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# Workplace bullying policies, higher education and the First Amendment: Building bridges not walls

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**Workplace Bullying Policies, Higher Education and the First Amendment:**

**Building Bridges not Walls**

## Abstract

The purpose of this paper is to demonstrate that higher education institutions should change their Faculty Codes of Conduct to reflect workplace bullying as a form of harassment that is unacceptable. This paper provides a definition for workplace bullying; secondly, it offers an analysis of how the First Amendment is not an absolute, especially in the workplace; thirdly, it examines the scant legislative and judicial attention that is given to this issue; and finally, an argument is made to show how colleges and universities are not adequately addressing workplace bullying through clear policies and procedures that render due process. Results of a thematic analysis of 276 Faculty Codes of Conduct from a variety of universities and colleges across the United States revealed two primary themes: The Harassment Hang-up and Employee Engagement. Based on this analysis, higher education institutions should change their Faculty Codes of Conduct so bullying is defined as a distinctive form of harassment that is not tolerated, institutions provide faculty and staff clear communications regarding how to define bullying, and instructions are given for what a person can do as a bystander or target.

Keywords: Workplace Bullying, First Amendment, Faculty, Thematic Analysis, Organizational Policy

## Introduction

According to the Workplace Bullying Institute, 60.4 million American workers have been affected by workplace bullying in their organizations.<sup>i</sup> While workplace bullying, and harassment share similar characteristics, there are distinct differences. Bullying targets anyone, regardless of class status, and it happens over an extended period of time.<sup>ii</sup> There are many definitions of workplace bullying provided in the literature.<sup>iii</sup> The primary feature of bullying is persistence (frequency, repetition, duration), which essentially alters messages' meanings and effects. Screaming occasionally does not equate with bullying. Screaming over and over at the same person, day after day, week after week, and month after month—that is workplace bullying.”<sup>iv</sup> According to Chaplin, “whichever definition one uses, two themes appear to be central: (1) the bullying is intentional, and (2) the bullying activity is harmful, both personally (psychologically and/or physically) and professionally (the activity seriously hinders the target's ability to effectively carry on his or her work-related duties).”<sup>v</sup> For this paper, workplace bullying will be defined as “a toxic combination of unrelenting emotional abuse, social ostracism, interactional terrorizing, and other destructive communication that erodes organizational health and damages employee well-being.”<sup>vi</sup>

The purpose of this paper is to demonstrate that higher education institutions should change their Faculty Codes of Conduct to reflect workplace bullying as a form of harassment that is unacceptable. No workplace is immune to the impact of workplace bullying. In fact, institutions of higher education are fertile ground for the development of such issues.<sup>vii</sup> As such, it is vital that Faculty Codes of Conduct—the documents presented to faculty upon their employment within an institution of higher education, meant to socialize them into the culture and communicate to them the important ethical and behavioral standards of the institution—

should have clearly stated policies regarding workplace bullying and the organization's intolerance for such behavior. The reality is that many institutions do not even mention the word "bullying" within their Faculty Codes of Conduct.

### **The First Amendment is Not Absolute, Especially in the Workplace**

*The Supreme Court Only Protects Public Employee Speech When It Focuses On an Issue of Public Concern and Does Not Disrupt the Workplace*

Understandably, as new policies are suggested as necessary regarding the speech and behavior of faculty in institutions of higher education, First Amendment rights and academic freedom come into question. In *Connick v. Meyers*, it was ruled that First Amendment protections are available when workplace speech covers matters of public concern and the speech does not interfere with the office operations that benefit the public. Meyers created a questionnaire about termination policies which was central to the case regarding her termination. The Court found the document was not about facts. The questionnaire had questions that solicited opinions and ideas. It was found to be generated for personal reasons and not for the benefit of the public. When close working relationships and efficiency of operations are necessary to fulfill public responsibilities and a public employee engages in speech that is not for public concern, the First Amendment does not attach. Both elements of "public concern" and "workplace disruption" need to be present for the First Amendment to be considered. This case involved personal speech that caused a disruption, so the employer was given broad discretion for speech that caused disharmony and impaired the efficiency of the office.<sup>viii</sup> Academic freedom would not be violated by including a policy within Faculty Codes of Conduct that prohibits workplace bullying speech and behavior. Codes are of public concern for employees in charge of student populations and the codes would not harm the workplace collaborations needed

to serve the students. There is no First Amendment violation for creating anti-bullying policies and procedures.

In *Garcetti v. Ceballos*, First Amendment protections were further minimized.<sup>ix</sup> The court determined that public employees who make statements pursuant to their official duties, are not speaking as citizens with First Amendment protections. It was decided that the Constitution does not protect their communications from employer discipline. It is not clear whether this applies where an employee uses offensive and abusive language against another employee. However, American public-sector employees are no longer completely shielded by the First Amendment. This is favorable for a target. However, this lack of freedom is an issue if a supervisor retaliates because one spoke offensively within the scope of official employment duties. Due process is paramount to protect all involved. Unfortunately, as this study shows, most codes of conduct and any due process procedures are limited to speech and behavior falling under Title IX, or speech and behavior related to a person's protected characteristic.

#### *Workplace Bullying is Likely to Disrupt the Workplace, Almost by Definition*

Workplace bullying is the result of uncivil workplace communication created through social processes. Organizational members are the bullies and the targets. The organization itself creates the environment conducive for bullying to take place. Lutgen-Sandvik and Tracy describe bullying as a systematic issue resulting from organizational practice and policy.<sup>x</sup> Certain organizations create a culture that breeds bullying behaviors. Organizational cultures that promote "making the numbers," reward aggressiveness, and value short-term planning display a few of the characteristics that make them ripe for bullying behavior.<sup>xi</sup> Salin determined a series of enabling processes and structures within the organization that perpetuate bullying.<sup>xii</sup> Motivating structures include internal competition, a reward system with expected benefits, and

bureaucracy with difficulty in laying off employees. Precipitating processes include restructuring and crises, other organizational changes, and changes in the management/composition of the work group. When the motivating structures and the precipitating processes are combined with the enabling structures such as perceived power imbalances, low perceived costs, and dissatisfaction and frustration, bullying within the organization becomes increasingly likely.<sup>xiii</sup>

Unfortunately, there is scant research delineating organizational anti-bullying policies alone.<sup>xiv</sup> Those who have researched policies against bullying have typically outlined prescriptions for writing effective policies.<sup>xv</sup> Bullying should be defined. Names of who to contact should be listed. Procedures for making complaints, that lack ambiguity, should also be listed. Language that is supportive like “we do not tolerate abusive language or intimidating verbal and nonverbal behaviors” should be stated so employees and employers know the institution is not afraid to publicly denounce bullying. This research seeks to determine what policies exist in Faculty Codes of Conduct and are made available to faculty in higher education institutions and what those policies describe in terms of the definition of bullying, reporting methods, or other information that is included.

*Even if the Bullying Seems to be a Matter of Public Concern, the Disruption Should be Dispositive*

A First Amendment violation has two requirements under Connick: 1) the alleged bullying speech is about a public concern and 2) the speech is not disruptive to office responsibilities that require productive collaborations in order to serve the public. Once speech hinders communications and processes, and the speech is about issues of public concern, First Amendment protections will attach.<sup>xvi</sup>

It is important to be zealous and guard freedom of speech. Making sure a workplace disruption is serious to the overall effectiveness of employee productivity is paramount. In *Connick v. Meyers*, the Supreme Court made a clear ruling that speech about matters of public concern are protected. In *Pickering v. the Board of Education*, a case that preceded *Connick*, the Court found discussing issues of public importance are very important and a “balancing test” is used to weigh the importance of free speech against a government workplace free of disruptions.<sup>xvii</sup> Research has been minimal in defining a “disruptive workplace.” In analyzing *Connick* and *Pickering* the Court rulings merely state the workplace cannot be disruptive. A concrete definition of the word “disruptive” and a list of disruptive behaviors are not clearly outlined within those court rulings. Understanding exactly what a disruption is for fulfilling the balancing test is necessary or First Amendment freedoms are in jeopardy. The Court should make sure speech is protected and then limit that right if needed.<sup>xviii</sup>

### **Legislative and Judicial Attention to Workplace Bullying is Scant**

*We Should Go Beyond “Protected Classes” When Creating Policies for Workplace Bullying.*

Legal remedies are minimal for people who are targeted unless they fall within a protected class. With so few cases to analyze that involve bullying absent legally defined harassment and with only the state of Connecticut providing general protection for employment speech, briefly mentioning the “Healthy Workplace Bill” seems apropos. This bill was created to protect people regardless of their class status. Yamada reminds us that unless the speech is related to status-based discrimination, one who complains will find little comfort within state court systems as the courts are not settled on the issue; and claims for anti-retaliation or whistleblower provisions under employment discrimination laws will not attach.<sup>xix</sup> This is an issue. Protecting some people and leaving others exposed to injustice is at the core of historical



human rights litigations. Our Constitution was written to protect all Americans and not just “protected classes.” The First Amendment does not protect people who yell “fire” in a crowded room. To that end, it should not shield people who cause verbal severe and intentional psychological harm. Even if it is unintentional, a contradiction exists when bullying speech is allowed under First Amendment protections. Additional “classes” need to be created and included in the Constitution or workplace bullying needs to be defined and accepted as a legal violation of one’s right to enjoy a non-hostile work environment. Melnick, in the online article for the American Bar Association, mentions how the bill, such as the “Healthy Workplace Bill,” would prohibit employers from subjecting employees to a hostile work environment which includes employees who act with an intent to cause harm and who subject an employee to conduct that causes physical harm and/or psychological harm.<sup>xx</sup> To establish that an abusive or hostile work environment has been created, a plaintiff would have to prove that he or she was subjected to “abusive conduct.”<sup>xxi</sup>

From a legal perspective, there are no laws for workplace bullying in the United States. 26 states have introduced anti-bullying bills; but none of them have been passed.<sup>xxii</sup> There are protections for physical violence and tortious behaviors. Strict scrutiny is applied for alleged constitutional violations. However, absent criminal threats of physical violence, intentional acts under tort law and absent a violation towards a member of a protected class, there is no legal protection for verbal or nonverbal threats that undermine an employee’s work performance.

#### *Courts Fail to Follow the Spirit of Connick and Garcetti*

Connick and Garcetti limit First Amendment protections. When deciding what is a matter of public concern under Connick, lower courts must use a balancing test and look at the person’s First Amendment interest and the employer’s interest in limiting the expression. Connick limits

speech that “disrupts” a workplace that works on behalf of the public if there is an issue of public concern. Garcetti shows that the First Amendment does not prevent an employee from being disciplined for communications they make pursuant to their work duties. These rulings are broad so courts can decide what constitutes a disruption, what is a matter of public concern and what work duties apply to meet the legal standard. This flexibility should be beneficial in drafting Faculty Codes of Conduct. Limiting free speech is not the same as banning it; therefore, college and university policies that punish employees for ongoing abusive speech, can be created with Connick and Garcetti in mind.

In *Rodriguez v. Maricopa Cty. Community College Dist.*, a group of employees brought a class action suit claiming emails from a co-worker caused a hostile work environment.<sup>xxiii</sup> The court found the emails offensive but they were protected by the First Amendment. The court found the emails addressed everyone, were not threatening, and the accused was not a supervisor. Most importantly, the court emphasized its special deference to academic freedom. This case can be analyzed in conjunction with *Connick*.<sup>xxiv</sup> Here the speech is protected because the emails were not deemed to be within the scope of his duties and there was no disruption within the work environment.

#### *Instances of Workplace Bullying May be Able to Support Other Claims*

Research has been conducted regarding aggressive behavior in the workplace. Research shows that workplace harassment is prevalent in higher education at all levels and among all disciplines. The evidence indicates that harassment appears to be present at all staffing levels—academics, general staff and administrators.<sup>xxv</sup> Victims of harassment are protected through legal precedent, but targets of bullying currently have little legal recourse beyond tort claims. Tortious liability is important. The intentional infliction of emotional distress caused by repeated

acts that can be proven to cause emotional harm, are actionable. Linking the First Amendment to outrageous behavior is tricky. Torts require a showing of outrageous behavior. The First Amendment often protects outrageous speech if it does not give rise to the other elements. Yamada states that tort relief has not been an effective response, especially when an abusive supervisor is involved. “An analysis of case law reveals that typical workplace bullying especially conduct unrelated to sexual harassment and other status-based discrimination seldom results in liability for intentional infliction of emotional distress. Courts find the two required elements are often lacking 1) conduct is not severe enough; 2) the alleged victim did not suffer severe emotional distress.”<sup>xxvi</sup> Employees in the official duties do not get protection. If the conduct is outrageous but is still seen as reasonable and the conduct was not repeated often, then bullying may not attach. Also, conduct is not speech all of the time so tort law, even libel, requires elements that may not attach to bullying.

In *Raess v. Doescher*, the Indiana Supreme Court upheld a verdict against a cardiovascular surgeon accused of being a “workplace bully but the damages were just for the alleged assault.”<sup>xxvii</sup> The verbal attacks and perceived threats under the intentional infliction of emotional distress were dismissed. The ruling was a major outcome for the study of case law. Although workplace bullying was not established as law, the ruling allowed workplace bullying evidence to support the assault claim.

### **Colleges and Universities Do Not Adequately Address Workplace Bullying**

#### *Higher Education is Fertile Ground for Workplace Bullying*

Certain organizations create a culture that breeds bullying behaviors. Organizational cultures that promote “making the numbers,” reward aggressiveness, and value short-term planning display a few of the characteristics that make them ripe for bullying behavior.<sup>xxviii</sup>

Research shows that higher education is a fertile ground for bullies due to sociocultural power imbalances and cultures conducive to incivility.<sup>xxix</sup>

Universities are unique organizations in which the culture of faculty can be a breeding ground for bullying. Farley and Sprigg state that academia encourages debating and criticism so behaviors that undermine individuals may be seen as justifiable.<sup>xxx</sup> Competition leads to displays of power and hidden agendas which cause stress and the potential for lashing out at co-workers or subordinates. Publishing mandates and the demands within higher education institutions cause some to bully when they normally would not subject themselves to this negative form of coping. Legally, bullying is much like sexual harassment has been in the past—difficult to define and a relatively moving target.

With academic organizations, Misawa found three ways that bullying appeared.<sup>xxxi</sup> The first was positional bullying. This occurred when the bully was in a position of power over the target and used that power to negatively influence the target's organizational experience. The second form of bullying was counter-positional bullying. This was described as bullying that occurred from a perpetrator with less power but who was able to target another member based on race, gender, or sexual orientation. Lastly, unintentional conspirative positional bullying occurred when a group of bullies who had both higher and lower levels of power than the target enacted bullying behavior. Ultimately, Misawa called for specific training regarding treatment of members in the higher education community regardless of individual identities.<sup>xxxii</sup>

Research about higher education organizations has revealed specific propositions related to bullying among faculty.<sup>xxxiii</sup> Faculty are more likely to display their aggression indirectly due to organizational norms. Tenure also plays a role in bullying as tenured targets of bullying are likely to disengage from the organization through lowering the quality of courses, electing not to

participate in service, and “retiring on the job.” Also, as institutions of higher education continue to see their government-subsidized funding cut, the importance of an emphasis on clear, specific policies to combat workplace bullying is mandatory.

We can learn about an organization’s position regarding an issue like workplace bullying by considering how the organization has responded to situations that could give rise to legal proceedings. Unlike harassment, which is illegal, bullying is less specifically defined within the law and organizations are not legally-bound to communicate direct policies regarding workplace bullying. Therefore, workplace bullying is often not documented as an actionable threat.

Unfortunately, there is scant research delineating organizational anti-bullying policies alone. Those who have researched policies against bullying have typically outlined prescriptions for writing effective policies. Suggestions such as defining bullying, noting who to contact, and providing procedures for making complaints, may all be effective but do not demonstrate an organization's’ actual use of the advice. Furthermore, prescriptive anti-bullying research does little to interpret meanings of organizational messages about bullying as viewed by the members. Organizations, such as higher education institutions, that are ripe to experience workplace bullying should be vigilant regarding their documented organizational anti-bullying messages and the influence those messages have on members.

Academic institutions and other public-sector employers need to revisit their anti-harassment policies. After Rodriguez, purely verbal or visual harassment, not targeted at one individual and not linked with discriminatory adverse employment actions, may be due First Amendment protection.<sup>xxxiv</sup> However, language involving race and other protected areas may be allowed unless there is clear and convincing evidence of the contrary. Therefore, casting a wider net around protected language may be necessary for harassment and bullying claims. A closer

look at the purpose of the First Amendment and the right to be free from hostile work environments is necessary in making sure we serve the greater amount of people for the greater good of humankind.

Fear of retaliation is a factor when codes do not have guidelines for reporting and language that proves an institution will support both parties is not evident. Even if workplace bullying was illegal, many targets may choose to not report violations for fear of backlash in work environments that are highly competitive and inundated with organizational politics. Right now, codes are broad and many lack specific anti-bullying language and guidelines for bad conduct. Keashly and Neuman note in their article that faculty who feel they have little authority may not address issues with “difficult colleagues thus allowing situations to escalate, resulting in a toxic climate and an increased likelihood of aggression and bullying.”<sup>xxxv</sup>

This study is intended to add to this important conversation of workplace bullying to situate it within the realm of faculty in institutions of higher education. Considering the importance of this issue for academic institutions, this paper provides the results of research conducted on 276 Faculty Codes of Conduct from institutions of higher education. To avoid detracting from the flow of the argument here, the usual methods section is provided as a separate addendum.

### **Current Policies Fail to Adequately Address Workplace Bullying**

Faculty Codes of Conduct researched for this paper provided descriptions of their expected behavior of the faculty or employees of their institutions. Although this research was seeking information on workplace bullying policies in Faculty Codes of Conduct, workplace bullying was rarely mentioned within the codes. Therefore, a thematic analysis revealed what was discussed within the Faculty Codes of Conduct regarding how faculty should behave and

what policies exist with regards to incivility among faculty. Two themes emerged most prominently out of this analysis of Faculty Codes of Conduct: The Harassment Hang-up and Employee Engagement.

### *The Harassment Hang-up*

The analysis of faculty codes overwhelmingly revealed a commitment to discussing the organization's aversion to harassment, particularly toward protected populations. Although bullying is not the same as harassment, this was the most prominent theme found within the codes that related to the issues being studied here. It is important to note that these Faculty Codes of Conduct did address harassment in multiple forms (sexual harassment, hostile workplace, etc.) but very rarely addressed bullying. In this way, harassment policies were too narrowly defined, provided no support for targets of bullying, and they offered no help for bystanders. The following are examples of the language used in Faculty Codes of Conduct:

... University is committed to a work environment free of **harassment** and disruptive behavior, and to an equal opportunity work environment where every member of the University community is treated with fairness, dignity, and respect. No one shall discriminate against any individual **on the grounds of** race, color, religion, sex, age, disability, sexual orientation, national origin, or any other factor prohibited **by law**. [emphasis added]

Notice in this segment, the initial language seems to indicate a determination by the university that everyone should be treated with respect. This would be a clear place to include language directed at an anti-bullying policy. However, the message is followed with discrimination and legally-protected class language, indicating that this policy is only related to harassment that breaks the law. Without a clear law against workplace bullying, this language will not protect a target of workplace bullying. Consider the next quotes:

The college prohibits sexual or any other kind of **harassment** or intimidation, whether committed by or against a student, faculty member, supervisor, coworker, vendor or visitor.

**Harassment** has no place in our community, whether **based on** a person's race, sex, color, creed, religion, national/ethnic origin, age, handicap, sexual orientation or disabled veteran/Vietnam-era veteran status. [emphasis added]

...

Harassment may be verbal, visual or physical. Merely by way of illustration, harassing acts may include racial, ethnic or religious slurs; name-calling that demeans **based on** gender, age, disability, sexual orientation or gender identity; unwanted touching of a person's legs or shoulder; physically harming or threatening another due to racial or religious animosity; vulgar pictures or ethnically offensive symbols or writings; or gestures that mimic or mock a person's gender, sexual orientation, disability, race or age. [emphasis added]

Through these examples and many others, Faculty Codes of Conduct emphasize issues of harassment and the importance of avoiding sexual and other types of harassment, particularly as they relate to protected populations as required by law. As previously stated, the problem here is that bullying and harassment are not the same.<sup>xxxvi</sup> Furthermore, bullying is not restricted to people in protected classes. So, this kind of language in a Faculty Code of Conduct does nothing to address issues of bullying among faculty.

A very small minority of policies did address bullying directly. These policies included language such as the following:

Bullying, defined as: 1. Repeated and/or severe 2. Aggressive behavior 3. Likely to intimidate or intentionally hurt, control or diminish another person, physically or mentally.

...



Conduct which abuses or degrades another person, including but not limited to, **bullying**, threats, intimidation, verbal or physical abuse, stalking, coercion or hateful behavior, is inconsistent with the mission and values of the University and will be confronted and challenged as unacceptable.

[emphasis added]

Out of 276 Faculty Codes of Conduct that were analyzed, 8 had references to bullying. Most were like the second example in which bullying was a word in a list of unacceptable behavior. A detailed, specific, defined policy noting bullying as unique and important was not found in these documents.

What is more concerning are codes of conduct that addressed harassment in the direct opposite way of these. Consider the following example:

In all instances, **a key factor** is whether the complained-of behavior occurred **because of a protected characteristic**. If it did not, the behavior is not regulated by this Policy. [emphasis added]

Codes of conduct written in this manner communicate directly that bullying does not apply in their Faculty Code of Conduct policies. Although they do not use the word “bullying” specifically, by demanding that the only harassment they address is that concerning those who are being harassed because of a specific, legally-protected characteristic, they are automatically marginalizing anyone who experiences bullying. In this way, when codes are written so harassment is the only form of negative behavior addressed, there is a communicative hang-up that neglects an important and growing problem among college and university faculty. A university faculty member looking for help from their institution who reads this policy, which only addresses harassment, finds that if they do not fit into the definition of harassment, their institution has no recourse to offer. Challenging First Amendment protections is necessary for

accountability. A blanket of protection is not warranted when other freedoms are violated. Examining each situation on a case-by-case basis is valid. Some words fall under the First Amendment. Some words are rightfully actionable via a tort claim. Some words target people based on race, sex, gender and other protected groups. If the fact-finders believe the speech gives rise to a legal remedy outside tort law, it will make due process more relevant when clear policies are set forth.

Freedom of expression in some cases does not outweigh a reasonable expectation to be free from a hostile work environment, even if some of the words are protected. The totality of the circumstances that includes the language, the frequency of attacks and other protections like privacy, should all be factors when deciding a workplace bullying claim. Everything should be outlined in the policy document.

### *Employee Engagement*

Another prominent theme revealed in Faculty Codes of Conduct was the overarching message requesting that the faculty or employees themselves support an open organizational climate. In the *Employee Engagement* theme, Faculty Codes of Conduct presented messages related to the importance of employee involvement in making the university atmosphere one free from incivility. While this seems like an effective way to encourage faculty to create a positive organizational environment, this kind of language lacks “teeth” when it comes to an anti-bullying policy. Observe the following quotes:

Respect for others includes a respect for those who are different from you. A positive working environment where everyone can receive respect and do their best work requires a respect and tolerance for difference and diversity.

...

A practice will not be condoned on the grounds that it is “customary,” “easy,” or “expedient” if it does not meet the standards of ethical conduct; condoning such practices may compromise the integrity and reputation of the university. If asked to act against these standards, one should decline. Members are empowered to say something such as the following: “University policy doesn't allow me to do this. Please discuss this matter further with...” or “I'm uncomfortable with what you've asked me to do and I'd like to discuss the matter with....”

...

Some universities relied on the AAUP (American Association of University Professors) to provide their Faculty Code of Conduct Statement, as in this example:

“As colleagues, professors have obligations that derive from common membership in the community of scholars. Professors do not discriminate against or harass colleagues. They respect and defend the free inquiry of associates. In the exchange of criticism and ideas professors show due respect for the opinions of others. Professors acknowledge academic debts and strive to be objective in their professional judgment of colleagues. Professors accept their share of faculty responsibilities for the governance of their institution.”

This kind of employee engagement language demonstrates a vague stamp of general kindness requested of faculty—an expectation of collegiality, but it does not specify any kind of way faculty are inclined to refrain from bullying or acting as bystanders in bullying situations. Language within Faculty Codes of Conduct should be beneficial to the organization. However, the ambiguity of language may prove to be ineffective. Only in a few policies, as in the second one presented, was any specific language used to describe how an employee should behave or communicate when the culture of the organization became hostile. Certainly, encouraging faculty to act with respect toward one another is helpful, but it is far from delineating an anti-

bullying policy. It lacks a clear definition of bullying, what to do if you have been targeted or if you have witnessed bullying, and to whom to report the incident.

When reading the codes, the only detail typically provided is regarding harassment behaviors directed at protected populations, as discussed in the previous theme. As for the First Amendment, it does not protect harassment speech that targets specific populations; but it does protect language that a reasonable person would find offensive regardless of the target audience. This protection of offensive language should be examined when drafting policies that are supposed to make employees feel safe, secure and supported.

## **Discussion**

Results of an analysis of 276 Faculty Codes of Conduct from a variety of universities and colleges across the United States revealed two primary themes: The Harassment Hang-up and Employee Engagement. The Harassment Hang-up described the emphasis placed on the word harassment, particularly as it related to protected populations. Employee Engagement related to the messages describing the importance of employees being involved in the culture of their organization to reduce the incivility within it.

Previous research has demonstrated that workplace bullying is a significant problem. Yet, as demonstrated by these Faculty Codes of Conduct, rarely are messages communicated to faculty that directly relate to the definition of bullying, how it differs from harassment, who may be targeted, or what to do if you are a target or a bystander. The language should be more narrowly defined. The term “inappropriate” needs to be defined and the behaviors and vocabulary words that fall under that specific language need to be stated within policies. The ambiguity is widespread and those who have legitimate claims will often just ignore the perpetrator and suffer indignities in silence or they may feel compelled to vacate the hostile

environment despite a right to be there. Absent measures that can be validated in writing through clear wording and processes with authorities outside of one's immediate supervisor in charge of the due process procedures, targets will be under conditions where tacit consent is perceived as a want rather than a compelling need. The language in these codes intimates that bad behavior regardless of First Amendment protections will not be tolerated, but there is "other language" that is tolerated. Without policies being modified, bullying will continue. Since the majority of the 276 codes do not define bullying, the reader must assume the meaning of bullying is within the harassment jargon. Assumptions cannot be at the core of policies or laws. Although there are strong arguments for broad language that covers special circumstances, narrow definitions help with clarity when violations take place. While a very small number of codes addressed bullying directly, the overwhelming majority did not use the term bullying or anything like it within their Codes of Conduct. In fact, they were consistently focused on the harassment directed at legally protected populations—which leaves the targets of bullying with no recourse.

Vartanian suggests that there should be a First Amendment push towards a statute that would prohibit severe workplace bullying that creates a hostile environment.<sup>xxxvii</sup> Along with the aforementioned Healthy Workplace Bill, there has been some movement because some private and public companies do have contractual protections. Vartanian purports that Title VII of the Civil Rights Act protects speech and behavior based on race, sex, national origin, religion. It does not protect other speech like sexual orientation or any other classification. Hostile environment theory creates a hierarchy of expression where certain subjects are tolerated while others are not.<sup>xxxviii</sup> Therefore, Title VII violates the rule of subject matter underinclusion. This underinclusion is often reflected in school's codes of conduct because the language within the Codes is taken from the laws that exclude certain behaviors and certain speech. Vartanian notes

that there is an implicit message that the government finds some offensive speech as harassment and other offensive speech tolerable. Vartanian questions whether our government can regulate certain subjects and ignore others.<sup>xxxix</sup> Workplace bullying should be outlined in the Codes regardless of discriminatory intent. The language should cover behaviors and speech that protect individuals who are outside of the protected class. Naime suggests creating a values-driven policy where the organization is clear that it will not accept misconduct of any kind, outlines protections for everyone and not just the protected classes, clarify the threshold for taking action, and offering a nonpunitive safety measures and documentation of adverse impacts to discourage frivolous claims.<sup>xi</sup>

The language used in Faculty Codes of Conduct could be evidence of Language Convergence/Meaning Divergence as described by Dougherty, Kramer, Klatzke, & Rogers.<sup>xli</sup> In LC/MD, language convergence describes the ways in which common language is used to create meaning. Meaning divergence happens when individuals demonstrate different meanings with the same labels. In the case of workplace bullying, organizational members may be using terms such as harassment, or may be discussing behaviors as harassment, to mean bullying. Dougherty, Kramer, Klatzke, & Rogers explain how LC/MD creates misunderstandings in organizations due to the illusion of shared meaning.<sup>xlii</sup> Practitioners may believe that they have a Faculty Code of Conduct that prevents workplace bullying because they discuss harassment, as many of them do. However, this may be evidence of the illusion of shared meaning. This is consistent with Cowan's findings which revealed that HR professionals felt that bullying was covered under their harassment policies.<sup>xliii</sup>

In order to clarify the communication about workplace bullying and protect all faculty from being targets, Faculty Codes of Conduct must address bullying specifically. The law

covering tortuous acts of intentional or reckless emotional harm allow some relief when one feels targeted. However, policies need to be examined and procedures set forth since the court system does not provide legal relief. The terms need to be defined so bullies, targets, and bystanders know what bullying is and what to do if they see or experience it. Binney notes in an online article that the Society of Human Resource Management has a sample policy for workplace bullying.<sup>xliv</sup> This policy includes an objective clearly stating that all employees will be governed by the policy and consequences including termination are possible. There is a definition of bullying that does not overlap with the definition of harassment and there is a list of examples of bullying. Binney also mentions that the Occupational Safety and Health OSHA Field Health and Safety Manual has a policy within the “Violence in the Workplace” chapter. The policy sets forth the responsibilities of employees and managers when it comes to workplace bullying.<sup>xlv</sup>

## **Conclusion**

In conclusion, Faculty Codes of Conduct often include harassment policies that describe the impact of unwanted speech and offensive behaviors or intimidation; however, as demonstrated by this research, these policies are often directed only toward the illegal forms of harassment targeting persons within protected groups (sexual harassment, hostile environment, etc). Without a clear distinction and a policy delineating the intolerance toward workplace bullying, the perception remains that harassment and bullying are synonymous. There is little recourse once offensive language or behavior is deemed non-discriminatory and not within constitutional protections. The absence of bully language, policies and procedures within Codes of Conduct is disturbing when looking through a First Amendment lens. Although an argument can be made that suppressing speech to create a policy is close to crossing the line and entering First Amendment rights, with legally protected harassment policies throughout the workplace,

this study is firm in finding that no values are duly infringed or encroached upon when moving the line from harassment to bullying.

This research demonstrates a need for higher education organizations to consider the messages they present in their Faculty Codes of Conduct related to workplace bullying. The First Amendment should always be examined when speech of any form is being regulated. However, the First Amendment should not impede progress nor infringe upon one's right to be free from a hostile workplace environment. Workplace bullying is absent from over 250 Faculty Codes of Conduct that are currently in use. Anti-harassment policies, case law that only addresses some aspects of bully evidence without providing legal remedies and ongoing potential legislation that remains filed away, will not suffice. Language in Faculty Codes of Conduct that guarantees non-retaliatory protective measures when one reports bullying, must exist for targets to consider reporting it. Language protected by the First Amendment needs to be re-examined as some language is as damaging as that which links to protected classes of people. Ignoring this fact could hinder institutions and companies in the public sector from drafting concrete policies and procedures that consider the well-being of all employees and not just the current protected few. Relying on the current 276 Codes within this study will not provide enough information to communicate to faculty what bullying behavior is, what to do if you are a target or bystander, and how the organization chooses to proceed when offenses have been made. Within organizations like universities and colleges, where bullying culture is prevalent, policies such as these Codes of Conduct need to be communicated to all employees and with an assurance that First Amendment rights will not be violated. They should be drafted with complete clarity, to aid in prevention. These codes should be drafted for the greatest amount of liberty but also, with the greatest amount of justice for all.



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## **Addendum**

### **Methods**

To understand policies included in Faculty Codes of Conduct regarding workplace bullying, this research used an interpretive approach to study the codes themselves. We focused on the codes as “documents” within the organization because they provide a specific view of the organization’s attempt to make claims regarding the behavior they expect from their faculty. As Lindlof & Taylor describe, documents are valuable sources to organizations and the analysis of them can describe particular truth claims based on organizational reality.<sup>xlvi</sup>

### **Sampling**

In order to collect a wide variety of Faculty Codes of Conduct from a multitude of universities and colleges, a research assistant considered 335 schools from across the United States by obtaining a list from The Database of Accredited Postsecondary Institutions and Programs (U.S. Department of Education) and noted colleges and universities within the database.<sup>xlvii</sup> He then searched for each institution’s Faculty Code of Conduct using the school’s website. A second research assistant also reviewed the list and searched for Faculty Codes of Conduct from those universities and colleges to provide an additional source of data collection and review of the original list. University faculty seeking to understand their university’s policy on bullying would likely also search online sources to find the messages regarding this information. It is our assertion that if the university or college has a bullying policy, it should be delineated in the Faculty Code of Conduct documents or the faculty should be directed to the location of the workplace bullying policy through this important piece of informative documentation. Therefore, the data collection was limited to Faculty Codes of Conduct. If the institution’s website created difficulty in finding the Code of Conduct, search engines were used

to continue the search. Of the 335 academic institutions considered, 302 were extensively searched based on availability of websites and information, 276 provided usable information via website links to Faculty Codes of Conduct. Therefore, 276 Faculty Codes of Conduct were available for analysis.

### **Data Analysis**

Thematic analysis was used to determine the messages being communicated to faculty regarding workplace bullying through Faculty Codes of Conduct. Thematic analysis was an appropriate tool to use because it helped us see the language being used by the organization to influence employees.<sup>xlviii</sup> Furthermore, thematic analysis allowed the researchers to determine what themes were present within the Faculty Codes of Conduct as they related to issues of workplace bullying.

Thematic analysis through these texts was conducted by identifying themes through their recurrence, repetition, and forcefulness.<sup>xlix</sup> For this analysis, the first author read and re-read the 276 Faculty Codes of Conduct provided to determine what messages appeared and what language was used as it related to policies regarding behavior towards other faculty members. NVivo qualitative software was used to assist in sorting the data into particular codes to help identify the recurrence and repetition of specific words or phrases, such as harassment, discrimination, retaliation, academic freedom etc. When anomalies or unusual wording occurred during the process of analysis, this was also noted as it represented a different way of expressing the organization's position toward negative behavior among faculty. The NVivo codes were then analyzed to determine what, if any, themes they represented. Ultimately, three themes emerged from this analysis.

The results were then verified for accuracy. Creswell recommends two

forms of verification for qualitative research. This research was verified by peer review and thick, rich description.<sup>1</sup> In peer review, a second researcher reviews and asks questions of the analysis, exploring and playing “devil’s advocate” to question and listen to the analysis for verification. The second author served as peer-reviewer for this analysis. In thick, rich description, the reader is provided with sections of the data so he or she may verify for themselves the accuracy of the results. Sections of the Faculty Codes of Conduct are presented within the results for reader verification.

## Notes

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<sup>iii</sup> "It's Complicated: Defining Workplace Bullying from the Human Resource Professional's Perspective," *Management Communication Quarterly* 26 (2012). 379-381.

<sup>iv</sup> Pamela Lutgen-Sandvik and Sarah J. Tracy, "Answering Five Key Questions About Workplace Bullying: How Communication Scholarship Provides Thought Leadership for Transforming Abuse at Work," *Management Communication Quarterly* 26 (2012). 17.

<sup>v</sup> Michael E. Chaplin, "Workplace Bullying: The Problem and the Cure," *U. Pa. J. Bus. L.* 12 (2009). 445

<sup>vi</sup> Pamela Lutgen-Sandvik and Sarah J. Tracy, "Answering Five Key Questions About Workplace Bullying: How Communication Scholarship Provides Thought Leadership for Transforming Abuse at Work," *Management Communication Quarterly* 26 (2012).5.

<sup>vii</sup> L. Keashly and J. H. Neuman, "Faculty Experiences with Bullying in Higher Education: Causes, Consequences, and Management," *Administrative Theory & Praxis* 32 (2010). 50-55.

<sup>viii</sup> *Connick V. Myers*, 461 U.S. 138, 75 L. Ed. 2d 708 (1983).

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<sup>xii</sup> Denise Salin, "Ways of Explaining Workplace Bullying: A Review of Enabling, Motivating and Precipitating Structures and Processes in the Work Environment," *Human Relations* 56, no. 10 (2003). 1218-1225.

<sup>xiii</sup> *Ibid.* 1218.

<sup>xiv</sup> Cowan, ""Yes, We Have an Anti-Bullying Policy, But...:" Hr Professionals' Understandings and Experiences with Workplace Bullying Policy." 308.

<sup>xv</sup> *Ibid.*309.

<sup>xvi</sup> *Connick V. Myers*.

<sup>xvii</sup> Christie S. Totten, "Quieting Disruption: The Mistake of Curtailing Public Employees' Free Speech under *Garcetti V. Ceballos*," *Lewis & Clark Law Review* 12 (2008). 237-238.

<sup>xviii</sup> *Ibid.* 253.

<sup>xix</sup> David C. Yamada, "The Phenomenon of Workplace Bullying and the Need for Status-Blind Hostile Work Environment Protection," *Geo. LJ* 88 (1999).522-523.

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