Investigating Employee Complaints of Workplace Bullying

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Special to the Legal

Workplace bullying is once again receiving significant media attention after a Miami Dolphins offensive lineman, Jonathan Martin, lodged allegations of bullying and harassment by fellow lineman Richie Incognito and other unnamed teammates. While the National Football League investigates Martin’s claims, the Dolphins have suspended Incognito pending the outcome of the investigation. The NFL’s prompt response to Martin’s allegations serves as an important reminder that it is imperative that employers implement an effective mechanism to investigate and resolve workplace complaints.

Although workplace bullying is not actionable under current law, it is critical that employers investigate these claims, because an investigation may reveal that the workplace bullying was motivated by discriminatory animus. A majority of lawsuits that stem from workplace bullying are brought pursuant to Title VII of the Civil Rights Act and include allegations of race, gender, national origin or religious discrimination. An employer may be liable for employee bullying in a subsequent discrimination or harassment lawsuit if the plaintiff employee demonstrates a nexus between membership in a protected class (i.e., race) and the mistreatment. An employer’s prompt and effective response to internal complaints, such as when the complaint came to the employer’s attention, who was interviewed, what was disclosed, what remedial action was taken, and why it was taken. The investigation notes should be taken contemporaneously with, or soon after, each witness interview to ensure accuracy.

Documentation is important because the employer may be required to demonstrate when and how it investigated the employee’s complaint in subsequent litigation. It is also advisable for the investigator to have a witness present during all of the interviews related to the investigation to serve as a corroborating witness if the employee being interviewed later tries to challenge the content of the interview.

CONDUCTING THE INVESTIGATION

The timing of an investigation is critical because in subsequent litigation a delay in investigating the internal complaint can connote indifference on the part of the employer. Once an employee has made a complaint of workplace bullying, the person designated to investigate such claims (i.e., human resources or an outside investigation firm) should promptly obtain a written statement of the facts underlying the complaint. The statement of the complaining employee should include the following: (1) the date and time of the incident; (2) the location of the incident; (3) the company employees involved; (4) any witnesses to the incident; (5) the precise nature of the complaint; and (6) any additional facts that are relevant to the complaint. The complaining employee should sign and date the statement. If the statement is not in the employee’s handwriting, the employer should have the employee sign an acknowledgement that the employee has read the statement and that the statement is complete and accurate.

After taking the written statement, the investigator should promptly interview the complaining employee and obtain a complete narrative of the allegations. The investigator should be careful to distinguish between what the employee has personally witnessed or experienced and what the employee has heard from others (i.e., office gossip). In addition to exploring the details of the actual complaint of harassment, the investigator should explore the employee’s response to the harassment and ask how the harassment has affected the employee (i.e., job performance). The investigator also should obtain the identity of any witnesses to the harassment and any individuals with relevant information. The investigator should ask the employee if he or she is aware of any other incidents of harassment by the alleged harasser and whether the employee knows of any other complaints against the alleged harasser. Further, the investigator should request that the employee provide any notes, physical evidence or other documentation regarding the harassment.
Finally, the investigator should ask the employee how he or she would like to see the situation resolved and instruct the employee to report any subsequent instances of harassment. In certain circumstances, the complaining employee will not want any adverse action taken against the alleged harasser. In the latter situation, the employer should conduct a thorough investigation and issue discipline as appropriate, despite the complaining employee’s request. Similarly, if the complaining employee requests that the employer keep the complaint confidential, the employer should explain that the employer cannot forgo an investigation and cannot keep the complaint confidential as it pertains to the investigation.

It is also important to ascertain whether the complaining employee is comfortable continuing to work in his or her position during the investigation. As a precaution, the employer should ensure that the alleged harasser does not have further access to the complaining employee during the investigation. For example, if the alleged harasser is a supervisor, the employer could place the alleged harasser on a leave of absence until the company has time to conduct and finalize its investigation. Alternatively, the company could have the complaining employee report to another supervisor pending the outcome of the company’s investigation.

Next, the investigator should interview the alleged harasser. At the outset of the interview, the investigator should explain the nature of the complaint against the alleged harasser. The investigator also should instruct that retaliation against the complaining employee will result in disciplinary action regardless of the outcome of the harassment complaint. During the interview with the alleged harasser, the investigator should obtain the alleged harasser’s response to the complaint. If the alleged harasser denies the allegations, the investigator should ask if the complaining employee has any reason to lie (i.e., personality conflicts). The investigator should ask the alleged harasser if any other individuals have information that would be relevant to the investigation and should request any relevant documents or evidence that he or she may have in his or her possession.

Finally, it is critical for the employer to interview witnesses to the alleged harassment in order to conduct a thorough investigation. At the beginning of the interview, the investigator should provide the witness with a brief introduction that includes the reason for the interview, as well as a disclosure that the employee will not be retaliated against for providing truthful information. During the interview, the investigator should ascertain what, if anything, the employee personally witnessed with regards to the alleged harassment. This should include a detailed description of the alleged harasser’s behavior toward the complaining employee and toward others in the workplace. The interviewer should ask about any communications that the employee has had with the complaining employee or alleged harasser regarding the incident. The investigator also should explore any other conduct that the employee witnessed in the past that may be relevant to the harassment complaint. Last, the investigator should ask the employee for any relevant documents and the identity of any other individuals with knowledge.

At the conclusion of the witness interviews, the employer must make a determination as to whether actionable harassment has occurred.

POST-INVESTIGATION: DETERMINING THE RESPONSE

At the conclusion of the witness interviews, the employer must make a determination as to whether actionable harassment has occurred. It is important that any action taken against the alleged harasser occur only after a thorough investigation. The appropriate employer response depends on whether the allegations are corroborated, disproven or if the employer is unable to reach a definitive conclusion regarding whether the allegations have merit. Further, an employer should be mindful that a bully is not always a harasser, unless the conduct is directed at the target because of his or her membership in a protected group (i.e., race, age or national origin)—not simply incivility or nastiness. Thus, even if meanspiritedness or bullying renders a workplace environment abusive, there is no violation of the law unless that meanspiritedness or bullying is rooted in a protected characteristic.

If the investigation establishes that the employee’s allegations have merit and the employee was subject to bullying because of the employee’s membership in a protected class, the employer must determine the most appropriate level of discipline. In making this determination, it is important to consider how similar misconduct was handled in the past to avoid claims of discrimination based on differential discipline. For example, if an African-American employee was found to have harassed a co-worker by making inappropriate jokes and the discipline imposed is suspension, the employer is risking a discrimination claim if a white employee engaged in nearly identical conduct but was only given a verbal warning. Two similar cases of misconduct may be treated differently, however, if the employer is prepared to present a legitimate reason for the differential treatment. For instance, one employee may have had prior discipline for a similar problem whereas the other employee had no such disciplinary history.

If the allegations are disproven by the investigation, the employer should communicate the results of the investigation to the complaining employee, but should not penalize the employee for the complaint. Penalizing an employee for a complaint of harassment could subject the employer to a subsequent retaliation claim. It is important that any action taken regarding the complaining employee not be perceived in a way that undermines the employer’s policies or discourages the future reporting of misconduct.

Finally, in some circumstances, the investigation may be inconclusive—for example, if there are no corroborating witnesses to the harassment. If this occurs, it is completely acceptable to inform the parties that a thorough investigation was conducted and was inconclusive. The employer should inform the complaining employee to immediately report any further instances of harassment, discrimination or retaliation. Moreover, the employer should consider the following actions: (1) ongoing monitoring; (2) a change in the reporting relationship if the alleged harasser was a supervisor; and (3) workplace training on the issue implicated by the investigation.

In sum, it is crucial for an employer to conduct a thorough investigation of an internal complaint of workplace bullying, particularly given that an employer’s prompt remedial response is a potential defense to liability in a subsequent harassment, discrimination or retaliation lawsuit.