

NFL Should Have Monitored Emails To Prevent Hate Speech

By **Arash Homampour** (November 2, 2021, 3:11 PM EDT)

Discrimination and harassment have no place in today's work-from-anywhere workplace. Employers have a legal obligation to prevent hateful words directed at people in a protected status or class, or who engage in protected activities, and they must take prompt action when such behavior comes to light.

Yet we continue to see, sometimes only retrospectively, workspaces infested with such toxicity.

Case in point: Recent reports[1] show that the National Football League tolerated bad behavior for years, not just among its rank and file, but at the highest levels of the organization. Recently, the U.S. House Oversight and Reform Committee sent a letter to NFL Commissioner Roger Goodell to request documents concerning the league's workplace culture investigation into the Washington Football Team.



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How could its predominantly Black employee ranks[2] be managed and coached by a group of white men who openly and regularly disparaged them?

The NFL and its individual teams are workplaces, just like other more traditional work settings in the country. They may pay higher salaries and offer more perks, but they are subject to the same laws that apply to all U.S. employers.

With their high-paid legal teams and their fingers on the nation's pulse, the football giants should have understood the legal imperatives against hate speech and discrimination. And they should have been taking immediate action against behavior that violated moral, ethical and legal standards.

Most importantly, they should have taken proactive steps to regularly monitor and police email communications on their networks.

When Las Vegas Raiders coach Jon Gruden[3] was forced to turn in his key to the executive suite last month, it was not an isolated, one-time transgression that forced him out. His resignation was truly the straw that broke the camel's back.

According to The Wall Street Journal and The New York Times, Gruden had repeatedly engaged in racist, misogynistic and homophobic communications going back almost a decade, most of that time as an analyst for ESPN. He had directed these communications to fellow members of the upper echelon —

team owners, coaches, and others in positions of power and authority.

Gruden was just the tip of the iceberg. An inquiry recently commenced by the NFL[4] has surfaced more than 650,000 emails from the Washington Football Team.

More troublingly, it has also turned up email correspondence from NFL general counsel Jeffrey Pash,[5] in which the league's top lawyer engaged in the same type of reprehensible behavior.

Pash reportedly arranged to have penalties — including a \$15,000 fine against Washington executive Bruce Allen — rescinded, discussed a cheerleading scandal and arranged perks in emails with Washington team executives.

Pash was also the individual responsible for investigating illegal and improper activity within the NFL. Yet the NFL workplaces — and specifically, the executive suites — instead became poster children for how to do things badly.

The NFL's top law enforcement officer was not only conflicted in investigating and addressing bad behavior, he was allegedly complicit in the activity. With a level of cronyism that made a mockery of independent legal judgment, the league's general counsel was truly the fox guarding the henhouse.

At a minimum, the NFL — as well as ESPN, the network that covers it — should have been, and still can be, proactive in preventing harassment and discrimination before an actual victim comes forward.

This includes real policies, procedures and consequences that are known, understood and enforced; legitimate complaint procedures; regular training and testing; encouraging and protecting the whistleblowers; practicing early intervention; understanding microaggressions; advancing inclusion and diversity; and random but regular discrimination and harassment audits.

Like any employer, the NFL, its teams and the cable network had the ability to regularly monitor and police email communications on their networks,[6] putting them in a position to take quick and decisive action against bad actors. It might have been as simple as tracking or searching for keywords — words likely to signal bias, misogyny, homophobia, or other objectionable mindsets.

The bottom line is that these communications could have been uncovered and should never have been allowed to happen.

Under the Federal Wiretap Act,[7] as amended by the Electronic Communications Privacy Act,[8] employers that have policies stating that they can monitor their email systems have the right to monitor emails sent by employees on their work devices. The Stored Communications Act[9] governs stored communications, including an employee's search history, emails, passwords and other information stored on an employer's network.

Whether they suspect bad activity or not, all employers should give themselves the tools to police their email and other shared systems if necessary. It does not take long to run a search across emails for keywords that uncover ongoing or percolating harassment.

Employers should adopt and publish policies in their handbooks stating that employee emails and internet usage may be monitored, and that employees should have no expectations of privacy in their email communications or computer usage when using employers' email and computer systems. And

they should ask employees to acknowledge receipt of these policies.

Had ESPN, the NFL and its teams followed these simple processes, Gruden, Pash and others may have acted appropriately many years ago, or they likely would have been long gone.

As the Raiders are now discovering, nobody is irreplaceable. But the damage done to players, fans and the league's reputation could take years to repair.

In workplaces that acknowledge the #MeToo and Black Lives Matter movements, many employers have a newfound urgency to foster diversity, provide equal opportunities to qualified workers, and promote a respectful and thoughtful interchange of ideas and perspectives. They are finally recognizing the need to be proactive, to stop bad acts before they happen.

Whether employees are engaging in improper communications via emails, Zoom calls or simply standing around the water cooler, they should be counseled, disciplined and ultimately fired if they don't change their ways.

But when someone in a position of power feels perfectly comfortable making a racist, homophobic or misogynistic comment in an email or other work-related communication, we have to ask ourselves: What about the organization's true culture allowed him to believe it was okay to do so? There is something clearly wrong with a workplace where this behavior happens, especially without repercussions.

Employers should view the NFL example as a wake-up call to put policies and procedures in place — including workplace email monitoring — that can help deter and weed out such bad behavior.

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[1] <https://www.nfl.com/news/congressional-committee-seeks-information-from-nfl-on-washington-football-team-i>.

[2] <https://www.nbcnews.com/news/nbcblk/most-nfl-players-are-black-so-why-aren-t-there-n1240131>.

[3] <https://www.bloomberg.com/news/articles/2021-10-11/nflpa-leader-smith-appreciates-gruden-reaching-out>.

[4] <https://www.bloomberg.com/news/articles/2021-10-12/fallout-continues-from-gruden-resignation-over-emails>.

[5] <https://www.nytimes.com/2021/10/14/sports/football/nfl-washington-emails-jeff-pash.html>.

[6] <https://www.americanbar.org/news/abanews/publications/youraba/2018/january-2018/how-much-employee-monitoring-is-too-much-/>.

[7] 18 U.S. Code Chapter 119.

[8] 18 U.S.C. §§ 2510-2523.

[9] 18 U.S.C. Chapter 121 §§ 2701–2712.