

Hazing and bullying in the NFL

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ABSTRACT

Employee interpersonal relationships vary across work environments. Acceptable actions in one organization might not follow the social norms in an alternative organization. This case will focus on the work environment in the National Football League (NFL) by exploring accusations of employee bullying and abuse from the Miami Dolphins locker room in 2013. The case explores the theoretical foundation of employer, employee, and customer discrimination within the practical application of the associated legal responsibilities of the major case stakeholders. The case is designed for use upper-division undergraduate courses in employment law, labor economics, or human resource management

Keywords: Bullying, Employee Discrimination, Employment Law, Hazing, National Football League

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INTRODUCTION

Jeff Ireland looks out at the empty practice field and reflects on his history of being involved with the culture of football. Now in his fifth year as general manager of the Miami Dolphins, he began his football initiation as a childhood ball boy with the Chicago Bears. After a successful high school career in the football hotbed of Texas, Jeff moved on to play college ball at Baylor University. Before joining the Dolphins, his professional experience included successful scouting appointments with the Kansas City Chiefs and Dallas Cowboys. The departure of a starting offensive lineman in the NFL for emotional issues based on an accusation of hazing and bullying by other veteran lineman is not a situation Ireland can recall at any level of football. After a day of sports talk tales of out-of-control hazing in the Dolphins locker room, the players union released a statement clarifying an expectation that players, coaches, club owners, and executives should follow standards for appropriate professionalism and safety in the workplace. Jeff hopes to move the team focus back on the field and away from the locker room drama once and he concludes meetings with several players.

The case is designed to apply critical thinking and ethical issues in employment law, labor economics, or human resource management courses. The discussion of the case begins with a brief narrative about the National Football League. The second section explores the theoretical background of hazing and bullying in the workplace. The third section puts forth key issues from the perspective of various case stakeholders. The fourth section provides a theoretical background for the sources of discrimination. The next two sections offer case questions for class discussion followed by a brief analysis of the case questions. The final section puts forth a case epilogue.

THE NFL: POPULARITY AND CHALLENGE

One billion in sponsorship revenue, one billion for satellite broadcast via DirecTV, and approximately five billion in broadcast television rights. Add in ticket revenue and the National Football League (NFL) generates over \$10 billion a year in revenue. In fact, Commissioner Goodell has publicly stated that he expects revenue to reach \$25 billion by the year 2027 (Ejiochi, 2014). Several factors influence the popularity of the league. First, football is the most popular team combat sport in the United States. Despite the physical nature of football, it is easy to modify the rules of contact in a range of simple touch to full tackle. Hence, many children play the sport at a young age and continue through adulthood. Second, high definition television has made the NFL experience very accessible on the small screen. In fact, camera angles and replay might make the television experience superior to the stadium experience. Third, fantasy football and gambling are extremely popular indirect facilitators of the sport. Gambling and the point spread have always been an important part of the professional football world but the rise of fantasy sports activity and gaming continues to grow in popularity. Some fans follow players on their fantasy team closer than the traditional local team. Fourth, the brief regular season schedule of 16 games versus 162 in baseball or 82 in basketball helps focus fan interest and makes every game a relatively significant entertainment event.

Although football has never been more popular, the sport faces future environmental challenges. First, the potential of head trauma, or chronic traumatic encephalopathy (CTE), continues to rise as an issue. The high-profile suicide case of a Hall of Fame player, Junior Seau,

combined with a \$765 million NFL settlement with former players has kept the potential danger of playing football in the headlines (Wilson, 2013). On the one hand, football fans recognize the combat nature of the sport and continue to watch in record numbers. On the other hand, there continues to be an increasing number of parents with reservations about allowing children to play the game with full contact. Second, violence and arrest off the field have become an offseason challenge. The combination of murder (e.g., Aaron Hernandez), animal abuse (e.g., Michael Vick), and domestic assault (e.g., Ray Rice and Greg Hardy) decreases the connection between the general public and players. Third, the use of performance-enhancing drugs and human growth hormone are not encouraged but not aggressively discouraged in football. Players caught violating the substance policy are suspended but the general attitude of the fans is somewhat apathetic compared to other sports such as baseball, boxing, or cycling. If fans do not care about the use of banned substances, football players are at risk of simply being a collection of helmets and jerseys that entertain.

BACKGROUND: HAZING AND BULLYING IN THE WORKPLACE

Incidents of workplace aggression have been documented for a long time, dating back well before the game of professional football. Bullying, the most severe form of workplace aggression, is generally defined as intentional/deliberate, causes harm (emotional and/or physical), is repeated over time and can include social exclusion and behaviors that negatively affect the victim's work tasks (Ritzman, 2016). It is not surprising that a common characteristic of bully-prone industries is one where employees tend to be high achievers and perfectionists that cannot tolerate mistakes made by others (Wilkie, 2016). Researchers have examined the behavior of bullies as well as the responses of their victims. The perpetrators of workplace bullying are often in a position of power over the victim, whether it be in a supervisory role or simply higher in the hierarchical structure (Northouse, 2016). When asking observers about reported bullying behavior, their different perceptions of the event make investigations difficult to conduct.

When assessing a level of significance to the types of workplace aggression, physical assaults are perceived as very serious while verbal assaults have a much wider interpretation in terms of their intent and level of harm. Reactions to bullying by the victim range from forgiveness to revenge (Howard and Wech, 2016). It is fairly common for the victim to leave the organization as the most permanent solution for terminating their relationship with a toxic work environment. Employer responses to bullying include doing nothing (the lowest level of response), discussing the behaviors with both parties, sanctioning or transferring (viewed as one way of adjusting the workplace dynamics) the aggressor, or at the highest level - termination of the perpetrator (protecting the victim).

Bullies are often unaware that they are perceived as bullies (Wilkie, 2016). In their mind, they are helping to motivate peers or simply treating the victim or recipient of their special attention as one of the group. It is not unusual for the bully to see their behavior as necessary to create an atmosphere where everyone gets hazed as a rite of passage into the group or team. From their perspective, it helps to create the sense of commitment to the common cause and a feeling of loyalty to the group/team. Sports locker rooms are especially vulnerable to this type of atmosphere with behaviors that would not be tolerated in other work environments. Fans expect their football teams, like gladiators, to be mentally tough, physically strong, and ultimately

winners. While bullying cannot be openly condoned, it does not seem to elicit the same strong negative reaction from fans of professional sports that one would expect if the situation were being reported about their child on a pee wee football team. What has been reported in the media about behaviors in professional football locker rooms would be perceived as highly unacceptable in other environments, where teamwork is essential, such as an operating room or fire station.

Currently, there are no federal or state laws that specifically prohibit bullying in the workplace; including a workplace of professional football teams, the locker room. Although no legislation expressly targets workplace bullying, franchises and players may still be legally liable for the hazing and bullying of players and other members of the franchise. One source of liability for a franchise is Title VII of the Civil Rights Act of 1964. According to guidance adopted by the Equal Employment Opportunity Commission (EEOC), Title VII prohibits the harassment of employees when the harassment relates to the employee's race, color, religion, sex, or national origin, and where 1) enduring the harassment becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a hostile work environment. Examples of behavior that may create a hostile work environment are offensive jokes, slurs, name-calling, physical assaults or threats, intimidation, ridicule or mockery, insults and put-downs; all of which can be considered bullying as well as harassment. To be unlawful under these anti-discrimination statutes, the bully's conduct must be more than just minor insults, aggravations, or annoyances; the conduct must create a work environment that is intimidating, hostile or offensive to reasonable people (U.S. Equal Employment Opportunity Commission, 2016). In addition to Title VII, states have their own version of anti-discrimination laws that prohibit harassment of protected employees. Under anti-discrimination laws, the employer's liability for an employee's harassment of another employee depends on whether the employer knew, or should have known about the harassment and failed to take corrective action.

Even if workplace bullying is not unlawful under anti-discrimination laws because the bullying is directed at an employee who is not protected against discrimination, the bullied employee may file a civil lawsuit for the tort of intentional infliction of emotional distress or negligent supervision. Generally, the tort of intentional infliction of emotional distress involves some kind of behavior that is so awful that it causes emotional trauma. Courts have held that workplace bullying can be considered a form of intentional infliction of emotional distress, depending on the circumstances. "To prove a case of intentional infliction of emotional distress, the affected employee must prove that 1) the bully acted intentionally or recklessly; 2) the bully's conduct was extreme and outrageous; 3) the bully's conduct must be the cause 4) of severe emotional distress, and if the employee is suing the employer, 5) the employer was responsible for the bully's conduct" (Restatement of Torts Section 46, 1965). An employer may be held to be responsible for a bully's conduct if the bully was acting within the course and scope of his or her employment, the employer failed to address complaints filed by the injured employee about the bully's conduct, or the bully held an important position in the workplace so that the bully's actions may be vicariously attributable to the employer. An emotionally injured employee may also claim that his or her employer is liable for the employee's trauma arising from the bullying because the employer failed to use reasonable care in controlling or monitoring the bully. This theory of liability arises under the tort of negligent supervision.

THE MIAMI DOLPHINS, RICHIE INCOGNITO, AND JONATHAN MARTIN

Since joining the Miami Dolphins as General Manager at the end of the 2007 season, Jeff Ireland had orchestrated an impressive turnaround. The once floundering Miami Dolphins had a combined 25 -24 record in Ireland's first three years with the team and had captured the AFC East title. Owner Steve Ross was pleased with Ireland's progress and looked forward to more as Ireland signed a multi-year contract extension in 2011 (NFL Wire Reports, 2011). The focus moving forward after the Ireland extension was upgrading the coaching staff. The first step in the effort to upgrade the coaching staff was hiring a new Head Coach: Joe Philbin. A former offensive coordinator with the Packers, Philbin joined the Miami Dolphins as Head Coach in 2012. He brought 28 years of coaching experience to the job. His expertise with offense seemed a good fit for the Dolphins; a strong offense was what Miami needed (NFL Wire Reports, 2012). In his early days on the job Coach Philbin promised reporters, "You're going to see a team that's tough physically and mentally and a team that plays the game the right way" (Kent, 2012).

Head Coach Philbin brought in a fresh new coaching staff for the offensive line, including Offensive Line Coach Jim Turner. Jim Turner joined the Miami Dolphins coaching staff at the recommendation and urging of Miami Offensive Coordinator Mike Sherman, who Turner had coached Offensive line for at Texas A&M University. Turner had previously worked with Head Coach Philbin too, at Northeastern University. Though best known for his experience coaching offensive line, Turner's career background had patches of diversity. He had also coached defensive line, worked as a player/coach for pro team Kent Rams in London, England, and he served four years in United States Marine Corp as a lieutenant in the infantry. "As far as being a football coach and preparing to be a football coach, I do not think there is any greater experience that I have had in my life than my four years in the Marine Corps," Turner said in an interview for the Miami Dolphins website (Kent, 2012). Turner's experience in the military impacted his coaching philosophy: "I know from my time in the Marine Corps as a lieutenant and my time as a coach, the more time you spend being wordy with things like [philosophy] the more difficult they become. So I just try and keep it simple and really it is ... In football you play hard, you play physical and you play smart and it is that simple" (Kent, 2012).

The Dolphins already had some building blocks for a great offensive line, starters brought to the team by Jeff Ireland. One of those building blocks, a lineman picked up through free agency in 2010, lived to play hard, aggressive, physical football - Richie Incognito. Unfortunately for his past teammates and his own career, Incognito did not always play a clean game. At his last NFL team Incognito had earned the title Dirtiest Player in the NFL (Darlington, 2012). Incognito had always played a hard game, even as a child. That was the game he knew. Incognito's father, a blue-collar worker and Vietnam veteran, had raised his son to be tough. "You don't take no s--- from anyone. If you ever let anyone give you s--- now, you're going to take s--- your entire life," Richie Senior once told his son (Darlington, 2012). Incognito took that lesson to heart and carried it onto the football field. In college, Incognito's attitude made him a liability for the team. His college football career at the University of Nebraska ended in suspension, a result of numerous fights he had with teammates, opponents, and random students (Darlington, 2012).

The start of his pro career brought Incognito more evidence that though he played well, he was not playing right. An offensive lineman taking an aggressive play too far picks up penalties, and that hurts the team. Incognito committed 38 penalties and drew more flags for

unnecessary roughness than any other player in the league during the 2006-2009 years with the Rams (Biggane, 2012). In one 2009 game, Incognito committed 2 personal fouls and the NFL imposed a \$50,000 fine. The Rams responded by cutting Incognito from the team (Darlington, 2012). That seemed to be the end of Incognito's NFL career. The Buffalo Bills did pick him up on the waiver wire but dropped him when the season ended. Incognito took a hard look in the mirror and admitted that he did not like what he found. Incognito decided it was time to change. He began attending regular therapy sessions and started a prescribed regime of the anti-depressant Paxil (Darlington, 2012).

Then the news came: Incognito would get another chance in the NFL. In 2010, the Miami Dolphins threw him a career changing opportunity – a starter position on the offensive line. Once in the Miami locker room he took action, finding fellow Dolphin Ricky Williams, a man recognized as a spiritual seeker, and asking for advice on meditation and relaxation techniques. The reformed Incognito embraced the philosophy of the Miami Dolphins coaching staff. Miami made it very clear, “We want you to be you. We want you to get out there and get after people. That is why we brought you in,” Incognito reported (Darlington, 2012). At the same time, Incognito knew that the very traits that made him an asset on the field would make him a liability if he picked up penalties that hurt the team.

Incognito was voted into the 2012 Pro Bowl by his peers. Local media also awarded him the Good Guy award along with Reggie Bush in recognition for being the Dolphin's most cooperative player. Incognito marked his successful transformation with a new tattoo. The phoenix tattoo, a black ink piece covering much of the outside portion of Incognito's lower left arm, symbolizes what he sees as his personal rebirth, recreated from his own ashes and rising up newer and stronger (Darlington, 2012).

Coming off a great 2012, Incognito could not wait for the start of the Dolphin's 2013 season. The rest of the team looked to the future too, and General Manager Jeff Ireland gave them more reason to think the future would be bright. In the second round of the NFL draft, the Miami Dolphins picked up offensive lineman Johnathan Martin, a standout left tackle from Stanford University (Kaufman, 2013).

Johnathan Martin, nicknamed Moose at Stanford for his formidable size, did not fit the mold of the typical professional football player. He had studied ancient Greek and Roman classics at Stanford. Had he accepted an offer to attend Harvard, Jonathan Martin would have followed in the footsteps of three previous generations of his family at the Ivy League school. But Martin did not want Harvard; he wanted to play at Stanford, where he believed he would have a better chance at making it into the NFL (Kaufman, 2013).

The idea of using college to build a career for football was new in Martin's family, and someone with Martin's background was something new in football. Martin was caught between two worlds. For him, that was nothing new. Since elementary school, Martin had felt like he stood out and did not belong. His interests isolated him from other black kids and his skin color barred acceptance with the white kids. “I was trapped in my own head often, and I would later learn that I have a major depressive disorder ... and I get anxiety along with that,” Martin explained (Tsuji, 2016). He struggled to express himself too, stuttering in his college classes. It took focus and hard work for him to learn to control his speech and express himself (Tsuji, 2016).

To deal with his emotions and to forge an identity, Martin decided to put his size to good use. He struck on a pursuit of coolness through football as the answer. At Stanford he found his

stride as a player, becoming one of the top offensive tackles in the nation his junior year. He enjoyed playing at Stanford, working in a team environment that emphasized respect on and off the field (Tsuji, 2016).

Martin seemed to enjoy his early days with the Miami Dolphins too. He reported being excited about joining the team. Though quiet in the beginning, he began to reach out to his teammates. Veteran players, Incognito among them, actively mentored Martin (Wells, 2014). The mentoring was partially the idea of the management and coaching staff – General Manager Jeff Ireland personally told Incognito to take responsibility for making Martin physically tougher and stronger – but some of the impetus came from Incognito alone. Incognito noticed during training camp how quiet and reserved Martin could be and took it upon himself to bring the rookie into the close-knit offensive line unit (Wells, 2014).

Another part of Martin's initiation to the team, a part of every rookie's initiation, was hazing at training camp. To Martin, none of the initiation rituals seemed inappropriate or abusive. They were mild – sing in a talent show in front of the team, sport a clownish haircut, pay for a meal for the other lineman. It seemed like a normal rite of passage to Martin (Wells, 2014). He did not care for the nickname he was given at camp (i.e., Big Weirdo) because he thought it meant the team saw him as an outcast, misunderstanding and ostracizing him because of his intelligence, but he didn't tell his teammates to stop using it (Wells, 2014).

Moving into preseason, Martin had more to think about than just training camp hazing. His position and job on the field were changing. Martin had played left tackle in college, but standout offensive lineman and Pro Bowl player Jake Long held the starter's place for that position on the Miami team. Martin was assigned to right tackle (Kaufman, 2013). In his first two preseason games Martin committed two false starts, a holding penalty, and gave up two sacks (Biggane, 2012). Offensive Line Coach Turner expressed confidence in Martin, insisting that he was the right guy for the position and just needed time to get comfortable. Head Coach Joe Philbin agreed.

At the start of the season, while Martin continued struggling to adjust as right tackle, the tone of the hazing from the veteran players changed. Lineman John Jerry began calling Martin a "b----" and daring Martin to say something back. The insults and name-calling quickly escalated, with Incognito and offensive lineman Mike Pouncey joining in the name-calling, taunts, and slurs (Wells, 2014). Then the offensive linemen learned that Martin had a sister. The players stopped insulting Martin directly and made slurs about his sister instead, graphic sexual remarks that deeply offended Martin. Now Martin did snap back, but his verbal jabs only seemed to encourage the other players (Wells, 2014).

The graphic remarks quickly spread through the locker room and the team cafeteria. Martin assumed someone would put a stop to it since the remarks were so vulgar that anyone hearing them would know immediately that they were inappropriate. Martin was certain that Coach Turner knew what was happening, but the coach did nothing about it (Wells, 2014).

Incognito did not see a problem with what he and the other players were doing. His intent was to irritate Martin, and since what he did worked, he continued. Incognito insulted Martin's sister daily for over two weeks (Wells, 2014). To Incognito, vulgar language like he was using was normal for a lineman. It helped the offensive line bond. The linemen were like brothers, and it was a sign of their closeness that they could go for the jugular through jeers and taunts (Wells, 2014). And Martin used vulgarities too, though his choice of phrases seemed limited. Incognito

assumed Martin did not know how to trash talk creatively because of his sheltered background, but there was every chance the rookie would learn in time (Wells, 2014).

As he continued to deal with the hazing from the offensive line off the field, Martin was hit with another position change. Left tackle Jack Long went out with an injury, so after 12 games as right tackle Martin was moved to left tackle. His new position put him next to Incognito on the field. In the final game of the season against the New England Patriots, Martin gave up two sacks. According to Incognito, Martin was still beating himself up for errors days later (Wells, 2014). He went home to California after the game and kept to himself for the next week.

For most of the team, the end of the season was an event to mark with distinction. The offensive linemen planned a Las Vegas celebration trip in early January 2013. It was assumed that Martin would attend with the rest, and publicly he gave the impression that was true. Privately, he struggled with the decision. Martin couldn't bear the idea of partying with people he felt mistreated him all season. He also feared there would be fresh humiliation so Martin decided not to attend. Incognito did not know why Martin changed his mind about Vegas and did not ask. He assumed it was a personal issue (Wells, 2014).

Martin did not see his teammates for a while. He returned to Stanford and focused on strength training in the offseason. After a productive ten weeks he felt better and stronger, and posted on Twitter that he was excited to get back to football. Incognito saw the tweet and responded. He called Martin and left a voicemail, full of vulgarities and employing the n-word (Wells, 2014). "F--- you, you're still a rookie," Incognito laughed in the message then concluded, "I'll kill you" (Wells, 2014). The voicemail rattled Martin. Incognito had never called him the n-word before. Martin worried that the bullying was escalating yet again, and wondered if Incognito's rookie remark meant he should expect the abuse of his rookie year to continue. He returned to Florida in April 2013 upset and depressed. Martin texted his mother from Florida: "I figured out a major source of my anxiety. I'm a push over, a people pleaser. I avoid confrontation whenever I can, I always want everyone to like me. I let people talk about me, say anything to my face and I just take it, laugh it off, even when I know they are intentionally trying to disrespect me ... Everywhere I go, I get punked. I have a disagreeable personality, people are always annoyed by me. And I don't know how to stop it. I don't. High school still and will forever haunt me ... I really am getting increasingly tempted to just get in my car and leave Miami, live by myself for months or a year or two off the grid. But something holds me back every time, because part of me still loves football. But I am losing touch with that part of me more and more every day" (Wells, 2014).

Martin's mother did her best to comfort her son by text. She also located a psychiatrist near the Dolphins training facility for Martin to talk to. The psychiatrist met with Martin but quickly concluded the fit was not good and declined to take on the new prospective patient (Wells, 2014).

At the same time, Martin was wondering again what position the Dolphins wanted him to play. The coaching staff told him originally that they were thinking about bringing in someone else to play left tackle. They finally informed Martin in May that he would stay at left tackle and be a starter (Wells, 2014). Martin seemed happy, but Incognito thought he seemed upset when the coaching staff shared a collection of film clips from the previous season that showed sacks given up by the offensive line. Martin admitted he felt uncomfortable watching the tape and stated he would learn from his mistakes. The rest of the linemen were not ready to let go of the

errors so easily. On a yacht trip later that day Incognito and another player, Pouncey, brought up Martin's errors and told him he needed to improve as a player. The comments were made in front of other guests on the yacht, including a woman who asked Martin why his teammates were giving him such a hard time (Wells, 2014). After the yacht trip Martin texted his mother: "I'm never gonna change. I got punked again today. Like a little b----. And I never do anything about it. I was sobbing in a rented yacht bathroom earlier" (Wells, 2014).

For the second time since joining the Miami Dolphins, Martin contemplated suicide. The following week he stayed home and did not report to the team's voluntary off-season workouts (Wells, 2014). Concerned by Martin's absence, Offensive Line Coach Turner reached out to the player. He persuaded Martin to come to his office and visit with him. Martin agreed to the meeting but was reluctant to talk. He spoke vaguely of personal issues and said nothing about the bullying from Incognito and others on the team. To Martin, discussing the conduct of his teammates with the coach would be a violation of the players' unwritten code – never snitch (Wells, 2014).

Coach Turner could tell Martin was not telling him everything. He continued to press the player with questions, even asking directly if Martin was experiencing suicidal thoughts. Martin admitted that he had. Quickly, Turner contacted Head Coach Philbin and asked him to speak with Martin. Philbin offered to contact Martin's parents, to which Martin agreed, and arranged for Martin to begin therapy. Philbin also notified General Manager Ireland about the meetings with Martin (Wells, 2014).

In the months that followed, Martin attended regular weekly sessions with the local team affiliated psychiatrist. He began a prescription of the antidepressant medication Lexapro. Martin never mentioned the team bullying in his sessions with the psychiatrist, fearing the information would find its way back to the team and he would be labeled a snitch. At the same time Martin continued hanging out with Incognito and other linemen, going to movies, bars, restaurants, and strip clubs. In August 2013 Incognito began calling Martin his road dog, a term for a close friend who could be relied on to provide company at a moment's notice (Wells, 2014).

On the football field, the offensive line lacked cohesion. They allowed more sacks than any other team in the league and were in range of setting a new franchise record in that ignoble category. Hoping to strengthen the line, the front office acquired veteran left tackle Bryant McKinnie from the Baltimore Ravens. The coaches decided to bench Tyson Clabo, who had struggled as the team's right tackle. Martin was informed in October that he would move out of the left tackle position and move back to right tackle once again (Salguero, 2013). Martin told the press he would handle the change with a good attitude: "You can approach this two different ways. You can go in the tank and be one of those guys who moans and is a cancer in the locker room, or you can be a guy who goes out there and can be a professional that plays hard" (Salguero, 2013). Meanwhile, Head Coach Philbin admitted that shuffling Martin around so much could be bad for the Dolphin lineman (Salguero, 2013).

On October 27, the day of the first game after the change, the Dolphins played the Patriots and lost. The offensive line gave up six sacks for a combined loss of 47 yards. According to Head Coach Philbin's notes Martin played poorly, missing an assignment and giving up a quarterback hit (Salguero, 2013). The next day, Martin was taunted by other linemen as he entered the Dolphins facility. By dinner time, Martin was on edge. He promised himself that if his teammates did one more thing to him, he would leave. As he worked his way through the food line, Martin heard Incognito say that he was not welcome at the offensive line table. As

Martin approached the table with his tray of food, the rest of the lineman stood up and walked away. It was the final straw. Martin slammed his tray on the floor, turned on his heels, and rushed to the locker room. He took his car keys from his locker and left the Dolphins facility, never looking back (Wells, 2014).

SOURCES OF DISCRIMINATION

The idea of discrimination in the work environment will often focus on employer discrimination as the primary source. Legal liability usually revolves around the employer but, in many work environments, the source of discrimination might be employees or customers. This section will briefly review the theoretical foundation for employer, employee, and customer discrimination.

Organizations, whether intentionally or unintentionally, are often times guilty of discriminatory practices or policies that result in some level of harm to the individuals affected by them. Updates in laws (such as the Equal Employment Opportunity laws and Affirmative Action policies) and changing social standards (views on civil rights and LGBT policies) that are not addressed by the organization in a timely manner are often times the root cause of discriminatory behaviors. In other cases it is a function of an organizational culture failing to evolve as the demographics, attitudes, perspectives, and cultural values of their employees change. With growth and the changing legal environment comes the need to implement more formalized processes and the utilization of human resources best practices related to recruitment/hiring/retention, employee development/promotion, formalized job descriptions, performance management, and succession planning. Failure to recognize discriminatory behaviors and practices in any of these areas can result in lost opportunity at the lowest level and lawsuits against the organization at the highest level. Whether the policies and practices are found to be a function of disparate impact (a practice that disproportionately excludes individuals that are members of a protected class, even when the outcome was unintentional) or disparate treatment (occurs when there is intentional different treatment of individuals in similar situations that is based upon the individual's membership in a protected class such as using gender as factor for employment in a position that cannot be justified as gender specific based upon the job duties), the outcome is discrimination against an individual or group of individuals that are legally protected by law based on their gender, race, color, religion, ethnic background, country of origin, age, or disability status. In the world of professional sports at the player level, organizations are very focused on hiring the right individual with the required skills and abilities to enable the team to be successful and win games. Performance is measured by clearly defined criteria appropriate for the sport and player position. Retention is often a function of several factors which might include overall performance, salary level, projected useful years of productivity, injury status, ability to work well with other team members, and some other external behaviors that are in violation of team or league rules. Regardless of the industry, all organizations must engage in human resource activities that are not in violation of the local, state, and federal employment laws that apply to their operations.

When employees that are in a position of power, whether it is based upon their position (legitimate, coercive, expert, or tied to rewards types of power) or their personal attributes (referent power or expert power), an environment of discrimination can be created based upon the behaviors of the majority class employee and his/her interactions with the employees that are members of a protected class. Similar to discrimination that is found at the employer level

(disparate impact and/or disparate treatment), these behaviors result in lost opportunity for the employee that experiences the discrimination. One lens that can be used to examine these types of employee relationships includes the various leadership theories that investigate formal and informal working relationships. More specifically, the use of the Leader-Member Exchange Theory (LMX) provides some insights into how leaders, whether they have that role based upon position or personal attributes, create an in-group and an out-group (Northouse, 2016). Members of the in-group often receive benefits not afforded to the out-group such as inclusion in both work and social activities that result in either reward or increased organizational status/recognition. While members of the out-group often choose not to be a member of the in-group for a variety of reasons, when in-group membership status is denied based upon factors such as race, ethnicity, religion, age, gender or disability status, a discriminatory situation has occurred. The practice of initiation hazing put forth by senior employees is generally accepted as part of the professional football work environment. Of course, there is a line between employee rituals versus abuse.

It goes without saying that customers/fans of professional sports teams want their teams to win. As consumers, their focus is the team achieving the objectives: a winning season; conference/league championship; and, ultimately national/world titles. Fans seldom have knowledge of the true inner workings of the organization, are not consulted for hiring/firing/trade decisions, nor do they have influence on player behaviors on or off the field/court. Their real power is in ticket sales and merchandise purchases. As such, many fans develop a lifelong relationship with their favorite teams and view individual player issues as just a small incident in their long-term relationship with the franchise. In other words, they will not sell their season tickets nor donate all of the team jerseys to charity because of the questionable behaviors of one or two players. Fans forgive losing seasons, even decades of losing. In combat sports like football and hockey, fans want to see players that are tough (mentally and physically), both on the field and off. For every bad seed (the player that behaves unacceptably either on or off the field), there are dozens of players that earn hero-worship from fans. Teams, as long as the fans continue to support them, will make employment decisions that enable winning and earn fan support. While these hires may not be acceptable in other work environments, professional sports have a different organizational culture and their customers expect high levels of performance and winning seasons. Win at all costs is not an unusual position in the world of professional sports teams that need fan support.

CASE QUESTIONS FOR CLASS DISCUSSION

What actions should Jeff Ireland take to support the future of the Miami Dolphins in light of the Jonathan Martin accusations? There are no explicit answers to the case but there are several points worthy of discussion in employment law, business law, human resource management, and labor economics courses. Before exploring the analysis and epilogue for real world resolution, discuss the following questions relating to the case:

- (1) Employee discrimination is a significant issue in the Jonathan Martin case. What suggestions would you give the general manager with respect to taking or not taking action against Richie Incognito and other Miami Dolphin employees?
- (2) Even if employees are the primary source of discrimination, the employer is accountable if condoning behavior that facilitates a hostile work environment. As the personnel leader of

the organization, how should Jeff Ireland respond to hazing and harassing complaints put forth by Jonathan Martin and other employees?

- (3) Do you believe the creation of a training seminar would be an effective tool with respect to modifying the NFL culture of hazing and bullying? Explain why or why not?
- (4) Given the information of the case, how should Jeff Ireland approach media relations with respect to this case? Do you believe NFL leadership would allow the Dolphins to conduct their own strategic communications operations? Explain the reasons for your response.
- (5) As a collegiate athlete, Richie Incognito was suspended from the University of Nebraska for repeated violation of team rules. His efforts to transfer to another collegiate football program fell short when he dismissed without ever getting onto the field at the University of Oregon for failure to complete an anger-management course and comply with team conduct rules. In contrast, Jonathan Martin was an All-American at Stanford University and both of his parents are Harvard graduates. When evaluating the case, to what extent do you believe academic background merits consideration? Explain.
- (6) Do you believe the Miami Dolphins or Richie Incognito have any concerns relating to legal liability from this case? Explain why or why not?

BRIEF ANALYSIS OF CASE QUESTIONS

The case centers on work environment issues in the National Football League. Hazing and pranks as a vehicle for initiation and informal teambuilding are commonplace in athletics. Harmless pranks versus actions that might create a hostile work environment can easily cross in any work environment. This section offers analysis and actions relating to the case questions put forth in the previous section.

Employee discrimination is a significant issue in the Jonathan Martin case. The general manager cannot simply blame the employees as a defense for the employer. At a minimum, a thorough investigation by the employer (i.e., Miami Dolphins) or mother organization (i.e., the NFL) is required. In this case, the NFL conducted an extensive independent investigation. Not surprisingly, the report found fault with the actions of Incognito, Martin, several other players, and key coaches. The investigative report did not address the prospect of the NFL or the Miami Dolphins creating a cultural that, in some cases, embraces an alpha male state of mind and indirectly encourages bullying.

Even if employees are the primary source of discrimination, the employer is accountable if condoning behavior that facilitates a hostile work environment. As the personnel leader of the organization, how should Jeff respond to hazing and harassing complaints put forth by Jonathan Martin and other employees? As mentioned in the previous paragraph, the minimum action required is an investigation. In the extreme, individuals violating NFL rules or standard employment law should receive a suspension without pay. In this specific case, Jeff Ireland initially reacted to Martin's bullying allegations on the part of Incognito by suggesting that Martin retaliate by punching him and fighting back (Breech, 2013). Once the accusations became public, the Miami Dolphins suspended Richie Incognito indefinitely. In total, Incognito missed the last six games of the season. Two of the six games were a suspension without pay but after the two-week window, the team and Incognito agreed to continue the suspension with pay while the NFL special investigator continued to explore the case. The team suspension ended at the end

of the season and the player became eligible to seek employment with other teams. In the end, Incognito lost approximately \$500,000 of salary via the two game suspensions without pay.

It is unlikely that the creation of a training seminar would be an effective tool with respect to modifying the NFL culture of hazing and pranks. On the other hand, a training seminar could have at least three positive outcomes. First, the seminar would help players and coaches understand the limits of acceptable behavior. The fact that football is a contact sport creates more confusion than other professions when coworkers seek teambuilding opportunities. Second, a seminar would share a plan of action for employees that become victims of inappropriate behavior. The reality is that many football players are unsure as to what constitutes inappropriate behavior and are even less certain how to access channels of support. Third, a seminar sends an explicit message that bullying and excessive hazing is not acceptable. Players, coaches, and most in the organization might not like the idea of the seminar but the training might go a long way in minimizing team legal liability. Football offers an environment that is different than most but that does not mean employees should accept anything less than a safe and professional workplace.

The Miami Dolphins and Jeff Ireland have to make a public statement after the Martin allegations. One strategy is to minimize the content in an initial statement under the constraint the team is conducting an investigation into the allegations. The NFL is very protective of the brand and so it is unlikely the team would ever actually lead an investigation. In this case, the NFL hired Ted Wells to lead an independent investigation of the case. The entity in the most difficult position might be the NFL Players Association, which represents both Martin and Incognito. The union has to be sensitive to Martin's ability to work in a positive environment but also has to fight against the Incognito suspension and loss of income.

The academic history of Incognito and Martin might provide historical perspective but have little bearing on this specific case. The accusations put forth by Martin and defense offered by Incognito need to focus directly on the case. Martin might be an academic overachiever for his profession but the details of the case include signs of psychiatric instability. As for Incognito, his collegiate experience includes the well-known dismissal from the University of Nebraska plus, after transferring, a dismissal from the University of Oregon for conduct violations without ever playing a game. While Incognito's history alone might appear sufficient to validate Martin's accusations, the focus of the investigation should be on the specific accusations. In fact, more players and coaches on the 2013 Miami Dolphins publicly supported Incognito over Martin in the case. Peer support does not imply that Incognito is innocent but actions from the past do not automatically make him guilty either. Further, the NFL report into the incident via Ted Wells offered the observation that Martin's "mental health problems, alcohol and drug use and concerns about poor performance on the field" and "his text messages and other evidence demonstrate that these are real factors, not issues Incognito has manufactured out of whole cloth" (Wells, 2014).

The Dolphin's legal liability ensuing from Incognito's hazing and harassment of Martin may arise from several sources of law. First, because a substantial amount of Incognito's and other teammates harassment of Martin was based upon Martin's race and color, the Dolphin franchise likely violated federal and state employment anti-discrimination laws that protect employees from working in a hostile work environment. Second, under state common law, Martin has standing to sue the Dolphins and Incognito for intentional infliction of emotional distress, a common law tort.

Under federal law, harassment of an employee by a manager or a co-worker that is based upon the employee's race or color is a form of employment discrimination in violation of Title VII of the Civil Rights Act of 1964. In the context of Title VII, harassment has been defined by courts as unwelcome conduct based upon race, color, religion, sex, or national origin. If the harassing conduct is severe or pervasive enough to create a hostile work environment, the employer will be in violation of Title VII and subject to damages allowed under Title VII and the regulations adopted by the EEOC.

To prevail in an employment discrimination case under Title VII based upon a hostile work environment, Martin must prove each of the following facts: 1) the bullying of Martin by his teammates was unwelcome; 2) the harassment was based upon Martin's race or color; 3) the harassment was sufficiently severe or pervasive to create an abusive working environment; and 4) there is some basis for imposing liability on the Dolphin franchise (U.S. Equal Employment Opportunity Commission, 2016). An analysis of these requirements using the facts discussed above illustrates that Martin would likely have cause to pursue a hostile work environment suit against the Dolphins.

To begin the hostile work environment analysis, Martin must prove he was subjected to unwelcome harassment in the sense that he did not solicit or incite his teammates conduct and regarded the harassment as undesirable or offensive (U.S. Equal Employment Opportunity Commission, 2016). Although Martin did not typically challenge Incognito about his abuse and bullying, Martin's texts and calls to his mother at the time of the bullying reflect the emotional distress Martin suffered at the hands of his teammates. Additional evidence that Martin did not welcome the verbal abuse of his teammates is Martin's claim that he informed Jeff Ireland of Incognito's bullying and, last but certainly not least, Martin's checking himself into the hospital. All of these facts indicate that the abusive and demeaning words and actions of his teammates went far beyond normal teasing and were unwelcomed by Martin.

Next, Martin must prove that Incognito's harassment was based upon Martin's race or color. Martin is an African American. Although neither Title VII nor any regulations adopted by the EEOC define race, African-American and Black is one of the five racial categories on which the Office of Management and Budget collects federal data and is recognized as one of the classes protected by Title VII. As stated by the EEOC, harassment based upon race includes racial slurs and offensive or derogatory remarks about a person's race or color. It is clear from Incognito's use of multiple racial slurs as well as his jokes about slavery that Incognito's harassment was influence by Martin's race, African-American.

To meet the third required element, Martin must prove Incognito's harassment was sufficiently severe or pervasive to create an abusive or hostile working environment. "In the workplace, simple teasing, offhand comments, or isolated events that are not very serious do not create a hostile work environment. Courts analyze harassment on a case-by-case basis; looking at factors such as a) the frequency of the discriminatory conduct; b) the severity of the conduct; c) whether the conduct was physically threatening or humiliating; d) whether it unreasonably interfered with the employee's work performance; and the context in which the harassment occurred, as well as any other relevant factor" (U.S. Equal Employment Opportunity Commission, 2016). With respect to whether Incognito's abuse was severe, one court stated "Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'n-----' by a supervisor in the presence of his subordinates" (Rodgers v. Western-Southern Life Inc. Co.,

1993). Although not officially Martin's supervisor, Incognito was part of the Dolphins' six-player leadership council and a veteran player. Because of his status as a leader of the team, Incognito's using a racial slur in reference to a rookie, could, by itself, create a hostile working environment for Martin. Regarding whether Incognito's abuse was pervasive, Martin claims his teammates began to treat him disrespectfully early in the 2012 season, after training camp; when Incognito, Jerry and Pouncey starting hurling profanity and demeaning comments at him. In the 2013 season, the players' abusive language and treatment of Martin increased, ending with Martin checking himself into the hospital. Two years of hazing and harassment by a leader of the team supports the pervasive nature of the harassment. Under either condition, severe or pervasive; Incognito's and the other players' harassment of Martin created a hostile work environment for Martin.

To hold the Dolphins' liable under Title VII for the harassment of Martin by his teammates, Martin must prove there is a legal basis for imposing liability on the Dolphin franchise. By law, employers owe a duty to protect the safety of its employees. If an employer is negligent in controlling the working environment, and an employee suffers injury, the employer is liable. Consequently, if an employee is mentally or physically harmed due to bullying and harassment by other employees, the employer will be liable if the employer failed to maintain a safe work environment through negligence. In order to prove an employer's negligence, the injured employee must show the employer knew or should have known about the other employees' harassing conduct and the employer failed to take prompt and appropriate corrective action (U.S. Equal Employment Opportunity Commission, 2016). Dolphin management deny they knew of Incognito's and the other players' harassment of Martin. However, Martin asserts he informed Jeff Ireland of Incognito's bullying; and Jeff Ireland responded by telling Martin to confront Incognito physically and punch him if he had a problem with the situation. If Martin is to be believed, Jeff Ireland's knowledge of the harassment would be imputed to the Dolphin franchise. But even if Jeff Ireland is to be believed that Dolphin management did not know of Martin's harassment, there is more than enough evidence to show the Dolphin franchise should have known about the harassment due to Incognito's inglorious past. Before joining the Dolphins, Incognito's college and professional career, as well as his personal life, was filled with aberrant and violent behavior. Incognito was arrested several times in college, including a charge of three counts of assault. His conduct during his professional years did not improve. Not only was this public information assessable by the Dolphin franchise when they signed Incognito in 2010, there is evidence Dolphin management had actual knowledge of Incognito's anger issues. As additional proof the franchise knew of Incognito's potential for problems, the Dolphins added a character clause to Incognito's contract. And so, even if Dolphin management did not know of the harassment going on in their locker room, they should have known such a possibility existed because of Incognito's past behavior and his position on the team's leadership counsel. Other than putting the character clause in Incognito's contract, there is no evidence the franchise took any affirmative steps to prevent harassment and misconduct by Incognito in the locker room. Instead, they entrusted the governing of the locker room to the leadership council, one of whom had a well-known and continuous history of assaults and violence. Finally, a year before the Martin revelations, Miami Dolphins coach Philbin wanted to release Richie Incognito after an accusation of harassment put forth by a volunteer during the team's charity golf tournament (Gorman, 2013).

To summarize the analysis of facts, there is sufficient evidence to believe the Dolphin franchise could be guilty of violating provisions of Title VII that protect Martin from a hostile work environment based upon Martin's race and color. In addition to the liability the Dolphins could incur for violating anti-discrimination provisions under Title VII, the franchise could be liable under state common law for the injury to Martin's mental health pursuant to a claim for the intentional infliction of emotional distress. Intentional infliction of emotional distress is a claim that protects employees from emotional harm caused by purposely outrageous conduct. Unlike Title VII and state anti-discrimination laws, recovery under intentional infliction of emotional distress does not require the harassment be based upon an employee's race, color, religion, sex, or national origin. The Dolphins' liability for Incognito's actions, however, must arise under the legal claim of respondeat superior or negligent supervision. Under the principals of respondeat superior, an employer is liable for the tortious acts of its employee if the employee was acting within the scope of his or her employment. In contrast, a claim of negligent supervision alleges the employer failed to take reasonable steps in the supervision of an employee, or permitted or failed to prevent tortious conduct by the employee, when the employer knew or should have known of the employee's propensity to cause harm. Under the theory of negligent supervision, the Dolphin franchise could also incur liability for Martin's emotional distress. If Martin proves a prima facie case of intentional infliction of emotional distress against Incognito, the Dolphins will also be liable if Martin proves the Dolphin's failed to supervise Incognito.

Whether Incognito is liable to Martin for Martin's emotional distress depends upon Martin proving each of the following elements: 1) Incognito's conduct was extreme and outrageous; 2) Incognito intended to cause, or recklessly disregarded the likelihood of causing, Martin emotional distress; 3) Martin suffered severe emotional distress; and 4) there is a causal connection between the Incognito's conduct and Martin's emotional distress (Restatement of Torts Section 46, 1965). To answer the first question, whether Incognito's conduct was extreme and outrageous, Martin must prove the conduct was so horrible that it shocks the conscience of the ordinary individual. Use of language like "n-----," "we are going to run train on your sister..." and similar crude remarks are not normal banter among employees, even in the NFL (Wells, 2014); and certainly are so horrible to shock the conscience. Martin must also prove Incognito intended to cause, or recklessly disregarded the likelihood of causing, emotional harm to Martin. Although Incognito denies he intended to cause Martin any distress, Incognito knew of Martin's struggle with mental health issues and contemplations of suicide. For Incognito to continually bully and harass Martin while knowing Martin had mental health issues could certainly be interpreted as a reckless disregard of the likelihood of causing Martin emotional distress. The question of whether Martin suffered severe emotional distress is clear. Martin checked himself into the hospital because of his depression. Lastly, in the investigation of the harassment performed after Martin entered the hospital, the investigators found there was a temporal relationship between the abusive conduct and the onset of Martin's serious depression. All of these facts support the charge that Incognito could be liable to Martin for Martin's emotional distress.

EPILOGUE

The career paths of the major characters in this study all significantly changed in recent years. After leaving the Dolphins in the fall of 2013, Jonathan Martin would never again play for the team. In March of 2014, Miami traded the former second-round pick to San Francisco for a future seventh-round pick. Now playing for his former college coach at Stanford (i.e., Jim Harbaugh), Martin started the first game for San Francisco but faced a diminishing role throughout the season. San Francisco placed Martin on waivers at the end of the season. The Carolina Panthers claimed Jonathan Martin off the waiver line in March of 2015. Martin retired four months later, citing a back injury that would have made him unable to play for the forthcoming season. Jonathan Martin did not entertain legal action against the Miami Dolphins or Riche Incognito.

Jeff Ireland lost his position as general manager of the Dolphins on January 7, 2014. He was the first major executive from the case to depart the team. Ireland became infamous before the 2010 NFL draft for asking Dez Bryant if his mother was a prostitute (Trotter, 2010). Ireland survived the 2010 draft controversy. His 2013 reaction to allegations of a culture of bullying on the part of Incognito and others was to encourage Jonathan Martin to punch him back. The high profile mistakes combined with the lack of his team winning on the field will likely limit the chance of Ireland to reach the stature of general manager again. A year after his departure from the Dolphins, Ireland became a college scout for the New Orleans Saints.

Richie Incognito did not return to the Dolphins after the Martin accusations. He was suspended on November 3, 2013, for misconduct detrimental to the team. As mentioned in a previous section, Incognito lost approximately \$500,000 of salary via a two game suspension without pay but earned \$1,000,000 for the four game suspensions with pay. At the end of the season, the Dolphins lifted his suspension as his contract expired. Incognito did not play the entire 2014 NFL season but signed as a free agent with the Buffalo Bills before the start of the 2015 season. Incognito started all 16 games for the Bills in 2015 and was selected as a Pro Bowl starter for being one of the best offensive guards in football. In the spring of 2016, the Bills rewarded their star lineman with a three-year extension worth approximately \$16 million. Incognito claimed that six or seven teams reached out to him before re-signing with the Bills. "We definitely took a discount to stay in Buffalo...but they believed in me and I believe in them," Incognito said via a conference call, shortly after agreeing to the three-year contract extension (Maiorana, 2016).

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