

# Bullying in the Workplace: The Plight of South African Employees

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## Abstract

This article discusses the prevalence of bullying in South African workplaces as well as the causes and symptoms thereof and the shortcomings in the current protection available to victims. Jurisprudence indicates that in the past victims typically had to rely on the prohibition against harassment in the *Employment Equity Act 55 of 1998 (EEA)*. However, they were often unsuccessful as they could not prove that the bullying took place on a prohibited ground. An analysis of the common law and various other statutes confirms that South African law provides inadequate protection to victims of bullying. A brief overview of measures against bullying in some foreign jurisdictions indicates that bullying is mostly seen as a health and safety concern and that victims do not have to prove that bullying took place on a prohibited ground.

This article also discusses the newly adopted Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (2022 Code) which endeavours to give effect to the International Labour Organisation's (ILO) Violence and Harassment Convention No 190. The discussion aims to establish whether the 2022 Code will resolve the lacuna in the protection against workplace bullying. The article concludes that this is not the case and recommends that the EEA be amended to define harassment sufficiently wide to include bullying; that the *Labour Relations Act 66 of 1995* be amended to provide that an omission by an employer to address harassment (including bullying) could constitute an unfair labour practice; that a national code issued in terms of the *Occupational Health and Safety Act 85 of 1993* be adopted to address bullying; and that health and safety legislation be amended to explicitly address bullying in the workplace and provide remedies to victims.

## Keywords

Bullying; harassment; victimisation; mobbing; moral harassment; psychosocial climate; health and safety; constructive dismissal; COIDA; Violence and Harassment Convention; Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace.

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## 1 Introduction

It may come as a surprise that of all forms of workplace harassment, bullying is the most prevalent, even more so than sexual harassment.<sup>1</sup> Although this form of harassment is pervasive in workplaces all over the world, with South Africa being no exception, bullying has until recently not drawn a great deal of attention in South Africa. As a result, the protection of employees against bullying leaves much to be desired. However, in many other jurisdictions protection against workplace bullying has been firmly established over the last two or three decades. Bullying, which mostly constitutes a form of psychological violence,<sup>2</sup> is extremely harmful, places onerous burdens on victims, infringes their constitutional rights and impacts negatively on workplaces. It is therefore imperative that effective measures should be put in place to address, prevent and hopefully eradicate this unacceptable conduct in South African workplaces.

Although workplace bullying is rampant globally, data on the percentage of employees who have been bullied in different countries is not comparable since researchers use different definitions and criteria.<sup>3</sup> Even though the results of the research are not comparable, the value of this article lies in the common trends that can be identified such as the factors conducive to bullying and the impact of bullying. Most studies indicated that women suffered higher levels of bullying than men,<sup>4</sup> that younger workers were more likely to be bullied, and that supervisors were most often the bullies.<sup>5</sup> However, managers could also be bullied by their subordinates with equally severe consequences.<sup>6</sup>

The central aim of this article is to emphasise the importance of addressing bullying given the prevalence and profound negative impact thereof on employees and on the workplace. Up until the adoption of the 2022 Code,

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<sup>1</sup> Grigoryan and Weisdorn 2019 *Gradiozo Business Review*.

<sup>2</sup> Guimarães, Caçado and Carvalho Lima 2017 *Revista de Administração* 151-164.

<sup>3</sup> Salin 2001 *European Journal of Work and Organisational Psychology* 425-441; Ortega *et al* 2009 *Int Arch Occup Environ Health* 418.

<sup>4</sup> Feijó *et al* 2019 *International Journal of Environmental Research and Public Health* 4.

<sup>5</sup> Deniz and Gulen Ertosun 2010 *Journal of Global Strategic Management* 130; Ortega *et al* 2009 *Int Arch Occup Environ Health* 418; Cunniff and Mostert 2012 *SAJHRM* 10.

<sup>6</sup> Björklund *et al* 2019 *International Journal of Environmental Research and Public Health* 13.

South African law provided scant protection to employees against bullying and although the 2022 Code does address bullying to a certain extent, the protection provided for is still far from adequate.

Section 2 of this article considers a definition and consequences of workplace bullying, factors conducive to bullying and indicators of bullying. Section 3 analyses how bullying is addressed in a few other countries while section 4 evaluates the protection available to employees against bullying in South African law up till the adoption of the 2022 Code. Valuable lessons can be drawn from best practice in the countries discussed, as well as from the provisions of the International Labour Organization's (ILO) Violence and Harassment Convention No 190 (2019) (V&H Convention) which will be briefly discussed in section 5. Section 6 discusses the 2022 Code which gives effect to the provisions of the V&H Convention. The article concludes and makes recommendations in section 7.

## **2 A definition and consequences of workplace bullying and factors conducive to bullying**

### **2.1 A definition of workplace bullying**

Although it is claimed that workplace bullying is a bigger problem with more severe consequences than any other source of stress at the workplace, it was only during the 1980s that this phenomenon and its negative effects came under the spotlight, mainly through the publications of the Swedish author, Leymann.<sup>7</sup>

There is no universal definition of bullying and different terms are used for the phenomenon in different countries. Moreover, the terms harassment and bullying are often used interchangeably, or in other instances to denote different types of conduct.<sup>8</sup> In Brazil, the term "moral harassment" is used.<sup>9</sup> In Europe, authors prefer the term bullying, in the United States of America (USA) both mobbing and bullying are used while in Sweden it is commonly referred to as victimisation.<sup>10</sup> Leymann referred to this type of conduct as mobbing.<sup>11</sup> He defined mobbing as:

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<sup>7</sup> Leymann 1990 *Violence and Victims* 119-126.

<sup>8</sup> International Labour Office 2018 [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_553577.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_553577.pdf) para 23.

<sup>9</sup> Guimarães, Caçado and Carvalho Lima 2017 *Revista de Administração* 151-164.

<sup>10</sup> Deniz and Gulen Ertosun 2010 *Journal of Global Strategic Management* 130.

<sup>11</sup> Leymann 1990 *Violence and Victims* 119.

hostile and unethical communication, which is directed in a systematic way by one or a number of persons towards one individual. These actions often take place (almost every day) over a long period (at least six months) and because of the frequency and duration result in considerable psychic, psychosomatic and social misery.<sup>12</sup>

A more recent definition of bullying, which according to researchers at the Brandeis University in Massachusetts is based on a synthesis of 30 legal definitions currently in force worldwide, provides as follows:

Workplace bullying is a persistent pattern of unwelcome conduct that a reasonable person in the same circumstances would consider unreasonable. It includes behavior that is belittling, intimidating, humiliating, offending, or disempowering. The behavior must have the cumulative purpose or effect of harming an employee's health, reputation, career success, or ability to perform.<sup>13</sup>

This definition includes an objective standard not found in Leymann's definition.

Furthermore, Alan Rycroft suggests that bullying could be defined using the definition of harassment in the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (PEPUDA) where it is described as "unwanted conduct in the workplace which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences".<sup>14</sup>

The above are just three examples of the many different definitions of bullying. In the discussion of other jurisdictions below, the definition of bullying in the different statutes and codes of these jurisdictions is discussed.

Bullying at work can manifest in different forms, including physical, verbal and non-verbal conduct.<sup>15</sup> For example, bullying by co-employees can be in the form of exclusion and gossiping, or it may take the form of overloading the victim with work and setting unreasonable goals if the bully is a manager.<sup>16</sup>

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<sup>12</sup> Leymann 1990 *Violence and Victims* 119-126 in Strandmark "Workplace Bullying and Harassment in Sweden" 23-38.

<sup>13</sup> Brandeis University 2020 <https://www.brandeis.edu/faculty-senate/ongoing-work/dignity-at-work/pdfs/nature-and-consequences-of-workplace-bullying.pdf>.

<sup>14</sup> Rycroft 2009 *ILJ* 1431.

<sup>15</sup> Einarsen 1999 *International Journal of Manpower* 18; Rycroft 2009 *ILJ* 1437-1439.

<sup>16</sup> Ortega et al 2009 *Int Arch Occup Environ Health* 417-426; *Solid Doors (Pty) Ltd v Theron* (CA4/03) [2004] ZALAC 14 (22 July 2004) para 4.

A list of acts by employers that would typically amount to harassment and bullying is contained in the *Protected Disclosures Act 26 of 2000 (PDA)* which provides that no employer may subject an employee to any occupational detriment on account of having made a protected disclosure.<sup>17</sup> The list of occupational detriments includes measures such as being subjected to disciplinary action, dismissed, suspended, demoted, harassed, intimidated, and so forth.

Effects of bullying include depression, insomnia, ill-health, post-traumatic stress disorder (PTSD),<sup>18</sup> burnout, anxiety and nervous breakdowns.<sup>19</sup> Research has shown that not only victims but also eyewitnesses (mainly co-employees) are affected by bullying with a concomitant negative effect on productivity.<sup>20</sup>

The fatal consequences that bullying in the workplace may have on victims recently came to the fore in France. This was in the case against seven former managers of France Télécom.<sup>21</sup> During a restructuring exercise of this former state-owned corporation, the executives implemented several tactics designed to force employees to resign by deliberately creating a toxic work environment. The result saw 19 employees commit suicide, eight attempting to commit suicide and eight suffering from severe depression. Some of the deceased left suicide notes indicating that the company made life unbearable. In December 2019, the criminal court in Paris sentenced three managers to a prison sentence of one year (of which eight months were suspended) plus a fine of €15 000 euro for "institutional/moral harassment". The court imposed a further fine of €75 000 on the company. Notably, the executives were held liable not for personally bullying the employees, but for deliberately creating an environment and supporting a strategy conducive to bullying.<sup>22</sup>

## **2.2 Factors conducive to bullying and indicators of bullying**

Researchers found that factors conducive to bullying include "an extremely competitive environment; poor leadership; an environment where bullying is not addressed but in effect condoned by management; stressful

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<sup>17</sup> Section 3 of the *Protected Disclosures Act 26 of 2000 (PDA)*.

<sup>18</sup> Einarsen 1999 *International Journal of Manpower* 17.

<sup>19</sup> Smit 2021 *LDD*.

<sup>20</sup> Ciceralli and Ciceralli 2015 *Nordic Psychology*.

<sup>21</sup> Schofield 2019 <https://www.bbc.com/news/world-europe-48948776>.

<sup>22</sup> *France Télécom Tribunal de grande instance de Paris*, 31e chambre, 2e section, 20 Décembre 2019, n° 0935790257.

circumstances such as restructuring and the need to find a scapegoat".<sup>23</sup> The irony is that when the bullying is reported, management often accepts the prejudices of the bully or bullies and then blame the victim for the conduct, perceiving the victim as "a difficult or neurotic person".<sup>24</sup> Drawing on more than 50 studies that considered factors conducive to bullying (most of these in high-income countries) Feijó *et al* found that authoritarian styles of management, a weak organisational structure, a highly demanding, stressful work environment, a lack of leadership and clarity on different roles, as well as repetitive work and the failure to address complaints about bullying, are some of the factors that contribute to bullying taking place.<sup>25</sup>

In this regard, Alan Rycroft has identified the following as indicators that an employee is being bullied:

For employers who understand the link between fulfilled, contented employees and job performance, it has to be a matter of concern that corporate bullying may be undetected, causing deep unhappiness. Increased sick leave, sleep deprivation, lost productivity and employee turnover are common manifestations of corporate bullying.<sup>26</sup>

Recognising these indicators of bullying is important in a strategy to identify and address bullying as early as possible.

### **3 A brief discussion of measures to address bullying in a few other countries**

As mentioned above, apart from the newly adopted 2022 Code giving effect to the V&H Convention, there is no explicit protection for employees in legislation or codes against bullying in South Africa. Considering measures against bullying in a few other countries could provide guidance for addressing bullying in South Africa.

#### **3.1 Sweden**

*The Swedish Work Environment Act*,<sup>27</sup> which deals with health and safety at work, refers throughout the act to an employer's duty to safeguard the physical as well as psychological safety of employees.<sup>28</sup> Sweden has

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<sup>23</sup> Einarsen 1999 *International Journal of Manpower* 22.

<sup>24</sup> Einarsen 1999 *International Journal of Manpower* 19.

<sup>25</sup> Feijó *et al* 2019 *International Journal of Environmental Research and Public Health* 16.

<sup>26</sup> Rycroft 2009 *ILJ* 1432.

<sup>27</sup> *Swedish Work Environment Act* 1977:1160.

<sup>28</sup> Section 2.5 of the *Swedish Work Environment Act* 1977:1160 defines an occupational injury as a physical or psychological injury while s 2.6 states that occupational illness includes physical as well as psychological disablements which include stress related illness as well as illness caused by work overload. ILO 2014

already in 1993 adopted an Ordinance entitled "Victimisation at Work"<sup>29</sup> that prohibits victimisation in the workplace. It is formulated in such a way that it can include bullying, although it does not explicitly mention bullying:<sup>30</sup>

By victimization is meant recurrent reprehensible or distinctly negative actions which are directed against individual employees in an offensive manner and can result in those employees being placed outside the workplace community.<sup>31</sup>

This definition clearly emphasises the alienating effect of bullying.

Swedish employers are required to assess and eliminate organisational and management practices that could be conducive to bullying. A list of risk factors that could contribute to bullying, such as a high workload, restructuring, and signs of bullying such as high absenteeism and a high employee turnover rate, are listed in guidelines to employers issued by the Swedish Work Environment Authority.<sup>32</sup> The Ordinance has been criticised for focusing on preventative measures and not having the desired impact because of a lack of enforcement mechanisms.<sup>33</sup>

### **3.2 The United Kingdom and Ireland**

Although there is no legal definition or specific protection for victims of bullying in the United Kingdom (UK), the Advisory, Conciliation and Arbitration Service (ACAS) in the UK defines workplace bullying as "offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the person being bullied".<sup>34</sup> This definition emphasises bullying by a person in a position of power. Victims' claims may be based on unfair discrimination (if the bullying is based on a prohibited ground) or on unfair constructive dismissal. In *Price v Surrey County Council*<sup>35</sup> the Employment Appeal Tribunal (EAT) found that the constructive dismissal of an employee who was bullied by the headmaster of a school was unfair. The reason was

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[https://www.ilo.org/dyn/legosh/en/f?p=14100:1100:0::NO:1100:P1100\\_ISO\\_CODE\\_3,P1100\\_SUBCODE\\_CODE,P1100\\_YEAR:SWE,2014](https://www.ilo.org/dyn/legosh/en/f?p=14100:1100:0::NO:1100:P1100_ISO_CODE_3,P1100_SUBCODE_CODE,P1100_YEAR:SWE,2014).

<sup>29</sup> *Ordinance AFS 1993:17 (Victimisation at Work)* (Statute Book of the Swedish National Board).

<sup>30</sup> Strandmark "Workplace Bullying and Harassment in Sweden" 23.

<sup>31</sup> Section 1 of *Ordinance AFS 1993:17 (Victimisation at Work)* (Statute Book of the Swedish National Board).

<sup>32</sup> Swedish Work Environment Authority 2020 <https://www.av.se/en/health-and-safety/mental-ill-health-stress-threats-and-violence/bullying/>.

<sup>33</sup> Hoel and Einarsen 2010 *Comp Lab L & Pol'y J* 248-249.

<sup>34</sup> Worksmart date unknown <https://worksmart.org.uk/health-advice/illnesses-and-injuries/violence-and-bullying/bullying/what-bullying-work>.

<sup>35</sup> *Price v Surrey County Council (UK)* UKEAT/0450/10/SM (27 October 2011).

that the Council, which heard the victim's grievance, did not acknowledge that she was bullied, despite substantial evidence that this was the case. This denial was according to the EAT sufficient to constitute a breach of the implied term of trust and confidence in the employment relationship.<sup>36</sup> Employees have been successful in claiming damages for psychological stress caused by a breach of the employer's implied duty of care to provide a safe workplace.<sup>37</sup> Although these cases dealt with work overload, the same principles would apply if employees were bullied. In *Majrowski v Guy's & St Thomas' NHS Trust*,<sup>38</sup> in which the employee was bullied by his manager, the employer was held vicariously liable for breach of a statutory duty in terms of the *Protection from Harassment Act 1977* (PHA) which provides for criminal as well as civil remedies for victims. This Act provides that "[a] person must not pursue a course of conduct— (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other".

Ireland has explicitly regulated bullying by issuing the Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work (Code) in terms of section 60 of the *Safety, Health and Welfare at Work Act 10 of 2005*. The Code describes bullying as repeated conduct impairing the victim's dignity and holding a risk for health and safety. The words "impairing the victim's dignity" point to a subjective test while "holding a risk for health and safety" point to an objective test. The two parts of the definition combined seem to entail a reasonable victim test. The Code also provides examples of conduct that would constitute bullying as well as an informal and a formal complaints procedure. Guidance is further provided on preventative measures.<sup>39</sup>

### 3.3 Canada

In Canada, bullying and harassment are mostly treated as health and safety concerns. According to the Canadian Centre for Occupational Health and Safety, most Canadian provinces do not provide explicit protection against

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<sup>36</sup> *Price v Surrey County Council* (UK) UKEAT/0450/10/SM (27 October 2011) para 116.

<sup>37</sup> See *Walker v Northumberland County Council* [1995] 1 All ER 737 (QB); *Hatton v Sutherland* [2002] 2 All ER 1.

<sup>38</sup> *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34.

<sup>39</sup> Health and Safety Authority 2017 [https://www.hsa.ie/eng/Publications\\_and\\_Forms/Publications/Safety\\_and\\_Health\\_Management/Safety\\_Representatives\\_Resource\\_Book.pdf](https://www.hsa.ie/eng/Publications_and_Forms/Publications/Safety_and_Health_Management/Safety_Representatives_Resource_Book.pdf).



bullying, but almost all jurisdictions have legislation in place dealing with violence and harassment, which covers bullying as well.<sup>40</sup>

British Columbia provides an example of a province dealing with bullying and harassment mainly as a health and safety matter. Policy item D3-115-2 regulating employer duties in terms of the Workers Compensation Act<sup>41</sup> prohibits workplace bullying and harassment and defines it as:

Any inappropriate conduct or comment by a person towards a worker that the person knows or reasonably ought to have known would cause that worker to be humiliated or intimidated, but excludes any reasonable action taken by an employer or supervisor relating to the management and direction of workers or the place of employment.<sup>42</sup>

Examples of bullying and harassment include "verbal aggression or insults, calling someone derogatory names, harmful hazing or initiation practices, vandalising personal belongings, and spreading malicious rumours".<sup>43</sup>

Strategies against bullying and harassment are contained in a collective agreement between the Government of British Columbia and the BC Government and Service Employees' Union (BCGEU),<sup>44</sup> indicating the important role that trade unions may play in addressing harassment and bullying.

The British Columbia *Workers Compensation Act*<sup>45</sup> was amended in 2012 to explicitly include compensation for bullying.<sup>46</sup> It makes provision for compensation for mental disorders which were caused by "traumatic events" or predominantly caused by "a significant work-related stressor including bullying or harassment", or "a cumulative series of significant

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<sup>40</sup> Canadian Centre for Occupational Health and Safety date unknown [https://www.ccohs.ca/oshanswers/psychosocial/bullying.html#\\_1\\_2](https://www.ccohs.ca/oshanswers/psychosocial/bullying.html#_1_2); Burns 2012 <https://www.benefitscanada.com/benefits/benefits-other/b-c-s-anti-bullying-law-in-effect/>.

<sup>41</sup> Workers Compensation Act [RSBC 1996] Chapter 492. WorksafeBC has published an anti-bullying policy in which employers and employees are informed about their duties and rights and the steps that must be taken should bullying and harassment occur: WorksafeBC date unknown <https://www.worksafebc.com/en/health-safety/hazards-exposures/bullying-harassment/resource-tool-kit>.

<sup>42</sup> WorksafeBC date unknown <https://www.worksafebc.com/en/law-policy/occupational-health-safety/searchable-ohs-regulation/ohs-policies/policies-for-the-workers-compensation-act#SectionNumber:D3-115-2>.

<sup>43</sup> WorkSafeBC date unknown <https://www.worksafebc.com/en/health-safety/hazards-exposures/bullying-harassment>.

<sup>44</sup> Government of British Columbia 2019 [https://www2.gov.bc.ca/assets/gov/careers/managers-supervisors/managing-employee-labour-relations/bcgeu\\_main\\_agreement.pdf](https://www2.gov.bc.ca/assets/gov/careers/managers-supervisors/managing-employee-labour-relations/bcgeu_main_agreement.pdf).

<sup>45</sup> *Workers Compensation Act* [RSBC 1996] Chapter 492.

<sup>46</sup> *Bill 14, Workers' Compensation Amendment Act*, 2011.

work-related stressors, arising out of or in the course of the worker's employment".<sup>47</sup> Recently the Supreme Court overturned a decision by the Workers' Compensation Appeal Tribunal that abusive behaviour by a supervisor (culminating in a derogatory text message) did not constitute a "traumatic event" and referred it back for reconsideration.<sup>48</sup> The Supreme Court remarked:

Another area of concern I have with the Decision is the Vice Chair's reliance on the supervisor's lack of intent to harm in finding that sending the text message did not constitute bullying. Intent to harm is not a requirement for a finding that an act constitutes bullying. If it were, then the ignorant would routinely be exonerated. The test is whether the perpetrator knew *or ought to have known* that the action would intimidate, humiliate or degrade an individual.<sup>49</sup>

The court pointed out that this is an objective test in contrast to whether the supervisor knew that his conduct would have the effect: "The question should have been asked: based on what the supervisor knew at the time, would a reasonable person have known that the text message would be offensive and belittling?"<sup>50</sup>

In the British Columbia system there is thus no need for a victim to prove fault, bullying and harassment are mainly regarded as health and safety concerns, the prohibition against harassment and bullying does not need to be linked to discrimination, and lastly, reasonable management action will not be regarded as bullying.

### **3.4 The United States of America**

There is no explicit federal protection for employees against bullying in the USA, unless the bullying is based on a prohibited ground in terms of Title VII of the Civil Rights Act 1964. In *Oncale v Sundowner Offshore Services, Inc.*,<sup>51</sup> the Supreme Court moreover stated that federal employment discrimination laws are not intended to create a general civility code for the American workplace.<sup>52</sup> Courts therefore tolerate a rather robust workplace because employers have relied on the "equal opportunity defence"<sup>53</sup> to avoid liability for harassment. This is based on discrimination law which

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<sup>47</sup> Section 5(1) of *Bill 14, Workers' Compensation Amendment Act*, 2011.

<sup>48</sup> *Cima v Workers Compensation Appeal Tribunal* 2016 BCSC 931.

<sup>49</sup> *Cima v Workers Compensation Appeal Tribunal* 2016 BCSC 931 para 76.

<sup>50</sup> *Cima v Workers Compensation Appeal Tribunal* 2016 BCSC 931 para 80.

<sup>51</sup> *Oncale v Sundowner Offshore Services, Inc* 523 US 75 (1998) 80.

<sup>52</sup> *Oncale v Sundowner Offshore Services, Inc* 523 US 75 (1998) 75.

<sup>53</sup> *Holman v State of Indiana* 24 F Supp. 2d 909 (ND Ind 1998).

does not recognise harassment as actionable if the harasser displayed the same conduct towards persons belonging to different protected classes.<sup>54</sup>

However, some states, *inter alia* California and Tennessee have adopted legislation addressing workplace bullying.<sup>55</sup> In Massachusetts, the Healthy Workplace Bill, "[a]n Act addressing workplace bullying, mobbing and harassment, without regard to protected class status"<sup>56</sup> (unfair discrimination on prohibited grounds) is in the process of being adopted. The Bill acknowledges that

at least a third of all employees will directly experience health-endangering workplace bullying, abuse, and harassment during their working lives, and this form of mistreatment is approximately four times more prevalent than sexual harassment alone;<sup>57</sup>

The Bill further acknowledges that currently, if a victim cannot point to a prohibited ground, they will be unlikely to be protected against abuse by law since the common law and current workers' compensation plans do not provide adequate protection to victims of bullying and harassment.<sup>58</sup>

Abusive conduct against employees is prohibited and defined as

acts, omissions or both, that a reasonable person would find abusive, based on the severity, nature and frequency of the conduct, including, but is not limited to repeated verbal abuse such as the use of derogatory remarks, insults and epithets; verbal, non-verbal or physical conduct of a threatening, intimidating or humiliating nature; or the sabotage or undermining of an employee's work performance...<sup>59</sup>

The definition entails an objective test and does not require complainants to show a connection between bullying and a prohibited ground.<sup>60</sup>

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<sup>54</sup> *Holman v State of Indiana* 24 F Supp. 2d 909 (ND Ind 1998) para 22.

<sup>55</sup> Yamada 2015 *Employee Rights and Employment Policy Journal* 49.

<sup>56</sup> *Bill S.1072, 191st General Court of the Commonwealth of Massachusetts* (2019-2020).

<sup>57</sup> Chapter 151G, s 1(a) of *Bill H.1766, 188th General Court of the Commonwealth of Massachusetts* (2013-2014).

<sup>58</sup> Section 1(a)(5)-(7) of *Bill H.1766, 188th General Court of the Commonwealth of Massachusetts* (2013-2014).

<sup>59</sup> Section 2 of *Bill S.1072, 191st General Court of the Commonwealth of Massachusetts* (2019-2020).

<sup>60</sup> Section 1(a) of *Bill S.1072, 191st General Court of the Commonwealth of Massachusetts* (2019-2020).

No employee may further be subjected to an abusive work environment<sup>61</sup> If this Bill is adopted, employers could be held liable if no preventative measures were taken or if they did not address bullying behaviour.<sup>62</sup>

### 3.5 *Australia*

The Australian Fair Work Act 2009 provides the following definition of bullying: A worker is bullied at work if an individual or group "repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member and that behaviour creates a risk to health and safety".<sup>63</sup>

Significantly the behaviour must be repetitive, and bullying is seen as a health and safety issue.<sup>64</sup> The fact that the behaviour must be "unreasonable" to qualify as bullying, points toward an objective test. The definition includes bullying of groups of employees by groups of employees.

Employees who are bullied may apply for an order (which will be issued to the employer) by the Fair Work Commission to the effect that the bullying must be stopped.<sup>65</sup>

Australian employees may bring civil claims for damages caused by bullying against their employers. In *Robinson v State of Queensland*,<sup>66</sup> in which the complainant suffered a psychiatric injury because of bullying by her superior, the employer was found to be directly liable for negligence for breach of the duty of care. According to the court, the fact that the complainant was bullied by the CEO added to the inherent risk against which the employer should have taken precautions and neglected to do.<sup>67</sup>

Examples of bullying provided in a fact sheet of the Australian Human Rights Commission include amongst others harmful initiation practices, excluding people from work-related activities, spreading malicious rumours,

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<sup>61</sup> Section 2(a) of *Bill S.1072, 191st General Court of the Commonwealth of Massachusetts* (2019-2020).

<sup>62</sup> Section 3 of *Bill S.1072, 191st General Court of the Commonwealth of Massachusetts* (2019-2020).

<sup>63</sup> Section 789FD of the *Australian Fair Work Act 2009*.

<sup>64</sup> Section 789FD of the *Australian Fair Work Act 2009*.

<sup>65</sup> Fair Work Commission date unknown <https://www.fwc.gov.au/disputes-at-work/anti-bullying>.

<sup>66</sup> *Robinson v State of Queensland* [2017] QSC 165 (8 August 2017) (hereafter the *Robinson case*).

<sup>67</sup> *Robinson case* para 19.

intimidation, giving pointless tasks, giving tasks impossible to complete within the given time, and withholding information needed to do a job.<sup>68</sup>

Aspects that are noteworthy in the regulation of bullying in the above jurisdictions are that bullying does not have to be based on discrimination, there is mostly no need to prove fault, and bullying is mostly regulated as a health and safety issue. In some jurisdictions, a reasonable victim test is applied and in others an objective test. Reasonable acts by management in running the business are in some instances excluded from bullying. Guidance is provided in most jurisdictions on the type of conduct that would constitute bullying and a range of remedies are available to victims.

#### **4 The protection of employees against workplace bullying in South Africa**

Regarding the prevalence of bullying in South Africa, research by Cunniff and Mostert, in a study of different sectors and regions in the country, indicates that in terms of a representative sample, 31,1% of the workforce has been bullied in the past. Male workers (contradicting results of research by Feijó *et al* that women are more prone to be bullied),<sup>69</sup> younger employees, and black employees reported higher levels of bullying than other employees.<sup>70</sup> While 15.7% of employees who were bullied, were bullied by co-workers, almost twice this percentage, namely 30.5% were bullied by their supervisors,<sup>71</sup> confirming this trend in other countries.

Despite this high prevalence of bullying, there is no explicit protection for employees against bullying in South African legislation. The term is not mentioned in any legislation.<sup>72</sup> In light of the constitutional rights of victims of bullying that will be infringed, namely the right to equality, (section 9) the right to dignity, (section 10) freedom and security of the person, (section 12) and the right to fair labour practices, (section 23) it is imperative that victims should be protected in South African law. The discussion below deals with the different statutes as well as the common law to indicate the limited extent

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<sup>68</sup> Australian Human Rights Commission date unknown <https://humanrights.gov.au/our-work/employers/workplace-bullying-violence-harassment-and-bullying-fact-sheet>.

<sup>69</sup> Feijó *et al* 2019 *International Journal of Environmental Research and Public Health* 4.

<sup>70</sup> Cunniff and Mostert 2012 *SAJHRM* 8.

<sup>71</sup> Cunniff and Mostert 2012 *SAJHRM* 8.

<sup>72</sup> The CCMA includes bullying in the description of harassment. See CCMA date unknown <https://www.ccma.org.za/advicecategories/information-sheets/>.

of protection for victims of bullying and to consider which measures could enhance protection for this group.

The *Employment Equity Act* 55 of 1998 (EEA) is the only statute providing protection against harassment, which is not defined but could be seen as including bullying.<sup>73</sup> Victims have thus relied on section 6(3) of the EEA which provides that "[h]arassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in section 6(1)". The difficulty for victims of bullying who rely on a prohibition against unfair discrimination in the EEA and the *Labour Relations Act* 66 of 1995 (LRA) (regarding an automatically unfair dismissal in terms of section 187(1)(f)), is illustrated in *Aarons v University of Stellenbosch* (Aarons).<sup>74</sup> The applicant alleged that the university did not take the necessary measures in terms of section 60 of the EEA after she had complained about a co-employee who had victimised, harassed, and discriminated against her. She further alleged that she was constructively dismissed and that the dismissal was automatically unfair in terms of section 187(1)(f) of the LRA. The Labour Court held that the evidence did point to constructive dismissal, but that the dismissal was not automatically unfair:

The grounds listed in s 6(1) of the EEA are no different to those listed in s 187(1)(f) of the [Labour Relations] Act. Harassment may indeed be a form of unfair discrimination that is recognized under s 187(1)(f) of the Act. However, an employee claiming harassment must do more than just make the bald allegation; it must clearly set out why the harassment amounts to unfair discrimination. The applicant has not done so.<sup>75</sup>

The employee failed to link the harassment to any prohibited ground and her claim was thus unsuccessful.

Likewise, in *Shopleft Checkers (Pty) Ltd v Samka (Samka LC)*,<sup>76</sup> the arbitrator accepted that the bullying and harassment of the complainant did take place but found that the insults by her co-employees were not based on race,<sup>77</sup> as she alleged. The arbitrator found that the bullying took place because they "were fed up with Ms Samka's numerous complaints and grievances, many of which they considered to be petty and frivolous."<sup>78</sup> The

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<sup>73</sup> Rycroft 2009 ILJ 1434.

<sup>74</sup> *Aarons v University of Stellenbosch* 2003 24 ILJ 1123 (LC).

<sup>75</sup> *Aarons v University of Stellenbosch* 2003 24 ILJ 1123 (LC) para 19.

<sup>76</sup> *Shopleft Checkers (Pty) Ltd v Samka* 2018 39 ILJ 2347 (LC).

<sup>77</sup> *Shopleft Checkers (Pty) Ltd v Samka* 2018 39 ILJ 2347 (LC) para 10.

<sup>78</sup> *Shopleft Checkers (Pty) Ltd v Samka* 2018 39 ILJ 2347 (LC) para 11.

Labour Court and the Labour Appeal Court upheld the decision with the latter commenting as follows:

There is a burden placed upon the appellant to show, on a balance of probabilities, that the conduct alleged by her was not rational, that it amounts to discrimination and that the discriminatory practice was unfair. An allegation of harassment, even if indeed it can be shown to exist on its own and of itself, cannot and does not meet the requirements as set out in s 6(3) read together with s 11 of the EEA. More is required before an employer such as the first respondent can be held liable in terms of the EEA, where, as in the case brought by appellant, that is based on 'an arbitrary ground'. So much is clear from the wording of s 11(2) of the EEA.<sup>79</sup>

The complainant further alleged that her employer was liable in terms of section 60 of the EEA for racial abuse by a customer. Section 60 of the EEA provides that an employer can be held liable for the discriminatory conduct of that employer's employee if it was reported, and the employer did not consult the parties involved and did not take measures to eliminate the conduct. However, if the employer can prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of the EEA, the employer will not be liable.

The Labour Appeal Court pointed out that section 60 only deals with the liability of employers for the conduct of their employees and that an employer cannot be held liable for the conduct of a customer.<sup>80</sup>

Similar to *Samka LC* and *Aarons*, the complainant in *Private Sector Workers Trade Union on behalf of Opperman and Gerrie Ebersohn Attorneys (Opperman)*<sup>81</sup> failed to prove that the harassment in the form of crude remarks and unreasonable reprimands was based on a prohibited ground. Clearly, a wrong was done to her, but the EEA did not provide any remedy.

The above cases illustrate the dilemma of persons who are bullied and who then endeavour to rely on a prohibition against unfair discrimination. In many instances of bullying, complainants will not be able to prove that the conduct was based on a prohibited ground. The reason why they are bullied is often not known to them. The result is that they can neither rely on sections 6(1), 6(3) or 60 of the EEA, nor on section 187(1)(f) of the LRA.

One instance in which a victim of bullying who relied on the EEA was successful, is *Du Plessis and Rickjon Mining and Engineering (Du*

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<sup>79</sup> *Samka v Shoprite Checkers* 2020 41 ILJ 1945 (LAC) para 23.

<sup>80</sup> *Samka v Shoprite Checkers* (2020) 41 ILJ 1945 (LAC) para 13.

<sup>81</sup> *Private Sector Workers Trade Union on behalf of Opperman and Gerrie Ebersohn Attorneys* 2019 40 ILJ 1159 (CCMA).

*Plessis*).<sup>82</sup> In this case, the victim's co-employees made allegations on Facebook that the complainant, a female miner, had relationships with married miners. Soon after these allegations, the victimisation and bullying started. Several shift bosses, apparently afraid that their wives would hear about the rumours, lodged a grievance based on groundless complaints against the employee. When she in turn filed a grievance, the harassment escalated. Her employer transferred her without a disciplinary hearing and against her wishes. The arbitrator held that she proved unfair discrimination based on sex, gender, and an arbitrary ground and explained his view of what constitutes an arbitrary ground as follows:

An arbitrary ground is one that has no rational justification and impairs the dignity of the victim of the harassment. It is reasonable to infer from the abovementioned evidence that the shift bosses subjected the applicant to the abovementioned harassment because they feared that the rumours that had been posted on Facebook would affect their own marriages. The applicant denied the rumours and there is no evidence that they were true. There was thus no rational justification for the fears of the shift bosses or their response thereto, namely making false claims about the applicant's work and requesting that she be transferred.

The arbitrator ordered the employer to compensate the complainant in terms of section 60 of the EEA<sup>83</sup> because it failed to take measures to address her grievance based on unfair discrimination. Although the arbitrator's interpretation of an arbitrary ground (no rational ground for the discrimination) would provide welcome relief to victims of bullying, the arbitrator's view of what constitutes an arbitrary ground does not seem to be correct in light of the judgment by the Labour Court in *Naidoo v Parliament of the Republic of South Africa (Naidoo)*.<sup>84</sup> The court in *Naidoo* held that for conduct to qualify as "arbitrary discrimination" it must be shown that it is based on attributes and characteristics which have the potential to impair a person's fundamental human dignity or to affect someone adversely in a comparably serious manner to a listed ground".<sup>85</sup> The court in *Naidoo* favoured this narrow interpretation of "arbitrary ground" whereas the arbitrator in *Du Plessis* ostensibly favoured a broader interpretation in terms of which any irrational, frivolous reason for the discrimination would qualify as an arbitrary ground. This is not in line with the jurisprudence of the Labour Court and the argument of Garbers and Le Roux that an "arbitrary ground" in the amended section 6(1) has the same meaning as an "analogous ground" in the original section 6(1). Thus, an arbitrary ground

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<sup>82</sup> *Du Plessis and Rickjon Mining and Engineering* 2018 39 ILJ 1665 (CCMA).

<sup>83</sup> See the discussion of this section below.

<sup>84</sup> *Naidoo v Parliament of the Republic of South Africa* 2019 40 ILJ 864 (LC).

<sup>85</sup> *Naidoo v Parliament of the Republic of South Africa* 2019 40 ILJ 864 (LC) para 44.



cannot simply be interpreted as an irrational ground but must be linked to a ground that could potentially impair the dignity of the victim.<sup>86</sup>

Victims of bullying who relied on constructive dismissal were more successful than those relying on unfair discrimination. In *Centre for Autism and Education CC v CCMA*<sup>87</sup> the Labour Court held that the conduct of the employer made continued employment objectively intolerable for the employees and that the constructive dismissal was indeed unfair:

what the evidence discloses is a workplace operated by a narcissistic personality whose offensive and unwelcome conduct had the effect of creating a toxic working environment in which discrimination, degradation and demeaning behaviour became the norm. I have no hesitation in finding that the nature and extent of the workplace bullying suffered by the third and fourth respondents were such that for the purposes of s 186(1)(e) of the LRA, their continued employment was rendered intolerable.<sup>88</sup>

The employees did not claim automatically unfair dismissal, although there is ample evidence that the bullying was based on prohibited grounds. This judgment is one of few in South Africa explicitly referring to workplace bullying.

Although the complainants, in this case, were successful, victims first have to resign before they can claim constructive dismissal. They may not be able to prove that the employer made continued employment intolerable (courts apply an objective test)<sup>89</sup> and would then be left without a job.<sup>90</sup>

Victims of bullying could potentially rely on section 186(2) of the LRA which prohibits unfair labour practices by employers. If bullying results in unfair acts by the employer in respect of, for example, promotion, demotion, refusal to provide benefits or training, unfair disciplinary action or suffering an occupational detriment on account of having made a protected disclosure, employees<sup>91</sup> could claim that their employer subjected them to an unfair labour practice. The protection in respect of this section is however

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<sup>86</sup> Garbers and Le Roux 2018 *Stell LR* 256.

<sup>87</sup> *Centre for Autism and Education CC v CCM* 2020 41 ILJ 2623 (LC).

<sup>88</sup> *Centre for Autism and Education CC v CCM* 2020 41 ILJ 2623 (LC).

<sup>89</sup> *Jordaan v Commission for Conciliation Mediation and Arbitration* 2010 31 ILJ 981 (LAC) 985.

<sup>90</sup> Rycroft 2009 *ILJ* 1431.

<sup>91</sup> See the PDA.

limited as the employer's act or omission must fall within the closed list of unfair labour practices.

Although there are no judgments in this regard, victims of bullying may be successful in claiming delictual damages against their employers in terms of the common law based on the negligence or vicarious liability of employers. Victims of sexual harassment have in the past been successful in claiming damages against their employers based on vicarious liability in for instance *E v Ikwezi Municipality*<sup>92</sup> and *LP v Minister of Correctional Services*.<sup>93</sup> Based on these cases, victims of bullying could argue that their employers are vicariously liable for the psychological and other damages suffered as a consequence of being bullied by co-employees. In *Media 24 v Grobler*<sup>94</sup> the Supreme Court of Appeal (SCA) held the employer, who knew about the harassment but did not take any measures to protect the employee, liable on the ground of negligence. The SCA pointed out that employers have a common-law duty to protect employees against physical as well as psychological harm.<sup>95</sup> In the Australian case *Robinson v State of Queensland*,<sup>96</sup> a victim of workplace bullying who suffered a psychiatric injury was successful in claiming that the employer breached its common-law duty of care to protect him. However, claiming remedies based on the common law can be a protracted and lengthy process.

It is further possible that victims could rely on the *Protection from Harassment Act* 17 of 2011 in terms of which a person who is harassed can apply for a protection order against the harasser. Harassment is sufficiently broadly defined to include bullying. If the perpetrator breaches the terms of the protection order, this will amount to a criminal offence. A protection order may be obtained against the complainant's employer or co-employee, but it could be extremely awkward to work with someone against whom a protection order has been granted.

The PEPUDA, like the *Protection from Harassment Act*, contains a definition of harassment that is broad enough to encompass bullying as referred to above, but similar to the EEA, protection is only applicable in the discrimination context. The PEPUDA is further of limited use in the

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<sup>92</sup> *E v Ikwezi Municipality* 2016 37 ILJ 1799 (ECG).

<sup>93</sup> *LP v Minister of Correctional Services* (27220/2010) [2019] ZAWCHC 144 (5 November 2019).

<sup>94</sup> *Media 24 Ltd v Grobler* 2005 6 SA 328 (SCA).

<sup>95</sup> *Media 24 Ltd v Grobler* 2005 6 SA 328 (SCA) para 65.

<sup>96</sup> See the *Robinson* case.

workplace as it does not apply to persons to whom the EEA applies.<sup>97</sup> Employees who have been bullied can thus claim against perpetrators who are co-employees or non-employees such as customers but cannot claim against the employer for these persons' conduct. The complainant in *Samka LC* discussed above could have been successful in her claim against a customer who made a racist remark, had she relied on PEPUDA.

Some of the jurisdictions discussed above deal with bullying as a health and safety issue. This is understandable considering the impact of bullying on employees' health. The South African legislator only had physical and not psychological safety in mind when the *Occupational Health and Safety Act* 85 of 1993 (OHSA) was adopted almost three decades ago. However, section 8 of the OHSA provides that "every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of employees". This section could be interpreted to include a duty by the employer to ensure a workplace that is also psychologically safe. Section 7 of OHSA further provides that employers must on the instruction of the chief inspector formulate a health and safety policy addressing the hazards of the specific workplace and a copy of the policy must be prominently displayed at the workplace. The provision in section 11 that risks specific to a certain workplace should be identified is further important in the context of bullying at the workplace. Section 38 of OHSA provides that a contravention of the Act will constitute an offence for which a fine or imprisonment may be imposed.

Results of the research discussed above indicated that certain management practices and a specific type of culture at a workplace would increase the risk that bullying will occur.<sup>98</sup> An exercise in identifying such risk factors could be instrumental in creating a safe psychosocial climate at the workplace that would prevent and address bullying. Law, et al define a psychosocial safety climate as "shared perceptions of organizational policies, practices and procedures for the protection of worker psychological health and safety, that stem largely from management practices".<sup>99</sup>

Employees who have suffered occupational injuries and diseases may in certain circumstances claim compensation in terms of the *Compensation for Injuries and Diseases Act* 130 of 1993 (COIDA). The Compensation Fund was clearly not established to compensate employees for psychological

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<sup>97</sup> Section 5(3) of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (PEPUDA).

<sup>98</sup> Law et al 2011 *Accident, Analysis and Prevention* 1793.

<sup>99</sup> Law et al 2011 *Accident, Analysis and Prevention* 1785.

injuries, but in *Urquhart v Compensation Commissioner*<sup>100</sup> and *Odayar v Compensation Commissioner*<sup>101</sup> the court held that employees suffering from a work-related psychiatric condition caused by witnessing traumatic events are entitled to compensation. Victims of bullying could in light of these judgments possibly argue that they are entitled to compensation for temporary or permanent psychological disablement caused by bullying.<sup>102</sup> The burden to prove that the disease arose out of the employee's employment would however be on the victims because psychological diseases (such as post-traumatic stress syndrome) are not listed as compensable diseases in terms of schedule 3 of COIDA.

The following section briefly discusses the V&H Convention, while section 6 considers whether the 2022 Code (based on the V&H Convention) could successfully address the shortcomings in the protection of victims of bullying in South African workplaces.

## **5 The role of the V&H Convention and Recommendation 206 in addressing bullying in the workplace**

In terms of section 39(1)(b) of the *Constitution of the Republic of South Africa*, 1996 courts must consider international law when interpreting the Bill of Rights. Section 233 further provides that "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with the international law". It is thus imperative that any international instrument having an impact on bullying should be considered here. The latest convention of the ILO, the V&H Convention, accompanied by Recommendation 206, contains provisions on eliminating and dealing with all forms of violence and harassment in the workplace but does not specifically address bullying. However, the definition of violence and harassment (defined as one concept) is sufficiently broad to include bullying:

the term "violence and harassment" in the world of work refers to a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment.<sup>103</sup>

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<sup>100</sup> *Urquhart v Compensation Commissioner* 2006 2 All SA 80 (E).

<sup>101</sup> *Odayar v Compensation Commissioner* 2006 27 ILJ 1477 (N).

<sup>102</sup> See Malherbe and Calitz 2016 *Stell LR* 476 who made this argument (albeit in the context of sexual harassment).

<sup>103</sup> Article 1(a) of the *Violence and Harassment Convention* No 190 (2019) (the *V&H Convention*).

The Convention provides in brief that member countries that ratify the V&H Convention may define violence and harassment as a single concept or as separate concepts. Member countries are further enjoined to adopt "an inclusive, integrated and gender-responsive approach for the prevention and elimination of violence and harassment in the world of work",<sup>104</sup> to adopt laws, regulations, and policies to ensure equality and eliminate discrimination<sup>105</sup> and to adopt laws and regulations prohibiting workplace violence and harassment.<sup>106</sup> Member countries are further required to adopt a national policy for this purpose and also to require employers to adopt workplace policies on the prevention of violence and harassment.<sup>107</sup> In these policies "psychosocial risks in the management of occupational safety and health" must be taken into consideration.<sup>108</sup> Employers are enjoined to identify hazards and assess the risks of violence and harassment in the specific workplace and address these.<sup>109</sup> Recommendation 206 provides that factors that increase the likelihood of violence and harassment which arise from working conditions, work organisation, cultural and social norms that would be conducive to violence and harassment should be taken into account in the identification of hazards.<sup>110</sup>

Member countries are enjoined to address violence and harassment in national policies regarding health and safety, discrimination and migration.<sup>111</sup> There is also a duty on member countries to conduct training and awareness-raising about violence and harassment in the workplace. South Africa has ratified this Convention on 29 November 2021. The 2022 Code which is discussed in the following section endeavours to give effect to the V&H Convention.

## **6 The effectiveness of the 2022 Code in addressing bullying in the workplace**

The objective of the 2022 Code is to address the prevention, elimination and management of all forms of harassment in the workplace as guided by the V&H Convention. Although the V&H Convention requires each member country to adopt laws, regulations and policies to ensure the right to equality

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<sup>104</sup> Article 4 of the *V&H Convention*.

<sup>105</sup> Article 6 of the *V&H Convention*.

<sup>106</sup> Article 7 of the *V&H Convention*.

<sup>107</sup> Article 9(a) of the *V&H Convention*.

<sup>108</sup> Article 9(b) of the *V&H Convention*.

<sup>109</sup> Article 9(c) of the *V&H Convention*.

<sup>110</sup> Article 8 of the *V&H Convention*.

<sup>111</sup> Article 11(a) of the *V&H Convention*.

and non-discrimination,<sup>112</sup> only one code was adopted to cover all forms of harassment, including bullying. The 2022 Code was issued in terms of the EEA which immediately points to the link with discrimination. The article will argue that this perpetuates inadequate protection against bullying in the workplace.

According to the 2022 Code, harassment includes violence, physical abuse, psychological abuse, emotional abuse, sexual abuse, gender-based abuse and racial abuse.<sup>113</sup> The drafters of the 2022 Code thus chose to have one concept encompassing both violence and harassment, although the V&H Convention allowed for separate definitions. The 2022 Code defines harassment (which is not defined in the EEA) as unwanted conduct which impairs dignity, which creates a hostile or intimidating environment and which relates to the prohibited grounds of discrimination in the EEA.<sup>114</sup> It is to be welcomed that harassment is defined, but the concept of harassment in the Code is unfortunately still embedded in discrimination law. The article highlighted the drawback of this for victims of bullying who were not bullied on a prohibited or analogous ground. Bullying is further not addressed in a separate section of the 2022 Code as in the case of sexual harassment<sup>115</sup> and racial harassment.<sup>116</sup> This is surprising because bullying in the workplace is more prevalent than any other type of harassment. In the case of sexual and racial harassment, so-called "tests" are formulated in the 2022 Code to provide greater clarity on the types of conduct,<sup>117</sup> but the 2022 Code only refers to examples of bullying in a few paragraphs as discussed below.

The term bullying is described as follows:

Bullying – where harassment involves the abuse of coercive power by an individual or group of individuals in the workplace. Intimidation – is intentional behavior that would cause a person of ordinary sensibilities to fear injury or harm. Workplace bullying may involve aggressive behavior in which someone repeatedly causing another person injury or discomfort<sup>118</sup>

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<sup>112</sup> Article 6 of the *V&H Convention*.

<sup>113</sup> Item 4.2 of GN R1890 in GG 46056 of 18 March 2022 (*Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace*) (hereafter the 2022 Code).

<sup>114</sup> Item 4.1 of the 2022 Code.

<sup>115</sup> Item 5 of the 2022 Code.

<sup>116</sup> Item 6 of the 2022 Code.

<sup>117</sup> Items 5.3 and 6.8 of the 2022 Code.

<sup>118</sup> Item 4.7.7 of the 2022 Code.

This description does not seem to have the correct syntax since intimidation is defined in the middle of an explanation of what bullying is. Further "coercive power" is not defined. Is this conduct by a superior?

It is helpful that the 2022 Code points out that bullying may be an escalating process in which the complainant ends up in an inferior position and becomes the target of systematic negative social acts<sup>119</sup> and that verbal bullying may include threats, shaming, hostile teasing, insults, constant negative judgment, and criticism, or racist, sexist or LGBTIA+phobic language.<sup>120</sup>

The description of passive-aggressive or covert harassment does not specifically mention bullying, but it includes many types of conduct that could be regarded as bullying. These are "negative gossip, negative joking at someone's expense, sarcasm, condescending eye contact, facial expression, or gestures, mimicking to ridicule, deliberately causing embarrassment and insecurity, invisible treatment, marginalisation, social exclusion, professional isolation, and deliberately sabotaging someone's dignity, well-being, happiness,<sup>121</sup> success, and career performance".<sup>122</sup> Mobbing (which is typically associated with bullying) is defined as a form of harassment by a group of people targeted at one or more individuals.<sup>123</sup> Item 4.7.5 further contains a list of conduct that may constitute bullying such as spreading rumours, withholding work-related information, ostracising or boycotting the employee.

Bullying is thus not defined as unfair discrimination as in the case of sexual harassment and racial harassment,<sup>124</sup> although it is regarded as a form of harassment which is defined in terms of impairment of dignity and unfair discrimination.<sup>125</sup> It seems as if the drafters of the 2022 Code endeavoured to sever the link between bullying and unfair discrimination to ensure that the Code addresses as wide an array of types of harassment as possible. However, this is confusing since the EEA in terms of which the 2022 Code was issued, is focused on addressing unfair discrimination. Employers have for instance to address incidents of unfair discrimination in terms of section 60 of the EEA and if employers fail to do this, it will be taken into account in determining if the employer is liable for "statutory vicarious liability" in terms

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<sup>119</sup> Item 4.5.2 of the 2022 Code.

<sup>120</sup> Item 4.7.3 of the 2022 Code.

<sup>121</sup> Item 4.7.5 of the 2022 Code.

<sup>122</sup> Item 4.7.9 of the 2022 Code.

<sup>123</sup> Item 4.7.10 of the 2022 Code.

<sup>124</sup> Items 5.3.1 and 6.1 of the 2022 Code.

<sup>125</sup> Item 4.1 of the 2022 Code.

of section 60(3). The 2022 Code requires employers to deal with an incident of harassment in much the same way as required by section 60 of the EEA, namely by consulting the parties involved, to address the complaint and eliminate the conduct.<sup>126</sup> This seems to be required for all types of harassment even if not based on discrimination. But what will the remedy for the employee be if the employer does not address the bullying? The employer cannot be held liable in terms of section 60 of the EEA if there was no unfair discrimination.

Victims of bullying which does not involve unfair discrimination will thus still have to rely on the common law, constructive dismissal and the Harassment Act which provides limited protection to victims in the narrow circumstances pointed out above. In light of the fact that bullying is more prevalent than sexual harassment, this is disappointing. In a commentary by the CCMA<sup>127</sup> on the Draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work<sup>128</sup> it is recommended that protection against bullying, violence and harassment which is not based on unfair discrimination, should be addressed in section 186(2) of the LRA.<sup>129</sup> This could be done by adding to the list of unfair labour practices an omission by an employer to take appropriate action if the employer is aware of violence, harassment and bullying perpetrated against an employee.<sup>130</sup> An employee could then refer an unfair labour practice to the CCMA, which will not involve the costs and other disadvantages pointed out regarding existing remedies. Currently, conduct will only be regarded as an unfair labour practice in terms of section 186(2) of the LRA if the harassment results in a closed list of unfair acts or omissions by an employer.

It was further indicated above that a number of countries regard bullying primarily as a health and safety concern and although the 2022 Code refers to the OHSA as one of the other statutes (over and above the EEA) impacting on harassment, there is little guidance on how violence, harassment and bullying could be addressed. The OHSA should be amended to make specific provision for measures that should be taken to protect employees from this type of conduct. Although protection against harassment may be read into the current OHSA, explicit reference to violence, harassment and bullying and how to ensure a safe psychosocial

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<sup>126</sup> Item 10.2 of the 2022 Code.

<sup>127</sup> CCMA "Commentary on the Draft Code" (hereafter the Commentary on the Draft Code).

<sup>128</sup> Gen N 896 in GG 43630 of 20 August 2020.

<sup>129</sup> This is a recommendation made in Commentary on the Draft Code.

<sup>130</sup> Paragraph 3.13 of the Commentary on the Draft Code.



climate will be conducive to preventing and addressing this type of conduct. A separate Code, dealing with health and safety aspects of conduct that could cause psychological harm, should further be issued in terms of the OHSA.<sup>131</sup> ILO Recommendation 206 provides guidance in this regard.

## 7 Recommendations and conclusion

The discussion indicated that although bullying is rife in South Africa, the country lags far behind many other jurisdictions in preventing and addressing bullying. The term is not found in any legislation and was only recently defined in the 2022 Code. In the few court cases that specifically dealt with bullying, victims were mostly unsuccessful because they had to rely on the prohibition of harassment in the EEA. This required them to prove that the bullying constituted unfair discrimination based on a prohibited ground. Victims could often not prove that this was the case as it was not always clear what the reason for the bullying was.

An analysis of possible protection for victims in terms of the EEA, the LRA, the common law, health and safety legislation, the PEPUDA and the *Protection from Harassment Act* indicate that there are many shortcomings in the protection afforded to victims of bullying in South African law.

Although bullying is not specifically mentioned in the V&H Convention (which aims to eradicate all forms of violence and harassment in the workplace), this Convention places certain duties on member countries as well as on employers to address violence and harassment in the workplace. Adoption of the 2022 Code which endeavours to give effect to the V&H Convention, is a step in the right direction, but it is inadequate to protect employees effectively against bullying. The 2022 Code seemingly aims to sever the link between bullying and unfair discrimination to provide for bullying not connected to a prohibited ground. However, this does not solve the plight of victims of bullying since the 2022 Code, like the EEA, is aimed at addressing unfair discrimination. In short, bullying on any other ground than unfair discrimination does not fit into the structure of the 2022 Code.

To address the shortcomings that still exist in the protection of victims of bullying in South African workplaces, the following recommendations could be considered:

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<sup>131</sup> See the recommendation in para 3.14 of the Commentary on the Draft Code.

- The definition of bullying, which is applied in British Columbia, could be considered for incorporation in a code on bullying. The definition reads as follows:

Bullying means conduct in the workplace by one or more persons which demeans, humiliates, lowers self-confidence and which would be so perceived by a reasonable person in the same circumstances, or which creates a hostile or intimidating environment, or poses a danger to the health and safety of a person, but excludes any reasonable action taken by an employer relating to the management of the workplace<sup>132</sup>

This definition could be suitable as it includes a reasonable victim test, refers to the impact that bullying could have on health and safety, and further protects employers against frivolous complaints arising from reasonable management practices.

- The EEA should be amended to define harassment widely enough to include bullying.
- The LRA should be amended to include a provision in section 186(2) that it will constitute an unfair labour practice if an employer who became aware of an incident of violence, harassment or bullying did not take the requisite measures to protect the employee.
- A separate national code on bullying should be adopted instead of including bullying in one code for all types of harassment. This code should provide guidance to employers on how to prevent and address bullying in the workplace and require employers to adopt workplace codes on bullying. Considering the impact of bullying on the health and safety of employees, this code should ideally be issued in terms of the OHSA.
- Employers should be required to adopt workplace codes on bullying with the participation of employees and their representatives. Employers should further analyse management structures and practices to establish how the risk of bullying taking place in a particular workplace can be avoided. Such analysis conforms with article 9 of the V&H Convention, section 11 of the OHSA and the guidelines contained in Recommendation 206 on factors that increase

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<sup>132</sup> WorksafeBC date unknown <https://www.worksafebc.com/en/law-policy/occupational-health-safety/searchable-ohs-regulation/ohs-policies/policies-for-the-workers-compensation-act#SectionNumber:D3-115-2>.

the likelihood of violence and harassment that arise from working conditions, work organisation, cultural and social norms.

- Employers should be required to make provision in their workplace codes for the safe reporting of bullying, awareness-raising and training on what constitutes bullying as well as the duties of both employers and employees in this regard.
- Section 8 of the OHS Act should be amended to explicitly require employers to ensure that workplaces are physically as well as psychologically safe throughout the Act as is required in for example the *Swedish Work Environment Act*.
- COIDA should be amended to include psychological injuries and psychological diseases in the definitions of occupational injury and occupational disease. This will clarify that employees who are disabled because of psychological injuries caused by *inter alia* bullying, may claim from the Fund. PTSD should further be listed as a compensable disease in terms of COIDA to ease the burden of employees having to prove that PTSD caused by harassment (including bullying) arose out of their employment.<sup>133</sup>

If the above measures are implemented, many instances of bullying could be prevented, and South African victims of bullying will enjoy far better protection than is currently the case.

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<sup>133</sup> See Malherbe and Calitz 2016 *Stell LR* 476 who made this argument (albeit in the context of sexual harassment).

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## List of Abbreviations

ACAS	Advisory, Conciliation and Arbitration Service
BCGEU	BC Government and Service Employees' Union
CCMA	Commission for Conciliation, Mediation and Arbitration
Comp Lab L & Pol'y J	Comparative Labor Law and Policy Journal

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COIDA	Compensation for Injuries and Diseases Act 130 of 1993
EAT	Employment Appeal Tribunal
EEA	Employment Equity Act 55 of 1998
ILJ	Industrial Law Journal
ILO	International Labour Organisation
Int Arch Occup Environ Health	International Archives of Occupational and Environmental Health
LDD	Law Democracy and Development
LRA	Labour Relations Act 66 of 1995
OHSA	Occupational Health and Safety Act 85 of 1993
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
PDA	Protected Disclosures Act 26 of 2000
PHA	Protection from Harassment Act 1977
PTSD	post-traumatic stress disorder
SAJHRM	SA Journal of Human Resource Management
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review
UK	United Kingdom
USA	United States of America