



# Protecting Against Workplace Bullying

## Why Employers Should Be Concerned and What They Can Do To Address It

BY RICK HEPP & CHRIS LALAK

**M**iami Dolphins offensive lineman Jonathan Martin was taunted, ridiculed and jeered in a two-year campaign of harassment by his teammates, according to an internal investigation commissioned by the National Football League. Obscene jokes followed anti-gay and racial epithets. On at least one occasion, he was physically attacked.

According to Martin, the bullying ended only when, on October 28, he walked out of practice and into a nearby hospital, requesting psychological treatment. His actions not only cast a spotlight on a deeply troubled locker room but also highlighted how difficult it is for employers in general to properly supervise employees who engage in such behavior toward their colleagues.

### Understanding the Problem

Workplace bullying has no set legal definition. It can range from subtle acts such as gossip, personal jokes, withholding critical work information and ostracism, to overt acts, such as insults, being told to quit one's job and violence.<sup>1</sup> It typically happens on a regular, e.g. weekly basis, and its severity escalates over a prolonged period of time.<sup>2</sup> And it can occur from supervisor to subordinate, from subordinate to supervisor, between colleagues and from customer to employee.<sup>3</sup>

Some studies estimate that as many as 35% of all employees in the United States have been the target of bullying in the workplace while at least half of all employees have witnessed such acts.<sup>4</sup> The U.S. Department of Labor provides support for such assertions. It says that nearly two million workers each year report being victims of workplace violence, which it defines as "any act or threat of physical

violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site."<sup>5</sup>

### Potential Employer Liability

There is a possibility that an employee seeking refuge from bullying may be able to find it under Title VII of the Civil Rights Act of 1964, which protects employees from a hostile work environment if it is based on the employee's race or color, national origin, gender, and religion.

For now, however, Ohio courts appear reticent to tie bullying to protected class status. Take for example the recent decision in *Gatsios v. Timken Co.*, in which the Fifth Appellate District held that a janitor failed to establish that a hostile work environment was based on his Greek ethnicity, despite a supervisor repeatedly linking his ethnicity with homosexual activity. This was, in part, because the supervisor "was verbally abusive to the other employees on his crew who were not Greek."<sup>6</sup>

Advocates of anti-workplace bullying legislation have seized on the NFL investigation, released in February, to renew their push for states to do more to protect workers. There has been an uphill battle for more than a decade. Twenty-six states have introduced such legislation since 2003; none have passed it into law.

Whether such legislation would act as a salve or a gloss is beside the point. Employers should be acting now for one very simple reason: the bottom line. The negative effects of workplace bullying cost U.S. employers billions of dollars each year due to higher rates of absenteeism and employee turnover as well as lower motivation and morale.<sup>7</sup>

### Best Practices to Address Workplace Bullying

So how do employers prevent and protect against workplace bullying? The best way to start is with a written policy. Some may want to implement a specific anti-bullying policy. This may be difficult given the undefined nature of bullying. Rather, employers should consider a strict harassment and workplace violence policy that includes examples of what is acceptable and what is unacceptable behavior.

Employers should also include in their harassment policy online conduct between employees to prevent cyber-bullying, an

increasing phenomenon where employees continue their harassing behavior through email, text messaging and social media. In the case of the Miami Dolphins players, investigators reviewed thousands of text messages sent between teammates, some of which included racist, sexually explicit, misogynistic or homophobic references directed at Martin.

Second, the employer should adopt regular training so that supervisors and employees know how to identify and respond to workplace bullying. Training is particularly important because some employees may not even realize they are bullies.<sup>8</sup> Indeed, aggressive communication styles, poor interpersonal skills and cultural misperceptions may be a root cause of why some people bully at work.<sup>9</sup> The NFL investigation cited a lack of training as one of the reasons for the bullying that occurred, noting that “it appears that the Dolphins’ rules of workplace behavior were not fully appreciated and, with respect to at least some of their actions, [the harassing] teammates may not have been clearly notified that they were crossing lines that would be enforced by the team with serious sanctions.”

Third, the employer should take each complaint seriously by fully investigating the claim. Failing to do so may expose the employer to liability for harassment, negligent hiring, intentional infliction of emotional distress or assault. The problem is that workplace bullies can be difficult

to identify. They are often socially astute, capable of influencing others, sincere in their interactions, and good at social networking.<sup>10</sup> Those skills help bullies identify easy targets; it also makes them less likely to be viewed as a bully by their supervisors.<sup>11</sup> Complaining employees and witnesses need to know that the company won’t tolerate retaliation for their cooperation.

Finally, the employer needs to enforce their policies. Research has shown that weak leadership often leads to increased bullying, not only by the bullies who have no fear of repercussions but also among other colleagues who more often side with perpetrators for fear of becoming the next target.<sup>12</sup> The investigation into the Dolphins found that two offensive line coaches knew of the bullying but never made an effort to stop it. According to the investigation, this permitted offensive lineman Richie Incognito to continue his harassment and, in fact, two other teammates followed his lead in bullying Martin. It also resulted in others, including another player and an assistant trainer, being tormented by them.

The key to preventing workplace bullying is to recognize and correct employee misconduct. This is best done by adopting and adhering to an anti-harassment and workplace violence policy. Like the problem of workplace bullying, employment law is ever changing and employers would be wise to address these issues and not wait for their legislators to act.

<sup>1</sup> Samnani, A.-K. & Singh, P. (2012). *20 Years of Workplace Bullying Research: A Review of the Antecedents and Consequences of Bullying in the Workplace*. *Aggression and Violent Behavior*, Vol. 17, 582.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Treadway, D. et al. (2013). *Political Skill and the Job Performance of Bullies*, *Journal of Managerial Psychology*, Vol. 28, No. 3, 273.

<sup>5</sup> <https://www.osha.gov/SLTC/workplaceviolence/>

<sup>6</sup> *Gatsios v. Timken Co.*, 5<sup>th</sup> Dist. Stark No. 2011CA00185, 2012-Ohio-2875, ¶¶ 42-34.

<sup>7</sup> Georgakopoulos, A., et al. (2011). *Workplace Bullying: A Complex Problem in Contemporary Organizations*. *Int’l Journal of Business and Social Science*, Vol. 2, No. 3., p. 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Treadway, D. et al., supra note 4, 275.

<sup>11</sup> Treadway, D. et al., supra note 4, 279.

<sup>12</sup> Samnani, A.-K. & Singh, P., supra note 1, 585.



Richard Hepp is an associate attorney with Benesch’s Labor & Employment Practice Group. He focuses his practice on employment litigation and counseling, administrative proceedings, and immigration matters. He has been a CMBA member since 2013. Rick can be reached at [rhepp@beneschlaw.com](mailto:rhepp@beneschlaw.com) or (216) 363-4657.



Chris Lalak is an associate attorney with Benesch’s Labor & Employment Practice Group. He focuses his practice on employment litigation and counseling, administrative proceedings, and immigration matters. He has been a CMBA member since 2013. Chris can be reached at [clalak@beneschlaw.com](mailto:clalak@beneschlaw.com) or (216) 363-4557.