

# Strike Him Out Throw Him Out – The White Sox And Phillies Mishandling Of Two Employment Law Issues

Michael S. Cohen

## WOLFBLOCK

The fondest of my childhood memories consist of one subject – baseball with my little brother.

Whether we were learning the game from our dad, watching it with our friends or talking about it with anyone who would listen, the Cohen boys' primary concern growing up was baseball. My brother and I would stay in our backyard, from sun up to sun down, pretending to be our heroes.

Consistent with our suburban Philadelphia upbringing, I became Pete Rose and Larry Bowa. My brother, a few years my junior and a few inches my senior, wagged his bat and his butt ala Gary Matthews. When we expanded our geographic scope, I became Rod Carew, my brother went George Brett.

When day turned into night, we either watched the Phils on television, or, when Harry and Whitey bid us a good night, down to the basement we went, continuing our season of Strat-O-Matic baseball until inevitably my mom chased us to bed.

Things have changed.

Although my brother now is in New York City and I remain in Philadelphia, we still talk almost daily. And whether the conversation begins with one of us telling a funny story about what our daughters did or complaining about how our wives seem to think there is, in fact, a money tree growing in one of our apartments, the conversation invariably comes back to baseball.

The conversations are far different than they used to be. Now, we find ourselves focusing on the way the league as a whole, and teams specifically, seem to do everything in their collective power to make the game, and its players, difficult to applaud.

While my brother, the financier, views the situation from his Wall Street perspective, as an employment lawyer, my frustration derives from the fact that many of baseball's reported missteps could have been avoided. Many of the alleged fouls did not have to happen.

This season, two of these blunders involved high profile employees, namely Ozzie Guillen, manager of the World Champion Chicago White Sox, and Brett Myers, pitcher for the Philadelphia Phillies. This article will discuss how the Major League Baseball franchises reportedly bungled each player's transgression and how the more prudent employer would have responded appropriately to each.

### Ozzie Being Ozzie

On June 20, 2006, Guillen, unhappy with Chicago Sun-Times sports columnist Jay Mariotti, is alleged to have let out a verbal rampage culminating with Guillen referring to Mariotti by saying, "What a piece of %0# he is, %0&#% fag." This amazingly homophobic tirade allegedly came on the heels of Guillen's 2005 reported "greeting of a friend" in New York by, "Hey everybody, this guy's a

homosexual! He's a child molester."

The White Sox responded with, in essence, it was just Ozzie being Ozzie. You see, in the 1980s and 1990s, Guillen was a successful slap-hitting short-stop who survived in the league for 16 years based less on pure talent, and more on the fire and desire to win. Apparently, the White Sox organization didn't want to take away Guillen's fire and lose any of the "Ozzeness."

Notwithstanding the horrifically offensive nature of what Guillen was reported to have said, the White Sox took exactly zero action against its manager. Sure, according to Guillen, White Sox owner Jerry Reinsdorf "reprimanded me like a friend." But, no suspension, no loss in pay, no disciplinary response at all.

While Guillen's purported statement was amazingly inappropriate, the fact that the White Sox determined that there was no reason to take action against its manager was even more so, particularly in light of the fact that this was the second time in as many years that Guillen was reported to have spewed forth this kind of anti-gay venom.

What if someone who was the face of your organization conducted himself or herself in such a manner? Would you be comfortable from a legal (or human) standpoint taking no action against the employee? This do-nothing approach creates real legal risks.

First there is the hostile work environment claim. Guillen's alleged statement, and the team's failure to take remedial action after the statement, absolutely could be used as evidence in the future if a White Sox employee brings a claim for harassment or discrimination based on sexual orientation, which is a protected class in Illinois.

Assume that a White Sox marketing employee feels that he was treated differently because he is gay. That employee claims that the organization has created and condoned a culture of intolerance towards gay employees. Guillen's alleged statement, and the organization's inaction in response to his statement, may serve as evidence supporting this employee's allegation.

Moreover, in failing to take remedial action against Guillen, the White Sox have created a comparator who may be difficult to escape in the future. What if a Caucasian, female, Jewish executive, who is not the face of the organization, makes an anti-gay statement, or statement against any protected class, and that employee is suspended or even terminated for her indiscretion? This Caucasian, female executive may claim that she was treated more harshly than was Guillen because of her gender, race and/or religion. While the White Sox may argue that Guillen is not a valid comparator, such a determination likely will not be made until well into the litigation of that case.

Even in the best case scenario, where the case is dismissed at summary judgment because no valid comparator exists, a great deal of time and money will be spent to achieve the result. Just as likely, however, the summary judgment motion



Michael S. Cohen

will be denied, leaving the jury to make the determination.

Do you, as general counsel or CEO, want to roll those dice? It seems the more effective way to handle the situation is to take prompt remedial action against the initial wrongdoer at the time the initial infraction occurred.

And what about the public relations component of the White Sox mishandling of Guillen's alleged inflammatory remark? The Gay Games were held in Chicago this summer. Do you think many of the Games' attendees beat a path to U.S. Cellular Field for purposes other than expressing their anger with Guillen and the White Sox organization?

Finally, seemingly ignored by the White Sox brass is the very real employee relations issue the situation must create. Imagine you are a gay employee of the White Sox. How do you feel knowing your employer sent a very clear message of apathy following Guillen's alleged statement? Do you think this employee is going to work hard for the organization or put in extra hours because the employee believes in his or her employer's mission? Unlikely.

Guillen's alleged words were horrific. Their inappropriateness paled only in comparison to the team's lack of action following the statement. However, the White Sox inaction was at least equaled by my team, the Phillies, in its inexplicable and inexcusable failure to act in response to one of its pitcher's off-field conduct.

### Brett Myers, The Staff Ace

In the early morning of June 23, 2006, former amateur boxer and current Phillies pitcher Brett Myers was charged with assaulting his wife Kim on a street in downtown Boston. Myers, standing six feet-four inches and weighing 240 pounds, was alleged to have struck his five-foot four inch, 120-pound wife twice with his fist and, according to a witness, slapped her and then pulled her off the ground by her hair.

By now, most people know the story. Myers' alleged assault took place only hours before the Phillies opened a weekend series with the Red Sox. By game time that night, baseball and news commentators throughout the nation discussed not only the horror of the alleged domestic abuse, but also the fact that there simply was no way the Phillies would allow Myers to make his scheduled start the following day.

How would you have dealt with Myers' alleged transgression? Hopefully, not like the Phillies.

The team's first response to the situation was, and there is no other word for it, wrong. In response to questions about whether Myers would pitch the following day, team General Manager Pat Gillick explained, "I think it's in the best interest of the club [for Myers to pitch]. He's our best pitcher." After all, as of June 24, 2006, the Phillies were only 11 games behind the first place Mets and in eighth place in the National League Wildcard race. Imagine had the staff ace not started, the season might have been lost.

Myers made his scheduled start on June 24. Following the game, Myers made the situation worse. Rather than showing an ounce of contrition, Myers remarked, "I'm sorry it had to go public. That's it."

It was not until Tuesday afternoon, June 27, that Team President David Montgomery finally offered the team's first official statement. Montgomery's statement was reasonable, and likely would have been well received had it occurred about three days earlier. However, by this time, now more than four days since Myers had been arrested, Montgomery's statement, and the team's inaction, was the subject of intense, and justified, criticism.

This criticism intensified after one of the Phillies' owners, Bill Giles, who was in Italy when the alleged assault occurred, stated "I do know what really happened was a lot less than what the public thinks happened.... Brett was trying to help his wife." Following Giles' embarrassing statement, a Phillies executive who did not want to be named pleaded, "[Giles] must have misunderstood what [team President David Montgomery] was telling him. There was no way Brett was helping Kim that night."

The Phillies handled the Myers situation, at best, poorly. The question remains, however, what should the team have done? What should the prudent employer do when one of its most important contributors allegedly commits an act as vile and as public as that attributed to Myers?

From a public relations perspective, the prudent employer would get out in front of the situation. It would not, as the Phillies did, offer absurd explanations for its actions and then, when criticized, bury its head in the sand and wait for the fans, media and public interest groups to excoriate it about its ineptitude.

From a legal perspective, however, employers generally cannot take action against an employee based solely on an arrest. In this case, the Phillies likely would have been on the losing end of arbitration had the team suspended Myers without pay based simply on what was alleged.

That does not mean, however, that the Phillies, or any other employer, is prevented from taking action against an employee who is arrested for a crime outside of the workplace.

The Phillies could have suspended Myers pending the outcome of its own internal investigation and analysis of the facts. As mentioned above, while in most cases an employer is forbidden from taking adverse employment action against an employee based on an arrest, an organization absolutely may take action based on the facts that are revealed during its own internal investigation. Had the Phillies taken this course of action, thereby sending a clear message not only to Myers but to its fans as well, that domestic violence simply would not be tolerated, the team could have avoided yet another public relations debacle. Instead, the team went ostrich, hoping the whole matter would just disappear. It didn't.

Baseball could have had a magical summer. Chase Utley chased Rose's national league hitting streak record, the Detroit Tigers are the best story in sports, and we are getting what might be our last look at Roger Clemens. But those are not the subjects about which people are talking, at least not my brother and me. When he and I speak, it's been more about the sport's mistakes than anything else.

*Michael S. Cohen is an Associate in WolfBlock's Employment Services Practice Group. He concentrates his practice in the areas of training and counseling and has conducted investigations into claims of harassment and discrimination.*

*Please email the author at [mscohen@wolfblock.com](mailto:mscohen@wolfblock.com) with questions about this article.*