

Harassment and Bullying Laws: An International Perspective¹

By Keith A. Fink² and Jennifer H. Yeung³

I. A Different World Today

It is hard to imagine that at one time teenagers watched *Leave it to Beaver*, *Ozzie & Harriet* and *Howdy Dowdy*. During that time, people bought books at independent bookstores, got a cup of coffee at the diner, made telephone calls only at home using a rotary phone and typed letters on a typewriter. Today's youth watches "reality shows" featuring the Kardashians and the Osbournes, for example. The independent bookstore and coffee shop are nearly extinct, having been replaced by corporations such as Borders and Starbucks. If you can remember using liquid paper and an IBM Selectrix, you must have reached an age where the Age Discrimination in Employment Act ("ADEA") protects you. Perhaps even harder for some to imagine is a time when divorce rates were not astronomical and people met their spouses at work and freely dated those from work. Yes, there was a time when the world functioned without laws prohibiting sexual harassment.

The world today is radically different than it was just 25 years ago and much different than it was 40 years ago. Nowhere is this more evident than in the workplace, where a spate of employment laws have sprung into place. These laws have virtually rendered the concept of "employment at-will"⁴ a dead letter. The wisdom of these laws is certainly debatable even though these laws are assumed to be sacrosanct.⁵ Whether these laws are sound public policy is not the focus of this paper. The laws prohibiting harassment in the workplace are here to stay and the laws prohibiting workplace bullying are just beginning to burgeon. Understanding these laws is vital and herein below the laws on harassment and bullying in the workplace are discussed in an international context. This paper will also examine the extraterritorial

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² Mr. Fink is the owner and Principal Partner of Keith A. Fink and Associates, a boutique litigation firm specializing in employment and entertainment litigation in Los Angeles, CA. Mr. Fink currently teaches at the University of California at Los Angeles such courses as Free Speech in the Workplace and Sex, Race & Politics: Free Speech on Campus. He has also served as Adjunct Professor at Southwestern University Law School since 1993, wherein he has taught various courses on Employment Discrimination and Civil Rights Law.

³ Ms. Yeung is a second-year student at Boston College Law School, Class of 2011. She has served as a judicial extern for the Honorable Stephen J. Hillman, United States District Court for the Central District of California, as well as a law clerk at Keith A. Fink & Associates in Los Angeles, CA.

⁴ "Employment-at-will" is an American legal doctrine that states that the employer is free to discharge individuals for good cause, bad cause, or no cause at all, and the employee is equally free to quit, strike, or otherwise cease work. California is an example of a state that has codified this doctrine. See Cal. Lab. Code § 2922 ("An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month.")

⁵ See Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (1992 Harvard University Press).

application of U.S. employment laws as well as ways in which employers can protect themselves from harassment and bullying claims.

II. Sexual Harassment in the Workplace

Sexual harassment in the workplace violates Title VII of the Civil Rights Act of 1964⁶, which prohibits many forms of discrimination in employment, including discrimination based on sex. Title VII applies to employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations, as well as the federal government. In 2008 alone, the Equal Employment Opportunity Commission (“EEOC”) received 13,867 new charges of workplace sexual harassment. 84.1% of those charges were filed by females. That same year, the EEOC resolved 11,731 sexual harassment charges and recovered \$47.4 million in monetary benefits for the aggrieved individuals.

The EEOC defines sexual harassment as unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature. There are two types of sexual harassment: “quid pro quo” and “hostile work environment”. “Quid pro quo” harassment occurs when such conduct explicitly or implicitly affects an individual’s employment, or is used as a basis for employment decisions affecting an individual. For example, an employee may be required to submit to unwelcome sexual conduct in order to keep a job or to receive a job benefit, such as a raise or promotion. “Hostile work environment” harassment occurs when such conduct unreasonably interferes with an individual’s work performance or creates an intimidating, hostile, or offensive work environment. Physical contact is not required; words alone may be enough to constitute sexual harassment of both types. Furthermore, while a single isolated incident may be sufficient to establish a claim of “quid pro quo” harassment, a pattern of conduct is required to establish a claim of “hostile work environment”.⁷ Courts will consider both the frequency and severity of the conduct for “hostile work environment” claims.

In the 1986 case of *Meritor Savings Bank v. Vinson*⁸, the U.S. Supreme Court first recognized sexual harassment as a form of sex discrimination under Title VII. Two years later, the U.S. Supreme Court concluded in *Faragher v. City of Boca Raton*⁹, that employers are liable for harassment by their employees. Furthermore, *Oncale v. Sundowner Offshore Services*¹⁰ set the precedent for same-sex harassment, stating that any discrimination based on sex is actionable so long as it places the victim in an objectively hostile working condition.

⁶ States have adopted their own legislation, patterned after Title VII, that prohibits sexual harassment in the workplace. It is the state statutes that sophisticated plaintiff’s attorneys use when filing a claim of sexual harassment. State laws usually provide many more benefits to the plaintiff than federal laws do. Some benefits include: avoiding a unanimous jury in order to get a plaintiff’s verdict, a smaller employee numerical threshold, less chance of a dispositive motion being granted, and the likelihood of a larger attorneys’ fee award based on those states that consider a multiplier to the standard lodestar on a fee motion.

⁷ There is an inverse correlation between the severity of the conduct and the number of incidents for a hostile work environment claim. For example, a single serious sexual physical attack, such as rape, would be sufficient for a hostile work environment, whereas a few incidents of an employee being touched (e.g. rubbing of the shoulders) would not.

⁸ See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

⁹ See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

¹⁰ See *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).

Many countries have similarly taken steps to prohibit workplace sexual harassment. In Australia, for example, the Sex Discrimination Act of 1984 defines sexual harassment as "...unwanted conduct of a sexual nature, in circumstances in which a reasonable person...would have anticipated that the person harassed would be offended, humiliated or intimidated." The United Kingdom has also modified its Discrimination Act of 1975 to include sexual harassment as a form of discrimination. In Russia, the Criminal Code, Russian Federation prohibits the use of an office position and material dependence for coercion of sexual interactions; however, in practice, courts typically do not examine these issues. Sexual harassment in the Middle East are, for the most part, in their infancy. Israel's "Prevention of Sexual Harassment Law" is the only set of directives in the Middle East that provides protection for women against sexual harassment. Even the more developed countries, such as Egypt and Saudi Arabia, did not have laws prohibiting sexual harassment until recently. Israeli courts are instructed to protect human dignity and to promote equality between the sexes. Israeli law defines criminal offenses of "sexual blackmail by way of threats" and "indecent acts" as sexual harassment. This definition enables the victim of such acts to file a tortious action against the perpetrator, and/or to sue the employer for intimidation and/or injury if the sexual harassment occurred in the workplace.

Chinese law does not directly target harassment in the workplace. Through the use of codes and provisions, harassment in certain cases is punished, but this trend is just beginning. It was not until June 2001, that the first claim under sexual harassment in the workplace was filed, but none of the witnesses were willing to testify against their boss and therefore, the plaintiff received nothing. The first of such lawsuits to prevail occurred in 2003, where an employer was sued for having kissed and fondled a school teacher in front of a group during a school outing. The teacher won an apology from her former boss, and it took over ten different law offices to find an attorney who was willing to accept the case.

Furthermore, the law varies throughout the different provinces of China. A statute in Shanghai, known as the "Shanghai Supplement," was China's first local law to define sexual harassment and to allow victims to sue. The statute states, "Women victims have the right to complain to their employer or relevant departments. Relevant departments and employers must take necessary measures to prevent and to stop sexual harassment toward women." This statement, unfortunately, has proven to be too vague and therefore, hard to enforce. In Beijing, the law states that for sexual harassment to exist, the target of the conduct must be female, the conduct must be against the woman's will, and the conduct must involve sexual advances.

Recognizing that sexual harassment in the workplace is a global problem, all employers can and should take steps to prevent such harassment. Employers should clearly define for their employees what sexual harassment is, as well as communicate to them that they will not tolerate harassment of this nature. Additionally, they can provide sexual harassment training to their employees and establish an effective complaint or grievance process. Employers should further state that retaliation against complainants will not be tolerated, and lastly, all complaints should be taken seriously and be promptly addressed and investigated upon notice to the employer.¹¹

¹¹ A proper handling of the investigation is critical. Any investigation must be done in good faith by a person who is objective. Too often investigations are done by those not trained to properly conduct an investigation or to properly document the results of an investigation. Perhaps the biggest problem occurs when the alleged harasser is a high-ranking member of the organization. Arguably, someone in human resources (a position below that of the alleged harasser) cannot conduct a neutral and independent investigation. At times, it is imperative that the company seek an investigator outside of the company.

III. Workplace Bullying: The Robert Montgomery Knight Management Problem¹²

There is no single formal definition of workplace bullying. However, in general, workplace bullying occurs when a worker is faced with hostile, abusive, and/or intimidating behavior from a boss or a co-worker. It includes all types of interpersonal harassment and psychological violence.¹³

The Workplace Bullying Institute (“WBI”), the sole United States organization dedicated to the eradication of workplace bullying, defines workplace bullying as “repeated mistreatment manifested as either verbal abuse, conduct which is threatening, humiliating, intimidating, sabotage that interferes with work, or some combination of the three”.¹⁴ In August 2007, the WBI partnered with Zogby International to conduct the first representative study of all adult Americans on the topic of workplace bullying.¹⁵ The margin of error was +/- 1.1 percentage points. According to this study, which sampled 7,740 American adults, approximately 54 million Americans have experienced bullying directly. 37% of workers have been bullied, 13% currently and 24% previously. 72% of bullies are bosses. 60% of perpetrators are men and 40% are women. 57% of targets are women. Bullying is 4 times more prevalent than illegal discriminatory harassment. 62% of employers ignore the problem. 45% of targets suffer stress-related health problems, such as anxiety, panic attacks, clinical depression, and even post-traumatic stress. 40% of bullied individuals never tell their employers. Only 3% of bullied people file lawsuits and only 4% complain to state or federal agencies.

Although some forms of workplace bullying are outright illegal, most are not. Furthermore, the typical target of workplace bullying has little chance of prevailing in a lawsuit against co-employees or an employer. The absence of a clear path to liability also encourages employers to sidestep complaints about bullying. This is in sharp contrast to the current state of sexual harassment law. In 1986, the U.S. Supreme Court held that employers could be held

Again, however, the retention of an outside investigator is subject to attack. How neutral is someone who is hired and paid by the employer to conduct the investigation?

¹² The Robert Montgomery Knight management problem refers to those situations where an employer may be susceptible to harassment or bullying claims as a result of his/her forceful management style. Robert Montgomery Knight and Alfred Manuel “Billy” Martin, Jr. were extremely successful coaches/managers who motivated their athletes/employees by raising their voices at times. Their leadership strategy was not meant to demean or to demoralize, but to motivate their teams.

¹³ David C. Yamada, *Dignity, “Rankism,” and Hierarchy in the Workplace: Creating a “Dignitarian” Agenda*. 28 Berkeley J. Emp. & Lab. L. 305, 312-13 (2007).

¹⁴ Attaching such a definition to the problem of workplace bullying may be too all-encompassing. The lack of a unifying definition of the phenomenon is a problem because without it, individuals may misclassify their experiences of abuse, and thus misrepresent in studies such as this the prevalence of workplace bullying. Employers like Robert Montgomery Knight and Billy Martin, Jr. who use forceful words to urge their employees to work harder or to get the job done may not be the right targets of harassment or bullying laws. Legislatures and the courts should keep in mind the Robert Montgomery Knight management problem as they determine how to define the workplace bullying phenomenon in order to give individuals the process to pursue justice against their bullies, those who simply demean and/or demoralize their workers. Employers should not end up being straight-jacketed by “bullying” laws where they have to walk on egg shells when speaking with their employees. Such a result would turn the workplace into Mister Rogers’ Neighborhood.

¹⁵ See WBI-ZOGBY, 2007 U.S. WORKPLACE BULLYING available at <http://www.workplacebullying.org/research/WBI-Zogby2007Survey.html>.

strictly liable for sexual harassment committed by a supervisor, resulting in a striking increase in employer activity to adopt and enforce sexual harassment policies. A supervisor must take the laws on sexual harassment seriously as well. Putting aside the possibility of losing one's job for committing harassment, a supervisor could face personal liability. While most federal courts have found no Title VII liability against supervisors, state statutes exist to impose such liability.¹⁶ Additionally, a harasser may be subject to common law tort claims such as assault and battery.

Workplace bullying is still being established as a relevant social problem, and has only recently emerged as an issue for the courts. Thus, no specific federal or state "anti-bullying" legislation exists in the United States at this time. The current law in the United States is that unless a target can prove he/she was bullied for being a member of a protected class (typically based on race, color, national origin, sex, religion, age, or disability), he/she most likely does not have a claim to litigate. Many instances of workplace bullying involve harmful conduct that cannot be linked to protected class status, and therefore, employees who face bullying are often left without any legal protection.

In response, organizations such as the Workplace Bullying Institute and the Healthy Workplace Advocates have been trying to encourage states to enact the Healthy Workplace Bill, a model anti-bullying legislation designed to provide remedies to targets of workplace bullying who can demonstrate tangible harm and to encourage employers to act preventively and responsively with regard to these behaviors. Since 2003, many state legislatures have considered similar bills, and as of April 2009, 16 U.S. states have proposed legislation. Interest in this type of legislation is growing.

Litigation and liability for employers increase as this issue becomes more public. Not only is there an exposure to risk on behalf of the employer, but a loyal employee who has been bullied may lose his/her commitment to the organization, not to mention damage his/her own personal well-being. Since no "anti-bullying" legislation exists in the United States, employees who are victims of workplace abuse must look to discrimination and harassment laws under Title VII of the Civil Rights Act, Age Discrimination in Employment Act, the Americans with Disabilities Act, or the False Claims Act. All four of the above are written into U.S. federal and state laws, and unless the employee has suffered discrimination under one of these four laws and has sustained significant pain, suffering, and financial losses, he/she is unlikely to prevail in court. Employees who are victims of workplace abuse, as in the case of harassment, can also look to common law tort claims, such as assault, intentional infliction of emotional distress, and intentional interference with the employee's employment relationship.

Workplace bullying is a universal problem, and many other countries have similarly taken steps to address this issue in order to improve workers' health and safety. In Ireland, for example, there is a Code of Practice for employers and employees on the prevention and resolution of bullying at work. The Code requires employers to manage work activities to prevent improper conduct or behavior in the workplace; such requirement includes stamping out workplace bullying. In Sweden, workplace bullying is covered by the Ordinance of the Swedish National Board of Occupational Safety and Health, which contains provisions on measures against victimization at work. There, victimization is defined as "...recurrent, reprehensible or distinctly negative actions...directed against individual employees in an offensive manner and can result in those employees being placed outside the workplace community." Furthermore, Australia seems to be one of very few countries that have addressed workplace bullying in its

¹⁶ See *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451 (5th Cir. 1994); Cal. Gov't Code § 12940(j)(3).

legislation. Under the New South Wales Occupational Health and Safety Act of 2000, employers are required to ensure the health, safety and welfare of all employees; this extends to bullying. Employers also have a duty to take reasonable care for the safety of their employees at work. This Act is the most direct basis upon which a worker can claim damages for bullying.

For some employers, the bully may be the most creative person, the best salesperson or the brilliant technical genius. However, if that individual is terrorizing the work force and the employer continues to tolerate that behavior, there are negative ramifications for the employer. Some workers subjected to bullying may quit, have a decline in their work performance, take a leave, or file a lawsuit. To protect themselves, employers must recognize workplace bullying and know what to do to minimize present and future risks. Employers can clearly state in their policy handbooks that they have zero tolerance toward all forms of harassment, and abusive and violent conduct.¹⁷ Employers should also quickly respond to complaints of improper behavior, in the same way as they would respond to complaints of harassment. Additionally, employers can and should turn to Employment Practices Liability Insurance (“EPLI”) to protect against bullying-type claims, such as harassment and wrongful termination, for which companies have, on average, paid \$5,000 to \$100,000 annual premiums with a retention of \$5,000 to \$25,000.¹⁸

IV. Extraterritorial Application of U.S. Employment Laws

In today’s global economy, an increasing number of companies are employing workers from foreign countries. These employment relationships present unique challenges for employers, including language and cultural differences, which have the potential to stir litigation. For this reason, it is essential that companies that employ workers abroad understand how U.S. employment laws apply to their foreign or “extraterritorial” employees. Federal courts that enforce U.S. discrimination laws have determined that the federal discrimination statutes, such as Title VII, the ADA, and ADEA have very limited extraterritorial application.

It is undisputed that Congress has the authority to enforce its laws outside the territorial jurisdiction of the United States.¹⁹ However, Congress did not extend the federal statutory protections to American employees working abroad until the early 1990s. Prior to the enactment of the Civil Rights Act of 1991, federal courts held that Title VII, the ADA, and the ADEA did not apply to U.S. citizens employed in foreign countries. The U.S. Supreme Court decided in the

¹⁷ The authors do not suggest that an employer actually adopt a zero tolerance policy. Too often policies such as this, which are written with good intentions, are used as a sword by the plaintiff’s counsel who attempts to hoist the defendant employer on the petard of the words in an employee handbook. For example, if the policy is really zero tolerance, then why did the employer not fire the bully the first time he yelled at an employee?

¹⁸ No reason exists not to get EPLI. Each employee creates for a company the potential for a million dollar problem should a lawsuit for bullying or harassment be filed. Most employers and still many brokers are ignorant about this type of insurance. An employer’s workers’ compensation or commercial general liability policy is not going to provide coverage against claims of employment discrimination. All EPLI policies are not created equal. It is suggested that when getting such insurance, an employer not try to save pennies on premium payments and get smaller coverage. Getting a million dollars in coverage instead of \$250,000 does mean paying four times more in premium payments. Provisions such as third-party coverage should be added (disability claims, such as under the ADA, are covered) as well as choice of counsel and defense outside of the limits. Most importantly, in the United States, some carriers now provide for wage and hour defense and indemnity on an EPLI policy.

¹⁹ See *Torricon v. Int’l Bus. Mach. Corp.*, 213 F. Supp. 2d 390, 397 (2002).

1991 case *EEOC v. Arabian American Oil Company*²⁰ that Title VII extended protection only domestically to both American citizens and aliens working in the United States, and did not apply extraterritorially to U.S. employers who employed U.S. citizens abroad. The Court held that the employers were not liable under Title VII for employment discrimination against the U.S. citizens employed abroad. Upon passage of the Civil Rights Act of 1991 and other similar amendments, however, these federal statutes found some application in foreign lands.

A. Title VII

Congress enacted Title VII of the Civil Rights Act of 1964 to secure equality in the workplace and to eliminate discrimination based on race, color, religion, sex, or national origin. As discussed, the U.S. Supreme Court held in 1991 that Title VII did not apply extraterritorially.²¹ In response to this decision, Congress enacted the Civil Rights Act of 1991, which amended Title VII to give the statute limited extraterritorial reach. The amended Title VII expanded the definition of “employee” to include U.S. citizens working abroad, but explicitly precluded aliens working for U.S. companies abroad. Permanent legal residents, such as individuals holding green cards, were also not subject to the protections of Title VII while working abroad.

In addition, Title VII was amended to include a “foreign laws defense,” which states that an employer may escape Title VII liability for discrimination against a U.S. citizen employed abroad upon proof that compliance with Title VII would cause it to violate the law of the foreign country.²² This defense was created in order to avoid placing a foreign employer in the position of having to operate between two inconsistent legal systems.

B. Americans with Disabilities Act²³

The Americans with Disabilities Act (“ADA”) prohibits an employer from discriminating against a qualified individual with a disability in the employment context. Discrimination includes an employer’s failure to make reasonable accommodations to the known physical or mental limitations of a qualified individual with a disability unless doing so would impose undue

²⁰ See *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).

²¹ See *id.*

²² See 29 U.S.C. § 623(f)(1) (“It shall not be unlawful for an employer, employment agency, or labor organization to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located.”).

²³ In September 2009, Sears Holdings Corp., the fourth largest broad-line retailer in the U.S., settled an employment bias case for \$6.2 million. According to the Associated Press, Sears Holdings Corp. agreed to pay a record \$6.2 million to settle allegations that it illegally fired disabled employees. The EEOC reported that the settlement is the “largest it has reached in a single case under the ADA.” The lawsuit claimed that Sears “fired hundreds of employees who took workers’ compensation leave after being injured on the job” without offering “a reasonable accommodation that would have allowed them to return to work.” An EEOC lawyer said, “The settlement should be a wake-up call for employers who lack policies that incorporate the requirement of both workers’ compensation laws and the Americans with Disabilities Act...It’s the intersection of the workers’ compensation laws and the ADA that has been an area where employers have struggled with regard to compliance.”

hardship on the employer. The extraterritorial reach of the ADA is similar to that of Title VII. The Civil Rights Act of 1991 enacted the same amendments to the ADA to give the statute limited extraterritorial reach.²⁴ Thus, the ADA's definition of "employee" was expanded to include U.S. citizens working abroad and also included the identical "foreign laws defense."

C. Age Discrimination in Employment Act

The Age Discrimination in Employment Act ("ADEA") prohibits discrimination based on age in an employment context.²⁵ In 1984, the Third Circuit decided the seminal case of *Cleary v. United States*, in which it held that the ADEA did not apply extraterritorially.²⁶ Prior to 1984, the ADEA could not be applied to U.S. citizens employed outside of the U.S. by U.S. employers. That same year, Congress responded by amending the ADEA to provide for limited extraterritorial application. The 1984 amendments require that the employee is a U.S. citizen and that a U.S. employer controls the foreign employer. The purpose of the amendment was to ensure that a U.S. citizen who was employed abroad by a U.S. corporation received the protections of the ADEA. This statute was carefully worded so as to not apply to foreign nationals working for U.S. companies in a foreign country or to foreign companies not controlled by U.S. companies. Additionally, like Title VII and the ADA, the ADEA includes a "foreign laws defense" that permits an employer to escape liability upon proof that compliance with the ADEA would cause it to violate the laws of a foreign country if, for example, a country has a mandatory retirement age.

D. Fair Labor Standards Act and Equal Pay Act

In contrast to Title VII, the ADA, and the ADEA, the Fair Labor Standards Act ("FLSA") and the Equal Pay Act ("EPA") do not apply to work performed in a foreign country. The FLSA governs minimum wage, overtime pay, employment of children, and record-keeping standards, while the EPA prohibits discrimination in pay based on gender. To date, neither the FLSA nor the EPA have been amended to apply extraterritorially. In fact, Congress has specifically excluded U.S. employees working in foreign countries from coverage under the FLSA and the EPA.²⁷

E. Family and Medical Leave Act

The Family and Medical Leave Act ("FMLA") applies only to employees who are employed within the United States or any territory or possession of the United States. U.S. citizens employed abroad are excluded from coverage under the FMLA.

Although the amendments have furthered the extraterritorial application of some statutes, the extent of the expansion remains quite narrow. The general rule is that for Title VII, the ADA, and the ADEA to protect employees working in foreign countries, the employee must be a U.S. citizen and must either work for a U.S. corporation or for a subsidiary foreign corporation that is controlled by a U.S. company.

We can expect in the coming years that U.S. courts will clarify the extraterritorial application of U.S. employment laws and expand protections for employees working for U.S.

²⁴ See 42 U.S.C. § 2000e(f).

²⁵ See 29 U.S.C. § 623(a).

²⁶ See *Cleary v. U.S.*, 728 F.2d 607, 610 (3rd Cir. 1984).

²⁷ See 29 U.S.C. § 206.

companies abroad. Until that time, employers doing business abroad should be careful and consider the legal implications of their actions under both U.S. and foreign laws regarding their foreign employees.

V. Steps to Protect Employers from Harassment and Bullying Claims

Given that laws prohibiting harassment in the workplace are about as likely to disappear as the “designated hitter” rule in the American League²⁸, every employer needs to understand these laws as well as ensure that policies and procedures are in place to prevent and properly address both harassment and bullying claims. Here are some of the important issues to consider:

- Employee Handbooks should clearly state policies and procedures that define what constitutes harassment and that provide a rationale grievance mechanism for employees. If an employee speaks a foreign language, such as Spanish, providing that employee with a handbook in English is a farce. Furthermore, requiring that an employee report an incident of harassment by a superior to a subordinate is also questionable. Too many employers are sloppy in adopting cogent written policies. Many, unfortunately, buy the generic handbook template or find another company’s handbook and adopt the content in its entirety, aside from changing the company name to the name of their own business. Whether the handbook they have adopted was appropriately drafted is not even considered. Most of these handbooks are so poorly drafted that they provide for a rigid progressive discipline policy. Therefore, an employer should have a skilled labor lawyer draft a handbook specific to the business. Furthermore, without a written policy or complaint procedure in place, it is extremely difficult for an employer to invoke the Ellerth/Faragher²⁹ defense under Title VII. A written complaint procedure should also assure that confidentiality will be protected to the extent possible, and that the employer will take immediate and appropriate action if it determines harassment occurred. A harassment policy should also delineate the other prohibited grounds of harassment and discrimination under both federal and state law, such as race, age, and national origin.
- A non-fraternization policy may, unfortunately, be advisable given the liability a company faces if (more likely when) the employer-employee or employee-employee relationship sours.³⁰

²⁸ In American baseball, the designated hitter rule allows teams to designate a player, known as the designated hitter, to bat in place of the pitcher each time the pitcher would come to bat, rather than replace the pitcher by pinch-hitting. Since the rule came to existence in 1973, the American League has refused to revert back to the traditional rule followed by the National League wherein the pitcher hits for himself. This is so despite the hue and cry of baseball purists.

²⁹ In the absence of a tangible employment action, the employer may raise the Ellerth/Faragher affirmative defense that the employer 1) “exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and 2) “that the plaintiff employee unreasonably failed to take advantage of any preventive corrective opportunities provided by the employer or to avoid harm otherwise.”

³⁰ See *Miller v. Dep’t of Corr.*, 36 Cal. 4th 446, 466 (2005) (where the California Supreme court held that a hostile work environment could be found where a supervisor concurrently engaged in sexual affairs with three female subordinates which he promoted over others more qualified, that he demoted other women who complained, and that this had a demeaning effect on the workforce as a whole). *But see Schobert v. Ill. Dep’t of Transp.*, 304 F.3d 725, 733 (7th Cir. 2002).

- California is a state that now mandates harassment training for management if the employer employs over 50 employees.³¹ Even without this requirement, periodic training for all employees by somebody who is knowledgeable about harassment, bullying, and discrimination laws is advisable.
- Policies on the use of the Internet is a must. Filters should be bought to screen out access to pornographic sites and to bar receipt of information containing other offensive material (written and visual). Too many off-colored jokes and sexually-explicit streaming audios are circulated at the workplace; many of them are often received by employees from friends outside of the workplace. Such tomfoolery serves no legitimate place at work and is just “grist to the mill” for a harassment suit.
- Employers should adopt arbitration policies that would provide that in the event of a claim for harassment or bullying, the claim will be decided by an arbitrator (usually a retired judge) and not by a jury of the plaintiff’s peers.³²
- An employer should purchase EPLI. A single harassment claim costs, on average, \$80,000 to defend. If the plaintiff prevails, the employer is on the hook not only for his/her lawyers’ defense fees, but also for the plaintiff’s as well as compensatory and punitive damages to the plaintiff. Having this insurance allows an employer to sleep at night. A single suit for harassment or bullying has the ability to drag a business to bankruptcy.
- When sued, employers should seek sophisticated counsel. Lawyers are not fungible. A skilled practitioner will know steps to limit exposure. For example, that practitioner may suggest that the employer make an offer to compromise early in the matter.³³ Such offers, if accepted, terminate a case and if not, can possibly cut off the plaintiff’s entitlement to attorneys’ fees, an often exorbitant amount.

Harassment and bullying laws are here to stay and are now as ingrained in the legal fabric as MySpace, Facebook, and the BlackBerry cell phone are in today’s social fabric. These concepts must be understood and actions must be taken to prevent instances of harassment and bullying from occurring.

³¹ See Cal. Gov’t Code § 12950.1(a)(c).

³² See *Armendariz v. Found. Health Psychcare Serv., Inc.*, 24 Cal. 4th 83, 98 (2000) (holding that a policy on arbitration should be carefully tethered to case law).

³³ See Fed. R. Civ. Proc. r. 68 (Offer of Judgment); Cal. Code of Civ. Proc. § 998 (Offer to Compromise).