

# Legal Issues in

# COLLEGIATE ATHLETICS

A Report of Court Decisions, Legislation and Regulations Affecting Collegiate Athletics

## IN THIS ISSUE

### 2 Xavier Student-Athlete Files Lawsuit Against School, Head Soccer Coach

*A student athlete at Xavier University has sued the school, claiming that after being diagnosed with a concussion, he was allowed to return to play too soon and suffered another concussion, potentially impacting his collegiate career.*

### 3 The UNC Debacle: Lessons Learned From a Legal Standpoint

*From all angles, the current happenings at the University of North Carolina-Chapel Hill (UNC) involving whistleblower Mary Willingham form a complex, high-profile situation, involving a large swath of administrators and athletes all allegedly complicit in their acceptance of substandard ethical compliance. From a legal standpoint, Ms. Williamson's fight to stand firm on the laws protecting her as a whistleblower is at least a plausible one. Thus, it would seem that there are important lessons to be learned from the entire ordeal.*

### 4 Johnny Football: Heisman Winner Closer to Registering Mark

*In honor of Johnny Manziel's pro day, there's something for the Texas A&M star to celebrate. Just last week, the U.S. Patent and Trademark Office rejected an application made by an entity unaffiliated with Manziel for the mark JOHNNY FOOTBALL, paving the way for Manziel's application to proceed.*

### 5 Game Changer — NLRB Regional Director Finds Northwestern Scholarship Football Players are Employees under the NLRA

*On March 26, 2014, in Northwestern University, the NLRB Regional Director for Region 13 issued a Decision that could permanently change major college sports. Specifically, the Regional Director found that football players receiving grant-in-aid scholarships from Northwestern University (Northwestern), who have not exhausted their playing eligibility, are employees under Section 2(3) of the NLRA. The decision also directed that an immediate secret ballot election be held among the eligible employees in the unit to determine whether they should be represented by the College Athletes Players Association (CAPA) in collective bargaining with Northwestern.<sup>[1]</sup>*

### 7 Judge Sides with California State University, Sacramento in Dispute with Rowing Club

*A federal judge from the Eastern District of California has granted a motion to dismiss filed by California State University, Sacramento (CSUS) in a case in which the school was sued by the Men's Rowing Club, which claimed it was denied procedural due process after the school suspended it.*

### 8 If Players Are Employees, What Are Coaches?... Supervisors?

*The decision of the Regional Director of Region 13 of the National Labor Relations Board that scholarship football players at Northwestern University are "employees" under the National Labor Relations Act has created an interesting question for all colleges and universities: Are members of coaching staffs now considered to be supervisors under the NLRA?*

### 9 Appeals Court Upholds Jury Verdict for Coach Against Asbury University in Retaliation Case

*A Kentucky state appeals court has affirmed a jury verdict for a former coach at Asbury University, who sued the university for firing her in retaliation for her claim of discrimination.*

### 12 EX- Student Athlete Sues Iowa over Workouts

*A former University of Iowa football player, who was hospitalized a little over three years ago after a high-intensity workout, has sued the school for negligence.*

### 12 UNH to Investigate Reporting Delays on Athletic Improprieties

*The University of New Hampshire has hired the state's former attorney general, Mike Delaney, to lead an investigation into reporting delays of improprieties involving an athletics department employee.*

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### 10 News in Brief

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**COLLEGIATE ATHLETICS**



## Xavier Student-Athlete Files Lawsuit Against School, Head Soccer Coach

**A** student athlete at Xavier University has sued the school, claiming that after being diagnosed with a concussion, he was allowed to return to play too soon and suffered another concussion, potentially impacting his collegiate career.

Neil Henley was a star soccer player at St. Xavier High School in Kentucky, where he earned the Gatorade Boys Soccer Player of the Year for that state in 2012.

Henley ultimately accepted a scholarship at Xavier University. The men's soccer team at Xavier had a practice at Xavier of allegedly hazing incoming freshmen at the "soccer house." On Feb. 16, 2013, Henley was the subject of that hazing ritual, which meant he consumed large amounts of alcohol. According to the complaint, he hit his head several times on inanimate objects.

He was allegedly brought to his room early on the morning of February 17, and did not leave his bed until February 18. That day he visited the Xavier sports medicine department. He further claimed that he was pressured by his teammates to say that the concussion he suffered that night came from playing soccer.

Xavier allegedly followed its concussion protocols of having its athletes undergo impact testing. He was also to receive medical clearance by a physician before being allowed to return "to full sport activity."

However, on March 4, "an unsupervised student trainer" allegedly cleared the plaintiff for a return to soccer.

The plaintiff contends that Head Soccer Coach Andy Fleming "knew or should have known that the plaintiff had not undergone a followup impact test or physician evaluation before being allowed to return to the soccer field."

On March 28, 2013, the plaintiff

was participating in a scrimmage against Bowling Green State University when he headed a ball. He was then knocked to the ground by an opposing player, causing a concussion. Henley claimed this resulted in the debilitating condition known as "second impact syndrome."

Nevertheless, Fleming allegedly met with the plaintiff on March 27 and "required him to sign a document on April 12, which "described what (Fleming) believed to be academic and performance issues." The plaintiff claimed this was "an additional attempt to cover up" the decision to allow Henley to return too soon.

On June 14, the university allegedly revoked the plaintiff's scholarship, citing "performance issues." The plaintiff claimed the performance issues arose from the concussion-related events of the previous six months.

The plaintiff claimed that as a result of the second concussion, the plaintiff sustained serious cognitive and physical limitations, which impaired his ability to continue to play soccer. More importantly, the second concussion impacted the plaintiff's ability to perform usual daily activities and stay focused on his academics."

Henley is suing Xavier University and Fleming for one count of hazing, one count of negligence, one count of negligent supervision and one count of vicarious liability. He is seeking \$50,000 in damages, attorney fees and other costs associated with his injuries.

Xavier University released the following statement on the lawsuit: "We have reviewed the complaint. The allegations of wrongdoing are unfounded. The University will provide a vigorous defense." ■

## The UNC Debacle: Lessons Learned From a Legal Standpoint

By Carney Shegerian

**F**rom all angles, the current happenings at the University of North Carolina-Chapel Hill (UNC) involving whistleblower Mary Willingham form a complex, high-profile situation, involving a large swath of administrators and athletes all allegedly complicit in their acceptance of substandard ethical compliance. From a legal standpoint, Ms. Williamson's fight to stand firm on the laws protecting her as a whistleblower is at least a plausible one. Thus, it would seem that there are important lessons to be learned from the entire ordeal.

### THE LAW RESPONDS WHEN AN EMPLOYEE BLOWS THE WHISTLE

When Mary Williamham, a former learning specialist for the UNC Academic Support Program, decided that enough was enough, she joined the ranks of a number of whistleblowers who have pulled back the cover on scandal after scandal over the decades. Ms. Willingham's job was to assist student athletes with academic challenges through tutoring and educational assistance. This task placed her up close and personal with the inner workings of an alleged large system of academic fraud, with school officials turning a blind eye to the "functional illiteracy" among UNC student athletes.

Though not yet proven, no doubt, the purpose of such head-in-the-sand practices was to require that everyone involved keep knowledge about the player's less than third grade reading ability, and, in some cases, absolute illiteracy, a secret. In other words, it meant that administrators should operate under a tacit agreement—an unspoken understanding—for the sake of maintaining their jobs and the prestige of a high-profile athletic program.

The oppressive type of employment

atmosphere described in Ms. Willingham's case is not a novel one. Over the years, the highest levels of every sector of industry, education and commerce have generated complex and intense whistleblowing climates. When whistleblowers decide to break the silence, however, the law springs up to protect them, and the current situation at UNC is no different.

### WHISTLEBLOWER PROTECTION LAWS TEACH SMART LESSONS

There's a good reason why Ms. Willingham is standing firm in her position despite heated disagreement from UNC coaches and administrators. Top whistleblower protection laws like those found in the Occupational Health and Safety Act (OSHA), the Federal Labor Standards Act (FLSA) and the Whistleblower Protection Act, provide ample protection at the federal level and state laws offer further protection as well. These and other whistleblower and anti-retaliation laws are designed to build a hedge around employees who place their jobs and solid income on the line in deciding to expose company violations of the law and ethical standards.

There is much to be learned from whistleblower law. OSHA, for instance, protects workers from employers who discharge or discriminate against an employee because he or she has "filed a complaint or instituted a proceeding under the OSH Act or is about to testify in such proceeding." Although there is no private cause of action under OSHA's whistleblower provision, an aggrieved employee can file a complaint with the Secretary of Labor within thirty days of a violation.

According to OSHA, the Secretary has authority to order all appropriate relief, including the aggrieved employee's reinstatement with back pay. Similarly, state laws with hefty remedies for aggrieved

whistleblowers are also designed to keep wayward employers in line with ethical standards.

### STATE LAW PROTECTS WHISTLEBLOWERS FROM HARASSMENT AND DISCRIMINATION

In the current case, a 37-year-old whistleblower watch dog group, the Government Accountability Program (GAP) could assist with the use of North Carolina law to obtain protection for Ms. Willingham. The group alleges that Ms. Willingham has experienced harassment and retaliation in the wake of a January CNN report exposing poor literacy rates among UNC student athletes and has called for the university to conduct a thorough investigation. The group also alleges that the university has attempted to smear Ms. Willingham's reputation by publicly questioning and disavowing her research methods.

Most state whistleblower laws have the authority to protect whistleblowers when they 1) report unlawful incidents to 2) someone outside of the place of work. It is not necessary that the incidents be reported to police or government officials. In North Carolina, whistleblowers who are "discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against" can obtain protection from the False Claims Act (30 U.S.C. Section 3730(h)), a broad sweeping statute designed to protect the government from false claims as well as provide protection for whistleblowers.

According to the statute, whistleblowing employees are entitled to "all relief necessary to make the employee whole." This may include reinstatement, two times the amount of back pay lost, interest on

See THE UNC DEBACLE on Page 4

## The UNC Debacle: Lessons Learned From a Legal Standpoint

Continued From Page 3

the back pay and compensation for “any special damages sustained as a result of the discrimination,” including attorneys fees and costs. These are hefty prices to pay for non-compliant employers.

### BEST PRACTICES TO AVOID THE WHISTLEBLOWER CONUNDRUM

The whistleblower scenario presents a significant amount of risk for employers whose policies or employment practices center around fraudulent or illegal activity. It stands to reason that most employers would be extremely vigilant in their efforts to avoid even the appearance of unethical behavior in light of the heavy consequences and detrimental exposure which results from the whistleblower experience.

Many employers rely on compliance programs or company whistleblower policy to avoid lapses in ethical behavior and to prevent the kind of fraudulent activity that would lead a whistleblower to take

action. The purpose of such programs is to outline the steps and tips for best possible adherence to federal and state laws. When these programs are effective, companies stay within ethical guidelines and whistleblowers have very little cause to expose non-compliant behavior.

However, in some cases, even with compliance programs in place, employers may continue to engage in illegal or fraudulent behavior, deeming the importance of certain business prospects or the prestige of the organization more important than abiding by ethical standards. This type of climate in the workplace is to be avoided if an employer wishes to remain free of the risk of having a whistleblower finally make the decision to speak out.

The stakes are high when whistleblowers take action, and the employer’s reputation and financial stability could be placed on the line. In a high-profile case like the situation at UNC, employers of all kinds

would be wise to take note of the current firestorm. ■

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### Sources

1. Survey of Federal Whistleblower and Anti-Retaliation Laws, (April 22, 2013) Congressional Research Service, [www.crs.gov](http://www.crs.gov).

## Johnny Football: Heisman Winner Closer to Registering Mark

By Natalie S. Lederman, of Sullivan & Worcester LLP

In honor of Johnny Manziel’s pro day, there’s something for the Texas A&M star to celebrate. Just last week, the U.S. Patent and Trademark Office rejected an application made by an entity unaffiliated with Manziel for the mark JOHNNY FOOTBALL, paving the way for Manziel’s application to proceed.

Manziel rose to fame in 2012 breaking numerous records in his first season with Texas A&M. Along with the Heisman Trophy, the Manning Award, and the Davey O’Brien National Quarterback Award, Manziel also won a nickname – “Johnny Football” – that followed his rise

to popularity.

On November 1, 2012, just as the nickname had started to gain popularity, a local investment firm named Kenneth R. Reynolds Family Investments, unassociated with Manziel, filed an application with the U.S. Patent and Trademark Office for the mark JOHNNY FOOTBALL, claiming the mark was not associated with any particular individual. When Manziel sought to register the mark three months later through JMAN2 Enterprises, his filing was placed on hold due to the already-pending Reynolds filing.

The U.S. Patent and Trademark office refused the registration, according to its examining attorney, because “the

applied-for mark consists of or includes a name, portrait, or signature identifying a particular living individual whose written consent to register the mark is not of record.” The examiner also attached to the rejection notice, as support, news articles specifically referring to Johnny Manziel by his nickname.

The examiner’s rejection is supported by 15 U.S.C. §1052(c), which provides that a name that identifies a living person cannot be registered as a trademark without such person’s written consent. This includes nicknames, provided that a person is sufficiently known in the field of the product or service that the relevant

See MAKE WAY on Page 11

## Game Changer — NLRB Regional Director Finds Northwestern Scholarship Football Players are Employees under the NLRA

By Robert L. Clayton and Vincent Norwillo, of Gonzalez Saggio & Harlan

On March 26, 2014, in Northwestern University, the NLRB Regional Director for Region 13 issued a Decision that could permanently change major college sports. Specifically, the Regional Director found that football players receiving grant-in-aid scholarships from Northwestern University (Northwestern), who have not exhausted their playing eligibility, are employees under Section 2(3) of the NLRA. The decision also directed that an immediate secret ballot election be held among the eligible employees in the unit to determine whether they should be represented by the College Athletes Players Association (CAPA) in collective bargaining with Northwestern.<sup>[1]</sup>

### THE PARTIES' COMPETING POSITIONS

In its petition to the NLRB, CAPA claimed that football players receiving grant-in-aid scholarships (“the players”) performed services for Northwestern “under a contract of hire, subject to Northwestern’s control or right of control, and in return for payment.” Accordingly, the Union argued that these scholarship student-athletes were “employees” within the meaning of the NLRA, and therefore entitled to choose whether or not to be represented for purposes of collective bargaining.

Northwestern maintained that the football players were not employees. Citing the Board’s Brown University decision, Northwestern argued that the overall relationship between the players and the University was primarily educational, rather than economic, and that the players were essentially students engaged in school sponsored activities.<sup>[2]</sup> In the

alternative, Northwestern argued that the players were temporary employees who are not eligible for collective bargaining. Finally, Northwestern asserted that the petitioned-for bargaining unit was arbitrary and not appropriate for bargaining, in part because it excluded student athletes who walked-on to the football team and shared an overwhelming community of interest. The Regional Director rejected each of these arguments.

### THE CRITICAL FACTS — COMPENSATION AND CONTROL

The Regional Director supported his Decision by characterizing the value of grant-in-aid scholarships as “compensation to perform football-related services for Northwestern”. Specifically, he noted that the football grant-in-aid scholarships awarded by Northwestern averaged a total of \$61,000 to pay for tuition, fees, room, board and books. Northwestern extended these scholarship benefits for up to five years of player eligibility as determined by the rules of the National Collegiate Athletic Association (NCAA).

The Regional Director also viewed the scholarships as well as the associated Letter of Intent (“Tender”) as subjecting the students’ daily activities to Northwestern’s control. The Tender includes the terms and conditions of the scholarship offer, including the caution that the scholarship can be reduced or cancelled if the player: a) becomes ineligible for intercollegiate competition, whether by accepting compensation for football, acquiring an agent or otherwise; b) engages in serious misconduct warranting discipline including criminal activity or an abuse of team rules; or c) voluntarily withdraws from football. The Tender also explains that the scholarship award cannot be reduced based

on the player’s athletic ability or injury.

The Regional Director stressed that Northwestern required scholarship players to comply with a series of team and athletic department rules not applicable to students who were not on an athletic scholarship. A number of these rules related exclusively to the students’ football activities, including physical conditioning “penalties” for tardiness and other violations of team rules; game day attire requirements; and travel restrictions before football games.

The Regional Director also noted that the University imposed restrictions on the players that were not only unrelated to football, but also applied year round. For example, the University required grant-in-aid players to live in dormitories as freshmen and sophomores; obtain permission before entering into any outside employment (to ensure they are not receiving additional compensation or benefits based on their reputation or athletic ability); adhere to a stringent social media policy controlling what they may post and prohibiting them from denying their coaches’ friend requests; and prohibited the scholarship players from profiting from their image or reputation, including through the sale of merchandise or photographs.

The Regional Director found it significant that these rules were *in addition* to the players’ expected commitment to the football program. For example, Northwestern also required the scholarship players to attend a pre-season training camp and devote 40-60 hours per week to practice, conditioning, film study, and other football-related activities both during and after the actual football season. Despite these commitments, the players did not receive academic credit for playing football,

See THE GAME CHANGER on Page 6

## Game Changer – Football Players Called Employees

Continued From Page 5

could not enroll in classes that conflicted with practices or pre-season training — all while being directed by coaches that were not members of the academic faculty.

### THE LEGAL ANALYSIS — STUDENT-ATHLETES ARE COMMON LAW EMPLOYEES

In reaching his Decision, the Regional Director did not simply assess whether the players satisfied the definition of “employee” as expressly contained in the Act. Rather, in a veiled attempt to circumvent existing precedent, the Regional Director cited Supreme Court authorization to consider the common law definition of “employee”<sup>[3]</sup> when construing Section 2(3) of the Act. Under this common law test, an employee is a person who performs services for another under a contract of hire, subject to the other’s control or right of control, and in return for payment.<sup>[4]</sup>

Applying this test, the Regional Director concluded that football players who receive grant-in-aid from Northwestern are employees because: the scholarships are a transfer of economic value as compensation to perform football-related services for Northwestern under a contract for hire; the scholarships are contingent upon the players’ football performance, providing incentive for the players to abide by “player only” rules that significantly restrict the payers’ daily lives. The Region also concluded that unlike the scholarship recipients, walk-on players did not meet the common law definition of employee because they did not receive compensation for football services or sign a Tender, and were permitted more flexibility to miss practices if they conflict with their academic schedule.<sup>[5]</sup>

### BROWN UNIVERSITY DISTINGUISHED

In *Brown University*, the Board found that the graduate students were not “employees” under the Act because the overall relationship between the graduate assistants and their university was primarily an educational one, rather than an economic one. In *Northwestern University*, the Regional Director found that the scholarship players are not “primarily students”:

“The players spend 50 to 60 hours per week on their football duties during a one-month training camp prior to the start of the academic year and an additional 40 to 50 hours per week on those duties during the three to four month football season. Not only is this more hours than many undisputed full-time employees work at their jobs, it is also many more hours than the players spend on their studies.”

The Regional Director also emphasized that unlike the *Brown University*<sup>[6]</sup> graduate assistants, the *Northwestern* received no academic credit for their football activities, nor did their football performance satisfy a core element of their educational degree requirements. Moreover, the players’ performance of their football activities were directed and supervised by members of the Northwestern coaching staff, who were not part of the University’s academic faculty. The Regional Director found that this distinction reduced any concern that collective bargaining would have a «deleterious impact on overall educational decisions» by the academic faculty. Finally, the Regional Director found that the scholarship players’ compensation was not financial aid, since the players were required to perform athletic services to receive their scholarships, whereas the graduate assistants’ compensation in *Brown University* was not tied to the quality of their work.

### SCHOLARSHIP PLAYERS ARE NOT TEMPORARY EMPLOYEES

The Region also rejected Northwestern’s alternative argument that the players were temporary employees. Under Board law, employees employed for a set duration or have no substantial expectancy of continued employment are generally excluded from voting during a union election as temporaries.<sup>[7]</sup> However, the Regional Director found that the football players, who generally remained on the team for four to five years, were not temporary employees because the Board has never applied the term “temporary” to employees whose employment, albeit of a finite duration, might last from three to seven or more years.<sup>[8]</sup>

### THE IMPLICATIONS

*Northwestern* is significant because it is the first NLRB determination that student athletes qualify as employees of a university and are permitted to unionize. Even so, it is not binding upon other Regions. Indeed, the University has confirmed its plan to appeal the Decision to the NLRB. Unless the Board approves the Regional Director’s analysis, this Decision is not precedential. Even if the Board adopts the Region’s analysis, the factors relied on for concluding that certain student athletes at Northwestern are employees covered by the NLRA may not apply at academic institutions or even to non-football scholarship athletes at Northwestern. In any event, it will likely be several years before the case runs its full course through the Board and federal judicial appeals. By then, the student athletes presently in the petitioned-for unit will likely have graduated.

In the interim, this Decision may expose  
See THE GAME CHANGER on Page 8

## Federal Judge Sides with California State University, Sacramento in Dispute with Rowing Club

A federal judge from the Eastern District of California has granted a motion to dismiss filed by California State University, Sacramento (CSUS) in a case in which the school was sued by the Men's Rowing Club, which claimed it was denied procedural due process after the school suspended it.

The dispute began in late 2012 when the school's interim assistant director of intramural and sport clubs suspended the club for failing to comply with the Tier 1 club training and competition requirements. The suspension came after the Rowing Club admitted that they used students that were not CSUS students to practice and compete. This, the defendant claimed, was "in direct violation of a (the school's) sports club rule." The suspension lasted until February 23, 2013.

The Rowing Club sued, alleging that CSUS should not have issued the suspension without prior notice and a hearing. Specifically, it claimed the suspension violated the written Student Conduct Procedures contained in the Policies and Procedures for CSUS.

In its analysis, the court noted that "a necessary prerequisite to any procedural due process claim is a recognized liberty or property interest.

"California case law has determined that a 'student's participation in interscholastic athletics, like any other extracurricular activity, is not protected by the due process guarantee of the federal Constitution.' Ryan v. Cal. Interscholastic Fed'n-San Diego Section, 94 Cal. App. 4th 1048, 1059-60, 114 Cal. Rptr. 2d 798 (2001).

"Although participation in extracurricular activities is generally not a protected property right, a property

right may nonetheless be created if mandatory rules or disciplinary policies are in effect. Brands v. Sheldon Cmty. Sch., 671 F. Supp. 627, 631 (N.D. Iowa 1987). As noted in Brands, 'when a government must follow mandatory laws or regulations which limit its discretion to make a decision in any way or for any reason, those laws or regulations can create a property right which is deprived if those regulations are not followed.' Id.

"To be entitled to the due process protections of the Fourteenth Amendment, the plaintiff must allege a protected liberty or property interest. As stated in Brands, 'a clear majority of courts addressing this question in the context of interscholastic or intercollegiate athletics has found that athletes have no legitimate entitlement to participate.' Id. However, it is possible for a defendant to create a property interest by adopting mandatory regulations or policies. The plaintiff's FAC refers to Executive Order 1006, which states that campuses 'may establish codes of conduct for student organizations and procedures for sanctions against the organizations. Sanctions may include . . . suspension of recognition for a specified period of time . . . .' FAC, ¶ 11. The plaintiff also relies on a provision from the Student Organization Handbook 2011-2012 which provides that 'a student organization's recognition may be withdrawn or otherwise suspended by Student Organization[s] & Leadership following a review of written charges presented to the Assistant Director of Student Organizations & Leadership.' Id. at ¶ 13. The language of these provisions is permissive, not mandatory, and the plaintiff fails to provide any relevant

policies, regulations, or procedures that would limit in any way the discretion of the defendant in disciplining student organizations such as the plaintiff."

The court also took issue with the plaintiff's "reliance on California case law as set forth in Andersen v. Regents of University of California, 22 Cal. App.3d 763, 99 Cal. Rptr. 531 (1972)," calling it "misguided."

The plaintiff cited Andersen "for the proposition that in any college disciplinary proceeding, the student is entitled to notice and a hearing. However, Andersen involved disciplinary sanctions taken against a student for misconduct such as forging a professor's signature. Andersen, 22 Cal.App.3d at 768. While the court's analysis in Andersen may demonstrate that students have certain due process rights in the context of disciplinary actions, the same is not true in the context of extracurricular activities. This point was made explicit by the court in Ryan, which held that a 'student's participation in interscholastic athletics, like any other extracurricular activity, is not protected by the due process guarantee of the federal Constitution.'" 94 Cal. App. 4th at 1059-60. ■

Sacramento State University Men's Rowing Club v. California State University, Sacramento; E.D. Cal.; No. 2:13-cv-00366-MCE-EFB, 2014 U.S. Dist. LEXIS 17353; 2/11/14

Attorneys of Record: (for plaintiff) Michael James Zinicola, LEAD ATTORNEY, Law Office Of Michael J. Zinicola, Sacramento, CA. (for defendant) Lorena C. Penalzoza, LEAD ATTORNEY, California State University, Office of General Counsel, Office of the Chancellor, Long Beach, CA.

## Game Changer – Football Players Called Employees

Continued From Page 6

other private universities and colleges to a range of unprecedented concerns. At a minimum, “copy cat” petitions may be filed in Regional offices across the country. Likewise, this Decision may trigger test union organizing cases at public universities, subject to any applicable state labor relations laws.

The Decision threatens larger concerns wholly unrelated to union organizing. Specifically, student athletes (or their new lawyers) may be motivated by this Decision to test whether they are covered by other federal statutes, such as the Fair Labor Standards Act. If student-athletes are found to be «employees» under the FLSA, they could be entitled to back wages, which could expose a university to expensive class or collective action litigation.

The Decision also implicates “employee” eligibility issues under state laws. For example, if student-athletes became “employees” subject to state unemployment insurance laws, their “employer” University

could be liable for unpaid statutory contributions. Moreover, if student-athletes were regarded as “employees” eligible for workers’ compensation benefits, the cost of maintaining insurance and paying the inevitable claims could force many smaller schools to abandon some varsity sports programs altogether.

Finally, there is the elephant in the room. If student-athletes are ultimately found to be entitled to a minimum or collectively bargained wage, the resulting “compensation for services” would almost certainly compromise their eligibility under the NCAA rules. Such an outcome would threaten the foundation of the entire athletic structure of the NCAA. ■

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- [1] *Northwestern University v. College Athletes Players Association (CAPA)*, Case 13-RC-121359
- [2] *Brown University*, 342 NLRB 483 (2004).
- [3] *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995)
- [4] *Brown University*, 342 N.L.R.B. 483 (2004)
- [5] *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 N.L.R.B. slip op. 83 (2011)
- [6] *Brown University*, 342 N.L.R.B. 483 (2004)
- [7] *Marian Medical Center*, 339 N.L.R.B. 127 (2003)
- [8] *Boston Medical Center*, 330 N.L.R.B. 152 (1999)

## If Players Are Employees, What Are Coaches?... Supervisors?

*By Gregg E. Clifton, Howard Bloom and Patrick Egan, of Jackson Lewis*

The decision of the Regional Director of Region 13 of the National Labor Relations Board (“NLRB”) that scholarship football players at Northwestern University are “employees” under the National Labor Relations Act (“NLRA”) has created an interesting question for all colleges and universities: Are members of coaching staffs now considered to be supervisors under the NLRA? The answer is likely “yes.” This would mean that members of athletic department coaching staffs must be trained to foster their understanding that the NLRB has changed the rules relating to scholarship athletes.

A Section 2(11) “supervisor” under the NLRA is one who possesses the authority, in the employer’s interest, “to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”

Supervisory status requires an extensive analysis turning on the facts in each case. However, based upon the defined role and generally accepted responsibilities of most college football coaches, it is likely that the

NLRB will conclude in almost all cases that coaches are statutory supervisors, if their players are employees.

If this is so, coaches’ actions and statements can legally bind their university and constitute unfair labor practices (“ULP”) in violation of the NLRA. The NLRA prohibits employers from making statements or engaging in conduct that “interferes with, restrains or coerces” employees in their right to join a union or to band together to improve working conditions. It also prohibits employers from discriminating against employees because of their union activities or sympathies, or because they band together to

See IF PLAYERS on Page 9

## Appeals Court Upholds Jury Verdict for Coach Against Asbury University in Retaliation Case

**A** Kentucky state appeals court has affirmed a jury verdict for a former coach at Asbury University, who sued the university for firing her in retaliation for her claim of discrimination.

As such, plaintiff Deborah Powell will still receive the \$380,000 jury award as well as \$200,000 in attorneys' fees.

Powell was hired as the school's part-time head women's basketball coach in 2002. A year later, she was named the full-time coach, which included some responsibilities as an intramural coordinator.

In 2008, Asbury terminated Powell's employment, claiming that it did so because student athletes had complained that Powell was caressing her assistant coach at various times while involved in her coaching duties. The court noted that Asbury is "a Christian school" and that then-Provost Jon Kulaga said that "the student athletes were uncomfortable with Powell's behavior in their presence."

Prior to Kulaga, Ray Whiteman was

provost at Asbury. Powell filed a gender discrimination grievance against Whiteman, asserting that she was being discriminated against in that she was given extra intramural duties. Asbury contends that these extra duties were a result of her full-time employment.

Powell ultimately sued for discrimination and retaliation. On February 2, 2012, the jury found in favor of Asbury on Powell's gender discrimination claim, but awarded Powell \$380,000 on her retaliation claim. Asbury appealed.

One of the school's arguments was that an error was made in the jury instruction, which was that "to prevail on her claim of retaliation, Deborah Powell must prove that:

"She engaged in protected activity by complaining about gender discrimination;

She had a good-faith, reasonable basis for her complaints;

She suffered material adverse employment action in connection with her

employment;

Asbury University officials responsible for the actions against her were aware of her complaints of gender discrimination;

Her complaining about gender discrimination was a substantial and motivating factor in the adverse employment action; and

But for her complaining about gender discrimination she would not have suffered the adverse employment action."

In essence, Asbury argued that a finding of retaliation could not be made, if the discrimination claim was denied.

"First, the U.S. Supreme Court makes clear that retaliation is a separate cause of action and requires different proof from status based (i.e., race, color, religion, sex, national origin) claims," wrote the court. "Kentucky cases also treat retaliation claims separately, see *Kentucky Dept. of Corrections v. McCullough*, 123 S.W.3d 130 (Ky. 2003). Therefore, we hold that the retaliation claim can go forward even if the underlying discrimination claim fails.

"Second, the Supreme Court in *Nassar* held that Title VII retaliation claims must be proved according to traditional principles of 'but-for causation.'"

The court elaborated:

"Deborah Powell's complaining about gender discrimination was a substantial and motivating factor in the adverse employment action; and but for her complaining about gender discrimination she would have not suffered the adverse employment action." ■

Asbury College, Now Asbury University v. Deborah Powell; Ct. App. Ky.; NO. 2012-CA-000653-MR, 2014 Ky. App. Unpub. LEXIS 75; 1/31/14

Attorneys of Record: (for appellant) Debra H. Dawahare, Leila G. O'Carra, Lexington, Ky. (for appellee) Debra Ann Doss, Bryan Begley Daley, Lexington, Ky.

## If Players Are Employees, What Are Coaches?

Continued From Page 8

improve working conditions.

An NLRB Regional Office's investigation of a ULP charge will decide whether the athlete is an employee under the NLRA, and whether the coach who engaged in the complained-of conduct or made the allegedly unlawful statement is a "supervisor." If the Region decides that the answer to both questions is yes, it will then decide whether the coach's conduct/statement violated the NLRA.

The remedies that potentially can be imposed against a college or university by the NLRB depend on when the ULP occurs:

The potential remedy for a ULP com-

mitted at any time is the posting (for 60 days) of an official "Notice to Employees" in the workplace (conspicuously placed wherever other notices to employees, now including student-athletes, are posted) stating that the institution violated federal law, with a description of the specific illegal acts found to have been committed. In certain cases, the NLRB even has required a senior member of the management team involved in the ULP to read the Notice to the affected employees. Further, if an employee has been unlawfully suspended or termi-

See IF PLAYERS on Page 11

### **BYU Changes Media Relations Policy Regarding Honor Code Violations**

Brigham Young University has changed a policy that many believe was unfair to the student athlete as well as his or her family. Previously, BYU's athletic department might respond to inquiries on the status of disciplined athletes by confirming whether the student was disciplined for an honor code violation, which some believe attached a scarlet letter to the student. Meanwhile, other universities merely point to "a violation of team rules." Going forward, "there won't be a campus spokesperson that addresses any honor code issues anymore," said BYU Athletic Director Tom Holmoe. "There will be two exceptions to that. If there is something that is in public record, or if one of our student-athletes chooses to come public, then we would. We won't discuss any honor code violations anymore, so don't ask."

### **Troy University Shuttters Rodeo Programs**

Troy University has announced that it will discontinue its men's and women's rodeo programs after the current season. Athletic Director John Hartwell issued the following statement: "After an extensive evaluation of our rodeo programs, part of which included revenue, expenses, number of participants and risk management, the determination was made to discontinue the men's and women's rodeo programs at the end of the current academic year." The school announced that it will honor the scholarships spread across nine student athletes. "We certainly understand the situation our student-athletes on the rodeo teams are in with this decision."

### **University of New Mexico Bans Cup-Throwing Fan**

The University of New Mexico has banned a fan, who threw a cup of ice water at an opposing team, from attending any sporting event at the school effectively immediately and through the end of the 2014-15 season. The following statement was issued by Vice President for Athletics Paul Krebs: "As folks know, at the February 22 basketball game between the University of New Mexico and San Diego State University, we had an unfortunate incident occur at the end of the game where a Lobo fan threw a cup with ice at the San Diego State team as they were exiting the court. The Athletics Department has identified, contacted and spoken with the individual responsible for this act. The person in question has been banned from attending any Lobo athletic events, basketball or otherwise, on the UNM campus for the

remainder of this year and for the 2014-15 athletic season. The individual responsible purchased his seats for the game from a season ticket holder. The season ticket holder is responsible for the actions of the people in their seats, and we are in discussions with them about this incident as well. We appreciate the many individuals who helped us in this process. The vast majority of our fans are great fans who enthusiastically cheer on our Lobos and have made The Pit one of the greatest home court environments in college basketball. However, we will not tolerate fan behavior incidents such as the one that occurred on the 22nd, as it puts the program, the university, and the city in such a poor light. We now consider this matter closed."

### **Former Student Athletes Sue Rutgers, Coaches and Other School Officials**

Two former Rutgers University basketball players have filed a civil lawsuit against the school, former administrators, ex-coach Mike Rice and current coach Eddie Jordan in New Jersey state court, alleging that the defendants were responsible for the verbal and physical abuse they allegedly suffered at the hands of Rice. Plaintiffs Jerome Seagears and Robert Lumpkins alleged the following in their complaint: negligence, negligent hiring, training and supervision; gross negligence; breach of fiduciary duties; assault and battery; intentional infliction of emotional distress; intentional infliction of emotional distress (retaliation); negligent infliction of emotional distress; interference with prospective economic advantage; and breach of implied. Also named in the lawsuit is former athletic director Tim Perneti.

### **Title IX Investigation Cloud Settles over FSU**

The savior of Florida State University's football program is also bringing some unwanted attention to the Tallahassee campus. The U.S. Department of Education's Office for Civil Rights is reportedly investigating whether the school violated Title IX laws in its handling of the Jameis Winston rape allegations. USA Today reported earlier this month that federal officials are attempting to determine if the case was dealt with in a prompt and equitable fashion. The controversy began in 2013 when a former FSU student came forward and alleged that she was raped by another student that she later identified as Winston. Winston and his attorney claimed the sexual encounter was consensual. The attorney general criticized local police for delays in the investigation, but then ultimately decided not to bring charges. ■

## If Players Are Employees, What Are Coaches?

Continued From Page 9

nated (improperly benched, suspended or kicked off the team), the NLRB can order reinstatement (placement back on the team's roster) and back pay (reinstatement of the athlete's scholarship and all of its benefits).

If the ULP occurs after the union has filed a petition with the NLRB to conduct a representation election, remedies could include overturning any election that the institution may have won and requiring a rerun election. The college or university also would have to post a Notice to Employees. Again, if an employee has been unlawfully suspended or terminated, the NLRB also can order reinstatement and back pay, with rapidly accumulating interest.

If the ULP occurs while there is active union organizing underway and after

the union had obtained signed union authorization cards from a majority of the "employees" in the proposed unit, presumably including scholarship football or basketball players, the NLRB would require the posting of a Notice.

If the ULP involved what the NLRB refers to as "outrageous" and "pervasive" violations, or those tending to undermine the union's majority strength and impede the election process, and where the possibility of erasing the effects of that conduct and ensuring a fair election is slight, the NLRB also could impose a more drastic remedy of issuing a "bargaining order."

This would require a college or university to recognize the union as the representative of the players and begin the process of negotiating a collective bargaining agreement. This could occur

in the absence of an election or after an election in which the union lost. Examples of such "hallmark" violations of the NLRA include conduct such as terminating key union supporters (e.g., cutting union supporters from the team), providing benefits to players to discourage their interest in the union or threatening plant closure (e.g., shutting down the program or taking away all scholarships) to discourage union organizing.

The impact of the NLRB's finding that scholarship football players at Northwestern University are "employees" provides potential ramifications in addition to the change in status for these scholarship athletes. It requires the further education of athletic department coaching staffs to ensure their understanding that the NLRB has changed the rules. All coaches must be aware of their likely status as legal supervisors and the potential legal ramifications of their actions under the NLRA. ■

## UNH to Investigate Reporting Delays

Continued From Page 12

"The staff member was placed on administrative leave and subsequently terminated. The University of New Hampshire takes any and all allegations of misconduct by a member of our community very seriously. While we cannot talk about the specifics of ongoing police investigations, UNH is cooperating fully with all law enforcement agencies."

But Huddleston was clearly bothered by the delay in reporting the impropriety.

"Mr. Delaney and his colleagues will have full access to necessary resources and personnel to ensure a thorough and timely investigation into the reporting delays," he said.

"Our students and their parents count on us to act swiftly and decisively when we learn of misconduct. We, in turn, count on every member of our campus

community to report any and all forms of misconduct without delay."

### ABOUT DELANEY

Delaney is part of the law firm of McLane, Graf, Raulerson & Middleton Professional Association. Prior to that, he served for four years as Attorney General of New Hampshire. Prior to his government experience, Delaney worked for five years in private practice, focusing on complex business litigation cases.

In addition to serving New Hampshire as Attorney General, he has served on the New Hampshire Bar Association's Ethics Committee, the New Hampshire Supreme Court's Committee on Character and Fitness and on the Board of Directors of the Council of State Government's Justice Center. ■

## Make Way for Johnny Football

Continued From Page 4

public would associate the person with the mark in question. Certainly, a trophied star quarterback with a significant fan following could qualify in this instance.

Manziel is now one step closer to calling his nickname his own; Reynolds has up to six months to either request reconsideration by the U.S. Patent and Trademark Office or appeal to the Trademark Trial and Appeal Board. Once the Reynolds filing is resolved, Manziel's application can be reopened. The takeaway here, though, is one we've discussed on Trending Trademarks before; since a popular nickname has the potential to be quite lucrative for an athlete, it makes sense for that athlete to run to the U.S. Patent and Trademark Office to register the mark as soon as the nickname takes off, before someone else tries to beat them to it. ■

## Former Student Athlete Sues Iowa over Workouts

**A** former University of Iowa football player, who was hospitalized a little over three years ago after a high-intensity workout, has sued the school for negligence.

Plaintiff William Lowe alleged in Johnson County district court that coaches and trainers failed to properly supervise him during the Jan. 20, 2011 workout. He also claimed the school failed to provide medical care after he reported severe pain. Lastly, he claimed the injuries were aggravated because he was required to participate in additional workouts soon thereafter.

Because the school was negligent in “developing and implementing a dangerous improper training program,” Lowe argued that the school should have to pay unspecified damages for the pain and suffering he has allegedly been subjected to.

The incident leading to the litigation occurred on January 20, 2011 when Lowe and other members of the team participated in a “team-sanctioned mandatory intensive workout, focusing on the large lower body muscle groups.”

Lowe alleged that after the workout

the group reported “substantial leg pain and stiffness as well as abnormally dark urine.”

Despite these reports, Lowe and “other members of Iowa football team were required to participate in another “team-sanctioned mandatory intensive workout, focusing on the upper body muscle groups.”

The plaintiff further alleged that after taking the weekend, another “team-sanctioned mandatory intensive workout” was held on January 24. After that workout, the plaintiff was hospitalized and allegedly diagnosed with exertional rhabdomyolysis. The condition is defined as the result of muscles breaking down and releasing proteins into the bloodstream, which can cause kidney failure.

Lowe was allegedly released from the hospital Feb. 2. But he allegedly still suffered from weight loss, pain in his lower back and legs, headaches and high blood pressure over the next several months.

The incident led to an internal investigation in which a committee made 10 recommendations. Most notable among them, reportedly, was that the team

should shutter that specific workout, and create ways to better identify players who are suffering health complications during workouts and practices.

The committee also cleared the players, trainers and coaches of wrongdoing, after determining that the injuries were unintentional and not the fault of those who designed the workout.

During the course of the investigation in the spring of 2011, Lowe asked for his release for the purposes of transferring from the team.

At the time, he said he wasn't sure if he would play again.

“I would like to be able to sit out a year, regain my strength, feel fine and play again,” he told the media. “But I don't know. I am still down 20 pounds and I am having headaches every few days.”

In the lawsuit, Lowe maintained that the incident could have been “avoided through safe and proper athletic training and supervision.”

The lawsuit can be viewed here:<http://localtvwqad.files.wordpress.com/2014/03/lowe-vs-state-of-iowa-lawsuit.pdf> ■

## UNH to Investigate Reporting Delays on Athletic Improprieties

**T**he University of New Hampshire has hired the state's former attorney general, Mike Delaney, to lead an investigation into reporting delays of improprieties involving an athletics department employee.

The improprieties came to light on Feb. 21 after the arrest of Scott A. Weitzell, the part-time director of operations for the UNH men's basketball program, who was charged with trying to take video and still images of the team in a locker room.

The conduct was allegedly committed at the University of Vermont, where the basketball team played a game on Jan. 20. The incident was reported by “a UNH staff member,” who heard about it from members of the men's basketball team, on February 20.

Police obtained a search warrant to seize Weitzell's mobile phone, which reportedly contained the images. Media reports suggested that Weitzell had the phone on him when police attempted to

confiscate it, and then tried to destroy it.

Meanwhile, the school suspended Weitzell on Feb. 21 and fired him four days later.

UNH President Mark Huddleston said he was “deeply troubled” by the amount of time that elapsed between the Vermont game and the date when the incident was reported.

At the time, the school issued the following statement:

See UNH TO INVESTIGATE on Page 11