
[412] 2011: 2.
[413] A hazard is defined as a source of potential harm, according to Caponecchia & Wyatt 2011: 6.
[414] Caponecchia & Wyatt 2011: 8.
[415] Caponecchia & Wyatt 2011: 2. The authors believe that the use of the word 'bully' implies that the problem is entirely that of the individual, while 'victim' infers helplessness on the part of the person experiencing unacceptable behaviours.
[416] Caponecchia & Wyatt 2011: 10.
[417] *Midwest Radio Ltd v* Arnold [1999] QCA 20 (12 February 1999), as cited in Einarsen *et al* 2011: 472.
[418] Einarsen *et al* 2011: 472.
[419] (2013) VSCA 122 WL 221570 Court of Appeal of the Supreme Court of Victoria.
[420] (2013) VSCA 122 WL 221570 Court of Appeal of the Supreme Court of Victoria par 4.

employment, and the case involved an allegation of vicarious liability for acts of the co-employee and direct liability for working in an unsafe system of work.[421] The appeals court stressed that although workplace bullying was defined in the WorkSafe Victoria guide on the prevention of violence at work of 2003, it did not have any legal force.[422] However, the judge accepted that the definition for workplace bullying in the guide was a workable one against which the allegations could be tested.[423]

4.3.8 Civil action and workplace bullying

In Australia, occupational health and safety legislation cannot be used as a basis for civil action (unless specifically mentioned, as in South Australia's Work, Health and Safety Act of 2012),[424] like in the UK.[425] Health and safety laws have to be formally consulted by the employers and trade unions, and employees have the responsibility, by means of these laws, to refrain from harming others through their actions or omissions.[426] The word "health" in section 3 of the South Australia Work Health and Safety Act of 2012, which repealed the 1986 act, includes both "physical and psychological" health.

Nothing in law prohibits the victims of bullying to take civil or tort action against perpetrators if the requirements of the specific torts have been met. Torts relevant to workplace bullying would include negligence, for which it has to be proven on a balance of probabilities that "a legal duty of care was owed by one person to another; breach of that duty by the person owing it, and damage to the person to whom the duty is owed which is caused as a result of the breach".[427] Bates[428] refers to the importance of knowing when one person owes a duty of care to another, and this can be extrapolated to a bullying scenario. The 'reasonable man' standard is used to establish whether or not there was indeed a breach of this duty.[429] This tort could only be used where there is proof of damage as a result of the breach of this

[421] (2013) VSCA 122 WL 221570 Court of Appeal of the Supreme Court of Victoria par 5.
[422] (2013) VSCA 122 WL 221570 Court of Appeal of the Supreme Court of Victoria par 14.
[423] (2013) VSCA 122 WL 221570 Court of Appeal of the Supreme Court of Victoria par 14.
[424] S 107-113.
[425] Caponecchia & Wyatt 2011: 73.
[426] Caponecchia & Wyatt 2011: 73.
[427] Bates 1975: 96 par 937.
[428] 1975: 98.
[429] Bates 1975: 98.

duty, which damage must not be too far removed from the action. Defences under this tort would include a denial that there was a duty of care; that there was no breach of the duty; that no causal connection between the action and damages can be proven, and contributory negligence on the side of the plaintiff.[430]

Other torts, such as those providing a remedy where one person induces another person to break his contract with someone else, or invents injurious falsehoods that can damage the business,[431] fall outside the scope of this thesis. These could however be explored as a separate civil remedy. Since the aim of the civil courts is to redress harm and to restore injured parties to their former position, damages can be claimed.[432] Equitable remedies such as an order for specific performance and injunctions can also be ordered.[433]

4.3.9 The new draft model Code of Practice for Preventing and Responding to Workplace Bullying and the draft on Bullying in the Workplace: A Worker's Guide

The new model Code of Practice for Preventing and Responding to Workplace Bullying was developed by Safe Work Australia, in support of the new Health and Safety Act and Regulations under the Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety,[434] as a draft code for the whole of Australia, and was open for public comment until 15 July 2013.[435]

At the time of writing this thesis, the draft code had not yet been assented to and was thus not yet a legal document. It is still scheduled to undergo a process of analysis, after which Safe Work Australia will review the code and amend it where necessary. Then, the code will serve before the ministerial council for adoption as a model code of practice.[436] The new draft code was developed based on material

[430] Bates 1975: 99 par 941.
[431] Bates 1975: 99.
[432] Bates 1975: 116, where it is stated that damages could take the form of general damages, special damages, nominal damages, compensatory damages, aggravated damages and exemplary damages.
[433] Bates 1975: 117.
[434] Safe Work Australia 2013b: 2.
[435] Safe Work Australia 2013c: 1.
[436] Safe Work Australia 2013b: 3.

produced by the Commonwealth and guidance material used by Victoria, New South Wales and South Australia as well as academics.[437]

The executive summary of the code reads as follows: "Research shows bullying continues to be a problem in Australia, indicating previous legislation and/or guidelines have not achieved the desired reduction in bullying in the workplace. As Work Health and Safety[437] laws with broad legislative duties of care have now been introduced in seven of the nine jurisdictions, the opportunity exists to implement a new, nationally consistent approach to tackle this significant health and safety issue in Australia."

The new work health and safety legislative framework[438] provides a vehicle for improvement, with 'health' defined as inclusive of both physical and psychological health in the WHS Act. This more clearly establishes bullying as a WHS issue. Workplaces are required not only to identify and manage physical hazards, but also psychological hazards, including bullying. The WHS laws are not prescriptive in respect of processes for ensuring the psychological health of workers and others. Additional guidance will provide consistent practical support for duty holders to comply with their duties to ensure the psychological and physical health of their employees and others.

The estimated prevalence rates of workplace bullying vary between 3, 5% and 21% of the Australian workforce,[439] and the estimated cost to Australian businesses in 2000 were between $6 and $36 billion,[440] which indicated "that more needed to be done to prevent workplace bullying, especially in Australia".[441] This also explains why all the 'bullying provisions' in states have been removed by the new 2012 WHS Act and Regulations, and are now contained in the national draft code of practice.

The code proposes a definition for workplace bullying, namely "repeated and unreasonable behaviour directed against a worker or a group of workers that creates

[437] Safe Work Australia 2013d: 18. Caponecchia and Wyatt contributed to the draft code as academics in the field of bullying.
[438] Also referred to as WHS.
[439] Dollard *et al* 2012: 1784.
[440] Productivity Commission 2010, available on http://www.pc.gov.au/ (accessed 3 January 2014).
[441] Safe Work Australia 2013d: i-62.

a risk to health and safety",[442] despite the fact that there is currently no common WHS definition of workplace bullying in Australia.[443]

A code of practice approved under the WHS Act in a jurisdiction has special status, because it is automatically permitted in court proceedings as evidence of what is known about a hazard, risk or control, as opposed to other guides, which simply offer guidance on how to achieve the desired standard in occupational health and safety. It affords employers wide discretion to comply with the code or not, and may also be relied on by courts to determine what is reasonably practicable[444] in the circumstances to which the code relates.[445]

The code also refers to what bullying is and what it is not, and describes repeated behaviour as being persistent in nature, including a range of behaviours over time.[446] Of great importance is the fact that a single incident of unreasonable conduct or behaviour is not regarded as bullying, although it may have the potential to escalate into bullying, and intent is not a necessary element for bullying, as even unintentional behaviour could lead to bullying according to the model draft code.[447]

The fact that downward, sideways and upwards bullying are all acknowledged aids the uniform understanding of the phenomenon.[448] A clear distinction is drawn between bullying, harassment and workplace violence, and the impact of bullying, being personal or organisational, is acknowledged.[449] Should the draft code be accepted, other laws, for example anti-harassment legislation, equal employment opportunity, workplace relations and human rights laws, may come into play, although bullying can be distinguished from discrimination and harassment, since a single act could constitute harassment or discrimination, but not bullying.[450]

Normal management practices, such as having to meet reasonable goals, being transferred for operational reasons, having to inform a worker of unsatisfactory

[442] Safe Work Australia 2013b: 6.
[443] Safe Work Australia 2013d: 26.
[444] When a "reasonable person", having regard to the circumstances, would regard the conduct as unreasonable, including victimisation, humiliation, intimidation or threats, as per Safe Work Australia 2013b: 6.
[445] Safe Work Australia 2013b.
[446] Safe Work Australia 2013b: 6.
[447] Safe Work Australia 2013b: 6.
[448] Safe Work Australia 2013b: 6.
[449] Safe Work Australia 2013b: 7.
[450] Safe Work Australia 2013b: 6.

performance, terminating employment, non-promotion if a reasonable procedure was followed, having to inform a worker about inappropriate behaviour, and allocating reasonable working hours, are not considered bullying, but rather normal management actions to effectively direct and control the way of work, as long as these actions are taken in a reasonable manner.[451]

According to the draft code, the employer is not the only one with a duty to ensure a safe workplace; everyone, including workers, is obligated to help ensure that workplace bullying does not occur.[452] Early identification of unreasonable conduct, implementation of control measures, and monitoring and review of control measures are paramount to create a workplace where everyone is treated with dignity and respect and, thus, to create a bully-free workplace.[453]

The code also guides both small and larger businesses in stakeholder consultation,[454] which is quite useful in countries where small and medium-sized enterprises are more abundant than larger organisations. Most importantly, the code is not prescriptive, yet ensures consistency in the approach to workplace bullying.

Interestingly, the Australian government explored four options on how to deal with bullying in the workplace, three of which were found to be insufficient. To retain the status quo was considered as a first option, but was rejected due to the differences in dealing with workplace bullying in the different jurisdictions as well as the different definitions for bullying that emanated from the investigation.[455]

The second option was to specifically include workplace bullying in the existing WHS Regulations, but was also found to be unsuitable, as "all jurisdictions would have to agree on a common set of regulations as the basis for a more consistent approach to regulating workplace bullying across all jurisdictions",[456] which was not feasible.

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[451] Safe Work Australia 2013b: 8.
[452] Safe Work Australia 2013b: 8.
[453] Safe Work Australia 2013b: 9.
[454] Safe Work Australia 2013b: 9,10.
[455] Worksafe Australia 2013. Public commentary on the Draft code of Good Practice on the prevention and response to workplace bullying, available on http://www.safeworkaustralia.gov.au/sites.swa/model_whs_laws/publiccomment/pages/whs_cop_bullying_comment (accessed 4 September 2013).
[456] http://www.safeworkaustralia.gov.au/sites/swa/model-whs-laws/public-comment/pages/submissions-cop-bullying-comment (accessed 4 September 2013).

The third option was to develop guidance material to harmonise existing guides and codes of practice to deal with bullying in the workplace. This was however also found to be less than ideal, since businesses' take-up of guides was less likely than their take-up of a code of practice, as it does not have the same status as a code under legislation.[457] Also, the fact that three jurisdictions in South Australia already had codes dealing with workplace bullying, which thus had to be replaced with mere guides would have reduced the legislative evidentiary status of the material, which would also not have been acceptable.[458]

Finally, it was decided that workplace bullying should be managed via a risk management approach supporting existing WHS legislation, where 'health' already included both physical and psychological health. The development of a model code of practice was voted the best way forward. The draft Bullying in the Workplace- A Worker's Guide, contains the information set out above, but in a language easily understood. This draft Code explains what bullying is and provides examples of behaviours to be considered bullying and explains that even though some situations may feel uncomfortable, they are not bullying behaviour and lists items such as a single incident of unreasonable behaviour, reasonable management action taken in a reasonable way, discrimination and harassment, workplace violence and conflict.[459]

The guidelines drafted for employees also elaborate on what an employee should do if he or she suspects that he or she is bullied and what he or she can expect from the organisation.[460] These are very handy guidelines and ensure a common understanding of bullying in the workplace, with the right of organisations to tailor make their own policies and which could be borrowed from by the South African legislature.

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[457] http://www.safeworkaustralia.gov.au/sites/swa/model-whs-laws/public-comment/pages/submissions-cop-bullying-comment (accessed 4 September 2013).
[458] Safe Work Australia 2013c: 19.

[459] Worksafe Australia 2013. Public commentary on the Draft code of Good Practice on the prevention and response to workplace bullying, available on http://www.safeworkaustralia.gov.au/sites.swa/model_whs_laws/publiccomment/pages/whs_cop_bullying_comment (accessed 4 September 2013).
[460] Worksafe Australia 2013. Public commentary on the Draft code of Good Practice on the prevention and response to workplace bullying, available on http://www.safeworkaustralia.gov.au/sites.swa/model_whs_laws/publiccomment/pages/whs_cop_bullying_comment (accessed 4 September 2013).

It was thought best to adopt a code that was flexible, yet fixed enough to demonstrate the provision of an equivalent standard of health and safety. The flexible code had to retain the option of tailor-making the draft code,[461] which would lead to the consolidation of existing guiding documents where these existed, while at the same time raise awareness of the need to manage workplace bullying.[462]

The fact that a draft anti-bullying code[463] will be available to employers once the code has been accepted is very important, as it would lead to greater uniformity, would assist both employers and employees in their quest to curb workplace bullying, and could serve as a guiding document to South Africa as well.

The draft Bullying in the Workplace: A Worker's Guide contains all the information set out in the code, but affords a practical understanding thereof. The draft guide explains what bullying is; provides examples of behaviours that are considered bullying, and explains that even though some situations may feel uncomfortable, they do not necessarily amount to bullying, listing items such as a single incident of unreasonable behaviour, reasonable management action taken in a reasonable way, discrimination and harassment, workplace violence and conflict as examples.[464]

These are very useful, as they ensure a common understanding of workplace bullying, while also affording organisations the right to tailor-make their own policies, and could be drawn on by the South African legislature as had been mentioned on page 119 of this thesis.

[461] Worksafe Australia 2013. Public commentary on the Draft code of Good Practice on the prevention and response to workplace bullying, available on http://www.safeworkaustralia.gov.au/sites.swa/model_whs_laws/publiccomment/pages/whs_cop_bullying_comment (accessed 4 September 2013).

[462] Worksafe Australia 2013. Public commentary on the Draft code of Good Practice on the prevention and response to workplace bullying, available on http://www.safeworkaustralia.gov.au/sites.swa/model_whs_laws/publiccomment/pages/whs_cop_bullying_comment (accessed 4 September 2013).

[463] Safe Work Australia 2013b: 21.

[464] Safe Work Australia 2013a: 1-2.

4.4 The legal position pertaining to workplace bullying in other jurisdictions

Next, brief reference will be made to different jurisdictions in Europe to indicate their legal position pertaining to bullying or mobbing. Of all the European countries that do not have separate legislation prohibiting bullying, Italy is the only state that plans to adopt such legislation,[465] although 17 European countries mention harassment in their national laws.[466] France, Finland and Sweden have adopted separate legislation or at least special sections in their harassment law dealing with bullying.[467]

4.4.1 Sweden

Sweden was one of the first nations to offer a direct legal response to workplace bullying. Leymann[468] defines bullying at work as "hostile and unethical communication, which is directed in a systematic way by one or a few individuals mainly towards one individual who, due to mobbing, is pushed into a helpless and defenceless position, being held there by means of continuing mobbing actions".[469]

The Victimisation at Work Ordinance of 2003[470] now regulates workplace bullying in Sweden in conjunction with the Victimisation at Work Act of 1993.[471]

The aforementioned ordinance refers to "adult bullying, mental violence, social rejection and harassment, including sexual harassment" as forms of victimisation at work, and obliges employers to institute measures to prevent victimisation[472] and to act responsively when signs of victimisation became apparent,[473] even alluding to employers' obligation to assist the targets of bullying.[474] In effect, victimisation is

[465] European Agency for Safety and Health at Work 2010: 29.
[466] European Agency for Safety and Health at Work 2010: 28.
[467] European Agency for Safety and Health at Work 2010: 29.
[468] Heinz Leymann – a Swede and the pioneering researcher on workplace bullying.
[469] European Agency for Safety and Health at Work 2010: 21.
[470] Bully Online http://www.bullyonline.org/action/victwork.htm (accessed on 6 September 2013).
[471] Victimisation at Work Ordinance adopted 21 September 1993, promulgated by the then National Board of Occupational Safety and Health. See Einarsen *et al* 2011: 474. This board has since been replaced by the Swedish National Board of Occupational Safety and Health. See Caponecchia & Wyatt 2011: 78 in this regard.
[472] Dignity at Work Partnership http://www.dignityatwork.org/default.htm (accessed on 28 August 2013): 13.
[473] Caponecchia & Wyatt 2011: 78.
[474] Einarsen *et al* 2011: 474.

prohibited, but the term 'victimisation' is broad and encompasses an obligation on the employer to ensure that "unsatisfactory working conditions, problems of work organisation or deficiencies of cooperation" within a working environment are detected and corrected if these could lead to victimisation.[475]

Einarsen and colleagues[476] state that despite these efforts, criticism has been levelled against the ordinance for not being as successful as was anticipated, mainly due to certain inherent shortcomings or cultural and social responses to it as well as stakeholder attitudes towards litigation, liability, exposure and proactive prevention.

4.4.2 France

France's legal response seems to be the only outlier, apparently being the only jurisdiction where bullying acts are criminalised by that country's Social Modernisation Law enacted in 2002.[477] The act prohibits "moral harassment" in the workplace, leading to acts of bullying being viewed as a violation of the nation's labour and criminal codes.[478] Caponecchia and Wyatt[479] refer to the act's provision that "no employee shall be subject to the repetitive application of moral harassment with the aim to cause, or which results in, the degradation of his working conditions with the risk of damaging his rights and dignity, affecting his physical and mental health or compromising his career". In essence, the French Labour Code prohibits repeated acts of moral harassment that have the purpose of causing a deterioration in working conditions by impairing the employee's rights and dignity, affecting the employee's physical or mental health, or compromising the employee's professional future.[480] According to Einarsen and colleagues,[481] legislation in France protects jobs and makes provision for anti-retaliation protection, and both the Penal Code and Labour Code allow for prison sentences and fines to be imposed on guilty parties. The Labour Code imposes a duty on employers to prevent moral harassment at

[475] European Agency for Safety and Health at Work 2010: 30.
[476] 2011: 474, with reference to Hoel & Cooper 2009.
[477] Einarsen *et al* 2011: 474.
[478] Guerrero 2004: 491.
[479] 2011: 76-77, with reference to Bukspan & Hoel 2010.
[480] Einarsen *et al* 2011: 474.
[481] 2011: 374.

work,[482] and even the Hygiene, Safety and Working Conditions Committee[483] has to prevent risks of sexual and moral harassment.[484]

It must be kept in mind that, in France, there are two jurisdictions: one for public servants, who comprise 25% of the workforce, and another for those employed in the private sector.[485] There is no system of mediation for the public sector, and senior managers may cut a complainant's salary without having to justify their reasons.[486] An analysis of the French law on this issue indicates that employees in the private sector are afforded more means to tackle the issue than those in the public sector.[487]

Following a string of suicides due to bullying and an increase in awareness of bullying at work, the court of appeal in France developed 'guides' to assist the courts to consistently interpret 'moral harassment'.[488]

Einarsen and colleagues[489] refer to France as the only nation to have criminalised bullying in the workplace. However, as case law in this jurisdiction reflects a rather narrow interpretation of the statutes, it is not surprising that other nations have not followed suit.

4.4.3 Finland

Finland followed the same route as Australia. Their Occupational Safety and Health Act[490] includes sections on threats of violence (section 27) as well as on harassment, including the 'inappropriate treatment' of employees (section 28), and places an obligation on employers to avoid such harassment and inappropriate treatment of employees in the workplace.[491]

[482] Article L412-1, 1.5.2008, as cited in European Agency for Safety and Health at Work 2010: 2.
[483] This body is only present at workplaces with more than 50 employees, as per European Agency for Safety and Health at Work 2010: 29.
[484] European Agency for Safety and Health at Work 2010: 29.
[485] Caponecchia & Wyatt 2011: 77.
[486] Caponecchia & Wyatt 2011: 77.
[487] European Agency for Safety and Health at Work 2010: 34.
[488] Caponecchia & Wyatt 2011: 77
[489] 2011: 474.
[490] 738 of 2002.
[491] European Agency for Safety and Health at Work 2010: 29,30.

4.4.4 Norway

Section 4-3 of Norway's Working Environment Act prohibits harassment or any other improper conduct in the workplace. Harassment is defined broadly and includes instances where a person experiences actions or omissions as negative, unreasonable and offensive, as well as where one or several individuals are repeatedly exposed to negative actions over time. Of interest is that the imbalance of strength between the perpetrator and target is referred to even in the act, according to which harassment is characterised by an imbalance of power, and the subject being harassed has to be in a psychologically weaker position than the harasser.[492]

4.4.5 Belgium

The Belgian Well-Being of Workers Law prohibits "moral harassment", which word is framed in a broader definition of psychosocial aspects, and refers to abusive conduct that hurts people, damages the social environment and endangers the stability of employees.[493] It is not necessary for a multiplicity of deeds, or for the negative deeds to have been committed over time for the conduct to be labelled as such, and it is managed via internal procedures if the conduct is regarded as internal violence at work. Third-party moral harassment must be dealt with by the employer, who also has to arrange for psychological support.[494] Failure of the internal processes could cause actions to be brought via external procedures, i.e. the labour court, to settle disputes.[495]

4.4.6 The Netherlands

The Working Conditions Act[496] obliges employers to ensure that psychosocial aspects, including bullying, do not cause harm to workers, and to have draft preventative policies, educate employees on these aspects, and develop a plan on

[492] European Agency for Safety and Health at Work 2010: 30.
[493] European Agency for Safety and Health at Work 2010: 31.
[494] European Agency for Safety and Health at Work 2010: 29,30.
[495] European Agency for Safety and Health at Work 2010: 31.
[496] 18 of 1999, s 1.3e, as per European Agency for Safety and Health at Work 2010.

how to approach these risks.[497] In turn, the Dutch Civil Code contains regulations on how a good employer should behave.[498] Interestingly, once an employee has ended up in hospital due to an incident of aggression or violence, the employer has to register the incident.[499]

4.4.7 Slovakia and Poland

Both Slovakia and Poland have anti-bullying laws. Slovakia sees workplace bullying as part of their anti-discrimination law,[500] while Poland utilises their Labour Code[501] to prohibit and deal with the issue. Workplace violence is often understood more generally as an occupational health and safety issue.[502]

4.4.8 India

Researchers such as D'Cruz and Rayner in India also prefer the definition for bullying offered by Einarsen and colleagues,[503] requiring multiple acts over a period of time. Until recently, no quantitative studies had been done in India,[504] and prevalence figures according to the Work Harassment Scale indicated that 44,3%[505] of the sample of 1 036 participants scattered across six cities had been bullied at work.

D'Cruz and Rayner confirm that culture is an important factor in the prevalence of bullying, and stress that the labels of collectivism and relations "mask a web of complexity" in India.[506] It appeared from their study that superiors were most often

[497] European Agency for Safety and Health at Work 2010: 35,36.
[498] European Agency for Safety and Health at Work 2010: 36.
[499] European Agency for Safety and Health at Work 2010: 35.
[500] Anti-Discrimination Act, s 6, as per European Agency for Safety and Health at Work 2010: 36.
[501] Div IV, art 94, s 2, as per European Agency for Safety and Health at Work 2010: 36.
[502] European Agency for Safety and Health at Work 2010: 32.
[503] 2011: 22.
[504] D'Cruz & Rayner 2012: 612.
[505] D'Cruz & Rayner 2012: 612.
[506] 2012: 599.

the bullies, and that victims did not seek collectivisation or legal redress,[507] an aspect that needs to be further explored given India's sociocultural dimensions.

There is no legislation against bullying in India,[508] and they have only started to take cognisance of this pervasive problem.

4.4.9 Canada

Canada chose to respond to bullying by way of legislation in most provinces, and the Canadian national government has also added bullying provisions to their occupational safety and health legislation.[509] Regulatory amendments to the national occupational health and safety regulations were enacted in 2008, requiring employers in federally regulated workplaces to address violence, associated bullying and abusive behaviour at work.[510] Quebec and Saskatchewan have incorporated anti-bullying provisions through the aforementioned act since 2002. The province of Quebec was the first North American government entity to enact anti-bullying legislation by means of its Civil Code[511] as well as occupational health and safety legislation.[512] This act provides that "[e]very employee has a right to a work environment free from psychological harassment and that employers must take reasonable action to prevent psychological harassment and whenever they become aware of such behaviour, [must] put a stop to it".[513]

In 2007, another Canadian province, Saskatchewan, followed suit and amended its Occupational Safety and Health Act "to protect against personal harassment that constitutes a threat to the health or safety of the worker",[514] including "psychological well-being" under the definition of harassment.

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[507] D'Cruz & Rayner 2012: 612.
[508] D'Cruz & Rayner 2012: 612.
[509] Einarsen *et al* 2011: 473.
[510] Caponecchia & Wyatt 2011: 75.
[511] Section 2087 of the Civil Code of Quebec, as per Chainey 2010:5, where it is stated that the employer is bound to take measures to protect the health, safety and dignity of the employee.
[512] The new Regulation Respecting Labour Standards of 2004 that prohibits psychological harassment was adopted in 2013 and integrated into the Labour Standards Act s 81.18-81.20, as per Chainey 2010: 9.
[513] Einarsen *et al* 2011: 473, with reference to Quebec's Psychological Harassment at Work Act and the Regulation Respecting Labour Standards, RRQ, c N-1.1,r3.
[514] Einarsen *et al* 2011: 473, with reference to the Saskatchewan Occupational Health and Safety Act; Caponecchia & Wyatt 2011: 76.

In 2008, the Canadian government enacted regulatory amendments to the national occupational health and safety regulations, compelling employers in federally regulated workplaces to "dedicate sufficient attention, resources and time to address factors that contribute to workplace violence, including but not limited to bullying, teasing, and abusive and other aggressive behaviour and to prevent and protect against it".[515] The term 'workplace violence' is widely formulated in section 20.2 of the regulations,[516] and constitutes any action, conduct, threat or gesture of a person towards an employee in their workplace that can reasonably be expected to cause harm, injury or illness to that employee. Section 20.3 obliges an employer to develop and post a workplace prevention policy, identify factors that contribute to workplace violence, put in place assessments to assess the potential for workplace violence as per section 20.5, have controls in place to eliminate or minimise workplace violence as per section 20.6, and conduct reviews of the measures taken pertaining to workplace violence in accordance with section 20.7.

As far back as 1959, the Right Honourable Sir Edward Holroyd Pearce,[517] as he was then known, remarked as follows:

> *It is quite useless to expect an English Judge, or I suspect, an Australian Judge, to reach a decision that he feels to be unjust or unworkable if with industry and ingenuity he can produce a result that is fair and workable … For the ordinary judge, fairness between man and man is of paramount importance. I know that I and most of my colleagues are made miserably unhappy if we find ourselves compelled to give a judgement that to our minds in the circumstances of the case produces unfairness.*

This sentiment certainly also applies to the universal pervasiveness of bullying in the workplace.

The following chapter will deal with the South African position pertaining to workplace bullying, which is still in its infancy.

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[515] Einarsen *et al* 2011:473; Regulations Amending the Canada Occupational Health and Safety Regulations, 2008; also see Saskatchewan Occupational Health and Safety Regulations of 1996, s 36, 37, 1(jj) and 1(kk).
[516] Regulations Amending the Canada Occupational Health and Safety Regulations, 2008.
[517] 33 ALJ 105, as cited in Derham *et al* 1977: 196.

CHAPTER 5: LEGAL PERSPECTIVES ON WORKPLACE BULLYING IN SOUTH AFRICA

5.1 Background and introduction

> *A modern workplace is not a heavenly garden of smiling buddhas focused on the welfare of others. More often than not it presents the contrary picture of a highly stressful and robust environment in which the pressures and demands to perform is placed on staff and, even more so, members of management who carry the can, can on occasion contribute to managers conducting themselves in a manner that is less than desirable …*[1]

But the question is: Does undesirable conduct refer to misconduct or bullying? South Africa is regarded as a violence-ridden country. Violence is no longer limited to personal day-to-day activities, but has permeated into the workplace as well. Ten years ago, the ILO conducted a study on the violence-at-work problem in South Africa[2] and found that nearly 80% of respondent employees had reported hostile behaviour at work.[3] It has been stated that "bad management needs bullies"[4] and that South African needs to embark upon building a culture of caring for workers.[5] Limited studies regarding the impact of workplace bullying on group dynamics have shown that bullying behaviour not only affects employees as direct targets, but has an equally debilitating effect on those who witness it[6] – something that has not been fully explored in a South African context. It seems common cause that abusive (including bullying) employers pay a price in increased medical and worker's compensation claims as well as in lawsuits and overall lower productivity.[7]

Still, South Africa has no legislation dealing with bullying in the workplace, nor any clarity on where bullying should be located in the greater scheme of things or in what way our legal dispensation should provide protection for victims of bullying. Only

[1] Commissioner Marcus in *Visser and Amalgamated Roofing Technologies t/a Barloworld* (2006) 27 ILJ 1567 (CCMA) 1569.
[2] ILO 2003a: 5.
[3] ILO 2003c.
[4] ILO 2003a: 46.
[5] ILO 2003a: 46.
[6] Leuders 2008: 206.
[7] Leuders 2008: 206.

recently, workplace bullying has started to grab the attention of the media[8] and legal scholars: For instance, only one book could be found containing a chapter dealing with workplace bullying in South Africa.[9] The book *Corporate Hyenas at Work*[10] is devoid of legal discussions and merely serves to sensitise workers at all levels about the notion of workplace bullying. No completed doctorate could be found dealing with the legal aspects of bullying in the workplace; only one LLM study addressed the issue from a legal perspective,[11] while other legal scholars have explored it through the lens of psychology or industrial psychology.[12] The lacuna in research pertaining to the legal aspects of bullying in the workplace in South Africa is therefore clear.

Robustness in the workplace is common and managers are no saints.[13] However, there is a fine line between robustness and unacceptable conduct, which encompasses more than the occasional shout or raising of the voice towards subordinates. Given the pressures to perform, paired with the fallibility of human behaviour, violence is rapidly becoming an everyday reality for many workers,[14] and the shroud of silence around it allows bullies to continue bullying. In this regard, Bernice Fields[15] said that "(b)ullies cannot exist unless the Employer tacitly permits or encourages bullying behaviour". It seems to be universally accepted, however, that workplace bullying forms part and can be seen as a category of aggressive behaviour, manifesting in interpersonal conflict between individuals as well as between individuals and groups.[16]

Taking a step back, it is noteworthy that the ILO[17] defined workplace violence as being physical or psychological in nature and "offensive behaviour through vindictive, cruel, malicious or humiliating attempts to undermine an individual or groups of employees".[18] Such persistently negative attacks on employees' personal and

[8] As Juffrou geboelie word, Rooi Rose 2011: 163; Bully bosses 2010; Nyathikazi 2011; Beleid kan boeliery in kiem smoor, Voklsblad 2013.
[9] *Harassment in the Workplace* by Le Roux *et al* 2010: 51-66.
[10] Marais & Herman 1997.
[11] Cunniff 2011.
[12] Sham 2012; Momberg 2011.
[13] *Visser and Amalgamated Roofing Technologies t/a Barloworld* (2006) 27 ILJ 1567 (CCMA) 1569.
[14] ILO 2003c.
[15] As cited in Namie & Namie 2011.
[16] Zapf & Einarsen 2001: 370; Cunniff 2011: 16; Namie & Namie 2011:31.
[17] In 2003.
[18] ILO 2003c: 2.

professional performance are typically “unpredictable, irrational and unfair”.[19] The ILO also found that certain sectors are more prone to bullying than others, with specific mention of the health-care sector, while tasks involving the handling of money, the provision of care or education, the carrying out of inspections as well as work with the mentally disturbed surfaced as categories of workers who are more exposed to workplace bullying than others.[20]

The fact that South Africa is a diverse country is not disputed. The ILO had the following to say about this feature of its member state: “Diversity is a key feature of South Africa, where 11 languages are recognised as official, where community leaders include rabbis and chieftains, rugby players and returned exiles, where traditional healers ply their trade around the corner from stockbrokers and where housing ranges from mud huts to palatial homes with swimming pools.”[21]

South Africa was a founding member of the ILO, and the first country to codify labour legislation.[22] The country rejoined the ILO in 1994 and set about ratifying core ILO conventions. These created imperatives for the country to adjust domestic legislation to give full effect to the obligations of South Africa as a member state of the ILO, since they created international law obligations.[23]

As part of their studies regarding the perceived workplace violence problem in South Africa, the ILO[24] studied the country’s health-care sector, which presented a grim picture, despite South Africa being a signatory to many ILO conventions and recommendations.[25] The information in the following section will provide a synopsis of the findings of the ILO country study, which in essence set the wheels in motion for the recognition of workplace bullying in South Africa.

Susan Steinman, who led the ILO study in South Africa in 2003, found that the term ‘workplace violence’ was not commonly used in South Africa, but, once explained, was readily accepted to include both physical and psychological injury, and was perceived to be equally damaging to the victim’s physical, emotional, psychological

[19] ILO 2003c: 2.
[20] ILO 2003c: 2.
[21] ILO 2010.
[22] Einarsen *et al* 2003: 312.
[23] Van Niekerk, Christianson, McGregor, Smit & Van Eck 2008: 12.
[24] This was a country-specific study in accordance with the finding of the ILO pertaining to workplace violence.
[25] ILO 2010.

and social development.[26] It was found that South Africa lagged behind the developed world in research regarding workplace violence, despite the increasing awareness and concern around workplace bullying in the country.[27] In addition, the extreme levels of workplace violence seemed to have been a result of a greater problem originating from the socio-economic realities of the country.[28]

This chapter will explore the South African position regarding workplace bullying against the backdrop of the current uncertainty as to the category in which bullying should be placed, except in a 'violence' category. Firstly as a possibility that bullying could be seen to fall under the common law, harassment law or that it could be seen as unfair discrimination and/or that bullying could be seen to form part of a safety and health issue in the South African legal dispensation. The common law remedies will be discussed in short to afford the reader a picture *in toto* and will be expanded to cover possible statutory prohibitions or *ex post facto* remedies.

The difference between preventing bullying in the workplace and the *ex post facto* dealing with the phenomenon will also be investigated. The effectiveness and possibilities of dealing with an act (or acts) of bullying will be evaluated in terms of existing mechanisms, before a suggestion will be tendered as to whether this type of harassment, if it can be regarded as such, should be statutorily regulated. Later developments in other jurisdictions indicate some legal scholars' preference for mediation or alternative dispute resolution[29] rather than court action against perpetrators. This avenue will thus be explored to establish whether it could find application in the South African legal setting.

5.2 The legal system in South Africa

No country develops and puts in place a legal system overnight and South Africa is no exception. The legal system is based in Roman-Dutch law, also referred to as common law, but is not limited thereto. Court decisions, legislative enactments and

[26] ILO 2003a: 3.
[27] ILO 2003a: 8.
[28] ILO 2003a: 20.
[29] Seagriff 2010: 576.

English law also played a large part in the development of the South African legal system.[30]

In 1652, Jan van Riebeeck brought Roman-Dutch law to South Africa, and despite the English occupation and colonisation of the country, this system remained in operation for many years.[31] English law, however, also had quite an influence on the development of the legal system in South Africa, and it can therefore be said that the South African legal system is a hybrid or mixed system comprising Roman-Dutch law, amended by customary law and legislation, decisions of the courts as well as English law.[32]

The Constitution of the Republic of South Africa, 1996, is the highest law of the country, and subsequent legislation was passed to give effect to its principles. National legislation is passed by parliament and must be tested against the provisions contained in the Constitution, and legislation found to be in conflict with the Constitution may be declared invalid.[33] Parliament is thus no longer sovereign and the Constitution aims to protect human rights, including a non-exclusive list pertaining to unfair discrimination.[34] As Nagel puts it: "The Constitution allows the fundamental rights to be limited by the law of general application to the extent that it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."[35]

Each of the nine provinces in South Africa has their own legislature, which may pass legislation on various subjects, but the Constitution contains the provisions regulating the division of powers between provincial legislatures and parliament.[36] Court decisions are important in law, and the high courts, lower courts, special courts and tribunals, such as the Council for Conciliation, Mediation and Arbitration and bargaining councils, as well as the courts of appeal all contribute to South African

[30] Nagel 2011: 4.
[31] Nagel 2011: 5.
[32] Nagel 2011: 6.
[33] Nagel 2011: 13.
[34] Nagel 2011: 13.
[35] 2011: 13.
[36] Nagel 2011: 13.

law.[37] The *stare decisis* doctrine finds application in South African law,[38] as does the law of delict and the doctrine of vicarious liability.

Of particular importance for labour law are its sources, being the common law, the provisions of the contract of employment, legislation, collective agreements, international labour law standards, customs and practice and, lastly, constitutional provisions.[39]

The most important acts relevant to workplace bullying are the Labour Relations Act 66 of 1995,[40] which aims to regulate and encourage collective bargaining, gives effect to section 27 of the Constitution, provides for the resolution of labour disputes through various mechanisms, the establishment of the Labour Court and Labour Appeal Court as superior courts, to provide for the resolution of disputes through statutory conciliation, regulate organisational rights of trade unions, regulates strikes and the recourse to lock out, mediation and arbitration and alternative dispute resolution, gives effect to the public international law obligations of the Republic relating to labour relations, to amend and repeal certain laws relating to labour relations and to provide for incidental matters ;[41] the Basic Conditions of Employment Act 75 of 1997,[42] which lays down minimum conditions of employment;[43] the Employment Equity Act 55 of 1998, which aims to eradicate discrimination from employment and promote affirmative action;[44] the Compensation for Occupational Injuries and Diseases Act 130 of 1993,[45] which ensures compensation for employees and dependants who suffered injury, illness or death arising from the performance of their jobs;[46] the Unemployment Insurance Act 30 of 1966, which aims to provide payment of benefits to employees who have lost their jobs due to no fault of their own, and the Occupational Health and Safety Act 85 of 1993,[47] which imposes a

[37] Nagel 2011: 15.
[38] Nagel 2011: 27.
[39] Du Plessis & Fouche 2012: 4.
[40] Hereinafter referred to as the LRA.
[41] Grogan 2010: 6 and the preamble to the LRA.
[42] Hereinafter referred to as the BCEA.
[43] Grogan 2010: 7; Du Plessis & Fouche 2012: 49.
[44] Hereinafter referred to as the EEA.
[45] Hereinafter referred to as the COIDA. Grogan 2010: 8.
[46] Hereinafter referred to as UIA. Grogan 2010: 8; Du Plessis & Fouche 2012: 127, but explained in the act as deeds being committed "within the course and scope of employment."
[47] Hereinafter referred to as OHSA.

general duty on employers to ensure a safe and healthy work environment to employees.[48]

Only employees[49] have access to labour dispute resolution forums and enjoy legislative protection, but recent developments in labour law have afforded labour law protection to prostitutes[50] (prostitution is a criminalised act in South Africa) and extended legislative protection to illegal aliens.[51] Lately, there seems to be more emphasis on the concept of the employment relationship[52] than on the common-law elements of the contract of employment, and this should be taken into consideration where bullying occurs. This development seems to be in line with the *Supiot* report by the European Commission, which promotes the application of labour laws to all forms of work performed for others, and not only to subordinate work.[53]

The abovementioned acts will form the backdrop to the discussion on whether legislation, the common law, law of delict and/or the contract of employment sufficiently protect the victims of workplace bullying in South Africa, or whether other interventions are needed.

5.3 The legal position pertaining to workplace bullying in South Africa

5.3.1 Introduction

As Pietersen[54] puts it, "[b]ullying is an important issue in the contemporary workplace", and South Africa is among those countries where awareness and research in this regard still have a long way to go. Einarsen and colleagues[55] alluded to the fact that the South African milieu, being an emerging country, presents a unique challenge when it comes to dealing with bullying, and listed 13 items as potential problems, mostly relating to poor social economic circumstances, a high

[48] Grogan 2010: 8; Du Plessis & Fouche 2012: 185.
[49] The LRA, BCEA, EEA and the Skills Development Act all use the same definition for an employee, but the definitions of employee in the UIA, COIDA and OHSA are different. See McGregor, Dekker, Budeli, Manamela & Tshoose 2012: 16.
[50] *"Kylie" v CCMA & others* [2008] 9 BLLR 970 (LC). Also see Smit & Du Plessis 2011: 476-479; Selala 2011: 207-208.
[51] *Discovery Health Ltd v CCMA & others* [2012] 8 BLLR 795 (LC).
[52] Du Plessis & Fouche 2012: 14.
[53] Benjamin, as cited in Le Roux & Rycroft 2012: 25.
[54] 2007: 59.
[55] 2003: 315-318.

unemployment rate, affirmative action programmes, racial discrimination, the HIV pandemic, fraud, bribery and nepotism, and referred especially to poverty and groups of vulnerable workers such as domestic and farmworkers[56] as particular challenges. They said that "[t]he implications of fighting workplace bullying in a developing country where the HIV/Aids holocaust is taking its toll, where poverty and employment are still the people's enemies, are that the privileged class (those who are employed) should, or so it is argued, not complain about bullying".[57] However, when the prevalence figures are noted, it is clear that keeping silent about workplace bullying should be neither encouraged nor accepted. Added to this is the fact that violence in a workplace often has huge cost implications, as well as poses a lethal threat to the efficiency and success of organisations.[58] Bullying can and should therefore not be tolerated.

Of interest was the finding that the 11 official languages in the South African 'rainbow nation' did not present a problem from a bullying perspective, as English is seen to be the language of choice in the business environment. It was found that where bullying occurred on the grounds of language, it was mainly due to English being most employees' second language, which led to ridicule, although this was done in an underhanded manner, which made it extremely difficult to prove.[59]

Before one can discuss the legal prudence of legislation on employment bullying or recommend any legal process for South Africa, it is vital to understand the notion of employment bullying, i.e. comprehending what it is and what it is not.[60] Cilliers[61] remarked that "bullying has a life of its own that works below the surface of its conscious psychological manifestation and its effect in organisations", and describes a bully as an individual who is in an elevated hierarchical position, such as a manager or supervisor, or a group displaying the same characteristics, acting out low self-esteem or hostility. Behaviour could manifest as physical,[62] mental, emotional

[56] "These factors render South Africans extremely vulnerable to bullying in the workplace, and the high incidence of workplace bullying in the country is no surprise", according to Einarsen *et al* 2003: 318.
[57] Einarsen *et al* 2003: 314.
[58] Einarsen *et al* 2003: 315.
[59] Einarsen *et al* 2003: 318.
[60] Leuders 2008: 199.
[61] Cilliers 2012: 1.
[62] *Makeleni/Transtruct* (Pty) Ltd (2013) 22 CCMA A.8.12.1, also reported as [2013] (3) BALR 259 265, where it was confirmed that physical assault could lead to dismissal, as in this instance where a female manager was threatened after she had sent home an employee who did not wear his protective clothing.

and/or verbal abuse, for example irrational, unacceptable, disrespectful, offensive, humiliating or intimidating behaviour towards the victim, and often occurs in front of other people.[63] The 2003 country study on the violence-at-work problem in South Africa serves as a handy tool to identify the lacuna in our law pertaining to bullying, and will be discussed as part of the pursuit for a uniform approach.

There is no uniform definition for workplace bullying in South Africa, and it is as yet not prohibited in the country's legal dispensation.[64] It is not clear whether multiple acts are needed to constitute bullying, or whether a single serious act would suffice in a South African milieu. The word 'bullying' is not frequently found in the South African working environment, and it seems that writers and researchers are divided on where bullying should be located in the country's legal dispensation, if it belongs there at all.

Labourguide,[65] a website designed to offer guidelines to employers and employees to help avoid harassment at work,[66] equates harassment to unfair discrimination, and is one of the few places where the word 'bullying' specifically appears. Bullying is seen as a form of harassment, and arguments have been tendered that the law places an obligation on employers to draft policies to curb all forms of harassment (thus, including bullying).[67] The basis for this is unclear, although Einarsen and colleagues[68] regard the drafting of appropriate anti-bullying policies as a possible means to deal with bullying.

The Commission for Conciliation, Mediation and Arbitration[69] names bullying as a form of harassment,[70] but without providing the reasoning behind this or furnishing a definition for bullying or harassment. It is therefore tendered that the depiction of bullying as a form of harassment has been random and is, as such, not embedded in

[63] Cilliers 2012: 2.
[64] Le Roux *et al* 2010: 53.
[65] http://www.labourguide.co.za/general/harassment-in-the-workplace-374 (accessed on 23 April 2013).
[66] CCMA http://www.ccma.org.za/UploadedMedia/InfoSheets_HARASSMENT percent20- percent20JAN percent202002(1).pdf (accessed on 23 April 2013).
[67] "Harassment is in fact classed as an unfair discrimination and only results in a violation of human rights, poor morale among employees, unexplained absenteeism, late-coming and poor concentration at work. It is the cause of loss of productivity and a major cause of workers resigning", as per Labourguide http://www.labourguide.co.za/general/harassment-in-the-workplace-374 (accessed on 23 April 2013).
[68] 2003: 322.
[69] Hereinafter referred to as the CCMA.
[70] CCMA http://www.ccma.org.za/UploadedMedia/InfoSheets_HARASSMENT percent20- percent20JAN percent202002(1).pdf (accessed on 23 April 2013).

clear legal arguments. This categorisation can therefore not be taken at face value, but warrants further discussion before it can be unanimously accepted as a legal stance.

Interestingly, the EEA[71] is cited as the only relevant piece of legislation pertaining to bullying, although the act itself does not contain any reference to the word or notion as understood in the legal arena. It merely refers to the prohibition of unfair discrimination based on a list as per section 6(1) of the act, and confirms that harassment is a form of unfair discrimination. It is argued that this reasoning is equally insufficient. The fact that the CCMA's guiding document also refers to the protection of the dignity of employees,[72] and stresses the employer's duty to provide a workplace free from harassment, serves to illustrate the confusion on where bullying should be located in the South African legal framework. Thus, the question remains whether bullying should be treated as a dignity violation or as a form of harassment, being a type of unfair discrimination, according to South African law.

5.3.2 Defining and explaining workplace bullying in South Africa

Explaining workplace bullying

The 2003 study conducted by the ILO found that 61,9% of health-care workers in South Africa experienced at least one incident of bullying/mobbing, racial bullying/mobbing (22,3%), sexual harassment (4,6%) or verbal abuse (49,5%) in the 12 months leading up to the research.[73] The study also indicated that the age bracket of 40-44 seemed particularly vulnerable and that there was no significant difference in the reporting frequency among males and females,[74] nor a difference in reporting by race.[75]

A later study reported on in 2012, which comprised all nine provinces of the country, both genders, all ages and various sectors, delivered different results: Blacks

[71] 55 of 1998, s 6(1), 6(3).
[72] CCMA http://www.ccma.org.za/UploadedMedia/InfoSheets_HARASSMENT percent20- percent20JAN percent202002(1).pdf (accessed on 23 April 2013).
[73] ILO 2003a: 21,24.
[74] ILO 2003a: 28.
[75] ILO 2003a: 29.

reported a higher incidence of bullying compared to other racial groups, and men scored higher than women on all bullying dimensions, except on indirect bullying by colleagues.[76] Also noteworthy is that the age bracket of 30-39 experienced the highest levels of bullying and, most importantly, that supervisors in government were most often bullies.[77] The mining sector, manufacturing sector and government were found to be workplaces where direct bullying was most rife.[78]

According to Cunniff and Mostert,[79] bullying from supervisors to subordinates was more common in South African than bullying by colleagues, which is in line with literature indicating that linear bullying is more prevalent than peer-on-peer bullying.[80] The results of this study confirmed the whole power-play scenario[81] as similar to the views of Salin[82] and Namie.[83] Deniz and Ertosun[84] found that bullied employees displayed a high level of loyalty to the organisation and identified quite strongly with their work. Of further interest in this cross-sectional study was the finding that employees with a lower education experienced higher levels of bullying than their more educated colleagues.[85]

The study results achieved by Cunniff and Mostert,[86] however, deviated considerably from most of the findings of Pietersen some five years earlier. The most important deviation is that Pietersen[87] found no real difference in the bullying experiences of men and women, while Cunniff and Mostert[88] found that men reported a much higher level of workplace violence than women. In turn, Steinman[89] reported in 2003 that South African women were more prone to being bullied than their male counterparts.

Black employees, being the majority group in employment, experience the highest level of bullying, which is contrary to the international perception created by

[76] Cunniff & Mostert 2012: 8
[77] Cunniff & Mostert 2012: 8.
[78] Cunniff & Mostert 2012: 11.
[79] 2012: 11.
[80] Namie 2007: 45.
[81] See chapter 2 of this thesis.
[82] Salin 2003: 1215.
[83] Namie 2007: 44.
[84] 2010: 132.
[85] Cunniff & Mostert 2012: 11.
[86] 2012: 10-13.
[87] 2007: 63.
[88] 2012: 10.
[89] ILO 2003a: 17.

researchers such as Archer[90] and Pryor and Fitzgerald,[91] namely that employees from the minority racial groups experience higher levels of workplace bullying. It is suggested that gender-related research could be country-specific,[92] which needs to be taken into consideration when a uniform approach is sought for South Africa.

An internet-based self-reporting study conducted by the Work Dignity Institute in South Africa in 2000 indicated that 77,8% of South Africans felt bullied in the workplace.[93] A later study reported on in 2012 – one of the few studies conducted in South Africa on workplace bullying – indicated a prevalence rate of 31,1% among the sample of almost 14 000 employee respondents.[94] It is a known fact that the sampling and research methods used can play a role[95] in prevalence figures,[96] but this does not change the pervasive nature of bullying experienced by employees in the workplace.

Literature shows that bullying is more pervasive in larger organisations dominated by men.[97] In South Africa, where manufacturing is the second-largest industry, men account for 79% of the workforce, while in the country's mining sector, men outnumber females by 8:1, thus creating the ideal breeding ground for workplace bullying.[98]

The definition used in the South African country study was the one originally compiled by Rothmann and Rothmann,[99] who defined bullying as "repeated actions and practices that are directed to one or more workers, which are all unwanted by the victim, which may be done deliberately or unconsciously, but clearly cause humiliation, offence, and distress, and may interfere with job performance and/or cause unpleasant working conditions". Clearly absent here is the possibility that a single occurrence of bullying could also be branded as bullying. This is in line with the international perspective that bullying is escalating in nature[100] and often refers to

[90] 1999: 95.
[91] 2003: 78.
[92] Cortina, Magley, Williams & Langhout 2001: 64.
[93] Cunniff & Mostert 2012: 3.
[94] Cunniff & Mostert 2012: 1.
[95] Namie & Namie 2011: 19-20.
[96] See chapter 2 of this thesis.
[97] Einarsen 2000: 380.
[98] Cunniff & Mostert 2012: 11.
[99] 2006: 14.
[100] See chapter 2 of this thesis.

conflict that lasts for a lengthy period and occurs regularly, with individual victims unable to defend themselves because of the unequal distribution of power between them and the perpetrator.[101]

Preventative measures taken by management, according to the ILO country study, included the drafting of policies, which were either not known to the victims of workplace bullying or had not been formally laid down, with the public sector trumping the private sector in this respect.[102] Although it is not known what transpired after this study by the ILO, but it is inferred that the ILO's work of 2003 has not been taken further in the South African legal dispensation.

The ILO research confirmed earlier work done on bullying by Einarsen,[103] who had found that bullying in the workplace consisted of four phases, being aggressive behaviour, bullying, stigmatisation and severe trauma for the victim, which invariably led to increased absenteeism, depression, anxiety and post-traumatic stress disorder, which in turn caused decreased productivity and a 26% escalation in certified sick absenteeism.[104] Steinman[105] found that the cost to replace a professional person in South Africa was estimated at between R25 000 and R45 000 per person, excluding legal costs, early retirement or ill-health packages. The overwhelming majority of victims of bullying/mobbing thought it "useless" to report the matter, were dissatisfied with any outcomes, and feared negative consequences if they reported it.[106]

As a result, ILO researchers suggested embarking on a large-scale intervention, and advised government, management, trade unions and the greater community to work together to address this peril in health care in South Africa. This culminated in a workshop held at Edenvale Hospital on 9 November 2003, comprising managers, trade union representatives, health and safety officers, CCMA representatives, human rights representatives, labour advocates, fieldworkers and advisors to the project.[107] A general code of good practice to deal with workplace violence was used

[101] Leymann 1996: 165.
[102] ILO 2003a: 35.
[103] 1999: 16-27.
[104] ILO 2003a: 40.
[105] ILO 2003a: 41.
[106] ILO 2003a: 42.
[107] ILO 2003a: 49.

as a working document at the workshop,[108] and the 1989 definition of violence introduced by Van Der Merwe[109] was adopted, namely: "Violence is the application of force, action, motive or thought in such a way (overt or covert, direct or indirect) that a person or a group is injured, controlled or destroyed in a physical, psychological or spiritual sense." This definition conformed to the definition adopted by the European Commission in 1997,[110] which includes both physical and psychological violence and reads as follows: "Incidents where persons are abused, threatened or assaulted in circumstances related to their work, involving an explicit or implicit challenge to their safety, well-being or health."[111] It stands to be argued in both the aforementioned definitions whether reference is made to bullying as potentially a single deed or whether bullying denotes several acts over time.

This definition was adapted by the ILO researchers to reflect on workplace violence, and currently reads as follows: "Incidents where staff are abused, threatened or assaulted in circumstances related to their work, including commuting to and from work, involving an explicit or implicit challenge to their safety, well-being or health."[112] The definition contains a subsection separately describing the violence in terms of bullying/mobbing and other threats respectively. From these definitions, it is still not clear whether or not a single incident of uncivil behaviour could be branded as bullying. Van Schalkwyk and colleagues[113] confirm that bullying is an escalating process where the victim experiences systematic, negative social acts, which lead to feelings of inferiority. The word 'bullying', so it is argued, could only be used where the deeds or interactions occurred over time, repeatedly and frequently.[114]

When the CCMA representatives were asked to comment on workplace violence in South Africa as part of the 2003 ILO country study, they reported that whatever lacked in legislation was provided for by the 1996 Constitution, especially section 10,[115] which guarantees the dignity of all. This clearly indicates that, at this meeting, the CCMA viewed bullying in the workplace as a dignity problem rather than a

[108] ILO 2003a: 49.
[109] 1989: 7.
[110] Wynne, Clarkin, Coz & Griffiths 1997: 2.
[111] Wynne *et al* 1997: 2.
[112] ILO 2003a: 4.
[113] Van Schalkwyk, Els & Rothman 2011: 2, with reference to Einarsen *et al* 2003.
[114] Van Schalkwyk *et al* 2011: 2, with reference to Wood 2008.
[115] "Everyone has inherent dignity and a right to have their dignity respected and protected."

legislative one. Years later, Rycroft[116] evaluated the possibility that bullying was embedded in the protection of victims' dignity, and that legislation to curb workplace bullying might be superfluous.[117] As these arguments will be discussed later on in this chapter, suffice it to say here that the phrasing chosen by especially Nordic countries to refer to bullying, namely 'moral harassment', indicates a clear link with dignity, which further proves the uncertainty as to whether workplace bullying should be seen as a form of harassment or be regarded as a dignity violation,[118] or perhaps even a combination of the two.

A lesser known fact is that Steinman and representatives of the CCMA, trade unions in the health sector, trade union federations and other interested stakeholders were invited to a subsequent meeting following the ILO study in 2003 to agree on a definition for workplace violence applicable to all sectors, and not only the health sector. The following definition was agreed upon for consideration by government, labour and business: "Incidents where employees are physically or emotionally abused, harassed, threatened or assaulted (overt, covert, direct or indirect) in circumstances related to their work, including commuting to and from work, involving an explicit or implicit challenge to their safety, well-being or health."[119] Once again, the question of whether or not a single act could constitute bullying does not seem clear from the accepted definition.

Defining workplace bullying

As already mentioned, without a proper and generally accepted definition for workplace bullying, the question arises as to where bullying can or should be located in the South African legal dispensation: Is it a form of harassment, a moral dilemma based on disregard for employees' dignity, or a health and safety issue? Which elements should be proven, and can it be regulated via internal policies or a general code of good practice? Do the common law and implied obligations of employers

[116] Currently Head of the Department of Mercantile Law, University of Cape Town, South Africa, and co-author of the 2010 book *Harassment in the Workplace*. Much of the information in chapter 5 of this thesis has been sourced from this book, as it is the only one available in South Africa on the issue of workplace bullying.
[117] Le Roux *et al* 2010: 52.
[118] Le Roux *et al* 2010: 52.
[119] ILO 2003a: 4.

cater for bullying incidents, or even the 'good faith' obligation? These questions can only be answered once a definition for workplace bullying has been agreed to, albeit in principle. As gathered from the introductory section of this chapter, this is no easy task.

According to international authors, there is no generally accepted definition for workplace bullying,[120] but the notion of bullying seems to be universal. It seems as if international authors have given up hope on ever compiling a single definition for workplace bullying, hence the Namies' view[121] that bullying, however defined, is uninvited conduct, overt or covert, and must lead to some form of personal injury. Knowing that this is not an 'either or' phenomenon,[122] it is viewed as a gradually evolving process. Upton[123] refers to the concept of bullying as taking place often and over time. Smith and colleagues[124] believe that bullying would cover situations where one or more employee would be subjected to negative behaviours over a period, against which they cannot defend themselves, clearly stating that a single incident would not be considered bullying. The search for a definition in the South African domain should comprise these elements.

It seems to be common cause that workplace bullying can manifest in a wide variety of behaviours, including public humiliation and criticism, verbal abuse, social exclusion, intimidation, inaccurate accusations, spreading of rumours, ignoring people for long periods, and undermining the professional status of victims.[125] The negative effects of bullying also seem to present themselves in South Africa, and it has been shown universally that the intention to leave the profession or job, sleep and eating disorders as well as anxiety and depression are rampant subsequent to workplace bullying.[126]

The search for a definition for workplace bullying in South Africa must acknowledge both direct bullying (face-to-face bullying, verbal abuse, criticism and false accusations) and indirect bullying (the more subtle form of bullying with the intent to

[120] Smith, Singer, Hoel & Cooper 2003: 175; Namie & Namie 2011: 15.
[121] 2011: 15.
[122] Einarsen 1999: 17.
[123] 2010: 7.
[124] 2003: 176, with reference to Einarsen & Skogstad 1996.
[125] Cunniff & Mostert 2012: 1.
[126] Cunniff & Mostert 2012: 1.

harm employees on a psychological level, such as gossiping, excluding victims from social events, not informing them of decisions that directly influence them or their people, and neglecting the working conditions of the victim).[127] In addition, it should note the differences between dispute-related bullying (which develops from grievances of work-related conflict where a negative behaviour of some sort was committed) and predatory bullying (often seen as 'wrong time, wrong place' bullying, where the perpetrator bullies the victim without any apparent reason).[128] Upton agrees with Agtervold and Mikkelsen[129] in terms of a definition, viewing it as "social interaction in which the sender uses verbal and/or non-verbal communication that is characterised by negative and aggressive elements directed towards the receiver's person or his or her work situation".[130] This definition does however not make provision for victim bullying, nor does it address the aspect of a single or multiple actions or omissions, but rather ties it to a work situation, which is arguably not the only place where workplace bullying originates.

Scholars in Scandinavia, which is one of the first countries to prohibit workplace bullying through legislation and is regarded as a pioneer in this field, have dealt with bullying as a safety and health matter. They treat it as a form of victimisation at work, and see bullying as "recurrent reprehensible or distinctly negative actions which are directed against individual employees in an offensive manner",[131] thus, once again, referring to recurrent acts. Scholars in Ireland view bullying as repeated inappropriate behaviour, and have differentiated it from harassment, passing a guiding code[132] in this respect. They see bullying in the workplace[133] as actions that could be direct or indirect, verbal or physical, or otherwise, deeds conducted by one or more persons against another or others at the place of work, in the course of employment,[134] which could reasonably be regarded as undermining the individual's right to dignity at work. Again, the theme of multiple actions appears. The Irish code specifically states that it does not aim to address physical assault at work, stressing

[127] Einarsen *et al* 2009: 48.
[128] Upton 2010: 8.
[129] 2004: 338.
[130] Upton 2010: 8.
[131] Namie & Namie 2011: 14.
[132] Ireland: Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work (2007).
[133] Le Roux *et al* 2010: 65; p 5 of the Irish Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work (2007).
[134] Namie & Namie 2011: 17; Irish Safety, Health and Welfare at Work Act of 2005.

that bullying should be distinguished from other inappropriate behaviour: "For example, a once-off incident of bullying behaviour may be an affront to dignity at work but is not considered to be bullying."[135] It is this notion that is proposed for the South African work environment, where bullying is not yet clearly defined.

It is contended that a working definition for workplace violence does in fact exist in South Africa, albeit surrounded by doubt as to whether a single incident of improper behaviour could lead to a finding of bullying. As already mentioned, the ILO country study accepted the following definition for bullying at work: "Incidents where employees are physically or emotionally abused, harassed, threatened or assaulted (overt, covert, direct, indirect) in circumstances related to their work, including commuting to and from work, involving an explicit or implicit challenge to their safety, well-being or health."[136] No mention is made of whether a single deed will suffice to be branded as bullying behaviour, nor is reference made to the fact that several individual actions towards different employees could perhaps also be seen as bullying. However, the inference is drawn that the reference to "incidents" (plural) favours an interpretation in line with that of the Workplace Bullying Institute,[137] which also refers to repeated deeds of health-harming mistreatment to qualify as bullying behaviour. Legal scholars of the ILO further defined workplace bullying as offensive behaviour though "vindictive, cruel … attempts to undermine an individual or group of employees"[138] and, by implication, refer to multiple acts instead of a single act.

This definition compiled for South Africa, is in line with the international notion of workplace bullying, which, in the absence of a universal definition, comprises the elements of an imbalance of power; wilful, intentional conduct of the bully; the frequency and duration of the deed; the victim's inability to defend him or herself, and negative consequences suffered by the victim and organisation.[139] However, nNamie and Namie[140]are adamant that the bullying behaviour should be repetitive and implies that a single action could not constitute bullying as accepted

[135] P 5 of the Irish Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work (2007).
[136] ILO 2003a.
[137] Workplace Bullying Institute 2007.
[138] ILO 2006a, stipulating that the consideration of laws and regulations and their interpretation should be compatible with the objectives of decent work; ILO 2006b.
[139] Cunniff 2011: 17; Namie & Namie 2011: 15.

internationally. Ireland, for one agrees with this notion and their Code[141]deals with multiple actions as had been stated *infra*.

o trace could be found of any formal meeting over the past ten years dealing with workplace violence subsequent to the aforementioned ILO study, and it is thus inferred that it died a silent death, leaving the South African legal fraternity without a proper definition for workplace bullying.

Le Roux and colleagues[142] define bullying as "unwanted conduct in the workplace which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences".[143] Their definition[144] also refers to multiple deeds or a single deed of grave seriousness to qualify as bullying, thereby excluding the element of unwanted conduct being "persistent", as found in foreign definitions. This is an interesting position taken by these legal scholars, and is of particular significance as it seems that it had been borrowed from the South African Code of Good Practice on the Handling of Sexual Harassment Cases,[145] which deals with sexual harassment, specifically and exclusively, as a form of unfair discrimination. This view is supported by Rycroft,[146] whose notion of bullying in the workplace refers to "any unfavourable or offensive conduct on the part of a person or persons which has the effect of creating a hostile environment".[147]

No other original definition could be found in South African literature. Thus, formally, the country has one definition compiled by parties to the ILO country study, and another compiled by Le Roux and colleagues. Therefore, Whitcher[148] is incorrect when stating that Rycroft's definition for bullying is "unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse

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[142] As already mentioned, the authors of the only academic textbook currently available in South Africa on the topic, specifically written for South Africans.
[143] Le Roux *et al* 2010: 55.
[144] Le Roux *et al* 2010: 55.
[145] Schedule 8 to the LRA 66 of 1995.
[146] Rycroft 2009: 1434.
[147] Rycroft 2009: 1434.
[148] 2010: 47.

consequences" – this, in fact, is the general definition of harassment, and not the one for bullying proposed by Rycroft.[149]

During a discussion on 7 May 2013,[150] Professor Rycroft encouraged the author of this thesis to draft a workable definition for workplace bullying, and conceded that bullying most probably connotes multiple acts with their accompanying negative effects, and further noted that a single act would most probably be seen as an unacceptable act, but not necessarily bullying. This notion seems acceptable and is also in line with the international perspective. However, from conversations with Professors Du Toit and Le Roux, also during May 2013, they seem to differ from this view, viewing a single serious deed of incivility as bullying, which is very much in line with the current stance on sexual harassment prohibition. A proper definition is therefore more than an academic need, and would serve as a basis to prove the said transgression, even if only contained in a code similar to the Code of Good Practice on the Handling of Sexual Harassment Cases, as per the LRA.

Sham[151] mentions certain key indicators for conduct to be branded as bullying, and believes that the conduct concerned should among others be escalating in nature, repetitive, of long duration, feeding on power imbalances, and comprise some form of malicious intent. In their latest book, however, the Namies ask but one question to distinguish between tough management and bullying: "What has that got to do with bullying?"[152] If the conduct is directed at the person to satisfy the superior's personal agenda, including inducing humiliation, it is seen to be bullying, as it will not advance the company's goals, but will rather hinder performance.[153] As already mentioned, the Namies' preferred definition also includes the element of repeated actions, and they do not regard a single deed as bullying.

And, in essence, it is this point that needs further deliberation. Without a clear definition and the subsequent identification of the different elements to be proven by applicants, it is not clear where the notion of bullying fit into South Africa's legal

[149] 2009: 1434.
[150] Profs Rycroft, Le Roux and Du Toit kindly agreed to an audience with the author of this thesis at the University of Cape Town on 7 and 8 May 2013, and gave permission for the use of information gathered from various conversations regarding bullying, its definition and where it should or could be located in the South African legal dispensation.
[151] 2012: 19.
[152] Namie & Namie 2011: 13.
[153] Namie & Namie 2011: 13.

dispensation, or even whether it should be regulated at all, and whether existing mechanisms are sufficient to protect employees from bullying by either their peers or managers and supervisors. Of course, it is not suggested that another country's law simply be 'plugged' into the South African context, especially since our diverse nature and cultural differences require a unique solution. However, what stands firm is that a uniform South African approach needs to be developed.

5.3.3 Should workplace bullying be regulated or not?

Opinions are vastly different on whether bullying in the workplace should be legally regulated at all. This argument is also not limited to South Africa, but is the very reason why the Healthy Workplace Bill of the USA, drafted by Yamada,[154] is still stuck in Congress.

There is clear opposition to regulating interpersonal conduct, even in South Africa. Whitcher[155] seems to be one of the most prominent opponents of legislative intervention, and fears that it will open a floodgate in terms of cases brought to the tribunals and internal dispute mechanisms. She bases this on an anticipated increase in constructive dismissal claims or the misuse of a new cause of action and, by implication, relates certain types of bullying conduct to managerial styles.[156] Similar to the position in the USA, Whitcher believes that legislation on the matter would invariably lead to the loosening of the 'intolerability' test in constructive dismissal cases[157] and would pave the way for a flood of complaints about managerial style. Dekker,[158] however, rightly refers to the fact that this fear might be unfounded due to the stringency of the intolerability test, citing the labour appeal court's decision in *Jordaan v CCMA and others*,[159] where it was remarked that "[w]ith an employment relationship, considerable levels of irritation, frustration and tension

[154] Namie 2013.
[155] Whitcher 2010: 43.
[156] Whitcher 2010: 43.
[157] Whitcher 2010: 43.
[158] Dekker 2012: 347.
[159] (2010) 31 ILJ 2331 9 (LAC).

inevitably occur over a long period. None of these problems suffice to justify constructive dismissal".[160]

Knowing that "speed information processing, toxic environmental stimuli, perceived threats, isolation, blocking … and group pressure" can all be considered as bullying behaviour,[161] against the backdrop of dispute-related or predatory bullying,[162] it is not surprising that other authors and legal scholars believe that bullying in the workplace is of such a serious nature that interventions are urgently needed and that positive action can no longer be postponed in anticipation of separate legislation.[163]

In a typical South African setting, Khalil[164] found that despite the end of apartheid, subtle and unspoken tension among ethnic and cultural groups was noted, especially in nursing. She found that the abuse of power led to vertical bullying (from senior to junior staff, and vice versa) as a form of psychological abuse[165] and that horizontal abuse manifested itself as a failure to respect other nurses' privacy, leading to a lack of support, sabotage of other nurse's work and the hiding of essential equipment from fellow nurses to frustrate others' ability to do their jobs. This occurred between colleagues of the same rank.[166] She also established that race and cultural differences aggravated the bullying and violence problem and led to covert levels of violence, which is where fear of reporting is instilled in victims.[167] Botha and colleagues[168] confirm that professional people are afraid to admit that they are being bullied, are embarrassed, blame themselves, and fear that the phenomenon will escalate. In addition, they believe that bullying behaviour is not sufficiently recognised in South Africa, nor is it acknowledged in today's business world.[169]

[160] (2010) 31 ILJ 2331 9 (LAC) 2336D.
[161] Upton 2010: 4, noting that the said conduct presents itself as stress in a working environment.
[162] See chapter 2 of this thesis for further information.
[163] Le Roux *et al* 2010: 66.
[164] 2009: 207.
[165] Khalil 2009: 208.
[166] Khalil 2009: 208
[167] Khalil 2009: 215.
[168] Botha, Herbst & Buys 2011: 1173.
[169] Botha *et al* 2011: 1174.

5.3.4 Is workplace bullying harassment or a dignity violation?

It is open for debate whether acts of bullying should be treated as a dignity violation or a form of discrimination in South Africa; whether existing or future occupational health and safety legislation or even the mere expansion of the Code of Good Practice on the Handling of Sexual Harassment Cases would suffice, and whether the employer in South Africa has a positive duty to protect employees from bullying in the workplace.

As a backdrop to answering these questions, the international arena presents us with various possibilities. In Sweden, bullying is treated as a form of victimisation, and health and safety legislation prohibits recurrent negative acts (not a single act) against individual employees[170] through ordinances and the occupational health and safety framework.[171] In the UK, it is treated as a form of discrimination prohibited by legislation[172] and common-law principles as well as safety and health programmes focused on work-related stress.[173] In the USA, bullying actions are treated as a form of harassment and prohibited if the discrimination is based on a protected ground, while the federal government places it on the continuum of workplace violence.[174] In Australia, bullying is seen to be a workplace hazard[175] governed by separate state laws on occupational health and safety, which place a primary duty on the employer to prohibit workplace bullying.[176] Germany treats it as a labour law problem, and labour books devote pages to bullying, with statutory protection flowing from the need to protect the "personality" of a person,[177] while Turkey regards it as a health and safety matter.[178]

In the USA, according to Yamada,[179] there is a quest to supplant "markets and management" with human dignity, and a need to replace the debate about

[170] Ordinance on Violence and Menace in the Working Environment VALD OCH HOT I ARBEITSMILJON [VIOLENCE AND THREATS IN THE WORKING ENVIRONMENT] [AFS 1993:2] (Swed.); Ordinance on Victimisation, the KRANKENDE SARBEAHNDELING I ARBEITSLEVET [VICTIMISATION AT WORK] [AFS 1993:17].
[171] Harthill 2011: 287.
[172] Protection from Harassment Act 1997 (UK) c 40.
[173] Harthill 2011: 293.
[174] Harthill 2011: 265.
[175] Caponecchia & Wyatt 2011: 7,281.
[176] For more in this regard, see chapter 6 of this thesis.
[177] Leuders 2008: 222.
[178] Yildiz 2007: 114.
[179] 2009: 524-525.

employment law and policy with a focus on the dignity and well-being of workers (which coincides with Le Roux's view).[180] However, the framework to build public support for stronger labour protection and better enforcement to focus more on employee well-being and human dignity has not been accepted into either American or South African law.

Nevertheless, it remains a pervasive problem in South Africa, and has to be managed in a uniquely South African way. The following section will view bullying through different lenses against the backdrop of the South African legal dispensation, in a quest to move towards a uniform approach for the country.

5.4 Common law and the contract of employment

It is trite law that common law governs the employment relation between employees and employers where legislation is not applicable.[181] Despite the vast array of legislation passed to regulate the relationship between employers and employees, the existing common law is now being developed[182] to align it with the 1996 Constitution.[183] Cheadle[184] rightly remarked that although the scope for the development of the common law is limited, given the extent of legislative intervention in employment relations, the central concept of the legislative edifice is still a common-law construct, being the contract of employment, which stands to be developed. It is known that the relevance of the contract of employment has been placed in dispute,[185] especially if the latest developments in this regard are taken into account, but the wider application of people in employment relationships do not defer from the history in this regard.

[180] Discussed during a personal interview at the University of Cape Town on 8 May 2013.
[181] Grogan 2010: 2; Du Plessis & Fouche 2012: 3.
[182] Grogan 2010: 2; Du Plessis & Fouche 2012: 3-4.
[183] Also see Du Plessis & Fouche 2012: 5.
[184] Cheadle 2012: 349, with reference to the reception of international labour standards in common law legal systems.
[185] Henrico & Smit 2010: 247.

Going back to the old master-and-servant laws,[186] the common law did not (and still does not) place any obligation on the employer to prevent bullying in the workplace. Thus, other sources of labour law[187] are needed to fill the legal gaps in regulating this fragile relationship. The common law provided no job security to employees, and the contract could thus be terminated at any stage, as long as the prescribed notice period was given. Ample criticism has been levelled against the relatively weaker position of the employee[188] in relation to that of the employer (which falls outside the scope of this thesis). However, it does seem as if the common law is being developed by the courts, as it now appears quite clear that a reciprocal duty of "fair dealings" should be read into the contract of employment.[189] Still, the (open) question remains whether the prohibition of bullying is seen to be read into this "fair dealings" principle.

Of importance are the implied duties and rights of the respective parties to a common-law contract of employment, which have been noted to include core rights of employees that may not be altered, save for constitutional changes.[190] Employers' obligation to accept employees into service and provide them with work; to pay the agreed remuneration or a *quantum meruit*; to comply with statutory duties and, most importantly, to provide the employee with a safe working environment, lies at the heart of the employment relationship. The provision of a safe working environment is of the utmost importance for this study.[191] It is trite law that common-law remedies include cancellation, the claiming of specific performance and/or damages, and a refusal to work, and statutory remedies are available to employees.[192]

The employee also implicitly has to obey the employer; make his/her personal services available to the employer; be subordinate; maintain bona fides; exercise

[186] Grogan 2010: 4, where it is stated that these laws originated from England and later evolved into the Dutch "Placaaten", and were revolutionised by the Industrial Revolution, which led to the South African master-and-servant laws. Later, several other acts were promulgated and the industrial court was eventually established.
[187] Rycroft 2009: 1432-1433.
[188] Brassey, Cameron, Cheadle & Olivier 1987: 3, where it was stated that the common law feels little for commercial rationality, in that in the absence of an express agreement to the contrary, parties do not have to give a reason for termination of the employment relationship.
[189] *Martin v Murray* (1995) 16 ILJ (C) 589-619.
[190] Du Plessis & Fouche 2012: 5.
[191] Du Plessis & Fouche 2012: 17.
[192] Du Plessis & Fouche 2012: 19.

reasonable care, and refrain from misconduct, which is once again of great importance for this study.[193]

The common law did not keep pace with the rapid developments in modern commerce and industry, and statutory intrusions eventually necessitated developments in line with business needs, with emphasis placed on human rights and their entrenchment in national constitutions.[194] From a common-law perspective, employment contracts were seen to be mere commercial contracts,[195] which led to a hierarchy of laws contained in sections 49 and 50 of the BCEA.[196] In *Martin v Murray,*[197] judge Marais duly noted that one would have unreasonable expectations of the common law to speedily keep up with the "waxing and waning" of respective bargaining strengths, increased emigration and immigration, and other factors on the respective positions of the employer and employee in a rapidly changing world.[198] He argues that only the legislature could respond quickly enough to frequently fluctuating circumstances of a socio-economic nature.[199]

Due to economic dynamics and the flexibility of contracts, the traditional notion that employment is mainly regulated by contract is no longer true in South Africa, and the contract is no longer viewed as the primary means of employment regulation.[200] Many employers make use of temporary labour, labour brokers and contract employees akin to independent third-party contractors,[201] not to mention the fact that, these days, the employment relationship seems to be more important than the content of any legal or illegal employment agreement.

[193] Du Plessis & Fouche 2012: 20.
[194] Grogan 2010: 3.
[195] Du Plessis & Fouche 2013: 4; Van Niekerk, Christianson, McGregor, Smit & Van Eck 2012: 36.
[196] 75 of 1997; Du Plessis & Fouche 2012: 5.
[197] (1995) 16 ILJ 589 (C) 590,605. Judge Marais argued that it would be unfair to confer upon a court a common-law jurisdiction just because of the inequality of bargaining position, since everyone is free to bargain the terms and conditions of their contracts.
[198] *Martin v Murray* (1995) 16 ILJ 589 (C) 605.
[199] Grogan 2010: 3.
[200] *SA National Defence Union v Minister of Defence and another* (1999) 20 ILJ 2265 (CC) 2267, where it was held that members of the SA Defence Force were deemed to be in a relationship akin to that of an employment relationship, and could thus exercise rights afforded by s 23 of the Constitution, considering the ILO stance on the meaning and scope of 'worker'.
[201] Van Niekerk *et al* 2008: 5; Du Plessis & Fouche 2012: 10.

In *Kylie v CCMA & Others*,[202] it was found that a prostitute was deemed to be an employee, despite having entered into an unlawful contract, due to her vulnerability and the guarantee of protection of her dignity by section 23 of the 1996 Constitution. In the same vein, in *Discovery Health Ltd v CCMA & others*,[203] the labour court upheld a decision by the CCMA commissioner to assume jurisdiction pertaining to an Argentinian national who allegedly had been unfairly dismissed, finding that subsequent to the expiry of their work permits, immigrants needed protection and a labour law remedy against unfair treatment by their employers, and the immigrant in question was thus found to be a vulnerable employee. In the *Discovery*[204] case, Van Niekerk alluded to the fact that abuse may easily follow where employees have no legal remedy and that the constitutional value of fair labour practices could be undermined, and stressed that even illegal immigrants have the right to fair labour practices. Having studied the reasoning in this case, there appears to be no reason as to why the same would not apply to bullying.

In *Ndikumdavyi v Valkenberg Hospital & Others*,[205] it was found that even a contract concluded in contravention of a statute (offering permanent employment to a refugee from Burundi) while his refugee status was deemed expired could give rise to labour law protection if the work was lawful, thus stressing that lawful work based on an unlawful contract still warranted protection against wrongful action by the employer. The court noted that section 187(1)(f) of the LRA, which renders discriminatory dismissals automatically unfair, is not prohibitive, nor does it create positive rights,[206] and furthermore deemed the applicant an employee for purposes of the decision.

In turn, the ILO adopted Recommendation 197 of 2006,[207] which affords member states guidance on how to establish an employment relationship, as opposed to defining an employee. Recently, Van Niekerk and colleagues discussed this matter,[208] which will be alluded to in the discussion to follow. Even at this stage, therefore, it is necessary to point out that there are several definitions for the term

[202] [2010] 7 BLLR 705 (LAC) par 40.
[203] *Discovery Health Ltd v CCMA & others* [2008] 7 BLLR 633 (LC) 641 par 30,31.
[204] *Discovery Health Ltd v CCMA &* others [2008] 7 BLLR 633 (LC) 642 par 31.
[205] *Ndikumdavyi v Valkenberg Hospital & Other*s [2012] 8 BLLR 975 (LC) 804.
[206] *Ndikumdavyi v Valkenberg Hospital & Other*s [2012] 8 BLLR 975 (LC) 795,803.
[207] ILO 2006a.
[208] 2012: 61.

'employee'.[209] And, although broad, it is trite law that labour legislation only applies to 'employees'.[210] Of late, however, the mere existence of an employment relationship has brought about protection for vulnerable categories of people in an employment relationship, as discussed above.

According to Van Niekerk and colleagues,[211] the LRA, BCEA, EEA and the Skills Development Act[212] all contain definitions borrowed from the previous era with a strong common-law background. However, the definitions contained in the UIA, OHSA and COIDA differ from those offered in the primary labour legislation. This makes statutory regulation of bullying quite difficult, as not all bullies work for large organisations or have been appointed on open-ended contracts, which causes the maize of possibilities to regulate bullying behaviour to become even more muddled.

Nevertheless, the ILO studies conducted did recognise workplace bullying against the broader backdrop of violence at work, and stressed that the cumulative effect of "relatively minor incidents" could become a particularly serious form of violence.[213] The ILO does not grant protection against workplace bullying in any of its recommendations or conventions, although its Declaration on Fundamental Principles and Rights at Work affirms the right of all persons to be free from discrimination, among other things, but fails to mention bullying as such.[214] Considering that the ILO "seeks the promotion of social justice and internationally recognised human and labour rights and its mission to help women and men around the world to find decent working conditions of freedom, equity, security and human dignity through its Decent Work Agenda",[215] it comes as no surprise that, as a member country, South Africa endorsed several recommendations and conventions of the ILO, and ratified all of the core conventions[216] and promulgated statutes to give effect thereto.

[209] LRA s 1 describes an employee as a person who is employed by, or working for, any employer, and is receiving or entitled to receive any remuneration, and any other person whosoever assisting or carrying on the business or conducting the business of an employer.
[210] Van Niekerk *et al* 2012: 59.
[211] 2012: 62.
[212] 97 of 1998, hereinafter referred to as the SDA.
[213] Yamada, as cited in Einarsen *et al* 2003: 408.
[214] Yamada, as cited in Einarsen *et al* 2003: 408.
[215] ILO 2010.
[216] Van Niekerk *et al* 2008: 8.

It must be kept in mind that cross-pollination is possible, as the entrenchment of labour rights raises the prospect of constitutional jurisprudence being developed by civil courts and the constitutional court, which may have far-reaching consequences for the way in which the contract of employment and the employment relationship could be approached in future.[217] In the words of Grogan: "This could lead to a cross-fertilisation of the principles of labour law, the common law and public law."[218]

Human interaction is fraught with words, looks, gestures and non-verbal behaviours that lend themselves to misunderstanding and misinterpretation in the workplace.[219] As far as unacceptable conduct is concerned, workplace bullying often goes unrecognised or, even if it is recognised, ignored, partly due to the absence of protection by the common law.[220] Where recognised, protection comes too late. It is known that the legislature favours three methods of balancing inequality in employment, namely through collective bargaining, imposing minimum conditions of service and creating tribunals to deal with labour-related workplace issues.[221]

By emphasising freedom of contract, the common law encourages, or at least does not discourage, the exploitation of labour,[222] and the inherent relative inequality in bargaining power between the employer and the subordinate employee, who works on demand for welfare and job security,[223] lies at the heart of the common law contract of employment. This gives rise to an environment that could easily breed bullying behaviour, i.e. behaviour that is neither prohibited nor regulated by common law, and affords no *ex post facto* remedy to the victims. As yet, the common law does not obligate employers to prohibit bullying as such, save for an obligation to provide employees with a safe working environment.

Thus, the common law provides virtually no legal protection to bullying victims, and other mechanisms must therefore be explored.

[217] Grogan 2009: 6.
[218] Grogan 2009: 6.
[219] Le Roux *et al* 2010: 46.
[220] Le Roux *et al* 2010: 52.
[221] Grogan 2010: 4.
[222] Grogan 2009: 3.
[223] Grogan 2009: 3.

5.5 Workplace bullying and the law of delict

The rights and duties of employers and employees are regulated by the laws of contract, delict, administrative law and constitutional principles.[224] As legislation constitutes such a large part of the regulation between employer and employee, or, in some instances, even between employer and 'worker', one would have expected a common-law claim to be a less attractive option for litigants, especially in a labour environment. This, however, does not seem to be the case.[225]

In the labour sphere, employees are able to lodge delictual claims against their employers; employers may claim from their employees, and third parties may lodge claims against both employers and employees.[226] It is common cause that in common law, delictual claims can only be lodged against a perpetrator in respect of his or her wilful or negligent wrongful acts or omissions, which have shown a causal link to damage or personal injury.[227]

Of importance where bullying is concerned is the doctrine of vicarious liability, in which the principles of the common law have remained largely intact, save for certain restrictions such as the statutory provisions contained in COIDA, which restricts claims lodged by employees against their employers in respect of occupational injuries and diseases.[228] In the *locus classicus* case of *Media 24 & Another v Grobler*,[229] the court confirmed that due to the psychological damages Grobler suffered at the hands of her employer (sexual harassment that occurred in the scope of her employment), she was entitled to sue her employer and was not barred by COIDA. She was free to sue her harasser and her employer, and it was confirmed that the labour court was indeed the correct forum to utilise for this claim. At the same time, this ruling confirmed the common-law principle of vicarious liability.

The aforementioned decision was of course not free from criticism.[230] It has been debated that the EEA specifically prohibits sexual harassment, and that the

[224] Van Niekerk *et al* 2008: 83.
[225] Van Niekerk *et al* 2008: 83.
[226] Van Niekerk *et al* 2008: 85.
[227] Neethling, Potgieter & Visser 2006: 400.
[228] Van Niekerk *et al* 2008: 85.
[229] *Media 24 & Another v Grobler* (2005) 26 ILJ 1007 (SCA) 1028 par 77.
[230] Van Niekerk *et al* 2008: 86, with reference to *Eastwood & another v Magnox Electric PLC* [2004] UK HL par 3.4.

aforementioned judgement carefully circumvented the statutory rights and remedies established by the EEA. Nevertheless, the decision by the Supreme Court of Appeal stands and until the principles are overruled or legislation is passed in this regard, the doctrine affords a possible avenue for employees to sue their employers if bullying occurs in the scope of their work. This doctrine is important in the search for a uniform approach to bullying.

As already mentioned, vicarious liability stems from English law, is embedded in our common law, and forms part of the legal system in South Africa. It rests upon the principle that the employer is responsible for the wrongdoings of the employee if such acts or omissions were committed within the scope and course of employment.[231] To determine whether the employee indeed acted within the course and scope of employment, and whether the employer could be held vicariously liable, the court found that there were numerous tests that could be used. In *Ngubetole v Administrator Cape*,[232] judge Corbett held that "[b]ecause of the flexibility or lack of precision in the concept of course of employment in the sphere of vicarious liability, the courts have devised various tests for determining whether a particular act, or course of conduct, on the part of a servant falls within or without the course of his employment. Some of these tests are of broad application, others are more suited to the particular situations for which they were devised".[233]

The most noteworthy of these are the 'standard' and the 'risk' tests. The 'standard' test[234] is traditionally favoured. In terms of this test, the employer only incurs vicarious liability for the misconduct of an employee if the misconduct was committed while acting or attempting to act for the sole benefit of the employer; therefore, the misconduct will fall within the scope of employment if an employee is not acting in his or her own interest.[235] The 'standard' test consists of both a subjective and an objective element.[236] The subjective element looks at the intent of the servant who committed the wrongful act, while the objective element emphasises the

[231] Visser 2006: 359.
[232] (1975) 3 SA 1 (A) 9.
[233] *Ngubetole v Administrator Cape* (1975) 3 SA 1 (A) 9.
[234] *Absa Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 1 SA 372 (SCA) 378.
[235] Loots 2008: 156-157; *Minister of Police v Rabie (*1986) 1 SA 117 (A) 134.
[236] Loots 2008: 157.

establishment of a causal link between the action of the servant and the business of the master.[237]

Application of this test in a bullying environment will add the element that the perpetrator acted for the sole benefit of the employer, which is no easy task to prove. In *K v Minister of Safety and Security*,[238] however, the constitutional court found that that "an intentional deviation from duty does not automatically mean that the employer will not be liable".

The risk test for vicarious liability complements the aforementioned view taken by the constitutional court. After all, in its simplest form, the doctrine of vicarious liability can be described as a form of risk allocation.[239] This means that bullying in the workplace could be seen as a form of risk and not merely a dignity violation or a form of harassment, which in effect constitutes unfair discrimination. This could prove to be an interesting proposition. According to this approach, a master who determines the circumstances of employment and thereby creates a risk of wrongful acts can be held liable on the grounds set out by this test if a wrongful act is committed by his or her servants.[240] Nevertheless, Neethling and colleagues[241] argue that it should still be possible to hold the master vicariously liable for the wrongful actions or omissions of a servant if the appointment of that servant put the servant in a position to commit a wrongful act. The master in effect empowered the servant with the risk he himself created, and it would be only reasonable, fair and just to hold the master vicariously liable.[242] There is no reason why the same principles could not find application in a workplace bullying environment.

In *K v Minister of Safety and Security*,[243] the applicant sought damages in delict from the respondent on the basis that she had been raped by three uniformed and on-duty policemen after she accepted their offer of a lift home.[244] The supreme court of

[237] Loots 2008: 157.
[238] 2005 6 SA 419 (CC) 762 par 26.
[239] Loots 2008: 158.
[240] Loots 2008: 158.
[241] 2006: 360.
[242] Loots 2008: 159; Neethling *et al* 2008: 407.
[243] 2005 JOL 14983 (SCA), also reported as *K v Minister of Safety and Security* [2005] 8 BLLR 749 (CC).
[244] *K v Minister of Safety and Security* [2005] 8 BLLR 749 (CC) 835.

appeal held that on application of the standard test for vicarious liability, it could not be said that the policemen were, while raping the applicant, still exercising the functions to which they were appointed or carrying out an instruction of their employer.[245] The court found that in instances of sexual misconduct committed by employees, the enquiry should be whether the deviation from their employment responsibilities was of such a nature that it could be said that in doing what they did, they were still exercising the functions to which they had been assigned or were still carrying out some instructions of the employer. On appeal to the constitutional court, it was found that two questions had to be answered for vicarious liability to apply.[246] Those questions were whether the wrongful act was done solely for the purpose of the employee, and whether there was a close enough link between the employee's acts for his own interests and the purposes and the business of the employer.[247] If merely one of these questions could be answered in the affirmative, vicarious liability can be found.

If this is extrapolated to bullying in the workplace, it ought to see the same questions raised and answered, and opens the possibility for victims to claim in delict based on this doctrine. If it presents a legal avenue for victims of workplace bullying, employers should be able to guard against these claims and manage bullying as a risk in their businesses.

The judgement in *K v Minister of Safety and Security*[248] confirmed the old common-law principles applicable to the law of delict and vicarious liability, although adapting existing principles to reflect the normative framework of the Bill of Rights. It is important to note that the responsible employer is not without remedy in these instances, as he or she can still claim from the perpetrator damages so caused. Adherence to the statutory provisions contained in the BCEA, which limits the amounts to be deducted from payments due,[249] is compulsory. Simply put, this entails that should the employer be found guilty of bullying, either in a linear or vertical form, the employer can claim money back from the perpetrator. This is not a

[245] *K v Minister of Safety and Security* [2005] 8 BLLR 749 (CC) 762.
[246] *K v Minister of Safety and Security* [2005] 8 BLLR 749 (CC) 762.
[247] *K v Minister of Safety and Security* [2005] 8 BLLR 749 (CC) 763.
[248] *K v Minister of Safety and Security* [2005] 8 BLLR 749 (CC) 759 par 21.
[249] 75 of 1997.

preventative strategy, but presents a mere *ex post facto* remedy for both victim and perpetrator.

According to Halfkenny,[250] the court places an affirmative duty on employers to ensure that its employees are not subjected to sexual harassment, which is just another form of violence, in the workplace. By placing an affirmative duty on the employer to prevent harassment, it is assumed that harassment is endemic, widespread, part of the workplace culture and, therefore, requires strong preventive measures.[251] The same reasoning applies to bullying. The burden is therefore on the employer to formulate effective policies and to ensure that they are adhered to.[252] This approach further acknowledges that groups of workers are negatively affected, which requires collective solutions.[253]

Therefore, one of the most effective methods for preventing and remedying workplace harassment is for employers to develop clear policies that prohibit sexual harassment, including an effective complaint procedure, and to outline disciplinary measures that will be taken in the event that an employee is found guilty of such conduct.[254] The same principles could apply in a bullying environment; yet, a provision to that effect in respect of bullying is markedly absent in current South African law.

It is thus contended that if bullying shows a sufficient nexus between acts committed by an employee and the 'purpose of the employer', the employer could be held vicariously liable, and third parties would be able to claim from the employer.[255] In the present day, the *respondeat superior* doctrine manifests itself as the doctrine of vicarious liability due to the special relationship that exists between the parties and the social necessity to hold responsible those who create situations of risk.[256] The doctrine of vicarious liability has often been applied to cases of sexual harassment, where the employee had to prove that, when the harassment took place, the

[250] 1996: 216.
[251] Halfkenny 1996: 221.
[252] Halfkenny 1996: 221.
[253] Halfkenny 1996: 221.
[254] Halfkenny 1996: 227.
[255] *Viljoen v Smit* (1997) 18 ILJ 61 (A) 61-63, where even a frolic, like going to another farm to relieve himself (unsuccessfully argued by the employer that this was for a personal purpose), as there were no toilet facilities on the farm where he worked and a fire was subsequently started, did not exonerate the employer.
[256] Loots 2008: 146.

perpetrator was acting in the course and scope of his or her employment.[257] The courts have established that within a special relationship such as the one between an employer and employee, three common-law requirements have to be met before vicarious liability could be established, namely "a wrongful act must [have] be[en] committed by the servant; a master-servant relationship must [have] be[en] established, and the servant must have committed the wrongful act while acting within the scope of his or her employment".[258]

The common law has been added to by section 60 of the EEA,[259] which specifically deals with vicarious liability as a statutorily regulated item. This piece of labour legislation allows the victim (against whom has been unfairly discriminated in the workplace) a choice. The victim could take action against the employer rather than against the perpetrator, and would in all likelihood end up in a better financial position.[260] In practice, this section is often used in sexual harassment cases, such as in *Media 24 & Another v Grobler*,[261] in which it was found that this provision in the act does not "oust the common law doctrine of vicarious liability". It seems, then, as if section 60 of the EEA is another option to be explored in cases of bullying (although only if bullying is found to be a form of harassment, which is still uncertain). This will be discussed later on.

In conclusion, therefore, it is tendered that a delictual claim based on the doctrine of vicarious liability is an option to be explored by victims of workplace bullying, provided that the requirements are met. Both Whitcher[262] and Rycroft[263] believe that civil law provides ample relief for an employee against an employer for an injury caused by wrongful conduct. However, it is argued that this remedy is far too expensive to be regarded as a suitable, effective remedy for workplace bullying. The employer can protect himself from liability and can claim money back from perpetrators if found guilty, but actions taken seem to be *ex post facto* and not

[257] *ABSA Bank Ltd v Born Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA) 395.
[258] Loots 2008: 149.
[259] 55 of 1998.
[260] The legislature also created s 189 of the LRA, whereby the employer and temporary employment service are jointly and severally liable under certain circumstances. S 197 of the LRA (transfer of business) also contains a similar provision.
[261] (2005) 26 ILJ 1007 (SCA) 1028 par 77.
[262] 2010: 44.
[263] 2009: 1448.

preventative in nature, and will come too late for the employee, who will then already have suffered from the negative effects of bullying.

5.6 Workplace bullying and the Constitution

The 1996 Constitution is an obvious source to search for the existence of an obligation on employers to prohibit bullying in the workplace. The rights to dignity of the person, security and fair labour practices seem like the obvious place to start. The Constitution aims to seek protection for all human beings, irrespective of race, creed or sex through the right to pursue both material well-being and spiritual development in conditions of freedom and dignity, in economic security and equal opportunity.[264]

The fundamental rights granted by the Constitution and their respective interpretation by the courts have led to the development of significant jurisprudence relevant to workers, employers and their representative bodies, and since constitutional rights have the potential to permeate into each and every domain of the work relationship, "it is difficult to consider the constitutional framework within which labour legislation operates without addressing, in a substantive sense, the manner in which each right is given expression".[265] Hence the reference to case law under this section.

Knowing that a claimant may not rely on the Constitution directly when legislation has been passed to give effect to a constitutional right, as confirmed in *Sidumo & another v Rustenburg Platinum Mines Ltd and another*,[266] one needs to investigate subsequent legislation passed. Constitutional rights have the potential to affect labour law in various respects: through a test of the validity of labour laws that seek to give effect to constitutional rights; through the interpretation of legislation enacted to give effect to fundamental rights, and by developing the common law in as far as legislation does not – of course, all in line with the limitations clause contained in section 36(1) of the Constitution.[267] In an attempt to deal with workplace bullying in the absence of specific legislation and inadequate protection afforded by the

[264] Zibi 2011.
[265] Van Niekerk *et al* 2008: 33.
[266] *Sidumo & another v Rustenburg Platinum Mines Ltd and Another* [2007] 12 BLLR 1097 (CC) 1174 par 250.
[267] Van Niekerk *et al* 2008: 34.

common law, this needs to be kept in mind as we venture towards a uniform understanding of the phenomenon.

Of particular importance is section 9 of the Constitution[268] dealing with equality, which bestows on "everyone" in South Africa the right to equality, and confirms the right that everybody is equal before the law and that nobody may discriminate unfairly against another. The anti-discrimination clause contains a number of items that are seen to be grounds upon which persons may not be discriminated against; if discrimination does occur on these grounds, a presumption of unfairness is created.[269] This, however, is not a closed list, as the wording chosen by the legislature in section 9(3) contains a list of stated grounds preceded by the word "including". This clearly indicates that the list is not closed, nor does it pertain to 'status' as found in the American legal system.[270]

It is important to note the content of these stated grounds, as subsequent legislation[271] was passed in line with these prohibitions. Du Toit[272] warns against unfair discrimination based on unlisted grounds, and stresses that the EEA should be interpreted in compliance with the ILO's Convention 111,[273] which in effect guarantees no scope for 'fair' discrimination, as the listed grounds are, as such, unfair. Giles with reference to Du Toit[274] further believes that "the absolute nature of the prohibition arises because the listed (and unlisted) grounds are inherent features of the human personality, which, if not 'immutable', are so important to self-definition that these too should be protected". It then seems as if the criterion of discrimination in employment relates to the question whether the impugned "distinction, exclusion or preference" on that ground has the effect of nullifying or impairing opportunity or treatment in employment or occupation.[275]

Section (9)(3) of the 1996 Constitution prohibits direct or indirect discrimination against another person, including based on race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion,

[268] 1996.
[269] Du Plessis & Fouche 2012: 89.
[270] Yamada 2004a: 488.
[271] EEA 55 of 1998, s 6(1).
[272] Giles with reference to Du Toit 2013: IR Network Editorial September 2013.
[273] As per Giles 2013: IR Network Editorial September 2013.
[274] Giles 2013: IR Network Editorial September 2013.
[275] Du Toit 2013.

conscience, belief, culture, language and birth. Should discrimination occur on any one or more of these 17 “stated grounds”, it is presumed that the discrimination is unfair. However, due to the choice of words by the drafters of the Constitution, unfair discrimination can occur on grounds that are not so-called “stated grounds”,[276] albeit with a different onus to prove the discrimination as well as the fact that it was unfair.[277]

In *Harksen v Lane NO and Others*[278] and *Larbi-Odam & Others v Member of the Executive Council for Education & Another (North West Province)*,[279] the constitutional court confirmed this point, stating that the list contained in the Constitution is not a *numerus clausus*. In the former case – the *locus classicus* pertaining to unfair discrimination and the proving thereof – a three-staged enquiry into alleged violations of the equality clause was proposed. The first question to be asked is whether there was differentiation between people or categories of people. If so, the second question would revolve around whether there was discrimination on the grounds of one or more of the 16 listed items. If not, it should be asked whether, objectively speaking, the non-specified ground relates to attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings, or to affect them adversely in a comparably serious manner. Only if the differentiation points to discrimination, the last question would be dealt with, namely whether the discrimination was unfair. This is where the presumption would take effect.

If it is alleged that the discrimination was based on one of the specified grounds, a rebuttable presumption of unfairness is created. However, if the alleged discrimination was on an unspecified ground, both the elements of ‘unfairness’ and ‘discrimination’ would have to be proven by the complainant. Unfairness focuses on the impact of the conduct, and not the perpetrator’s intention. This presumption of unfairness and the burden of proof have been dealt with by the legislature in statute.[280]

[276] Du Plessis & Fouche 2012: 90.
[277] Du Plessis & Fouche 2012: 91.
[278] 1997 (11) BCLR 1489 (CC) 1506 par 42,43.
[279] 1997 (12) BCLR 1655 (CC) 1673 par 46.
[280] EEA 55 of 1998, s 11.

In *Larbi-Odam & Others v Member of the Executive Council for Education & Another*,[281] it was found that foreign nationals were a disadvantaged group and that citizenship/nationality as an 'unspecified ground' would give rise to unfair discrimination.[282] It was found that these foreign nationals were entitled to protection, as they were legally permitted to work in South Africa, with their work permits having been renewed over the years. The significance of this is that it has broadened the 'listed' items to incorporate other forms of unfair discrimination as well.[283] Therefore, this case serves as an example that bullying based on citizenship could probably be seen as unfair discrimination.[284]

Case law has refined the notion of unfair discrimination found in the Constitution and subsequent legislation. Unfair discrimination based on both specified and unspecified grounds was for example dealt with by the labour court in *Stojce v University of KZN (Natal) & Another*.[285] Subsequent to a Bulgarian citizen's failed application to be appointed as lecturer at the university, he alleged unfair discrimination on specified grounds, being race and language, and further alleged unfair discrimination based on qualifications as an unlisted ground. In brief, the labour court found that for him to claim unfair discrimination based on an unlisted ground, he had to prove that the conduct concerned had affected him as a member of a class or group of vulnerable persons, or that the conduct was inherently pejorative.[286] He also had to show that the alleged grounds had impaired his dignity or had had the potential to do so.[287] The applicant failed to prove these elements, and could also not substantiate that his defining attributes, being qualifications and tertiary education as well as research experience, classified him as a member of a group worthy of protection.[288]

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[281] 1997 (12) BCLR 1655 (CC).
[282] *Larbi-Odam & Others v Member of the Executive Council for Education & Another* 1997 (12) BCLR 1655 (CC) 1665 par 19-20.
[283] *Larbi-Odam & Others v Member of the Executive Council for Education & Another* 1997 (12) BCLR 1655 (CC) 1655 par 43.
[284] *Larbi-Odam & Others v Member of the Executive Council for Education & Another* 1997 (12) BCLR 1655 (CC) 1655 par 43.
[285] *Stojce v University of KZN (Natal) & another* [2007] 3 BLLR 246 (LC) 246-252.
[286] *Stojce v University of KZN (Natal) & another* [2007] 3 BLLR 246 (LC) 251 par 27 and 28.
[287] Van Niekerk *et al* 2008: 132.
[288] *Stojce v University of KZN (Natal) & another* [2007] 3 BLLR 246 (LC) 251.

The anti-discrimination clause in the Constitution should thus not be assessed in isolation, but subsequent developments also have to be taken into account. This will serve as a backdrop to the research undertaken to try and establish where bullying fit into the greater legal milieu.

To claim unfair discrimination on an unlisted ground in a bullying claim would not be easy: Either the victim would have to prove his/her membership of a group or class of persons worthy of protection, or that the deeds were inherently pejorative and had the potential to or did impair his/her dignity. In line with judge Pillay's finding in *Stojce*,[289] a bullying victim would then have to show that the bullying was based on an unlisted ground. If that was indeed the case, the victim would further have to prove that there was a difference in treatment, that it defines a group or class of persons, and that the difference is worthy of protection.

Section 10 of the Bill of Rights in the 1996 Constitution deals with the protection of the dignity of all persons, including both safeguarding of, and respect for, their dignity.[290] This aspect is important in the search for a uniform South African approach to bullying: The Constitution as well as subsequent legislation should thus be considered, especially the EEA,[291] the BCEA[292] and the LRA.[293] These acts set out to prohibit unfair discrimination based on certain characteristics, and confirm that harassment is seen as unfair discrimination. Einarsen and colleagues[294] remarked that although these acts dealt with the prohibition of unfair discrimination as listed in section 6(1) of the EEA (the prohibition of violence and physical attacks), the law needed to be augmented by a code of conduct dealing with workplace violence – and, by implication, therefore, bullying as well. This has not happened yet.

Section 23 of the 1996 Constitution deals with "fair labour practices" for "everyone", which find application not only between employer and employee, but also between employer and "worker",[295] and incorporates a wider application. The Constitution of the Republic of South Africa is the only constitution that incorporated section 23(1)

[289] *Stojce v University of KZN (Natal) & another* [2007] 3 BLLR 246 (LC) at 250 par 27.
[290] Einarsen 2003:314.
[291] Sections 5-11.
[292] Sections 78-81.
[293] Schedules 7(2) and 8.
[294] 2003:314.
[295] Van Niekerk *et al* 2008:39.

as a fundamental right, save for Malawi.[296] In *Nehawu v University of Cape Town*,[297] the constitutional court specifically found that this right applies to both employer and worker. The judge further remarked: "In giving content to that right, it is important to bear in mind the tension between the interests of the worker and the interests of the employers that is inherent in labour law."[298] Thus, fairness extends to employers and workers, and has to be kept in mind when bullying behaviour presents itself in the workplace. It stands firm, then, that fair labour practices are prescribed by the Constitution for a working environment.

5.7 Workplace bullying as unfair discrimination/harassment or a dignity violation

The distinction between treating bullying behaviour as either a dignity violation or discrimination is important for the South African legislature in the absence of specific legislation dealing with bullying in the South African workplace.

Judge Cameron's ruling in the supreme court of appeal[299] confirmed a reciprocal duty of fair dealings between the employer and employee in a workplace, and provides a theoretical framework to treat employees openly and honestly. This was confirmed in *Kotze and Agricultural Research Council of SA.*[300] Treating one another with dignity, according to Le Roux and colleagues,[301] as well as "refrain[ing] from bullying"[302] could be found in the principle of fair dealings, although this principle extends far wider than bullying.

It was confirmed in *Murray v Minister of Defence*[303] that "marginalisation", which is regarded as a form of bullying in the international arena, was seen as a reason for demoralisation and led to suspicion and depression, although viewed subjectively. Based partly on marginalisation, the court found a breach of the duty to conduct fair

[296] Van Niekerk et al 2008:36.
[297] *Nehawu v University of Cape Town* 2003 5 BLLR 409 (CC):167.
[298] *Nehawu v University of Cape Town* 2003 5 BLLR 409 (CC) 167 par 40.
[299] *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA) 1375.
[300] (2007) 28 ILJ 261 CCMA 267, where it was found that the employer acted in bad faith by allowing the applicant to act in a position for two years and then informing him that he lacked the formal qualifications for the job. The court ordered promotion of the employee.
[301] 2010 52.
[302] Le Roux *et al* 2010: 53.
[303] (2008) 29 ILJ 1369 (SCA) 1374B.

dealings. Both Whitcher[304] and Rycroft[305] believe that the common-law duty of fair dealings is a common-law right available to employees, implying the right to be dealt with fairly by their employers, thereby granting a possible legal remedy to bullied employees. It is also noteworthy that, in *Murray*, the judges considered the victim's feelings of being "shunned" and "side-lined".[306] The mere acknowledgement of 'feelings' in a labour law environment certainly is something to be grateful for.

Harassment has been called "an evil in every Western country", and stems from the belief that this is a way of "tormenting members of minority or other disadvantaged groups seeking upward social mobility through work".[307] Friedman and Whitman[308] argue that harassment should rather be seen as a violation of the right to dignity as opposed to treating it as a form of discrimination, although harassment as a form of discrimination is currently favoured by the legislature.[309] Their reason for this assertion centres on the argument that the Western world allows for two views: firstly the American paradigm in which "harassment is treated as a form of discrimination", and secondly, a continental paradigm, which favours harassment as a form of dignity injury – an interesting stance. The fact that almost every European country has a law prohibiting harassment illustrates the American influence, although Europeans have never fully accepted the USA's notion of harassment.[310]

Friedman and Whitman are not the only authors taking this view. Le Roux and colleagues,[311] among others, mention that the reference to workplace bullying as moral harassment strengthens the link between bullying and dignity, thereby implying that bullying could be seen as a form of dignity violation rather than discrimination, as in France and most of the rest of Europe. Bernstein[312] and Ehrenreich[313] also support this view.

[304] 2010: 44.
[305] 2009: 1448.
[306] *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA) 1375.
[307] Friedman & Whitman 2003: 241.
[308] 2003: 241.
[309] EEA 55 of 1998, s 6(3).
[310] Friedman & Whitman 2003: 241,242.
[311] 2010: 52.
[312] 1997-1998: 524.
[313] 1999-2000: 27.

This stance is further supported by case law. In *Maharaj v CP de Leeuw (Pty) Ltd*,[314] it was confirmed that bullying should rather be seen as a dignity violation than a form of unfair discrimination or harassment. Judge Landman found that the applicant was constructively dismissed based on the fact that the employment relationship had been made intolerable embedded in racial grounds.[315] It was however found that the dismissal was not automatically unfair, because it was not caused by racial discrimination against the applicant.[316] Le Roux and colleagues[317] summarised this case as one in which the promotion of an unqualified white person above a qualified black person had led to feelings of humiliation in the victim, or, at the very least, feelings of not being treated as a person, but rather as an object. Feelings of being demeaned and humiliated or career prospects destroyed[318] lie at the heart of the bullying phenomenon,[319] and despite the fact that the court in this instance did not find the promotion unfair, it did find that the employer's action had been provocative (even though there was a good commercial reason for it) and could have led to the constructive dismissal of the applicant. No reasons can be tendered as to why a claim based on bullying would not have the same results.[320]

Public humiliation may also fall in the category of bullying as a dignity violation. Whitcher,[321] supported by the judgement in *Pretoria Society for the Care of the Retarded v Loots*,[322] rightly remarks that verbal abuse and humiliating and demeaning conduct have to be assessed on the merits of each case. He questions the meaning of humiliation, marginalisation and feelings of being demeaned in the workplace, and confirms the need for a set of guidelines (similar to those on sexual harassment) to integrate the subjective feelings of victims with an objective set of *boni mores* in order to ground said feelings in an objectively measureable way.[323]

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[314] *Maharaj v C P De Leeuw (Pty) Ltd* (2005) 26 ILJ 1088 (LC) 1104 par 74.
[315] *Maharaj v C P De Leeuw (Pty) Ltd* (2005) 26 ILJ 1088 (LC) 1104 par 76.
[316] *Maharaj v C P De Leeuw (Pty) Ltd* (2005) 26 ILJ 1088 (LC) 1104 par 77.
[317] 2010: 58.
[318] Einarsen *et al* 2003: 7.
[319] Le Roux *et al* 2010: 58.
[320] *Murray v Minister of Defence* 2009 (3) SA 130 (SCA) par 8.
[321] 2010: 49.
[322] (1997) 18 ILJ 981 (LAC) 982, where the court found that the conduct as a whole should be taken into account to establish whether it was such that, when judged reasonably and sensibly, the employee could not be expected to put up with. The court found that this type of conduct had led to the destruction or potential serious damaging of the trust relationship and that the employee need not have put up with such conduct.
[323] Whitcher 2010: 49.

In *Pretoria Society for the Care of the Retarded v Loots*,[324] judge Nicholson held that the cumulative impact – in that instance, the "overall strategy to make the life of the employee intolerable" – had to be assessed. Cognisance was taken of the fact that stress at work had caused the applicant's health to deteriorate,[325] which is very similar to a bullying scenario today. Although reference has been made to "thin" and "thick-skinned" employees[326] who could experience the same situation in different ways due to their particular personality traits, one would, in a legal environment, surely need guidelines to pair subjective feelings with objective, justifiable facts. The quest for the development of a code prohibiting bullying in employment would serve this purpose.

In France, bullying is called moral harassment, and incorporates acts such as refusing to communicate with an employee, failure to give proper instructions or the issuing of contradictory instructions, the denial of work or giving senseless assignments, shunning, incessant criticism, bullying, humiliation and slanderous comments, insults or threats. The notion that these types of behaviour should be forbidden in employment has for years been making headway in Europe – a movement began by industrial psychologists and not the legal fraternity – and has led to the question whether the law should be involved at all.[327] Nevertheless, European lawyers soon removed bullying behaviour from the health and safety domain, and statutes have firmly placed it in the dignity paradigm.[328] It is thus possible, though unlikely from the legislature's view, that workplace bullying can be seen as a dignity violation as opposed to treating it as unfair discrimination.

The strongest argument for treating workplace bullying as discrimination in the South African dispensation lies in the country's plethora of existing legislation. It is important to keep in mind that the EEA prohibits both discrimination and harassment, and does not deal with dignity as such.

[324] (1997) 18 ILJ 981 (LAC) 981.
[325] *Pretoria Society for the Care for the Retarded v* Loots (1997) 18 ILJ 981 (LAC) 981.
[326] Le Roux *et al* 2010: 58.
[327] Friedman & Whitman 2003: 250-251.
[328] Friedman & Whitman 2003: 254.

5.8 Statutory provisions and workplace bullying

5.8.1 Workplace bullying and the Protected Disclosures Act

Although no specific mention is made of bullying in any statute, Le Roux and colleagues[329] believe that the legislature considered potential bullying behaviours in drafting the Protected Disclosures Act[330] by protecting those who have made a protected disclosure from being "otherwise adversely affected in respect of one's employment, profession or office, including employment opportunities and work security"[331] as well as items a-h, recognising an "occupational detriment" as a result of a protected disclosure. Le Roux and colleagues argue that the definition for occupational detriment in the act provides a list of potential bullying behaviours, which they regard as harassment.[332] Apart from this definition, they say, there is no definition for workplace bullying in South African labour legislation.[333] This view originated with Rycroft in 2009, and it is still not clear whether or not other South African authors support it.

In *Van Alphen v Rheinmetall Denel Munition (Pty) Ltd*,[334] the principle was confirmed that an applicant carried the burden of proof to show that a protected disclosure in terms of the PDA had been made. The applicant in this case failed to prove such. She had circulated an e-mail in which allegations of poor work performance were made against her superior and, when charged with a subsequent disciplinary hearing pertaining to these allegations, applied to the labour court for PDA protection and an order to halt the proceedings. The labour court found that no clear right had been shown; that the PDA had not been created to deal with allegations of poor work performance, and that criminal conduct could not be shown. Based on this case, it is argued that the PDA is very specific and that retaliation by superiors could follow,

[329] 2010: 53.
[330] Act 26 of 2000, hereinafter called the PDA.
[331] S 1(i). Also includes being subject to any disciplinary action (s 1(a)); being dismissed, suspended, demoted, harassed or intimidated (s 1(b)); being transferred against one's will (s 1(c)); being refused transfer or promotion (s 1(d)); being subjected to a term or condition of employment or retirement which is altered or kept to the employee's disadvantage (s 1(e)); being refused a reference or being provided with an adverse reference from the employer (s 1(f)); being denied appointment to any employment, profession or office (s 1(g)); being threatened with any of the actions referred to in (a)-(g) above (s 1(h)), or being otherwise adversely affected in respect of one's employment, profession or office, including employment opportunities and work security (s 1(i)).
[332] Le Roux *et al* 2010: 14.
[333] Le Roux *et al* 2010: 53.
[334] (2013) 22 LC 11.1.1.

without sufficient protection for the person who disclosed perceived negative actions by a superior.

This stresses the need for further research in this regard to arrive at a uniform approach.

5.8.2 Workplace bullying and the Labour Relations Act

The primary purposes of the LRA are to give effect to and regulate the fundamental rights conferred by section 23 of the 1996 Constitution, and to provide a framework for collective bargaining, including on matters of mutual interest. Questions have been raised as to the correct forum to approach where an alleged unfair labour practice has been committed, which has led to a so-called occupational detriment. In the recent matter of *Sefolo/Tshwane University of Technology*,[335] the respondent alleged that the CCMA lacked jurisdiction to hear a dispute relating to an occupational detriment and the subsequent unfair disciplinary hearing. After lengthy deliberations, it was found that the CCMA had jurisdiction to hear the matter, and that it was up to the applicant to choose whether he wanted the CCMA or the labour court to hear his matter,[336] due to the wording of section 191(13) of the LRA, stipulating that employees may, and not must, refer the matter to the labour court. Thus, even where bullying clearly occurred (although not mentioned verbatim) based on a protected disclosure, jurisdiction may be problematic.

In *NUPSAW obo Gule & Another/Young Sang Industrial Co (Pty) Ltd*,[337] which is a small Korean-owned company with only 13 employees, two employees forcefully removed the owner's personal assistant after her remarks that the workforce was on an illegal strike because of a black-and-white issue relating to short time. She was allowed back after the owner returned; the two employees were charged with abusive behaviour towards a colleague and were summarily dismissed.[338] The CCMA commissioner found the conduct of the two dismissed employees "nothing

[335] *Sefolo/Tshwane University of Technology* [2012] 11 BALR 1193 (CCMA) v1198.
[336] *Sefolo/Tshwane University of Technology* [2012] 11 BALR 1193 (CCMA) v1197-1198.
[337] [2007] JOL 20748 (MEIBC).
[338] *NUPSAW obo Gule & another/Young Sang Industrial Co (Pty) Ltd* [2007] JOL 20748 (MEIBC) 1.

less than hooliganism and bullying of unacceptable proportions",[339] and confirmed the dismissals. Interestingly, this is one of the few cases where reference is made to bullying as such, and could lead the way for South African jurisprudence on bullying.

The word 'bullying' also appears in judge Ngcobo's reasoning in *Country Fair Foods (Pty) Ltd v CCMA & others*,[340] where he remarked that the physical persuasion to continue with a physical relationship that had ended was paramount to being "nothing short than bullying".[341]

Both the aforementioned cases were however built on the premises of physical bullying and not emotional bullying, and still have not filled the void in dealing with the broader concept of bullying.

5.8.3 Workplace bullying and unfair labour practice jurisprudence

If Rycroft's definition for bullying is accepted, namely being "unwanted conduct in the workplace which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences",[342] the possibility exists that bullying behaviour can be seen to fall under unfair labour practice. This can however only be the case if the negative behaviour that is broadly labelled as harassment, as confirmed by Whitcher,[343] amounts to demotion, the non-provision of benefits, or an occupational detriment due to a protected disclosure made.

Van Eck and colleagues[344] refer to the undefined right to fair labour practices in the Constitution, which affords far more protection than the narrow definition expressed in the LRA, and can surely find application in bullying cases in the workplace. If the preamble to the BCEA is considered, it purports to support this, as it gives effect to the aim of section 23(1) of the Constitution (which *inter alia* relates to the right to fair labour practices).

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[339] *NUPSAW obo Gule & another/Young Sang Industrial Co (Pty) Ltd* [2007] JOL 20748 (MEIBC) 10.
[340] *Country Fair Foods (Pty) Ltd v CCMA & others* [1999] 11 BLLR 1117 (LAC) 1123 par [17] (1).
[341] *Country Fair Foods (Pty) Ltd v CCMA & others* [1999] 11 BLLR 1117 (LAC) 1123 par [17] (1).
[342] Rycroft 2009: 1448.
[343] 2010: 44.
[344] Van Eck, Boraine & Steyn 2004: 902.

Although the case of *Jansen van Vuuren v South African Airways (Pty) Ltd and another*[345] did not deal with bullying as such, it did confirm a very important principle, namely that a collective agreement cannot be used to permit or further discriminatory, harassing or unfair labour practices. Employers, employees and the collective should thus take note and ensure a zero-tolerance content in respect of bullying in all policies and procedures. Even unintended consequences should be considered.

Rycroft believes that this is one of the better avenues to pursue in a case of bullying, as bullying actions often result in a lack of promotion, demotion, differentiation in training or benefits, as described in section 186(2) of the LRA.[346] However, this option also poses its share of problems: Although employment is guarded, litigation against one's employer (despite the non-discrimination clauses) often leads to other bullying behaviours not covered by the LRA.[347] Yamada[348] quite correctly mentions that even if bullying behaviour is not necessarily discriminatory in nature but merely abusive, the abusive element needs to be addressed in the first instance.

Therefore, the unfair labour practice jurisprudence seems insufficient to deal with and prohibit all types of workplace bullying.

5.8.4 Workplace bullying and constructive dismissal

Assault is the most obvious form of bullying, and the industrial court has found that a guilty finding on assault in the workplace is sufficient grounds for termination of the contract, often based on a finding of constructive dismissal.[349]

In *Marsland v New Way Motor & Diesel Engineering*,[350] it was found that a mere threat of assault by leaning over the applicant and using only verbal abuse could be reason enough for constructive dismissal. In this instance, the applicant previously

[345] 2013 22 (LC) 6.12.2.
[346] Rycroft 2009: 1446.
[347] Rycroft 2009: 1446.
[348] 2000: 475.
[349] *Ndebele v Foot Warehouse (Pty) Ltd t/a Shoe* Warehouse (1992) 13 ILJ 1247 (IC) 1251, in which the applicant was held captive for three hours during which time he was brutally assaulted and threatened with shooting his knee caps to put an end to a promising golf career.
[350] 2009 30 ILJ 169 (LC) 183, 190.

witnessed the assault of another employee, and the abuse was continuous in nature. Verbal abuse can lead to a finding of constructive dismissal if the relationship between the parties has been destroyed beyond repair.[351] In *Marsland*, judge Stein found that, objectively speaking, the ongoing verbal abuse had in itself been calculated or likely to destroy the employment relationship, and contributed to an intolerable working environment.[352] Verbal abuse is often used by bullies, and presents itself more often than physical bullying.[353] Crawford[354] partly ascribes this to the fact that verbal tactics are seen as being more acceptable in modern society. *Marsland*[355] is a good example where judge Stein found in favour of the applicant after he had suffered a mental breakdown when his wife of 24 years suddenly left him. The applicant fell into a depression that required hospitalisation and subsequent medication and psychological assistance, which caused him to be ostracised from the company and exposed to continuous verbal abuse. In judge Stein's words: "There could be no legitimate purpose for the verbal abuse of the applicant … and it was conduct that the applicant could not be expected to put up with."[356] Not only did verbal abuse present itself in *Marsland*, but the applicant was refused access to tools of the trade to do his job, which further indicates that an intolerable working environment had been created.[357] Once again, these actions are typical of bullying behaviour and should be prohibited.

In case law, it has been shown that not all forms of verbal abuse or even swearing would necessarily lead to the destruction of the trust relationship, as a certain degree of 'improper conduct' on the part of employers is seen to be human. In *Visser and Amalgamated Roofing Technologies t/a Barloworld*,[358] the commissioner found as follows: "Managers are after all not infallible. They are subject to human limitations … This is part of the modern working environment with which employees have to

[351] *Lang v Daliff Precision Engineering (Pty) Ltd (1993) 14 ILJ 1359 (IC)* 1363; *Marsland v New Way Diesel Engineering* (2009) 30 ILJ 169 (C) 189.
[352] *Marsland v New Way Diesel Engineering* (2009) 30 ILJ 169 (C) 189.
[353] Pietersen 2007: 59; Einarsen *et al* 1994: 397, where it was said that distressed employees may violate expectation, annoy others, perform less competently and even violate social norms, and elicit negative behaviours in others in the process.
[354] 1999: 84.
[355] *Marsland v New Way Motor & Diesel Engineering* (2009) 30 ILJ 169 (C) 193.
[356] *Marsland v New Way Motor & Diesel Engineering* (2009) 30 ILJ 169 (C) 189.
[357] *Marsland v New Way Motor & Diesel Engineering* (2009) 30 ILJ 169 (C) 190.
[358] (2006) 27 ILJ 1567 CCMA.

cope."[359] However, in *LM Wulfsohn Motors*,[360] a finding to the contrary was reached, stating that callousness and cruelty displayed on the part of the employer had led to the applicant's resignation. In this case, a finding of constructive dismissal was made, but the commissioner's decision was overturned by the labour court, not because of the treatment itself, but due to the fact that this was an isolated incident, for which the applicant should have used the grievance procedure prior to claiming constructive dismissal.

With reference to English case law cited in *Milady's (a division of Mr Price Group Ltd) v Naidoo*,[361] it is thus contended that the extent of the verbal abuse or swearing, the degree thereof, any accompanying malice or aggression, and the impact of the swearing should be considered in deciding whether, as a form of workplace bullying, it can lead to constructive dismissal. In *Milady's*, however, it was found that the applicant's excessive overreaction to a management style with which she did not agree was insufficient on its own to warrant a finding of constructive dismissal.[362] If extrapolated to the field of bullying, a stringent management style should not give rise to a finding of workplace bullying.

In *Pereira v South African Recycling Equipment (Pty) Ltd*,[363] the applicant resigned two years after he had been promoted to managing director, because another director made his working life intolerable. He claimed constructive dismissal and was granted R250 000 in compensation. The commissioner held that "no employee should have to put up with the sort of demeaning, humiliating, insulting and abusive conduct from an employer".[364] Although the word 'bullying' was not used by the applicant or the commissioner, the conduct concerned clearly fell within the notion of workplace bullying, and therefore, this case can surely serve as authority that constructive dismissal based on continuous negative acts will be actioned if referred to the relevant dispute resolution forum in South Africa.

[359] (2006) 27 ILJ 1567 CCMA 1569.
[360] Le Roux *et al* 2010: 56; *LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre* (2008) 29 ILJ 356 (LC).
[361] (2002) 23 ILJ 1234 (LAC).
[362] *Milady's (a division of Mr Price Group Ltd) v Naidoo & others* (2002) 23 ILJ 1234 (LC) 1235.
[363] (2013) 22 CCMA 6.13.2.
[364] *Pereira /South African Recycling Equipment (Pty) Ltd* (2013) 22 CCMA 6.13.2 par [145].

It must be noted that the remedy attached to constructive dismissal relates to compensation, which is yet another *ex post facto* remedy and is not preventative in nature.[365] If these actions could rather be prohibited by law, the applicant would not have to carry such a heavy burden in trying to prove constructive dismissal in the first place.

5.8.5 Workplace bullying and the Protection from Harassment Act[366]

The Protection from Harassment Act took effect on 27 April 2013.[367] According to its full title, the act and its directives aim among others to provide for the issuing of protection orders against harassment.[368] The preamble confirms the constitutional right to privacy and dignity and, thus, also the right to be free from all forms of violence.[369]

The act was passed to afford all victims of harassment an effective remedy against such behaviour. For the first time, the word 'harassment' is defined, namely as "directly or indirectly engaging in conduct that the respondent knows, or ought to know (a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or related person by unreasonably (i) following, watching, pursuing or accosting of the complainant or a related person or loitering outside or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be, item (ii) deals with engaging in verbal, electronic or any other communication aimed at the complainant or a related person by any means whether or not conversation ensues and item (iii) refers to the sending of letters and other means of communication".[370]

The mere fact that the word 'workplace' is incorporated into this act and that harassment is so well defined ought to grab legal scholars' attention in terms of applying the act in the workplace where harassment occurs. It needs to be noted,

[365] Le Roux *et al* 2010: 65.
[366] 17 of 2011. (Hereinafter referred to as the PHA).
[367] Proc R9/GG 36357/20130412, added by GN R 274/GG 20130412 EW.D.F. 27 April 2013, and directives in terms of section 20(3) GN R 276/GG 36357/20130412.
[368] As well as to effect consequential amendments to the Firearms Control Act of 2000, and to provide for matters connected therewith.
[369] Protection from Harassment Act, 17 of 2011: 2.
[370] Protection from Harassment Act, 17 of 2011: 4.

however, that the act only applies *ex post facto*, despite the legislature's words "ought to know may cause harm".[371] It must be kept in mind that the similarly worded act in the UK is being used to deal with workplace bullying, but it is tendered that the South African version of this act was never created to cover workplace bullying *per se.*

The word 'harm' is also clearly defined and includes physical, mental, psychological and economic harm, which fits well into a bullying milieu. The definition of a 'related person'[372] proves somewhat of a problem if this act is to be applied in a work environment, as it refers to a family or household member of the complainant or any other person in close relation to the complainant. Whether this would include reference to colleagues remains to be seen, but at least victims of bullying (if the dreaded act amounts to harassment) have the option to apply for a protection order against such a respondent.

Of particular interest here is that sexual harassment is listed separately, is clearly defined and, thus, viewed as harassment. It is also stated that this act does not prevent a person who may apply for relief against harassment or stalking in terms of the Domestic Violence Act,[373] from applying for relief in terms of this act.[374] The protection order may be applied for by any other person who has a material interest in the well-being of the complainant, and the conduct must constitute harassment to invoke the protection granted by the act. It also does not exclude the simultaneous lodging of a criminal complaint against the respondent, whether *crimen iniuria*, assault or rape, which has a bearing on the complainant's persona or property.[375] The court's powers are wide, in that both engaging and attempts to engage in harassment can be prohibited, while the enlisting of others to engage in the harassment may be prohibited, as well as the imposition of any other act as specified in the protection order.[376]

[371] The long title of the act should be considered here.
[372] Protection from Harassment Act, 17 of 2011: 4.
[373] Act 114 of 1998.
[374] Protection from Harassment Act, 17 of 2011: 4.
[375] S 2, 3.
[376] S 10.

Taking into account the nature of bullying and the incitement of others to participate in group behaviour[377] to ostracise a victim in a place of work, the act surely provides a means of protection against harassment. However, once again, this only applies if bullying acts are seen to be harassment, and not if they are treated as a dignity violation. This further illustrates the importance of the previous discussion of whether bullying must be seen as harassment/unfair discrimination or a dignity violation – an issue that is still unclear in South Africa. It is suggested that the moral harassment or dignity route would be more appropriate, although the legislature and courts seem to prefer to treat bullying acts in terms of the discrimination paradigm.

This act, although not created to deal with workplace bullying, could easily be amended to deal with bullying behaviour where it amounts to harassment. The problem remains however, where bullying does not amount to harassment in that those instances would still present a *lacuna* and this act is merely *ex post facto* and thus does not display any pro active measures.

5.8.6 Workplace bullying and the Promotion of Equality and Prevention of Unfair Discrimination Act[378]

This act serves to give effect to section 9, read with item 23(1) of schedule 6 to the 1996 Constitution, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech, and to provide for matters connected therewith. It inevitably finds application where bullying acts are committed. PEPUDA also seeks to demarcate areas of separate jurisdiction between itself and the EEA, in that it will not apply to persons falling under the ambit of the Employment Equity Act,[379] as per section 5(3).

It is noteworthy that both the EEA and PEPUDA provide for protection against unfair discrimination. Although the wording of the EEA is less detailed, both acts contain the 16 listed items as per the 1996 Constitution, while the EEA add another three,

[377] Visagie *et al* 2012: 63.
[378] 12 of 2004, hereinafter referred to as PEPUDA.
[379] 55 of 1989, hereinafter referred to as the EEA.

being HIV status, family responsibility and political opinion. Cooper[380] believes that a "content overhang" and subsequent "forum shopping" should not arise if effect is given to the open-ended nature of the grounds of discrimination,[381] which could be a problem where bullying occurs.

The definitions of discrimination and harassment in PEPUDA are clear and could easily relate to bullying behaviour: "'[D]discrimination' means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly *(a)* imposes burdens, obligations or disadvantage on; or *(b)* withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds", while "'harassment' means unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to *(a)* sex, gender or sexual orientation; or *(b)* a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group".[382]

The problem, however, lies in the application of the act, as section 5(1) binds all persons and the state, but excludes those covered by the EEA as per section 5(3).

Seeing that this thesis deals with bullying in employment and the search for a uniform South African approach, it would be difficult to translate these provisions into an employment milieu (excluding government employees) without extending the applicability of the act, unless bullying occurs in employment and the applicant is not covered by the LRA. It is a pity, however, that the application of PEPUPA is not wide enough to cover all instances of typical bullying behaviour, because they could fit the definitions and prohibitions very well. The preamble to PEPUDA specifically states that the act endeavours to "facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate and guided by the principles of equality, fairness, social progress, human dignity and

[380] 2001: 1537.
[381] Cooper 2001: 1537.
[382] PEPUDA 12 of 2004.

freedom", which are exactly what is lacking in an employment milieu where bullying is not tackled head-on.

5.8.7 Workplace bullying and the Employment Equity Act[383]

Rycroft[384] states that although bullying is undefined in any statute, the consequences of harassment (not bullying) are well defined in law, and section 6(3) of the EEA explains harassment to be a form of unfair discrimination. Harassment is prohibited on any one or a combination of grounds listed in subsection 6(1). In effect, this relates to the prohibition of unfair discrimination in any employment policy and practice, as the list is open, which is indicated by the legislature's choice of the word 'including'. Both Rycroft[385] and Du Toit and colleagues[386] argue that the reference to harassment in section 6(3) could lead to an interpretation that, while all kinds of discrimination are prohibited in employment policies and practices, only those referred to in section 6(1) are seen as harassment and, thus, amount to unfair discrimination.

A more purposive interpretation is favoured to align bullying as a form of unfair discrimination with the provisions of section 9(3) of the 1996 Constitution.[387] Du Toit and colleagues[388] also state that the conduct constituting sexual harassment, as a form of unfair discrimination, need not be repeated, and refer to *J v M Ltd*,[389] where it was found that a single act of sexual harassment could constitute sexual harassment.

As already mentioned, the EEA, which was promulgated to give effect to section 9 of the Constitution, adds three items to those cited in the aforementioned section of the Constitution, namely family responsibility, HIV status and political opinion.[390] The EEA creates a proactive prohibition of unfair discrimination, directly or indirectly based on one or more of these grounds, including those listed in the Constitution.

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[383] 55 of 1998, hereinafter referred to as the EEA.
[384] Rycroft 2009: 1445.
[385] 2009: 1445.
[386] Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giloes, Bosch & Rossouw 2006: 611.
[387] Rycroft 2009: 1446.
[388] Du Toit *et al* 2006: 612.
[389] (1989) 10 ILJ 755 (IC) 757.
[390] S 6.

Bullying behaviour, so it could be argued, could be brought under this section, but only if it can be proven to be discrimination. However, many forms of bullying cannot be regarded as discrimination, such as the making of snide remarks, withholding of information because of trivial differences, or demeaning of the entire workforce. Although there is at times a fine line between bullying on the one hand and harassment and discrimination, the type of bullying behaviour will dictate the possible avenues to be explored. Du Toit and colleagues[391] take an interesting stance, namely that the procedures as per the Code of Good Practice on the Handling of Sexual Harassment Cases[392] are different from, and more restrictive than, those prescribed in the EEA pertaining to unfair discrimination, and that the procedures as per the EEA should prevail in view of the mere advisory status of a code.[393]

In common law, vicarious liability depends on the employee acting in the course and scope of employment, while liability in terms of section 60 of the EEA is location-based, rather than activity-based: The conduct must occur while at work, irrespective of whether the conduct occurred in the course and scope of employment.[394] Section 60(1) of the EEA states that "if it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act". More often than not, this section is applied in sexual or racial harassment claims. Should it be argued that bullying is a form of harassment, the following discussion of section 60 of the EEA is imperative to take note of as an alternative *ex post facto* remedy available to the victims of bullying.

A simple reading of section 60(3) of the EEA clearly shows that the employer is liable not for the discriminatory act of another, but because the employer is deemed to have done something untoward to the victim in the workplace.[395] It is therefore suggested that it is more appropriate to regard section 60 of the EEA as creating a form of direct liability for failing to address equity in the workplace; hence the two

[391] 2006: 613.
[392] 2005.
[393] Du Toit *et al* 2006: 614.
[394] Le Roux 2006: 414.
[395] Le Roux 2006: 414.

possible defences that have evolved, namely whether the employer actually dealt with complaints of discriminatory conduct in the workplace, and whether the employer implemented anti-discriminatory measures in the workplace.[396]

In *Ntsabo v Real Security CC*,[397] it was found that merely because it had not been immediately reported to the employer, the applicant was not barred from bringing a claim of sexual harassment against the employer. Her personal circumstances, such as her culture and fear of losing her job, were accepted as reasons why she first opted to report it to her mother and not her employer. 'Immediately' cannot be construed as within minutes of the deed,[398] and reporting the incident within a reasonable period of time is also accepted. There is no reason why this principle would not equally apply in bullying cases.

There are certain defences that can limit the employer's liability in terms of the EEA. The origin of the defence created by section 60(1) and 60(2) of the act is less clear, but is possibly located in the judgements of the United States supreme court in *Faragher v City of Boca Raton*[399] and *Burlington Industries Inc. v Ellerth*,[400] which both unfortunately related to sexual harassment and not workplace bullying. In these judgements, the court considered the extent to which an employer ought to be liable under Title VII of that country's Civil Rights Act of 1964 for the discriminatory conduct of a supervisory employee towards another employee.[401] No defences similar to those under section 60 of the EEA are listed in the aforementioned Title VII, but the US supreme court recognised from an early stage that liability under Title VII was not absolute.[402] In terms of hostile environment harassment not resulting in a tangible employment action, the court in *Faragher* and *Burlington Industries* based the employer's liability on negligence.[403] In these instances, the court held that the employer would be vicariously liable for compensation, unless it could show "(a) [t]hat the employer exercised reasonable care to prevent and correct promptly any

[396] Le Roux 2006: 414.
[397] *Ntsabo v Real Security CC* (2003) 24 ILJ 2341 (LC) 2374.
[398] *Ntsabo v Real Security CC* (2003) 24 ILJ 2341 (LC) 2374.
[399] 524 US 775 (1998).
[400] 524 US 742 (1998).
[401] Le Roux 2006: 416.
[402] Le Roux 2006: 416, with reference to *Meritor Savings Bank v Vinson* 477 US 57 (1986).
[403] Le Roux 2006: 416.

sexually harassing behaviour, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm".[404]

Although element (a) above is very similar to the defence listed in section 60(4) of the EEA, the US supreme court made it clear that both elements form part of the same defence, and are not two separate defences.[405] While the aforementioned cases may have led to the defence in section 60(1) and 60(2), and even partly the defence in section 60(4), of the EEA, it will be problematic only to rely on US case law to give content to the South African defence.[406] The US courts have persistently distinguished between *quid pro quo* and hostile environment harassment, as well as between supervisory and non-supervisory employees.[407] No such distinction is apparent from section 60.[408]

The employer's liability envisaged by section 60 of the EEA[409] will only find application once it can be shown that an employee, while at work, contravened a provision of the EEA or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of the act.[410] More often than not, section 60 of the EEA would be the provision that is contravened, but if the conduct concerned does not amount to sexual harassment, section 60 will only take effect if the victim can show contravention of section 6(1) of the EEA.[411] The latter provides that no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice on the grounds referred to in the rest of the subsection.[412]

If the abovementioned principles are applied in a bullying environment, it is clear that unless the bullying conduct concerned falls within the prescribed list, section 60 of

[404] Le Roux 2006: 416.
[405] Le Roux 2006: 416.
[406] Le Roux 2006: 416.
[407] Le Roux 2006: 417.
[408] Le Roux 2006: 417.
[409] Grogan 2010: 114.
[410] Le Roux 2006: 417.
[411] Le Roux 2006: 417.
[412] Le Roux 2006: 417; "… race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, HIV status, conscience, belief, political opinion, culture, language and birth".

the EEA could not be evoked, which strongly reminds of the 'closed status list' found in the USA.

The question should thus be asked whether the conduct concerned constitutes harassment and, thus, a contravention of section 6(3).[413] This section provides that harassment of an employee on one of the grounds listed in section 6(1) is a form of unfair discrimination, while it must be stressed that it is in no way required for the deed to be linked to an employment policy or practice.[414] Therefore, if one employee is harassed by another as envisaged by this subsection, it would undoubtedly constitute a contravention of the act, and the provisions of section 60 should apply, even if the employer was not aware of the contravention.[415]

An interesting phenomenon is the so-called 'queen bee syndrome', where females in executive positions are reluctant to promote other females to similar positions,[416] which could easily be branded bullying behaviour. 'Queen bees' do not bond with other women but rather tend to bond with men, and feel that as they did not receive special support to help them climb the corporate ladder, other women should also do it by themselves.[417] In the process, they end up demeaning fellow females. There is no legal avenue to explore for victims of this syndrome, because preventing other females from advancing in their careers, provided it does not amount to discrimination, has not been legalised. Knowing that this syndrome originates from feelings of self-preservation, insecurity, intimidation and being threatened,[418] it does not elicit any legal protection for victims. Undermining can be so subtle that bullying may very well be the correct avenue to explore, for which there is no protection in the South African legal system. Previous studies show that females are more likely than males to be disloyal to same-sex colleagues, while self-interest has been shown to be the reason why information is often withheld to prevent other females from

[413] Le Roux 2006: 418.
[414] Le Roux 2006: 418.
[415] Le Roux 2006: 418. I strongly agree with this view.
[416] Johnson & Mathur-Helm 2011: 48.
[417] Johnson & Mathur-Helm 2011: 48.
[418] Johnson & Mathur-Helm 2011: 48.

performing well and achieving success.[419] This seems like typical bullying behaviour, which is unfortunately not covered by existing legislation.

Therefore, if there is no contravention of the EEA[420] that could trigger employer liability in terms of section 60 of the act, the victim would have no cause of action against the employer in terms of the EEA.[421] This does however not imply that the victim is without remedy, because he/she could still hold both the perpetrator and the employer liable based on the common-law doctrine of vicarious liability.[422]

5.8.8 Workplace bullying and health and safety/risk in the workplace

Introduction

The role of the occupational health and safety professional has evolved from protecting physical health and safety in the workplace, to guarding broader concerns of physical health, lately also including psychosocial and psychological components of health.[423] Of late, occupation-related stress, often including harassment in different forms, forms part of risk management, which is the umbrella under which health and safety legislation is applied.

A basic tenet of risk management is that risks in the workplace cannot be eliminated, but can be managed to a certain degree, which is why health and safety legislation aims to minimise the risk of harm[424] or at least keep it at acceptable levels, which are usually determined by industry. The distinction between hazard and risk is important: The former refers to something with the potential to cause harm, while the latter refers to the probability that such harm will occur. That is why the first step in dealing with bullying as a form of risk management will be to identify and define the problem, after which severity, frequency and the number of affected people will come into play.

[419] Johnson & Mathur-Helm 2011: 52.
[420] Grogan 2010: 114.
[421] Le Roux *et al* 2006: 419.
[422] Le Roux 2006: 420.
[423] Spurgeon Anne, as cited in Einarsen *et al* 2003: 327.
[424] Einarsen *et al* 2003: 328.

Risk management further embraces some form of prevention as well as continuous evaluation to assess the effectiveness of prevention strategies.[425] Of further importance is the fact that the risk problem must stem from the workplace, and that the employer is ultimately responsible for controlling hazards. This could lead to the minimisation of the role of the victim/employee who may contribute to the danger, also in a bullying scenario – irrespective of whether it is due to eliciting bullying behaviour or due to interpersonal characteristics. This fact is noted as negative, as it seems to be required that the hazard be removed at the source, rather than expecting the individual to make adjustments to cope with an unsatisfactory environment, referred to as the "hierarchy of control".[426] In a workplace bullying scenario, where psychosocial issues are involved, this could lead to the employer having to make reasonable accommodation for 'thin-skinned' employees, where in more traditional cases of health and safety, employees are expected to at least minimise their own risks to a certain extent, such as by wearing protective clothing.

Problem identification, thus identifying bullying as a risk, is difficult in the absence of an acceptable uniform definition in South African law. Even the first hurdle proves difficult to overcome: As there is no uniform definition for bullying in South Africa, it makes it difficult to manage bullying from a risk perspective. Not even the notion of what bullying entails can be universally accepted without referring to cultural aspects, both nationally and in the workplace.[427] As this has not been done in South Africa, scholars will need to draw on the international arena. In the words of Anne Spurgeon:[428] "In the workplace, precise definitions are clearly important within a legal or disciplinary framework. However, outside this framework, the objective is essentially a practical one, that of developing a form of working definition which will assist in the day-to-day implementation of a preventative policy."

To exacerbate matters, criticism has been levelled against self-reporting as a means of establishing prevalence, and a proper measuring instrument will therefore have to be developed to identify the problem and to measure the success of any intervention

[425] Einarsen *et al* 2003: 328.
[426] Einarsen *et al* 2003: 329.
[427] Einarsen *et al* 2003: 330.
[428] As cited in Einarsen *et al* 2003: 330.

strategy (if bullying is at all seen as a risk management issue). The same applies to effective training, which also forms part of any risk management strategy.[429] One should however keep in mind that risk management is not an intervention strategy in itself, but a structured framework within which preventative measures are contained. Spurgeon[430] sees the framework itself as workable in order to manage workplace bullying from a risk perspective, although adaptations will have to be made to cater for pressing occupational concerns.

It is clear that viewing workplace bullying as a risk management issue will allow preventative measures to be instituted, and will not be a mere *ex post facto* remedy that does not guarantee job security nor afford effective relief. The fact that bullying behaviour can be overt or direct and can comprise of physical or emotional components, which can be very discreet and sometimes indirect, makes this a difficult problem to manage from a risk perspective, especially where verbal and indirect means are used to subject targets to bullying behaviours.[431]

The same principles will apply if workplace bullying should be viewed as a risk problem in South Africa. As in the UK, South Africa has several acts dealing with health and safety matters. Both Whitcher[432] and Rycroft[433] believe that bullying acts could be dealt with under health and safety legislation, although by a far stretch, due to the physical nature of, as well as the serious emotional abuse resulting from, some bullying acts. It is not clear what their stance is in cases where bullying does not lead to serious psychological abuse, but Rycroft seems right in stating: "Even if health and safety legislation is a tentative basis to deal with workplace bullying, there is clearly the potential to claim compensation."[434]

[429] As cited in Einarsen *et al* 2003: 332.
[430] Einarsen *et al* 2003: 337.
[431] Pietersen 2007: 59.
[432] 2010: 44.
[433] 2009: 1446.
[434] Rycroft 2009: 1447.

Occupational Health and Safety Act[435]

Employees enjoy a common-law right to a safe working environment. The OHSA is aimed at supplementing this basic right, while matters not regulated by it are still being dealt with under the common law, as discussed.[436]

Le Roux and colleagues[437] note that, from a bullying perspective, it is not clear[438] whether this general duty bestowed upon employers extends to the psychological well-being of employees as well. By means of inference, the definitions for "health"[439] and "occupational health", as well as the general structure of the act, seem to include psychological well-being in the general duty of care. With the act covering both the private and public sectors, and even those not supposed to be exposed to hazards in the context of employment, and the added provision that the minister may deem persons as employees for purposes of the act, the OHSA certainly has a very broad scope and application. However, it does have certain exceptions, including mines and mining areas,[440] certain vessels at sea,[441] labour brokers, as well as those excluded by the minister.[442]

The OHSA imposes certain duties on both employees and employers. Employers need to provide employees with training and supervision, where needed; supply them with protective clothing; establish hazards, if any, to the health and safety of employees in the workplace, and take the necessary precautionary measures.[443] This is in line with the broader risk management perspective described at the start of this section. Employees need to adhere to health and safety rules; refrain from misusing or damaging anything that is provided for in the interest of health and

[435] 85 of 1993, hereinafter referred to as OHSA.
[436] Du Plessis & Fouche 2012 : 185; Grogan 2009: 8; Le Roux *et al* 2010: 12.
[437] Le Roux *et al* 2010: 12,13.
[438] These views are not supported by subsequent case law which indicates a clear obligation in terms of both physical and psychological health, as will be discussed infra.
[439] S 1 refers to 'healthy' as being free of injury or illness due to occupational causes, which is a very broad description.
[440] As defined by the Minerals Act 50 of 1991.
[441] As defined by the Merchant Shipping Act 57 of 1991.
[442] Du Plessis & Fouche 2012: 180,186.
[443] Du Plessis & Fouche 2012 : 186,187. For details of duties of employers and employees, see Du Plessis & Fouche 2012: 186-187; OHSA s 8-15.

safety,[444] and report unhealthy situations and incidents to their health and safety representatives, of whom a certain number have to be appointed on a sliding scale if the business has more than 20 employees.[445]

Whether bullying can be interpreted to fall under this act remains to be seen.

Compensation for Occupational Injuries and Diseases Act[446]

This piece of legislation ensures that employees or their dependants who have suffered injury, illness or death arising from the performance of their duties are compensated from a specially created fund to which employers contribute and which is administered by the director-general.[447] Note, however, that this is once again an *ex post facto* remedy, and claimants can thus only be compensated after the injury, accident or death occurred in the scope of the employee's employment, and only if the occurrence could not be predicted.[448]

It is trite law that the right to compensation is embedded in the requirement that an employer-employee relationship had to exist at the time; that the accident must have caused the injuries or death concerned, and that the accident must have occurred in the "scope of the employee's employment".[449] Although COIDA originally replaced the previous Workmen's Compensation Act,[450] which primarily dealt with physical injuries, a psychiatric disorder or psychological trauma now also qualifies for compensation under the act, as confirmed in *Urquhart v Compensation Commissioner*[451] and *Odayar v Compensation Commissioner*.[452] In *Urquhart,* the applicant's post-traumatic stress disorder was found to be based on a specific

[444] Du Plessis & Fouche 2012 : 187.
[445] Grogan 2009: 9.
[446] 130 of 1993, hereinater referred to as COIDA.
[447] Grogan 2010: 8; Du Plessis & Fouche 2012: 164.
[448] Grogan 2010:9.
[449] Du Plessis & Fouche 2012: 165.
[450] 30 of 1941
[451] (2006) 27 ILJ 96 (E).
[452] 2006 (6) SA 202(N) 208.

incident,[453] as referred to in COIDA, but in *Odayar,* it was found that the applicant's disorder could be a disease, as contemplated in section 65(1)(b) of COIDA, and the case was thus referred back to the tribunal to determine the monies payable.[454]

Post-traumatic stress disorder is a classic negative result of workplace bullying.[455] Therefore, it is important to note that COIDA provides for increased compensation if the employer was negligent, defining 'employer' as a manager or person who is in charge of machinery or has the right to hire and dismiss staff. This is typical of a working environment, and employers will have to guard against bullying in the workplace, as the act covers not only physical injury or disease, but also some of the typical negative effects of bullying.[456] In addition, 'workplace' is defined very broadly and includes "place of employment".[457]

As bullying occurs more frequently between managers and subordinates than between co-workers, and managers are the main culprits of downward bullying in South Africa,[458] there is a definite void in South African legislation in prohibiting this form of violence. COIDA can only take effect based on the negative effects of bullying in the workplace if these manifest in the form of a psychiatric disorder or psychological trauma. Only then, the act will allow for compensation. COIDA does not prohibit bullying as such, save for a general provision to guarantee a safe working environment in line with the common law and constitutional provision as found in section 9 of the 1996 Constitution.

The courts have raised the question whether section 65 of COIDA[459] provides for claims of psychological disease, especially post-traumatic stress disorder, as a result

[453] 2006 27 ILJ 96(E) 103 par 14, where it was said that a psychological disorder or psychological trauma is as much a personal injury as a cracked skull, and nothing can be gathered from the act to indicate a contrary intention.
[454] *Odayar v Compensation Commissioner* 2006 (6) SA 202 (N) 208.
[455] Einarsen *et al* 2003: 53; Einarsen 1999: 17; Leymann & Gustaffson 1996: 255.
[456] Depression, low self-esteem, post-traumatic stress disorder, as per Einarsen *et al* 2003: 53.
[457] Du Plessis & Fouche 2012: 168.
[458] Pietersen 2007: 59.
[459] Which states as follows: "Subject to the provision of this chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General – that (a) the employee has contracted a disease mentioned in the first column of Schedule 3 and that such disease has arisen out of and in the course of his or her employment; or (b) that the employee has contracted

of harassment in the workplace, such as sexual harassment. In *Grobler v Naspers*,[460] which served as *locus classicus* in this regard, the argument was tendered that due to the fact that the post-traumatic stress disorder (which had been caused by the sexual harassment of the employer) conformed to the definition of an occupational injury as defined in COIDA, the victim was limited to a claim in terms of COIDA, and could not utilise other avenues such as vicarious liability to claim from her employer. This argument, as also tendered in *Ntsabo v Real Security CC,*[461] was rejected by the labour court as well as the supreme court of appeal.[462] In *Grobler v Naspers*,[463] the question was raised whether harassment could indeed be seen to be an accident as referred to in COIDA.[464] The court found that an accident required a specific incident and not a condition such as post-traumatic stress disorder, which is long-term, although brought about by harassment over an extended period of time. Section 1 of COIDA clearly defines an accident as "an accident arising out of and in the course of an employee's employment and resulting in a personal injury, illness or the death of the employee". The courts have been hesitant to find that post-traumatic stress disorder is a disease covered by section 65(1)(b) of COIDA, and judge Farlam[465] even declined to express an opinion on this, but implied that it could be.

Le Roux and colleagues[466] rightly refer to *Odayar v Compensation Commissioner*,[467] where it was held that post-traumatic stress disorder could be seen as a disease in terms of section 65(1) of COIDA, but only if it arose as a result and in the course of the victim's employment. Du Plessis and Fouche[468] also refer to *Urquhart v Compensation Commissioner*,[469] where it was found that a psychiatric disorder or psychological trauma had long been recognised by the courts as a personal injury

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a disease other than a disease contemplated in para (a) and that such a disease has arisen out of and in the course of his or her employment."

[460] *Grobler v Naspers* (2004) 25 ILJ 439 (C) 439-647.

[461] *Ntsabo v Real Security CC* (2003) 24 ILJ 2341 (LC) 2380A-E.

[462] In the subsequent case between the same parties, *Media 24 v Grobler* (2005) 26 ILJ 1007 (SCA) 1007-1028.

[463] (2004) 25 ILJ 439 (C) 515.

[464] In s 1.

[465] *Media 24 v Grobler* (2005) 26 ILJ 1007 (SCA) 1028 par 77.

[466] 2010: 13.

[467] 2006 (6) SA 202 SA 202 (N) 207-209.

[468] 2012: 168.

[469] (2006) 27 ILJ 96 (E).

(for purposes of compensation only), and that there was nothing in any legislation to indicate an intention to the contrary.[470]

Einarsen[471] remarks that bullying is the systematic persecution of a colleague, a subordinate or a superior, which, if continued, could lead to severe social, psychological and psychosomatic problems for the victims. Whether this is regarded to be an occupational disease or injury if it leads to the suffering of lesser evils, such as depression, low morale, feelings of isolation, is still to be seen.

Compensation granted for post-traumatic stress disorder comes too late for many employees who suffer in their workplaces. In principle, however, it is thus possible to view workplace bullying from a risk perspective embodied in the provisions of COIDA.

Unemployment Insurance Act[472]

The UIA aims to effect payment of benefits to employees who have lost their employment income due to circumstances beyond their control or due to pregnancy.[473] Employees earning below the threshold[474] (those earning above such are treated as if they earn the ceiling amount) may claim from the Unemployment Insurance Fund if they had been in employment for 13 weeks prior to the occurrence that rendered them fit to claim under the UIA, and that they are not entitled to more than two thirds of their normal salary.[475] Those employees receiving grants from COIDA are excluded from benefits under this act.[476] Section 3 of the UIA lists the exclusions,[477] while chapter 3 includes "illness" benefits,[478] but the act does not specify whether this refers to physical or mental illness.

[470] Du Plessis & Fouche 2012: 168.
[471] 1999: 17.
[472] 63 of 2001, hereinafter referred to as UIA.
[473] Grogan 2009: 8; Du Plessis & Fouche 2012: 128; Van Niekerk *et al* 2008: 438.
[474] Currently R178 464 per annum, as per Du Plessis & Fouche 2012: 130.
[475] Grogan 2009:8.
[476] Du Plessis & Fouche 2012: 130; Van Niekerk *et al* 2008: 439.
[477] Employees in employment for less than 24 hours per month; those under contract in terms of the Skills Development Act; those employees in local or provincial spheres of government who are officers or employees in terms of the Public Service Act of 1994, and those in South Africa under a contract of apprenticeship.
[478] Du Plessis & Fouche 2012: 129.

5.9 Employee assistance programmes

Momberg[479] explains employee assistance programmes as work-based programmes designed to assist in the identification and resolution of productivity problems associated with employees impaired by personal concerns, including but not limited to health, marital, family, financial, alcohol, drug, legal or emotional stress, which may adversely affect employee job performance. Employee assistance programmes have been used globally as part of business strategies to enhance employee functionality, loyalty and performance.[480] The problem, once again, is that these programmes do not offer a remedy to aggrieved bullied employees, but merely offer consolation after a bullying deed has already been committed and the negative effects have already been suffered by victims, and cannot be employed as a strategy to prohibit or manage bullying in a working environment.

5.10 Grievance procedures

It is trite law that a grievance procedure should be utilised to promote peace in the working environment, and aims to offer solutions as close to the problem as possible before it becomes a dispute.[481] Most companies have a grievance procedure, although it is not compulsory, but it is clear that this is an avenue to be explored where both horizontal and linear bullying takes place. Momberg[482] refers to the fact that it is important to lodge a grievance before a dispute is declared, especially to normalise the working environment and ensure labour peace.[483] As the number of bullying grievances lodged is not kept track of, it would be speculation to argue that grievance procedures are ineffective in addressing bullying at work, but the question has rightly been raised as to why this procedure is not used more often as a first point of departure to address workplace bullying in order to minimise adjudication.[484]

[479] 2011: 110, with reference to Jantjie 2009.
[480] Momberg 2011: 111.
[481] *Mackay v ABSA and another* (2000) 21 ILJ 2054 (LC).
[482] 2011: 100.
[483] Momberg 2011: 101.
[484] Momberg 2011: 102.

Momberg[485] takes an interesting view in asserting that a grievance procedure will fail where managers do not view it as a communication process, mainly because managers feel threatened by the process, as it would expose their lack of knowledge and leadership skills. It must be noted that employees often do not regard the grievance procedure to create awareness of employee problems. As all grievance procedures do not clearly indicate management's concern for employees, and in view of employees' fear of not being seen as a team player, the perception has been created that grievance procedures often fail in their original goal.[486]

Despite the aforementioned, however, it does seem as if the utilisation of a written grievance procedure may be another mechanism to deal with bullying *ex post facto*. Yet, it would be insufficient in most organisations due to the abovementioned perceptions, and cannot prohibit bullying in the workplace, but merely deal with it once it has happened.

5.11 Is there a need for separate legislation to prohibit and deal with workplace bullying in South Africa?

Le Roux and colleagues[487] capture the legal position very well and their arguments are without fault. The absence of a uniform definition for workplace bullying, and the plethora of avenues to be explored in managing and preventing it, do create legal uncertainty. Referring to bullying in education, De Wet[488] views it as victimisation, with narcissistic school principals committing or condoning bullying actions. She blames the recognised power disparity between victim and perpetrator.[489] However, it is uncertain whether this proposition can or should be followed where workplace bullying is concerned.

The existing law on unfair discrimination does not seem to cater for bullying as such, as it is not regarded as harassment[490] on a listed ground. In addition, section 186(2) of the LRA does not cater for all kinds of bullying behaviour. The existing health and

[485] 2011: 103.
[486] Momberg 2011: 104-105.
[487] 2010: 65.
[488] 2011c: 74,75.
[489] De Wet 2011c: 74,75.
[490] Le Roux *et al* 2010: 65.

safety law area is also untested[491] in terms of workplace bullying, unless it results in depression or post-traumatic stress disorder, in which case compensation is offered. However, this is still not seen as a proactive measure against bullying.

Civil litigation is expensive, but *iniuria* claims can be brought on grounds of vicarious liability if caused by bullying and if all the necessary elements have been proven. Constructive dismissal claims brought on grounds of bullying behaviour currently seem to be the best option,[492] but also only once all the strict requirements have been met. Once again, this is merely an *ex post facto* remedy after the employment relationship has already been destroyed. Thus, it is not the most ideal remedy to utilise in employment, where the relationship between employer and employee is of the utmost importance.

South African does not have a code of good practice dealing with bullying as such as can be found in Ireland, nor is there a clear distinction between harassment and bullying as found in England, where the Protection from Harassment Act[493] creates a criminal offence and allows for civil remedies to be utilised.[494]

The time has come for this maze of legal avenues available to the victims of workplace bullying to be consolidated to create legal certainty. Dealing with bullying separately, albeit in a new code of good practice, is paramount in the pursuit of a uniform understanding of bullying.

It is common cause that bullying should not be tolerated. The question that needs to be answered, however, revolves around the feasibility of workplace bullying laws and the fear of opening a "Pandora's box".[495]

The following chapter will deal with comparative perspectives on workplace bullying in the form of comparing "principles" on a jurisdiction basis.

[491] Le Roux *et al* 2010: 65.
[492] Le Roux *et al* 2010: 65.
[493] 11 of 1997.
[494] Le Roux *et al* 2010: 65; Ireland Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work of 2007; UK Protection from Harassment Act of 1997.
[495] Whitcher 2010: 44.

CHAPTER 6: COMPARATIVE PERSPECTIVES ON WORKPLACE BULLYING

6.1 Introduction and background

> *It is possible to destroy someone with just words, looks and innuendos: this is called perverse violence or moral harassment.*[1]

For too long, bullying has been regarded as the price to pay for employment.[2] However, different initiatives reflect changing attitudes towards workplace bullying: In many countries, legal and policy implications of bullying are being considered and given effect.[3] Having been described as part and parcel of being employed, bullying today strongly resembles sexual harassment 30 to 40 years ago.[4]

Transnational bodies such as the International Labour Organisation and World Health Organisation[5] have taken an interest in violence at work, thus incorporating bullying in their studies, and have acknowledged that bullying may represent behaviour that, viewed in isolation, could seem menial but cumulatively could become a very serious form of violence.[6] The ILO regards it as part of the greater violence problem at work;[7] the European Union has had a framework agreement signed, while the WHO recognises bullying legislation as a useful way to assist targets to recover their "health and dignity".[8]

The WHO has advocated in favour of bully legislation not only to assist victims to recover their health and dignity, but also in a bid to prevent workplace bullying.[9] This has given rise to extremely diverse legal frameworks regarding bullying. Legal responses to bullying have taken three forms: firstly, action taken by the state on behalf of targets, usually criminalising the negative action; secondly, action taken by

[1] Lerouge 2010: 109.
[2] Lerouge 2010: 109
[3] Einarsen *et al* 2011: 481.
[4] Einarsen *et al* 2011: 481.
[5] Hereinafter referred to as the ILO and WHO.
[6] Einarsen *et al* 2011: 481.
[7] Einarsen *et al* 2011: 481; Yamada, as cited in Einarsen *et al* 2003: 408.
[8] Einarsen *et al* 2011: 481; Yamada, as cited in Einarsen *et al* 2003: 408, where it was stated that the EU might address bullying through a directive.
[9] Einarsen *et al* 2011: 481.

suing perpetrators to stop the offence and/or get compensation, and thirdly, the articulation of industry codes, best practices and codes of conduct.[10]

Einarsen and colleagues[11] note that efforts towards law reform are moving in two different directions: Firstly, certain jurisdictions have adopted tangible legal or policy responses to workplace bullying (mainly regulatory provisions in occupational safety and health laws), such as recent initiatives in Australia, Canada and Sweden. Secondly, there are initiatives such as those in the UK, which has adopted and applied the Protection from Harassment Act.

Statutory tort remedies could be utilised where these apply, to alleviate the harm done by bullying in the workplace, although France seems to be an outlier in apparently being the only country who has criminalised bullying conduct.[12] Other countries try to use existing laws to prohibit and manage workplace bullying, with varying success.

Human resource practitioners in the USA are set against regulating the conduct of their workforce, and vehemently oppose anti-bullying legislation despite the fact that 72% of employers have been found to be bullies[13] and 13,7 million Americans were direct victims of bullying in 2010.[14] At present, there is not a single state in the USA with a law or code or provision in the field of occupational health and safety prohibiting or dealing with workplace bullying.[15] The Namies do not regard this as sign of toughness, but rather a lack of regard for the psychological integrity and dignity of persons.[16]

Einarsen[17] regards bullying or generic harassment as a more serious and crippling problem for employees than all other work-related stress combined, and many victims suffer from symptoms akin to post-traumatic stress syndrome.[18] Cognisance

[10] Caslon Analytics http://www.caslon.com.au/cyberbullyingnote6.htm (accessed on 9 September 2013).
[11] 2011: 481.
[12] Einarsen *et al* 2011: 481.
[13] Namie & Namie 2011: 129.
[14] Namie & Namie 2011: 17.
[15] Namie & Namie 2011: 17.
[16] Namie & Namie 2011: 55.
[17] Einarsen 1999: 17.
[18] Leymann & Gustafson 1996: 255.

needs to be taken of the distinction between dispute-related bullying and predatory bullying when possible solutions are investigated for South Africa.[19]

The aim of this chapter is to present comparative perspectives on how workplace bullying is regarded and managed in the USA, UK, Australia and South Africa. These comparative perspectives are presented to indicate both the differences and similarities in the way in which workplace bullying is prohibited as well as dealt with *ex post facto*.

The respective jurisdictions will be compared in terms of the following indicators:

- The legal puzzle
- The role of the ILO
- The continuum on which workplace bullying is placed
- The common law, contract of employment and duty of care
- Employment law
- Anti-discrimination and harassment legislation
- Occupational Health and Safety legislation as well as codes of practice
- Anti-stalking legislation
- Retaliation and other legislative interventions
- Prominent legal interventions
- Collective bargaining and the legal frameworks pertaining to workplace bullying
- Local interventions and lastly
- Final notes on workplace bullying in the international arena

6.2 The legal puzzle

In addition to seeking redress from the bullies themselves, victims often seek (financial or other) redress for injuries suffered at the hand of the bully.[20] Bullying victims in the USA, UK and South Africa have far fewer legal avenues to utilise for both financial and non-financial redress than in the Scandinavian countries and Canada – perhaps even fewer than in Australia, should the Code of Practice on Preventing and Responding to Workplace Bullying be adopted.

Legislation that could possibly be applied in workplace bullying scenarios is ambiguous, with a wide range of one or more general provisions that could form the

[19] Einarsen 1999: 17.
[20] Meglich-Sespico *et al* 2007: 37.

basis of a case.[21] Hoel[22] regards the existing legal frameworks as too weak to deal with workplace bullying. He believes that the contract of employment, common law (where applicable), health and safety legislation, anti-discrimination legislation, regulations or anti-stalking law may be possibilities[23] to deal with workplace bullying. Governments such as those of the UK[24] and USA,[25] on the other hand, view existing mechanisms as sufficient and are opposed to additional legislation dealing with workplace bullying. In Australia, the window for public comment on a new Code of Practice for Preventing and Responding to Workplace Bullying has just closed, which is aimed at prohibiting and effectively dealing with bullying in the workplace specifically.

In comparison, the situation in South Africa is dire: The country lags behind the rest of the world in acknowledging, studying and preventing or dealing with bullying. No piece of legislation or code of practice prohibits it by name. Le Roux and colleagues[26] acknowledge the uncertainty about whether existing legal remedies in South Africa are sufficient to deal with workplace bullying, and call for internal policies to be adopted by employers while specific legislation is awaited.

South Africa, Australia and the USA have constitutions that guarantee the right to dignity of all persons, while the UK, in the absence of a written constitution, relies on legislation, European Union directives and case law to ensure the dignity of employees and all people.[27] Dignity rights are seldom defined in Europe, although they are often referred to.[28]

Of great concern is the fact that not the UK, USA or South Africa has specific legislation dealing with or prohibiting bullying as such. Although the general position in Australia is currently similar, with an absence of federal legislation dealing with workplace bullying, certain states in South Australia have adopted either legislation or policies or practices prohibiting workplace bullying.[29] However, of even greater

[21] Hoel 2013: 65.
[22] 2013: 65, with reference to Walden & Hoel 2004.
[23] Hoel 2013: 65.
[24] The Dignity at Work Bill of 1996 died in parliament in 1997 and 2001, as per Hoel 2013: 65.
[25] Hoel 2013: 65, with reference to Di Martino, Hoel & Cooper 2003.
[26] Le Roux *et al* 2010: 65.
[27] Harthill 2008: 269.
[28] Harthill 2008: 264.
[29] Caponecchia & Wyatt 2011: 78.

concern, is the fact that, while there has been a drive in the USA,[30] the UK[31] as well as Australia[32] to push for some form of solution to the matter, no similar drive has been noted in South Africa. This, then, leads to the primary research question: Are the available legal mechanisms in South Africa sufficient to address bullying in the workplace in the pursuit of a uniform approach to the matter?

Despite the findings of the ILO country study conducted in South Africa, namely that workplace violence is rife in the country,[33] nothing has been done to either create awareness or tender solutions to this pervasive problem. Stakeholders merely compiled a definition for workplace bullying, and a call was made for urgent intervention regarding workplace bullying and violence in South Africa. However, no such interventions have seen the light.

6.3 The role of the International Labour Organisation

The ILO is a tri-partite agency that comprises employer representatives, representatives of trade unions and governments; is affiliated to the United Nations, and primarily aims to promulgate labour standards dealing with the health and welfare of workers, provide technical assistance to member nations on employment and industrial relations matters, and conduct research and publish studies on labour and employment issues.[34]

It must be kept in mind that no matter how proactive the ILO may be, it is not a supranational entity, and may thus not impose obligations on member states, unless voluntarily agreed by members states.[35] Therefore, even if the ILO were to enact a general anti-workplace bullying standard, it would lack the power to impose it on member states. However, it is encouraging that the ILO recognised bullying in 2000 already, when it stated in a monograph that although bullying may be a relatively

[30] Healthy Workplace Bill.
[31] Dignity at Work Bill.
[32] Code of Practice for Preventing and Responding to Workplace Bullying.
[33] ILO 2003a.
[34] Einarsen *et al* 2003: 407.
[35] Einarsen *et al* 2003: 408.

minor incident in the workplace, the cumulative effect could become a very serious form of violence.[36]

Still, the ILO does not grant employees the right to be free of workplace bullying as such, although its Declaration on Fundamental Principles and Rights at Work affirms the right of all persons to be free from discrimination, among other things.[37] The ILO is not a legislature, but can assist through its aforementioned primary roles. The mere raising of awareness about workplace bullying has already assisted member states greatly.

6.4 Workplace bullying and the continuum on which it is placed

6.4.1 United States of America

The USA has no law dealing with workplace bullying specifically, and it is treated as a kind of harassment rather than a dignity violation.[38] Claims could be brought under tort for emotional distress, usually where there has been an intentional infliction of emotional distress,[39] which is similar to a South African claim brought in delict where an *iniuria* has been committed.[40] Collective bargaining can also be used to combat bullying in the USA, but due to the decline of unionism in that jurisdiction, this is not the best or only avenue to be explored.[41]

6.4.2 United Kingdom

The UK also has no law specifically dealing with workplace bullying**.** Namie and Namie[42] state that, by means of inference, bullying could be indirectly framed as a health and safety matter, or be placed on the harassment continuum. This could be

[36] Chappell & Di Martino 2006: 12.
[37] Einarsen *et al* 2013: 408.
[38] Caponecchia & Wyatt 2011: 79,80
[39] Caponecchia & Wyatt 2011: 79,80.
[40] Le Roux *et al* 2010: 643.
[41] Einarsen *et al* 2011: 478.
[42] 2009b: 261.

done either through employment law codes or through legislation such as the Protection from Harassment Act.[43]

In the UK, stress is not seen as an employee's inability to cope with excessive demands, but a consequence of the employer's failure to provide a safe system of work as required under the Health and Safety at Work Act of 1974.[44] Due to the combination of successful legislation and non-legislative efforts to combat workplace bullying in the UK, this can be used as a model[45] for combating workplace bullying in South Africa.

6.4.3 Australia

Similar to the USA and the UK, there is also no specific law dealing with workplace bullying in Australia. That jurisdiction generally deals with bullying from a health and safety perspective, with South Australia having adopted codes of practice or at least guides to curb workplace bullying.[46] The new Occupational Health and Safety Act of 2012 has removed the particular anti-bullying sections from the South Australian codes, and incorporated them almost verbatim into the new 2013 draft model Code of Practice for Preventing and Responding to Workplace Bullying.[47] The reason for having placed workplace bullying on the continuum of health and safety and, thus, risk management, is because it is viewed as a hazard that could cause harm to people's physical and psychological health.[48]

The current position in Australia is that occupational health and safety laws differ slightly from state to state, but have the same essence, being that an employer has a duty of care towards all employees, and must therefore take active steps to ensure a reasonable safe place of work (including physical and psychological health) and that the systems of work are safe.[49]

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[43] 2001.
[44] Bully Online http://www.bullyonline.org/action/legal.htm (accessed on 16 September 2013).
[45] Harthill 2008: 266.
[46] Caponecchia & Wyatt 2011: 72.
[47] Safe Work South Australia n.d.
[48] Caponecchia & Wyatt 2011: 72.
[49] Caponecchia & Wyatt 2011: 73.

6.4.4 South Africa

In South Africa, there is no law dealing with workplace bullying in particular, nor any clarity on the continuum on which the matter is placed. Should bullying be regarded as harassment, it needs to be prohibited by anti-discrimination legislation;[50] should it be regarded as a dignity violation, other laws will have to come into play, and should it be seen as a health and safety issue, current legislation will need to be adapted to provide for the notion of bullying.

Ntlatleng[51] remarks that the Protection from Harassment Act[52] emanated from an investigation by the South African Law Reform Commission into stalking behaviour, which concluded that existing civil and criminal-law frameworks may not provide adequately for stalking victims who are not in a domestic relationship. Basset[53] notes that a similar approach has been followed by other countries, such as the UK, USA and Australia, and that this act will afford protection to all persons who are the victims of harassing behaviour and whose rights may be infringed upon in the process.

There is no uniform approach in this regard, which is seen as one of the greatest hurdles to overcome in addressing the matter.

6.5 The common law, contract of employment, duty of care and workplace bullying

6.5.1 Introduction and background

South Africa and the three comparative jurisdictions have their legal systems historically rooted in common law.[54] It is common knowledge that each nation's employment laws have their own unique characteristics, but also display commonalities.[55] Yamada[56] refers to common ground found in wrongful discharge,

[50] Le Roux *et al* 2010: 63, with reference to Yamada, who believes that bullying is not necessarily discriminatory in nature, but abusive.
[51] 2013: 5.
[52] 17 of 2011.
[53] Ntlatleng 2013: 5.
[54] Yamada, as cited in Einarsen *et al* 2003: 400.
[55] Yamada, as cited in Einarsen *et al* 2003: 400.
[56] As cited in Einarsen *et al* 2003: 400.

emotional distress as a cause of action grounded in common-law tort and contract law, as well as an array of statutes governing discrimination and worker safety. Therefore, the sections below will compare the chosen jurisdictions in terms of their common-law provisions, contract of employment and employer's duty of care in order to move towards a uniform understanding of the workplace bullying phenomenon.

United States of America

The favoured tort claim for bullying takes the form of claims for intentional infliction of emotional distress,[57] and although it has proved to be successful, it cannot be regarded as a panacea for the management of bullying.[58] It has been shown that if IIED claims are not based on sexual harassment or other forms of status-based discrimination, they seldom have a positive outcome for bullying victims.[59] Harthill[60] states that dignity assaults are arguably the domain of tort, specifically referring to IIED claims that seldom succeed. These unsatisfactory results in bullying claims could be due to the stringent requirements that need to be met, and many incidents may not have proven sufficiently severe, extreme or outrageous to meet the requirements of this tort.[61]

Collective bargaining and agreements could also be used to combat bullying, but due to the decline in union density in the USA, an insufficient number of employees are covered by these. Should this vehicle be used to prohibit bullying in the workplace, one would have to assume that most, if not all, of the conflict exists between management and subordinates, which is devoid of truth.[62] So-called 'horizontal' bullying, i.e. between equal employees in the same workplace, cannot be addressed via collective agreements, and poses a problem.[63]

The Healthy Workplace Bill was drafted in response to the lacuna in American law to deal with bullying in the workplace. Although introduced in many states, it still has to

[57] Hereinafter called IIED, which is discussed in detail in chapter 3.
[58] Yamada, as cited in Einarsen *et al* 2003: 404.
[59] Yamada, as cited in Einarsen *et al* 2003: 405.
[60] Harthill 2008: 262.
[61] Einarsen *et al* 2011: 477.
[62] Einarsen *et al* 2011: 478.
[63] Einarsen *et al* 2011: 467.

be enacted. Should the bill be enacted, for which there is a strong drive, bullied employees can claim for lost wages, medical expenses, emotional distress and punitive damages, where proven.[64]

Employment discrimination laws could also aid bullied employees, provided they fall within a protected class.[65] If not, there seems to be limited protection for bullied employees along this avenue.

United Kingdom

A bully's behaviour may constitute a breach of the employer's duty of care under the Health and Safety at Work Act of 1974, whereby employers have a legal obligation to ensure both the physical and psychological well-being of their employees**.**[66]

The principle of constructive dismissal is also known in UK employment law, as in South Africa, and provides relief for employees who resign due to severe bullying, where the employer has breached a fundamental term of the contract,[67] whether an express or implied term.[68] A typical example of implied contract terms, according to the Namies,[69] could be 'mutual trust and confidence', while the phrasing 'provide a safe system of work' would be an express term. UK law requires the employee to have resigned without notice[70] upon a serious fundamental breach of contract, for a claim of constructive dismissal to succeed.

Case law confirms that severe bullying could lead to a breach of contract, and that the dismissal of the perpetrator in such circumstances could be fair.[71] Cases such as these should be brought before employment tribunals.[72]

[64] Einarsen *et al* 2011: 479.
[65] Einarsen et al 2011: 480.
[66] Bully Online http://www/bullyonline.org/action/legal.htm (accessed on 16 September 2013).
[67] Yamada, as cited in Einarsen *et al* 2011: 476.
[68] Yamada, as cited in Einarsen *et al* 2011: 476.
[69] 2009b: 261.
[70] Namie & Namie 2009b: 261.
[71] *Mitchell v the Court* Service (2000) WL 1274032 (EAT 2000) par 11(j).
[72] Namie & Namie 2009b: 261.

Australia

Common law in this jurisdiction imposes a "contractual duty of reasonable care for the safety of employees while in the course of their employment",[73] even in the absence of stand-alone national legislation. Employer obligations under common law include a duty to protect employees from workplace bullying in tort, such as negligence (the failure to provide a safe working place) as an implied term in the contract of employment, and the undertaking that the employer would not without reasonable cause destroy or seriously damage the relationship of trust and confidence between employer and employee.[74]

South Africa

It is trite law that the common-law contract of employment as such does not directly protect an employee against bullying, but an obligation of "fair dealings" may have to be read into contracts of employment subsequent to the decision in *Martin v Murray*.[75] Whether protection from bullying could be read into this obligation remains to be seen. The fact that an employer has a duty of "fair dealings" towards employees, as recognised in *Murray v Minister of Defence,*[76] implies that preventative or reactive measures should not only be confined to measures relating to sexual harassment or harassment, but should include instances of victimisation, bullying, abuse and other forms of intolerable employee behaviour.[77] Le Roux and colleagues[78] specifically mention that the term "fair dealings" is much wider than bullying, and that bullying still needs to be defined.

Basset[79] remarks that school bullying and cyberbullying victims could benefit from the local Protection from Harassment Act,[80] and believes that the promulgation of the act goes a long way in protecting and enhancing basic human rights as enshrined in

[73] Yamada, as cited in Einarsen *et al* 2011: 472.
[74] Namie & Namie 2009b: 263.
[75] 1995 16 ILJ (C) 589-619.
[76] (2008) 29 ILJ 1369 (SCA) 1389 par 66.
[77] Viljoen 2013: 3.
[78] 2010: 53.
[79] As cited in Ntlatleng 2013: 5.
[80] 17 of 2011.

section 10 of the 1996 Constitution in an attempt to protect the dignity of employers and employees.

Implied terms in the common-law contract of employment ensure that employees are entitled to offer their services in a safe environment, which the employer needs to provide,[81] and are especially relevant to a bullying scenario. Whether this obligation extends to psychological harm for purposes other than compensation remains to be seen, but it can surely be argued that this obligation of the employer would extend to bullying in the workplace.

6.5.2 Tort/civil law

Tort law refers to wrongful acts that result in injury to another's person or property or reputation, for which the injured person may seek redress.[82]

United States of America

As mentioned above, the favoured tort claim for bullying and emotionally abusive treatment at work is the IIED route. Yamada[83] found that although this seems to be a perfect avenue to explore for bullied victims, they are seldom successful with their claims, unless it is based on sexual harassment or one of the forms of status-based discrimination. The conduct concerned is often not extreme enough or outrageous enough to meet the requirement of the tort, as in *Hollomon v Keadle*.[84]

United Kingdom

English common law imposes a duty on employers to provide a safe workplace to all their employees, and court cases have indicated that typical effects of bullying, such as suffering nervous breakdowns (seen as a mental illness) due to an unreasonable workload, could be brought under tort.[85] Victims can claim damages[86] where they

[81] Du Plessis & Fouche 2012: 17.
[82] Kohut 2008: 229.
[83] As cited in Einarsen *et al* 2011: 476.
[84] 931S.W.2d 413, 132 Lab.Cas. 58,170 12 IER Cases 194 168-175.
[85] See Yamada, as cited in Einarsen *et al* 2003: 403, with reference to *Walker v Northumberland County Council* (1994).

suffer some or other injury based on the employer's general duty of care towards an employee.

According to Namie and Namie,[87] there is a trend in the UK for bullying cases to be tried under personal injury claims in common law, as both physical and psychological injury may lead to action taken against the employer as part of the employer's obligation to take suitable precautions to protect employees. It has been noted that "[i]t is the pattern of incidents which reveal intent",[88] and the plaintiff therefore needs to prove malice and deliberateness in bullying claims before the tribunal.[89]

Australia

Employers have a duty of care for the safety of their employees under tort law, which governs negligence and other claims for personal injuries.[90] Bullying could resort under this obligation, and it seems possible that a combination of tort and common-law obligations may present a vehicle for bullying claims where psychological harm has been done, Yamada believes.[91]

South Africa

Delictual claims may be lodged against employers by employees and vice versa, and third parties may lodge claims against either the employer or employee if there has been negligence on the part of the defendant, or a wilful act or omission has caused damage or personal injury.[92] This does not seem to be an option of choice for bullying victims, as only pecuniary losses can be recovered and no protection is offered against bullying in the workplace. Viljoen[93] remarks that the employer remains exposed to bullying claims in delict if the bullying behaviour was not properly addressed internally, and that the duty of care includes psychological harm. For

[86] Namie & Namie 2009b: 261.
[87] 2009b: 263.
[88] Bully Online http://www.bullyonline.org/action/legal.hmtl (accessed on 6 September 2013).
[89] Bully Online http://www.bullyonline.org/action/legal.hmtl (accessed on 6 September 2013).
[90] Yamada, as cited in Einarsen *et al* 2003: 401.
[91] As cited in Einarsen *et al* 2011: 472.
[92] Van Niekerk *et al* 2012: 85,400.
[93] Viljoen 2013: 3.

example, damages in excess of R700 000 were awarded to the claimant in a vicarious liability (sexual harassment) case in *Media 24 Ltd & Another v Grobler.*[94]

6.6 Employment law and workplace bullying

6.6.1 United States of America

Most bullying claims can be brought under tort law as an IIED claim. To claim under this tort, plaintiffs try to impose liability for IIED on their respective employers and the specific perpetrators who engaged in the conduct, and claim for emotional stress induced due to the bullying.[95] Einarsen and colleagues[96] refer to the requirements that need to be met, namely that the conduct needs to have been intentional or reckless, outrageous and intolerable; have offended against generally acceptable standards of decency and morality, and have been causally linked to the emotional distress suffered, which has to be severe. Thus, it is hardly surprising that these claims seldom succeed.[97]

Collective bargaining may also be used as a tool, but union membership has declined and a mere 40% of employees are now covered by collective agreements. These agreements fail to deal with bullying where both members belong to the same union, and is thus not a successful vehicle in employment where bullying is concerned.[98]

Normal discrimination laws can afford protection to bullied employees, but only where they belong to a protected class and the bullying relates to such class.[99] Kohut[100] would like to see bullying claimants who are not protected by their 'status' to be able to sue for bullying under civil tort, which is not a normal practice in the USA.

Namie and Namie refer to USA law being attentive to harassment or discrimination when it relates to sex and race, as well as Title VII of the revised 1964 Civil Rights

[94] [2005] 7 BLLR 649 (SCA) 670.
[95] Einarsen *et al* 2011: 477.
[96] 2011: 477.
[97] Einarsen *et al* 2011: 477.
[98] Einarsen *et al* 2011: 477.
[99] Kohut 2008: 259; Einarsen *et al* 2011: 479.
[100] Kohut 2008: 259, with reference to Davenport and colleagues.

Act, which has created the so-called "protective classes" of individuals.[101] This in effect lowers the burden of proof for those employees in a "protected class" where discrimination or harassment is claimed, as opposed to others who claim on the same grounds.[102]

Regular avenues such as defamation,[103] wrongful termination[104] and constructive discharge could be used, but are not ideal routes to follow due to the special nature of bullying.[105] Wrongful termination may find application where the employee has been fired, laid off or forced to leave employment, which is often the result of discrimination involving 'protected class' status. Lately, the courts have been finding in favour of plaintiffs where they had been able to prove on a balance of probabilities that they were exposed to a harmful environment.[106] However, the Namies[107] are not optimistic that a federal prohibition of general harassment, which could counter bullying at work, is forthcoming and, by implication, have called for separate legislation dealing with bullying at work.

Constructive discharge is similar to constructive dismissal in South African law, and denotes a situation where the workplace has been made intolerable by the employer to such an extent that any reasonable person would feel compelled to leave their employment.[108] It can thus be envisaged that bullying could lead to constructive discharge cases.[109] Retaliatory discharge refers to instances where an employee utilised the grievance or complaint procedures, and was dismissed as a result thereof. To succeed with such a claim, the plaintiff has to prove that the employer's action was retaliatory. Undoubtedly, this can be foreseen in bullying cases.

[101] Namie & Namie 2009b: 284.
[102] Namie & Namie 2009b: 284.
[103] Tort actions of libel and slander, with the former referring to written statements and the latter to spoken statements or misleading or deceptive photographs and videotapes; see Kohut 2008: 230.
[104] Wrongful termination cases in California cost employers an average of $50000,00 per year. Altogether 17% of these cases are dropped and 40% settled before trial, costing $60000,00 per year in legal fees, according to Namie & Namie 2009b: 283.
[105] Kohut 2008: 259.
[106] Kohut 2008: 231.
[107] Namie & Namie 2009b: 284.
[108] Kohut 2008: 231.
[109] It could present itself in various disguises, such as unwarranted demotion, harassment, salary cuts, reduced job responsibilities, reassignment to menial work, humiliation or degrading work; see Kohut 2008: 231.

The doctrine of vicarious liability is not unknown in the USA,[110] and mirrors the South African requirements. If an employer knows or should have known that an employee is being grossly mistreated at work, yet fails to intervene, the employer could be held liable for the harm suffered by the plaintiff.[111] This will certainly find application in specific bullying cases in the USA.

Proponents for the passing of the Healthy Workplace Bill believe that "putting the brakes on bullying" would benefit organisations by increasing morale and productivity, and lowering health costs. Kohut[112] also pushes for the bill by saying that despite having passed legislation against bullying in several other countries, it did not lead to a flood of "sue your boss" lawsuits.

The Namies[113] believe that the Federal Occupational Health and Safety Act of 1970 is not a vehicle to be used by bullied employees, as it rather focuses on physical hazards in the workplace. Yamada[114] agrees that there is little in this act to assist the victims of workplace bullying, and it is thus not an effective remedy. Daniel,[115] however, differs from this and sees potential in the act and its fact sheet, which refers to workplace violence, ranging from "threats and verbal abuse to physical assaults and homicide".[116]

Employees who are mistreated or bullied in the USA have no legal recourse in employment law specifically addressing bullying, unless the victim has the 'protected status' of being discriminated against due to gender, nationality, race, religion, age, or those specifics covered by the Americans with Disabilities Act,[117] the Age Discrimination in Employment Act[118] or the Civil Rights Act of 1964.[119]

ADEA could grant protection against bullying from a federal point of view, but only if the victim is older than 40 years of age and belongs to a "protected class".[120] The act

[110] Namie & Namie 2009b: 284.
[111] Kohut 2008: 232.
[112] 2008: 228.
[113] 2009b: 79.
[114] As cited in Namie & Namie 2009b: 79.
[115] 2009: 48.
[116] Daniel 2009: 49.
[117] Hereinafter referred to as the ADA.
[118] Hereinafter referred to as the ADEA.
[119] Kohut 2008: 229.
[120] Daniel 2009: 49.

applies to all employers and employees, including job applicants. It protects against discrimination based on age with respect to any term, condition or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefit, job assignment or training.[121] It protects against retaliation, and interestingly provides that a worker older than 40 may be preferred for a particular job, even if this implies discrimination against younger employees. This act reminds of certain aspects of the South African regime regarding unfair labour practice, although more differences than similarities are noted.

The ADA is important, as it protects employees against discrimination based on mental or physical impairments, including learning disabilities, which substantially limit one or more of their major life activities.[122] A bullying victim may claim under this act if he or she suffers an adverse employment action.[123] This is a foreign concept to South African law, and can thus not currently be incorporated into a South African solution to the workplace bullying problem.

American whistleblower laws can also be regarded as employment law, as the False Claims Act[124] protects employees who speak out about employers or entities who make false monetary claims against the federal or state governments by charging them for services or goods not rightfully rendered or through embezzlement, money laundering, bribery, kickbacks and income tax evasion.[125] It is hard to see how this act can find application in a uniform South African approach to bullying, however.

The free-speech protection granted by the First Amendment would only apply to a bullying scenario if it is related to a matter of public concern in one's official duties, and private employees have little hope of utilising this as protection against bullying, bar perhaps where whistleblowing or retaliation is concerned,[126] although separate legislation is available for such purposes.

[121] Daniel 2009: 49.
[122] Daniel 2009: 48.
[123] Daniel 2009: 48.
[124] 31 of 2011.
[125] Daniel 2009: 50.
[126] Daniel 2009: 50.

6.6.2 United Kingdom

Bullied employees may succeed if they utilise British law governing unfair dismissals, as the Employment Rights Act of 1996 prohibits the unfair dismissal of employees, unless they are poor performers, have conducted themselves improperly or are made redundant.[127] This act resembles certain South African legislation.[128]

The law governing unfair dismissals seems promising as an *ex post facto* remedy for the victims of bullying in the UK. In this context, 'constructive dismissal' is used[129] as the vehicle to alleviate the pain of a dismissal following bullying due to the employer's breach of contract, either as an express or implied term of the contract of employment. However, by then, the harm will have been done: The employee will have already lost his or her job and will fear retaliation upon reinstatement. Still, case law certainly confirms the possibility of following this route, as in *Roger Storer v British Gas PLC, 2000*[130] and *Mitchell v The Court Service*.[131]

6.6.3 Australia

Currently, the WorkCover Queensland Act of 1996 allows for employees who have suffered injury or disease due to bullying, to submit claims for worker's compensation.[132] The Workplace Relations Act of 1997, as amended, permits claims of "constructive dismissal", where an employee has resigned as a result of bullying, while the same applies even where the employee has been dismissed as a result of bullying.[133]

In 2005, the state of South Australia passed one of the strictest anti-bullying laws, namely Safe Work South Australia's amendment to the Occupational Health, Safety and Welfare Act (which has been repealed by the new 2012 Work Health and Safety Act). This act defines bullying as repeated and systematic acts directed at an employee or group of employees, resembling deeds that a reasonable person would regard as victimisation, humiliation, undermining or threatening the person or group

[127] These are only the main reasons for fair dismissal, as per Yamada, cited in Einarsen *et al* 2011: 476.
[128] See the LRA 66 of 1995.
[129] Yamada, as cited in Einarsen *et al* 2003: 402.
[130] [2000] 1 W.L.R. 1237; [2000] 2 All E.R. 440; [2000] I.C.R. 603; [2000] I.R.L.R. 495.
[131] WL 1274032 (EAT 2000) 1-20, as discussed in chapter 4.
[132] Namie & Namie 2009b: 263.
[133] Namie & Namie 2009b: 263.

and at the same time creating a risk to health and safety,[134] including both physical and psychological health under the 2012 Work Health and Safety Act.

The new draft model Code of Practice for Preventing and Responding to Workplace Bullying[135] aims to prohibit bullying throughout the country, and was compiled through the effective use of existing legislation in South Australia, Queensland and Victoria with regard to workplace bullying as model. If adopted, the code of practice will replace the currently fragmented laws, codes of practice and guiding documents dealing with bullying.[136] The period for public participation in respect of the code of practice has closed and further developments are awaited.

6.6.4 South Africa

In South Africa, it is trite law that one may not rely on the Constitution directly if legislation has been passed to give effect to a right granted in the Constitution.[137] Therefore, direct reliance on section 9 and 10 of the Constitution, which guarantee equality and the protection of everyone's dignity, is not permitted, as subsequent legislation has been passed to ensure employees' equality and dignity.[138]

Although the Constitution contains a list of stated grounds on which discrimination is prohibited, this is not a closed list.[139] The word 'including' is noted in section 9, which points to something different from a so-called closed list as found in USA law. Subsequent legislation[140] adds another three grounds to the constitutional prohibition, also containing the word 'including'. Should discrimination be alleged on grounds not mentioned in the list, the burden of proof would merely shift to the alleging party.[141] An exception to the rule is where no adequate statutory or common-law remedy is available. The labour court has recognised employees' recourse by means of a claim for "constitutional damages" (based on a violation of the right to fair labour practices) in *Piliso v Old Mutual Life Assurance*, where a claim

[134] Namie & Namie 2009b: 263.
[135] Safe Work South Australia n.d.
[136] See chapter 4 for a full discussion on the model Code of Practice.
[137] *Sidumo & Another v Rustenburg Platinum Mines Ltd and Another* [2007] 12 BLLR 1097 (CC) 1174 par 250.
[138] See the EEA 55 of 1998.
[139] *Harksen v Lane NO and Others 1997* (11) BLCR 1489 par 42, 43.
[140] S 6 of the EEA.
[141] Du Plessis & Fouche 2012: 89.

for damages was upheld due to the employer's failure to ensure a safe working environment. Added to this was the failure or neglect to investigate the surrounding issues and to provide subsequent counselling after the harassment.[142]

Constructive dismissal relates to resignations or absconding when the employer has made the work situation, or the situation at work has become, so intolerable that there was no reasonable alternative than to resign/abscond.[143]

6.7 Anti-discrimination and harassment legislation and workplace bullying

6.7.1 United States of America

Both federal and state laws prohibit discrimination and harassment on the basis of a so-called closed list, referred to as an employee's membership of a protected class such as race, colour, sex, national origin, religion, age and disability.[144] Should bullying occur based on one of these protected traits, a claim could theoretically succeed; however, should the uncivil conduct not be based on the class membership of the victim or target, anti-harassment and anti-discrimination legislation would be insufficient.[145]

Should the bullying cause or aggravate mental illness, disability discrimination laws may come into play, and retaliation in the form of bullying against a plaintiff could also lead to a legal claim under USA legislation.[146] Title VII of the 1964 Civil Rights Act, as amended in 1991, prohibits harassment and discrimination if related to sex and race or the "protected class" of individuals only,[147] which remedies Yamada[148] have found to be very limited.

Both federal and state law prohibits only status-based harassment on the grounds of immutable characteristics, and a bullying victim will only have a claim based on harassment if the bullying amounted to "cognizable harassment based upon one of

[142] Viljoen 2013: 3.
[143] Viljoen 2013: 4.
[144] Yamada, as cited in Einarsen *et al* 2003: 405.
[145] Yamada, as cited in Einarsen *et al* 2003: 406.
[146] Yamada, as cited in Einarsen *et al* 2011: 480.
[147] Namie & Namie 2009b: 284.
[148] *Einarsen et al* 2003: 404.

these protected characteristics".[149] Therefore, these laws do not offer protection where the bullying victim is targeted due to something other than a protected characteristic or for a combination of reasons, and thus fall short in sufficiently protecting employees from workplace bullying. [150]

6.7.2 United Kingdom

Anti-discrimination legislation in the UK prohibits employment discrimination only on the basis of race, sex and disability, and affords potential protection to bullying victims only if the bullying can be attributed to one of these statuses.[151] As the USA legal system is based in UK common law, the two jurisdictions display more similarities than differences.[152]

The Protection from Harassment Act of 1997 has now found application in bullying cases in the UK, and seems to be the preferred remedy because it not only creates criminal liability, but also caters for civil liability where a defendant "engages in a course of action which amounts to harassment of another and which he knows or ought to know amounts to harassment of another".[153] This mechanism affords the necessary remedies where bullying has been committed outside the scope of 'status' embedded in race, sex and disability, and is supported by case law.

Thus, it seems as if the Protection from Harassment Act probably is the better vehicle to address bullying claims, as it is not embedded in a specific class and is widely used in employment to deal with incidents of bullying.[154]

6.7.3 Australia

Both federal and state anti-discrimination statutes prohibit employment discrimination based on a so-called closed list, consisting of race, sex, disability, age, marital status or parental status, pregnancy, family responsibilities and political and religious

[149] Harthill 2008: 260.
[150] Harthill 2008: 261.
[151] Yamada, as cited in Einarsen *et al* 2011: 403.
[152] Harthill 2008: 271.
[153] Yamada, as cited in Einarsen *et al* 2011: 475.
[154] As discussed in chapter 4.

belief.[155] However, research has shown that bullying cases brought under these statutes tend not to succeed, as bullying is not mentioned specifically as a ground, thus failing the victims of bullying.[156] Should the bullying be due to offensive conduct that is not embedded in sex, thus being sex-neutral or intimidation without any sexual connotation, bullying claims have also failed at employment tribunals.[157]

This, then, explains the national drive to have the model draft code of practice dealing with bullying in employment accepted and implemented at a federal level.

6.7.4 South Africa

The Protection from Harassment Act 17 of 2011 took effect on 27 April 2013, and aims to protect the right to dignity, among other things. Although it was not originally meant to be used in a workplace bullying scenario, but to grant relief to violence victims and amend the Firearms Control Act of 2000, it is currently the most likely avenue to be used in workplace bullying claims. It is contended that there seems to be no reason why workplace bullying claims in South Africa could not be brought in terms of this new piece of legislation (although, only if bullying is regarded as harassment), but it is still untested.

The act not only defines 'workplace', but also states that 'harm' includes both physical and psychological harm, while also for the first time in South Africa properly defining 'harassment'. Problematic could be the definition of 'related person', as it is uncertain whether a supervisor or co-employee would be regarded as such.[158] The fact that the remedies offered are civil in nature and not aimed at guaranteeing job security, may pose a further problem in future.

The Promotion of Equality and Prevention of Unfair Discrimination Act[159] is not an appropriate vehicle to use, unless the victim is a government employee (due to the exclusion of everyone who falls under the EEA).[160] PEPUDA also provides for harassment or discrimination based on a closed list of grounds, being sex, gender or

[155] Yamada, as cited in Einarsen *et al* 2003: 401, with reference to Chapman & Sivarajah 2000.
[156] Yamada, as cited in Einarsen *et al* 2003: 401.
[157] Yamada in Einarsen *et al* 2003: 404.
[158] Protection from Harassment Act, 17 of 2011: 4.
[159] Hereinafter called PEPUDA; see chapter 5 for more detail.
[160] PEPUDA, Act 4 of 2000: sect 5(3).

sexual orientation only, or due to a person's "membership or presumed membership of a group … or a characteristic associated with such group".[161] Therefore, if bullying behaviour has occurred in a government setting, and harassment or discrimination is based on one of the grounds listed, bullying claims could be brought under PEPUDA, although its restrictions still render it a less than ideal vehicle in the greater employment sphere.

Even the Employment Equity Act[162] fails to provide effective protection to bullied victims, although the potential grounds for harassment are not seen to be a closed list. By means of inference, bullying would have to be seen as a form of harassment for a claim to be brought under the EEA, despite its deficiencies.

Thus, although harassment is seen as a form of unfair discrimination in South African law,[163] it fails to protect victims of bullying if the acts or omissions concerned do not conform to the definition of harassment – hence the lobbying for separate legislation to rid South Africa of the maze of possible (yet often insufficient) avenues to explore in cases of alleged workplace bullying.

6.8 Occupational health and safety legislation and codes of practice and workplace bullying

6.8.1 United States of America

Federal legislation was enacted to ensure that, as far as possible, every working man and woman is safe and work in a healthful environment to preserve the human resources in the USA.[164] The focus, however, was and still is on protecting the physical safety of employees in especially manufacturing and construction. It has been argued that there is little in the American Occupational Safety and Health Act of 1973 that will assist targets of bullying.[165]

[161] PEPUDA, Act 4 of 2000: definitions.
[162] 55 of 1998, hereinafter called EEA; s 6(3).
[163] Viljoen 2013:3.
[164] Occupational Safety and Health Act, 1970, 29 U.S.C., s 651(b).
[165] Caponecchia & Wyatt 2011: 79.

Despite lobbying for government to pay more attention to occupational stress under this act, it is unlikely that bullying claims brought in this manner will succeed.[166]

6.8.2 United Kingdom

The applicability of health and safety laws as relief for victims of bullying in the UK is largely untested, although an employer has the duty under the Health and Safety at Work Act to ensure the health, safety and welfare of all its employees at work, as far as practicable.[167] This includes a legal duty to conduct suitable and sufficient assessments of the health and safety risks that employees face while they are at work.[168] Namie and Namie[169] stress that although not specifically referred to in legislation, it must be taken that 'health' refers to both physical and mental health, as in the new 2012 Work Safety and Health Act of Australia.

Although Britain's Health and Safety Executive, which is the government agency responsible for enforcing the act, recognises bullying as a cause of work stress, its role is merely that of educator,[170] and it does therefore not lobby for a wide interpretation of this law to assist the victims of bullying. The Executive's published guidelines pertaining to stress at work make it clear that bullying can be regarded as a stressor at work, and that preventative measures taken by an employer to eliminate or mitigate stress at work should include anti-bullying provisions.[171] This, however, is as far as the guidelines go, which does not constitute a suitable remedy for the victims of workplace bullying.

6.8.3 Australia

Bullying is seen as a health and safety issue in Australia, because it is seen to be harmful to people's physical or psychological health. An array of legislation has seen the light to protect employees from bullying,[172] especially in South Australia.

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[166] Yamada, as cited in Einarsen *et al* 2003: 406.
[167] Yamada, as cited in Einarsen *et al* 2003: 404.
[168] Namie & Namie 2009b: 261.
[169] 2009b: 261.
[170] Yamada, as cited in Einarsen *et al* 2003: 476.
[171] Namie & Namie 2009b: 261.
[172] Caponnechia & Waytt 2011: 72.

Federal and state laws establish general standards of care owed to employees, primarily focusing on physical safety and including both acts and omissions.[173] Current law sees Australian states and territories address workplace bullying through workplace safety agencies, especially in South Australia,[174] where bullying is specifically prohibited.[175]

The new 2013 draft model Code of Practice for Preventing and Responding to Workplace Bullying[176] may consolidate the existing provisions dealing with workplace bullying, as they are currently scattered across legislation,[177] policies and practices, and will thereby ensure a uniform federal approach in Australia, while still dealing with the matter on the continuum of health and safety.

The new 2012 Work Health and Safety Act, which includes psychological health in the definition for health, points to a shift in focus, and bullying claims could be brought under this act in future.

6.8.4 South Africa

According to Le Roux and colleagues,[178] occupational health and safety legislation such as the South African Occupational Health and Safety Act[179] is a potential remedy for workplace bullying, although only compensation could be claimed.

Employers have a general duty of care to provide a safe working environment for employees as far as is reasonably practicable, and to provide an environment without risk to employees' health.[180] Although bullying is not mentioned at all, it could be argued that these provisions may encompass bullying, but this is still untested. The unhealthy situation needs to be reported to the employer, the health and safety

[173] Caponecchia & Wyatt 2011: 73.
[174] For more detail, see chapter 4 of this thesis, Victoria's Guide to Workplace Safety and Bullying, the Queensland Code of Practice in Preventing Workplace Bullying of 2004, and South Australia's education programme to prohibit and explain workplace bullying.
[175] Yamada, as cited in Einarsen *et al* 2011: 471.
[176] Safe Work South Australia n.d.
[177] South Australia Occupational Health, Safety and Welfare Act of 1986, where bullying is mentioned and defined as an area where the employer has a duty of care. See chapter 4 for more detail in this regard.
[178] Le Roux *et al* 2010: 64.
[179] 85 of 1993, hereinafter called OHSA.
[180] OHSA 85 of 1993, s 8.

inspector or a labour inspector.[181] It is doubtful whether OHSA is the correct vehicle to curb bullying in South Africa.

Also to be kept in mind is that codes in South Africa are not legally binding, but are merely instructive,[182] and where the code and internal policies do not quite correspond, the code will prevail.[183]

6.9 Anti-stalking legislation and workplace bullying

Not the USA, Australia or South Africa uses anti-stalking legislation as a means to prohibit or alleviate the negative effects of bullying.

6.9.1 United States of America/Australia

The legal position pertaining to stalking in the USA and Australia is best explained in the words of Sheridan:[184] "Stalking is prohibited in various ways in a number of countries, but globally, no anti-stalking law has avoided criticism. In the United States of America, for instance, many anti-stalking sanctions require that the offender cause the victim to fear impending death or serious injury (Sohn, 1994). In Australia, with the exception of Queensland's legislation (which seeks only to criminalise behaviour which threatens a violent act), there is an intent requirement in the form of the intention to create fear or apprehension for personal safety, or mental or physical harm to the victim (Dennison and Thomson, 1998). One major criticism that may be levelled at US statutes is that by requiring the victim to fear death or serious bodily injury, they may prevent prosecution of those cases where the victim did not feel physically threatened, but nevertheless felt psychologically menaced. As regards the intent requirements present in Australia's various laws, a number of commentators have pointed out the difficulties of proving intent in many cases of stalking (e.g. Dennison and Thomson, 1998)."[185]

[181] Le Roux *et al* 2010: 64.
[182] Viljoen 2013: 4, with reference to *Ntsabo v Real Security CC* [2004] 1 BLLR 58 (LC) 95.
[183] *Ntsabo v Real Security CC* [2004] 1 BLLR 58 (LC) 95.
[184] 2007.
[185] Sheridan 2007.

The California Civil Code[186] prohibits the tort of stalking where intent can be shown as well as a fear for the target's own safety or that of a family member, and is clearly not suitable for workplace bullying.

All Australian jurisdictions currently have stalking legislation; however, the legislation differs across the states. In comparison to other nations, Australia's legislation is quite stringently defined, focusing on the extreme examples of stalking behaviours, and relying on predominantly subjective understandings of offenders needing to intend to cause harm.[187]

6.9.2 United Kingdom

The UK Protection from Harassment Act of 1997 was largely enacted as a response to personal stalking, but has been cited and is now acknowledged as a relief in workplace bullying claims. It provides for both criminal and civil claims where a defendant has engaged in a course of conduct that he knows or ought to know amounts to harassment.

According to the act, harassment must have occurred on at least two occasions, including speech and putting people in fear of violence.[188] Interestingly, if an individual manager or a company is found responsible for causing a recognised psychological illness (such as post-traumatic stress disorder) or harm, the conduct may constitute either actual bodily harm[189] or grievous bodily harm[190] under UK law if the actions were committed with intent.

Green v DB Group Services (UK) Ltd[191] is the *locus classicus* case in which the expansion of this act to bullying scenarios in employment was confirmed. Yamada[192] quite correctly states that the judicially approved application of the Protection from Harassment Act to employment situations may have created a *de facto* statutory tort

[186] S 1708-01725.
[187] Ogilvie 2000.
[188] Namie & Namie 2009b: 261. For a full discussion of this act, see chapter 4.
[189] A violation of the Offences Against Persons Act, punishable by up to five years imprisonment, as per Namie & Namie 2009b: 262.
[190] This qualifies for a life sentence, although seldom imposed, as per Namie & Namie 2009b: 262.
[191] EWHC 1898 (QB 2006), case number TLQ/05/0753 1-191.
[192] Yamada, as cited in Einarsen *et al* 2011: 475,476.

remedy for workplace bullying targets, thereby undercutting the momentum for the passage of a 'Dignity at Work' bill.

6.9.3 South Africa

The Protection from Harassment Act 17 of 2011 was enacted in response to the South African Labour Committee report that stalking and harassment of people not in a domestic relationship was not adequately covered by legislation. The act was therefore passed in a bid to protect all such other people.[193]

Ntlatleng[194] states that by implementing the Protection from Harassment Act, government has upheld the requirements of section 7(2) of the 1996 Constitution, which stipulate that the state has to promote, respect, protect and fulfil the rights contained in the Bill of Rights by putting in place a mechanism to address harassment or stalking. A National Instruction on Protection from Harassment was published on 16 September 2011[195] to guide the police on how to deal with allegations pertaining to the said act, and indicates the legislature's commitment to prohibit harassment in broad terms.

It needs to be kept in mind that harassment is properly defined and that harm relates to physical, financial as well as psychological harm. However, the problem rather pertains to whether employees or employers in the workplace would be seen to be complainants under this act, although a complainant applying for a protection order is widely defined as "any person who alleges that he or she is being or has been harassed".[196] Another question altogether would be whether one wants the police involved in internal workplaces, and how one would deal with protection orders against managers or employees. Theoretically, this act could be used to deal with workplace bullies, although the practicalities of it remain to be seen.

[193] Ntlatleng 2013: 5.
[194] 2013: 5.
[195] GG 36845 dated 16 Sep 2013.
[196] National Instruction on Protection from Harassment, GG 36845, dated 16 Sep 2013.

6.10 Retaliation and other legislative protection against workplace bullying

6.10.1 Retaliation legislation

Anti-retaliation legislation in the UK may be a source of legal protection where the employer retaliates against the lodging of a claim based on discrimination or harassment.[197] *Zimmerman v Direct Federal Credit Union*, as referred to by Yamada,[198] confirms this stance. In that matter, the plaintiff was bullied, humiliated and degraded after she had filed a gender and pregnancy claim, and the retaliation claim was upheld by the magistrate. The South African position is similar.

According to UK law, once an employee has blown the whistle and made a protected disclosure, and suffers victimisation akin to bullying afterwards, the employee may take the employer to an employment tribunal for any detriment suffered. The same principle applies in South Africa, but within the jurisdiction of the labour court.

Le Roux and colleagues[199] mention that the legislature acknowledged the problem of workplace bullying in drafting the Protected Disclosures Act,[200] in which certain categories of potential bullying are suggested.

6.10.2 Worker's compensation legislation and employee benefits

United States of America

Yamada[201] states that the courts are split on whether worker's compensation laws preclude a tort claim against an employer for intentional, work-induced emotional injuries (which could include bullying), and finds it a poor legal response to workplace bullying, as victims could only enjoy the benefits thereof if they have become partially or permanently incapacitated because of the bullying. The state of Pennsylvania provides compensation to employees who sustain injuries at work under its Worker's Compensation Act, but excludes cases where a third person intentionally injures employees because of personal reasons, even if it happens at

[197] Yamada, as cited in Einarsen *et al* 2003: 406.
[198] In Einarsen *et al* 2003: 406.
[199] 2010: 53.
[200] 26 of 2000.
[201] Yamada, as cited in Einarsen *et al* 2003: 405.

work. Clearly, bullying would not be protected under this act, even if it has resulted in physical injury.[202]

Yamada[203] lobbies for income replacement and no-fault employee and public benefits for severely bullied workers who leave their employment or whose employment is terminated, and notes that such provisions vary widely among nations. In general, worker's compensation statutes provide replacement income and medical expenses where employees are injured or fall ill due to their jobs, but it is likely, according to Daniel,[204] that claims based on psychological illness will be contested. In many states, cover for psychological illness or injury is absent, providing little if any protection to bullied employees.[205]

California is an exception to the rule, in that employees may bring a claim in civil law against another employee when the injury relates to "wilful and unprovoked physical acts of aggression of the other employee". However, as most bullying is not physical in nature, this can hardly be used in bullying cases.[206] This stresses the need for South Africa to first reach a uniform approach to bullying before solutions are tendered.

Unemployment insurance applies where former employees can show that they are unemployed due to no fault of their own. It is a known fact that most bullied employees leave their employment voluntarily as a result of the bullying, which disqualifies them for unemployment insurance pay-out.[207] These requirements seem to be uniformly accepted, although in South Africa, contributors to the fund do not need to indicate that they were dismissed due to no fault of their own. Section 16 of the Unemployment Insurance Act[208] merely stipulates that the period of unemployment must be longer than 14 days; that the employer must have terminated the contract, and that if the unemployed person earned more than the

[202] Simon & Simon 2006-2007: 162.
[203] Yamada, as cited in Einarsen *et al* 2011: 480.
[204] 2009: 51.
[205] Daniel 2009: 51.
[206] Daniel 2009: 51.
[207] Daniel 2009: 52.
[208] 30 of 1966, hereinafter called the UIA, which is discussed in full in chapter 5.

ceiling amount, the benefits will be calculated as if the person earned the ceiling amount.[209]

United Kingdom

An employment and support allowance is paid to people whose ability to work is affected by an illness or disability. Persons who are unable to work or need support in order to work may be eligible for this allowance. While interviews at Jobcentre Plus offices are not mandatory, medical assessments are.[210] Statutory sick pay[211] is also available and intended for victims of severe bullying, as the employment and support allowance.

Australia

According to Australian law, an employee has to choose between pursuing a legal claim against an employer or applying for worker's compensation, as he/she cannot do both. The different states have differently worded provisions[212] on when an employee may claim, but the principle applies throughout Australia. One also has to keep in mind the new 2012 Work Health and Safety Act, which creates a civil recourse.[213]

South Africa

In terms of compensation for health-related illness (such as post-traumatic stress disorder or the conditions listed in the act), the Compensation for Occupational Injuries and Diseases Act[214] could be relied upon to effect possible pay-outs, with employees not having to show extreme exposure to a traumatic event or stressor. Claimants only need to prove that their injury/disease has arisen out of or in the

[209] Du Plessis & Fouche 2012: 152.
[210] AngloInfo n.d.
[211] Gov.uk 2013.
[212] See Queensland WorkCover Act of 1996, which states that benefits will be provided if a worker suffers an injury or disease as a result of the workplace, as per Yamada, cited in Einarsen *et al* 2003: 401.
[213] See chapter 4 for a full discussion of this act.
[214] 130 of 1993, hereinafter called COIDA.

scope of employment.[215] Case law confirms this.[216] As bullying is known to cause post-traumatic stress disorder and major depression, claims lodged in terms of COIDA could be a possible avenue for victims of bullying.

However, where illness benefits under the UIA in South Africa are concerned, it is doubtful whether the effects of bullying would lead to a successful claim based on psychological illness. The act is silent as to whether 'illness' refers to physical or mental illness.

6.11 Prominent legal interventions

6.11.1 United States of America

Of the most prominent work done in the USA pertaining to bullying has been that by Yamada, especially through the drafting of the Healthy Workplace Bill, which was drafted in response to the shortcomings in American law for victims of workplace bullying,[217] and has been introduced in many states since 2003.[218]

If successful, victims could claim for lost wages, medical expenses, emotional distress and punitive damages, where applicable.[219] It aims to eradicate workplace bullying by making it an unlawful employment practice to subject an employee to an abusive work environment when "the defendant, acting with malice, subjects the employee to abusive conduct so severe that it causes tangible harm to the employee".[220]

Although supported by many, the lobbying for separate legislation dealing with workplace bullying has also been met by strong opposition, mainly as organisations such as the chambers of commerce[221] are set against imposing additional responsibilities on employers and fear a flood of litigation.

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[215] COIDA 130 of 1993, s 65.
[216] See *Odayar v Compensation Commissione*r 2006 (6) SA 202 (N) 207-209; *Marsland v New Way Motor and Diesel Engineering* (2009) 30 ILJ 169 (LC); *Urquhart v Compensation Commissioner* (2006) 27 ILJ 96 (E).
[217] Yamada, as cited in Einarsen *et al* 2011: 479.
[218] 21 states as in 2013.
[219] Yamada, as cited in Einarsen *et al* 2011: 479.
[220] Yamada, as cited in Einarsen *et al* 2011: 479.
[221] Yamada, as cited in Einarsen *et al* 2011: 479. For a detailed discussion on the Healthy Workplace Bill, see chapter 3.

6.11.2 United Kingdom

James Mathew[222] once remarked that "[i]n England, justice is open to all, like the Ritz Hotel". In the UK, the Dignity at Work Bill is regarded as the main legislative proposal to address workplace bullying, but has not been enacted as yet, even after having been introduced in the House of Commons.[223]

The utilisation of the Protection from Harassment Act in workplace bullying cases seems to be the main reason why the adoption of the bill has been delayed,[224] as it is argued that the current act offers sufficient protection to victims of bullying. The Dignity at Work Bill addresses bullying by providing the right to dignity and respect in the workplace, but is not based on the discriminatory model.[225]

In the absence of a law against bullying in the UK, one has to identify the nearest area of law on which to base one's case: "If a person does not have an obvious disability, and is the same race and gender as the bully, one is paradoxically discriminated against in the UK law by not being covered by discrimination law."[226]

6.11.3 Australia

The draft model Code of Practice for Preventing and Responding to Workplace Bullying[227] in Australia is the latest development in that jurisdiction, and the window for public comment on the code closed in July 2013. This draft code, if enacted, will confirm the legal stance that bullying is seen as a health and safety matter, and will consolidate existing, fragmented pieces of legislation prohibiting and dealing with workplace bullying, such as those currently found in South Australia.

It is clear that the Australian government has recognised the pervasiveness and serious consequences of workplace bullying, and is acting upon these findings.

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[222] Bully Online http://www.bullyonline.org/action/legal.htm (accessed on 16 September 2013).
[223] Yamada, as cited in Einarsen *et al* 2011: 476.
[224] Yamada, as cited in Einarsen *et al* 2011: 475.
[225] Bully Online http://www.bullyonline/org/action/legal.htm (accessed on 6 September 2013).
[226] Bully Online http://www.bullyonline.org/action/legal.htm (accessed on 16 September 2013).
[227] Safe Work Australia 2013b.

6.11.4 South Africa

The recently enacted Protection from Harassment Act[228] may offer a legal solution to workplace bullying, but has certain deficiencies, especially as no firm decision has been taken about the continuum on which bullying should be placed. The act applies to harassment only, and if bullying should be seen as a mere dignity violation instead of a form of harassment, the act will not apply.[229]

No new interventions to prohibit or deal with bullying *ex post facto* are envisaged, despite the desperate need for a solution. A uniform approach to bullying in South Africa remains markedly absent.

6.12 Collective bargaining and the legal framework against bullying

6.12.1 United States of America

Collective action taken by organised labour remains one of the strongest sources of advocacy on behalf of employees. Yamada[230] refers to the state of Massachusetts, where the so-called "mutual respect" provision was negotiated by organised labour, and now forms part of the contract of employment, in effect protecting employees against bullying and abusive supervision. This collective bargaining agreement is believed to have been the first of its kind and protects against "behaviours that contribute to a hostile, humiliating or intimidating work environment, including abusive language of behaviour", and may be the subject of a valid grievance.[231] It falls short of offering proper protection, however, as it does not cover bullying between union members, but assumes that conflict in the workplace is primarily between managers and subordinates, which is incorrect.

6.12.2 United Kingdom

Harthill[232] states that although the Labour Party is the traditional ally of the working class, a steady decline in union density has been seen in the UK. Unions have

[228] 17 of 2011, enacted on 27 Apr 2013.
[229] Ntlatleng 2013: 5.
[230] Einarsen *et al* 2011: 478.
[231] Yamada, as cited in Einarsen *et al* 2011: 478.
[232] 2008: 271.

however continued to play an important part in placing bullying on the legislative agenda and in forming partnerships with the government and employers.[233] Notably less union involvement in the quest for solutions to the bullying problem is seen in Australia, the USA and South Africa.

Of the most important union contributions pertaining to bullying is the union-sponsored Dignity at Work Bill, although this has not been enacted due to successive governments having found that current legal remedies are sufficient.[234]

6.12.3 Australia

Australia has long passed anti-victimisation provisions protecting union members from victimisation, and workplace rights include the enjoyment of statutory protection, exercising of certain rights, and the right to participate in certain proceedings.[235]

6.12.4 South Africa

Apart from the trade unions' involvement in the 2003 ILO country study on violence at work, trade unions have not been involved in the search for a uniform approach to workplace bullying, which is thus identified as a lacuna.

6.13 Local-level interventions

In the USA, city governments appear to be more proactive and certain cities have adopted resolutions requesting the Department of Human Resources to recognise and action workplace bullying.[236] Several states in the USA have introduced the Healthy Workplace Bill in Congress, although it has not been adopted anywhere.

[233] Harthill 2008: 272.
[234] Hoel 2013: 65.
[235] Fenwick & Nowitz 2010: 65.
[236] City and County of San Francisco Resolution on Anti-Bullying, as per Harthill 2008: 262.

Other local interventions in the USA include Rhode Island's introduction of an ordinance to ban bullying at citywide workplaces, and commitments by council presidents to ban bullying from employment.[237]

Certain Australian states, especially South Australia, took the initiative and used their local health and safety laws or codes to prohibit bullying,[238] which has now culminated in a national drive to protect victims from workplace bullying, should the new national draft code be accepted.

The UK has the Dignity at Work Bill, which has been tabled several times, but not yet assented to. Other local interventions may be found in the policies and procedures of individual businesses or collective agreements.

Sadly, no such interventions are noted in South Africa.

Smit[239] refers to the philosopher Aristotle, who said that legal justice is the art of "the good and the fair". It is proposed that this should be our guide as we venture towards a uniform approach in preventing and managing workplace bullying in South Africa. The following chapter will deal with possible solutions to bullying in the South African workplace.

[237] Von Bergen *et al* 2006: 20.
[238] 1996, H.L. Bill [31].
[239] 2010:1.

CHAPTER 7: POSSIBLE SOLUTIONS TO WORKPLACE BULLYING

7.1 Introduction and background

> *Knowing where you stand legally is an important consideration for individuals targeted by bullying and organisations faced with the challenge of providing a safe workplace.*[1]

Over the past few years, there have been dramatic changes in the world of work affecting workplaces across the globe, ranging from globalisation and technological advances to increased competition, work intensification, the blurring of boundaries between work and family life,[2] and job insecurity. As people spend a significant amount of time at work, it goes without saying that changes in the work environment will have a profound effect on their health and well-being, their job and organisational performance, their family life and, eventually, also society as a whole.[3] The amount of time spent at work makes the workplace an ideal breeding ground for repeated acts of bullying, and even though workplace structures are usually such that some domination/subordination is expected, the fine line between a tough management style and bullying does sometimes become blurred.[4]

In view of the USA's score of 49 out of a possible 100 on the Gallup-Healthways well-being index, not to mention the UK's 35,[5] it is evident that the fostering of a culture where the balance between life and work is valued would likely lead to sustainable employee well-being, including psychological health, and increased organisational performance.[6] The aforementioned index measures job satisfaction, supervisors' treatment of employees and the existence of an open and trusting environment, and clearly reflects the challenge to create a working environment that would enable people to flourish.[7] Although similar data are not available for South Africa, it clearly shows that a workplace where dignity is key will perform much better than one where bullying occurs.

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[1] Caponecchia & Wyatt 2011: 71.
[2] Kalliath & Kalliath 2012: 729.
[3] Kalliath & Kalliath 2012: 729.
[4] Browne & Smith 2008: 133.
[5] Kalliath & Kalliath 2012: 730.
[6] Kalliath & Kalliath 2012: 730.
[7] Kalliath & Kalliath 2012: 730.

From a practical point of view, it seems as if workers across the globe have a very similar understanding of workplace bullying, which has positive implications for the development and implementation of strategies in dealing effectively with this phenomenon.[8] Sweden was the first country to enact anti-bullying legislation in the form of the Victimisation at Work Ordinance of 1993,[9] after which France passed their Modernisation of Employment Act in 2002,[10] with Belgium,[11] Quebec[12] and the UK[13] soon following suit.

Hoel and Einarsen[14] argue that bullying is extremely difficult to manage, and that the introduction of anti-bullying regulations that are "clear, unambiguous, and easy to apply" and the description of such a complex issue in legal terms are easier said than done. According to Velázquez,[15] although the mere presence of workplace bullying does not necessarily require new ways of punishing offenders, it does increase the demand for mediation and dispute resolution, emphasising the need for developing new ways to protect those who are potentially at risk. It has been shown that the more pervasive the bullying, the greater its negative effects.[16] Thus, early intervention and even prohibition are more important than managing the effects of bullying *ex post facto*.

Namie and Namie[17] have articulated the question that probably is in many employers' minds: Why should I care? The answer says it all. Bullying is costly: It often drives the most productive employees away from the organisation; turnover is expensive, as is litigation. In addition, when others in the workplace have to witness

[8] Agtervold 2007; Hoel & Beale 2006; Zapf & Gross 2001, as cited in Escartin *et al* 2011: 199.
[9] Ordinance of the Swedish National Board of Occupational Safety and Health containing provisions and measures against victimisation (bullying) at work [AFS] 1993: 17.
[10] C.Trav. art.s L. 1152-1 to L1152-6, L 1154-1. L 1154-2, L1155-1 to L 1155-4 (Fr) C PEN. Art. 222-33-2 (Fr.). The French legislation against bullying was incorporated into both the penal and labour code. See Browne & Smith 2008: 135.
[11] Law for the Protection against Violence and Moral or Sexual Harassment at Work. See Browne & Smith 2008: 135.
[12] An Act Respecting Labour Standards, currently incorporated into the Labour Standards Act. See Browne & Smith 2008: 135.
[13] Protection from Harassment Act of 1997, c 40; Employment Rights Act of 1996, c 16; case law.
[14] 2010: 46.
[15] 2010-2011: 185.
[16] Ortega *et al* 2009: 200,203.
[17] 2004: 325.

bullying, this may in itself lead to poor morale. Employee recruitment and retention are also more difficult when the employer has a reputation of bullying.[18]

In 2003, the ILO approved a Code of Practice on Workplace Violence in Services Sectors and Measures to Combat this Phenomenon,[19] which defined violence at work very broadly, namely as "any action, incident or behaviour that departs from reasonable conduct in which a person is assaulted, threatened, harmed, injured in the course of, or as a direct result of his or her work".[20] In line with this was article 26 of the European Social Charter (to which South Africa is not a member or signatory), which stressed dignity at work by promoting the creation of awareness, information and prevention of sexual harassment at work or in relation to work; the taking of measures to protect workers from such conduct, as well as the promotion and provision of information and the prevention of recurrent, reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to work.[21] ILO Convention 111 on discrimination, to which South Africa is a signatory, has established a framework for equal treatment in the workplace. However, all the aforementioned initiatives to ensure a fair workplace have failed to address bullying specifically.

The fact that different countries have responded differently to the abovementioned ILO code, the European charter and the subsequent framework agreement – by addressing bullying at work through either health and safety legislation, codes of practice or separate legislation, and placing bullying on different continuums[22] – points to the need for a uniform approach, especially in South Africa.

For purposes of finding a solution, it is accepted that the South African view of bullying corresponds with the notion of bullying in the comparative jurisdictions in this thesis, namely that, in the absence of a definitive list of bullying behaviours, it can be seen as a systematic pattern of behaviour, stressing the menace rather than the specific acts, as even if the individual acts are tolerable, their cumulative effect may

[18] Namie & Namie 2004: 327.
[19] Velázquez 2010-2011: 191.
[20] Velázquez 2010-2011: 191, with reference to the ILO Code of Practice on Workplace Violence in Services Sectors and Measures to Combat this Phenomenon. This led to a subsequent country study in South Africa in 2003, which indicated very high levels of "violence at work".
[21] Velázquez 2010-2011: 192.
[22] Velázquez 2010-2011: 193.

be extremely destructive and destabilising. [23] Three elements stand firm in definitions tendered, namely exploitation of the power imbalance, the type of behaviour displayed(such as intimidation, insults or malice) and the impact of the negative behaviour on the victim.[24]

Workplace bullying is a psychosocial issue for many employees; has a significantly negative impact on health outcomes for those exposed to it, and even adds to mental health problems such as anxiety and depression.[25] It has been indicated that victims are unable to resolve workplace bullying on their own, without receiving assistance from senior management, mainly due to their relatively low hierarchical status and a lack of power, and can therefore not utilise regular conflict management techniques. Thus, solutions to the problem must be investigated and evaluated against this backdrop.

Before legal interventions can be tendered, one also has to take note of research that indicates cultural differences in the acceptability of workplace bullying, and that companies tend to attract employees who share the values of the enterprises, even if these values are not widely accepted in every country where the firm operates.[26] Thus, employees seek organisations whose values correspond with their own.[27] In a South African context, the complex nature of addressing bullying is added to by the considerable variation in workplace size, with some large and many medium and small enterprises.

Einarsen and colleagues[28] believe that even though legal reform is but one component in an overall societal response to workplace bullying, it should still play a meaningful role in combating this destructive phenomenon. Recent research shows that some workplace factors may reduce bullying and buffer its negative effects.[29]

[23] Nielsen, Glasø, Matthiesen & Einarsen 2013: 369.
[24] Fox & Stallworth 2011:6.
[25] Nielsen *et al* 2013: 369.
[26] Nielsen *et al* 2013: 369.
[27] Power *et al* 2013: 379.
[28] Einarsen *et al* 2011: 481.
[29] Negative effects include a negative effect on the organisation's bottom line, decreased performance and the infliction of serious bodily harm to employees. See Seagriff 2010: 581.

Therefore, these also need to be considered when drafting policies or legislation, and will assist practitioners and employers in combating workplace bullying.[30]

It is expected that opponents of separate legislation to regulate workplace bullying in South Africa will rely heavily on the argument that added legislation may have a negative effect on the economy, as happened in the USA.[31] However, with bullying being four times as common as sexual assault in the USA,[32] for example, the matter is far too serious just to ignore. Even though such figures are not available for South Africa, prevalence statistics indicate a similar pattern.

Although mindful of the fact that one should guard against merely 'plugging' another country's solution into one's own problems, this chapter will draw on the experiences in the USA, UK and Australia to evaluate possible solutions to the phenomenon of workplace bullying in South Africa. Reference will also be made to the lessons learnt in Sweden, as they were the first country to have legislated bullying from a health and safety perspective, although this now seems to be less than ideal. The ultimate objective, however, will be to tailor-make a solution for the South African workplace.

In doing so, the chapter will deal with the need for legal reform by attempting to compile a draft South African definition for workplace bullying; discussing the placement of workplace bullying on a South African legal continuum, and then addressing the need for new legislation as a long-term solution to the problem. The drafting of policy (as 'soft law') will also be examined as a short-term solution to this pervasive problem. To add practical value for practitioners, unions and employers, a 'draft policy' to combat bullying in South Africa, based on Australia's draft model code of practice, also appears as an addendum to this thesis.

The solutions tendered will also keep in mind that legislation alone is insufficient to regulate bullying in the workplace, and that a multi-pronged approach is needed, including well-informed, trained and motivated employers, trade unions who are willing to deal with the problem proactively on both an organisational and individual level, supported by an enforcement agency that is properly equipped for its role.[33]

[30] Cooper-Thomas, Gardner, O'Driscoll, Catley, Bentley & Trenberth 2013: 385.
[31] Browne & Smith 2008: 149.
[32] Morris 2008: 1.
[33] Hoel & Einarsen 2010: 47,48.

7.2 Towards a uniform understanding of bullying, and its location on a South African legal continuum

7.2.1 Introduction and background

Harthill[34] believes that although "dignity rights" are often referred to in Europe, it is rarely defined, and that although the term "dignity at work" has become a part of the workplace bullying lexicon in the UK, there is no tradition of basing harassment law on the concept of individual dignity.[35] However, there has obviously been a shift to the dignity paradigm in the UK, as can be seen from the wording of the Dignity at Work Bill.[36]

Harthill[37] is also not optimistic that the dignity paradigm can serve as a model for the USA, due to its history and laws being based on remedying past status-based discrimination. A dignatarian workplace is described as a work environment where everyone is treated with respect[38] – something that is desperately needed in the South African workplace. However, South Africa is not characterised by a dignatarian workplace, and the country's harassment law is not embedded in dignity, but rather focuses on equality to redress past injustices. If bullying should only be approached from the angle of the right to a safe working environment in South Africa, harassment must be proven to have been severe or pervasive enough to create an abusive or hostile working environment,[39] including both physical and psychological harm.[40]

Any solution to workplace bullying, therefore, will clearly require the development of an adequate definition of workplace bullying,[41] which is the subject of the following section.

[34] 2008: 265.
[35] Harthill 2008: 265.
[36] Harthill 2008: 265.
[37] 2008: 265.
[38] Harthill 2008: 266, with reference to Fuller's views on the dignity paradigm.
[39] Le Roux *et al* 2010: 33.
[40] *Media 24 Ltd v Grobler* (2005) 26 ILJ 1007 (SCA) 65-68.
[41] Carbo 2009: 98.

7.2.2 Defining workplace bullying

Before bullying is defined, it is important to note that governmental and management recognition of the problem of bullying in both the private and public sector is the first step in tackling the problem in the workplace.[42] Currently, this is clearly lacking in South Africa, and should therefore be a point of departure. Meglich-Sespico and colleagues[43] also refer to the need for organisations to acknowledge the magnitude and cost of the problem[44] before preventative and corrective steps can be taken.

As it is universally accepted that employees' dignity is negatively affected by bullying, any solution should address the breach of this basic human right.[45] After all, legal scholars have pointed out that definitions do not exist for the purpose of validating scientific concepts, but to regulate behaviour.[46]

Workplace bullying presents itself in many ways, which could include "competent staff constantly being criticised, having their responsibilities removed or being given menial tasks; persistently being picked on in front of others or in private; blocking promotion without reason; ignoring or excluding employees from work activities, or even work-related social activities; setting employees up to fail by overloading them with work or setting impossible deadlines; consistently attacking a member of staff in terms of their standing within the organisation, and regularly making the same person the butt of jokes".[47]

The international notion, although disputed by some, is that the negative acts have to be pervasive to qualify as bullying. Some authors require bullying to be as often and pervasive as once a week for at least six months to qualify as real workplace bullying, while others simply require the negative behaviour to be repeated, patterned or persistent.[48] Fox and Stallworth[49] recommend that pervasiveness be included as a definitive criterion.

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[42] Harthill 2008: 253.
[43] 2007: 40.
[44] Fox & Stallworth 2011:7-8.
[45] Carbo 2009: 101.
[46] Escartin *et al* 2010: 3.
[47] TUC 2013.
[48] Fox & Stallworth 2010: 222, with reference to Leymann, 1996; Einarsen *et al* 2003; Rayner & Keashly 2005.
[49] 2010: 222.

It is suggested that the following definition of Von Bergen and colleagues[50] be adapted for South Africa and be used as a draft to develop a local definition:

> *Conduct of an employee or employer or groups of employees and employers, directed at an employee, employer or groups of employees and employers, which a reasonable person would find hostile or offensive and is unrelated to an employer's legitimate business interest. Abusive conduct may include but is not limited to repeated infliction of verbal abuse such as the use of derogatory remarks, insults, epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, humiliating or creates a risk to health and safety or relates to the gradual sabotage or undermining of a person's work performance. Bullying is not reasonable action taken in a reasonable manner by an employer to transfer, demote, discipline, counsel, retrench or dismiss an employee*.[51]

A single act shall not constitute bullying unless it is especially "severe and egregious,"[52] but should be clarified by the South African Law Commission,[53] as permitting a single serious act to qualify as bullying would not be in line with the international experience. Contrary to the international experience, however, Yamada[54] has proposed that a single serious negative act could indeed constitute bullying, while Le Roux and colleagues[55] also refer to that possibility. Still, it is the author's contention that multiple acts are needed to establish bullying, and the draft policy annexed to this thesis will be framed to take that into account.

The role of ethics in bullying should not be underestimated, and presents an area for further research. Given that bullying is a deliberate act of violence that aims to hurt, it is regarded as "unethical",[56] and Rhodes and colleagues[57] argue that the consideration of ethical and organisational dimensions is key to understanding bullying and addressing it at work. Bullying, according to these authors, is

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[50] 2006:19.
[51] Von Bergen *et al* 2006: 19.
[52] Adapted from the Healthy Workplace Bill definition by Yamada, as cited in Harthill 2008: 255, as well as from definitions contained in Safe Work Australia and Cuniff, as cited in Landman & Ndou 2013: 88.
[53] Hereinafter referred to as the SALC.
[54] Yamada 2004: para 519.
[55] Le Roux *et al* 2010:55
[56] Rhodes *et al* 2010: 97.
[57] 2010: 97.

considered bad, “but its ethical meaning is assumed rather than theorised or interrogated”.[58] Business entities should thus seek to address and minimise unethical acts such as bullying in all policies and practices, to minimise their liability for bullying acts committed by their employees.[59]

Smit[60] makes a valid point when saying that the return to work of disabled workers and, by means of inference, severely bullied employees is sadly neglected, and any policy development should pay attention to this aspect as well. The right to security of employment is zealously guarded in South African labour law, and bullied employees should retain the right to be re-integrated with the workplace and not to be unfairly dismissed,[61] in the same way that the employer would be entitled to dismissal where the negative effects of bullying were so severe that, despite the employer having made reasonable accommodation, it becomes impossible for the employee to continue with the employment relationship.

Considering all of the above, it is suggested that the SALC investigate the entire phenomenon of workplace bullying in South Africa, and compile a definition of workplace bullying along with all stakeholders, such as employers, trade unions and representatives of business. In drafting such definition, cognisance should be taken of the ILO’s recommendations subsequent to their 2003 country study on violence at work as well as Le Roux and colleagues’ working definition.[62]

What should be clear from the definition is that negative behaviour has to occur repeatedly and over time (except if very “serious and egregious”, as stated by both Le Roux and colleagues[63] and Yamada[64]), without being prescriptive in terms of the number of times or a certain number of negative acts to be committed over a fixed period of time, as in some European countries.

[58] Rhodes *et al* 2010: 97.
[59] Rhodes *et al* 2010: 96.
[60] Smit & Guthrie 2008: 374.
[61] Smit & Guthrie 2008: 374.
[62] Le Roux *et al* 2010: 55, where bullying is defined as unwanted conduct in the workplace that is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment, or is calculated to induce submission by actual or threatened adverse consequences.
[63] LE Roux et al 2010:55.
[64] Yamada 2004: 519.

7.2.3 The common law and legislation pertaining to workplace bullying

Introduction and background

Leuders[65] refers to Americans' reputation for being unduly litigious, petty and prone to seeing the legal system as a chance of a big pay-out. Thus, one should be apprehensive about creating a new cause of action, especially one such as bullying. Most countries that have legislation prohibiting bullying regard it as the employer's problem, placing the burden solidly on the employer's shoulders,[66] which is not necessarily the best route to follow locally, given South Africa's business dynamics and the drive for job creation. Among the reasons tendered against anti-bullying legislation in the USA is also the fear of frivolous lawsuits and harm to the economy.[67]

As already mentioned, the legislature in Sweden was one of the first to pass legislation against bullying; despite this, however, there has been an increase in bullying claims reported over the years.[68] This piece of legislation has since been described as the "waste bin" for all kinds of problems in the workplace, as everyone who feels violated, irrespective of having been bullied or not, tends to use the anti-bully legislation[69] to alleviate such feelings. Naturally, this was to be expected, since the ordinance is the only statutory regulation referring to personal violations at work.[70]

According to Chainey,[71] in Quebec, the specific provisions in legislation regarding workplace bullying brought the reality of workplace violence and harassment to the fore and legitimised the complaint process in holding the employer accountable. She further states that the legislation was designed to emphasise the importance of prevention, and the additional obligation facing employers merely entails ensuring a bully-free workplace.[72] Employers and employees in South Africa could certainly do with the creation of awareness about workplace bullying, legitimising of the complaint

[65] 2008: 1.
[66] Leuders 2008: 135.
[67] Leuders 2008: 149.
[68] Hoel & Einarsen 2010: 33.
[69] Swedish Victimisation at Work Ordinance, Swedish National Board of Occupational Safety and Health, 1994.
[70] Hoel & Einarsen 2010: 36
[71] 2010: 23.
[72] Chainey 2010: 23.

procedures, and even ways of holding the employer responsible, but awareness could probably be raised via other avenues than specific legislation.

Hoel and Einarsen[73] also believe that specific legislation is not necessarily the best avenue to curb workplace bullying. They point out that it is extremely difficult to regulate intangible issues associated with human interaction and relationships, such as bullying. They further argue that statutory regulation in this field is in itself insufficient, and that training, effective prevention, timely intervention and rehabilitation are needed in addition to the passing of legislation.[74] Stakeholders in South Africa should take note of this. Finally, they contend that the enactment of the Swedish ordinance against bullying came too early, without the ground having been properly prepared – another lesson to be taken into consideration in a local context.[75]

It is thus clear that a uniform solution to the problem does not currently exist and that countries should develop their own, tailor-made solutions, taking into consideration the types of enterprises dominant in their specific contexts as well as their existing legislation and its enforcement. Also important is that any legislation should be preceded by proper timing and preparation for it to succeed as part of an integrated approach to workplace bullying.

The need for new legislation – a long-term solution

The following discussion will investigate existing legislation and/or legal remedies pertaining to workplace bullying in South Africa, and will indicate whether these are sufficient to deal with the issue or whether new legislation is required.

- Common law and the contract of employment

It is trite law that an employer has to furnish an employee with a workplace that is safe and healthy, and a breach of this duty could lead to an action based on delict

[73] 2010: 46.
[74] Hoel & Einarsen 2010: 46.
[75] Hoel & Einarsen 2010: 47.

against the employer.[76] Le Roux and colleagues[77] refer to a civil claim for *iniuria* and/or a breach of ensuring a safe working environment to be instituted where workplace bullying occurs. These are potential vehicles through which bullying claims can be brought, as is the use of the doctrine of vicarious liability, but are all expensive *ex post facto* remedies, merely offering pecuniary compensation or awarding damages, without any proactive element. Thus, although bullying claims could be brought in delict and under the doctrine of vicarious liability, when these avenues are presented in isolation to prevent bullying in the workplace, South African law lacks a prohibitive element.

Daniel[78] mentions that organisations may opt to include anti-bullying provisions in the contract of employment to ensure a common understanding of the employment relationship, especially where executives are concerned. This contract could also include compulsory arbitration to alleviate expensive future dispute-related conflicts.[79]

- Constructive dismissal

It seems as if a claim for constructive dismissal is a good option on which bullied victims can rely.[80] The dismissal of the defendant bully has been found fair in bullying cases brought before the tribunals and courts.[81] However, this option does not offer job security and, again, can only be instituted after a 'dismissal', thereby constituting yet another *ex post facto* remedy.[82]

- The Employment Equity Act[83]

This act offers little consolation for bullied victims if the bullying is not related to the grounds stipulated in the EEA.[84] Although harassment is equated with unfair

[76] Landman & Ndou 2013: 89; *Media 24 v Grobler* [2005] 7 BLLR 649 (SCA) 666.
[77] 2010: 65.
[78] 2009: 79,80.
[79] Daniel 2009: 80.
[80] Le Roux *et al* 2010: 65.
[81] Landman & Ndou 2013: 89.
[82] Landman & Ndou 2013: 89.
[83] 55 of 1998.
[84] S 6(3) of the EEA.

discrimination in South Africa,[85] and Du Toit[86] submits that the guidelines contained in the sexual harassment code may be applied to other forms of harassment as well, this is not universally accepted. This is even indicated by the differences in the definitions for harassment, sexual harassment and bullying. Bullying and harassment do not carry the same significance, especially in respect of the number of times that the deed has to be committed, whether or not intent is a necessary element to prove the transgression, or whether harassment is viewed subjectively or objectively.

Although it is agreed that there are similarities between the development of sexual harassment law and bullying law, it is submitted that the notions differ when viewed from a legal perspective, and that these types of misconduct should be treated separately. Still, however, Daniel[87] notes that the degree, gravity and regularity of workplace bullying may require law or policy change, or both, just as sexually harassing behaviour at work was first deemed unacceptable by society and then codified into law. Thus, although it is believed that the two concepts should be treated separately, it does seem as if bullying is today on the same trajectory as sexual harassment was a few years ago.

Section 60 of the EEA creates defences for the employer. Most importantly, in a bullying milieu, the employer is expected to take action to avoid liability for an employee's conduct. If the employer did all that was reasonably practicable to ensure that the employee would not act contrary to the EEA, and took the necessary steps subsequent to having been informed of the transgression, the employer will not be held liable for his employees' deeds.[88]

However, the EEA does open the door to locating workplace bullying on the continuum of harassment, which in essence boils down to unfair discrimination, where it should (to this researcher's opinion) find application in the lack of acknowledgement of 'morality' in the workplace. The EEA aims to ensure fair treatment at work for all, and to achieve equity and prohibit discrimination based on one or a combination of the items listed in section 6(1) thereof. Although bullying is not mentioned specifically in this list, claims could be brought under unlisted items

[85] S 6(1) of the EEA.
[86] According to Landman & Ndou 2013: 89.
[87] 2009: 61.
[88] S 60 of the EEA.

where the plaintiff carries the burden to prove unfair differential treatment.[89] Should the EEA be used to claim for workplace bullying[90] in the absence of its listing as a prohibited ground in said act, therefore, intent to discriminate does not need to be shown, but what does need to be proven on a balance of probabilities is discrimination and the element of unfairness.[91]

In summary, therefore, the EEA enables the harassed employee to bring a claim and to hold the employer liable for the harassment of its employees by other employees, provided that the requirements of section 60 are met.[92] This could surely find application where workplace bullying occurs.

- The Promotion of Equality and Prevention of Unfair Discrimination Act[93]

PEPUDA finds little application in the workplace, and limits the prohibition of harassment to only three categories.[94] Despite section 11 of the act, which provides that no person may subject another to harassment, it furnishes a closed or, at least, limited list of reasons for the prevention of harassment.

This could have been a partial solution to the problem. The definition for harassment is broad enough to encompass workplace bullying: In bullying, the prohibited conduct must be unwanted, persistent or serious, and must have demeaned, humiliated or created a hostile or intimidating environment, or have been calculated to induce submission by actual or threatened adverse consequences.[95] This notion is also found in PEPUDA, thereby offering potential protection against workplace bullying in government or other institutions, although only if the EEA does not apply.

However, considering the limitations of the aforementioned three categories, and the fact that no person who is covered by the EEA may use the remedies afforded in PEPUDA, this route is not necessarily the best remedy available.

[89] Du Plessis & Fouche 2012: 90, where it is clearly stated that the list is not closed, due to the use of the word 'including', and other forms of differentiation may therefore also lead to unfair discrimination.
[90] Du Plessis & Fouche 2012: 91.
[91] Du Plessis & Fouche 2012: 91.
[92] Landman & Ndou 2013: 90.
[93] 4 of 2000.
[94] Sex, gender or sexual orientation, or a person's membership or presumed membership of a group identified by one or more of the prohibited grounds, as in s 5(3) of PEPUDA.
[95] Einarsen *et al* 2011: 11.

- The Protection from Harassment Act[96]

This new act could be used as a vehicle to protect against bullying at work, and is currently the best avenue to explore and use in a bullying claim in South Africa. It does however only offer protection orders and the issuing of warrants for arrest, and makes provision for criminal sanctions where the protection order is violated.

It is argued that this act can be applied to the workplace, as the wording is equally wide-reaching than that of the UK Protection from Harassment Act of 1999, which is now the vehicle used by claimants in workplace bullying cases in that jurisdiction.

The South African act only applies to instances where the negative conduct concerned amounts to harassment or stalking, which necessarily implies that if this act should be used to counter workplace bullying (as the similarly worded UK act is), bullying in South Africa must be treated as a form of harassment and not a dignity violation, thus placing it on the continuum of unfair discrimination as opposed to a dignity violation. It offers protection of one of the most fundamental human rights enshrined in the 1996 Constitution, being the right to be free from harassment. The act covers both sexual and non-sexual harassment, and allows for the organs of state to give effect to its provisions.[97]

Landman and Ndou[98] seem to be correct in saying that the definition of harassment in the Protection from Harassment Act in South Africa is broad enough to include workplace bullying, and it is highly possible and likely that a complainant may bring an application for a protection order against the workplace bully in terms of this act. The way in which this will be managed, however, may prove problematic in the workplace.

In terms of the Protection from Harassment Act, anyone who has been harassed may apply for a protection order against the harasser at a magistrate's court, which order, if granted, could remain in force for up to five years.[99] This could be impracticable where the plaintiff and respondent work at the same workplace or,

[96] 17 of 2011.
[97] Landman & Ndou 2013: 81.
[98] 2013: 88.
[99] Landman & Ndou 2013: 84.

even worse, where the harasser is the plaintiff's manager. This would in most instances lead to a transfer of either of the parties or the mending of relationships, which may render the warrant for arrest superfluous.

The word 'harassment' is well defined in the act, denoting conduct that the respondent knows or ought to know causes harm (financial, physical or psychological) or inspires the reasonable belief that harm may be caused to the complainant or related person by his/her/their unreasonable conduct.[100] Should this be extrapolated to a workplace bullying milieu, the unreasonable engaging in verbal, electronic or other communication aimed at the complainant, which causes or could lead to the belief that harm could be caused, may lead to a protection order against a fellow employee or manager. This protection order,[101] whether final or interim in nature, may prohibit the respondent from engaging or attempting to engage in harassment, enlisting the assistance of others to harass, or committing any other act as specified in the protection order. As these powers are wide-reaching, they could make it extremely difficult for employers to manage such a protection order in the workplace, and employers may in effect find themselves compelled to take disciplinary action against the harasser or to transfer the complainant.

Transgressions of the protection order will be judged by the courts, which deprive organisations of the authority to manage internal matters. Even the lodging of an appeal does not stay the execution of the order, and if the South African Police Service suspects that there are reasonable grounds that the complainant may suffer harm or is suffering harm due to a breach of the protection order, they may arrest the respondent.[102] Having the police arrest a manager or fellow employee based on a suspicion in an internal matter could harm the enterprise, especially if the allegation is not true and the parties still need to work together following the arrest. The mere fact that a criminal offence is created by the act in terms of section 18 does therefore not alleviate the problems envisaged in using the act in the workplace.

Practical problems may also occur when an employer may have to ensure that the protection order is adhered to, which could give rise to difficulty for the employer

[100] Landman & Ndou 2013: 82.
[101] S 10 of the PHA.
[102] Landman & Ndou 2013: 84.

where the alleged harasser and complainant work together.[103] Where the harassment has taken place at the workplace, it could pose further problems to the employer, as he himself could be held vicariously liable for the harassment committed by his employee.[104] It does seem as if the South African courts are moving in that direction after the *Grobler v Naspers*[105] ruling, where the employer was found to be vicariously liable after the continuous sexual harassment of its employee.[106]

Further criticism against using the Protection from Harassment Act to manage workplace bullying is the fact that the court may subpoena whom it wants[107] and compel attendance.

In addition, the UK Protection from Harassment Act[108] prohibits only a "course of conduct", requiring multiple acts of harassment. In the absence of a uniform definition in South Africa, this may prove to be a loophole for employers where a single negative deed was committed. Case law has however established that the interpretation of sexual harassment provides for a single deed to qualify for protection,[109] and the interpretation regarding other forms of harassment is therefore left to the South African courts to develop. However, should the similar UK act be used as a guideline, more than one act of harassment would be required to invoke the protection granted by the South African act. This once again stresses the urgent need for a uniform definition in South Africa, and the need to place the concept on the correct continuum.

Le Roux and colleagues[110] propose that the creation of a new cause of action, namely the "intentional infliction of a hostile work environment" be investigated. Although this avenue could pose a possible solution to the problem, the creation of an entirely new cause of action may be too timeous to address this pervasive problem.

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[103] Landman & Ndou 2013: 86
[104] Landman & Ndou 2013: 86.
[105] 2004 ALL SA 160 (C).
[106] Meyerowitz & Johnson n.d.
[107] Landman & Ndou 2013: 83.
[108] 1997.
[109] *J V M* 1989 10 IOLJ 755 (IC) 757 E-G.
[110] 2010: 65.

What is positive, however, is that electronic bullying is addressed by the South African Protection from Harassment Act. The act contains clear descriptions of this concept, but the same problems are envisaged as those likely to be experienced with face-to-face workplace bullying, in that the act could interfere with managerial autonomy. The act definitely applies to cyberbullying in employment, and could be extended to electronic bullying, but once again, only if the electronic bullying is seen as a form of harassment.

If this act were to be used to combat workplace bullying, it would follow in the footsteps of the UK and their act of the same name. There, legislation to combat workplace bullying has been described as a mechanism to force employees to be "nice to each other", police snide remarks, and compel employers to battle lawsuits with employees who feel that they have been picked on.[111] However, although the utilisation of the act may lead to some frivolous lawsuits, one can of course draw on the experience of jurisdictions where legislation has found its way[112] to institute certain legal mechanisms to prevent a flood of litigation. South African courts will surely be able to learn from the UK experience in distinguishing between senseless and substantial cases. In the words of judge Auld in *Majrowski v Guy's and St Thomas' Trust*:[113] "Courts would have in mind that irritations, annoyances, even a measure of upset arose at times in everybody's day to day dealings with others. Courts were well able to recognise the boundary between conduct that was unattractive, even unreasonable and conduct which was oppressive and unacceptable."

As could be seen from the before mentioned discussion, existing mechanisms fail to adequately address workplace bullying in South Africa, despite the absence of non-restricted anti-discrimination laws. Separate legislation will provide legal clarity in employment bullying claims. This will have the effect of claims or charges formulated as they should be and alleviate the problem of framing bullying issues in employment to fit the one or other legal avenue amidst the maze of possible legal options available.

[111] Browne & Smith 2008: 149,150.
[112] Browne & Smith 2008: 150.
[113] [2006] UKHL 34 par 30{E}.

7.2.4 'Soft law' – policies and procedures to combat bullying as a short term solution

Introduction and background

It is a fact that policies and procedures define the culture of organisations and establish the boundaries of conduct for the employees of an entity.[114] Coaching has also been shown to be effective after a new policy-driven behavioural standard has been put in place, and aims to clarify expectations for the envisaged behavioural change.[115]

For policies and procedures as well as the envisaged organisational change to be successful, these efforts need to go beyond the words on paper, and require the aggressive support of upper management.[116] Sanders and colleagues[117] mention some of the reasons why policies are implemented, namely to avoid litigation, to create strong organisational behaviour, and to avoid taking a so-called "band-aid" approach by being proactive instead of reactive.

According to Power and colleagues,[118] a potential route of intervention would be to compel adherence to policies and procedures. This would include adherence to policies and procedures in interactions with subordinates, despite the general aversion for a uniform human resource standard in managing employees.[119] Vega and Comer[120] state that a policy clearly shows what an organisation thinks, its relationship with staff, and how it expects people to work within its culture.[121] Not only is a zero-tolerance statement required to curb workplace bullying, but a code of conduct that provides concrete examples of desirable and forbidden behaviours is also of the utmost importance.[122]

[114] Meglich-Sespico *et al* 2007: 39.
[115] Namie & Namie 2009a: 212.
[116] Meglich-Sespico *et al* 2007: 39.
[117] 2012: 31.
[118] 2013: 379.
[119] Power *et al* 2013: 379.
[120] 2005: 107.
[121] Vega & Comer 2005: 107.
[122] Vega & Comer 2005: 107.

A code on its own would however not suffice, as employees need to be educated, awareness must be raised about the policy, and upper management's support must be made visible.[123]

Policies and procedures – the way forward

The law does not describe in detail how company policies should be designed, but at a sector level, social partners should collaborate with employers in drafting policies.[124] Hoel[125] states that policies alone would not guarantee a harassment-free work environment, but calls for employee involvement and joint ownership to ensure an environment free of bullying. She further highlights the need for training in problem recognition and the need to establish a zero-tolerance policy in a joint partnership[126] to combat workplace bullying. These suggestions could be applied in a South African setting in a bid to prevent and manage workplace bullying.

According to Namie and Namie,[127] policies should include at least the following:

- "A statement of organisational opposition to bullying
- Rationale for the policy
- Name for the phenomenon
- A clear definition of workplace bullying
- An illustrative set of examples of the unacceptable conduct
- Guaranteed manager's rights for as long as they are not abused
- An anti-retaliation clause"

Sanders and colleagues[128] propose the following ten steps to enforce the no-bullying rule:

- "State a workplace rule against bullying, include it in a policy and enforce it.
- Since bullies are likely to hire bullies, include civilised people in job interviews.
- Get rid of bullies fast, even if they do other things really well.

[123] Vega & Comer 2005: 107, with reference to Hubert 2003.
[124] European Agency for Safety and Health at Work 2010: 36.
[125] 2013: 72.
[126] Hoel 2013: 73.
[127] 2009a: 213.
[128] 2012: 33-34, citing Sutton.

- Treat bullies as incompetent. Promote good people and watch them carefully, as promoted power may corrupt.
- Respect the pecking orders in organisations, but downplay and reduce unnecessary status differences.
- Correct behaviour timeously.
- Model and teach constructive confrontation.
- Set good examples, because people follow rules better when there are some examples of bad behaviour.
- Link big policies to small decencies – no-one likes a bully."

A policy cannot be effective in isolation and, therefore, coaching and mediation tools are required to assist policy intervention.[129] Typical enforcement procedures would include the normal informal investigation, a formal complaint procedure and proper investigation, assurances of confidentiality, consequences for retaliation, dissemination of the decision, innovative remedies/punishment, restorative practices, where applicable, and support for the team who witnessed the bullying.[130] Due to the special character of bullying, it is suggested that policies should include mediation as a compulsory mechanism before a dispute is declared, where applicable, and external remedies are utilised.

Daniel[131] agrees with the Namies[132] in stating that although the bully or victim could be moved to another location, an employee should first be afforded the opportunity to be coached or to receive training in management techniques, unless the actions are clearly intentional, in which case these steps could be bypassed in favour of immediate lawful termination of the perpetrator.[133] Escartin and colleagues[134] also refer to the need for training in the entire concept of bullying, or at least in acceptable and unacceptable conduct after understanding of the notion has been ensured.

[129] Namie & Namie 2009a: 213.
[130] Namie & Namie 2009a: 214.
[131] 2009: 56.
[132] 2009.
[133] Daniel 2009:56.
[134] 2010: 199.

The Namies[135] are clear on the fact that post-implementation activities are key to the success of an internal policy, and suggest the following:

- "Design and administer bullying-related indices prior to policy implementation and at periodic intervals thereafter to gauge efficacy of the intervention
- Designate and prepare internal educators to train peers and managers
- Board and executive training
- Training for investigators
- Production of training, material and programme material
- Plan to integrate the policy principles into performance appraisal/evaluation system
- New employee orientation module
- Plan to revisit, revise and sustain policy and procedures"

One should however also take note of the business dynamics and culture in South Africa. Most of the local enterprises are small, medium and micro-sized enterprises,[136] including large numbers of informal businesses, who are already battling to survive the country's stringent labour laws:[137] "Gauteng is the leading province in terms of the number of SMMEs in both the formal and informal sectors, but while it accommodates 48% of formal SMMEs nationally, it accounts for only a quarter of informal SMMEs. The Western Cape is the second-largest province as far as the number of formal SMMEs is concerned (19%). Provinces with large rural populations, such as KwaZulu-Natal (19%), Limpopo (14%) and Eastern Cape (13%), accommodate higher proportions of informal businesses."[138] Of the economically active enterprises of known size in South Africa (based on annual turnover) in March 2007, 36% were micro enterprises, 46% were very small enterprises, 11% were small enterprises, 4% medium enterprises, while only 3% were large enterprises.[139] Popular media have indicated that small-business owners feel that South Africa's modern labour legislation is out of touch with most of them, and that it often inhibits SMMEs to employ more people in the country.[140] Therefore,

[135] Namie & Namie 2009a: 214.
[136] Hereinafter called SMMEs.
[137] Adcorp Labour Index 2013.
[138] Department of Trade and Industry 2013.
[139] Department of Trade and Industry 2013.
[140] SMEs less confident about labour laws 2013.

the decision to add further responsibilities to SMME owners' already heavy load should not be taken lightly, but that the government's drive to stimulate growth through SMMEs be taken into consideration when solutions are considered.

Further country-specific factors to take into account include that, based on World Economic Forum data, South Africa's labour market competitiveness fell by 8,1% over the past year. South Africa's labour laws and regulations are now the seventh most restrictive out of 139 countries in the world. According to a survey of the world's 1 000 largest multinationals, restrictive labour regulations are the fourth most problematic factor for doing business in South Africa,[141] and too much added responsibilities would only aggravate the problem.

It is suggested that the development of a policy along with all stakeholders, tailor-made for every enterprise, would place less strain on employers than expecting them to adhere to legislation, as SMMEs or informal businesses could formulate their anti-bullying policies to be less stringent and expansive than those of a multinational or big enterprise.

Policies should contain a proper dispute resolution procedure, which should include a contact officer or confidential counsellor and, if merited, an informal intervention should be followed.[142] Should the informal intervention not succeed, a formal route should be followed and an impartial mediator could even be appointed. This route is not without its problems, though. As Vega and Comer[143] put it, feelings of "revenge and rancour" could present themselves if the victim wins.

Implementation of a fair grievance and disciplinary procedure

Daniel[144] states that the development of a grievance system does not only diminish costs for the organisation in terms of dispute resolution, but also serves to increase morale when employees feel that there are alternatives to explore other than litigation. Utilising regular grievance procedures and disciplinary procedures could

[141] Adcorp Labour Index 2013.
[142] Vega & Comer 2005: 107.
[143] 2005: 107.
[144] Daniel 2009: 81.

suffice, but only if bullying is described in the policy and training and awareness have been addressed. A clear sanction is imperative for such a policy to succeed, and it has been suggested that termination of the bully's employment, or transfer of either party, could assist to get the message across that bullying does not pay and will not be rewarded.[145]

Since a policy indicates desired behaviour in the workplace, and affords clarity on how a problem will be dealt with should it occur, the policy should be in writing and should clearly state that harassment, discrimination, a hostile work environment, employee abuse and other key areas are prohibited.[146] These policies and procedures should also be regularly updated.

7.3 Leadership and workplace bullying – towards a uniform understanding of bullying and a working solution

7.3.1 Constructive leadership

Research points to a poor working environment as the primary antecedent for bullying, and has shown that work environment factors may influence both the likelihood of, and response to, bullying.[147] Poor leadership has been shown to lead to or exacerbate bullying, while, according to Cooper-Thomas and colleagues,[148] "constructive leadership may reduce the negative effects of bullying by managing conflict, clarifying work roles and goals, acting as a role model for appropriate behaviour, and reducing targets' perceptions of loss of control". Constructive leadership is merely a demonstrated set of behaviours that encourage and recognise individuals for their contributions to the enterprise, support their needs, and foster growth and development within the team, and once such constructive leaders intervene in conflict, trust their employees and provide autonomy, without resorting to a *laissez-faire* management style, it is guaranteed to reduce workplace bullying.[149]

[145] Vega & Comer 2005: 108.
[146] Daniel 2009: 80.
[147] Cooper-Thomas *et al* 2013: 385, with reference to Leymann 1996.
[148] 2013: 387.
[149] Cooper-Thomas *et al* 2013: 387.

Companies need to foster good leadership to counter bullying. Kossek and colleagues[150] suggest that leaders can and must play a critical role in the removal of bullying from the workplace. Not only should leaders be chosen to stand up to, and speak out against, bullies and bullying, but their behaviour should be visibly ethical.

The maintenance of a strong management team is a key tool in proactively preventing and managing bullying, as it could counter high turnover and low employee morale.[151]

7.4 Perceived organisational support

Perceived organisation support is defined as the employee's perception that the organisation will help employees to carry out their work, and support their well-being.[152] A supportive workplace supports the well-being and performance of its employees, values their ideas as well as their contributions, and has been shown to be an effective counter to bullying in organisations.[153] The underlying principle here is that when the target of bullying feels supported at work, he or she is more likely to see bullying as separate from the broader experience at work.[154] The study by Cooper-Thomas and colleagues[155] has shown that higher levels of perceived organisational support, along with constructive leadership and anti-bullying initiatives, do discourage bullying in organisations.

It needs to be kept in mind that the excessive work demands, long hours, insecure structures and continuous organisational change that have become so characteristic of the contemporary workplace, and are often regarded as "a price worth paying", may perhaps lead to greater productivity, but could also institutionalise bullying, viewing it as a normal part of everyday working life.[156] Indeed, the danger of not viewing bullying as an organisational ethical problem is that it could become established as an acceptable, normal or even desired characteristic in

[150] 2012: 745.
[151] Daniel 2009: 80.
[152] Cooper-Thomas *et al* 2013: 387-388.
[153] Cooper-Thomas *et al* 2013: 388.
[154] Cooper-Thomas *et al* 2013: 388, with reference to Parzefall & Salin 2010.
[155] 2013: 400.
[156] Rhodes *et al* 2010: 106,107.

organisations.[157] Although these contextual factors are often overlooked by legal practitioners, legislatures and employers, who are mostly output-driven, having a policy in place to deal with bullying, and communicating a clear procedure on how to handle complaints about bullying, should be high up on organisations' list.[158] According to Vega and Comer,[159] any organisation who wishes to discourage bullying should have a policy in place that explicitly states that bullying will not be tolerated.

Knowing that organisational commitment and initiatives to combat bullying will reduce bullying and replace it with well-being, it is strange that organisations are still taking minimal action to address bullying.[160]

7.5 Other factors to be considered in combating workplace bullying

7.5.1 Individual

Personal coping strategies could alleviate the effects of bullying, as it has been shown that 47% of targets had discussed the situation with colleagues, some even before leaving the organisation; had adopted a wait-and-see strategy, or attempted to change the situation.[161] Choosing a response strategy is a complex process, which is influenced by the cost and efficacy of the strategy as well as the attractiveness of the setting,[162] and training of staff and management could assist targets in choosing the better response.

Interestingly, Nielsen and colleagues[163] have found that recruiting and fostering stable self-esteem among employees could further help minimise bullying behaviour, as unstable high self-esteem has been shown to be an antecedent for bullying in organisations.

[157] Rhodes *et al* 2010: 107.
[158] Cooper-Thomas *et al* 2013: 400.
[159] Vega & Comer 2005: 107.
[160] Cooper-Thomas *et al* 2013: 400.
[161] Meglich-Sespico *et al* 2007: 34.
[162] Meglich-Sespico *et al* 2007: 34
[163] 2013: 377.

7.5.2 Organisational

It is suggested that one of the most powerful ways to prevent workplace bullying is for organisations to change their workplace culture.[164] A zero-tolerance policy and regular review of an organisation's ethics policy, with proper communication by the leaders of the organisation, are extremely important for businesses.[165] Equally so is proper training for the entire workforce to facilitate the understanding of the harm that bullying does to the individual and the entity.[166]

To deal with third-party bullying is not easy, and Kossek and colleagues[167] suggest that contractors should be included in collective agreements and labour law. Proactive employers could make policies relevant to third parties, and treat them as if they were the company's employees,[168] especially where conduct such as bullying is concerned.

7.5.3 Employee assistance programmes

Employee assistance programmes could help victims of bullying to better deal with personal and work-related matters, and they could seek relief from the programme to either stop the bullying or deal with its associated consequences.[169] Non-clinical therapists could assist bullied employees to restore their trust in the organisation, complement psychotherapeutic work, and rekindle a sense of safety in the organisation, and should not be overlooked.[170]

7.5.4 Health-care professionals

Access to health professionals following bullying could assist the victims, as employers cannot simply ignore potential health-related consequences.[171] Help for

[164] Kossek *et al* 2012: 745.
[165] Kossek *et al* 2012: 745.
[166] Kossek *et al* 2012: 745.
[167] 2012: 746.
[168] Kossek *et al* 2012: 746.
[169] Meglich-Sespico *et al* 2007: 36.
[170] Namie & Namie 2009a: 210.
[171] Meglich-Sespico *et al* 2007: 36.

individuals could be in the form of individual psychotherapy or group therapy, and the coach could even be a therapist to help restore the bullied victim's emotional health.[172]

7.5.5 Reference-checking and proper pre-hiring procedures

It has been said that American employers are not mobilised enough to keep potentially violent employees out of their businesses,[173] and no reasons could be found as to why this statement would not apply to the South African workplace as well. According to Kerr,[174] "[t]he process of hiring should involve ways of spotting troubled employees", and the recruitment process should thus enable managers to ask the right questions that may identify any problems. This would normally be preceded by proper training in recruitment, searching or spotting trends, asking the right questions to notice trends, or covertly or overtly held beliefs that show a pattern of victimisation.[175] The hiring of the right people is a key strategy for reducing bullying in the workplace, and Daniel[176] stresses the importance of appointing not only the best person for the job, but "a good fit for the organisation".

Proper reference-checking and pre-hiring procedures are great opportunities to keep potential perpetrators from entering the workplace. This could include screening of job applicants, and investigating as to why applicants left their previous jobs, and human resource officials or managers should be trained to spot any 'red flags'.[177] It has been found that a mere 40% of employers in the USA screen their current or potential employees, which could contribute to high workplace violence.[178]

Daniel[179] has added to this, proposing a two-day orientation programme for newly recruited personnel, where policies and procedures of the company are discussed, which should include discussions about the company's anti-bullying procedures.

[172] Namie & Namie 2009a: 210.
[173] Kerr 2010: 29.
[174] 2010: 29.
[175] Kerr 2010: 29.
[176] Daniel 2009: 80.
[177] Kerr 2010:29.
[178] Kerr 2010: 29,30.
[179] 2009: 56.

Training on the company's values, such as respect, excellence, integrity and service should regularly take place at staff meetings as a further aid to prevent bullying.[180]

The company GOODWILL in the USA introduced their anti-bullying policy by expanding their existing harassment policy, merely stating that interpersonal bullying was unacceptable in their company, and defined the prohibited conduct as "behaviour that bullies, demeans, intimidates, ridicules, insults, frightens, persecutes, exploits and/or threatens a targeted individual and would be perceived as such by a reasonable person".[181] Since the legal standing of internal policies in the USA is almost equal to that of a contractual agreement, and the position in South Africa is not much different, this is a good option to prevent bullying, provided it is accompanied by a proper procedure and sanction for non-compliance.

Other US companies simply never use the word 'bullying' in their policies, but expand their existing harassment policies by merely stating that their policy is "that all employees are entitled to a workplace where you are not harassed for any reason".[182]

7.5.6 Hotlines to report workplace bullying

Daniel[183] proposes the implementation of hotlines where workplace bullying can be reported, similar to the fraud and corruption hotlines in South Africa. If implemented, these hotlines need to be promoted: Daniel[184] cites the example of an organisation who attaches stubs to their payslips four times a year to remind employees to report not only financial misconduct at work, but also stealing, bullying or harassment. It would be extremely easy to instil this culture in South Africa, as anonymous hotline reporting of theft, financial misconduct and serious crimes is not a foreign concept. This could be considered by government and larger organisations in particular.

[180] Daniel 2009: 56,81.
[181] Daniel 2009: 56, with reference to Smith 2007.
[182] Daniel 2009: 57.
[183] 2009: 56.
[184] Daniel 2009: 56.

7.5.7 Cultural change

Kerr[185] states that in order to change an organisation's culture to one that is healthy and, thus, not rife with bullying behaviour, organisational change should be based on the organisational communication principle "CLEAR". This principle entails the following:

"C- Communication - Is it a priority to communicate?

L- Learn to listen. Then question should be asked whether management really listens or merely pays lip service to the concerns of employees or people?

E- Evaluate and examine. An investigation should be lodged into policies, strategies, procedures and tactics and the question answered whether they are up to date and current within the organisation's 'posture'.

A -Accountability should be established

R- Responses to issues"[186]

If extrapolated to a bullying environment, management should obviously not only pay lip service, but really listen to concerns raised; they should also act swiftly, and accept accountability. Response times should be quick where concerns have been raised; constant evaluation of policies must occur to ensure that they are up to date, while proper communication should always take place to curb workplace bullying and change the organisational culture to a healthy one with zero tolerance for workplace bullying.

Lutgen-Sandvik and Tracy[187] believe that communication is of the utmost importance in managing workplace bullying, and refer to the macro, meso and micro communicative elements in answering questions about workplace bullying. For communication about bullying to be effective in a workplace, one has to take cognisance of the everyday talk about bullying, which represents the so-called micro level; the meso or mid-level, where the question is eventually asked why management does not do something to prevent workplace bullying, or at least do

[185] 2010: 94.
[186] 2010: Appendix H.
[187] 2012: 8,9.

something about it after the fact, and lastly, the big-picture, macro-level communication process where bullying is concerned, namely that it supports and encourages aggression.[188] The bottom line is that all interventions need to address all three levels to be successful,[189] which once again confirms that a multi-pronged approach is needed to deal with workplace bullying.

7.6 Conflict resolution and workplace bullying

7.6.1 Dispute resolution

The South African Protection from Harassment Act[190] enables complainants to apply for a protection order from the magistrate's court, while complainants who use PEPUDA to claim for harassment are compelled to utilise the equality court as the forum to address their disputes.[191] Civil courts will deal with claims for vicarious liability, and the CCMA or a bargaining council will adjudicate claims for constructive dismissal. Moreover, the labour court will deal with harassment claims where it is assigned jurisdiction. Therefore, it is clear that there are various possibilities to address workplace bullying if it is seen to be harassment, which is a form of unfair discrimination.

Should policy be formulated to address workplace bullying, an agreed dispute resolution procedure could be agreed upon, which would cut costs, save time and afford legal clarity. The use of progressive discipline as a final internal strategy to get the message across that bullying is unacceptable is promoted, and early warnings that lead to dismissals are suggested as a means of dealing with and prohibiting bullying in the workplace.[192]

A fundamental knowledge and understanding of workplace bullying and workplace violence is necessary before any strategy should be implemented, especially when referring to recovery measures.[193] If the entity is smaller, the model may be simpler,

[188] Lutgen-Sandvik & Tracy 2012: 9.
[189] Lutgen-Sandvik & Tracy 2012: 9.
[190] 17 of 2011.
[191] Landman & Ndou 2013: 90.
[192] Kossek *et al* 2012: 745.
[193] Kerr 2010: 94.

and if the entity is larger, more role players may be involved.[194] This is one of the reasons why the suggested policy should be tailor-made for every sector, or left to employers to draft, taking into consideration the specifics of their own entities.

Daniel[195] refers to various alternative dispute resolution options in the USA, from which South Africa may wish to borrow in order to deal with bullying *ex post facto*. They include the following:

- Open-door policies: These encourage employees to meet with their immediate supervisor. This suggestion is problematic where the bully is the supervisor, but not where co-worker bullying is involved.[196]
- Senior management review: This next step, as a follow-up to an open-door policy, is proposed where the first step failed and the next level of management must be utilised to deal with bullying.[197] Both these steps as forms of alternative dispute resolution strongly remind one of the regular grievance procedures found in South African workplaces. This is a type of review that affords the aggrieved person the right to move up a level and try to have the conflict resolved.
- Peer review: This is where the aggrieved employee is afforded the chance to present his side of the story to a small panel of employees and supervisors selected from a pool who have already been trained in dispute resolution. Daniel[198] finds this a very effective method of alternative dispute resolution, as barriers between management and employees are broken down and employees participate in the entire process. This peer review process can be made binding on both parties or not, and if not, the dispute could be referred to mediation or arbitration.
- Facilitation: A neutral person in the organisation acts as a facilitator to bring the parties closer together, without deciding who is right or wrong.[199]
- Ombudsman: This is someone who generally reports to senior management, and may be a full or part-time employee contracted to act as an ombudsman. This person could also have been sourced from outside the company to provide an independent, confidential investigation into allegations, and may only divulge general

[194] Kerr 2010: 94.
[195] 2009: 81.
[196] Daniel 2009: 81
[197] Daniel 2009: 81-82.
[198] 2009: 82.
[199] Daniel 2009: 82

information to assist the company to resolve the dispute, but may not divulge specifics provided by the employees.[200]

7.6.2 Mediation as an alternative solution

Introduction and background

Seagriff[201] notes that mediation could be a suitable mechanism to diffuse workplace bullying, as it "encourages people in conflict to perceive and accept their commonalities, to acknowledge their differences, and see themselves as separate from their opponents". Mediation is a voluntary and informal process where parties to the alleged dispute select a neutral third party to assist them in reaching a negotiated settlement.[202] It serves as an alternative to adjudication or arbitration; could be agreed upon as part of a private agreement as disputes arise, or could form part of a prior-negotiated collective agreement or the internal policies of a company.[203]

There has been increased use of mediation to resolve conflict in the workplace, which can circumvent time-consuming and costly litigation.[204] The following are different types of mediation as a form of alternative dispute resolution, as per Seagriff [205] and Fox and Stallworth.[206]

- Facilitative mediation

Facilitative mediation is designed to overcome conflict by getting past the preconceived notions about the other party through dialogue.[207] This is done by a neutral mediator, who assists parties to "generate and assess proposals designed to accommodate those interests and positions", and can repair the broken

[200] Daniel 2009: 82.
[201] 2010: 576.
[202] Fox & Stallworth 2009: 226.
[203] Fox & Stallworth 2009: 266.
[204] Seagriff 2010: 594, with reference to Lipsky *et al*.
[205] 2010: 592-594.
[206] 2009: 226-227.
[207] Seagriff 2010: 592.

relationship.[208] This is the type of mediation best suited to tackle bullying, as it is a form of "interest-based mediation", which is therapeutic and achieves an actual outcome between the parties.[209]

- Transformative mediation

This can be described as a process of "conflict transformation", as its purpose is to move from a position of weakness to strength and from "self-absorption" to understanding of the other party.[210] This type of mediation is an option to explore, although facilitative mediation still seems more ideal for workplace bullying in particular.

- Evaluative mediation

In this type of mediation, the facilitator hears the relevant parties' compelling arguments, and then focuses more on the parties' legal rights and less on satisfying their personal interests,[211] and could be considered before a matter goes to trial.

Seagriff[212] duly notes that in-house conflict resolution is important to resolve bullying, and an in-house, neutral human resource practitioner could for example serve this purpose quite well. Due to the very nature of workplace bullying, which is characterised by a power imbalance, a policy prescribing mediation could level the playing field, because the employer thereby issues an instruction that workplace policies must be respected and conflict be resolved, and effectively removes the barrier of power, as all relevant parties work together to resolve the conflict[213] before it escalates and the relationship is severed.

The advantages of alternative dispute resolution are a decrease in direct, indirect and general opportunity costs resulting from workplace bullying or conflict,[214] as well

[208] Seagriff 2010: 595.
[209] Seagriff 2010: 596.
[210] Seagriff 2010: 592.
[211] Seagriff 2010: 593.
[212] 2010: 600.
[213] Seagriff 2010: 601.
[214] Fox & Stallworth 2009: 227.

as the factoring in of the human aspect and the psychological and physical consequences of bullying,[215] which makes it a field to seriously consider where bullying in the workplace occurs.

Ethical and legal concerns in drafting an alternative dispute resolution system should also not be underestimated, as they are crucial to its successful implementation.[216]

Research by Law and colleagues[217] indicates that the psychosocial safety climate (which can be measured), stemming largely from management practices, is an indicator of workplace bullying. Effective interventions at organisational level can be made via a change in management and supervisory practices, aided by human resource policies (which must have clear reporting systems and procedures to deal with bullying complaints in a timeous fashion), to prevent problems with employees' psychosocial health.[218]

7.7 Final notes on a legal response to workplace bullying in South Africa

Le Roux and colleagues[219] believe that workplace bullying is far too serious a problem to simply ignore until NEDLAC, the South African Law Commission, trade unions, employers and other interested parties have finally developed new legislation or a code to deal with it. They quite correctly suggest the following:

- "Employers need to develop their own anti-bullying policies.[220]
- Employers need to educate managers and employees on suitable workplace behaviours.
- Employers have to establish and/or advertise grievance procedures to report and investigate allegations of workplace bullying.

[215] Fox & Stallworth 2009: 227.
[216] Fox & Stallworth 2009: 228. Also see p 227-228 for further detail on utilising and drafting an alternative dispute resolution system.
[217] Law *et al* 2011: 1786.
[218] Law *et al* 2011: 1791.
[219] 2010: 66, with reference to Kieseker & Marchant; Rayner & Cooper; Kelloway *et al*.
[220] Fox & Stallworth 2009: 230 note that all concerns should be addressed as early as possible and at the lowest possible level, similar to grievance procedures.

- Human resource practitioners should be educated in investigation processes to investigate bully claims.
- Work cultures of private and public sectors organisations should be monitored to identify any stress-related absence due to bullying.
- Long-term absences from work should be monitored to identify any stress-related absence due to bullying.
- Suitable reporting mechanisms should be established between human resource departments and senior management to report workplace bullying.
- Senior management should actively support the introduction of procedures, policies and practices to alleviate workplace bullying."[221]

Hoel and Einarsen,[222] who investigated the success of legislation in Sweden to regulate bullying, clearly state that one should not overestimate the legislative regulation of bullying, and that more emphasis should be placed on ongoing prevention and control of bullying through policies and procedures to deal with problems internally as they arise. This should include a clear response to formal complaints, and an external body such as an astute inspectorate (similar to the South African CCMA) to deal with the process.[223] Drawing on South Africa's own experience in the drafting of sexual harassment policies, it is now clear that the mere existence of a policy is not enough to succeed – it should be clearly phrased, readily displayed at strategic points, and regularly evaluated to ensure its relevance.[224]

The question for our legislatures should be: "Who will suffer more harm: victims of workplace bullying if we do not pass legislation, or employees and employers in general who have to comply with the terms of the litigation if we should pass it?"[225] An integrated conflict resolution system ought to afford employees the right to choose a problem-solving approach, to seek determination thereof, and to exercise their rights in the workplace.[226] Policies provide a set of coherent measures that should only be implemented after an assessment,[227] and it is advised that government, employers and trade unions become involved to effect a proper

[221] Le Roux *et al* 2010: 66, with reference to Kieseker & Marchant; Rayner & Cooper; Kelloway *et al*.
[222] 2010: 47.
[223] Hoel & Einarsen 2010: 47, with reference to Einarsen & Hoel 2008.
[224] Joubert, Van Wyk & Rothmann 2011: 2.
[225] Browne & Smith 2010: 158.
[226] Fox & Stallworth 2009: 231.
[227] Velázquez 2010-2011: 189.

assessment of the prevalence of workplace bullying in both the private and state sector.

It is thus suggested that employers be obliged to comply with their own, internal policies drafted to prohibit and deal with workplace bullying. There should be a sanction for non-compliance with their own policies or a failure in drafting and properly implementing such internal policies, which should include the participation of all relevant stakeholders. The legislature should take heed of the viewpoint that "….seen through the eyes of labour process theory, bullying is better conceived as an endemic feature of the capitalist employment relationship".[228]

This concept is not foreign to South African labour law: The EEA, for example, compels employers to draft and adhere to their own employment equity policies.[229] Sanctions are prescribed for non-compliance, and labour inspectors enforce such legislation. Such a route could easily be explored, which would compel employers to give effect to section 9 of the 1996 Constitution.[230]

It is therefore proposed that a similar route be followed where bullying in the South African workplace is concerned. The drafting and implementation of an own, internal anti-bullying policy would suit even small businesses, as it could be tailor-made to suit the size and type of organisation. Government should definitely not be excluded from this obligation, as research has shown that bullying in governments is extremely pervasive.

Olmstead[231] has drafted a checklist for negative behaviour identification in the nursing industry, which could easily be adapted to fit most workplaces, in order to facilitate understanding of workplace bullying deeds. This could come in handy as we move towards a uniform understanding of workplace bullying and uniform standards in employment.

[228] Fox 7 Stallworth 2011:7.
[229] EEA s 20, which prescribes the drafting of an EE plan, and s 16-18, which prescribes consultation with trade unions, workplace forums and representatives of non-union employees.
[230] S 9 of the Constitution, where it is stated that everyone is equal before the law; has the right to full and equal enjoyment of all rights and freedoms, and is protected against unfair discrimination, thereby upholding a fundamental value in South Africa. See Du Plessis & Fouche 2012: 89.
[231] 2013: 54.

Hoel and Einarsen[232] believe that if formal regulation should be proposed, legislation alone will fail to address bullying.[233] There is definitely scope and a dire need for addressing bullying via separate legislation in South Africa, but then the ground has to be properly prepared[234] before such legislation is passed. This would include a range of interventions by local employers and trade unions as well as key stakeholders, and form part of a holistic and multi-level approach to the problem.[235] Training of the CCMA commissioners, employers, employees, human resource community and the greater legal fraternity would also be suggested long before legislation is passed.

However, the question is whether South Africa needs the added burden of additional legislation dealing with bullying, as the country's law does not display anti-discrimination provisions in a so-called closed list like those the UK, USA and even Australia. Also, with no proper prevalence studies, no awareness of bullying as a cause of action, no training in this regard, and especially in view of the passing of the recent Protection from Harassment Act,[236] it is suggested that there still is a need for separate legislation dealing with this problem in the long term, but that this pervasive issue is too serious to wait until such has been promulgated. Medium and short term solutions need to be investigated.

It must however be kept in mind that the Protection from Harassment Act, although broad enough to be applied in the workplace, covers only 'harassment' deeds of bullying as well as cyber harassment deeds, but falls short in those instances where the deeds no not amount to harassment. It is also not advisable to involve the police at the workplace in effecting arrests (for which the act provides).

Therefore, a multi-pronged approach is proposed to deal with and combat workplace bullying in South Africa. The creation of awareness of bullying, training in this regard, the drafting of internal policies, and the utilisation of existing avenues available to victims should enjoy preference. The requirements to avoid vicarious and general liability for bullying should be clearly communicated, and it is foreseen that bullying

[232] 2010: 46.
[233] Hoel & Einarsen 2010: 46.
[234] Knowledge of bullying, methodology and a supportive culture are key to the successful implementation of legislation dealing with bullying, as per Hoel & Einarsen 2010: 47.
[235] Hoel & Einarsen 2010: 47.
[236] 17 of 2011.

will follow a similar legal route than sexual harassment in being acknowledged in the South African workplace.

Although separate legislation is not absolutely necessary in South Africa, the Protection from Harassment Act could be expanded to include a definition for bullying in the workplace, specifically stipulating that bullying is a form of harassment. This should be repeated in the EEA,[237] while the development of a Code of Good Practice on the Handling of Workplace Bullying in line with the LRA[238] is also proposed. This would be similar to the Code of Good Practice on the Handling of Sexual Harassment Cases.[239] It is further suggested that the EEA be amended to also contain a provision that all employers should have an anti-bullying policy in place, with a proposed punitive sanction to compel employers to adhere to their own codes. Labour inspectors could easily enforce such a provision.

Bullying in schools has received ample attention in the past few years, and counselling, training, education, mediation, restorative justice, the Bully Buster programme and school packs containing anti-bullying policies and programmes have all seen the light.[240] School bullying seems to favour a definition that includes that the negative acts had to have displayed an intention to harm, had to have been repetitive, intentionally negative, and had to have presented an imbalance of power, which could be physical, social or otherwise.[241] It is seemingly easier to combat bullying if there is a common understanding thereof, hence the drive towards uniformity in South Africa as a stepping stone to combat this phenomenon in the workplace.

De Wet[242] has found that an effective anti-bullying programme should be formulated to speak to the individual (micro) level, organisation (meso) and community level (macro). The time has come to take cognisance of the development in anti-bullying programmes in schools to guide us towards a uniform South African approach to bullying, even in the workplace.

[237] 55 of 1998.
[238] 66 of 1995.
[239] GN 1357 in GG 27865 of 4 August 2005, replacing the original code.
[240] De Wet 2011b: 6.
[241] Jordan & Austin 2012: 442.
[242] De Wet 2011b: 5-6.

According to Daniel,[243] critics of regulating bullying behaviour have said the following:

> *What you call sabotage, I call competition.*
>
> *What you call conniving deception, I call savvy ambition.*
>
> *What you call abuse and harassment, I call shrewd gamesmanship.*
>
> *What you call record-keeping, I call "Hoover Files". And that's the workplace. It's brutal. It ain't for sissies. Just play the game.*[244]

The only solution seems to be training in order to be able to distinguish a so-called 'tough boss' from a bully. Unlike a bully, a 'tough boss' would display overwhelmingly positive characteristics, such as interactive two-way communication, engaging in positive mentoring and tutoring to ensure the success of the mentee, and ensuring honest and fair conflict through healthy debate and discussions.[245] The fairness of a tough manager is markedly visible, and he acts self-controlled and unemotional to further the goals of the enterprise, and although he is results and organisationally orientated, he consistently acts in the best interest of the company in a predictable and fair manner.[246] The bully, on the other hand, favours the misuse of power, displays a fragrant disregard for policies and procedures, and is personally focused and self-interested, with the goals of the enterprise lagging far behind. Bullies also display irrational outbursts of emotion and are unpredictable, and their actions can be branded as inconsistent and unfair.[247]

Recommendations will inevitably have to evolve from a uniform understanding of bullying in South Africa, and individuals will have to exhaust all internal company policies, such as reporting the bullying, lodging an investigation into the allegations, utilising the internal policies regarding dispute resolution, after or in addition to which the individual could utilise existing legal remedies available.[248]

It is thus tendered that:

- South Africa should adopt a uniform definition for workplace bullying

[243] Daniel 2009: 67.
[244] Daniel 2009: 67.
[245] Daniel 2009: 69.
[246] Daniel 2009:69.
[247] Daniel 2009: 67- 68.
[248] Martin *et al* 2009: 153.

- The current definitions for “workplace” should be maintained
- Awareness should be created of workplace bullying and training should be effected in this regard
- National legislation, as a long term solution, should be promulgated to protect employees and employers from workplace bullying
- In the absence thereof, a Code of Good Practice, similar to the Code dealing with sexual harassment in the workplace, should be issues to guide employers and employees in the management and prevention of workplace bullying.
- In the meantime could consideration given to expand the PHA to specifically include workplace bullying
- Current legislation such as the PHA and EEA should compel employers to adopt and implement such codes
- Employers should immediately be compelled to implement policies or codes of conduct which will set the standards regarding bullying at each workplace

Bullying in South Africa seems to be such a pervasive problem that the matter should be referred to the South African Law Commission and the Employment Equity Commission as a matter of urgency; the above proposals should be considered by all stakeholders, and policy should be developed by each and every enterprise in South Africa to prevent and manage bullying in the workplace as a short and medium-term solution. Clearly, “the concepts of stress, violence and psychosocial risks are not yet legally consolidated”,[249] and efforts should be made to arrive at a uniform approach to workplace bullying in South Africa and to overcome the confusion about which route to follow.

Placing an unnecessary additional burden on employers may have a negative effect on job security, as the business environment already has to adapt to increasingly complex technologies as well as political and economic frameworks, and employers need to adhere to a plethora of legal instruments applicable to the working environment, ranging from several labour law provisions to provisions relating to tax,

[249] Velázquez 2010-2011: 201.

social security, health and safety, and insurance.[250] It is however submitted that bullying in the workplace is so serious that "discomfort" should make way for proper legislation and codes preventing and managing workplace bullying.

Too many targets of workplace bullying have however found themselves abandoned by the law – working in environments that are conducive to threats of a personal nature and suffer from decreased productivity due to bullying – for this problem to be ignored or simply wished away. As Kerr said,[251] "this is a human problem that links the depth of human emotion to acts of frustration as a last resort to fix the unfixable or to regain some sort of control of a situation". The multi-pronged approach proposed in this thesis will break the awkward silence that has been reigning thus far in South Africa on the matter of workplace bullying, and is regarded as the best way forward in preventing and managing it in the local context.

> *I decided it is better to scream … Silence is the real crime against humanity.*[252]

[250] Smit & Van Eck 2010: 46.
[251] Kerr 2010: Preface XXI.
[252] Nadezhda Mandelstam, as cited in Namie & Namie 2009b: 245.

7.8 Summary of recommendations

Employers are obliged to ensure a *bully-free workplace*	• Employers have an obligation to ensure a safe and healthy workplace, which should extend to employees' mental health. • The definition of "workplace" shoud remain as is in South African labour law.
Accept the word "bullying" and "victim" into our legal vocabulary	• Accept the word "bullying" into the South African workplace, and not the words "moral harassment", "incivility", "employee abuse" or "workplace aggression" as often referred to in other jurisdictions to describe bullying behaviour. • It is recommended that the word "victim" instead of "target" is used to describe the employee affected by bullying in the workplace.
Define workplace bullying in conjuction with all stakeholders	•There is no uniform definition available for workplace bullying,: different jurisdictions define it according to their own specifics. •Bullying in a South African milieu denotes "any unfavourable or offensive conduct on the part of a person or persons, which has the effect of creating a hostile workplace environment", according to Le Roux and colleagues' (2010. •*There is a need to get all stakheholdders such as NEDLAC, the SALC and others involved in compiling a unique definition for workplace bullying for South Africa*
Proposed working definition of workplace bullying	•"Conduct of an employee or employer or groups of employees and employers, directed at an employee, employer or groups of employees and employers, which a reasonable person would find hostile or offensive and is unrelated to an employer's legitimate business interest. Abusive conduct may include but is not limited to repeated infliction of verbal abuse such as the use of derogatory remarks, insults, epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, humiliating or creates a risk to health and safety or relates to the gradual sabotage or undermining of a person's work performance. Bullying is not reasonable action taken in a reasonable manner by an employer to transfer, demote, discipline, counsel, retrench or dismiss an employee." •Von Bergen *et al* 2006: 19.

Accept that bullying refers to multiple acts	•Research has indicated that the notion of bullying refers to multiple actions and, thus, persistency and frequency to be defined as bullying. A single deed does not constitute bullying, but could be victimisation or any one of a myriad other wrongs.
Take note that normal managerial action is not bullying	•It is not bullying when a manager exercises his/her managerial prerogative in a fair manner. Fair performance management is not bullying, nor is giving fair instructions and taking fair disciplinary action.
Accept that workplace bullying is costly to the organisation and individual	•Bullying costs companies millions per year; not only in terms of litigation, but in decreased productivity, absenteeism and a demotivated workforce. •The individual could suffer from depression, display suicidal tendencies, suffer from anxiety and severe stress - all of which lead to abnormally high absenteeism and low morale.
Bullying is partly harassment, partly a dignity violation and displays elements of a health and safety matter	•In the UK, bullying is viewed as a dignity violation; in the USA, it is seen as harassment, and in Australia, it is regarded from a health and safety perspective. •Due to South Africa's *sui generis* legal system, reaserchers and the legislature do not have to choose, as characteristics of all three are indicated.
Workplace bullying is a pervasive problem, for which proactive measures meed to be instituted	•In a UK study, it was shown that six out of ten employees had been exposed to workplace bullying over the six months preceding the research.. •Altogether 31-77% of South Africans have reported workplace bullying in the limited studies conducted, while 37% of employees have been bullied in the USA, equating to 54 million employees. It is thus a pervasive problem.
Bullying presents itself as a power play meant to demean or humiliate	•It presents itself as: •verbal abuse (53%); •threats, intimidation, humiliation (53%); •interference with performance (45%); •abuse of authority (47%); and •destruction of relationships (30%).

"Bullying" is not necessarily illegal and often does not constitute harassment or victimisation	•The top ten bullying acts are: blame for 'errors', unreasonable job demands, criticism of ability, inconsistent compliance with rules, threats of job loss, insults and put-downs, discounting, denial of accomplishments, exclusion or 'ice-outs', yelling, screaming, or stealing another's credit. •These actions or omissions are clearly not illegal.
Vicitms of workplace bullying sufere severe negative effects	•Both physical and psychological effects have been indicated by victims of workplace bullying. These include suicide, anxiety and a myriad of other sympoms. Low morale, loss of effectivity and loss of workdays to employers have been shown. • 10% of suicides in the USA can be ascribed to workplace bullying.
Employers suffer too	•Employers have to foot the bill for legal costs and could be sued on grounds of vicarious liability •They need to deal with a negative workforce where bullying is rife which impacts negatively on productivity and the retention of staff.
Witnesses and bystanders of bullying suffer as much as bullied employees	• The South African legislature needs to take cognisance of the fact that bystander witnesses of bullying need to be protected as well, since research has shown that bullied victims and witnesses thereto suffer the same ill effects
There is no single law that protects from bullying in the workplace in South Africa	• Bullying research has only begun in South Africa. • If the bullying act does not amount to harassment or a crime, or cannot be seen as victimisation or unfair discrimination, it is not illegal. • This presents a legal *lacuna*
Both proactive and reactive measures and remedies need to be institued to protect boithe employers and employees.	• There is a need for both proactive measures and reactive, *ex post facto* remedies for the victims of workplace bullying. • Both employers amd employees need to be protected from bullies and the ill effects of workplace bullying.

Separate legislation is recommended as a long terms solution to the problem	•**New legislation is absolutely necessary as it will provide legal clarity.** •Caims currently have to be presented and framed in such a way as to fit the maze of legal avenues and options available.
A new code of Good Practice is recommended, similar to the code dealing with Sexual Harassment in the absence of legislation	•Should the South African Law Commission or NEDALC participants find that additional legislation is unnecessary, it is proposed that a code of good practice (similar to the code dealing with sexual harassment in employment) be added as a schedule to the Labour Relations Act. •This cannot be done by way of simply expanding the existing sexual harassment code, as the specific nature of "bullying" does not fit the mould of "sexual harassment" prohibition.
The Protection from Harassment Act 17 of 2011 is not an ideal remedy for workplace bullying	•The Protection from Harassment Act lends itself to be used to deal with bullying in the workplace, but falls short in many ways, mainly due to unintended consequences •The remedies offered do not necessarily *prevent* workplace bullying. •One certainly does not want the police involved in internal company matters. •The act merely protects against bullying where it amounts to harassment, not in other instances. •However, it is still recommended that 'workplace bullying' be added as a prohibition in the act, as the wording is sufficiently wide-reaching to allow for utilisation in the workplace.
Drafting and implementation of internal policies are recommended	•Employers should be advised to draft and implement internal policies in conjunction with all stakeholders. •Australia's example could be followed, in that model draft documents are available to employers, employees and trade unions, which organisations can adapt to suit specific business needs.

Both proactive measures and reactive remedies need to be instituted	• There is a need for both proactive measures and reactive, *ex post facto* remedies for the victims of workplace bullying. • Employers need to be protected from bullies and the ill effects of workplace bullying.
In the absence of separate legislation, the development of a new Code of Good Practice on Dealing with Workplace Bullying, similar to the Code of Good Practice on Dealing with Sexual Harassment Cases, is recommended.	•Should the South African Law Commission find that additional legislation is unnecessary, it is proposed that a code of good practice (similar to the code dealing with sexual harassment in employment) be added as a schedule to the Labour Relations Act. •This cannot be done by way of simply expanding the existing sexual harassment code, as the specific nature of 'bullying' does not fit the mould of 'sexual harassment' prohibition.
In addition to legislation and/or a code dealing with workplace bullying, the drafting and implementation of internal policies are recommended.	•Employers should be advised to draft and implement internal policies in conjunction with all stakeholders. •Australia's example could be followed, in that model draft documents are available to employers, employees and trade unions, which organisations can adapt to suit specific business needs.

Annexure A: Draft policy to prevent and deal with workplace bullying

The following draft policy has been adapted from Australia's model draft Code of Practice for Preventing and Responding to Workplace Bullying, research done by Yamada in drafting the USA's Healthy Workplace Bill, as well as legal writings by the Namies,[253] Kohut[254] and other authors in the field. It is means to serve as a draft document for consideration by all relevant stakeholders and the South African Law Commission.

(Name of legal entity**) believes that all workers should work in an environment free from bullying. Bullying is regarded as unacceptable, and will not be tolerated.**

Workplace bullying is defined as repeated, unreasonable behaviour directed towards a worker or a group of workers.

Bullying can occur horizontally, vertically, upward, downward and/or by electronic means.

Workplace bullying can also be committed via the misuse of social media.

Repeated behaviour refers to persistent conduct, and can entail a range of behaviours over time. Several individual acts over time could lead to a pattern of bullying behaviour.

Unreasonable behaviour means behaviour that a reasonable person, having regard for the circumstances, would see as unreasonable, including behaviour that is victimising, humiliating, intimidating or threatening.

Examples of behaviour that may be considered to be workplace bullying, if the above three criteria are met, include:

- abusive, insulting or offensive language or comments;
- use of derogatory remarks;
- unjustified criticism or complaints;
- deliberately excluding someone from workplace activities;
- withholding information that is vital for effective work performance;
- setting unreasonable timelines or constantly changing deadlines;
- setting tasks that are unreasonably below or beyond a person's skill level;

[253] Various, including 2009a & b.
[254] 2008: 261.

- denying access to information, supervision, consultation or resources in such a way that it has a detriment to the worker;
- spreading misinformation or malicious rumours;
- changing work arrangements, such as rosters and leave, to deliberately inconvenience a particular worker or workers;
- excessive scrutiny at work;
- work sabotage;
- giving someone the ‘silent treatment’;
- social ostracism;
- electronic bullying;
- abusive supervision; and
- isolation.

Bullying does not include normal managerial actions such as performance management, promotion, demotion or disciplinary action taken, if based on legal principles or managerial prerogative.

If the employer exercised reasonable care to prevent bullying or, where bullying does occur, took the necessary steps to correct or address it, and/or the employee unreasonably failed to take advantage of the corrective opportunities provided by the employer, the employer would not be held liable for bullying at work.

Should the employer take normal employment decisions based on business interests, such as promotion, demotion, dismissal, measures taken regarding poor performance, and counselling, the employer will not be held liable for bullying.

Single incidents can also present a risk to health and safety, and will not be tolerated.

(Name of company) and its workers have a responsibility to ensure that workers are not exposed to bullying and do not engage in this behaviour.

(Name of company) has procedures to deal with workplace bullying. All reports will be treated seriously and dealt with promptly, confidentially and impartially.

(Name of company) encourages all workers to take action to manage workplace bullying, and to report workplace bullying in line with the procedure. The regular disciplinary and grievance procedures should be used.

(Name of company) will ensure that no worker who makes reports, nor anyone else who may be involved, is victimised.

Confidentiality will be respected by all involved in bullying claims, and is regarded as important.

The contact person for reporting any alleged bullying in this workplace is <insert name>.

Consequences of breaches

If anyone should fail to adhere to this policy, it may result in disciplinary action, including warnings, final written warnings, transfer, counselling or dismissal, depending on the circumstances.

Compulsory attendance of anger management and other prescribed training that could prevent or minimise bullying is compulsory if ordered.

Mediation is recommended where applicable, and it is compulsory to utilise the internal disciplinary and grievance procedures before disputes are declared.

This policy does not detract from any other legal means that are available to the victims of workplace bullying.

Signed: _____

Dated: _____

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SUMMARY

Bullying in the workplace is a kind of aggression that occurs where an individual or group intimidates, excludes, harasses, insults, mistreats or demeans another individual or group at work, either directly or indirectly.

A complex power imbalance presents itself, in that the perpetrator uses formal or informal power over his or her victim to such an extent that the victim is almost powerless to defend him or herself. Bullying can occur from the top to the bottom, from the bottom to the top, or horizontally.

Not all kinds of bullying give rise to illegal acts, but even if menial bullying continues over time, it can give rise to severe negative effects. Due to new digital developments in employment, the management of cyberbullying, as a form of workplace bullying, complicates the legal dilemma even further.

Not only do bullied victims have to continue in a working relationship where the bullying took place, but depression, stress, anxiety, post-traumatic stress disorder and a plethora of physical illnesses also take their toll, as reflected in abnormally high turnover and absenteeism figures. If no timeous intervention occurs early during the bullying, severe psychological problems have been reported by bullied victims, which render them incapable to continue with work, or lead to summary resignations accompanied by claims for constructive dismissal. Low morale and negativity have been shown to be linked to workplace bullying and impact negatively on the organisation as a whole, and vicarious liability for the employer may follow.

Due to the fact that there is no universally accepted definition for bullying and different jurisdictions place bullying on different continuums, it adds to the problem of regulating and preventing workplace bullying. The question has been asked whether there is a need to legislate employees into being “nice” to one another, but that merely shows the lack of knowledge about the notion and effects of workplace bullying. Sexual harassment is a form of human behaviour and is regulated extensively. With bullying four times more prevalent than sexual harassment, there is no reason why bullying should not be regulated also.

Many countries, such as Sweden, Germany and France, have legislated bullying and there is a strong drive in the USA to have the Healthy Workplace Bill passed. Many states have introduced different versions thereof, but none have been passed. The USA treats bullying as a form of harassment, and no protection exists for employees who fall outside the scope of certain “classes”, unless, of course, the bullying amounts to criminal actions or tort action.

The UK treats workplace bullying as a dignity violation and extensively uses anti-stalking law, in the form of the Protection from Harassment Act of 1997, to curb bullying.

Australia views bullying from a health and safety perspective and, in South Australia, it is currently dealt with by means of Codes. There is a drive to eradicate bullying from the workplace on a national level through a new Code (dealing with workplace bullying), for which public commentary has recently closed.

Little has however been done in South Africa to create awareness of, or deal with, this peril. The country is in dire need of a uniform approach to workplace bullying. It is not clear on which continuum bullying should be placed, but as our discrimination laws are not limited to certain “classes”, it is not suggested that separate legislation should be passed. The new Protection from Harassment Act could be used, as in the UK. Employers should embark on the creation and implementation of zero-tolerance policies in the workplace to deal with this pervasive problem.

For too long the victims of workplace bullying have suffered silently at the hands of bullies.

Keywords: workplace bullying, workplace harassment, workplace mobbing, unfair labour discrimination, workplace efficiency, workplace discrimination, hostile working environment, workplace violence, incivility, moral harassment, employee dignity.

SAMEVATTING

Bullebakkery in die werkplek is ’n soort aggressie waar ’n individu of groep ’n ander individu of groep hetsy direk of indirek by die werk intimideer, uitsluit, teister, beledig, mishandel of verneder.

Daar is ’n komplekse magswanbalans ter sprake in die sin dat die oortreder dermate formele of informele mag oor sy/haar slagoffer uitoefen dat dit vir die slagoffer bykans onmoontlik is om hom-/haarself te beskerm. Bullebakkery kan van bo na onder, van onder na bo óf horisontaal geskied.

Nie alle soorte bullebakkery lei tot onwettige handelinge nie, maar selfs geringe bullebakkery wat oor ’n tydperk voortduur, kan mettertyd ernstige negatiewe gevolge hê. Weens nuwe digitale ontwikkelings in die werkplek, maak die bestuur van kuberbullebakkery – synde ’n vorm van bullebakkery in die werkplek – die regsdilemma al hoe groter.

Nie net moet die slagoffer aanbly in die werksverhouding waar die bullebakkery plaasgevind het nie, maar depressie, stres, angs, post-traumatiese stressteuring en ’n magdom fisiese ongesteldhede begin eis ook hul tol, soos die abnormaal hoë omset- en afwesigheidsyfers toon. Waar daar nie vroeg genoeg gedurende die bullebakkery ingegryp word nie, het slagoffers al ernstige sielkundige probleme ontwikkel, wat hulle onbevoeg laat om met hul werk voort te gaan, of tot summiere

bedankings tesame met eise vir konstruktiewe ontslag lei. ’n Swak moreel en negatiwiteit is ook al met bullebakkery in die werkplek verbind. Dit het ’n negatiewe uitwerking op die organisasie in die geheel, en middellike aanspreeklikheid vir die werkgewer kan boonop volg.

Die feit dat daar geen universeel aanvaarde omskrywing is vir bullebakkery nie en verskillende jurisdiksies die verskynsel op verskillende kontinuums plaas, maak dit selfs moeiliker om dit in die werkplek te reguleer en te voorkom. Die vraag is al gevra of daar ’n behoefte is om werknemers volgens wet te verplig om “gaaf” met mekaar te wees. So ’n siening dui egter bloot op die gebrek aan kennis van die verskynsel en uitwerkings van bullebakkery in die werkplek. Seksuele teistering is ’n vorm van menslike gedrag en word breedvoerig gereguleer. Aangesien bullebakkery vier keer meer as seksuele teistering voorkom, is daar geen werklike rede waarom bullebakkery nie ook gereguleer kan word nie.

Lande soos Swede, Duitsland en Frankryk het wetgewing oor bullebakkery aanvaar, en drukgroepe in Amerika is tans hard aan die werk om die Wetsontwerp op Gesonde Werkplekke deurgevoer te kry. Verskeie Amerikaanse state het reeds verskillende weergawes daarvan voorgestel, maar niks daarvan is nog aanvaar nie. Amerika beskou bullebakkery as ’n vorm van teistering, met geen beskerming vir werknemers wat buite die bestek van sekere “klasse” val nie, tensy die bullebakkery natuurlik op misdrywe of delikte neerkom.

Die Verenigde Koninkryk hanteer bullebakkery in die werkplek as ’n skending van menswaardigheid, en maak uitvoerig gebruik van wetgewing teen bekruipery – in die vorm van die Wet op Beskerming teen Teistering van 1997 – om bullebakkery te bekamp.

Australië beskou bullebakkery uit ’n gesondheid- en veiligheidsoogpunt. In Suid-Australië word dit deur middel van sogenaamde kodes hanteer. ’n Nuwe nasionale kode oor bullebakkery in die werkplek is daarop toegespits om dié verskynsel uit werkplekke te verdryf, en die tydperk vir openbare kommentaar op dié kode het onlangs gesluit.

Tog is bitter weinig tot dusver in Suid-Afrika gedoen om bewustheid te wek van hierdie probleem óf dit te hanteer. Die land kom dus dringend ’n eenvormige benadering tot bullebakkery in die werkplek kort. Dit is nie duidelik op watter kontinuum bullebakkery geplaas behoort te word nie, maar aangesien ons diskriminasiewette nie tot sekere “klasse” beperk is nie, hoef afsonderlike wetgewing nie noodwendig uitgevaardig te word nie. Soos in die Verenigde Koninkryk, kan die nuwe Wet op Beskerming teen Teistering byvoorbeeld gebruik word. Werkgewers behoort hulle ook te beywer vir die ontwikkeling en inwerkingstelling van nulverdraagsaamheidsbeleid oor bullebakkery om hierdie diepgaande probleem die hoof te bied.

Slagoffers van bullebakkery in die werkplek het lank genoeg in stilte swaargekry.

Trefwoorde: bullebakkery in die werkplek, teistering in die werkplek, toetakeling in die werkplek, onbillike arbeidsdiskriminasie, doeltreffendheid in die werkplek, diskriminasie in die werkplek, vyandige werksomgewing, geweld in die werkplek, onbeleefdheid, morele teistering, werknemerwaardigheid.