STATUS-BLIND HARASSMENT AND THE *FARAGHER* MODEL: A COMPREHENSIVE MANAGERIAL RESPONSE TO WORKPLACE BULLYING[+]

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I. INTRODUCTION

The newly-published study on Workplace Harassment and Morbidity Among US Adults ("Study") provides the long-awaited impetus for re-conceptualizing our managerial and legal responses to an issue that is both prevalent and "associated with significant health risk factors and morbidity."[1] It no longer makes sense to continue the present fragmented approach to workplace harassment, which relies upon a legal framework that is ill-suited and not specifically designed to address the breadth of this issue. Instead, employers would be wise to implement a *Faragher*[2] approach that incorporates claims of status-blind harassment in the absence of a comprehensive statutory or regulatory mandate. The *Faragher* approach, borrowed from case law decided under Title VII of the Civil Rights Act of 1964[3] (Title VII), balances the rights and obligations of employers and employees in claims of workplace harassment. This approach has the added benefit of minimizing the risk of a Title VII or Americans with Disabilities Act[4] (ADA) claim, particularly in light of the anticipated growth in the diversification of our workforce and greater integration into the job market of individuals with a range of impairments, including autism spectrum disorder. In addition, the *Faragher* approach aligns with recent legislative enactments in California, Tennessee and Utah that reflect an incremental step towards recognizing and preventing workplace bullying as a distinct form of

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[1] Jagdish Khubchandani & James H. Price, *Workplace Harassment and Morbidity Among US Adults: Results from the National Health Interview Survey*, 40 J. COMM. HEALTH 555 (2015).
[2] Faragher v. Boca Raton, 524 U.S. 775 (1998).
[3] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e)-2000(e)-17 (2012).
[4] Americans with Disabilities Act Amendments Act of 2008, 42 U.S.C. §§ 12101-12103, 12111-12114, 12201, 12205(a), 12206-12213 (2012).

unacceptable workplace behavior. Although these initiatives fall far short of recognizing a private cause of action predicated upon bullying in the workplace, bills already have been proposed in 29 states that create such a right. Given this backdrop, it is likely that the issues associated with workplace harassment will continue to occupy the attention of the public at large and lawmakers in particular. Adoption of the *Faragher* approach will position employers to avail themselves of the opportunities presented by a more diverse workforce and to incorporate any changes in the legal landscape that attempt to address workplace bullying on a more comprehensive, status-blind basis.

This article will discuss the Study as it informs our understanding of the scope of the problem of workplace bullying. We will argue that the opportunities and challenges presented by an increasingly diverse workforce necessitate a proactive approach to mitigate claims of harassment in the workplace and to promote a work environment that maximizes the strengths of each employee. The urgency of creating a more responsive approach is further supported by the present inadequacy of the existing legal framework and the potential for legislative or regulatory action in the future. In light of state-led anti-bullying initiatives, we will conclude with a proposal that employers adopt a *Faragher* approach that is consistent with present proposed legislation and provides a framework that elevates civility in the workplace.

II. THE SCOPE OF THE PROBLEM OF WORKPLACE BULLYING

A. *The Study: Workplace Harassment and Morbidity Among U.S. Adults*

The newly-released Study examines the prevalence and impact of harassment in workplaces across the nation.[5] The Study is receiving widespread attention not only in human resource outlets but also across a range of industry publications.[6] It informs our understanding of the problem, challenging employers to consider the human as well as financial costs associated with the failure to address workplace harassment. The Study reaffirms what so many other sources, statistical and anecdotal, have shown for years in terms of the negative health impacts of bullying.

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[5] Khubchandani & Price, *supra* note 1.

[6] Genevieve Douglas, *Harassment Takes Major Toll in Victims and the Overall Workplace, Study Reveals*, BNA HUMAN RESOURCES Report (Dec. 29, 2014), http://www.bna.com/harassment-takes-major-n17179921754/; *HR Answers: Workplace Bullying*, CREDIT UNION MANAGEMENT MAGAZINE (Jan. 6, 2015), http://www.cues.org/article/view/id/HR-Answers-Workplace-Bullying.

Specifically, the Study examines harassment in the workplace by analyzing the responses to the following question posed in the National Health Interview Survey (2010): "During the past 12 months, were you threatened, bullied or harassed by anyone while you were on the job?"[7] No definition of these terms was provided and no other limitation, such as whether the participant perceived that the harassment was based on a protected characteristic, was imposed. Thus, the Study does not parse the root cause of the threats, bullying conduct, or harassing behavior in terms of whether the suspected motivation was race, sex, disability or some other protected characteristic versus dislike, animosity or some other reason that may be unrelated to a protected characteristic. Notably, the Study does observe that "the odds of harassment were statistically higher for females. . ., multiracial individuals. . ., and divorced or separated individuals . . . [as well as] [i]ndividuals who worked for state/local government, worked night shifts, had more than one job, and [were] paid hourly…. when compared to their counterparts."[8] In the absence of more refined data collection and analysis, the potential exists that perceptions and experiences of harassment are not inherently linked to Title VII or ADA protected classes, referred to as "status harassment," but rather may extend to a wide range of motivations and rationales for the harassing conduct that move beyond harassment based on race, color, gender or disability, referred to as "status-blind harassment."[9]

Even though the specific health impacts from workplace bullying may differ based on gender, the impacts are nonetheless serious and significant for both men and women. In summary, participants who reported workplace harassment had statistically significant higher rates of serious mental illnesses, daily tobacco use, and sleeping less than six hours compared with participants who did not report harassment. Moreover, victims of harassment were significantly more likely to have experienced more than two weeks of lost time from work, more than two weeks of bed days, asthma attacks, ulcers, and worsening of general health. Pain disorders, including headache, neck pain, and low back pain, also were more likely. The Study does acknowledge a limitation insofar as "[i]t is possible that workers with some of these health risks were more likely to be harassed."[10] Therefore, the Study does not permit a conclusion of a causal nature as to whether the harassment caused or exacerbated negative health effects or whether negative health issues precipitated the harassment, referred to as reverse causation. In either case, the implications for employers are significant. Indeed, the toll is high

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[7] Khubchandani & Price, *supra* note 1, at 556.
[8] *Id*. at 557.
[9] *See* David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blink Hostile Work Environment Protection,* 88 GEO. L.J. 475 (2000).
[10] Khubchandani & Price, *supra* note 1, at 561.

for both employees and employers who fail to address harassment in their workplaces.

B. *External Responses to Workplace Bullying*

In recent years, there has been increased attention directed towards workplace bullying as reflected in popular media as well as scholarly publications. Most notably, the issue of workplace bullying was thrust into our national consciousness in fall 2013 when major news outlets reported that football player Jonathan Martin had left the Miami Dolphins, raising claims of harassment perpetrated by Miami Dolphins teammates, including high-profile player Richie Incognito.[11] This case highlighted the incidence of bullying and undercut the notion that bullying is merely a form of "roughhousing" or "teasing" or an otherwise acceptable form of interaction between co-workers.

In addition to the recent attention afforded bullying in the popular press, legal as well as other scholars have sought to expose the harm caused by workplace harassment and to propose means of addressing the problem either through legal or human resource avenues. In February of 2013, Temple University School of Law hosted a symposium on the problem of bullying,[12] attracting national presenters including law professor David C. Yamada. Professor Yamada's work on the topic has spanned over a decade and has garnered the attention of other scholars and politicians alike by persuasively arguing for passage of anti-bullying legislation.[13] Workplace bullying also has been a topic of interest in recent years for industrial organizational psychologists who have argued for additional workplace training to decrease the negative effects of workplace bullying.[14] Long before the recent attention to this issue, the phenomenon of workplace bullying was first identified and labeled in the United States by Drs. Ruth and Gary Namie.[15] Recognizing the absence of an organization dedicated to studying this specific behavior, they founded the Campaign Against Workplace Bullying in 1997. The organization ultimately evolved into the Workplace Bullying Institute (WBI).

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[11] *See, e.g.,* John Branch & Ken Belson, *In Bullying Cases, Questions on NFL Culture*, N.Y. TIMES, November 5, 2013, at A1.

[12] Nancy J Knauer, *Bullying Across the Life Course: Redefining Boundaries, Responsibility, and Harm*, 22 TEMP. POL. & CIV. RTS. L. REV. 253 (2013).

[13] David C. Yamada, *Emerging American Legal Responses to Workplace Bullying*, 22 TEMP. POL. & CIV. RTS. L. REV. 329 (2013).

[14] Suzy Fox & Lamont E. Stallworth, *Building a Framework for Two Internal Organizational Approaches to Resolving and Preventing Workplace Bullying: Alternative Dispute Resolution and Training*, 61 CONSULTING PSYCHOL. J.: PRAC. & RES. 220 (2009).

[15] GARY NAMIE & RUTH NAMIE, THE BULLY AT WORK: WHAT YOU CAN DO TO STOP THE HURT AND RECLAIM YOUR DIGNITY (2000).

The WBI advocates across a spectrum of fronts, including proposals for legislative action. Specifically, the WBI defines itself as "the first and only U.S. organization dedicated to the eradication of workplace bullying that combines help for individuals, research, books, public education, training for professionals-unions-employers, legislative advocacy, and consulting solutions for organizations."[16] The WBI actively solicits advocates as either state coordinators[17] or citizen lobbyists[18] to advance statewide legislation designed to address this issue on a comprehensive scale. Thus far, the efforts of WBI advocates have contributed to the introduction of anti-workplace bullying bills in more than half the states, a few of which have cleared some preliminary hurdles and are moving through the legislative process, as discussed in Section III. C. below. Should there be any doubt that workplace bullying is an issue of potential legal consequence, it is worth noting that insurance companies are tracking developments on this front, and some have begun "to include workplace bullying in their employment practice liability insurance (EPLI) policies."[19]

C. *EEOC Strategic Enforcement Plan*

The Equal Employment Opportunity Commission (EEOC), the federal administrative agency charged with enforcing federal anti-discrimination laws, identified the prevention of harassment as one of six priorities in its Strategic Enforcement Plan for Fiscal Years 2013-2016 (SEP) and has vowed to "pursue systemic investigations and litigation and conduct a targeted outreach campaign to deter harassment in the workplace."[20] The EEOC's focus on workplace harassment is justified by the statistics, which reveal that approximately 30% of all EEOC charges filed in fiscal year 2014 included a harassment charge.[21] The SEP also prioritizes the EEOC's commitment to address "[e]merging and [d]eveloping [i]ssues," including "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex

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[16] WORKPLACE BULLYING INSTITUTE, http://www.workplacebullying.org (last visited Mar. 9, 2016).
[17] HEALTHY WORKPLACE BILL: BECOME STATE COORDINATOR, http://www.healthyworkplacebill.org/takeaction/coord.php (last visited Mar. 9, 2016).
[18] HEALTHY WORKPLACE BILL" BECOME A CITIZEN LOBBYIST, http://www.healthyworkplacebill.org/takeaction/citizenlobby.php (last visited Mar. 9, 2016).
[19] David C. Yamada, *supra* note 13, at 343.
[20] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN, FY 2013-2016 (2012), http://www.eeoc.gov/eeoc/plan/sep.cfm.
[21] Press Release, U.S. Equal Employment Opportunity Comm'n, EEOC Releases Fiscal Year 2014 Enforcement and Litigation Data (Feb. 4, 2015), http://www1.eeoc.gov/eeoc/newsroom/release/2-4-15.cfm.

discrimination provisions, as they may apply."[22] The urgency of affording attention to this issue is underscored by the 2011 Report from the National Center for Transgender Equality and National Gay and Lesbian Task Force in which 50 % of the transgender and gender non-conforming respondents reported that they had experienced harassment in the workplace.[23] More broadly, "[n]inety percent (90%) of respondents said they had directly experienced harassment or mistreatment at work or felt forced to take protective actions that negatively impacted their careers or their well-being. . . ."[24] Respondents identified the "[m]istreatment [as] rang[ing] from verbal harassment and breaches of confidentiality to physical and sexual assault, while bias-avoidant behaviors included hiding one's gender, delaying transition, or staying in a job one would have preferred to leave."[25] Although the EEOC's attention may be directed towards status-based harassment that is predicated upon a protected characteristic under existing federal anti-discrimination statutes, including Title VII, ADEA and the ADA, the scrutiny afforded to this issue may raise a general awareness that workplace harassment also may occur on a broader, status-blind basis and is no less harmful to both employees and employers.

D. *Demographic Changes in the Workplace Encourage Anti-Bullying Efforts*

Other factors at play in our broader social construct suggest that employers could well benefit from elevating civility in the workplace by eliminating bullying conduct. In particular, the population of the United States is aging and becoming more racially and ethnically diverse, and not surprisingly, so too is the workforce.[26] As reported by the Bureau of Labor Statistics, there are currently nearly 157,000,000 people in the U.S. labor force.[27] Increased diversity is expected across several demographics, especially age and ethnicity. For example by 2022, as the population

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[22] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 20.
[23] JAMIE M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 58 (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.
[24] *Id*. at 56.
[25] *Id*.
[26] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, MONTHLY LABOR REV., THE LABOR FORCE PROJECTIONS TO 2022: THE LABOR FORCE PARTICIPATION RATE CONTINUES TO FALL (Dec. 2013), http://www.bls.gov/opub/mlr/2013/article/pdf/labor-force-projections-to-2022-the-labor-force-participation-rate-continues-to-fall.pdf.
[27] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USDL-15-0530, THE EMPLOYMENT SITUATION—MARCH 2015 (Apr. 2015) http://www.bls.gov/news.release/archives/empsit_04032015.pdf.

continues to age, workers age 55 and older will comprise 25.6% of the civilian labor force, up from 20.9% in 2012.[28] The number of workers of Hispanic origin is expected to increase from 24,391,000 in 2012 to 31,179,000 by 2022, representing an impressive increase of 27.8%.[29] Women currently account for just under 47% of the civilian labor force, compared to 29.6% in 1950.[30] By 2022, that number is also expected to rise slightly.[31] Black workers currently account for approximately 11% of the labor force, and that number is expected to increase to about 12.4% by 2022.[32] Beyond the numbers, researchers estimate that by 2050, there will be no racial or ethnic majority in our country.[33]

Tracking the participation of lesbian, gay, bisexual and transgender (LGBT) workers is more difficult because the Department of Labor does not collect information on sexual orientation or gender identity.[34] (Burns et al., 2012). However, some researchers have estimated that there are approximately one million LGBT workers employed in the public sector, and approximately 7 million in the private sector. (Burns et al., 2012). In the recent past, both federal and state rights have expanded for this segment of the population, which may lead to an increase in workforce participation as well. One giant step towards rights' expansion occurred in June 2015 as a result of the Supreme Court's ruling in *Obergefell v. Hodges*.[35] In this landmark decision, the Court held that "same-sex couples may exercise the fundamental right to marry in all States[36]. . . . [and] . . . that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character."[37] This decision followed the Court's earlier ruling in *United States v. Windsor*.[38] In *Windsor*, the Court struck down a portion of the federal Defense of Marriage Act defining marriage as between a man and woman, [39] thus paving the way for same-sex married couples to enjoy the same federal rights as heterosexual married couples in states that recognize marriage equality.

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[28] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *supra* note 26, at 20.
[29] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *supra* note 26, at 2.
[30] CROSBY BURNS, ET AL., THE STATE OF DIVERSITY IN TODAY'S WORKFORCE: AS OUR NATION BECOMES MORE DIVERSE SO TOO DOES OUR WORKFORCE (Center for American Progress, 2012), https://www.americanprogress.org/issues/labor/report/2012/07/12/11938/the-state-of-diversity-in-todays-workforce/.
[31] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *supra* note 26, at 2.
[32] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *supra* note 26, at 2.
[33] BURNS ET AL., *supra* note 30, at 2.
[34] BURNS ET AL., *supra* note 30, at 4.
[35] 135 S. Ct. 2584 (2015).
[36] *Id*. at 2607.
[37] *Id*. at 2608.
[38] 133 S. Ct. 2675 (2013).
[39] *Id*. at 2695.

In addition to these judicial decisions, the executive branch, including the EEOC, has taken action to extend protection against discrimination in the workplace to the LGBT community. On July 21, 2014, President Obama issued Executive Order 13672, banning federal contractors from discriminating against employees on the basis of sexual orientation or gender identity.[40] A few months later, then-Attorney General Eric Holder issued a memorandum clarifying the Department of Justice's position on filing claims against state and local public employers for sex discrimination in violation of Title VII. In that memorandum, he advised federal department heads and U.S. attorneys that Title VII's ban on sex discrimination "encompasses discrimination based on gender identity, including transgender status."[41] And, most recently, on June 3, 2015, four federal agencies, including the U.S. Office of Personnel Management (OPM), the U.S. EEOC, the U.S. Office of Special Counsel (OSC), and the U.S. Merit Systems Protection Board (MSPB), issued an updated guide entitled "Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment: A Guide to Employment Rights, Protections, and Responsibilities."[42] The Guide mirrors the positions taken by the executive branch by making explicit that Title VII's ban on sex discrimination protects all federal workers, including lesbian, gay, bisexual and transgender individuals. Revisions to the Guide were motivated by recent changes in the legal landscape, including the EEOC's 2012 decision in *Macy v. Holder.* [43]

In that case, Mia Macy alleged that she was denied a job with the Bureau of Alcohol, Tobacco, Firearms and Explosives after it learned that she was transitioning her gender expression from male to female. On appeal, the EEOC concluded that discrimination on the basis of transgender status is discrimination on the basis of sex and, therefore, prohibited under Title VII. The Commission reasoned as follows:

This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-

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[40] Exec. Order No. 13672, 79 Fed. Reg. 42971 (July 21, 2014).

[41] ERIC HOLDER, TREATMENT OF TRANSGENDER EMPLOYMENT DISCRIMINATION CLAIMS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, MEMO FROM THE ATT'Y GEN. TO U.S. ATT'YS, HEADS OF DEP'T COMPONENTS (December 15, 2015), http://www.justice.gov/file/188671/download.

[42] OFFICE OF PERSONNEL MGMT., U.S. EQUAL EMP. OPPORTUNITY COMM'N. OFFICE OF SPEC. COUNSEL & MERIT SYSTEMS PROTECTION BD., ADDRESSING SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION IN FEDERAL CIVILIAN EMPLOYMENT: A GUIDE TO EMPLOYMENT RIGHTS, PROTECTION AND RESPONSIBILITIES (2015), http://www.opm.gov/policy-data-oversight/diversity-and-includsion/reference-materials/addressing-sexual-orientation-and-gender-identity-discrimination-in-federal-civilian-employment.pdf.

[43] Appeal No. 0120120821 (Apr. 20, 2012), http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt.

stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision."[44]

Citing the EEOC's decision in *Macy*, the Office of Special Counsel in August 2014 similarly recognized a claim by a transgender woman, who alleged sex-based harassment that occurred during the time she was transitioning her gender expression.[45] Perhaps most significant, and consistent with the priorities identified in its SEP discussed above in Section II. C., the EEOC has filed three separate lawsuits since September 2014 against *private* sector employers on behalf of a transgender employee for sex discrimination in violation of Title VII.[46] In the most recent case, *EEOC v. Deluxe Financial Services Inc.,* the Commission alleges, among other things, that the employee was subjected to a hostile work environment created by supervisors and coworkers that included "hurtful epithets and intentionally using the wrong gender pronouns to refer to [the employee]."[47] "Continuing to solidify its commitment to ensuring that individuals are not discriminated against in workplaces because of their sexual orientation,"[48] the EEOC announced on March 1, 2016 that it had filed two additional lawsuits against *private* employers, alleging harassment on the basis of sexual orientation directed at a gay employee in one suit and a lesbian employee in the other suit in violation of Title VII's ban on sex discrimination.[49] In light of the rapidly-changing legal landscape, employers will need to be vigilant in their efforts to address issues of bullying directed at LGBT workers. A status-blind anti-bullying policy can bolster those efforts.

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[44] *Id*. (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 244 (1989)).
[45] OFFICE OF SPECIAL COUNSEL, REPORT OF PROHIBITED PERSONNEL PRACTICE, OSC FILE NO. MA-11-3846 (JANE DOE) (2014), http://osc.gov/Resources/2014-08-28_Lusardi_PPP_Report.pdf.
[46] Press Release, U.S. Equal Employment Opportunity Comm'n, EEOC Sues Deluxe Financial for Sex Discrimination against Transgender Employee (June 5, 2015), http://www.eeoc.gov/eeoc/newsroom/release/6-5-15.cfm.
[47] *Id*.
[48] Press Release, U.S. Equal Employment Opportunity Comm'n, EEOC Files First Suits Challenging Sexual Orientation Discrimination as Sex Discrimination (March 1, 2016), http://www.eeoc.gov/eeoc/newsroom/release/3-1-16.cfm.
[49] *See id*.

According to the Bureau of Labor Statistics, 29,219,000 Americans, or over 11% of the population, have a disability.[50] But only about 17.1% of those who identify as having a disability are in the labor force.[51] While the number of persons with disabilities in the workforce has remained fairly static over the past few years, recent changes in federal regulations may cause an increase. Specifically, regulations pursuant to Section 503 of the Rehabilitation Act of 1973 were amended to prohibit federal contractors from discriminating against individuals with disabilities.[52] The new regulations became effective on March 24, 2014, and require federal contractors to adopt affirmative action plans for the recruiting, hiring, promoting and retention of persons with disabilities. They establish a nationwide utilization goal of seven percent for individuals with disabilities, and require an annual utilization analysis and assessment of problem areas, so that contractors may adopt remedial measures to assist with achievement of the utilization goal.[53]

In addition to this regulatory initiative, the rise in the number of children identified with Autism Spectrum Disorder (ASD) has created a new landscape that has the potential to reshape workplaces in profound ways. Specifically, The Centers for Disease Control and Prevention estimated in 2010 that 1 in 68 children have autism.[54] "This new estimate is roughly 30% higher than the estimate for 2008 (1 in 88), roughly 60% higher than the estimate for 2006 (1 in 110), and roughly 120% higher than the estimates for 2002 and 2000 (1 in 150)."[55] Although no one specific cause for the increase has been pinpointed, the CDC posits that "[s]ome of it may be due to the way children are identified, diagnosed, and served in their local communities, but exactly how much is unknown."[56] Significantly, children with average or above average intellectual ability, measured as an IQ of greater than 85, account for almost half of the ASD prevalence increase.[57]

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[50] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NEWS RELEASE, USDL-15-1162, PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS—2014 (June 2015), http://www.bls.gov/news.release/pdf/disabl.pdf.

[51] *Id.* at 1.

[52] Affirmative Action & Nondiscrimination Obligations of Contractors/Subcontractors regarding Individuals with Disabilities, 41 C.F.R. § 60-741 (2016).

[53] *Id.*

[54] U.S. DEP'T OF HEALTH & HUMAN SERVICES, CENTERS FOR DISEASE CONTROL & PREVENTION, MORBIDITY AND MORTALITY WEEKLY REPORT: PREVALENCE OF AUTISM SPECTRUM DISORDER AMONG CHILDREN AGED 8 YEARS—AUTISM AND DEVELOPMENTAL DISABILITIES MONITORING NETWORK, 11 SITES, UNITED STATES, 2010 (2014), http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6302a1.htm?s_cid=ss6302a1_w.

[55] *Id.*

[56] *Id.*

[57] *Id.*

A study published in the Journal of American Academy of Pediatrics in June of 2012 confirmed that young adults with a diagnosis of ASD are at a high risk of unemployment or failure to pursue postsecondary education, particularly within the first two years after graduating high school,[58] emphasizing the need for improved transition planning to "ensure that services promote participation in education and employment in the first years after high school."[59] Despite these odds, it is estimated that approximately 500,000 young adults with ASD will be entering college or the workforce within the next decade.[60] In response to the increased incidence of, and challenges posed by, an ASD diagnosis, university-based programs designed to help teens transition to college and employment are beginning to emerge.[61] Anticipating the projected wave of students with ASD, Mercyhurst University in Erie, Pennsylvania, for example, has pioneered the Autism/Asperger's Initiative (AIM), a program that is designed to aid students in developing executive functioning skills and social skills in addition to acquiring proficiency in their chosen course of academic studies.[62] Motivated by its inability to accept all of the applicants into its program, Mercyhurst is working with a growing number of colleges across the country to create similar programs.[63] Indeed, the growing trend for universities to adopt programs designed to support students with ASD has been observed by David Kearon, Director of Adult Services at Autism Speaks.[64] As Brad McGarry, AIM Program Director at Mercyhurst emphasizes, the ultimate goal of these programs is to prepare students for meaningful employment.[65]

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[58] Paul T. Shattuck et al., *Postsecondary Education and Employment Among Youth with an Autism Spectrum Disorder*, 129 J. of AM. ACAD. OF PEDIATRICS 1042, 1046-1047 (2012).
[59] *Id*. at 1047.
[60] Linda F. O'Murchu, *From "Lost" to Possibilities: Colleges Helping Students with Autism,* TODAY: HEALTH AND WELLNESS (May 12, 2015, 12:08 PM), http://www.today.com/health/more-colleges-helping-students-autism-t20661.
[61] *See* Paige Carlotti*, More Colleges Expanding Programs for Students on Autism Spectrum*, FORBES (July 31, 2014, 5:32 PM), http://www.forbes.com/sites/paigecarlotti/2014/07/31/more-colleges-expanding-programs-for-students-on-autism-spectrum/#43bd01ca3661; 10 Impressive Special College Programs for Students with Autism, http://www.bestcollegesonline.com/blog/2011/05/25/10-impressive-special-college-programs-for-students-with-autism/ [https://web.archive.org/web/20160314152752/http://www.bestcollegesonline.com/blog/2011/05/25/10-impressive-special-college-programs-for-students-with-autism/]; PROGRAMS FOR STUDENTS WITH ASPERGER SYNDROME, http://www.collegeautismspectrum.com/collegeprograms.html (last visited when?).
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*

Some employers have already taken the lead in consciously integrating individuals with ASD into their workplaces. For example, SAP, one of the world's largest enterprise-software companies is actively recruiting employees with autism and other disabilities through its new program, Autism at Work, and providing training to its managers and employees to learn effective means of engaging their new co-workers.[66] To minimize stress and boost the self-esteem of employees with ASD, its training emphasizes clearly stated goals, direct communication, and empathy.[67] Since the launch of its program in 2013, SAP has hired 40 individuals with ASD at six locations across the globe.[68] Recognizing the benefits of increasing the diversity of its workforce, Microsoft also announced in April 2015 a new pilot program in partnership with Specialisterne.[69] Microsoft's program will focus on hiring individuals with ASD for full-time positions at its Redmond location.[70] Within the same timeframe, Autism Speaks, the leading internationally-recognized autism research and advocacy organization, announced the creation and implementation of a free jobs portal called TheSpectrumCareers.com in partnership with Rangam Consultants Inc. and WebTeam Corporation.[71] The website is "designed to promote inclusive employment of the autism community by connecting employers, service providers and employees on the spectrum."[72] Through the portal, prospective employers can post job openings and requirements, prospective employees can upload video resumes to demonstrate their skills and interests, and employment service providers and job coaches can provide autism-specific resources and support to both parties, as needed.[73]

Beyond the numbers, researchers estimate that by 2050, there will be no racial or ethnic majority in our country.[74] Given the changing demographics of the workforce, it is incumbent on employers who seek to take advantage of the diverse skill sets that will be present in the labor market to create a workplace environment that accommodates a workforce which reflects a

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[66] *Software Company Hires Autistic Adults*, CBS NEWS THIS MORNING (June 10, 2014; 7:18 AM), http://www.cbsnews.com/news/new-program-at-sap-hires-autistic-adults-for-specialized-skills/.
[67] *Id.*
[68] *Id*.
[69] Mary Ellen Smith, *Microsoft Announces Pilot Program to Hire People with Autism,* MICROSOFT: MICROSOFT ON THE ISSUES (April 3, 2015) http://blogs.microsoft.com/on-the-issues/2015/04/03/microsoft-announces-pilot-program-to-hire-people-with-autism/.
[70] *Id.*
[71] Dave Kearon, *The Spectrum Careers: A New Tool for the Business Community*, AUTISM SPEAKS (Apr. 29, 2015), https://conqueringthecliff.wordpress.com/the-spectrum-careers-a-new-tool-for-the-business-community/.
[72] *Id.*
[73] *Id.*
[74] BURNS ET AL., *supra* note 30, at 2.

broad range of personalities and differences. Accomplishing this goal will require all employers to address diversity, both to reduce legal liability and to enhance understanding among workers. Adoption of status-blind anti-bullying policies can play a key role in that process.

III. INADEQUACY OF EXISTING LAWS

The present legal framework is decried as woefully inadequate to address bullying in the workplace. Both common law and existing statutory protections fail to address status-blind bullying in a comprehensive and cohesive fashion; each is fraught with shortcomings.

A. *Common Law Protections*

Common law causes of action may provide some recourse for employees, but these claims tend to be difficult to win and suffer from inherent limitations in their ability to address the wide spectrum of behaviors that fall within the penumbra of workplace bullying. For example, intentional infliction of emotional distress (IIED), assault, and battery may be invoked by employees who seek to bring civil law claims predicated upon instances of workplace bullying. As a practical matter, however, a self-standing claim for IIED is very difficult to win and courts have long resisted recognizing this tort in the context of the employment relationship, typically finding that the complained-of conduct was not sufficiently severe and outrageous, that the employee did not suffer severe emotional distress, or that the tort claim was preempted by state workers' compensation laws.[75] In addition, the tort of assault requires that the employee reasonably perceive an imminent threat of harmful or offensive *bodily contact*, which may be lacking in many instances of workplace harassment.[76] Beyond the reasonable perception of bodily contact required for an assault claim, battery requires an employee to prove that the harmful or offensive *bodily contact* actually occurred.[77] It is arguable that many instances of bullying as commonly understood or as defined under any of the state initiatives discussed below in Section III. C. or in the model Healthy Workplace Bill would nevertheless fall short of meeting the elements of either assault or battery as defined by most states. Other common law causes of action, such as defamation, invasion of privacy, or false imprisonment also may provide a legal avenue for some victims of workplace bullying, but each of these torts relates to very specific behaviors

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[75] Yamada, *supra* note 9; Jordan F. Kaplan, *Comment, Help Is on the Way: A Recent Case Shed Light on Workplace Bullying*, 47 HOUS. L. REV. 141 (2010).
[76] Kaplan, *supra* note 75.
[77] 6 AM. JUR. 2D *Assault and Battery* § 87.

and do not take account of the full scope of behaviors that many victims of workplace bullying experience. At best, the common law landscape provides only a patchwork of potential legal avenues to address workplace bullying.

B. *Statutory Protections*

1. The Occupational Safety and Health Act

The Occupational Safety and Health Act of 1970 (OSHA) has as its stated purpose "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."[78] This purpose is achieved largely through Section 5 of the Act, dubbed the "general duty clause," which requires employers to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[79] Accordingly, it has been argued that OSHA is a logical statutory tool for addressing workplace bullying.[80] But there is disagreement on this point. OSHA's primary focus of addressing *physical* harms in the workplace, coupled with a statutory scheme that does not allow for a private right of action for workers, has limited its usefulness in tackling workplace bullying, especially where no physical harm results.[81] Moreover, the scant relevant case law has held that the general duty clause does not extend to physical harms occurring as a result of workplace violence. For example, in 1995, the Occupational Safety and Health Review Commission ruled that OSHA's general duty clause did not require the owner of an apartment complex to protect its employees against the criminal acts of violent third parties.[82] The Commission argued that imposing such a duty was unreasonable, as employers cannot be charged with anticipating and preventing the unpredictable behavior of unknown violent offenders. Similarly, in the 2009 case of *Ramsey Winch, Inc. v. Henry*, the Tenth Circuit Court of Appeals held that OSHA did not preempt an Oklahoma law prohibiting employers from restricting an employee's right to store firearms locked in vehicles on the employer's property.[83] The Court reasoned that OSHA's general duty clause does not extend to the curtailment of workplace

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[78] 29 U.S.C. § 651(b) (2012).
[79] *Id*. at § 654(a)(1).
[80] *See* Susan Harthill, *The Need for a Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act*, 78 U. CIN. L. REV. 1250 (2010).
[81] David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL'Y J. 475 (2004).
[82] Megawest Financial Inc., OSHRC No. 93-2879, 19 (1995).
[83] 555 F.3d 1199 (10th Cir. 2009).

violence. Although the OSH Administration has begun to recognize workplace violence as a serious safety issue, it has not led to the promulgation of any mandatory regulations to address the problem.

The OSH Administration has, however, established guidelines for workplace violence prevention. These guidelines define workplace violence to include threats and verbal abuse as well as physical abuse.[84] For that reason, OSHA's website provides useful information and training materials on the topic of workplace bullying to assist organizations looking to reduce incidents of workplace violence.[85] Ultimately, whether OSHA's current statutory scheme could be reinvented to provide useful legislative relief for workplace bullying is still subject to debate.[86]

2. Title VII of the Civil Rights Act of 1964

Unlike OSHA, Title VII does provide a private cause of action for workplace harassment; however, the statutory remedies are limited to only those claims of harassment based upon the status of the target as a member of a protected class. Specifically, the harassment must be predicated upon the race, religion, sex, color or national origin of the victim. Moreover, the harassment must be severe or pervasive to fall within Title VII's prohibition.[87]

On June 26, 1998, the Supreme Court handed down companion decisions in the cases of *Burlington Industries v. Ellerth*,[88] and *Faragher v. Boca Raton*,[89] which addressed the issue of whether and to what extent an employer is liable for the sexually harassing conduct of its employees. The Court set forth varying standards of liability, depending upon whether the unlawful conduct was committed by either an employee's supervisors or coworkers. The *Faragher/Ellerth* Court determined that Title VII imposes strict liability on employers where supervisors engage in sexual harassment resulting in a "tangible employment action," such as hiring and firing.[90] The definition of "supervisor" was later clarified by the Court as someone who could effect a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different

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[84] U.S. OCCUPATIONAL SAFETY & HEALTH COMM'N, OSHA FACT SHEET: WORKPLACE VIOLENCE (2002), https://www.osha.gov/OshDoc/data_General_Facts/factsheet-workplace-violence.pdf.
[85] *Id.*
[86] *See* Harthill, *supra* note 80.
[87] Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986).
[88] 524 U.S. 742 (1998).
[89] 524 U.S. 775 (1998).
[90] *Id*. at 808.

responsibilities, or a decision causing a significant change in benefits."[91] Thus, for example, where an employee is fired for refusing to engage in sexual conduct with a supervisor, the employer will always be liable. Where supervisors engage in sexual harassment that does *not* result in a tangible employment action, the employer is vicariously liable unless it can demonstrate the affirmative defense that "(a) … the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[92]

The Court also opined that employers may be liable for the sexually harassing behavior of *non-supervisory* employees under a negligence standard;[93] in other words, where the employer knew or should have known about the harassing behavior but took no action to correct it going forward. In order to rely on the affirmative defense set out in *Ellerth/Faragher* (referenced throughout as the *Faragher* defense), the Supreme Court noted that "[w]hile proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense."[94]

Taking its cue from the Court's directive that "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms,"[95] both the EEOC and lower courts have interpreted the *Faragher* affirmative defense as requiring that employers do more than simply point to an anti-harassment policy in an employee handbook. Rather, the affirmative defense can be used only where an employer has actively communicated its anti-harassment policy to employees and provided complaint procedures and effective investigation to actually prevent further harassment from occurring. According to EEOC Enforcement Guidance on the matter, employers should undertake the following actions:

> [P]rovide every employee with a copy of the policy and complaint procedure, and redistribute it periodically. The policy and complaint procedure should be written in a way that will be understood by all employees in the employer's workforce. Other measures to ensure effective dissemination of the policy and

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[91] Vance v. Ball State University, 133 S. Ct. 2434, 2443 (2013).
[92] *Faragher*, 524 U.S. at 806.
[93] *Id*. at 798.
[94] *Id*. at 807.
[95] *Ellerth*, 524 U.S. at 764.

> complaint procedure include posting them in central locations and incorporating them into employee handbooks. If feasible, the employer should provide training to all employees to ensure that they understand their rights and responsibilities.[96]

Anti-harassment policies and complaint procedures "should contain, at a minimum, the following:

- A clear explanation of prohibited conduct;
- Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred."[97]

Lower courts likewise have held that employer policies and practices are adequate to address harassment by supervisors only where those policies and practices are effective in actually remediating the harassment. In *Hurley v. Atlantic City Police Department [ACPD]*, the Third Circuit Court of Appeals affirmed judgment against the Appellee Atlantic City Police Department, finding that after the Appellant police officer suffered severe sexual harassment, the Department did nothing to actually correct the harassment. Instead, it merely issued written policies without enforcing them and painted over "offensive graffiti every few months only to see it go up again in minutes, failing to investigate sexual harassment as it investigated and punished other forms of misconduct."[98] The Court cautioned that the affirmative defense announced in *Faragher* and *Ellerth* does not "focus mechanically on the formal existence of a sexual harassment policy, allowing an absolute defense to a hostile work environment claim whenever the

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[96] U.S. EQUAL EMP. OPPORTUNITY COMM'N, NO. 915.002, ENFORCEMENT GUIDANCE ON VICARIOUS LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS V.C.1 (1999), http://www.eeoc.gov/policy/docs/harassment.html.
[97] *Id.*
[98] 174 F.3d 95, 118 (3d Cir. 1999).

employer can point to an anti-harassment policy of some sort."[99] Accordingly, based on its failure to implement sufficient remedial measures following the sexual harassment, the ACPD could not escape liability. Still other courts have found liability where employers failed to ensure proper remediation channels, such as developing adequate outlets for employees to report sexual harassment and then taking action reasonably likely to prevent the misconduct from recurring.[100]

Despite Title VII's recognition of workplace bullying as a form of impermissible discrimination, Title VII ultimately falls short of serving as the statutory solution to the broader problem at hand because of its status-based orientation. In *Oncale v. Sundowner Offshore Services, Inc.,* a case involving a claim for a hostile work environment based on sex, the Supreme Court reasoned that Title VII cannot be expanded into a "general civility code" because "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at '*discrimination* . . . because of . . . sex."[101] Lower court decisions interpreting Title VII have reflected an approach to workplace harassment that is constrained by Title VII's statutory scope and further fueled by the Supreme Court's admonition in *Oncale*.[102] In addition, legal scholars have pointed out that overly-narrow interpretations of Title VII can result in a court's failure to recognize discrimination that manifests itself in the context of "equal opportunity" harassers,[103] "generically vulgar or generally offensive" language,[104] and conduct that is not explicitly linked to a protected characteristic, such as sabotaging a co-worker's work,[105] but nonetheless reflects the very discrimination that Title VII is intended to prohibit. As one legal scholar has noted, "[d]espite all of the progress that employment discrimination law has made, it continues to cling irrationally to the precept that Title VII is not a civility code, leaving it tolerant of some of the most nefarious workplace speech and conditions."[106] Otherwise legitimate claims for status-based harassment, therefore, may go unrecognized under Title VII and thereby fall through the cracks in the absence of a statute that sweeps within its reach the full scope of bullying behaviors irrespective of protected class status. Justice Scalia's emphasis in *Oncale* that Title VII is not a civility statute underscores the need for specific

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[99] *Id*.
[100] Varner v. Nat'l Super Markets Inc., 94 F.3d 1209 (8th Cir. 1996); Wilson v. Tulsa Jr. College, 164 F.3d 534 (10th Cir. 1998).
[101] 523 U.S. 75, 80 (1998) (emphasis in original).
[102] Kerri Lynn Stone, *Decoding Civility*, 28 BERKELEY J. GENDER, L. & JUST. 185 (2013).
[103] D.R. Cleveland, Discrimination Law's Dirty Secret: The Equal Opportunity Sexual Harasser Loophole, 58 HOW. L.J. 5, 6 (2014).
[104] Stone, *supra* note 102, at 222.
[105] Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).
[106] Stone, *supra* note 102, at 193.

legislation designed to address the genuine harm experienced by employees who are bullied in their workplaces irrespective of the reason. His point reinforces the premise that Title VII is ill-suited because it is not designed to address the full range of motivations that drive harassment directed towards an individual or group, but rather only seeks to guard against harassment that is predicated upon those certain legislatively-identified characteristics protected under the statute. Other federal anti-discrimination statutes, including ADEA and the ADA, suffer the same statutory limitations as Title VII as a vehicle for addressing workplace harassment more generally.

Although the *Faragher* affirmative defense is limited to status-based harassment arising under Title VII, the approach nonetheless provides the template for preventing and remedying a wide range of bullying conduct in the workplace. The *Faragher* approach addresses the same concerns raised by employers who feared vicarious liability for hostile work environments based on sex, race, or other protected characteristics by imposing a shared responsibility for addressing the issue; both employers and employees have a duty under the *Faragher* framework. Thus, employers would be wise to get on board now by creating policies that implement the *Faragher* model.

C. *A Call to Action: State Legislative Initiatives Pave the Way*

Currently, there is no federal workplace anti-bullying law; however, there is a strong grassroots initiative to enact such legislation at the state level. Beginning in 2001, anti-bullying activists, led by legal scholar David Yamada, drafted a model Healthy Workplace Bill.[107] The bill was designed to address the lack of legislative relief for victims of workplace bullying who were not protected by workplace laws prohibiting harassment based on a legally protected category such as race or gender. By 2003, the bill had been introduced into California's state legislature. Since that time, the bill or a version of it has been proposed in a total of twenty-nine states plus two territories. Although successful passage into law has yet to be achieved, the growing attention to workplace bullying suggests that it is just a matter of time. For example, according to 'healthyworkplacebill.org," the bill has successfully passed committee votes in Illinois, Washington, New York and Connecticut, and has passed both houses in Illinois as a Joint Resolution, establishing funding for a one-year Task Force on Workplace Bullying. Moreover, in 2010, the bill cleared the Senates in both New York and Illinois. Finally, as discussed more fully below, three states have passed

[107] HEALTHY WORKPLACE BILL, http://healthyworkplacebill.org/ (Last Visited Mar. 11, 2015); *see also* David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL'Y J. 251 (2010) (appending Model Healthy Workplace Bill).

related laws which either require training against abusive workplace conduct or provide incentives for employers who adopt anti-bullying policies in the workplace.[108]

The model Healthy Workplace Bill prohibits employers from subjecting employees to an "abusive work environment" which exists where "an employer or one or more of its employees, acting with intent to cause pain or distress to an employee, subjects that employee to abusive conduct that causes physical harm, psychological harm, or both."[109] Psychological harm and physical harm must be established by "competent evidence."[110]

By requiring proof of actual physical or psychological harm as established by competent evidence such as a healthcare professional, the Healthy Workplace Bill imposes a strict legal standard reminiscent of the "severe or pervasive" standard for actionable sexual harassment under Title VII. This should address any criticism that the legislation will produce frivolous lawsuits and be overly burdensome on employers. In addition, the Healthy Workplace Bill adopts the affirmative defense established in the *Faragher* and *Ellerth* cases by holding an employer vicariously liable for fostering an abusive work environment, unless (1) the employer exercised reasonable care to prevent and correct promptly any actionable behavior; and (2) the complainant employee unreasonably failed to take advantage of appropriate preventive or corrective opportunities provided by the employer. Given the widespread momentum at the state level to pass legislation like the Healthy Workplace Bill, employers would benefit from proactively adopting meaningful anti-bullying policies.

Recognizing the harm inflicted by workplace bullying, three states, California, Utah, and Tennessee have enacted legislative initiatives that attempt to raise awareness of the issue and, to varying degrees, encourage prevention of this conduct. Taking the lead as it often does in areas of social and employment policy, California recently amended its Code, effective January 1, 2015, to require employers with fifty or more employees to provide at least two hours of sexual harassment training and education that includes the prevention of abusive conduct every two years to all supervisors and within six months of an individual assuming a supervisory position in the organization.[111] The Code defines "abusive conduct'" as follows:

> . . . conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Abusive

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[108] HEALTHY WORKPLACE BILL, http://healthyworkplacebill.org/ (Last Visited Mar. 11, 2015).
[109] David C. Yamada, *supra* note 107, at 281.
[110] *Id*.
[111] CAL. GOV'T CODE § 12950.1(a) (2011 & Supp. 2014).

> conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious.[112]

Unlike California, Utah's law, effective July 1, 2015, has a more limited reach because it applies only to state executive branch agencies.[113] Utah's law, however, requires training of both supervisors and employees every other year[114] "about how to prevent abusive workplace conduct."[115] The training must include information regarding the following: "what constitutes abusive conduct and the ramifications of abusive conduct; resources available to employees who are subject to abusive conduct; and the grievance process."[116] Without referencing *Faragher* or creating an explicit defense to employers who comply with this new initiative, the Utah law, in essence, captures the essential features of the *Faragher* approach as described above. Under the Utah law, "abusive conduct" is defined as follows:

> . . . verbal, nonverbal, or physical conduct of an employee to another employee that, based on its severity, nature, and frequency of occurrence, a reasonable person would determine: (A) is intended to cause intimidation, humiliation, or unwarranted distress; (B) results in substantial physical or psychological harm as a result of intimidation, humiliation, or unwarranted distress; or (C) exploits an employee's known physical or psychological disability. A single act does not constitute abusive conduct, unless it is an especially severe and egregious act that meets the standard [set forth above].[117]

Tennessee's initiative is an amalgam of California's and Utah's approach in terms of its requirements and applicability. Like California and Utah, Tennessee provides a status-blind definition of "abusive conduct," as follows:

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[112] *Id*. § 12950.1(g)(2).
[113] *See* UTAH CODE ANN. § 67-19-44 (1)(b) (2015).
[114] *Id*. at § 67-19-44 (5).
[115] *Id*. at § 67-19-44 (3)(a).
[116] *Id*. at § 67-19-44 (3)(b).
[117] *Id*. § 67-19-44 (1)(a).

> . . . acts or omissions that would cause a reasonable person, based on the severity, nature, and frequency of the conduct, to believe that an employee was subject to an abusive work environment, such as: (A) Repeated verbal abuse in the workplace, including derogatory remarks, insults, and epithets; (B) Verbal, non-verbal, or physical conduct of a threatening, intimidating, or humiliating nature in the workplace; or (C) The sabotage or undermining of an employee's work performance in the workplace . . . .[118]

In contrast with California's and Utah's statutory scheme, the Tennessee law goes further and directs the Tennessee Advisory Commission on Intergovernmental Relations (TACIR) to create a model policy for the prevention of abusive conduct in *public-sector* workplaces by no later than March 1, 2015.[119] Notably, the policy must "[a]ssist employers in recognizing and responding to abusive conduct in the workplace; and [] [p]revent retaliation against any employee who has reported abusive conduct in the workplace."[120] Most significantly, public employers who adopt the policy or implement their own policy consistent with the model will be granted immunity from a lawsuit for negligent or intentional infliction of mental anguish.[121] Although limited in its reach, the Tennessee initiative is moving in the direction of *Faragher* by encouraging employers to adopt anti-bullying policies that serve to promote healthier workplaces and also protect employers from legal liability.

These three state legislative mandates share two common and significant features. First, they employ a reasonable person standard that is consistent with assessing claims of harassment predicated upon a protected class and now familiar across the employment law landscape. Second, they are not limited to harassing or bullying conduct that is targeted at specific protected classes but rather reflects an implicit understanding of the destructive impact of such conduct, whether motivated by a discriminatory intent that is prohibited by existing law or some other rationale that presently escapes the penumbra of law. In essence, these state laws reflect the concept of status-blind bullying and cast a wide net over a range of intolerable behavior.

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[118] TENN. CODE ANN. § 50-1-502(1) (2015).
[119] *Id*. § 50-1-503(a) (2015).
[120] *Id*. § 50-1-503(b) (2015).
[121] *Id*. § 50-1-504 (2015).

IV. HUMAN RESOURCE AND LEGAL BENEFITS OF IMPLEMENTING A STATUS-BLIND *FARAGHER* MODEL

The psychological harms associated with harassment have been documented and include "low self-esteem, concentration difficulties, anger, lower life satisfaction, frustration, burnout, reduced productivity, increased absenteeism, and greater intentions to quit [the] job[]."[122] These negative outcomes provide ample incentive for employers to affirmatively seek to eliminate harassment in the workplace by adopting the *Faragher* model. Even the United States Supreme Court has acknowledged the breadth of negative effects that can result from workplace harassment, which can fall short of a nervous breakdown but nonetheless provide a basis for a discrimination claim within the scope of Title VII. Writing on behalf of the majority in *Harris v. Forklift Systems, Inc.,* Justice Sandra Day O'Connor affirmed: "Title VII comes into play before the harassing conduct leads to a nervous breakdown."[123]

A. *Human Resource Benefits*

From the perspective of human resource management, the *Faragher* approach is consistent with the recommendations of the Study's authors and incorporates best practices reflected in the literature. The Study's authors propose a model for addressing workplace harassment that essentially incorporates the *Faragher* approach by citing the need for an employer policy against harassment and training, a "protocol for reporting harassers," and "organizational justice," which includes discipline of the alleged harasser.[124] From the human resource perspective, the benefits of a bully-free workplace are numerous and well-documented. Fox and Stallworth have identified the costs of workplace bullying to include both direct and indirect costs, such as 1) interference with job performance as evidenced by reduced productivity and increased errors; 2) withdrawal, as evidenced by increased absenteeism and employee turnover; and 3) negative effects on work culture, such as "strained loyalty, distrust, sabotage, resentment, uncivil climate, decreased communication, potential escalation to workplace aggression or violence . . . ."[125] Moreover, direct costs could result from increased litigation as well as from medical bills associated with targeted employees.[126] Thus, the *Faragher* model reflects an interdisciplinary approach to the challenge of

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[122] Khubchandani & Price, *supra* note 1, at 556.
[123] 510 U.S. 17, 22 (1993).
[124] Khubchandani & Price, *supra* note 1, at 561.
[125] Fox & Stallworth*, supra* note 14, at 227.
[126] *Id*.

workplace harassment that is supported by the Study's consideration of sound public health principles, human resource considerations as well as business ethics.

B. *Reduced Risk of Legal Liability under Title VII and the ADA*

From a legal perspective, opening the door to generalized harassment or bullying claims by employees also may help to unmask less obvious Title VII status-based harassment claims and thereby enhance an employer's ability to address and defend against such claims. Conduct that may appear to be status-blind bullying, which falls outside the purview of Title VII, actually may be rooted in underlying sex or race-based discrimination. An anti-bullying policy implemented under the *Faragher* approach may have the benefit of striking at the heart of a wide range of behaviors that are "rooted in, and reflective of, historical prejudice[,]"[127] which may be unrecognized by the perpetrator as discriminatory or otherwise not readily-identified as discriminatory because overt status-based conduct may be lacking. In addition, a status-blind *Faragher* approach would account for harassment directed at LGBT individuals, extricating LGBT individuals from the confused and confusing judicial landscape that has failed to articulate a coherent, unified theory that recognizes status-based claims under Title VII despite the recent emergence of some incremental inroads to protection reflected in EEOC decisions and executive branch initiatives, as discussed in Section II. C.

As noted above, judicial interpretations of Title VII sometimes fail to acknowledge the full range of behaviors that can create a hostile work environment for employees on the basis of sex or some other protected characteristic. Despite the criticism directed at courts for construing status-based harassment claims under Title VII in an artificially-constrained manner, recent subtle case developments suggest that some speech and conduct that has been discounted by courts thus far may yet be brought within the reach of Title VII.[128] In a decision characterized as "ground-breaking" by one legal scholar[129] the United States Court of Appeals for the Eleventh Circuit allowed a hostile work environment case to proceed to trial where the case was predicated upon workplace speech that included "explicit, vulgar and derogatory language," "gender-derogatory language,"[130] and other offensive behaviors to which the plaintiff, Ingrid Reeves, the only female sales representative working alongside six other male co-workers,

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[127] J.E.B. v. Alabama, 511 U.S. 127, 128 (1994).
[128] *See* Stone, *supra* note 102.
[129] *Id*. at 222.
[130] *Id*. at 218.

was exposed even though these behaviors were not explicitly directed towards her. Specifically, Reeves' coworkers regularly used gender-derogatory language "to refer to or to insult individual females with whom they spoke on the phone or who worked in a separate area of the branch."[131] She was also forced to hear a "crude morning show" on the radio daily and was exposed to pornographic images on her coworkers' computer screens.[132] Noting the importance of viewing these behaviors in their broader context, the court held that the "gender-specific, derogatory, and humiliating" conduct to which Reeves had been exposed was sufficient to permit an inference of sex-based discrimination even if she was not the intended target of the behavior.[133] Beyond the specific holding in this case, it has been suggested that the *Reeves* decision provides a platform for reconsidering "the traditional boundaries of Title VII,"[134] arguing the following: that women need not be the direct targets of the conduct for a valid claim of sex discrimination to exist; that generically vulgar or generically offensive language may give rise to an inference of sex-based discrimination; and, that women may still be the victims of a hostile work environment even if the harassing behavior is being directed at both men and women[135] by an equal opportunity harasser. *Reeves* thus opens the door to an expanded, more contextual view of sexual harassment claims, which argues in favor of employers recognizing and prohibiting generalized bullying or harassing conduct because that behavior may well be conceptualized as Title VII discrimination as the doctrine of status-based harassment law continues to evolve. This expanded view of harassment comports with Fox and Stallworth's work on bullying as subtle racism.[136] Specifically, they argue that while overt forms of racial harassment are prohibited by law, they have been replaced by subtle acts of discrimination in the form of bullying behaviors such as incivility and neglect.[137] Such acts of bullying based on race or other Title VII protected categories may not, individually, rise to the level of actionable harassment. But over time, such repeated acts could in the aggregate be considered pervasive enough to meet the Title VII standard. Adopting a *Faragher* approach to workplace harassment would arguably prevent those "micro-aggressions"[138] from developing into costly legal battles.

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[131] *Id*.
[132] *Id*. at 219.
[133] *Id*. at 221-22.
[134] *Id*. at 218.
[135] *Id*. at 222.
[136] *See* Suzy Fox & Lamont E. Stallworth, *Racial/Ethnic Bullying: Exploring Links Between Bullying and Racism in the U.S. Workplace*, 66 J. VOCATIONAL BEHAVIOR 438 (2005).
[137] *Id*. at 439.
[138] *Id*.

Like Title VII, the ADA recognizes harassment on the basis of disability as an impermissible form of discrimination. Notably, from 2010 to 2014, there was a 17.7 % increase in the number of charges filed with the EEOC alleging harassment in violation of the ADA.[139] This increase coincides with the passage of the 2008 amendments to the ADA. Specifically, the ADA bars discrimination against an individual with a disability, defined in the three-part statutory definition as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[140] The precise scope of the definition of "disability" was the subject of several Supreme Court decisions from 1999 to 2002 that ultimately narrowed the coverage of the Act as it relates to actual disabilities as defined in part (A).[141] In response to the Court's decisions, Congress passed the ADA Amendments Act of 2008 (ADAAA) to "reinstat[e] a broad scope of protection . . . under the ADA."[142] Seeking to reframe the analysis in ADA cases, Congress emphasized that the *primary* focus of ADA cases should be whether an employer has met its obligations under the Act.[143] Consistent with this emphasis, Congress cautioned that determinations of whether an individual's impairment qualifies as a disability under the Act "should not demand extensive analysis."[144]

Given this broad reading of the Act, individuals with neurodevelopmental disorders, including ASD, likely will be recognized as persons with a "disability" within the meaning of the Act. This conclusion is supported by the EEOC's post-ADA Amendments Act regulations which state explicitly that certain impairments, including autism, "should be easily found to impose a substantial limitation on a major life activity" because of their inherent nature and, therefore, the "individualized assessment should be particularly simple and straightforward."[145] In addition, it is worth noting that attention deficit hyperactivity disorder as well as other mental health diagnoses, such as anxiety disorders and some depressive disorders, likely fall within the reach of the Act, and it is not uncommon for individuals

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[139] U.S. EQUAL EMP. OPPORTUNITY COMM'N, BASES BY ISSUE: FY 2010-FY 2014 (2014), http://www.eeoc.gov/eeoc/statistics/enforcement/bases_by_issue.cfm.
[140] 42 U.S.C. § 12102 (2012).
[141] *See* Sutton v. United Airlines, 527 U.S. 471 (1999); Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Toyota Motor Manufacturing v. Williams, 523 U.S. 970 (2001).
[142] 42 U.S.C. § 2(b)(1) (2012).
[143] *Id*. at § 2(b)(5).
[144] *Id*.
[145] 29 C.F.R. § 1630.2(j)(4)(iv) (2012).

diagnosed with ASD or Social (Pragmatic) Communication Disorder (SCD), as discussed below, to also have other mental health diagnoses.[146]

At the same time that Congress was working to reinvigorate the ADA, the medical community was embroiled in a twelve-year process of revising the criteria for the diagnosis and classification of mental disorders. Serving as the seminal resource for medical practitioners and researchers, the Diagnostic and Statistical Manual of Mental Disorders was unveiled in May 2013 at the annual meeting of the American Psychiatric Association.[147] The role of the DSM cannot be understated. Its impact extends even to the courts, which have relied upon it for guidance.[148] The 2013 revisions are of particular relevance here. In this Fifth Edition, the DSM combines several diagnoses under the broad penumbra of "autism spectrum disorder" (ASD) that previously had been categorized as distinct, including autistic disorder, Asperger's disorder, and pervasive developmental disorder not otherwise specified (PDD-NOS).[149] Under the new criteria, a diagnosis of ASD requires "[p]ersistent deficits in social communication and social interaction across multiple contexts" in addition to at least two of the following criteria:

1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases).
2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns or verbal nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat food every day).
3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g, strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interest).
4. Hyper- or hyporeactivity to sensory input or unusual interests in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching of objects, visual fascination with lights or movement).[150]

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[146] Am. Psychiatric Ass'n, DIAGNOSTIC AND STATISTICAL MANUAL § 299.00 (ASD) & § 315.39 (SCD) (5th ed. 2013).
[147] Am. Psychiatric Ass'n, *Timeline*, DSM-5 DEVELOPMENT, http://www.dsm5.org/about/Pages/Timeline.aspx (Mar. 13, 2016).
[148] U.S. EQUAL EMP. OPPORTUNITY COMM'N, NO. 915.002, ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISORDERS (MAR. 1997), http://www.eeoc.gov/policy/docs/harassment.html.
[149] Am. Psychiatric Ass'n, *supra* note 147, at § 299.00(E) (Note).
[150] *Id*. at § 299.00(B)(1)-(4).

Equally significant, the DSM-5 recognizes a separate neurodevelopmental disorder, Social (Pragmatic) Communication Disorder (SCD), which is marked by "[p]ersistent difficulties in the social use of verbal and nonverbal communication,"[151] but lacks the other characteristics associated with autism spectrum disorder, as described above, or other diagnoses.[152] The hallmark of both ASD and the newly-recognized SCD is difficulty with social interactions, which may manifest in workplace settings and impact the work environment of an employee with either diagnosis.

Whether or to what extent employers have already implemented a *Faragher* approach to specifically address and ultimately defend against disability-based harassment claims is unknown. Absent a specific legislative mandate, employers may be failing to undertake the preventive, investigatory and remedial steps required to afford themselves the benefits of a *Faragher*-type defense. For example, Jane Kow, an employment lawyer with HR Law Consultants in San Francisco, has raised the concern that while California now requires two hours of sexual harassment training of supervisors every two years, no corresponding requirement exists regarding disability-based harassment despite a 75% increase in claims of disability discrimination and harassment in California from 1997-2008.[153] But even if a disability-based *Faragher* approach is presently in place, implementing a status-blind approach to harassment has particular relevance and advantages to addressing workplace bullying involving individuals with ASD. Specifically, this more inclusive approach will help to ensure that instances of disability-based or related harassment, which initially may go unrecognized, will not escape the employer's attention and result in liability that could have been avoided otherwise. Greater representation of individuals with ASD in the workforce and practical considerations support this approach.

It is anticipated that an increasing number of high school or college educated youth with ASD will be entering the workforce in the next decade. This projection has significant implications. From a historical perspective, this population of youth has been particularly susceptible to bullying.[154] Individuals with ASD or SCD, who are either targeted by bullies or whose differences or other underlying medical conditions may be exacerbated by bullying behavior, will likely be protected under the broad umbrella of the ADA. Reciprocally, behaviors by individuals with ASD may be perceived by

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[151] *Id*. at § 315.39(A).
[152] *Id*. at § 315.39(D).
[153] Jane Kow, WRITTEN TESTIMONY ON WORKPLACE HARASSMENT, EEOC MEETING OF JANUARY 14, 2015 (Jan. 2015), http://www.eeoc.gov/eeoc/meetings/1-14-15/Kow.cfm.
[154] Connie Anderson, *IAN Research Report: Bullying and Children with ASD*, INTERACTIVE AUTISM NETWORK (Mar. 26, 2012), http://www.iancommunity.org/cs/ian_research_reports/ian_research_report_bullying.

others as harassing or bullying.[155] In the absence of a status-blind approach to workplace bullying, it may be difficult for an employer to identify, address, and ultimately defend against harassment claims involving individuals with ASD, particularly where the individual has not self-identified and the ASD may not be readily-apparent or is otherwise misunderstood.

A recent case decided after the enactment of the ADAAA of 2008 is particularly instructive as a window into the relationship between the ADA, workplace bullying and ASD. In *Glaser v. Gap Inc.*, William Glaser, a 37 year old male with an autism diagnosis, was terminated from his position at Gap as a merchandise handler at a distribution center in Fishkill, New York, where he had worked for over seven years.[156] With one exception, the material facts surrounding the incident that led to Glaser's termination are undisputed. On the day prior to his termination, Glaser requested a "fish knife," a plastic device used to cut tape and open boxes, from his supervisor. According to Glaser, he placed the knife in his back pocket and then asked his supervisor if he could speak with her to apologize for an incident that had occurred a few days earlier. At the time, Glaser and his supervisor were standing in a cubicle that was assigned to another employee, who was also present. Glaser was animated, and was moving his hands and continuously moving into the cubicle. Two other employees observed this exchange, noting that Glaser blocked the cubicle and was clenching and unclenching his fists and appeared agitated. When the employee in the cubicle indicated that she and the supervisor needed to leave to attend a meeting, Glaser's demeanor changed and he immediately left the area. Glaser said hello to the two other employees on his way past them. The one disputed fact is the supervisor's contention in her deposition that that Glaser was "clenching onto the knife," even though the termination documents did not mention the knife and the supervisor's original recount of the event also failed to mention the knife.[157]

In his lawsuit, Glaser asserted multiple claims, including several under the ADA, as follows: (1) failure to accommodate; (2) hostile work environment; (3) failure to train managers; and (4) discriminatory discharge.[158] Judge Zilly denied Gap's motion for summary judgment on each claim,[159] noting that he would not address the hostile work environment and failure to train claims because of Gap's failure to raise an argument to rebut these two counts.[160] The court's discussion of the two remaining

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[155] *Id.*
[156] 994 F. Supp. 2d 569 (S.D. N.Y. 2014).
[157] *Id*. at 571-72.
[158] *Id*. at 572.
[159] *Id*. at 581.
[160] *Id*. at 572 n.2.

claims, however, provides insight into the subtleties of an ADA case involving an individual with ASD. The court's decision will be examined, followed by a discussion of its practical implications.

The prism through which the court analyzed this case was heavily influenced by Congress' legislative intent in revising the ADA and may signal the future of ADA cases seeking to be disposed of on motions for summary judgment, particularly in the context of ASD. First, Judge Zilly observed that the amendments were "principally aimed at unwinding judicial decisions that had improperly narrowed the scope of protection under the ADA" and that the ADAAA had "drastically altered the manner in which [elements of the definition of disability] should be construed."[161] Second, the court heeded Congress' admonition that ADA cases should focus on whether an employer has met its obligations under the Act rather than engage in a protracted analysis of whether an individual's impairment rises to the level of a "substantial limitation" of a "major life activity," and, therefore, a "disability" within the meaning of the ADA.[162] In this specific case, the court relied upon the EEOC's regulations that explicitly identify autism as an impairment that "substantially limits brain function" as well as potentially other major life activities, including interacting with others.[163]

To answer the threshold question of whether Glaser has a disability that is protected under the ADA, the court cited several instances in which Gap had received complaints about Glaser's interactions with his co-workers and his supervisor, including the following, which are illustrative:

- A complaint by a coworker that Glaser "made her feel uncomfortable by getting upset if she was too busy to speak with him when he stopped by to see her and by talking about her to other people in too familiar a manner," for which Glaser was counseled;
- A complaint that Glaser was distracting coworkers who were on duty when he routinely arrived about two hours early for his shift and spoke with them, for which Glaser was advised to "go to the cafeteria and read a newspaper" instead; and
- The need to counsel Glaser to "refrain from placing his arm around his supervisor, [], or placing his hands on her when speaking with her," and the need to "stand further apart from others when talk[ing] to them," after which Glaser indicated that he would not have contact with his supervisor unless work-related.[164]

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[161] *Id*. at 574.
[162] *See id*. at 574-75.
[163] *See id*. at 575-76.
[164] *Id*. at 575.

Reviewing the evidence presented, the court had no difficulty concluding that genuine issues of material fact exist as to whether Glaser was substantially limited in his ability to "interact with others," noting that Glaser was "frequent[ly] coach[ed]" by Gap on this issue.[165]

Gap also argued that Glaser could not prove that he was terminated because of a disability in violation of the ADA because Gap lacked notice of Glaser's autism until after he was terminated. The court emphasized that Gap need not have been specifically informed of the diagnosis, but merely aware of Glaser's impairment or have acted on its perception of an impairment.[166] In this context, the record was replete with indicia that Gap management understood that Glaser was impaired, evidenced by the following:

- Perceptions that Glaser was "different" and probably suffered from a "mental disability"; that he had difficulty communicating and socializing in ways similar to one of the supervisor's sons, who had autism; that Glaser would sometimes fixate on and not be able to solve a problem; and, that he would follow people around and get too close;
- Advice to one of the trainers to "keep an eye on" and help Glaser and to "[m]ake sure nobody bothered [Glaser]";
- Disclosures by Glaser to his supervisors indicating his inability to tell time, count, or perform mathematics.
- An incident in which Glaser expressed concern to his supervisor that his disabilities might cause him to arrive at work at the wrong time because of the upcoming shift to daylight savings time, to which his supervisor allegedly responded, "Do me a favor, go get your f---ing watch fixed."
- Denial of a request at the time of his interview for a job coach or retention specialist from the state; refusal to allow the job coach who accompanied Glaser to the interview to be present at the interview, indicating that if Glaser needed assistance to perform the job, then he probably would not be hired, even though the interviewer was informed that Glaser was eligible for state services.[167]

Based upon the record above, the court reasoned that Glaser had offered sufficient evidence to suggest that Gap management regarded him as

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[165] *Id*.
[166] *Id*. at 578.
[167] *Id*. at 577-78.

disabled even if no formal diagnosis had been provided prior to his termination.[168]

Whether Gap had a legitimate reason for Glaser's termination was the next question tackled by the court. Here, Gap asserted that Glaser was terminated for violating company policies when he blocked the cubicle. Like many employers, Gap maintained a "Zero Means Zero" policy against discrimination or harassment and a "Workplace Violence" policy, neither of which Judge Zilly found to provide a legitimate justification for his termination. Like many harassment policies, the Zero Means Zero policy prohibited "slurs and any other offensive remarks, jokes and other verbal, graphic, or physical conduct that could create an intimidating, hostile or offensive work environment."[169] The only reference to "'blocking' another's movement," the conduct for which Glaser is alleged to have been terminated, is located within the description of sexual harassment at the end of a list of improper behaviors, including a description of *quid pro quo* sexual harassment, whereby an employee is offered employment benefits in exchange for sexual favors and experiences a negative job action for declining the sexual advance.[170] Because the court found no sexual overtones associated with Glaser's blocking, it concluded that the conduct was not captured within the Zero Means Zero policy.[171] Similarly, Judge Zilly found that blocking does not fall within the kind of behavior contemplated by the Workplace Violence policy, which prohibits "workplace violence, threats or intimidation against employees by anyone, including . . . other employees."[172] It is arguable that the court's narrow reading of the policies in light of Glaser's behavior reflects a perception that Gap could have at least viewed the incident that triggered Glaser's termination in the much larger context of his impairment, especially given Gap's history of working with Glaser through other incidents.

Finally, the court addressed Glaser's claim that Gap failed to provide a reasonable accommodation for his disability. Under the ADA, an employer is required "to make 'reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability' unless doing so would 'impose an undue hardship on the operation of the business.'"[173] The Second Circuit Court of Appeals has reasoned that an employer's obligation arises if the employer knows or reasonably should have known that the employee is disabled.[174] This duty is even more

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[168] *Id*. at 578.
[169] *Id*. at 579.
[170] *Id*.
[171] *Id*.
[172] *Id*.
[173] *Id*. (quoting 42 U.S.C. § 12112(b)(5)(A) (2016)).
[174] *Id*. at 579.

compelling, according to the Second Circuit, when the employee does not share the employer's perception that the employee has a disability and the employee has not requested an accommodation.[175] In other words, it is incumbent upon the employer to initiate the interactive process in these circumstances to determine whether a reasonable accommodation can be made. The court rejected Gap's argument that it had no duty to provide a reasonable accommodation because Glaser's disability was not obvious.[176] Instead, the court reasoned that genuine issues of material fact exist as to whether Gap knew or should have known of Glaser's disability based upon the facts presented above in the discussion of Glaser's discriminatory discharge claim.[177] Furthermore, Judge Zilly declined to hold that a request for a job coach, which Glaser claims he made at the time of his interview, is unreasonable as a matter of law.[178]

What then can be gleaned from the court's decision as it relates to the adoption of a status-blind anti-bullying policy? Here, the *Glaser* case offers a cautionary tale. Complaints of harassment may serve as the canary in the coal mine, alerting management to think more broadly about potential ADA implications vis-a-vis the bully or the victim where either employee has or is perceived to have ASD. Failing to comprehend or to adequately address the harassment issue could lead the employer to be whipsawed into an ADA claim for failure to make a reasonable accommodation. For example, even though Gap addressed Glaser's behavior in each instance by counseling him, Gap may have fallen short by failing to recognize that the behavior was linked to his disability, thereby triggering the requirement to engage in an interactive process to determine if a reasonable accommodation beyond counseling was warranted. It requires no great stretch to imagine the kinds of behaviors exhibited by Glaser occurring in any number of workplace settings that could benefit from a *Faragher* approach to ensure that the behavior is not ignored.

V. CONCLUSION

The convergence of multiple forces across myriad fronts counsels in favor of implementing a status-blind *Faragher* approach to address workplace bullying. Such an approach requires employers to institute proactive workplace policies and training designed to prevent and respond to complaints of workplace harassment, whether or not those complaints are tied to a legally-protected status. The *Faragher* approach responds to the

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[175] *Id*. at 580.
[176] *Id*.
[177] *Id*.
[178] *Id*.

results of the recently-published Study on Workplace Harassment that validates the incidence of workplace bullying and its serious and negative health-related effects. From a human resource perspective, employers who implement the *Faragher* approach will be better positioned to manage an inclusive workforce that maximizes the full range of talent available in an increasingly diverse employment market that includes individuals with ASD or SCD. This is especially true in light of projected changes in the demographic composition of the workforce and the new regulatory mandate that federal contractors engage in affirmative efforts to recruit and hire individuals with disabilities. From a legal perspective, adoption of a *Faragher* approach will sensitize the workforce in ways that should help employers avoid liability under a presently-evolving and more contextual view of sexual harassment claims under Title VII. Equally significant, a status-blind *Faragher* approach provides an opportunity for employers to identify potential disability-based claims under the newly-restored ADA, and to engage in the interactive process before behavior escalates or the employee raises a claim that the employer has failed to make a reasonable accommodation. Finally, the *Faragher* approach is consistent with newly-enacted state legislative initiatives that require either the adoption of an anti-bullying policy or training that addresses the prevention of abusive conduct. Although none of these statutes authorizes a specific cause of action for bullying, these incremental steps may signal the potential for anti-bullying legislation in the future that will provide victims with a private cause of action. Implementing the *Faragher* approach now will satisfy an employer's obligations under these state mandates and position it to get ahead of the curve should an anti-bullying law be passed at the state or federal level.