Chapter 20
(Non)existent Laws of Workplace Cyberbullying: Limitations of Legal Redress in a Digitized Market

Harrison M. Rosenthal
University of Kansas, USA

Genelle I. Belmas
University of Kansas, USA

ABSTRACT

This chapter chronicles the legislative and jurisprudential history of workplace bullying and analyzes new frameworks for applying employee harassment laws to the digital era. Part I considers the sociolegal underpinnings of workplace harassment found in Title VII of the 1964 Civil Rights Act. The authors discuss how Title VII and its legal progeny gave way to "hostile work environment" claims. Part II discusses leading U.S. Supreme Court precedent, the creation of an affirmative defense for employers, and the limitations of that defense, including those developing in state and local jurisdictions. Part III discusses prevailing solutions and raises questions not yet addressed in the legal literature. Findings reveal that American jurisprudence is ill-set to protect or compensate workers injured by bullying—either cyber or physical.

INTRODUCTION

Swedish psychologist Heinz Leymann conducted the first serious academic inquiry into workplace bullying, or what he called "workplace mobbing," in the late 1980s (Leymann, 1990; 1996). This seminal research brought bullying out of the scholastic context and shed light on the psychopathological ramifications of organizational harassment (Nolfe et al., 2007). Workplace bullying has since become an interdisciplinary focal point in fields ranging from occupational health (Quine, 2003), to epidemiology (Einarsen & Skogstad, 1996), to management research (Branch et al., 2013). Topical scholarship

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proliferated concurrently with the development of new media. The effects of bullying are generally thought to be amplified through electronic forms of contact for two reasons (Campbell, 2005; Dooley et al., 2009; Tokunaga, 2010). First, the public and anonymous natures that digital bullying pose make people perceive online bullying as worse than in-person bullying (Sticca & Perren, 2013). Second, the ubiquitous nature of new media allows workplace interactions, and by extension harassment and bullying, to extend "beyond the office's 'four walls'" (Gelms, 2012, p. 259). This ubiquity provides bullies with ample time and resources to target victims (West et al., 2014).

Legal scholarship, however, has been slow to study the effects of workplace cyberharassment (West et al., 2014). The recent codification of school bullying laws, promulgated by the out-of-classroom reach new media have on student-to-student interactions, is strengthening the workplace anti-bullying movement and societal acceptance of anti-bullying legislation generally (Bloom, 2007). As state legislatures begin to codify school bullying laws, advocacy groups are successfully building support for workplace anti-bullying legislation. Yet while 29 states and two territories have introduced workplace bullying legislation, no proposal has been codified into law (Workplace Bullying Institute, n.d.-a).

Furthermore, workplace harassment research is rejecting the plaintiff-centered narrative that legal protection from workplace bullying necessarily harms the employer's financial interests. This is not a zero-sum relationship. The law and economics literature, heavily influenced by organizational and industrial psychology, is recognizing adverse ramifications bullying has on human and economic capital (Einarsen et al., 2010). Workplace bullying may lead to individual psychological damages, impaired interpersonal relationships, and third-party distress—for which harmed workers may seek recourse in tort action (Martin & LaVan, 2010). Victim demoralization, in turn, leads to environmental toxicity, which diminishes corporate productivity and organizational efficiency (Vega & Comer, 2005). Thus, the psychological effects that workplace bullying has on an employer's financial situation likely outweighs the potential economic ramifications that workplace bullying legislation would put on industry (Yamada, 2010).

The relationship between workplace bullying and the law has become increasingly complicated. Present common law and statutory remedies provide inadequate redress because such online harassment falls outside the bounds of "traditional workplace harassment" (Coletta, 2017, p. 450). Current harassment law has several key limitations (Paul, 2015). First, legal remedies are only available to harassment occurring in certain protected settings, such as a physical workplace or school. Second, the law assumes that the harassment and resulting harm occur in the same protected setting. With the advent of virtual business and digital communications, the bounds of the workplace have become increasingly blurred such that bullied workers have been unable to find legal recourse for harms occurring wholly or partially online (Franks, 2011).

In sum, workplace harassment has lagged behind the proliferation of digital media. Current legal frameworks necessitate that bullying occur in physical settings, such that cyberharassment often precludes bullied victims from obtaining legal redress. This chapter chronicles the legislative and jurisprudential histories of workplace bullying and analyzes new frameworks for applying cyberbullying laws to the digital era. Part I begins with the legislative underpinnings of workplace harassment found in Title VII of the 1964 Civil Rights Act, which forbids employers from making employment decisions based on employees' race, color, religion, sex, or national origin. The authors discuss how Title VII and its legislative progeny gave way to "hostile work environment" claims articulated by the U.S. Supreme Court in *Harris v. Forklift Systems, Inc.* (1993). Part II discusses the leading Supreme Court precedent on workplace harassment law: *Burlington Industries, Inc. v. Ellerth* (1998) and *Faragher v. City of Boca*