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Editor's Note

In the October 2015 issue of *Liability Beat*, we touched on two issues. Though targeted toward law enforcement, the first topic – “Tom Brady and the NFL: Personnel Law Lessons for Public Safety Leaders” by PATC attorney Matt Dolan – is applicable to all departments within a city or county government.

Tom Brady and the NFL: Personnel Law Lessons for Public Safety Leaders

By Matt Dolan, Attorney, PATC LLRMI

On September 3 of 2015, a decision was issued by the U.S. District Court for the Southern District of New York. The decision was widely viewed by football fans as being one that centered around deflated footballs, a potential suspension for one of the game's greatest quarterbacks, and this season's prospects for one of the most polarizing franchises in America's most popular sport.

But, in reality, the decision was about personnel law. More specifically, it was about an employee's right to receive fair notice prior to discipline and to be free from inconsistently harsh discipline.

The fundamental issues upon which the court ruled are just as applicable to a dispute over a police officer's discipline imposed by a Police Chief as they are to a Super Bowl-winning

Whether the decision-maker is a leader of a public safety agency, public works director, human resource director, or commissioner of the NFL, beyond simply determining discipline in cases of misconduct on a purely case-by-case basis, issues of consistent discipline and fair notice must be addressed to ensure that disciplinary decisions are legally defensible.

quarterback's discipline imposed by the commissioner of the NFL. This is particularly true of agency leaders operating under agreements requiring binding arbitration, or whose decisions are subject to review by a merit board or personnel review board or state court, or whose disciplinary decisions could



appear inconsistent and thereby discriminatory based on race, gender, religion, military status or any other protected class status under Federal and State law.

While this article will not discuss all of the elements involved in this case, there are two key elements which will be briefly examined that are directly applicable to public safety leaders seeking to hold employees accountable for misconduct in a way that is legally defensible: (1) Inconsistent application of discipline, and (2) Lack of notice of possible discipline.

Allegations of Misconduct

Following the New England Patriots victory over the Indianapolis Colts in the AFC Championship game on January 18, 2015, allegations emerged that the Patriots offense was using under-inflated footballs during the course of the first half of that game and that the result was an unfair advantage favoring the Patriots. Furthermore, it was alleged that this under-inflation was purposefully undertaken in violation of NFL rules.

Almost immediately, the NFL launched an investigation into what has now been famously termed “Deflatgate”. At the conclusion of this investigation a “disciplinary decision” letter from the NFL was given to Brady, suspending him for the first 4 games of the upcoming season. The discipline was “imposed . . . [due to Brady’s] involvement in the use of under-inflated footballs by the Patriots in this year’s AFC Championship Game . . . [which] represents a violation of the longstanding playing rules developed to promote fairness in the game.”ⁱ

More specifically, Brady’s suspension was levied because “there is substantial and credible evidence to conclude that you were at least generally aware of the actions of the Patriots’ employees involved in the deflation of the footballs . . . [m]oreover . . . [for] your failure to cooperate fully and candidly with the investigation.”ⁱⁱ The letter contained the assertion that “[y]our actions . . . clearly constitute conduct detrimental to the integrity of and public confidence in the game of professional football.”ⁱⁱⁱ It is noteworthy that the NFL Player Contract language pertaining to conduct detrimental to the integrity of the game lays out specific examples of conduct including accepting bribes to fix games, betting on an NFL game and providing other players with performance-enhancing drugs – in the court’s view, none of these illustrations appear to be particularly similar to the deflating of footballs.

Inconsistent Application of Discipline

When considering a proposed disciplinary action, leaders of any organization would be well-served to ask themselves: Have we ever given this type of discipline for this type of conduct? If not, is this conduct something that is substantively different from anything we have dealt with in the past? If the answer to both of these questions is “no”, then there may be an inconsistency in discipline. This inconsistency can undermine the integrity of the disciplinary system and, as in the case of Brady, can result in the discipline itself ultimately being overturned.

In Brady’s case, the court refused to accept the rationale given by NFL Commissioner Roger Goodell, who stated at the arbitration stage, “I am very aware of, and believe in the need for consistency in discipline for similarly situated players . . . the closest parallel of which I am aware is the collectively bargained discipline imposed for a first violation of the policy governing performance enhancing drugs . . .”^{iv} The court determined that the comparison between the allegations against Brady and a willful violation of the NFL’s steroid policy was unreasonable and, therefore, asserted that “Brady . . . had no notice that his discipline would be equivalent of the discipline imposed upon a player who used performance enhancing drugs.”^v

The court plainly stated that, with respect to allegations of general awareness of wrongdoing and failure to cooperate with an investigation, “it does not appear that the NFL has ever, prior to this case, sought to punish players for such an alleged violation.”^{vi}

Depending on one’s definition, NFL players routinely engage in gamesmanship that could easily cross over into the realm of cheating or undermining the integrity of the game. Wide receivers try to “sell” an incomplete pass as a completion. Punters hurl themselves into defensive players in hopes of getting a roughing the kicker call. During an offensive drive late in a game, defensive players are known to fake an injury in order to stop the drive and allow their team to regroup. The list goes on. Although the court did not find it necessary to delve into the question of inconsistent discipline to such an extent, it seems fair to assume that these examples are the kind of instances which undermine the NFL’s position. These are all examples of instances in which the integrity of the game was arguably undermined and other players presumably had generally awareness of their teammates’ efforts to

game the system. And yet, these instances did not tend to result in significant disciplinary action by the NFL.

Lack of Notice of Possible Discipline

In addition to issues of consistency, when considering a proposed disciplinary action, leaders of any organization should ask themselves: was this employee in a position where they knew or should have known that the discipline we are considering now could come as a result of their misconduct? As in the case of consistency issues, the inability to answer “yes” to this fundamental question can create a substantial risk, not only of internal unfairness, but of legal liability ramifications.

The issue of lack of notice is intertwined with the issue of inconsistent discipline. Due, in part, to the fact that past incidents of general awareness and/or failure to cooperate with an investigation had not resulted in significant discipline by the NFL, the notice to Brady that such discipline could result was lacking.

The court found that Brady’s “disciplinary decision” letter asserted penalties for alleged violations that were without precedent or forewarning. “Brady had no notice that he could receive a four-game suspension for general awareness . . . and non-cooperation with the ensuing Investigation.”^{vii} The apparent inability of the NFL to point out past incidents of significant discipline based on “general awareness” or wrongdoing or failure to cooperate with an investigation was of particular concern to the court.

The Court is unable to perceive “notice” of discipline, or any comparability between a violation of the Steroid Policy and a “general awareness” of the inappropriate activities of others . . . and non-cooperation in a football deflation investigation.^{viii}

Conclusion

Ultimately, the court never answered the questions that grabbed most of the public’s attention. Did Brady know about the footballs being deflated? Did Brady instruct others to deflate the footballs? Did Brady cheat? The court never answered these questions because the initial legal analysis was limited to issues of fair notice and consistency of discipline before these other questions would be addressed. And because notice and consistency of discipline were found to be lacking, the court did not delve into a lengthy analysis of air pressure or unfair advantage in a football game.

Leaders in public safety agencies are often tempted to view an employee’s misconduct in a vacuum – because the employee engaged in activity X, they should be suspended without pay for a period of 14 days. While their assertion may be completely reasonable on its face, and a disciplinary decision may seem a moral imperative in light of the circumstances, this does not necessarily mean that the decision will not be ultimately overturned or otherwise result in liability exposure. If a similarly-situated officer was not similarly disciplined for engaging in activity X at some point in the past, the discipline may be ultimately deemed unreasonable as it creates the appearance of discriminatory discipline. Furthermore, the fact that past incidents of similar or even more egregious conduct were not subject to significant discipline tends to indicate that the officer was not on notice of the possible disciplinary ramifications of his or her actions.

In the end, Brady’s suspension was not overturned because he was deemed innocent nor was it overturned because his alleged infraction was deemed inconsequential. It was overturned because the court determined that the NFL did not offer fair notice nor did the NFL have a record of past discipline that would render the suspension objectively reasonable.

Whether the decision-maker is a leader of a public safety agency or commissioner of the NFL, beyond simply determining discipline in cases of misconduct on a purely case-by-case basis, issues of consistent discipline and fair notice must be addressed to ensure that disciplinary decisions are legally defensible.

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

Citations

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|------|---|-------|------------|
| i. | <i>NFL Mgmt. Council v. NFL Players Ass’n</i> , 2015 U.S. Dist. LEXIS 117662 (S.D.N.Y. Sept. 3, 2015) at 9. | iv. | Id. at 18 |
| | | v. | Id. at 21 |
| ii. | Id. at 9 | vi. | Id. at 27 |
| | | vii. | Id. at 21. |
| iii. | Id. | viii. | Id. at 23. |

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Accident Investigation: Root Cause Analysis

By Dennis Watts

When an accident or near miss occurs it is very important to conduct an accident investigation. The goal always is, “to prevent it from happening or occurring again.” A key and often misunderstood part of the investigation is to identify the root cause. If we are too quick in finding a cause – such as an unsafe condition or behavior – but miss perhaps a dysfunction in the operation, then we may find the condition or behavior repeating itself, maybe in a different form. If that is the case, then we may have failed in our goal of keeping it from happening again.

We must ask ourselves two questions when our investigation leads to a cause:

If we correct the identified root cause, can it happen again?

Will countermeasures developed to correct the root cause really correct them?

A key component to getting this right is to acknowledge the role of the operators (those involved in the day to day operation or processes) in performing the analysis and developing countermeasures for future prevention. For local governments this means, the department, or section, or crew within a department. The safety coordinator, or the management representative controlling the investigation may need to guide and facilitate, or provide training for this process.

Ryder System Inc., a world-class safety organization, has developed a three element process, to include starting with managers viewing the operation as it relates to the employee, the equipment, and the environment. This, when it works, allows a ground eye view of what is actually happening versus what managers think is happening from the distance of a remote office.

The first element is looking at the employee or employee’s involved in the incident, and determine the conditions, issues, or factors that may have contributed to the event. The factors could be knowledge, skill, training, experience, fatigue, or distractions that may have contributed. There may be other factors (personal issues, family, health,), but the specifics of the event should guide the investigation.

The second element is looking at the equipment, or tools. What equipment or tools were involved in the incident? What equipment was not used, but perhaps could or should have been used? Was it the correct equipment

for the job? Was it inspected and maintained? Again the specifics of the event should guide this line of the investigation.

The third element is the operating environment. This should be very broad. Often when we think of this element we focus on weather, lighting, or physical aspects of the workplace. Vehicle accidents often list road conditions as an environmental aspect of the accident. These are legitimate concerns, but we need to expand our view and include non physical factors of the environment.

For example, does the emphasis on satisfying our citizens (our customers) lead to a manager or supervisor putting pressure on employees to work faster or find shortcuts to save time and money? Does the emphasis on being good stewards of resources promote employees to not report lost or broken equipment/tools? Have we promoted a supervisor who has been a good employee, then not provide the training they need to be an effective supervisor? We need to look at management styles, skills, and practices of individuals responsible for, or who control the workplace. Not because the supervisors are bad or doing something wrong, but because the unintended consequences may not have been thought through in some cases. Lets look at the below case study.

An employee cut himself while opening boxes at a warehouse using an inexpensive fixed blade box cutter. The initial investigation showed the employee was not using the issued retracting blade cutter. All employees received a safety orientation and training on use of tools including box cutters. The investigation revealed that the employee took his issued box cutter home, and forgot to



bring it to work on day of the injury. He instead used a fixed blade cutter from a fellow employee.

Looking at this in a straightforward way clearly indicates the employee used the wrong tool, a major contributor to the injury. Environmental factors did not contribute as the workplace was well organized, well lit, and clean.

Looking at a few other environmental factors showed some critical items. First, the issued box cutters cost about \$5 each. Supervisors were held accountable if too many replacement tools were issued during a given period, and questioned by upper management on their ability to oversee their workforce. As a result, employees requesting replacement tools, such as the box cutters, received unpleasant counseling from their supervisor. It had become habit for employees not to ask for replacements, but buy their own cutters to avoid being grilled on waste.

There was not a systematic process to inspect or ensure that this type of tool was on hand or being used properly.

Though safety training and policies were in effect, other management issues (cost savings) created an atmosphere where workers were more willing to risk noncompliance with those policies than face the wrath of a supervisor.

Changing the way management, supervisors, and employees viewed the use of, and/or loss of tools, eliminated the negative atmosphere in this case. Think of how the unintended consequences of a policy or workplace habit could affect employee or organizational safety in your workplace.

When looking for the root cause of an accident, look deep. Sometimes it is not a physical issue but an element of culture or environment.

Health & Wellness Corner

Tips to Become a Morning Exerciser

By Sherea Robinson, LGRMS Health and Wellness Manager

We know how it goes. The alarm starts to ring and, as your arm instinctively reaches for the snooze button, you think “no way, this bed is way too comfortable to get out of to exercise.” But getting up and doing exercise first thing in the morning has its perks. For starters, no matter what happens during the day you know that you’ve already gotten your workout in. It’s a great way to kick start the day and fill you with energy and enthusiasm to get what you have to do done. Also, you now have your evenings back to spend more time with family or to have some you time. Of course, until it becomes routine, waking up and exercising isn’t an easy thing to do. Here are a few tips to help you get going until the habit is formed.

Get ready the night before. Your workout may seem to be a much larger obstacle to tackle if there is a whole routine of stuff to do before you can even get started. Take out the prep work by doing as much as possible the night before. Lay out your workout clothes (or sleep in them!), pack a gym bag, and put your shoes and keys right by the door. Go ahead and prep your pre-workout snack and post-workout meal. By doing all of this ahead of time, you are making the task of getting up much less daunting.

Get pumped. The normal blaring alarm clock noise may wake you up, but it doesn’t do a lot in the way of motivation. Setting the radio to go off is a good choice, or you could set your phone alarm to wake you up with your favorite workout song. Keep the music going as you get ready and maybe even dance around a bit to get your blood flowing. Also, be sure to get enough sleep so you don’t leave yourself too tired to workout.

Get into the mindset. Keep exercise on the brain. Make it the last thing you think about before you go to bed and the first thing when you wake up. Put a motivational poster in your line of sight in your bedroom. It can remind you of your goals and get you in the “let’s do this” mindset.

Ease into it. Don’t expect to pick up the morning workout routine over night. Building healthy habits take time; 21 days, to be exact. Try starting with doing morning exercise 2 or 3 days a week and then adding on. Or start with just a quick morning workout and then add time. Growing the habit slowly can help you be successful.

Plan for failure. Stuff happens. Maybe the alarm clock didn’t go off or the weather is terrible or you’ve got too much work to do. Nothing good ever comes out of making excuses so have a back up plan. A couple of workout DVDs that you can do in the living room or some saved YouTube exercise videos can help keep you on track for when the unpredictable happens.



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Safety Bulletin

Vehicle Breakdowns are Inevitable



Have a Plan!

Vehicle Breakdowns: What's Your Plan?

At work and on our own time, we all dread the feeling in heavy traffic of a tire blowing out or the engine acting up. How do we safely get off the road and then fix our vehicle or arrange for a tow, without getting killed or injured by traffic?

There are really two separate immediate issues we have to deal with in this situation.

1. Immediately get safely off the road and onto the shoulder,
2. Resolve whatever the emergency is.

Planning ahead can help us do both and increase our chances of coming out of it with only a bit of aggravation.

Getting Safely off the Road

You need to know how to react. People get panicked and forget how to safely react to emergencies. They forget to signal, or they slam on their breaks or stop in the middle of a heavy traffic lane. The National Safety Council recommends, at the first sign of trouble, easing your foot off the accelerator – do not break hard or suddenly. Using your signal, carefully maneuver your vehicle to the shoulder or, if possible, an exit. If you have to change lanes, check your mirrors and watch the traffic around you.

Once off the road, pull over as far as possible. This gives you more room between you and traffic and makes it safer if you have to exit the vehicle. Make your vehicle visible by using your hazard flashers and putting out warning triangles.

Resolving the Emergency

In the case of a flat, be certain you can change it safely: well off the road, maintaining awareness of traffic. Safety



should take precedence over missed appointments or other concerns. If in need of professional help, call for a tow or roadside assistance. Raise your hood so police and certified tow operators know you need help. If someone stops and offers help, keep your doors locked and window up and ask them to call the police or 911 for help. If there is no phone service and you have to leave your vehicle to find a phone, keep as far from moving traffic as possible, make yourself as visible as possible and never cross multi-lane roads on foot.

A few other tips:

- Check your tires and perform other routine operator level checks (such as fluids and mirrors).
- Always let someone know when and where you are going.
- Have a map; a GPS is nice, but always have a backup.
- Always know where you are, and keep an eye out for businesses and other places that might be useful if you have an emergency.
- Always look for an out in driving – the ability to change lanes, or maintaining proper following distance.
- Minimize distractions.

Carry an Emergency Kit

Everyone's emergency kit will be different. Some items to consider:

- Flashlight with extra batteries
- Scissors and string or cord
- Blanket
- Duck tape
- Extra water
- Jumper cables
- Snack-type foods
- Reflective vest
- Small first aid kit

In winter, consider adding other items, such as:

- Ice scraper
- A bag of sand or other abrasive material (for momentary traction)
- Shovel
- Matches and candle
- Flares
- Tow and tire chains

The bottom line . . .

Have a plan before you need it!



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**Local Government
Safety Coordinator 1**

January 12 Cornelia, Habersham County
January 14 Cartersville, Bartow County
January 21 Dublin, Laurens County
January 26 Tifton, Tift County

**Local Government
Safety Coordinator 2**

February 2 Cornelia, Habersham County
February 4 Cartersville, Bartow County
February 9 Tifton, Tift County
February 11 Dublin, Laurens County

**Local Government
Safety Coordinator 3**

February 16 Cornelia, Habersham County
February 18 Cartersville, Bartow County
February 23 Tifton, Tift County
February 25 Dublin, Laurens County

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