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BULLYING IN THE WORKPLACE:
HOW TO DETECT, PREVENT AND ELIMINATE

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Human Resource Executive Online

Stopping Bullying in the Workplace

Employers in all industries can learn some valuable lessons on employee relations as the Miami Dolphins bullying case plays out in the international media.

By Lawrence Lee and Daniel Perkins
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At first blush, it seems almost implausible . . . a 300-lb professional football player claiming to be the victim of bullying? By now, most of the nation has at least heard of the controversy embroiling the Miami Dolphins locker room: offensive lineman Jonathan Martin left the team in late October 2013 and checked himself into a hospital seeking treatment for emotional distress.

The cause of Martin's departure? Allegations that he endured ongoing harassment and bullying by teammate Richie Incognito. In the weeks since Martin left the Dolphins, the allegations of shocking and outrageous behavior by Incognito and of encouragement or approval of that behavior by members of the Dolphins coaching staff and front office continue to mount. Presently, the National Football League has begun its own investigation, and the issue of workplace bullying has grabbed the nation's attention. While the saga is far from over and the allegations have yet to be confirmed or refuted by the investigative process, the Martin case presents an interesting study of the blurred lines between "locker room" behavior and workplace harassment. And, while this particular drama has played out in a very public way, at one of the NFL's most storied franchises, the issue is far from unique to professional sports. Employers in all industries can learn some valuable lessons on employee relations as the Martin case plays out in the international media.

What is Workplace Bullying?



When it comes to addressing the issue of bullying at work, the primary concern among experts on workplace culture is in trying to establish exactly what workplace bullying means. The difficulty lies in defining a range of conduct that is not so broad as to cover every petty slight or disagreement among co-workers -- after all, judges have routinely pronounced that the courts do not exist to ensure a conflict-free workplace. On the other end of the spectrum, defining the term too narrowly risks excluding victims who cannot obtain relief under the current cadre of state and federal workplace laws. So, the question remains: How do we define the term?

Generally speaking, most advocates of workplace bullying legislation initiatives define the term as repeated mistreatment of one or more victims by one or more perpetrators, which results in harm to the physical, mental, and/or emotional health of the victim(s) and interferes with the victim's ability to perform his/her work. Workplace bullying may consist of verbal abuse and/or conduct (both verbal and nonverbal) which is threatening, humiliating, and/or intimidating.

Martin's allegations that Incognito constantly threatened him with physical violence, left racist and threatening voice mails on his telephone, and badgered him into paying $15,000.00 for a trip to Las Vegas that Martin did not even attend would seem to be extreme, but certainly poignant examples of the type of behavior advocates of workplace bullying legislation are seeking to prevent. For obvious reasons, part of a reasonable litmus test to determine bullying in the workplace is whether the bad behavior becomes an impediment to an employee's ability mentally and

physically to fulfill the duties of his or her job. However, if the mistreatment is based on discrimination or any other illegal reason, then the analysis becomes one of whether an employee's civil rights, under federal or state law, are at risk of being violated and the employer exposed to a potential claim.

Legislative Initiatives

Presently, there are no state or federal laws prohibiting workplace bullying. While some of the conduct falling within the broad definition may be prohibited by other state and federal laws (such as Title VII and other anti-discrimination laws prohibiting harassment on the basis of race, sex, or other very specific characteristics), much of the conduct experts say amounts to workplace bullying is legal under current law. The Healthy Workplace Campaign, a national movement promoting anti-bullying legislation in all 50 states, estimates that almost 80 percent of all conduct amounting to workplace bullying is not covered by Title VII or other anti-discrimination laws, and that 37percent of all adults in America have experienced bullying at work.

In the past 10 years, 23 states have introduced legislation aimed at addressing workplace bullying. In 2013 alone, 11 states introduced workplace-bullying bills that would hold employers accountable for bullying behavior. To date, none of those states have yet enacted an anti-bullying law.

What All Employers Can Learn

Both the Miami Dolphins and the NFL have shown initiative in addressing the allegations in the Martin case. The Dolphins hired an independent investigator to look into Martin's accusations and suspended Incognito indefinitely, pending resolution of that investigation. Additionally, the organization promised full cooperation with the investigation and appears to be honoring that pledge. Similarly, the NFL has hired its own independent investigator and will no doubt look into both Martin's allegations and the extent to which the Dolphins' coaching staff and front office knew about it and/or condoned it. Ultimately, regardless of how the investigations turn out, and whether or not any one of the 50 states pass workplace bullying legislation, employers in all industries can learn a great deal from the Martin-Incognito incident.

Just because workplace bullying is not specifically prohibited by law does not mean employers can look the other way in the face of such conduct. Workplace bullying incidents may fall under existing laws, such as Title VII, if the conduct touches upon issues of race, gender, religion or other protected characteristics, or under state laws which prohibit discrimination based on sexual orientation. Similarly, most states permit negligent hiring/retention and outrageous conduct claims, which may address those bullying situations involving particularly egregious conduct or instances in which supervisors are aware of bullying, but tacitly (or actively) encourage or allow it. In general, employers may be subject to potential liability under common law if they fail to provide a reasonably safe workplace.

But even if it is not actionable through law, workplace bullying presents problems that may have a negative effect on the employer's bottom line. A workplace fraught with disrespect may lead to worker dissatisfaction, unproductive work habits and potential bad behavior by the alleged victim and his or her colleagues. If the workplace bully is a manager, then potential turnover is at stake, claims and litigation costs may ensue, and more frequent use of sick time, vacation leave, or other paid time off will result in real, but oft-forgotten consequences of workplace dissatisfaction. Savvy employers will address workplace conflicts *before* they can become instances of bullying. Employers should stay ahead of the times by:

* Having their counsel and HR department create a respect-in-the-workplace policy, which includes a complaint procedure and reporting requirement similar to common harassment policies;
* Implementing training for both management and non-management employees that focuses on respecting the rights and feelings of others;
* Establishing a protocol permitting complaints to be made to an independent ombudsman in the event that the bullying complaint pertains to an immediate or successively higher supervisor; and
* Ensuring that all employees adhere to the respect-in-the-workplace policy and avoiding the minimization of employee concerns/complaints.

Merely having a respect-in-the-workplace policy is not enough. Employers must vigilantly keep a finger on the pulse of employee morale. Monitoring employee complaints about abusive co-workers and/or supervisors, following up with individual complainants, and providing measurable and timely responses to address these complaints are only the tip of the iceberg. Employee satisfaction surveys, if done periodically and correctly and regular, timely performance evaluations can go a long way toward helping the astute employer track and monitor workplace issues, including instances of workplace bullying.

The Rights of Those Involved

One of the less-publicized aspects of the Martin-Incognito Affair is the effect Martin's allegations may have on Incognito's continued career in the NFL. If Martin's allegations are not confirmed, or if evidence comes to light establishing that Martin embellished his claims or worse, fabricated them, what can he do to restore his reputation, and how will his future in the NFL be affected? These questions are equally important for employers in other industries when addressing workplace bullying allegations.

The temptation in many instances is to react hastily to "fix" the problem. Doing so, however, may result in unfairness to the accused. Employers must engage in a fair, impartial and thorough investigation of all facts before taking any action that could be viewed as "adverse." Even when the allegations of harassment are confirmed, automatic dismissal often is not the most appropriate response. Employers must investigate and assess the facts of each situation to best determine how best to address the underlying conduct and tailor discipline to achieve the overarching goals: improving workplace harmony and ending the conflict.

Equally important is the assurance provided by management to the reporter that it is taking the bullying allegations seriously through swift and immediate assessment and possible action. If, for example, Jonathan Martin's allegations are confirmed as factually supported, then the Miami Dolphins would likely consult with its employment counsel to determine reasonable measures for next steps. Presumably, a foundation has been established that management never showed any favoritism towards the accused or accuser. Best practices also dictate that the organization's human resources division acted as the management conduit to promote a proper decorum over the entire investigatory process, both in a professional and an objective manner. From beginning to end, safeguards must be taken to preserve the confidentiality of all witness statements as well as management discussions that end up contributing to any decision made over future disciplinary action or towards the restoration of the employees' future work environment and status.

Conclusion

Although Jonathan Martin's predicament is lamentable and unfortunate, it has provided the nation's employers with a textbook example of what workplace harassment and bullying can do, both to the victim and to the workplace atmosphere. In almost every case, co-workers take sides, hard feelings are created, and workplace morale and productivity suffer.

Regardless of the setting, workplace bullying exposes employers to far-reaching legal and practical consequences. The best way to avoid such consequences is to recognize and prevent bullying behavior in the first place with a strong, enforceable respect-in-the-workplace policy and comprehensive management skills training. Although employers cannot prevent all bullying incidents, a strong and comprehensive policy coupled with training initiatives can help the vigilant employer recognize bullying behavior before it reaches the point of the Martin-Incognito Affair. This helps ensure a respectful workplace, which fosters a solid work environment – one which is better able to withstand challenging personnel situations.

In the meantime, employers should take a lesson from the Martin/Incognito saga and reexamine their workplace policies and practices. If necessary, seek the advice of an experienced workplace attorney. For the consequences of failing to take such action, look no further than the Miami Dolphins locker room.

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