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Cases

Terminated Club House Employee Loses Racial Harassment Case Against Pro Team

By Jeff Birren, Senior Writer

Essex Wayne Brown, a former clubhouse manager for the Sacramento River Cats, sued the Reno Aces, alleging claims including racial harassment and for failure to prevent racial harassment. Brown was employed by the Sacramento River Cats, a Pacific Coast League (PCL) team, as the manager of the visiting team's clubhouse. The Reno Aces, also in the PCL and affliated with the Arizona Diamondbacks of Major League Baseball ("MLB"), played at Sacramento twice in 2014 and according to Brown, the Aces treated him poorly in 2014. Those problems continued into the 2015 season, and the River Cats terminated Brown in July 2015.

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Brown's case against the Aces was dismissed on summary judgment and he subsequently appealed two of the dismissed claims. However, the California Court of Appeal recently affirmed the ruling, (Brown v. SK Baseball, (the "Aces"), C0982888, Third Appellate District, unpublished., LEXIS 4284; WL 2662507 (7-11-22)).

Brown was hired by the River Cats in 2014 to maintain and operate the visiting team's clubhouse (Id. at 2). He alleged that in 2014 the Aces's athletic trainer, Joseph Metz, "was rude and disrespectful to Brown, and refused to work with him to plan the Aces's visit." Metz allegedly "loudly complained about him" and "let it be known that he thought Brown was doing a bad job." Brown further asserted that Metz "threatened" to have him fired and "used an egregious racial epithet against him." Brown claimed that he reported these issues to the River Cats and the Diamondbacks.

Brown returned to the River Cats for the 2015 season, but his problems continued. The Aces returned to play at Sacramento in June 2015. Afterwards, Brown claimed that the Aces's team manager "yelled and cursed at Brown for giving him a wrinkled shirt, saying that Brown was everything that Metz said he was the year before." Later that day, "Metz upbraided Brown for failing to fill a therapeutic ice tub" and "then threw an ice bucket across the room, striking him in the leg."

During the 2015 season another team's trainer "created a survey rating clubhouses and clubhouse managers in the league." The River Cats' "visiting clubhouse received the lowest rating in the survey." The River Cats "concluded the survey results reflected poorly on Brown and called into question his ability to continue as clubhouse manager." As a result, the River Cats terminated Brown on July 14, 2015.

Brown responded to his termination with litigation. He sued the River Cats, the Diamondbacks and Metz, and filed another lawsuit against the Aces. His case against the Aces had five causes of action, including a cause of action for racial harassment, (Gov. Code §12940(j)); a cause of action for failure to prevent racial harassment, (§12940(k)); for retaliation; aiding and abetting violation of the Code; and for unfair business practices in violation of Bus. & Prof. Code §17,2000.

The Aces moved for summary judgment, arguing "that Brown could not establish" his causes of action "because the undisputed facts showed that he was employed by the River Cats, not SK Baseball" (Id. at 3). Nevertheless, Brown argued that he was jointly employed by the River Cats "and every other team comprising MLB, as well as their affiliated minor league teams, including the Reno Aces." The trial court ruled that Brown failed to allege a joint employment in his Second Amended Complaint ("SAC") and "failed to present evidence of a triable issue of material fact as to the existence of an employment relationship" with the Aces. The trial court. therefore, granted the Aces's summary judgment motion.

Brown appealed the dismissal of his causes of action for racial harassment in violation of §12940(j), and for failure to prevent discrimination and harassment in violation of §12940(k). He did not appeal the other three dismissed causes of action (Id. at 2, FN 4). The Court of Appeal stated that summary judgment "is appropriate when all the papers show there is no triable issue of material fact and the moving party is entitled to judgement as a matter of law." Its purpose is to determine whether trial is in fact necessary to resolve the dispute.

A defendant making such a motion has "the initial burden of presenting evidence" that would either show a cause of action lacks merit "or there is a complete defense" (Id. at 4). If that happens, the plaintiff must show "that a triable issue of material facts exists, and that is so "only if, the evidence reasonably permits the trier of fact to find the contested fact in favor of the plaintiff in accordance with the applicable standard of proof."

Such rulings are reviewed de novo, although the court views "the evidence in a light favorable to the party opposing" the motion, "resolving all doubts concerning the evidence in favor of the opposing party." The Court reviews all the evidence presented except for evidence the trial court "properly excluded." The appellant has the burden "to affirmatively demonstrate error" and "review is limited to issues which have been adequately raised and briefed."

California created "a comprehensive scheme intended to protect and safeguard the right and opportunity to seek and hold employment free from prohibited discrimination and harassment." The relevant statute prohibits "employment discrimination… not discrimination or retaliation in other relationships" (Id., italics in the original). The "fundamental foundation for liability is the 'existence of an employment relationship between the one who discriminates against another and that other finds himself the victim of discrimination.'"

The statute § 1240(j) states, "prohibits harassment 'because of race'" and protects "an employee, an applicant or unpaid intern or volunteer," while subsection (k) "proscribes an employer's failure to 'take all reasonable steps necessary to prevent discrimination and harassment from occurring'" (Id. at 5). Brown did not argue that he was an Aces's employee but rather that he was "a person providing services pursuant to a contract." However, subsection (k) does not apply to independent contractors and Brown "does not suggest that he had any other employment relationship with SK Baseball." Therefore, the Court concluded "no error has been shown" as to that cause of action and consequently "summary adjudication was properly granted" by the trial court.

The Court then turned to the § 1240(j) cause of action. This required showing that Brown provided services to the Aces "pursuant to a contract." To succed on his claim, Brown had to meet the following criteria: (a) that the Aces had the right to control his performance; (b) that Brown was customarily engaged in an independently established business; and (c) the person has control over the time and place the work is performed, supplies the tools used in the work and performs work "that requires a particular skill not ordinarily used in the course of the employer's work." The question was thus whether Brown was an independent contractor.

The SAC alleged that Brown was employed by the River Cats. It further claimed that he was "a person providing services pursuant to a contract," but it did not "specifically allege that he provided services to SK Baseball or the Reno Aces" (Id. at 6). Nevertheless, the Court concluded that the SAC encompassed Brown's theory that he was providing services to the Aces.

The Aces "presented evidence that Brown was directly employed by the River Cats" and not the Aces. This included a declaration that "Brown had never been employed by that organization" and evidence from Brown's deposition testimony that "he received paychecks from the River Cats and was not familiar with SK Baseball." This was "sufficient" "to find that Brown was not an employee or person providing services to SK Baseball pursuant to a contract." The "burden thus shifted to Brown," according to the Court.

Brown's opposition "admitted the was employed by the River Cats but argued that they were not his

only employer." He provided services pursuant to a contract and somehow obtained the status of an independent contractor. Unfortunately for Brown, this argument was "not supported by the record." To begin with, "Brown does not tell [the Court] anything about any alleged contract" nor did the record "support the existence of a contract for services between Brown and the River Cats, on one hand, and the Reno Aces or SK Baseball, on the other hand." There was also nothing in the record to support his "attempt to meet the statutory definition of an independent contractor."

The Court again quoted § 12940(j), then stated: "Brown pays lip service to these requirements," but "offers no record evidence raising a triable issue of fact as to any of them" (Id. at 7). Brown further argued that "he and/or the River Cats provided, equipped and maintained the clubhouse," that "the River Cats paid his salary and benefits," and that "managing the clubhouse and caring for the players required a set of hospitality skills different than playing baseball." He also asserted that he "worked the hours necessary to get the job done." Yet, Brown made his arguments "without citation to the record." Furthermore, these "unsupported arguments and allegations do not demonstrate error and do not raise a triable issue of material fact" as to his "status as an independent contractor."

The Court concluded by stating that a "fundamental rule of appellate review is that an appealed judgment is presumed to be correct, and error must be affirmatively shown." This requires citing evidence in the record that shows the existence of a triable issue of fact. That level of evidental support is the appellant's duty, and Brown failed "to demonstrate error with respect to the threshold issue of standing." Therefore, the Court had "no occasion to consider his other arguments." With that, the Court affirmed the judgment.

To conclude, assuming Brown believed the facts he asserted it is easy to understand why he would be angry at the Aces. But anger did not make him their employee, and that fact was fatal to his case. This lawsuit could be expensive for Brown, and one wonders if counsel told him that he could be liable for the Aces' court costs. Those seeking to bring such claims would be well advised to pay close attention to the law before filing a potentially costly lawsuit. Brown also sued the River Cats for his termination, and whatever may happen in that case, at least he met the threshold issue since there is no question that he had been their employee.

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Agent Conduct and the Many Sides of State Law Preemption

By Johnathan Wayne

A licensed NFL Players Association ("Union") agent, Vincent Porter, was charged in 2014 with conspiracy to commit wire fraud. Recently, the charge was dismissed and Porter entered into a deferred prosecution agreement for misprision, which included deliberate concealment of one's knowledge of a treasonable act or felony.

Previously, the Union suspended his contract-advisor certification, and the NFLPA Committee on Agent Regulation and Discipline (CARD) filed a disciplinary charge against him. Porter appealed his suspension, and the sides arbitrated the dispute. Before the arbitrator issued a decision, the criminal charge was dismissed. The arbitrator then found that CARD failed to sustain its burden to prove that Porter engaged in prohibited conduct under the agent regulations.

Post-arbitration, Porter alleged that the Union continued to harass him and interfere with his business. He subsequently brought state law claims of tortious interference with business expectancy and business relationships, negligence, breach of duty, and breach of contract. After removal, the federal district court held that Porter's claims were preempted by federal law under § 9 of the National Labor Relations Act (NLRA), and § 301 of the Labor Management Relations Act (LMRA).

This appeal followed, with the Sixth Circuit Court of Appeals finding preemption of both business claims under the NLRA, but not under the LMRA.

National Labor Relations Act § 9 Preempts the Business Claims

Section 9 of the National Labor Relation Act, in the context of professional football, bestows all representative power on the Union. This body acts as the representative for its players in negotiations with the NFL and its clubs. The Union delegates this power to agents

who have met certain requirements, passed an exam, and paid the fees. Once an agent has checked all the boxes, and the Union will allow that individual to represent its players.

State law preemption will swat away causes of action that are prohibited or protected by the NLRA. Therefore, the Union argued that Porter's claims were preempted because they targeted the Union's representational structure, which is generally protected under the regulations.

In essence, the Union's stance was that an agent's career exists because the Union delegated its exclusive representational authority. Because of this delegation, the NLRA preempts any cause of action concerning how the union exercises that delegation.

The Court agreed that direct challenges to the Union's right of exclusive representation were preempted by § 9, but it stopped short of saying that all challenges triggered preemption. Applied to Porter, the Court found that any legal entitlement he might have to his business expectancy or relationships existed only because the Union gave him the right to represent players in the first place.

To hold in favor of Porter on those two counts would have held that Porter had a right to represent players on his own. The Court agreed that only the Union has that right, which is established by the NLRA. Thus, § 9 preempted the first two claims.

However, Porter's negligence, breach of duty, and breach of contract claims survived. The negligence and duty claims concerned the Union's alleged duty not to suspend his certification without cause. The contract claim related to the Union's actions towards Porter within the bound of contractual or fiduciary relationships with him. The Court held that these claims had nothing to do with an entitlement or restriction of the Union's rights under the NLRA.

§ 301 of the LMRA Was Not Preemptive

The Court however reversed the lower court ruling that § 301 of the LMRA also preempted Porter's claims. This issue focused on the nature of the Regulations Governing Contract Advisors ("Regulations") document, a set of rules that all certified agents must follow. The Regulations prohibit engaging in any conduct involving fraud or dishonesty, such as the allegations against Porter.

The Court first analyzed if the state law claims required interpretation of the terms of the collective bargaining agreement. Precedent holds that the preemptive effect of § 301 can cover more than just the collective bargaining agreement itself, including related contracts. The Union argued that the Regulations were such a contract as this, and that they were covered because they are a labor agreement "significant to the maintenance of labor peace" as stated in § 301.

Though case law agreed with the sentiment, the Court's decision turned on the nature of the parties. According to § 301 "contract" is defined as an agreement between employers and labor organizations significant to the maintenance of labor peace between them (referring to the Union and the league). In contrast, the Regulations are an agreement between the Union and its own delegates – the agents it certifies to carry out its business of negotiation on behalf of the players. Consequently, the Regulations were found to not be a contract under § 301 and LMRA preemption did not apply.

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Olson May Offer Professional Sports Leagues a Shield Against Sports Betting Lawsuits

By Holt Hackney

When the United States Court of Appeals for the Second Circuit rendered its decision in *Olson et al. v. Major League Baseball et al* last spring, it provided some legal insights as to what the courts expect

of professional sports leagues when it comes to ensuring integrity on the playing field.

The answer? Not much.

The panel of judges affirmed the lower court's ruling dismissing the claim of a group of aggrieved plaintiffs (fantasy sport participants), who had alleged that MLB, and other defendants, had failed to properly address the infamous sign-stealing controversy as it occurred. This created "a dishonest" outcome, which the plaintiffs believed negatively impacted their paid participation in daily fantasy sports contests operated by non-party DraftKings, Inc.

Specifically, the plaintiffs claimed they thought they were engaging in "games of skill" based upon "a fair gauge of player performance." Furthermore, the plaintiffs contended that the defendants "fraudulently concealed" that player statistics were "unreliable because of rule violations in the form of electronic sign-stealing by certain MLB teams during the 2017–2019 baseball seasons."

The panel tipped its hand early on in the opinion, noting that "this action is nothing more than claims brought by disgruntled fantasy sports participants, unhappy with the effect that cheating in MLB games may have had on their level of success in fantasy sports contests."

In sum, the panel stated that alleged misrepresentations or omissions by organizers and participants in major league sports about the competition itself—such as statements about performance, team strategy, or rules violations—do not give rise to plausible claims sounding in fraud or related legal theories brought by consumers of a fantasy sports competition who are utilizing a league's player statistics.

The big flaw in the plaintiffs' argument, according to the opinion, was that it failed to allege "actual or reasonable reliance upon the alleged fraudulent and negligent misrepresentations about player performance and electronic sign-stealing. Specifically, apart from actual reliance, no consumer of fantasy baseball competitions could plausibly allege that, in paying to participate in the competition, they reasonably relied upon these statements in believing that the sport of major league baseball was free from intentional violations of league rules by teams and/or individual players. Instead, any reasonable spectator or consumer of sports competitions—including participants in fantasy sports contests based upon such sporting events—is undoubtedly aware that cheating is, unfortunately, part of sports and is one of many unknown variables that can affect player performance and statistics on any given day, and over time."

Peeking Under the Covers

One of the plaintiffs' allegations was that MLB Commissioner, Rob Manfred, issued a statement in October 2015 that he was "quite convinced" that MLB DFS contests were a game of skill. The plaintiffs alleged, however, that the defendants' "misrepresentations" about "electronic sign-stealing deprived fantasy baseball contestants of the ability to exercise their skill in selecting players," according to the panel. Instead, it "converted the contests to being based on random chance."

The panel disagreed with the plaintiffs and went on to suggest that MLB DFS players (and perhaps sports bettors by extension) must consider off the field issues (such as cheating or rules violations) as much as on the field performance, and that it all goes into the mix when they make a "skillful" decision.

"The skill in participating in an MLB DFS contest lies not in any assurances of on-field performance, but rather in choosing a lineup based on considerations of the innumerable, widely-known variables that could impact player performance, such as weather, injuries, umpiring, cheating, and many more," wrote the panel. "Indeed, one could even argue that factoring in potential cheating or rules violations that could occur during the game itself could implicate a degree of additional skill by MLB DFS contest participants. Thus, any statements that can fairly be attributed to defendants about the fantasy baseball contests being 'games of skill' or 'contests of skill' are not rendered plausibly false due to the existence of rules violations, including electronic sign-stealing."

The appeals court went on to cite "numerous other courts around the nation that have found that fraud and related claims brought by disappointed sports fans—whether about poor performance or rule violations—cannot survive a motion to dismiss."

In re Pacquiao-Mayweather Boxing Match Pay-Per-View Litig. ("Pacquiao"), 942 F.3d 1160, 1171–72 (9th Cir. 2019) (collecting cases); *Mayer v. Belichick,* 605 F.3d 223 , 230 (3d Cir. 2010); *Bowers v. Fédération*

Internationale de l'Automobile, 489 F.3d 316 , 322, 325 (7th Cir. 2007); *Oliver v. Houston Astros, LLC*, No. 220-cv-00283, 2020 WL 1430382 , at *3 (D. Nev. Mar. 23, 2020), aff'd, 2020 WL 2128656 (D. Nev. May 5, 2020); *Le Mon v. Nat'l Football League*, 277 So. 3d 1166 , 1168 (La. 2019); *Castillo v. Tyson*, 701 N.Y.S.2d 423 , 423 (N.Y. App. Div. 2000).

In one particular case, the *Pacquiao* matter, the Court stated, "Although many of these cases addressed the limits of the contractual rights of ticketholders, several of these decisions dismissed fraud-related claims. They also more broadly rejected the ability of disappointed ticketholders to bring such claims based on alleged cheating or some other alleged deficiency in the competition itself, because any alleged reliance would be unreasonable as a matter of law." See, e.g., *Pacquiao*, 942 F.3d at 1170 n.7; Mayer, 605 F.3d at 234–36; Bowers, 489 F.3d at 324; Castillo, 701 N.Y.S.2d at 423.

The panel continued: "We recognize that plaintiffs are not suing as ticketholders or pay-per-view fans, but rather as participants in a fantasy sports contest that uses real-game statistics. However, the analysis of these cases, especially as it relates to reasonable expectations regarding the competition itself, applies with equal—if not greater—force here because, as acknowledged at oral argument, plaintiffs are an additional step removed from the baseball game itself when compared to paying ticketholders or viewers. See also *Oliver,* 2020 WL 1430382 , at *3–4.

"In other words, just as a ticketholder should have no reasonable expectation that he or she will see a game that is free of poor performance or rule violations, a fantasy sports participant similarly should have no such expectation in utilizing the statistics from that game. *See also id. at* *2."

Rejecting a Broad Duty to Disclose

The panel also agreed with the lower court, which rejected the plaintiffs' misrepresentation by omission theory, or the idea that the plaintiffs would not have entered into the MLB DFS contests if the defendants had not concealed the sign-stealing schemes and the corruption of the statistics on which the MLB DFS contests were based.

"The plaintiffs seek to create a broad and all-encompassing duty that, in essence, would require defendants to disclose as a 'basic fact' anything that could affect the integrity of MLB players' performance statistics. Such an expansive interpretation of the duty to disclose in this context, which is unsupported by any case authority, would open the courthouse doors to a wide range of claims that would require courts to draw unmanageable lines between types of undisclosed facts. Disappointed ticketholders, sports bettors, and others financially impacted (directly or indirectly) by the outcome of sporting events could sue over every type of undisclosed fact about teams and players, which plaintiffs could argue would have altered their decision to pay money in connection with the event.

"In *Mayer*, the Third Circuit noted the endless litigation that could result from requiring a duty to disclose in these situations and rejected such a requirement:

'[T]here appear to be no real standards or criteria that a legal decision-maker may use to determine when a particular rule violation gives rise to an actionable claim or should instead be accepted as a usual and expected part of the game. At the very least, a ruling in favor of [plaintiff] could lead to other disappointed fans filing lawsuits because of "a blown call" that apparently caused their team to lose, or any number of allegedly improper acts committed by teams, coaches, players, referees and umpires, and others. This Court refuses to countenance a course of action that would only further burden already limited judicial resources and force professional sports organizations and related individuals to expend money, time, and resources to defend against such litigation.' 605 F.3d at 237"

Olson et al. v. Major League Baseball et al.; Second Circuit; March 21, 2022; Nos. 20-1831-cv; 20-1841-cv.

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Court Considers Arbitrary and Capricious Standard in High School Eligibility Case

By Allie Benson, 2L at UNC School of Law

As the recent *K.H. v. Pennsylvania Interscholastic Athletic Association (PIAA)* case demonstrates, transfer rules are a common form of rendering high school student-athletes ineligible.[1]

1 See K. H. v. Pennsylvania Interscholastic Athletic Ass'n., 277 A.3d

Generally, student-athletes who transfer "from one high school to another without a corresponding change" in their parents' residence are ineligible to participate in varsity sports for a year.[2] However, this rule comes with exceptions, like waivers of the eligibility limitation when there is evidence of the transfer resulting from hardship.[3] Athletically-motivated transfers are not allowed as that conduct is part of what this rule attempts to combat.[4]

Though there are common trends among interscholastic transfer eligibility rules, state athletic associations promulgate and enforce their own rules on eligibility for their high school student-athletes while also following state laws.[5] "Public high schools and state athletic associations judicially characterized as state actors also must respect student-athletes' federal constitutional" rights.[6] Procedural due process from the U.S. Constitution "requires consideration of whether fair notice and an opportunity to be heard have been provided by a state athletic association…before the athlete is denied eligibility to participate."[7] Substantive due process rights protect student-athletes by preventing interscholastic athletic associations from intruding upon certain fundamental rights and ensuring that if these rights are intruded on, there is a valid justification.[8] Both types of due process claims require a deprivation of a "constitutionally protected property or liberty interest" to receive heightened scrutiny.[9] Despite attempted arguments otherwise,[10] courts have commonly held that there is no constitutional right nor any liberty or property interest to participate in high school athletics.[11] Thus, although state high school associations are required to follow their own rules, they do not typically have to comply with federal due process.

The Constitution's equal protection clause "requires that similarly situated parties be treated alike, with a heightened level of judicial scrutiny applicable if there is discrimination denying an individual a fundamental right or based on innate characteristics."[12] Apart from those scenarios, differing treatment is determined via a highly deferential standard and courts utilize the rational basis test: "if there is any rational basis for the challenged decision or rule, the court probably will not find a denial of equal protection of the law."[13]

Since there is no Supreme Court ruling on point of interscholastic student-athlete transfer rule eligibility claims or on what qualifies as a liberty interest for due process in interscholastic athletics, [14] each state has its own framework for these cases, while still keeping in line with the aforementioned rules for federal constitutional claims in this area.[15] As *PIAA* demonstrates, one commonly used standard of review in these cases is the arbitrary and capricious standard that allows limited

638, 640 (Pa. Cmmw. 2022).

2 Mitten et al., Sports Law and Regulation: Cases, Materials, and Problems 56-57 (5th ed. 2020)[hereinafter Mitten]. However, the transfer rule in PIAA for postseason eligibility is actually stricter and does not have this typical provision allowing transfers when there is a residence change. Pennsylvania Interscholastic Athletic Ass'n, 277 A.3d at 640, 643.

3 Mitten, supra note 2, at 57. These are called hardship waivers. Id.

4 Indiana High Sch. Athletic Ass'n, Inc. v. Carlberg, 694 N.E.2d 222, 233 (Ind. 1997); Mitten, supra note 2, at 57; see Pennsylvania Interscholastic Athletic Assn., 277 A.3d at 641.

5 See Mitten, supra note 2, at 55.

6 Id.

7 Id. at 56.

8 See id.

9 Id. at 55. Often, student-athletes who have been rendered ineligible as a result of a transfer rule argue that Goss v. Lopez, 419 U.S. 565 (1975) (holding that there is a property interest in receiving an education) should extend to participation in interscholastic sports as a way to get the heightened standard of due process and have typically, though not always, lacked success with that claim. See Amanda Siegrist, W. Andrew Czekanski, & Steve Silver, Interscholastic Athletics and Due Process Protection: Student-Athletes Continue to Knock on the Door of Due Process, 6 Ole Miss L. Rev 6, 10, 12, 14 (2016)[hereinafter Siegrist]. Most recently, the liberty "interest of parents in the care, custody, and control of their children," from Troxel v. Granville, 530 U.S. 57, 65 (2000), was used by a student-athlete's parent to successfully claim procedural due process in an interscholastic athletics transfer eligibility case. Motheral v. Black 03-21-00671-CV, 2022 WL 1433960, *1, *7 (Tex. App.--Austin May 6, 2022).

10 See, e.g., Matthew J. Mitten & Timothy Davis, Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities, 8 Va. Sports & Ent. L.J. 71, 113 (2008).

11 Indiana High Sch. Athletic Ass'n, Inc v. Carlberg, 694 N.E.2d 222, 242 (Ind. 1997); Albach v. Odle, 531 F.2d 983, 984-85 (10th Cir. 1976); Cornerstone Christian Sch. v. Univ. Interscholastic League, 563 F.3d 127, 136-37 (5th Cir. 2009); Siegrist, supra note 9, at 3 (discussing Taylor v. Encumclaw School District). However, Boyd v. Bd. of Directors of the McGehee Sch. Dist. No. 17, 612 F. Supp. 86 (E.D. Ark. 1985), Duffley v. New Hampshire Interscholastic Athletic Assoc., Inc., 122 N.H. 484 (1982), and a handful of other cases have elevated participation in interscholastic athletics to the status of a right/property interest instead of a privilege. Id. at 12, 14.

12 Mitten, supra note 2, at 56. Innate characteristics include race, ethnicity, national origin, or gender. Id.

13 Id.

14 See Siegrist, supra note 9, at 20.

15 See Mitten, supra note 2, at 55-56.

judicial review of the decisions of these high school athletic associations.[16]

In *PIAA*, the student-athlete transferred schools when he and his father moved so that his father could be close to work.[17] Prior to moving, the father only had access to transportation using a relative's car, which he was in jeopardy of losing access to for his 39-mile commute.[18] The father had a work disciplinary hearing and was advised to move closer "or be on the path toward termination because of tardiness and attendance issues" stemming from his long commute.[19] Before the hearing, the father "transferred into a new position with the post office" and became a permanent employee.[20] PIAA bylaws state that "if a student who participated in a sport transfers after the 10th grade, [they are] ineligible to play in the postseason" unless the student can show that the "transfer was necessitated by exceptional and unusual circumstances beyond the reasonable control of the student's family."[21] The PIAA hearing regarding the student-athlete's regular season eligibility and postseason eligibility was dominated by the former issue, and that issue was ultimately withdrawn by the sending school due to the severe lack of evidence that the transfer was athletically motivated.[22] PIAA then denied the student-athlete a waiver to participate in postseason basketball since the father's change in residence wasn't a necessity, the move did not equate to a "change in residence necessitated by a change in employment" required to restore eligibility, and there were other ways for him to fix his tardiness issues.[23]

The student-athlete then went to court requesting an injunction to enjoin PIAA from prohibiting his participation in postseason basketball.[24] The court stated that "the general rule with respect to high school athletic associations…is one of judicial non-interference" and a court may only set aside a decision of PIAA if "the action complained of is fraudulent, an invasion of property or pecuniary rights, or capricious or arbitrary discrimination."[25] "[A]n action is capricious if it reflects the willful, deliberate disbelief of an apparently trustworthy witness, whose testimony one has no basis to challenge" and is arbitrary "when the conduct is based on random or convenient selection of choice rather than of reason or nature."[26] The trial court ruled that PIAA's decision was arbitrary and capricious and granted this injunction.[27]

Having a further limited standard of review, this appeals court held that as the trial court's decision was based on reasonable grounds, there was no error in its decision that PIAA "acted with arbitrary and capricious discrimination when it devoted too little time to [his postseason eligibility], deliberated for less than 16 minutes, failed to offer Father the opportunity to testify about his employment status directly relevant to [an exemption from the transfer rule], and essentially discouraged Student and Father from presenting additional evidence."[28] The appeals court also indicated that the "trial court may not substitute its judgment for that of the PIAA" and that it did not do so.[29]

Indiana courts also use this arbitrary and capricious standard, but make it stricter when reviewing student-athlete challenges than member school challenges since students have no say in the governing body.[30] The PIAA court did not mention this distinction. However, it also appears to apply a stricter, less deferential level of the arbitrary and capricious standard as the PIAA's decision, arguably skirting around fairness via a highly

16 See K. H. v. Pennsylvania Interscholastic Athletic Ass'n, 277 A.3d 638, 643 (Pa. Cmmw. 2022).

17 Id. at 640.

18 Id.

19 Id.

20 Id.

21 Id. at 643. A "change of residence necessitated by a change in employment" and "[a]n involuntary substantial change in financial condition and resources that compels a withdrawal from a school" explicitly fit under this exceptional and unusual circumstances clause and "[a]ll other tendered reasons will be considered…on a case-by-case basis. Id.

22 Id. at 641.

23 Id. at 641-42.

24 Id. at 639-40.

25 Id. at 643 (citing *Harrisburg School District v. Pennsylvania Interscholastic Athletic Association*, 453 Pa. 495 (1973)).

26 Id. (internal citations omitted).

27 Id. at 645.

28 Id. at 648.

29 Id. However, the appeals court failed to really explain how the trial court did not just substitute its judgment for that of PIAA so it would not be irrational to wonder if that is in fact what the trial court did. This question itself shows how the highly deferential standard was lessened in this case to some extent.

30 See Indiana High Sch. Athletic Ass'n, Inc v. Carlberg, 694 N.E.2d 222, 230 (Ind. 1997).

technical interpretation of its rules was not entirely arbitrary since PIAA did have reasons for their decision.[31]

The *PIAA* court potentially could have used a public policy reason to grant the injunction also (or instead). The public policy reason to allow the student-athlete to play in the postseason would be that society wants people to be employed, especially those who have children so that they can support their family. Employment keeps families together, reduces poverty rates, and lessens the burden on state welfare systems.[32] Thus, since there is sufficient evidence of how this move was to help the father keep his job and a lack of evidence about an athletically-motivated transfer,[33] public policy necessitates that the student-athlete should not be punished for his father trying to keep his job.[34]

The fact that *PIAA* still used the arbitrary and capricious standard[35] for a non-constitutional claim regarding transfer eligibility in an interscholastic athletics case[36] that was used in *Carlberg* shows that the standard is strong enough to last almost fifty years and is being applied across different states.[37] However, a new case shows that, at least in Texas, there might be a shift in the legal standards used in these cases.[38]

While federal due process claims are typically unsuccessful in this area due to the lack of a liberty or property interest at issue, in *Motheral v. Black*, a procedural due process claim was successful after the University Interscholastic League (UIL) voted that a student-athlete moved for athletic purposes and was ineligible to play varsity sports for a year.[39] The student-athlete's mother claimed that they were denied adequate due process[40] and that parents have a liberty interest per *Troxel* in the "'care, custody, and control'" of their child which was violated by the decision and that UIL's "decision implicated their liberty interest [from *Roth*] in their good name, reputation, honor, and integrity."[41] Plaintiffs contended that UIL's failure to provide adequate due process during the hearing resulted "in a determination contradicting their basis for transferring schools and injuring their liberty interests." The stigmatizing effect of the decision upon their family was then implicated on the mother's ability to make child rearing decisions without government intrusion, particularly decisions in regards to her child's safety.[42] Suggesting that the due process claim could not hinge on the alleged reputational injury alone, the court concluded "that the Plaintiffs pleaded a liberty interest that warrants due-process protection."[43]

Overall, *Motheral* represents a rare successful due process claim in the realm of interscholastic student-athlete transfer eligibility cases.[44] *Motheral* also shows how some state courts offer more protection for student-athletes challenging transfer rules than others

31 See Pennsylvania Interscholastic Athletic Ass'n, 277 A.3d at 641-42. While the PIAA court did take a bit of a less deferential approach, their language and overall way of doing so was less strong and pointed than that of some other courts. See, e.g., Scott v. Oklahoma Secondary Sch. Activities Ass'n, 313 P.3d 891, 908-909 (Okla. 2013).

32 See Employment and Decent Work, United Nations: Department of Economic and Social Affairs (2007), https://www.un.org/development/desa/socialperspectiveondevelopment/issues/employment-and-decent-work.html; see Why is Work Important?, InWork European Project, http://www.inworkproject.eu/toolbox/.

33 Pennsylvania Interscholastic Athletic Ass'n, 277 A.3d at 641.

34 The public policy reason is strengthened by the fact that in many districts, the transfer rule only applies to those who transfer without a corresponding change in their parent/guardian's residence. See Mitten, supra note 2, at 56-57.

35 even if it was a weaker version of this standard to some extent,

36 Pennsylvania Interscholastic Athletic Ass'n, 277 A.3d at 643.

37 Carlberg, 694 N.E.2d at 230-31. The standard has been in use in Indiana since Sturrup, which took place in 1974. Id.

38 See generally Motheral v. Black 03-21-00671-CV, 2022 WL 1433960, *1 (Tex. App.--Austin May 6, 2022).

39 Motheral, 2022 WL 1433960 at *3. Texas courts have determined that state due process claims, like the one here, are functionally the same as federal due process challenges. Id. at *7. The student-athlete's father was physically and verbally abusive to him at a basketball games and had a history of abuse against the mother. Id. at *1-2. The mother, student-athlete, and the mother's boyfriend (the basketball coach at the receiving school) moved from Coppell to Duncanville to get away from the father and so that the father would not know where they lived. Id. at *2.

40 Id. at *7. This failure to provide adequate due process is significant because if a liberty interest is implicated, federal due process requires a heightened level of scrutiny to take away/infringe upon that liberty interest.

41 Id. (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000)). This argument regarding due process is different than the common route taken, which is asserting that sports are included in the "'total educational process'" -- a liberty interest protected by Goss. Siegrist, supra note 9, at 3. This argument was successful in some cases in Texas since they allowed "academic credit for participation in high school sport." Id. at 4.

42 Motheral, 2022 WL 1433960 at *8.

43 Id. The Motheral court went on to "affirm the portions of the trial court's order granting the temporary injunction [allowing the student-athlete to participate in varsity high school athletic competitions pending his trial's resolution] …regarding the Plaintiff's [due process] claim." Id. at *1.

44 See id.

since there is no Supreme Court case on point.[45] *PIAA* shows a slightly less deferential version of the still-utilized arbitrary and capricious standard.[46] These recent interscholastic student-athlete transfer eligibility cases show how, at least in some states, interscholastic athletics are becoming more important in society and the idea of participation in interscholastic athletics being a right might not seem as remote anymore. However, even Motheral reaffirmed the common notion that participation in interscholastic athletics is not a fundamental right or liberty interest.[47]

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Court Partially Guts Expert Testimony in Student Athlete's Negligence Lawsuit Against Dartmouth

A federal judge has dealt a blow to the claim of a student athlete, who alleges that Dartmouth College was negligent when the school's Athletic Trainer and its Strength and Conditioning Coach for Field Hockey and Football permitted, or encouraged, the student athlete to do weight training exercises that could exacerbate injuries she had suffered eight months earlier in a car accident.

Specifically, the court denied Dartmouth's motion to preclude the testimony of one of the plaintiff's experts, while partially granting a motion to preclude the testimony of another one of her experts.

By way of background, plaintiff Khia Hollyer was in a car accident in December 2016. Afterwards, she suffered shoulder, neck, and back pain. She received treatment for her injuries from her physiotherapist, Nico Berg, and by June 2017 she was physically cleared to participate in Dartmouth's Field Hockey Program that summer. Berg wrote a letter stating that Hollyer could participate in the Program, but suggested "limiting any heavy or overhead strength and conditioning for the next 4 months," according to the letter.

Hollyer arrived on Dartmouth's campus for the Program on August 16, 2017. A few days later, Hollyer, her mother, or both, allegedly gave a copy of Berg's letter to Meredith Cockerelle, Dartmouth's Athletic Trainer, and relayed the contents of the letter to Mark Kulbis, Dartmouth's Strength and Conditioning Coach for Field Hockey and Football.

In September 2017, Kulbis directed Hollyer to perform a "trap bar deadlift exercise" during a Program workout. Hollyer alleges that Kulbis provided her with minimal instruction and told her to lift an "excessive amount" of weight (84% of her bodyweight), despite Berg's letter and her limited weightlifting experience.

Consequently, Hollyer injured her back during the exercise. Over the following days, "Cockerelle led Hollyer in other exercises and practices despite Hollyer's complaints of pain," according to the complaint.

Hollyer sought medical treatment and was diagnosed with an L5-S1 disc herniation. She alleges that she has suffered and continues to suffer from various symptoms because of her injury, including right leg weakness, diminished reflexes, and urinary incontinence.

Regarding the instant decision, Hollyer designated two expert witnesses— Dr. Douglas Goumas and Thomas LeBrun—both of whom authored expert reports. In her expert disclosure, Hollyer stated that Dr. Goumas "will testify regarding the treatment provided to Ms. Hollyer, along with the cost of such care, future medical treatment, and any long-term pain or discomfort the Plaintiff may have as a result of this accident." With regard to LeBrun, Hollyer stated that he "will testify regarding his expert knowledge of weightlift training and the mechanics of the strengthening exercise that caused the injury to Ms. Hollyer and how it relates to the same."

Dartmouth challenged the admissibility of some or all of Dr. Goumas's and LeBrun's opinions on the grounds that "they are irrelevant, unreliable, or not helpful to the jury."

The court noted that Federal Rule of Evidence 702 applies in the instant dispute and that, specifically, the U.S. Supreme Court case *Daubert v. Merrell Dow Pharmaceuticals* proscribes a gatekeeping role for

45 See Siegrist, supra note 9, at 20. Similarly, some state constitutions, like Indiana's, provide more protection to student-athletes challenging transfer rules than the US Constitution does. See Indiana High Sch. Athletic Ass'n, Inc. v. Avant, 650 N.E.2d 1164 (Ind. App. 3d Dist. 1995).

46 See K. H. v. Pennsylvania Interscholastic Athletic Ass'n., 277 A.3d 638, 643 (Pa. Cmmw. 2022).

47 Motheral, 2022 WL 1433960 at *7.

the judge to make rulings about the admissibility of expert testimony. In recent years, case law suggests that the courts have interpreted Rule 702 "liberally in favor of the admission of expert testimony." Levin v. Dalva Bros., Inc., 459 F.3d 68, 78 (1st Cir. 2006).

The court first considered Dr. Goumas's testimony. Dartmouth challenged the following four parts of Dr. Goumas's opinion: (1) all of the treatment Hollyer has received has been reasonable, necessary, and causally related to the injury she allegedly suffered when performing a hex bar deadlift, (2) Hollyer's urinary incontinence was caused by the injury she allegedly suffered when performing the hex bar deadlift, (3) Hollyer has a 17% whole person impairment according to the A.M.A. Guides to the Evaluation of Permanent Impairment, Fifth Edition, and (4) there is a "possibility" that Hollyer will require future fusion surgery if conservative treatment options fail.

On the first part, the court ruled Dr. Goumas's testimony inadmissible because it was "limited to the timeframe of the records reviewed." In other words, his testimony was incomplete.

Regarding the second part, the court deferred to the plaintiff, noting the "liberal interpretation courts have given to Rule 702," and suggested if Dartmouth wanted to challenge that it could do so "at trial."

Turning to the third part, the court noted that New Hampshire courts have approved of opinion evidence regarding a percentage of permanent impairment in negligence cases, and thus denied Dartmouth's challenge.

Finally on the last part, the court wrote "Dr. Goumas's opinion is relevant to Hollyer's ability to carry that burden of proof. Although the court agrees with Dartmouth that Dr. Goumas's opinion would not itself satisfy Hollyer's burden, that fact does not render the opinion unreliable such that it must be excluded. Whether Dr. Goumas's testimony concerning the possibility and cost of a lumbar procedure may be considered by the jury is a question to be answered at trial. Therefore, Dartmouth's motion is denied without prejudice."

Regarding LeBrun, Hollyer retained him as an expert in the field of weightlift training. LeBrun authored an expert report that contains his opinion "regarding his expert knowledge of weightlifting training and the mechanics of the strengthening exercise that caused the injury to Ms. Hollyer and how it relates to the same."

LeBrun opined that (1) Dartmouth should not have allowed Hollyer to perform the hex bar deadlift in light of the restrictions in Berg's letter, (2) if Dartmouth did allow her to do the exercise, it should not have let her do it with 84% of her body weight, and (3) Dartmouth failed to provide proper instruction and training during and after the alleged injury.

Dartmouth challenged this, arguing that LeBrun "should be precluded from testifying at trial because his opinions are either not supported with reliable facts or data or are speculative and therefore not helpful to the jury. For example, Dartmouth argued that LeBrun does not explain the mechanics of a hex bar deadlift or why it goes against the restriction in Berg's letter and that LeBrun fails to cite any guides or studies saying that a hex bar deadlift using 84% of an individual's bodyweight is unsafe. However, none of Dartmouth's objections warranted exclusion of LeBrun's opinion.

According to the court, "LeBrun's report states that he is a Certified Personal Trainer and MMA conditioning coach through the National Academy of Sports Medicine, and a Certified Sports Injury Specialist through the National Exercise & Sports Trainers Association. The report also states that LeBrun has 50 years of experience in the field of strength training. His opinion is based on his training and experience, in light of his review of the relevant facts in this case."

Therefore, the court concluded, "Dartmouth's motion does not challenge LeBrun's qualifications. Dartmouth instead appears to argue that the fact that LeBrun bases his expert opinion on his training and experience rather than, for example, relying upon treatises or studies, necessarily undermines the reliability of his opinion. That argument fails."

Hollyer v. Trs. of Dartmouth Coll.; D.N.H.; Civil No. 20-cv-954-SE; 8/10/22

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Articles

Buffalo Bills Kick Rookie Punter from the Team After Getting Tackled by a Civil Lawsuit

By Dr. Robert J. Romano, St. John's University, Seniro Writer

On August 25, 2022, *Jane Doe* filed a civil complaint in the Superior Court of California, County of San Diego, against the Buffalo Bills' sixth round draft pick, Matthew Araiza, plus two other San Diego State football team members, and SLJ, LLC – a California limited liability company. Per the complaint, Jane Doe alleges that on Sunday, October 17, 2021, the Bills prospective punter, together with a number of other named and unnamed defendants, 'gang-raped' her at a Halloween party held at Azaria's residence.[48] *Jane Doe*, who was 17 years old at the time, admits to arriving intoxicated to the party, but that Araiza, who was 21 years of age, after providing her with additional alcohol and 'other intoxicating substances', took advantage of both her young age and state of inebriation by separating her away from her friends and other party goers, leading her to the side yard of the house where he allegedly raped her orally and vaginally.[49] From there, *Jane Doe* claims that Araiza directed her to one of the bedrooms inside the house, where a group of men, including the two named San Diego State football players, 'took turns having sex with her' while she went in and out of consciousness.[50]

Prior to the lawsuit being filed, on both July 31 and August 1, 2022, the attorney for *Jane Doe*, Dan Gilleon, notified the Bills organization's assistant general counsel, Kathryn D'Angelo, about the issues relating to the alleged rape and the impending civil lawsuit (and possible criminal charges) which both involved and implicated its draft pick. However, according to Gilleon's law firm, the Buffalo franchise never followed up with his office, nor did it ask to speak to *Jane Doe,* despite its public statement that it had conducted a "thorough examination."[51] This was acknowledged by Bills general manager, Brandon Beane, who admitted the franchise learned about the accusations in late July, stating "We tried to be thorough and thoughtful and not rush to judgment," before adding, "It's not easy."[52]

At the same time the Bills were not 'rushing to judgement', it did however cut another punter on its roster, Matt Haack, which by doing so, pretty much handed the starting job to its Araiza who signed a four-year contract with the organization, valued at almost $4 million.[53] It wasn't until August 27, 2022, two days after the civil lawsuit was filed by *Jane Doe*'s attorney that the Bills organization decided to act, releasing Araiza from the team and themselves of the obligation of paying out almost $1 million for the upcoming season. Even still, the team's general manager sounded somewhat reluctant about the move, stating "We don't know all the facts, and that's what makes it hard, but at this time we think it is the best move for everyone to move on from Matt and let him take care of this situation."[54]

One would think the Bills, together with the NFL, would have acted when they became aware of the significant and appalling allegations surrounding Araiza and his co-conspirators, especially considering the recent sexual misconduct and assault violations involving Cleveland Browns quarterback Deshaun Watson.[55] However, the league and its 32 franchises have a history of reluctance when it comes to properly investigating domestic violence and sexual abuse claims perpetrated by its players. In other words, the NFL has what one would refer to as an 'unofficial policy' of staying in the background, waiting to see if criminal charges are filed

48 Plaintiff's Complaint for Damages, page 2, paragraph 8. (Jane Doe also filed claims against Roes 1 through 20 who represent other individuals who are allegedly liable in this matter but whose true names and identities are unknown at this time.)

49 Plaintiff's Complaint for Damages, page 2, paragraphs 9 and 10.

50 Plaintiff's Complaint for Damages, page 2, paragraph 11.

51 https://www.nytimes.com/2022/08/27/sports/football/buffalo-bills-matt-araiza-released.html

52 Id.

53 https://overthecap.com/player/matt-araiza/10225

54 Id.

55 Watson was eventually suspended for 11 games and fined $5 million. However, the Cleveland Browns structured the contract so that the suspension would have the least amount of financial impact on Watson's total compensation package of over $230 million.

or indictments are secured, before it takes any punitive action against one of its players. This, therefore, allows for the athlete to continue playing and collecting their million-dollar annual salaries in the interim. And why not, the franchises get the benefit of having their talented players perform each and every week until such time that the facts come to light after a criminal investigation has concluded. This, however, is assuming that such criminal charges are even filed because prosecutors are sometimes reluctant to pursue cases in which high profile athletes are concerned, especially when the victim is intoxicated since this would lead to what is commonly referred to as an 'unreliable witness'.

But this 'policy' of waiting until the facts come to the forefront through a criminal investigation may be coming to an end because now victims have decided to pursue an alternative legal avenue. *Jane Doe*, whose frustrations over the alleged incident began on October 18, 2021, when she waited five hours at the San Diego Police Department before a police officer decided to speak with her about the assault, then subsequently watched as one of her assailants was offered a seven-figure contract by an NFL team to punt a ball around a stadium each Sunday, has decided to use the civil courts as a means to find justice. As outlined in the six-count civil complaint, her causes of action against Araiza and his co-conspirators include the following: a) Rape in violation of Civil Code Section 1708.5, b) Gender Violation as per Civil Code Section 52.4 and Penal Code Section 261(a)(2)(3), c) Violation of the Ralph Act, d) False Imprisonment, e) Violations of Code Section 1714, and f) Premises Liability.[56]

Jane Doe, like the twenty-four victims who filed civil actions against Deshaun Watson for sexual misconduct, have decided that issues surrounding sexual assault and professional football players need to be taken seriously by the NFL and the hierarchy at its various franchises, and if the criminal courts are going to be slow to justice, then the civil courts with their lower burden of proof standard will have to do. And no, we don't want to 'rush to judgement', but the NFL cannot continue standing back and letting these perpetrators continue cashing their million-dollar paychecks while victim after victim waits for the criminal courts to 'do their thing'. We know it is not 'easy', but it is the right and necessary thing to do.

56 Plaintiff's Complaint for Damages filed on August 25, 2022.

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Could Leagues and Teams be Joint Employers Before the NLRB?

By Patrick L. Egan, of Jackson Lewis

The National Labor Relations Board (NLRB) has released a Notice of Proposed Rulemaking to change the standard for determining if two employers may be joint employers under the National Labor Relations Act (NLRA). The proposed rule, expected to become effective sometime in 2023, could make it more likely that professional and collegiate leagues would be found to be joint employers of any unionized professional players or collegiate student-athletes who play for teams that are members of those leagues.

As a joint employer of unionized players of member teams, a league could be jointly responsible for unfair labor practices committed by the teams or the team's supervisors or managers (i.e., coaches and administrators), be required to participate in collective bargaining negotiations with the teams concerning the wages and other terms and conditions of employment of the players, and picketing directed at the league would be considered primary and therefore permissible (rather than secondary and subject to injunction).

Currently, the NLRB will find two or more employers to be joint employers if there is evidence that one employer has actually exercised direct and regular control over essential employment terms of another employer's employees. An employer that merely reserves the right to exercise control or that has exercised control only indirectly will not be found to be a joint employer. The NLRB has proposed that the Browning Ferris standard be restored. Under the proposed rule, two or more employers will be found to be joint employers if they "share or codetermine those matters governing employees' essential terms and conditions of employment." Importantly – and the critical import of the proposed rule – the NLRB will consider both evidence that direct control has been exercised and that the right to control has been reserved (or exercised indirectly) over these essential terms and conditions of

employment when reviewing two or more employers for status as joint employers.

Professional athletes are employees under Sec. 2(3) of the NLRA, of course. As for collegiate student-athletes, NLRB General Counsel Jennifer Abruzzo issued a memorandum, GC 21-08, announcing the intention to consider scholarship athletes at private colleges and universities to be employees because, as she wrote, they "perform services for their colleges and the NCAA, in return for compensation, and subject to their control." Stating in summation "that this memo will notify the public, especially Players at Academic Institutions, colleges and universities, athletic conferences, and the NCAA, that [she] will be taking that legal position in future investigations and litigation" under the NLRA, Abruzzo signaled that conferences, leagues, and the NCAA will face joint-employer analysis in an appropriate case.

The "essential terms and conditions of employment" will translate to the sports workplace in the nature of game, practice and meeting times, travel and accommodation standards, equipment and safety standards, conduct rules and disciplinary proceedings, the length of a season, the number of games and playoff terms, and numerous other areas. Professional leagues may already coordinate with their member teams on a number of employment terms for players. For collegiate conferences and leagues, this may be new. Under the current standard, a league could better insulate itself from the decisions made by its members' coaches and administrators by not exercising direct involvement in those matters. Under the proposed rule, a league or conference that merely has the power (even if reserved and unexercised) to make decisions affecting the "work" conditions for student-athletes could be jointly liable along with the institution for decisions made solely by the institution's agents.

Consequently, conferences and leagues should consider training managers on their responsibility under the NLRA to private sector employees. They should also consider the role they want to play in collective bargaining should any of the student-athletes at their member institutions unionize.

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ACLU Draws Some Praise for Its Comment Regarding Proposed Title IX Rule

The American Civil Liberties Union submitted its public comment on September 12, in response to the U.S. Department of Education's proposed regulations concerning Title IX.

In June of 2022, the DOE issued a notice of proposed rulemaking governing schools' obligations under Title IX. The ACLU's comments in response to the proposal highlighted its support for those regulations that:

- Make clear that Title IX covers harassment and discrimination based on sexual orientation, gender identity, and sex stereotypes;
- Draw from a long-standing definition of "sexual harassment" used for other forms of harassment;
- Require schools to investigate instances of student-on-student harassment or assaults that occur off campus where they affect students' access to education;
- Hold institutions accountable when they fail to take prompt and effective action to end sex discrimination;
- Clarify that parties should be able to access relevant evidence while limiting access to irrelevant or privileged evidence;
- Clarify that in the limited circumstances where Title IX's regulations permit differential treatment or separation on the basis of sex, that differential treatment cannot prevent a person who is transgender from participating in an educational program or activity consistent with the person's gender identity;
- Clarify the definition of discrimination based on status as a parent to include a range of individuals with caregiving responsibilities for children; and
- Make clear that the existing prohibition on pregnancy discrimination includes discrimination based on lactation and requires recipients to provide a clean lactation space and break time to express milk for both students and employees.

The ACLU also stated its opposition to provisions in the proposed regulation that:

- Do not require universities to provide a live hearing and an opportunity for cross-examination where serious sanctions, such as suspension or expulsion, may apply;
- Permit universities to use the single investigator model, where a single person investigates a complaint and makes the decision about the outcome; and
- Do not explicitly require institutions to delay Title IX proceedings upon the request of a respondent who faces an imminent or ongoing criminal investigation or prosecution.

In 2020, the Supreme Court ruled in *Bostock v. Clayton County*, in which the ACLU was counsel, that anti-LGBTQ discrimination is a form of sex discrimination prohibited under Title VII, the workplace nondiscrimination law, according to the ACLU. The proposed regulation, it continued, applies this ruling to the education context, provides that transgender students are not excluded from sex-separated facilities, and specifically cites the harm experienced by transgender students excluded on the basis of their gender identity.

"At a time when some members of Congress, like former Auburn head football coach and now Senator Tommy Tuberville are characterizing the proposed new Title IX rule contemplated by the U.S. Department of Education as an **attack,** the ACLU's response to the call for comments offered a balanced review," said Ellen J. Staurowsky, Ed.D., Professor – Sports Media, of the

Roy H. Park School of Communications at Ithaca College. "It applauds the DOE for clarifying that students experiencing gender-based discrimination because of their sexual orientation and gender identity should benefit from Title IX's protections. This has implications for transgender athletes barred from participating on athletic teams because of their gender identity and who have suffered the harms of that kind of gender-based exclusion.

"At the same time, the ACLU raises concerns that the new rule falls short of adequate due process considerations in campus sexual harassment and assault hearings."

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States Rush to Protect Consumers from Cyber Threats as Gaming Legislation Moves Across All States

By Jake Gray

(Editor's Note: The following appeared in **My Legal Bookie***, a periodical produced by Hackney Publications that covers the legal sports betting industry.)*

In the four years since the U. S. Supreme Court struck down the federal ban on sports betting, more than 36 states and the District of Columbia have launched legal sports betting markets, with more than half of legalized states offering online and mobile options. [1] In most markets that offer online and mobile sports betting, the offerings are responsible for more than 70% of the total handle, and in states where online betting is particularly popular, online wagers account for more than 90% of the total. [2] The New York total handle in May 2022, for instance, was $1.269 billion with the mobile and online handle comprising $1.263 billion, and New Jersey's mobile and online handle was $708 million of $766 million total. Such drastic differences in handle percentages between online and retail sports betting evince the extent to which online and mobile gaming are the preferred wagering method in today's market.

However, as online and mobile sports betting options become more prevalent, so do the potential risks of data and information privacy breaches for companies and consumers alike, and the associated need to protect data the operators collect. The online gaming industry is heavily regulated. Alongside a careful vetting process prior to licensure by state regulators, gaming operators are subject to extensive regulatory mandates covering many obligations. State regulators require gaming operators to collect and maintain the personal identifying information of patrons at the time of account creation with the operator. Robust customer disclosures of this sort are part of what is known as Know Your Customer (KYC) regulations, which are enacted in order to verify consumers' identities and to

prevent fraudulent activity. States also enact such requirements in the regulated gaming industry in order to:

- comply with existing state or federal law, such as the Unlawful Internet Gambling Enforcement Act, the Wire Act, and the Bank Secrecy Act of 1970
- ensure that all bettors are of legal age
- prevent identity theft and fraud
- combat money laundering
- prevent access by impermissible bettors such as employees of professional sports leagues, problem gamblers, or those located outside a licensed jurisdiction

For these purposes, operators are generally mandated to collect and maintain the following patron information: (1) legal name, (2) date of birth, (3) an identifier such as a social security number (4) e-mail address, (5) residence, and (6) current geo-location. In some cases, answers to security questions are also required for purposes of account security, although such answers may also be considered sensitive personal information. After account creation, operators continually verify a patron's geolocation (with the patron's consent) throughout the gaming session and prior to the placement of wagers to prevent location fraud. Additionally, an electronic **deposit method** may be required to fund a patron's account, which entails either providing online banking details, or credit or debit card information. [3]

State Data Security Laws and Regulations

Typical state sports betting statutes lay the onus on gaming regulators to develop rules over customer data privacy and cybersecurity. For instance, the recently passed Massachusetts sports wagering bill **S269** states:

"Prior to the allowance of sports wagering in the commonwealth, in order to provide robust protections for all patrons engaged in sports wagering, the commission shall promulgate regulations to: (1) Maintain the security of wagering data, customer data and other confidential information from unauthorized access and dissemination. Nothing in this chapter shall preclude the use of internet or cloud-based hosting of such data and information or disclosure as required by court order, other law or this chapter."

State gaming regulators generally mandate compliance with all applicable state and federal requirements for data security and information privacy as well as the use of minimum encryption standards to secure data. New York's sports wagering rules and regulations, for instance, state that a mobile sports wagering operator is responsible for, at minimum, the "employment of systems and procedures to maintain the security of authorized sports bettors' accounts and information from tampering or unauthorized access, using the minimum standard encryption of AES 256 or other [National Institute of Standards and Technology of the Department of Commerce] NIST standards." [4] Without a comprehensive federal privacy law, five states have now enacted their own data privacy laws—California, Virginia, Colorado, Connecticut, and Utah. All but one of these state laws (the exception being the Utah Consumer Privacy Act) require covered entities to conduct data security assessments for processing activities that present a "heightened" risk of harm such as the processing of sensitive personal identifying information, the sale of personal data, or targeted advertising. [5]

Heightened Data Security Concerns in the Gaming Industry

Gaming operators collect this information because they are required to by law. However, possessing such information presents the need for operators to be especially vigilant when it comes to data security, as bad actors have targeted the gaming industry, alongside other industries such as banking and healthcare, for sensitive consumer data. Indeed, the number of reported personal data breach incidents have generally gone up; they rose from 45,330 in 2020 to 51,829 in 2021—an increase of 14 percent—according to the FBI's annual Internet Crime Report. [6] Paired with its wealth of users and user information, the numbers of which will continue to rise, the burgeoning online and mobile sports betting industry in the United States may appear as a high-value target for cyber-attacks and data thefts. Indeed, gaming operators and affiliates have been a target historically for their consumer records.

For example, in early 2020, MGM Resorts confirmed a data breach from summer 2019 when 10.6 million records of MGM customers' personal information were leaked on a Russian hacking forum. The records included customers' full names, home addresses,

phone numbers, emails, and dates of birth. [7] In May 2022, the incident resurfaced, when a data dump was discovered containing 142 million of the same records from the MGM Resorts incident. While no financial, payment card, or password data was stolen, all 142 million records went on sale on the dark web for US $2,900. [8] The information was originally retrieved by hackers through unauthorized access to a cloud server.

In another instance, in March 2020, an attempt was made to access the consumer data of more than 50 sportsbooks powered by SBTech, a sports betting platform provider which was acquired by DraftKings in April 2020. Luckily, the matter was resolved before any information was compromised, as SBTech's monitoring system flagged the potential security threat and SBTech accordingly shut off its data centers. [9] Two such sportsbook platforms affected by the server shutdown were Churchill Downs' BetAmerica-branded sportsbooks in Indiana, New Jersey, and Pennsylvania and the Oregon Lottery's sports betting application, Scoreboard. At the time, SBTech set aside $30m in cash and stock to settle any lawsuits relating to the incident, though it's unclear if any actions came about from the incident. [10]

On occasion, cybersecurity vulnerabilities may be less straightforward to identify and many attacks can go unreported. In 2018, for instance, an unnamed Las Vegas casino's system was breached through a smart thermostat in its fish tank, by which hackers retrieved customer data through the cloud. [11] In addition, hackers stole cardholder names, credit card numbers, and CVV codes from Hard Rock Las Vegas customers on three different occasions.

In general, gaming operators tend to rely on encryption and authentication technology licensed from third-party specialists to securely transmit confidential and sensitive information, but such specialists and malicious actors are in a perpetual arms race against one another. Certain gaming operators have publicly stated that they have been and expect to continue to be subject to attempts to gain unauthorized access to information systems and databases in which sensitive customer data is stored. Despite such instances, the secure maintenance and transmission of sensitive customer data is a critical element of any gaming operators' operations. As such, they should devote a significant amount of resources to ensure that their systems are secure in order to minimize the risk of breaches affecting customers, lest their customers as well as their reputation and business be harmed in the process.

[1] https://www.americangaming.org/research/state-gaming-map/

[2] https://www.gamingtoday.com/revenue/

[3] Other commonly accepted deposit methods include gift cards or PayPal, although online banking is recommended in most cases.

[4] https://www.gaming.ny.gov/pdf/legal/SGC-35-21-00010%20Sports%20wagering%20and%20mobile%20sports%20wagering%20rule%20text.pdf. For more on NIST standards and AES 256 encryption, see the following, respectively:

https://www.nist.gov/standards.

https://www.n-able.com/blog/aes-256-encryption-algorithm

[5] https://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-related-to-internet-privacy.aspx

[6] https://www.ic3.gov/Media/PDF/AnnualReport/2021_IC3Report.pdf

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[8] https://www.casino.org/news/mgm-resorts-data-hack-customer-info-stolen-in-2019-now-on-telegram/

[9] https://igamingbusiness.com/sports-betting/sbtech-powered-sites-taken-offline-by-cyberattack/

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[11] https://www.casino.org/news/hackers-stole-las-vegas-casino-high-roller-database-via-its-fish-tank/

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Former Collegiate Field Hockey Player Appeals Ruling that Dismissed Her Concussion Lawsuit Against NCAA, American University

An American University (AU) field hockey player has filed a notice of appeal with the US Court of Appeals for the D.C. Circuit regarding a district court's dismissal of her negligence claim against the school and NCAA.

While the district court did award the plaintiff, Jennifer Bradley, a $1.7 million verdict against another one of the defendants – the federal government, that was clearly not enough.

Specifically, Bradley disagreed with the district court's finding that she failed to show the actions of the NCAA were the proximate cause of her injury and that her claim against AU was invalid because she signed an acknowledgment of risk form, effectively agreeing to hold the school harmless.

By way of background, Bradley was hit in the head during a field hockey game between AU and Richmond University in 2011. Subsequent to that hit, she allegedly began experiencing symptoms of a concussion arising from previous head injuries. Yet, she continued participating in field hockey practices and games based on the advice of the team physician, until she suffered the aforementioned blow that ended her career.

She subsequently sued the NCAA, the Patriot League, the federal government, AU, and others in Superior Court of the District of Columbia. The litigation was consolidated into federal court.

In the previous ruling, the district court held that "there is nothing of a factual nature in the record to support the plaintiff's conclusory allegation that the NCAA did anything that was the proximate cause of her injuries."

It also agreed with AU that "because the Acknowledgement of Risk form signed by the plaintiff applies to injuries arising from inherent risks of the sport, such as concussions, as well as the subsequent treatment of such injuries, the university (is) entitled to summary judgment as a matter of law," Univ. Defs.' Mem. at 20, and "concludes that the District of Columbia would apply its normal rule enforcing waivers that are clear and unambiguous," Jaffe I, 276 F. Supp. 2d at 110. Because the waiver signed by the plaintiff "meets these criteria, the plaintiff's claims of negligence and medical malpractice claims against the University defendants are therefore barred."

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Holland & Knight Goes All in in Sports Law, Raiding Quartet of Attorneys at Mintz Levin

For almost a decade, attorneys Keith Carroll and Tyrone Thomas have been a fixture in the sports industry, representing their law firm, Mintz Levin, at conferences and meetings as well as cultivating some notable clients.

Now the duo, along with fellow Mintz attorneys Anthony Mulrain and O'Kelly E. McWilliams III, will operate with a different calling card in light of the recent announcement that they will be joining Holland & Knight.

Previously, Holland & Knight had only a modest footprint in the practice area. The biggest news over the last five years, for example, was Title IX expert Janet Judge joining the firm in 2017. But she departed earlier this year, leaving Tampa Lawyer David Lisko as one of the firm's only attorneys who is active in the industry.

With the hire of this foursome, Holland & Knight is "ushering in a new era for its Sports and Entertainment Law practice."

Carroll, Mulrain and Thomas will collectively lead the practice. Carroll will remain in Boston, while Mulrain is in New York and Atlanta, while McWilliams and Thomas are in the Washington, D.C. area.

With regard to McWilliams, the firm was more interested in his ability to boost "its growing private equity practice. In addition to advising clients in the sports and entertainment industry, McWilliams works directly with private equity firms and hedge funds," according to the firm.

Christopher G. Kelly, leader of Holland & Knight's Litigation Section, noted that "given the firm's significant and growing opportunities in the sports and entertainment industries, there was no better time to commit increased resources to take the firm to new and higher levels. With Ty, Tony and Keith and their national reputations in sports and entertainment law, our abilities to service clients in these multibillion-dollar industries are demonstrably enhanced. Just as importantly, their collective track record, national recognition and extensive contacts present a fantastic opportunity for the firm to develop and attract talented lawyers in these areas."

Jose Sirven, leader of Holland & Knight's Business Section added that "the team has built an impressive practice, and, just as important, they share our philosophy of working collaboratively across multiple disciplines to deliver world-class client service. They each have different strengths and backgrounds, but together they are a powerhouse team that can handle everything from finance and marketing deals to high-profile disputes. With their help, we can build an industry-leading team that understands how the industry is evolving and innovates alongside our clients."

Carroll regularly advises prominent professional sports franchises, senior executives, and athletes with regard to league investigations, business disputes, and

other sensitive and high-profile matters. He has been trial counsel for more than 20 matters taken to verdict, decision or award in numerous state and federal courts and arbitration forums, and has also successfully represented multiple clients in investigations conducted by Major League Baseball (MLB), the National Hockey League (NHL) and the National Basketball Players Association (NBPA). He has also been trial counsel in multiple sports-related arbitrations and conducted internal investigations for sports industry clients. Carroll has been recognized as a leading sports law practitioner by Chambers USA. Carroll earned a J.D. degree from Georgetown University Law Center and a B.A. degree from Georgetown University.

Mulrain handles a broad range of matters for creatives, talent, studios, networks, executives, agencies, teams, leagues and companies in the entertainment and sports industries and beyond. He has been ranked for both Sports Law and eSports by Chambers USA. He initially began working with entertainment clients when he was engaged by a publicly traded multibillion-dollar mass media company to handle litigation. His successful resolution of disputes for that client led to representing actors, writers, producers and directors in the motion picture and television businesses in transactions with studios and production companies. He has extensive experience advising and counseling professional athletes, sports agencies, sports leagues, Olympic sport governing bodies and boxing promoters, as well as regularly representing players in the NBA, National Football League (NFL) and MLB, including at least one No. 1 overall draft pick in all three major sports. Prior to joining Mintz Levin, Mulrain served as the founding and managing partner in the Atlanta office of Gordon & Rees. Mulrain earned a J.D. degree from Rutgers Law School and a B.B.A from Iona University.

Thomas, who actually left his firm for Holland & Knight earlier this summer, represents clients on complex legal issues in both collegiate and professional athletics. He advises boards and senior executives on employment, consulting, and executive compensation agreements. Thomas is a member of the Sports Lawyers Association and is a past deputy general counsel for the National Bar Association. He frequently speaks at national employment and sports law conferences and forums. Thomas is nationally recognized for his experience in sports matters and has served as a legal analyst for The New York Times, ESPN, Forbes, Sports Litigation Alert, and others. At Mintz Levin, was chair of Mintz's Diversity Committee and member of the firm's governing Policy Committee.

"I'm really excited to join a firm with the extensive resources and broad reach that Holland & Knight has, especially in the executive compensation and education practices," said Thomas. who received his J.D. degree from Tulane University Law School and his B.A. degree from Dartmouth College.

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Next Steps Toward Legalized Online and Retail Sports Betting in Massachusetts

By Sara Dalsheim, of Ifrah Law

The road to legalized sports betting in Massachusetts has been slow and lengthy, the lawmakers have spent five sessions on the question of sports betting legalization. Last month, the Massachusetts state House and Senate reached an agreement on a bill that would legalize online and retail sports betting on professional and some collegiate contests (H 5164). Sports betting on Massachusetts colleges and universities will only be permitted for play in tournaments like March Madness.

Under the bill, Massachusetts's slot parlors, casinos, and racetracks will be able to obtain sports betting licenses and each casino is permitted to partner with two mobile betting platforms. The state will also grant seven additional stand-alone mobile betting platform licenses. The bill provides that in-person bets are subject to a 15% tax rate, and 20% tax rate for bets placed through mobile platforms. Additionally, Massachusetts bettors will not be allowed to use credit cards to fund their accounts.

The Massachusetts sports betting licenses are subject to a $5,000,000 application fee. The bill declares the state will grant three categories of operational licenses and mentions occupational licenses for those so designated by the Massachusetts gaming commission. However, there is limited to no

mention of the specific licensing requirements for sports wagering suppliers and affiliates.

Speaking of affiliates, this bill leaves out a proposal for a strict advertising ban initially set forth by the state's Senate. In previous bill proposals the Senate called for a "whistle-to-whistle" ban on sportsbook ads during live sporting events. This compromised bill does not include such a strict advertising ban but given the past concerns there is room to believe that advertising may be strictly monitored and leading to the supposition that licenses and/or registrations will likely be required for affiliates in Massachusetts. We will continue to monitor and track the progress of this bill and all regulations regarding sports betting advertising requirements.

The bill will now head to Governor Charlie Baker's desk, where it is expected to be signed.

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Sports Lawyer Richard Ensor Announces Retirement as MAAC Commissioner

Metro Atlantic Athletic Conference (MAAC) Commissioner Richard J. Ensor, Esq., has announced his retirement, effective at the end of the 2022-23 season.

Ensor, the longest tenured NCAA Division I multi-sport conference commissioner, has held his post at the MAAC since August 1988. He has been active in the sports law community as a long-time member of the Sports Lawyers Association, where he currently serves as Treasurer.

He has attracted plenty of fans during his career, such as long-time sports lawyer Gregg Clifton, a partner at Lewis Brisbois.

"Rich is a true icon in collegiate athletics," Clifton told Sports Litigation Alert. "Rich has focused his entire career on helping to grow and advance opportunities for all college athletes. In particular, while growing the national and international reputation of the MAAC conference and its individual member schools, he has pushed for the advancement of opportunities for women athletes and been a tireless leader pushing for equity while serving in various leadership roles on numerous boards and committees. His leadership of the MAAC stands as a role model for all conference commissioners. His commitment to college athletics will be severely missed."

A pioneer of gender equity, Ensor has been involved with the growth of women's sports and more specifically, women's basketball. He serves on the boards of the Women's Basketball Coaches Association, the Women's Basketball Hall of Fame, has chaired the Women's Basketball Oversight Committee and has been a past member of the NCAA Division I Women's Basketball Committee. Ensor was instrumental in combining the women's basketball tournament with the men's basketball tournament in 1992 at what was then called Knickerbocker Arena in Albany, NY (currently MVP Arena), having both tournaments run simultaneously at the same neutral site for 30 consecutive years – the longest running combined neutral site basketball tournaments in DI. The WBCA has honored Ensor twice for his contributions to women's basketball with the coach's association's Presidents Award in 2014 and as its Administrator of the Year in 2015.

Ensor is a 1975 graduate of MAAC charter member, Saint Peter's University (formerly College). In 1982, he was awarded a Master's degree in sports management with honors from the University of Massachusetts, Amherst and in 1987 he graduated from Seton Hall University's School of Law and was admitted to the New Jersey Bar in June of that year. Ensor has served in many administrative capacities in college sports prior to his time as MAAC Commissioner, including positions at his alma mater, Saint Louis University and Seton Hall University.

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Sports Lawyers Share Insight in: 'Welcome to the Metaverse – And the Virtual Pitfalls that Await'

By Ellen M. Zavian and Norman Wain

(This article originally appeared in ACC Docket and reprinted herein with permission.)

Cheat Sheet

- ***The metaverse***. First coined in a novel in 1992 and often described as a network of 3D virtual worlds, there is no clear definition of the metaverse.
- ***In-house involvement***. As companies expand into the metaverse, their in-house counsel are at the table aiding these decisions and leading the charge into the undefined legal space.
- ***The future of labor and employment law.*** With employees engaging in extended reality, employers will have to consider online code of conducts, crypto-compensation, and liabilities.
- ***Intellectual property (IP), data privacy, and jurisdiction***. The unique issues IP and data privacy present in global and international matters will compound in virtual words and present new problems and questions for lawyers.

In 1992, American author Neal Stephenson coined the term "metaverse" to describe the fictional world in his novel, **Snow Crash**. Metaverse was used to describe a world where people interact with various types of software in a three-dimensional space.

Wikipedia's description of the metaverse is a "network of 3D virtual worlds" with the convergence and shared features based on what the internet will offer in the future. And the Merriam-Webster Dictionary has the term noted on its "**Words We're Watching**" page with a note that the word is too new to thoroughly describe and list in its main pages. Despite a great deal of mainstream coverage on the topic, a clear definition has not surfaced. It's not surprising, therefore, that **Black's Law Dictionary** hasn't listed it.

And so, as we are about to dive into a virtual space, a place where digital and physical worlds converge, we don't know how much our current laws apply.

Come with me and you'll be in a world of virtual imagination

We'll overlay a few legal concepts on a shifting word in this article that will no doubt bring much angst to our future selves. With millions of people already spending countless hours immersed in a three-dimensional virtual world (video games, running virtual businesses, etc.), some would say lawyers are late to the game already.

With millions of people already spending countless hours immersed in a three-dimensional virtual world (video games, running virtual businesses, etc.), some would say the lawyers are late to the game already.

Conversely, others might say we are leading the charge. After all, profit-seeking companies are currently controlling the metaverse narrative and that means in-house counsel are at the table aiding in the decisions. **Well-known tech giants** like **Microsoft**, **Facebook (Meta)**, and **Nvidia** are pushing the value up while a chorus of investors and startups try to jump on the bandwagon as well.

But don't hitch a horse to the wagon just yet. Many believe the metaverse will only work if people have a sense of belonging, participating in a shared synchronous experience … even if they are not being paid to show up.

Current metaverse platforms serve as a case study of triumph and error for newcomers. Decentraland is a vast virtual world where users can buy virtual real estate and clothing, play games, attend concerts, hang out with other users, sell products and services, and explore. **Decentraland** is decentralized, meaning it is controlled by a network of users rather than one centralized entity. The platform has its own cryptocurrency, **MANA**, and users interact and purchase property in a space known as **LAND**.

The **Decentraland Autonomous Organization (DAO)**, Decentraland's decision-making tool, controls smart contracts regulating virtual real estate, naming rights, avatar clothing, and holds a sizeable amount of MANA to support community grants and maintain the platform. Through the **DAO**, users can vote on proposals to fund a community project, add or remove a point of interest, or ban harmful usernames. The **Security Advisory Board (SAB)**, a group of elected users, must vote to approve any changes to LAND contracts.

Despite **buy-in** from **multi-million and billion-dollar investors**, Decentraland has not escaped criticism. Specifically,

MANA being tied to a volatile crypto market;

High real estate cost – **prices have skyrocketed** to anywhere from US$500,000-3.5 million for the most in-demand virtual properties;

Long l**oad times and technological bugs**;

A rigid governance process — users were **unable to gather enough votes to ban the name "Hitler"** via the DAO; and

Lackluster user experiences — raves and concerts on the platform have been called out for being "**boring and dead**."

Some believe the metaverse is merely **Second-Life 2.0 by Linden Lab**, a two-decade-old virtual world. Linden Lab's engagement has been, according to their data, **complicated**. Specifically:

Generating US$600 million annual gross domestic product (GDP);

Creating more than US$2 billion user-generated assets; and

Paying more than US$80.4 million to creators per year.

Growth has been slow over the past 20 years for Second-Life, and many metaverse believers contribute the creeping expansion to three main design differences:

Anti-speculative market protections via a central bank;

Inflation controls to keep the exchange rate of virtual currency in check; and

Policies like a dropping the price of virtual land.

Since the metaverse relies on **cryptocurrency** and **blockchain**, many believe these technological differences will allow the platform to grow at an explosive rate, thereby allowing advertising/attention-based business models to scale quickly.

Should social connection evolve with the metaverse, there's still a need to correct the lack of empathy on current online social media platforms. For instance, current communication spaces are filled with biases, hate, and anti-social behavior. While **emoji** have tried to fill this gap, the emotional connection remains the linchpin to success.

If success is built on the need for the metaverse to be a trust-based environment, then traditional laws like employment and labor, contracts, IP, and privacy will need to be understood.

As we all get ready to build our expressive personas (**avatars**) and buy our dream piece of virtual land, those steering this ship will need to create a safe space for the full range of human expression to roam, without violating any real-world laws.

Glossary of metaverse terms

AR (Augmented Reality): Technology used to create an enhanced version of the physical world overlaid by digital information, visual elements, and sensory stimuli delivered via an electronic device.

Avatar: An image use to represent individual users.

BCI (Brain-Computer Interface): A form of interface that allows users to go directly from thought to a computer system (i.e., a chip installed in their brain).

Blockchain: A shared accounting system used to store and process transactions and assets from cash to property, including tangible and intellectual.

Cryptocurrency: Digital currency like bitcoin and ether that are based on blockchain architecture.

DAO (Decentralized Autonomous Organization): An internet community owned by its members and run on blockchain technology, using smart contracts that use code to establish rules and automatically execute decisions.

Metaverse: A "world" of user-created 3D virtual spaces in which people can work, play, shop, and socialize.

MMORPG ***(Massively Multiplayer Online Role-Playing Game)***: Video games in which millions of people interact in shared spaces.

Mirror World: An artificial intelligence, digital version of the real world that represents real people, places, and things (is part of the term, simulated reality).

MR (Mixed Reality): A blend of physical and digital worlds that interact in real-time.

NFT (Non-Fungible Token): A type of digital asset that exists on a blockchain, which can allow proof of ownership of goods in the metaverse.

SSI (Self-Sovereign Identity): A form of digital identity that provides the user full control and ownership over the identity, often built on a blockchain and not beholden to any centralized authority.

Skeumorphic Design: Like Mirror World, except the virtual objects only resemble — are not identical to — the real-world ones.

Telepresence: A digital teleportation, which is the ability to "travel" to a remote physical or virtual location via AR or VR.

VR (Virtual Reality): A computer-generated simulation of a 3D image or environment that can be interacted with by a person using special equipment.

Web2: Websites that provide user-generated content designed to motivate online interaction.

Web3: The next phase of the internet which is decentralized (perhaps running on blockchain) and not dominated by major online companies.

XR (Extended Reality): An umbrella term that covers VR, AR, and MR.

Zero Knowledge Proofs: Algorithms that permit two users to share a piece of information without the grantor disclosing any additional information to the grantee used to verify something, like a statement.

Avatars and the blockchain: How does this affect the future of labor and employment law?

Due to the pandemic, employers have begun relying on remote work options to protect employee health, maintain productivity, save costs, and retain talent. Employers are just getting accustomed to this change, however, the metaverse will introduce new challenges to the workplace, whether virtual or in real life.

Online behavior

Current applications like Second-Life or **Horizon Venues**, Meta's metaverse, serve as a case study for adapting to the metaverse and can provide employers with a glimpse of future trials and tribulations.

In 2007, a **Second Life user reported a "virtual rape"** on the platform allegedly committed by a Belgian user. In 2022, a woman claimed she was "verbally and sexually harassed" on Horizon Venues, when a group of men virtually groped her avatar and made sexually explicit comments. Second Life has built "**safety bubbles**" around users' avatars.

More than 600 **virtual reality (VR)** users — 49 percent female and 36 percent of male — said they were sexual harassed in the metaverse, according to a 2018 **survey**. Often, this harassment occurs when one user virtually gropes or makes sexually explicit comments towards a non-consenting user's avatar.

With the rise of the **#MeToo movement** bringing to light systemic sexual harassment in the workplace, employers must prepare to address these concerns in a virtual world where employees are under less supervision and inhibitions run freer at home.

With great customization comes great concerns of abuse and toxicity in the virtual workplace.

To combat sexual harassment, some companies dabbling in the metaverse have created **features** limiting how close two avatars can get to one another and concealing an avatar's hands when getting too close to another user.

Discrimination

As sexual harassment has been thrust into the spotlight, so has discrimination based on race, sex, disability, age, and other protected class status. Taking center stage will be company policies related to employee avatars. Since the metaverse allows users to express themselves through avatar customization, an employee may mirror their in-real-life (IRL) male or female appearance or decide to represent their identity with an avatar of another gender. While this provides opportunities to express one's identity, with great customization comes great concerns of abuse and toxicity in the virtual workplace.

For example, what if a white employee creates a Black avatar? Now, what if that Black avatar is designed with exaggerated racial stereotypes? What if an employee makes negative comments about another employee's avatar's skin color or use of a wheelchair?

While there are no one-size-fits-all solutions to address harassment or discrimination in the virtual workplace, employers should:

- Update employee handbooks and trainings to address virtual behavior; prepare to receive and investigate complaints.
- Treat virtual harassment and discrimination the same as their IRL counterparts.
- Plan to handle complaints lodged against third-party actors like vendors or independent contractors.
- Consider whether the virtual workplace provides further avenues for accommodation, such as those required under the Americans with Disabilities Act.

Cryptocurrency and non-fungible token paychecks

The blockchain has been inextricably tied to the metaverse with the rise of cryptocurrency and **non-fungible tokens (NFTs)**. As popular cryptocurrencies have skyrocketed in value in recent years, employers should expect requests by employees to receive crypto-compensation. Employers entertaining such inquiries must consider how these payments may be regulated, such as under US state laws and the **US Fair Labor Standards Act (FLSA)**.

As popular cryptocurrencies have skyrocketed in value in recent years, employers should expect requests by employees to receive crypto-compensation.

For instance, the FLSA requires wage payments "**in cash or negotiable instrument payable at par**." While the **US Department of Labor (DOL) has published guidance** allowing for the payment of wages in foreign currency, it remains to be seen where the DOL stands on cryptocurrency. Similarly, many US states additionally restrict the payment of wages, requiring payment in cash and/or without the employee incurring a fee for converting cash into crypto. Employers seeking to retain top talent through crypto payments must stay current on state and federal guidance while monitoring the fluctuating crypto markets.

Unions and strikes

Unionized employers may face additional hurdles. The virtual workplace will provide employees with new avenues to participate in concerted activity. Virtual picketing and strikes may become a cost-effective way to convey the pro-union message. Employers should not be surprised to see the **US National Labor Relations Board adopt new procedures** to facilitate virtual-representation elections or arbitrations that may strengthen the voting as well as the grievance process.

Virtual picketing and strikes may become a cost-effective way to convey the pro-union message.

Physical injuries

Although the metaverse exists in a 3D virtual world, the risk of IRL physical harm to users is real. Due to the inherent sensory deprivation of VR headsets, early adopters of the VR experience have reported serious injuries including fractured and broken limbs, concussions, cuts, and even a fractured spine.

The US Occupational Safety and Health Administration (OSHA) regulates and inspects worksites to ensure employee health and safety. Typically, OSHA does not inspect home offices or hold employers liable for injuries occurring in an employee's home office; however, an employee's work-related, home-office injury is recordable on an **employer's OSHA log**. Whether an employee's injury is related to work will be fact determinative.

If an **employee, using a VR headset**, is injured as they run and trip to care for a crying baby, then that injury will likely not be recordable; however, if that same employee breaks their hand after accidentally punching a wall while making exaggerative hand gestures during a VR work presentation, then that injury likely is recordable. Knowing when to record an at-home injury can be confusing for employers, and failure to properly record can lead to citations and costly fines.

... Serious injuries including fractured and broken limbs, concussions, cuts, and even a fractured spine.

While individuals have been wading into the metaverse waters, employers will soon be thrown into the deep end. It remains to be seen who will sink and who will swim.

IP ownership and commercialization in a meta-reality

If you think the metaverse is complicated already, imagine the impact that it has on intellectual property law. In the words of Disney's Aladdin, it's a "**whole new world**!" IP already presents unique issues globally, so in virtual worlds, designed by developers and companies, protecting these intellectual property assets will present new problems for lawyers to tackle. Imagine lawyers from a wide variety of practice areas working through their own assumptions regarding the scope of the metaverse as they try to legally define IP rights in a virtual world that has no borders.

Imagine lawyers from a wide variety of practice areas working through their own assumptions regarding the scope of the metaverse as they try to legally define IP rights in a virtual world that has no borders.

Sports, entertainment, and intellectual property in the metaverse

Intellectual property law is at the center of the huge commercial opportunities offered by the sports and entertainment industries. These rights (especially patents, trademarks, and broadcasting rights), and the legal protections they provide, help to secure the economic value of sport. This in turn stimulates growth of the industries and enables organizations to finance high-profile events, not to mention provide for the means to promote growth and development. Business transactions related to sponsorships, merchandising, licensing, and broadcasting are all media deals built on IP. The economic impact of the sports and entertainment industries on the world economy is enormous, so understanding these meta-realities is important.

Thus far, the sports and entertainment industries have seen lawyers take advantage of the metaverse's broad potential by establishing licensing agreements on different metaverse platforms. On platforms that invite user-generated content, agreements generally clarify steps the metaverse provider will take to remove and/or censor infringing content.

These efforts to protect brands venturing into the metaverse are still in their infancy. It is expected that governments and companies will evolve to address the regulatory needs of the metaverse, but the needs driving these policy changes are also incredibly fluid. Entities will need to closely monitor these new policies, both globally and locally, as they start navigating the metaverse. The metaverse will likely force updates to the **European General Data Protection Regulation (GDPR)** and/or the **US Digital Millennium Copyright Act (DMCA)** that are specific to virtual regulation.

For that reason, copyrights, trademarks, patents, royalties, licenses, etc. will be even more complex to navigate. Yet that isn't stopping corporations and sports brands from diving in and trying to exploit the new meta-reality. Companies like Heineken, Coca-Cola, and Hermès have already started making their presence known in the metaverse.

Heineken Silver

Heineken leapt into the arena with a new beer. Per **Global Head of Brand Bram Westenbrink**: "We know that the metaverse brings people together in a lighthearted and immersive way, but it's just not the best place to taste a new beer." Yet they created **Heineken Silver (made from the freshest pixels)**. Westenbrink says this effort was "a self-aware idea that pokes fun at us and many other brands that are jumping into the metaverse with products that are best enjoyed in the real world."

Roblox concerts

The entertainment industry has embraced the metaverse with virtual concerts. Popular programs like **Roblox**, a platform for online games and entertainment, have put on shows with stars like **Lizzo**, and even hosted **its own music festival**. Roblox content creators have also jumped in on the action. Kai, a 16-year-old Roblox influencer, has developed a program allowing her to perform for thousands of fans in seven different venues at once.

On the "field"

From a sports perspective, the metaverse also presents an entirely new playing field for sports properties to better engage with consumers and stay relevant. Each of the major sports leagues have already begun exploring different options to promote their respective leagues. They are aiming to create additional exposure for their broadcasts or digital media rights products to stay relevant and at the forefront of the minds of consumers. These varying efforts have also coincided with the rise of revenue streams that are not reliant on the live experience (especially in a world recently ravaged by a pandemic). Younger sports fans tend to be extremely familiar with how to access this content and desire greater flexibility regarding when and how to consume sporting content.

National Basketball Association and National Football League

For example, some sports, like the **National Basketball Association (NBA)** and **National Football League (NFL)**, have already secured licensing agreements in VR games. The NBA and the National Basketball Players Association collaborated with **Dapper Labs, a leading consumer blockchain company**, to develop **NBA Top Shot**, "a new digital platform for basketball fans to collect, trade, and own some of the greatest moments in league history on blockchain."

NBA Top Shot enables fans to compete head-to-head in a fun and authentic way. Meanwhile, the NFL has signed a deal to work with a VR sports game developer that will provide a first-person experience, allowing fans to play the game through the eyes of characters on the virtual football field. Additionally, the NFL has already become the first North American sports league to team up with Roblox. NFL Tycoon is an interactive game where fans take on the role of a team owner by designing virtual stadiums, collecting and trading player cards, and competing with others for in-game rewards.

Major League Baseball

With regard to **Major League Baseball** (MLB), the **Atlanta Braves became the first MLB team to tackle the metaverse** with a virtual replica of the franchise's home stadium where users can play games with other fans and access clubhouse exclusives. These Web3 products, combined with NFTs, crypto, and the blockchain, will enable the team to engage with future generations of fans.

Major League Soccer

Multiple fan "universes" are being offered by Major League Soccer. Fans compete in in-game competitions with other users for in-game collectibles, spots on the leaderboards, and bragging rights. Fans can deck out there avatar in officially licensed gear to support their favorite teams.

NFTs in sports

Lastly, NFTs allow their rights holders the ability to engage with their communities in a unique way, giving fans the opportunity to connect beyond the traditional rules of engagement. They are another powerful tool for driving fan engagement and creating strong identification between consumer and brand.

In addition, the sale of NFTs in the sports market creates yet another new revenue stream for a sports property. This platform is likely to open new opportunities for archived and newly created content, further impacting and expanding the rights of existing commercial partnerships. Sports properties can now partner with sponsors and the sale of tangible merchandise by reaching out to the communities within the evolving audience of sports fans and inviting them to claim ownership over a specific part of a sporting culture that specifically resonates with them.

Virtual potpourri – Smart contracts, data privacy, and jurisdictional quandaries

As the blockchain becomes more mainstream, the use of smart contracts will likely rise. Smart contracts allow businesses to manage digital transactions on the blockchain. Similar to standard contracts, smart contracts are programmed with terms of agreement derived from negotiations and agreements. Once conditions have been met, the program will automatically execute the remaining obligations. Smart contracts allow for speed, efficiency, and cost savings in contractual dealings by eliminating third-party middlemen and paperwork headaches. Encryptions and online storage provide safety and privacy protections.

Speaking of privacy, metaverse users may be paying an entrance fee with their personal data. Developers are poised to track a user's pupil dilations, nose scrunches, body movements, and much more in a bid to profit on user bio-information. Companies, like Meta, have already made **headlines for selling user information**. Advertisers and businesses will seek to capitalize on a potential customer whose eyes dilate when they see a new phone or fitness equipment. Online users already have little control over the collection of their personal data. As the metaverse continues to grow, so too will the discourse on this emerging topic.

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The popularity of the metaverse has been rapidly growing since the release of Stephenson's Snow Crash, however, the rules of the game have yet to be determined. Perhaps the greatest conundrum at the intersection of virtual reality and the law is which jurisdiction will apply to meta-disputes.

The metaverse is an expansive world existing outside national and international boundaries. Citizens and institutions from all across the world will be able to work closer together; however, with collaboration comes the potential for legal disputes and even more questions. What court will have jurisdiction over an employment dispute arising between a corporation in Indiana, an employee in Colorado, an independent contractor in Virginia, and freelancers in the United

Kingdom, North Africa, and Japan? How will disputes be resolved over NFT or virtual land ownership? Will forum selection clauses become more prevalent in business transactions and employment agreements? Will state, federal, or international laws apply?

A new frontier ... or business as usual?

It remains to be seen what the future holds for the metaverse. Concerns over Zoom fatigue and technology burnout have been on the rise since the pandemic, and a virtual "escape" may just exacerbate these problems. Employers may embrace the new frontier or revert to business as usual with mandatory, in-office attendance. Cryptocurrency and NFTs are still great unknowns.

On the other hand, the metaverse and augmented and virtual reality have the potential to change the world in amazing ways. Engaging with entertainment from music to sports has taken on new meaning and could increase accessibility and inclusion in these spaces. Industries like real estate can offer new personalized experiences for clients regardless of geographic location. AR could fuel advancements in surgical assistive tools. Employers can find the best candidate for the job by hiring globally and retain top talent looking for remote freedom.

While lawyers may be leading the charge into the metaverse, there is so much more to learn.

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News Briefs

Football Australia appoints Mel Mallam as General Counsel

Football Australia has announced the appointment of Mel Mallam as General Counsel. As part of her previous roles, Mallam has worked on two FIFA World Cups, the London 2012 Olympic Games, and an array of International and European Summer and Winter sporting events. Mallam's first job in sport was also at the Sydney 2000 Olympic Games. "Mel's 20 years of experience covers leadership roles across a number of global organisations and industries including with FIFA in Zurich, and we look forward to welcoming her back to her place of birth, Australia," said Football Australia Chief Executive Officer James Johnson.

Ifrah Law Selected as Finalist as Best Regulatory Law Firm of the Year

Gambling Compliance, an organizer of the Global Regulatory Awards, has announced that Ifrah Law is a finalist for Best Regulatory Law Firm of the Year. The honor was bestowed on the law firm by an independent judging panel of industry experts. Ifrah Law is a regular recipient of industry recognition. In fact, founding partner Jeff Ifrah was one of only two attorneys ranked by the prestigious Chambers USA earlier this summer in Band 1 for Gaming & Licensing Law.

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