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Case Summaries

Transgender Athletes and Sport Participation – Updates in the *Hecox v. Little* Case

By Andrew Gatti, MS & Michael S. Carroll, PhD

In April 2020, Lindsay Hecox brought a lawsuit against Bradley Little, the current Governor of the state of Idaho, for the state's recently enacted Fairness in Women's Sports Act (HB 500). Hecox was a transgender woman attending Boise State University (BSU) at the time of the complaint. She sought to run for the university's cross-country team and compete at the NCAA Division I level. However, Governor Little signed the Act in March of 2020, and it was made effective on July 1st, 2020. The Act prohibits transgender women for participating in women's sports teams. The bill calls for all public schools and those that compete against public schools to classify their teams based on biological sex. Teams that are designated for women

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will not be open for males, and this is where the dispute lies.

According to the statute, if there is a dispute about the sex of a student, the student may be requested to provide a health examination or a signed statement by the student's personal doctor. The signed statement must confirm the student's biological sex by meeting at least one of the following factors: reproductive anatomy, genetic makeup, or regular endogenously produced testosterone levels.

The case also includes a cisgender female high school athlete as co-plaintiff (an underage female Jane Doe), who could be potentially affected by the conditions put in place because of the law. While the case also discusses Jane's claims as well, this article will focus on Hecox and her claims.

Claims Against the Act

In the complaint, Hecox alleged that the Act violated the Equal Protection and Due Process Clauses of the Constitution, and freedom from unconstitutional searches and seizures. Hecox sought a preliminary injunction based on the claim that the law was in violation of the Equal Protection Clause. The complaint states that the law specifically targets and discriminates against transgender women and will subject all female athletes to potential unwarranted invasive medical screenings and tests. While female athletes are the sex that is regulated, males are not explicitly listed in the law and therefore do not have to undergo the same testing or process.

Procedural History

Three different motions were made by three different parties. First, as stated above, Hecox filed for a preliminary injunction to prohibit the law from being enforced. Secondly, two student-athletes from Idaho State University, Madison Kenyon and Mary Marshall, filed a motion to intervene. Both Kenyon and Marshall competed against a transgender athlete at the collegiate level and lost to that athlete. These two athletes wish to have their concerns heard in a court of law and want to be represented in the case. Finally, the State of Idaho filed a motion to dismiss the case.

While the case may not be ready to be heard and decided on by a court of law, all three of these motions have been heard and decided on.

Motion to Intervene

The Court first looked at the Motion to Intervene. The Court used a four-part test for intervention: application of the intervention must be timely, the applicant must have a significant protectable interest relating to the action, the applicant must be situated in a way that the outcome of the case will impede the applicant's ability to protect the interest, and the applicant's interest must be inadequately represented by existing parties. The Court found that Kenyon and Marshall can be Intervenors to this case. The Court found that they had a protectable interest in this case (as the law was enacted to protect cisgender females for unfair competition). The Court also found that Title IX was enacted to help promote athletic opportunity between the sexes, which is a very important interest. The Court also found that Kenyon and Marshall's interests would be impaired if this case was decided for the Plaintiff and the Act was struck down. Finally, the Court found that Kenyon and Marshall have a more defined interest than Little and the Act do. Because of this, the Court decided that the Intervenors' interests are not adequately represented. Thus, the motion was granted.

Motion to Dismiss

The Court then looked at the Motion to Dismiss that was filed by the Defendants. The Defendant claimed that the Plaintiffs lack standing, that their claims are not ripe for review, and that the challenges against the signed Act fail as a matter of law. The motion was granted in part and denied in part. The Court found

that Hecox has a legitimate injury in fact. Due to the way the Statute is stated and written, injury in fact has occurred to Hecox. With this ruling, the court denied this section of the motion. The Court also ruled that the claims brought by Hecox are proper to examine now, and that there is no need for time to pass to see how the law will be applied to athletes. Stating that the Plaintiff's claims are ripe, the Court found that the Plaintiff's claims are a "pure question of law" and can be adjudicated on immediately and denied this section of the motion. However, the Court is dismissing the facial challenges that are presented by the Plaintiff. By granting this section of the motion, the Court is making way for a jury or judge to determine whether the Fairness in Women's Sports Act is legal and follows all Constitutional and Federal law.

Motion For Preliminary Injunction

Finally, the court looked at the Plaintiff's Motion Preliminary Injunction. This motion was filed to prevent the law from being enforced until the case has been heard and a decision has been made. The Court first analyzed the Equal Protection Clause. In previous cases adjudicated by the US Supreme Court, tiers of judicial scrutiny have been developed to help determine if the Equal Protection Clause has been violated. With respect to this case, the Act needs to withstand the standard of heightened scrutiny, which means that the statute must serve an important governmental objective at that the law must be substantially related to the achievement of those objectives. The Court then looked at the likelihood of Hecox to win the case based on the merits. The Court ruled that the Act discriminates against those who are transgender for athletic participation. As the Court analyzes the Act's potential violation of the Equal Protection Clause, there are four principles that the Court will use to help with their analysis. The Court will first look to the Defendant to justify the Act. Then the Court will consider the Act's actual purpose. Third, the Court will consider the post hoc justifications of the Act; the court will only look at how the law is applied in the current circumstances. Finally, the Court will decide whether the Defendants justifications overcome the injury done to the Plaintiff.

The Defendant looked to justify the Act by stating that it addresses the interests of promoting sex equality, providing females the ability to showcase their skill, and by giving females an opportunity to earn a college scholarship and other awards. The Plaintiffs agreed that these are worthwhile and important government interests. However, the Plaintiffs argue that the Act does not accomplish these goals.

In August of 2020, the District Court granted a Preliminary Injunction in favor of the Plaintiffs, pending a trial on the merits of the case, which served to bar the state from enforcing HB 500. In its decision to do so, the court noted that there had been no history of transgender athletes participating in athletics in Idaho, and further no record of cisgender female athletes being displaced by said transgender athletes. Due to this lack of history, the Court argued that there is no evidence that shows the Act is necessary to promote the Government's intentions. While there are some instances

in other states, such as Connecticut, of transgender females beating cisgender females, there are no such instances in Idaho. Heightened scrutiny would require that the Act address an actual, genuine problem and not one that could potentially happen in the future. The court further noted a stark contrast between the "deeply and irreparable" harms the Plaintiffs would face and the lack of harm on the part of the Defendants in the case of a preliminary injunction, as it would simply maintain the status quo.

Justification of the Act: Equality of the Sexes

A large part of the argument for the Act surrounds itself around the competitive advantage due to the presence of testosterone. While both sides mentioned studies that help support their side of the case, the Court found deficiencies in the argument of the Defendant. Dr. Gregory Brown, the Defendant's medical expert, stated that a large part of the competitive advantage from comes from the higher testosterone concentrations in men and adolescent boys after puberty. Dr. Brown also stated that testosterone suppression therapy cannot diminish the physiological advantage in someone who has already gone through puberty. The Court found that some of the studies that Dr. Brown used contradicted his argument. There were no arguments made or studies used that found a difference between cisgender athletes and transgender athletes who have undergone hormone suppression.

However, the Act states that there is such an advantage for transgender women who have undergone hormone therapy. The Court cited a number of factors that do not follow this conclusion. The Court stated there is a population of transgender females who never go through male puberty and do not undergo the physical and physiological changes that are associated with it. As this is the case, those transgender females have similar physical and physiological traits of cisgender females. The Court also cited the NCAA rule for transgender athlete participation in organized athletics. Since their rule was put into place in 2011, there have been no reports of any issues/problems in this area.

The Court also stated that the separation of boys' and girls' teams already exists in Idaho, and the Act does not prevent this from happening. According to the Idaho High School Athletic Association's Non-Discrimination Policy, boys cannot participate on girls' teams. The Idaho High School Athletic Association also has a transgender policy the mirrors the NCAA policy, which allows transgender females to participate in athletics after one year of hormone suppression. Since the Defendants cannot show that transgender females break the interest of sexual equality in athletics, the Act's justifications cannot overcome the inequalities that it presents to transgender female athletes.

Justification for the Act: College Scholarships and Other Awards.

Along with sexual equality, the Act also purports to protect cisgender girls' opportunities to earn scholarships and other awards from their athletic participation. While this is also a noble goal, there is no evidence that the law will increase the instances of this happening. As there is no evidence of a transgender female participating in women's athletics in Idaho, there is no evidence of a transgender female receiving a scholarship in Idaho at the expense of a cisgender athlete. Along with no evidence of this happening, the Intervenors in this case have not lost their scholarships due to transgender female participation. The Court went on to state that Hecox is likely to succeed in establishing that the Act violates the Equal Protection Clause based on the lack of evidence that the Defendant has brought to the Court.

There is one interesting caveat to the law and this case. The Defendant stated that if Hecox's health care provider states that she is a female, she would be allowed to participate in women's sports. If this is the case, the law does not come into effect and does not matter, at least not for Hecox individually. The Act will not ensure sexual equality in athletics if transgender athletes possess a health care provider's note stating they are a female.

The Purpose of the Act

The Court found that the Act is aimed at excluding transgender females from participating in women's athletics. Based on the Act's definition of biological sex, the Court concluded that the goal was to exclude transgender athletes from participation in athletics. The definition of biological sex, as stated in the Act, does not include any important factors that the medical community can agree on as it pertains to a competitive

advantage between males and females. Where the NCAA and Idaho High School Athletic Association policy appear to address this issue, the Act does not and looks to solely prohibit transgender athletes from participation.

Conclusion

As mentioned, the District Court granted a preliminary injunction in favor of the Plaintiffs in this case in August of 2020. In September of 2020, Defendants appealed the granting of the injunction to the United States Court of Appeals for the 9th Circuit. Fourteen states subsequently banded together to file an amicus brief in favor of appellants and overturning the injunction in late 2020. In June of 2021, the 9th Circuit remanded the case back to the District Court for the limited purpose of determining whether Hecox's claim is moot in light of her changed enrollment status at Boise State University. According to the Defendants, Hecox failed to take enough credits in her first two years to participate in college sports for BSU. Hecox, however, asserted in May of 2021 that she remains eligible under NCAA rules. Neither side provided sufficient evidence for their claims to the court. Thus, the 9th Circuit remanded the case back to the District Court to resolve this dispute and determine whether the issue is now moot. This is where the case currently sits.

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Fairness in Women's Sports Act, I.C. § 33-6201-6206, July 1, 2020.

Hecox v. Little, 479 F.Supp.3d 930, (9th Cir. 2020).

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Dent v. NFL Is No Longer a Class-Action

By Jeff Birren, Senior Writer

Soon after the NFL Concussion Case Litigation entered settlement discussions, another NFL class action was filed in federal court in San Francisco, (*Richard Dent et al v. NFL,* ("*Dent*") N.D. Cal. Case No. C 14-02324 WHA). It was assigned to Judge Alsup. *Dent* was based on the theory that the NFL, and not the clubs, gave pain medication to players to allow them to continue to play. These pages have followed its progress (*SLA,* "Former NFL Football Players Sue League over Use of Prescription Drugs" (5-30-14)). After the District Court dismissed *Dent, (SLA*, "Judge Grants NFL Motion to Dismiss Prescription Drug Claims" (12-26-14)), the same counsel, but different plaintiffs, filed similar claims not against the NFL but against the member clubs, *Etopia Evans et al v. Arizona Cardinals et al.* That case was filed in Maryland but was transferred to Judge Alsup. Much of *Evans* was tossed on a motion to dismiss (*SLA, "*Court Dismisses Claims Brought by Ex-NFL Players in Pain Medication Litigation" (3-17-17)). The final claims were dismissed on summary judgment, based on workers compensation exclusive remedy statutes (*SLA,* "Judge Grants Summary Judge on the Few Remaining Claims in NFL 'Painkiller' Case" (9-1-17)). The Ninth Circuit affirmed (761 F. App'x 701 (9th Cir. 2019)).

The Ninth Circuit revived the *Dent* claims that had been dismissed based on preemption (902 F. 3d 1109 (9th Cir. 2018)). Judge Alsup later granted the NFL's motion for summary judgment, but the Circuit reversed as to one cause of action (*SLA*, "Richard Dent v. NFL: The Ninth Circuit Revives a Single Dismissed Claim in Workers Comp Case" (9-11-20)). The NFL filed a motion to dismiss, but perhaps to the surprise of all, Judge Alsup denied the motion (*SLA*, "Dent v. NFL: The Plaintiffs Survive a Motion to Dismiss" (4-23-21)).

Dent Continues

The sole remaining cause of action was a common law claim for negligent voluntary undertaking for a supposed failure to ensure the proper recordkeeping, administration and distribution of painkillers and other prescription medications. The purported class included

all NFL players who played between January 1, 1973, and December 31, 2008, and who received various medications from an NFL club including opioids, non-steroidal anti-inflammatory drugs, corticosteroids, or local anesthetics.

The plaintiffs recently sought class certification. The Court held the hearing on the motion on 8-5-21 and ruled 26 days later ("Order Denying Class Certification ("*Order")* (8-31-21). (The first six pages recites in vastly greater detail the history of the litigation summarized above).

The Court's "Analysis"

The plaintiffs sought certification under FRCP 23(b)(c), which requires showing that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" (Id. at 8). The court "must do a rigorous analysis to determine if the requirements" are satisfied.

The Court stated that even after two Ninth Circuit opinions, "the precise nature of plaintiffs' theory of the NFL's liability remains elusive." Originally the theory was that the NFL "itself illegally distributed controlled substances and therefore its actions directly injured players" (quoting *Dent I,* 902 F3d. at 1118). The plaintiffs later "admitted those allegations were incorrect." They then asserted a voluntary undertaking theory. The Ninth Circuit articulated that theory as: the NFL voluntarily undertook a duty to ensure proper recordkeeping, administration, and distribution of the medications; that it created a drug oversight program; audited clubs' compliance with federal drug laws; mandated procedures to control the drug distribution system; oversaw the administration of that system; and it was within the NFL's control to "promulgated rules or guidelines that could improve safety for players across the league" (Order at 8/9).

To determine whether the NFL breached that duty, the Court "must by definition looks at the actions of the clubs." Class counsel asserted at oral argument that *Dent II* "precluded consideration of the conduct of the clubs." The Court responded that this was not so, as the items listed above support a duty by the NFL, but those "items necessarily turn in part of the propriety of the conduct of the clubs."

Common Questions of Law?

The class included all NFL players who played "at any time during the 35-year period from 1973 to 2008 and who received any drugs from his team." Class counsel argued that New York should apply to all claims, or, if not New York, then the law of the named plaintiffs' states, California, Arizona, and Illinois, should apply to the entire class. At oral argument class counsel "misstated that plaintiffs' briefing had done a comprehensive survey" of the law and "virtually all 50 states follow" the *Restatement (Second) of Torts.* In fact, counsel had only compared the law of those four states. The Court responded that it could not "rely merely on the assurances of counsel" (Id. at 10). "Plaintiffs' counsel has simply assumed away the problem and provided an inadequate record for certification."

In California, "the situs of the injury remains a relevant consideration." Here, "at least 23 states are implicated." The putative class includes "thousands of current and former NFL players spanning 35 years of plays, 32 different teams, and medications administered and distributed (and injuries suffered) in at least 23 different states." (Note that eight of the clubs have permanently moved from jurisdiction to another during the relevant time frame.)

Plaintiffs' brief admitted that the class was "harmed in dozens of different cities during the course of their NFL careers." Therefore the "potentially affected jurisdictions" are the states where the class members sustained injuries and the states where they currently reside. California requires comparing each non-forum state's law with California law. Plaintiffs cited a Wyoming District Court opinion but that dealt with one medication. Here, the plaintiffs "have not met their burden to show that a single body of law can be applied to the entire class, or even that the differences among the states would be manageable" (Id. at 11). A case involving the laws of 23 different states could "become a sprawling trainwreck. Variation in the law from state to state might make the case unmanageable." Although it might work, plaintiffs "have not met their burden to show it."

Club by Club Factual Questions Predominate

The NFL developed its annual prescription drug audit system in the early 1970s based on widely publicized

dispensing of controlled substances and practices among certain teams. A 1990 NFL report acknowledged that there was still "variations among the clubs in terms of recordkeeping" and this would "affect not only the lack of common proof but the substantiative lability of the NFL." If a club "maintained good drug records, the NFL did not breach its duty to the players of that club". Conversely, players of a club "who negligently maintained drug records might have claims" (Id. at 12). But even then, "we don't have a method of common proof to show that such failure caused injury to the player, given the lack of records."

A 1992 NFL report stated that the range of use of such drugs "is quite wide." In 1986 the "maximum number of controlled substances dispersed by a team was 15." In 2012 the average was 9.3 different types of NSAIDS and 13.6 different types of controlled substances per club." These differences continued over time. Moreover, there were wide differences in the use of the same drug. In 2005 the Jets dispensed 320 tablets of Toradol and 148 Toradol injections. The previous season the Colts dispensed 651 doses of Toradol and 249 Toradol injections.

Plaintiffs "would have us wave our hand at these inter-team differences as merely a question of damages, not liability, because, they say, the volumes were all unreasonable. At oral argument, plaintiffs' counsel brazenly compared the differences in volumes of medications dispensed by the NFL teams to the difference in the number of victims between 'a serial killer who killed 20 people and a murderer who committed 1.'" However, they "provided no reason or evidence, other than exaggerated rhetoric, to believe that the least volume of medications was equally unreasonable to the most and that such differences are immaterial." In fact, they "have made no showing whatsoever that the wide variety of painkillers and non-steroidal anti-inflammatory drugs (NSAIDSs) posed a uniform risk of injury in terms of excessive use. The inter-team differences in volumes and varieties of drugs cannot be ignored."

Furthermore, plaintiffs' evidence showed a substantial variation over time within a single team. In 2006 the Jets dispensed 511 Vicodin tables but in 2007 they dispensed 1275 Vicodin tablets. Plaintiffs have "provided no reason to believe that such differences are a matter of damages only rather than liability versus non-liability."

The NFL program did not and could not "provide a unform standard of medical care for the team" physicians and trainers. A 1986 report emphasized that it did not "dictate how physicians should practice medicine. That was controlled by state law in the place of the practicing physicians." Consequently, a court would "need to look at the reasonableness of the conduct of the club physicians and trainers" and that is "governed by state law."

Moreover, "the NFL has frequently modified the audit program over time. Plaintiffs alleged that by voluntarily undertaking the program, the NFL assumed a duty to conduct the audits with reasonable care for the benefit of the players." The relevant factors, however, "have changed significantly over the 35-year period from 1973-2008" (Id. at 13). In a 2011 study, 48% of the retired players "reported using no prescription opioids during the NFL careers." The cited study also "shows that a significant number of putative class members received opioids from sources other than their clubs" such as a teammate or family member. Plaintiffs admitted that this "factor would have to be accounted for" but "there is no practical way to do so on a class-wide basis. For the foregoing reasons, a *Rule 23(b)(3)* class will not be certified."

The Class Seeks Large Damages

One class certification factor in *FRCP 23(b)(A)* is the class members' interest in damages. Small individual damages weigh in favor of certifying a class, but relatively large damages weigh against class action. Several putative class members "claim damages created than two million dollars" (Id. at 14). Thus, "individual class members have substantial incentive to pursue individual claims weighing against the class action."

FRCP 23(c)(4) Class?

The plaintiffs last assertion was that class status was appropriate for certification of the duty and breach elements of the negligence claim. The Court disagreed. In evaluating the NFL's conduct, "we would still need to have evidence concerning what the NFL itself knew about the extent of the problems, if any, at the club level." A club "by club probing of the NFL's knowledge would still devolve into a myriad set of club issues." Even if that happened, the "state courts would have a devil of a time trying to dovetail that finding into the

specifics of a follow-up trials by individual players in state courts."

Consequently, the "most effective and efficient way to litigate this case is to proceed to trial on a non-class basis." Should plaintiffs win, that "would have collateral estoppel effect that would benefit their teammates" while a loss "would not prejudice other class members suing on their own." Plaintiffs cited a case that the Court thought was inapposite because all the properties at issue were in a single state. Finally, the duties related to the distribution and administration of medications is "governed by a professional standard of care" and not ordinary negligence (Id. at 15). The "complexities raised by the differences in law are compounded" by "the necessity of examining both the NFL's conduct towards the clubs under 23 different bodies of law, and the clubs' conduct towards the players under the medical professional standards of 23 different jurisdictions." *FRCP 23(c)(4)* class status was denied.

Conclusion

A California workers compensation firm started the case, and in that venue, applicants have a massive home field advantage. *California Labor Code §3202* states that the code "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Things do not work that way in federal court. The annual drug audit was a voluntary undertaking created to help the players. It led to this lawsuit, proving again that no good deed goes unpunished. It is now on to summary judgment before heading back to the Ninth Circuit.

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Judge Dismisses Case Against U.S. Soccer After Relevant Sports Claims That FIFA's Refusal to Sanction International Soccer Matches in the United States Was Unlawful

By Jason A. Young, MA & Michael S. Carroll, PhD

On July 21 2021, United States District Court Judge Valerie Caproni dismissed a case against U.S. Soccer and the Federation Internationale de Football Association (FIFA) alleging that the organizations had conspired to benefit Major League Soccer (MLS) by refusing to sanction matches in the US and thus cut off the American market.

The lawsuit was filed by Relevant Sports, which claimed that U.S. Soccer was refusing to sanction International Soccer matches in the United States unlawfully, and that U.S. Soccer was attempting to frustrate 'the promotions' from entering the U.S. soccer market in an effort to support Major League Soccer (MLS). Relevant Sports alleged that U.S. Soccer had contracts with FIFA and other regional confederations and national associations that ensured that their request for a sanctioned event would be summarily refused, and that boycotts by other professional leagues and their players would unfairly continue for all unsanctioned Games.

FIFA

FIFA administers soccer worldwide with six regional confederations that manage operations at the continental level and enforce FIFA regulations. The Confederation of North, Central, and Caribbean Association Football (CONCACAF) is the regional confederation governing North American soccer and specifically the U.S. soccer national associations which sanctions official games in the U.S. The U.S. Soccer Federation (USSF) is the recognized national governing body for soccer and is endorsed fully by FIFA as the recognized national association for governing soccer in the U.S.

As FIFA's recognized national association for soccer in the U.S., the USSF has the authority to sanction official international soccer games and friendlies held in the U.S. These "official games" are soccer matches that count towards the competing clubs' official league records and are often between foreign countries' national teams and/or professional soccer clubs from foreign countries. By contrast, "friendly matches" are not part of an official regular season league schedule, so they do not count towards a club's official record.

It is a violation of FIFA regulations for soccer clubs to play in the U.S. without USSF's approval. USSF has agreed to notify FIFA of any international game that are planned to be played in the U.S. Third-party promoters such as Relevant Sports frequently seek to obtain approval from FIFA and their governing bodies to host Official games. Players competing in unsanctioned games risk being deemed ineligible to participate in FIFA-sanctioned competitions, including

representing their home country in the World Cup. According to FIFA's bylaws and regulations regulating international matches, FIFA reserves the right to make the final ruling on the approvals of any and all international matches. As a result, Relevant Sports' only means to seek sanctioning for their event was by way of a FIFA-licensed match agent. Match agents are obligated to be a neutral person and agree to FIFA's Match Agents Regulations. Relevant Sports match agent was Charlie Stillitano, who has in the past organized and marketed friendly games in the U.S., including a game between Real Madrid and Manchester United in 2014.

FIFA Regulations

In 2018, Relevant Sports announced that it intended to host an "Official Game" with two Spanish La Liga teams in Miami, specifically FC Barcelona and Girona. FIFA's President, Gianni Infantino, immediately questioned whether FIFA would endorse the Game, as it was beyond the teams' home territory. The Spanish national soccer association and USSF requested guidance from FIFA to determine whether the game should be sanctioned. The FIFA Council in October of 2018 dispensed a ruling forbidding the staging of official season games outside of the participant league's home countries. The mandate was consistent with FIFA's regulations requiring Official Games to take place in the home league's region, and FIFA made it clear that any failure to comply would result in expulsion from FIFA. Subsequent to this public statement, FC Barcelona withdrew its commitment to participate in the match Relevant Sports planned to organize in Miami.

FIFA Statute

Leagues or clubs that are affiliated to a member association may only take part in competitions on that member association's territory and only under exceptional circumstances will authorization be given by both member associations, the respective confederations and FIFA. The Spanish National Association was strongly opposed to the game in Miami. The plaintiff argued that the event fell apart due to push back from the players and especially FIFA.

In March 2019, Mr. Stillitano presented an application to USSF for endorsement to host an Official FIFA sanctioned event between two Ecuadorian soccer clubs. Prior to submitting the application, Relevant Sports obtained approval from the Ecuador's regional confederation, the and the proposed teams' and their league. In April 2019, the application was denied because it would violate the FIFA bylaw banning "Official Games" outside the clubs' home territory.

Relevant Sports alleged that the refusal of USSF to sanction their events was the result of an 'anticompetitive agreement' with FIFA to limit the organizing of any Official Games in the U.S. by refusing to authorize Official Games outside of the teams' home territory and further claimed that USSF entered into an anticompetitive agreement with FIFA. Relevant Sports contends that USSF was illegally and artificially controlling the competitive market in the U.S. declaring in a distinct tort claim, interference with its business relationships.

USSF moved in August 2021 to induce arbitration or to dismiss the complaint, arguing that claim was 'prohibited' by prior covenant not to sue, that FIFA is an 'indispensable party', and that Relevant Sports had failed to prove any antitrust was presented in the case.

Conclusion

The defendant's motion to compel arbitration was granted, and litigation was stayed on November 1, 2020. Officially, Relevant Sports motion to compel arbitration was denied, and the antitrust claim was dismissed.

References

Relevant Sports, LLC v. United States Soccer Federation, Inc. (S.D.N.Y., 2019). Retrieved from: https://cdn-s3.si.com/s3fs-public/download/relevent-lawsuit-us-soccer.pdf

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Claims of Sexual Assault and Harassment Tested the Boundaries of a College's Obligation to Investigate

By Brian G. Nuedling, of Jackson Lewis P.C.

A student-athlete's claims of sexual assault and harassment tested the boundaries of a college's obligation to investigate such allegations and implement a corresponding remedy.

In *Hughes v. Missouri Baptist University,*[1] Plaintiff Kelly Faye Hughes ("Hughes") enrolled in Missouri Baptist University ("MBU") in the fall of 2016 and was member of the school's volleyball team. During her freshman year, Hughes had an "on again-off again" relationship with Kendell Davis ("Davis"), who played for the MBU football team. In the fall of 2017, during a "Welcome Weekend" event at MBU on August 18, Hughes and Davis attended an off-campus party. Early the next morning, they returned to the campus, entered her vehicle (which was parked in a residence hall parking lot), and had sexual intercourse. According to Hughes, and prior to sexual intercourse, she twice asked Davis to stop. Hughes stated that she asked Davis to stop a third time, but that he continued on and had sexual intercourse with Hughes.

Later in the morning of August 19, 2017, Hughes shared the details of the sexual encounter with her roommates. However, she did not report the matter to an MBU official until August 31, 2017. Hughes made her report to an MBU athletic trainer a day after observing an athletic training office whiteboard that included a message requesting prayers for the "false allegations" against Davis. The athletic trainer immediately brought Hughes to MBU's Office of Public Safety, where she gave a statement to Stephen Heidke ("Heidke"), MBU's Director of Public Safety.[2]

On September 1, 2017, Heidke reported Hughes' allegations to Andy Chambers ("Chambers"), MBU's Senior Vice President of Student Development and Associate Provost, who also served as MBU's Title IX Coordinator. Later the same day, Hughes met with Davis for the first of three statements that he would provide during the investigation. Davis stated that Hughes had twice asked him to stop but that he became "confused" when they kept "making out." Davis stated that Hughes "finally agreed to have sex." During the meeting, Heidke directed Davis not to have contact with Hughes in any form. This instruction was repeated by Thomas Smith ("Smith"), MBU's Director of Athletics, who told Davis not to have any contact with Hughes during the investigation and to cease any discussion about Hughes with his friends and teammates.

Also on September 1, 2017, Hughes reported the matter to MBU's volleyball coach. The coach took Hughes to see Kimberly Grey ("Grey"), MBU's Associate Dean of Students. Hughes provided similar information that she had reported to Heidke the previous day.

In the following days, Hughes traveled to Memphis to visit her sister and filed a Memorandum with the Memphis Police Department. Prior to her visit to Tennessee, Hughes had not received any guidance from MBU regarding contacting police. The MBU public safety officer did not report Hughes' allegations to police.

Hughes met with several MBU officials during the investigation. This included a meeting on September 19, 2017, when Hughes met with Grey and provided the names of individuals she believed would have information relevant to the investigation. She also described several recent incidents of harassment by MBU football players who were friends with Davis. Following this meeting, Hughes made several complaints to MBU of harassment by other students. MBU responded to Hughes' emails alleging harassment, but apparently no students were disciplined as a result of the complaints.

On September 25, 2017, MBU named Davis "Athlete of the Week." On October 9, 2017, MBU selected Davis to pose for promotional materials for the school. Also sometime in the fall of 2017, MBU learned that Davis had contacted Hughes' brother and stated that he was worried about her mental health and that she was "too skinny." Davis was not disciplined for this contact.

On October 12, 2017, Chambers and Grey met with Hughes. Chambers advised Hughes that he could not find by a preponderance of the evidence that Davis had lacked Hughes' consent or that Davis had violated

1 No. 4:19-cv-02372-AGF, 2021 U.S. Dist. LEXIS 96470 (E.D. MO. May 21, 2021).

2 At that time, Heidke also served as a Title IX investigator for MBU.

MBU's Policy on Sexual Assault and Relationship Violence.[3] However, Davis stated that Davis' conduct violated MBU's Statement on Sexual Behavior and Resident Life Policy,[4] since Davis had admitted engaging in sexual activity on campus, in violation of that policy. Chambers further told Hughes that she could be disciplined for violating the Statement on Sexual Behavior as well, but that he had decided against such punishment because he did not believe it was appropriate. Chambers and Grey met with Davis privately and advised him of the outcome of the investigation. As a result of the policy violations, MBU issued several sanctions, including placing Davis on disciplinary probation for the remainder of the fall 2017 semester, requiring his participation in MBU's Restorative Justice Program, and suspending him from participating in MBU football team practices, games and other activities for approximately one week, from October 6, 2017, through October 12, 2017.

On October 12, 2017, following her meeting with Chambers and Grey, Hughes requested and received from the St. Louis County Circuit Court an Ex Parte Order of Protection against Davis. Five days later, the court issued an addendum to the Ex Parte Order, which allowed Davis to attend MBU and MBU-related activities, subject to the terms of the Order. While MBU undertook several measures to minimize the likelihood of contact between Hughes and Davis, Hughes later reported several incidents in October 2017 in which she believed that Davis had violated the Order. On October 30, 2017, the St. Louis County Circuit Court entered a Full Order of Protection against Davis. After the issuance of the Order, Hughes continued to report incidents of harassment by Davis and his friends.

Hughes completed the fall 2017 semester at MBU and then transferred to Carson Newman University for the spring 2018 semester.

On August 19, 2019, Hughes filed suit in the United States District Court for the Eastern District of Missouri, alleging that MBU violated Title IX of the Education Amendments of 1972 ("Title IX") because it was deliberately indifferent to actual notice of sexual discrimination and sexual harassment (Count I); that MBU acted negligently by breaching its duty of care to Hughes to protect her from harassment on school premises (Count II): and that MBU breached contractual obligations owed to Hughes by failing to provide an adequately safe living and suitable educational environment (Count III).

MBU subsequently moved for summary judgment on all counts. The school asserted that (1) no reasonable jury could conclude that MBU was deliberately indifferent to actual notice of discrimination; (2) Hughes had not established that MBU owed a duty to protect her under Missouri law; and (3) Hughes had not identified an enforceable contract with MBU.

As to the claim under Title IX, the court noted that student-on-student sexual assault and sexual harassment constitute forms of sexual harassment under Title IX. The court further noted that Hughes would need to prove that MBU was (1) deliberately indifferent to (2) known acts of discrimination, (3) which occurred under its control. While some of the facts gave the court "pause," the issue was whether MBU's response was "clearly unreasonable," not whether it was commendable or even adequate. The court found that viewing the facts even in the light most favorable to Hughes, no reasonable jury could find the response unreasonable. The court observed that Hughes' belief that MU should have done more was not sufficient to create a triable issue. Accordingly, the court granted MBU's motion for summary judgment as to Hughes' Title IX claim of deliberate indifference.

As to the second claim of negligence, Hughes contended that MBU was negligent in responding to her claims of non-physical harassment by Davis and other students. The court found that Hughes had presented sufficient evidence that MBU had a duty of care to protect her against stalking and harassment by Davis. On that basis, the court denied MBU's motion for summary judgment on that claim.

In ruling on Hughes' breach of contract claim under Missouri law, MBU challenged this claim on the basis of whether Hughes had established the existence of a valid contract with identifiable and enforceable promises. The court found that Hughes was relying on student handbook provisions to effectively request

3 This policy served as MBU's Title IX policy and was available to students in several locations, including on MBU's website and in the Student Handbook. Among other things, the policy provided that students found responsible for sexual assault and certain other sexual misconduct could face a range of sanctions, including suspension or expulsion.

4 The Statement of Sexual Behavior and Resident Life Policy prohibited students from engaging in acts of sexual intercourse on campus.

that the court supervise MBU's internal procedures for monitoring and disciplining its students. The court found that the handbook could not form the basis for such a claim and granted MBU's motion for summary judgment.

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Judge Grants Summary Judgement in Case Involving Racial Discrimination, Harassment, and Retaliation Claims Made by High School Coach — Part 1

By Rachel S. Silverman, MS

Mark Johnson, a high school basketball coach and physical education teacher, claimed that he was forced to resign from the South Bend Community School Corporation (SBCSC) due to racial discrimination, harassment, and retaliation from the parents and employees of the school. He insisted that because he was white, the black parents and employees interfered with and criticized his coaching and that the school ignored his reports of racial harassment. The principal, Francois Bayingana, who is black, received complaints from parents about Johnson's negative coaching style and favoritism towards certain students. The criticisms were not received well by Johnson, and he complained to Principal Bayingana that he was "sick and tired" of the parents. He felt that the parents of a black player, Derrick Sr. and Leslie Wesley, were "badmouthing" him on Facebook. Despite their disagreements with the coach, the Wesleys made donations and volunteered their time to assist the team. The Wesleys and Johnson had multiple disagreements about the basketball team, coaching, team events, and parent involvement during the years that Derrick Wesley Jr. was on the team.

There was only one formal human resources complaint filed by Johnson in November 2016. He filed a complaint about Principal Bayingana directing him to keep a certain player on the team and about Leslie Wesley, but no further action was taken. There were numerous emails exchanged between Johnson, the Wesleys, Principal Bayingana, and other school employees, but only one email mentioned race. Charan Richards, the guidance director and sister of Leslie Wesley, emailed Johnson "[Y]ou have done African American males (team players) wrong," and Johnson used this email as evidence for his case of racial harassment.

When Johnson retired in March of 2017 after the basketball season concluded, he was replaced by another white male coach. When media outlets interviewed Johnson about his retirement, he leaked unredacted SBCSC emails to the media. Johnson admitted to leaking the emails to the South Bend Tribune, and he was not allowed to teach summer school after that, but the school still paid him his summer school salary. Johnson alleged that Leslie Wesley accused him of "hidden racism" in a comment on the Tribune's Facebook page, but Wesley claimed the "hidden racism" comment was aimed at the Tribune and not Johnson directly.

Summary judgment is a decision made by a judge based on the evidence without going to trial. The purpose of summary judgment is to avoid unnecessary trials. Summary judgment is granted when there is no conflict in the evidence and the judge decides that there is not enough evidence to show a genuine issue for a trial. In the Johnson case, the judge granted summary judgment due to a lack of evidence.

Race Discrimination

Title VII prohibits employers from racial discrimination. The court must decide whether Johnson would have kept his job were he not white and everything else in the situation had been the same. Johnson failed to provide enough evidence that SBCSC discriminated against him based on race. Additionally, there was no record of SBCSC discriminating against other white employees. Even though Johnson described how the comments from Leslie Wesley and Charan Richards made him feel, the only actual evidence presented related to race was one email from Richards and a Facebook comment from Wesley. Both pieces of evidence do not have to do with Johnson's race, but instead deal with concerns over Johnson's treatment of black athletes. The actions and comments from Wesley and Richards did not have any impact on Johnson's employment. Johnson's subjective interpretation of the events were not sufficient evidence for a racial discrimination claim.

Johnson's claims made against Principal Bayingana were also found to not have any evidence to support a racial discrimination claim. The principal may

have inappropriately meddled by voicing his opinion on the team rosters, but it was not based on Johnson's race. Johnson voluntarily retired in March 2017, even though he claims that he was forced to due to the hostile work environment. The principal encouraged Johnson to reconsider retirement and continue to coach and teach, which showed he was not forced to retire. After retiring from coaching, Johnson was supposed to teach summer school, but the school chose not to allow him to teach summer school, because he leaked internal emails to the Tribune, which is against school policy. However, Johnson was still paid his full summer school salary. Johnson was not allowed to teach summer school due to his own mistakes, not due to racial discrimination by the principal or school employees. After Johnson retired, he was replaced by another white male coach and there was no evidence that the school has treated Johnson or any employees with racial discrimination.

Racial Harassment

Johnson claimed that SBCSC was a hostile work environment due to Principal Bayingana, Leslie Wesley, and Charan Richards. Racial harassment is an independent Title VII claim, but there was not enough evidence to support Johnson's claim that the hostile work environment was due to race. The evidence he provided from emails by Richards, Wesley's involvement with the basketball team events, and Principal Bayingana's influence on the team's roster did not show any harassment based on race. The evidence showed that there were concerns about Johnson's coaching style, especially towards black athletes, but there was no evidence of a hostile work environment due to Johnson's race.

Retaliation

Johnson claimed that the SBCSC retaliated against him for his complaints about reverse racial discrimination. His claim was based on the SBCSC not allowing him to teach summer school after his retirement. However as seen above, SBCSC did not allow him to teach summer school due to his wrongdoing in leaking internal emails. SBCSC still paid him his summer school salary, even though he did not teach. There was no connection between Johnson not being allowed to teach summer school and his complains about racial discrimination. Johnson even admitted the superintendent that he leaked the emails to the Tribune, which violated SBCSC's policies. The adverse action that Johnson claimed was due to his violation of SBCSC's policies and not due to racial discrimination.

Conclusion

South Bend Community Schools Corporation's motion for summary judgment was granted on all three claims (racial discrimination, racial harassment, and retaliation) and the case was closed on May 6, 2021 by Philip P. Simon, judge for the United States District Court.

References

Johnson v. S. Bend Cmty. Sch. Corp. 2021 WL 1812721(not reported in Fed. Supp.)

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Articles

Congressmen Introduce NCAA Accountability Act, Sports Lawyers Weigh In

Earlier this week, U.S. Reps. Burgess Owens (UT-04), David Kustoff (TN-08), and Josh Harder (CA-10) introduced the bipartisan NCAA Accountability Act "to establish due process protections for universities and individuals under investigation by the NCAA for rule infractions."

"The NCAA has long wielded unchecked and unfair disciplinary power over America's student-athletes, coaches, and universities," said Rep. Owens. "The NCAA Accountability Act is a commonsense charge to level the playing field by eliminating favoritism and bias in college athletics through increased transparency in rule enforcement and due process protections."

What follows are some of the core points in the Act.

Due Process

- Requires the NCAA to provide its member universities with fair notice regarding enforcement proceedings.
- Requires the NCAA to complete any investigation no later than one year after it begins.
- Establishes a two-year statute of limitations.
- Prohibits information from confidential sources from being offered into the NCAA's enforcement decisions.
- Prohibits the NCAA from publicly disclosing information relating to an ongoing investigation until formal charges are filed.

Fairness, Consistency, Accountability

- Provides member universities the right to resolve disputes (over sanctions for bylaw infractions) with the NCAA through arbitration. The 3-person arbitration panel will provide an independent, unbiased review and legally binding decision.
- Requires the NCAA to conduct its enforcement proceedings and investigations in a fair and consistent manner. The penalties issued against member institutions for bylaw infractions shall be equitable with respect to the severity of the infraction and the institution's history of infractions.
- Directs the NCAA to submit an annual report to the DOJ summarizing its enforcement proceedings. The NCAA must also submit separate reports to each state's Attorney General summarizing its interactions with member universities headquartered in their respective states.

Enforcement

- Directs the DOJ to establish supervisory and investigatory procedures to determine the NCAA's compliance with this bill.
- Authorizes the DOJ, through an administrative law judge, to fine the NCAA or individuals on staff up to $15,000,000 for violating the provisions of this bill.
- Authorizes the DOJ to order the permanent removal of any member on the NCAA's Board of Governors.

Richard Karcher, a sports law professor at Eastern Michigan University and an expert on NCAA compliance issues, offered his take on the Act:

> *"Some of the provisions in this bill seem excessive and/or overly burdensome. An expressly stated goal of this bill is to provide protection for college athletes, but these proposed changes to the enforcement process would not have a huge impact on college athletes.*
>
> *"College athletes need due process, transparency and fairness protections, especially the independent arbitration provision, in the reinstatement process because that's the process used to determine their eligibility."*

Gregg Clifton, who heads the sports law practice at Jackson Lewis, also shared the following insights:

> *"Among the changes proposed in the proposed legislation is a new requirement that the NCAA complete an investigation within one year of its introduction, as well as the introduction of*

a new statute of limitations that would prevent the NCAA from penalizing anyone for a violation that occurred more than two years before.

"The bill would also drastically revise the existing appeals process and authorize the accused to have the right to resolve disputes through the use of an independent 3 person arbitration panel, require the NCAA to submit annual reports on the status of infractions cases to the Department of Justice (DOJ) as well as submitting separate reports to the Attorney General of each state summarizing its interactions with NCAA member schools locate within that state.

"The legislation would also authorize the DOJ to remove any member of the NCAA's Board of Governors and fine the NCAA up to $15 million for failure to follow the regulations as required by the legislation. It would also prevent "confidential sources" from being used by the NCAA as a basis for any of its findings in the enforcement process and limit the ability of the NCAA from publicly disclosing regarding an ongoing investigation until formal charges are filed."

The Impetus for the Act

Clifton also noted what he believed was the impetus for the Act.

"A little more than two years ago James Wiseman was the University of Memphis' prize recruit who was supposed to lead that school back to the Final Four," said Clifton. "Now, following his very limited college career that was plagued by allegations of NCAA rules violations and an NCAA declaration of ineligibility for 12 games, his name may soon be forever tied to an historic piece of federal legislation, The NCAA Accountability Act of 2021, rather than his exploits on the basketball court.

"The initial challenge to Wiseman's eligibility arose after the NCAA declared current basketball Coach Penny Hardaway a lifetime University of Memphis athletics booster because he had previously donated to the University. As a result, Hardaway's providing $11,500 to Wiseman's mother to cover the family's moving expenses to Memphis, at a time when Hardaway was not employed by the University of Memphis or any other NCAA institution, was deemed to be a violation of NCAA bylaws.

"Despite securing a state court injunction allowing him to play, Wiseman later dropped his legal action and the NCAA handed him a 12-game suspension. Ultimately, Wiseman decided to withdraw from the university and wait for the NBA draft the following spring. Although no longer enrolled, the NCAA subsequently asserted rules violations against the university for honoring the state court injunction and allowing Wiseman to play in three games. That NCAA case is still pending. The case is believed to be the motivation for three members of Congress to introduce The NCAA Accountability Act."

Thoughts from other Congressmen Sponsoring the Act

Rep. Kustoff: "The NCAA's infractions process is systemically flawed. The NCAA writes the rules, enforces the rules, and punishes universities at will. Essentially, the NCAA acts as the prosecutor, judge, jury, and executioner over college athletics. This unchecked authority and exploitative behavior has ruined careers, harmed the U.S. education system, and caused great economic damage to local communities. The NCAA offers its members little due process protections. Its rules are irregularly enforced, and its investigations lack established procedures. Further, the NCAA punishes universities inconsistently and unpredictably. My bill, the NCAA Accountability Act, provides protection for universities and student-athletes in the form of due process, transparency, and fairness during enforcement proceedings. I look forward to the quick passage of this important bill."

Rep. Harder: "Our Central Valley student-athletes compete at the highest level of college sports and make our whole community proud. This bill will do right by them, their coaches, and their universities. It's time we deliver them the protections they deserve."

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Professional Footballers Are Threatening GDPR Legal Action: The Significant Impact on How the Sports Industry Will Deal with Data Protection

By Gelu Maravela and Cristina Crețu, MPR Partners

A group of over 850 professional footballers have threatened legal action against several betting, data sharing and entertainment companies regarding how players' personal data is collected and shared. The players' group coordinating the legal action is the Global Sports Data and Technology Group. It is led by former Cardiff City, Leyton Orient and Yeovil Town manager, Russel Slade who **calls** the action "Project Red Card". Should the case succeed, it could have a significant impact on how the sports industry handles the processing of personal data either in the UK, Europe or globally.

The players' group argues that information such as a player's height, weight or the average number of goals scored amounts to personal data. It says that this is being unlawfully processed by numerous betting, data sharing and entertainment companies. Formal letters before action have now been issued to 17 such companies.

The players are seeking compensation for the dissemination of their performance data over the past six years. The group is also calling for annual fees to be paid to players by those companies commercialising their data in future.

As per Article 4 paragraph (1) of the GDPR personal data, any information relating to an identified or identifiable natural person, where the latter can be identified, directly or indirectly, in particular by reference to an identifier (i.e., amongst another name or to one or more factors specific to the physical, physiological or social identity of that natural person). Where the personal data processing falls under the material scope of Article 2 of GDPR, the rules and principles set in GDPR must be observed.

In the case at hand, for the players to receive compensation for such damages, the same must prove not only that the processing activities performed in relation with their personal data by the betting, data sharing, and entertainment companies have infringed GDPR but also that as a consequence of the infringement, the players have suffered material or non-material damages.

If this initial case is successful, it might create an important precedent for wider legal action against a far broader range of companies which also harvest player data. Indeed, the players' group says that it has identified some 150 companies unlawfully using players' personal data.

The group is making the case that using players' personal data without their consent constitutes a breach of the General Data Protection Regulations, 2018. As mentioned above, it is important to note if the information on the players constitutes personal data under Article 4 paragraph (1) of GDPR. The fact that a goal is scored is not itself personal information, but when it is attributed to an individual in specific contexts then the same can constitute for personal data under GDPR. As for consent, it should be noted that the same is not the only legal ground in case of processing personal data. In fact, GDPR provides for six legal grounds for processing personal data and none of these six has precedent over the others.

Another issue the players have raised is the inaccuracy of some of the personal data that is being processed. Slade recently **told** the Guardian that "What we would rather do is talk and resolve the matter with these companies that are collecting the data, processing the data and using it without the players' consent. I want to bring it to the attention of everybody and solve it going forward so the control goes back to the players, so we know that data that is going out is accurate and correct, and a fair reflection of the individual." It remains to be seen whether an out of court settlement can be agreed. However, the players' right to get their data rectified cannot be waived.

Thus, should this matter go to court, it is likely to involve some very interesting and complex legal arguments. For example, companies sharing performance data may argue that, by agreeing to play in public, the facts about players' performance inevitably enter into the public domain and that they have a legitimate interest in processing such information for their purposes. The court might decide that the companies have a legitimate interest in processing the players' information,

and that such interest outweighs the interest of the players in not having their personal data processed.

Indeed, the UK's Information Commissioners Office (ICO) says that this legitimate interest legal ground "could in principle apply to any type of processing for any reasonable purpose." However, the ICO also says that "Because it could apply in a wide range of circumstances, it puts the onus on you to balance your legitimate interests and the necessity of processing the personal data against the interests, rights and freedoms of the individual taking into account the particular circumstances." This can involve a difficult balancing exercise, and this can vary depending on the precise facts of the case.

Nevertheless, depending on the provided arguments, the court might decide that in this case, the fact that the information is in the public domain does not justify the processing of such information by the third parties based on the legitimate interest of the same.

The court might go further in its analysis and see if there are any legally binding agreements concluded by the players pursuant to which their personal data might be processed in a commercial manner. The intricacies of the contractual agreements between the concerned parties, the players, their clubs, the tournaments, the leagues or the broadcasters will make things even more complicated, since various interests may collide, and the court will need to decide which interest takes precedent over another. For example, a club has contracted to sell the television rights to a company, and potentially made commitments regarding players' personal data, but at the same the players have committed themselves to their clubs.

The court will need to provide an in-depth analysis on the situation at hand starting from the different types of data that are processed, such as match-stats, height, weight, age, or health information and the various agreements concluded in this case. Depending on the precise facts surrounding each type of data and circumstance, a different outcome might be reached.

However, this case holds many unknowns and in the absence of all the details pertaining to this case and it is difficult to assess the final outcome.

Additionally, the subject of the monetisation of personal data is very topical at the moment. The European Data Protection Board (EDPB) makes clear that "considering that data protection is a fundamental right guaranteed by Article 8 of the Charter, and taking into account that one of the main purposes of the GDPR is to provide data subjects with control over personal data relating to them, the EDPB reiterates that personal data cannot be considered as a 'tradeable commodity'. An important consequence of this is that, even if the data subject can agree to the processing of his or her personal data, he or she cannot waive his or her fundamental rights. As a further consequence, the controller to whom consent has been provided by the data subject to the processing of her or his personal data is not entitled to 'exchange' or 'trade' personal data (as a so-called 'commodity') in a way that would result as not being in accordance with all applicable data protection principles and rules."

This reasoning implies that each detail of the data processing activities will play a significant role in the assessment of the case. Likewise, the details as to the precise manner in which personal data is commercialised or traded on will be important in determining whether or not the subsequent use of data is lawful. There are likely to be different considerations for the different types of data processed, and for the different companies involved, depending on precisely how they operate. All this suggests that even the initial case involving 17 defendants could yet prove to be very complex indeed, should the matter go to court.

It will be certainly interesting to see how this matter progresses if it goes to court. If the case is successful, it could bring about significant changes to how such data is collected and handled across the entire sports industry. Likewise, it will be also interesting to see how the contractual relationship between the players and the clubs with regards to the players' personal data will be framed in the future.

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Name, Image & Likeness: What We Have Learned in Four Months

By C. Peter Goplerud III, of Counsel, Spencer Fane LLP

Twenty-five years ago, I wrote a law review advocating pay for play for college athletes. The article presented arguments for the concept, but also noted legal and practical obstacles to implementation.

I did not, however, even consider advocating for athletes to be able to directly benefit from the use of their name, image and likeness (NIL). I wasn't creative enough to think along those lines. And, of course, at that time there was no such thing as social media.

Since then, many others have argued that there should be compensation allowed for athletes' participation in intercollegiate athletics. In recent years, in the aftermath of the O'Bannon case, there have been many advocating that the athletes should be able to receive NIL benefits.

California enacted the first law granting NIL rights to collegiate athletes with an effective date of July 1, 2021, and prior to that date, several states enacted similar legislation. Following months of institutional indecision, the NCAA Board of Governors unanimously agreed , on June 30, 2021, it was time to address its stance regarding NIL. It announced a waiver of the rules that prevented athletes from exercising their NIL rights.

There are now 22 states that have NIL laws in effect. Another 12 states have bills that have been signed into law with effective dates between now and 2023. Several other states considered legislation but did not succeed in passing NIL bills.

Finally, there are numerous bills pending before both houses of Congress, but federal action is not likely this year.

While each state's law has different provisions and nuances, all provide a wide grant of NIL rights to collegiate athletes. Many of the laws prohibit the athletes from entering into contracts which conflict with existing institutional contracts, unless the school approves the contract. All of them require the athlete to disclose all contracts to their school.

In many jurisdictions the athletes are allowed to have agents or attorneys represent them in negotiations for contracts. Some states require that anyone representing an athlete in NIL matters must be licensed in that state. Some of the laws require schools to provide some level of education regarding financial matters. Some have provisions regarding the use of the schools' logos. Many of the laws preclude athletes from NIL relationships involving alcohol or marijuana.

Since July 1, it has been a wild west environment for athletes, agents, compliance officers, boosters and business entities. There are published reports of a few significant deals for some high-profile athletes and many smaller opportunities for others. In this context, "high-profile" has multiple meanings; it would include both highly talented and accomplished athletes and athletes with significant social media influence.

It is important to understand that there are opportunities throughout collegiate sports, not just for athletes at Power 5 schools. NAIA athletes were granted NIL rights nearly a year ago.

While there are reports of many schools adding staff to deal with NIL, Division II and III schools face unique challenges with NIL because they typically have fewer resources, particularly in compliance. The compliance and reporting requirements of the various state statutes do not differentiate between Division I schools and the others

There are already reports of athletes in various sports, male and female, securing six- and seven-figure contracts.

Early financial winners included the Cavinder twins, who are starting guards on Fresno State's women's basketball team; Bryce Young, who is the quarterback for Alabama's football team; and Paige Bueckers, star player on U Conn's women's basketball team. She has actually filed for a trademark for her nickname, Paige Buckets. More recently there are reports of a Kentucky men's basketball player signing a deal with a Porsche dealer and the backup quarterback for Florida indicating he will only be considering six- and seven-figure deals.

Most of the larger deals have been negotiated by agents or attorneys.

Many athletes, however, will not be able to monetize their NIL rights at that level. There are concerns expressed regarding gender equity. The Drake Group has recently released a lengthy paper setting forth strong arguments for protecting the rights of participants in women's sports, noting the need for schools to be vigilant about Title IX compliance in the context of NIL.

However, there are at least two notable large-scale deals for women's programs that have been announced recently. The entire Santa Clara University women's soccer roster has been signed to a NIL contract, and every Brigham Young University female athlete will benefit from a NIL deal with a Utah based tech company.

There are certainly questions whether Division II and III athletes will be able to monetize their NIL rights at a level comparable to the typical Division I athlete. While there are reports of lucrative deals being struck by athletes in these divisions, current data indicates a relatively wide disparity overall. One likely key for success for these athletes will be high levels of social media activity.

And, then there is the question of what happens when an athlete with a high-dollar deal underperforms on the field or court. The NCAA policy prohibits deals based upon performance or anything that looks like pay for play. It seems likely that such athletes will collect on deals in place, but they will find it difficult to secure additional opportunities.

Several university athletic departments have already put together group licensing programs for their athletes. Such arrangements can streamline NIL opportunities for these athletes and minimize the time and attention individual athletes might otherwise devote to securing contracts or sponsorships.

There are also several organizations which have recently been formed to represent and advise athletes and schools on NIL matters. Opendorse is a marketing entity working with both athletes and schools. WME Sports is representing several athletes for NIL agreements. Athliance provides NIL related compliance services for institutions. UniWorld Group, a multicultural advertising and marketing agency, is launching a new sports consulting unit to focus on NIL and Black student athletes.

It seems pretty clear that NIL is going to have a significant impact on recruiting, both for initial enrollment and athletes being enticed to enter the transfer portal. This has implications for compliance and enforcement, particularly with regard to booster involvement. Some of the state laws prohibit deals with boosters, but there are clearly some agreements already in place with athletes and local businesses.

The issues noted here just scratch the surface of a volatile and uncertain environment. Institutions and athletes alike are well advised to give careful consideration to the policies developed internally and the parameters for lawful and compliant exercise of NIL rights.

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Staffing Concerns at the 'Ol Ballgame: Why a good gig is losing its luster

By Jim Riordan, Ph.D., Florida Atlantic University MBASport

Way back in the day, people would lie about their age so they could enlist in the armed forces. Me? I fibbed so I could join Local 176, the Licensed Ushers and Ticket-Takers Union in New York.

I had to develop and earn my seniority because it was a coveted job to be an usher and ticket-taker in a New York stadium or arena. The seniority list for ushers at the old Shea Stadium once was 400 names long.

High school and college students used these part-time jobs to help cover their education expenses. Retirees supplemented their pensions. Husbands and wives viewed the work as secondary income streams.

These were good gigs, and no one wanted to give them up. Until now.

Traditional and social media stories abound about the large numbers of Americans who are quitting their jobs in search of better opportunities in a wide-open employment landscape. But some people still are hesitant to return to the workforce since the nation "reopened" after the height of the pandemic.

On Sept. 6, 2021, the three unemployment benefits programs established under the CARES Act expired. At the time of the expiration, 7.2 million people were receiving benefits from at least one of the three programs.

It was right around this time that reports started to circulate of long lines at concession stands and entry gates at college football games. The reasoning for these delays was two-fold: Guests not being accustomed to the new e-ticketing and cashless concessions and parking, and a severe shortage of game-day employees to satisfy staffing needs.

The sudden dearth of personnel is being seen by those stadiums and arenas and other public assembly facilities that manage their own in-house operations as well as those that outsource the jobs to third-party contractors. Each account of game-day problems is unique, but they all still maintain a common thread.

A Big 10 program is seeking "volunteers" to help combat a shortage. Those stepping forward will be given a shirt, parking and a meal. An Atlantic Coast

Conference university offered a flat rate of $250 for a six-hour shift (more than $41 an hour). Only 22 people signed up.

A program from the Southeastern Conference saw a no-show rate of 40% of the 1,500 required positions. In many cases, senior-level athletic department personnel are scanning tickets, performing pat-downs and bag checks and directing cars in parking lots.

The crisis is not limited to college events. An NFL stadium in the South is paying ushers and ticket-takers $17 an hour. An NHL/NBA arena on the West Coast is paying close to $20 an hour for the same service.

To deal with the staffing shortages, some facilities are ramping up a tactic that already is common in many venues: "Deploy then re-deploy," in which personnel are placed in the most-needed, most-important jobs at a given time and then moved to different positions as the event unfolds.

Some workers first are concentrated in the parking lots collecting fees and checking passes, while others are handling wand scans, bag-checks and ticket-taking at the entry gates. As the day progresses, many of those same workers are re-deployed to the stadium concourse or to on-field positions and posts within the seating area.

The re-deploy method works well in many venues across the country, but not in areas with strict labor union job jurisdictions. In those venues, a security guard, for example, performs security functions only and does not also take tickets or usher guests to seats.

It is obvious that this crisis is not limited to the sports and entertainment industries. Shelves in supermarkets sit empty because there aren't enough workers to stock items or to deliver the products. Some people have trouble getting their medications because the local pharmacy has closed for good for lack of workers.

Just as consumers expect the supermarket or pharmacy to be there and to have what they need, fans also count on top-notch experiences. The hope is that more people will return to the workforce after vaccine booster shots become more common and that others will feel better about taking jobs once they see crowded games not turning into super-spreader events.

But until then, fans will have to lower their expectations every time they set foot in a stadium or arena.

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Golf: The Importance of a Strong (IP) Approach Game

By Daniel G. Chung and Connor M. McGregor of Finnegan LLP

It is an exciting time for golf. Despite having only 250:1 odds prior to the 2021 PGA Championship, Phil Mickelson became the oldest player to win a major at the age of 50. At the 2021 U.S. Open, Jon Rahm won his first major only weeks after being pulled from the Memorial Tournament (where he had a six-shot lead on day three and was likely to win) for a positive COVID-19 test. Like Mickelson and Rahm, the golf industry has shown a knack for a comeback. Although golf participation dipped following the 2008 financial crisis, golf's popularity has since experienced steady growth in recent years, including a surge in participation during the COVID-19 pandemic. As the $84 billion golf industry focuses on maintaining this trend and continuing to grow the game, product innovation and technology continue to play an ever-increasing role. From new golf balls and clubs to shot trackers, swing analyzers, and other training aids, the technology surrounding golf is helping players of all skill levels and driving consumer demand. To complement innovation and product development, golf companies have made significant efforts to protect and enforce the related intellectual property (IP). The following snapshot highlights the trends, technologies, and issues from these recent IP efforts, while providing some takeaways as golf companies continue to innovate and keep pace with the growing market.

U.S. Patent Filing Trends

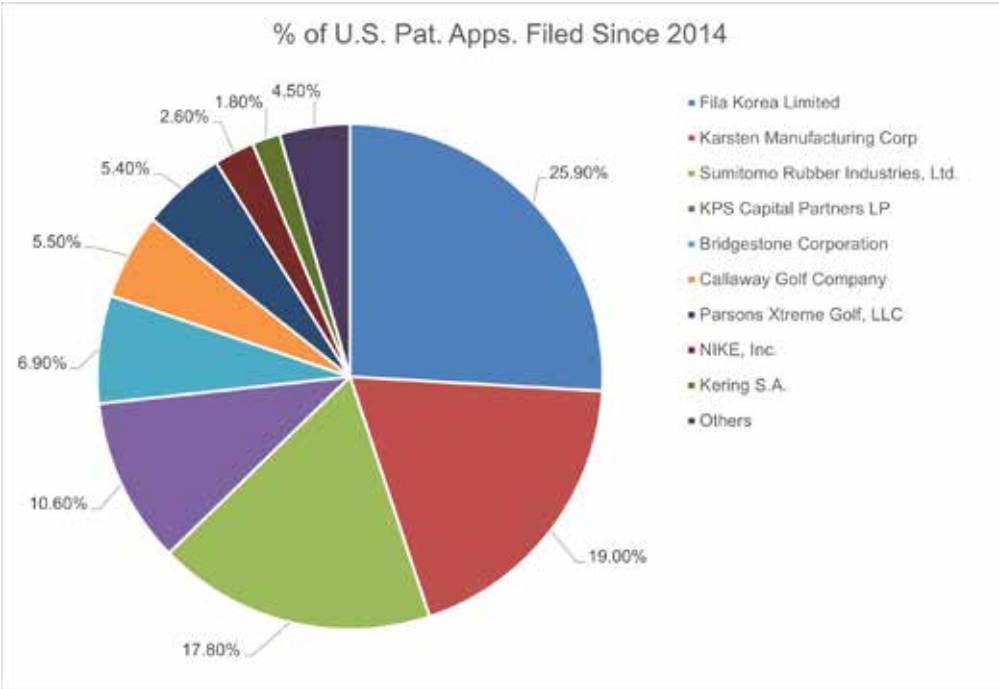
Since 2014, companies and individual inventors have filed U.S. patent applications for a diverse array of golf-related technology.[5] Two technical categories, however, clearly top the list: (1) golf club technology with over 2,200 patent application filings and (2) golf ball technology with over 1,000 patent application

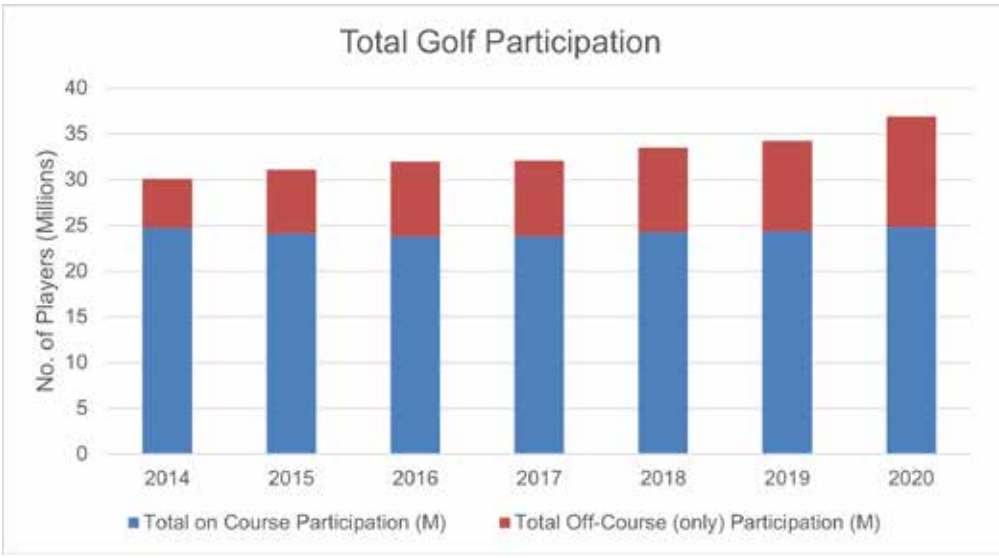
5 U.S. patent statistics come from reports generated by Innography (Innography is a trademark of Clarivate and its affiliated companies). Innography: keyword search for "golf" in U.S. patent applications filed since 2014.

filings.[6] As shown below, seven companies have filed over 90% of these patent applications.[7]

Not surprisingly, these companies represent some of the most popular brands in the sport—Fila Korea Limited S.A. (which owns Acushnet and Titleist); Karsten Manufacturing Corporation (which owns PING); Sumitomo Rubber Industries Ltd. (which owns Cleveland Golf, XXIO, and Srixon); KPS Capital Partners LP (which owned TaylorMade prior to its recent sale to Centroid Investment Partners); Bridgestone Corporation; Callaway Golf Company; and Parsons Xtreme Golf, LLC ("PXG").

When analyzing the data, the recent growth in golf's popularity can also be attributed to off-course participation. The National Golf Foundation's ("NGF") golf industry reports account for off-course participants, which are players that did not play at traditional golf courses but at golf entertainment venues, indoor golf simulators, and/or driving ranges.[8] As shown by NGF's data below, the trend in off-course participation has been positive since 2014.





Companies in the golf industry have advanced IP strategies that coincide with the growing popularity in off-course participation. For example, while many golf-related U.S. patent application filings involve technologies in more traditional products, such as golf balls and golf clubs, technologies for off-course participation have also been in the top ten for golf-related U.S. patent application filings since 2014. These patent applications, which the U.S. Patent and Trademark Office classifies into particular technical categories, include detection, measuring or recording technology, training appliances, and video games.[9]

6 Innography: keyword search for "golf" in U.S. patent applications filed since 2014, and classified by the U.S. Patent and Trademark Office under Cooperative Patent Classification (CPC) Classes A63 B53/00:Golf Clubs and A63 B37/00:Balls.

7 Innography: search results broken down by U.S. patent application assignee or applicant.

8 National Golf Foundation. https://www.thengfq.com/2019/04/ngf-releases-2019-golf-industry-report/; https://www.thengfq.com/2020/04/2020-golf-industry-report-available-to-members/.

9 Innography: keyword search for "golf" in U.S. patent applications filed since 2014, and classified under CPC Classes A61 B5/00:Detecting, Measuring or Recording for Diagnostic Purposes; A63 B69/00:Training Appliances or Apparatus for Special Sports; A63 F13/00:Video Games.

Snapshot of IP Disputes

As the market continues to grow and competition becomes tighter, players in the golf industry have taken action to enforce and defend their IP rights. And many of these IP disputes involve product features and technologies that drive consumer demand and golf's rising popularity.

Disputes have been filed in U.S. district courts and the Patent Trial and Appeal Board at the U.S. Patent and Trademark Office. For example, over 35 disputes involving U.S. patents in the golf club or golf ball classifications have been initiated since 2014.[10] The majority of those disputes have involved PXG and/or TaylorMade. Notably, in 2017, PXG filed a complaint against TaylorMade in the U.S. District Court for the District of Arizona, alleging patent infringement of eight patents relating to golf clubs "with an expanded sweet spot, having an ultra-thin club face, and an elastic polymer material injected in the hollow-bodied club head."[11] TaylorMade counterclaimed with patent infringement allegations of its own, and both parties filed numerous challenges at the U.S. Patent and Trademark Office, seeking to invalidate the other party's asserted patents. The parties eventually settled, and although the terms of the settlement were not disclosed, a PXG press release reports that the two companies "will have specified rights to make club products under patent cross-licenses." PXG's CEO further stated that "as a golf equipment innovator, PXG will continue to pursue research and development and obtain patents for our novel club designs in the iron technology space. We will not hesitate to assert those patents in the future."[12] Keeping their word, PXG filed another suit against Southern California Design Company d/b/a Indi Golf in the U.S. District Court for the Southern District of California, alleging patent infringement of four patents for golf club heads.[13] The parties settled, and PXG voluntarily dismissed the case in October, 2021.

Disputes have also involved non-traditional players in the golf equipment market. For example, in 2017, Costco Wholesale Corporation faced off against golf industry heavyweight Acushnet Company in a pair of IP suits in the U.S. District Court for the District of Western Washington.[14] Acushnet alleged, among other claims, that Costco's Kirkland Signature golf ball infringed ten Acushnet patents, and Costco filed its own suit seeking a declaration that the Acushnet patents were not infringed and are invalid. The parties settled in 2018.

In addition, recent U.S. patent disputes have involved technologies that complement the growing off-course participation in golf. For example, in 2016, Amit Agarwal sued Topgolf in the U.S. District Court for the Middle District of Florida, alleging infringement of a patent directed to a method for playing a point-scoring game at a golfing range.[15] In response, Topgolf successfully challenged the validity of the asserted patent at the U.S. Patent and Trademark Office, which was affirmed on appeal.

Takeaways

This IP snapshot of the golf industry provides several takeaways. Technology is expanding the golf equipment umbrella and is also changing how people play the sport. And naturally, golf companies are adapting to the expanding consumer demands on and off the course. As innovations are developed, it is important to have a strategy ready to protect them. Indeed, the most successful brands in the sport have the largest patent portfolios. This allows them to utilize their IP offensively, such as enforcing patents against alleged infringers, and for defensive purposes, such as countersuing for patent infringement, gaining leverage in an existing dispute, or acting as a deterrent against potential competitors. The resolution of the patent dispute between PXG and TaylorMade, which ended in a cross-licensing agreement, is a good example of how their respective portfolios were used for these offensive and defensive purposes.

Moreover, the expanding forms of technology and the players under the golf equipment and entertainment

10 Innography: keyword search for "golf" in U.S. patent litigations filed since 2014.

11 Complaint at pg. 2, *Parsons Xtreme Golf, LLC v. TaylorMade Golf Co. Inc.*, No. 17-03125 (D. Ariz. Sept. 12, 2017).

12 Parson Xtreme Golf, LLC. https://www.pxg.com/en-us/about/news/pxg-and-taylormade-golf-company-jointly-announce-s.

13 Complaint, *Parsons Xtreme Golf, LLC v. S. Cal. Design Co.*, No. 21-cv-1275 (S. D. Cal. July 15, 2021).

14 *Costco Wholesale Corp. v. Acushnet Co.*, No. 17-00423 (W.D. Wash. Mar. 17, 2017); *Acushnet Co. v. Costco Wholesale Corp.*, No. 17-01214 (W.D. Wash. Aug. 10, 2017).

15 *Agarwal v. Topgolf Int'l, Inc.*, No. 16-02641 (M.D. Fla. Sept. 14, 2016).

umbrella highlight the value of freedom-to-operate analyses. As the industry becomes more popular and diverse, navigating the potential IP infringement risk and enforcement opportunities will help a company make business and legal decisions as it develops and produces new golf products to meet the growing demand from both the traditional and non-traditional golf consumer.

IP due diligence and freedom-to-operate analyses should also be considered in other relevant contexts. Golf companies often acquire other companies to expand and/or diversify their market and product lines. An example of this is the 2020 merger between Callaway and Topgolf. At the time, the companies touted that they are "highly complementary businesses with reach across the entire $80 Billion global golf industry" and "together, Callaway and Topgolf create an unrivaled golf and entertainment business" and will "strengthen the experiences we create at the intersection of sports and tech-driven entertainment."[16] The merger was complete a few months after Topgolf's patent dispute discussed above was resolved in its favor. This example stresses the significance of analyzing IP issues to assess the risk and valuation for such transactions before and after closing.

As the golf industry continues its comeback and grows in popularity, innovation and product development will serve as major tools to capture the traditional and non-traditional golf consumer. And as golf companies continue to innovate, a recent snapshot of the industry highlights the importance of protecting their IP, assessing IP-related risks and opportunities, and taking action against other IP threats.

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Connor is an associate at Finnegan LLP, and a member of the firm's Sports, Fitness, and Outdoor Recreation industry group.

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16 Topgolf International, Inc. https://press.topgolf.com/2020-10-27-Callaway-and-Topgolf-to-Combine-Creating-a-Global-Golf-and-Entertainment-Leader.

College Football Stadiums: A Vaccination Station?

By Kyle Conkle

Colleges and universities are in a unique position this year as they attempt to effectively approach how to implement policies and procedures that allow for fans to safely attend games in the midst of an on-going global pandemic. With the arrival of multiple COVID-19 vaccines and numbers decreasing collectively at times across the U.S. following distribution, colleges and universities have been hopeful that much of the "how to handle" issues related to the virus are behind them.

Unfortunately, that is not the case, and considering the consequences of potentially another year without attendance, figuring out an alternative has been the priority. Protecting the health and safety of players, coaches, spectators, and other personnel connected to college football is vitally important, but many colleges and universities can ill afford another year without the revenue that college football brings, especially for smaller schools reliant on such funds.

Certain states appear to be less concerned about implementing COVID-19 protocol, which in some cases has made the process simpler for universities operating underneath said umbrella, while others have been proactive in incorporating restrictions which may make the undertaking quite demanding. The varying rules and expectations across the country certainly have an impact on players, coaches, athletic administration, and fans. But what is the nature of enforcement and could it potentially violate any rights?

It could be argued that the inception of such ideas began through observation of what most locations necessitated for travel, and given the transfer conceptually, colleges and universities saw the writing on the wall with what could be absorbed to standardize within their domain in hopes of mitigating the risk of the rising Delta variant while protecting permissible admittance. With Tulane University being on the forefront of the movement, the confining verbiage requires proof of a COVID-19 vaccination or a negative COVID-19 PCR test result within 72 hours of entering the stadium. The University of Oregon and Oregon State University quickly followed suit, but the school that perhaps made the most waves once they decided to go that

route was Louisiana State University. Currently, it is on the respective schools to make the decision regarding capacities and protocol per local and state guidelines. Attempting to balance health and safety with personal choices and individual liberties has proven to be a challenging endeavor to say the least.

While many individuals are calling for a consistent set of guidelines instituted by the NCAA, they have only provided recommendations for vaccinated and unvaccinated people at this time. With politics playing a major role in how standards are received, the NCAA likely removed the target from their back by eliminating themselves from the equation. Although it may seem clear on the surface what to do, actually carrying it out may prove much more difficult.

For instance, many colleges and universities utilize volunteers or outside companies to handle ticket taking or access control. Most often, this only includes a simple ticket, but now these individuals may be tasked with checking a vaccination card or negative COVID-19 PCR test. Have these individuals had the time to be properly trained on recognizing official/falsified documents? Does a proper training for checking the aforementioned documents exist at this level yet? Are they prepared to handle the unruly fan looking for a case? Or is the requirement really just a way to cover the colleges and universities from liability without the actual intent to truly enforce?

The confusion is evident, but the latter option of a negative COVID-19 PCR test seems to be the scapegoat from legal ramifications. It is apparent that the vaccination is encouraged on many fronts within colleges and universities. However, no college or university has implemented only a vaccine mandate to enter a stadium, nor should anyone expect that to happen because of what could follow. For instance, if a fan attempts to enter the game, in this scenario, without a vaccination card and is denied entry after voicing religious objection, he or she may seek litigation, depending on jurisdiction. On the flip side, some will simply defer to the ideology behind if you do not want to go to the game, then do not go. Or, if you want to go to the game, either get a vaccination card or a negative COVID-19 PCR test, or go to a state that does not require it.

Governors play a larger role in this framework than many realize. For example, Florida Governor Ron DeSantis views a vaccine mandate as reducing individual freedom and violating patient privacy. On a similar note, Texas's Greg Abbott is not allowing schools that receive state funds to have a mandate. Consequently, should schools violate such executive orders, they risk losing funding integral to their overall operation.

As one can see, the issue is very complex and probably the most frustrating aspect is the lack of consistency so that individuals know what to expect. What should be expected is the rise of litigation pertaining to COVID-19 related issues, like mandates, emerge over the course of the football season. While enforcement may be the preeminent issue to operations personnel, one of the highest concerns on behalf of the teams will be the issue of forfeiture. Consequently, practitioners should remain aware of developments regarding rules, regulations, and legal issues for preparation purposes that diminishes the imminent risk; regardless of the manner it decides to surface through.

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Leadership Failure: Chicago Blackhawks Organization and the NHLPA

By Paul V. Kelly, of Jackson Lewis

A 20-year-old player in the Chicago Blackhawks organization, Kyle Beach, filed a lawsuit against the

team in May 2021 alleging he was sexually assaulted by the team's video coordinator in May 2010, while the team was involved in the Stanley Cup playoffs. The senior management of the Blackhawks, including its president, general manager, and head coach, were made aware of the assault soon after it occurred, and elected not to promptly investigate the allegations, protect or respond to the player, or discipline the employee involved.

The fallout from the team's election to put this matter to the side and, instead, focus on the playoffs was – – unfortunately- – foreseeable. The video coach, Brad Aldrich, was allowed to remain on the club's payroll for several months, receive a playoff bonus, have his name engraved on the Stanley Cup, and quietly resign. Predictably, this failure to effectively deal with this serious allegation, and to terminate Aldrich for engaging in sexual misconduct, allowed him to secure successive employment with a private high school, where he allegedly assaulted and molested another teenage player.

Further, Beach reportedly also timely reported the assault to the National Hockey League Players Association and its leadership, including Executive Director Donald Fehr, and the players' union failed to take any action to protect the player or help him to vindicate his legal rights. In an interview with Canadian sports network TSN, Beach said about Fehr, "For him to turn his back of the players, when his one job is to protect the players at all costs. I don't know how that can be your leader. He supposed to have the players' back, and they definitely didn't have mine."

Following the filing of lawsuits against the Blackhawks by Beach, and by a sexually victimized high school player in Michigan, the organization engaged a former Assistant U.S. Attorney to conduct a comprehensive investigation. The report concluded that "no action was taken for three weeks" after the senior leadership of the Blackhawks were informed of the unwelcome sexual activity and alleged sexual assault by the video coach. This lack of response was a violation of the team's own sexual harassment policy – – which required investigation of all reports of sexual harassment to be conducted "promptly and thoroughly."

Based on the findings of this investigation, general manager Stan Bowman was forced to resign and his top assistant was dismissed. The former head coach of the Blackhawks, Joel Quennville, who went on to become the head coach of the Florida Panthers, summarily resigned his position in Florida following a meeting with NHL Commissioner Gary Bettman. The NHL has also imposed a substantial fine against the Blackhawks.

This sordid tale is about a sports team prioritizing winning over the well-being of a young player to which it owed a moral duty and responsibility. It's also about a players' union that appears to have failed in one of his principal missions – – the well-being of players. The consequences of these failures include lawsuits, the end of several management careers, an avalanche of adverse publicity, and an embarrassing distraction to the team, the league, and the sport. Kudos to Beach for his courage in coming forward and addressing the unfortunate situation in a brutally honest and direct manner.

The message for sports teams and employers generally is to be aware of your existing policies dealing with sexual harassment and other forms of employee misconduct, involve human resource professionals upon learning of such events and seek their input and advice, promptly and thoroughly investigate all allegations of sexual assault, harassment or misconduct, offer counseling or assistance to impacted employees, be prepared to discipline or dismiss the responsible parties, and be aware of any reporting responsibilities that may exist under state law or other regulations.

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Activision Blizzard Agrees to Expanded Workplace Initiatives, Reaches Settlement with the EEOC

The Company Will Also Develop Tools and Training Programs to Assist Efforts to Improve Workplace Experiences

Activision Blizzard has confirmed that, as part of its effort "to have the most welcoming, inclusive

workplace," it has reached an agreement with the U.S. Equal Employment Opportunity Commission (EEOC) to settle claims "and to further strengthen policies and programs to prevent harassment and discrimination in the company's workplace."

The company had been named, along with other California companies, in a **lawsuit** by the state's Department of Fair Employment and Housing in which it alleged Equal Pay Violations, Sex Discrimination, and Sexual Harassment.

Under the Settlement, Activision Blizzard has committed to create an $18 million fund to compensate and make amends to eligible claimants. Any amounts not used for claimants will be divided between charities that advance women in the video game industry or promote awareness around harassment and gender equality issues as well as company diversity, equity, and inclusion initiatives, as approved by the EEOC. The agreement is subject to court approval.

"Many tech companies build on the motto 'build fast and ask forgiveness later'," said Ellen Zavian, a GW law professor and the editor of **Esports and the Law**. "It is my hope all video companies take a pause and realize that forgiveness means someone has already been harmed. I hope the industry takes this opportunity to get it right so no one going forward is put in harm's way."

Activision Blizzard also announced an initiative to develop software tools and training programs to improve workplace policies and practices for employers across the technology industry.

"There is no place anywhere at our company for discrimination, harassment, or unequal treatment of any kind, and I am grateful to the employees who bravely shared their experiences," said Activision Blizzard CEO Bobby Kotick. "I am sorry that anyone had to experience inappropriate conduct, and I remain unwavering in my commitment to make Activision Blizzard one of the world's most inclusive, respected, and respectful workplaces.

"We will continue to be vigilant in our commitment to the elimination of harassment and discrimination in the workplace. We thank the EEOC for its constructive engagement as we work to fulfill our commitments to eradicate inappropriate conduct in the workplace."

In addition to the agreed funds, the company is taking additional steps, including:

- Upgrading policies, practices, and training to further prevent and eliminate harassment and discrimination in its workplaces, including implementing an expanded performance review system with a new equal opportunity focus;
- Providing ongoing oversight and review of the Company's training programs, investigation policies, disciplinary framework and compliance by appointing a third-party equal opportunity consultant whose findings will be regularly reported to our Board of Directors as well as the Commission.

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Study: Normal Concussion Recovery Could Take Up to a Month

The largest study of concussion ever conducted in college athletes is redefining the timeline for recovery as a process taking up to 28 days, up from the suggested normal recovery time of up to 14 days.

The **findings** are detailed in the journal Sports Medicine, in one of the marquee papers to emerge from the NCAA-DoD Concussion Assessment, Research and Education Consortium. The study's lead researcher, **Steve Broglio**, director of the **University of Michigan Concussion Center**, is on the **CARE Consortium** leadership team and leads the CARE clinical study core.

"Normal return-to-play time was previously set at 14 days—meaning 50% of people recovered in that time. Our paper suggests that 28 days more fully encapsulates the recovery process. At that point, 85% of people have returned to play," Broglio said.

The study found that though median recovery times were consistent with the previously suggested 14 days, it was not until one month post-injury that most athletes were cleared for unrestricted sport participation.

This doesn't mean that universities must revise their return to play protocols.

"The RTP protocols are driven by clinical presentation (symptoms), not time, so they don't need to be revised," Broglio said.

Rather, coaches, parents and athletes should reframe their expectations for return to play, in part

to avoid stigmatizing concussed athletes who take longer than 14 days to recover, he said. Reframing the normal recovery time to 28 days helps eliminate unintentional social pressure from teammates, coaches or parents who hope to see their player back on the field. If a concussed athlete takes longer than 14 days or up to a month, that's completely normal, he said.

There wasn't much variation in recovery times among study subgroups, with various factors altering recovery by only up to two days. The total return-to-play duration was shorter with ADHD medication usage, males and greater assessment frequency. Those with greater initial post-injury symptom severity, practice/training-related injuries and three or more prior concussions had longer recoveries.

Concussion management recommendations are outlined every four years by the Concussion in Sport Group, an international body that reviews the medical literature and develops guidelines on clinical care. This paper and others resulting from the CARE Consortium will likely be taken into consideration when the group meets next year, said Broglio, who is also a member of CISG.

Despite increased research in concussion over the previous decade, the trajectory of concussion recovery times across diverse populations of athletes has remained poorly defined, because most sport concussion research centered on male athletes in collision sports, or on female soccer players, Broglio said.

The current study included 34,709 male and female athletes from 30 colleges and universities—more than 1,700 of whom were concussed while participating in 22 sports.

Concussed male athletes most commonly played football (54.7%), soccer (10.7%), basketball (6.8%) and wrestling (6.4%), while concussed female athletes most commonly played soccer (23.4%), volleyball (14%), basketball (12.9%) and lacrosse (8.4%). Broglio said male and female athletes took about the same amount of time to recover from concussion, give or take a day.

Concussion education and treatment has improved dramatically in the last two decades, he said.

"Back when I started in concussion research 20 years ago, we'd manage these

injuries with a light switch. We'd ask, 'Do you have symptoms?' and if the answer was no, the athlete was put back on the field. Gone are the days when concussed athletes are put back in the same day," Broglio said. "Now, we can think of it as a dial, where we

slowly progress people back into the sport. Once a player is asymptomatic, it can still take some time. We have to respect the injury and respect the recovery process."

Co-authors include: Thomas McAllister, Barry Katz, Michelle LaPradd and Wenxian Zhou of Indiana University; Michael McCrea of the Medical College of Wisconsin; and CARE Consortium investigators.

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News Briefs

Professor Seeks Experts on Venue Safety

University of West Florida Professor Gil Fried is seeking experts on venue safety. Specifically, he is looking for the following help: "Several sport safety experts with significant exposure and connections throughout the sport safety area are looking to launch a non-profit to possibly provide free risk management and safety training programs. We are looking for an attorney experienced in non-profit law to help with our formation efforts and to help serve on our board of directors. If interested, please contact Gil Fried at gfried@uwf.edu or 203-606-4523."

Segal McCambridge Singer & Mahoney Brings Sports Lawyer Courtney Dunn Back to the Team

Segal McCambridge Singer & Mahoney (SMSM) has announced that Courtney Dunn has rejoined its sports law group as a legal associate. Dunn first joined SMSM in 2019. In February of 2021, she took a position at Ansell Grimm & Aaron, P.C. Seven months later she elected to return to SMSM. Prior to joining the firm for the first time, she clerked for The Honorable Judge Craig L. Wellerson, P.J.Cv. in Ocean County, NJ. Dunn earned her JD from Elisabeth Haub School of Law at Pace University. SMSM Partner Carla Varriale leads the firm's sports law practice. "Courtney is a rising star in the sports law community," said Varriale. "We expect big things from her as we build out this practice area."

SBRnet Signs Content Partnership with Sports Law Publisher, Hackney Publications, Sharing SportsLawExpert.com with Hundreds of Thousands of Readers

SBRnet has signed a content partnership with Hackney Publications, the nation's leading publisher of sports law periodicals. Hackney Publications will provide content from Sports Law Expert (SLE), an outlet that tracks legal developments in the sports industry. SLE will be distributed as part of SBRnet's core level subscription package to more than 230 colleges nationwide, reaching more than 250,000 students. "We are greatly expanding our content and Hackney Publications' titles are the best in the sports law field, and will greatly enhance the perspective we bring to our core audience of students and educators," said Mark Sullivan managing partner of SBRnet. Hackney Publications is the nation's leading publisher of sports law periodicals. Founder Holt Hackney is a life-long journalist who has been covering sports business and sports law for more than three decades. Hackney possesses a well-developed skillset for identifying experts in a field and then sharing the insights of those experts with readers. "Our publications feature news and insights about sports law with interviews from the top minds in sports law today," Holt Hackney said. "These insights will offer a great perspective to college students as they study and prepare to eventually enter the sports business"

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