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Worker Well-Being in the 21st Century: Addressing the Psychosocial Context of Work

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Introduction

The world of work has undergone significant change since the days when nation-states first began addressing the issue of worker well-being. Initially workers faced unsafe conditions in mines and manufacturing plants which posed dangers to life and limb. Governments addressed these problems, *inter alia*, by enacting workers' compensation laws and occupational safety and health standards. These legal responses initially focused on the physical environmental hazards to which workers were subjected, *e.g.* unsafe machinery or exposure to toxic chemicals. The recent transformation in the nature of work, moving from an industrial-based system to a service-oriented economy, led many to rethink the types of hazards to which workers are exposed. Research by sociologists, epidemiologists and industrial hygienists has focused on the psychological and social environment in the workplace and how that may contribute to undermining worker health. In particular, there has developed an awareness that conditions at work may cause, or contribute to, long-term stress, which medical research indicates increases the risk of diseases such as cardiovascular disease, musculoskeletal and psychological disorders. This article considers the ways in which European countries and the United States are responding to this newly recognized threat to worker well-being.

Early Challenges and Solutions

The Industrial Revolution changed the nature and scope of work. Low volume craft work was replaced by mass production through machine labor. Large groups of workers crowded together on the plant floor. Conditions in the new industrial workplace gave rise to increasing numbers of accidents causing serious injuries and death to workers. Trade unions and social reformers pressured governments to address this problem. The response was the development of two parallel, but complementary, systems: workers' compensation (WC) schemes and occupational safety and health (OSH) legislation.

Worker compensation systems cover the cost of medical care and provide replacement for wages lost due to work-related injuries and death, with the cost generally borne by the employer, usually through an insurance arrangement. Health and safety legislation, on the other hand, aims to prevent injuries from occurring by establishing mandatory safety standards to be followed at the workplace, usually enforced through fines and sometimes criminal penalties.

European governments responded to the problem of worker safety more quickly than the United States. For example, Germany mandated a national labor inspection system in 1878 which dealt with, *inter alia*, worker health and the prevention of accidents, and subsequently enacted its

WC law in 1884. England's WC law was passed in 1897 but it did not enact comprehensive OSH legislation until 1974. Finland's OSH Act of 1889 pre-dated its WC system which was enacted in 1898. France, Spain and Sweden all passed WC laws in 1889 (the same year Sweden passed its OSH law), with France passing its first OSH statute in 1893, and Spain enacting its first comprehensive OSH law in 1900.¹

The main WC systems in the United States are state-based.² Initial attempts by several states in the early 1900s to enact WC legislation were struck down by the courts which held that imposing no-fault liability on employers constituted an unconstitutional taking of property without due process.³ Eventually, the U.S. Supreme Court in *New York Central R.R. Co. v. White*, 243 U.S. 188 (1917), upheld the principle behind worker compensation laws, determining that the states' decision to assign the loss resulting from worker injury or death to the employer which expects to derive a profit from the operation of the business is neither arbitrary nor unreasonable. In quick succession, all but eight states passed WC legislation by 1920; with the passage of Mississippi's WC law in 1949 all fifty states finally had WC systems.⁴

Occupational safety and health legislation in the U.S. originated at the state level as well. In 1877 Massachusetts passed the first factory inspection law which also included safety

¹See, Chris Parsons, *Liability Rules, Compensation Systems and Safety at Work in Europe*, 27 THE GENEVA PAPERS ON RISK AND INSURANCE 358, 360 (2002); Juan Silvestre, *Workplace Accidents and Early Safety Policies in Spain, 1900-1932*, 21 SOCIAL HISTORY OF MEDICINE 67, 72 (2008); Donald Reid, *Putting Social Reform into Practice: Labor Inspectors in France, 1892-1914*, 20 J. OF SOCIAL HISTORY 67, 71 (1994); TWENTY-FOURTH ANNUAL REPORT OF THE COMMISSIONER OF LABOR, vol.2 WORKMEN'S INSURANCE AND COMPENSATION SYSTEMS IN EUROPE 2381 (GPO, 1911); U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, ADMINISTRATION OF LABOR LAWS AND FACTORY INSPECTION IN CERTAIN EUROPEAN COUNTRIES (1914); INTERNATIONAL ENCYCLOPEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS, *National Monographs: Finland* at 29; *Great Britain* at 50; *Sweden* at 44 (R. Blanpain, ed.)(database version).

²There are four main federal law exceptions to the state-based system: the Federal Employees' Compensation Act, 5 U.S.C. §8101 *et seq.*, providing WC benefits for workers employed by the federal government; the Federal Employment Liability Act, 45 U.S.C. §51 *et seq.*, covering workers employed by railroads engaged in interstate commerce; the Jones Act, 46 U.S.C. §688, covering seamen; and the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, applying to employees working as stevedores or in ship-service operations.

³Arthur Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 231-33 (1952).

⁴*Id.*

standards. By 1890 twenty-one states had made some provision for regulating health hazards.⁵ These early laws, however, were seldom enforced. By 1968 only 20 states had comprehensive occupational health programs.⁶ Seeking to fill the gap, as well as to eliminate the competitive disadvantage for those states which had enacted OSH legislation, the U.S. Congress enacted a comprehensive federal law governing workplace health and safety applicable in all fifty states in 1970.⁷

Work-Related Stress: Effects and Causes

Britain's Health and Safety Executive reported that "work-related stress accounts for over a third of all new incidences of ill health."⁸ A 2000 survey by the European Foundation for the Improvement of Living and Working Conditions indicated that the second most common work-related health problem was stress, reported by 28% of all workers.⁹ A 2007 survey commissioned by the American Psychological Association indicated that one-third of Americans are living with extreme stress, and 74% of respondents cited work as the source of stress.¹⁰

There is wide-spread recognition that work-related stress increases the risk of disease. The effects of stress can manifest themselves both physiologically and psychologically. Typical reactions to stress include increased blood pressure, irregular heart rate, and muscular tension causing headache and backache.¹¹ Moreover, stress may lead to the aggravation of existing

⁵Judson MacLaury, *The Job Safety Law of 1970: its passage was perilous*, MONTHLY LAB. REV. 18 (March 1981).

⁶See U.S. DEPT. OF LABOR, BUREAU OF INT'L LABOR AFFAIRS, OCCUPATIONAL SAFETY AND HEALTH LAWS, SECTION 3, <http://www.dol.gov/ilab/media/reports/nao/oshreport.htm>

⁷29 U.S.C. §541 *et seq.*

⁸HEALTH AND SAFETY EXECUTIVE, *Why tackle work-related stress?*, <http://www.hse.gov.uk/stress/why/htm>.

⁹EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, *Ten Years of Working Conditions in the European Union*, <http://www.eurofound.europa.eu/pubdocs/2000/128/en/1/ef00128en.pdf>.

¹⁰AMERICAN PSYCHOLOGICAL ASSOCIATION, *Stress in America (2007) available at* <http://www.apa.org/releases/stressproblem.html>.

¹¹See, e.g., WORLD HEALTH ORGANIZATION, SOCIAL DETERMINANTS OF HEALTH: THE SOLID FACTS at 18-20 (Richard Wilkinson and Michael Marmot, eds., 2d ed., 2003); EUROPEAN COMMISSION, EMPLOYMENT & SOCIAL AFFAIRS, GUIDANCE ON WORK-RELATED STRESS at 22-24 (1999); John Malone, Terry Denny, Peter Dalton and Ken Addley, *Stress at work part 1: Recognition, causes, outcomes and effects*, in OCCUPATIONAL STRESS: A PRACTICAL APPROACH at

conditions as well as increasing the risk of injury or disease, in particular cardiovascular disease. Lastly stress also impacts psychological well-being, causing depression and anxiety.¹²

Workplace stress can be caused by a number of factors. A review of the literature, however, indicates that three factors commonly surface in any discussion of workplace stress: job insecurity, overwork and exposure to an abusive work environment.¹³

Adapting Existing Solutions to the New Challenge

WC systems and OSH legislation have had varying degrees of success in addressing the challenges posed by workplace stress. WC systems in particular, originally established to deal with physiological injuries, have been slow to adapt to claims of work-place stress. As of 2006, no European member state had included stress on its list of compensable illnesses, thus precluding an automatic right to compensation. In those member states which operate a mixed system of recognition for compensable illness, workers may receive compensation if they are able to prove both the existence of the illness and its attribution to a work-related cause. In other EU countries workers must resort to litigation to receive compensation.¹⁴ In the UK, for example, where an employer liability claim system co-exists with the WC system, the courts have been involved in establishing standards for the compensability of work-related stress claims. The seminal case of *Walker v. Northumberland County Council* (1995) 1 All ER 737, laid the foundation for employer liability for mental breakdown caused by the stress of job pressure where it was reasonably foreseeable that such harm would result. Subsequently, in *Sutherland v. Hatton* (2002) EWCA Civ. 76, the Court of Appeals enumerated a set of factors to be considered in determining the reasonable foreseeability of harm to the employee. These factors were implicitly accepted by the House of Lords in *Barber v. Somerset County Council* (2004) UKHL13.

37 (Ken Addley ed., 1997).

¹²EUROPEAN COMMISSION, *supra* n. 11 at 22-24; NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, STRESS. . . AT WORK at 10-11, <http://www.cdc.gov/Niosh/pdfs/stress.pdf>.

¹³NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, *supra* n.12 at 9; EUROPEAN COMMISSION, EMPLOYMENT & SOCIAL AFFAIRS, GUIDANCE ON WORK-RELATED STRESS , *Executive Summary* at 5 (2002); THE JAPAN INSTITUTE FOR LABOUR POLICY AND TRAINING, JAPANESE WORKING LIFE PROFILE 2006/2007 at 79.

¹⁴*See, e.g.*, INSTITUTE OF WORK, HEALTH AND ORGANISATIONS, DEFINING A CASE OF WORK-RELATED STRESS at 21-23 (Research Report 449, 2006), <http://www.hse.gov.uk/research/rrpdf/rr449.pdf> ; *Work-related stress and industrial relations*, EIRO OBSERVER, Issue 1/02 at Comparative Supplement i, <http://www.eurofund.europa.eu/pubdocs/2002/09/en/1/ef0209en.pdf>.

In the U.S. there is general agreement among the various state-operated WC systems that a physical injury caused by mental stimulus is compensable, whether that stimulus is sudden (*e.g.* fright at the sound of an explosion causes a heart attack) or gradual (*e.g.* stress from job pressure causes a heart attack).¹⁵ Receipt of compensation when a mental injury is caused by mental stimulus (*e.g.*, anxiety or depression caused by job pressure), however, is not assured. Approximately fifteen states refuse to award compensation for so-called “mental-mental” cases. Eight states will award compensation when the mental injury is the result of sudden and unexpected stress (*e.g.* psychological disorder caused by worker being robbed at gunpoint). About a dozen states have awarded compensation for mental injury caused by gradual and protracted stress but only if the stress is unusual, in that it is of a greater magnitude than one would encounter in everyday life or in ordinary employment. Finally, there are eight states which find mental injury compensable when it is caused by gradual, protracted stress, regardless of whether that stress is unusual or not.¹⁶

Workplace stress issues have been better addressed by European OSH legislation; the same, however, cannot be said of the American OSH Act. At the European Union level, Framework Directive 89/391/EEC on health and safety addresses the employer’s general duty to ensure the safety and health of workers, and more specifically refers to the implementation of preventive measures including both “adapting the work to the individual . . . with a view . . . to reducing their effect on health” as well as “developing a coherent overall prevention policy which covers technology, organisation of work, working conditions, *social relations* and the influence of factors related to the working environment.”¹⁷ This duty to develop preventive policies includes the prevention of work-related stress.¹⁸ On October 8, 2004, the EU social partners signed a Framework Agreement on Work-Related Stress acknowledging employers’ obligation under the directive to address stress to the extent that it creates a risk for worker health.

On a national level, legislation in several European countries directly addresses the need for employers to deal with work-related stress. In Belgium, the Law on the Well-Being of Workers at Work (1996) and the Royal Decree on Internal Prevention and Protection Services require employers to take measures to deal with the “psycho-social burden caused by work.” The Norwegian Working Environment Act which came into effect in 2006 includes requirements concerning the psychosocial work environment. The Swedish Work Environment Act § 1 requires that work content and organisation “be designed in such a way that the employee is not

¹⁵See Arthur Larson, WORKERS’ COMPENSATION LAW §56.02 (2008).

¹⁶See, *id.* at §56.06.

¹⁷Framework Directive 89/391/EEC Art. 5 §1 and Art. 6 §2(d) and (g).

¹⁸See EUROPEAN COMMISSION, EMPLOYMENT & SOCIAL AFFAIRS, GUIDANCE ON WORK-RELATED STRESS (1999)

subjected to physical and mental strains which can lead to ill health . . .” The UK Health and Safety at Work Act of 1974 §2 includes a general duty for the employer to ensure the health and safety of its employees. The Management of Health and Safety at Work Regulations 1999 §3 require employers to undertake a risk assessment to identify measures to be undertaken to comply with their obligation to ensure the health of the workers. While neither of these provisions expressly mentions work-related stress or the psychosocial work environment, the UK Health and Safety Executive, which is responsible for enforcing these laws, has interpreted the provisions as applying to work-related stress.¹⁹

The U.S. Occupational Safety and Health Act of 1970 (OSHA) contains a general duty clause but, unlike the general duty clauses found in the Framework Directive and the UK Health and Safety at Work Act, the obligation imposed on the employer is more limited. Whereas the EU and UK clauses impose a duty to ensure the safety and health of workers, the statutory language found in OSHA requires the employer to “furnish . . . a place of employment. . . free from recognized hazards that are causing or are likely to *cause death or serious physical harm* to his employees.” Thus, under the specific terms of the statute the general duty is linked to physical harm, not psychological harm. Even with that restrictive language, one could argue that if a place of employment includes stressful conditions which could cause or are likely to cause serious physical harm (such as a heart attack) the general duty clause could apply. To date, however, neither the Occupational Safety and Health Administration (the agency responsible for enforcing the law) nor the courts have adopted that argument. OSHA also requires employers to comply with health and safety standards promulgated under the law, but no standards have been issued addressing work-related stress.

As a general proposition it is safe to say that issues relating to workplace stress have received far more serious attention on the policy level in Europe than in the U.S. Apart from OSH law, work-related stress has also been addressed in some European collective bargaining agreements as well as through tripartite dialogue; the 2002 European Week for Safety and Health at Work, focusing on work-related stress, involved activities throughout the EU aimed at preventing psychosocial risks at work.²⁰ Such activities are virtually unheard of in the U.S.

Other Responses to Work-Related Stress

As noted earlier, the most commonly cited causes of work-related stress are job insecurity, overwork and exposure to an abusive work environment. Government policies and laws not directly focused on workplace safety but which act to regulate or mitigate these causes

¹⁹See HEALTH AND SAFETY EXECUTIVE, *Why tackle work-related stress?*, <http://www.hse.gov.uk/stress/why.htm>.

²⁰*Implementation of the European Autonomous Framework Agreement on Work-Related Stress*, Report by the European Social Partners (June 18, 2008); European Week 2002, <http://osha.europa.eu/en/campaigns/ew2002/>.

of stress can have the corollary effect of protecting worker health and well-being.

There is abundant evidence that job insecurity can cause anxiety, depression, high blood pressure, cardiovascular risk, immune system impairment and sleep deprivation.²¹ Indeed, there are indications that the threat of job loss and the experience of being insecurely employed is more harmful than actual job loss.²² European laws governing workplace dismissal provide at least some cushion against that insecurity. Such protection is largely absent in the U.S.

Most European countries place strict limitations on the circumstances under which a worker can be discharged. Even where termination is permissible, notice requirements are often imposed. Additionally, some countries require the payment of severance pay in addition to notice.²³ In the U.S, however, the general rule²⁴ is employment-at-will, which means an

²¹See e.g., Sarah Burgard and Jennifer Ailshire, *Putting Work to Bed: Stressful Experiences on the Job and Sleep Quality*, Research Report 08-652, Population Studies Center, University of Michigan (July 2008); Sarah Burgard, Jennie Brand and James House, *Perceived Job Insecurity and Worker Health in the United States*, Research Report 08-650, Population Studies Center, University of Michigan (July 2008); Sunmin Lee, Graham A. Colditz, et al., *Prospective Study of Job Insecurity and Coronary Heart Disease in US Women*, 14 ANNALS OF EPIDEMIOLOGY 24 (2004); Jane E. Ferrie, Martin J. Shipley, Michael G. Marmot et al., *Job Insecurity in White Collar Workers: Toward an Explanation of Associations with Health*, 6 J. OF OCCUP. HEALTH PSYCH. 26 (2001); Peggy McDonough, *Job Insecurity and Health*, 30 INT'L J. OF HEALTH SERV. 453 (2000); Hans De Witte, *Job Insecurity and Psychological Well-being: Review of the Literature and Exploration of Some Unresolved Issues*, 8 EUR. J. OF WORK AND ORG. PSYCH. 155 (1999); Catherine A. Heaney, Barbara A. Israel and James S. House, *Chronic Job Insecurity Among Automobile Workers: Effects on Job Satisfaction and Health*, 39 SOC. SCI MED. 1431 (1994).

²²See, Burgard et al., *Perceived Job Insecurity*, supra n. 21 at 6 and 19; DeWitte, *Job Insecurity and Psychological Well-being*, supra n. 21 at 172; Richard H. Price and Sarah Burgard, *The New Employment Contract and Worker Health in the United States*, in MAKING AMERICANS HEALTHIER 206 (Robert F. Schoeni, James S. House et al., eds., 2008).

²³See, I INTERNATIONAL LABOR AND EMPLOYMENT LAWS (William L. Keller and Timothy J. Darby, eds., 2d ed 2003); EU & INTERNATIONAL EMPLOYMENT LAW (Stefan Corbanie, Elizabeth Gillow and Martin Hopkins, eds. 2008). For example, Germany's Protection Against Unfair Dismissal Act limits the grounds for dismissal to reasons relating to the employee, such as illness or absences; reasons relating to the employee's conduct, such as breaches of work rules after receiving warning; or a business-related reason. In Sweden, just cause is required to terminate employment, and even then notice is required except in cases of gross misconduct. The notice period is based on years of service, i.e. 2 months notice for 2-3 years service; 3 months notice for 4-5 years of service; 4 months notice for 6-7 years of service; 5 months notice for 8-9 years of service; and 6 months notice if more than 10 years of service. In Italy, besides limiting

employee may be fired for good reason, bad reason or no reason at all and without any notice.

There are a few exceptions to the application of the employment-at-will rule. If a worker is employed pursuant to a contract, the contract may contain limits on termination. Approximately 13% of workers in the U.S. are covered by collective bargaining agreements which require an employer to have just cause for termination.²⁵ High level executives, teachers and some specially skilled workers may be employed under individual employment contracts; but the vast majority of workers are not parties to an employment contract. Government workers employed under civil service laws enjoy protection from arbitrary discharge. Finally, there are specific state or federal laws which prohibit an employer from discharging a worker for certain reasons, *e.g.*, race, color, religion, national origin, sex, disability, age or for engaging in activity which public policy protects. If an exception does not apply, however, the worker is subject to dismissal without notice. Moreover, there is no statutory requirement for severance pay.

The majority of workers in the U.S. are subject to the employment-at-will regime, facing a precarious working relationship on a daily basis. This daily insecurity is heightened by the fact that the majority of Americans obtain coverage for medical insurance through their employer; thus when they lose their job they lose their health insurance. In the absence of a national health care system, most individuals cannot afford the cost of insurance premiums. Losing one's job therefore not only implicates one's livelihood but also one's life.

A second major cause of stress is overwork, attributable to the pressures of the job and long hours. Job pressure can be caused in part by too much work and too many tasks to perform in the allotted time, which then leads to working longer hours. Not only does overwork produce the stress-related symptoms discussed previously, *e.g.*, anxiety, depression, and risk of cardiovascular disease, there are also studies which indicate work overload impacts on family interaction.²⁶ Moreover, the Japanese have linked overwork with mortality, coining the term "*karoshi*" meaning death from overwork. The Japanese Ministry of Health, Welfare and Labor

reasons for dismissal, notice or pay in lieu of notice is required, as well as severance pay.

²⁴The one exception to the general rule is Montana which abolished the employment-at-will rule and enacted the Wrongful Discharge from Employment Act which requires an employer to have good cause for termination. Mont. Code Ann. §39-2-902 – 914 (2008).

²⁵BUREAU OF LABOR STANDARDS, U.S. DEPT. OF LABOR, *Union Affiliation of employed wage and salary workers*, <http://www.bls.gov/news.release/union2.t01.htm>.

²⁶Elizabeth G. Menaghan, *Work Experiences and Family Interaction Processes: The Long Reach of the Job?*, 17 ANNUAL REV. SOCIOLOGY 419 (1991).

reported that in 2006 nearly 150 workers died due to *karoshi*.²⁷

Overwork can be addressed, in part, by governmental limitations on working hours as well as by mandating the provision of leave time. In these two areas European governments once again exceed the U.S. Within the EU, all countries have established a maximum hourly work week, with the majority pegged to 48 hours as provided for in the EU working time directive. Directive 2003/88/EC Article 6(b). The Directive allows for derogation in calculating the reference period for determining the 48 hour average (so long as that period does not exceed six months), and for authorizing individual employers to opt out from the 48 hour maximum so long as the affected employee(s) voluntarily agrees. Directive 2003/88/EC Articles 16, 19 and 22. Even with the possibility of derogation and the opt-out, however, the average weekly hours of work in 2005 for the EU-15 countries was 37.3, with only one country, Greece, averaging over 40 hours per week.²⁸

In the U.S. during that same time period, the average weekly hours of work was 39.1, exceeded only by four of the EU-15.²⁹ This difference may be explained, in part, by the fact that the U.S., with few exceptions, places no limit on maximum daily or weekly hours of work. The Fair Labor Standards Act, 29 U.S.C. §§201-260 (1938 as amended)(FLSA), requires that employers pay overtime wages (defined as one and one-half times the regular rate of pay) for all hours worked in excess of 40 during any workweek. So long as the employer pays the increased wage rate, however, it can require the employee to work as many hours as it wants.³⁰ Moreover, the FLSA contains exemptions to the overtime pay requirements. Workers whose job meets the definition of executive, administrative or professional position are not entitled to overtime pay; thus there is not even the monetary disincentive to overworking employees in these jobs.

As noted previously, there are a few instances in which the government does prohibit excess hours; in most cases the basis for the limitation is to protect the health and safety of the public at large, not the individual worker. At the federal level, work hour restrictions on imposed

²⁷Leo Lewis, *Downside of Japanese recovery is death by overwork*, TIMES ONLINE (May 18, 2007).

²⁸EUROFUND, *Hours of Work per Week*, <http://www.eurofund.europa.eu/area/qualityoflife/eurlife/index.php> scroll to Hours of Work per week.

²⁹U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES tbl.581 (2009), <http://www.census.gov/compendia/statab/tables/09s0581.pdf>; *id.*

³⁰States are allowed to enact laws more stringent (i.e. more favorable to the worker) than the FLSA. California requires overtime pay not only for hours worked over 40 in one week, but also for hours worked over 12 in one day. But as with federal law, this is not a prohibition on requiring additional work hours.

in three industries. The Hours of Service Act³¹ limits the working hours for railroad employees engaged in train operations. The Department of Transportation regulations, issued pursuant to the Motor Carriers Act, limit the number of hours for truck drivers employed by interstate and commercial motor vehicle transportation companies.³² The Federal Aviation Administration has issued regulations limiting the hours of work for airline crews.³³ At the state level, approximately fifteen states have enacted restriction on the use of mandatory overtime for nurses.³⁴ A very few states have imposed other prohibitions on mandatory overtime; for example, Maine prohibits mandatory overtime in excess of 80 hours in a two week period for most workers;³⁵ Oregon sets the maximum daily hours of work for underground miners at 8.³⁶

There is also a disparity between the EU and the U.S. with regard to statutory leave rights. All EU countries mandate paid vacations; the minimum for all EU countries is 20 days, with 9 countries exceeding that minimum. Four countries mandate 25 days of paid annual leave, and France provides for 30 working days of paid leave.³⁷ There is no statutorily mandated paid leave in the U.S. The leisure gap is even wider if one includes holidays, with many EU countries mandating paid holidays; again, the U.S. does not mandate paid holidays. Most American companies do, however, provide paid vacation and holiday leave; some because of the requirements of collectively bargained agreements, and some voluntarily. As a result, 77% of American workers receive paid vacations and 76% receive paid holidays. The amount of vacation and holiday time, however, is far less than that received by most workers in the EU. The average number of paid vacation days for American workers is 12, and the average number of paid holidays is 8.³⁸

³¹49 U.S.C. §§21101-21109.

³²49 C.F.R. §§395.1 - .5

³³14 C.F.R. §§121.470, 121.480 - .493 and 121.500 - .525.

³⁴*See e.g.*, ME. REV. STAT. ANN. tit. 26 §603(5)(2008); MD. CODE ANN., LAB. & EMPL. §3.421(b)(2008); MINN. STAT. ANN. §181.275 Subs.2 (2008); OR. REV. STAT. §441.166(2)(2008).

³⁵ME. REV. STAT. ANN. tit. 26 §603(2)(2008).

³⁶OR. REV. STAT. §652.040(2008).

³⁷EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, *WORKING TIME DEVELOPMENTS – 2007*, at 23-4, <http://www.eurofund.europa.eu/eiro/studies/tn0804029s/tn0804029s.htm>.

³⁸Rebecca Ray and John Schmitt, *No-Vacation Nation*, 4 (May 2007), <http://www.cepr.net/index.php/reports/no-vacation-nation/>.

An additional cause of overwork results from workers trying to accomplish all the tasks required by the employer while simultaneously meeting the obligations to their families. EU countries strive to ameliorate this stress by providing paid maternity and parental leave. Under EU Directive 92/85/EEC member states are required to provide 14 weeks of maternity leave with an adequate monetary allowance. Articles 8 and 11(2)(b). The majority of the EU-15 provide somewhere between 16-18 weeks of paid maternity leave; Ireland provides 26 weeks, the UK 39 weeks and Italy 5 months. A second EU Directive 96/34/EC requires member states to provide at least three months of parental leave. Article 1 and Annex cl. 2. While this is not required to be paid, many EU member states provide for paid parental leave; some states also provide for more than the required 3 months, such as Germany and Spain which provide 3 years.³⁹

The U.S. enacted the Family and Medical Leave Act, 29 U.S.C. §§2601-2654, in 1993, providing for maternity and paternity leave within the first 12 months of birth. Mandated leave is limited to twelve weeks and is unpaid. Due to coverage requirements under the statute, excluding both employers with less than 50 workers as well as some part-time employees, about 40% of the U.S. workforce is not eligible for the benefit.⁴⁰ Moreover, due to the unpaid nature of the leave, most male workers do not take the leave and female workers rarely take the entire twelve weeks.⁴¹

A few states have addressed these weaknesses in the federal law either providing some partial monetary allowance or extending coverage. For example, California and New Jersey offer six weeks of paid parental leave;⁴² other states have expanded coverage to smaller firms.⁴³

The third most commonly cited stress factor is an abusive working environment. A main contributor to such an abusive environment is harassment and bullying. Studies have shown that

³⁹Rebecca Ray, *A Detailed Look at Parental Leave Policies in 21 OECD Countries* (September 2008), http://www.cepr.net/documents/publications/parental-app_2008_09.pdf.

⁴⁰Rebecca Ray, Janet Gornick and John Schmitt, *Parental Leave Policies in 21 Countries: Assessing Generosity and Gender Equality* 8 (September 2008), http://www.cepr.net/documents/publications/parental_2008_09.pdf.

⁴¹Although entitled to 84 days of parental leave for the birth of a newborn, the mean length of leave for women is 75.6 days and for men is 16.75. Amy Armenia and Naomi Gerstel, *Family leaves, the FMLA and gender neutrality: The intersection of race and gender*, 35 SOC. SCI. RES. 871, 883 (2006).

⁴²CAL. UNEMP. INS. CODE §§3300-3306 (2008); N.J. STAT. ANN. §§43:21-37 to 21-42 (2008).

⁴³See e.g., ME. REV. STAT. ANN. tit. 26 §844 (2008)(covers employers with at least 15 workers); MINN. STAT. §181.940(3)(2008)(covers employers with at least 21 workers).

the victims of such behaviors suffer musculoskeletal disorders, headaches, nausea, sleep problems, depression and anxiety. There is even evidence to suggest that prolonged exposure to such abusive behaviors can cause the victim to suffer post-traumatic stress disorder.⁴⁴

The evidence concerning the occurrence of bullying is not entirely consistent. A 2007 poll found that 37% of all American workers claim to have been bullied, with 12.6% having experienced bullying in the past year. The survey also showed that 72% of the aggressors were supervisors.⁴⁵ An earlier survey, based on a smaller sample size, reported that incidents of bullying occurred in 24.5% of companies surveyed and that the most common aggressor was a co-worker. This survey reported that supervisors were the aggressor in only 14.7% of incidents.⁴⁶ Survey results within the EU indicated that 5% of workers had experience bullying during 2005, with the national figures ranging from 17% in Finland to 2% in Italy.⁴⁷

Bullying should be distinguished from harassment. The use of the term harassment is normally linked to status-based abuse, as in sexual or racial harassment. Bullying, on the other hand, is abusive words and conduct aimed at an individual unrelated to that person's membership in a "protected class." EU member states, as well as the U.S., have legislation focusing on status-based harassment.⁴⁸ Extending that protection to bullying has not been widespread.

⁴⁴Claire Mayhew, Paul McCarthy *et al.*, *Measuring the Extent of Impact from Occupational Violence and Bullying on Traumatized Workers*, 16 EMP. RESP. & RTS. J. 117 (2004); Heinz Leymann and Annelie Gustafsson, *Mobbing at Work and the Development of Post-traumatic Stress Disorders*, 5 EUR. J. OF WORK & ORG. PSYCH. 251 (1996); Paula L. Grubb, Rashaun K. Roberts *et al.*, *Workplace Bullying: What Organizations are Saying*, 8 EMP. RTS. & EMP. POL'Y J. 407, 411 (2004); Loreleigh Keashley and Joel H. Neuman, *Bullying in the Workplace: Its Impact and Management*, 8 EMP. RTS. & EMP. POL'Y J. 335, 346-348 (2004).

⁴⁵Gary Namie and Ruth Namie, *Workplace Bullying: The First U.S. Representative Prevalence Survey*, www.bullyinginstitute.org/research/res/2008apanioshGNRFN2.pdf.

⁴⁶Paula L. Grubb, Rashaun K. Roberts *et al.*, *Workplace Bullying: What Organizations are Saying*, 8 EMP. RTS. & EMP. POL'Y J. 407, 415-416 (2004).

⁴⁷EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, *FOURTH EUROPEAN WORKING CONDITIONS SURVEY* 35-36 (2007).

⁴⁸The Racial Equality Directive 2000/43/EC and the Employment Equality Directive 2000/78/EC require member states to, *inter alia*, protect individuals from harassment based race, religion, ethnic origin, age, disability and sexual orientation. Directive 2002/73/EC defines the discrimination prohibited by Directive 76/207/EEC as including sexual harassment. In the U.S. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §200e *et seq.*, the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.*, and the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 *et seq.*, have all been interpreted to prohibit harassment based on race,

While European nations' response to bullying hasn't been as uniform as their handling of job protection and leave policies, there have been some legislative and judicial attempts to confront the issue. Sweden was in the forefront in providing a legal basis for preventing bullying. The 1993 Ordinance on Victimisation at Work requires employers to take action to prevent and correct conduct that constitutes bullying.⁴⁹ In Germany, judges applied existing legal theories relating to the protection of personality to encompass the new phenomenon of bullying.⁵⁰ In 2001 Belgium passed an anti-bullying law⁵¹, which was amended in 2007 to place greater emphasis on preventative measures. France enacted the Modernization of Employment Act of 17 January 2002 which, *inter alia*, prohibited workplace bullying. In Britain, the Protection from Harassment Act 1997 has been interpreted by the House of Lords as imposing vicarious liability on the employer for damages suffered by an employee due to harassment by a co-worker.⁵² Other countries have addressed the problem through agreements with the social partners.⁵³

The U.S., on the other hand, has not taken any direct action aimed at addressing the problem. Creative plaintiff lawyers have attempted to use an existing common law tort doctrine, intentional infliction of emotional distress (IIED), as a basis for challenging workplace bullying. This approach has met with limited success. An initial hurdle to maintaining an IIED claim for bullying in the workplace is the exclusivity doctrine of workers' compensation law, which provides that the workers' compensation system is the exclusive method of obtaining damages for injuries sustained in the course of, and arising out of, employment. Some jurisdictions, like

sex, religion, national origin, color, age or disability. *See, e.g., Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. §1611(a) n.1 (2006)(principles on sexual harassment "continue to apply to race, color, religion and national origin.").

⁴⁹Ordinance of the Swedish National Board on Occupational Safety and Health containing Provisions on Measures against Victimisation at Work (1993).

⁵⁰Gabrielle S. Friedman and James Q. Whitman, *The European Transformation of Harassment Law: Discrimination versus Dignity*, 9 COLUM. J. EUR. L. 241, 254-259 (2002-03).

⁵¹Law on the protection against violence and moral or sexual harassment at work of 11 June 2002.

⁵²*Majrowski v. Guy's and St. Thomas's NHS Trst Ltd.* (2006) UKHL32.

⁵³*See generally*, Amanda E. Lueders, *You'll Need More than a Voltage Converter: Plugging European Workplace Bullying Laws into the American Jurisprudential Outlet*, 25 ARIZ. J. OF INT'L & COMP. L. 197 (2008); M. Neil Browne and Mary Allison Smith, *Mobbing in the Workplace*, 12 EMP. RTS. & EMP. POL'Y J. 131 (2008).

California, strictly apply the exclusivity principle and hold that IIED claims are preempted.⁵⁴ Other states have held that the principles of workers' compensation are meant to apply to "accidents" in the workplace and when conduct is intentional it falls outside the exclusive scope of the system.⁵⁵

Even if a jurisdiction recognizes an exception to exclusivity for intentional torts, the standard for proving IIED is difficult to meet. First, the bullying conduct must be so "outrageous and intolerable" as to exceed all possible bounds of decency. "Mere" insults, indignities or threats will not rise to the level of outrageous. Thus, many "garden variety" bullying claims will be unable to meet this standard. Secondly, the emotional harm suffered as a result of the outrageous conduct must be so severe that no reasonable person would be expected to endure it.⁵⁶ It should come as no surprise that most workplace bullying cases fail to meet this high threshold.

Conclusion

Over the past decade, a growing body of work by social scientists and health care professionals has increasingly examined the issue of workplace stress, its causes and effects. The nearly unanimous conclusion is that psychosocial factors encountered by workers are producing stress which adversely affects their physical and mental health.

The existing legal mechanisms for addressing workplace health and safety were originally focused on dealing with physical hazard producing physical harm. The U.S. has lagged behind EU member nations in adapting these mechanisms to face the new challenges. The policy debate on workplace stress is certainly more advanced within the EU system. Moreover, the general contours of EU member states' labor policy are more conducive to creating a working environment that ameliorates (although not entirely eliminates) levels of workplace stress by providing greater assurance of job security, a mandate for time away for work, and the nascency of mechanisms for addressing abusive working conditions.

Given the less supportive legislative policy framework within the U.S., and the paucity of policy debate on the issue, the prospect for improvement in worker well-being is dim. This does not bode well for the near term in which the global financial crisis is generating massive redundancies which are bound to create high levels of stress not only for those adversely affected

⁵⁴See *Miklosy v. Regents of University of California*, 44 Cal.4th 876, 902, 188 P.3d 629, 645 (2008).

⁵⁵See, e.g., *McSwain v. Shei*, 304 S.C. 25, 402 S.E.2d 890 (1991); Haw. Rev. Stat. §386-5 (exclusivity does not apply to cases of IIED).

⁵⁶RESTATEMENT (SECOND) OF TORTS §46 (2008). See generally, Frank J. Cavico, *The Tort of Intentional Infliction of Emotional Distress in the private Employment Sector*, 21 HOFSTRA LAB. & EMP. L.J.109 (2003).

by loss of employment but also for the workers left to cope with an increased work load amid continuing fear that their jobs may be next to disappear.

This lack of focus on workplace stress may be attributable, in part, to the pull of the American ethos of self-reliance and a tough-it-out attitude. Society as a whole is less than comfortable with acknowledging the existence of, and dealing with, mental health issues. Unfortunately ignoring the problem will neither make it go away nor resolve it.

The lack of supporting structures for preventing and resolving workplace stress has, in the past, led some American workers to resort to violence as a release valve. In 1986 an Oklahoma mail carrier killed 14 co-workers before shooting himself. As reported in the *New York Times*, the carrier had been reprimanded and threatened with dismissal the previous day. “Local union officials said there was extraordinary pressure, even harassment, to increase productivity.”⁵⁷ This is not, unfortunately an isolated incident.⁵⁸ Such tragedies reflect only the volcanic eruptions; underlying these episodes are the subsurface and continuous pressure to which many workers are subjected on a daily basis. In the absence of a serious effort to rethink and revise the way in which the U.S. legal system addresses worker well-being, such tragedies are likely to recur.

⁵⁷Peter Applebome, *Mail Carrier Kills 14 in Post Office, Then Himself*, N.Y. TIMES, Aug. 21, 1986, at A1.

⁵⁸*See, e.g.*, Rebecca Cathcart and Randal C. Archibold, *Murder-Suicide Leaves 7 Dead in California*, N.Y. TIMES, Jan. 28, 2009, at A19; *Dismissed Worker Kills 4 and Then is Slain*, N.Y. TIMES, Dec. 20, 1997, at A8; *Four Are Shot to Death in Carolina Factory*, N.Y. TIMES, Sept. 16, 1997, at A24; *6 Die in Texas Office Shooting*, N.Y. TIMES, Apr. 4 1995, at A16; Shawn Hubler and Duke Helfand, *Gunman Seemed to Have a Hit List*, L.A. TIMES, March 16, 1994, at B1.