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Bullying in the Workplace

By Jamie L. Lopez

Kids will be kids, right? A little taunting and teasing, maybe even a little rough play, is to be expected. But what happens when kids grow up, become adults, and enter the workforce?

Take what happened recently with the Miami Dolphins football team. At the end of October, Miami Dolphins' tackle Jonathan Martin left the team to receive professional assistance for "emotional issues," and it soon came to light that Martin left the team due to alleged bullying and harassment, mainly on the part of Richie Incognito, Martin's teammate. Martin was a rookie; his alleged harasser, Incognito, was a more senior player. Incognito has been accused of a number of different actions of bullying conduct against Martin, including using racial slurs in voicemail messages left for Martin, threatening Martin's life, offensive comments about Martin's mother, and coercing Martin into contributing \$15,000 to help finance a trip to Las Vegas by a group of Dolphins players, even though Martin himself did not attend. There have been reports that Incognito may have been instructed by the Dolphins' coaches to undertake the conduct, as it was designed to "toughen up" Martin and make him a better football player.

Workplace harassment and bullying is not limited to the school ground or the sports arena. It can take place at any job site or in any workplace. In fact, a [2010 survey](#) by the Workplace Bullying Institute found that 35 percent of the U.S. workforce reported being bullied at work. [Another study](#) reported that one in four people have experienced some form of bullying at work.

While there are no state or federal laws that expressly prohibit workplace bullying, such conduct in the workplace can lead to claims under existing anti-discrimination laws or state tort laws. Both

federal and state law prohibits discrimination based upon an employee's race, color, religion, sex, or national origin, which includes hostile work environment harassment claims. Under Title VII, a claim for hostile work environment must show that the harassing conduct is "sufficiently severe or pervasive" to alter the conditions of the victim's employment and create an abusive working environment. Acts of bullying based on one's protected characteristics could expose an employer to this type of claim, and if the bullying is sufficiently severe or pervasive, an employer may face liability. However, while acts of bullying may not necessarily be based on the victim's protected characteristic, those acts only increase the likelihood that the victim will one day file a charge of discrimination based on those acts, tying them to the victim's protected characteristic. The employer is then left in the unenviable position of arguing that, yes, there may have been bullying, but it was not *illegal* bullying. And regardless of the motivation for the bullying, an employer who is aware of but does nothing to remedy these actions will not look good in front of a jury.

In extreme cases, workplace bullying victims may even have a claim for intentional infliction of emotional distress, though they would have to show that the conduct was extreme and outrageous and resulted in severe emotion distress. Further, an employer who knowingly hires someone whom they knew was a bully and place them in a position of authority over others may face a negligent hiring lawsuit by bullied employees. However, depending on the state, these sorts of claims may be preempted by a worker's compensation law. Because worker's compensation law is intended to be the exclusive remedy for most injuries sustained in the course and scope of employment, many worker's compensation laws contain an exclusivity clause that prohibit these sorts of claims from being brought in civil court or otherwise outside of the worker's compensation context.

In addition to subjecting the employer to liability, however, employers still face the practical, non-legal effects of bullying in the workplace: bullying can lead to morale issues and drive talented employees to leave.

Employers must be proactive in monitoring and preventing workplace harassment. Every employer should already have anti-discrimination and anti-harassment policies consistent with existing legal requirements. But employers should also consider whether to develop, post, and follow an anti-harassment policy that goes beyond legally protected characteristics. One option is a "zero tolerance" anti-harassment policy that prohibits workplace harassment of any kind. A zero-tolerance policy sends the message that an employer values its employees and a safe and positive work environment. However, these policies come with their own issues of dissemination and enforcement. Inconsistent enforcement of the

policy can expose an employer to allegations of unfair treatment, especially in situations where the policy is applied to an employee who is subsequently terminated but the policy was not applied to similarly situated employees of a different race, sex, etc.

Regardless of the scope of the policy in place, employers should make sure that all employees are aware of the policy and the methods by which they can register complaints. They should encourage employees to voice concerns about harassment before it becomes severe and pervasive. Employers should train their managers on how to spot office bullying and harassment and should take all complaints seriously, following through with investigations to ensure that any issues are promptly and adequately addressed. All instances of discipline should be administered fairly and documented in the affected employee's file. If employers have questions on their anti-harassment policies or on how to deal with allegations of bullying in the workplace, they should consult with an employment attorney.

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