



Incognito No Longer: Workplace Bullying Legislation Again at the Forefront

The much “ballyhooed” controversy surrounding the Miami Dolphins’ offensive tackle Jonathan Martin’s departure following the allegedly incessant bullying and harassment by all-pro lineman Richie Incognito has reignited the discussion over the need for legislation to prevent bullying in the workplace. According to Martin, Incognito sent belittling, threatening and offensive text messages; left voicemail messages meant to intimidate and berate; and generally left Martin feeling threatened and depressed. Martin claimed that he could no longer withstand the treatment, and chose to leave the Dolphins on October 28.

LEGISLATIVE EFFORTS

Bullying in the workplace is certainly nothing new. What is relatively new is the emerging movement to put a stop to its potentially catastrophic consequences (such as the 2010 suicide of University of Virginia professor Kevin Morrissey, allegedly triggered by persistent bullying at work), and provide a means to punish such conduct. Legislative efforts are being made both in the criminal area and with respect to civil laws applying to employers. A model anti-bullying statute was drafted in 2001 and has been considered (in various configurations) by legislatures in 25 states, with bills still pending in several of those states. Relevant for Mr. Incognito and the Miami Dolphins, Florida’s version, HB 149, died in the legislature on May 3, 2013. *Continued*

NEWSLETTER

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As defined in the Florida version of the model workplace anti-bullying statute, “bullying” (there defined as “abusive conduct”) consists of:

“... conduct including acts or omissions that a reasonable person would find hostile based on the severity, nature and frequency of the defendant’s conduct. Abusive conduct may include, but is not limited to, repeated verbal abuse, such as the use of derogatory remarks, insults and epithets; verbal or physical conduct of a threatening, intimidating or humiliating nature; the sabotage or undermining of an employee’s work performance; or attempts to exploit an employee’s known psychological or physical vulnerability.”

Florida HB 149 further specified that it is an “unlawful employment practice” for an employer to “subject an employee to an abusive work environment,” and that an “employer is vicariously liable for an unlawful employment practice committed by an employee.” Under that language, and assuming that even a portion of the claims are true, Incognito and the Dolphins might have faced significant civil liability.

SEXUAL HARASSMENT LAWS PROVIDE MODEL LEGISLATION

Defining what actually should constitute “illegal bullying” versus less destructive workplace differences and personality conflicts is a challenge. Current state tort laws, such as those that address intentional infliction of emotional distress, are generally available to protect employees against extreme conduct, but potential anti-bullying legislation would greatly expand the conduct for which an employer may be held liable. With no state having yet made the full anti-bullying legislation leap, what does this mean for employers in 2013? Perhaps the adage “an apple a day keeps the doctor away” is fitting. Another civil rights storm is brewing, and employers who are prepared with appropriate internal policies and procedures for handling workplace bullying will likely reap the rewards of their foresight.

Statutory regulation of sexual harassment in the workplace provides a model for what employers and employees might expect in anticipation of anti-bullying legislation. While the Civil Rights Act of 1964 provided the teeth to quell sexual



discrimination in the workplace, widespread acceptance of sexual harassment as its own cause of action did not happen until the 1980s. Claims that now keep human resources managers awake at night had no little viable support just 30 years ago. *Continued*

EMPLOYER RESPONSIBILITY

Amid the outrage over Incognito's alleged actions, it is the action/inaction of the Miami Dolphins in dealing with the alleged bullying that seems to have struck a chord with the public. While the Dolphins have suspended Incognito indefinitely as the organization investigates the accusations, the team has been forced to defend its actions. Ex-players say that Incognito operated in an environment where such tactics were either ignored by the Dolphins or, worse, condoned or even directed by team management to "toughen up" the young Martin.

Today, while employers may not be faced with specific causes of action targeting them and the alleged bully

employee, instances of adverse publicity surrounding a bullying work environment are increasing. Savvy employers have begun amending their own company procedures and employee handbooks to reflect a firm, anti-bullying policy. Providing a clear outline of what is expected as appropriate behavior and what will not be tolerated will not only provide employees with a greater sense of security in a more harmonious environment but also paint a positive picture of employers at the forefront of this movement that have wisely chosen to stay ahead of the accelerating avalanche of legislation.

Wilson Elser is prepared to review company policies and procedures and assist with their revision to help with ongoing compliance.

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