

AUTHOR: Squelch, Joan Guthrie, Robert

TITLE: THE AUSTRALIAN LEGAL FRAMEWORK FOR WORKPLACE BULLYING

SOURCE: Comparative Labor Law & Policy Journal 32 no1 15-54 Fall 2010

COPYRIGHT: The magazine publisher is the copyright holder of this article and it is reproduced with permission. Further reproduction of this article in violation of the copyright is prohibited.

## I. INTRODUCTION

The health and safety of employees is of paramount importance in a workplace. Bullying in the workplace can create an unsafe, hostile, and threatening working environment that can have a profound effect on the health and safety of employees. Although there is no single definition of workplace bullying, most definitions, whether academic or statutory or arising from developments in case law, state that workplace bullying is "persistent" and "repeated" behavior and that there is generally an imbalance of power between the target of bullying and the bully. Namie and Namie,(FN1) for instance, describe bullying at work as the "repeated, health-harming mistreatment of a person by one or more workers that takes the form of verbal abuse; conduct or behaviors that are threatening, intimidating, or humiliating; sabotage that prevents work from being done; or some combination of the three." Well documented examples of workplace bullying include: abusive and offensive language; intimidation; unreasonable excessive criticism; threatening to withhold promotion or some other benefit; imposing undue pressure and unreasonable workloads; undermining a person's work performance; withholding information; initiation and pranks; physical abuse and threats; spreading malicious rumors and gossip about a person; and ostracizing a person.(FN2) Cyber bullying--via email, text messaging, and the Internet--is also a more recent phenomenon in the workplace. Such workplace bullying may have serious health and psychological costs for the victims that ultimately impact the employer. In addition to the more obvious physical consequences, bullying often has far more serious and lifelong psychological consequences for the victims such as anxiety, fear, depression, panic attacks, low self-esteem, and suicidal tendencies. Often these symptoms of serious psychological harm render a person unfit for work leading to absenteeism, reduced productivity, and stress claims.(FN3)

In Australia workplace bullying is increasingly recognized as a workplace risk that cannot be ignored because of the serious financial and legal implication for employers. The Australian Human Rights Commission has estimated that the annual financial cost of workplace bullying in Australia is between AU\$6 billion and AU\$36 billion when hidden and lost opportunity costs are considered.(FN4) Consistent with this estimate, a 2003 study by Griffith University, Queensland, estimates that workplace bullying could cost businesses in Australia AU\$13 billion a year. This estimate was calculated by including costs such as absenteeism, labor turnover, loss of productivity, and legal costs.(FN5) The Victorian WorkCover Authority estimates that bullying costs businesses more than AU\$57 million a year in the state of Victoria alone.(FN6) There is also the potential cost to the reputation of a business through negative publicity and loss of confidence in the business. Moreover, the cost of litigation and compensation claims may be substantial and likely to receive considerable media attention thereby impacting on business reputation.(FN7)

Although Australia does not have specific laws that deal with workplace bullying, certain systems of protection are incorporated under several different areas of the law including occupational health and safety, workers' compensation, equal opportunity, and industrial relations. In particular, a number of recent superior court decisions have recognized bullying as a workplace risk and have confirmed that the failure to prevent bullying in the workplace is actionable under common law.

The purpose of this article is to provide an overview of the legal framework to prevent and redress workplace bullying. Accordingly, this article will review the Australian laws in relation to occupational health and safety, workers' compensation, industrial law, and antidiscrimination laws as well as tort and contract law insofar as they address the issue of bullying. This review indicates that workers have a range of options when pursuing an action against an employer for bullying. The ultimate choice of remedy will depend on a number of factors including the standard of proof required to establish the claim, and the statutory limitations that limit or exclude access to certain claim options or that limit the amount of compensation or damages available.

## II. THE AUSTRALIAN LEGAL FRAMEWORK FOR WORKPLACE BULLYING

In Australia there is no one specific statute that deals with workplace bullying; however, action may be taken in relation to bullying under legislation covering occupational health and safety, workers' compensation, equal opportunity, and industrial relations. This section of the article considers the range of laws under which employees may seek a remedy against coworkers and employers who may be held liable for workplace bullying. As Australia is a federation with nine jurisdictions, Commonwealth, state, and territory legislation may apply. Each state and territory has enacted laws regulating workplace health and safety, workers' compensation, discrimination, and industrial relations. Each state and territory has also established various statutory regulatory bodies to manage the laws and regulations.

### A. BULLYING AND WORKPLACE HEALTH AND SAFETY LAWS

All Australian jurisdictions(FN8) have workplace occupational health and safety laws and regulations that aim to create a safe work environment. Workplace bullying falls within the ambit of this legislation. Bullying is viewed as a risk to workplace health and safety and both employers and employees may be prosecuted for bullying behavior or for failing to take steps to address workplace bullying. In general, workplace health and safety legislation and regulations seek to promote the safety and health of persons at work and aim to reduce, eliminate, and control the risks or hazards to which persons at work are exposed. In all jurisdictions, employers have a general duty to provide a healthy and safe working environment(FN9) and must, "so far as is reasonably practicable,"(FN10) provide and maintain a working environment in which the employees are not exposed to risks or hazards. Employers must take reasonable and practical steps to identify, reduce, eliminate, and control risks and hazards. Employees also have a responsibility to look after their own safety and not to engage in conduct that poses a risk to the health and safety of other persons in the workplace. Generally, an employee must take reasonable care to ensure his or her own safety and health at work and to avoid adversely affecting the safety or health of any other person through any act or

omission at work. (FN11) Workplace health and safety is ensured when persons are free from risk of death, injury, or illness created by any workplace, relevant workplace area, work activities, or plant or substances for use at a relevant place.(FN12)

Although workplace health and safety legislation covers workplace bullying, the concept of bullying is neither defined nor explicitly referred to in the legislation or regulations, other than in South Australia. The Occupational Health, Safety and Welfare Act 1986 (SA), is the only workplace health and safety statute that specifically describes bullying, including what is not bullying behavior. Section 55A(1) of the Occupational Health, Safety and Welfare Act 1986 (SA) as amended defines workplace bullying as: "[a]ny behaviour that is repeated, systematic and directed towards an employee or group of employees that a reasonable person, having regard to the circumstances, would expect to victimise, humiliate, undermine or threaten and which creates a risk to health and safety." This is qualified by section 55A(2) of the Occupational Health, Safety and Welfare Act 1986 (SA), which expressly states that bullying behavior does not include:

- \* reasonable action taken in a reasonable manner by an employer to transfer, demote, discipline, counsel, retrench, or dismiss an employee;

- \* 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;

- \* 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.

Although the legislation in other states and territories do not specifically mention bullying, they do provide codes of conduct or guidance notes that clearly acknowledge the seriousness of bullying and importance of dealing with workplace bullying in a purposeful and strategic manner. Western Australia and Queensland, for example, have developed codes of practices relating to workplace bullying that incorporate definitions of bullying similar to the South Australian provision. The Western Australia code of practice defines workplace bullying as "repeated, unreasonable behaviour directed towards a worker or group of workers at a workplace, which creates a risk to health and safety."(FN13) The Queensland code of practice uses the term "workplace harassment" rather than bullying, which is described as

repeated behaviour, other than behaviour amounting to sexual harassment, by a person, including the person's employer or a coworker or group of co-workers of the person that: (a) is unwelcome and unsolicited; (b) the person considers to be offensive, intimidating, humiliating or threatening, (c) a reasonable person would consider to be offensive, humiliating, intimidating or threatening.(FN14)

These codes of practices provide practical guidelines and information on matters such as what constitutes bullying, recognizing bullying behavior, developing intervention strategies, risk management, and developing bullying policies and procedures.

In addition to the more formal codes of practice, the various workplace safety regulatory bodies provide guidance notes for employers and employees on what bullying is, how to report bullying, and how to manage bullying in the workplace. The guidance notes all provide similar definitions on

workplace bullying.(FN15) The Tasmanian guide does not include a definition per se, but explains that if "behaviour goes beyond a one off-disagreement, if it increases in intensity and becomes offensive or harmful to someone it becomes bullying" and that this is a workplace health and safety risk.(FN16) Common to all the definitions is that workplace bullying is (a) repeated behavior, (b) unreasonable behavior, and (c) creates a risk to health and safety. The ACT guidance note states that the term "repeated behavior" refers to the "nature of the behaviour, not the specific form of the behaviour" and that repeated unreasonable behavior may be a "pattern of diverse incidents, often escalating over time, e.g., verbal abuse on one occasion, personal property intentionally damaged on another occasion, and subsequently being unreasonably threatened with the sack."(FN17) Behavior that is unreasonable or inappropriate behavior may be any behavior that has the potential to harm or offend someone and should be assessed for its risk to health and safety. Risk includes the risk of harm to one's physical, emotional, and psychological health.

All jurisdictions make provision for the appointment of occupational health and safety inspectors and workplace safety committees.(FN18) Employees may report bullying behavior to and seek the assistance from workplace health and safety representatives and workplace inspectors. Workplace inspectors have an important role to play in investigating and resolving complaints about bullying as part of their duties and functions.(FN19) The South Australian legislation is the only legislation that explicitly legislates that if an inspector receives a complaint from an employee that he or she is being bullied or abused at work the inspector may take reasonable steps to resolve the matter between the parties. Further, if the matter remains unresolved the inspector may refer the matter to the Industrial Commission for conciliation or mediation, following investigation and consultation.(FN20) Queensland, however, has taken the lead in appointing occupational health and safety inspectors to specifically deal with bullying and harassment, and providing education and training programs to deal with bullying and other psychosocial issues in the workplace.(FN21)

Although there are few workplace bullying prosecutions under workplace health and safety laws in Australia, the following cases nonetheless demonstrate the consequences and costs of workplace bullying under occupational health and safety laws.(FN22) Detailed facts of the cases are worth providing as the stories of the victims of bullying go to highlight the serious nature and consequences of bullying when employers fail to take steps to stop the bullying.

In the most recent case, a Melbourne cafe owner was fined AU \$220,000 under Victoria's Health and Safety Act 2004 for failing to provide a safe work environment after an employee waitress committed suicide in 2006 because of workplace bullying. The bullying was described as "persistent and vicious" and included the employee being spat on and regularly called hurtful names. The magistrate reportedly described the atmosphere in the cafe as poisonous. The coworkers who carried out the bullying were individually fined between AU \$10,000 and \$45,000.(FN23) The following cases also highlight the serious nature of workplace bullying and the application of workplace health and safety laws. In 2008, Macedon Ranges Shire Council entered into enforceable undertakings (that is, a legal agreement whereby a person or organization agrees to undertake certain activities to improve health and safety of employees) with WorkSafe Victoria after the Australia Industrial Relations Commission had found a bullied employee was unfairly dismissed for raising health and safety issues.(FN24) The undertakings required the shire to engage a consultant to train employees in identifying workplace bullying, conduct refresher training every two years, increase the profile of in-house OHS representatives, publish an article in a industry magazine

outlining its failings and focusing on lessons learned from recent incidents of bullying, and publish results of its OHS performance in its annual report.(FN25) This case in particular evidences the interaction between OHS laws and industrial laws that will be discussed below.

In 1999 a motor dealership Victoria was fined AU \$45,000 following ongoing incidents of bullying involving an apprentice, and in another case a motor vehicle repair business was fined AU \$15,000 after three employees were subjected to months of continual verbal and physical abuse by two supervisors.(FN26) Similarly, in 2000 a panel beater was fined AU \$25,000 for failing to provide adequate supervision and a safe work environment after an apprentice was subjected to months of verbal and physical abuse by employees. The directors were personally fined AU \$5,000 and AU \$8,000.(FN27)

In *Maddaford v. Coleman*(FN28) a New South Wales company was fined when a sixteen-year-old laborer was bullied in the first case of its kind to come before the New South Wales courts. The target was subjected to physical and psychological abuse that was demeaning and humiliating, and potentially very dangerous. In one particularly serious incident, he was wrapped from his neck to his feet in plastic wrap using a manual plastic wrapping machine. He was then placed on his back on a mobile work trolley, and secured to the trolley with more plastic wrap and spun around. The ongoing abuse resulted in the employee abandoning his employment shortly after this incident. The employer was fined AU \$24,000 when prosecuted under occupational health and safety laws. Importantly, the prosecution proceeded with an appeal against the sentencing of the directors of the employer company.(FN29) The two directors, one of whom was in the factory at the time of the incident, were originally fined nominal sums of AU \$1,000, but on appeal this was raised to AU \$9,000 and AU \$12,000.(FN30)

In *WorkSafe Victoria v. Ballarat Radio Pty. Limited ("Ballarat")*(FN31) a worker at the Ballarat Radio station in Victoria had been verbally abused by a radio announcer, who had also subjected fellow employees to verbal abuse and threats of violence while at work on over ten occasions in 2002 and 2003. He had also physically assaulted a colleague. The Magistrate hearing the complaint said the "explosive manner" of the coworker in dealing with other employees was "completely inappropriate." He noted that the incidents of bullying were serious, repetitive, and extended over a period of time. The radio announcer was convicted and fined AU \$10,000 for intimidating coworkers and for failing to take care of the health and safety of others in the workplace. The broadcasting company was subsequently fined AU \$25,000 for failing to provide a safe workplace, and AU \$25,000 for failing to provide instruction, training, and supervision in relation to bullying. The company was also ordered to pay costs of AU \$5,000.

The case of *Carlile v Council of the Shire of Kilkavin and Brietkreutz*,(FN32) a matter that was heard in the District Court in Queensland demonstrates the duty of employers to provide adequate information and training to address workplace bullying. The plaintiff issued proceedings against the defendant employer and his supervisor alleging a breach of contract of employment and a breach of the statutory duty of care that arose from section 9 of the Work Place Health and Safety Act 1989 (Qld), which provided inter alia that it was an offence for an employer to "fail to ensure the health and safety at work of all his employees, save where it is practicable to do so." The duty under section 9 extended to providing employees with such information, instruction, training, and supervision as was necessary to enable employees to perform their work safely. The plaintiff was employed by the

defendant council as a laborer and roller-driver from 1988 until 1991 when he suffered a nervous breakdown. He was aged forty-nine years. It was found that the breakdown was due to supervision by the supervisor, and that the employer was vicariously liable for the actions of this supervisor. During the course of his employment, the plaintiff was subjected to a range of harassing and humiliating behaviors. He was abused and given menial tasks, and on occasions he was required to perform quite dangerous and seemingly unnecessary tasks. The bullied employee informed the council of the behavior of his supervisor in October and November 1989 and again in April and May of 1991. Dodds, J. held that, but for the behavior of the supervisor, the plaintiff would not have had a nervous breakdown and this was compounded by the apparent apathy of the council. He held that the council had been in breach of its statutory duty. In particular, Dodds, J. noted that the council did not have any system for recording this form of dispute and provided little training or supervision for supervisors in this regard. Employees should have been provided with some process that allowed them to air their concerns in a respectful environment. Employees should also be given notice of such a system. The failure to provide these safety nets had led to the plaintiff's injuries. The importance of this case is that it highlights how OHS laws can be used to ground an action for damages against an employer. In *Carlile* the effect of finding a breach of OHS laws that gave rise to the plaintiff's injuries was an award in the plaintiffs favor rather than simply a penalty imposed upon the employer as in the cases discussed above.

Workplace health and safety laws provide the legal framework for establishing safe work environments and ensuring appropriate policies, practices, and procedures are in place to protect employees from physical and psychological harm. In all Australian jurisdictions whether or not bullying is explicitly provided for in legislation, workplace bullying and a failure to take reasonable steps to address bullying and make a workplace safe may constitute a breach of workplace health and safety laws and result in penalties involving the possibility of substantial fines as evidenced by the prosecutions mentioned above. However, from the overview of the occupational health and safety regulatory framework for dealing with bullying it is evident that, although bullying is recognized and accepted as serious risk to workplace health and safety and has legal consequences, only one state, namely South Australia, has given legal weight to bullying by specifically including it in the legislation. The codes of practice of Western Australia and Queensland provide a more formal approach to dealing with bullying but for the most part the array of guidance notes and information brochures are not mandatory and are not an "expression of the law"; at best they are a recommendation on how to deal with bullying. The proposed Model Work Health and Safety Bill(FN33) does not make specific mention of bullying either but physical and psychological bullying would fall within the definition of a "hazard," which is defined as "a situation or thing (including an intrinsic property of a thing) that has the potential to cause injury, illness or death of a person."(FN34)

In all of the cases cited the bullying behavior was severe and persistent, and caused physical and/or psychological harm to the plaintiffs. Moreover, the employers were aware of the bullying and had failed to take appropriate steps to create a safe environment as contemplated by legislation. From the cases discussed, it is also evident that the courts will take workplace bullying seriously and will not hesitate in imposing substantial fines against employers and employees who engaged in bullying behavior. As stated in the *Maddaford* case, the Court noted that issues of violence and bullying in the workplace require sober and serious consideration. It is imperative, in our view, that the jurisprudence of this Court is unambiguous in its condemnation of such conduct.... Further, it

must be made abundantly clear that safeguarding health and safety in the workplace extends to protecting employees from bullying and violence from other employees.(FN35)

To this end, the cases have drawn attention to the importance of having bullying policies and procedures that are acted upon, and to provide appropriate and adequate supervision and training to employees on the nature and consequences of workplace bullying. The implications of these decisions are that if employers fail to implement appropriate policies and do take positive steps to address bullying behavior, they are likely to face prosecution under occupational health and safety legislation for failing to provide a safe workplace.

While a breach of health and safety laws might punish the employer, it does not generally compensate the employee, save as in the case of Carlile noted above where an action is grounded in a breach of statutory duty. Victims of bullying may pursue other remedies, however.

## B. WORKERS' COMPENSATION FOR BULLYING

In Australia, a worker who suffers an injury or disease as a result of workplace bullying may submit a claim for workers' compensation.(FN36) However, in all jurisdictions the right to claim workers' compensation is subject to a number of qualifications.(FN37) The Western Australian approach is typical of the formula adopted nationally. In Western Australia, an "injury" is defined as:

(a) a personal injury by accident arising out of or in the course of the employment, or while the worker is acting under the employer's instructions;

(b) a disease because of which an injury occurs under section 32 or 33;

(c) a disease contracted to which the employment was a contributing factor and contributed to a significant degree;

(d) the recurrence, aggravation, or acceleration of any preexisting disease where the employment was a contributing factor to that recurrence, aggravation, or acceleration and contributed to a significant degree; or,

(e) a loss of function that occurs in certain circumstances.(FN38)

It is noteworthy that the inclusion of the reference to disease allows claims for both specific physiological trauma as in paragraph (a) and gradual onset, as the definition of "disease" includes "any physical or mental ailment, disorder, defect, or morbid condition whether of sudden or gradual development."(FN39) Diseases that arise from workplace stress are compensable where they satisfy all other criteria. Stress is not defined in the workers' compensation legislation. It may be a cause or in some other way give rise to an injury or disease. It is not a disease in itself although stress is commonly referred to as a sickness. Properly understood, stressful workplace situations may give rise to a range of recognized medical conditions that in turn fall within the statutory definition of injury by accident or work related disease. It follows that bullying may be one of the stressors that gives rise to a recognized disease or injury such as depression and anxiety disorders. It also follows that bullying in and of itself does not have to be proven in order to claim workers' compensation, but injuries and stress-related diseases suffered as a result of workplace bullying are compensable,

provided they are not subject to the exclusions discussed in more detail below. Claims for workers' compensation that feature bullying are worthy of comment for two key reasons. First, such claims are often a forerunner to common law claims for negligence, because as will be described below, most Australian jurisdictions retain the rights of workers to sue their employer at common law for negligence. Thus there is often a forensic link between the workers' compensation claim and the subsequent negligence action. Second, bullying issues are often linked with the so-called management/industrial relations exclusions noted below.

The exclusionary provisions alluded to above are often referred to as the industrial relations exclusions or management exclusions. For example, in Western Australia an injury does not include a disease caused by stress if the stress arises from a worker's dismissal, retrenchment, demotion, discipline, transfer, or redeployment; or from the worker not being promoted, reclassified, transferred, granted a leave of absence, or any other benefit in relation to the employment; or from a worker's expectation in relation to one of these matters, unless the employers' actions in relation to these matters are unreasonable and harsh.(FN40) This formula is basically mirrored in all other jurisdictions; however, in some jurisdictions, particularly Queensland and the Commonwealth, the exclusions are broader and include staff performance appraisal as an exclusionary provision. In addition, some jurisdictions refer to reasonable administrative action or reasonable management action as grounds for a defense against a stress related claim. It has been noted above that the South Australian occupational health and safety legislation draws on these exclusions as a means of differentiating between bullying and reasonable management actions.

Under the Commonwealth and Queensland workers' compensation legislation, the application of the management action defense noted above is of considerable significance in relation to harassment and bullying claims. In these two jurisdictions the courts have interpreted the management action defense broadly so that where the employer is able to show the presence of reasonable management action as a significant stressor, the worker's claim is excluded even if the worker is able to point to other work-related stressors, and even if those other stressors are significant. *Q-Comp v. Education Queensland*(FN41) held that it is no longer possible to accept an injury as compensable in Queensland if it is caused by multiple stressors where at least one or some of those stressors are through reasonable managerial action. Once an injury is in any way touched by reasonable management action then, by reason of section 32(5) of the Workers Compensation and Rehabilitation Act 2003 (Qld), it is not compensable. It follows that, in Queensland, mixed etiology claims arguably cannot be sustained under these provisions where one of the causative factors relates to reasonable management action. Likewise under the Safety, Rehabilitation and Compensation Act 1988 (Cth), sections 4 and 14 have been held in *Hart v. Comcare* ("Hart")(FN42) and *Wiegand v. Comcare (No 2)* ("Wiegand")(FN43) to preclude any claim where injury results and reasonable management action is one of the stressors, even in a multi-causal claim.(FN44) It follows that in Queensland and the Commonwealth, under the current workers' compensation provisions, it is possible for a worker suffering stress related illness through bullying of a coworker to be disentitled to compensation if that stressor coexists with stress arising from a reasonable management action. This might occur, for example, where the management action is to transfer the worker to another workplace consequent upon allegations of harassment and the transfer itself gives rise to stress. However, these technical difficulties may be overcome when the facts of the case are closely examined.



An example of how these matters overlap appears from the case of *Millichamp v. Comcare*(FN45) where the applicant was an employee of the Australian Taxation Office and was subjected to a range of bullying behaviors that gave rise to an adjustment disorder. The employer attempted to invoke statutory defenses (in this case that a transfer of work caused the workers condition) so as to exclude the applicant's claim. The Administrative Appeals Tribunal found that the employer's attempt to exclude the claim depended upon a finding that a change in the applicant's work patterns resulted in an adjustment disorder. On the evidence the Tribunal was unable to make this finding hold--that the applicant's unfair treatment and harassment had been the cause of her disability. Where harassment is established as a stressor, in most circumstances this will be indicative of unreasonable management action, either because the employer has been implicated directly or indirectly through failing to take action to prevent harassment.(FN46) Such was the case in *Fairley v. Q-Comp*(FN47) where the employer's defense of reasonable management action as a material stressor failed because Swan, D.P. held that the worker's supervisor was "controlling, aggressive, domineering and confronting" and consequently had acted unreasonably. Clearly this worker had been bullied and as the stress related condition arose from this action she had a compensable claim. The *Nikolich* case discussed below illustrates that failure to properly investigate an allegation may in itself give rise to psychological harm where it does not proceed with fairness and alacrity, and may also result in an award of workers' compensation where no exclusions apply.(FN48)

It is notable that with an increase in claims alleged to result from bullying, workers' compensation tribunals, and in particular the Commonwealth Administrative Appeals Tribunal (which deals with large numbers of Commonwealth stress claims), are particularly attuned to work-related stress matters arising from bullying. So much so that they have not been timid in declining to award compensation where the applicant worker appears to be the bully rather the bullied. In *Bauduccio v. Comcare*(FN49) for instance, a tribunal declined to award the applicant compensation for an adjustment disorder and in turn noted that:

More significantly the problem arose from a perceived failure to have his opinions sought and accepted, to spend time on his work in excess of that considered reasonable by his supervisors, to perform his tasks in a manner which he considered correct and not necessarily according to the established system and to be treated politely with his own loud outbursts accepted and ignored. Collectively, I am satisfied that it was not a matter of Mr Bauduccio seeking to be treated the same as everybody else but seeking special benefits for himself not available to others. As such, the psychological condition of Mr Bauduccio was not an injury within the meaning of the Act.(FN50)

What these cases suggest is that, in the first instance, workers who are subject to workplace bullying probably have valid workers' compensation claims because bullying is a recognized stressor and will only be excluded from claiming if the reasonable management action/industrial relations defense can be made out.

Finally, to deal with the issue of physical injuries as workers' compensation claims, in Australia claims for assault in the workplace have been consistently recognized where the cause of the dispute giving rise to the assault is work related. In some severe cases, bullying and harassment may involve frank physical assault. A number of factors need to be taken into account. First, the nature of the assault, that is, how it occurred. Second, if there was an argument or disagreement preceding the assault, what was the substance of that argument and its relationship with the employment?

Third, whether the assault occurred with or without any warning being given to the injured person. The early case of *South Maitland Railways Pty. Limited v. James* ("James")(FN51) provides some guidance. In that case Williams, J. noted:

It would not be in the course of the employment for workers to discuss their private affairs or ventilate their private quarrels in their employer's time; but it must often be necessary for workmen in the course of their employment to discuss some matter relating to their work. A discussion between Hindle and James in order to ascertain whether Hindle was making charges that James was a favourite with the management who had been given work which he was incompetent to do would be a conversation which the commission could reasonably find was incidental to James' employment and not to his private affairs.(FN52)

Thus the substance of the disagreement that led to an assault in the James case was clearly relevant and work related and accordingly the injuries that arose from the assault were compensable. In the later case of *Weston v. Great Boulder Gold Mines Limited* ("Weston")(FN53) the High Court held that a worker was entitled to compensation even though the subject of the disagreement between the workers giving rise to the assault involved issues entirely unconnected with the injured worker's employment. However, the worker was actively engaged in performing his duties at the time of the unexpected assault upon him by another worker. In essence, Weston shows there is no difference between an assault that occurs unexpectedly, and any other work accident. It follows that bullying claims might also arise out of assaults at work either because the worker has been assaulted in an unprovoked manner or was engaged in a dispute that was work related. It also follows that the above cases establish that a worker may have a claim for compensation where injury arises from witnessing an assault or indeed being threatened with an assault because such incidents could give rise to the kind of sudden physiological change as required by Australian case law to establish an injury by accident.(FN54) For example, in a New South Wales decision, the Court of Appeal in *Davis v. Mobil Oil Australia Limited* ("Davis")(FN55) held that a worker who suffered an emotional state and who could no longer cope as a consequence of an altercation between himself and his supervisor was found to be entitled to compensation. The court made no comment as to whether the emotional state was a disease or a personal injury. The Court of Appeal seems to have been preoccupied with the additional question of whether or not the altercation was in the course of the employment. Following the decision of *Tarry v. Warringah*(FN56) the New South Wales Court of Appeal found that the injury had arisen in the course of the employment, notwithstanding that the altercation that had precipitated the emotional state had occurred because the worker had chosen not to follow the supervisor's direction not to accede to a union directive. On the facts it was significant that there had been, at the time of the altercation, some talk of violence but no actual violence took place. The result in the Davis case supports the comments above in relation to compensable assaults that claims can arise not simply through a frank assault but through the threat of assault or apprehensions of violence. Of course it is open to an employer to dismiss a worker who engages in violence in the workplace, provided the employer takes into account the totality of the circumstances, in particular whether one or other of the participants was subjected to any form of provocation and whether the violence employed was proportionate to any attack.(FN57) It seems beyond doubt that bullying by a coworker will also exist where the behavior does not involve actual physical assault but involves frequent impolite exchanges, alteration of a work environment without notice, undermining behaviors, and embarrassing the worker in front of colleagues.(FN58)

One final forensic issue arising from workers' compensation matters relates to the issue of weekly payments. In all Australian jurisdictions workers' compensation payments involve some form of "step down" whereby the income support is reduced after a prescribed time. The reduction of payments may take place at thirteen, twenty-six, or thirty-nine weeks depending on the relevant provisions, and the fall in wages may vary from 15% to 35%. In the unusual case of *Gersten v. Cape York Land Council Aboriginal Corporation* ("Gersten"),(FN59) the applicant was a lawyer engaged by the respondent. He was in receipt of workers' compensation for a stress related claim following verbal abuse and assault by the executive director of the respondent. After a statutory period of payments under the Queensland scheme his wages were reduced by approximately 35% and he applied to the Queensland Industrial Commission for a declaration that his contract of employment was unfair because it did not compensate him for the significant wage loss while he was in receipt of workers' compensation. Commissioner Fisher held that there was a direct link between the applicant worker's absence and his employer's behavior and that the contract should be varied to take account of the shortfall in wages suffered as a consequence of his employer's conduct. In most cases, shortfalls of this kind are sought to be recovered through a common law action for negligence where the loss of earnings can be part of any damages claim. Gersten suggests an alternative avenue may be open for a limited class of workers to pursue a claim of this kind against an employer in the industrial arena. Such a course of action may be more attractive where employer's negligence is not in issue or the assailant is likely to be a "man of straw."

### C. BULLYING AND THE TORT OF NEGLIGENCE

In addition to statutory mechanisms for preventing and remedying workplace bullying, Australian courts have recognized liability under the tort of negligence for physical and psychological injury, and have been willing to award substantial damages for a breach of duty of care where it involves bullying behaviors. Consistent with other common law jurisdictions, the Australian common law provides that the employer has a duty of care to provide a safe work environment for its employees. Failure to provide a safe work environment may give rise to an action for damages by an employee, who must establish that they have suffered an injury consequent upon the employer's breach of duty of care. Physical or psychological injury suffered by the victim of bullying may give rise to damages where it can be shown that the harm suffered was the foreseeable consequence of the employer's lack of care. An employer can also be held vicariously liable for the actions of its employees where those employees have caused harm to others while those employees are acting in the course of their employment or within the scope of employment, as evidenced in the case that follows.

Although there are few Australian examples recorded of claims specifically nominating workplace bullying as the source of harm, the decision in *Naidu v. Group 4 Securitas Pty. Limited and Anor* ("Naidu")(FN60) highlights the gravity of workplace bullying and the consequences for an employer in breach of a duty of care. In this case the plaintiff brought an action at common law to recover damages for psychological injuries arising out of severe workplace bullying. Mr. Naidu was employed as a security guard with Group 4 Securitas Pty. Limited who provided security services to Nationwide News Limited. Mr. Naidu brought his action against Group 4 as his employer and also Nationwide News who contracted services from Group 4 and also negotiated with Group 4 to place him under

the direct supervision of Chaloner, an employee of Nationwide News. The evidence at trial showed that Chaloner subjected Mr. Naidu to a continual barrage of harassment, racial and sexual abuse, humiliation, unreasonable workloads and pressure, threats of violence, and financial harm that resulted in Mr. Naidu sustaining post-traumatic stress disorder and major depression.(FN61) The New South Wales Supreme Court found that Nationwide News, who had effective control over Mr. Naidu's workplace safety, owed Mr. Naidu a duty of care to exercise reasonable care for his safety, including the provision of a safe place of work and a safe system of work. Nationwide News, as the employer of Chaloner, failed in its duty to prevent Chaloner from subjecting Mr. Naidu to harm and was consequently held vicariously liable for the negligence and reckless behavior of the supervisor, which despite the excessive use of authority fell within the scope of his employment.(FN62) Adams, J. held that it "was reasonably foreseeable that such illness might well result from the infliction of that conduct upon the plaintiff."(FN63) He concluded that "so extreme was [the supervisor's] behaviour that he well knew, or would have known had he reflected as a reasonable man should have, that prolonged misconduct of the kind he exhibited towards the plaintiff could reasonably be expected to expose him to the real risk of such psychological injury."(FN64) Adams, J. further concluded that "the conduct as a whole indeed resulted in injury of a psychological kind, giving rise to perceptible psychiatric illness and that a substantial cause was internal--that is to say, workplace related."(FN65) The court awarded damages against Nationwide News for the sum of AU \$1,946,189.40 and AU \$150,000 in exemplary damages because the employer was aware of the bullying and did not do anything to restrain Chaloner.(FN66) In Australia, exemplary damages are awarded where there is evidence that the breach of duty of care is accompanied by very serious and reckless behavior. Adams, J. in making such an award held that "in light of his senior position, and the unremitting abuse of the plaintiff occurred when he acted on behalf of the employer, I consider that it follows that [Nationwide] News must be accountable also for the payment of such damages."(FN67) The Naidu case involved bullying as manifested by non-physical forms of violence.(FN68)

Another example of this form of bullying arose in *New South Wales v. Jeffery & Ors.*(FN69) Jeffery was a police officer subjected to bullying by his supervising sergeant. The New South Wales Court of Appeal held the employer was liable for the bullying behavior of a police sergeant toward an officer. The sergeant "regularly found fault with the plaintiff's work where it was inappropriate to do so. He engaged in vulgar abuse of the plaintiff. He made threatening remarks to him, frequently asserting that he would have the plaintiff sacked, so that he and his family would 'end up in the gutter'." He also made disparaging and humiliating remarks publicly about the plaintiff's relationship with his wife. The evidence clearly establishes that the Sergeant's bullying tactics had an adverse psychological effect upon the plaintiff. From being a happy outgoing person he became stressed and anxious.

Similarly, in *New South Wales v. Mannall* ("Mannall")(FN70) the employer was vicariously liable for failing to prevent a supervisor treating a staff worker in such a poor manner that she ceased work due to a mental breakdown. The plaintiff in Mannall was appointed to the position of team leader in place of the current incumbent who was aggrieved by the appointment. The plaintiff had to work alongside the person who had been displaced and was subjected to a campaign of harassment and victimization by that person and her immediate supervisor who also failed to address her complaints about the hostile environment and the ongoing demeaning and belittling treatment to which she was subjected. The supervisor's negligence arose because he failed to address workplace tensions

and disputes as well as harassing and victimizing the plaintiff. The supervisor was fully aware of the problems and the serious impact it was having on the plaintiff's health and mental state, and hence the injury to the plaintiff was reasonably foreseeable. As concluded by Mason, J. "[w]hat remains is a clear conviction that Mr Singh's negligence materially contributed to the mental breakdown and the damage that ensued. This is sufficient to ground tortious liability."(FN71)

In some instances, forensic barriers prevent an employee from establishing fault by the employer. Such was the case in *Midwest Radio Limited v. Arnold* ("Arnold")(FN72) where the majority of the Queensland Court of Appeal ordered that the plaintiff's action for damages arising from the bullying behavior of her manager (Williams) be dismissed despite finding that Williams was abusive, threatening, and unpredictable. The Court of Appeal found that William's conduct was "unforgivable."(FN73) The plaintiff suffered a psychiatric disorder and alleged this was due to the conduct of Williams for which the defendant/appellant employer was liable. The majority of the Court of Appeal found that, notwithstanding medical evidence that linked the plaintiff's disorder with the conduct of Williams, that evidence was based on evidence of the plaintiff and her witnesses, not all of which was accepted. Consequently the Court was unable to find the general opinions of Dr. Green, the medical practitioner who gave evidence that linked the plaintiff's condition with her work, could be "applied distributively to each of the incidents or conduct" that were established in evidence. The award of damages for over AU \$500,000 was set aside. What emerges from *Arnold* is that the employee must establish not only bullying behavior, but that there is a clear medical link between that behavior and the harm suffered. This is particularly so in relation to non-physical injuries.

In some situations where the bullying involves physical abuse there is little difficulty in finding for the plaintiff. Such was the case in *Blenner-Hassett v. Murray Goulburn Co-operative Pty. Limited & Ors* ("Blenner-Hassett")(FN74) where the plaintiff was an apprentice fitter and turner subjected to bullying and also witnessed others being bullied. The plaintiff was stripped, had his testicles painted with grease, threatened with rape and bastardization, and was placed in a forty-four gallon drum and rolled around the workshop. He also witnessed an employee being suspended from a harness over a fire. As a result of the bullying and harassment the plaintiff suffered severe posttraumatic stress. Gebhardt, J. noted that "there was negligence on the part of the defendant company which no amount of closing-of-the-ranks' could conceal." He further noted that "the company had no practices in place to ensure that the types of behaviour which occurred were either monitored or governed" and that "it was customary and a part of the 'initiation' into a set of values which we might now regard as singularly abhorrent." The plaintiff was duly awarded AU \$350,000 in damages including AU \$150,000 for pain and suffering.

In the cases cited above, the plaintiffs had been subjected to ongoing physical and psychological abuse, humiliation, and degrading treatment that is typical of bullying behavior, giving rise to symptoms of stress, anxiety, fear, and panic. For all the plaintiffs, the workplace had become an unsafe and threatening environment. It was foreseeable that the "abhorrent" actions of the employees would cause harm and threaten the health and safety of others, including employees who are bystanders and witnessed such behavior. In such circumstances there is a duty on the employer to take reasonable steps to prevent and put an end to such bullying behavior. In the cases cited the employer failed to take reasonable steps to prevent the harm and ensure a safe work

environment thus giving rise to liability for negligence. What also emerges is that cases involving physical harm will be easier for the plaintiff to establish than those involving non-physical harm.

#### D. BULLYING AND ANTI-DISCRIMINATION LAWS

All Australian jurisdictions have enacted anti-discrimination laws that make sexual and racial harassment unlawful.(FN75) It is not necessary to set out in detail all the relevant commonwealth, state, and territory provisions relating to these matters as there is a significant symmetry between these laws that essentially allow a complaint to be made to a tribunal where a person has been subjected to racial or sexual harassment either directly or indirectly. Sexual harassment is defined, for example, under the Sex Discrimination Act 1984 (Cth) to be "any unwelcome or unwanted sexual behaviour which makes a person feel offended, humiliated and/or intimidated where that reaction is reasonable in the circumstance."(FN76) Racial harassment includes racially based threats, taunts, abuse, or insults that disadvantage another person in their workplace or other area covered by anti-discrimination laws. Racial harassment could include, for example, racist jokes, racist graffiti, and name-calling. In addition, harassment based on age or disability(FN77) would be unlawful under commonwealth laws. It follows that workers have a right of action when subjected to a form of bullying that is motivated by or associated with sexual or racial harassment. The association between sexual harassment and bullying is illustrated in the following cases. First, in *Gabryelczyk v. Hundt*,(FN78) the New South Wales Administrative Decisions Tribunal awarded a sixteen-year-old apprentice electrician damages for sexual harassment and bullying in breach of the Anti-Discrimination Act 1977 (NSW). The apprentice was of Polish origin and was sexually harassed and bullied by his supervisor. The apprentice was called names such as "wog boy," "little fuckwit," "retard," "ball licker," and was inappropriately touched. He was also deliberately burnt on the neck with a cigarette lighter and had a cigarette stubbed out on his arm. It was claimed that the supervisor regarded this conduct as "all character building."(FN79) As a result of this unwelcome and repeated conduct the complainant "suffered distress, insult, anxiety and mental suffering as well as depression and post-traumatic stress disorder." The complainant resigned as he could no longer cope with the bullying and harassment. The supervisor was ordered to pay the apprentice AU \$15,286 in damages--AU \$10,000 in general damages and AU \$5,286 in special damages.

A further example of the link between bullying and sexual harassment is found in *Webb v. State of Queensland*,(FN80) which dealt with a complaint made under the Anti-Discrimination Act 1991 (Qld) alleging that the complainant was sexually harassed by a male coworker during her employment with Queensland Health. The sexual harassment consisted of unwanted touching, sexual epithets directed at the complainant, unwanted pornographic emails, and references to the complainant's sex life. The complainant made informal complaints to her supervisor in 2001 and 2002 but was told that she should speak to her colleague directly; otherwise nothing would be done until she lodged a formal complaint. When legal action was taken against the employer for the continued harassment it was argued that by applying its sexual harassment policy and complaints procedures "all reasonable steps" had been taken to prevent harassment from occurring in the workplace. The Tribunal disagreed, and found that having been put on notice of the concerns by way of informal complaint the employer had a duty to respond in a proactive manner as a formal complaint was not a precondition under the legislation. An award of AU \$14,665 was made to the complainant.(FN81)

In *Cvetkovski v. Cleary Bros (Bombo) Pty. Limited*,(FN82) the complainant, who was employed by the respondent as a truck driver, was subjected to ongoing racial harassment and bullying that comprised "his supervisor and his co-drivers, and in some instances, his managers referring to him directly, and in other cases referring to him within his hearing in discourse between his supervisor, his co-drivers and his managers, by the use of grossly insulting racial epithets."(FN83) He would often be referred to and called "a wog" and one worker made comments about his food as "wog food," and "greasy wog food."(FN84) The complainant suffered depression and withdrew from work. The Tribunal found that the employer had condoned the behavior and had done little to deal with the matter and improve the work environment. The Tribunal rejected the argument that the complainant was over-sensitive and had participated in trading insults and abuse. Moreover, merely because one person might be willing to put up with such abuse does not mean another person who is affected by the abuse should be precluded from making a claim for bullying and harassment: "The fact that the other [truck] drivers were prepared to put up with the abuse and to participate in it, is not, in the view of the Tribunal, a basis for the Tribunal to regard the adverse reaction of the Complainant as demonstrating an over-sensitive reaction on his part."(FN85) The Tribunal held that the complainant had been victimized and discriminated on the basis of race, and the employer was ordered to pay the complainant by way of compensation an amount of AU \$43,651.91.

These cases illustrate a number of points. First, employers may be vicariously liable (or attributed liability) under statutory antidiscrimination legislation, unless they can properly make out a defense that all reasonable steps had been taken to prevent the harassment. Second, the employer will be put on notice whenever a complaint is made, whether it is informally or formally made. Third, sexual and racial harassment may amount to bullying when they represent behaviors that are "repeated oppression, psychological or physical, of a less powerful person by a more powerful person or group of persons."(FN86) Finally, the creation of policies and procedures alone will not protect an employer from claims where it has not been proactive in implementing those policies.

The focus of the discussion on discrimination laws has been on the connection between bullying and racial or sexual harassment. However, bullying may be initiated or perpetrated for other reasons relating to a person's characteristics or disposition that are prohibited grounds of discrimination, such as age, disability, religion, or transgender status. When this occurs and where there is an established link between the bullying behavior and prohibited discrimination, an employee may seek redress under antidiscrimination legislation. For a claim to be brought under discrimination legislation, the person must show that he or she was bullied because of his or her race or sex or other trait that is a prohibited ground. However, where there is no nexus, redress lies elsewhere, for example a breach of contract as discussed later on.

In Western Australia, a 2007 review of the Equal Opportunity Act 1984 (WA) by the Equal Opportunity Commission observed that there was considerable support for the inclusion in that Act for bullying as a grounds of discrimination and accordingly recommended an amendment to that effect.(FN87) The Commission observed that "the current legislative and administrative schemes do not provide a ready remedy, such as conciliation, for persons subjected to it [bullying]."(FN88) It noted that some submissions made to the review recommended the inclusion of bullying as a ground of discrimination subject to exemptions for performance management.(FN89) Two points arise from these observations. First, conciliation is generally not regarded as a remedy, but rather a dispute process that might result in a negotiated resolution. The inexact language of the review does

not however diminish the sound point that other forms of dispute resolution in relation to bullying do not specifically provide for conciliated resolution of claims. The exception to this proposition can be found in the Occupational Health, Safety and Welfare Act 1986 (SA) that specifically provides for a process of conciliation or mediation of bullying issues identified by a workplace inspector. Second, the suggested exemptions for bullying parallel the existing exclusions under workers' compensation laws and would need to be carefully drafted so as not to effectively nullify any prospect of claims, although, as noted, the South Australian provisions provide guidelines in this respect. So far no Australian jurisdiction has specifically included bullying as ground of unlawful discrimination under antidiscrimination legislation although all jurisdictions include victimization as the basis of a claim. Victimization occurs when a person who is making or contemplating making a complaint of unlawful discrimination is treated in a discriminatory manner.

#### E. BULLYING AND INDUSTRIAL LAW

Workplace bullying may also feature in matters that progress to industrial tribunals in Australia. Australian industrial laws operate at both the federal and state level, providing employees with access to dispute resolution processes where, among other things, claims for unfairly harsh or unreasonable termination of employment arise. However, there are limitations upon an industrial commission intervening where bullying occurs but there has been no termination of employment.(FN90) This is because industrial commissions have been reluctant to issue orders against employers where the effect of those orders is for the commission to assume a management role in place of an employer, or where the orders would effectively make a manager answerable to the commission.(FN91) In such circumstances a worker might choose to proceed to an anti-discrimination tribunal if the form of bullying has sexist or racist connotations. An anti-discrimination tribunal does have the power to order the cessation of behavior that constitutes harassment.

Although each industrial jurisdiction may have slightly different provisions, it is well understood that the guiding principle in relation to termination of employment is that the employee has to be given a "fair go." As a general rule, the issue of bullying does not arise as an issue per se, but is brought to light where an employee is either terminated due to their behavior as a bully or where, by reason of being the victim of bullying, the employee resigns and claims the resignation should be construed as a constructive dismissal.

Constructive dismissal generally arises when an employee finds it intolerable or impossible to continue working for the employer and as a consequence the employee resigns. For constructive dismissal to be established, the circumstances must be such that the employee feels they have no other option or choice but to resign. Constructive dismissal is usually argued in the context of a claim for unfair dismissal or that the dismissal was "harsh, unjust or unreasonable" as it is necessary to show that termination of employment was at the initiative of the employer. For a constructive dismissal claim to be sustained, the employer would need to have engaged in some conduct that effectively amounts to a breach of contract, whether express or implied. The contractual context of constructive dismissal can be gleaned from the words of Lord Denning who said that



If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance.(FN92)

If bullying is established as part of the workplace environment, this may amount to a breach of contract and provide grounds by which an employee can lawfully bring a contract to an end. Thus constructive dismissal may arise in circumstances where the workplace bullying becomes so intolerable for the targeted employee that they have no option but to leave their employment. This breach of contract will amount to a constructive dismissal and may give rise to a claim for a statutory remedy. An example of bullying behavior that resulted in constructive dismissal is found in *Phillips v. Wilderness School*.(FN93) In this case the applicant claimed that the termination of her employment was at the instigation of the employer and that it was "harsh, unjust and unreasonable" pursuant to section 106 of the Fair Work Act 1994 (SA). The applicant alleged that she had been bullied by another teacher, who had for a period of time been a close work colleague. The bullying behavior was brought to the attention of the school principal but the matter was not resolved. In 2003, the applicant took a leave of absence without pay as she could no longer cope with the bullying behavior that was affecting her health and work performance. It was agreed that the applicant could take up a twelvemonth placement with another school during the leave of absence. When the applicant wished to return to work, she was required to attend a meeting with a particular psychologist before she could return to work. The applicant became increasingly concerned about the difficulties of her returning to work, she began applying for other positions. The applicant was offered a position, which she accepted, but with the intention of continuing to negotiate her eventual return to work through the union. The respondent thereafter emailed the union advising them that they would not continue to negotiate the applicant's return to work and awaited the applicant's letter of resignation. It was submitted that the email sent to the union constituted a dismissal. On the evidence submitted, the Commission accepted that the applicant had experienced the alleged bullying behavior that had made it intolerable for the applicant to continue working and hence the leave of absence. The Commission held that the email to the union "constituted a constructive dismissal on the part of the respondent"(FN94) and that the condition imposed on the applicant to undergo a psychological assessment before she returned to work "was a clear repudiation of the employment contract."(FN95) It was also noted that the applicant's acceptance of another job offer was not a breach of her contract of employment by "failing to maintain trust and confidence in the employment relationship" because the decision to "seek other employment at another school was not taken in isolation."(FN96) The Commission noted that "the applicant was justified in thinking she had come up against a brick wall in her dealings with the respondent"(FN97) and that "there is little surprise in my view that the applicant considered it necessary to hedge her bets by seeking employment at another school."(FN98) The Commission therefore found that the dismissal was at the instigation of the employer and that it was harsh, unjust, and unreasonable. However, no order was made for monetary compensation. Interestingly the Commission does not appear to attempt to define bullying for the purposes of the determination. For industrial purposes defining the limits of bullying may not be crucial because the key element for determination is whether the employer's behavior has been harsh unjust or unreasonable. As noted below, industrial tribunals have been somewhat more precise in considering what behaviors do not amount to bullying.

Workplace bullying must be distinguished from legitimate comments on the work performance of a subordinate employee by his or her supervisor. It is acceptable that employees are informed in relation to the employer's expectations and what must be done to address any shortcoming.(FN99) Such was the case more recently in *Bann v. Sunshine Coast Newspaper Company Pty. Limited*, where the Australian Industrial Relations Commission observed; while the Commission is unwilling on the evidence before it to make a finding that Ms Bann's conduct can be found to be that of a workplace bully, the Commission is of the view, however, that Ms Bann possessed a management style that the Respondent came to find as inappropriate, and for good reason. It was a management style that caused employees concern for reason of its directness, its abrasive tone and inflexibility.(FN100)

Despite finding that Ms. Bann had engaged in bullying the commission nevertheless found that her employer was justified in terminating her employment due to a series of unsatisfactory interactions with staff. This is in contrast in *Hill v. Minister for Local Government, Territories and Roads*,(FN101) where it was held that Mr. Hill's termination had been harsh, unjust, and unreasonable and that there was no evidence of poor performance. Mr. Hill was terminated from his employment following a performance appraisal. Mr. Hill took issue with Ms. Morrison's, his supervisor's, assessment of his performance. When Mr. Hill tried to explain his management style, Ms. Morrison was dismissive of his explanations. The following day Mr. Hill raised the issue of bullying with Ms. Morrison whereupon she demanded his resignation by the following morning. In the course of this exchange Ms. Morrison yelled at Mr. Hill in the presence of other staff, even as he returned to his work station via the corridor. Mr. Hill subsequently took stress leave and during this time his employment was terminated. At the hearing of Mr. Hill's application for reinstatement the Australian Industrial Relations Commission noted that Ms. Morrison's behavior had been threatening and humiliating to Mr. Hill. Importantly, complaints about Ms. Morrison's behavior were already on record at the time of Mr. Hill's termination of employment, and the Commission noted a disparity in the employer's treatment of Ms. Morrison as compared to Mr. Hill. The decision indicates the folly of an employer failing to properly investigate allegations of bullying by management and acting upon reports of poor performance when bullying may be an element in that assessment.

Although a line is drawn between workplace bullying and "strong management," or the exercise of legitimate managerial responsibilities, the Andrea Adams Trust has observed that, there is "a fine line between strong management and bullying" and "that line is crossed when the target of bullying is persistently downgraded with the result that they begin to show signs of being distressed, becoming either physically, mentally or psychologically hurt."(FN102)

## F. BULLYING AND CONTRACT LAW

Contract law provides another means of taking action against an employer for workplace bullying. A few cases in particular have addressed the issue of implied terms relating to a duty of care. In *Goldman Sachs JB Were Services Pty. Limited v. Nikolich* ("Nikolich"),(FN103) the Full Court of the Federal Court held (by a majority) that the appellant employer had breached its contract of employment with Mr. Nikolich by failing to take "every practical step to maintain a healthy workplace for its employees."(FN104) The crux of this case revolved around the precise terms of Mr. Nikolich's employment. Mr. Nikolich argued that a 119 page policy document entitled "Working with Us" that contained policies and procedures about safety and behavioral standards, harassment, and

grievance procedures and that accompanied his offer of employment, should be incorporated (at least in part) into his contract of employment. In particular, the policy document included a section on harassment that required all employees to "work together to prevent any unwelcome, uninvited and unwanted conduct which makes another team member feel offended, humiliated or intimidated in any work related situation...."(FN105) and a health and safety statement that the employer "will take every practical step to provide and maintain a safe and healthy work environment for all people."(FN106) Mr. Nikolich asserted that during the course of his employment he had been intimidated and bullied by his manager and that the employer had not provided a safe work environment. He made a complaint about this conduct to his supervisor, but the complaint was not properly investigated and his manager continued to treat him in a hostile manner. Mr. Nikolich brought a formal complaint to the Human Resources department of his employer, which did not fully investigate the complaint. Consequently, Mr. Nikolich's feelings of injustice led him to develop serious depression and he took sick leave. At the end of his sick leave his employment was terminated. Although the Full Court held that the harassment and grievance provisions were merely descriptive and not promissory (and not contractual), the majority agreed that the health and safety statement was promissory and an express term of the employment contract.(FN107) Therefore, failing to properly address Mr. Nikolich's complaint was a breach of that part of the policy document that related to providing a safe place of work. The majority held that by failing to promptly investigate the grievance the employer had aggravated Mr. Nikolich's depressive state, and that it was foreseeable that he would develop psychological injury as a consequence of this treatment. The employer had failed to take "every practical step to provide and maintain a safe and healthy work environment" in accordance with its own policies. Critical to this finding was the fact that the majority of the Full Court held that the safety provisions of the policy document were specific enough to be able to be understood and incorporated into the contract of employment. The end result was an award of AU \$515,000 in favor of Mr. Nikolich.

It is noteworthy that this outcome resulted from an interpretation of the terms of the employment contract as it incorporated specific policy documents. Although the policy statements pertaining to bullying and harassment were not considered terms of the employment contract, this decision has significant implications for employers in relation to policies on bullying and harassment. This case clearly demonstrates that employers' policies and procedures, including codes of conduct, human resource manuals, and so forth, especially where they are written in more prescriptive terms, may be treated as part of the employment contract and a failure to comply with such policies could give rise to a liability for a breach of contract. Moreover, it could also be argued that Mr. Nikolich suffered his injuries as consequence of his employer being in breach of an implied term not to destroy mutual trust and confidence.(FN108)

This argument was not raised in Nikolich, but it was raised in McDonald v. State of South Australia ("McDonald")(FN109) where the Supreme Court of South Australia awarded AU \$392,850 in damages to Mr. McDonald, a teacher who alleged that his employer had been in breach of a mutual obligation of trust and confidence when it overworked, victimized, and harassed him in the course of his employment. From 1997 until 2003 Mr. McDonald was employed as a secondary school teacher with a full teaching workload. He was also responsible for fixing and upgrading the school's computer networks, despite the fact that he had no training in relation to computer network repairs. When Mr. McDonald was compelled to work weekends and after-hours to perform his work, he complained about his workload but his complaints were not adequately dealt with. As a

consequence of the workload pressures and harassment, he suffered from an adjustment disorder with anxiety and irritable bowel syndrome. It was held that these conditions were caused by the employer's conduct. As a consequence of his ill health Mr. McDonald resigned his employment. He claimed during the course of proceedings that the resignation was forced upon him by reason of the employer's continual frustration of his attempts to have his grievances addressed. The court accepted that the termination of employment amounted to a constructive dismissal(FN110) brought about by the employer's breach of the obligation not to destroy trust and confidence in the employment relationship.(FN111)

Mr. McDonald's claim subsequently failed on appeal, however. In a nutshell, although the Appeal Court acknowledged that an implied term of mutual trust and confidence, and an implied contractual duty of care have been recognized in Australian law, following English law, these terms were not part of Mr. McDonald's contract.(FN112) The reason for this being that the contractual relationship between Mr. McDonald and the Minister (for Education) was comprehensively regulated by education statutes, education regulations, industrial awards, and departmental policies. It was held that these instruments provided adequate grievance procedures and remedies for Mr. McDonald to pursue his complaints.(FN113) The Appeal Court held that "[i]n our opinion, the statutory and regulatory context in which Mr McDonald's contract of employment operated made the implication of a term concerning mutual trust and confidence unnecessary."(FN114) Moreover, the Appeal Court found that the conduct of the education officials did not amount to conduct that resulted in the repudiation of the contract, even though their conduct at times was neither satisfactory nor appropriate: "[i]t may be that there were shortcomings in the manner in which [the principal] dealt with the issue ... But in our opinion, it is difficult to characterize shortcomings of that kind as constituting a breach of the implied contractual duty of care"(FN115) and that "the unpleasant conduct of the SSOs (School Services Officers) could not constitute a repudiatory breach of the implied contractual duty of care."(FN116)

Although Mr. McDonald lost on appeal, the case nonetheless illustrates that victims of bullying who have suffered mental illness could commence an action based in contract. However, the appeal case also brought home how difficult it can be to prove a breach of contract based on bullying especially where a thin line might be drawn between "poor management" and bullying. The Appeal Court noted that "even if [the conduct] evidenced a poor personal management style of Mr. Mitchell [the principal] is cannot be regarded as bullying, harassment or victimization."(FN117) The Appeal Court went on to state that:

[I]t is not altogether easy to identify other incidents which may have amounted to bullying, harassment or victimisation. We appreciate that conduct of this kind can often arise from minor incidents in which the bullying, harassment or victimisation arises from subtle conduct. It is often difficult for the full impact of bullying behaviour of this kind to be elicited in legal proceedings. In the present case, even making allowance for these kinds of considerations, it is difficult to identify any other specific incidents.(FN118)

The Appeal Court acknowledges the many shortcomings in the manner in which the school and education authorities dealt with Mr. McDonald's case but fell short of construing their behavior as bullying and victimization. Moreover, although Mr. McDonald had completed a pro forma document

headed "Indicators of Bullying by Another Employee," he had not provided sufficient particulars of bullying behavior.(FN119)

It is arguable, however, that following the Naidu decision there would have been scope for a claim of negligence given the facts of the case. Notably, Mr. McDonald brought his action in South Australia where claims for workplace negligence have been abolished. As noted at hearing, Mr. McDonald had commenced a workers' compensation claim but withdrew this when he was advised this might prevent him making any claims at common law. His action in contract for economic loss was not only a statement against his disempowerment, but also a means by which he could avoid a prohibition against suing his employer in negligence, because section 54 of the Workers' Rehabilitation and Compensation Act 1986 (SA) does not prohibit claims of that kind. Common law actions for workplace negligence have also been abolished in the Northern Territory and the Commonwealth, and in all other jurisdictions negligence actions are commenced upon proof that the worker can establish a statutory level of whole of person impairment. Importantly, if a worker in Western Australia, Queensland, New South Wales, or Tasmania cannot establish the requisite level of impairment they are unable to commence a negligence action.(FN120) Bullying and harassment victims usually suffer non-physical harm in the form of mental illness, typically anxiety, depression, and posttraumatic stress disorder. The assessment of impairment for mental illness is notoriously difficult and invariably results in low percentage ratings, effectively precluding such victims from common law negligence actions in all jurisdictions in Australia.(FN121) There is insufficient space to discuss in detail the rationale for such thresholds but, suffice it to say, the diagnosis of conditions aforementioned is notoriously complex, and often dependent upon subjective patient reports of symptoms so that such claims are frequently the subject of dispute. An additional issue is the cost of mental illness claims that tend to be grounded in long-term absence from work (as in McDonald and Nikolich) and consequently involve claims for considerable economic loss. The imposition of impairment tables, apparently based on objective criteria, has significantly reduced the scope for mental illness type claims.

### III. DISCUSSION AND CONCLUSIONS

As can be seen from this overview there are a range of legal options available where an employee has been the subject of workplace bullying. In the first instance many employees commence actions in industrial and workers' compensation tribunals to seek compensation for unfair termination of employment and/or income support where incapacity arises. When workers' compensation claims are made, either successfully or unsuccessfully, there is also an alternative forum through the anti-discrimination tribunals in each jurisdiction. These tribunals are unaffected by exclusions of the kind referred to above and can award damages where the evidence of harassment is properly made out. Thus employees may have cumulative claims for both workers' compensation and/or damages because the award of workers' compensation does not take account of pain and suffering or humiliation caused by harassment. This alternative form of damages can be sought from the antidiscrimination tribunals. In short, while an employer may be able to avoid some workers' compensation liabilities because it can rely on statutory exclusions or defences provided under the umbrella of reasonable management action, it is likely that at least some liability will be attached as a claim for discriminatory action.

Where an employee has lost employment through workplace bullying, the usual remedy seems to be to allege that the employment was terminated unfairly by relying on the principals of constructive dismissal to assert that the employment was terminated at the initiative of the employer through the employer's breach of contract. The developing theme in this area is the adoption by the courts and tribunals of the implied term of mutual trust and confidence that requires an employer to behave in such a manner so as not to destroy the employment relationship. Bullying behaviors by supervisors go to the core of the employment relationship and are readily recognized as factors destroying the trust and confidence in the relationship.

This review of cases also illustrates that the implied term of mutual trust and confidence can be applied against an employer for an award of damages as shown in the Nikolich decision. This decision and the decision in McDonald open an avenue for claims that have been denied to claimants whose rights to workplace negligence actions has been abolished or modified by statute. That said, such claims come at some risk to an employee who must establish that their psychological harm has suffered as a consequence of the employer's actions or inactions and were not the product of a frail psychological makeup that fell below normal fortitude. In most instances, bullying claims will manifest as workers' compensation matters where the thresholds are not as high or costly as the barriers set at common law.

These cases also confirm a gap in the legislative framework. In most jurisdictions the capacity of the courts and tribunals to intervene while bullying behaviors are occurring is limited. Although some effort has been made under OSH laws to use improvement notices to bring problems in the workplace to the attention of employers, these procedures are hampered by the shadow of the overall high standard of proof required to establish a successful prosecution. Antidiscrimination tribunals, which have adopted an approach that includes conciliation in the context of the civil standard of proof, might be better suited for more speedy and effective interventions. The Western Australian Review of the Equal Opportunity Act (1984) indicates a willingness of stakeholders to embrace this option for the future. In this respect, as noted, claims by employees against their employers at common law are expensive, time consuming, and difficult, with no promise of success. Prosecutions under occupational health and safety laws do not provide any direct remedy to employees. Actions based on anti-discrimination laws are limited and can only be commenced if there is a nexus between the bullying behavior and some form of discriminatory treatment such as gender and race discrimination or sexual harassment.

The recently enacted Fair Work Act 2009 (Cth) puts in place at a national level the Rudd Labor Government's pre-election promises to reform the Australia industrial relations laws. Of particular significance to matters discussed in this article are the new provisions in relation to protection and enforcement of workplace rights. Antidiscrimination provisions have long been a part of the industrial laws of Australia. Provisions relating to victimization at work appeared in the 1960s and 1970s and in the 1990s particular reference was made to the prohibition of discrimination in relation to freedom of association and on the ground of race, ethnicity, gender, parental status, political opinion, religion, family responsibilities, and the like.(FN122) Since the commencement of the Fair Work Act 2009 (Cth) in July 2009, section 340 prohibits a person from taking adverse action against a second person because that second person has a workplace right. A workplace right is defined in section 341(l)(a) of the Fair Work Act 2009 (Cth) to include among other things "a benefit of... of a workplace law." Section 342 of this Act provides a schedule of circumstances in which a person takes

adverse action against another and, under item one of the that table, includes an action by an employer against an employee to dismiss or injure an employee in their employment, or to alter the position of the employee to their prejudice or to discriminate against the employee. It is reasonably clear that these provisions have been widely drafted and could, without stretching the language of the legislation, include a benefit conferred under occupational health and safety laws, namely a safe workplace free from harassment or bullying. Arguably also, while the provisions of section 342 do not appear to contemplate adverse action by one employee against another employee, the employer would be vicariously liable for such action in any event. Accepting that this is potentially the case, section 342 permits a person affected by the adverse action of an employer (and vicariously via a co-employee) to seek a remedy. Section 545(2) provides that the remedies include injunctions and compensation and, where appropriate, reinstatement of an employee. In addition, a pecuniary penalty may be imposed upon the employer for a contravention of section 340 and by reason of section 546(3) such penalty may be paid to "a particular organisation or person" namely the employee's union or the employee personally. There is no cap or limit to the amount of compensation that can be sought.

It follows that the new Fair Work Act 2009 (Cth) might provide a potentially powerful remedy in action for the protection of a workplace right in relation to workplace bullying. Such a right of action does appear to incorporate the protection of a worker from bullying and has numerous advantages over other forms of proceedings, given that the civil standard of proof applies, costs in the industrial arena are generally modest and the onus of proof may rest upon the employer. Proceedings in respect of contraventions of section 340 are dealt with as civil matters, and by reason of section 360 it is sufficient that the adverse action is just one of the matters that motivated the action in question. Stewart asserts that effectively the onus of proof in such matters is reversed, so that once it has been established that a certain action, a dismissal (including, as noted above, a constructive dismissal) for example, has been taken, it is for the respondent to show that the action was not motivated by the prohibited or adverse action.(FN123) As noted in the preceding section, workplace bullying frequently surfaces where a worker is either dismissed or chooses to leave their employment because the persistence of bullying leaves them with no choice. It does appear that section 340 and the related sections of the Fair Work Act 2009 (Cth) provide a novel remedy for employees. These provisions have yet to be tested but hold considerable promise as a mechanism for empowering bullied employees. Of course, one practical issue is consideration of the employer's capacity to pay. It is doubtful whether an employer will be indemnified for this form of loss given that it is not the normal insurable loss, such as workers' compensation or common law liability. It follows that the depths of the employer's pocket will be a consideration when determining whether to proceed.

Although there are various legal remedies available to victims of bullying there is still the problem that workplace bullying tends to be unreported. Victims of bullying will often simply leave their job and seek other employment rather than face the stress and trauma of reporting bullying or pursuing some form of legal action, especially in cases where the bullying is subtle, covert, psychological, and difficult to prove. Moreover, it is not uncommon for victims of bullying to fear that they will be victimized or ostracized, or that their future employment prospects will be undermined if they report bullying. There is also the fear that if bullying is reported it will simply be ignored or avoided, which is reinforced if bullying is perceived to be part of the workplace culture. To this end, it is essential for employers to create a workplace culture and environment in which bullying and

harassment are not tolerated, i.e., prevention is better than cure. Employers are obliged to take steps to implement appropriate policies and procedures to endeavor to prevent and eliminate bullying in the workplace. In terms of workplace safety legislation, employers have a statutory duty to take steps to stop bullying when it is happening in their workplaces. This is clear from the cases discussed. Policies are an important tool for risk management and to ensure compliance with the law. However, policies on their own are seldom sufficient for dealing with bullying. Workplace bullying is often ignored because employers and employees do not necessarily recognize or understand bullying behavior.

Employers need to take active steps to ensure that employees, in particular people in positions of power and authority, are educated about the nature and consequences of bullying. People need to be well informed about bullying and trained in how to deal with incidents of bullying. To this end, the OHS codes of practices and guidance notes referred to in the article provide an invaluable source of information for both employers and employees. One of the challenges of managing with bullying is to recognize and indentify bullying behavior, especially covert psychological bullying that is often a "hidden hazard." Employees also need to be encouraged to report bullying and be provided with the necessary support. Complaints need to be taken seriously and investigated thoroughly and promptly. Workplace bullying is an ongoing issue and employers cannot be complacent in addressing bullying given the significant consequences of bullying and the potential human, financial and legal costs if left unattended.

#### ADDED MATERIAL

Associate Professor, School of Business Law and Taxation, Curtin University of Technology, Western Australia.

Professor, Graduate School of Business, Curtin University of Technology, Western Australia.

#### FOOTNOTES

1. GARY NAMIE & RUTH NAMIE, *THE BULLY AT WORK* (2009).
2. See, e.g., KEN RIGBY, *BULLYING IN SCHOOLS AND WHAT TO DO ABOUT IT* (1996); TIM FIELD, *BULLYING IN SIGHT: HOW TO PREDICT, RESIST, CHALLENGE AND COMBAT WORKPLACE BULLYING* (1996); Ståle Einarsen, *The Nature and Causes of Bullying at Work*, 20 *INT'L J. MANPOWER* 57 (1999); STÅLE EINARSEN ET AL., *BULLYING AND EMOTIONAL ABUSE IN THE WORKPLACE: INTERNATIONAL PERSPECTIVES IN RESEARCH AND PRACTICE* (2003).
3. *Id.*
4. Human Rights and Equal Opportunity Commission. Factsheet--Workplace Bullying, [http://www.hreoc.gov.au/info\\_for\\_employers/fact/workplace.html](http://www.hreoc.gov.au/info_for_employers/fact/workplace.html), accessed January 9, 2007.
5. Mike Toten, *Beating the Bully*, 73 *AUSTL. CPA* 8, 54 (2003).



6. WorkplaceInfo, Bullying Issues,

<http://www.workplaceinfo.com.au/nocookie/subjects/OHS/bullying.htm> (last accessed Dec. 12, 2007).

7. See, e.g., Shelley Thomas, Study Spurs Call to Ban Work Bullies, THE COURIER MAIL, July 1, 1999; Tony Koch, Time to Ban the Bullies at Work, THE COURIER MAIL, Apr. 27, 2002; Amanda Place, THE AGE, June 22, 2002; Employment Editorial, Horror of Bullies at work, THE ADVERTISER, Aug. 23, 2003; Fiona Serton, Fighting Back, 73 AUSTRALIAN CPA 52 (2003). See also Job Watch, Bullies Media and the Law,

<http://www.jobwatch.org.au/admin/spaw2/uploads/files/Oct%20199820Bullies%20Media%20and%20Law.pdf> (last accessed June 15, 2009).

8. In 2008 the Council of Australia Governments (COAG) signed an intergovernmental agreement to harmonize occupational health and safety legislation. An independent review panel was appointed to review all the OHS laws in each state and territory. In December 2009 the Model Work Health and Safety Bill was approved by the Workplace Relations Ministers' Council. It is intended that by December 2011, each jurisdiction will be required to enact their own jurisdictional laws that mirror the national model laws. <http://www.safeworkaustralia.gov.au/swa/ModelLegislation/Background> (last accessed Feb 19 2010).

9. Occupational Health and Safety Act 1991 (Cth) § 16; Occupational Health, Safety and Welfare Act 1986 (SA) §19; Occupational Health and Safety Act 2000 (NSW) § 8; Occupational Health and Safety Act 2004 (Vic) § 21(1); Workplace Health and Safety Act 1995 (Qld) § 23; Workplace Health and Safety Act 2009 (NT) § 55; Work Safety Act 2008 (ACT) §§ 27-28; Workplace Health and Safety Act 1995 (Tas) § 9; Occupational Safety and Health Act 1984 (WA) § 19.

10. The term "practicable" means that people are expected to take practical and reasonable steps to comply with legislative requirements. Practical implies that it is "capable of being done." Various factors may be taken into consideration to determine whether something is reasonable, for example, the severity of the injury, the degree of risk, and the cost of safeguards. Commission of Occupational Safety and Health, Western Australia. Code of Practice, Occupational Safety and Health in the Western Australian Public Sector 2007,

<http://www.worksafe.wa.gov.au/newsite/worksafe/media/pdf/codes/CodePublicSector.pdf> (last accessed Jan, 8, 2008). See also *Edwards v. National Coal Board* [1949] 1 KB 704 per Asquith LJ at 712, <http://education.qld.gov.au/riskmanagement/low.html> (last accessed Jan. 23, 2008).

11. Occupational Health and Safety Act 1991 (Cth) § 21; Occupational Health, Safety and Welfare Act 1986 (SA) § 21; Occupational Health and Safety Act 2000 (NSW) § 20; Occupational Health and Safety Act 2004 (Vic) § 25; Workplace Health and Safety Act 1995 (Qld) § 36; Workplace Health and Safety Act 2009 (NT) § 59; Work Safety Act 2008 (ACT) § 40; Workplace Health and Safety Act 1995 (Tas) § 16; Occupational Safety and Health Act 1984 (WA) § 20.

12. Workplace Health and Safety Act 1995 (Qld) § 22.

13. WorkSafe Western Australia, Dealing with Bullying at Work: A Guide for Workers, 20. This code of practice is developed under Occupational Safety and Health Act 1984 (WA) § 57.

14. Queensland Workplace Health and Safety, Prevention of Workplace Harassment Code of Practice 2004, 1. This code of practice is developed under Workplace Health and Safety Act 1995 (Qld) § 41.

15. See, e.g., ACT WorkCover, Preventing Workplace Bullying; Victoria WorkCover, Preventing and Responding to Bullying at Work; NSW WorkCover, Preventing and Responding to Bullying at Work; NT WorkSafe, Dealing With Bullying at Work; WorkCover Tasmania, Stress, Bullying, Alcohol and Others Drug Use. Hidden Hazards.

16. WorkCover Tasmania, Stress, Bullying, Alcohol and Others Drug Use. Hidden Hazards. A Guide for Employers, 19.

17. ACT, *supra* note 16, at 3.

18. Occupational Health and Safety Act 1991 (Cth) §§ 24, 40; Occupational Health, Safety and Welfare Act 1986 (SA) §§ 37, 31; Occupational Health and Safety Act 2000 (NSW) §§ 47, 17; Occupational Health and Safety Act 2004 (Vic) §§ 95, 72; Workplace Health and Safety Act 1995 (Qld) §§ 99, 86; Workplace Health and Safety Act 2009 (NT) §§ 15, 45; Work Safety Act 2008 (ACT) §§ 180, 60; Workplace Health and Safety Act 1995 (Tas) §§ 34, 36; Occupational Safety and Health Act 1984 (WA) §§ 42, 29.

19. For a detailed discussion and analysis of the role of OHS inspectors, see Richard Johnstone, Michael Quinlan & Maria McNamara, OHS Inspectors and Psychosocial Risk Factors: Evidence from Australia Working Paper, 60 NATIONAL RESEARCH CENTRE FOR OHS REGULATION (2008), available at <http://ohs.anu.edu.au/publications/pdf/wp%2060%20-%20Johnstone%20et%20al.pdf> (last accessed Feb. 11, 2010).

20. Occupational Health, Safety and Welfare Act 1986 (SA), § 55A(2)

21. Johnstone, Quinlan, & McNamara, *supra* note 19.

22. Some evidence of prosecutions for bullying appears in Victorian WorkSafe Prosecution summaries at <http://www.workcover.vic.gov.au/wps/wcm/connect/WorkSafe/Home/Forms+and+Publications/Forms+and+Publications+Results?searchAny=prosecutions> (last accessed June 15, 2009). For example, for the year 2009 in Victoria (Australia's second largest jurisdiction) only one prosecution is shown namely Wagstaff Cranbourne Pty. Ltd. for failure to comply with improvement notice after an inspector identified bullying in the workplace, <http://www.worksafe.vic.gov.au/wps/wcm/connect/WorkSafe/Home/Forms+and+Publications/Publications/Prosecutions+2006> (last accessed June 15, 2009). In 2005, similarly only one prosecution appears to have taken place in Kalinda Downs Pty. Ltd. for failure to comply with a direction to implement a bullying action plan, [http://www.worksafe.vic.gov.au/wps/wcm/resources/file/ebc8cc435b3fdaf/prosecutions\\_2005.pdf](http://www.worksafe.vic.gov.au/wps/wcm/resources/file/ebc8cc435b3fdaf/prosecutions_2005.pdf) (last accessed June 15, 2009). South Australia and New South Wales WorkCover do not reveal any prosecutions for bullying on their websites.

23. Alison Cladwell, Suicide Waitress 'Driven to the Edge and Punished, ABC NEWS, Feb. 8, 2010. See also WorkSafe Victoria, Business Director and Three Workers Convicted and Fined for Bullying, <http://www.worksafe.vic.gov.au/wps/wcm/connect/wsinternet/worksafe/sitetools/news/business-director-three-workers-convicted-fined-for-bullying> (last accessed Mar. 12, 2010).

24. *Brown v. Macedon Ranges Shire Council* [2008] AIRC 11.
25. WorkSafe Victoria, *Macedon Ranges Shire bullying leads to better council standards*, <http://www.worksafe.vic.gov.au/wps/wcm/connect/wsinternet/worksafe/sitertools/news/macedon+ranges+shire+bullying+leads+to+better+council+standards> (last accessed Mar. 12, 2010).
26. Abbott Tout, *Bullying in the Workplace--A Health and Safety Hazard* (2002), <http://www.findlaw.com.au/articles/default.asp?task=read&id=4398&site=LE> (last accessed Dec 20, 2007).
27. CCH Update--*WorkCover v. City Edge Panel Repairs*, Melbourne Magistrates Court July 10, 2000.
28. *Maddaford v. Coleman & Anor* [2004] NSWIRComm 317 (Nov. 3, 2004).
29. Section 26 of the Occupational Health and Safety Act 2000 (NSW) lifts the corporate veil and allows for prosecutions against directors.
30. The coworkers were also prosecuted and placed on good behavior bonds, with one worker, Pomente, fined AU \$500.
31. *WorkSafe Victoria v. Ballarat Radio Pty Limited*, unreported Ballarat Magistrate's Court (Aug. 2004) also noted at <http://www.abc.net.au/news/newsitems/200407/sll60031.htm> (last accessed Feb. 25, 2009); Victorian WorkCover Authority, *Landmark Court Decision sees Radio Station Convicted and Fined \$50,000 over Bullying*, <http://wwwl.worksafe.vic.gov.au/vwa/media.nsf/docsbyUNID/0D2FFD67967CAID8CA256EEE0080756F?Oe> (last accessed Jan. 15, 2008).
32. *Carlile v. Council of the Shire of Kilkavin and Brietkreutz* (Unreported Qld District Court No 12 of 1992, Dec. 2, 1995). The facts of this case (which is not readily available online) are reported in Max Spry, *Workplace Harassment: What Is It and What Should the Law Do about It?*, 40 J. INDUS. REL. 232-46 (1998).
33. See *supra* note 8.
34. *Id.* § 4.
35. *Maddaford v. Coleman* [2004] NSWIRComm 317 (Nov. 3, 2004).
36. Workers Compensation Act 1951 (ACT); Workers Compensation Act 1987 (NSW); Workers Rehabilitation and Compensation Act 2008 (NT); Workers' Compensation and Rehabilitation Act 2003 (Qld); Workers Rehabilitation and Compensation Act 1986 (SA); Workers Rehabilitation and Compensation Act 1988 (Tas); Workers Compensation Act 1958 (Vic); Workers' Compensation and Injury Management Act 1981 (WA).
37. Robert Guthrie, *The Australian Legal Framework for Stress Claims*, 14 J.L. & MED. 528-50 (2007).
38. Workers' Compensation and Injury Management Act 1981 (WA) § 5.
39. *Id.* § 5.

40. Workers' Compensation and Injury Management Act 1981 (WA) § 5(4).
41. Q-Comp v. Education Queensland [2005] QIC 46; 176 QGIG 492.
42. Hart v. Comcare (2005) 145 FCR 29.
43. Wiegand v. Comcare (2007) 94 ALD 154. Finn, J. noted in Wiegand that he was bound by Hart although he thought its effect was harsh.
44. The only suggestion that the effects of these cases may have been mitigated appears in the Queensland decision of Gillam v. Q-Comp (WC/2007/38) ("Gillam") January 25, 2008 where Swan DP applied a "global" approach to the assessment of the management actions holding that repetitive blemishes could over time be considered as representing unreasonable management action so as to negate a defense of reasonable management action. Under the Commonwealth provisions, the Administrative Appeals Tribunal in Caldwell v. Comcare [2008] AATA 450 ("Caldwell") declined to find that the defense of reasonable management action applied because on the facts the management action could not be seen as a material stressor. Thus these two cases suggest that, as in Gillam, some legal distinctions might be made to avoid the hard effects of these preclusions and, as in Caldwell, that the assessment of reasonable management action as a stressor might be downplayed in some instances.
45. Millichamp v. Comcare [2009] AATA 127.
46. See Dunstan v. Comcare [2006] FCA 1655 for an example where a male worker succeeded in a claim for workers' compensation where harassment that took place within and without the workplace was held to have materially contributed to his depression, notwithstanding that claims made in the Human Rights and Equal Opportunity Commission had been dismissed.
47. Fairley v. Q-Comp (Unreported WC/2007/72) Mar. 28, 2008. A similar case is Sheridan v. Q-Comp (unreported WC/2008/48) May 6, 2009, where the worker suffered an adjustment disorder due to the persistent over-management by her supervisor, which included impolite email correspondence, major changes to work patterns, and favoritism.
48. See, e.g., Q-Comp v. Foote (Unreported WC/2008/13 No 2) Nov. 26, 2008.
49. Bauduccio v. Comcare [2009] AATA 333.
50. *Id.* ¶ 27.
51. South Maitland Railways Pty. Limited v. James (1943) 67 CLR 496.
52. *Id.* ¶ 507.
53. Weston v. Great Boulder Gold Mines Limited (1964) 112 CLR 30.
54. Kavanagh v. Commonwealth (1960) 103 CLR 547.
55. Davis v. Mobil Oil Australia Limited (Unreported. CA (NSW), Feb. 3, 1988).
56. Tarry v. Warringah SC [1974] 48 WCR (NSW) 1.

57. *Rail Corporation New South Wales v. El Hawat* PR974345 [2006] AIRC 655 (Oct. 16, 2006) was a case of a worker who was racially abused by a passenger and responded by throwing a punch at him that did not connect. It was held that this was misconduct but that in the circumstances it was harsh and unreasonable to terminate the worker due to his otherwise long and unblemished employment history.

58. *Sheridan v. Q-Comp* (C/2008/48 May 6, 2009).

59. *Gersten v. Cape York Land Council Aboriginal Corporation* (No. B2041 of 2003), Commissioner Fisher, Dec. 22, 2004.

60. *Naidu v. Group 4 Securitas Pty Ltd* [2005] NSWSC 618.

61. Among other things the plaintiff was given unreasonably long shifts and he was refused permission to collect his wife from hospital when she had to seek medical treatment during pregnancy.

62. *Aaron Rathmell & Michaela Whitbourn, Wilkinson v. Downton at Work: Employer's Liability for Intentionally Inflicted Psychiatric Injury*, 21 AUSTL. J. LAB. L. 339, 350 (2008).

63. *Naidu v. Group 4 Securitas Pty Ltd* [2005] NSWSC 618, 205.

64. *Id.* ¶ 117.

65. *Id.* ¶ 20.

66. *Naidu v. Group 4 Securitas Pty Ltd* [2006] NSWSC 114. The plaintiff also received AU \$111,403.12 from the Group 4 workers' compensation insurer that was taken into account as part of the damages award.

67. *Naidu v. Group 4 Securitas Pty Ltd* [2005] NSWSC 618, 303. This decision was upheld on appeal at [2007] NSWCA 377. Group 4 Securitas lost its contract in Queensland as an airport passenger screener to 1SS Security Pty. Ltd., with the latter company also becoming embroiled in allegations of workplace bullying. See *ISS Security Pty. Ltd. v. Q-Comp* (Unreported WC/2007/06) June 27, 2007, where fortunately for ISS, the Queensland Industrial Relations Commission held that it had acted reasonably in its investigations of bullying allegations.

68. A similar case is *Hellsing v. British Aerospace Australia Ltd.* [2001] ACTSC 98, where an employee developed anxiety and depression following harassment and bullying by his supervisor. He was awarded AU \$342,898 in damages although the facts of the case are unclear from the judgment on appeal. In *Priest v. New South Wales* [2006] NSWSC 12 a police officer succeeded in a claim for damages on the grounds that he had been victimized and harassed at work giving rise to his psychiatric injury.

69. *New South Wales v. Jeffery & Ors* [2000] NSWCA 171 (Sept. 1, 2000).

70. *New South Wales v. Mannall* [2005] NSWCA 367.

71. *Id.* ¶ 168.

72. *Midwest Radio Limited v. Arnold* [1999] QCA 20.

73. *Id.* ¶ 31.

74. *Blenner-Hassett v. Murray Goulburn Co-operative Pty. Ltd. & Ors*, 1999 Victoria County Court (2651/96-Morwell),

[http://www.countycourt.vic.gov.au/CA256D90000479B3/Lookup/Judgments\\_B/\\$file/blenner.pdf](http://www.countycourt.vic.gov.au/CA256D90000479B3/Lookup/Judgments_B/$file/blenner.pdf) (last accessed Feb. 25, 2009).

75. Anti-Discrimination Act 1977 (NSW); Anti-Discrimination Act 1992 (NT); Anti-Discrimination Act 1991 (Qld); Anti-Discrimination Act 1998 (Tas); Discrimination Act 1991 (ACT); Equal Opportunity Act 1984 (WA); Equal Opportunity Act 1995 (Vic); Equal Opportunity Act 1984 (SA); Racial Discrimination Act 1975 (Cth).

76. One of the worst cases of sexual harassment and bullying occurred in *Lee v. Smith & Ors* [2007] FMCA 1092 where a defense department employee was awarded over AU \$400,000 and the employer found vicariously liable for a sexual assault upon her that resulted in subsequent victimization and bullying.

77. Age and disability are covered under state and territory laws by the legislation Age Discrimination Act 2004 (Cth) and Disability Discrimination Act 1992 (Cth).

78. *Gabryelczyk v. Hundt* [2005] NSWADT 94 (May 3, 2005).

79. *Id.* ¶ 12-19.

80. *Webb v. State of Queensland* [2006] QADT 8.

81. See also *Mobb v. King Island Council* [1995] IRCA 628; *Lulham v. Shanan, Watkins Steel and Others* [2003] QADT 11. In the latter case the complainant, a boilermaker, was subjected to offensive comments about his sexuality, being homosexual and a pedophile.

82. *Cvetkovski v. Cleary Bros (Bombo) Pty. Ltd.* [1999] NSWADT 34.

83. *Id.* ¶ 30.

84. *Id.* ¶ 44.

85. *Id.* ¶ 36.

86. RIGBY, *supra* note 2, at 15.

87. Equal Opportunity Commission of Western Australia, *Review of the Equal Opportunity Act 1984 Report* May, 14-15 (2007).

88. RIGBY, *supra* note 2, at 15.

89. Equal Opportunity Commission of Western Australia, *Review of the Equal Opportunity Act 1984 Report* May, 14-15 (2007).

90. See the discussion on constructive dismissal below.

91. See *Independent Education Union of Australia v. Yipirinya School Council (Inc)* [2007] AIRC 557 where Commissioner Lawson refused to intervene where allegations of bullying were made against a school principal as to do so would have meant stepping into a management role.
92. *Western Excavating (EEC) Ltd. v. Sharp* [1978] QB 761 at 769.
93. *Phillips v. Wilderness School*, [2007] SAIRComm 6 (Apr. 13, 2007).
94. *Id.* ¶ 205.
95. *Id.* ¶ 206.
96. *Id.* ¶ 183.
97. *Id.* ¶ 161.
98. *Id.* ¶ 180.
99. Max Spry, *Workplace Harassment*, 10 AUSTL. J. LAB. L. 229 (1997).
100. *Bann v. Sunshine Coast Newspaper Company Pty. Limited* (Unreported PR 935122 [2003] AIRC 915 July 30, 2003) at 117.
101. *Hill v. Minister for Local Government, Territories and Roads* PR946017 [2004] AIRC 394 (Apr. 26, 2004).
102. Andrea Adams Trust, *Fact Sheet on Workplace Bullying*, <http://www.andreaadamstrust.org/factsheet.pdf> (last accessed Jan. 16, 2008). (The Trust has since closed owing to lack of funding.)
103. *Goldman Sachs JB Were Services Pty. Ltd. v. Nikolich* [2007] FCAFC 120.
104. *Id.* ¶ 24.
105. *Id.* ¶ 186.
106. *Id.* ¶ 206.
107. Had the harassment and grievance sections been written differently, i.e., using more precise and promissory language, it is likely they too would have been incorporated into the contract.
108. Some support for this proposition can be found in Joellen Riley, *Damages in Executive Employment Litigation*, 52 U. NEW S. WALES FAC. L. SERIES 5 (2007).
109. *McDonald v. State of South Australia* [2008] SASC 134.
110. See *Phillips v. Wilderness School*, [2007] SAIRComm 6 (Apr. 13, 2007).
111. Relying principally on the decision in *Russell v. The Trustees of the Roman Catholic Church* [2007] NSWSC 105 discussed in Joseph Catanzariti & Simon Brown, *Major Tribunal Decisions in 2007*, 50 J. INDUS. REL. 429, 433 (2008).

112. *State of South Australia v. McDonald* [2009] SASC 219, 215-39; 243.

113. *Id.* ¶ 269.

114. *Id.* ¶¶ 270, 278.

115. *Id.* ¶ 335.

116. *Id.* ¶ 341.

117. *Id.* ¶ 345.

118. *Id.* ¶ 346.

119. It should be noted that Mr. McDonald represented himself in both cases.

120. Guthrie, *supra* note 37.

121. *Id.*

122. See Fair Work Act 2009 (Cth), § 351.

123. ANDREW STEWART, *STEWART'S GUIDE TO EMPLOYMENT LAW* 225 (2d ed. 2009).