My name is Jerry Carbo. I am the President of the National Workplace Bullying Coalition, an attorney in West Virginia, and Professor in the Grove College of Business at Shippensburg University. For nearly a quarter of a century in one way or another I have spent my career attempting to prevent, detect, remedy, and eliminate workplace harassment and bullying from the American workplace. I have undertaken these efforts as an employee relations and human resources manager at two Fortune 500 companies, as an attorney and consultant, as a union advocate, and in my current role as a professor, researcher, and President of the National Workplace Bullying Coalition. The state of workers today, even during a pandemic, show that I still have many years of work ahead of me.

Article 23 of the Universal Declaration of Human Rights, states that: Everyone has the right to work, to free choice of employment, **to just and favourable** conditions of work and to protection against unemployment. There is little doubt that workplace bullying, and harassment create working conditions that are anything but just and favorable. Not only do these behaviors create intimidating, hostile, offensive, and unfair working conditions, they also destroy the targets' and even bystanders' fundamental human right to dignity. Just as we see with unlawful harassment, workplace bullying leads to severe negative outcomes for targets, families, bystanders, communities, and organizations. These outcomes include depression, anxiety, PTSD, suicide ideation and even suicide attempts. Researchers such as Einarsen one of the pioneers in the field of the study of workplace bullying (1999) have concluded that "bullying may be a more crippling and devastating problem for employees than all other work-related stress put together."

As an HR manager I had the unfortunate experience of working in an organization where a bullied employee ended up taking her own life. As an attorney, I had numerous clients who were bullied so badly in their workplaces that they suffered physical manifestations including anxiety, nervousness, paranoia, physical shaking, and nervous tics. Many of my clients, as well as research participants, left their jobs much sooner than they had planned. They quit, even when they had no other options lined up. They often did so to literally to save their health and even their lives. As an attorney it became more and more frustrating to have to turn clients away with the explanation that while what occurred to them was wrong, it was not unlawful because it was not based on a protected status. The targets, whether I was able to help them from a legal standpoint or not, suffered greatly.

In 2006, as part of my dissertation research at Cornell's ILR school I began to develop the Dignity at Work Act (DAWA). Over the 15 years since that time, through qualitative, quantitative, and national and international legal research, my time on the EEOC Select Task Force for the study of Workplace Harassment, and my other experiences, I developed an updated version of DAWA that builds from US employment law on harassment and fills in the gaps in the EEO laws and court interpretations of these laws. Most importantly, I have worked closely with the real experts, the targets and activists who have been doing the heavy lifting to pass this legislation, to assure targets a full and complete remedy, to assure all workers dignity in the workplace, and to continue to improve DAWA. DAWA may not be perfect. There may not be a perfect law. Even the international laws that have helped to address the bullying

problem have issues. However, I believe and the members of the NWBC believe that DAWA is the best option we have to eliminate bullying from the US workplace.

I wanted to point out a few components of the Dignity at Work Act that are critical.

1. The first of these deals with the definition of bullying and whether we should include single incidents. As we have now had time to see some of the outcomes from laws passed to address workplace bullying in countries like Sweden, France, Belgium and in the Canadian Province of Quebec, one of the important lessons about workplace bullying is that the bullying while most commonly repetitive and on-going, can also take the form of single incidents -- incidents that should be addressed and that can be quite harmful to targets, bystanders, and organizations. In a study of the Quebec law on psychological harassment, Ann Marie Cox (2010) found that 13% of claims under the Quebec Law on psychological harassment were for single incidents, of these 50% were accepted by the employment tribunal as bullying – a higher acceptance rate than for repetitive incidents. In my own research, it was not at all uncommon for targets to point to single incidents of workplace bullying as causing the harm to their careers, or mental or physical health. It is important that we be clear in this legislation that single incidents can indeed rise to the level of workplace bullying. The Dignity at work Act, borrowing from both international laws and the US law around workplace harassment, adopts a severe or pervasive standard, and clarifies that single incidents can indeed rise to the level of workplace bullying.
2. A second critical lesson we have learned in the US employment jurisprudence is that we should not require a target to prove a bully's intent, nor should we focus on such intent. When we talk about intent in this area, we are not talking about intent to simply engage in an act or general intent. Those who would require a showing of intent under the harassment or bullying laws, are proposing a requirement of diving into the mind of the harasser to prove that they not only intended to act, but they intended to harm. In essence, adopting a criminal law standard of showing an actus reus and a mens rea (a bad act and an evil intent) – a showing of specific intent. Applying this type of standard to a civil claim would present an nearly impossible hurdle for targets of workplace bullying, would be antithetical to our established legal system of civil rights and responsibilities, and would create a higher burden for targets of bullying than what has been established for targets of status-based harassment. Proving a harasser or bully's intent is a nearly impossible hurdle for targets of workplace harassment. In my own research of targets of workplace bullying, intent was rarely mentioned in how they as targets defined bullying. Most of those I have interviewed were unable to identify their bully's intent, even when they might have had some assumptions about the intent and none of them had a way to prove such intent. Researchers, such as Einarsen, Randall and others have concluded that intent presents a hurdle targets are unlikely to overcome. This unfair hurdle was recognized in discussions within the EEOC STF, has been recognized in the research on harassment and bullying and is also recognized in the US laws addressing unlawful harassment. Both the Code of Federal Regulations, for sexual harassment, CFR § 1604.11 and the CFR for national origin harassment, CFR § 1606.8 recognize that we

must address harassment that is based on these protected statuses that has either the **purpose or effect** of unreasonably interfering with the targets working environment or creating a hostile or abusive working environment.

Even when we look at intent based torts, we see that our system does not require a showing of an intent to harm (with few exceptions such as IIED) but merely the intent to act or engage in the behavior. For instance, the torts of both battery and assault do not require a specific intent to harm, but merely the general intent to engage in a behavior. Our system is based on the idea that the actor should be responsible for their actions and any damage they might cause. This responsibility should not be passed onto the innocent target of such behaviors.

An addition of an intent requirement on the part of the bully, also makes little sense where liability is going to rest with the employer. Again, just looking at basic tort law and premises liability for basic licensees, we know that a property owner has a duty to inspect, to eliminate known hazards and to find and eliminate potential hazards and a duty to have reasonable control over third parties on their premises. Here the employer is the property owner, they have control and our legal system provides employers great control over their workplaces. Bullying and harassment are clearly known dangers and employers are in the best position to prevent these behaviors from occurring. When they do occur both the actor, who has engaged in an act that caused harm, and the employer who failed to prevent that harm should be responsible to make the target of that behavior whole. Again, the employer is being held responsible for their actions or lack thereof.

While intent may be relevant in determining how to stop or prevent a behavior, it is irrelevant to the harm that was caused by that behavior. Those most responsible for, and those who had the opportunity to prevent such behavior before it occurred, should bear the cost of the resulting harm.

Based on these principles, the Dignity at Work Act follows the language from the code of federal regulations to address bullying that has either the intent or the effect of creating harm. We must avoid requiring targets to prove specific intent or malice.

3. The Dignity at Work Act specifically addresses the need to take remedial measures against bullying behaviors before these behaviors lead to irreparable emotional, psychological, physical, or economic harm. During the EEOC Select Task Force for the Study of Workplace Harassment meetings this issue garnered a great deal of discussion and the consensus was clear that everyone – targets, organizations, society – would be better off if the behaviors were addressed early before such harm occurred. This was recognized by the Supreme Court in the Harris v. Forklift decision nearly three decades ago. Writing for the Court, Justice O'Connor wrote,

> *…Title VII comes into play **before** the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect the employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.*

The Dignity at Work Act is written to provide all workers this same protection from abusive behaviors whether they are based on a protected status or not.

Bullying behaviors must be addressed before they cause irreparable harm to targets. However, the problem is that employers by and large simply do not do so, and very few if any employers do so under all circumstances. Employers will not address these behaviors unless there is a strong incentive for them to do so, DAWA provides such an incentive.

DAWA will address gaps that have been created by judicial decisions regarding the level of severity or pervasiveness that is enough to rise to an actionable claim. Too often, judges at the appellate level have interjected their own concepts or definitions of a hostile environment in placement of jury decisions. The Dignity at Work Act, sets out a standard much like that recognized by the Supreme Court since Meritor and reiterated in Oncale, prohibiting conduct which a reasonable person would find severely hostile or abusive and the language of DAWA helps to avoid the expansion of this requirement that we have seen in many Circuit court decisions such as Judge Posner's decision in the 7th Circuit Baskerville case, to overturn a jury verdict in favor of the plaintiff, and to establish a standard that a plaintiff would have to show a "hellish environment" in the workplace in order to meet the definition of severe or pervasive.

Following Baskerville, the 4th Circuit decided, an environment in which supervisors had informed an employee that they had made every female in the office cry and would also make her cry, called a female sales assistant his slave, pointed out a "buxom" catalog model and asked why they did not have sales assistants like that, referred to the plaintiff's husband as a "stay at home wife," and asked the plaintiff, "Why don't you go home and fetch your husband's slippers like a good little wife, that's exactly what my wife is going to do for me," was not an actionably hostile working environment.

These two decisions are not isolated, in fact this Baskerville standard has been and continues to be adopted by numerous courts. We strongly disagree with Judge Posner and these courts and believe that workers are entitled to an environment that is much better than a "hellish" environment and in fact, have a human right to dignity in the workplace.

4. To protect workers' rights, I believe that we must follow Lance Compa's concept of a three-legged stool. We need to have strong laws, with strong enforcement, a strong labor movement, and employers who will voluntarily take steps to protect these rights. In order, to achieve this third step, it is important that we have a strong incentive for employers to adopt policies that will truly prevent, detect, remedy, and eliminate workplace bullying from their organizations. We need to also provide employers with the most up to date guidance of the steps necessary to do so, and to require employers to adopt those steps These elements are all included in the Dignity at Work Act.
5. Finally, in order to protect all targets of bullying and to assure their human right to dignity in the workplace, we must assure that legislation provides both a full remedy for targets who have been harmed and provides access to this remedy that simply does not exist today for targets of bullying of even status-based harassment. For most targets of workplace harassment, the legal system is inaccessible due to costs. For targets of non-status-based harassment or workplace bullying, there is no legal remedy. We must take steps to assure that targets of both status-based and non-status based harassment have access to a legal tribunal to protect them from acts of bullying and to make them whole from the bullying they have been subjected to.

I want to thank you for your time, and I hope that you will vote to support the Dignity at Work Act to move this bill forward to protect the dignity of the working people of your great state.

I would also of course be happy to answer any questions you may have.

Thank you,

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