SPORTS LITIGATION ALERT

January 13, 2023 Vol. 20, Iss. 1

Cases

Federal Court Rules in Favor of School District Holding No Property Right for Teachers in Coaching Positions

By William J. Robers, of Sparks Willson, P.C.

Judge W. Louis Sands, of the United States District Court for the Middle District of Georgia, has found in favor of the Lanier County Board of Education and its members (*Sneed v. Connell,* 2022 U.S. Dist. LEXIS 173125; 2022 WL 4454337) in a recent decision that continues the general decisions by courts that coaches do not have a property interest in their coaching position.

Case Background

At issue in the case was whether or not a teacher has a legally cognizable or constitutional right to keep a supplemental position as an athletics coach. Plaintiff Sneed was a teacher at Lanier County High School, and was the school's head baseball coach, for which

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he received a supplement of about $10,000 per year in addition to his teaching salary. During the 2020-2021 school year, Plaintiff disciplined a player by giving the player a "day off the team," after which the player quit the team altogether. The player's father, Jammie Cook, one of the Defendants and a member of the Defendant Board of Education, allegedly retaliated against Plaintiff by fabricating various stories about Plaintiff's character, and spreading false rumors about Plaintiff committing racist acts and having inappropriate relationships with minors.

Defendant School Board offered Plaintiff an assistant coaching position, but the Athletic Director at the school later informed Plaintiff that he was banned from coaching or interacting with the baseball team in any capacity, presumably as a result of the alleged retaliation by Defendant Cook and a majority of the School Board. Arguing that the ban caused serious injury to his character and reputation, Plaintiff sued Defendants, alleging a violation of due process rights pursuant to 42 U.S.C. §1983 and state law violations. Defendants filed a 12(b)(6) Motion to Dismiss for Failure to State a Claim.

The court subsequently granted the Defendants' Motion to Dismiss finding that Plaintiff did "not have a legally cognizable right or a constitutional right to keep his supplemental position of being a head baseball coach." The court also found that, although state law provides procedural protections that must be followed when demotions or nonrenewal of contracts of tenured teachers occur, the law specifically provides that such protections do not apply to positions that had no right to continued employment, including "coach, athletic director, finance officer, nurse," and other "similar positions." O.C.G.A. §20-2-942(c)(3). Therefore, regardless of whether or not Plaintiff acquired tenure in his teaching position, he could not acquire tenure or a property right in his coaching position.

Importance of Case

This case is simply another example of courts deciding that a coach has no property or constitutional right in a coaching position, citing similar decisions, including without limitation, *Sadiq v. Weller,* 610 F. App's 964, 964 (11th Cir. 2015). Resultingly, Plaintiff cannot state a claim under 42 U.S.C. § 1983 because of such a lack of constitutional protections.

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Plaintiff's Reliance on ADA to Get Extra Year of High School Eligibility Falls Short

A federal judge from the District of Oregon denied a motion for a preliminary injunction from an athlete who claimed the Oregon School Activities Association (OSAA) violated the Americans with Disabilities Act (ADA) when it declined to give him a fifth year of eligibility.

Previously, the court ruled on the plaintiff's motion for emergency temporary restraining order, denying the motion on the grounds that the plaintiff did not demonstrate the requisite "likelihood of success on the merits." Similarly, in the second instance, the court found the plaintiff's more formalized bid should also fail for the same reason.

The plaintiff in the case, D.M., was a 17-year-old senior in high school. The OSAA has a policy that limits student participation in sports to four consecutive years or eight semesters after entering ninth grade, known as 'the eight-semester rule.'

An exception to the eight-semester rule exists by way of a fifth-year hardship appeal. Specifically, a student may qualify for the exception if an Individualized Education Program (IEP) team determines that the student has a disability and was meeting certain requirements, but was unable to graduate within eight semesters primarily because of his disability, according to OSAA Handbook 35, Rule 8.2.4(b)(1). For purposes of

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this rule, "disability" is defined by the Individuals with Disabilities Education Act (IDEA) as a "child with a disability" has one or more of an enumerated list of impairments requiring "special education or related services."

The plaintiff completed the ninth and tenth grades at Marist Catholic High School. His parent enrolled him at Triumph Academy, a residential treatment program, where he repeated the tenth grade. For his eleventh-grade year, and fourth year of high school, the plaintiff enrolled in the Eugene School District. The plaintiff was entering the twelfth grade and his fifth year of high school in the Eugene School District when he sought an additional year of eligibility to compete in school sports. The plaintiff's high school submitted a fifth-year eligibility waiver request to the defendant in May of 2022, which the defendant denied the following month because the plaintiff did not meet the waiver requirements under Rule 8.2.4. In denying the plaintiff's request, the defendant noted that he did not qualify for specially designed instruction under an IEP since his year spent at Triumph Academy was a "choice," and allowing the plaintiff "to participate in contests as a fifth-year student would be taking a roster spot from an otherwise eligible student."

The court noted that Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. To succeed on a Title II claim, a plaintiff must show (1) he is a qualified individual with a disability, (2) he was excluded from participation in or otherwise discriminated against with regard to a public entity's services, programs, or activities, and (3) such exclusion or discrimination was by reason of his disability. *Lovell v. Chandler,* 303 F.3d 1039, 1052 (9th Cir. 2002). To meet Title II's "by reason of" requirement, a plaintiff must establish a causal connection between his disability and his exclusion from a public entity's program. See *Washington v. Ind. High Sch. Athletic Ass'n*, 181 F.3d 840, 848-49 (7th Cir. 1999); *Starego v. N.J. State Interscholastic Athletic Ass'n*, 970 F. Supp. 2d 303, 314 (D.N.J. 2013).

In the present case, the plaintiff must have shown that but-for his PTSD and ADHD, he would have been eligible to participate in school sports. The plaintiff claimed that his disabilities caused him to leave school and attend Triumph, ultimately missing a year of participation in OSAA-regulated sports and resulting in his ineligibility. He also claimed that his "particular circumstances required an accommodation to access OSAA's program."

According to the federal judge, "Assuming without deciding that the plaintiff's ADHD and PTSD qualify him as disabled under the ADA, the plaintiff has not demonstrated that his disabilities caused his ineligibility." The judge continued, "The record instead reflects that the plaintiff's parent chose to enroll the plaintiff at Triumph Academy to address substantial behavioral, emotional, and mental health concerns. The plaintiff acknowledges that his parent 'made the smart decision

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to send the plaintiff to Triumph Youth Services because he had really severe trauma and he was also breaking the law. If his mom hadn't made that decision [he] probably would be in jail or worse.'"

The plaintiff's therapist also confirmed that he "was sent to Triumph due to anti-social behaviors." After a few months at Triumph, a Treatment Plan Review noted that the plaintiff demonstrated "the propensity for threatening and intimidation of others, initiating fights and breaking into the property of others to steal. The plaintiff's size and strength give him the potential to harm others. [The] plaintiff continues to be in the contemplative stage of change for all of his addictive behaviors."

The record further revealed that the plaintiff's disabilities were addressed by each of his prior schools before, during, and after his time at Triumph through a 504 plan or its equivalent. These accommodations included allowing fewer assignments with additional time for completion, modeling approaches to organizing information, and permitting breaks for emotional regulation. An evaluation team at the plaintiff's school determined that an IDEA evaluation for special education eligibility and an IEP was unnecessary as "existing data [sufficiently] ruled out a suspicion of any educational disability that may require special education at this time."

The team agreed that the plaintiff's stress and anxiety "could be effectively addressed via general education supports that have been, and remain, available" to him. The team further noted that the plaintiff "never exhibited concerning behavior . . . in the academic setting."

In the court's decision, the judge wrote that despite his sympathy to the tragedy and trauma the plaintiff has suffered in his young life, the plaintiff's history of being provided accommodations at school, as well as the evaluation team's statements that his disabilities are adequately addressed by his 504 plan and other educational supports without need for an IEP, show that the plaintiff was not unable to meet the eight-semester rule due to his disabilities. Instead, based on an apparent combination of behavioral and emotional concerns, the plaintiff's parent chose to enroll the plaintiff at a school that she believed could more adequately meet the plaintiff's needs. Though the plaintiff refers to Triumph as a mental health residential treatment program, he received full academic credit and played on a rugby team during his year there. Under these circumstances, the ADA does not obligate the defendant to waive its eight-semester rule, providing the plaintiff an extra year of eligibility and taking a roster spot from another student, to accommodate the plaintiff's attendance at Triumph.

The judge further highlighted significant support in multiple circuit courts, which "concluded that waiver of the eight-semester rule and age restriction rule constitutes a fundamental alteration of a high school sports program. See *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 461-62 (6th Cir. 1997); *Sandison v. Mich. High Sch. Athletic Ass'n*, 64 F.3d 1026, 1034-35 (6th Cir. 1995); *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 929-31 (8th Cir. 1994).

While citing the OSAA Handbook, the judge wrote, "Here, a fundamental purpose of the defendant's eight-semester rule is to encourage continuous and sustained academic progress of students and to encourage graduation following the completion of eight semesters of high school." Further, the judge stated, "Despite obtaining support for his disabilities throughout his schooling and failing to demonstrate that his disabilities caused his ineligibility, the plaintiff now seeks further accommodation in the form of a waiver of the eight-semester rule. Considering the facts of this case and the above purpose behind the rule, the plaintiff's requested accommodation is not reasonable."

As a result, the judge concluded, "Because it appears that no discrimination on the basis of disability occurred, and because the plaintiff's requested accommodation is unreasonable, the plaintiff failed to meet his burden in showing a likelihood of success on the merits of his ADA claim."

D.M. v. Oregon School Activities Association; D. Oregon; Civ. No. 6:22-cv-01228-MC; 11/22/22

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Pennsylvania Appeals Court Reverses Trial Court in Negligence Case Involving a Zipline

A Pennsylvania court of appeals reversed a lower court, giving new life to the claim of a plaintiff, who sued a resort after she was injured on a zipline.

Specifically, the Superior Court of Pennsylvania found that the plaintiff, Aisha Monroe, "produced sufficient evidence that the defendant consciously engaged in conduct that created an unreasonable risk of

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physical harm to her that was substantially greater than mere negligence" to defeat the defendant's motion for summary judgment.

Monroe initiated this negligence action against Camelback Ski Resort, alleging that she was injured on the zipline as the result of Camelback's failure "to use reasonable prudence and care to take care of the customers' safety complaints" and its "acting in disregard of the rights of safety of [Monroe] and others similarly situated."

Camelback moved for summary judgment, arguing not against the "more specific pleading regarding the factual underpinnings of the allegations of recklessness Complaint," but rather that the allegations were "improper, broad and vague." It also did not object in "the nature of a demurrer by contending that the allegations of recklessness were legally insufficient."

Monroe responded with an amended complaint, "raising a single count of negligence. Therein, she repeated the averment, to which Camelback had stated no prior objection, that Camelback 'knew that there was a high risk of injury during the landing process,' and that her injury was 'a direct and proximate result of [Camelback] consciously disregarding [her] safety.'' She also amended the offending paragraph to state that Camelback's "recklessness, carelessness and negligence" included, inter alia: (a) "Failing to properly monitor the speed of the zip-line, in disregard of the safety of [Monroe]; (b) Failing to use reasonable prudence and care by leaving [Monroe] to land with no help, in disregard of the safety of [Monroe]; (c) [Left blank]; (d) Failing to use reasonable prudence and care to respond to [Monroe]'s safety concerns during the ziplining, specifically when [Monroe] ask[ed] [Camelback] to slow down the ziplining machine, in disregard of the safety of [Monroe]; and, (e) Failing to inspect and/or properly monitor the zip[-]lining machine engine, in disregard of the safety of [Monroe]."

Camelback, again, did not object to the specificity or legal sufficiency of Monroe's allegations of reckless conduct, opting instead to argue that her claim was barred by a release she signed. That document indicated that Monroe acknowledged that she assumed those risks "of which the ordinary prudent person is or should be aware" created by Camelback's amusement activities, including "injury or even death."

The release further reflected that, in consideration for the privilege of being allowed to use Camelback's facilities, Monroe agreed not to sue Camelback for any injury sustained, "even if [she] contended that such injuries [were] the result of negligence, gross negligence, or any other improper conduct for which a release is not contrary to public policy." In fact, Camelback argued that it was entitled to damages based upon Monroe's breach of the release agreement.

After a Common Pleas court sided with the defendants, the plaintiff appealed.

The appeals court sided with the plaintiff, basing its decision on Rule 1019 of the Pennsylvania Rules of Civil Procedure.

According to the court on appeal, the plaintiff's "facts do not suggest mere negligence. These allegations, viewed in the light most favorable to Monroe, sufficiently contend that Camelback engaged in intentional acts, knowing, or having reason to know facts which would lead a reasonable person to realize that it thereby created an unreasonable risk of physical harm that was substantially greater than incompetence or unskillfulness." The court cites *Bourgeois v. Snow Time, Inc*., 242 A.3d 637, 657-58 (Pa. 2020) which similarly held that a summary judgment on a claim of injury caused by recklessness was improper because, viewing expert reports in the light most favorable to the plaintiff, the ski resort defendant had a duty to bring snow-tubing patrons to a safe stop, failed to protect against unreasonable risks, and "instead increased the risk of harm to its patrons through a number of conscious acts, including using folded deceleration mats in an inadequate run-out area under fast conditions."

Finally, the court concluded, "Monroe's complaint sufficiently pled the state of mind of recklessness to defeat Camelback's motion for judgment on the pleadings, and the evidence of [the] record created genuine issues of material fact precluding the entry of summary judgment."

Aisha Monroe v. CBH20, LP, D/B/A Camelback Ski Resort D/B/A Camelback Ski Corporation; Superior Court of Pennsylvania; No. 1862 EDA 2019; 11/21/22

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Preliminary Injunction Granted in the Case of Title IX and Middle School Club Sports

By Rachel S. Silverman

This lawsuit involved female students who wanted to participate in the middle school club ice hockey team. The plaintiffs (Linnet Brooks, Aaron Brooks, Michael Lucy, Elizabeth Yoder, and Megan Abplanalp on behalf of their minor daughters) sought a declaratory judgment from the Court to resolve the alleged controversy about whether the State College Area School District ("the District") was responsible for complying with and enforcing Title IX in club sports programs.

In the plaintiffs' opening brief, the plaintiffs stated that the District declared that it had no Title IX responsibility for club sports. However, in the opposition brief, the District stated that it is not attempting to evade its Title IX responsibility and that the District agreed that Title IX applied to both club sports and intramural sports. In the plaintiffs' reply brief, they acknowledged that both the defendants and the plaintiffs were now in agreement about Title IX applying to club sports.

Since both parties were now in agreement about Title IX and club sports, the Court found declaratory judgment unnecessary. However, the remaining disagreement was whether the District's alleged conduct violated Title IX. The dispute is in the facts of the case and not in the initial questions regarding the District's Title IX responsibilities in terms of club sports. The Court thus denied the plaintiffs' Motion for Declaratory Judgment, but expected the plaintiffs to move forward in legal action against the District for their actions denying the female students the opportunity to play club ice hockey.

The Court thereafter granted the plaintiffs' Motion for a Preliminary Injunction, stating that the District could not take further action that would exclude the plaintiffs from participating in the District's ice hockey club program. Also, the District cannot relinquish any of its Title IX responsibilities to parent-run booster club organizations. Afterwards, the District was required to place the plaintiffs on an ice hockey club team roster, even if that meant the District would have to sponsor a second middle school ice hockey team. The District had to stop any efforts to block a second team from being added. To remedy the harm caused by the District's actions, the District also had to recruit female students and promote female participation in its ice hockey club program.

The Court required that a status report be filed within 45 days of the preliminary injunction to update the Court on the District's efforts to comply with these instructions.

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Brooks v. State Coll. Area Sch. Dist. 2022 U.S. Dist. LEXIS 217072

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Court Rules Premises Liability Claim Involving Outdoor Basketball Court Can Continue

A federal judge from the Central District of California denied a hotelier's motion for summary judgment in a case in which it was sued by a patron who suffered an injury involving a bench next to its basketball court. In so ruling, the court found that defendant, Marriott Resorts Hospitality Corporation, was aware of the risk and that the plaintiff should be given the benefit of the doubt in the summary judgment phase.

In November 2020, the May family—parents Melinda and Jeffrey May and their minor children, including Plaintiffs S.M. and M.M.—were staying at the Marriott Newport Coast Villas (hereafter "Resort") in Newport Coast, California.

At the 77-acre Resort, there is an outdoor area with a basketball court and putting green, known as Pacific Park. One side of the basketball court is at the bottom of a grassy slope, below the putting green. At the basketball court there were also two portable benches, which had been at the Resort since at least 2005.

On the evening of November 22, 2020, Melinda May, S.M., and M.M. were at Pacific Park. Melinda and the children walked down the grassy slope to the basketball court. The grass was wet and slippery. S.M., who was six years old at the time, slipped and grabbed one of the portable benches to break his fall. However, the bench fell and landed on S.M.'s head. The bench weighed approximately 109 pounds. The plaintiffs

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alleged that S.M. sustained a fractured skull and had to undergo emergency surgery to have plates and screws inserted following the incident.

The plaintiffs sued in Orange County Superior Court before Marriott removed the case to federal court. The plaintiffs alleged claims for negligence and premises liability as to S.M. and negligent infliction of emotional distress as to Melinda May and M.M. This led to Marriott's motion for summary judgment.

Marriott argued that (1) it maintained Pacific Park in a reasonably safe condition, so the plaintiffs' negligence and premises liability claims fail as a matter of law, and (2) Melinda May and M.M.'s claims must fail because the negligence and premises liability claims fail.

The court noted that "to prevail on a premises liability claim, a plaintiff must establish that the defendant owned or controlled the property, that the defendant was negligent in the use or maintenance of the property, that the plaintiff was harmed, and that the defendant's negligence was a substantial factor in causing the harm." *Carter v. AMTRAK*., 63 F. Supp. 3d 1118, 1144 (N.D. Cal. 2014).

Furthermore, the court noted, hoteliers have an enhanced responsibility to protect patrons.

Marriott did not contest the duty that it owed to the plaintiffs. Rather, it argued that "there was no dangerous condition, and that the plaintiffs have failed to meet their burden to show that it was aware or constructively aware of the dangerous condition." Central to its argument was the fact there had been no previous incidents involving the bench.

The instant court noted that the "question of whether the bench constituted an unreasonably dangerous condition is one for a jury to decide."

Elaborating, the court wrote: "Whether, in light of all of the evidence, including that there were never any other incidents with the portable benches, it was reasonably foreseeable that the unsecured benches created a risk of injury is a question of fact. The court cannot say that no reasonable jury could find that a 109-pound unsecured bench near a basketball court and wet grass constitutes an unreasonably dangerous condition."

The court favored the plaintiffs' argument that "the bench's placement at the time of S.M.'s injury, given the condition of the grass, was itself a dangerous condition. Once the dangerous condition is properly identified, Marriott's argument regarding knowledge or constructive knowledge collapses, as Marriott does not point to undisputed facts showing that its employees did not have actual or constructive knowledge of where the bench was or that the grass was or could be wet."

This contrasts with the "crux of Marriott's argument [which was] that the moveable bench/wet grass combination was simply not a dangerous condition."

"However, if a jury concludes that the bench's placement was unreasonably dangerous, they could find that Marriott either had actual notice, because employees walking through the park saw the bench and failed to move it, or constructive notice, because the unsecured bench sat near wet grass by the basketball court for a long enough period of time that Marriott reasonably should have discovered the danger it posed."

Melinda May et al. v. Marriott Resorts Hospitality Corporation; C.D. Cal.; CASE NO. 8:21-CV-01667-JLS-DFM; 12/5/22

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Articles

Participation by Transgender Athletes: 2022 Year in Review

By Libba Galloway, Stetson University

Participation by transgender athletes has been a hot-button issue in recent years, and this past year was no exception. The success of trans athlete Lia Thomas in NCAA women's swimming heightened concerns about competitive equity and has contributed to a multitude of legal and policy developments as to participation by transgender women in women's sports.

In 2022, many states passed laws prohibiting trans women from participating in women's sports; similar proposals failed in some states; and similar legislation is pending in other states. Federal and state courts

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entertained lawsuits challenging state laws banning trans women from participating in women's sports, as well as challenges to policies permitting trans women to participate in women's sports. From a policy standpoint, prominent sports organizations changed their rules as to participation by trans women in women's sports, in very different ways. And amidst these varying responses as to whether trans women may participate in women's sports, the most significant questions of law have remained unanswered.

State Laws

Prior to 2020, no state statutes expressly addressed whether trans women could participate in women's sports. This started changing in 2020, with Idaho's adoption of a statute banning trans women from participating in women's sports. Since then, it seems you need a scorecard to tell where trans women may and may not compete – and even then, the scorecard better be written in pencil, not ink.

The year 2022 saw legislation prohibiting trans women from participating in women's sports adopted in nine states – Arizona, Indiana, Iowa, Kentucky, Louisiana, Oklahoma, South Carolina, South Dakota, and Utah. When added to the states that passed similar legislation in 2020 and 2021 (Alabama, Arkansas, Florida, Idaho, Mississippi, Montana, Tennessee, Texas, and West Virginia), the total number of state statutes banning trans women from participating in women's sports has grown to 18.

But several of these statutes encountered legal challenges in 2022 that have at least temporarily rendered them ineffective. In *Roe v. Utah High School Activities Association*, a Utah state court granted the plaintiff's request for a preliminary injunction against enforcement of Utah's statute on the grounds that it violates equality guarantees of the Utah Constitution. In *A.M. v. Indianapolis Public Schools*, the U.S. District Court granted the plaintiff's request for a preliminary injunction against enforcement of Indiana's statute on the grounds that it violates Title IX. Additionally, in *Barrett v. Montana*, a state court held that Montana's ban on participation by trans women in women's sports in higher education violates the Montana Constitution, but the court declined to apply that holding to K-12.

As to other states, bills proposing bans on trans women participating in women's sports failed in six states – Kansas, Maryland, Missouri, New Hampshire, Pennsylvania, and Wyoming. Similar legislation is pending in a number of other states.

Policy Changes

Olympic Sports: In November of 2021, the International Olympic Committee (IOC) issued a framework for participation of transgender athletes that shifts the focus from individual testosterone levels to a sport-by-sport approach. Throughout 2022, national and international governing bodies have been scrambling to update their policies. The following list of organizations which changed their policies in 2022 shows just how much the policies vary:

World Aquatics (formerly FINA), the international governing body of swimming, diving, and water polo, now prohibits trans women who transitioned after age 11 from competing in women's events.

US Rowing now allows athletes to compete in accordance with their gender identity, but will default to international rules for collegiate rowing and international competitions.

World Triathlon now requires trans athletes to have a testosterone concentration less than 2.5 nanomoles per litre for at least two years in order to compete as women. Also, at least 48 months must have passed since the athlete has competed as a male in any sport.

NCAA: Since 2011, the NCAA has allowed trans women to compete in intercollegiate sports after one year of testosterone suppression therapy. In January of 2022, the NCAA updated its policy to align with the framework established by the IOC by requiring transgender student-athlete participation in each sport to be governed in accordance with the policy set by the national governing body of that particular sport. The policy includes phase-in provisions, and will be fully implemented in the 2023-2024 academic year.

The Leading Cases

Proponents of broad participation by trans athletes, as well as those who favor limitations on the ability of trans athletes to compete, are keeping a close eye on two federal lawsuits filed in 2020. The year 2022 saw developments in each of these cases, although not to the complete satisfaction of either side of the debate.

In the first case, *Soule v. Connecticut Association of Schools, Inc*., four cisgender girls sued the Connecticut

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Interscholastic Athletic Conference (CIAC), alleging that its policy allowing trans athletes to compete in accordance with their gender identity violates Title IX. Counterarguments were made to the effect that not only does the policy not violate Title IX, but both Title IX and the 14th Amendment's Equal Protection clause actually mandate that trans athletes be permitted to compete in accordance with their gender identity. In June of 2021, the U.S. District Court dismissed the lawsuit as not justiciable, and the plaintiffs appealed.

This past December, the Second Circuit Court of Appeals upheld the lower court's dismissal by ruling that the plaintiffs lacked standing to sue. Among other things, the Court held that the plaintiffs' claims that the participation of the transgender athletes deprived them of wins, state titles, and college scholarships were just too speculative. Attorneys for the plaintiffs are considering an appeal to the U.S. Supreme Court.

The second case, *Hecox v. Little*, involves a challenge to the Idaho statute prohibiting trans women from competing in women's sports by Lindsay Hecox, a trans woman intending to run cross-country at Boise State University. In August of 2020, the U.S. District Court issued a temporary injunction blocking enforcement of the law, based on the likelihood that the plaintiff would succeed in her claim that it violates the 14th Amendment's Equal Protection Clause.

The defendants subsequently appealed to the Ninth Circuit Court of Appeals to have the case dismissed on the grounds that the case was moot due to Hecox no longer attending Boise State. Because of factual questions that remained unanswered, the Ninth Circuit remanded the case back to the lower court. This past July, the District Court declined to dismiss the case because Hecox had re-enrolled at Boise State and might still be able to compete in cross-country there. The defendants once again appealed to the Ninth Circuit to dismiss the case, and oral arguments were conducted in November.

These two cases are clearly moving along from a procedural standpoint, but they're not providing answers to the substantive questions that many are asking. Do educational institution policies which permit trans women to participate in women's sports violate Title IX, or are educational institutions mandated by Title IX to permit trans women to participate in women's sports? Do laws which ban trans women from participating in women's sports violate the 14th Amendment's Equal Protection Clause? And will the U.S. Supreme Court ultimately be called upon to decide these questions?

The answers to these questions will likely impact the enforceability of state laws banning trans women from participating in women's sports, as well the enforceability of sports organization policies governing participation by trans women in women's sports (at least to the extent those sports are conducted in the U.S.). So unless and until these questions are answered, continue to mark your scorecard in pencil, not in ink.

Libba Galloway is Assistant Professor of Practice, Chair of the Management Department, and Director of the Business Law Program at Stetson University's School of Business

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When Actions Speak Louder Than Coaches: Imposing Liability on Contact-Sports Participants

By Kendra K. McGuire1, Charles F. Gfeller[2], and Olivia C. Tawa[3]

The Incident

Football is a popular collision sport, with almost every play involving players pushing, clashing, and running into each other. It is also a sport where emotions run hot, particularly when rival teams square off.

Despite football's inherent violence, well-established rules of play specifically delineate both permitted and prohibited contact. A breach of these universal rules can impose civil liability, and in some cases, criminal liability, on a player.

The charges filed in November of 2022 by the Washtenaw County Prosecutor's Office in Michigan provide a perfect illustration of a situation in which civil or criminal liability may be imposed on a contact sport participant due to unnecessarily violent behavior directed towards another player.

On October 29, 2022, the University of Michigan Wolverines hosted their in-state rivals, the Michigan State Spartans, for an evening game. For the first time in three years, the Wolverines defeated the Spartans, 29-7. Following the game, several Wolverines mockingly waved the Spartans off the field as the Spartans exited into their locker room through a tunnel.

Two Wolverines, graduate defensive back Gemon Green ("Green") and sophomore defensive back Ja'Den McBurrows ("McBurrows"), were walking to their locker room alongside the Spartans in the tunnel when they were suddenly physically assaulted. In a video that surfaced online shortly following the incident, Spartans can be seen pushing, punching, and kicking McBurrows. In another video, a Spartan appears to use his helmet to swing at and strike Green. Both McBurrows and Green sustained injuries as a result of the assault.

One month later, the Washtenaw County Prosecutor's Office in Michigan filed criminal assault charges against a total of seven Michigan State players for their actions in the tunnel on October 29, 2022.

Five players – redshirt sophomore linebacker Itayvion "Tank" Brown, junior safety Angelo Grose, redshirt junior cornerback Justin White, senior defensive end Brandon Wright, and freshman defensive end Zion Yong – were each charged with one misdemeanor count of aggravated assault. In Michigan, a conviction for a misdemeanor assault carries a prison term of up to one year. Additionally, senior linebacker/defensive end Jacoby Windmon was charged with one count of assault and battery, which carries a maximum sentence of 93 days in prison in Michigan.

The most serious charge, felonious assault, was brought against redshirt sophomore cornerback Khary Crump ("Crump"), who faces up to four years in prison if convicted. Crump was the player who appeared to swing his helmet at Green, which would likely account for his more serious charge. Michigan state law defines a felonious assault as an attack "using knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm."[4] To support the more serious of felonious assault, prosecutors likely argued that Crump brandished his helmet as a dangerous weapon during the attack.

All the charged players were suspended indefinitely while Michigan State, the Big Ten College Football Conference, and local police investigations took place. Another player, freshman cornerback Malcom Jones, was suspended from the team, but he was not included as a charged individual.

Legal Liability for Actions That Go Beyond the Bounds of the Sport

The University of Michigan-Michigan State incident offers valuable insight into the legal liability of the charged players for their actions taken during – or immediately following the conclusion of – a sporting event.

In addition to following the rules of play, participants generally have a duty of care to avoid causing reasonably foreseeable harm to other players.

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4 Mich. Comp. Laws § 750.82 (1994).

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However, in the context of sports, some jurisdictions apply a "contact sports exception" to the ordinary duty of care. This exception modifies the standard of care and acts as a bar to recovery for injuries caused by negligent conduct sustained in a contact sport, unless "caused by willful and wanton or intentional misconduct."[5] In other words, the "contact sports exception" makes it more difficult to sustain an action against a defendant because the plaintiff must prove that the defendant acted with recklessness or intent to cause bodily injury, not merely a failure to avoid causing reasonable harm.

In football, the rationale behind the "contact sports exception" is that football requires players to constantly come into physical contact with each other, often with great force. For example, linemen aggressively charge the opposing line shoulder to shoulder; a ball carrier risks being violently thrown to the ground, while a tackler risks jumping toward a quickly moving body.[6]

Common Defenses to Legal Liability

The "assumption of the risk defense" is frequently applied to claims arising out of participation in sporting events. Under this defense, a plaintiff's recovery is barred when the plaintiff takes action that assumes the risk of the injury. Note, however, that the "assumption of risk defense" is not recognized in all jurisdictions, and in some states, the doctrine of assumption of risk has been subsumed within the doctrine of comparative negligence.

For example, the Supreme Court of California applied the "assumption of risk defense" when it held that a defendant, who ran into and injured a co-participant when jumping for a ball during a touch-football game, did not breach a legal duty of care owed to the injured co-participant. Even though the defendant's play was rough, it was not so rough or reckless that it totally fell outside of the range of the ordinary activities involved in the sport, because jumping to catch a ball is a reasonably regular and foreseeable aspect of football. In other words, the injured co-participant assumed the risk of being injured as the result of coming into physical contact with a player who was conforming to the regulations of the sport. As a result, the injured co-participant's recovery was barred under the primary assumption of risk doctrine.[7]

Another defense that can be used to combat civil or criminal charges is the "consent defense." Generally, when an individual participates in a sporting event, he or she consents to reasonable contact in accordance with the understood rules and usage of the sport.[8] The "consent defense" fails, however, if the participant engages in such violent contact that the co-participant would not have reasonably consented to it.

In one case involving the "consent defense," the defendant was criminally charged with third-degree assault after he threw a punch while he was tackling the complainant, a ball carrier on the opposing team. The court opined that the complainant could not have legally consented to an "overly violent" activity. The defendant's actions were "overly violent" because the defendant intended to punch the complainant. As a result, the defendant's charge was upheld.[9]

In another case, decided by the Supreme Court of Virginia, a minor middle school football player filed a civil assault and battery charge against his football coach after the coach lifted the player up and slammed him on the ground during a tackling demonstration. The court held that by participating, the minor player consented to physical contact with players of like age and experience. However, the minor player did not expect or consent to his participation in an aggressive tackle by an adult football coach. The court reasoned that, while receiving an injury when tackling or being tackled may be a part of football, the coach's action – given the disparity in size and experience – could lead a reasonable person to conclude that the coach acted imprudently and with utter disregard for the involved player's safety. For these reasons, the minor player sufficiently stated a cause of action for assault and battery against his coach.[10]

In a factually similar case decided by the Western District of the Missouri Court of Appeals, a high school football player filed civil assault and battery charges against his football coaches after sustaining injuries

5 *Pfister v. Shusta,* 657 N.E.2d 1013, 1014 (Ill. 1995).

6 *Karas v. Strevell*, 884 N.E.2d 122, 132 (Ill. 2008).

7 *Knight v. Jewett*, 834 P.2d 696, 712 (Cal. 1992).

8 *Avila v. Citrus Community College Dist.*, 131 P.3d 383, 395 (Cal. 2006).

9 *People v. Freer*, 86 Misc. 2d 280, 284 (Dist. Ct. N.Y. 1976).

10 *Koffman v. Garnett,* 574 S.E.2d 258, 261 (Va. 2003).

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when he was tackled during a practice by one of the coaches, who was wearing full protective padding. The court found that the player voluntarily consented to the risks reasonably inherent in football, which included physical contact and collisions with other players, but the player's physical contact with his coach was not a reasonably foreseeable consequence of playing high school football. As such, the coaches' charges were upheld.[11]

Lessons Learned

Although the above-referenced cases involve situations where football players filed civil charges against other participants, the University of Michigan-Michigan State incident offers valuable insight into the potential criminal liability of an athlete's potentially criminal actions taken inside or outside the lines.

Taken together, the Michigan – Michigan State incident and the above-referenced cases suggest that a contact sports participant, or coach, may be held liable for their actions both on and off the field, if those actions go beyond what the other participants bargained for. Controlled violence on the gridiron is one thing – players know what they are getting themselves into; however, conduct that is effectively criminal (i.e., assault and battery) or which goes beyond the bounds of what players signed up for (i.e., coaches tackling players) could lead to criminal and/or civil exposure.

For those reasons, contact sports coaches should educate their players on the civil and criminal repercussions of their on-field and off-field actions, and should also make certain that their players are following the prescribed rules of the game and not engaging in potentially reckless or criminal conduct.

Facility operators should take care to implement security procedures around the facility, including the tunnels and locker rooms. In instances of heated rivalries, where emotions can be anticipated to potentially boil over, keeping the respective teams at arms-length is advisable. Moreover, the bigger and more physically mature the players, the more security a facility operator should have in place to protect against a Michigan – Michigan State tunnel-like scenario.

As an example, at their next home game following the incident, the University of Michigan increased the security presence in and around the tunnel. It also prevented University of Michigan players from entering the tunnel until each player from the opposing team left the field at halftime and after the game to ensure the protection of all participants.

In sum, contact sports – like football – have inherent risks to participants. Sports have rules to govern players' conduct and penalties that are assessed as part of the game when rules are broken. Despite this, players and coaches alike must acknowledge the legal precedent that they are not immune from civil or criminal liability when their actions go beyond what is reasonably foreseeable to reach a level that surpasses what is acceptable.

11 *Elias v. Davis*, 535 S.W.3d 737, 746 (Mo. App. 2017).

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Loyola Marymount University Terminates Women's Soccer Coach for Cause After She Openly Discusses Mental Health Issues

By Dr. Robert J. Romano, JD, LLM, St. John's University, Senior Writer

On October 21, 2022, former Loyola Marymount University head women's soccer coach, Jenny Bindon, filed a civil lawsuit in the Superior Court of California, County of Los Angles, against her previous employer. Per her sixteen-count complaint, Coach Bindon claims the following causes of action: Breach of Contract, Breach of Implied Covenant of Good Faith and Fair Dealing, Tortious Interference with a Contract, Violation of FEHA – Disability Discrimination, Violation of FEHA – Gender Discrimination, Retaliation, Failure to Take All Reasonable Steps Necessary to Prevent Discrimination, Failure to Investigate, Defamation, Failure to Provide Payroll Records, Failure to Provide Personnel Records, Wrongful Termination in Violation of Public Policy, Intentional Infliction of Emotional Distress, and Unfair Business Practices, and Whistleblower in Violation of Labor Code 1102.5. Coach Bindon's numerous claims center around the position that she was improperly terminated by LMU

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because on her disability, gender, and as retaliation for her reporting illegal practices.[12]

Coach Bindon, who was hired by the University on December 16, 2019, after agreeing to lead the team over the next four years for a base salary of $105,000,[13] alleges that immediately after signing the contract, she faced opposition from both the student-athletes and certain members of the LMU athletic department. As stated in her complaint, Coach Bindon claims that her efforts to motivate and inspire the members of the soccer team were 'ignored and even expressly rejected', that certain 'athletes were insubordinate', and that when she directed them to work out more or differently, some of the team members 'flatly refused to do so'.[14] This lack of dedication, as alleged, interfered with the progress of other team members who wanted to work hard and improve.[15] When the former Coach sought assistance from the athletic department regarding these and other concerns, Bindon asserts in her complaint that Craig Pintens, LMU Athletic Director, together with Maria Behm, LMU Assistant Athletic Director/ Women's Soccer Sports Supervisor, both failed to support her and that Pintens even commented that there was a difference between 'coaching women and men', making it clear (to Bindon) that at LMU it did not matter whether the women's team won, but only whether the male teams won.'[16]

With this being said, however, during a time of heightened mental health awareness and understanding, one of the noteworthy claims made by Coach Binden is that LMU violated the state of California's Fair Employment and Housing Act, and in particular Section 12940(a) which prohibits discrimination in employment based on a (mental health) disability.[17] Coach Binden, who in August 2012 and while playing goalie for the New Zealand National Women's Soccer Team, was injured when 'she was kneed in the head by another player'.[18] As a result, Coach Bindon maintains that her short-term memory and certain other social skills have been affected, all of which LMU and the athletic department were fully apprised of when the school hired her as its women's soccer coach.[19]

Concerns about Coach Bindon's mental health came to the forefront after an incident resulted in her being placed on a ten-day mandatory leave. Upon her return, while meeting with her players to discuss the reasons behind her absence, Coach Bindon confided with the team that during her 'time off' she sought mental health assistance and, in one instance, contacted a suicide prevention hotline. It was this open and unguarded acknowledgment to the team that she suffers from memory loss and other mental health issues that Coach Bindon claims LMU used as a pretext to terminate her 'for cause' and release itself from paying any remaining compensation due under the terms of the contract.

As stated in the lawsuit, Coach Bindon alleges that in the email notifying her that she was being terminated from the University, LMU's athletic department expressly stated that the dismissal was predicated on the disclosure of her mental health condition to the students, citing these comments were 'inappropriate, alarming, and inconsistent with University behavioral expectations.'[20] However, Coach Bindon claims that an individual can choose whether or not to divulge a personal mental health issue to a third party or parties and, if such divulgence is made, it cannot be used against a person because it is considered protected activity under California's Fair Employment and Housing Act. Coach Bindon also asserts that by LMU referring to her mental health disclosure as 'misconduct' and then using it as the basis to terminate the employment contract 'for cause', is prima facia evidence that supports her Breach of Contract cause of action since any mental health admission cannot be considered misconduct under anti-discrimination laws, while at the same time establishing a second violation of California's Fair Employment and Housing Act.

LMU will undoubtably attempt to defend the termination by claiming that the University retains the right to dismiss an employee 'for cause' if that employee violates either the terms or conditions of the

12 Bindon vs. Loyola Marymount University, Case No. 22SMCV02032.

13 The base salary for the subsequent three years was as follows: $108,500, $111,500, and $155,000.

14 Bindon complaint, at p. 6

15 Bindon complaint, at p. 6.

16 Bindon complaint, at p. 6.

17 Bindon complaint, at p. 12.

18 Bindon complaint, at p. 5.

19 Bindon complaint, at p. 5

20 Bindon complaint, at p. 10-11.

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employment contract and that Coach Bindon did indeed violate such terms by speaking openly about her own mental health issues, which the University considers to be 'conduct and behavior (that falls) materially below the University's expectations and requirements'.[21] This may be a legitimate argument on behalf of the LMU, but, perhaps, isn't the real motivation behind the dismissal being that since hiring Coach Bindon as the its head women's soccer coach in December 2019, the team had an overall record of 1-26-1?[22] This, coupled with the fact that a college or university cannot terminate a coach 'for cause' based upon a win/loss record, left LMU with only one alternative in order to avoid paying Coach Bindon the remaining balance due under the terms of the contract – create a pretext for termination.

Within college sports there is intense pressure to not only perform at a high level, but to excel. Because of these and the other difficulties associated with the Covid-19 pandemic, colleges and universities have realized that prioritizing mental health is crucial for the overall success of its student-athletes. At the same time, it is also crucial for the overall success of its coaches, trainers, and other athletic department administrators. LMU was fully aware that Coach Bindon experienced short-term memory loss and had other mental health issues when it hired her to lead its women's soccer team. LMU may have also subsequently realized that because of these issues, it may not be in the student-athletes' best interest to continue having her as the team's head coach. That being said, however, LMU should not use Coach Bindon's openness about her mental health as a reason to terminate her 'for cause', doing so is borderline unconscionable and contrary to any advancements made in the mental health awareness area over the past several years.

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21 Bindon complaint, at 10.

22 https://www.laloyolan.com/news/former-women-s-soccer-coach-sues-lmu-alleges-gender-discrimination-and-wrongful-termination/article.

Is the NLRB Opening the Door (Again) to College Athlete Unionization?

By Harry Johnson

When a National Labor Relations Board (NLRB or the Board) regional director in December apparently took the position that a university, the Pac-12 Conference, and the National Collegiate Athletic Association (NCAA) could be considered joint employers of college athletes, it created a new path for the potential unionization of those college athletes.

Seven years ago, a similar contention came before the NLRB in the 2015 Northwestern case (full disclosure, I was on the NLRB at the time when that case came before us). The Board exercised its discretion to avoid the question of whether student-athletes could organize into a union and bargain with their school, conference, or even the NCAA itself. At the time, the NLRB said that it could not decide the issue without first having decided whether students could be classified as university employees. Just a year later, the Board examined whether graduate students at Columbia University could be considered employees under the National Labor Relations Act (NLRA or the Act). The Board found that graduate student assistants were employees under the Act, ostensibly to further the Board's commitment to encouraging collective bargaining at colleges and universities.

That was reinforced in 2021 when the NLRB's General Counsel, Jennifer Abruzzo, issued a memorandum (GC Memo 21-08) stating her litigation position that scholarship football players at Division I FBS private colleges and universities—a position basically applicable to all college scholarship athletes—should be classified as employees under the NLRA and receive all statutory protections. She took it another step by saying that universities that don't classify such college athletes as employees will be in violation of the Act.

That memorandum became the basis behind the College Basketball Players Association and the National College Players Association filing unfair labor practice charges, arguing that college athletes are employees under the NLRA, which the NLRB has now decided to prosecute.

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Two overarching ramifications exist from this prosecution decision. First, although the General Counsel took a position on this issue in September 2021 in GC Memo 21-08, that analysis makes no distinction between the training and commitment in the service of an individual athlete's desire to compete and the control related to typical employer situations. The Board will have to confront that distinction in its adjudication, months or years from now. Second, the NCAA and the conferences will likely want to plan ahead strategically for either litigation outcome: athletes are NLRA employees or they aren't.

So, how should universities, conferences, and the NCAA prepare for either outcome?

1) Think through both the upside and downside of unionization for the parties. Athletes would gain a seat at the table, and this could increase morale/recruiting of athletes, but they would lose the ability to negotiate individual deals differing from a collective bargaining agreement. Universities, conferences, and the NCAA would face higher costs generally, less discretion in their own programs, and a slower pace of change, but they would gain antitrust lawsuit immunity. The more proactive this latter "school-side" determination is, and the more unified it is, the better for all parties.

2) Prepare for how to legally engage with college athletes who are exploring organization. Under long-standing labor law rules, colleges and universities are not permitted to negatively influence or even monitor student-athletes who are involved with unions, and this includes asking athletes directly whether they support unionization.

3) Preemptively review policies that would typically be part of an athletic union negotiation. This includes any policies related to revenue shares; salary caps; name, image and likeness (NIL) rights; post-graduation rights; frequency of games or practices; team rules; Title IX issues; travel accommodations; number of free tickets to games; commercial sponsorship; and due process rights for the athletic program's rule violations, among others.

4) Connect with your NIL team on the intersection with potential unionization claims. From a compensation perspective, most unions looking to represent college athletes will seek to eliminate existing restrictions or expand opportunities for name-, image-, and likeness-related compensation and enhance their personal brands. Colleges and universities should think through compensation models, including revenue sharing between athletes and the schools.

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FTX's Collapse Should Remind Sports Teams to Be Careful When Choosing Their Sponsorship Partners

By Alexander Chester, of Duane Morris

The dramatic collapse last fall of the cryptocurrency exchange FTX will also affect those teams, arenas and other sports companies that have naming rights and sponsorship agreements with FTX.

When a sponsorship partner undergoes a dramatic collapse like that suffered by FTX last week, sports teams that have partnered with the company for naming rights and other sponsorship agreements suffer losses on multiple fronts. First, of course, is the loss of the contractually guaranteed income that the team has taken for granted when budgeting for years to come. But beyond that is the reputational harm. Sports is about winning and losing, and no team wants to be associated with a loser.

When the energy company Enron collapsed in 2001, fewer than three years into a 30-year naming rights agreement with the Houston Astros for their home ballpark, the team had to negotiate with the bankrupt company to buy back the naming rights. This was adding insult to injury, as the Astros actually had to pay Enron just to disassociate themselves from Enron.

When we negotiate sponsorship agreements for teams today, we make sure to include a clause granting the team the right to terminate the agreement at any time in the event that the sponsor — in the team's sole good faith discretion – "becomes involved in any controversy or scandal that has or may have a negative

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effect on the business, reputation or the public's perception of" of the team or the associated league. In fact, today most of the major leagues will not grant their required approval to a team's sponsorship agreement without such a clause. The Astros/Enron case is illustrative; a team should never have to buy back its sponsorship rights from a disreputable sponsorship partner.

But beyond protecting itself in its negotiated agreement with the sponsor, teams also have to be careful about who they choose as partners in the first place. Stadium/arena naming rights agreements tend to have terms of 20 years or longer. When choosing a partner that will last a generation, teams must not simply go with the highest bidder, but carefully consider the brand's (and the industry's) reputation and history, and the likelihood that the company will continue to be one with whom the team wants to be identified when the team's present ownership has passed to the next generation.

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Is It Possible to Apportion a Professional Athlete's Income on a Level Playing Field?

By Michael Semes[23]

Like everyone else, a professional athlete is required to apportion compensation earned among the state and local jurisdictions in which that compensation was earned.[24] While the rules for determining the amount of compensation subject to tax are relatively consistent, a professional athlete[25] must apportion his or her compensation by applying non-uniform and, sometimes, ambiguous or non-existent rules. We will use Michigan and California to illustrate similar tax bases but dissimilar apportionment methods. This article will conclude by asking whether dissimilar apportionment methods are fair and whether unform apportionment formulas would be a sensible and possible way to level the playing field.

California and Michigan Tax Bases

California and Michigan define a professional athlete's tax base similarly to include all income earned by the athlete from sources within the state. The most significant issue is how a state taxes various types of bonuses. Both California and Michigan include performance bonuses in their respective apportionable tax bases but exclude signing and other non-performance bonuses. The two states reach these similar results using different language.

California defines its apportionable tax base by referencing Internal Revenue Code § 61(a) definition of gross income, which "include[s] compensation for services, including fees, commissions, fringe benefits, and similar items." California Residency and Sourcing Technical Manual 3895, last updated May 3, 2022 ("California Manual") at 21. From that starting point, California expressly excludes signing bonuses and includes performance bonuses:

> *true 'signing bonus'. . . is allocated in its entirety to the state of the player's residence rather than being apportioned under the duty days formula [but] a 'playing bonus' represents compensation for services rendered during the season, and is apportionable under the duty days formula. California Manual at 83.*

Michigan reaches a similar result by imposing tax on:

- salary and wages, guaranteed payments, certain

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24 See Jared Walczak, Tyreek Hill Moved to Lower His State Taxes, and He's Not Alone, Bloomberg Law (Oct. 12, 2022), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/XDTC595C000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly93d3cuYmxvb21iZXJnbGF3LmNvbS9wcm9kdWN0L2JsYXcvc2VhcmNoL3Jlc3VsdHMvMTg4ODc3ZTQyMDQ2ZGFhOGFkY2VlNjJjMGE4Y2I3NT-MiXV0--ac4ecc2e6a367394b3e569701dcae16a65c134e9&bna_news_filter=bloomberg-law-news&criteria_id=188877e42046daa8adcee62c0a8cb753&search32=V9S9L2eSO-5B9GeJty_FW-w%3D%3D9fMYfhxLpImOvQNlvtOY9Bz3vSw9QgxToi58c-1a6rJRIaoejwpKRGkGz9QfEjQrDxh6bIxADMgsSgCbNPqg1SqC-N1OsI345sJbzZZlskz7BJgm_HCt1DsByJHk8qfP7N7yF45b5HBU3IsIhqv9Xqg%3D%3D

25 For ease of reading, the term "professional athlete" always refers to a professional athlete or player who plays games at opposing teams' locations in which the professional athlete is not a resident. It should also be noted that a professional athlete's state of residence may tax all of the athlete's income and then will grant a credit for taxes the athlete pays to other jurisdictions. The manner in which these credits are calculated is beyond the scope of this article.

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bonuses, deferred compensation, and other forms of performance-based compensation paid to a player [but not] a bonus paid for signing a contract . . . [b]ecause these bonuses are not based on performance [and] must be allocated to the player's state of residence." MI RAB 2018-27 ("2018 Bulletin") at 2.

Michigan adds additional detail by providing that:

- A bonus that is based on performance relative to the player contract, such as a bonus for a championship or playoff appearance, or any other performance-based payments, must be allocated to Michigan using the duty days method. Id.

While California and Michigan define their tax bases in substantially the same way, as explained below, they apportion those tax bases differently.

- California and Michigan Apportionment Formulas
- California Apportionment
- California apportions an athlete's tax base by the ratio of "duty days" the athlete worked in California over the total number of the athlete's duty days. California Manual at 82-83. California defines duty days as "working days from the beginning of official pre-season training through the last game in which the team competes." Id.

A professional athlete generally trains year-round, not just during the pre-, regular or post-season. Therefore, an athlete will apportion less to an opposing team's taxing jurisdiction if that jurisdiction includes training days in the denominator of its apportionment fraction.[26] In an attempt to enlarge that denominator, a professional football player argued that duty days should include all days the athlete trained during the year, including the off-season. *Wilson v. Franchise Tax Board,* 20 Cal. App. 4th 1441 (App. 2d Dis. 1993). Wilson argued that excluding "offseason football activity from duty days . . . regardless of its location, is arbitrary." Id. at 1449. The California Appellate Court, however, rejected the professional football player's argument:

The contract does not require any participation in off-season activity. The term provision [of the player's contract] also states each contract covers one football season, which would not include the off-season. Id. at 1451.

Wilson involved a player in the National Football League, which at that time had only 16 regular season games per year compared to the NBA, NHL and MLB, which play multiples of that number of games.[27] This discrepancy in number of games played in the NFL compared to other professional sports could cause one to question whether Wilson would require all professional athletes – or just NFL players – to apportion using the duty days method. However, the California Manual states that the State Board of Equalization (SBOE) "approved the use of the 'duty days' method for professional athletes." California Manual at 83 (emphasis added).

The Manual and AR 125.1 speak in terms of 'professional athletes' and do not limit its applicability to HFL players. Therefore, it is reasonable to infer that California intends not to limit the duty days apportionment to NFL players.

Nonetheless, in Legal Opinion 80-SBOE-131 (Oct. 28, 1980) the SBOE opined that an NHL player was required (or permitted) to apportion based on game days. This SBOE opinion, however, may no longer be authoritative. First, it was issued more than a decade before Wilson and more than two decades before the Manual, both of which speak in terms of 'professional athletes.' Further, Wilson dealt with an NFL player playing sixteen games per season versus the eighty-two games per season an NHL player plays. While this difference in games played lessens the disparity in the apportionment percentage yielded by the 'games played' and 'duty days' formulas, it does not change the rationale of Wilson and the SBOE Opinion that the 'duty days' formula renders a more accurate reflection of the athlete's activities in the state. Therefore, it seems like California does not limit the 'duty days' formula to NFL players.

26 A 'duty days' formula will necessarily yield a lower apportionment percentage than a 'games played' formula. This is because the number of games played in the jurisdiction (the numerator of the apportionment fraction) will be roughly the same under each formula but the denominator in a 'games played' jurisdiction will be substantially smaller than the denominator in a 'duty days' jurisdiction. Further, professional sports training seasons are similar in length but the NFL plays only 17 games per season - compared to the NBA's and NHL's 82 games and the MLB's 162 games per season. Therefore, the size of the denominator and, concomitantly, the disparity between the 'games played' and 'duty days' formulas, will be more drastic for an NFL player than the other professional sports.

27 NFL Season to Feature 17 Regular-Season Games Per Team, NFL (NFL Communications, Mar. 30, 2021), https://nflcommunications.com/Pages/NFL-Season-To-Feature-17-Regular-Season-Games-Per-Team.aspx (announcing NFL moving to a seventeen game regular season in 2022).

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While Wilson provides the apportionment rule in California, one might stop to ask several questions. Is Wilson fair? Is it reasonable to exclude off-season training days in the apportionment factor? How does a state take into account a non-resident athlete that spends a considerable portion of time training in the state during the off-season? And, from a policy perspective, what sort of guidance might a state issue if it wanted to attract athletes to spend more time training in the state during the off-season? With those questions in mind, let's turn to Michigan.

Michigan Apportionment

Michigan apportions differently from California. Michigan uses the term "total duty-days" as the denominator of its apportionment fraction and defines that term to include:

> *attendance at training camps, exhibition games, travel days, practice days, regular season and playoff games, and certain off-season promotional activities." MI RAB 2018-27 p. 1-2 (2018 Bulletin) (emphasis added).*

By including "certain off-season promotional activities" in the apportionment fraction denominator Michigan provides a larger denominator for its apportionment formula than California. Therefore, Michigan's apportionment formula reduces an athlete's Michigan apportionment percentage to the extent the athlete engages in promotional activities outside of Michigan during the off-season. As a result, a professional athlete that is not a resident of Michigan or California and working the same number of non-off-season duty days in California and Michigan would have a higher California apportionment percentage than Michigan. This result raises the question of whether both California and Michigan's formulas can be fair?

While California guidance appears to require all professional athletes to apportion using the 'duty days' formula, in 2018, Michigan published guidance expressly requiring all professional athletes to use the 'duty days' formula. See 2018 Bulletin. Prior to 2018, Michigan utilized the duty days formula for professional football, while utilizing a "games-played" formula for all other professional sports. MI RAB 1988-48 (1988 Bulletin). Under Michigan's games-played formula for other professional sports, the denominator was total games played in a season with the numerator being the number of games played in Michigan. Id. And, the formula did not include pre-season or exhibition games or off-season training. Id. However, the 2018 Bulletin applies the 'total duty days' formula to all sports. 2018 Bulletin at 1.

The foregoing comparison of the California and Michigan apportionment schemes demonstrates that states may apportion the same base using different methods. This begs the question of how wide the apportionment fairness range is: is only one apportionment method fair; can multiple apportionment methods be fair and, if so, how much latitude does a state have in crafting a fair apportionment formula? If the Supreme Court of the United States were to even grant a petition for certiorari on the issue, it is likely that it would find – as it has in the corporate tax context – that:

> *States have wide latitude in the selection of apportionment formulas and that a formula-produced assessment will only be disturbed when the taxpayer has proved by "clear and cogent evidence" that the income attributed to the State is, in fact, "out of all appropriate proportions to the business transacted . . . in that State or has "led to a grossly distorted result." Moorman Mfg. Co. v. Bair, 437 U.S. 267, 274 (1978).*

Finally, what about a sport like golf where the athlete receives a certain amount of prize money for performance in a tournament in a certain state but may not win anything in the numerous other states in which the golfer played tournaments? Should a golfer be entitled to include some equivalent to duty days in the denominator of his or her apportionment formula or is it fair to require the golfer to allocate the entire amount of prize money to the state in which the tournament was played? What about a golfer's off-season training that does not require participation of other team members?

As we have seen, states apportion a professional athlete's income differently. And, the most significant difference is the utilization of a 'duty days' or 'games played' method. Some local jurisdictions also impose income taxes, which raise the same types of fair apportionment questions.[28]

28 See *Hillenmeyer v. Cleveland Bd. of Review*, 41 N.E.3d 1164 (Ohio 2015) (requiring the city of Cleveland to use the 'duty days' method instead of the 'games played' method); see also *Francoeur v. Pittsburgh*, Docket No. GD-19-015542 (Pa. Comm. Pleas. Ct. 2019) (finding Pittsburgh Facility Fee to be a tax and places "a discrimina-

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Today, the NFL plays 17 regular-season games per year. As a result, and not considering pre- and post-season games, the games played method would apportion 5.88% (1/17) of an NFL player's income to each opposing team's state that imposes an income tax. The 'duty days' method, however, would include pre-season training and regular season practice days in the denominator of the fraction – while not increasing the numerator (except for the practices in the opposing team's jurisdiction in the week prior to the game played).

Applying the 'duty days' formula (which apportions less to the opposing team's state compared to the 'games played' formula) is financially meaningful to the athlete and the opposing team's jurisdiction. The average NFL salary for 2022 is $860,000. As mentioned above, an opposing team's state employing the 'games played' formula would apportion 5.88% (1/17) of that $860,000 to the jurisdiction – or $50,568. Assuming an average tax rate of 5%, that's about $2,528. Assuming eight away games per year, the average NFL player would pays about $20,225 less in tax under the 'duty days' formula than under the 'games played' formula. This is not an amount that an average NFL player would likely sneeze at.

Whether to apply the 'duty days' or 'games played' formula also has a significant impact on the state or local taxing jurisdiction. When that $2,528 (the tax differential per player using the 'duty days' formula versus the 'games played' formula) is multiplied by 53, the number of players on an NFL roster (and again assuming a 5% tax rate) and 8, the number of home games played, it means that the state receives about $1.1 million less revenue under the 'duty days' formula. This impact on the taxing jurisdiction is even larger when one considers the other professional sport teams. Perhaps this explains why the other major league sports associations filed amicus briefs in Hillenmeyer.[29]

Conclusion

Without clear guidance for professional athletes or agreement between the states and professional leagues, a professional athlete will continue to be taxed differently depending on the states in which he or she plays 'away games.' It follows that lack of clear guidance will increase the number of challenges professional athletes bring, which, in turn will increase the administrative burden on teams, who have to decide the amount to withhold. Regardless, the lack of uniformity causes one to ask which – all or any – apportionment formula is fair? And, would it be sensible or possible for states and professional leagues to coalesce to adopt a uniform formula? While superstar athletes may be able to take tax implications into account when choosing which team to play for, the other professional athletes do not have this luxury of such a choice. So, when the buzzer sounds, will the apportionment playing field be level?

tory burden on out-of-state residents . . ."); see also Jeff Fannell, Hock Players Settle Jock Tax Dispute, Jeff Fannell & Associates, https://taxfoundation.org/tennessee-jock-tax-gets-full-court-press/. (last visited on Oct. 29, 2022) (discussing the Tennessee tax law).

29 See note 5, above.

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$10 Million Settlement in Case of Heatstroke Death

By Rachel S. Silverman

Update to original article "Murder Charge Against High School Coaches Accused of Negligence," published November 2021.

On August 13, 2019, Imani Bell, a 16-year-old student at Elite Scholars Academy in Jonesboro, GA, died after collapsing during running drills during a basketball practice in 100-degree weather. At the time of the incident, the temperature was 98 degrees with a heat index temperature of 101 to 106. A heat advisory had been declared for Clayton Country that day. Bell was running up football stadium steps at the time of her collapse. The Georgia Bureau of Investigation's autopsy confirmed that Bell's death was due to heatstroke caused by vigorous physical exertion in the extreme heat. The official cause of death stated, "Hyperthermia and rhabdomyolysis during physical exertion with high ambient temperature," and the manner of death was listed as an accident (Albright, 2019). She had no pre-existing medical conditions.

For the defendants, the civil case named the head basketball coach, the athletic director, the principal, and the assistant principals. The civil lawsuit included multiple claims against the defendants, including failures to pay attention to the heat index, to monitor students for signs of overheating, and to provide rest periods and water

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breaks (Diaz, 2021). However, the case became a criminal case in July of 2021 when a grand jury in Clayton County indicted Head Basketball Coach LaRosa Walker-Asekere and Assistant Basketball Coach Dwight Palmer on charges of second-degree murder, cruelty to children, involuntary manslaughter, and reckless conduct. In bringing the charges, Tasha Mosley, the Clayton Country district attorney, stated that "[t]he murder charge is second degree and is based on criminal negligence as opposed to malice" (Murphy, 2021).

The school district and the parents reached a $10 million settlement for the civil case in November 2022 (CBS/AP, 2022). As part of the settlement agreement, the school district agreed to rename the gymnasium at Elite Scholars Academy in honor of Imani Bell. A ceremony was held to commemorate the renaming. The family created a foundation, the Keep Imani Foundation, which will partly be funded by money from the settlement. The foundation will offer students scholarships and assist schools in obtaining cold tubs to prevent heat stroke deaths.

The criminal case against the two coaches is still ongoing.

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South Carolina State University Settles with Coach, Who Brought Breach of Contract Lawsuit

South Carolina State University has settled a lawsuit initiated by former women's basketball coach Audra Smith, who alleged that Athletic Director Stacy Danley and the school were liable for breach of contract, defamation as well as negligent hiring and retention.

Smith will receive $250,000 from the state's Insurance Reserve Fund in connection with the litigation, which was initiated in March of 2022 after she was fired a month earlier because she exceeded the amount of scholarships in her budget and because she refused to follow gameday COVID protocols, according to a termination letter

Smith challenged the school's for firing her for "just cause" in her complaint:

> *"Plaintiff had over twenty-five years of experience coaching basketball at the college level – fourteen years as a head coach – prior to starting with Defendant SC State. Plaintiff has performed her job duties for Defendant SC State in a competent if not more than competent manner throughout her employment. Despite this, Plaintiff faced arbitrary obstacles throughout her tenure as a result of wrongful actions by Athletic Director Stacy Danley."*

Specifically, she alleged that her budget requests were often unreasonably denied and that she received no formal notice that she was exceeding the budget.

Smith also challenged the claim that she violated gameday COVID protocols when a player's parents were on the floor, arguing that she wasn't responsible for gameday facility management.

"On Feb. 19, 2022, prior to the start of a women's basketball game, Plaintiff was told that two parents were on the floor level of the Court when they were not supposed to be. Parents were on the floor to see their daughter honored on a senior night," according to the lawsuit. "Gameday management is not one of Plaintiff's job duties and it was not Plaintiff's responsibility to ask the parents to move from the court. Nevertheless, Plaintiff was issued a pretextual three-day suspension based on this relatively minor issue. Danley cited the COVID Policy as the reason for the termination even though that policy said nothing about gameday management."

In a statement, both sides declined to comment on the settlement.

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News Briefs

DLA Piper Adds Caitlin Morgan as a Partner in the Firm's Media, Sport and Entertainment industry Group

DLA Piper has announced that Caitlin Morgan will join the firm as a Dallas-based partner in the Media, Sport and Entertainment industry group. Morgan's sports practice emphasizes litigation, where she routinely advises sports organizations in class actions, multi-district litigation and commercial business disputes at the state and federal levels. Her notable work within the sports industry includes representing collegiate organizations regarding athletic grant-in-aid, name, image and likeness, concussions, return-to-play issues, licensing and telecast rights agreements.

Sports Law Expert Podcast Highlights Sports Lawyer John Tyrrell of Ricci Tyrrell Johnson & Grey

Hackney Publications has published its latest recording on the Sports Law Expert Podcast. The show features sports lawyer John E. Tyrrell, a founding member of Ricci Tyrrell Johnson & Grey and the firm's Managing Member. The segment can be heard here: **https://anchor.fm/holt-hackney/episodes/A-visit-with-Sports-Lawyer-John-Tyrrell–of-RTJG-Law-e1segrv**

Tyrrell's practice is focused on three major areas. First, he has decades of experience in the representation of operators and managers of stadiums, arenas, entertainment and recreational facilities, including professional and collegiate sports teams; golf courses; ice rinks; gymnastics facilities; rowing associations; paintball facilities; and concert and entertainment venues. Tyrrell is trial counsel to such entities, and also provides risk management and liability prevention consultation to these clients. He has developed a particular expertise in prosecuting and defending contractual indemnity and insurance claims, both at trial and through declaratory judgment proceedings. Tyrrell has lectured at training sessions for the event staff of his clients. He has also authored information guides, ticket and pass disclaimers, prospective releases, patron signage and other communication devices used at facilities.

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