SPORTS LITIGATION ALERT

February 24, 2023 Vol. 20, Iss. 4

Cases

Madison, Wisconsin Prohibited 'Friday Night Lights' at a Catholic High School: Was It NIMBY or Discrimination?

By Gary Chester, Senior Writer

The term ''NIMBY'' was first used in a 1980 Virginia newspaper article by Emilie Travel Livezey, who was describing opponents of hazardous waste material sites such as landfills. The acronym for "not in my backyard" applies to community resistance to unwanted development in residential neighborhoods. It is normally reserved for objections to power plants, apartment complexes, wind turbines, and similar uses of land.

Now, add sports facilities to the list. In the progressive college town and state capital, Madison, Wisconsin, some vocal neighbors vehemently opposed the installation of stadium lights for night football games at

Table of Contents

Here's the latest issue of Sports Litigation Alert, the nation's only subscription-based periodical reporting on the intersection of sports and the law. We also publish 11 other sports law periodicals. Visit www.hackney-publications.com to learn more.

Cases

Articles

News Briefs

Hackney Publications

a Catholic high school. Amidst community opposition, the city denied the school's application to install lights at its field.

Was this a typical NIMBY case or was there something more sinister afoot?

In Edgewood High Sch. of the Sacred Heart v. City of Madison, 2022 U.S. Dist. LEXIS 233570 (W.D. Wis. 2022), the court dealt with the issue of whether the municipality's conduct constituted religious discrimination.

THE ROAD TO LITIGATION

Edgewood High School was founded in Madison in 1881. It is a private Catholic school in the Sinsinawa Dominican tradition. In 2011, the city created Campus Institutional Districts (CIDs) for Edgewood, the University of Wisconsin-Madison (UW), and other local schools that were invited to submit master plans for future growth and development. In 2014, Edgewood and UW submitted master plans.

In 2018, Edgewood decided to upgrade its athletic field to include seating, lighting, restrooms, and concessions. The city interpreted Edgewood's master plan as restricting the use of the field to practices and physical education classes while strictly prohibiting "athletic contests." The zoning administrator in 2019 cited Edgewood for a violation of zoning ordinances by holding girls' soccer contests on the field.

Edgewood appealed to the zoning board. The board denied the appeal even though UW had arguably used its property for purposes not disclosed in the master plan and had never been cited for a violation.

Nevertheless, Edgewood did not amend its master plan to include athletic competition. Instead, the school applied for a lighting permit under a municipal ordinance. The city refused to issue the permit because the lights could be used for athletic contests that were not permitted under the master plan.

Edgewood then filed a request to repeal its master plan, a move that would put it on equal footing with other schools and enable it to install lighting. But before considering Edgewood's application, the city enacted a new outdoor lighting ordinance that would make it more difficult to install lighting.

The plaintiff filed a conditional use application in 2020 that met with the building department's approval. However, the municipal plan commission denied the application and the city common council upheld the denial in 2021. In viewing the landscape, Edgewood believed the city was treating it differently from public institutions.

DID UW RECEIVE PREFERENTIAL TREATMENT?

On May 3, 2022, Edgewood brought suit against the city, its zoning board of appeals, its planning commission, the common council, and three individuals. The complaint asserted that the defendants violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), the Free Exercise Clause, and other statutes and constitutional provisions. Trial judge William M. Conley decided the defendants' motions for summary judgment on December 30, 2022.

In its decision, the court indicated that one purpose of CIDs noted in the city's zoning regulations was to "[b]alance the ability of major institutions to change… with the need to protect the livability and vitality of adjacent neighborhoods." Judge Conley also noted that Edgewood's master plan proposed 22 new projects, but did not include a proposal for improvements to a new athletic field.

Edgewood played its home football games off-campus at Breese Stevens Field, which is also the homefield for Madison East High School, a public institution. After receiving a million-dollar grant from a private donor, Edgewood sought to install lights at its field and upgrade the track surrounding the field. Nearby neighborhoods expressed opposition to putting lights on the field. This opposition dates back to at least 1996. Edgewood was permitted to resurface the

track because it could be classified as maintenance and repair.

However, in denying Edgewood a permit to install lighting, both the plan commission and the common council considered evidence from neighboring homeowners suggesting that lighting would have a "substantial negative impact on the uses, values, and enjoyment of surrounding properties" and that Edgewood had produced no evidence to the contrary.

RLUIPA prohibits city ordinances or zoning rules from treating religious land uses worse than secular land uses. Edgewood argued that the city was wrong to interpret its master plan as precluding all athletic contests, as opposed to practices and physical education classes. The court said that the distinction was beside the key point that outdoor lighting was never identified as a future project in Edgewood's master plan. In addition, the school held athletic competitions at its field during daylight hours and had never been cited for a violation.

The court also rejected Edgewood's argument that the city had treated UW and a public high school, Vel Phillips Memorial, more favorably. The court noted: "To establish a prima facie equal-terms violation, the plaintiff must come forward with evidence of a similarly situated secular comparator that is more favorably treated." Edgewood argued that UW was permitted to install lights at its tennis stadium in 2018. Yet, the court found that UW applied for this installation prior to submitting its master plan, in contrast to Edgewood's application that was made after it had submitted its master plan.

The trial judge also found that since the plaintiff and a comparator were subject to different standards it "compels the conclusion that there was no unequal treatment."

DID A PUBLIC HIGH SCHOOL RECEIVE PREFERENTIAL TREATMENT?

Edgewood argued that the city treated it worse than Memorial High School because the city permitted Memorial to install lighting on its field. The court found that Memorial was not a valid comparator because it did not submit a master plan and was not subject to those zoning rules. Moreover, Memorial had replaced existing lighting which constitutes maintenance and repair.

The court concluded that Edgewood failed to show that either comparator was treated better under the same approval process as Edgewood, since their lighting applications were submitted at different times, under different rules, and under different circumstances. Even if Edgewood had shown that a comparator was treated more favorably, which would have shifted the burden of proof to the defendants, the court found that the defendants offered "overwhelming evidence of permissible reasons for treating plaintiff's proposed lighting project differently" in view of proximity to neighbors and the lighting, noise, and crowd concerns surrounding high school football games.

THE COURT DOES NOT SEE THE LIGHT(S)

Edgewood further argued that the city has substantially burdened its religious exercise. In rejecting the

argument, the court noted that conducting athletic events at night is not necessarily an inherent element of the Sinsinawa Dominican faith. Moreover, the Eighth Circuit and three other circuits have found that in similar circumstances the religious exercise is merely inconvenienced, but not substantially burdened.

The court stated that it "cannot conceptualize how Edgewood's religious exercise is seriously violated simply because it must schedule night games just a 15-minute drive east of its campus. In fact, the school has barely supported its assertion that playing any sports games at night is important to Edgewood's sincere religious beliefs."

The court rejected the plaintiff's free speech claim on similar grounds.

In considering state law claims, the court found that Edgewood had no vested right to outdoor lighting because its application did not strictly comply with zoning requirements. Judge Conley also followed the rule that a court should not substitute its judgment for that of decision-making bodies where there is substantial evidence to support their decisions.

Here, the plan commission considered Edgewood's application for nearly five hours and the city common council considered evidence for nearly four hours. Neighbors testified and studies were presented to show that noise levels from Edgewood were already excessive and additional noise and lighting would negatively impact property values. Edgewood's own sound study found that nighttime noise levels would exceed 70 decibels.

In granting summary judgment to all defendants, the court stated, "The Council further noted that Edgewood might not comply with suggested limits and had been dishonest with neighbors…All of this constitutes substantial evidence sufficient to support the Council's ultimate decision on appeal."

THE TAKEAWAY

Even though the facts may show that what on the surface appears to be religious discrimination this may not always be the case. Finally, if you can't fight city hall, then surely you can't fight city hall and your NIMBY neighbors.

Return to Table of Contents

The Sports World and the Collapse of the FTX House of Cards

By Jeff Birren, Senior Writer

These pages last looked at the collision between the now-infamous FTX and the sports world in December 2022. The Golden State Warriors had recently been named as a defendant in the class action lawsuit, that claimed the Warriors were joined at the hip with FTX in its chicanery. This article will bring readers up to date on that case, as well as other events in the world of sports and FTX.

The Case Against the Warriors Redux

The Complaint against the Warriors was filed in San Francisco on November 21, 2022. Elliott Lam is the lead plaintiff. The case was assigned to Federal District Court Judge Jacqueline Scott Corley. Since the filing of Lam, similar cases were filed in that district. On December 19, 2022, Judge Corley issued an order stating that three cases were related to Lam, so she had the cases reassigned to her. She also reset all filing deadlines, vacated all dates for previously set hearings, and any motions had to be re-noticed. On January 10, 2023, Judge Corley issued an identical order in a fourth case.

So far Lam has yet to break any speed records. Although the initial Complaint was filed on November 21, 2022, the Summons were not issued until December 16, 2022, and as of February 16, 2023, there were no proofs of service filed by Lam's counsel. Consequently, there are no motions to dismiss, nor Answers from the defendants. However, Lam's counsel filed a motion on February 3, 2023, to consolidate all five cases; to appoint Lam's counsel as "co-lead counsel"; appoint liaison counsel; and plaintiff's executive counsel. The notice refers to several other defendants not included in the Lam Complaint. That motion drew an opposition on February 16, 2023. Lam's motion does not mention counsel for the Warriors, but it does reference notable law firms representing the defendants in the related cases including Wilmer Cutler Pickering Hale and Dorr; Fried, Frank, Harris, Shriver & Jacobson; and Sidley & Austin. That lineup is unlikely to go quietly into the night, whenever the Summons are served, and motion practice begins.

Lam Did Not Win the Race to the Court Six days before Lam was filed, Edwin Garrison filed

a class action lawsuit in the U.S. District Court of the Southern District of Florida. The Garrison Complaint was 41 pages. It states that: "Plaintiff Garrison purchased an unregistered security from FTX in the form of a YBA and funded the account with a sufficient amount of crypto assets to earn interest on his holdings. Plaintiff Garrison did so after being exposed to some or all of Defendants' misrepresentations and omissions regarding the Deceptive FTX Platform as detailed in this complaint, and executed trades on the Deceptive FTX Platform in reliance on those misrepresentations and omissions. As a result, Plaintiff Garrison has sustained damages for which Defendants are liable." The Complaint further states that Garrison seeks "many billions of dollars in damages."

Like Lam, Samuel Bankman-Fried, FTX's mastermind, is the lead defendant. Also, like Lam, the Golden State Warriors are a named defendant. But Garrison is far more interesting, starting with its list of defendants. The Complaint also includes the following defendants: "Thomas Brady, NFL Quarterback" and "a brand ambassador of FTX"; Gisele Bundchen, Brady's then wife; NBA player Udonis Haslem, another "brand ambassador of FTX"; former MLB player and "brand ambassador" David Ortiz; "NBA player Stephen Curry", yet another "brand ambassador"; as well brand ambassadors Shaquille O'Neal, Jaguars' quarterback William Trevor Lawrence, MLB player Shohei Ohtani, professional tennis player Naomi Osaka, and various other brand ambassadors from the entertainment field. Garrison also contains links to advertisements from the brand ambassadors, something that was impossible for complaints in the past.

There are unique allegations related to Curry. Garrison alleges that he "had his own nationwide ad campaign pushing the Deceptive FTX Platform" and although "Curry repeatedly denies being cast as an expert in cryptocurrency" he stated that he did not need to be. "With FTX I have everything I need to buy, sell, and trade crypto safely" (emphasis in the original). The Complaint asserts that Curry's ads highlighted "that 'first-time,' inexperienced buyers were the intended targets of the campaign." It does not state what Curry or the other "brand ambassadors" received in exchange for their FTX endorsements.

The Garrison Complaint also has specific allegations related to the Warriors. Garrison alleges the Warriors signed an eight-figure contact with FTX that made FTX the team's "official cryptocurrency platform" and that it sold FTX's products on their exchange. Furthermore, the "partnership between the Warriors and FTX marked the first international rights partner for the Warriors" and thus, the Warriors and FTX "had a visible market presence…internationally." This sponsorship "also included the Warriors' G League team," the Warriors' "Gaming Squad," in-arena signage at the Warriors' Chase Center, and "virtual floor signage at Warriors' games." That signage, and the payments to the Warriors, are long gone.

One of the law firms representing Garrison is Boies, Schiller, & Flexner, including the formidable David Boies. Boies is no stranger to litigation in the sports world, having represented the NBAPA in a case against the NBA some years ago, and defending the NFL in a case brought by Brady and other NFL players in 2011.

The Garrison Complaint had four causes of action. Count One is for violations of Florida's Securities and Investor Protection Act. Count Two is for violations of Florida's Unfair Trade Practices Act. Count Three is for Civil Conspiracy and Count Four is for Declaratory Judgment. The Complaint contains numerous photographs showing the named defendants endorsing FTX. The case was assigned to District Court Judge K. Michael Moore. Latham & Watkins is one of the defense law firms. The Summons were issued in December 2022. Garrison filed an Amended Complaint on December 16, 2022. In early February 2023 defense counsel were granted an extension of time to respond to the Amended Complaint until April 14, 2023.

FTX and Bankruptcy

FTX took the inevitable plunge and filed for bankruptcy on November 11, 2022, in the U.S. Bankruptcy Court in Delaware. The case number is 22-11068-JTD and was assigned to Judge John T. Dorsey. Sullivan & Cromwell is one of the firms handling the case. In January 2023, FTX and their related parties filed a list of FTX "Equity Holders." Udonis Haslem, one of the Garrison defendants, is listed as having 11,466 Common Shares of FTX. That barely makes a dent in this list.

Two of the NFL's participants have been hit far harder. Patriots' owner Robert Kraft had three separate sets of shares in FTX stock and its related entities.

His "KPC Venture Capital LLC" held 479,000 Class A Common (CA) Shares in WRS (West Realm Shires), and 43,545 shares in West Realm Series A Preferred (PA) shares. In the records filed with the Court, "KPC Venture Capital" includes in its definition "thekraftgroup.com." Kraft Venture Capital also owned 111,599 Series B Preferred Shares of FTX.

Brady, Kraft's former quarterback, had 1,144,861Common Shares (CS) of FTX Trading Equity stock, listed on Exhibit B of the Equity Holders list. Other figures from the world of sports may have held FTX's discredited stock, but most shareholders are not named in the filing, but that instead states, "name on file." It is not currently possible to calculate the magnitude of their specific losses, as that is not available in court filings to date, nor is the date they purchased their shares in that filing. However, in 2019, FTX common shares reached a high of $79.36 per share, and as of this writing, are priced at $1.5991. Recently Judge Dorsey stated that creditors "will likely not close to recovering the amount of their losses, and it may take some time to recover anything." Kraft and Brady may have lost millions of dollars investing in FTX, and Brady could lose millions more as a defendant in Garrison.

Bankruptcy, Part II

It is not just athletes, owners and clubs that have been harmed by FTX's downfall. The Miami Dade Arena has also taken a major hit. The Arena had entered into a naming rights agreement with FTX, taking on the name FTX Arena for nineteen years. In return it was to receive $135,000,000. FTX failed to make the payments, so the Arena's lawyers moved quickly. Before the end of November 2022, the Arena asked Judge Dorsey to be let out of the agreement. FTX stipulated to its motion for relief.

On January 11, 2023, Judge Dorsey approved the stipulation that granted a lift of the stay imposed by the bankruptcy filing for this purpose. The two-page court order "authorized" the parties "to take all actions necessary or appropriate to effectuate the relief granted in this Order and to perform their respective obligations under the Stipulation." The "relief from the automatic stay shall be effective immediately upon entry of this Order and the 14-day stay provided in Bankruptcy Rule 4001(a)(3) shall not apply. The terms and provisions of the Stipulation shall immediately be effective and enforceable upon entry of this Order." The Court retained jurisdiction "with respect to any matters, claims, rights or disputes arising from or related to the implementation of this Order and the Stipulation."

The Arena wasted little time in removing the now infamous "FTX" from the Arena, including off the roof and court, above many entrances, and even on the shirts of various employees. That process cannot be cheap. It began to search for a new naming rights partner, and in the interim the Arena is currently named the "Miami-Dade Arena." The Miami Heat are yet another victim of the scandal, as the team was to receive $2,000,000 a year from the Dade County-FTX naming rights deal.

Criminal Charges

Federal criminal charges were filed against Bankman-Fried and other executives of FTX and its related entities. The eight felony charges include wire fraud, securities and commodities fraud, money laundering, and campaign finance violations. Several executives quickly pled guilty. Bankman-Fried was able to post a bond to remain out of jail pending the trial, with the aid of his parents. As noted in the December article, his parents are both Stanford Law School professors. His father worked for FTX for eight months. The bond was based in part on using his parents' house in Palo Alto as security. However, it must have slipped their minds that the house is on property owned by Stanford and leased to them. Consequently, there are restrictions in the lease should they try to sell the house. This apparent oops, and his father's FTX employment, could severely limit their effectiveness if they tried to testify on Bankman-Fried's behalf in Garrison or Lam.

A major focus of the criminal charges is that FTX, through its ringleaders, siphoned billions of dollars from FTX, in part to related entities in a fruitless attempt to prop up those companies. The admission of serious criminal misdeeds at FTX by some of those very ringleaders will greatly benefit the plaintiffs in Garrison and Lam as it proves their point, beyond a doubt and in advance of a trial that FTX was essentially defrauding its shareholders.

Conclusion

Given the number of civil cases filed against FTX for similar reasons, it seems appropriate for the judicial panel on multidistrict litigation to consolidate the

various cases, and this in turn would set off a scramble among plaintiffs' counsel to be named lead attorneys.

The Fall of the House of FTX is barely four months old, and already teams, owners, athletes, and an arena have been severely, financially injured by the collapse, and that is before any of the civil cases really begin. For Kraft and Brady, beneficiaries of the NFL's infamous "Fumblegate" call, there are football fans to whom the phrase "karma delayed" will come to mind. Many major law firms are already involved in the current cases, and more will likely join the parade. One can only begin to imagine how much of what remains at FTX and the individual defendants will be spent in attorney's fees and subsequent damages.

If Garrison does not settle, one can anticipate an overflowing court room when Boies cross examines, Brady, Curry, and the other sports-related brand ambassadors. This time around, the officiating judge is unlikely to protect Brady from his fumbles, nor will Curry have a home-court advantage. He may enjoy running up the basketball court, but he may find out that he can't outrun the long arm of the law. The public will see if Curry, Brady and the other "brand ambassadors" can handle the truth on the witness stand.

After the sinking of the once titanic FTX, Bankman-Fried tweeted that he was "overconfident" and "careless" with FTX's (billions) of dollars. Garrison includes pages of his Tweets, including several times admitting that he "f…ed up." No one will dispute that. Tweets are relatively new as evidence in litigation, but FTX is a groundbreaking entity. Most athletes have relatively short careers and should spend and invest wisely. FTX now teaches that clubs and athletes going forward must endorse wisely.

Return to Table of Contents

A Friendly Reminder to Collegiate Athletes: 'The Waiver' is Real

By Erik Smith*

In a recent case filed on January 13, 2023, Konrad Sinu and *Linda Szurlej v. Concordia University*, a student athlete and his mother sued a private university in Nebraska for negligence. Ultimately, the claim lacked merit due to the student and his mother signing an "Assumption of Risk and Waiver of Liability Release." The plaintiff then attempted to amend the complaint to gross negligence before the discovery period closed, but the district court denied this motion and granted summary judgment in favor of the university. The plaintiff then filed an appeal to the Supreme Court of Nebraska, claiming that the district court abused its discretion in granting the summary judgment motion. The Supreme Court affirmed the decision made by the district court, finding no abuse in discretion and the university was released from its own negligence.

Background

Concordia University is a private university located in Seward, Nebraska. Concordia University recruited Konrad Sinu, an 18-year-old student, to play on its intercollegiate men's soccer team. A month prior to moving to Nebraska from England to play for Concordia University, Sinu and his mother signed an "Assumption of Risk and Waiver of Liability Release." After about five months at the university, Sinu engaged in a mandatory strength and conditioning workout on campus. During the workout, the players performed a "face pull" exercise with a resistance band. Throughout the workout, other players altered the band from the position originally set by a university employee. As a result of this improper modification, the resistance band rested on the squat rack's "J-hook." So, when Sinu performed the exercise, the resistance band slid off the hook and caused injury to his eyes. It is unclear the severity of the eye injury and how much money in damages the student and his mother sought to recover from the university.

Discussion

Ultimately, the waiver that Sinu and his mother signed protected the university. Despite not having the words "negligence" or "fault" in the release, the claims made by the student and his mother that the release did not have clear language lacked merit. In exculpatory clauses, such as contracts, any intentions must be determined in the contents of the contract. As seen in *Kuhn v. Wells Fargo Bank of Neb.* [1], a contract must be looked at as a whole to truly be evaluated and determined that no other meaning can be interpreted by either party. That is why they can be enforced: both parties have already worked out any ambiguities prior to signing. In a recreational sports context, a plaintiff's negligence claim

can be barred when a participant signs an exculpatory contract to engage in recreational or nonessential activities [2]. By signing the release, the student and his mother both acknowledged the risks of participating in the nonessential activity and released the university from its own negligence.

The waiver specifically instructed the signees to "please visit with an attorney before signing this document" [3], which served as an opportunity for them to investigate potential ambiguities or issues with the wording of the contract. Also, the student and his mother had access to the document a month prior to him relocating to Nebraska. The district court determined that a month provided them adequate time to consult with an attorney. Considering the clear language and consequences of signing the document, the district court granted summary judgment in favor of the university because it found additional evidence presented to be futile in trying to overturn the decision. Courts do not want to invalidate contracts because this creates power that should be used rarely since it has great consequences. A court should only invalidate a contract when it is absolutely certain that it goes against public policy or contains unclear language [4]. For Sinu and his mother, they did not encounter one of those doubt-free circumstances.

Conclusion

It is understandable that Sinu and his mother encountered frustration and wanted the university to claim some accountability for the injury resulting from a mandatory workout. Sinu went to Concordia for a life-changing experience and got one—of course not in the way he expected. Let this serve as an important reminder to collegiate athletes: be 100% sure of what you are signing before you make that life-changing move. When an institution gives you a contract that explicitly tells you to consult with an attorney before signing, you probably should take them up on that.

References

[1] *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 771 N.W.2d 103 (2009). https://casetext.com/case/kuhn-v-wells-fargo-bank-of-nebraska

[2] 57A Am. Jur. 2d, supra note 6, § 62 at 112.

[3] *Kondrad Sinu and Linda Szurelej v. Concordia University*, 313 U.S. 218 (2023). https://scholar.google.com/scholar_case?case=14625943752059271460&q=recreational+sports+complex&hl=en&as_sdt=40006&as_ylo=2023

[4] *Anderson v. Nashua Corp.*, 251 Neb. 833, 840, 560 N.W.2d 446, 450 (1997). https://casetext.com/case/anderson-v-nashua-corp

** Erik Smith is a student in the Sport Management Ph.D. program at Florida State University. He is interested in campus recreation research.*

Return to Table of Contents

Court of Appeals Reverses Finding for Stetson, Concludes Release Signed by Deceased Football Player Was Not 'Clear and Unambiguous'

By Elizabeth Bulat

A Stetson University football student-athlete, Nicholas Blakely, collapsed at a football practice on August 28, 2017, which resulted in his cardiac death. His family subsequently sued Stetson.

Initially, the trial court granted summary judgment for Stetson University upon discovering two identical releases that Blakely had signed before his athletic participation at the school. In addition, the trial court also granted the family's motion for leave to amend the complaint for punitive damages. However, the family appealed the trial court's grant of summary judgment.

On appeal, the family raised two arguments. First, that "[t]he language in the releases was insufficient to be enforceable as a matter of law… [and second,] that genuine issues of material fact exist concerning the scope of the release and whether Stetson's alleged tortious conduct fell within that scope."

These arguments were considered by the Court of Appeals of Florida on December 20, 2022. After further review, the Court of Appeals determined that, "the trial court erred in granting summary judgment for the [U]niversity because the exculpatory clause was not clear and unambiguous." The Court of Appeals reversed and remanded to the trial court.

By way of background, before the fateful practice in 2017 Blakely communicated to his football team's head athletic trainer that he had symptoms such as a bad cough, chest congestion, and shallow breathing, which the trainer determined to be from a cold. Although Blakely had experienced unexplained, fleeting chest pain for years, he was instructed to participate in practice per usual despite his stated ailment. During

practice, Blakely pulled himself out of the workout due to his chest feeling tight. The football team's assistant athletic trainer, "took Blakely to the sideline, took his pulse, gave him water to cool down, removed his helmet, loosened his shoulder pads, and had him stand in the shade." Trainers observed Blakely's symptoms while he rested on the sidelines, but 45 minutes later, he collapsed and died after being unresponsive to emergency procedures or hospital treatments.

When considering the uninvestigated chest pain before Blakely's untimely death and the responses of the football team's athletic training staff on August 28, 2017, "the operative amended complaint included counts for negligence and breach of fiduciary duty." The family also claimed in their amended complaint that the releases signed by Blakely "did not mention negligence and contained contradictory and ambiguous provisions rendering the releases unenforceable."

The trial court had previously determined that the releases Blakely signed were clear and understandable. On the other hand, the Court of Appeals found three factors within the case to deem the releases that Blakely signed to be unclear and ambiguous. The first was that it, "failed to expressly inform Blakely that he was contracting away his right to sue Stetson for Stetson's negligence." The Court of Appeals considered prior precedent in *UCF Athletics Ass'n, v. Plancher*, 121 So. 3d 1097, 1101 (Fla. 5th DCA 2013), which defined enforceability of an exculpatory clause as "an injured party [with] the right to recover damages from a person negligently causing his injury" and "such clauses are strictly construed against the party seeking to be relieved of liability." Moreover, "exculpatory clauses are enforceable only where and to the extent that the intention to be relieved from liability is made clear and unequivocal. The wording must be so clear and understandable that an ordinary and knowledgeable person will know what he is contracting away."

In Blakely's case, since the release focused on the regulatory and safety risks involved with playing football rather than the University's negligence, it does not prevent Stetson from suing. However, due to the ruling in *Sanislo v. Give Kids the World, Inc*., 157 So. 3d 256 (Fla. 2015), this finding alone does not merit the exculpatory unenforceable. Listed before the exculpatory clause in both releases signed by Blakely, "[he] was advised that it was important that he comply with Stetson's medical staff's instructions regarding, inter alia, conditioning and treatment and, indeed, was required to obey such instructions." Blakely had communicated his symptoms to the medical staff at Stetson and had been obedient to their instructions, therefore, he was compliant with this section of the release.

Once again, however, the ruling in *UCF Athletics Ass'n, v. Plancher*, 121 So. 3d 1097, 1101 (Fla. 5th DCA 2013) proves that since the release "does not expressly state that the athlete would be waiving a negligence action, [this] could reasonably lead the athlete to believe that the university would be supervising his training and instructing him properly (non-negligently), and that he was only being asked to sign the exculpatory clause to cover injuries inherent in the sport." Blakely's communication and compliance with Stetson's medical staff coupled with his cardiac death's indirect relationship with the football practice's inherent activity make this, in part, a contradicting release. Not to say that Blakely would have certainly survived his cardiac episode had the trainers reacted differently, but the wording of the releases that he signed "render the exculpatory provision unclear and ambiguous."

Paired with the prior problematic provisions, the wording of the releases' concluding sentences provides a third factor to deem the contract unenforceable, according to the Court of Appeals. Specifically, the language used in these sentences includes the phrase "for myself" rather than "by myself" which implies that the release is in place for the benefit of Blakely. Further, the Court of Appeals found that the release also suggested that, "if [Blakely] follows the instructions of Stetson's athletic department personnel and causes injury to another while participating in the dangerous activity of playing football, he is released from liability."

Considering that the releases inexplicitly communicated that Blakely was waiving his right to sue Stetson for the University's negligence, included wording that implied that Blakely would be appropriately supervised and trained by Stetson's football staff, and suggested that the releases were in place for Blakely's benefit, the Court of Appeals determined that, "the exculpatory clause was not clear and unambiguous…[and] conclude[d] that the exculpatory clause relied upon by Stetson is unenforceable." Therefore, the Court of Appeals held that the trial court erred in granting summary judgment in favor of Stetson.

"On cross-appeal, Stetson argue[d] that if this Court reverses the final judgment, it should also reverse the trial court's order allowing Wilson to add a claim for punitive damages." Although The Court of Appeals found some merit to the family's claim for punitive damages, "taking the record evidence and proffered evidence in the light most favorable to Wilson, we conclude that Wilson has not met the threshold necessary to state a claim for punitive damages." This decision was determined by considering the standard set by The Florida Supreme Court. As a result, the Court of Appeals concluded that "the trial court erred in granting Wilson's motion to amend complaint to add a claim for punitive damages."

Return to Table of Contents

District Court Dismisses Gender Discrimination Claim Brought by Football Players in Sexual Misconduct Case

A federal judge has dismissed the claim of nine former University of Minnesota football players, who claimed they were victims of gender discrimination after they were accused of sexual assault in 2016.

In granting the University's motion for summary judgment, the court found that the plaintiffs failed to "produce sufficient evidence" to support their claim.

By way of background, the incident occurred in 2016 when the victim alleged that she was raped at an off-campus party by as many as a dozen players, who either participated in the rape or cheered the others on. The University determined that 10 players were guilty of sexual misconduct. Five players were subsequently expelled or suspended for violating the student conduct code, while the other five successfully appealed the finding.

The players, identified in the lawsuit as John Does, were all Black. They initially filed claims for both racial and gender discrimination, but the claim for racial discrimination was dismissed, leaving only the claim for gender discrimination, pursuant to Title IX. The players supported the latter claim by noting that no criminal charges were filed. However, the judge was not persuaded by that argument, writing that a lack of criminal prosecution "is certainly not evidence of a judicial adjudication or that plaintiffs 'were proven innocent.'"

The court also found that allegations of bias by University investigators (specifically that they used "manipulative tactics") as well as pressure from Athletic Director Mark Coyle and former President Eric Kaler, were unfounded.

The University of Minnesota was pleased with the ruling.

"The important work of preventing sexual misconduct is ongoing," a spokesperson said in a statement on the case. "We will continue to focus on sexual misconduct awareness, prevention and response through the president's Initiative to Prevent Sexual Misconduct and other programs for our students, faculty, and staff."

Return to Table of Contents

Articles

It's a Reverse! Florida Repeals its Name, Image, and Likeness Law Removing University Restrictions

By Brett Owens and Michael Bonner, of Fisher Phillips

Governor Ron DeSantis signed a bill (HB 7-B) on February 16 repealing Florida's Name, Image and Likeness (NIL) law and significantly altering student-athlete NIL compensation, as well as the involvement of Florida universities and colleges. Previously, the state's law limited universities by requiring that any NIL deals with student athletes be conducted by third-parties, or **collectives**, that have no direct ties or supervision by the universities. Now, Florida has remedied this issue by eliminating these restrictions. How will this impact universities in Florida and the collectives that have been created to support them?

What has Changed?

Florida enacted its NIL statute in 2021 with the intent of being a leader in a new world of collegiate athletics. The result, however, was an obstacle for universities in the state because the law as written did not permit the universities to "cause compensation to be directed to a current or prospective intercollegiate athlete" — whereas universities in other states were not subject to such restrictions.

Now, Florida has removed the restrictions prohibiting universities from directing compensation to student athletes, thereby allowing universities in Florida to steer endorsements deals and compensation opportunities directly to student athletes. In addition, the new law requires universities and colleges to conduct an additional financial literacy, life skills, and entrepreneurship workshop for student athletes prior to graduation. The law also protects coaches from liability for making routine decisions that could adversely affect an athlete's NIL compensation, such as benching or suspending an athlete.

How Will These Changes Affect Florida Universities and Colleges?

Previously, Florida universities could not work with third-party collectives to ensure their respective goals are aligned — since they were prohibited from causing compensation to be directed to the student athletes. Not only did this restriction put Florida universities at a substantial disadvantage when recruiting high school athletes, but it had also caused significant problems in some instances when third parties who are not affiliated with the universities made unfulfilled promises.

Now that these restrictions have been eliminated, however, Florida universities will be able to work hand-in-hand with the third parties that are actually compensating the student athletes to make the most effective use of resources when trying to attract both high school recruits and transfers from other schools.

5 Steps for Florida Universities and Colleges to Consider Taking

Due to the elimination of these restrictions, you should consider taking the following steps:

1. Assess whether you will need to create new positions in your university or can use existing resources to assist with facilitating NIL compensation to student athletes and educating them to make informed financial decisions.

2. Evaluate what student athlete information, if any, you should be sharing with collectives or other third-parties and whether there are any privacy concerns relating to exchanging such information.

3. When working with collectives or other entities that compensate your student athletes, you should take steps to ensure you are protected from joint employer liability. For example, if possible, you should try to avoid directly supervising athletes when they are performing services for compensation, conducting performance reviews or evaluations unrelated to academics or athletic performance, requiring the athletes to perform specific work in exchange for compensation, or otherwise providing equipment or training that is unrelated to their academic or athletic endeavors with the university.

4. Consider developing strategies and relationships to work cooperatively with collectives to make sure their goals are in sync with your university's goals.

5. Think about whether your current sponsors may be interested in working with student athletes and how your branding efforts and strategic communication initiatives may be impacted.

Brett Owens is a Tampa-based partner at Fisher Phillips where he helps athletic entities navigate the myriad of federal and state laws governing the employer-employee relationship to ensure compliance and reduce the risk of litigation and drafts nondisclosure, arbitration, noncompetition, and severance agreements for employers.

Michael Bonner is a Fort Lauderdale-based associate at Fisher Phillips where he advises businesses and individuals on a range of labor and employment matters and represents them in related disputes. He helps clients comply with state and federal laws and regulations, with a focus on devising forward-thinking solutions to complex business and employment issues.

Return to Table of Contents

Longtime Harvard Women's Ice Hockey Coach Facing Allegations of Abuse & Racial Discrimination

By Ellen J. Staurowsky, Ed.D., Senior Writer, Professor, Sports Media, Roy H. Park School of Communications, staurows@ithaca.edu

On January 27, 2023, Boston Globe writer Bob Hohler reported that longtime Harvard women's ice hockey coach Katey Stone was facing allegations of abusive behavior that rewarded some favored players and created a culture of fear among others. Are these allegations merely petty and vengeful complaints as one former captain and assistant coach characterized them or do they represent a power dynamic created by a controlling coach that subjected players to abusive and discriminatory treatment? Were Coach Stone's comments part of a pattern of racial discrimination against Native players and an assistant coach? (Hohler (2023).

Player Complaints Described in the Boston Globe

According to Hohler (2023), "Sixteen of Stone's former players told the Globe they fault Harvard for keeping her [Coach Stone] despite numerous complaints about her alleged abusive coaching practices" (para. 9). In total, the interviews conducted by Hohler included accounts that fell into seven categories. The coach was alleged to have

- engaged in demoralizing and denigrating behavior that was the antithesis of positive motivation;
- been insensitive to the mental health issues players faced, allegedly remarking to one player who sought professional help that the player was a burden to her team;
- pressured players to return to play sooner than they should have while urging them to endure excessive pain and minimizing the severity of traumatic brain injuries;
- body shamed players triggering eating disorders if they were either too thin or too heavy;
- prioritized hockey over their academic careers, encouraging them to take easy courses; avoid taking academic commitments that conflicted with practices; and avoid pursuing more than one major; and,
- treated players differently in terms of team discipline, with favored players receiving little if any punishment for misconduct such as drinking while other players received harsher punishments.

There were also allegations that hazing on the women's ice hockey team involving forced drinking and role playing that had sexual overtones existed as far back as 2000 continuing through at least 2016. Although Coach Stone was not directly implicated in those reports as having known about the hazing, one player indicated that they had reported the hazing to Harvard through a signed survey and was never contacted by university officials about the report.

Specific Allegations Regarding Racial Discrimination

Despite the team emerging as Ivy League and Eastern Conference Athletic Conference (ECAC) regular season champions in 2021-2022, the postseason was marred according to some players by an episode that occurred when a practice session was abruptly stopped by Coach Stone, followed by a confrontation in the locker room. Addressing a team that included three First Nations women (two players and a former captain turned assistant coach), Coach Stone is alleged to have called out the players for not respecting her, accusing them of being a "collection of skaters 'with too many chiefs and not enough Indians'" (Hohler, 2023, para. 4).

One of the players, Maryna G. Macdonald, from the Ditidaht First Nation of Canada's Vancouver Island, reported the incident to Harvard Athletics, prompting an initial response from athletic director Erin McDermott on April 8, 2022 indicating that a review would be done. Explaining that the athletic department would use the complaint as an opportunity to learn more about the experiences of athletes on the team, a monthslong administrative review was conducted. On July 19, 2022 the results of the review were shared with the team in an email from McDermott with the subject line "Onward and Upward". Athletes on the team were informed that "Coach Stone is our head coach and will remain our head coach" while also noting that there were "opportunities for improvement, particularly

with communication across several areas" (Roberts & Scott, 2023, para. 14-15). Both Macdonald, as well as Taze Thompson, a member of Metis Nation Alberta and Okanagan Indian Band, British Columbia left the team allegedly because of Harvard's failure to respond to the situation, with Thompson opting to continue her hockey career at Northeastern (Roberts & Scott, 2023; Risom, 2023).

In advance of the Boston Globe article coming out, Coach Stone had written to the team noting that the article was going to be published, expressing her position that she had "…made it a priority as your coach to acknowledge and respond to direct feedback from the women in my program about my coaching style, and make concerted efforts to better support my players' experiences" (Roberts & Scott, 2023, para. 5).

The assistant coach, Sydney Daniels, who led a storied career at Harvard, left her position following that incident, eventually being named the first woman scout in the history of the Winnipeg Jets franchise. A member of the Mistawasis Nêhiyawak First Nation in Saskatchewan, Daniels sued Harvard in January of 2023 alleging racial discrimination (Canadian Press, 2023). On behalf of the Mistawasis Council, Chief Daryl Watson (2023), issued a statement noting that "…we stand in solidarity with Sydney Daniels and all Indigenous students who have experienced racism and discrimination at Harvard University. Racism has no place in any educational institution, and it is unacceptable that Indigenous students are being subjected to mistreatment" (para. 1). The Federation of Sovereign Indigenous Nations (FSIN), an organization representing 74 First Nations in Saskatchewan, issued a statement on January 31, 2023 calling for Coach Stone's resignation. FSIN Third Vice Chair Aly Bear commented, "Racism has no place in our society or locker rooms. A place where we entrusted our First Nations young women would be free from abuse and racism. This abuse should not be tolerated by any University, especially a highly regarded institution such as Harvard University. I truly hope Harvard will stand with the Indigenous students and protect future students from this type of racist behaviour" (Risom, 2023, para. 2). The statement noted that both Macdonald's and Thompson's "…grandparents were victims of the residential school system within Canada" (Risom, 2023, para. 4).

The Coach and Her Supporters

Prior to the public airing of these allegations, Coach Stone had a national and international reputation as a highly regarded and accomplished coach. At the conclusion of her 26th year at Harvard, her teams had amassed 516 wins by the conclusion of the 2021-2022 season. Her time as head coach was interrupted only once during her tenure when she took time away to serve as the head coach of the United States Olympic Women's Ice Hockey Team that competed in the 2014 Winter Olympics in Sochi, Russia. Under her leadership, U.S. women earned a silver medal in those Games. Her record as a coach and that of her team abound with accolades and titles. The team won the Ivy League Championship nine times; the ECAC tournament championship six times; and the ECAC regular season championship eight times. Her teams earned 12 NCAA tournament appearances; 6 NCAA Frozen Four appearances; and her teams competed four times for an NCAA championship. In 2022, she was named Ivy League Coach of the Year, an honor that accompanied other awards including Boston's Most Influential Women Award in 2020 and the NCAA Silver Award in 2014 (Harvard Athletic Communications Staff, 2023).

As of this writing, Stone has served on the National Advisory Board for the Positive Coaching Alliance (PCA) since 2014. The vision for the PCA is "A world where every young person benefits from a positive youth sports experience with a coach who inspires them to become the best version of themselves in the game and in life" (PCA, 2023). One of her contributions to the PCA was a series of podcasts under the title of "Make Everyone Better" that dealt with issues like early sport specialization, recruiting for character, whether athletes should compete in multiple sports in college, coach burnout, and recovering from a bad game (PCA Development Zone, n.d.).

In response to the allegations made by the 16 former players, 45 players signed on to a letter of support for her that was also shared with The Globe (Hohler, 2023). Additionally, "Stone's supporters, in interviews and e-mails, effusively praised her for developing them as students, athletes, teammates, and leaders. They called her kind, caring, and swift to respond to personal crises and tragedies" (Hohler, 2023, para. 12). In a letter to the editor, Dr. Holly A. Johnson raised a concern that

the opinions of 16 players that formed the basis of the article and a foundation for the assertion that there was a culture of fear on the team did not adequately capture the experiences of what she said were hundreds of women who played hockey at Harvard over the years. Johnson questioned why a story about a tough coach was even news and whether it would be news at all if not for the fact that the coach was a woman. She queried, "If women like Stone, a decorated coach, among the winningest in college women's hockey, a groundbreaker, are taken down because of a tough coaching style, who would be left to lead our female athletes?" (Thompson, 2023, para. 3). Johnson had played for Stone on her first Harvard team and served as captain of that team in 1994-1995, going on to serve as medical consultant for the team between the years 2013 and 2018 while also serving as the team physician for the U.S. Women's Ice Hockey Team in 2014. Johnson is also secretary of the Friends of Harvard Hockey.

Harvard's Faculty of Arts and Sciences 2019 Survey of Athletes

In the accounting of a meeting athletic director McDermott had with players following Macdonald's complaint to the athletic department in 2022, several former players commented on a reference she made to a survey of athletes undertaken in 2019. As per Hohler's (2023) reporting, "…while addressing the team after Stone's outburst, [McDermott] said a 2019 survey… ranked the women's hockey team last among the university's 42 varsity sports programs in the quality of its student-athletes' experiences" (para. 17).

The announcement regarding the survey was made in September of 2019 by then dean of the Faculty of Arts and Sciences at Harvard, Dr. Claudine Gay. According to press releases and statements made by the dean and athletic director at the time, the survey was initiated in anticipation of the athletic department's centennial anniversary in 2026. Employing the expertise of an outside firm, the scope of the study included an examination of the experience Harvard athletes were having on their teams, the culture of programming, and department structure (Gazette Staff, 2019). Of the 827 Harvard athletes who participated in the study, they believed that the experience overall was providing them with valuable life lessons (93%) and they were generally happy with their decision to attend Harvard (91%). 1 While the vast majority of athletes indicated that they had positive experiences associated with their participation, they also reported challenges, with nearly 65% reporting that they did find it difficult to meet the demands of their athletic careers while balancing their academics and their social lives (Aggarwal-Schifellite, 2020).

Questions were raised at the time the report was undertaken in terms of whether the athletic department had a cultural problem and pressures of competing within NCAA Division I were manifesting in numerous scandals within the athletic department. In 2016, the Harvard men's soccer season was cancelled following the release of documents showing that the men's team had been sexualizing women soccer recruits using rating sheets. Within weeks of that incident, it was disclosed that members of the men's cross country team had engaged in a similar practice, noting that by the time this was discovered they had addressed the "culture" issue on their team (Mettler, 2016).

Harvard administrators also denied that the impetus for the report stemmed from circumstances arising from alleged financial improprieties on the part of the men's fencing coach who sold his home to the father of two fencers for a price that was $300,000 above the assessed value of the home. One of the sons was a member of the team at the time of the sale while the second son was admitted to Harvard shortly after the sale of the home. The fencing coach was dismissed for violating Harvard's conflict of interest policy. While both the fencing coach and the father would later be acquitted of federal bribery charges, the review of Harvard athletics was undertaken at a time when other institutions, such as Yale, Stanford, and the University of Southern California, were in the process of instituting greater oversight in response to fallout from revelations that athletic department personnel (coaches and administrators) had accepted payments from parents in exchange for falsely designating students as athletic recruits in order to get them into top-tier colleges and university through a third-party broker (Berger & McCafferty, 2019).

1 The number of athletes participating in the 2019 study represented approximately 70% of the total number of athletes competing on Harvard teams at the varsity level (827 out of approximately 1200 athletes) (Berger & McCafferty, 2019).

Harvard's Ongoing Failure to Treat Indigenous People With Dignity

During the time that Macdonald and Thompson were playing on the team and Daniels was on the coaching staff, Harvard was in the midst of a study initiated by then President Lawrence S. Bacow to examine the University's "…relationship to and participation in the historically oppressive regimes of slavery and colonialism" (Steering Committee, 2022, p. 2). The issue at hand was the recognition that Harvard's Peabody Museum maintains in its collection the bodies of 15 individuals believed to have been enslaved. What has been known for a much longer period of time is the fact that Harvard through the Peabody has had one of the largest collections of Native human remains in the country (Harvard Steering Committee, 2022). Across the University it is estimated that they hold in their possession as many as 7,000 Native remains, including a collection of hair samples taken from hundreds of Native children forced into government-run boarding schools (Chung, 2022). That figure may not account for remains of Indigenous peoples from other parts of the world (Baca et al., 2022). Even after the passage of the Native American Graves Protection and Repatriation Act (NAGPRA) by the United States Congress in 1990, and numerous requests from Native Americans, Harvard still had not returned the remains of those Native ancestors to their families to be laid to rest (Baca et al., 2022). In the aftermath of a letter to President Bacow from Native American graduates of Harvard Law School and other Harvard programs wherein they noted that the Harvard Committee's report had treated the issue of Native remains "felt like an afterthought" (Baca et al., 2022), the Peabody Museum issued an apology to Indigenous families and announced that they would begin the process of returning the hair samples taken from children starting in the 1930s to living relatives and the tribes they came from (Chung, 2022).

Just a few months before the Harvard Committee issued its report, the Federal government had published the Federal Indian Boarding School Initiative Investigative Report. As described by Baca et al. (2022), "The Boarding School Report notes the active, conscious, suppression of indigenous languages, cultures, and religions over the last 150 years by the federal government, with assistance and cooperation from many educational institutions. Harvard's Report totally fails to realize how trauma from federally created boarding schools' stealing our youth from their tribal home and being sent away, many to die and lie in unmarked graves mimics and is part of the trauma related to the University's holding so many of our stolen Ancestors" (para. 5). They further noted, "No real input was sought from current Harvard Native students. If such had been sought, the Report surely would have noted the current, ongoing trauma experienced by students who feel unable to enter the Peabody Museum, the unease they feel simply walking past the Museum because of cultural and Ancestor restrictions due to housing so many stolen tribal Ancestors" (para. 4).

When Coach Stone angrily made reference to "too many chiefs and not enough Indians" to a team that included two Native players and in the presence of a Native assistant coach, she was doing so within this larger context. According to Harvard's Common Data Set for the academic year 2021-2022, there were five students who identified as American Indian or Alaska Native in the first-year class, with 16 in total in an undergraduate class of 7,153.

Considering Allegations Against Harvard's Coach Stone in Light of Other Cases

Based on the public record, this case is distinguished from other cases involving women head coaches of women's teams accused of creating toxic environments. Unlike *Griesbaum v. University of Iowa* (2017) and *Stollings v. Texas Tech University* (2022), Coach Stone held onto her position, allegedly apologizing to the team for her conduct. While Athletic Director McDermott offered unequivocal support for Stone, she did indicate that there was some kind of expectation (perhaps a personal improvement plan) that Stone would work on her communication and response to feedback. The effectiveness of the apology is in question, however, given that the First Nation players left the team, a lawsuit alleging race and other forms of discrimination was filed by the assistant coach Sydney Daniels, who was also Indigenous and a former captain, and other former members of the team felt that their complaints had not been heard and responded to by Harvard's administration. More continues to unfold on this case as Sydney Daniels lawsuit against Harvard proceeds.

References

Aggarwal-Schifellite, M. (2020, June 5). Student-athletes pleased with time on teams, but balancing commitments difficult. The Harvard Gazette. Retrieved from **https://news.harvard.edu/gazette/story/2020/06/first-ever-study-of-the-culture-of-harvard-athletics/**

Baca, L., et al. (2022, October 12). Letter to President Lawrence S. Bacow, Harvard University. Retrieved from https://turtletalk.files.wordpress.com/2022/10/harvard-letter-2022-10-12.pdf

Berger, J.S., & McCafferty, M.C. (2019, October 3). Harvard athletics study unrelated to fencing scandal, FAS Dean Gay says. The Harvard Crimson. Retrieved from https://www.thecrimson.com/article/2019/10/3/athletics-review-unrelated-fencing-scandal/

Canadian Press. (2023, January 31). FSIN calls for Harvard hockey coach's resignation after reported racist comments. Sportsnet.ca. Retrieved from https://www.sportsnet.ca/article/fsin-calls-for-harvard-hockey-coachs-resignation-after-reported-racist-comments/

Chung, C. (2022, November 10). Harvard museum will return hundreds of Native American hair samples. New York Times. Retrieved from https://www.nytimes.com/2022/11/10/us/harvard-museum-native-american-hair.html

Desjarlais, C. D. (2020). An exploration of Indigenous spiritual microaggressions. Theses and dissertations. Retrieved from **https://commons.und.edu/cgi/viewcontent.cgi?article=4265&context=theses**

Emmert, M. (2017, May 22). Griesbaum on lawsuit against Iowa: 'I tried to represent the coaching profession'. Hawk Central. Retrieved from https://www.hawkcentral.com/story/sports/2017/05/22/tracey-griesbaum-her-lawsuit-vs-iowa-i-tried-represent-coaching-profession/337109001/

Epstein, J., & Libit, D. (2020, August 5). Texas Tech women's basketball players describe toxic culture: 'Fear, anxiety, and depression'. USA Today. Retrieved from https://www.usatoday.com/in-depth/sports/ncaaw/big12/2020/08/05/marlene-stollings-texas-tech-program-culture-abuse-players-say/5553370002/

Gazette Staff. (2019, September 2019). Athletes for the 21st century: New study to look at organization, programs, and student experience to lay groundwork for strategic planning. The Harvard Gazette. Retrieved from https://www.thecrimson.com/article/2019/10/3/athletics-review-unrelated-fencing-scandal/

Harvard Athletic Communication Staff. (2023). Katey Stone bio. Gocrimson.com. Retrieved from **https://gocrimson.com/staff-directory/katey-stone/375**

Harvard's Common Data Set. (2021-2022). Retrieved from https://web.archive.org/web/20230104210457/https://oir.harvard.edu/files/huoir/files/harvard_cds_2021-2022.pdf

Harvard Steering Committee. (2022, September). Harvard Steering Committee report on human remains in university museum collections. Retrieved from https://provost.harvard.edu/files/provost/files/harvard_university-_human_remains_report_fall_2022.pdf?m=1663090982

Hohler, B. (2023, January 27). 'A culture of complete fear': Harvard women's hockey coach Katey Stone under fired for alleged abusive behavior. The Boston Globe. Retrieved from **https://www.bostonglobe.com/2023/01/27/sports/katey-stone-harvard-womens-hockey/**

Mettler, K. (2016, November 7). Another Harvard team lewdly rated female athletes. This time, with spreadsheets. The Washington Post. Retrieved from https://www.washingtonpost.com/news/morning-mix/wp/2016/11/07/another-harvard-team-lewdly-rated-female-athletes-this-time-with-spreadsheets/

PCA. (2023). PCA mission. Website. Retrieved from **https://positivecoach.org/mission-history/**

PCA Development Zone. (n.d.). Katey Stone: Make everyone better. PCA Development Zone Resources. Retrieved from https://devzone.positivecoach.org/resource/audio/katey-stone-make-everyone-better

Peter, J. (2022, August 29). Marlene Stollings to receive $740,000 as part of settlement in lawsuit against Texas Tech. USA Today. Retrieved from https://www.usatoday.com/story/sports/ncaaw/big12/2022/08/11/texas-tech-marlene-stollings-lawsuit/10298561002/

Risom, L. (2023, January 31). FSIN calls for termination of Harvard women's ice hockey coach. Press release. Retrieved from https://6zl045.a2cdn1.secureserver.net/wp-content/uploads/2023/02/Comments-from-Harvard-ice-hockey-coach-Jan.-31-2023.pdf

Roberts, P.D., & Scott, S.C. (2023, February 1). Longtime Harvard women's ice hockey coach faces allegations of abusive behavior. The Harvard Crimson. Retrieved from **https://www.thecrimson.com/article/2023/2/1/harvard-silent-stone-allegations/#:~:text=Donate-,Longtime%20Harvard%20Women%27s%20Ice%20Hockey%20Coach%20Faces%20Allegations%20of%20Abusive,Boston%20Globe%20investigation%20published%20Friday**.

Stollings v. Tex. Tech Univ., 5:20-CV-250-H (N.D. Tex. Aug. 25, 2021). Retrieved from https://casetext.com/case/stollings-v-tex-tech-univ

Thompson, A. H. (2023, February 7). Letters: Two differing views of Harvard hockey coach who's come under fire. The Boston Globe. Retrieved from https://www.bostonglobe.com/2023/02/07/opinion/two-differing-views-harvard-hockey-coach-whos-come-under-fire/

Watson, D. (2023, February 1). Chief Daryl Watson statement. Mistawasis.ca. Retrieved from https://mistawasis.ca/chief-daryl-watson-statement/

Return to Table of Contents

Analyzing the Legal Basis for the NWSL's Recent Banishment of Five Coaches

By Christopher R. Deubert, Senior Writer

In December, the law firms of Covington & Burling LLP and Weil, Gotshal & Manges LLP released a joint 125-page report detailing a history of misconduct by coaches and executives for clubs in the National Women's Soccer League (NWSL), including instances of sexual, racial and other inappropriate comments and instances of behavior. As a result of this and related investigations, the NWSL has permanently banned five coaches from the league: Paul Riley (formerly of the Portland Thorns and North Carolina Courage); Christy Holly (Sky Blue FC and Racing Louisville); Rory Dames (Chicago Red Stars); Richie Burke (Washington Spirit); and, Kris Ward (Washington Spirit). Two others were banned until 2025: Craig Harrington (Utah Royals FC); and, executive Alyse LaHue (NJ/NY Gotham FC).

The league's punishments raise questions as to their legal basis and potential legal challenges by the coaches.

As an initial matter, the bans appear to be based on the authority of NWSL Commissioner, Jessica Berman. A January 9 press release from the league announcing the penalties described them as having been "imposed" by Berman. The NWSL is a single-entity, meaning that it is a Delaware limited liability company in which each club is a member. Berman's authority is likely derived from the NWSL's Operating Agreement or a related document, such as a Bylaws and Constitution, giving the Commissioner broad authority to take action in the best interests of the league.

Courts have often been deferential to sports leagues and their Commissioners as to their judgment about what is in the best interests of their particular league. In a 1978 case involving the authority of Major League Baseball's Commissioner to disapprove player trades, the Seventh Circuit Court of Appeals affirmed the lower court's determination that "the Commissioner has the authority to determine whether any act, transaction or practice is 'not in the best interests of baseball,' and upon such determination, to take whatever preventive or remedial action he deems appropriate, whether or not the act, transaction or practice complies with the Major League Rules or involves moral turpitude." *Charles O. Finley & Co., Inc. v. Kuhn,* 569 F.2d 527 (7th Cir. 1978); see also Atlanta Nat'l League Baseball *Club, Inc. v. Kuhn*, 432 F. Supp. 1213 (N.D. Ga. 1977) ("What conduct is 'not in the best interests of baseball' is, of course, a question which addresses itself to the Commissioner, not this court"); *Crouch v. NASCAR*, 845 F.2d 397 (2d Cir. 1988); *Oakland Raiders v. NFL*, 131 Cal.App.4th 621 (Cal. Ct. App. 2005).

As to the suspended coaches, each would have had an employment agreement with their particular club. That agreement likely included a provision in which the coach agreed to abide by the league's rules and disciplinary determinations. Thus, the coaches' agreements likely provided the NWSL with some basis to impose the discipline that it did.

Nevertheless, suspensions like that imposed here have been subject to attack as violations of antitrust law. More specifically, parties of various kinds have alleged that when a sports organization which is necessarily made up of multiple actors (e.g., teams) suspends or otherwise disciplines someone with a commercial interest in that organization, such activity constitutes an unreasonable restraint of trade in violation of Section 1 of the Sherman Antitrust Act.

The first such challenge was brought by Jack Molinas, a promising young NBA player who was indefinitely suspended by the league for gambling on games in which he played. The court denied Molinas' claims, finding in relevant part that the league's rule prohibiting players from gambling on games in which they play was reasonable. *Molinas v. NBA*, 190 F. Supp. 241 (S.D.N.Y. 1961). The NBA survived similar allegations when it forced former Los Angeles Clippers owner Donald Sterling to sell the club after making racist statements. *Sterling v. NBA*, 2016 WL 1204471 (C.D. Cal. Mar. 22, 2016).

Professor Marc Edelman, an expert in antitrust law, has argued that such suspensions could be considered illegal group boycotts under the antitrust laws.2 Indeed, such arguments have been made – but failed. The NCAA fended off claims brought by a suspended coach who alleged that his suspension for rules infractions constituted an illegal group boycott. See *Bassett v. NCAA*, 528 F.3d 426 (6th Cir. 2008). The World Boxing Council survived similar claims from a suspended boxing promoter, Brenner v. World Boxing Council, 675 F.2d 445 (2d Cir. 1982), as did the American Horse Shows Association from a suspended horse trainer, *Cooney v. Am. Horse Shows Ass'n*, Inc., 495 F. Supp. 424 (S.D.N.Y. 1980). In each case, the courts found the suspensions, in sum and substance, to be sufficiently reasonable to survive antitrust scrutiny.

With these cases as precedent, the NWSL stands on strong ground in banning the coaches as it has. Nevertheless, given that these coaches are now deprived of a meaningful choice of employment in a very competitive field, it would not be surprising to see one of them give these antitrust arguments a fresh try.

Deubert is Senior Counsel at Constangy, Brooks, Smith & Prophete LLP.

Return to Table of Contents

2 Marc Edelman, Are Commissioner Suspensions Really Any Different From Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade, 58 Cath. U. L. Rev. 631 (2009).

Madison Square Garden Utilizes Facial Recognition Technology to Block Opposing Attorneys from Entering – But is it Legal?

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

The 2001 Super Bowl in Tampa Bay, Florida was nicknamed the "Snooper Bowl" because fans entering Raymond James Stadium were subjected to face-recognition scanning technology that ran a person's image through a database of known criminals and possible terrorists.[3] Fast forward twenty plus years, and similar, more advanced face-recognition technology is still being used by sports venues, this time by Madison Square Garden Entertainment Corporation, the owner of both Madison Square Garden and Radio City Music Hall. However, instead of using the technology for what would be considered legitimate reasons, to identify potential terrorist threats or criminal activity, MSG Entertainment Corporation is utilizing it to prohibit lawyers from entering its facilities if they work for a law firm or company that has initiated any form of litigation against any venue owned by MSG Corporation.[4]

This all began in the summer of 2022, after MSG Entertainment Corporation informed any 'oppositional' attorney that, "Neither you, nor any other attorney employed at your firm, may enter the Company's venues until final resolution of the litigation."[5] The stated reasoning behind MSG Entertainment Corporation barring opposing attorneys is its belief that it needs to protect itself against any unauthorized or improper evidence collection "outside of proper litigation discovery channels."[6] In addition, MSG Entertainment Corporation believes, as with most companies, that it is their decision as to whom they want to do business with and that they can forgo a commercial interaction with someone as long as they are not discriminating against that person based on their race, ethnicity, sex, religion, or other protected class. Therefore, since being a member of a state bar is not a protected class, MSG Entertainment Corporation's position is that it can refuse access to its venues for certain 'adversarial' individuals.

But not so fast MSG. First, New York Attorney General Letitia James sent an official letter to MSG Entertainment Corporation wherein it is her office's belief that barring opposing attorneys from its properties, together with its use of facial recognition technology, may violate anti-discrimination laws and may dissuade lawyers from taking on cases such as sexual harassment or job discrimination claims against the company.[7] As stated in Attorney General James' letter, "MSG Entertainment cannot fight their legal battles in their own arenas. Madison Square Garden and Radio City Music Hall are world-renowned venues and should treat all patrons who purchased tickets with fairness and respect."[8] The Attorney General's letter continues, stating that because substantial research suggests that facial recognition technology "may be plagued with biases and false positives against people of color and women,"[9] her offices wants to know how MSG, when using the technology, is ensuring compliance with applicable anti-discrimination laws.

Second, three New York State lawmakers have introduced legislation that would prohibit MSG Entertainment Corporation's practice of banning attorneys with whom it is in current litigation with from its entertainment venues. State senators Brad Holyman-Sigal and Liz Krueger, together with assembly member Tony Simone, want to amend an existing state civil rights law, NY Civil Rights Section 40-b, by adding the term 'sporting events' to the list of qualifying public places of entertainment or amusement that cannot legally refuse entry if a person arrives with a valid ticket. The current law, which went into effect in April 1941, was originally passed to prohibit Broadway theaters and other playhouses from refusing critics the right to enter their establishments fearing a bad review. The law's original language also defined places of public

3 L. Elmore, Tampa police made it the Snooper Bowl, but high-tech spying's a low-level sin, Street & Smith's Sport Business Journal (Feb. 12-18, 2001), at 34.

4 https://www.nytimes.com/2023/01/16/technology/madison-square-garden-ban-lawyers.html

5 Id.

6 Id.

7 https://apnews.com/article/new-york-knicks-technology-state-government-city

8 Id.

9 Id.

entertainment and amusement as 'legitimate theatres, burlesque theatres, music halls, opera houses, concert halls, and circuses', but did not include movie cinemas, sporting venues or racetracks.[10]

What is interesting, however, neither the Attorney General nor the state lawmakers, or even the banned lawyers involved, directly address the constitutionality of a public venue using facial recognition technology to screen and monitor legitimate ticketholders in a noncriminal context and whether such is a threat to an individual's privacy. As we are all aware, the Fourth Amendment of the U.S. Constitution protects society from unreasonable searches and seizures and the U.S. Supreme Court in Katz vs. U.S. established that a person has a reasonable expectation of privacy, so isn't scanning a person face as a prerequisite for attendance at the Rockettes or a Justin Bieber concert a violation?11 Then again, maybe the bigger question is shouldn't we as a member of society expect more?

Return to Table of Contents

Cheat Sellers Beware, Game Developers Are Not Playing When It Comes to Integrity

By Joseph Esses12

"Destiny 2" developer, Bungie, has filed a lawsuit against VeteranCheats.com, a cheat seller, for creating and disseminating cheat integration capabilities into the game making it unfair for the average player and ultimately harming the game's integrity. The lawsuit, filed in the United States District Court for the Western District of Washington, seeks $12 million in damages. The use of cheats and hacks in online gaming has become a growing problem in recent years. This is particularly problematic in games like "Destiny 2," which is built on a cooperative multiplayer experience.

Bungie's Motion for Default Judgment

Bungie's lawsuit alleges that VeteranCheats has caused harm to "Destiny 2" by selling cheats that enable players to gain an unfair advantage, such as aimbots, wallhacks, and other tools that allow players to see through walls, automatically aim, and shoot with perfect accuracy. These cheats disrupt the balance of the game and make it difficult for other players to compete on a level playing field.

The complaint also asserts that VeteranCheats has induced and encouraged others to infringe Bungie's federally registered copyrights in "Destiny 2." This means that the cheat seller has encouraged others to use the cheats in a way that violates the game's terms of service and copyright law. To claim copyright infringement, a plaintiff must prove (1) they own the copyright which is an original work of authorship fixed to a tangible medium, and (2) the defendant violated the rights of the plaintiff in said copyright. Video games enjoy copyright protection as audiovisual works so long as the subject matter therein is original. Copyright is violated when a defendant reproduces, prepares derivative works of, and distributes the work without the holder's consent.

Time and time again, game developers have successfully brought copyright infringement suits against bad actors - Bungie's claim here is likely no different. It is extremely likely Bungie will succeed based on the limited software license it requires all players to agree to and the fact that the individual behind VeteranCheats.com has failed to respond to the lawsuit. Before anyone plays Destiny 2, the individual must agree to a limited software license. The license lays out Bungie's intellectual property rights (including its copyright in the game itself) and requires a user to acknowledge its prohibition on cheating. This is common practice among all video game developers.

What is not so common, is the fact that the cheat seller has failed to appear or file an answer to Bungie's complaint. Bungie's motion for default judgment will likely be granted as there is no one to defend against. Although a court will construe all factors in favor of the non-moving party in such a motion, Bungie has met its burden of proof in this case as it has provided evidence of the copyright ownership, the acknowledgment of the license, and the misuse of the copyright by

10 NY CIV RTS Section 40-b, See, *Mandel v. Brooklyn Nat. League Baseball Club*, 1942, 179 Misc. 27, 37 N.Y.S.2d 152 – holding that a baseball ground was not a "place of public entertainment and amusement" within meaning of this section.

11 *Katz v. United States*, 389 U.S. 347, 361 (1967).

12 Joseph Esses is an Associate Attorney at the Gordon Law Group representing e-sports clients of all shapes and sizes including organizations, players, and sponsors.

the cheat seller. As such, it is likely the default judgment has been approved.

In response to the lawsuit, some gamers have expressed their support for Bungie's decision to take legal action against cheat sellers. They argue that cheating ruins the game experience for everyone and that the lawsuit is necessary to protect the integrity of the game. On the other hand, some argue that the lawsuit is an overreaction and that the problem of cheating can be better addressed through other means, such as better security measures or stronger in-game penalties

Game Developers Protect Their Rights Against Cheat Sellers Frequently

It is important to note that this is not the first time that a game developer has taken legal action against cheat sellers. In recent years, several high-profile lawsuits have been filed against cheat sellers, and the outcomes of these cases have varied. Some have resulted in settlements, while others have been dismissed.

Game developer lawsuits against cheat sellers have become a common occurrence in the gaming industry. These lawsuits are aimed at protecting the integrity of online games and the interests of the game's players. In recent years, several high-profile lawsuits have been filed against cheat sellers, and the outcomes of these cases have varied.

One of the most prominent examples of a such a lawsuit is when Riot Games sued LeageSharp, a company that sold cheats and hacks for League of Legends. Riot claimed that the defendant's enterprise was dedicated to destroying the player experience, harming the gamer community, and subverting Riot's game for its own profit. The lawsuit accused LeagueSharp of copyright infringement and sought millions of dollars in damages. The case was ultimately settled out of court, with the defendant agreeing to stop selling cheats for the world's most-played game.

Another notable case is the lawsuit filed by Activision Blizzard against Bossland, a German company that sold cheats for several popular games, including "World of Warcraft," "Overwatch," and "Heroes of the Storm." In 2016, Activision Blizzard filed lawsuits in both Calfiornia federal court and the UK seeking $8.7 million in damages for copyright infringement, unfair competition, and other claims. The case was later settled out of court, with Bossland agreeing to pay Activision Blizzard an undisclosed sum and to stop selling cheats for their games.

Similarly, in 2018, Tencent Games, the developer of the popular game "PUBG," filed a lawsuit against multiple cheat sellers in both a United States and German court. The lawsuit sought millions of dollars in damages and an injunction against the sale of cheats for the game. Courts in both countries ordered the hacking group to pay $10 million in damages to Tencent. However, the amount in damages is not the prize - the real prize is the level playing field for their title games and ensuring the competition is fair for their paying customers.

These lawsuits demonstrate the efforts of game developers to protect the interests of everyday video game players and to preserve the integrity of their games. By taking legal action against cheat sellers, game developers aim to prevent the harm caused by cheats and hacks, which can disrupt the balance of online games and make it difficult for real players to compete. When it is more difficult for players to compete, more legitimate customers may not continue supporting the game which greatly impacts the bottom line of these games.

However, these lawsuits are subject to controversy. Some argue that they are an overreaction and that the problem of cheating can be better addressed through other means, such as better security measures or stronger in-game penalties. Others argue that these lawsuits have a chilling effect on innovation in the gaming industry, as companies may be hesitant to create and sell new products for fear of legal action from game developers.

Whatever side of the discussion you are on, the lawsuit filed by Bungie against VeteranCheats highlights the ongoing problem of cheating in online gaming and the harm that it can cause to the gaming experience. The outcome of this case will likely have far-reaching implications for the gaming industry and will be watched closely by other game developers, cheat sellers, and gamers alike. Ultimately, it remains to be seen how the court will balance the interests of all parties involved including Destiny players across the globe.

Return to Table of Contents

A New Meta: Esports Injuries and the Changing Health Standards in the Industry

By Zach Holdsman, of Montgomery McCracken

Professional esports is beginning to enjoy more legitimacy but with that legitimacy, comes liability. Esports players can make millions of dollars, but the player's long-term career outlooks are concerning. These players are sustaining detrimental injuries and retiring in their early-to-mid-twenties. Health risks and preventative measures are becoming more documented and as a result, more foreseeable. All of this culminates in a new pressure on esports organizations to take further action to support the health of their players.

The realm of esports has developed rapidly from a fragmented landscape of locally coordinated competitions to professional leagues funded by the same key people supporting traditional sports organizations. Recent years have brought about enormous prize pools, advertisement revenue, and sponsorship deals for those lucky enough to get involved and be successful in esports leagues. For example, League of Legends brought in more viewers than the Super Bowl in 2019 according to a report by CNBC13. An article in Forbes14 reported that the value of esports was more than $1 billion in May 2022 and expected that value to reach over $7.1 billion by 2028. Prize pools alone can allow individual players in games like DOTA 2 to make over $7 million15.

While in the past teams may have simply been a name for a group of players, many of the teams independently, and even the leagues that host them, have become much more. Consider the Overwatch League, which touted16 a minimum $50,000 a year salary, health benefits, retirement savings plan, and housing and training facilities during the season. Many of these teams also have minor league organizations for finding fresh talent as well as college leagues.

However, just because the players are competing in a virtual world, does not mean they are not at risk of injury. Indeed, esports players appear to be very prone to chronic injuries from overuse resulting in retirement in their twenties. 1HP17, which describes itself as a team of medical professionals and gamers that specialize in helping gamers avoid injuries, reported18 that in 2021 they had 95 cases of tendinopathy across various tendons in the wrist and hands. They also reported 15 cases of thoracic outlet syndrome. 1HP also addresses issues related to the mental health of players.

The knowledge of treatment, preventative care, and risks of injury to esports players is developing and being documented and distributed just like other fields of sports medicine. 1HP published the Handbook of Esports Medicine: Clinical Aspects of Competitive Video Gaming and two research publications in 2021:

McGee, Caitlin, et al. "More Than a Game: Musculoskeletal Injuries and a Key Role for the Physical Therapist in Esports." Journal of Orthopaedic & Sports Physical Therapy 51.9 (2021): 415-417.

McGee, Caitlin, and Kevin Ho. "Tendinopathies in video gaming and esports." Frontiers in Sports and Active Living (2021): 144.

Most esports are played on a keyboard and mouse—not a traditional video game controller. As a result, the players are restricted to what is ergonomically feasible with a keyboard and mouse to avoid injury while practicing and competing. To make matters worse, the esports environment appears to allow for limitless practice time. It is well understood in traditional sports that players only have so many hours of practice before their bodies simply won't perform the physical actions anymore, or at least to the degree where practice is more beneficial than harmful. Esports appear not as limited because the physical requirements are not as obviously taxing on the body. Injuries may not become apparent until long after the players have passed their bodies' limits. Or worse, players may continue

13 This esports giant draws in more viewers than the Super Bowl, and it's expected to get even bigger, Annie Pei, Apr. 14, 2019, https://www.cnbc.com/2019/04/14/league-of-legends-gets-more-viewers-than-super-bowlwhats-coming-next.html

14 From Reality To Virtual: Why Traditional Sports Are Getting Into Esports, Swish Goswami, May 17, 2022, https://www.forbes.com/sites/forbestechcouncil/2022/05/17/from-reality-to-virtual-why-traditional-sports-are-getting-into-esports/?sh=1bc32dd74736

15 See https://www.esportsearnings.com/players

16 Six-figure salaries, million-dollar prizes, health benefits and housing included – inside the Overwatch League, Noah Higgins-Dunn, Sept. 29, 2019, https://www.cnbc.com/2019/09/29/what-its-like-to-be-a-professional-gamer-in-the-overwatch-league.html

17 See https://1-hp.org/

18 1HP 2021 Year in Review: Esports Medicine & Performance Team, Dec. 27, 2021, https://1-hp.org/blog/hpforgamers/1hp-2021-year-in-review-esports-medicine-performance-team/

practicing despite injuries because they do not perceive their injuries as serious.

This results in prominent players like Thomas "ZooMaa" Paparatto retiring at 25. The Washington Post reported19 on this:

"For a while, I had no range of motion in my thumb," Paparatto recalled in a recent interview with The Washington Post. A ganglion cyst, likely caused by gaming, had developed on one of his thumb tendons in 2016 and required surgery. "It was something I struggled with the entire second half of my career," he said. "I always felt the wear and tear after long gaming sessions, and it was difficult to live the professional grind."

That same Washington Post article discussed how some teams have been hiring in-house health professionals to support their teams. For example, Dr. Lindsey Migliore was hired as director of player performance for the esports organization: Evil Geniuses. Dr. Migliore was quoted by the Washington Post as saying, "We're losing these players in their early 20s due to preventable injuries that could've been, and still can be, treated." She then went on to detail some of the aspects of treatment plans that may be effective.

Based on a review of current litigation, there do not appear to be any claims by players against organizations for injuries suffered due to over-practice or competing in esports leagues and competitions. This is likely due to several factors: (1) player contracts have well-written assumption of risk clauses; (2) players are provided insurance, which may be deemed to be an adequate standard of care for the profession; (3) teams and organizations are engaging in practices similar to what is described above, where they retain health professionals to increase the health outcomes of their players; and (4) injuries occur slowly over time due to overuse and cannot be directed to specific incidents where there is a discernible and responsible party other than the player. It is unclear at this time how these factors may play a role in the lower leagues such as recruitment leagues and college-level leagues.

Those in the industry should be taking note of the developments in the field and ensuring their players are treated in accordance with the latest and best health practices if they want to keep their players in the game longer, help their players perform better, and reduce risk of liability.

Return to Table of Contents

Settlement Reached in Concussion Case Involving Berkeley Cheerleader

By Gina McKlveen

During a routine when a cheerleader rises to the top of a pyramid, supported solely by the strength and trust of her teammates, it probably doesn't occur to her that the hierarchical athletic structure in sports injury cases could impact her recovery if she falls.

And yet, for Melissa Martin ("Martin"), the plaintiff in the 2019 case filed against The Regents of the University of California and USA Cheer after sustaining several repeated head injuries while she was a member of the cheerleading squad at the University of California, Berkeley ("Berkeley") this sad fact became Martin's lived reality.

Represented by Jennie Lee Anderson ("Anderson"), an attorney at Andrus Anderson, LLP, who specializes in matters related to women's health and safety as well as employment discrimination issues, Martin accused her Berkeley coaches of bullying her into performing stunts even after she had experience three consecutive concussions over the course of a short four-month period. Martin alleged that she was intimidated on multiple occasions by her coaches, who pressured her to participate in activities that led to her injuries. Martin argued that she was obligated to follow her coaches' orders because the contract she signed with Berkeley and USA Cheer mandated her to do so. The now 27-year-old ex-cheerleader further alleged that her coaches deliberately ignored her concussion symptoms, which has caused her to experience permanent and on-going brain damage to the point that she still suffers from a 24/7 headache years after her initial injury. The consequences of these injuries affected her vision and limited her ability to study or read, so Martin was forced to take a medical leave of absence from school. In turn, Berkeley refunded about half of Martin's tuition.

19 Aching wrists, early retirement and the surprising physical toll of esports, Gregory Leporati, Mar. 14, 2022, https://www.washingtonpost.com/video-games/esports/2022/03/14/professional-esports-athlete-injuries/

In her complaint against Berkeley, filed at the Superior Court of California, County of Alameda, based on claims for negligence as well as violations of California's Student Athlete Bill of Rights and unfair competition law, Martin sought recovery of the other half of the tuition and damages related to her injuries. She also petitioned the court to go a step further and order Berkeley and USA Cheer to implement reasonable concussion protocols for collegiate cheerleaders. According to Martin, because cheerleaders are viewed as "half-letes," their safety is taken less seriously than other athletes. Even though cheerleading has evolved from its pom-pom days and now includes highly technical aerial acrobatics, Martin argued that her experience indicates that participants are not provided proper protection when injuries arise, therefore appropriate protocols are needed.

Given the details of a recent settlement with Martin in early 2023, it seems as though Berkeley is honoring its stated commitment to student health and safety. In addition to awarding Martin nearly $700,000, the terms of the settlement specify that Berkeley will provide an athletic trainer for its cheerleading squads who will be tasked with monitoring and treating any injuries when stunting, aerial tumbling, or flipping resumes. All injuries must be immediately reported to the student health center. Furthermore, both coaches and cheerleaders will be required to complete a safety training which is comparable to that of other sports and student athletes at the university level.

Martin's allegations that the health and safety of cheerleaders is not as sufficiently protected as other athletes is not so far-fetched. In fact, a study from the National Center for Catastrophic Sport Injury Research at The University of North Carolina at Chapel Hill revealed that at both the high school and collegiate level, cheerleading was the runner-up for the highest number of traumatic injuries, second only to football. While the report indicates from its sample size that the number of serious injuries for football players in college were more than 10 times higher than the number of serious injuries for cheerleaders in college, 145 compared to 13 respectively, the fact that cheerleading results in more frequent cases of serious injury than sports like lacrosse, ice hockey, and soccer should raise genuine concern.

Instead, in many cases, like Martin experienced, cheerleaders' injuries are often ignored or not taken seriously. As Martin's attorney, Anderson, made clear in her comments on her client's case, "there has been a lot of attention around concussion risk for young men in football, [but] there has not been a corresponding level of concern about head injuries for young women participating in cheerleading programs."

Moreover, failure to classify cheerleading as a sport in some instances has limited access to necessary resources such as safety protocols, training for coaches, and on-site athletic trainers. An investigative study from The Johns Hopkins University published by The Orthopedic Journal of Sports Medicine found that less than 30 states classify competitive high school cheerleading as a sport. However, since the year 2000 the number of concussions in cheerleading has increased exponentially from 600 to 5,500 as of 2019—practically 10 times greater in just 20 years. One rationale typically given to explain this significant increase is the evolution of cheerleading over the past several years, which includes more stunts, flips, etc., but arguably a larger contributing factor is the apparent lack of concussion protocols.

Unfortunately, it took a life-altering injury of one cheerleader (and a lawsuit) for one school to respond with the reasonable concussion protocols.

Return to Table of Contents

Claims Against the University of Vermont and Athletic Director Allege Mishandling of Assault Cases

By Alexis Sokach

Multiple claims have been brought in a lawsuit against the University of Vermont alleging the mishandling of various sexual assault accusations. On December 6, 2022, Kendall Ware, a former Division I swimmer at UVM, filed a civil lawsuit against the university. Ware asserts that she was raped by Anthony Lamb, a former UVM basketball star, and a current forward for the Golden State Warriors. Along with Ware in this lawsuit are two other female plaintiffs who claim they were sexually assaulted in separate incidents while they were students at the University of

Vermont. All three women assert that the school "ignored known and obvious conditions that substantially increased the Plaintiffs' risk of campus sexual assault by fellow students." The court documents detail allegations against the school, its board of trustees, and six employees, Jeff Schulman, UVM's Athletic Director included.

The claims also emphasize the university's and the university officials' violation of constitutional right to equal protection, federal Title IX protections against discrimination on the basis of sex and the Vermont Public Accommodations Act.

Ware reported the alleged sexual assault, along with two others involving Lamb, the next month to UVM's Title IX office. Ware claims that she was dissuaded from seeking a formal investigation by multiple university employees, including Schulman. The complaint, filed in the U.S. District Court in Burlington, states that Schulman and other employees also misled Ware about the available remedies as well as the potential consequences for Lamb. Schulman met with Ware while the Title IX process unfolded and Ware disclosed in the claims that it, "did not feel like Schulman expressed any concern about her assault, and he was clearly focused on not losing his prize asset, Lamb."

The complaint details Ware's mental state about the situation, "In such a small state, to many, Lamb was a bona fide celebrity both on and off campus. Ware was afraid of the repercussions of reporting him to the school authorities, let alone to the police."

Ware, after reporting the incident to her coaches, administration, and athletic department, was told by a campus victim advocate that she had two options: pursue a formal investigation or file a police report. A Title IX investigator, however, informed Ware that she had a third option, an informal resolution process that would take less time but could not result in consequences for Lamb beyond counseling. Ware restated her desire for the formal investigation because she felt that was "the only way she could get what she sought: punishment proportionate to the wrong: justice for herself; and protection for fellow female students."

The persuasion out of the claim worsened. Ware's mother had a conversation with the UVM athletic department's associate athletic director for external relations and communications, Krista Balogh. Balogh impressed upon her that the formal investigation would result in Lamb's "immediate and indefinite suspension" and that such punishment would be unfair to Lamb's teammates. Ware grew anxious that the campus community would blame her for causing UVM's star player to miss basketball games. Ware instead chose the informal proceedings to avoid being ostracized on campus. About a month later, Ware and Lamb signed a resolution agreement that resolved the investigation "without making any finding as to whether he violated UVM policy." The stipulations of the contract stated that Lamb had to complete a "healthy masculine identity program," among other minor penalizations.

Lamb, although not a defendant in the case, released the following statement to KNTV, "The allegations made against me in 2019 that have recently resurfaced are patently false. I have always been fully cooperative regarding the alleged incident and have welcomed any investigation into the matter. Simply put, I have never committed sexual assault." The Warriors also stated, "Anthony is not a defendant in this recent lawsuit and, to our knowledge, he has never been charged with any wrongdoing in any legal case. Prior to signing Anthony in September, we did our due diligence with the NBA and his prior teams, as we do with all players. If any new information comes to light, we will certainly evaluate it and act accordingly."

Apparently, these mishandling claims are not new to the University of Vermont. UVM students have previously staged protests and walk outs about the university's poor handling of sexual violence. Students have also created an Instagram account that circulates anonymous stories of sexual assault on campus. In 2021, the student activism surrounding the assault mishandlings prompted the university to have a consultant review its policies and procedures around Title IX.

One of the other plaintiffs asserts that she was drugged at an off-campus party attended by fraternity members. At the party, she became incoherent and woke up the next day in her own bed covered in bruises, caked in dirt, and with "the distinct physical sensation that something had roughly touched her vagina the night prior." The plaintiff confided in a university official, a deputy Title IX coordinator, who told her he would alert the Title IX office and that someone would be in touch within a week, but no one ever contacted her. The plaintiff later found out that the Title IX office had learned of her assault and chose not to take any action.

The third plaintiff attended a party where she met a member of the UVM club tennis team. After blacking out she regained consciousness while the club tennis player was having sex with her. After hearing about the Title IX offices previous mishandling of a case that included the same assailant, the plaintiff chose not to work with the Title IX office on her claim.

All three plaintiffs assert in their complaint that as a result of UVM's inadequate handling of these incidents they have suffered profound mental and physical distress that has interfered with their academic and personal lives.

References:

Derek Brouwer & Chelsea Edgar, Lawsuit: UVM Mishandled Rape Allegation Against Basketball Star Anthony Lamb, Seven Days (Dec. 13, 2022), https://www.sevendaysvt.com/vermont/lawsuit-uvm-mishandled-rape-allegation-against-basketball-star-anthony-lamb/Content?oid=37097413.

Tyler Boronski, Lawsuit claims UVM mishandled multiple sexual assault accusations, NBC5 (Dec. 9, 2022), https://www.mynbc5.com/article/lawsuit-claims-uvm-mishandled-multiple-sexual-assault-accusations/42192735#.

Jenna Lemoncelli, Warriors' Anthony Lamb accused of rape in suit against University of Vermont, N.Y. Post (Dec. 9, 2022), https://nypost.com/2022/12/09/warriors-anthony-lamb-accused-of-rape-in-lawsuit/.

Return to Table of Contents

Hackney Publications Announces Sports Law Symposiums Happenings Initiative

Hackney Publications, the Nation's Leading Publisher of Sports Law Periodicals, Publishes Two Dozen Sports Law Publications, the blog Sports Law Expert, and Sports Law Expert Podcast

Hackney Publications announced today that it is launching the Sports Law Symposiums Happenings initiative (SLSH), which will serve as a clearinghouse for sports law symposiums being held throughout the United States.

SLSH will be made available for free at Hackney Publications' LinkedIn page, where followers will be notified immediately about new symposiums, as well as other items of interest from Hackney Publications. You can subscribe here **https://www.linkedin.com/company/hackney-publications/?viewAsMember=true**

"This is an important way for us to give back to the industry, helping higher education highlight the good work it is doing, while making the private sector aware of opportunities to learn more from leaders in the sports law community," said Holt Hackney, the founder and publisher of Hackney Publications. "This clearinghouse will provide all the details necessary for someone to register and attend the event."

The latest announcement is one of many the company has made over the last 12 months.

Among them was:

- The announcement last fall of a new podcast, which publishes twice a month. Those interested in being notified when a segment goes live can subscribe by visiting https://follow.it/sportslawexpert?action=followPub;
- The naming of Sports Law Professor Dr. Ellen Staurowsky as Editor-in-Chief of Title IX Alert, and Christopher Deubert as a Senior Writer for Hackney Publications (where he joins four other industry leaders).
- The announcement last spring of the second annual list of "100 Law Firms with Sports Law Practices You Need to Know About." That list, which will be updated in March, is available for review at www.100lawfirms.com

Hackney said the announcements are "just the beginning" for Hackney Publications.

"We are committed to raising awareness about sports law as a growing practice area, as well as the important role that attorneys play in the overall sports industry," added Hackney.

About Hackney Publications

Hackney Publications is the nation's leading publisher of sports law periodicals. The company was founded by journalist Holt Hackney. Hackney began his career as a sportswriter, before taking on the then-nascent sports business beat at Financial World Magazine in the late 1980s. A few years later, Hackney started writing about the law, managing five legal newsletters for LRP Publications. In 1999, he founded Hackney Publications. Today,

Hackney publishes or co-publishes more than 20 sports law periodicals, including Sports Litigation Alert, which offers a searchable archive of more than 4,000 case summaries and articles. In addition, the Alert is

News Briefs

used in more than 100 sports law classrooms any given semester.

Return to Table of Contents

Tulane Sports Law Alum Named Associate AD for NCAA Compliance

The Western Michigan Division of Intercollegiate Athletics has announced the hiring of Kate Eshleman to the position of Associate Athletic Director for NCAA Compliance. Eshleman will serve as a member of the Athletic Director's Senior staff, while overseeing WMU's compliance department. Eshleman arrives in Kalamazoo after spending the last year at the University of Utah. While in Salt Lake City, she oversaw the athletic department's Name, Image and Likeness program, educated coaches, student-athletes and staff on NCAA as well as university rules, reviewed and approved all personnel for Utah's 20 sport programs, and monitored institutional and non-institutional camps and clinics. Prior to her time at Utah, Eshleman spent the 2020-21 academic year at the University of California, Santa Barbara as a compliance coordinator. While at UCSB, she researched and submitted waivers and violations for the department's 19 athletic programs, provided rules education to student-athletes, coaches and staff, as well as monitored CARA and recruiting activity. A two-time graduate of Tulane University, Eshleman began her professional career as a compliance legal intern at her alma mater, assisting with Academic Progress Rate reports and developing a database for Tulane's compliance staff. She also spent a summer as an extern at the NCAA National Office, researching case precedent and public records for Level I Violations, helping enforcement staff prepare for investigation interviews, and assisting in completing an infractions data base which included information regarding Level I and II violations. Eshleman received a bachelor's degree from Tulane University in May of 2014, and then a Juris Doctorate from Tulane in May of 2020.

Sports Law Expert Podcast Highlights Leading Sports Lawyer Bart Lambergman

Hackney Publications has announced that it has published its latest segment of the Sports Law Expert Podcast, this one featuring sports lawyer Bart Lambergman, general counsel and chief operating officer of LEAD1 Association, which represents the athletics directors of the 131-member schools of the Football Bowl Subdivision (FBS). The segment can be **heard here**.

"Bart has emerged as one of leading sports lawyers in collegiate athletics, supporting the great work that LEAD1 and its CEO, Tom McMillen, are doing in the industry," said Holt Hackney, the founder and publisher of Hackney Publications. "Over the years he has become a powerful resource for the athletics directors at the FBS schools." Going forward, those interested in being notified when a segment goes live can subscribe by visiting **https://follow.it/sportslawexpert?action=followPub**