

# Without Thanks to Richie Incognito: Should Employers Owe a Duty to Employees to Protect Against Psychological Harm from Status-Blind Bullying in the Workplace?

Samuel L. Gurney

Follow this and additional works at: <http://scholarship.law.marquette.edu/sportslaw>



Part of the [Entertainment, Arts, and Sports Law Commons](#)

---

### Repository Citation

Samuel L. Gurney, *Without Thanks to Richie Incognito: Should Employers Owe a Duty to Employees to Protect Against Psychological Harm from Status-Blind Bullying in the Workplace?*, 26 Marq. Sports L. Rev. 37 (2015)  
Available at: <http://scholarship.law.marquette.edu/sportslaw/vol26/iss1/4>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

# WITHOUT THANKS TO RICHIE INCOGNITO: SHOULD EMPLOYERS OWE A DUTY TO EMPLOYEES TO PROTECT AGAINST PSYCHOLOGICAL HARM FROM STATUS-BLIND BULLYING IN THE WORKPLACE?

SAMUEL L. GURNEY\*

## I. INTRODUCTION

Workplace bullying can be defined broadly as “repeated offensive behavior through vindictive, cruel, malicious or humiliating attempts to undermine an individual or group of employees” occurring “regularly, repeatedly, and over a period of time.”<sup>1</sup> In a recent, highly publicized example, the seriousness of the effects of workplace bullying occurring between two professional athletes in a professional football workplace (including team practices, locker rooms, film meetings, and small positional meetings) was catapulted into the limelight beginning in October 2013.<sup>2</sup> This example involves the highly controversial incident between Richie Incognito and Jonathan Martin, both offensive linemen for the Miami Dolphins. When the story first broke and took over mainstream media, initial reports indicated that Jonathan Martin, a second-year offensive

---

\*Received his J.D. from Marquette University Law School in 2015 and a B.S. in Accounting and Finance from the University of Kansas in 2012. While at Marquette University, he was a member of the *Marquette Sports Law Review* staff for the 2014–2015 academic year, competed in the National Entertainment Law Moot Court Competition and the National Sports Law Negotiation Competition, and received his Sports Law Certificate from the National Sports Law Institute. His article was selected as the winner of the 2015 *Marquette Sports Law Review* Comment Competition Award, given annually to the member of the *Review* who wrote the best overall student comment during the current academic year as judges by the *Review*'s Editorial Board.

1. Susan Harthill, *Bullying in the Workplace: Lessons from the United Kingdom*, 17 MINN. J. INT'L L. 247, 249 (2008).

2. *Timeline of Dolphins' Alleged Bullying Saga Between Richie Incognito and Jonathan Martin*, USA TODAY (Dec. 17, 2013), <http://www.usatoday.com/story/sports/nfl/2013/11/07/richie-incognito-jonathan-martin-bullying-miami-dolphins/3466755/>.

tackle for the Miami Dolphins, had left the team to address emotional issues.<sup>3</sup> As more details were released, along with an accompanying voicemail that demonstrated that the bullying primarily consisted of vulgar homophobic and racially derogatory remarks,<sup>4</sup> it became apparent that Martin's departure was related to severe workplace bullying from fellow teammate Richie Incognito, a veteran offensive guard.<sup>5</sup> As numerous reactions to this recent example demonstrate, workplace bullying has become especially prevalent among professional football organizations due to society's tendency to see athletes as impenetrable, emotionless brutes immune from psychological harm because they beat up on each other for a living.

Section II of this Article provides a more in-depth look at the facts underlying the recent Richie Incognito–Jonathan Martin situation, which helped shed light on the prevalence of bullying in professional sports, especially within the National Football League (NFL). Next, Section III will walk through the protections granted by Title VII of the Civil Rights Act of 1964, which has been used in the United States (U.S.) to try to eliminate workplace bullying based on protected-class distinctions. Additionally, Section III will address the history of anti-bullying laws in the U.S., or more precisely, the lack thereof, and the way that workplace bullying has been more successfully curtailed in foreign countries. Next, Section IV will address the duties that an employer owes to its employees to prevent reasonably foreseeable physical and psychological harm and apply this analysis to the professional sports context. Section V will then address several of the proposed solutions advanced by different scholars for ways to better eliminate status-blind workplace bullying. Lastly, Section VI concludes this Article by asserting that additional legislation is needed to properly combat and eliminate status-blind bullying in the workplace because the existing laws do not provide proper means for successfully bringing claims, particularly in the professional sports context, where societal and cultural norms have come to expect professional athletes to be impervious to psychological torment.

## II. RICHIE INCOGNITO'S MOST VALUABLE CONTRIBUTION: DEMONSTRATING THE PREVALENCE OF WORKPLACE BULLYING IN THE NFL AND THE PROBLEMS OF "MASCULINITY THEORY"

While it may be of some condolence for society to think that people like

---

3. *Id.*

4. Kerri Lynn Stone, *Lessons from the Dolphins/Richie Incognito Saga*, 14 NEV. L.J. 723, 734 (2014).

5. *Id.* at 730.

Richie Incognito are a rare exception and that bullies in the NFL are not a common occurrence, multiple players have provided specific examples that show otherwise. For example, in a 2013 interview with USA Today Sports, Brian Dawkins, a former All-Pro NFL safety, recounted some of the other notable, past incidents regarding NFL locker room bullying: Giants' defensive end Jason Pierre-Paul bullying cornerback Prince Amukamara in 2012 and Charles Haley, the Hall of Famer who won five Super Bowls and was notorious for harassing teammates.<sup>6</sup> Despite the fact that bullying in professional sports locker rooms occurs more often than we hear about, Dawkins stated that Martin's situation was extremely severe because, as a result of outrageous bullying, "[a] guy stopped playing."<sup>7</sup> However, while Incognito was an extreme example, it should not take a player deciding to quit his career, livelihood, and something he loves to do, before society notices the extreme psychological effects that workplace bullying can create.

In early November 2013, ESPN released transcripts of extremely vulgar voicemail and text messages that Incognito sent to Martin back in April 2013.<sup>8</sup> The most controversial voicemail message contained numerous derogatory racial slurs, repulsive descriptions of Incognito's desire to defecate in Martin's mouth, and physical threats to both Martin and his "real mother."<sup>9</sup> At the very end of the voicemail message, Incognito concluded, "F--- you, you're still a rookie. I'll kill you."<sup>10</sup>

Although the vulgar nature of Incognito's messages was shocking, they should not have surprised anyone familiar with Richie Incognito or his similar behavioral issues throughout his football career.<sup>11</sup> On May 14, 2013, Incognito posted a picture to his Instagram account showing what appears to be his personalized locker with a sign reading, "There are two things Richie Incognito does not like: taxes and ROOKIES."<sup>12</sup> While this sign demonstrates Incognito's unfounded, irrational, and public disdain for rookie professional football

---

6. Jarrett Bell, *Martin Situation in Miami Brings Bullying to Forefront*, USA TODAY (Nov. 3, 2013), <http://www.usatoday.com/story/sports/nfl/2013/11/02/jonathan-martin-miami-dolphins-bullying-jarrett-bell-column/3393497/>.

7. *Id.*

8. James Walker et al., *Richie Incognito of Miami Dolphins Used Slurs in Messages to Jonathan Martin*, ESPN (Nov. 5, 2013), [http://espn.go.com/nfl/story/\\_id/9926139/richie-incognito-miami-dolphins-used-slurs-messages-jonathan-martin](http://espn.go.com/nfl/story/_id/9926139/richie-incognito-miami-dolphins-used-slurs-messages-jonathan-martin).

9. *Id.*

10. *Id.*

11. See Chris Chase, *Richie Incognito Openly Announced That He Dislikes Rookies*, USA TODAY (Nov. 4, 2013), <http://ftw.usatoday.com/2013/11/richie-incognito-sign-jonathan-martin>.

12. *Id.* (follow <http://instagram.com/p/ZSxi6mIwAw/embed/>); Richard D. Incognito Jr. (68incognito), INSTAGRAM, <https://instagram.com/p/ZSxi6mIwAw/> (Last visited Dec. 14, 2015).

players, Incognito's bully reputation dates back as early as 2002 when he was a freshman at the University of Nebraska.<sup>13</sup> According to one report, Incognito once bullied college teammate Jack Limbaugh so badly that Limbaugh stormed out of football practice.<sup>14</sup> Limbaugh, a walk-on offensive lineman, was a very susceptible target to bullying from the more talented Incognito.<sup>15</sup> During the practice where Limbaugh stormed out, Incognito had "plowed into Limbaugh's back . . . knocking him to the ground for no apparent reason."<sup>16</sup> Multiple comparisons can easily be drawn between the walk-on lineman Limbaugh, whom Incognito pummeled during practice for no reason, and Jonathan Martin, whom Incognito singled out and bullied after becoming a professional football player with the Miami Dolphins.

Based on the amount of drastic and recurring bullying at every stage of Incognito's career, the Miami Dolphins should have been on notice and aware of the increased foreseeability that a similar risk of psychological harm would resurface as it did with Jonathan Martin, Incognito's latest victim. Accordingly, due to Incognito's notorious history, the Miami Dolphins should be held to a higher duty of care to prevent foreseeable harm to the other members of the Dolphins football team in the workplace because of the consistent psychological and physical harm that has followed Incognito throughout his career.

Despite the absolutely appalling voicemail and Incognito's past bullying behavior, many players around the league, including other Dolphins teammates, came to Incognito's defense and blamed Martin for breaking the code of locker room conduct by revealing the voicemail messages to the media. Ryan Tannehill, the Miami Dolphins quarterback, went as far as to say that Martin and Incognito were good friends.<sup>17</sup> Additionally, Randy Starks, a defensive tackle for the Dolphins, said, "We joke with each other. You can't have thin skin around here. . . . We're trying to clear Richie's name. He's getting a bad rap."<sup>18</sup> Other players around the league, such as Giants safety Antrel Rolle, said, "Jonathan Martin is a 6'5" 320 pound dude. I think he should be able to

---

13. Brent Schrottenboer, *Richie Incognito's Bully Reputation Goes Back to 2002*, USA TODAY (Nov. 5, 2013), <http://www.usatoday.com/story/sports/nfl/2013/11/05/incognito-bully-accusations-nebraska-freshman/3439819/>.

14. *Id.*

15. *Id.*

16. *Id.*

17. Gary Mihoces, *Dolphins Players Defend Incognito, Question Martin in Bullying Case*, USA TODAY (Nov. 6, 2013), <http://www.usatoday.com/story/sports/nfl/dolphins/2013/11/06/miami-dolphins-jonathan-martin-richie-incognito-locker-room/3458891/>.

18. *Id.*

stand up for himself.”<sup>19</sup> Furthermore, Denver Broncos defensive tackle Terrance Knighton stated, “I feel like, as players, when it is player-to-player, it can be handled as players. It can be addressed. I don’t think (Martin) should have gone outside the team and expressed how things are going in the locker room.”<sup>20</sup> As a result of the perceptions of Martin’s peers that players should not be affected by the psychological effects of workplace bullying, the culture within NFL teams has become one where thick skin is required to survive and any cries for outside help will cause the bullied victim to be blamed and isolated from the team.

Greg Dale, a professor of sports psychology and sports ethics at Duke University, believes this is better classified as a “male perspective,” rather than just a “player perspective.”<sup>21</sup> Professor Dale stated that, while teaching one of his classes to undergraduate students, comments from some of the male students regarding the Incognito–Martin situation were along the lines of: “Well, he really needed to man up. He’s a man, and you’ve got to handle that on your own. He shouldn’t have walked away.”<sup>22</sup> Other professors around the country have had similar encounters in their classes and summarize the students’ general reaction to a report on bullying as, “[e]ither he doesn’t measure up or he’s a sissy for reporting it.”<sup>23</sup> As a result of the seemingly widespread tendency to blame victims in cases of athletic hazing, the biggest problem with correcting the ongoing problem of workplace bullying in the professional sports context may be altering society’s perception regarding this abusive activity as wrongful behavior. After reaching a common recognition of the psychological harms caused by workplace bullying in sports, the next step will be to enact new legislation to create causes of action for status-blind bullying so that all players can enjoy a workplace environment free from hostility.

### III. HISTORY AND BACKGROUND OF WORKPLACE BULLYING PROTECTION IN THE UNITED STATES, OR LACK THEREOF, AND THE PROTECTIONS AFFORDED BY OTHER NATIONS

Currently, in the U.S., there are no federal laws that prohibit bullying in

---

19. Chris Strauss, *What NFL Players Are Saying About the League’s Hazing Dilemma*, USA TODAY (Nov. 7, 2013), <http://ftw.usatoday.com/2013/11/nfl-hazing-polamalu-scott-dolphins-incognito-martin/>.

20. Erik Brady et al., *Blame the Victim? Some Players Criticize Jonathan Martin*, USA TODAY (Nov. 5, 2013), <http://www.usatoday.com/story/sports/nfl/2013/11/05/bullying-jonathan-martin-richie-incognito/3449621/>.

21. *Id.*

22. *Id.*

23. *Id.*

general,<sup>24</sup> but Title VII of the Civil Rights Act of 1964 (Title VII) prohibits harassment in the workplace on the basis of race, color, religion, sex, or national origin.<sup>25</sup> As it is written, a gap exists in the protection of workplace bullying under U.S. laws where the “workplace bully does not target his or her victim based on the victim’s race or sex, or other protected characteristics.”<sup>26</sup> As a result, the question becomes, if the harassment does not pertain to one of the statuses protected under Title VII, does an employer have a duty to prevent or stop psychological harm from non-status-based bullying in the workplace? More specifically, applying the issue to the professional sports context, what duties do professional football teams in the NFL owe their players to prevent or stop them from being subjected to psychological harm in the workplace?

On July 2, 1964, President Lyndon B. Johnson signed the Civil Rights Act of 1964 into law.<sup>27</sup> This Act was especially important because it was the first successful civil rights legislation following the Thirteenth, Fourteenth, and Fifteenth Amendments, which, respectively, abolished slavery in the U.S., granted citizenship to former slaves, and gave all persons the right to vote, regardless of race.<sup>28</sup> Pursuant to Title VII of the Act, individuals are protected against discrimination in the workplace on the basis of race, color, national origin, sex, or religion.<sup>29</sup> Title VII has broad implications because it applies to all employers with fifteen or more employees.<sup>30</sup> To ensure compliance with the Act, Title VII also created the Equal Employment Opportunity Commission (EEOC) to implement and enforce its provisions.<sup>31</sup> Specifically, the EEOC is tasked with enforcing laws that “prohibit discrimination based on race, color,

---

24. Joseph Z. Fleming, *Responding to Recent Sports Law Trends Through Internal Sensitivity Training Programs*, in UNDERSTANDING SPORTS LAW LEADING LAWYERS ON NAVIGATING THE WIDE WORLD OF SPORTS LAW: CONTRACTS, EMPLOYMENT, WEALTH MANAGEMENT, AND INTELLECTUAL PROPERTY, at \*8 (2014), 2014 WL 3725832.

25. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2013).

26. Harthill, *supra* note 1, at 260–61.

27. *Civil Rights Act*, HIST., <http://www.history.com/topics/black-history/civil-rights-act> (last visited Dec. 14, 2015).

28. *Id.*

29. *Title VII of the Civil Rights Act of 1964*, SOC’Y FOR HUM. RESOURCE MGMT., <http://www.shrm.org/legalissues/federalresources/federalstatutesregulationsandguidanc/pages/titlevii-ofthecivilrightsactof1964.aspx> (search in Internet search engine for title and institution to access link) (Last visited Dec. 14, 2015).

30. *Id.*

31. *Teaching with Documents: The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission*, NAT’L ARCHIVES, <http://www.archives.gov/education/lessons/civil-rights-act/> (last visited Dec. 14, 2015).

religion, sex, national origin, disability, or age in hiring, promoting, firing, setting wages, testing, training, apprenticeship, and all other terms and conditions of employment.”<sup>32</sup> By enacting the Civil Rights Act of 1964, employees now have a federal claim against an employer who fails to take prompt and appropriate steps to prevent and correct unlawful harassment as enumerated in the Act,<sup>33</sup> but not psychological harassment in general. Accordingly, this issue of workplace bullying can be further narrowed into psychological harm arising from status-based bullying<sup>34</sup> (which is prohibited by several federal statutes) or non-status-based bullying<sup>35</sup> (which is currently non-actionable under federal law), and the duties that employers owe their employees to prevent each kind of harm.

Moreover, despite laws in place to prevent certain harmful harassment in the workplace, “[t]here is no requirement that [the employer make] the workplace be hospitable, or even civil,” as long as the employer treats all employees equally, poorly, or unfairly.<sup>36</sup> As a result of the lack of regulation regarding workplace bullying, a number of scholars have expressed opinions that “[o]verall, workplace bullying remains the most neglected form of serious worker mistreatment in American employment law.”<sup>37</sup> Professor David Yamada has demonstrated this neglect by exploring the shortcomings of other potential legal theories that could be used to eliminate workplace bullying, including the National Labor Relations Act, the Occupational Safety and Health Act, the Americans with Disabilities Act, Title VII hostile work environment, and the common law tort of intentional infliction of emotional distress.<sup>38</sup> Thus, to fully protect employees from status-blind bullying in the workplace and psychological harm in general, legislation that expands the protections of Title VII of the Civil Rights Act of 1964 needs to be enacted.

In contrast to U.S. laws, which currently afford no remedy to victims of status-blind workplace bullying, Canada and parts of Europe consider all forms

---

32. *Id.*

33. *Title VII of the Civil Rights Act of 1964*, *supra* note 29.

34. Michael E. Chaplin, *Workplace Bullying: The Problem and the Cure*, 12 U. PA. J. BUS. L. 437, 439 (2010).

35. *Id.*

36. *Id.*

37. David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL’Y J. 251, 253 (2010).

38. See David C. Yamada, *The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 493–522 (2000).



of workplace bullying an actionable offense.<sup>39</sup> Additionally, Mexico,<sup>40</sup> France,<sup>41</sup> Sweden,<sup>42</sup> and multiple countries in both South America<sup>43</sup> and Central America<sup>44</sup> have active legislation that addresses status-blind harassment in the workplace. Despite the successful implementation of workplace anti-bullying laws in other countries, some scholars have speculated that similar statutes could not be effectively implemented in the U.S. because there are inherent and fundamental differences underlying the rationale behind the laws.<sup>45</sup>

These scholars have described European anti-bullying laws as based on a “dignity” paradigm, which can broadly be described as a historical and deep-rooted continental tradition of recognizing respect for individuals at all levels, including at work. In contrast to the European dignity paradigm, U.S. workplace harassment law is based on anti-discrimination law, which has the goal of creating equal treatment for minority groups in the workplace.<sup>46</sup>

Accordingly, some scholars assert that the inherent differences between a law founded on principles of “anti-discrimination” in the U.S. and a law founded on a “dignity paradigm” in foreign countries make it impossible for the U.S. to implement the already-existing and successful anti-bullying laws from other countries.<sup>47</sup> The difference between the two rationales is best demonstrated by comparing the scope of Title VII of the Civil Rights Act of 1964 and the protections it guarantees to employees with the broader anti-bullying statutes found in other countries. Under Title VII, workplace bullying only becomes actionable when minorities or other protected classes of people are discriminated against, as opposed to foreign “dignity” laws, which grant broad protection against all forms of workplace bullying, regardless of the reason the bullying occurs.<sup>48</sup> As a result of the anti-discrimination focus in U.S. laws,

---

39. Harthill, *supra* note 1, at 263.

40. Fleming, *supra* note 24.

41. Harthill, *supra* note 1, at 263.

42. *Id.*

43. Fleming, *supra* note 24.

44. *Id.*

45. Harthill, *supra* note 1, at 250.

46. *Id.* at 250–51.

47. *Id.* at 251.

48. *Id.* at 250–51.

rather than a foundational respect for all individuals, gaps exist allowing status-blind bullying to go unpunished where employees who are subjected to hostile work environments have limited available remedies.

Alternatively, some scholars have observed that although some European anti-bullying laws are rooted in the dignity paradigm, the United Kingdom's (U.K.) well-developed workplace anti-bullying laws could serve as a useful archetype for future U.S. laws because they are not dignity-based.<sup>49</sup> In the U.K., several factors, including the passage of the Protection from Harassment Law of 1997, have influenced employee expectations in the workplace and prompted employers to enact and enforce anti-bullying policies.<sup>50</sup> Based on the U.K.'s success with implementing effective anti-bullying laws without following the dignity paradigm, the U.S. should adopt and follow similar provisions of foreign nations' legislation related to workplace bullying to help create and foster the safest and most productive workplace for employees without drawing lines between status-based and status-blind bullying.

Even though there is no particular federal statute that prohibits workplace bullying generally, there may be some protection available through state anti-bullying statutes, as well as tort claims that can be used to combat status-blind workplace bullying.<sup>51</sup> However, under a theory of tort liability, the threshold for harm required to be actionable will likely be higher than other workplace-specific anti-discrimination statutes because the actions must be so egregious as to create separate liability if the same act were to occur outside the context of employment.<sup>52</sup> Additionally, while individual state statutes might provide protections to employees within that state, employees who work in other states will fall outside the scope of protection. Therefore, the best way to combat workplace bullying in the future is through the creation of a federal statute that makes all harmful workplace bullying actionable, rather than reliance upon an individual state statute or a tort claim.

#### IV. WHAT IS THE DUTY THAT EMPLOYERS OWE TO THEIR EMPLOYEES: CAN IT BE REDUCED, DOES IT PROTECT ALL FORMS OF WORKPLACE BULLYING, AND WHAT MUST BE PROVED TO RECOVER UNDER FEDERAL LAW?

In modern society, numerous courts have held, and there is a common understanding, that the individual football clubs of the NFL are considered to

---

49. *Id.* at 251.

50. *Id.*

51. See generally Dan Calvin, *Workplace Bullying Statutes and the Potential Effect on Small Business*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 167 (2012).

52. See generally *id.*

be employers of the professional football players on their respective teams.<sup>53</sup> In *Brown v. National Football League*, the court held that Orlando Brown, a professional football player at the time, was employed by the Cleveland Browns, rather than the NFL.<sup>54</sup> The court stated that NFL team owners “own franchises in the NFL and employ the [U]nion members as football players.”<sup>55</sup> Additionally, because every NFL team has many more than fifteen employees, the team is subject to Title VII.<sup>56</sup> Accordingly, pursuant to the *Brown* court’s determination that owners of NFL teams were the employers of the professional football players on their teams,<sup>57</sup> Title VII requires the owners of each NFL team to provide a work environment, including the locker rooms, which will be free of status-based harassment of a protected class under the Act.<sup>58</sup> While NFL players can expect protection from status-based harassment in their workplace,<sup>59</sup> there is no law currently in place that requires NFL team owners to prevent workplace bullying that is not predicated on the basis of a protected class under the Civil Rights Act of 1964.<sup>60</sup>

Under current labor laws, employers owe a duty to their employees to create a reasonably safe workplace and to protect against ascertainably dangerous situations.<sup>61</sup> Additionally, negligence on the part of the employer, in failing to remedy dangerous situations, can lead to liability for the employer.<sup>62</sup> Further, “[s]ome relationships impose a duty on one in control of another to ensure that the servient party does not cause harm to third persons [or other employees].”<sup>63</sup> While it is clear that an NFL team or other professional sports team owner owes the professional athletes on its team a duty to remedy dangerous situations and a duty to ensure that its players do not cause harm to third persons, does this liability also extend to negligence in monitoring employees for workplace bullying that leads to psychological harm, rather than just physical harm? The duty

---

53. See *Clarett v. Nat'l Football League*, 369 F.3d 124, 130 (2d Cir. 2004).

54. *Brown v. Nat'l Football League*, 219 F. Supp. 2d 372, 383 (S.D.N.Y. 2002).

55. *Id.*

56. See Marc Lillibridge, *The Anatomy of a 53-Man Roster in the NFL*, BLEACHER REP. (May 16, 2013), <http://bleacherreport.com/articles/1640782-the-anatomy-of-a-53-man-roster-in-the-nfl>.

57. *Brown*, 219 F. Supp. 2d at 383.

58. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2013).

59. See *id.*

60. Fleming, *supra* note 24, at \*6.

61. GIL FRIED & LORI MILLER, *EMPLOYMENT LAW: A GUIDE FOR SPORT, RECREATION, AND FITNESS INDUSTRIES* 155–68 (Herb Appenzeller ed., 1998).

62. *Id.*

63. M. Jenifer Osment, *Torts—Employer—Employee—An Employer Has a Duty as a Reasonably Prudent Employer to Exercise Control over an Intoxicated Employee in Order to Prevent Unreasonable Risk of Harm to Others: Otis Engineering Corporation v. Clark*, 16 ST. MARY’S L.J. 261, 265 (1984).

owed by professional sports team owners should be expanded to include psychological harm that is reasonably foreseeable or to impose vicarious liability for the employer where steps are not taken to stop, prevent, and minimize the risk of psychological harm arising from severe workplace bullying.

As the Restatement (Second) of Torts section 315 makes clear, “[t]here is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless a special relation exists” between the person and the third person who is causing the harm or the person being harmed.<sup>64</sup> In other words, there are two kinds of situations that may create a duty to control the conduct of another person arising out of a special relationship: (1) the duty to attempt to control the person’s conduct and (2) the duty to “afford protection from certain dangers including the conduct of others.”<sup>65</sup> Accordingly, whether the employer–employee relationship creates a duty for the owner of a professional sports team to control the actions of one of his players (the bully) or to protect another one of his players (the victim), it is clear that at least some duty exists that requires owners to look out for their players’ safety, which should be interpreted broadly to include preventing reasonably foreseeable physical harm, as well as psychological harm. Despite the duty to provide a safe work environment for their employees, owners of professional sports teams have rarely been found liable for breaching their duty owed to players, even though workplace bullying continues to permeate professional sports both on-the-field and off-the-field, causing both physical and psychological harm.

In determining what duty is owed to professional athletes by their employer, it is important to look at the many different behaviors in the workplace that can constitute workplace bullying to determine what should be considered foreseeable and preventable. Some popular examples of workplace bullying include:

Some non-verbal means of bullying include the following: aggressive eye contact, either by glaring or meaningful glances; giving someone the silent treatment; intimidating physical gestures, including finger pointing; and slamming or throwing objects. Examples of verbal bullying in the workplace include yelling, screaming and/or cursing at the target . . . accusations

---

64. RESTATEMENT (SECOND) OF TORTS § 315 (AM. L. INST. 1965).

65. Fowler V. Harper & Posey M. Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 887–88 (1934).

of wrongdoing, insulting or belittling the target, often in front of other workers and excessive or harsh criticism of the target's work performance. Additional forms of workplace bullying also include false rumors about the target, breaching the target's confidentiality, making unreasonable work demands, withholding needed information and taking credit for the target's work.<sup>66</sup>

Applying this framework to the facts of the Richie Incognito–Jonathan Martin situation, the Miami Dolphins organization likely breached its duty in multiple ways: failing to reasonably attempt to control Incognito's bullying behavior and failing to protect Martin from Incognito, a person whom the Dolphins should have known possessed a reasonably foreseeable propensity for bullying and harassing Martin and others in the football workplace.<sup>67</sup>

Although parties can agree amongst themselves to limit the liability of the employer for certain injuries or dangerous situations, the court in *Retherford v. AT&T Communications of Mountain State, Inc.* held that an employer cannot lower its liability below the state-imposed common law duty to ensure the safety of its employees.<sup>68</sup> In other words, in any given situation, there is an absolute minimum duty that is owed by an employer to protect the safety of its employees imposed by state common law that cannot be abrogated or limited by private contractual agreement or waivers.<sup>69</sup> Applying this same rationale requiring employers to prevent physical harm to their employees, courts should determine that an employer's minimal duty also includes the duty to protect an employee from psychological harm resulting from all types of workplace bullying, including status-blind bullying.

Furthermore, in *Kelley v. Oregon Shipbuilding Corp.*, the court held that an employer who could reasonably know that an employee posed a physical threat to another employee created a cause of action against the employer for resulting injuries.<sup>70</sup> If new legislation is enacted in which employers have a duty to prevent psychological harm to their employees, as advocated for in this Article, then this duty would likely extend to prevent psychological harm caused by a co-employee if an employer reasonably knew that the potential for harm

---

66. Calvin, *supra* note 51, at 170–71.

67. *See* Harper & Kime, *supra* note 65.

68. *Retherford v. AT&T Comm. of Mountain St., Inc.*, 844 P.2d 949, 974 (Utah 1992).

69. *Id.*

70. *See* Kelley v. Or. Shipbuilding Corp., 189 P.2d 105, 107–08 (Or. 1948).

existed.<sup>71</sup> Extending an employer's duty to prevent foreseeable psychological harm would have great future implications in a case like the Richie Incognito situation because there was a clear history of Incognito's involvement in bullying teammates prior to the incident with Jonathan Martin. As a result of Incognito's extensive bullying track record, Incognito's employer, the Miami Dolphins, should have reasonably known of the potential risk of physical and psychological harm to Incognito's teammates and would likely have been held to have breached its duty to prevent such harm.<sup>72</sup> Moreover, in the Incognito–Martin situation, Martin claims to have made it known to the Dolphins' General Manager (G.M.) that Incognito was bullying him.<sup>73</sup> However, instead of fixing the situation, the G.M. told Martin to confront Incognito physically and punch him if he had a problem with the situation.<sup>74</sup> If Martin's claims are true, the Miami Dolphins likely breached its duty owed to both Incognito and Martin by: (1) telling Martin to harm Incognito, and (2) ignoring Martin's pleas for help to stop Incognito's bullying.<sup>75</sup> As a result, even if Martin does not have a guaranteed winning claim under any particular federal anti-bullying law, he could likely bring a claim, with a strong chance of success, for breach of duty owed by his employer for its knowing failure to remedy a harmful situation to one of its employees in the workplace, separate and apart from Martin's psychological harm claims that would be available under new status-blind bullying legislation.

Based on a formalistic reading of Title VII and the prohibition against racial discrimination in the workplace, the situation appeared ripe for an inevitable lawsuit.<sup>76</sup> However, Martin has yet to file a formal lawsuit against Incognito or the Miami Dolphins.<sup>77</sup> Some have speculated that Martin fears retribution or retaliation from Incognito,<sup>78</sup> while others have speculated that Martin thinks it will hurt his chances of being able to sign with another NFL

---

71. *See id.*

72. *See id.*

73. James Walker & Paul Gutierrez, *Martin Had Issues with Several Fins*, ESPN (Nov. 7, 2013), [http://espn.go.com/nfl/story/\\_/id/9941182/jonathan-martin-issues-several-miami-dolphins-agent-rick-smith-says](http://espn.go.com/nfl/story/_/id/9941182/jonathan-martin-issues-several-miami-dolphins-agent-rick-smith-says).

74. *Id.*

75. *See id.*

76. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2013).

77. Chris Mortensen & Adam Schefter, *Jonathan Martin of Miami Dolphins Has Not Filed Formal Complaint Due to Fear of Retribution from Teammates*, ESPN (Nov. 3, 2013), [http://espn.go.com/nfl/story/\\_/id/9921634/jonathan-martin-miami-dolphins-not-filed-formal-complaint-due-fear-retribution-teammates](http://espn.go.com/nfl/story/_/id/9921634/jonathan-martin-miami-dolphins-not-filed-formal-complaint-due-fear-retribution-teammates).

78. *Id.*

team.<sup>79</sup> Another possible reason is because an informal code of conduct, inherent within the realm of professional sports, inevitably develops among players in areas such as locker rooms, film reviews, practices, and meetings.<sup>80</sup> Within these settings, “communications of young, brash, highly competitive football players often are vulgar and aggressive . . . and that ‘for better or worse, profanity is an accepted fact of life in competitive sports, and professional athletes commonly indulge in conduct inappropriate in other social settings.’”<sup>81</sup> Along these same lines, the Court in *Oncale v. Sundowner Offshore Servers* determined that “[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.”<sup>82</sup> Therefore, any legislation enacted that creates a duty for employers of professional athletes to protect against status-blind workplace bullying will have to be “context specific” and evaluated in light of the common understanding that not everything in a professional sports locker room is “G” rated.<sup>83</sup> Hopefully, the enactment of context-specific legislation will allow players to feel more encouraged to bring claims and less worried about the future ramifications of doing so.

In the recent scenario involving Miami Dolphins offensive linemen Richie Incognito and Jonathan Martin the NFL “retained a law firm to conduct an independent investigation” and produce a report, to be made public, regarding the allegations by Martin.<sup>84</sup> Despite the recognition that a professional football locker room often features profanity and mental and physical intimidation, the report still concluded that Incognito and the other bully-teammates’ behavior exceeded the bounds of common decency.<sup>85</sup> Although the report found Incognito’s behavior to have crossed the line, one ex-professional football player who played offensive line for seven years with five different teams stated he was “kind of surprised something like this hasn’t happened earlier given the typical structure of [an individual football] positional meeting room.”<sup>86</sup> This

---

79. *See id.*

80. *See Stone, supra* note 4, at 748–49.

81. *Id.* at 749.

82. *Oncale v. Sundowner Offshore Servers*, 523 U.S. 75, 81–82 (1998).

83. *See Stone, supra* note 4, at 749.

84. *Stone, supra* note 4.

85. *Id.* at 749.

86. Ross Tucker, *Behind NFL’s Closed Doors: There’s a Richie Incognito in Every Lineman Meeting Room*, SPORTING NEWS (Feb. 17, 2014), <http://www.sportingnews.com/nfl/story/2014-02-17/richie-incognito-jonathan-martin-investigation-offensive-line-culture-meeting-room-fines-structure>.

statement by an ex-player, who was present in an extremely similar setting for a number of years, demonstrates the widespread frequency with which this kind of bullying behavior occurs in the NFL and the sweeping problem that it has become.<sup>87</sup>

Throughout the extensive media coverage of the Incognito–Martin situation, multiple sources reported that Richie Incognito and others used “racial slurs and other racially derogatory language” and “homophobic name-calling and improper physical touching” to bully Jonathan Martin.<sup>88</sup> However, despite the appalling and shocking nature of some of the statements, text messages, and voicemail messages Incognito sent to Martin, Martin has refused to press any charges in the case against Incognito.<sup>89</sup> Perhaps Martin has decided not to file a case against Incognito because sexual orientation is not a protected class under Title VII, and, therefore, would not be actionable.<sup>90</sup> Although this theory makes sense regarding the homophobic slurs, the racial slurs and racially derogatory comments would certainly be actionable under Title VII.<sup>91</sup> Perhaps the main reason that Martin has yet to file suit against Incognito is because after NFL investigator Ted Wells released his 144-page report, Martin’s agent released a statement saying that “his client feels ‘vindicated’ by the report and plans to resume his football career. ‘He feels a great sense of relief.’”<sup>92</sup> Either way, regardless of the reason that Martin has decided not to file suit against Incognito, this incident and the resulting reactions demonstrate the prevalence of workplace bullying in a professional sports context and the dire need to enact legislation to prevent similar future occurrences.

Another issue that has arisen in the context of determining whether workplace bullying is actionable under a Title VII discrimination claim focuses on the phrase “because of sex” and how it should be interpreted.<sup>93</sup> One

---

87. *See id.*

88. Sam Farmer, *Report Says Dolphins’ Richie Incognito, Others Bullied Jonathan Martin*, L.A. TIMES (Feb. 14, 2014), <http://articles.latimes.com/2014/feb/14/news/la-report-says-dolphins-richie-incognito-others-bullied-jonathan-martin-20140214>.

89. Charlie Gasparino, *Suspended NFL Player Richie Incognito Claims Texts Show Jonathan Martin Wasn’t Bullied*, FOX NEWS (Jan. 30, 2014), <http://www.foxnews.com/sports/2014/01/30/richie-incognito-fights-back-against-bullying-allegations/>.

90. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2013).

91. *See id.*

92. Adam Schefter & James Walker, *Miami Dolphins’ Bullying Report Released—Richie Incognito, Others Responsible for Harassment*, ESPN (Feb. 15, 2014), [http://espn.go.com/nfl/story/\\_/id/10455447/miami-dolphins-bullying-report-released-richie-incognito-others-responsible-harassment](http://espn.go.com/nfl/story/_/id/10455447/miami-dolphins-bullying-report-released-richie-incognito-others-responsible-harassment).

93. Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment “Because of Sex,”*



commentator suggests that “masculinities theory,” when applied in four contexts, should be determined to be harassment on the basis of sex and, therefore, become actionable under Title VII.<sup>94</sup> The relevant example is termed “Men Harassing Men Who Do Not Conform to Gender Norms” by Ann McGinley and involves men harassing other men in the workplace “who present themselves as not sufficiently masculine.”<sup>95</sup> Despite McGinley’s assertion that such harassment should be considered gender-based, courts have generally granted summary judgment for the bully–defendants under similar facts by reasoning that the harassment was occurring because of the victim’s “sexual orientation rather than his sex or gender.”<sup>96</sup> Therefore, the masculinity theory and Title VII will likely fail to provide Jonathan Martin, and others similarly situated, with an avenue for bringing a claim of discrimination in the workplace in a situation where Martin’s manliness was called into question.<sup>97</sup>

V. A PROPOSAL FOR CORRECTING THE GAPS IN EXISTING U.S. LAW: ENACT NEW LEGISLATION THAT DIRECTLY ADDRESSES STATUS-BLIND BULLYING AND ITS ACCOMPANYING PROBLEMS

To fully protect professional athletes from status-blind workplace bullying that has become institutional or customary in some respects, new legislation should be enacted that creates a duty for employers to prevent non-status-based harassment in the workplace that is likely to lead to psychological harm to their employees. This proposal to make workplace bullying actionable directly corresponds with public opinion, as an online survey by Parade Magazine depicted, where ninety-three percent (93%) of respondents voted that workplace bullying in general should be illegal.<sup>98</sup>

One obvious difficulty that will arise from legislation that creates a duty for employers to prevent status-blind bullying in the workplace likely to lead to psychological harm will be determining between what one party may classify as crude locker room banter between friends and what others consider to be workplace bullying.<sup>99</sup> Accordingly, any new legislation that is enacted should be context-specific to the relevant workplace, as well as explicit in detailing that it applies to all status-blind bullying and the foreseeable, resulting psychological

---

79 U. COLO. L. REV. 1151, 1152 (2008) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

94. *Id.* at 1154–55.

95. *Id.* at 1156–57.

96. *Id.*

97. *See id.*

98. Yamada, *supra* note 37, at 251.

99. *See* Gasparino, *supra* note 89.

harm. As is the case with most new legislation, there should be some accompanying instruction regarding the public policy underlying it, so that individuals and courts attempting to interpret the legislation know whether to give it a broad and inclusive interpretation or whether examples contained within the legislation are intended to be exhaustive. Given the almost infinite number of different kinds and forms of bullying, this Author suggests that any new legislation addressing status-blind bullying should be read broadly, erring in favor of preventing workplace bullying, and should refrain from including an exhaustive list of examples of what constitutes workplace bullying. Although this will inevitably require employers to speculate somewhat regarding the foreseeability of psychological harm and what constitutes actionable workplace bullying, such legislation will greatly increase the awareness and recognition for all parties involved about the serious effects of allowing such behavior to continue and will help curtail a serious and prevalent problem within today's society. Additionally, through the enactment of new legislation and the resulting increased awareness of harms accompanying workplace bullying, individual employers wishing to avoid this speculation should be encouraged to implement their own strong policies that prohibit workplace bullying and provide notice that it will not be tolerated.

## VI. CONCLUSION

In conclusion, although the government has generally avoided rushing to interject in legal conflicts in the realm of sports,<sup>100</sup> it is time for some form of legislation that makes status-blind harassment in a professional sports context actionable where it is reasonably foreseeable that it will result in psychological harm to the person being bullied.

In the near future, there should be some form of legislation that creates a duty for employers to protect their employees from workplace bullying that has the potential to lead to psychological harm, even if the bullying is status-blind. Although adopting legislation prohibiting status-blind workplace bullying would drastically expand the current protection that is afforded to harassed employees and potential employer liability, it would provide the safest and most fair working conditions without precluding deserving employees of any remedy for discrimination in their workplace. Under the current system, unless a person can show that he or she belongs to a protected class under Title VII of the Civil Rights Act of 1964, or the bullying behavior was so egregious to create liability on its own under a different tort theory, a wronged employee will be left without

---

100. Fleming, *supra* note 24, at \*4.

a remedy or a chance to improve his or her working conditions. Additionally, although the current laws do not protect against workplace bullying in general, by enacting relatively minor additions to Title VII and other existing laws that prohibit certain forms of discrimination to expand their scope and applicability, the laws could be greatly strengthened to help reduce workplace bullying altogether.<sup>101</sup> Therefore, some expansion of the existing laws should occur to provide protection to all employees in the workplace, rather than only a subset of the overall population. Lastly, adopting extended legislation would protect against all forms of workplace bullying and reach a greater portion of the overall population, rather than just bullying based on race, color, national origin, sex, or gender, without being overly burdensome on employers or the legal system.

Moreover, public policy supports this expansion of the current legislative scheme to cover and protect against all workplace bullying. The existing laws are designed to prevent the forms of bullying behavior that are most likely to lead to psychological harm or have other lasting damaging effects on the bullied victim. To evidence this assertion, Title VII focuses on characteristics that are inherent to an individual's identity or that someone possesses at birth. In other words, the types of discrimination that are currently prohibited are those perceived to be the most important characteristics in terms of self-identification. However, public policy supports the notion that other individual characteristics are just as important and worthy of protection, and an employee should be protected from abuse by co-workers while at work. Therefore, an employer should have a duty to take necessary steps to stop and remove all forms of workplace bullying, regardless of whether they are status-based or status-blind.

---

101. See generally Susan Harthill, *The Need for a Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act*, 78 U. CIN. L. REV. 1250 (2010).