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Case Summaries

Zion Williamson v. Prime Sports: Round Three

By Jeff Birren, Senior Writer

Sports Litigation Alert has previously reported on the litigation between NBA player Zion Williamson and his one-time marketing agent, Prime Sports Marketing. The first article discussed the factual background and the claim brought by Prime Sports against Williamson in Florida State Court. The Florida Court of Appeal had recently reversed the trial court's denial of Williamson's motion to dismiss the case for lack of personal jurisdiction (*SLA,* "Court Favors NBA Star Williamson in Contract Dispute with Agent" Vol. 18, Issue 3 (2-12-21). The second article focused on Williamson's declaratory judgment case filed in North Carolina Federal Court. The Court had granted his motion for Partial Judgment on the Pleadings ("Order") and pursuant to a North Carolina statute, Williamson could void his short-lived contract with Prime Sports, (*SLA, "*Zion Williamson & Prime Sports: Round Two" Vol. 18, Issue 4 (2-26-21)). The Order must have caused consternation for Prime Sports and its owner because they filed four separate motions attacking that

Table of Contents

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Case Summaries

- Zion Williamson v. Prime Sports: Round Three 1
- Alabama Federal Court Finds No Title IX Retaliation in Auburn Softball Case. 4
- Ninth Circuit Hands Victory to Defendant in Concussion Case 6
- Fifth Circuit Delivers Partial Victory to Texas A&M University in Copyright Infringement Case. 7
- Federal Judge Allows Student-Athletes Wage and Hour Claims Against the NCAA to Continue 8

Articles

- Student-Athletes as Employees – Who Could Have Ever Thought? Well, Apparently the NLRB 9
- Will the NCAA's NIL Ruling Impact Collegiate Esports? 12
- Sports Lawyer Bob Lattinville Talks About His Successful Career in the Legal Profession. 13
- Dickinson College Agrees to Reinstate Women's Squash Team, and Comply with Title IX. 15
- As Fans Return to Sports Facilities So Do Security Issues – an Interview with Jim Riordan. 16
- Former University of Cincinnati Coach Faces a 'Bearcat' of a Time in Federal Court 17
- Court Denies NCAA, UNM and Head Coach's Motion to Dismiss in Player Suicide 19
- National Sports Law Institute's Annual Fall Sports Law Conference Set for October 15 19

News Briefs

- John Tortora Named Senior Vice President and Chief Legal Officer at Columbus Blue Jackets Hockey Club 21
- Arkansas State Hires Graduate of Arizona State University Sandra Day O'Connor College of Law as Women's Basketball Director of Operations 21
- Greenberg Traurig Attorneys to Present at Esports Business Summit October 18-20 in Las Vegas 21

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ruling. Judge Loretta C. Biggs denied all four motions (*Williamson v. Prime Sports Marketing, LLC,* Case No. 1:19-cv-593, 2021 U.S. Dist. LEXIS 175218 (9-15-21)).

The Court's Introduction

The Court stated that the Defendants' four motions "all appear to seek the same relief" (Id. at 1). The first motion requested "that this Court alter" the Order, and "specifically" to "reconsider and alter its position concerning the appropriateness of a court determining a student's eligibility" under NCAA guidelines. The Defendants told the Court it had "committed a clear error of law by taking a position that is 'contrary to all authority on the subject'" (Id. at 2). They asserted the Court was not bound by the NCAA's determination of Williamson's eligibility, and the Defendants "should be granted leave to amend their affirmative defenses to include the factual allegations" that could prove that Williamson was not in fact eligible.

A second motion sought to amend the Answer, Affirmative Defenses, and Counterclaims to prove that Williamson was not eligible to participate in NCAA athletics and therefore was unable to invoke the protections of the relevant North Carolina statute.

They also filed a motion to "Substitute Proposed Amended Answer, Amended Affirmative Defenses and Amended Counterclaims in Pending Motion for Leave to Amend" to "include information regarding" Williamson that the Court said, "was presented" to another federal court in an "unrelated matter … that has since been dismissed on the merits with prejudice and to which Plaintiff was not a party."

The fourth motion was "captioned 'Notice of Motion to Vacate January 20, 2021, Partial Judgment on the Pleadings Pursuant to *FRCP 60(b)(2)* based on newly discovered evidence." This "Notice" was "fully briefed by the parties" and "appears to cover the same ground" as the motion to alter or amend the judgment "with minor exceptions." The Court construed "this as a motion to vacate." The Court noted that the Defendants again cited "information regarding Plaintiff that was presented in the unrelated, and now dismissed with prejudice" case.

The Motion to Alter or Amend Judgment

The first issue was the appropriate standard of review. The motion was procedurally improper because motions brought under *FRCP 59* are only to be brought after a final judgment. Defense counsel admitted this, but thought this best preserved the right for appellate review. The Defendants therefore "knowingly and intentionally brought a procedurally improper motion."

Although "concerning" the Court treated the motion as one for reconsideration under *FRCP 54,* the correct statute. That requires either an intervening change in the law; additional evidence that had not been available; or that the prior decision was either based on clear error or would work manifest injustice. The Court previously ruled that Williamson was not permanently ineligible, and the Defendants insisted that the Court's ruling was in "clear error" because the Court "ceded" its authority to make such a determination to the NCAA (Id. at 3).

The Defendants did "not contend that there has been an intervening change in the controlling law or previously unavailable evidence." Their sole argument was based on a theory of "clear error." That requires showing that the prior decision was "dead wrong." The Defendants, however, "merely rehash their previous arguments that have been rejected by this Court."

In the prior motion the Court "considered the pleadings in the light most favorable" to the Defendants. Their pending motion did "not rely on material allegations of fact" but instead was "a conclusion of law that flies in the face of their own pleadings as well as attachments to their pleadings" (Id. at 4). They responded that the Court was not bound by the NCAA's determination of eligibility, citing an older case. However, that

court "was not faced with a defendant that contradicted its own pleadings."

The Defendants next insisted that the Court had ceded its authority to the NCAA. The Court disagreed. It had "used its authority" to interpret the relevant North Carolina statute. That statute did not "define 'permanently ineligible'" nor did it provide any criteria for making that determination. The NCAA had not found Williamson to be permanently ineligible and even the Defendants cited a case that stated that it was "well established that courts will not interfere with internal affairs of voluntary associations." The Defendants "conclusory allegations" did not raise a "genuine issue."

Their next argument was that the Order was "contrary" to prior decisions (Id. at 5). A case from Tennessee was irrelevant because unlike that case, the issue here was not whether the Defendants could raise eligibility as a defense "but whether Defendants plausibly alleged facts that called Plaintiff's eligibility into question." A Mississippi opinion was irrelevant because that agent failed to raise the issue in the trial court. The Defendants also cited cases wherein students who had been declared ineligible sued the NCAA on this issue. These were irrelevant because these Defendants "failed to plausibly allege facts that raised a question" of Williamson's "eligibility status." The Defendants cited a case released five days prior to the Order, but that was a wire fraud case (Id. at 6).

They "have still not provided any relevant case law that would suggest it is for this Court to exercise oversight on how private organizations enforce and investigate alleged violations of their rules." The question was not whether Williamson could have been found to be permanently ineligible "but whether Defendants had sufficiently alleged that he was permanently ineligible" and this they "failed to do."

Finally, the Defendants disputed the prior Order which stated that Williamson had "effectively terminated and voided" his agreement with the defendants by letter. The Court rejected this, because the relevant statute stated that an athletic agency agreement made in violation of the statute "is void" and the student shall return any consideration received under the contract. There was thus "no clear error or manifest injustice."

The Motions to Amend the Pleadings

That motion "lies within the sound discretion of the District Court" and it should be denied when it would be prejudicial to the opposing party; if there has been bad faith by the moving party; or if it would be futile. The Defendants wished to allege "specific violations of NCAA rules" by Williamson or his representatives, insisting that any single such violation would have rendered him ineligible. This proposed amendment would be futile, however, because "they do not plausibly allege that Plaintiff was permanently ineligible to participate in intercollegiate basketball at the time he entered into the contract" with the Defendants (Id. at 7). The "Court is not tasked with undertaking an analysis of whether a student athlete engaged in activities that should have rendered him permanently ineligible" but only "if that individual *is* permanently ineligible (Id., emphasis in the original).

The Defendants sought to add allegations "enumerating alleged gifts of payments received" by Williamson and/or his family, but they had already alleged that he was not a student athlete as defined by NCAA rules, and thus "these arguments … have already been raised." They further wished to amend their pleadings to include information presented in an unrelated case in South Carolina, including allegations of gifts received by Williamson's family. However, the proposed amendment would be "futile" because it "would not change the analysis conducted by the Court in reaching its determination that Plaintiff was not 'permanently ineligible'" under the North Carolina statute during the relevant time frame.

The Motion to Vacate

The final motion was to vacate the entire prior ruling "due to newly discovered evidence" pursuant to *FRCP 60(b)(2)* (Id. at 8). This motion applies to a final judgment, not an interim order. The Court was willing to set "aside" that issue "for the moment" and perform the analysis. The moving party must prove that the motion is timely; meritorious; has "a lack of unfair prejudice to the opposing party"; and that there are "exceptional circumstances." This motion was based on the "same information" from the other case "discussed above." Even "if taken as true" it would have "no bearing on the basis for the Court's ruling."

This claimed new evidence "does not provide a meritorious defense nor would it likely produce a new outcome." It "appears" that the "Defendants are asking in multiple ways, that it change its mind on its finding that Defendants failed to plausibly allege that Plaintiff was permanently ineligible to be a student athlete despite his enrollment at Duke University and participation on its men's basketball team." A Fourth Circuit opinion held that a motion that is "nothing more than a request" to the court to "change its mind… is not authorized by *Rule 60(b).*"

The Court's Conclusion.

The Defendants seemingly "wish to engage in a fishing expedition into the backgrounds of Plaintiff, his parents, and his associates." They sought to "relitigate matters which have been addressed by the Court" or to "introduce evidence that could have been raised prior to" the earlier ruling. All four motions were denied.

Conclusion

Telling a court that it made significant errors can be risky. These Defendants filed four such motions. Enthusiasm does not excuse failing to file the correct motion at the correct time. From a distance it seems that the Defendants took careful aim and shot at both feet.

Return to Table of Contents

Alabama Federal Court Finds No Title IX Retaliation in Auburn Softball Case

By Erica J. Zonder

Alexa Nemeth, a former softball player at Auburn University, sued Auburn for Title IX retaliation, claiming that the school denied her a roster spot on the team after she made complaints about sexual improprieties by a former coach, and further participated in a related investigation.

Background

Nemeth originally filed a Title IX complaint in 2017, alleging that Coach Corey Myers was having inappropriate sexual relationships with the athletes, that Head Coach Clint Myers (his father) knew about it, and that school officials covered it up. ESPN covered the story and did numerous interviews, corroborating many of the allegations (Junod & Lavigne, 2017). Nemeth was cut from the team, leading to the initial Title IX filing. After Clint Meyers retired/resigned ahead of the following school year, Nemeth was denied a roster spot with the new coaching staff.

In 2019, Nemeth filed a lawsuit in federal district court against Auburn, Corey and Clint Meyers, and two former presidents of the university, bringing claims for: 1) Title IX sex discrimination against Auburn, 2) Sexual harassment in violation of 42 U.S.C. §1983 against all defendants, 3) Title IX retaliation against Auburn, 4) Retaliation in violation of 42 U.S.C. §1983 against all defendants, and 5) Failure to supervise against all defendants in violation of §1983 (*Nemeth v. Auburn*, 2021). Nemeth ultimately amended her complaint, limiting it to only the Title IX retaliation claim against Auburn. She alleges that she was deprived of her roster spot on the team for 2017/2018.

Facts

Per the court's opinion, Nemeth was a walk-on on the softball team in the fall of 2016. She had been getting "favorable" feedback from Corey Myers. After Corey took a leave of absence, she was criticized by Clint Myers (she "sucked" compared to others), yet was still given favorable comments in front of the team, and allowed to travel with the team on at least one occasion, although typically given minimal scrimmage time at practice and in games. After Corey resigned, other coaches "effectively eliminated" her participation. Nemeth believed she was being groomed/pressured to have sexual relations with Corey in order to receive better treatment at practice/games, as were other players, and Clint knowingly allowed it. After she and her father complained to the Auburn athletic director and other staff, she was told by the coaches in the year-end meeting that they didn't see a role for her on the team for the following year, and she was cut. Her Title IX suit followed a few days later (Vitale, 2019). After Clint "retired," the new coaching staff held open tryouts, in which Nemeth participated, but she did not make the team (none of the participants did). She then left Auburn for Elon University, where she played on their softball team.

Summary Judgment and Court Analysis

Auburn's response to the retaliation claim was that the new coaching staff determined that Nemeth wasn't a SEC caliber player/good enough to help the team moving forward, just like the other open tryout participants. The court, as typical, analyzed the Title IX relation claim under the Title VII burden shifting framework. Auburn conceded that Nemeth could establish a prima facie case, and focused their defense on showing a legitimate non-discriminatory reason that was not pretextual – i.e. the new coaching staff's assessment of her ability. The court noted, per *Holifield, Combs*, and *Burdine*, that the burden to rebut retaliation is "exceedingly light" and the defendant need only produce admissible evidence that would allow the trier of fact to rationally conclude that retaliation was not the motivation. The court concluded that Auburn met this burden – as new coaching staffs must assess the team needs, and previous walk-ons, who played sparingly, are not guaranteed roster spots. Therefore, in order to defeat summary judgment, Nemeth needed to demonstrate pretext, including satisfying a "but for" causation test – if not for her complaints, Auburn wouldn't have taken an adverse action (not giving her a roster spot on the team). The court also noted that Nemeth cannot substitute her own judgment for Auburn's (per *Chapman*), nor simply "quarrel" with the reasoning. To establish pretext at the summary judgment stage, according to the court, Nemeth would need to demonstrate incoherencies, contradictions, etc. of the proffered legitimate reasons (so it's false), AND that retaliation was the real reason.

Nemeth argues "temporal proximity" – she was deprived of a roster spot by the new coaches after her father sent an email to a member of the Auburn Board of Trustees (the "latest instance of protected conduct"). The court noted that while temporal proximity is evidence of pretext (and Auburn "does not appear to quibble" with this issue here), it is not necessarily sufficient alone. Something more is needed (*Hurlbert, Tolar, Gogel*). For something more, Namath advances five more points: Continued presence on the website roster, general custom that walk-ons were not required to try out again, other walk-ons (who didn't make Title IX complaints) were treated differently, she made the softball team at Elon, and Auburn's "suspicious" actions in hiring new coaches. According to the court, the problem is "simple," – it's a new coaching staff, and they can manage the roster differently than the old staff, and that roster spot expectations are not the same for walk-ons as for scholarship players. The court further states that Nemeth fails to identify any similarly situated players who were treated more favorably. Even the other walk-ons she claimed were treated differently were not similarly situated as they did not try to make the team with the new coaching staff. And, playing for Elon does not require the same level of skill as an SEC school does (and courts are not "super coaching staffs" who substitute their judgement on issues such as skill anyway). And finally, the court addresses her contention about Auburn's suspicious behavior as innuendo and conjecture.

Conclusion

Nemeth, according to the court, "failed to demonstrate" that Auburn's stated reason for not granting her a roster spot on the 2017/2018 softball team was pretextual/

masking a retaliatory motive. Therefore, the court concludes, Auburn is entitled to summary judgment on the Title IX retaliation claim.

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Return to Table of Contents

Ninth Circuit Hands Victory to Defendant in Concussion Case

By Anthony B. Corleto and Philip Robert Brinson, of Gordon & Rees

By unanimous opinion, a Ninth Circuit panel affirmed summary judgment against chronic traumatic encephalopathy ("CTE") wrongful death claims brought by the estates of two young men. Archie v. Pop Warner, No. 20-55081; CD CA 2:16-cv-06603.

Archie was brought by the mothers of two former youth football players, each of whom died in their mid-twenties, a decade after they last played youth football; one from a self-inflicted gunshot wound, the other in a motorcycle accident. The mothers sued for monetary damages and to enjoin advertising that "youth tackle football is safe for minor children." Their theory alleged that exposure to repetitive contact in football leads to CTE, the disease process found in autopsied brain tissue of football players Aaron Hernandez and Junior Seau.

The Archie plaintiffs each claim their son had CTE from playing youth football, and this led to the behavior that ended their lives. Worth noting: each also played football in high school and one played into college. Also worth noting, the suicide victim was diagnosed bi-polar and was admitted multiple times for psychiatric holds. In December 2019, District Court granted Pop Warner's motion for summary judgment, finding "[T]here is not a sufficient evidentiary basis that Pop Warner's alleged negligence in connection with Pop Warner Football, to the exclusion of high school football, other experiences, social or biological factors, was a substantial factor[.] The plaintiffs essentially argue that any child that plays Pop Warner football, simply by virtue of participating, without any documentation of head trauma, if found with CTE postmortem, has a viable cause of action based on any occurrence as a result of recklessness or mood behaviors in that person's life. The Court does not agree that this satisfies the factual causation standard."

On appeal, plaintiffs argued that district court incorrectly excluded their causation experts, the noted pathologist Bennet Omalu and the neuropsychiatrist James Merikangas. At deposition, Merikangas admitted he had no specific basis to conclude the decedents suffered head trauma playing Pop Warner football "aside from the fact that people playing football have head trauma." Observing that the plaintiffs offered no explanation of how, given evidence of significant other independent factors, the expert found participation in Pop Warner a substantial factor in their death, district court found his opinion "unreliable" and that it should be excluded under Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590 (1993). Citing testimony from plaintiff's original neuropathologist, that there was no reason to believe the motorcycle death was anything but an accident, and that he cannot opine as to whether CTE was the cause of death in either decedent, District court also declared "unreliable" Omalu's unsupported declaration that youth football was a "substantial factor" in both deaths.

Observing the opinions of both Merikangas and Omalu "contained no explanation supporting the logical leap from the underlying conclusion to the ultimate conclusion," and that neither "explained why Pop Warner was a substantial cause rather than simply a possible cause," the panel found that district court did not abuse its discretion in finding the opinions unreliable and inadmissible. The panel also agreed with district

court's alternative holding, that even if the causation experts rendered admissible opinions, they failed to raise a triable issue, as the opinions "showed only that Pop Warner football could have caused the deaths and contained no explanation why Pop Warner football likely caused the deaths."

Anthony Corleto, partner in the Westchester office, handled the Ninth circuit argument and the successful summary judgment motion at District Court. Corleto and Houston partner Philip Brinson, co-lead the firm's Catastrophic Brain Injury Defense Group. The Catastrophic Brain Injury Defense group is made up of attorneys based nationwide with extensive experience and a track record of success defending sports concussion and CTE matters, including class actions. Our attorneys regularly work with clients to develop best practices, risk management strategies, and crisis management protocols.

Return to Table of Contents

Fifth Circuit Delivers Partial Victory to Texas A&M University in Copyright Infringement Case

By Tal Dickstein and Alex Inman, of Loeb & Loeb

The Fifth Circuit has affirmed the dismissal of copyright infringement claims against Texas A&M University on sovereign immunity grounds, but held that the university's unauthorized use of plaintiff's work may be subject to takings claim in state court.

The Texas A&M University football team is known for the lore of the "12th Man," which originated in 1922 when reserve football player E. King Gill came down from the stands ready to play after several TAMU players were injured. Sportswriter Michael Bynum wrote a biography about Gill and his impact on TAMU. As part of the writing process, Bynum visited TAMU and interviewed a number of people in the TAMU athletic department, including Associate Director of Media Relations Brad Marquardt and Assistant Athletic Director for Media Relations Alan Cannon.

Bynum, seeking photographs from TAMU to include in his book, emailed a draft of the book to Marquardt in 2010. Included in the draft was language making clear that Bynum was the author and that Canada Hockey LLC d/b/a Epic Sports, Bynum's publishing company, owned the copyright. Communications between Bynum and Marquardt continued until late 2013, and Bynum hoped to publish his book in fall 2014.

As part of a fundraising effort that same year, the TAMU athletic department tasked its staff with finding background information on Gill. Marquardt directed his secretary to take Bynum's biography of Gill and remove all references to Bynum and Epic. He then changed the title and circulated the biography among athletic department staff. The Gill biography was subsequently published on a TAMU athletic department website and shared widely on TAMU athletic department social media. When he discovered this, Bynum contacted Marquardt and asked him to remove the article. Marquardt complied, but the biography continues to be shared widely and Bynum's book remains unpublished.

Bynum and Epic filed suit against TAMU and employees of the athletic department, including Cannon, in 2017, alleging direct copyright infringement under the Copyright Remedy Clarification Act (CRCA), vicarious and contributory copyright infringement under the CRCA, violations of the Digital Millennium Copyright Act (DMCA) by the TAMU athletic department, and violations of the takings clauses of the Texas and U.S. Constitutions by the athletic department. TAMU moved to dismiss on behalf of the athletic department on state sovereign immunity grounds. The district court dismissed the claims but stayed its decision pending the U.S. Supreme Court's decision in Allen v. Cooper. (Read our summary of the Supreme Court's decision here.) Upon the Supreme Court's 2020 decision, which held that the CRCA was unconstitutional and states retained sovereign immunity from copyright infringement claims, the district court entered final judgment for TAMU.

On appeal, the Fifth Circuit first addressed whether the athletic department was a separate entity from TAMU (and therefore not entitled to sovereign immunity) or was an arm of the state. The court determined that each factor used to determine whether an organization is an arm of the state—whether the state statutes and case law view the agency as an arm of the state; the source of funds for the entity; the degree of local autonomy the entity enjoys; whether the entity

is concerned primarily with local, as opposed to statewide, problems; whether the entity has the authority to sue and be sued in its own name; and whether the entity has the right to hold and use property—favored treating the athletic department as an arm of the state through TAMU and that it was therefore entitled to sovereign immunity.

The court then considered whether the state's sovereign immunity from copyright infringement claims had been abrogated. In Allen, the Supreme Court held that the CRCA did not validly abrogate the states' sovereign immunity from copyright infringement suits, holding that, while the CRCA was clear in its intent to abrogate sovereign immunity, Congress had no power to do so under either Article I of the U.S. Constitution (which authorizes Congress to protect copyrights) or Section 5 of the Fourteenth Amendment, because the evidence of actual constitutional injury from willful copyright infringement by the states was "exceedingly slight."

Bynum and Epic argued that this case was distinct from Allen because TAMU's copyright infringement under the CRCA violated the Fourteenth Amendment by depriving Bynum and Epic of property without due process and taking the property. Bynum and Epic argued that, just as the Supreme Court found an abrogation of sovereign immunity under the Americans with Disabilities Act for actual violations of the Fourteenth Amendment in its 2006 decision in United States v. Georgia, the court should so find with respect to the CRCA in this case.

The Fifth Circuit determined that it need not consider whether Georgia applied to copyright claims, because Bynum and Epic failed to sufficiently plead that TAMU's actions actually violated the Fourteenth Amendment. First, regarding the deprivation of property claim, while TAMU deprived Bynum and Epic of their property rights by intentionally infringing their copyright, Bynum and Epic still had meaningful post-deprivation remedies in state court—specifically, by bringing a takings claim under the Texas Constitution, which is more expansive than a takings claim under federal law and which automatically waives sovereign immunity in state court.

Second, regarding the takings claim under the U.S. Constitution, the court noted that, while the question of whether copyright infringement constitutes a valid takings claim has not been considered by the U.S. Supreme Court, the Fifth Circuit held in Porter v. United States, that copyrights are not a form of property that is protected by the Takings Clause of the U.S. Constitution.

Addressing the other claims, the court found that the takings claims, pleaded in the alternative, necessarily failed because a state is entitled to sovereign immunity from a federal takings claim if there is a valid remedy available in state court—and as the court previously noted, there was a takings claim available under the Texas Constitution—and similarly, states are entitled to sovereign immunity from state takings claims filed in federal court.

The claims against the individuals, including Cannon, were similarly dismissed, as they had a supervisory role of Marquardt, but there were no allegations that they either directly infringed Bynum's work or were aware of the infringement before it occurred.

The opinion can be viewed here: **20-20503.0.pdf (uscourts.gov)**

Return to Table of Contents

Federal Judge Allows Student-Athletes Wage and Hour Claims Against the NCAA to Continue

By Gregg E. Clifton, of Jackson Lewis

The NCAA must defend claims that they are a joint employer from student-athletes seeking to be paid for the time they spend participating in collegiate athletic activities. Despite U.S. District Court Judge John Padova's dismissal with prejudice of wage and hour claims filed by the student-athletes against more than 20 schools that the plaintiffs never attended, he rejected that same argument when raised by the NCAA. Instead, he allowed the Fair Labor Standards Act (FLSA) claim seeking financial remuneration for their participation in Division I athletic activity to continue against the NCAA. (Ralph "Trey" Johnson et al. v. NCAA).

Judge Padova concluded the student-athletes' allegation that the NCAA is their joint employer, along with the defendant university schools that the student-athletes attended, is possible.

Recognizing that two different entities can be joint employers of the same person if they both have significant control over the employee, Judge Padova utilized a Third Circuit test involving four factors established In Re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation. The four factors to consider if a joint employer relationship exists as outlined in Enterprise include, if an alleged employer can hire and fire the relevant employees; if it has the authority to promulgate work rules and assignments and to set the employees' conditions of employment; is involved in day-to-day employee supervision and discipline; and has actual control of employee records, including payroll.

Approximately one month ago, Judge Padova allowed the six student-athlete plaintiffs' claims against their institutions (Villanova, Fordham, Sacred Heart, Cornell and Lafayette) to proceed because the schools had failed to provide sufficient proof to establish that the student-athletes were not employees. Similarly, Judge Padova rejected the NCAA's defense and effort to dismiss the FLSA action concluding that a possible joint employer relationship exists because the "NCAA does more than just impose rules…it also investigates violations of those rules and imposes penalties, including the firing of student athletes, for those violations".

Judge Padova concluded, "the complaint plausibly alleges that the NCAA exercises significant control over the hiring and firing of student athletes, including plaintiffs, such that the complaint satisfies the first factor of the Enterprise test with respect to the NCAA."

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Return to Table of Contents

Articles

Student-Athletes as Employees – Who Could Have Ever Thought? Well, Apparently the NLRB

By Robert J. Romano, JD LLM, Professor of Sport Management at St. John's University

When Mark Emmert, President of the NCAA, was interviewed by Frontline in February 2011, reporter Lowell Bergman didn't pull any punches when he presented, quite frankly, the new head of the country's largest intercollegiate sport governing body a series of issues and concerns surrounding the commercialization of college athletics: "*You don't see the contradiction that many have pointed out that when we're watching March Madness, when we're watching these games, you may have a coach who's being paid six figures, maybe seven figures in some cases. Everyone is being paid – the athletic director, everyone you can see on the screen and many people you can't – are being paid as part of this, but the students aren't. The athletes who are actually performing are not paid."*[1]

Not phased, the freshly appointed and polished administrator's reply was just as direct: *"No, I don't find that contradictory at all. Quite the contrary.* ***I think what would be utterly unacceptable is, in fact, to convert students into employees.*** *The point of March Madness, of the Men's Basketball Tournament, is the fact that it's being played by students. We don't pay our student-athletes."*[2] He then went on to comment that, *"The status question is about the student, not about the coach or the professor. And our student-athletes remain student-athletes. And they are preprofessional. They are not professional in anything."* [3]

Not surprisingly, Mark Emmert's responses were in line with what the NCAA has been selling to the American public since the early part of the 20th Century: amateur collegiate athletes are those that play sport purely for the enjoyment and as a way to develop his or her mental, physical, moral, and social skills. In fact, the initial NCAA rule regarding amateurism in 1916 decreed that "no student shall represent a College or University in any intercollegiate game or contest who

1 https://www.pbs.org/wgbh/pages/frontline/money-and-march-madness/interviews/mark-emmert.html.

2 Id.

3 Id.

is paid or receives, directly or indirectly, any money or financial assistance."[4]

By 2011, however, Mark Emmet's answer was based on the more detailed and comprehensive NCAA rules, specifically, Section 2.9 *"The Principle of Amateurism"* which states:

> *"Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."*[5]

Additionally, as per Article 12 of the NCAA Division I manual, which governs rules related to athletic eligibility and amateurism, outlines how a student-athlete would lose his or her "amateur status":

> *"An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: (a) uses his or her athletic skill (directly or indirectly) for pay in any form in that sport; (b) accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; (c) signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received, except as permitted in Bylaw 12.2.5.1; (d) receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletic skill or participation, except as permitted by NCAA rules and regulations; (e) competes on any professional athletics team per Bylaw 12.02.12, even if no pay or remuneration for expenses was received, except as permitted in Bylaw 12.2.3.2.1; (f) after initial full-time collegiate enrollment, enters into a professional draft (see Bylaw 12.2.4); or (g) enters into an agreement with an agent."*[6]

Since, according to the NCAA rules and bylaws as outlined above, an athlete will lose 'amateur status' if he or she uses his or her athletic skill for ***pay in any form,*** Mark Emmert's statement that student-athletes cannot be considered employees of the college or university for which the play, was, by the NCAA's own definition of amateurism, correct.

That isn't to say that this concept of amateurism wherein student-athletes are considered 'preprofessional' that cannot be financial compensated, above that of the costs of the scholarship, has never challenged. One such attempt came in March 2014, three years after Mark Emmert took over as the NCAA's president, when the National Labor Relations Board (NLRB) Regional Office in Chicago, after a petition was filed by Northwestern University quarterback Kain Colter, determined that members of the University's football team that are receiving academic scholarships are "employees" within the meaning of the National Labor Relations Act (NLRA) and therefore, have the right to form a labor union.[7] The NLRB Regional Office based its findings after finding the following facts:

- The University's football program generated revenues of approximately $235 million between 2003 and 2012, such that the players performed valuable services for the University.
- The players were "compensated" via scholarships equal in value of up to $76,000 per year.
- The players are engaged in football activities all year-round and devote between 40-50 hours a week to football activities during many months, which is often more time than they devote to academics.
- The football coaching staff exerted incredible control over the players, not only requiring them to practice and attend meetings on a rigid schedule throughout the day but also requiring them to seek some type of approval before they could make living arrangements, apply for employment, purchase vehicles, travel off campus, post items

4 Afshar, Arash (2014). **"Collegiate Athletes: The Conflict Between NCAA Amateurism and A Student Athlete Right of Publicity"**. *Willamette Law Review*.

5 NCAA Division I Manual, Constitution Art. 2.9.

6 NCAA Division I Manual, Constitution Art. 12.1.2.

7 https://www.archerlaw.com/nlrb-regional-director-rules-northwestern-football-players-are-employees-and-can-unionize/

on social media forums, and speak to the media.[8]

Northwestern University, unquestionably at the urging of the NCAA and its over 1,100-member institutions, appealed the decision of the Regional Office to the full National Labor Relations Board in Washington, D.C. almost immediately.

The NLRB D.C. Office, in August 2015, maybe not surprisingly based on the political climate at that time, dismissed Colter's petition. In its decision, the NLRB didn't rule on the merits, but instead declined to exert jurisdiction of the matter and therefore, by not doing so, preserved one of the NCAA 's core principles: that college athletes are students. However, the NLRB D.C. Office never determined whether or not the players are employees, instead, finding that the novelty of the petition and its potentially wide-ranging impacts on college sports would not have promoted "stability in labor relations."[9] As per its decision, "The Board has never before been asked to assert jurisdiction in a case involving college football players, or college athletes of any kind. Even if scholarship players were regarded as analogous to players for professional sports teams who are considered employees for purposes of collective bargaining, such bargaining has never involved a bargaining unit consisting of a single team's players."[10]

But that was 2015. It is now 2021 and college sports is in a whole new post O'Bannon, post Alston, post Trump Administration, social media driven world. On September 29, 2021, NLRB General Counsel, Jennifer Abruzzo issued an 'updated' memorandum solidifying the NLRB's *current* position wherein 'certain' "Players at Academic Institutions (sometimes referred to as student athletes), are employees under the National Labor Relations Act, and, as such, are afforded all statutory protections."[11] Specifically, Abruzzo's memo declares that "Players at Academic Institutions perform services for institutions in return for compensation and subject to their control. Thus, the broad language of Section 2(3) of the Act, the policies underlying the NLRA, Board law, and the common law fully support the conclusion that certain Players at Academic Institutions are statutory employees, who have the right to act collectively to improve their terms and conditions of employment."[12]

It is presumed that the NLRB's reclassification of student-athletes as employees is because of a) recent legal developments including the U.S. Supreme Court's unanimous decision in NCAA vs. Alston wherein the Court recognized that college sports is indeed a profit-making enterprise, b) the players' recent collective actions about racial justice issues and demands for fair treatment, as well as for safety protocols to play during the pandemic, which all directly concern their terms and conditions of employment, [13] and c) the new political climate under the Biden Administration.

Interestingly, the NLRB has warned colleges and universities that classifying players as 'student-athletes' leads to those players believing that they are not employees and therefore, can 'chill' employee rights. Therefore, the NLRB announced, that in appropriate cases, it will "pursue an independent violation when a college or university misclassifies players at academic institutions as student-athletes."[14]

It may have taken over a hundred years, but finally someone, in this case the NLRB, recognizes the contradiction and illogicality of not paying student-athletes whose skills are the catalyst that drive this billion-dollar industry. The contradiction that Lowell Bergman highlighted, wherein when the American public is watching *March Madness*, a sporting event that generates over $900,000,000.00 annually for the NCAA, the coaches are being paid, the athletic directors and administrators are being paid (Mark Emmert earns $2.9 million as the President of the NCAA),[15] everyone associated with the event is being paid, but the student-athletes aren't – may finally come to an end.

Return to Table of Contents

8 https://www.sbnation.com/college-football/2014/3/27/5551014/college-football-players-union-northwestern-nlrb

9 https://www.nytimes.com/2015/08/18/sports/ncaafootball/nlrb-says-northwestern-football-players-cannot-unionize.html

10 Id.

11 https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status

12 Id.

13 Id.

14 Id.

15 https://www.si.com/college/2021/07/19/mark-emmert-ncaa-salary-covid-19-revenue-drop

Will the NCAA's NIL Ruling Impact Collegiate Esports?

By David A. Moreno Jr. and Alvin Benjamin Carter III, of Brown Rudnick

In 2014, Kurt Melcher, an associate athletics director at Robert Morris University, called up an executive at Riot Games, which publishes the popular video game League of Legends. The reason? He was laying plans to form the first collegiate esports team.

David Moreno

"This is such a team-based game, why couldn't we go and treat it like baseball, like basketball, like soccer?" Melcher wondered. "Get the best players, scholarship them and bring them to our school."

In six months, he'd done just that, finding sponsors to fund uniforms, a facility, and 35 partial scholarships. Three thousand inquiries to join the team flooded Melcher's inbox; 2,000 new students applied to the school. Fast forward to 2021, and hundreds of others have followed in Melcher's footsteps: the National Association for Collegiate Esports (NACE) now has over 170 member schools that together have provided more than $16 million in esports scholarships.

One might think, given all this interest, it'd be the NCAA in charge and not a newcomer like the NACE. But in 2019, the NCAA officially chose not to govern esports. Their primary justification, according to Melcher – who is now the Executive Director of Intersport, which led the task force responsible for persuading the NCAA – was their "inability to get past the fact that gamers might come to college after earning money, have a personal brand already built in their streaming following, and could easily have a sponsorship deal in place…prior to accepting an NCAA scholarship."

In other words, the NCAA chose not to govern esports because of their amateurism definition – a definition they amended this year with their new name, image, and likeness (NIL) policy. Though the full impact of this decision on collegiate esports is still uncertain, new questions and opportunities appear to be on the horizon: Will the NCAA rethink its stance towards collegiate esports? What benefits and lessons might this offer esports? And what can esports – which has long allowed young players to profit of their name, image and likeness – offer the NCAA?

The NCAA, NIL, and esports: a brief primer

As noted above, the NCAA chose not to govern esports in 2019. While the amateurism definition was a key issue, the committee also cited potential Title IX issues (esports is a male-dominated arena) and the violence of certain video games. As of now, only 8.2% of collegiate esports gamers are women, but interest is there: one study shows roughly half of women gamers participate in video games that belong in the esports category.

In light of the NCAA's decision, other esports leagues have cropped up, including the NACE and the Electronic Gaming Federation (EGF). These organizations permit gamers to license their names, images, and likenesses to sponsors.

Now, the NCAA is allowing their players to do the same. Their interim policy (active July 1, 2021) allows student-athletes to sign NIL licensing deals from third parties but prohibits pay-for-play (i.e., universities can't pay students to play for them) and impermissible inducements. These rules are of course superseded by various state laws – there are 19 thus far and more on the way – and NCAA schools might have their own NIL policies as well.

No matter the specifics, one would expect that with the amateurism issue out of the way and esports' popularity surging (especially amid the pandemic), the NCAA might reconsider their stance–creating new opportunities, benefits and learnings for the NCAA, esports, and the students and schools who participate.

What the NCAA can do for esports

If the NCAA *does* to choose to govern esports, there could be a number of benefits to esports, including:

- *Better regulated competition.* The NCAA has extensive experience and resources when it comes to providing fair competition, standardized rules, and compliance. These are not insignificant issues when it comes to esports, which has been wrestling with drug testing and cheating matters.
- *Improved diversity and inclusion in esports.* If the NCAA were to govern esports, schools would be

under more pressure to tackle the Title IX issues inherent in a sport so dominated by men. The NCAA, which is familiar with these issues, could help esports and participating schools take steps in a positive direction – while also implementing measures to facilitate safer environments for women gamers.

- *Ensuring the overall wellbeing of student gamers.* The NCAA's mission statement focuses on students-athletes' wellbeing and academic success. It could institute and enforce rules that would help ensure student gamers are not lagging behind academically or walking into potentially exploitative deals. The latter is already happening at the school-level in response to NIL policies: the athletic department at Nebraska, for instance, recently **launched education and support** for its athletes in this respect.
- *Improving esports' reputation and legitimacy.* Though esports has fast become a legitimized sport – especially amid COVID-19 – the NCAA's participation would go a long way towards legitimizing it even further, while also creating opportunities to increase its exposure and reach. Perhaps there could be even something akin to a traditional sports draft that helps create a more structured way of becoming a professional esports gamer.

What esports can do for the NCAA (and its member schools)

The NCAA – and the schools it works with – could also greatly benefit from esports on various fronts, such as:

- *NIL policies.* Gamers in esports have always had the independence to license their names, images, and likenesses. Now that the NCAA has agreed to allow its student-athletes to do the same, they could look to collegiate esports for guidance and best practices – especially in this interim period.

  For example, this experience could shine a light on issues that may arise with conflicting deals. As Melcher **describes**, "I knew if we were going to have a successful program, we would have to honor the existing partnerships the players came to our school with. If we had a mouse deal with the program, we would exclude that student from the mouse company deal if they had a competing mouse deal and make sure that player was not of any promotions that would cause conflict with his existing deal."
- *New partnerships and recruitment opportunities for schools.* Esports opens up entirely new avenues for partnerships (and recruitment) that could benefit universities the NCAA serves. The University of Kentucky, for instance, has **partnered** with JMI sports for the naming rights for their new esports facility and struck a deal with established esports franchise, Gen.G.

These deals show that NIL policies don't have to come at the expense of university partnerships and revenue. As NACE's director **told** the *Washington Post* last year, "Whether the esports team is part of the athletic department or the engineering school, we believe esports' success is due to its flexibility, allowing the school to obtain sponsorships while encouraging the gamers to develop their own broadcast channel and licenses. It is all about helping the athlete build their personal brand, which in turn aids the college in the long run."

Looking forward

Much remains to be seen when it comes to the NCAA and collegiate esports. But one thing is clear: esports' momentum **shows** no signs of slowing down. The same could be said of student-athletes' desire for NIL opportunities.

As these new trends gather steam, there's ample potential for the NCAA and esports to come together, learn from one another, and create value for students, schools, and the esports industry at large.

Return to Table of Contents

Sports Lawyer Bob Lattinville Talks About His Successful Career in the Legal Profession

Robert (Bob) Lattinville is one of those rare sports lawyers, who has had two highly successful careers in sports law – one as a lawyer and one as an agent. Besides that, he has also played an important

role as a board member of the Sports Lawyers Association for a quarter of a century.

Thus, *Sports Litigation Alert* sought him out for an interview, just nine months after he joined William Morris Endeavor as an agent. That interview follows.

Question: Why did you decide to become an agent again?

Answer: After 30 years of practicing law for individuals and institutions within and outside of the industry of sports across many areas of law, I wanted to focus on serving coaches, executives and athletes in employment matters.

Q: What do you now miss most about being a sports law attorney at a law firm?

A: My friends and colleagues. Practicing law is a challenging profession and an even more challenging business; those pressures forge some terrific personal and professional bonds.

Q: How is your day different as a sports agent?

A: My mentality is truly "whatever it takes". I no longer measure my days (and most nights) in 6-minute increments, which means that the amount of time spent to achieve the desired result is typically only a consideration in the context of a client deadline rather than a mounting legal bill. It's truly life changing in the sense that my and my company's success is inextricably linked to our clients' success. I always enjoyed practicing law but I'm also confident that if the business model for law firms aligned more closely to the agency business model, clients would be better served and we, as attorneys, would keep more talented and decent people in the profession . . . and they and their clients would be happier.

Q: are the biggest challenges in your current role?

A: At present, the biggest challenges are trying to identify and assist our client's in implementing the most productive strategies during a remarkably fluid period in college athletics. The advent of NIL coupled with: (a) another round of conference realignment in relatively recent proximity to, (b) the expiration of media rights deals, at a time when (c) the impact of the Alston decision is still being calibrated, along with (d) the potential (read: likely) restructuring of the NCAA, represent more critical disrupters in any industry at one time than I can recall. And, to a meaningful degree, each of them will be affected by a global pandemic.

Bob Lattinville

Q: What is your take on the NIL movement and the opportunities for the agent industry?

A: It's important. It's necessary. It represents a great opportunity for agents. But NIL also comes with some potentially serious risks; at least until the industry and its law and regulations become better defined. As much as the general public (and many industry participants) may complain about certain aspects of professional sports, its overall competitive balance and fiscal viability is aided immensely by collectively bargained labor agreements and uniform player contracts, negotiated by skillful and experienced principals and attorneys. And although it represents great opportunities for student-athletes and agents alike, the NIL market has the realistic potential to become the Wild West. To be sure, the significant business, legal and administrative issues it creates do not outweigh its enormous value and utility. But there are going to be some major growing pains along the way (in countless aspects of

the business of college athletics) to new definitions of amateurism, equality and competitive balance.

Q: What impact has the pandemic had on the Sports Lawyers Association?

A: Ironically, it's made the resources and contributions of our talented membership more available; the mode of access is just different. Our most recent presidents (Bobby Hacker and Nona Lee) have rallied the membership to make "SLA 2.0" an even more valuable resource for sports lawyers via expanded podcasts, virtual meetings and other important and topical web-based content. Please check out our website: **www.sportslaw.org**

Q: What are the chances we will have a an in-person SLA conference in May?

A: We are planning on an in-person SLA Conference in Atlanta in 2022. I'm looking forward to seeing my sports law colleague and friends there.

Return to Table of Contents

Dickinson College Agrees to Reinstate Women's Squash Team, and Comply with Title IX

Dickinson College, a liberal arts college in Carlisle, Pennsylvania, has agreed to reinstate its women's squash team, develop a gender equity plan, and come into full compliance with Title IX to avoid a sex discrimination class action for depriving female student-athletes of equal opportunities and treatment in its intercollegiate athletics program, according to the attorneys representing the female student-athletes.

"This is a great victory for women at Dickinson College, the entire Dickinson community, and all who care about gender equity and the rule of law," said Arthur H. Bryant of Bailey Glasser's office in Oakland, CA. "Title IX has been the law for almost 50 years and Dickinson College has been flagrantly violating it. Now, thanks to the women's squash team, that's going to stop. Dickinson will reinstate the women's team it illegally tried to eliminate, develop a gender equity plan with an expert approved by the squash team members, stop discriminating against its female student-athletes, and bring all aspects of the intercollegiate athletic program into compliance with Title IX."

In addition to Bryant, the lawyers for the female student-athletes are Cary Joshi of Bailey Glasser in Washington, DC, Lori Bullock of Bailey Glasser in Des Moines, Iowa, and Jade Smith-Williams of Bailey Glasser in Oakland, CA.

On August 26, 2021, Dickinson announced that it was eliminating its women's and men's varsity squash teams at the end of the 2021-22 academic year. On September 9, 2021, Bryant wrote a letter to Dickinson College Interim President John E. Jones, III, on behalf of the women's team members and informed him that the women's elimination violated Title IX. The law prohibits universities from eliminating women's teams for which interest, ability, and competition are available unless "intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments," according to Bryant. Dickinson failed this test, he added.

According to the most recent publicly available data, which Dickinson submitted and verified to the U.S. Department of Education under the Equity in Athletics Disclosure Act, Dickinson had an undergraduate population in 2019-20 of 1,193 women and 898 men. So undergraduate enrollment was 57.05 percent women. The school's intercollegiate athletic teams had 326 men and 243 women, or 42.71 percent women—creating a 14.35 percent gap between the women's undergraduate enrollment rate and their intercollegiate athletic participation rate. Dickinson needed to add women's opportunities to comply with Title IX.

Instead, Dickinson announced that it was eliminating its women's squash team (along with the men's team). As a result, according to the most recent publicly available data, the school's athletic participation numbers would drop to approximately 314 men and 231 women, or 42.39 percent women—creating a 14.67 percent gap. Dickinson would need to add approximately 186 women to reach gender equity under Title IX.

Bryant said he and his co-counsel would file a class action lawsuit in federal court against Dickinson for depriving women athletes and potential athletes of equal opportunities and treatment unless the school agreed to reinstate the teams and comply with Title IX.

The settlement agreement, reached today, avoids the need for the suit.

Under the agreement, Dickinson agreed to reinstate its women's squash team and develop a gender equity plan no later than August 31, 2022. During the gender equity review, the school will solicit input from student-athletes and alumni and will expressly invite participation from the women's squash team members and other Dickinson women's varsity intercollegiate athletic team members. It will post the plan on Dickinson's athletics department's website and ensure that Dickinson's intercollegiate athletic program complies with Title IX during the 2022-2023 academic year and beyond. It will also take eight detailed steps to provide female student-athletes with improved and equal treatment and benefits in the interim.

The Dickinson College settlement is similar to agreements Bryant, Joshi, and Bullock reached with St. Thomas University in June 2021, Dartmouth College in May 2021, East Carolina University in early January 2021, the University of North Carolina at Pembroke in December 2020, and William & Mary College in October 2020. Additional Title IX settlements were reached by Bryant and his co-counsel with Clemson University in April 2021 and Brown University in September 2020.

Return to Table of Contents

As Fans Return to Sports Facilities So Do Security Issues – an Interview with Jim Riordan

Dr. Jim Riordan, the founder in 2000 of the MBA Sport Management program at Florida Atlantic University, was recently the subject of an exclusive interview with Sports Litigation Alert, which follows.

Question: Has the pandemic made sports facilities more secure or less secure, and why?

Anwer: Individuals who have been charged with the management and operation of professional, amateur and intercollegiate sports and entertainment organizations, as well as those who own and operate the public assembly facilities where events take place, have increased their concern for the proper maintenance and operation of said facilities since the outbreak of COVID-19.

Operating processes that have received increased attention include: access, egress and within-facility movement of guests and employees; deploying of social distancing strategies through the use of ticketing (seat allocation and assignments); attaining cleanliness and sanitizing certification from international accrediting agencies; and the increase in cleaning and sanitizing operations within a facility and/or organization administrative building (achieved through the frequency of applications as well as increase in quality and strength of the products/compounds used in the cleaning and sanitizing process). When it comes time to implement the processes and operations, an increase in staff will be required to properly implement these procedures to ensure the intended result of each operation comes to fruition. Properly trained parking lot attendants, gate/door attendants, building/event security personnel and ushering staff in seating areas always will provide the potential for a safe and pleasant experience for the guest. However, now amid the COVID crisis, there will be *additional* essential event staff to administer keener, finite and pandemic-specific policies and procedures.

Q: Are there any dangers associated with security with the advent of E-tickets, and if so, what might they be?

A: Though numbers are quickly dwindling, there remain individuals today who have no desire or enthusiasm to participate in the era of modern technology. They refuse to own or operate a personal computer, cell phone and, in some cases, still make use of a rotary dial telephone. This faction of people makes life somewhat difficult for those sport, entertainment and convention center event managers and their ticketing operations staff. Over the past few years, an increasing number of "sportainment" (sport and entertainment) event managers have been switching to an all-electronic method of ticket distribution and entering the facility (E-ticketing). Event tickets (and in many cases pre-paid parking passes) are sent directly to one's smartphone for scanning at the venue entrance and/or the venue parking lot entrance.

The main problem with E-ticketing (besides having a still-present fragment of society that refuses to

partake in the knowledge needed to use it) is the same predatory issue that invades all modes of computer technology — phishing, hacking, scamming and theft of data. Devices used in E-ticketing are no different from a laptop or desktop. They all are computers and are subject to unlawful invasion and identity theft. Of course, users of smartphones, cell phones, tablets (all devices used in E-ticketing) are encouraged to keep their devices protected by installing and running anti-malware, anti-theft and identity protection software to help alleviate E-Ticket theft (among other items).

Q: What is the most underestimated security risk by facility managers?

A: A common concern regarding security and crowd management at sportainment events is having non-security or non-crowd-management experts or professionals interfere with the planning and designing of security/event operations.

Specifically, this usually comes in the form of the event's or venue's finance team and/or those individuals who were charged with marketing and or booking the event. It is the charge of the finance/accounting team, as well as those working with the event promoter, to put on a high-quality, professional event while at the same time doing so as cheaply as possible. In many (but not all) scenarios, the finance and booking people will look first to cut security, ushering and other event-related staff in order to cut back on the final bill presented to the event promoter. Doing so denies paying guests a well-rounded guest relations experience while they are in attendance.

There also is a very dangerous and irresponsible method of determining event staffing cuts: setting the amount of staffing needed predicated *solely* on the number of tickets sold. Some finance, booking and marketing executives feel the same minimal staffing levels should be deployed for an anticipated crowd of 5,000 guests, be it for Disney on Ice or the band Metallica. Absolutely not. Event-staffing levels should be determined based on the type of performers/participants, demographics of the expected audience, history of the event and similar type of events. The director of security for the venue should have the final and binding say over all staffing levels.

Q: Are drones still a security risk, and in what ways?

A: In December 1979, during halftime of the New York Jets-New England Patriots game at Shea Stadium, the Electronic Eagles of the Radio Control Association of Greater New York was performing an exhibition of remote-controlled airplanes. One airplane was in the shape of a lawn mower and went out of control, flying into the stands, hitting two men. One of the men died of his injuries a few days later.

While the technology, design and operation of man-controlled machines (now called drones) has improved tremendously, it should be remembered that the drones and the software controlling the devices are designed by humans. Most importantly, the drones are driven and directed in the communities (some quite dense in population) by humans. When you have human beings operating a machine, there always is a chance for error. The safest way to obtain overhead and side angle shots of the field or court of play is to have the camera attached to a cabling system above the court or field.

Return to Table of Contents

Former University of Cincinnati Coach Faces a 'Bearcat' of a Time in Federal Court

By Robert J. Romano, JD LLM, Sports Law Professor at St. John's University

In May of 2021, former University of Cincinnati Men's Basketball Coach John Brannen, filed a lawsuit against the University, Director of Athletics John Cunningham, and President Neville Pinto, in Federal District Court, Southern District of Ohio. As per his complaint, Coach Brannen claims the defendants deprived him of his constitutionally protected procedural and substantive due process rights by terminating him "for cause" without properly notifying him or allowing a hearing on the issues involved, which, he alleges, is a violation of 42 U.S.C. § 1983, together with the Fifth and Fourteenth Amendments to the United States Constitution.

Specifically, Coach Brannen contends that his suspension and subsequent release by the University were the "result of a sham 'investigation' that was unfair, unreliable, and inherently flawed and nothing more than a smokescreen to avoid triggering a contractual

buyout clause that would have cost the University millions of dollars."[16] In addition, Brannen claims the "defendants not only intentionally failed and refused to provide Coach Brannen adequate notice of the allegations against him, but also denied (him) a meaningful opportunity to rebut those charges, formally respond to any allegations, and otherwise clear his name before the results of the incomplete 'investigation' were published and his employment was terminated 'for cause' via a letter purporting to summarize the findings of such 'investigation.'"[17] It is important to note here that Coach Brannen's liquidated damage buyout is estimated to be worth more than $5 million.

Per his lawsuit, the former coach is requesting that the court award him compensatory and punitive damages, attorneys' fees, and interestingly, to compel the University to give him the opportunity to publicly clear his name during a broadcasted press event.[18]

On August 27, 2021, the defendants, per both Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), filed a motion to dismiss the Coach's complaint in its entirety. The defendants assert that the lawsuit should be dismissed per Federal Rule 12(b)(6) since the University of Cincinnati is not a 'person' as defined under Section 1983. It is the defendants' argument that under Section 1983, an individual who suffers a constitutional deprivation can only sue a 'person' who caused it, not either the state or a state entity. Therefore, since the University of Cincinnati is a public institution, it is therefore a state entity and not a 'person' as defined under § 1983, and as a result, "a claim against it under this section cannot be asserted for money damages."[19]

In addition, the University of Cincinnati and its two co-defendants contend that Federal Rule 12(b)(1) requires the court to dismiss Coach Brannen's complaint since subject matter jurisdiction is missing in this case, because, as a governmental entity (state university), it enjoys the benefits of immunity as guaranteed under the Eleventh Amendment.[20]

The doctrine of sovereign immunity shields the government and government officials sued in their individual capacity from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[21] The doctrine balances two important interests – "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[22] A defendant is entitled to immunity from suit unless a plaintiff can establish two elements: (1) that the defendant violated a constitutional right; and (2) that the right at issue was "clearly established" at the time of the defendant's alleged misconduct."[23]

It is the defendants' contention that Coach Brannan's lawsuit fails to establish either, and therefore, since his suit is premised on harassment and distractions, and not solely on liability, he failed to satisfy his burden to show that governmental immunity is not appropriate in this matter and its motion to dismiss under Federal Rule 12(b)(1) is appropriate.

University of Cincinnati Athletic, Director Cunningham, recently stated that the decision to terminate Coach Brannen was a "decision to move in a new direction" and that the University "is acting in the best interests of its student athletes . . .".[24] But let's be real here, this case is in no way about the University moving forward or the best interest of its student-athletes, it's all about money. Specifically, the liquidated damage amount of $5 million.

And that's a lot of bearcats.

Return to Table of Contents

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19 *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 617 (2002).

20 *Johnson v. University of Cincinnati*, 215 F.3d 561, 571 (6th Cir. 2000). "Lack of subject matter jurisdiction is a non-waivable, fatal defect." *Coley v. State of Ohio Dep't of Rehab.*, No. 2:16-CV-258, 2016 WL 5122559, at *2 (S.D. Ohio Sept. 21, 2016).

21 *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *accord Bishop v. Hackel,* 636 F.3d 757, 765(6th Cir. 2011).

22 *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

23 *Bailey v. City of Port Huron*, 507 F.3d 364, 366 (6th Cir. 2007).

24 https://www.newsrecord.org/sports/uc-motions-to-dismiss-former-men-s-basketball-coach-brannen-s-lawsuit/article_05857db6-0ac1-11ec-b101-b3a38cda33d1.html.

Court Denies NCAA, UNM and Head Coach's Motion to Dismiss in Player Suicide

A federal judge from the District of New Mexico has partially denied the NCAA's, University of New Mexico's, and former head coach Robert Davie's motions to dismiss in a case involving a UNM Lobos football player, Nahje Flowers, who committed suicide after allegedly being forced to continue playing football despite suffering serious brain injuries from multiple concussions.

After Nahje's death, his family filed a lawsuit against the University of New Mexico, the NCAA, and his former coach, Robert Davie, for their alleged roles in Nahje's untimely death.

Nahje, a starter for UNM's defensive line tragically took his own life on November 5, 2019 after "experiencing harassing and degrading treatment by Davie, as well as other coaches and school officials" according to the family's attorneys.

The attorneys, from the firms Hilliard Martinez Gonzales, LLP, Ben Crump Law, PLLC, and Hilare McGriff, continued: "Nahje was required to continue and play despite suffering multiple concussions and head injuries from playing, even though white players were permitted to sit out and recover when similarly injured. Plaintiffs highlighted Coach Robert Davie's deplorable conduct with respect to how he treated African American student-athletes, specifically Nahje Flowers, and the Court found that Plaintiffs had sufficiently alleged that head coach Robert Davie discriminated against Nahje Flowers based on his race and Plaintiffs can move forward on their § 1983, equal protection and substantive due process claims against Robert Davie. As the Court stated, Plaintiffs adequately plead that Davie engaged in racially discriminatory behavior by forcing Flowers to play football while not forcing similarly situated white players to play."

The NCAA argued that it could not have predicted Nahje would kill himself, and the suicide was an "intervening cause" that prevents the NCAA from being liable. The court disagreed, stating, in part:

"The Court concludes that, here, the Plaintiffs plead sufficiently that the NCAA's conduct — namely, its failure to implement protocols to treat N. Flowers' concussion — induced the suicidal ideations that led to N. Flowers' death. Accordingly, the Court denies the NCAA MTD with respect to the wrongful death claim."

The Court also denied the University of New Mexico's motion to dismiss with respect to Plaintiffs' Title VI claims against the University and the Board of Regents.

Return to Table of Contents

National Sports Law Institute's Annual Fall Sports Law Conference Set for October 15

The National Sports Law Institute of Marquette University Law School will present its annual fall conference on Friday, October 15.

It will feature Perspectives from members of the Sports Law Alumni Association who teach sports law and sports management at various universities around the country.

The conference will cover a wide range of topics, from gender equity issues related to the impact of the Supreme Court's *Bostock* decision on transgender participation in sport, and the epidemic of sexual harassment in NCAA college sports; technology and intellectual property issues related to wearable technology and its impact on name, image, and likeness rights, the use of brain implants or Whole Brain Emulation in football, and trade secret protection in auto racing; team and facility issues in professional sports from disputes over ownership and relocation of franchises, to the development and evolution of naming rights; legal issues impacting international sport including the use of U.S. federal law to combat sports corruption, new federal efforts to combat sports doping, and the evolution of European soccer over the past 25 years.

The conference will also include a keynote focused on issues faced by the Court of Arbitration for Sport at the Tokyo Olympics.

Conference participants include:

- Paul Anderson (L'95), Director, Sports Law Program and National Sports Law Institute, and Adjunct Professor of Law, Marquette University Law School, Milwaukee, WI

- **Dr. Genevieve F.E. Birren** (L'04), Associate Professor, Sport Management, SUNY Cortland, Cortland, NY
- **Dr. Sarah Brown** (L'14), Clinical Assistant Professor, Department of Applied Physiology & Wellness, Southern Methodist University, Dallas, TX
- **Kerri Cebula** (L'06), Associate Professor of Sports Management, Kutztown University of Pennsylvania, Kutztown, PA
- **Mark Dodds** (L'05), Professor, Sport Management Department, SUNY Cortland, Cortland, NY
- **James Gray** (L'90), Professor and Sport & Recreation Management Program Director, Marian University, Fond du Lac, WI
- **Martin Greenberg** (L'71), Adjunct Professor of Law and Founder, National Sports Law Institute of Marquette University Law School, Attorney, Law Offices of Martin J. Greenberg, LLC, Milwaukee, WI
- **Aaron Hernandez** (L'13), Director, Allan Bud Selig Sports Law and Business Program, Sandra Day O'Connor College of Law, Arizona State University, Phoenix, AZ
- **Lauren McCoy** (L'09), Assistant Professor, Winthrop University, Rock Hill, SC
- **William Miller** (L'96), Associate Professor of Sport Management, University of Wisconsin – Parkside, Kenosha, WI
- **Matt Mitten**, Professor of Law and Executive Director, National Sports Law Institute and LL.M. in Sports Law Program for Foreign Lawyers, Marquette University Law School, Milwaukee, WI, and member, Court of Arbitration for Sport, Anti-doping Division, XXXII Summer Olympic Games, Tokyo, Japan
- James Wold (L'17), former Associate Attorney, Stupar, Schuster & Bartell, Milwaukee, WI

Complete details along with registration information can be found **online here**.

Return to Table of Contents

News Briefs

John Tortora Named Senior Vice President and Chief Legal Officer at Columbus Blue Jackets Hockey Club

The Columbus Blue Jackets have announced that John Tortora has been named the club's Senior Vice President and Chief Legal Officer. A graduate of Seton Hall University, where he earned both his bachelor's and JD, Tortora has spent the previous decade in various executive roles with the San Jose Sharks, ascending to Co-President before his departure. Prior to that, he spent 14 years at the National Hockey League, where he served as Vice President, Media & Business Affairs. There, Tortora was actively involved in the launch of the NHL Network. Further, he navigated a variety of content rights issues across various distribution platforms. The National

Arkansas State Hires Graduate of Arizona State University Sandra Day O'Connor College of Law as Women's Basketball Director of Operations

Arkansas State University has announced the hire of Erin Campbell as director of basketball operations for the women's program. Campbell joined the A-State staff after spending the last three years in the high school and junior high coaching ranks in Arkansas. Notably, she earned her masters of law in sports law and business from Arizona State's Sandra Day O'Connor College of Law in August 2018. While earning her law degree, Campbell served the women's basketball and softball team as student assistant and video coordinator, respectively. She is now pursuing her doctorate in educational leadership at Arkansas State. Campbell's dissertation will investigate the educational experience of high-achieving academic students from low socioeconomic households. She will explore how those students are able to achieve success by looking through the lenses of social capital, economic resources, the intangible components of family cohesion, strong community mentors, and how culture influences their success. She also founded GOAT.ED, an organization that empowers all student-athletes to use sports as a vehicle to achieve success.

Greenberg Traurig Attorneys to Present at Esports Business Summit October 18-20 in Las Vegas

Attorneys for Greenberg Traurig, one of the more active law firms in the Esports space will present at the upcoming Esports Business Summit October 18-20 in Las Vegas on the topic of "The Elephant in the Room: Can Esports teams become viable commercial enterprises?" The panel discussion begins on Wednesday, October 20, at 1:15 p.m. and lasts to 1:50 p.m.

The panel is described as follows:

The esports industry is a booming global business with a worldwide audience growing exponentially each year. As the industry continues to see massive growth on a global scale, the question for many investors remains: Is there a viable business model for esports teams to become profitable enterprises? This discussion will explore the evolution of esports as a business with a particular focus on monetization opportunities within the sector and the viability of esports teams as commercial enterprises.

Join Greenberg Traurig Shareholder **David Schulman**, Co-chair of Video Games & Esports Practice, who will serve as moderator for the discussion with Adam Rymer, CEO Of Envy Gaming, Inc.; Todd Harris, Partner, Ghost Gaming; and Greenberg Traurig Corporate Shareholder **Tom Woolsey**. The panelists will explore considerations when entering into the world of esports fundraising and investing, long-term growth opportunities, and more relating to esports as a business enterprise. For more on the conference, visit: **Event Overview – Esports Business Summit 2021 (esportsbiz.com)**

Return to Table of Contents