Beyond the Schoolyard: Workplace Bullying and Moral Harassment Law in France and Quebec

Rachel A. Yuen

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Rachel A. Yuen†

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>626</td>
</tr>
<tr>
<td>I. Background</td>
<td>627</td>
</tr>
<tr>
<td>A. What is Moral Harassment?</td>
<td>627</td>
</tr>
<tr>
<td>B. Differing Concepts of Harassment</td>
<td>628</td>
</tr>
<tr>
<td>C. Employer Liability</td>
<td>630</td>
</tr>
<tr>
<td>D. General Trends in Moral Harassment</td>
<td>631</td>
</tr>
<tr>
<td>1. Empirical Evidence on Workplace Bullying</td>
<td>631</td>
</tr>
<tr>
<td>2. European Union Initiatives</td>
<td>632</td>
</tr>
<tr>
<td>II. Development of Moral Harassment Law in France</td>
<td>633</td>
</tr>
<tr>
<td>A. Early Case Law</td>
<td>633</td>
</tr>
<tr>
<td>B. Law on Social Modernisation [L. n° 2002-73 du 17 janv. 2002]</td>
<td>634</td>
</tr>
<tr>
<td>1. Material Elements of the Offense</td>
<td>635</td>
</tr>
<tr>
<td>a. “Repeated acts”</td>
<td>635</td>
</tr>
<tr>
<td>b. “Whose purpose or effect is the deterioration of working conditions”</td>
<td>635</td>
</tr>
<tr>
<td>c. “May violate his rights and dignity, impair his physical or mental health, or compromise his professional future”</td>
<td>636</td>
</tr>
<tr>
<td>d. Intent</td>
<td>637</td>
</tr>
<tr>
<td>e. Relationship of Authority</td>
<td>637</td>
</tr>
<tr>
<td>2. Prevention</td>
<td>637</td>
</tr>
<tr>
<td>3. Rights of Employees</td>
<td>638</td>
</tr>
<tr>
<td>4. Punishment</td>
<td>639</td>
</tr>
<tr>
<td>C. Subsequent Case Law</td>
<td>640</td>
</tr>
<tr>
<td>III. North America’s First Psychological Harassment Legislation</td>
<td>641</td>
</tr>
<tr>
<td>A. The Need for Anti-Bullying Legislation in Québec</td>
<td>641</td>
</tr>
<tr>
<td>B. Amendments to Québec's Act Respecting Labour Standards</td>
<td>641</td>
</tr>
<tr>
<td>1. Provisions on Standards</td>
<td>642</td>
</tr>
<tr>
<td>2. Provisions on Recourse</td>
<td>643</td>
</tr>
<tr>
<td>C. Implementation in the Workplace</td>
<td>644</td>
</tr>
<tr>
<td>IV. Future Implications of Psychological Harassment Law in North America</td>
<td>645</td>
</tr>
<tr>
<td>Conclusion</td>
<td>647</td>
</tr>
</tbody>
</table>

† J.D. Cornell Law School, 2005

38 CORNELL INT'L L.J. 625 (2005)
Introduction

Imagine that you have been working as an associate at a prominent global law firm for a few months. One day, a midlevel associate gives you an urgent assignment involving a complicated corporate transaction in a foreign country with an undeveloped legal system. After performing some preliminary research, you ask the associate for some additional guidance, but she responds that she has no time and calls you "incompetent." She writes a poor evaluation about your lack of responsibility and tells her colleagues that the recruiting department made a mistake in hiring you. On subsequent projects, she continually criticizes your work without explanation and speaks negatively about you in front of the partners. You begin experiencing headaches, muscle tension, and fatigue, and your doctor finally prescribes anti-anxiety medication.

Or imagine that you are a senior associate who hopes to become a partner at your firm. You have built a reputation as a diligent, insightful attorney, and you spend many late nights and weekends working on various projects for a particularly influential partner. You take a week off to handle a family emergency at home. Upon your return, you notice that the partner starts to exclude you from important meetings and withholds information that you need to make key decisions. He then over-turns your decisions while taking credit for your research and analysis. You have also stopped receiving new work, even when they relate to your existing clients, and your fellow associates no longer invite you to their social gatherings. You have heard a rumor that the partners are planning to let you go, and you are so worried about your job prospects that you cannot eat or sleep.

Can you take any action against your law firm for mistreatment by the midlevel associate or partner in each of the above scenarios? Not surprisingly, the answer depends on the country in which you are working.

In the United States, the answer is probably "no," at least not yet. Most people would classify such behavior as "tough" management and an inevitable step along the way to corporate success. In France, on the other hand, employees can turn to the Law on Social Modernisation of January 17, 2002, which introduced a number of legislative provisions to create the offense of "psychological," or "moral," harassment (le harcèlement moral) and to provide recourse for individuals who have suffered psychological harassment by their employers.¹ Now the Québécois will also enjoy such protection. On June 1, 2004, Québec amended its provincial Labour Standards Act to address the issue of workplace psychological harassment, thus enacting the first anti-bullying law in North America.²

This Note compares moral harassment law in France and Québec and examines the likelihood of similar legislation in the rest of North America.

Part I defines moral harassment and reviews the different conceptions of harassment in North America and Europe. It also reviews general trends in moral harassment, including empirical evidence and European Union legislation. Part II traces the development of moral harassment law in France from the early cases that foreshadowed anti-harassment legislation, to the Law on Social Modernisation of 2002 and subsequent case law. Part III examines Québec's new anti-bullying legislation, and Part IV considers the potential role of the French and Québec legislation as models for the rest of North America. Part V is a conclusion.

I. Background

A. What is Moral Harassment?

"Moral harassment," an English translation of the French term *le harcèlement moral*, is also known as "mobbing" in Sweden, Germany, and Italy; "victimization" in Sweden; "workplace bullying" in the United States and the United Kingdom;³ and "psychological harassment" in Québec.⁴ Other synonyms include sub-lethal workplace violence, psychological violence, "status-blind" harassment, and generalized workplace abuse or mistreatment.⁵ Although no universal definition of psychological harassment exists, it generally refers to recurring non-physical acts of harassment in the workplace that negatively affect the employee's physical or mental well-being.⁶ Literature on this subject divides moral harassment into three basic categories of behaviors: (1) abusive communications and actions (e.g., screaming, berating, telephone terror, unjustified criticism, sexual harassment, and violence); (2) destruction of the employee's status at work (e.g., through insults, rumors, public humiliation, sabotage, and physical isolation); and (3) degrading assignments (e.g., assigning useless tasks, no tasks, or tasks for which the employee is unqualified).⁷ In one 2002 study on the frequency and patterns of workplace aggression, the behaviors with the highest incidence rates as reported by the actor included using an angry tone of voice (74.5%), avoiding another person (67.2%), giving dirty looks or angry facial expressions (64.5%), talking behind someone's back

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(58.2%), yelling or raising one's voice (56.7%), and insulting or criticizing another person (including sarcasm) (49.5%).

Workplace bullying may occur between colleagues at the same organizational level or between superiors or subordinates, and the harasser may be either the superior or the subordinate. Moral harassment may arise from an existing conflict that has deteriorated or from a situation deliberately set up to humiliate the target employee. Often the harasser is well-integrated in the workplace and can find some seemingly objective justification for his actions. There is no typical profile for moral harassment victims: They may be male or female, young or old, and newly promoted or longtime employees—not necessarily fragile individuals.

The costs of workplace harassment are significant for both the employer and the employee. Bullying can reduce worker productivity by about 2% and lead to absenteeism, poor health and early retirement, high turnover, and increased insurance premiums. Third parties, such as the employee's friends and family, and witnesses to the psychological harassment may also suffer from deteriorating relationships with the targeted individual.

Overall, psychological harassment laws may be a sound business idea in some jurisdictions because they recognize the importance of employees' physical and mental health and safety, and they aim to promote a positive workplace for both employers and employees.

B. Differing Concepts of Harassment

The disparity in the current laws on moral harassment—namely, that Canada and the United States lag behind many of the European Union countries—may stem partially from a fundamental difference in the underlying conceptions of harassment. Two paradigms have emerged in the harassment context: the American antidiscrimination paradigm and the European dignity paradigm. Each one reflects a different motivation for governing the employment relationship, which perhaps explains the difference in each region's need for workplace harassment legislation.

Although academic literature and commentary have focused on the American conception of harassment, Canadian labor law has been

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8. See Loraleigh Keashly & Karen Jagatic, By Any Other Name: American Perspectives on Workplace Bullying, in Bullying and Emotional Abuse in the Workplace: International Perspectives in Research and Practice 40 tbl.2.2 (Ståle Einarsen et al. eds., 2003) (showing results of a study by Glomb).
10. Id.
11. See id.
12. Id..
14. See id.
15. Friedman & Whitman, supra note 7, at 243.
modeled after U.S. labor law to some extent. Therefore, the general American view of harassment as “a form of discrimination, a way of tormenting members of minority and other disadvantaged groups seeking upward social mobility through work[,]” especially as it relates to women and sexual harassment, may be extrapolated to Canada as well. Indeed, the American laws against sexual harassment have triggered similar statutes around the world. However, sexual harassment law in the United States has two notable features. First, sexual harassment grew out of Title VII of the Civil Rights Act of 1964, which states that “[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . . ” Thus, the American laws against sexual harassment are in fact based on laws against racial discrimination. Although Title VII does not apply in Canada, Canadian harassment laws also seem to reflect a focus on discrimination. Second, U.S. sexual harassment law focuses on hiring, termination, and advancement issues instead of on the terms and conditions of issues regarding stable employment. It assumes “a relatively fluid job market, in which employees regularly quit, get fired, get promoted or get denied promotion,” which is furthered by the employment-at-will doctrine. This bias exists despite Title VII’s explicit reference to “terms” and “conditions” of employment and not to advancement or termination. Moreover, the Supreme Court views this language to extend beyond “economic or ‘tangible’ discrimination” to cover abusive or hostile workplaces. Canada, however, has not adopted the employment-at-will doctrine.

Although European countries have enacted their own provisions against sexual harassment as discrimination against women, their laws reflect a focus on the “dignity of women” rather than mere distaste for discrimination against women. This idea of dignity extends to the European labor law context, where harassment law has become the “law of

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17. Friedman & Whitman, supra note 7, at 241.
18. Id.
19. Id. at 241 & n.2.
20. 42 U.S.C. § 2000e-2(a) (2004); see Friedman & Whitman, supra note 7, at 244.
21. Friedman & Whitman, supra note 7, at 244.
23. Id. at 244–45.
24. Id.
25. Id. at 246.
28. Gilbert & Burkett, supra note 16.
‘dignity’ in a stable job, rather than [the] law of ‘equality’ in a fluid job market.”

Like Canadians, Europeans have far from embraced the idea of at-will employment that is so prevalent in the United States; they typically stay longer at the same workplace, and employee dismissals and resignations are fairly uncommon. Because stable employment is much more important in Europe, workplace harassment legislation must address quality of life, dignity in the workplace, and disciplinary concerns, and focus less on problems relating to hiring, advancement, and termination. The concept of dignity is thus an influential feature throughout European law.

C. Employer Liability

Moral harassment is a serious problem, and, as a result, moral harassment legislation is accompanied by liability standards for the harasser and, not surprisingly, for the employer. Since moral harassment occurs at the workplace, plaintiffs will naturally identify the employer as part of the cause, whether in the context of prevention (i.e., the employer should have established an anti-harassment policy and educated employees accordingly) or remedial action (i.e., the employer did not do anything or did not do enough to investigate and stop a known incident of harassment).

Although the concept of respondeat superior is familiar in the United States, the idea of an employer’s vicarious liability for its employees’ actions has been largely rejected in the United Kingdom and Canada, and does not exist in France. Article 121-2 of the French Criminal Code is very clear that “[n]o one is criminally liable except for his own conduct.” Article 222-33-1 qualifies this rule slightly by providing that certain legal persons may incur criminal liability for offenses “committed on their account by their organs or representatives,” but limits its application to the offenses listed in Articles 222-22 to 222-31, which cover rape and other sexual aggressions. Since there is no reference to the offense of moral harassment in the new amendments, one may reasonably infer that the

30. Id. at 245, 242 n.3.
31. Id. at 266 (noting that the traditional resistance to at-will employment in Europe is both a “legal tradition” and a “deeply rooted socio-cultural pattern.”).
32. Id.
33. See id. at 267 (“Caring about employee dignity in the workplace is part and parcel of a larger tendency to care about human dignity in the law of international human rights, and indeed about dignity in all of its forms.”).
34. See infra text accompanying notes 104-06 and Part II.B.
drafters did not intend to make employers criminally liable for acts of moral harassment by their employees. Yet the French labor laws against sexual harassment and moral harassment do stress that employers must undertake all necessary means to prevent violations of the moral harassment laws.40

D. General Trends in Moral Harassment

1. Empirical Evidence on Workplace Bullying

Psychological harassment in the workplace is not a new phenomenon. In a European Union survey of trends in workplace violence, comparative empirical evidence showed that between 1996 and 2000, the composition of cases reported changed significantly.41 The percentage of reported cases relating to physical violence decreased from 4% to 2% and reported cases involving sexual harassment remained at 2%, while the percentage of reported cases of intimidation and bullying increased from 8% to 9%.42 The European Foundation for the Improvement of Living and Working Conditions reported that "over 7% of EU workers are aware of the existence of physical violence in their workplace while 2% report having experienced physical violence at work."43 International studies on the frequency of workplace bullying between 1995 and 2001 by various researchers indicate that between 1% and 4% of employees experience serious bullying and between 10% and 20% or more of employees experience occasional bullying in Europe.44 Bullying may last for many months or several years; the average duration in studies of victims alone was three years.45 Although self-selection is an issue in these studies—bullies are obviously reluctant to identify themselves and admit to their behavior—these statistics show that "bullying is not a short episode but a very long-lasting process that 'wears down' its victims ... "46 Among industry sectors, employees in the civil service or public administration, the hotel and restaurant business, and retail trade and services seem to face a higher risk of psychological harassment at the workplace.47

Gender differences also emerge in workplace bullying statistics. Victims tend to be females, likely due to the prevalence of male-dominated professions and work cultures, and bullies tend to be males, likely due to

40. See infra text accompanying notes 104-105.
41. See European Foundation for the Improvement of Living and Working Conditions, Preventing Violence and Harassment in the Workplace 3 fig.1 (2003), (citing the Second and Third European surveys of working conditions by Paoli and Merlli), available at http://www.eurofound.eu.int/publications/files/EF02112EN.pdf [hereinafter Preventing Violence and Harassment in the Workplace].
42. Id.
43. Preventing Violence and Harassment, supra note 13.
44. See Dieter Zapf et al., Empirical Findings on Bullying in the Workplace, in Bullying and Emotional Abuse in the Workplace: International Perspectives in Research and Practice 103-09 & tbl.5.1 (Ståle Einarsen et al. eds., 2003).
45. Id. at 109-10 & tbl.5.2.
46. Id. at 110.
47. See Institut National de Recherche et de Sécurité, supra note 1.
more aggressive personalities and the typically supervisory positions they hold in the workplace. Interestingly, studies by Swedish psychologist Dr. Heinz Leymann showed that women are bullied more often by other women, and men are bullied more often by other men, which he attributed to labor market segregation. Often, victims face multiple bullies, and studies have reported a positive correlation between the bullying duration and the number of bullies.

2. European Union Initiatives

The Charter of Fundamental Rights of the European Union provides that "[e]very worker has the right to working conditions which respect his or her health, safety and dignity." On September 20, 2001, the European Parliament adopted a resolution on harassment at the workplace, acknowledging the serious problem of bullying, its "devastating effects" on its victims and their families, and the need for the European Community and Member States to address this issue. The resolution urged the European Commission (EC) "to consider a clarification or extension of the scope of the framework directive on health and safety at work or, alternatively, the drafting of a new framework directive as a legal instrument to combat bullying . . ." It also called for the EC to publish a green paper by March 2002 analyzing workplace bullying in the EU Member States and to present by October 2002 an "action programme of measures at Community level against bullying at work" and a corresponding timetable for implementation. The EC has maintained its position that its 1989 Council Directive on health and safety adequately covers moral harassment by providing that "[t]he employer shall have a duty to ensure the safety and health of workers in every aspect related to the work," and has not issued a green paper.

48. See Dieter Zapf et al., supra note 44, at 110-13 & tbl.5.3.
49. Id. at 113.
50. See id.
However, this directive predates awareness about moral harassment and likely targeted physical health and safety only.\textsuperscript{57} Member of European Parliament Proinsias de Rossa expressed his dismay at the Commission’s failure to issue the green paper and implementation plan: “What is needed is not necessarily a common approach but a common acknowledgement of the problem at the EU level and a common commitment to deal with it . . . .”\textsuperscript{58}

Initiatives at the Member State level have been more successful. France’s law is only a recent example of the trend of regulatory responses to psychological harassment in Europe. Sweden,\textsuperscript{59} Belgium,\textsuperscript{60} Finland,\textsuperscript{61} and the Netherlands\textsuperscript{62} have also enacted legislation addressing this issue. In fact, Dr. Leymann in Sweden was the first to refer to hostile workplace behavior as “mobbing.”\textsuperscript{63} He identified a series of forty-five mobbing behaviors, divided into five stages, and suggested that employers develop measures to fight mobbing in each of these stages.\textsuperscript{64}

Other countries have also taken steps towards fighting workplace harassment, though not necessarily in the form of specific new legislation. Germany refers to mobbing in its Labor-Management Act, and German lawyers counsel corporations to negotiate anti-mobbing collective agreements.\textsuperscript{65} Courts in the United Kingdom, Ireland, and Australia currently deal with workplace bullying under existing legislation,\textsuperscript{66} but the United Kingdom has pending draft legislation called the Dignity at Work Bill, which underwent a third reading in the House of Lords and passed to the House of Commons in May 2002.\textsuperscript{67}

II. Development of Moral Harassment Law in France

A. Early Case Law

Although there was some case law in France reflecting the courts’ acknowledgment of issues that would now fall under the area of moral harassment, judges did not start referring to moral or psychological harass-

\textsuperscript{57} Guerrero, supra note 3, at 494.
\textsuperscript{60} See \textit{id.} at 23 (noting that Belgium’s Act of 11 June 2002 has a wide scope).
\textsuperscript{61} See \textit{Preventing Violence and Harassment in the Workplace, supra note 42, at 4.}
\textsuperscript{62} See \textit{id.}
\textsuperscript{63} Guerrero, supra note 3, at 480–82.
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} Friedman & Whitman, supra note 7, at 258–59.
\textsuperscript{66} \textit{Targeting Workplace Bullies, supra note 2.}
ment in their opinions until the late 1990s, when psychologist Marie-France Hirigoyen introduced the concept of moral harassment in her book entitled *Le harcèlement moral: la violence perverse au quotidien.* Hirigoyen's book led to a rise in activism against moral harassment, including employee strikes at Eclatec, an outdoor lighting company, and the Chamber of Commerce and Industry of Vendée (*la Chambre de Commerce et d'industrie de Vendée*). Subsequent cases in the Labor Court of Paris (*Conseil de Prud'hommes de Paris*), the Social Security Court of Vosges (*Tribunal des affaires de sécurité sociale de Vosges*), and the Regional Court of Law Roche Sur Yon (*Tribunal de grande instance de La Roche sur Yon*) reflected the growing awareness and recognition of the offense of psychological harassment.

B. Law on Social Modernisation [*L. n° 2002-73 du 17 janv. 2002*]

The French Law on Social Modernisation added (or amended) Articles L. 122-46 to L. 122-54 to the French Labour Code (*Code du Travail*), Article 222-33-2 to the French Criminal Code (*Code Penal*), and provisions to government service regulations. The French Constitutional Council has held that all of these articles are constitutional and do not need to be

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68. See Guerrero, *supra* note 3, at 488-89 (describing a 1960 *Cour de Cassation* decision affirming damages against IBM France for terminating an employee without cause and a 1973 French Supreme Court decision in favor of a manager who resigned after his employer demoted him to floor-sweeping as examples of the early recognition of moral harassment).


70. Id. at 490-91.

71. See Conseil de Prud'hommes de Paris, Dec. 15, 1999, (awarding 100,000 FF to a depressed hotel employee who had to take a two-year sick leave after her supervisor disparaged and humiliated her in the presence of clients and colleagues, repeatedly changed her working hours, and required her to perform computer-related tasks and speak English without prior training), available at http://perso.club-internet.fr/lextel/jurisprudence/Billaux.html; Guerrero, *supra* note 3, at 489.


73. See T.G.I. La Roche sur Yon, Feb. 26, 2001, (applying Article 225-14 of the French Criminal Code, which provides that an abuse of authority that subjects another individual to working conditions that are incompatible with human dignity is punishable by two years' imprisonment and a 500,000 FF fine), available at http://perso.club-internet.fr/lextel/jurisprudence/bonnet.html; Guerrero, *supra* note 3, at 490. Note that France passed the Law No. 2003-239 of March 18, 2003, J.O. Mar. 19, 2003, p. 4761, which amended this provision as follows: "An act that submits a person, whose vulnerability or dependence is apparent or known to the acting party, to working or living conditions that are incompatible with human dignity, is punishable by five years' imprisonment and a 150 000 _ fine." C. PEN. art. 225-14, available at http://www.legifrance.gouv.fr/WAspad/UnArticleDeCode?commun=CPENAL&art=225-14 (emphasis added).


76. Graser et al., *supra* note 1, at 240.
implemented by regulatory provisions. Article L. 122-49 creates the offense of psychological harassment by providing that no employee shall suffer repeated acts of psychological harassment whose purpose or effect is the deterioration of working conditions that may violate his rights and dignity, impair his physical or mental health, or compromise his professional future.

1. Material Elements of the Offense

The offense of psychological harassment in France has essentially three material elements: (1) "repeated acts" [les agissements répétés]; (2) "whose purpose or effect is the deterioration of working conditions" [qui ont pour objet ou pour effet une dégradation des conditions de travail]; and (3) "may affect his rights and dignity, impair his physical or mental health, or compromise his professional future" [susceptible de porter atteinte à ses droits et à sa dignité, d'altérer sa santé physique ou mentale ou de compromettre son avenir professionnel].

a. "Repeated acts"

One difference between Hirigoyen's original theories and the current Law on Social Modernisation is that Hirigoyen defined moral harassment such that "a single act of aggression could constitute moral harassment if it [was] intentionally humiliating"; thus, harassment would include a humiliating situation "where the employer locks the employee out of his or office, throwing the employee's personal belongings into a box" but exclude "single verbal acts, which are often spontaneous rather than premeditated." The Law on Social Modernisation makes it clear that a single act, regardless of severity, is not enough to constitute psychological harassment. The courts will likely examine the acts and require a certain pattern over a given time period. One outstanding issue that the courts must determine is the length of time after the harassment during which employees may bring claims of psychological harassment—should there be a statute of limitations and, if so, how long should it run?

b. "Whose purpose or effect is the deterioration of working conditions"

The French Labour Code implies that "working conditions" apply only

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77. See id. These provisions have applied since January 20, 2002. Id.
79. Id.
80. Guerrero, supra note 3, at 484-85.
81. Id. at 485.
82. Id.
83. See Graser et al., supra note 1, at 241.
84. See id.
85. See id.
to the physical working area.\textsuperscript{86} "Deterioration" is somewhat subjective because this element depends partially on employee perception. For example, some employees may view France's 2001 move to the 35-hour working week\textsuperscript{87} as "deteriorating" if, due to more flexible work allocation, they have to work on the weekend; however, compared to the previously longer working week, the working conditions would have actually improved.\textsuperscript{88}

c. "May violate his rights and dignity, impair his physical or mental health, or compromise his professional future"

According to the French Constitutional Court, the rights referred to in the psychological harassment provision are the "personal and collective freedoms"\textsuperscript{89} in Article L. 120-1 of the French Labour Code.\textsuperscript{90} The concept of employee dignity as part of harassment law originated in the European Community's November 2000 Council Directive, which sets out a framework for dealing with various kinds of discrimination and emphasizes the principle of equal treatment.\textsuperscript{91} The Directive defines harassment as follows:

> Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.\textsuperscript{92}

The Directive also prohibits direct or indirect discrimination on any of the grounds in Article 1, which addresses discrimination "on the grounds of religion or belief, disability, [and] age or sexual orientation as regards employment and occupation . . . "\textsuperscript{93} The French Criminal Code requires violation of both the rights and dignity of the employee for psychological harassment.\textsuperscript{94}

Regarding the impairment of physical or mental health, only the courts can decide whether deterioration in working conditions actually caused the employee's health consequences.\textsuperscript{95} Employees alleging harass-
ment may only produce medical certificates of clinical findings; harassers are liable only for the effects of their conduct, not their conduct per se.\textsuperscript{96}

The French Labour Code and Criminal Code are not clear on the meaning of "professional future," which might include increased responsibility, a promotion or a raise, or continuing in the present position at the company.\textsuperscript{97}

d. Intent

Although Article 222-32-2 of the French Criminal Code does not appear to require a particular mental state for the offense of psychological harassment,\textsuperscript{98} Article 121-3 provides that "there is no crime or offence without an intention to commit such."\textsuperscript{99} A victim must show that the harasser intentionally or deliberately harassed him.\textsuperscript{100}

e. Relationship of Authority

The French National Assembly originally required a relationship of authority between the harasser and the victim but later removed it on the advice of the French Economic and Social Council.\textsuperscript{101} Thus, the offense of psychological harassment no longer requires an abuse of authority.\textsuperscript{102} The harassment may be top-down (harassment by a superior), horizontal (harassment between colleagues), or bottom-up (harassment by a subordinate).\textsuperscript{103}

2. Prevention

As a deterrent against psychological harassment, France expanded the scope of its labor law by importing the general obligation of good faith performance of the employment contract by employers from the French Civil Code to Article L. 120-4 of the French Labour Code.\textsuperscript{104} Additionally, the Law on Social Modernisation imposes new obligations on employers. Article L. 122-34 of the French Labour Code requires employers to prepare a written document displaying workplace rules, implementation measures for health and safety rules, and provisions prohibiting psychological harassment.\textsuperscript{105}

\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} See id. at 243.
\textsuperscript{100} See id.; Graser et al., supra note 1, at 243.
\textsuperscript{101} Graser et al., supra note 1, at 243.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 244; see C. TRAV., art. L. 120-4, ("Le contrat de travail est exécuté de bonne foi."). available at http://www.legifrance.gouv.fr/WAspad/UnArticleDeCode?code=CTRAV\textsubscript{A}L&cvart=L120-4.
\textsuperscript{105} Graser et al., supra note 1, at 244. The French text reads:

Le règlement intérieur est un document écrit par lequel l'employeur fixe exclusivement:
3. Rights of Employees

Where an employee suffers a violation of his rights or an impairment of his physical or mental health, Article L. 422-1-1 of the French Labour Code has extended the right to notify the employer of such violation or impairment to cases of psychological harassment. The employer must make an immediate inquiry and take steps to remedy the situation. If the employer fails to do so, or factually disagrees with the employee, then the employer may, with the employee’s written permission, refer the problem to the adjudication panel of the industrial tribunal [bureau de jugement du conseil de prud’hommes]. The panel will take proper measures to stop the harassment.

Any individual who believes he has been a victim of psychological harassment has the option of mediation. The mediator investigates the relations between the parties, attempts reconciliation, and submits written proposals to stop the harassment. Under revised Article L. 122-54 that became effective on January 3, 2003, the parties mutually agree upon the mediator. Previously, under the 2002 Law on Social Modernisation, the mediator selection process took place outside of the company from a pre-determined list. The 2003 law also removes the earlier requirement that

- les mesures d’application de la réglementation en matière d’hygiène et de sécurité dans l’entreprise ou l’établissement . . . ;
- les conditions dans lesquelles les salariés peuvent être appelés à participer, à la demande de l’employeur, au rétablissement de conditions de travail protectrices de la sécurité et de la santé des salariés dès lors qu’elles apparaîtraient compromises; [et]
- les règles générales et permanents relatives à la discipline, et notamment la nature et l’échelle des sanctions que peut prendre l’employeur.

. . . Il rappelle également les dispositions relatives à l’interdiction de toute pratique de harcèlement moral.


Si un déléguée du personnel constate, notamment par l’intermédiaire d’un salarié, qu’il existe une atteinte aux droits des personnes, à leur santé physique et mentale ou aux libertés individuelles dans l’entreprise qui ne serait pas justifiée par la nature de la tâche à accomplir ni proportionnée au but recherché, il en saisit immédiatement l’employeur. Cette atteinte aux droits des personnes, leur santé physique et mentale ou aux libertés individuelles peut notamment résulter de toute mesure discriminatoire en matière d’embauche, de remunération, de formation, de reclassement, d’affectation, de classification, de qualification, de promotion professionnelle, de mutation, de renouvellement de contrat, de sanction ou de licenciement.

Id. 107. Id.
108. Id.
110. Id.
111. Id.
the parties meet in person within one month.113

4. Punishment

The penalty scale for the offense of psychological harassment is oddly inconsistent. The French Criminal Code punishes harassment with one year’s imprisonment and a 15,000 _ fine (or one of these two penalties alone),114 while the French Labour Code states that one year’s imprisonment and a 3,750 _ fine (or one of these two penalties alone) apply to all violations covered by the harassment provisions—Articles L. 122-46, L. 122-49, and L. 123-1.115

Employees may bring both criminal and civil actions against the harasser.116 Under Article L. 122-53 of the French Labour Code, trade unions may bring actions on behalf of a harassed employee with the latter’s written permission; the employee may then participate in the court action but end it anytime he wishes.117 Despite sanctions against psychological harassment, evidentiary problems remain, leading France to create rules of evidence favoring harassment victims.118 The modified burden of proof in civil proceedings follows the burden of proof established by the European Community’s December 1997 Council Directive on the burden of proof in sexual discrimination proceedings.119 According to the Council Directive and Article L. 122-52 of the French Labour Code, after plaintiffs have produced evidence of psychological harassment, “it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.”120 Criminal actions, on the other hand, follow the principle of pre-


114. C. PÉN., art. 222-33-2. The French text reads: Le fait de harceler autrui par des agissements répétés ayant pour objet ou pour effet une dégradation des conditions de travail susceptible de porter atteinte à ses droits et à sa dignité, d’altérer sa santé physique ou mentale ou de compromettre son avenir professionnel, est puni d’un an d’emprisonnement et de 15 000 _ d’amende.

Id.


116. See Graser et al., supra note 1, at 246.


118. See Graser et al., supra note 1, at 246.

119. Id.

Assumption of innocence outlined in Article 9 of the Declaration of the Rights of Man of 1789121 and the French Code of Criminal Procedure.122 Prior to court proceedings, an employer who discovers moral harassment at his workplace can order a disciplinary sanction under Article L. 122-50 of the French Labour Code.123 If the dispute is not settled, Article L. 122-49 automatically nullifies any employment contract termination (e.g., dismissal, resignation, or negotiated departure)124 resulting from psychological harassment.125

C. Subsequent Case Law

Shortly after the Law on Social Modernisation became effective, France encountered its first criminal moral harassment case involving a former program director at Canal NuMedia, a subsidiary of a French television station.126 The Criminal Court of Paris [Tribunal correctionel de Paris] concluded that the alleged harassment—the company president’s repeated vexation and pressure on the complainant, causing her to suffer from depression and to finally quit her job—was not directed at the employee personally.127 The court referred to the burden of proof requirement in Article 122-52 of the French Criminal Code and reiterated that moral harassment requires a violation of the employee’s rights or dignity, impairment of physical health or morale, or jeopardy to his professional future.128


123. See Graser et al., supra note 1, at 247.

124. See id.


126. Guerrero, supra note 3, at 492-93.


128. Id.
In finding for the employer, France narrowed the scope of its Law on Social Modernisation—a rather unexpected move, given that the motivation behind psychological harassment laws is generally to help victims.129

III. North America’s First Psychological Harassment Legislation

A. The Need for Anti-Bullying Legislation in Québec

In a survey of 640 salaried workers in Québec (approximately a 64.8% response rate), between 7% and 9% of respondents said that they had been regular victims of some form of psychological harassment at work, which included facing isolation by an individual or a group, being demeaned or ridiculed in front of other people, and receiving abusive, threatening, or degrading remarks.130 These figures were comparable to those from similar surveys in Sweden (3.5% - 1992), Great Britain (10% - 2000), and Belgium (11.5% - 2002).131 As it turns out, France’s Law on Social Modernisation was “the very law that inspired Québec to follow suit”132 and enact its own legislation.

B. Amendments to Québec’s Act Respecting Labour Standards

First introduced by the former Parti Québécois government in 2002,133 Québec’s new standards on psychological harassment came into effect this year on June 1, 2004 and are now part of the provincial Act Respecting Labour Standards in § 81.18-81.20, along with standards on recourse in § 123.6-123.16.134 The new legislation aims “first and foremost to make employers and employees aware of psychological harassment in the workplace and to permit actions upstream in order to avoid a deterioration of the work environment for the employee.”135 Modeled after moral harassment laws in France, Sweden, and Belgium,136 Québec’s standards clarify employers’ existing obligations under Québec’s Civil Code137

129. See Guerrero, supra note 3, at 492-93.
131. Id.
136. Marowits, supra note 133.
137. Civil Code of Québec, S.Q. 1991, ch. 64, § 2078 (amended Apr. 2004) (Can.), (“The employer is bound not only to allow the performance of the work agreed upon and to pay the remuneration fixed, but also to take any measures consistent with the nature of the work to protect the health, safety and dignity of the employee.”), available at http/
and Charter of Human Rights and Freedoms. Section 3.1 states that Division V-2, the section on psychological harassment, applies to all employees and employers.

1. Provisions on Standards

Instead of using the term “moral harassment” [le harcèlement moral] as in France, the Québec legislation introduces the offense of “psychological harassment” [le harcèlement psychologique], which refers to “any vexatious behavior in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee’s dignity or psychological or physical integrity and that results in a harmful work environment for the employee.” This definition of psychological harassment could also encompass sexual harassment. Unlike the French Law on Social Modernisation, but consistent with Hirigoyen’s definition of moral harassment, section 81.18 explains that psychological harassment may also occur with “[a] single serious incidence of such behavior that has a lasting harmful effect on an employee,” although the legislative interpretation clarifies that the harmful effect of the incidence “must be felt over time.” Although “vexatious behavior” may appear at first to be subjective, Québec applies an objective reasonableness standard that assesses the vexatious nature of the alleged harassment by whether the conduct is socially acceptable. The relevant test is whether “a person who is reasonable, objective and well informed of all the circumstances and finding himself in a situation similar to the one related by the employee . . . [w]ould . . . conclude that [it] was a harassment situation[.]” The French Law on Social Modernisation is less clear on the nature of the applicable standard for determining when behavior crosses the boundary between a legitimate exercise of management and moral harassment. This difference between the French and Québécois approaches may result from the general empha-
sis in North American common law on the reasonable person concept and the distinction between subjective and objective standards.

The next provision, section 81.19, confers upon all employees the "right to a work environment free from psychological harassment" and requires all employers to "take reasonable action to prevent psychological harassment and, whenever they become aware of such behavior, to put a stop to it." The work environment includes both the physical location where the employee works and other places where he goes to fulfill his duties, including clients and third parties (e.g., suppliers). As in the French legislation, the employer is responsible for creating a harassment-free environment for all employees. The Quebec law goes further by explaining in its interpretation that the employer's lack of awareness about ongoing psychological harassment does not relieve him of his obligations under the anti-bullying legislation—negligence or wilful blindness in fact triggers the employer's responsibilities under the Act Respecting Labour Standards. The French Law on Social Modernisation is not as specific as the Quebec law but does stress the employer's obligation to maintain healthy working conditions.

2. Provisions on Recourse

Because a number of the new provisions on anti-bullying standards and recourses are "deemed to be an integral part of every collective agreement," employees who have a right to grievance under their collective agreements must first follow the agreed-upon procedures. The parties may also jointly request that the Minister of Labour appoint a mediator. Under the provisions on recourses, employees alleging psychological harassment may file a written complaint with the Labour Standards Commission [Commission des normes du travail] ["Commission"]. Nonprofit organizations who defend employees' rights may also file complaints on behalf of employees with their written consent. Unlike France, which does not require a complaint to be filed within a certain time period, the law in Quebec requires harassment victims to file their complaint "within 90 days of the last incidence of the offending behaviour."

The Commission, upon receiving the complaint, must then investigate

146. Id. § 81.19 at para. 1.
147. Id. § 81.19 at para. 2.
149. See id.
the facts of the case to assess whether the claim is valid.\textsuperscript{157} The Commission's decision on validity is an administrative decision and therefore does not bind the parties.\textsuperscript{158} If the Commission refuses to act or decides that the claim is not valid, the employee may apply in writing to refer the case to the Labour Relations Commission [Commission des relations du travail] within thirty days of the Commission's refusal to act on the claim.\textsuperscript{159} With the parties' agreement, the Commission itself may also ask the Minister of Labour to appoint a mediator at any time during the investigation.\textsuperscript{160}

If the parties are unable to reach an internal settlement, and the Commission has agreed to proceed with the complaint, then the Commission must automatically refer the case to the Labour Relations Commission.\textsuperscript{161} Section 123.15 then allows the Labour Relations Commission to "render any decision it believes fair and reasonable,"\textsuperscript{162} including ordering the employer to reinstate the employee, to pay an indemnity for lost wages, to pay punitive and moral damages, or to pay for psychological services.\textsuperscript{163} The Labour Relations Commission files its decision in Superior Court, after which it becomes binding and enforceable.\textsuperscript{164}

C. Implementation in the Workplace

The Québec Labour Standards Commission has made a lot of information available to the public on its website, which includes a sample statement of the employer's commitment to be posted in the workplace,\textsuperscript{165} awareness and prevention guides for employers and employees,\textsuperscript{166} scenarios of what constitutes psychological harassment,\textsuperscript{167} and links to other sites dealing with psychological harassment.\textsuperscript{168} As companies scrambled in the days before June 1, 2004 to comply with the new legislation, the Québec Labour Standards Commission offered half-day information ses-

\textsuperscript{158} See Act Respecting Labour Standards, R.S.Q. ch. V-2, § 123.9.
\textsuperscript{159} Id.
\textsuperscript{160} Id. § 123.10.
\textsuperscript{161} Id. § 123.12.
\textsuperscript{162} Id. § 123.15.
\textsuperscript{163} Id.
sions to educate employers about psychological harassment and the provincial law. Large companies may believe that their existing policies already cover psychological harassment; even so, some are still taking some additional measures to ensure compliance. But experts have warned that employers may not know for a long time whether their measures are sufficient due to the "great uncertainty about how the law—the only one of its kind in North America—will be interpreted and enforced." Potential issues may include an excessive burden on employers to police workplace behavior or employees filing complaints merely "to get even." An interesting question is whether Québec will follow France and limit the scope of its psychological harassment laws once the courts begin hearing cases.

IV. Future Implications of Psychological Harassment Law in North America

The director of legal affairs of the Labour Standards Commission expressed his hope that the Labour Standards Commission would be able to settle 95% of psychological harassment claims through negotiation, a figure based on France's experience with the Law on Social Modernisation. Union leaders believe that psychological harassment clauses will become a key priority in future collective agreement bargaining as a result of the Québec law and increased pressure from employees.

Currently, the Québec law applies only to provincially regulated entities, but the Bloc Québécois attempted to introduce a private members bill, Bill C-451, in the House of Commons in 2003 to extend the anti-harassment provisions to the federal level. Bill C-451 included specific details on areas such as due diligence (i.e., the employer must take action to stop the harassment within five days of notification by the employee), duty of disclosure, mistake of fact, and the definition of bad faith—a stark contrast from the more aspirational language in the French and Québécois laws. The bill also proposed a fine of up to $10,000 for psychological harassment in the form of vexatious behavior, which is similar to the Québec definition, or abuse of authority (e.g., intimidation, threats, and blackmail, or

170. See id.
171. See id.
172. See id. (explaining that the Commission is "here to prevent rather than prosecute" and aims to deal with complaints in a speedy manner).
173. See id.
174. See id.
175. See id.
coercion). However, the bill did not proceed to debate since the Parliamentary session ended in May 2004, ahead of the June federal election.

The possibility still exists of another proposal for federal anti-harassment legislation during the current Parliamentary session. Other provinces will undoubtedly closely follow the developments in Québec and consider whether similar legislation is necessary in their own regions. However, the Ontario Ministry of Labour has already declared that the Ontario Human Rights Code sufficiently protects against workplace harassment and that the province has no plans to follow Québec’s lead.

In the United States, where Drs. Gary and Ruth Namie, co-founders of The Workplace Bullying & Trauma Institute, introduced the term “workplace bullying” in 1998, statistics on psychological harassment are similar. Professor David Yamada has written about the need for new legislation and explained that existing legal theories do not adequately cover the issue of workplace bullying. Instead, he proposed new legislation at the federal or state level that would allow remedies such as back or front pay, punitive damages, and injunctions. At the federal level, in early 2002, Congress appropriated funds, asked the National Institute for Occupational Safety and Health (NIOSH) to develop prevention research programs jointly with the Departments of Justice and Labor to address workplace violence, and appointed a task force accordingly. The NIOSH researched state-based action against workplace violence and observed that California and Washington have training requirements or workplace violence risk assessment; Michigan, Minnesota, and Connecticut have special workplace security training programs; and Indiana and Alaska have issued general duty clause citations for workplace violence.

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177. See id. §§ 2, 3(6).
178. See Immen, supra note 132.
179. Marowits, supra note 133.
180. Human Rights Code, R.S.O. ch. H-19, § 5(1) (1990) (Can.), amended by 1999, ch. 6, § 28(5) and 2001, ch. 32, § 27(1) (“Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or disability.”).
181. Immen, supra note 132.
184. See David C. Yamada, The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection, 88 GEO. L.J. 475, 491-522 (2000) (examining the limitations of intentional infliction of emotional distress (IIED), Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the National Labor Relations Act (NLRA), and the Occupational Safety and Health Act (OSHA) in the workplace harassment context).
185. See id. at 528-29.
risk. California's proposed bill AB 1582 in 2003 had more specific language than the Quebec law and was the first attempt at workplace bullying legislation in the United States, but the bill subsequently died in committee. There has also been grassroots lobbying in 2005 to reintroduce the bill in California, with similar campaigns in Oregon, Washington, and Oklahoma.

Conclusion

After almost two years since its enactment, the French Law on Social Modernisation is recognized in the European Union as one of several models for enacting legislation against psychological harassment in the workplace. Québec's new legislation is not surprising, given the province's French roots. Overall, however, the legal and political systems in France are more uniform on a nationwide basis than those in Canada and especially the United States, and this difference may affect the development of similar moral harassment legislation in North America.

Returning again to our initial scenarios, an employee in these situations would probably have recourse in Québec, France, and a number of other EU countries. Notice, however, the common thread among these jurisdictions: a strong civil law tradition. Although moral harassment legislation may be desirable in the United States and Canada, two nations which pride themselves in granting individual liberties and social freedom, transplanting the European concept of dignity that underlies the French and Québeçois legislation into common law jurisdictions seems to be a necessary yet likely difficult task. Employers need to start recognizing workplace bullies as "not tough leaders but abusers of the highest ideals of work."

Canada has made some progress, with its Québec legislation as a first step. However, the more specific language in both the proposed Bill C-451 and the proposed California legislation reflect the North American emphasis on discrimination discussed in Part I.B. Broader and more aspirational provisions similar to the Québec amendments may better survive legislative debate. Because the proposed Canadian federal legislation on psychological harassment died in Parliament due to the election and not because of disapproval by Members of Parliament, there is still hope for a Canada-wide law. Although Ontario—the most influential Canadian province, home to

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187. Id.
188. A Model Act to Provide Legal Redress for Targets of Workplace Bullying, Abuse, and Harassment, Without Regard to Protected Class Status, AB 1582 (Cal. 2003), available at http://bullyinginstitute.org/advocacy/ab1582.pdf.
192. Id.
both the nation’s capital and Canada’s largest city—has denounced any intention to enact new anti-harassment legislation, it seems likely that Canada will pass such legislation before the United States for several reasons. First, Canada can use the Québec legislation as a stepping stone for future legislation; provincially-approved law is inherently more powerful than statewide grassroots lobbying efforts. Second, Canadian law tends to provide employees with more statutory protections, along with less administrative delay in enforcement.\textsuperscript{193} Third, Canada does not rely on the employment-at-will doctrine\textsuperscript{194} and generally has a much less litigious atmosphere.\textsuperscript{195} Finally, unlike Bill C-451 in Canada, there has been no hint of proposed legislation at the federal level in the United States.

Federal legislation may be difficult in the United States because of the need for national consensus, which is especially complicated due to the country’s sheer size, the strength of the state governments, and the multitude of other laws that overlap on harassment issues. Moreover, the U.S. federal government has more urgent priorities on its agenda at the moment; leaving this issue to the states may be the easier solution, at least in the foreseeable future. Therefore, it may be a long time before we see an established legislative framework for dealing with psychological harassment in the United States. Although “[l]egal and policy developments and initiatives . . . suggest that we are in the early stages of an emerging transnational consensus that workplace bullying is best dealt with legally by the creation of new protections”\textsuperscript{196} and there is growing recognition of the problem of workplace bullying in the United States, enacting specific legislation is a big step: America just might not be ready to follow in the footsteps of the French.

\textsuperscript{193} Gilbert & Burkett, supra note 16.
\textsuperscript{194} See id. (noting that protection for harassment victims in Canada and the United States are similar, but that an investigation into a sexual harassment complaint in Canada that leads to dismissal of the harasser must consider whether there is cause for termination).
\textsuperscript{195} Id.
\textsuperscript{196} David Yamada, Workplace Bullying and the Law: Towards a Transnational Consensus?, in BULLYING AND EMOTIONAL ABUSE IN THE WORKPLACE: INTERNATIONAL PERSPECTIVES IN RESEARCH AND PRACTICE 410 (Ståle Einarsen et al. eds., 2003) (noting also that “[w]e are so early in the history of understanding and responding to workplace bullying that it is impossible to predict whether such legal protections will be enacted on a widespread level”).