

Sports Litigation Alert

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But It Is Our Locker Room

What Is Acceptable Behavior in the Sports Workplace?

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The first week in November was a particularly interesting period in the National Football League, especially as it applies to what is acceptable behavior between football teammates and in a professional locker room.

Richie Incognito, an eight-year veteran offensive lineman for the Miami Dolphins, was accused of harassing and/or bullying teammate Jonathan Martin, a second-year offensive tackle from Stanford who, by the way, played right next to Incognito on the offensive line. According to voicemails and text messages released to the media, Incognito levied extensive verbal abuse on Martin. The harassment apparently continued over a period of at least a few months. Martin responded to the vitriol by, at first, skipping off-season workouts, and then, in early November, abruptly leaving the Dolphins. In short, he preferred to leave his team in the middle of the NFL season than continue to put up with Incognito's treatment.

The Dolphins have indefinitely suspended Incognito. The NFL has hired outside counsel and is investigating the matter.

As a result of the alleged actions by Incognito and Martin's reaction to these behaviors, a firestorm has engulfed the football world and garnered the attention of commentators as well as current and former football players. (The controversy has also spread to others in the sports world; shortly after the Incognito story broke, the NBA issued guidelines on hazing.) Some have called for the League to expel Incognito or levy a lifetime ban. Some have said Martin wasn't tough enough and should have handled the situation "man-to-man." Others have defended Incognito's actions as a rite

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of passage that Martin, like many rookie players, had to endure. It's argued that such "trials by fire" build teamwork and serve an essential part of the testosterone-driven culture of the NFL.

However, that argument falls short when you consider the racially-charged and threatening nature of Incognito's messages. That part of the incident significantly contributes to what takes this incident well across the line of acceptable hazing, indoctrination or team building.

One issue that remains to be settled is whether Incognito — who was, unexplainably, a member of the Dolphins' leadership council — was directed by Dolphin coaches to "toughen up" Martin. We also don't know yet whether the coaches or management were aware of the methods Incognito was employing to accomplish this task. Furthermore, Martin, through a statement issued by his attorney, has alleged that Incognito did not act alone, and that other teammates may have also engaged in hazing and possible physical abuse. On the flip side, it has been alleged that Martin was at times a willing participant in the hazing ritual, and that his treatment was not bullying or unwanted hazing but part of the Dolphins' locker room culture.

In the locker room, anything goes

Locker rooms, especially male locker rooms (I have never been in a female one) are very rough places. There are cliques formed by position, age, college, religion and race. Certain players have an elevated status based on longevity, accomplishment, money, position or personality. Things that athletes say and do to each other can be profane, mean, harsh, cryptic and personal. The language, tone and subject matter that can routinely be heard in the locker room and among players would be unacceptable in any other workplace.

When one enters a locker room, he often does so at his own peril. When I worked for the Philadelphia Eagles as assistant to the President-General Counsel, I made use of the players' workout facility. This required me to walk through the locker room, a short stroll that subjected me to the unrelenting barbs from the late-great defensive tackle Jerome Brown.

Brown was one of those players with an elevated status — he was loud, funny, a great player and an important member of the Eagles most dominant unit, its defensive line. When Brown would see me coming through the locker room, he unleashed a blistering verbal barrage, attacking me for my apparent nerve in coming down from the front office to enter their domain. He referred to the job I held as, “the man’s penny pincher.” Considering that my job or my ability to be successful in that job did not require Brown’s approval and that we did not have a dependent relationship, his barbs had little effect on me. However, I still remember it some 20 years later. The sharpness of his verbal attacks drew great laughter from his teammates. If my relationship to Brown and those teammates would have been different, his comments would have been tough to tolerate.

I accepted Brown’s behavior at that time because I understood that I was in his locker room sanctuary, and that the accepted culture of that environment was far different from any office situation I had worked in. In that long-established testosterone culture, language and political correctness take a backseat. The question we now face is whether that long-time tradition relieves a sports organization and its players from standard workplace rules. If it doesn’t, what are the consequences of tolerating a potentially “hostile” environment?

What’s OK in a sports workplace?

Workplace harassment has been defined as offensive, belittling or threatening behavior directed at an individual worker or a group of workers. A hostile environment usually requires a pattern of offensive conduct. Clearly the admitted behavior of Incognito could be categorized as such. But the football world defends this type of behavior as normal and unique to its culture. It’s this mindset that will get sports leagues and organizations into more hot water. These sports entities are not so different and unique that the rules of society and the legal obligation of providing a safe and healthy work environment do not apply to them.

Bullying and hazing have been commonplace in sports locker rooms for decades. From the first real glimpse into the inner working of pro sports with the books “Paper Lion” or “Ball Four” to the glamorized look of HBO’s “Hard Knocks,” we have seen the sometimes juvenile and perhaps cruel actions of our athletes. Whether it is taping a rookie defensive end to a goal post or dumping a hot-shot running back into a cold tub, the dominance of one group or person over another is unmistakable.

Some who are deeply invested in this culture may continue to argue that this type of indoctrination is useful. But Martin’s response to his harassment is telling. Rather than confronting his alleged tormenters, he extricated himself from the environment entirely, a choice that has subjected

him to professional criticism, public attention and the possible end of his NFL career.

Next steps

If Martin’s career is over or substantially damaged, does he have any remedy? Could he sue Incognito for intentional infliction of emotional distress? Or does he have a claim against the Dolphins for the same? Did the Dolphins have some duty to make the workplace environment safe? Given Incognito’s history of inappropriate behavior, is the team subject to some liability for not monitoring locker room antics or for placing Incognito in a leadership role and failing to monitor him?

Authors Brian Crow and Scott Rosner looked at this question in an interesting article on organizational liability that was written a decade ago for the St. John’s Law Review.¹ For the article, they reviewed several cases of hazing in university and professional sports where “the injured employee alleges that the employer did not exercise due care to prevent the intentional acts of the co-employees.”

Crow and Rosner cited Stephen J. Beaver’s work on workplace violence² when he noted that in those cases “of managerial negligence: the plaintiffs allege that the employer should have screened applicants more scrupulously.” This charge of negligent hiring could perhaps be made against the Dolphins if Incognito’s “dangerous propensities, unfitness or incompetence were known or should have been” to the Dolphins. (It is noted that Incognito’s college and professional athletic career was checkered with problems, suspensions, fines, and off-field allegations that demonstrate a pattern of troubling behavior and was known to many NFL teams.)

As a result of this spotlight, sports organizations are going to quickly realize that they do not operate under a different set of rules, and the sooner they come to this realization, the better. As Boston Globe columnist Christopher Gasper wrote on Nov. 11 when discussing the Incognito bullying allegations, “The insular and Darwinian culture of the NFL locker room is not yet ready to join the rest of society in open acknowledgment of the seriousness of bullying” and that culture seems “more interested in protecting locker room sanctity.” Instead, Gasper writes, the NFL “should

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be concerned about is its players creating an environment that is openly hostile to the next player reporting bullying or harsh hazing.” Teams “must evolve past the idea that hazing, intimidating, or belittling teammates is a necessary part of NFL team-building.”

A more productive strategy would be for teams and the leagues to change the culture of their locker rooms and to stress to their workforce that the behaviors of the past will no longer be acceptable or tolerated. Ben James of Law 360, after talking to several employment lawyers, suggested several steps sports organizations could take to change their toxic workplace cultures, including creating a written policy, articulating the importance of appropriate and safe workplaces, and putting in place formal procedures to handle complaints.

If the Dolphins had taken these steps, they might not have found themselves in this position. They could have created a culture where Incognito’s boorish ways were not greeted with appreciative laughter or a blind eye. They could have built an organizational institution where teammates and staff members were educated and aware about what is appropriate workplace behavior. They could have created a team where players felt empowered to stand up to so-called bullies.

NFL Commissioner Roger Goodell believes strongly in protecting the NFL shield; the Incognito incident has sullied it quite a bit. As CBS commentator and ex-Steeler head coach Bill Cowher said on “NFL Today,” “maybe it’s time

that we bring a third party into every building, an HR department, where any player or coach can go to if they feel like the situation is one that they cannot work in.” What Cowher did not add, but is critical if such a procedure is to work, is that any HR personnel must have the autonomy and authority to take appropriate action without spurring retaliation by coaches or players against the complaining person. Without such protection, and as the Martin complaint illustrates, such harassing behavior will be kept behind closed doors and sports organizations will continue to be confronted by embarrassing incidents.

Note: This article did not address in great detail the complicating racial component of this workplace incident, which adds to its explosiveness but is not necessary to evaluate an appropriate workplace environment. It also does not address the effect that bullying and inappropriate behaviors could have on those who witness bullying or harassment but are not its direct target. That analysis is discussed in numerous pieces on hostile work place environments.

Endnotes

- 1 Crow, R. Brian and Rosner, Scott R. (2002) “Institutional Organizational Liability for Hazing in Intercollegiate and Professional Team Sports,” *St. John’s Law Review*: Vol. 76: Iss 1, Article 3.
- 2 Stephen J. Beaver, Comment, *Beyond the Exclusivity Rule: Employer’s Liability for Workplace Violence*, 81 MARQ. L. REV. 103, 108 (1997)

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