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Case Summaries

NCAA V. Alston: Student-Athletes Trounce NCAA, 9-0, in Supreme Antitrust Battle

By Gary J. Chester, Senior Writer

For decades, some sports law scholars and economists have characterized the NCAA as an illegal cartel engaging in anticompetitive conduct that is unfair to student-athletes.

On June 21, 2021, the U.S. Supreme Court confirmed those allegations.

In a landmark 9-0 ruling in *NCAA v. Alston*, 594 *U.S.* ___ (2021), the Court held that the NCAA's scheme to limit compensation to student-athletes in the name of amateurism violates section 1 of the Sherman Act. The opinion, written by Justice Neil Gorsuch, praised both the Ninth Circuit and the trial court that had ruled in favor of the student-athletes.

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Procedural History

Student-athletes won a huge victory in *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015), where the Ninth Circuit affirmed in large part a district court's ruling that the NCAA illegally restrained trade, in violation of section 1 of the Sherman Act, by preventing FBS football and Division I men's basketball players from receiving compensation for the use of their names, images, and likenesses (NILs). The court also affirmed the district court's injunction which required the NCAA to permit athletic scholarships covering the full cost of attendance.

Alston is a consolidation of multiple actions brought by current and former student-athletes in men's Division I FBS football and men's and women's Division I basketball. The case was decided after a bench trial before Judge Claudia Wilken (who also decided *O'Bannon*). The district court ruled that NCAA limits on education-related benefits such as private tutoring and laptop computers were unreasonable restraints of trade and that the athletic conferences could set different standards. But the court found that the NCAA limits on compensation unrelated to education are lawful.

On appeal, the Ninth Circuit in 2020 held that the circuit court properly applied the rule of reason in determining that the NCAA's limits on education-related compensation constituted unlawful restraints of trade under section 1. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig*., 958 F. 3d 1239 (CA9 2020). [The rule of reason is one of three ways to analyze alleged anticompetitive conduct; it is a fact-specific assessment of market power and market structure to determine if a restraint restricts competition.]

The appeals court found that only the NCAA's rules restricting non-educational benefits and certain academic or graduation awards were reasonably related to the procompetitive goal of improving consumer choice by maintaining a distinction between college and professional sports. (In other words, the NCAA can prohibit payments to athletes that are unrelated to their education, but it cannot restrict colleges from offering private tutoring, computers, post-graduate scholarships, and other education-based benefits as part of an athletic scholarship.)

The NCAA appealed to the Supreme Court, asserting that it is immune from the normal operation of antitrust law and that, in any event, the district court should have approved each of the NCAA's restraints on student-athlete compensation.

The Opinion

The Supreme Court's 36-page opinion essentially begins with a brief history of the intersection of commercialism and college sports. It recounts the first intercollegiate competition: an 1852 boat race at Lake Winnipesaukee, New Hampshire between students from Harvard and Yale. The event was sponsored by a railroad executive who sought to promote train travel to the picturesque lake.

Justice Gorsuch discusses the 1929 Carnegie Foundation report that found college athletics to be overridden with commercial interests. He recounts the NCAA Sanity Code adopted in 1948 to authorize universities to pay athletes' tuition while simultaneously enabling member institutions to limit the amount of compensation granted to student-athletes. The history concludes with the observation that the NCAA in 2014 first permitted conferences to allow "member schools to increase scholarships up to the full cost of attendance."

The Court notes that the NCAA accepted that its members enjoy a monopsony (a buyer's monopoly) in the market for student-athlete services and that its restraints harm competition. It was uncontested that "student-athletes have nowhere else to sell their labor."

A primary NCAA position was that its objective of preserving amateurism in college sports called for a standard of antitrust scrutiny that was less restrictive than the customary "rule of reason." The NCAA relied on dicta in *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984)

(NCAA's television contracts with two networks held anticompetitive), wherein the Court recognized that the NCAA is given latitude to promote amateurism in college sports. But the Court rejected the notion that it should use a "quick look" standard to summarily declare the NCAA's limits on athletic scholarships to be lawful.

Justice Gorsuch proceeds to address three main objections that the NCAA raised.

The first is that member institutions will abuse the district court's inclusion of paid post eligibility internships as an approved education-related benefit that colleges can offer as part of a scholarship package. The NCAA imagines that boosters will promise internships "at a sneaker company or auto dealership with extravagant salaries." The Court states that the NCAA's reading of the district court's ruling was too broad, as it did not preclude "NCAA rules prohibiting its members from providing compensation or benefits unrelated to legitimate educational activities—thus leaving the league [conferences] room to police phony internships."

Second, the NCAA asserted that the trial court's ruling that it may fix academic awards at a level no lower than the limit on athletic awards (currently $5,980 per year) is the equivalent of a professional salary. The fear is that colleges will pay players thousands of dollars each year for minimal achievements such as a passing GPA. The Court stated: "The basis for this critique is unclear. The NCAA does not believe that the athletic awards it presently allows are tantamount to a professional salary…[and] the NCAA [is] free to reduce its athletic awards."

Third, the NCAA is said to overstate concerns over in-kind educational benefits, fearing that schools will offer items much more valuable than graduate scholarships, laptops, and tutoring. But the Court stated that "the NCAA is free to forbid in-kind benefits unrelated to a student's actual graduation; nothing stops it from enforcing a 'no Lamborghini' rule."

Gorsuch concludes the opinion by recognizing that some will think the district court did not go far enough in assisting student-athletes who generate millions in revenue each year for their universities, while others will believe the courts have undervalued the social benefits associated with amateur sports. He states: "For our part, though, we can only agree with the Ninth Circuit: "'The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law.'"

The Concurrence

Justice Brett Kavanaugh's five-page concurring opinion fires an uncustomary warning shot at the NCAA. He observes that "the NCAA has long shielded its compensation rules from ordinary antitrust scrutiny. Today, however, the Court holds that the NCAA has violated the antitrust laws. The Court's decision marks an important and overdue course correction, and I join the Court's excellent opinion in full."

Kavanaugh discusses the compensation rules restricting student-athletes from profiting from their NILs, writing that those rules "also raise serious questions under antitrust law…Under the rule of reason, the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such a justification."

The concurrence debunks the NCAA's rationale that the defining feature of college sports is that student-athletes are not paid. Kavanaugh asserts that the NCAA's business model would be flatly illegal in almost any other industry in America.

"The bottom line," Kavanaugh states, "is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes."

Kavanaugh observes that many of the athletes who generate substantial revenues are African American and from lower-income backgrounds and "end up with little or nothing." He recognizes that compensating student-athletes raises Title IX and other concerns, suggesting that the universities and student-athletes could work to resolve the issues through collective bargaining.

The concurrence concludes: "Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law."

The Takeaway

- *Alston* is a huge win for student-athletes, but not a total loss for the NCAA. The ruling affirms the district court's finding that the NCAA could prohibit payments to student-athletes that are unrelated to education because differentiating college sports from pro sports promotes competition and broadens consumer choice.
- The decision continues the erosion of NCAA authority over intercollegiate athletics that had begun in previous antitrust cases such as *Bd. of Regents* (cited above), which shifted authority over TV contracts from the NCAA to the various conferences, and *Law v. NCAA*, 902 F. Supp. 1394 (D. Kan. 1995), which held that the NCAA cannot lawfully place limits on the salaries that colleges pay to assistant coaches. The result is that much power has shifted from the NCAA to the athletic conferences and individual universities.

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Sports Law Experts Weigh in on the Import of the Landmark Supreme Court Ruling in *Alston*

Sports Litigation Alert asked a handful of our contributors, all of whom are attorneys, to analyze the U.S. Supreme Court's ruling in *NCAA v. Alston*. Here are their responses:

Jeff Birren, former law professor/general counsel to the Oakland Raiders

It is sad that it took a unanimous Supreme Court decision to finally do the right thing so that now so many of their athletes can be lifted out of poverty. The NCAA will have spent well over $100,000,000 in attorneys' fees. Had they embraced change earlier, that money could have gone for many worthy causes, starting with a fund for permanently injured college athletes.

Mark Conrad, professor of sports law and ethics at Fordham University

The Supreme Court's opinion not only reaffirmed the importance of antitrust law in the governance of sports associations, but also demolished the NCAA's core arguments. In justifying a rigorous "Rule of Reason" analysis (as opposed to the more lenient "quick look" approach), the court affirmed the district court and appeals court rulings that found that the educational benefits restrictions were unduly burdensome to student-athletes and rejected the "amateurism" justifications given by the organization.

The court strongly rejected the NCAA's reliance on language in the 1984 Board of Regents ruling that pointed to the NCAA's role as protecting the "revered tradition of amateurism." The fact that the NCAA relied so strongly on an old case that had nothing to do with student-athlete rights shows a desperation in finding anything to justify its restrictions.

The lower court ruling in question was actually quite narrow — it only rejected the method of calculation of educational benefits but upheld other compensation restrictions. Yet, the NCAA made a misguided

attempt to appeal the case to the Supreme Court. This turned out to be a strategic mistake.

Justice Kavanaugh's concurrence goes further than the majority opinion in its criticism of the NCAA's restrictions. His criticism of the NCAA's policies used a broader brush and opens the door for more litigation. Maybe that is why the NCAA threw up its hands when it suspended enforcement of its name, image and likeness regulations in the states that do not have pro-NIL laws.

If the NCAA is hoping for a lifeline from Congress in passing new NIL laws, coupled with an antitrust exemption, dream on.

Gary Chester, sports law professor and national CLE lecturer on sports law

The Supreme Court recognized the thin veneer that is so-called amateurism in college sports. The truth is that our universities did away with true amateurism, where people engage in sports without significant compensation, decades ago when it took in substantial television and other revenues and awarded valuable scholarships to student-athletes who are aggressively recruited by highly compensated coaches. The Court, particularly Justice Kavanaugh, recognized that the NCAA and the universities have enriched themselves while maintaining strict limits on the ability of a student-athlete to profit from signing autographs and other activities that are not directly related to games. A telling statement in the opinion: "While the NCAA asks us to defer to its conception of amateurism, the district court found that the NCAA had not adopted any consistent definition…the NCAA's rules and restrictions on compensation have shifted markedly over time."

While few see our universities as akin to for-profit businesses, there is little doubt that the athletic departments in the major conferences are just that. The Court understood this concept and did an excellent job of examining intercollegiate athletics through the lens of antitrust law. It saw the NCAA for what it is: a business charged with keeping costs as low as possible for its members, without regard for the constraints of antitrust law.

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High School Football Players Tossed from Summer Camp, Then from Court

By Jeff Birren, Senior Writer

In 2016, high school football players attended a summer camp at a university campus. They stayed in a dormitory and received on-field instruction. The university had a concurrent high school cheerleading camp, and those participants were in a neighboring dormitory. During the camps, a female cheerleading coach believed that she had seen people in a nearby window "observing her" and possibly photographing her while she undressed in her dorm room. She reported it and university police investigated. Ultimately seven players were dismissed from the camp. Two of the players subsequently sued members of the university's police department alleging various federal claims, including unreasonable search and seizure. The defendants filed a motion to dismiss. The District Court denied the motion and the defendants appealed. The Eighth Circuit recently reversed the District Court in a 2-1 opinion, (*T.S.H. v. Green*, Case No. 19320, 2021 U.S. App, LEXIS 13828, W.L. 1878155 (5-11-21)).

Facts

The camp was held in June 2016 at Northwest Missouri University. The participants were supervised by their high school coach and received on-field instruction by university coaches. The school also hosted a cheerleading camp and they stayed in a "neighboring dormitory." A female cheerleading coach reported to resident assistants that she "had seen people in a nearby window, and possibly photographing her, while she undressed in a dormitory room." That was forwarded to University Police. Clarence Green, head of campus police, and Officer Anthony Williams, investigated the incident (Id. at 5).

They "inferred" that the window in question belonged to one of two dormitory rooms that were assigned to seven football camp participants. The officers filed an "offense report" that included the students' names. According to the Complaint, Williams "directed their high school coach to gather the seven players in a room and hold them there for 'interrogation' about the incident." The coach, "acting at the officers' direction" and "in submission to" the officers' perceived authority, brought the players into a room and "told them they

were being investigated." The coach "kept the players in the room 'for a period of hours'" to question them.

He asked to see the photographs on their cell phones, and this was done, in "submission" to the officers' "perceived authority." No one confessed, and the players "were expelled from the camp." Two of the participants, identified by their initials" "T.S.H." and "H.R.J.", sued Officers Green and Williams in federal court. They claimed that the defendants violated their rights "against unreasonable searches under the Fourth and Fourteenth Amendments*."* They asserted that they were subjected to an unlawful seizure because their coach "confined" them at the officers' direction. They further alleged that the officers "denied them certain statutory rights to due process and privacy that are accorded to juveniles in federal delinquency proceedings." They also claimed that the officers "conspired to violate their civil rights" (Id. at 6).

The defendants moved to dismiss the Complaint "based on qualified immunity." The District Court denied the motion, holding that the Complaint "adequately alleged violations of clearly established constitutional rights" and that "qualified immunity could not be established 'on the face of the complaint.'" The defendants appealed. The Circuit had "jurisdiction to consider their interlocutory appeal addressing purely legal issues."

The Circuit's Analysis

The Court began by stating that state actors are entitled to "qualified immunity from suits under 42 U.S.C. §1983" unless "(1) they violated a federal or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." The critical question is "whether the official acted reasonably in the particular circumstances that he or she faced." The denial of a motion to dismiss based on qualified immunity is reviewed *de novo*. The court must "accept as true all of the complaint's factual allegations and view them in the light most favorable to the plaintiffs."

The Fourth Amendment Claim

The defendants argued that they were entitled to qualified immunity on the Fourth Amendment claim. The first question was whether the defendants "seized" the students. The Complaint alleged that the officers "instructed" the coach to confine the students in a room and question them. The Court assumed "for the sake of analysis" that "the coach was acting as an agent of the officers" and because the students claimed that they "submitted to the officers' authority, we will also assume that they were seized within the meaning of the Fourth Amendment."

The defendants asserted that "any seizure was reasonable, or at least they believed that was the case." The Eighth Circuit had previously "observed" that "in the public-school context, children have a diminished expectation of privacy, and this expectation becomes even more diminished" in "extracurricular activities and athletics" (Id. at 7). A school official does not need "probable cause to search a student" but legality is based "on the "reasonableness, under all the circumstances, of the search." Although the law is not settled in this area, the defendants "could have proceeded on the understanding" that the test was based on reasonableness. Moreover, "searches conducted by school police or school liaison officers have been evaluated under a reasonableness standard." The majority determined that "a reasonable officer could have believed that the seizure was reasonable."

The plaintiffs responded by stating that the officers treated the incident as a "possible Title IX incident" but because "the cheerleading coach was neither a student nor an employee of the University" Title IX was not implicated. The Court thought otherwise. "Title IX also protects third parties from sexual harassment …in a school's education programs and activities" (Id. at 8). This same rationale also applied to the breach of Missouri privacy claim, as "reasonable officers could have believed that the cheerleading coach's report gave reasonable grounds to suspect that questioning the student would turn up evidence about invading the privacy" of that coach.

The "seizure" must also have been reasonable "in scope." Other courts had "found student seizures of similar durations to be reasonable." The plaintiffs "identify no authority for placing a more precise limitation on the duration for the seizure" and the Court concluded that "the students had not clearly established right to be free from a seizure" for that time period. Consequently, "it was reasonable" for the officers "to believe" that a seizure of high school students by their coach, at the officers' request, was reasonable and thus they were "entitled to qualified immunity on this claim."

The Statutory Claims

The plaintiffs made claims under 18 U.S.C. §5033, that provides "specific due process rights for juveniles who have been 'seized' in connection with a criminal investigation" and "that the officers violated their 'right to privacy' by disclosing certain information in violation of 18 U.S.C. §5038." The statutes "at issue concern juvenile delinquency proceedings under federal law." However, those statutes "are not applicable here" as the students "were not charged with federal crime" and thus the defendants were "entitled to dismissal on these claims" (Id. at 9).

Conspiracy to Violate Civil Rights

This "plaintiff must show that the defendant conspired with others to deprive him of a constitutional right." If a defendant believed he was acting lawfully as an individual, "then he could also believe that he was acting lawfully by working with a colleague to the same end." The officers believed this and thus "they violated no clearly established constitutional right by acting in concert" and were therefore entitled to qualified immunity on this claim. The dissenting opinion agreed with the majority that the statutory claims should have been dismissed but stated that the Fourth Amendment and civil conspiracy claims should not have been dismissed.

Conclusion

The Court remanded the case to the District Court with instructions to dismiss all claims. Teen-based movie comedies have long celebrated this sort of dorm-room behavior. Although boys may be boys, they need to know that certain behavior can lead to unpleasant consequences and the courts may not be a path compensation.

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Court Grants Summary Judgment to College in Case Involving Contract Dispute with Coach

By John Miller, Ph.D., sports law professor at the University of Southern Mississippi

Jeff Harlow entered into an employment agreement with Chaffey Community College for the position of Professional Expert-Head Coach, Baseball for January 15, 2004, through May 31, 2004. From 2004 through 2017, Harlow was annually hired for the season-long position of baseball head coach. Each year the position was promoted as a temporary, non-faculty position for a fixed term, terminable at any time without cause at the sole discretion of the community college.

Harlow's agreement ended in 2017 when, Eric Bishop, the vice president of student services at the time, made the decision not to offer Harlow the head coach position for the 2017-2018 baseball season. Bishop declared that his decision not to hire Harlow for the 2017-2018 baseball season was predicated on the results of an independent investigation regarding a baseball game between Chaffey and Santa Ana Community College. A written report to Interim Athletic Director Jeff Klein proclaimed that Harlow was ejected for arguing with an official and using profanity.

After being ejected, Harlow left Santa Ana in a van he had used to bring the student-athletes to the game. According to school policy, coaches are responsible for ensuring all athletes have transportation to and from sporting events. However, Harlow revealed that because he was experiencing a panic attack, he drove the van about 40 miles to take his medication. Notably, Chaffey Community College policy prohibits more than seven passengers in a van transporting student-athletes. However, because Harlow drove one of the vans home from the game alone, each remaining van had more than seven passengers and one student did not have a seat belt, thereby violating college policy.

Cory Schwartz, interim dean of Kinesiology, Nutrition, and Athletics, Interim Athletic Director Jeff Klein, and Susan Hardie, director of human resources received an anonymous email, purportedly from a parent, reporting that Harlow jeopardized the safety of student-athletes at the 2017 game. After receiving the email, Hardie recommended Harlow be placed on administrative leave while an independent investigator completed an investigation as is the protocol at Chaffey. Harlow was placed on paid administrative leave in both his coach position and his faculty position.

Based on the investigator's report, Bishop concluded Harlow endangered the student-athletes when he left them at a game and took a Chaffey van without ensuring all athletes returned to Chaffey safely. Bishop further decided it was not safe for Harlow to operate a motor

vehicle if he was experiencing a panic attack. Furthermore, Bishop had also been told that Harlow urinated on an opposing team's baseball field, would yell at office staff, and was easily upset. However, Harlow denied urinating on the field and yelling at staff. Bishop asserts that he decided not to offer Harlow a professional expert contract for 2017-2018 based on Harlow's behavior and failure to take responsibility for his actions but allowed him to return to teaching. As a result of his dismissal as a coach, Harlow brought claims for race, age, and disability discrimination; retaliation; and harassment against Chaffey Community College. These issues will be discussed in the following sections.

Age Discrimination

The Age Discrimination in Employment Act (ADEA) of 1967 was created to protect employees who are 40 years old or older from discrimination in the workplace. The ADEA prohibits organizations from hiring or firing an employee based on that person's age. Thus, the ADEA promotes "employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment" (Age Discrimination in Employment Act of 1967 (Pub. L. 90-202) (ADEA), section b).

Because he was older than 40, Harlow asserted age discrimination because he is white and his replacement as the head baseball coach, Michael Cordero, Latino, was younger, less qualified, and has less experience. Defendants argue the Court should grant summary judgment on Harlow's claim for age discrimination because Harlow cannot prove a prima facie case of age discrimination. Using the three-stage burden-shifting approach established by *McDonnell Douglas Corp. v. Green* (1973). For the first stage, the plaintiff first bears the burden of establishing a prima facie case, which raises a presumption of discrimination. To ascertain a prima facie case of age discrimination, Harlow needed to reveal that he (1) was at least forty years old, (2) was performing his job satisfactorily, (3) suffered an adverse action, and (4) was either replaced by a substantially younger employee with equal or inferior qualifications or discharged under circumstances otherwise giving rise to an inference of discrimination (*Schechner v. KPIX-TV*, 2012).

In the second stage, the burden shifts to the employer to rebut this presumption by producing admissible evidence sufficient to show that "its action was taken for a legitimate, nondiscriminatory reason" (*McDonnell Douglas Corp. v. Green*, 1973, pp. 355-356). Should Chaffey Community College, as the employer, supports its burden, the presumption established in the first step disappears. As a result, Harlow would need to raise a triable issue indicating that Chaffey Community College submission was a simple pretext for unlawful discrimination or offer other evidence of discriminatory motive (*McDonnell Douglas Corp. v. Green*, 1973, p. 356). To do so Harlow needed to produce sufficient evidence "to allow a jury to conclude that age was a 'substantial motivating factor in his termination" (*Harris v. City of Santa Monica*, 2013, p. 232). This requirement ensures that "liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision" (*Harris v. City of Santa Monica*, 2013, p. 232).

In the third stage, the burden falls to the defendants to present admissible evidence revealing Chaffey terminated Harlow for a legitimate, nondiscriminatory reason. An employer's "true reasons need not necessarily have been wise or correct," as long as they are not discriminatory. In the immediate case, evidence showed that Bishop decided to terminate Harlow due to the events such as leaving his team and other objectionable actions at the baseball game against Santa Ana Community College. The defendants argued that because Harlow did not apply for the coaching position for the 2017-2018 season after Bishop made the decision not to offer him the position, Harlow could not state a claim for age discrimination. However, it could be asserted that Harlow suffered an "adverse action" sufficient to state a claim when he was not offered a contract for the subsequent year (*Wilson v. Murillo,* 2008). Since the defendants provided sufficient evidence that they acted for a legitimate, nondiscriminatory reason, Harlow had to show the defendants' reasons were pretextual. However, Harlow made no further argument addressing age discrimination. As a result, the court granted summary judgment to the defendants.

Racial Discrimination

The most significant law that covers racial discrimination on employment is Title VII of the Civil Rights

Act of 1964 (Title VII of the Civil Rights Act of 1964 (Pub. L. 88-35*2)*. Title VII protects individuals against employment discrimination based on race and color as well as national origin, sex, or religion. Title VII also prohibits employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals of certain racial groups. Thus, it is not lawful for an organization to discriminate against any employee or applicant for employment because of race or color regarding the hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment.

Harlow alleged that once in the 1990s and once in 2008 he was told he needed more "color" in his program. To that extent, the Court reported that offensive comments are not actionable. Furthermore, two comments over nearly 20 years do not generate a prevalent environment of harassment. Further, the Court indicated that race discriminatory was not about his race or the race of coaches rather it referred to student-athletes. As a result, the allegations Harlow made about the three student-athletes harassing him apparently because he is white were irrelevant since the individuals were students and not Chaffey employees. Thus, the Court granted summary judgment to the defendants regarding assertions of race discrimination.

Disability Discrimination

Disability discrimination happens when an employer that is covered by the Americans with Disabilities Act (ADA) or the Rehabilitation Act treats those with a qualified disability unfavorably because of the disability. Among the disabilities covered under the ADA are panic attacks (*Equal Employment Opportunity Commission v. Crain Automotive Holdings, LLC* No. 17-cv-00627 (E.D. Ark. April 11, 2019).

Harlow did not allege any comments were made to him as to his disability (e.g. panic attacks). Instead, he asserted that he was not provided proper accommodations as he had to drive Chaffey vans and did not have an additional coach assigned to him despite his disability both of which were standard policies for Chaffey Community College. The Rehabilitation Act defines disability as "a physical or mental impairment that constitutes or results in a substantial impediment to employment" 29 U.S.C § 705(9).

A person alleging a claim under Section 504 of the Rehabilitation Act must establish a prima facie case by revealing evidence that he/she is: disabled within the meaning of the Act; able to perform the essential aspects of his employment either with or without reasonable accommodations; and receives federal financial assistance. Additionally, the plaintiff must show the defendant involved in contrary employment action(s) that discriminated against the plaintiff due to a disability. Furthermore, "A failure to provide reasonable accommodation can constitute discrimination under section 504 of the Rehabilitation Act" (*Vinson v. Thomas*, 2002). However, he did not present any evidence that he requested to alter these standard policies due to his disabilities until after he was terminated as baseball coach. Furthermore, the defendants argued for summary judgment since Harlow could not prove a prima facie case as the community college had a non-discriminatory basis for its actions and they did not have any knowledge of Harlow's panic attack disability. As a result, the Court held that being treated equally to other sports coaches did not show Harlow's claim that there was a "pervasive" environment of harassment at Chaffey Community College. Thus, the Court granted summary judgment for the defendants concerning charges of disability discrimination.

Sexual Harassment

It is unlawful to harass an employee due to the individual's sex. Such actions can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature. To prove a claim for harassment, Harlow needed to prove unwelcome conduct based on age, race, or disability that is "sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive work environment." (*Lyle v. Warner Bros. Television Prods.,* 2006, p. 264)

Harassment does not have to be sexual, however, and can include offensive remarks about a person's sex. Moreover, the victim and the harasser can be either a woman or a man, and the victim and harasser can be of the same sex. Finally, the harasser can be the victim's supervisor. In this case, Harlow alleges that the interim dean of students, Schwartz, made advances towards him that he rejected. Specifically, Harlow stated that Schwartz asked him to meet her at a local Starbucks

which he declined. However, Harlow further indicated that Schwartz did not make any overtures of being romantically interested in him. As a result, the Court granted summary judgment to Chaffee Community College.

Retaliation

To employ a prima facie claim for retaliation, Harlow needed to reveal that (1) he was engaged in a protected activity, (2) Chaffey Community College subjected him to an adverse employment action, and (3) there is a causal link between the protected activity and Chaffey Community College's action. Harlow contended Schwartz canceled one of his classes in retaliation for him rejecting her alleged advances. As the interim dean, Schwartz had the responsibility to identify and cancel courses that did not have a minimum of 17 students the week before the course started. Of the three summer classes Harlow was assigned to teach, one had an enrollment of only seven students. Schwartz then consulted with the coordinator for the Kinesiology Department and determined that the course with seven students had to be canceled due to low enrollment. However, Schwartz assigned another class to Harlow that substituted for the one that was canceled. Finally, Harlow alleged several retaliatory actions were committed against him such as denying him the use of his car, terminating him and denying him another assistant coach. However, Harlow had never reported or filed any complaints of discrimination, retaliation, harassment, or sexual harassment to the Chaffee Community College human resource department. The Court determined that no material issue of fact existed regarding whether Harlow was retaliated against as he did not present *any* evidence of a causal link between his "complaints" and his termination. As a result, the Court granted summary judgment to the defendants.

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McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 36 L. Ed. 2d 669 (1973).

Schenchner v. KPIX-TV, 686 F.3d 1019, 1023 (9th Cir. 2012)

Wilson v. Murrillo, 163 Cal. App. 4th 1124, 1134-35, 78 Cal. Rptr. 3d 214 (2008).

Vinson v. Thomas, 288 F.3d 1145, 1154 (9th Cir. 2002)

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The Hits Keep Coming: NCAA Loses Another Name, Image, and Likeness Court Decision

By Gregg E. Clifton, of Jackson Lewis

The NCAA has lost an additional federal court battle on name, image, and likeness (NIL) compensation for student-athletes just days after the U.S. Supreme Court's unanimous decision confirming the Ninth Circuit's ruling that the NCAA's limitation on education-related benefits for student-athletes violates federal antitrust laws.

In its latest legal loss, U.S District Court Judge Claudia Wilken, the federal district judge who presided over both the *Alston* case and Ed O'Bannon antitrust cases, denied the NCAA's request to dismiss any of the claims in the lawsuit seeking to eliminate any NCAA rules blocking a student-athletes ability to profit from their NIL and allowing student-athletes ability to challenge NCAA rules preventing them from securing a portion of the rights fees received by the NCAA from group licensing revenues from the broadcasting of college sports.

Judge Wilken rejected the NCAA's motion that the claims asserted in this action have already been ruled upon in prior antitrust litigation.

The class action lawsuit, filed in June 2020 on behalf of Arizona State University swimmer Grant House and Oregon women's basketball player Sedona Prince, will continue. The lawsuit seeks to prevent the NCAA from using any bylaws or rules to allow their college and university members to "restrict the amount of name, image, and likeness compensation available" to athletes. It challenges rules prohibiting athletes from being paid for sponsorships or endorsements, being paid for social media influencer sponsorships and using their NIL to promote their own businesses, along with rules that prohibit them from sharing in television revenue made by schools and conferences through group licensing.

The action also seeks unspecified damages, which could be result in treble damages in the hundreds of

millions, based on the share of television-rights money and the social media earnings the plaintiffs claim athletes would have received if the NCAA's current restriction on NIL compensation had not existed. The suit seeks to cover athletes who played in the last four years through those who play through the date of a final judgment.

When the lawsuit was filed, House alleged the NCAA puts college athletes who are shooting for the Olympics at a huge disadvantage. He stated, "[W]hile Olympic athletes rely heavily on endorsements to afford the cost of competing and training, the NCAA shuts us out of the opportunity entirely."

Judge Wilken rejected the NCAA's argument that prior judicial decisions fail to support the claim that student-athletes should be able to make a claim to be compensated for the use of their name, image and likeness in live broadcasts.

She held that the athletes had raised "sufficient" allegations against the rules denying them television revenue in that they "raise the reasonable inference that competition among schools and conferences would increase in the absence of the challenged rules, and that this increased competition would incentivize schools and conferences to share their broadcasting and other commercial revenue with student-athletes even if the student-athletes lacked publicity rights in broadcasts."

Judge Wilken further supported her dismissal of the NCAA's motion to dismiss by stating that to establish injury "a plaintiff need not establish that it has a legal entitlement to the compensation in question." Rather, a "plaintiff can show that it was injured in fact by alleging that it was deprived of the opportunity to receive compensation it otherwise would have received but for the challenged conduct."

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Federal Appeals Court Affirms Ruling that Insurance Companies Are Not Liable to Defend Joint Venture that Built Levi's Stadium in ADA Lawsuit

The 9th U.S. Circuit Court of Appeals has affirmed a lower court's ruling that Hartford Financial Services Group Inc., Chubb Ltd., and Markel Corp. are not obligated to defend the joint venture that constructed the San Francisco 49ers football team's stadium in a disability discrimination lawsuit.

The underlying putative class-action lawsuit was brought in 2016 by Abdul Nevarez, who named the 49ers, the City of Santa Clara (home of Levi's Stadium), and related corporate entities as defendants. Specifically, she alleged that the stadium did not have sufficient public accommodations – such as accessible seating, restrooms, and signage – in violation of the federal Americans with Disabilities Act and state law.

The 49ers then sued Turner/Devcon (the joint venture of New York-based Turner Constructor Co. and Devcon Construction Inc.), which had constructed the stadium, claiming any liability was caused by Turner/Devcon's negligence. Further, it alleged the joint venture had a contractual obligation to indemnify the 49ers for any litigation relating to "penalties or fines levied or assessed for violations of any Legal Requirement."

Turner/Devcon turned to the aforementioned insurance companies, spawning litigation. The lower court agreed with the insurance companies, leading to the appeal.

"In California, the design and construction of a structure that allegedly violates accessibility laws generally does not fall within the plain meaning of 'accident' when used in insurance contracts," wrote the panel in its ruling.

"Put another way, an event is not an 'accident' where the insured intended the acts that caused the victim's injury and an insured's intentional act does not become an accident simply because it had the unintended effect of violating federal and state accessibility laws.

"With these principles in mind, we agree with the district court that the Nevarez complaint does not allege an 'occurrence' within the meaning of the policies.

"The Nevarez complaint alleges that the 49ers violated the Americans with Disabilities Act by designing and constructing their stadium in a manner that did not comply with federal disability access design standards.

"Because the design and construction of the stadium was not an 'accident,' it was not an 'occurrence,' and is not covered by the policies in issue."

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Articles

Trends in Sports Investment

By Steve Argeris, Christopher Weigand, Katy Raffensperger, and Brandon Leppke, of Hogan Lovells

A confluence of market and regulatory factors has made now the prime time for new and creative investment structures for investments in U.S. sports franchises, long an illiquid asset class available only to wealthy individuals or groups of wealthy investors, and "sports-adjacent" businesses, as private equity firms and special purpose acquisition companies ("SPACs") jump at new opportunities to invest. From a general market perspective, we are continuing to see skyrocketing team valuations, which, coupled with unprecedented levels of "dry powder", the emergence of the SPAC trend and lengthy periods of revenue losses for leagues and franchises due to COVID-19, have made now the time for many prospective sports investors.

Against this market backdrop, regulatory changes have further opened the door to private equity investment in sports franchises. In 2019, Major League Baseball became the first U.S. professional sports league to allow private investment funds to hold passive, minority interests in multiple teams and the National Basketball Association ("NBA") and Major League Soccer followed in 2020. This new flexibility in ownership structure provides existing sports franchise owners with access to liquidity, highly beneficial in light of COVID-19-related revenue losses, while still allowing them to maintain control over management and operational decisions. This stands in contrast to funds taking active positions in European clubs and helps insulate U.S. franchise owners from activist pressure and interference in day-to-day operations of the team from minority partners. In exchange, private equity firms, flush with dry powder, have an opportunity to invest in a high-growth, uncorrelated asset class with a history of steady revenue streams.

In contrast to the loosening regulatory environment applicable to private equity firms, SPACs, however, are facing increased regulatory scrutiny from the U.S. Securities and Exchange Commission ("SEC"). More specifically, recent staff statements call into question the historical accounting treatment for SPAC warrants, as well as the ability of SPACs to rely on the safe harbor for forward looking statements under the Private Securities Litigation Reform Act. SPAC IPO activity slowed dramatically in April as a result of these statements, and incremental guidance from the SEC, particularly as it relates to forward looking statements, could have a longer-term chilling effect on SPAC activity.

Despite these potential regulatory challenges, SPACs have had success with investments in sports-adjacent businesses, although this has not been the case with sports franchises themselves. For example, Diamond Eagle Acquisition Corp. (a SPAC that IPO'd in May 2019) acquired DraftKings, Inc., a sports-betting and fantasy sports platform, in April 2020 for $3.3 billion. DraftKings, Inc. closed its first trading day on the NASDAQ up ~10% at $19.35 and is currently trading well in excess of that price. On the other hand, RedBall Acquisition Corp. (which IPO'd in August 2020) was rumored at the end of 2020 to be discussing acquiring a minority ownership interest in Fenway Sports Group (owners of the Boston Red Sox and Liverpool FC). However, reports indicate that the RedBall team was unable to secure the necessary additional outside investment needed to fund the acquisition.

Unlike SPACs, private equity has proven to be a viable investment vehicle for ownership stakes in sports franchises. In April 2021, Arctos Sports Partners became the first NBA-approved private investment fund to hold an interest in an NBA Team, and subsequently acquired a minority interest in the Golden State Warriors. The deal provides a blueprint for the NBA future private equity investment in sports franchises.

Taking all of this together, an interesting potential trend emerges that could help drive both private equity and SPAC investment in the sports industry. Although SPACs may not be a viable investment vehicle for ownership stakes in sports franchises due to soaring team valuations (among other factors), SPACs have proven to be viable for sports-adjacent investments in industries such as sports betting, sports media, sports technology and e-sports. These sports adjacent

businesses frequently provide robust ancillary revenue streams for sports franchises, which could continue to drive up the valuations of these franchises. At the same time, transactions such as the Arctos Sports Partners' investment in the Golden State Warriors have provided a solid model for private equity investment in sports franchises, which, unlike SPACs, have proven to be viable even in the face of unicorn franchise valuations. In fact, these unicorn valuations appear to have only further paved the way for private equity investment as franchise owners seek opportunities for liquidity and private equity investors seek opportunities for this crown jewel asset class. Accordingly, there appears to be ample opportunity for the SPAC and private equity investment models to play off of one another and continue to drive new investment into the sports industry.

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Adding As Many Women's Sports Programs as It Takes: La Salle Settles with Women Volleyball Players

Ellen J. Staurowsky, Ed.D., Senior Writer & Professor, Roy H. Park School of Communications, Ithaca College, staurows@ithaca.edu

In a novel settlement agreement, La Salle University avoided a Title IX lawsuit by agreeing to offer athletic opportunities proportional to enrollment or, in the event of falling short of that standard in the academic year 2021-2022, automatically reinstating women's teams cut in the fall of 2020 and adding more women's teams until the proportionality standard is met (Bailey Glasser, 2021; Libit, 2021).

La Salle's Decision to Cut Teams Characterized as Strategic & Not About Cost Cutting

On September 29, 2020, then La Salle University President Colleen Hanycz* and director of athletics Brian Baptiste announced a plan to cut seven (four men's and three women's) of its 25 varsity athletic teams, a decision that affected an estimated 130 athletes and a third of the athletic department. The teams on the list to be cut included baseball, men's swimming and diving, water polo, and tennis as well as women's tennis, softball, and volleyball. According to an open letter sent to the campus community, the restructuring of the athletic department was an outgrowth of a comprehensive review undertaken to address concerns that the athletic department simply did not have the resources to sustain the number of teams offered (Hanycz & Baptiste, 2020).

Noting that La Salle offered more varsity teams compared to their peers in the Atlantic 10 conference, Hanycz and Baptiste (2020) stated "The size of our athletics department compromises our ability to provide an exceptional, transformational experience for our student-athletes. Our resources and support services for our student-athletes are stretched too thinly across too many sports teams" (para. 5).

La Salle's athletics department review had three identified outcomes: to reallocate resources to strengthen the experience for athletes and to improve competitiveness and overall quality. There was also an intention to bring the size of the department in line with the average number of teams offered in their conference, the Atlantic 10 (19 teams), and the NCAA (18 teams).

Characterizing the decision as a strategic one and not a cost-cutting measure, school officials estimated that it would take $100 million in endowment, scholarship assistance, and capital improvements to retain the teams slated for elimination (Staff, 2020). President Hanycz emphasized continuing to offer a relatively large number of athletic teams compared to others in the conference was not feasible given that La Salle was situated in the bottom quartile of the conference in overall enrollment (Ralph, 2020).

La Salle Men's Swimming & Diving Are Reinstated

In the aftermath of the announcement, La Salle's administration expressed an openness to reconsidering their decision if teams shared new and compelling information and if they were able to meet or exceed specified fundraising goals by the end of April 2021. On that basis, the men's swimming team was reinstated in May of 2021 after surpassing the required $300,000 benchmark ("La Salle reinstates…", 2021; Sutherland, 2021). In reviewing the pledge total reported on Save La Salle Swimming and Diving website, a total of $400,261 was pledged, with 78% of that coming from

family and friends and the remainder (22%) contributed from La Salle alumni.

La Salle Athletics Accused of Violating Female Athletes Rights Under Title IX

Within three weeks of that announcement, two of La Salle's women volleyball players retained Arthur Bryant of Bailey Glasser and notified President Hanycz that they intended to pursue a class action lawsuit because female athletes at La Salle (and potential female athletes) were deprived of an equal opportunity to participate in athletics and were not receiving equal treatment as required by Title IX of the Education Amendments of 1972 (Bryant, 2021). Based on the information reported on the university's website regarding enrollment and number of athletes competing on teams in 2019-2020, La Salle was disproportionately offering male athletic opportunities in excess of their representation in the general student body. Even with the cuts to baseball, men's tennis, and men's water polo, the university would still have fallen short of Title IX's expectation that athletic opportunities be offered to female and male athletes proportional to their enrollment (Bryant, 2021).

Nine months to the day after women's teams were cut at La Salle, the university issued a statement that it would launch a gender equity review during the 2021-2022 academic year with the goal of creating a gender equity plan to go into effect in 2022-2023 designed to "…maintain and strengthen Title IX compliance across all aspects of the University's intercollegiate athletics program" (Staff, 2021, para. 1).

One of the most interesting parts of the settlement agreement is the stipulation that if La Salle fails to provide proportional opportunities to female athletes in 2021-2022 they are obligated to immediately reinstate the women's teams cut and continue to add additional women's teams until compliance is achieved. The magnitude of the proportionality gap would dictate which of the teams is reinstated first and the number of athletic participation opportunities it would take to address that gap. In the eventuality that women's teams are reinstated and/or added, La Salle also agreed to commit to those teams for at least five years. La Salle is further obligated to comply immediately with Title IX's equal treatment provisions in the specific areas of travel, facilities, gear, medical services, and food. La Salle also agreed to an accountability measure that requires public disclosure of enrollment and athletic participation information on its website along with the underlying data (Bailey Glasser, 2021).

*President Hanycz was hired by Xavier University in Cincinnati, Ohio in the spring of 2021 and La Salle appointed Tom Shaughnessy as interim president in May of 2021.

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Did the Supreme Court Just Clear the Way for Student Athletes to Promote Sports Betting?

By Sara Dalsheim, of Ifrah Law

The Supreme Court's recent ruling in *NCAA v. Alston, et al.* could be the catalyst that transforms the NCAA's student athlete regulation of the benefits/compensation provided to college athletes. The Court, in a decision written by Justice Neil Gorsuch, upheld the lower courts' ruling that the NCAA violates antitrust laws by placing limits on the education-related benefits schools can offer to their athletes. Colleges and universities may now provide athletes with unlimited compensation so long as it is connected in some way to their education. However, the Court's decision reaffirmed the NCAA's authority to adopt reasonable rules and repeatedly noted that the NCAA remains free to articulate what are truly education benefits. The decision did not address, and leaves open the issue of other types of student athlete compensation, such as whether the athletes may receive compensation as "influencers" or product endorsers of commercial products and services.

The NCAA is a multi-billion-dollar business that provides little to no forms of compensation for its key constituents (*i.e.*, the athletes). Previously, athletes could only receive compensation in the form of tuition and fees, room and board, books and other expenses related to the costs of university attendance. The athletes challenged this restriction, and won, on the basis that schools act as cartels in limiting how much each can pay by requiring NCAA caps on academic-related compensation of athletes. Now, schools are permitted to provide athletes unlimited non-cash "education-related benefits" including post-eligibility internships, in addition to annual payments up to $6,000 if they maintain academic eligibility.

The ruling repudiated the long-standing NCAA contention that it is owed favorable treatment under federal antitrust law. However, the Court did not expand further on what types of compensation/benefits should be awarded to athletes. Known college basketball fan, Justice Kavanaugh, in his concurrence welcomed and encouraged college athletes to bring more cases in front of the Court, stating that, "[t]he NCAA is not above the law … [and] the NCAA's business model would be flatly illegal in almost any other industry in America." The concurrence suggested that the NCAA's rules inhibiting any sort of compensation, including direct payment for athlete accomplishments, may no longer hold up if there are forthcoming antitrust challenges.

The Supreme Court decision opens up multiple avenues for college athletes. First, now that athletes are permitted to receive wider education benefits, it shifts some power during the recruitment process. Students may be able to negotiate with potential universities and be better able to pursue a meaningful career path focused on their post-collegiate interests rather than strictly on training and play. Secondly, as hinted to by Justice Kavanaugh, the Court may be looking to expand benefits and rights of college athletes; stating that, "the NCAA's remaining compensation rules also raise serious questions under the antitrust laws." The most likely forthcoming challenge is whether athletes may use their name, image, and likeness to act as influencers and/or promoters of products and services. Thus, soon, a case involving college athletes' name, image, and likeness could come in front of the Court and provide athletes with opportunities to pursue monetary and/or promotional benefits while participating in college athletics. Similar to the expansion of educational benefits in the *Alston* case, it is probable that a ruling in favor of athletes profiting off of their name, image, and likeness would be subject to reasonable rules and restrictions implemented by the NCAA. For example, the NCAA strongly disfavors any ties to sports betting; therefore, the NCAA is likely to prohibit their athletes from using their name, image, and likeness to promote any sort of sportsbook. This restriction could face legal challenges, with the NCAA likely asserting integrity and health and safety of the athletes (one of the NCAA's missions) to justify a restriction.

The Supreme Court suggested that the NCAA would not fare well on antitrust challenges and may be looking to grant college athletes the benefits/compensation to which they may be entitled as the primary commodity of the NCAA's multi-billion-dollar product. It is evident that this will not be the last NCAA-related decision we see in front of the Court since

the Court indicated it is ready to reshape the way the NCAA regulates athletics.

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As Legal Controversy Brews Over Sexual-Assault Allegations, Chicago Blackhawks Hire a Law Firm to Investigate

A lawsuit against the Chicago Blackhawks, claiming that the team was liable for the actions of former video coach Bradley Aldrich when he sexually assaulted a player a little over a decade ago and then a high school student after he had left the team's employ, has led the organization to retain Jenner & Block to conduct an "independent review."

The firm will have a sensitive task ahead of it.

The Blackhawks were sued on May 7 by a former player (John Doe), who alleged that he and another player were sexually assaulted by Aldrich in May 2010.

Specifically, the plaintiff alleged among other things that Aldrich:

- sent inappropriate text messages
- turned on porn and began to masturbate in front of [Doe]
- threatened to injure [Doe] physically, financially, and emotionally if [Doe] did not engage in sexual activity

NHL Commissioner Gary Bettman has weighed in, saying in a press conference that he would "await the results of the investigation and then decide what, if anything, needs to be done from our standpoint. All options are available if there's something that warrants punishment."

Bettman further encouraged a patient approach: "Everybody is jumping too far, too fast. This is going to be handled appropriately and professionally and done right."

The Chicago media has reported that three players from the 2010 team — including defensemen Brent Sopel and Nick Boynton — have come forth, saying Aldrich's alleged assaults were "widely known among the team."

In response to the lawsuit, the Blackhawks moved to dismiss the Doe 1 claim on statute of limitations grounds.

The team adopted a different strategy regarding Doe 2, involving the 2013 incident. The *Chicago Sun Times* summarized the "two main arguments" made in the Doe 2 motion.

"First, the Hawks argue they 'under Illinois law... [have] no duty to protect an individual from the criminal acts of a third party,' given they neither knew Doe 2 nor employed Aldrich at the time," according to the paper.

"Second, the Hawks argue the claim in the original lawsuit that they provided 'positive references to future employers of Aldrich' is 'vague and factually unsupported.' They also argue the lawsuit's lack of allegation claiming they provided positive reference specifically to Houghton High School is a 'fatal omission,' rendering irrelevant any arguments about whether they provided positive references to other employers."

Meanwhile, the lawyer for the two plaintiffs, Susan Loggans, has told the media that she and her clients would not participate in the investigation. Her reasoning centered on the fact that the team and league were paying for the investigation and have not promised to publicly release the findings.

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Texas Judge Grants Joint Motion to Dismiss Paramedic's Concussion Lawsuit against Houston Astros

A Harris County (Texas) District Judge has granted a joint motion to dismiss with prejudice a lawsuit brought by Paramedic Brian Cariota, who was working in the dugout of the Houston Astros' post-season game at Minute Maid Park against the New York Yankees in October of 2019 when he was struck by a foul ball and suffered a concussion.

Cariota sued the Astros after he was struck in the head. After the incident, he was rushed to the hospital where he was treated for a traumatic brain injury, brain bleed and facial fractures after the incident. His attorneys alleged that he suffered permanent damage to his retina and will have lifelong vision issues and

post-concussion syndrome. He was seeking $1,000,000 to cover his physical pain and mental anguish.

Cariota recently amended his lawsuit against the team, removing that part of the complaint, which suggested that the lack of netting over the Astros dugout may have been related a desire by the ballclub to preserve sightlines for use in stealing other teams' signals.

The amended complaint read: "The decision was made in deliberate disregard for the rights, safety, and welfare of others including Brian Cariota. The decision not to protect the dugout with safety netting left the area where Brian was assigned to work exposed to a foreseeable hazard of which (the Astros) had actual knowledge."

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Washington State's Lystedt Law – an Update

By Tony Corleto, of Gordon & Rees

(Editor's Note: The following article appears in **Concussion Defense Reporter***, which can be subscribed to at the site.)*

Enacted by the Washington State legislature in 2009 (RCWA 28A.600.190) the "Zackery Lystedt Law" set the pattern for similar legislative and regulatory acts in each state and the District of Columbia.

Washington's law established an education requirement for coaches, youth athletes and their parents, requiring each school district to develop a concussion and head injury information sheet for athletes and parents. Critically, the law also requires: (i) removal from play of athletes suspected of sustaining concussion or head injury; and (ii) written medical clearance before returning to play. Although implementation varies in each state, invariably each includes an information component, criteria for removal upon injury and criteria for return with medical clearance.

This article examines two decisions from the Washington Supreme and Appellate courts which illustrate the interplay of Lystedt with traditional tort law and procedural principals. In *Swank*, Washington's Supreme Court addresses private causes of action, volunteer immunity and long arm jurisdiction. In *Anderson*, the Court of Appeals restricts *Lystedt* to sport activities.

Private Right of Action Recognized

What happens when a statute regulates conduct? In some instances (e.g., securities, telemarketing) penalties, rights of action and other remedies are implemented. In areas that are generally unregulated (e.g., youth sports) remedies are left to the judicial system. Lystedt laws fall into the latter category: invariably they specify no penalty, right of action or limitation of action. At this point in time, the core Lystedt requirements for disclosure, removal from play and return to play, are recognized as standards of care in tort claims. The approach taken by each court gives insight for defense strategies.

Washington's Supreme Court expressly recognized the right to sue based on a Lystedt violation in *Swank v Valley Christian School*, 118 Wash.2d 663 (2017). The case arises from on field events in 2009, the year Lystedt was adopted. Valley Christian School (VCS) adopted the requisite information disclosure and implemented the prescribed removal from play and return to play criteria.

On September 18, 2009, Drew Swank took a hard hit to the head in a football game, was removed from play and later complained of neck pain and headaches. Three days later he saw the family physician, Dr. Burns, in Coeur d'Alene, Idaho where the Swanks resided. Dr. Burns examined Drew in Idaho and told him to stay out of contact sports for the next three days. He prescribed ibuprofen and advised that if Drew experienced headaches after playing football, he would need to stay out of contact sports for a week.

Two days later Drew had been without headaches. His mother asked Dr. Burns for a release because Washington's new law required a doctor's note for Drew to practice. Later that day, Dr. Burns wrote a note releasing Drew and his mother picked it up from the Idaho office. Drew's father gave a copy of the medical release to the VCS coach, Puryear.

Playing in the next game, Drew appeared "sluggish," confused, and slow to respond. Drew's father recalled uncharacteristically poor play on kickoff returns and coach Puryear yelling at Drew from the sidelines in apparent frustration over missed plays. Drew's teammates recalled coaches yelling frequently about his positioning. During the game, coach Puryear called Drew to the sidelines, grabbed his face mask and, according

to Drew's father, "began to jerk it up and down hard while he screamed at [Drew]". Drew returned to the game, was hit by an opposing player, staggered to the sideline and collapsed. Drew died two days later.

Three years later, Drew's parents sued VCS, coach Puryear, and Dr. Burns, claiming that each violated the Lystedt law. Each defendant moved for and was granted summary judgment. The Court of Appeals affirmed dismissal of Lystedt based claims against the school and coach, affirmed the jurisdictional dismissal in favor of the doctor and reversed dismissal of the general negligence claim against VCS, holding: (1) Lystedt did not create an implied statutory cause of action, (2) coach Puryear was entitled to volunteer immunity, (3) the battery claim (coach Puryear's) jerking of Drew's face mask is barred by the two-year statute of limitations; and (4) the court lacked personal long-arm jurisdiction over Dr. Burns in Idaho.

Implied Cause of Action

Holding that Lystedt implied a cause of action, Washington's Supreme Court reversed dismissal of the coach and reinstated the Swanks' claims that VCS and coach Puryear violated the Lystedt law. The court also found the grant of summary judgment on the general negligence claim against coach Puryear "erroneous" and reversed the grant of summary judgment on this point. Finally, the court found that the trial court lacked personal jurisdiction over Dr. Burns and affirm the grant of summary judgment for the claims against him.

In **Bennett v Hardy, 113 Wash.2d 912 (1990)** Washington's Supreme Court created a test to determine whether a statute includes an implied cause of action. **Bennett** sued her employer for age discrimination under the state's non-discrimination statute, which made age discrimination an unfair employment practice, but did not create a remedy. Opposing summary judgment, the plaintiffs argued they should be able to sue their employer for an implied cause of action. Finding that plaintiff is within the class intended to benefit from the statute, that legislative intent supports a remedy, and that implying a remedy is consistent with the act's underlying purpose, the *Bennett* court denied the motion. Their rationale is generally recognized: "We can assume that the legislature is aware of the doctrine of implied statutory causes of action and also assume that the legislature would not enact a remedial statute granting rights to an identifiable class without enabling members of that class to enforce those rights. Without an implicit creation of a remedy, the statute is meaningless."

Turning back to *Lystedt*, the *Swank* court observed that there is no dispute Drew was within the class intended to benefit from *Lystedt*, that legislative concern for catastrophic and significant injuries associated with youth athlete concussions is clear, and that the legislature contemplated the possibility of civil liability when it exempted volunteer health care providers from liability. Finally, observing that "One of the major purposes of tort law is to encourage people to act with reasonable care for the welfare of themselves and others", the court found that recognizing a private remedy would serve *Lystedt's* purpose of preventing injuries by encouraging people to act with due care for the welfare of youth athletes and giving youth athletes recourse.

Volunteer Immunity Defense

The court's handling of coach Puryear's volunteer immunity defense is particularly instructive. Washington's Volunteer Protection Act (**RCW 4.24.670**) immunizes volunteers from liability for simple negligence. However, volunteers are not immune for acts that are grossly negligent or reckless. **RCW 4.24.670** provides immunity for a volunteer of a nonprofit organization for harm caused by an act or omission on behalf of the organization "if the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer."

Although Coach Puryear plainly met the definition of volunteer, evidence was sufficient for a jury to find that Coach Puryear acted with gross negligence or recklessness. Simple negligence is the degree of care which the reasonably prudent person would exercise in the same or similar circumstances. **Simonetta v. Viad Corp., 165 Wash.2d 341, 348, 197 P.3d 127 (2008)** ("Under the law of negligence, a defendant's duty is to exercise ordinary care."). Gross negligence is "negligence substantially and appreciably greater than ordinary negligence." **Nist, 67 Wash.2d at 331, 407 P.2d 798**; *see also* **Eastwood v. Horse Harbor Found., Inc., 170 Wash.2d 380, 401, 241 P.3d 1256 (2010).**

Reckless misconduct differs from negligence in that the actor "must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent." Reckless misconduct, unlike gross negligence, "requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man." (quoting Restatement § 500 cmt. g); *see also* **State v. Graham, 153 Wash.2d 400, 408, 103 P.3d 1238 (2005).**

Here, the Swanks presented evidence about Coach Puryear's conduct that a jury could find to be gross negligence or reckless misconduct. The evidence would support the Swanks' claims that Coach Puryear violated the Lystedt law, as well as their common law negligence claims.

Testimony suggested that Coach Puryear failed to monitor Drew for symptoms of a concussion during the game. Coach Puryear testified that he was not looking at Drew during the game for the possibility of a concussion. Other testimony contradicted Puryear's statement that he believed Drew's play was normal up until the injury. Several witnesses described Drew's conduct during the game as highly unusual and consistent with the "signs" of a concussion as disclosed in VCS's CIS: "appears dazed; confused about assignment; forgets plays; is unsure of game, score, or opponent; moves clumsily or displays incoordination; any change in typical behavior or personality." Witnesses further described Puryear and the assistant coach yelling at Drew from the sidelines in frustration over his poor performance, and about Puryear grabbing Drew's face mask and shaking it up and down while yelling at him.

The Swanks submitted further evidence from a medical expert who concluded that Coach Puryear violated the relevant standard of care, that Drew's game behavior was an indication that he "more likely than not continued to suffer from the concussion he had been previously diagnosed with", and that "the coaching staff should have removed Drew from play once he began to exhibit the signs and symptoms [of a concussion] and kept Drew off the field until he had been properly evaluated and cleared to return to play again."

The court observed that this collective evidence could suggest that Coach Puryear "substantially" failed to meet the standards of a reasonable and prudent person under the circumstances, and as a whole, the evidence created genuine issues of material fact regarding Puryear's degree of fault. Holding that a reasonable jury may conclude Puryear was grossly negligent or reckless summary judgment on the claims against Coach Puryear was reversed.

Long Arm Jurisdiction

Every state recognizes the concept of long arm jurisdiction: the court's power to compel non-citizens or non-residents to appear and answer outside their home jurisdiction. Conversely, every state recognizes limits on this power, based on the nature and particulars of the defendant's conduct. Generally, courts have no power to compel the appearance of someone who doesn't reside, work or have some other relevant presence in the forum state. Although Dr. Burns' treatment affected someone who was injured in Washington and was expressly done for purposes of complying with Washington's *Lystedt* act, the *Swank* court recognized the limitation of its power over Dr. Burns as a non-resident / non-citizen practitioner: Dr. Burns provided medical care to Drew solely in Idaho; therefore, the tort is deemed to have taken place in Idaho, not Washington.

Washington's long-arm statute reaches: "Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits . . . to the jurisdiction of the courts of this state [for] any cause of action arising from [such] acts: (b) The commission of a tortious act within this state."

Washington generally follows the rule that when an injury occurs in the forum, it is inseparable from the tortious act, and thus the act is deemed to have occurred in the forum for purposes of the long-arm statute. **Lewis, 119 Wash.2d at 670, 835 P.2d 221 .** However, Washington recognizes an exception for professional malpractice. **Id. at 673, 835 P.2d 221**. A nonresident professional's malpractice in another state against a Washington resident, without more, does not confer jurisdiction, regardless of whether injury was suffered upon the plaintiff's return to Washington.

Because Dr. Burns rendered treatment solely in Idaho, less than 30 miles from the school, he was not subject to jurisdiction in Washington, and his dismissal was upheld.

Lystedt Confined to Sports

What activities are within *Lystedt?* Washington's Appellate Court has declined to extend the education requirement to other school-based activities, specifically field trips.

In *Anderson v Snohomosh School District,* parents of a high school student brought suit after their daughter, Haley, suffered a concussion and a second impact riding the Matterhorn at Disneyland on a school field trip. Between the first and second impacts, Haley had informed a chaperone of her initial injury. The chaperone, untrained any aspect of medicine or concussion recognition and management, told Haley that "she didn't look concussed" and let her proceed with further activity. After the band flew home, Haley experienced dizziness and headaches and was diagnosed with 'second impact' syndrome.

The Andersons sued the District and the trip chaperones, alleging that while acting as agents for the District, the chaperones failed to provide reasonable and necessary medical care after her **head injury**, and that their failure to prevent ongoing trauma was a proximate cause of Haley's "second impact syndrome".

Independent of *Lystedt,* Washington, school districts have "an enhanced and solemn duty to protect minor students in [their] care." **Christensen v. Royal Sch. Dist. No. 160, 156 Wn.2d 62, 67, 124 P.3d 283 (2005)**. They must exercise the care that an ordinarily responsible and prudent person would exercise under the same or similar circumstances. **N.L., 186 Wn.2d at 430**. Further, school districts must take certain precautions to protect the students in their custody from dangers reasonably to be anticipated. **Hendrickson v. Moses Lake Sch. Dist., 192 Wn.2d 269, 276, 428 P.3d 1197 (2018)**. If harm is reasonably foreseeable, a school district may be liable if it failed to take reasonable steps to prevent that harm. Id.

In opposition to the District's motion for summary judgment plaintiffs argued in part that the District's *Lystedt* "Concussion Form, which student athletes and their parents sign to acknowledge the risks and symptoms of a concussion, made the risk of injury foreseeable. The court noted that "[u]nlike student athletes who are protected by a mandated concussion protocol, there is no district policy or mandate requirement that would override the students' responses." It pointed out that the District's general policy requires that word of illness or accident be sent to the principal's office and the nurse, but that the school was closed on at the time of Haley's injury. It also cited a declaration stating that the principal's primary duty in that situation is to inform the parents, and this was effectively accomplished.

The District argued that it has no duty to seek medical attention every time a student reports hitting their head and having a headache, noting that *Lystedt,* which requires youth athletes be removed from play immediately when they are suspected of sustaining a concussion or **head injury**, applies *only* to student athletes. The District further argues that "[t]o create Lystedt-like duties for schools, toward every student, based on the imputed knowledge that 'all concussions are potentially serious' would completely change the landscape of school liability for student **head injuries**."

The Appellate Court agreed, holding that *Lystedt* plainly applies only to student athletes. See **RCW 28A.600.190**, and that the concussion form is also directed to the parents of student athletes.

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Esports Included in Recent Flurry of States' Sports Betting Legalization Bills

By David A Bujarski and Michael A. Tomasulo , of Winston & Strawn LLP

Most states with recently passed sports betting legislation include esports under the definition of "sporting event" or "sports event." Maryland's HB940, Arizona's HB2772, Wyoming's HB133, and Connecticut's HB6451 include "electronic sports," "e-sports," or "video game competitions" within their definition of a "sporting event."

Some of these bills require further negotiations with tribal gaming commissions, and then approval from the U.S. Department of the Interior before they can go into effect but will eventually open avenues for betting on these kinds of competitions along with traditional events like football and basketball. Because they are included and categorized as part of the broad definition of a "sporting event," gambling on esports events will

be regulated and administered the same way as traditional sports betting.

Other major states with bills introduced, but not yet passed, take a similar approach. Ohio's SB176, which has been approved by the Senate and referred to committee in the House, includes "esports events" in its definition of a "sporting event." Texas's HB2070, which is still in committee, also includes "electronics sports events" and "competitive video game events" in its legalization bill. Interestingly, Louisiana's HB697, which has been signed by Louisiana Governor John Edwards, specifically excludes "electronic sports" and "competitive video games" from its definition of "sports event." Meanwhile, the competing state Senate bill, SB247, includes "competitive video game or other electronic sports event" in its purview. SB247 was passed by both chambers of Louisiana's legislature and sent to the Governor for review. If signed into law, SB247 would likely expand the scope of the more restrictive House bill. The inclusion of esports in the Louisiana Senate bill shows the growing influence of the esports industry in the wider sports entertainment sector.

As more states pass sports betting legalization bills, the inclusion of esports and videogame events may also signal a growing respect for esports as legitimate competitive events. As streaming platforms like Twitch already allow informal non-monetary betting of "channel points" on the outcomes of esports events, gamers and fans will likely jump on the opportunity to wager real money on video game competitions as more states approve legislation. Gambling on esports events will also provide a smaller but steadier stream of tax revenue for states that include it in part of their sports betting bills, as esports events happen year-round and often without a defined season.

As more data becomes available, industry observers and commentators will be watching to see how much revenue esports can provide in comparison to traditional sporting events.

The original article can be found here: **https://www.winston.com/en/the-playbook/esports-included-in-recent-flurry-of-states-sports-betting-legalization-bills.html**

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CCHA Announces Hire of Todd Shumaker to Sports Law Group

Church Church Hittle + Antrim (CCHA) has announced the hire of Todd Shumaker to the firm's **Sports Law** group.

Shumaker's practice focuses primarily on collegiate sports and includes representing clients in the NCAA infractions process, as well as educating and presenting on NCAA topics to athletics administrators, coaches and student-athletes.

"Todd has a wealth of knowledge from his experience with the NCAA enforcement staff on NCAA infractions matters that our clients will benefit from greatly," said CCHA Sports Law Partner Kelleigh Fagan.

Before joining CCHA, Shumaker spent seven and half years with the enforcement staff at the NCAA where he investigated and processed violations of NCAA rules across Divisions I, II and III as an associate director and, more recently, helped develop processes and procedures related to the Independent Accountability Resolution Process. During his time with the NCAA, Shumaker also sat as an appeals panelist for USA Basketball, served as a liaison to the NCAA Board of Governors Student-Athlete Engagement Committee and the Division II Enforcement and Infractions Task Force and helped lead diversity, equity and inclusion efforts as chair of the Enforcement Inclusion Guiding Team and as a member of the LGBTQ-A+ Employee Engagement Group leadership team. From 2007 to 2013, Shumaker was an attorney and Chief Compliance Officer with the Indiana Office of Inspector General and State Ethics Commission where he assisted in public corruption investigations and adjudicated ethics violations.

Shumaker received his undergraduate degree in political science from Taylor University before earning his juris doctor from the Indiana University Robert H. McKinney School of Law in Indianapolis. During his time with the NCAA, Shumaker also completed a master's degree with the Butler University College of Education.

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NFL Announces Outcome of Washington Football Team Workplace Review

The National Football League has announced the outcome of the workplace review of the Washington Football Team led by independent counsel Beth Wilkinson, as well as remedial measures and penalties arising out of that review.

What follows is its statement on the matter:

Wilkinson's firm ("Wilkinson") was initially engaged by the Washington club in July 2020. At the club's request, the league office assumed oversight of her work a short time later, just prior to the start of the 2020 season. Her assignment was to conduct a thorough and independent investigation into allegations of a hostile workplace culture at the club, including allegations of bullying and harassment, and to make recommendations regarding any remedial measures the club should take in light of her findings. Wilkinson was not specifically tasked with confirming or rejecting any particular allegation of inappropriate conduct. Throughout her engagement, Wilkinson communicated with the league office on a regular and ongoing basis.

Wilkinson interviewed more than 150 people, most of whom were current or former employees of the club, and many of whom conditioned their participation on a promise of anonymity. She interviewed owner Dan Snyder twice. Dan Snyder and the club released current and former employees from any confidentiality obligations for purposes of speaking with Wilkinson and pledged that there would be no retaliation against any current or former employee who did so. Washington Football Team president Jason Wright emphasized this commitment and encouraged employees to cooperate and speak with Wilkinson.

Commissioner Goodell said: "I want to thank Beth Wilkinson and her team for conducting a thorough and independent review of the Washington club's workplace culture and conduct and providing both the club and me with a series of thoughtful recommendations based on her findings. Beth and her team performed their work in a highly professional and ethical manner. Most importantly, I want to thank the current and former employees who spoke to Beth and her team; they provided vital information that will help ensure that the workplace environment at the club continues to improve. It is incredibly difficult to relive painful memories. I am grateful to everyone who courageously came forward."

Based on Wilkinson's review, the Commissioner concluded that for many years the workplace environment at the Washington Football Team, both generally and particularly for women, was highly unprofessional. Bullying and intimidation frequently took place, and many described the culture as one of fear, and numerous female employees reported having experienced sexual harassment and a general lack of respect in the workplace.

Ownership and senior management paid little or no attention to these issues. In some instances, senior executives engaged in inappropriate conduct themselves, including use of demeaning language and public embarrassment. This set the tone for the organization and led to key executives believing that disrespectful behavior and more serious misconduct was acceptable in the workplace. The problems were compounded by inadequate HR staff and practices and the absence of an effectively and consistently administered process for reporting or addressing employee complaints, as well as a widely reported fear of retaliation. When reports were made, they were generally not investigated and led to no meaningful discipline or other response.

Dan Snyder has acknowledged that, as the club's owner, he is responsible for the culture. Owners are obligated to set an appropriate tone and establish appropriate standards, develop and implement appropriate policies, including a policy of non-retaliation, ensure that there is proper training, compliance, and recordkeeping, invest in employee-related systems and infrastructure, and instill an ethic of respect at the club. This did not occur at the Washington club for far too long, and Dan Snyder has acknowledged his personal responsibility for that failure.

Beginning near the end of the 2019 season, Dan and Tanya Snyder made a series of significant organizational changes based on his recognition that the club's workplace culture, initially on the football side but then more broadly, was deficient and needed to be significantly improved to enable football and other club employees to perform at their full potential. These steps included the hiring of Head Coach Ron Rivera and the

decision to replace a number of top club executives. Additional and more widespread changes have been made over the past year, and Wilkinson's review identified several strong and positive steps taken by ownership over the past year to improve workplace conduct and culture in Washington. None of the managers or executives identified as having engaged in misconduct is still employed at the club. In place of the prior leadership group, the Snyders have hired a new, highly qualified and diverse team of executives on both the football and business sides of the club. These include club president Jason Wright, Chief HR Officer Andre Chambers, General Counsel Damon Jones, Chief Financial Officer Greg Rush, Senior Vice President of External Engagement and Communication Julie Jensen, and Senior Vice President of Media and Content Julie Donaldson, as well as Coach Rivera and General Manager Martin Mayhew. Overall, the new executive team shows an impressive commitment to diversity, with a substantial number of women and people of color in leadership roles. This leadership team appears to be both respected within the community and genuinely committed to changing the workplace environment and is doing so with the full support of the Snyders. In addition, the cheerleader program is now under the leadership of Petra Pope, who has replaced the all-female squad with what Pope has described as "an inclusive, co-ed, diverse, athletic" dance team that will no longer pose for calendars.

Apart from hiring a new leadership team, the club has also implemented strong and state-of-the-art policies and protocols regarding workplace conduct, reporting, and non-retaliation and has also moved to institute comprehensive training. The club has retained outside resources to assist in this effort and has given its assurance that these consultants will remain engaged on an ongoing basis and will be available to discuss their work with the league office.

Commissioner Goodell stated: "Over the past 18 months, Dan and Tanya have recognized the need for change and have undertaken important steps to make the workplace comfortable and dignified for all employees, and those changes, if sustained and built upon, should allow the club to achieve its goal of having a truly first-tier workplace. I truly appreciate their commitment to fully implement each of the below ten recommendations, but the league also must ensure accountability for past deficiencies and for living up to current and future commitments."

Wilkinson made several specific recommendations, which are set forth below, regarding actions that the club should take to further improve and sustain the workplace culture improvements made over the past year. Dan and Tanya have agreed to implement each of these ten (10) recommendations. The club has made considerable progress over the last 18 months in implementing these recommendations and will be required to implement each of them. The specific recommendations are:

1. Protocols for Reporting Harassment: Develop a formal protocol for reporting allegations of harassment and misconduct that allows victims to report anonymously and without fear of retaliation. Ensure that this protocol is communicated to all employees via the club's employee handbook and in other ways. Engage a third party to monitor a confidential hotline/secure email site to receive workplace misconduct reports.

2. Disciplinary Action Plan: Develop a formal disciplinary action plan with clear protocols and processes for documenting, evaluating, and adjudicating misconduct. Apply those protocols and processes consistently in a prompt and proportionate manner across the organization. This includes holding executives and other supervisors accountable for addressing misconduct in the organization, including by requiring that supervisory level employees formally report any misconduct of which they become aware and disciplining the failure to report such misconduct.

3. Regular Culture Surveys: Conduct regular, anonymized workplace culture and sexual harassment climate surveys to track the Club's progress in addressing these issues.

4. Regular Trainings: Engage an independent and professional third party to provide regular training for all employees on bullying, sexual and other forms of harassment, diversity and inclusion, and other issues of workplace conduct. Provide special training for managers and supervisors on how to recognize and handle

harassment and reports of harassment. Review the proposed training program with the League office and incorporate recommendations.

5. More Diverse Workforce: Increase the number of women and minorities throughout the organization, particularly in leadership and supervisory positions that have decision-making authority.
6. Establish Clear Lines of Authority: Implement clear organizational structure and clear lines of authority for club executives to eliminate influence of informal or unaffiliated advisors on the Club's business operations.
7. Expand and Empower HR and Legal: Expand and empower the in-house HR and Legal Departments, particularly with respect to their ability to investigate and address allegations of misconduct at all levels, without interference from club executives.
8. Develop Formal Onboarding, Performance Management and Compensation System, and Exit Interview Process: Implement a formal onboarding process for new hires, a program of regular performance and compensation reviews, and an exit interview or debriefing process for departures.
9. Protecting Cheerleading Team: Ensure cheerleaders (if a program is retained, either in its earlier form or in the form of a new, co-ed Dance Team) have access to HR and other organizational resources, including by assigning an HR employee to the cheerleading squad. Confirm that the Team's processes and trainings described above apply to and are clearly communicated to the cheerleaders.
10. Regular Assessment of Policies: Require the Club to retain an independent professional consultant selected by the Team and approved by the league office to conduct an annual assessment of all employment policies to ensure they are both consistent with best practices and being implemented in practice. The league office will have full access to the consultant.

Having considered Wilkinson's findings and other information brought to his attention, the Commissioner has decided that, in addition to paying all fees and expenses associated with Wilkinson's investigation, the club will pay $10 million, which will be used to support organizations committed to character education, anti-bullying, healthy relationships and related topics. They will also fund programs directed more broadly at improving the workplace, particularly for women and other underrepresented groups, and training and development programs throughout the league, with recipients identified with the assistance of respected third-party advisors. We will solicit recommendations from the club, particularly for organizations based in the Washington metropolitan area.

In addition, to ensure that the club's recent workplace conduct and culture improvements are sustained and that its stated commitment to progress is realized, the club shall have the following semi-annual reporting obligations through July 31, 2023:

Report to the league office, through an independent third party selected by the club and approved by the league office, on:

1. the club's progress in implementing each of Wilkinson's workplace recommendations, with the first report due by July 31, 2021;
2. the results of the culture and other surveys recommended; and
3. all complaints, including those made at exit interviews or post-employment, that reasonably present workplace-related issues of bullying, discrimination, harassment, sexual misconduct, or retaliation, whether made anonymously or by an identified party, as well as how the club addressed those complaints. Based on these semi-annual reports, the league office will be permitted to conduct follow-up inquiries with any workplace consultants the club has engaged.

Any material failure to implement these recommendations or to otherwise comply fully with these obligations and the commitments may result in an extension of the reporting period or other discipline.

As co-CEO, Tanya Snyder will assume responsibilities for all day-to-day team operations and represent the club at all league meetings and other league

activities for at least the next several months. Dan Snyder will concentrate on a new stadium plan and other matters. All senior executives of the club, including Dan and Tanya Snyder, will undertake comprehensive training in workplace conduct and related issues (including bullying, diversity and inclusion, harassment, LGBTQ issues, microaggression, and unconscious bias, among other topics).

As a league, we will review our own policies and practices and will look to supplement existing programs to promote respectful, inclusive, and professional workplaces that are free of misconduct. In addition to current annual training and our critical response protocols, we will develop additional comprehensive and mandatory training across the league, including on bullying, discrimination, and harassment; a requirement that all club employees have the ability anonymously to report issues of workplace conduct to their club or the NFL; and ensuring that all clubs are fully informed of best practices for building and maintaining a diverse, healthy and respectful workplace environment.

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News Briefs

Insightful Concussion Webinars Set for July 28 and August 12

Two concussion webinars will be held in the coming weeks that will explore more deeply the issues around Chronic Traumatic Encephalopathy (CTE), from the defendant's perspective. Both webinars are sponsored by Concussion Defense Reporter.

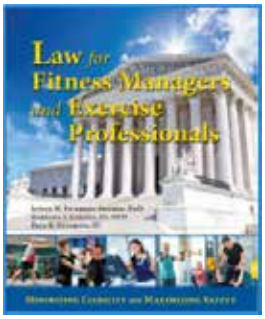
Human Factors in Sports Concussion–July 28, 2021 3:30-4:30 ET

Every sports concussion case, whether a "second hit" or a "CTE suicide", has one question in common: How did we get here? How claimants, coaches and others perceive, process and act is the subject of Human Factors. Join Gordon & Rees attorney Tony Corleto and Joe Sala, Ph.D. from Exponent for a discussion of how warning and safety information factor into behavior on and off the field.

Register here: https://grsm.webex.com/grsm/onstage/g.php?MTID=eb222a975e6483a49c19cea57ec515661

Sports Law Professor Introduces Law for Fitness Managers and Exercise Professionals

Fitness Law Academy, LLC has announced the availability of ***Law for Fitness Managers and Exercise Professionals***, by JoAnn M. Eickhoff-Shemek, PhD, Barbara J. Zabawa, JD, MPH, and Paul R. Fenaroli, JD. The publisher describes the textbook is **the** "go to" resource for fitness managers and exercise professionals. Written specifically for a "lay" audience, it includes descriptions of over 100 legal cases and numerous risk management strategies to help professionals protect themselves, their employers, and their clients.



Two New Educational Programs Available with the Textbook:

1. FREE Faculty Training Program (June 7- August 6, 2021) – designed for academic programs that want to offer a Legal/Risk Management course or add Legal/Risk Management content to an existing course.
2. Self-Study CEC/CEU Course: Minimizing Legal Liability and Maximizing Fitness Safety. Fitness managers and exercise professionals can earn 22 ACSM CECs or 2.0 NSCA CEUs.

For more information about the textbook, educational courses, and authors' bios, visit the Fitness Law Academy, LLC website (www.fitnesslawacademy.com). The textbook is sold on Amazon-Click Here.

Bond, Shoeneck & King Brings on Former NCAA Attorney Michael Sheridan as Senior Counsel

Bond, Shoeneck & King has announced the hire of Senior Counsel Michael Sheridan, a former attorney with the NCAA. Sheridan will represent colleges & universities and student-athletes nationwide on NCAA infractions, compliance, and eligibility matters. As a former NCAA investigator and athletics compliance administrator, he "brings a wealth of knowledge and experience to the Collegiate Sports Practice Group," according to the firm. "Before joining Bond, Michael served as Associate Director of Enforcement at the NCAA National Office, where for more than eight years, he led investigations of alleged Level I/II (Division I) and major (Divisions II and III) violations and delivered oral arguments in hearings before the NCAA Committees on Infractions. Prior to joining the enforcement staff, Michael worked in athletics compliance roles at two Division I universities, where he assisted in the development, implementation and administration of comprehensive compliance programs, and served as a trusted resource for coaches, student-athletes, athletics department staff and other university stakeholders.

"Michael's direct knowledge and extensive experience in the highly regulated world of intercollegiate athletics aids his clients throughout each phase of the NCAA enforcement process. Michael also provides strategic direction, planning and counsel on a wide range of other NCAA compliance and eligibility matters to NCAA member institutions, coaches and student-athletes."

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