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Case Summaries

La'el Collins v. NFL, et al – A case illustrating the extreme deference given to arbitral awards issued under Collective Bargaining Agreements

By Paul J. Greene & Matthew D. Kaiser, *Global Sports Advocates*

La'el Collins, an offensive tackle for the Dallas Cowboys, sued the NFL, the NFL Management Council, and Roger Goodell on October 6, 2021, for breach of contract and fraudulent misrepresentation after an arbitrator under the NFL's Collective Bargaining Agreement ("CBA") upheld the NFL's 5-game suspension against Mr. Collins for violating the drug testing requirements of the CBA's Policy and Program on Substances

Paul J. Greene

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of Abuse (the "Policy"). In his complaint, Mr. Collins also sought a preliminary injunction to enjoin the NFL from imposing the 5-game suspension while the case was being appealed. Although District Court Judge Amos L. Mazzant was critical of the arbitrator's decision to uphold the suspension and noted he personally would have imposed only a fine against Mr. Collins, Judge Mazzant ultimately dismissed Mr. Collins' request for a preliminary injunction because of the significant deference district courts must give to final arbitral decisions arising out of CBAs.

In March 2020, the NFL and NFLPA agreed to a new 10-year CBA. As part of the CBA, players consented to be bound by the Policy, "which includes provisions for mandatory testing for prohibited substances, treatment protocols for players that use substances of abuse, and discipline for violations".[1] There are 9 different substances of abuse under the Policy, one of which is THC (marijuana), which is specifically tested for between the start of the pre-season training camps and the club's first pre-season game.[2]

If a player tests positive for THC (or any of the other 8 substances of abuse), the player automatically enters Stage One of the Policy's Intervention Program. In Stage One, a player is required to fulfill a treatment plan that addresses his substance of abuse issues. Unless unusual and compelling circumstances arise, a player will only remain in Stage One for a period of less than 60 days. If the player is found to need specific clinical intervention or treatment, the player is advanced to Stage Two, where a more stringent treatment plan and clinical intervention are provided. All players in Stage Two are subject to unannounced testing and will remain in Stage Two until discharged by the medical director.[3]

Under the Policy, a player in Stage Two who has a positive test (which can include a variety of situations such as providing a diluted specimen or failing to cooperate fully in the testing process), fails to appear for testing without adequate reason, or fails to cooperate with testing, will be subject to discipline by the Commissioner as set forth in Section 1.5.2(c) of the Policy:

Unexcused Failure to Appear for Testing	1st Violation: $20,000 fine 2nd Violation: 1-week's salary 3rd Violation: 2-weeks' salary 4th and Subsequent: 4-weeks' salary
Positive Test Result	1st Violation: 1/2-week salary 2nd Violation: 1 week's salary 3rd Violation: 2-weeks' salary 4th and Subsequent: 3-weeks' salary
Failure to Cooperate with Testing or Clinical Care	1st Violation: 1-week's salary 2nd Violation: 2-weeks' salary 3rd Violation: 3-weeks' salary 4th Violation: 3-game suspension 5th Violation: 4-game suspension 6th Violation: 8-game suspension 7th Violation: banishment for an indefinite period of at least one calendar year

However, under Section 1.3.3, "additional discipline" can be imposed if a player deliberately tries to substitute or adulterate a specimen, alter a test result, or engage in prohibited doping methods.[4]

Before the close of the 2019 season, Mr. Collins had advanced to Stage Two of the Intervention Program. During the following offseason, Mr. Collins provided incorrect or incomplete whereabouts information multiple times and on at least three occasions failed to fully cooperate with the testing process. As a result, the NFL imposed a 4-game suspension on Mr. Collins, but following Mr. Collins' decision to appeal the sanction, the NFL and Mr. Collins reached an agreement whereby Mr. Collins would pay a fine of $478,470 and

1 *Collins v. NFL*, 2021 U.S. Dist. LEXIS 196329, *2 (E.D. Tex. 2021).

2 See, National Football League Policy and Program on Substances of Abuse, 2020, p. 7.

3 *Id.* at p. 12-14.

4 Section 1.3.3 states:

"A Player who fails to cooperate fully in the Testing process as determined by the Medical Advisor or provides a dilute specimen will be [*19] treated as having a Positive Test Result. In addition, a deliberate effort to substitute or adulterate a specimen; to alter a test result; or to engage in prohibited doping methods will be treated as a Positive Test and may subject a Player to additional discipline."

See, *id.* at p. 14.

remain in Stage Two of the Intervention Program in lieu of serving the 4-game suspension (the "4-Game Settlement Agreement"). As noted in the 4-Game Settlement Agreement, neither party was allowed to use the 4-Game Settlement Agreement "as precedent in any other proceedings, except as required or necessary to enforce its terms."[5]

Following the conclusion of the 4-Game Settlement Agreement, Mr. Collins tested positive under the Policy on multiple occasions and on at least three other occasions also failed to appear for testing. The NFL deemed both the positive tests and failure to appear for testing as first violations and imposed the corresponding penalties as set out in the rigid sanctioning chart in Section 1.5.2(c): $20,000 fine for his unexcused failure to appear for testing and another fine of 1/2-week salary for his positive test results.

Months later, Mr. Collins failed to appear for several toxicology appointments and on one occasion, when he did appear for testing, he asked the collector if there was something that "we could do" and offered the collector $10,000. He subsequently failed to appear for testing on a number of occasions the following month.

On January 6, 2021, the NFL assessed Mr. Collins' case and imposed a 5-game suspension, which was upheld on appeal. The arbitrator found Mr. Collins' attempt to bribe the test collector was an attempt to evade or avoid testing, meaning Mr. Collins was "subject to the discipline set forth in Section 1.3.3 of the Policy".[6] The arbitrator found a 5-game suspension was a reasonable punishment under Section 1.3.3 since such a punishment was the "next logical progression from prior discipline".[7] Mr. Collins subsequently appealed this decision to state court in Texas, which was later removed to federal district court, and sought a preliminary injunction to prevent the 5-game suspension from being enforced until after the case was decided.

In order to obtain a preliminary injunction, Mr. Collins needed to prove 4 elements: (1) a substantial likelihood on the merits, (2) irreparable harm, (3) the harm he would suffer by being suspended outweighs any potential injury the NFL may suffer if the preliminary injunction was granted, and (4) the public interest supports granting an injunction.

Under the first element, Mr. Collins argued he would likely succeed on both his breach of contract and fraud claims because the NFL failed to sanction him as specifically outlined according to the Policy (i.e., he should have only been fined as opposed to suspended) and the NFL made misleading assertions to the arbitrator that he had been suspended for 4 games previously, which the arbitrator relied on in upholding the 5-game suspension against Mr. Collins.

In assessing Mr. Collins' likelihood of success, District Court Judge Mazzant explained that the court's review of an arbitrator's decision is extremely deferential: as long as the arbitrator imposed a sanction that can be arguably construed from the Policy (i.e., "rationally inferable"[8]) and did not fashion "his own brand of industrial justice"[9], then the District Court would not have the

5 *Collins*, 2021 U.S. Dist. LEXIS 196329, *17.

6 Policy, *supra*, at Appendix E, p. 28.

7 *Id.* at *7.

8 *Id.* at *13.

9 *Id.* at *9.

authority to reconsider the merits of the arbitral award and could not set aside the award, even if the award was based on factual errors or on misinterpretation of the CBA. Such deference is required because the parties to the CBA "have bargained for the arbitrator's" – not the court's – "construction of their agreement."[10]

Under this deferential legal standard, even though District Court Judge Mazzant had "serious concerns regarding … the arbitrator's interpretation of the [P]olicy"[11] and actually thought the arbitrator's interpretation of the Policy was incorrect (i.e., contrary to the arbitrator's findings, "the NFL did not give itself authority under [the Policy] to subject a player to suspension as a type of 'additional discipline' for deliberately evading or avoiding testing"[12]), he determined the arbitrator's belief that a 5-game suspension was an available sanction could arguably be construed from the Policy. Consequently, District Court Judge Mazzant found Mr. Collins could not prove he would succeed on the merits.[13]

Additionally, even though the District Court Judge Mazzant also had serious concerns with the NFL's conduct during the arbitration proceedings, namely, the NFL's use of the 4-Game Settlement Agreement to support its position to ban Mr. Collins for 5-games (an act that was in direct contravention to the terms of the 4-Game Settlement Agreement), Judge Mazzant similarly found Mr. Collins could not prove a likelihood of success on the merits under this claim because Mr. Collins was actually written up for a 4-game suspension and the settlement agreement was given to the arbitrator to review, meaning the arbitrator was not duped by the NFL.[14]

In dicta, District Court Judge Mazzant went through the other three prongs of the preliminary injunction standard and similarly found Mr. Collins failed to prove each of them, too. As a result, Mr. Collins' motion for a preliminary injunction was dismissed even though the Court made clear that it took "no comfort in enforcing an arbitration award that upholds a punishment that, arguably, is not permissible under the parties' CBA."[15]

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Twins Secure Legal Victory After Showing Legitimate, Nondiscriminatory Reason for Not Renewing Scout's Contract in Age Discrimination Case

By Cara H. Wright, J.D., Professor, Trinity University

Howard Norsetter alleges in Norsetter v. Minnesota Twins, LLC that the Minnesota Twins, LLC violated the Minnesota Human Rights Act (MHRA) when it decided not to renew his one-year contract as a talent scout and failed to consider him for other open scouting positions.

Norsetter, a permanent resident of Australia, was employed as the Twins' international scouting supervisor based in Australia. He was employed by the Twins under a series of one-year, fixed-term contracts for 27 years as a talent scout. Norsetter was 59 years old at the time his contract with the Twins expired.

Norsetter brought many notable players to the Twins organization over the course of his career. He received favorable evaluations, reviews, and feedback regarding his job performance. In September 2016, Norsetter signed a contract that would expire on December 31, 2017. The terms of the contract stated that the Twins could terminate the contract for any reason with ten days written notice.

In the fall of 2016, the Twins hired new management that assessed the Twins' scouting strategy to

10 *Id.* at *21.

11 *Id.* at *17.

12 *Id.* at *20.

13 District Court Judge Mazzant agreed with the arbitrator that, pursuant to Appendix E of the Policy, the arbitrator had to apply the discipline set forth in Section 1.3.3 since the arbitrator found Mr. Collins attempted to evade or avoid testing when he tried to bribe the test collector with $10,000. However, the sanction for "evading or avoiding testing" was not explicitly noted in Section 1.3.3. Thus, while the arbitrator believed such conduct fell within the ambit of the second sentence in Section 1.3.3, which allowed the arbitrator to impose "additional discipline" beyond Section 1.5.2(c), District Court Judge Mazzant believed Mr. Collins' evasion or avoidance to get tested should have been treated as a failure to cooperate fully in the testing process and thus fell within the first sentence of Section 1.3.3, which would have precipitated only a fine under Section 1.5.2(c).

14 *Id.* at *28-29.

15 *Id.* at *35.

determine how the Twins could most effectively spend their money and receive the best return on their investment. It was determined that the Twins were spending "an inordinate" amount of money scouting in Australia, which was considered a "niche market," relative to their return on the investment. The Twins management decided to part ways with Norsetter along with the other international scouts based in other countries. The revision of the Twins' scouting strategy appeared to be the general approach for most of the 30 clubs.

Norsetter was informed in September 2017 that his position was being eliminated following the expiration of his contract on December 31, 2017. Following the expiration of Norsetter's contract, the Twins hired eight scouts in North America who were in their 20s, 30s, and 40s; six were more than 20 years younger and three were more than 30 years younger than Norsetter. Norsetter was not informed of or considered for the openings, even though Norsetter did inform the Twins that he would relocate and take a pay cut to remain with the Twins.

Procedural History

In September 2018, Norsetter sued the Twins, claiming that the Twins discriminated against him on the basis of his age in violation of the MHRA. In May 2019, the district court granted the Twins' motion for summary judgment, determining that the Twins' decision to not renew Norsetter's contract was not motivated by discrimination. The district court reasoned that Norsetter established a prima facie case of age discrimination but that the Twins articulated a legitimate, nondiscriminatory reason for not renewing Norsetter's contract. The district court further reasoned that Norsetter failed to show that the Twins' reason or conduct was pretextual.

Norsetter appealed and the case was reversed and remanded to the district court for further limited discovery. Following the additional discovery, both parties filed cross motions for summary judgment in November 2020. The district court granted the Twins' motion for summary judgment, determining that, while Norsetter had established a prima facie case of age discrimination, the Twins met their burden to demonstrate a legitimate, nondiscriminatory reason for their business decision not to renew Norsetter's one-year contract. The district court further determined that Norsetter did not meet his burden of showing that the Twins' decision was pretextual. Norsetter again appealed.

Case Analysis and Decision

On appeal from summary judgment, the court reviewed de novo whether there are any genuine issues of material fact and whether the district court erred in applying the law. Ruiz v. 1st Fid. Loan Servicing, LLC, 829 N.W.2d 53, 56 (Minn. 2013). Norsetter alleged that the Twins violated the MHRA by discriminating against him because of his age. The MHRA provides that an employer may not, because of age, "discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." *Minn. Stat. § 363A.08, subd. 2(3)* (2020).

Under the MHRA, an age-discrimination plaintiff can survive summary judgment by submitting sufficient circumstantial evidence to survive the burden-shifting test set out in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 98 S. Ct. 1817 (1973*). *See Dietrich v. Canadian Pac. Ltd.*, **536 N.W.2d 319, 323 (Minn. 1995)** (applying *McDonnell Douglas* test to claim under MHRA). There are three steps in the *McDonnell Douglas* analysis: first, the plaintiff must establish a prima facie case of discrimination; second, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its conduct; and third, the plaintiff must prove by a preponderance of the evidence that the reason offered by the defendant is merely a pretext for discrimination. *Id.*

The district court concluded, and the parties do not contest, that Norsetter met the first step of the *McDonnel Douglas* analysis by showing a prima facie case of age discrimination. On appeal, Norsetter contests the district court's findings and conclusions on the second and third steps of the *McDonnel-Douglas* analysis.

A. The Twins offered a legitimate, nondiscriminatory reason for not considering Norsetter for the open scouting positions.

Norsetter admitted that the Twins provided a legitimate, nondiscriminatory explanation for reorganizing its scouting department and eliminating Norsetter's position. However, he argues that the Twins failed to provide a credible legitimate, nondiscriminatory reason for not considering him for the open scouting positions.

The record reflected that the Twins considered Norsetter to be their Australian scout and Norsetter's expertise to be in international scouting; consequently, the Twins did not consider him for a domestic scouting position. The record further establishes that the Twins decided to shift their international scouting philosophy after reviewing their investment returns and changes to the MLB rules capping international player signing expenditures. This resulted in the elimination of not only Norsetter's position as the Australian scout, but also several other "niche" international scouting positions. Furthermore, Norsetter acknowledged that the Twins (1) changed its international scouting philosophy throughout his employment and (2) needed to focus its international scouting efforts in Latin America.

Norsetter argued that because the Twins were aware of his desire to remain employed with the organization, they were required to inform him of the open positions and failed to do so. However, the law does not impose this requirement on employers. *See, e.g.,* **Leidig, 850 F. Supp. at 805**. The court determined that the Twins' explanation for its decision to eliminate Norsetter's position in the Australian market is legitimate and nondiscriminatory.

B. Norsetter has not offered evidence sufficient to show that the Twins' proffered explanation was merely pretextual.

The court determined that the Twins provided a legitimate, nondiscriminatory reason for not renewing Norsetter's contract and the burden shifted to Norsetter to put forward sufficient evidence to demonstrate that the Twins proffered explanation was a pretext for discrimination. *Goins v. West Group*, **635 N.W.2d 717, 724 (Minn. 2001)**.

Norsetter argued that he was far and away the best candidate for the open domestic scouting positions and that the Twins' actions were against its best interest and contrary to its policy and practice. Norsetter further argued that he was not informed of other scouting positions; that his request to be considered for the other open scouting positions was ignored, and that statistical evidence suggested pretext. Here, even with all reasonable inferences in Norsetter's favor, the court noted that he did not put forth sufficient evidence to demonstrate that the Twins' proffered explanation is pretextual.

While Norsetter put forth statistical evidence that the Twins favored hiring younger domestic scouts since his employment ended, this evidence alone is insufficient to prove pretext. *See, e.g., Hutson v. McDonnel Douglas Corp.*, **63 F.3d 771, 778 (8th Cir. 1995)** The court noted that Norsetter's beliefs regarding his skillset are irrelevant to determining pretext. *Wilking*, **153 F.3d at 873**. Norsetter did not carry his burden of showing that the Twins' proffered explanation was pretext.

Conclusion

The court determined that the district court properly granted summary judgment to the Twins. The lower court decision was **Affirmed**.

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Successful, But Slandered, High School Coach's Lawsuit Against School District Will Go Forward

By Gary Chester, Senior Writer

Hershey, Pennsylvania is known to tourists as the home of chocolate. But for Dr. Kenneth Taylor, a women's high school lacrosse coach at Hershey High School from 2013 to 2018, life became anything but sweet.

Despite winning the conference and district championships in 2018, Taylor was forced out of his position by the Derry Township School Board in 2019 amid a flurry of accusations of unsavory conduct. The result was *Taylor v. Derry Township School District*, Civ. Action No. 1:20-CV-1363 (M.D. Pa. Jan. 7, 2022), where the coach fought back against an alleged conspiracy by the board of school directors.

The Facts

The lacrosse team achieved significant success under Taylor from 2013 to 2018, but an unnamed school board director told the athletic director that another director had heard from a player's parent that Taylor had been "sexually inappropriate" with a female lacrosse player. Taylor countered that the director, Donna Cronin, had fabricated the story because she coveted the coaching position for herself.

The athletic director conducted an inconclusive investigation but asked Taylor to resign. Taylor denied the accusation but resigned. After the lacrosse players and their parents inundated the athletic director with

statements of support for Taylor, the athletic director met with Taylor and reinstated the coach. The athletic director explained that Cronin had misled him and directed him to remove Taylor.

That is where the alleged mischief escalated. Cronin allegedly recruited Lindsay Drew, a school board director, and David Obenstine, the parent of a lacrosse player, to malign Taylor and force him to again resign. Cronin allegedly told third parties that Taylor acted inappropriately with a female player and Obenstine allegedly expressed unfounded concerns about player safety in a meeting with parents. Obenstine sent emails to the athletic director accusing the district of covering up Taylor's inappropriate conduct.

Despite Taylor leading the team to a second consecutive conference title in 2019, the board voted not to retain him as coach by a 6-3 margin. The directors did not provide Taylor with notice of the facts underlying its accusations of emotional abuse and inappropriate conduct and it did not afford him a hearing.

In the search for a new coach, the athletic director interviewed Taylor and recommended him. The board rejected that recommendation, again by a 6-3 vote. Cronin, Drew, and Obenstine allegedly made false statements to other directors to persuade them to vote against Taylor.

Taylor filed the operative Amended Complaint against the district, Cronin, Drew, Obenstine, and four other directors who voted against rehiring him. Taylor asserted the following causes of action: violations of procedural and substantive due process, civil conspiracy, tortious interference, false light, and defamation. The defendants filed a motion to dismiss under Rule 12(b)(6) of the *Federal Rules of Civil Procedure*.

The Due Process Claims

Taylor brought claims under Section 1983 of the Civil Rights Act, which provides a means to enforce civil rights that exist elsewhere in the law. The court dismissed the procedural due process count brought against the board directors because they were duplicative of Taylor's claim against the district, to the extent that they were made in their official capacities. The court allowed Taylor to continue against the district since he properly alleged a deprivation of liberty when the district decided not to rehire him under circumstances creating a defamatory impression (the "stigma-plus test").

The court denied the motion with respect to the conduct of one director, Drew, that arguably was outside of her official capacity. Drew allegedly made false statements accusing Taylor of bullying players, emotionally abusing players to the point of self-harm, engaging in inappropriate (sexual) conduct with a player, and possibly shoving another player.

As to substantive due process, Taylor alleged that he had a property interest in his continued employment under Pennsylvania law. The court granted the motion to dismiss because the board voted against retaining Taylor only after his one-year appointment expired, so he had no expectation of further employment under the law. However, since Taylor alleged in his brief that he was dismissed before his term ended, he was granted leave to amend the complaint.

The State Tort Claims

The court denied Obenstine's motion to dismiss the interference with a prospective contract claim because "the athletic director's recommendation the School Board rehire Taylor squarely gives rise to a reasonable probability the School Board would have hired Taylor but for the alleged smear campaign." The court granted the motion with respect to Taylor's claim for interference with an existing contract because he failed to allege that Obenstine's smear campaign caused the district to terminate him, but it granted Taylor leave to amend the complaint.

On the false light claim, the court recognized that false light in Pennsylvania encompasses both untrue statements and selectively published true statements that create a false impression. This form of the invasion of privacy tort imposes liability on defendants who publish material that "is not true, is highly offensive to a reasonable person, and is publicized with knowledge or in reckless disregard of its falsity." The court denied Obenstine's motion because a reasonable person could find that his alleged accusations of the plaintiff's bullying, emotional abuse of players, possibly shoving a player, and possibly engaging in sexually inappropriate conduct were offensive.

As to defamation, the issue was whether Obenstine's statements were "merely annoying or embarrassing" and therefore not actionable. The court noted

that a "statement must be capable of being proven false to give rise to a claim of defamation." [*Milkovich v. Lorain Journal Co*., 497 U.S. 1, 19-20 (1990).] The court found that statements about bullying were too commonplace to be actionable, but it let the remaining defamation claims stand.

"Abuse is a serious accusation to level at a high school coach," the court wrote, "[that] is likely to lower the coach's esteem in the community and can carry the connotation of criminality."

As to the civil conspiracy count, the court noted that the plaintiff must plead: (1) facts alleging a combination of persons acting with a common purpose to do an unlawful act; (2) an overt act was done to further the common purpose; and (3) actual damages. The plaintiff must also allege an underlying tort. The court denied Obenstine's motion because Taylor properly pleaded tortious interference, false light, and defamation, and the facts necessary to establish the three requirements.

The Public Official Immunity Defense

The court also considered Drew and Cronin's motions to dismiss the tortious interference, false light, and defamation claims, based on Pennsylvania immunity to high school officials making defamatory statements. The issue was whether the directors made the statements while acting in their official capacity or as private individuals.

The court granted the motion with respect to all statements made during official school board meetings. But it denied the motion as to Drew and Cronin allegedly soliciting persons outside of board meetings to provide false information about Taylor.

The Takeway

- When an employer is confronted with sexual allegations concerning an employee, it should hire an outside law firm to conduct a thorough investigation, rather than rely on an "inconclusive" investigation by a supervisor.
- Prospective employers may publish opinions about a candidate's credentials, but if they express unsubstantiated defamatory "facts," they should be prepared to pay substantial legal fees, at the very least.

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High School AD Cannot Prove Hostile Employment Actions by School Board, Loses Job

By John Miller, Ph.D., Professor, Sport Management, University of Southern Mississippi

From 2004 until 2019, Patrick Murtha worked under contract for the Rossford Exempted Village Schools in various capacities including assistant principal and athletic director (*Murtha v. Rossford Village Schools*, 2021). In late January 2019, several members of the school's cheerleading squad inquired to athletic director Murtha about ordering new uniforms (Thomas-Baird, 2020). Since the request was not in line with the uniform rotation followed by the school, Murtha denied the request. About one week after the denial, one of the upset cheerleaders mentioned in a class that she would retaliate against Murtha for not allowing the purchase of new cheerleading uniforms (Thomas-Baird, 2020). As a result, in February 2019, a group of female students complained that Murtha harassed them by inappropriately touching their hair, faces, and shoulders (*Murtha v. Rossford Village Schools*, 2021).

Anti-Harassment Investigation

To resolve the issue, Rossford's administration began an investigation of the female students' allegations and placed Murtha on paid administrative leave (*Murtha v. Rossford Village Schools*, 2021). The results of the investigation revealed that the allegations made by the female students were consistent, credible, and corroborated. Thus, the report surmised that discipline against Murtha was warranted as it applied to Rossford's anti-harassment policy. The investigation also revealed similar misconduct allegations had been levied against Murtha at a different school previous to his employment at Rossford. These allegations resulted in Murtha being asked to leave the previous school due to inappropriately harassing conduct toward female students (*Murtha v. Rossford Village Schools*, 2021).

However, it is important to note that the investigation was conducted under the Rossford Schools Anti-Harassment Policy. Furthermore, the investigation reported that while Murtha did not engage in sexual harassment as defined in that policy, he engaged in

inappropriate conduct, including unwanted touching of students' hair and or shoulders (Caldwell, 2019). Finally, Murtha contended that he was never provided a copy of the allegations against him, nor was he provided a disciplinary hearing (Thomas-Baird, 2020).

Transition Agreement

During the investigation, Murtha commenced negotiations for a Transition Agreement with Rossford's School District Board (*Murtha v. Rossford Village Schools*, 2021). In this case, a Transition Agreement would permit Murtha to finish his existing contract with Rossford while working from his home. Additionally, Murtha would not seek further employment with the Rossford School District (*Murtha v. Rossford Village Schools*, 2021). The agreement revealed that there would not be any record of disciplinary nature in his personnel file. Additionally, it is significant to note that the School Board did not report that Murtha engaged in any conduct that would require discipline or termination of his contract (Thomas-Baird, 2020). Moreover, Murtha was able to have access to the school's property and School Board would provide a letter of reference on his behalf (Caldwell, 2019). Additionally, the agreement indicated that none of the involved parties would admit to any misconduct after the Transmission Agreement. Finally

The Transition Agreement detailed that the School Board would not retaliate against Murtha or his family.

Interestingly, after the Transition Agreement had been completed, the Rossford Schools, the Rossford School Board, and Superintendent Dan Creps individually and collectively circulated the investigation report contending that discipline was justified because Murtha had been involved in many disturbing occasions of misconduct (Thomas-Baird, 2020). Murtha asserted in his lawsuit that that information released to the public was false, damaged his reputation, and marred future employment opportunities without an adequate explanation. Furthermore, Murtha related that the statements, especially in a public forum, contradicted the terms of the Transition Agreement (Thomas-Baird, 2020).

Murtha Lawsuit

Due to his identity becoming public, Murtha sued Rossford Schools, the Rossford Board, and Superintendent Creps in federal court for $1 million (Thomas-Baird, 2020). Murtha asked the defendants to "publicly recant defamatory and false statements; that any material in his personnel file be expunged; that he be awarded civil and compensatory damages in excess of $1 million; that he be awarded punitive damages in excess of $1 million; and that defendants pay his costs for this action" (Thomas-Baird, 2020, para. 4). In particular, Murtha alleged that these parties violated due process as indicated under the Fourteenth Amendment because he allegedly never received any copies of the complaints nor was provided a disciplinary hearing (Thomas-Baird, 2020). Curiously, the lawsuit Murtha filed did not include retaliation.

Procedural Due Process Fourteenth Amendment

The Due Process Clause of the Fourteenth Amendment does not allow States to deprive "any person of life, liberty, or property without due process of law" (U.S. Const. amend. XIV, § 1). To prove deprivation of procedural due process rights, Murtha needed to show that he was deprived of an individual interest that is encompassed within the Fourteenth Amendment protection elements of the of 'life, liberty, or property" (*Hill v. Borough of Kutztown*, 2006, pp. 233-234). Secondly, Murtha needed to prove that the procedures accessible to him did not offer 'due process of law'" (*Hill v. Borough of Kutztown*, 2006, pp. 233-234)

The Court needed to ascertain whether the state actually denied or impeded Murtha's ability to have sufficient life, liberty, or property interest to activate due process protection (*Board of Regents of State Colleges v. Roth*, 1972). It is here that the Transition Agreement provided significant background information. When Murtha willingly decided to renew his employment contract with Rossford, he surrendered any constitutionally protected interest that may have provided him aid under the Fourteenth Amendment. In other words, in his effort to perhaps protect his identity from public consumption by negotiating a Transition Agreement with the Rossford School Board, Murtha appeared to indicate that he was willing to separate himself from the school. As a result, Murtha's life, liberty, nor property interest would not be negatively impacted (*Murtha v. Rossford Village Schools*, 2021).

Property Interests

Murtha also contended he had a property interest in his sustained employment as an administrator for Rossford. Such a contention was predicated on the Transition Agreement leading to his leaving the school. He further alleged that his employment contract, in addition to Ohio state law, generated a property interest for which he cannot be deprived without a hearing. According to the *Board of Regents of State Colleges v. Roth* (1972), to have a property interest in a benefit, "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it" (p. 408).

While it may have been asserted that Murtha had a property interest before signing the Transition Agreement, he waived that interest when he freely consented to not apply for the renewal of his employment contract. In essence, Murtha negotiated away any claim that the Rossford School Board breached Ohio state law by constraining contract non-renewal to a good and just cause. Furthermore, Murtha appeared to accept the Transition Agreement in exchange for the promise that the Rossford School Board would supply a positive reference for future employment opportunities Murtha may pursue. As a result, Murtha surrendered any property right he may have had that would connect the due process protections of the Fourteenth Amendment.

Informational Privacy

The constitutional right to informational privacy is based on the "right to be let alone" (Pittman, 2018). If employed without approval, the information may be embarrassing or harmful to the person's reputation or future employment opportunities (Pittman, 2018). Murtha alleged a property interest from informational privacy through the state of Ohio confidentiality laws. In particular, Murtha contested Rossford's release of the Transition Agreement, the investigator's report to the public, and Superintendent Creps's release of a letter for a similar reason. The Murtha court revealed that none of the actions followed by these parties violated the conditions of either the Transition Agreement or any Ohio state laws. Moreover, had the actions had violated state law, they could not approach the level of being constitutionally protected interests. In *Kaplan v. University of Louisville* (2021), employers were found to have no affirmative duty to advise employees about their potential entitlement to a name-clearing hearing

Conclusion

The origin of this case began due to Mr. Murtha denying a request by several of the school's cheerleading for new uniforms. Murtha followed the policy, established by the school, in which uniforms for school-sponsored activities could only be purchased during certain years (Thomas-Baird, 2020). After the request was denied, one of the cheerleaders mentioned in class that she would retaliate against Murtha (Thomas-Baird, 2020). Approximately one week after the denial of uniforms, the cheerleaders reported that Murtha had harassed them by inappropriately touching their hair, faces, and shoulders. Thus, the school investigated the matter and found evidence that Murtha had harassed the students, albeit not in a sexual manner. The results of the investigation were compounded when it was revealed that Murtha had previously been found to have committed similar harassment actions at another school (*Murtha v. Rossford Village Schools*, 2021). As a result, information regarding these findings was made public by members of the school, school board, and superintendent, despite the terms outlined in the Transition Agreement (*Murtha v. Rossford Village Schools*, 2021).

Rather curiously, Murtha did not allege retaliation on the part of Rossford Schools, School Board, or Superintendent. Instead, Murtha contended a liberty interest was in his name, reputation, honor, and integrity (*Murtha v. Rossford Village Schools*, 2021). However, because Murtha voluntarily collaborated on the Transition Agreement with the School Board to not seek renewal of his position as athletic director, the Court ruled that he had no liberty interest in his reputation that would have implicated due process. Furthermore, the Court cited *Paul v. Davis* (1976) that explained that defamation by itself is inadequate to give rise to the protections of the Fourteenth Amendment. Since Murtha was not terminated, demoted, or discharged, rather he willingly agreed to not renew his contract, his legal status regarding an alleged stigma did not change. As a result, Murtha could not claim that Rossford took hostile employment action against him. The Court concluded that Murtha's constitutional claims could not be

granted and dismissed the additional state law claims without prejudice.

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S. B. v. Minn. State High Sch. League – Player's Misconduct Actions Lead to Missed Memories

By Michael A. Ross, MS

S.B. (Plaintiff) is a quarterback for the Chatfield High School varsity football team. He sought a temporary restraining order or preliminary injunction to enjoin the Defendant, Minnesota State High School League (MSHSL), from enforcing a single-game suspension that would result in him being ineligible to participate in the Minnesota Class AA State Championship football game held on November 26, 2021.

It should be noted the complaint was filed on November 23, 2021. S.B. was ejected from the semi-final football game held on November 18, 2021, after receiving two unsportsmanlike conduct penalties. As a result of his ejection from the semi-final game, S.B. would be ineligible and suspended from participation in the following game per MSHSL's bylaws (i.e., the state championship game).

S.B. disputed the unsportsmanlike conduct calls by stating he was not the instigator in the actions warranting misconduct penalties, but his conduct specific to the second call was a reaction to the twisting of his ankle and to protect his own safety. The current bylaws and verbiage within the MSHSL prohibit him from appealing the penalties resulting in the suspension being upheld. The aforementioned and specific bylaw being referenced is Bylaw 407.1, which states, "protests against decisions of contest officials will not be honored," that "the decisions of contests officials are final," and that "video recordings will not be used to overrule an official's decision or change the outcome of the game, meet, or contest."

The complaint asserts and relies on a single claim against the MSHSL under *42 U.S.C. § 1983* insisting a violation of S.B.'s due process rights protected and ensured by the Fourteenth Amendment. Utilizing this assertion, S.B. claims that the MSHSL's bylaws bar him from challenging the unsportsmanlike conduct penalties against him and the automatic game suspension resulting from said penalties. S.B. continues by insisting that the enforcement of the aforementioned bylaws set forth by the MSHSL deprived him of a property interest in the participation in interscholastic varsity athletics without due process of law. S.B. sought a temporary restraining order (TRO) and preliminary injunction to enjoin the MSHSL from upholding his suspension from the state championship game until a later date in which the misconduct penalties and automatic suspension could be reviewed by a neutral decisionmaker for further evaluation.

Case Anaylsis and Key Factors

It should be noted that a TRO or preliminary injunction is recognized as an extraordinary remedy in which the party bringing forth the claim bears the burden of establishing its appropriateness and acceptable application. To determine if a TRO or preliminary injunction should be issued, a court considers four pertinent factors:

> *(1) The threat of irreparable harm to the movant in the absence of relief; (2) the balance between the harm alleged and the harm that the relief may cause the non-moving party; (3) the movant's likelihood of success on the merits; and (4) the public interest.*

It is also noted that the likelihood of success on the merits do not need to be established or calculated with

mathematical precision. The case furthers this notion and understanding by stating "at base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined."

The court first considers the status quo issue at hand. The court reasons that S.B.'s request to have his eligibility reinstated until the merits of his claim can be reevaluated at a later date would disrupt the status quo. The purpose of the TRO is to preserve the status quo until the merits can be determined and granting a TRO under the circumstances requested by S.B. would be counterproductive to what the intended purpose is. Under these circumstances, injunctive relief is deemed not appropriate. S.B. would submit a counter claim following the determination of the court in regard to the status quo ruling, but this claim held no weight and was discarded with the acknowledgement that it would not advance S.B.'s case.

In addition to disturbing the status quo, the aforementioned pertinent factors warranting consideration before a TRO could be issued were taken into consideration, and the result of such considerations and analysis will be presented below.

S.B.'s singular claim against the MSHSL asserts his Fourteenth Amendment due process rights have been violated. As stated in the Due Process Clause of the Fourteenth Amendment, no state actor may deprive a person of life, liberty, or property, without the due process of law. By taking this approach, S.B. must prove the following criteria: (1) he has life, liberty, or property interest protected by the Due Process Clause, (2) MSHSL deprived him of that interest, and (3) MSHSL did not afford him adequate procedural rights. S.B. reasons that he has a constitutionally protected right to participate in interscholastic athletic opportunities, and that his misconduct penalties and subsequent suspension exist as a property right that was taken from him without adequate process. Relying on former precedent, the court weighed this assertion through the following lens:

> *Protected interests in property are normally not created by the Constitution. Rather, they are created, and their dimensions are defined by an independent source such as state statues or rules entitling the citizen to certain benefits. Although an independent source such as state law creates property interest, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause.*

The Minnesota Constitution created and established the right to a public education, resulting in this specific right to exist as a property interest that would be protected under said Due Process Clause. The court furthers this analysis by referring to *DeLaTorre, 202 F. Supp. 3d at 1055*, which establishes "no statue, rule, or case… definitively includes eligibility for interscholastic varsity competition within the right to a public education under Minnesota law."

It should be noted that the decision does raise question to the lens in which interscholastic athletic participation aligns with the rights of receiving public education. Former cases were considered and reviewed which arguably suggest such a correlation's existence, but many of these cases were considering season or year long suspensions as opposed to S.B.'s singular game in question. If one views interscholastic athletic participation as a part of the public education protected right, then S.B.'s claim favors in a positive light when considering the merits of the claim. The fact that he is receiving a single-game suspension, which also establishes he can remain on the football team, engage in school activities, and continue in all interscholastic school related activities except the next scheduled game in the tournament series, does not help his claim against MSHSL.

It is also noted that all ejections made by an MSHSL official require the official to review the decision with the entire officiating staff at the time of the penalty and after the game has concluded to ensure the application of the penalty is correct and justifiable. S.B. claims misconduct penalties should be subjected to review from a neutral decisionmaker. It is of the court's opinion and basing their reasoning on precedential rulings that issues such as unsportsmanlike conduct penalties are most accurately determined when left as a judgement call that are best left to the discretion of the contest or acting officials. The MSHSL does identify certain plays may be video-reviewable during the semifinal and championship games, but these plays specifically involve objective criteria and not subjective

judgement calls such as the unsportsmanlike conduct penalty in S.B.'s claim. It should also be noted that the plays deemed appropriate for video review are limited to narrow circumstance in which a given play may affect the outcome of the game in hand. Because of the aforementioned reasoning displayed, S.B. does not show a likelihood of success on the merits resulting in this factor weighing against injunctive relief in which he seeks.

The second factor warranting consideration, irreparable harm, is identified as when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages. S.B successfully illustrates the threat and presence of irreparable harm with the understanding that money damages awarded would not adequately compensate for the loss of an opportunity to participate in a state championship game.

Next, the court considers if it is their obligation to "flexibly weigh the case's particular circumstances to determine whether the balance of equities so favors the movant that the justice requires the court to intervene to preserve the status quo until the merits are determined." As previously mentioned, S.B. has established an argument for irreparable harm in the absence of injunctive relief. One must continually keep in mind that his suspension is set at a singular game and event and is not applied to an entire season or academic year. Despite the circumstances of the importance of the game in this given situation (championship game), the instituted punishment is not deemed excessive or long lasting. After the suspension had been served, S.B. is permitted to resume activities with the team as usual and without additional punishment.

With this understanding, it is the court's responsibility to weigh the harm against S.B. against the MSHSL's interest in enforcing its Bylaws. If S.B. is permitted to participate in the subsequent game while consideration on the merits of his claim is being conducted, the MSHSL's ability and overall effectiveness in enforcing its own rules and bylaws would certainly be diminished. Permitting such an action would set precedent for the MSHSL to conduct such hearings anytime an issue related to this occurs and considering the number of similar cases that occur in any given year, one must consider the long-term effect this may have on the governing body and all of its stakeholders long after this particular incident has occurred and been decided upon. One must also keep in mind that judicial intervention in this situation would alter, and not maintain the status quo as previously discussed. Based upon this reasoning, the court finds the balance of harms factor weighs against injunctive relief.

Finally, the public interest factor is considered. S.B. asserts that this factor weighs in favor of protecting the deprivation of constitutional rights until the matter can be examined and determined on its merits. As previously examined and determined, S.B. did not establish his case based on the likelihood of success on the merits of his constitutional claim. Again, based on this reasoning the court does not find sufficient evidence and weighs against granting injunctive relief. With the irreparable harm factor existing as the only favorable factor toward the plaintiff's claim, the court finds a TRO is not warranted in this issue. S.B.'s request for a TRO is denied based on the reasonings, findings, and judgement listed above relying on an effective application toward all stakeholders potentially effected from such an approved request and from the precedential framework regarding such matters.

Conclusion

There are multiple components that warrant additional consideration from any case similar to this. One should be the importance of the matter and its potential to have long-lasting implications on a much wider reaching group of potential stakeholders. Although S.B. issued his complaint in hopes of participating in a state championship game, the potentially negative effect this exception to the established rules could have created more detrimental issues for numerous participants, officials, schools, administration, parents, and arguably most important the state governing body (MSHSL). A governing body without the ability to effectively uphold its constitution and bylaws is essentially ineffective and a shadow of what it should be in regard to its duty toward its own stakeholders. In this particular case, it is clearly stated within the MSHSL's bylaws what is permitted and expectations of those choosing to participate in interscholastic competition. Wavering from this, without question, is directly harmful to the integrity and ability to enforce the rules and regulations of any governing body.

While it is unfortunate that S.B. will not be permitted to participate in such a memorable event as competing in a state championship game, this does offer a lesson for many to understand and apply as needed for upcoming athletes. This lesson is to always be cognizant of your own actions because consequences for inappropriate behavior does have the potential to have negative consequences. While it is subject for debate, currently participation in interscholastic varsity athletics is deemed as a privilege and almost voluntary while receiving an education is a protected right. Controlling one's actions and understanding the potential consequences of failing to do so should be an integral part of any program in the hopes that interscholastic participation is not developing solely athletic prowess but aiding in the development of well-rounded and high character young men and women who will further develop into positive members of society in time.

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S. B. v. Minn. State High Sch. League, No. 21-2553 ADM/JFD, 2021 U.S. Dist. WL 5545118

Michael A. Ross is the Department Chair and an Assistant Professor of Sport Management at Shorter University and a PhD student at Troy University specializing in research related to youth sport studies, leadership, sport law, social media policies and procedures within athletics, and participation motivations in sport and recreation.

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Articles

Dan Rooney and Brian Flores, Two Men Now Linked Together Forever as Part of NFL History

By Robert J. Romano, JD LLM, Senior Writer

The *Rooney Rule* is a National Football League policy requiring each of its 32 franchises to interview minority and female candidates for head coaching and other front-office positions when they become available within an organization.[16] Created in 2003 by NFL's *Workplace Diversity Committee,* a *Committee* tasked with creating initiatives to address the historically low number of minorities who have held head coaching positions in the NFL, the rule originally required a franchise to interview at least one diverse candidate before making a new head coach hire.[17] In 2009, the *Committee* expanded the policy to include general managers and equivalent front office positions, so now teams are required to interview no less than two external minority candidates for these various positions.

In December of 2018, changes were made to strengthen and enhance the effectiveness of the *Rooney Rule*, with the intention being to "create additional opportunities for diverse candidates by identifying, interviewing, and ultimately hiring coaches of color when vacancies become available."[18]

The 2018 enhancements to the *Rooney Rule* include the following:

1. Clubs must interview at least one diverse candidate from the Career Development Advisory Panel list, or a diverse candidate not currently employed by the club;
2. Clubs must continue best practice recommendations of considering multiple diverse candidates;
3. Clubs must maintain complete records and furnish to the league upon the Commissioner's request; and
4. If final decision-maker is involved in the beginning, he/she must be involved through the conclusion of the process.

16 Named after Dan Rooney, the former owner of the Pittsburgh Steelers who was the chair the league's diversity committee when the Rule was enacted.

17 The policy came about, in part, after two African-American coaches were terminated from their positions: Tampa Bay Buccaneers' Tony Dungy, who at the time of his dismissal had a winning record, and the Minnesota Vikings' Dennis Green, who was fired after his first losing season in ten years with the team.

18 NFL Communications Memo dated December 12, 2018, entitled *NFL Expands Rooney Rule Requirements to Strengthen Diversity.*

The *Workplace Diversity Committee* also endorsed **strong accountability measures** in the event clubs fail to comply or seek to evade procedures as outlined.[19]

Two years later, in 2020, the *Rooney Rule* was again revised to reward teams who groomed and developed minority talent internally, who then went on to become general managers or head coaches elsewhere. The modifications specified that if a club lost a minority executive or coach to another franchise, it would receive a third-round compensatory pick each of the next two years. If it lost both a coach and personnel member, then the team would receive a third-round compensatory pick each of the next three years.

Interestingly, in 2021, the NFL's *Workplace Diversity Committee* found it necessary to enhance the rule again, this time requiring a franchise to interview no less than two external minority candidates for open head coaching positions and at least one external minority candidate for a coordinator job. In addition, at least one minority and/or female candidate had to be interviewed for any senior level positions within an organization.

Brian Flores Lawsuit Brings Scrutiny

So, after 20 years, and four *'enhancements'* to the *Rooney Rule* later, how is the NFL and its franchises doing when it comes to diversity hiring? Well, apparently, not good enough if you ask the *'passed over'* candidate for both the New York Giants' and Denver Broncos' Head Coach position, Coach Brian Flores.

Coach Flores, who was fired after a second straight winning season at the helm of the Miami Dolphins, filed a four-count class action suit against the NFL and its 32 franchises. The federal lawsuit specifically names the New York Giants, Denver Broncos, and aforementioned Miami Dolphins, accusing them of discriminatory hiring practices against black coaches wherein such denies them the equal opportunity and compensation when compared to their white coaching counterparts.

Coach Flores' complaint, filed in U.S. District Court for the Southern District of New York, claims that "the NFL remains rife with racism, particularly when it comes to the hiring and retention of Black Head Coaches, Coordinators and General Managers." The lawsuit goes on to state that "Over the years, the NFL and its 32-member organizations . . . have been given every chance to do the right thing. Rules have been implemented, promises made — but nothing has changed. In fact, the racial discrimination has only been made worse by the NFL's disingenuous commitment to social equity."[20]

As for the NFL's *Rooney Rule* itself, Coach Flores asserts that the "Rule may have been well intentioned . . . but that it is not working because the number of Black Head Coaches, Coordinators and Quarterback Coaches are not even close to being reflective of the number of Black athletes on the Field."[21] Coach Flores goes on to state that the "Rule is not working because management is not doing the interviews in good faith . . . and are only being done to comply with the Rule rather than in recognition of the talents that the Black candidates possess."[22]

Because of this lack of *good faith* by the 32 franchises, and specifically the New York Giants, in the hiring of minority coaches, the causes of action Coach Flores alleges in his class action lawsuit include violations of Section 1981 of the Civil Rights Act of 1866, the New York State Human Rights Law, the New York City Human Rights Law, and the New Jersey Law Against Discrimination.[23]

As evidence, Coach Flores claims that even before his scheduled interview with the New York Giants for its vacant Head Coach position, the team's ownership already made the decision to hire another coach and disclosed this decision to a third party – that third party being New England Patriots' Head Coach, Bill Belichick. Therefore, Coach Flores proclaims that his subsequent interview with the Giants' General Manager, Joe Schoen, was just a pretense, "held for no other reason other than for the Giants to demonstrate falsely to the League Commissioner Roger Goodell and the public at large that it was in compliance with the Rooney Rule."[24]

19 *Id.*

20 *Brian Flores v. NFL* Case 1:22-cv-00871 Document 1 Filed 02/02/2022 p. 2.

21 *Id* at p. 13.

22 *Id.*

23 *Id.* at p. 24.

24 *Id.* at p. 19.

Both the NFL League Office and the New York Giants have responded to the lawsuit, with the NFL stating in a simple press release:

> *"The NFL and our clubs are deeply committed to ensuring equitable employment practices and continue to make progress in providing equitable opportunities throughout our organizations. Diversity is core to everything we do, and there are few issues on which our clubs and our internal leadership team spend more time. We will defend against these claims, which are without merit."*

The New York Giants' organization, however, has been more 'aggressive' in its response, claiming that Coach Flores allegations are "completely false" and that "no decision was made, and no job offer was extended, until the evening of January 28, a full day after Mr. Flores' in-person interview and day-long visit to the Giants."[25] As *'concrete and objective'* proof, the Giants offered the itinerary for the meeting it had with Coach Flores on January 27, 2022, which show the interviewing Coach arriving at the Quest Training Center at 8:45 a.m. to meet with the owners John Mara, Chris Mara, and Steve Tish, and leaving the facility after his time with Joe Schoen at 3:30 p.m.

But even though the Giants believe that its actions were justified and not racially motivated, there can be no argument that Coach Flores' lawsuit does bring to the forefront the ongoing problem that the NFL and its 32 clubs have regarding race.

From its earliest days, it was a League that sanctioned and approved of both a *'gentleman's agreement'* that banned black players from participation and an owner, Preston Marshall, who, by all accounts was a deep seeded racist that didn't integrate his Washington franchise until 1962, and then, only because he was forced to by the federal government. It is a League that blackballed Colin Kaepernick, a young man who protested societal racial injustices by taking a knee during the national anthem, while at the same time allowing a head coach, who exchanged numerous emails with team officials containing racists, misogynistic and homophobic slurs, to be rehired by one of its franchises to a 10-year contract valued at $100 million dollars. It is a League whose concussion settlement deliberately discriminated against its former black players since the payout formula presumed they would have an *inferior baseline cognitive function level* as compared to former white players. It is a League that obligates its Kansas City team to paint *"Advance Social Justice"* in its end zone, while at the time turning away and saying nothing when Chiefs fans perform the *Arrowhead Chop*, an act which in and of itself is racist and dehumanizing to a large section of the American populace.

But most importantly, what Coach Flores' lawsuit does, in addition to creating awareness about the above, is to bring to the forefront the insincerity, hypocrisy and lack of understanding regarding race by the NFL's hierarchy. The NFL profits immensely off the talents of minority players, but in the last 20 years since the *Rooney Rule* was implemented, of the 129 head coaching jobs that have become available, only 15 of them were awarded to black coaches. And for those who are hired, their tenure is much shorter than their white counterparts since, on average, a white head coach has 3.5 years to establish himself, as opposed to only 2.5 for a black head coach.[26] Currently, there are only 4 minority, two of whom are black, head coaches and 6 minority general managers in the NFL. Based upon these numbers, the *Rooney Rule,* though well intentioned, is clearly not working. And whose fault is that? The NFL owners – because they are the ones responsible for leading their organizations and making the final hiring decisions. It is time for them to hire and retain qualified minority leaders and to establish a culture of inclusion in a League wherein the majority of its labor pool, is 70% minority.

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25 *Id.*

26 *Id.* at p. 111.

David Moreno

Sports Lawyer/Agent David Moreno Weighs in on Flores Lawsuit, Puts It in Context

David A. Moreno, Jr., a partner in Brown Rudnick's Litigation & Arbitration Practice Group, has extensive legal experience, extended even into criminal law. But what intrigued us was the fact that he is a Certified Contract Advisor with the NBA, NFL, and the NCAA, and that he has represented athletes both in a legal capacity as well as in a management capacity. David has been integral in the negotiations and legal review of marketing deals and playing contracts for several athletes.

His perspective on the Brian Flores suit is invaluable, so we sought him out for the interview that follows.

Question: Did the Flores suit surprise you?

Answer: The Brian Flores lawsuit did surprise me. Historically, we have seen more staunch collective bargaining in the other major American pro-sports leagues regarding things such as guaranteed contracts and revenue splits. What we have seen with the NFL has been a hesitancy to push back against perceived and actual slights. What was the most surprising about the suit in general was that the complaint referred to other coaches and i.e., Eric Bieniemy and his situation as further data to support the position that the NFL head coaching hiring process is discriminatory.

Q: Is the Rooney Rule the right tool for creating a level playing field? Why or why not?

A: The Rooney Rule, while well intentioned it is incredibly flawed. When the rule was initially implemented, we saw a slight uptick in hiring of qualified minority head coaches but since then the hiring of minority head coaches has stagnated back to the levels that predate the Rooney Rule. While an interview is a step in the right direction, what the allegations in the Flores complaint suggest is that the interview process for many involved has just become an obligatory box to check and not a genuine interview. Resolution JC-2A which incentivizes the development of minority head coaches and rewards teams who have those same home-grown coaches hired away is an excellent addition to the Rooney rule.

Q: What are some of the interesting legal issues that you see coming up (Discovery issues and right to privacy)?

A: This complaint is ripe with interesting legal discussions. First, does the NFL move to try and have this matter resolved by the NFL arbitration process like we have seen so often in this past as per there CBA. Or will Flores's counsel be successful in having this case remain in Federal Court in the Southern District of NY. If Southern District is deemed to be the proper venue, the NFL will still certainly file a motion to dismiss. If this complaint survives that that's where things can become very interesting. Bill Belichick whose text messages are at the center of these allegations would be deposed under oath. Belichick's text suggest he was in possession of sensitive information to the New York Giants franchise. Belichick is not a staff member of the Giants and/or the Buffalo Bills which means that he would have found out this information via some sort of correspondence either via text or call with members of those organizations. The door would be potentially open for these communications to be discoverable. In order to establish discrimination, there would need to be more than just potential hearsay evidence via text. There would be a need to establish the same evidence via an authorized actor of the organization. Allowing

the discovery of these messages could potentially uncover this.

Q: The plaintiff has requested unspecified damages in the form of systemic reform. He is seeking injunctive relief necessary to cure defendants' policies and practices. If successful, in what ways can a court order systemic reform on a privately owned company?

A: The decision to seek unspecified damages in the form of systemic reform is an interesting one. While the NFL isn't technically a privately owned company it is one that is owned by the 32 owners of the teams that compete in the league. We have seen publicly traded companies comply with the SEC'S rules regarding diversity, but the NFL isn't a publicly traded company either. We have seen things such as the Mansfield rule in law firms which was ironically inspired by the Rooney rule but has raised the bar in terms of its requirements. The Civil rights Act of 1964 is designed to protect applicants against discrimination. Courts could use this as a basis to suggest a framework if found liable to improve on discriminatory hiring practices.

Q: What might the plaintiff be seeking to accomplish with the class action strategy?

A: The plaintiff has publicly stated that the decision to file a Class Action lawsuit was made with the hope that others would join in his fight against systemic racism in the NFL. Strategy wise this was an interesting decision. If others join in his suit, it will strengthen the plaintiff's position in the court of public opinion and the media in this high-profile matter. Regarding the effect on the case itself in the courtroom more co-plaintiffs will lead to additional discovery and the potential for discovery of other evidence that supports the claim of discrimination against the same defendants.

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Terminated ASU Women's Lacrosse Coach Files Retaliation and Wrongful Termination Lawsuit

By Erica J. Zonder and Emily J. Houghton

Courtney Connor, the former women's lacrosse coach at Arizona State University, sued the University and the Arizona Board of Regents (collectively, "ASU") for Title VII and Title IX retaliation, as well as wrongful termination. Shortly after she was hired, Connor claims that she reported Title IX violations occurring in the athletic department to NCAA investigators. While Connor continued to report Title IX inequities within the athletic department, her male supervisor and Athletic Director created a hostile work environment.

Background

Connor claims that she reported sexual harassment to human resources and "followed the appropriate routes" but the complaints were never fully investigated by the university (Field, 2022). Connor was fired from ASU in April 2019. She appealed her termination to Human Resources in May 2019. Connor argued that it took ASU 10 months to investigate her claims that she was retaliated against for engaging in protected conduct (reporting Title IX and Title VII violations).

In 2022, Connor filed a lawsuit in federal district court against ASU bringing claims for: 1) retaliation in violation of Title VII 42 U.S.C. §2000e against all defendants; 2) retaliation in violation of Title IX 20 U.S.C. §1681 against all defendants; and 3) wrongful termination against all defendants.

Facts

Connor was hired in 2015 to build a brand-new women's lacrosse program at ASU. According to the complaint, the lacrosse program was created to address some existing gender inequities within the athletic department (*Connor v. ASU*, *14). Shortly after she was hired, she was interviewed as part of an NCAA investigation into gender equity complaints. Her "truthful" responses "angered" her supervisor and the Athletic Director, who then made the inequities among programs worse (*20). The male supervisor and Athletic Director also created a hostile work environment by subjecting Connor and other female colleagues to sexually explicit comments, touching and propositions. Connor reported the sexual harassment, hostile work environment, and disparities in resources, equipment, facilities among men's and women's athletic programs to human resources and was fired "immediately after and because of" (*23) in April 2019. In May 2019, Connor appealed her termination. The university rejected

her appeal 10 months later in March 2020, stating that there was "no violation" of the ASU policy that prohibits retaliation in relation to making Title VII and/or Title IX complaints.

First Cause of Action: Retaliation in Violation of Title VII

According to the complaint, Connor made "numerous reports and complaints" of employment practices that she believed to be unlawful under Title VII, and as such, the complaints were protected conduct (*31). Specifically, she reported her male supervisor's persistent sexual overtures, persistent sexual comments, and both her supervisor's and Athletic Director's "approval of, participation in, and ratification of the severe and pervasive sexual harassment" (*32b). She was then subject to an adverse employment action, ultimately leading to termination. Further, according to the complaint, the termination was "ratified and condoned" some 10 months later in the school's determination that no violation of Title VII or ASU's Discrimination, Harassment, and Retaliation policy occurred (*34). Finally, the complaint alleges that ASU's campaign of adverse treatment against Connor is reasonably likely to deter other employees from engaging in protected activity (*36).

Second Cause of Action: Retaliation in Violation of Title IX

In addition to Connor's sexual harassment complaints, she complained of gender inequity in athletics, specifically: a) gross disparities between the resources afforded to the ASU's men's and women's programs, including facilities, equipment, training, staff, and more; and b) responding truthfully about the failure to provide essential resources to the women's lacrosse program when interviewed by NCAA investigators (*43). As such, Connor reasonably believed that both the sex discrimination (sexual harassment) and gender inequality violated Title IX, and therefore her complaints were protected conduct. And then therefore, as with the Title VII cause of action, the adverse actions taken against her, specifically termination and ratification thereof, constituted a violation of Title IX. Connor is seeking equitable relief and damages for compensable harms including emotional distress, past and future lost wages and benefits, and other related costs for both the Title VII and Title IX claims.

Third Cause of Action: Wrongful Termination

Connor utilizes the language of both the Arizona Employment Protection Act (AEPA) and Arizona Civil Rights Act (ACRA) to claim that she was wrongfully terminated by ASU in violation of the State of Arizona's public policy. §23-1501(A)(3) of the AEPA states that an employee has a claim against an employer for termination of employment if (c) The employer has terminated the employee in retaliation for (ii) the disclosure by the employee that the employer has violated, is violating or will violate the statues of this state (ARS, §23-1501). The ACRA §41-1463(B)(1) makes it unlawful for an employer to discharge or otherwise discriminate against an employee on the basis of sex (ARS §41-1463) – the complaint specifically references §§41-1461to 41-1468 here. According to the complaint, ASU was aware of discrimination in violation of the statutes, and refused to take prompt action or respond appropriately, instead retaliating (*60-62). And further, ASU retaliated against another employee who was similarly situated (See below). Connor is seeking damages here and additionally, due to "the willful and malicious conduct" of ASU (*66), punitive damages as well.

David Cohen Lawsuit

The Connor suit comes six months after the filing of a 2021 lawsuit (following an initial notice of claim filed in 2020) by David Cohen, the former Senior Associate Athletic Director at ASU, claiming that he was discharged in retaliation for his "repeated requests" that ASU promptly investigate claims of sexual assault and harassment made by three wives of athletic department employees, allegedly perpetrated by an ASU booster in 2019 (Tochterman, 2021). Specifically, Cohen claims retaliation in violation of Title VII and wrongful termination in violation of public policy (*Cohen v. Arizona State University et al*, 2021). The booster filed his own claim in 2020, accusing ASU of damaging his reputation and making false statements (Ryman, 2020).

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Carfagna, McMillen Offer Insights into Current Legal Developments in Collegiate Athletics

(Editor's Note: What follows is an excerpt from a LEAD1 Association webinar featuring Tom McMillen, President and CEO of LEAD1; Sports Law Professor Peter Carfagna, Chairman/CEO of Magis, LLC, a privately owned sports marketing, management and investment company; and Sports Law Professor Michael McCann.)

Here are some of the key takeaways from LEAD1 about the discussion:

1. Athletics departments should begin preparing for a potential future with college athletes defined as employees, with such change occurring via legislative, administrative, and/or judicial outcomes.

2. Legislative Pathway: An Iowa state representative recently introduced a bill that would classify college athletes as employees. Maryland introduced a collective bargaining bill in 2019, and New York last year. College athlete employment rights could play out the same way as NIL, with states putting pressure on the enterprise to change. It is also possible that the NCAA could argue that a state-by-state approach to college athlete employment rights would be unconstitutional under the Dormant Commerce Clause (DCC), a federal restriction that prevents states from passing laws that burden interstate commerce. The NCAA could argue that inconsistent state laws interfere with a national college sports governing structure. Like NIL, however, if more and more states pass employment rights legislation, that may make the NCAA's DCC argument harder to defend.

3. Administrative Pathway: The National Labor Relations Board (NLRB) recently issued a memorandum (without the force of law) that certain college athletes at private universities are employees under the National Labor Relations Act (NLRA). In addition, the College Basketball Players Association recently filed an unfair labor practice charge under the NLRA. Because of the NLRB petition process and possible political administrative changes, any NLRB ruling on college athlete employment status could take at least a couple years to play out. Although the NLRB General Counsel in her memo indicates a plan to pursue college athletes at public institutions through "joint employer" theories involving the NCAA and/or conferences, this is far from a given.

4. Judicial Pathway: A Pennsylvania District Judge recently elevated the Johnson v. NCAA case to the U.S. Court of Appeals for the Third Circuit, certifying the case under interlocutory appeal, meaning an appeal of the case before it is decided. The essential issue is whether college athletes can be employees under the Fair Labor Standards Act (FLSA). Previous rulings in other federal circuits have ruled that college athletes are not employees (the Seventh Circuit in Berger v. NCAA and the Ninth Circuit in Dawson v. NCAA). The plaintiffs also argue that the NCAA functions as a joint employer in

having significant control over college athletes. A potential ruling at the Third Circuit defining college athletes as employees could create a circuit split, increasing the possibility of the U.S. Supreme Court (SCOTUS) ruling on the issue. It is worth mentioning that FLSA protections, including federal minimum wage and overtime pay, would be somewhat modest compared to other possible versions of employment rights, such as under the NLRA.

5. Expansion of college athlete publicity rights could mitigate employment arguments and certain legal concerns about the equitable treatment of college athletes. DeMaurice Smith, Executive Director of the National Football League Players Association (NFLPA), has stated that a conference could establish a licensing model along the lines of the one administered by the NFLPA through its own licensing arm, NFL Players Inc. NFL Players Inc. enters into licensing deals with third party entities that want to use the players' NIL in connection with media, and other licensing categories. Similarly, college athlete NIL rights could be expanded into more of these joint licensing categories, including media, with such revenue sharing structure supporting college sports under antitrust law, and without having to define college athletes as employees.
6. House v. NCAA could lead to current and recent college athletes receiving money they would have earned had NIL been allowed. This past summer, U.S. District Judge Wilken denied the NCAA and Power Five conferences' motion to dismiss a lawsuit by current and former college athletes, arguing that the NCAA's previous restrictions on NIL, dating back to 2016, violate antitrust law, including with respect to telecast revenue. The potential financial repercussions are uncertain at this point given that NIL is still in its infancy and previous court rulings may undermine the players' argument.
7. Although the NCAA's Alston appeal to the SCOTUS was a miscalculation, the immediate impact of Alston has been modest. The NCAA believed that the SCOTUS would take a more conservative position on the NCAA's principle of "amateurism" when they decided to appeal the Alston decision, however, the SCOTUS held the NCAA's longstanding legal defense in Board of Regents v. NCAA to be dicta, in other words, comments not part of the legal reasoning and therefore not legally binding precedent. More litigation attacking the NCAA's broader compensation restrictions could result now that the NCAA's main legal defense has been weakened. The immediate impact of Alston, however, has been much slower than NIL, as there has been confusion among institutions and conferences as to whether outside-aid under Alston should counted against financial aid limits for athletes on scholarship.
8. "Pay for Play" may need to be redefined. As more and more institutions form outside "collectives" to pool donor and fan resources for NIL deals, the college athlete compensation model has become closer to "pay for play" than ever before. As the NCAA redefines itself over the next several months, the association may need to concede that NIL has become a version of pay for play and that NIL has not caused less interest among fans in college sports, which they have previously argued. Institutions should also be mindful that any involvement in the creation or operation of a collective could constitute the type of institutional assistance that would trigger Title IX scrutiny. Thus, the more involved an institution is with their collective, the more careful they need to be in terms of equitable treatment between their male and female athletes.

In sum, athletics departments must continue to be nimble as legal developments could cause significant changes to college sports over the next several years.

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Cybersecurity Expert Assesses Whether There is a Threat at the Beijing Olympics and Future Games

Dr. Scott J. White, director of the George Washington University Cybersecurity Program. has taught many courses on Olympic security.

Scott J. White

Given that China has been something of a lightening rod for controversial issues involving cybersecurity, we sought him out to get his assessment of the threat to the Beijing Olympics, future Games, and other large =scale sporting events. That interview follows.

Question: Why are the Olympics vulnerable to a breach in cybersecurity?

Answer: I don't believe the Olympic Games are particularly vulnerable to a cyber breach from an outside actor considering the major Advanced Persistent Threats (APT's) are the state sponsored programs of China, Russia, Iran and North Korea. These governments pose the greatest threats to Americans and other participants at the Games. Individuals that are most susceptible to an attack are Western journalists, Olympic Committees and competitors. These groups are primarily susceptible to the Chinese surveillance state. Any hardware linked to Chinese Wi-Fi (the network), will be vulnerable to monitoring. When you consider the breadth of the Chinese surveillance state and the disregard they have for individual rights; it is safe to assume they will be monitoring all the Olympic Committees and their athletes. And, the American Olympic Committee and its athletes will be the number one target of Chinese espionage.

Q: What makes the Olympics difficult to protect?

A: All participants to the Games in China are required to download an application (app) to navigate their time at the Games. Contrary to the Beijing organizing committee's assurance that they are compliant with Chinese data security laws and their encryption protocols will protect personal data and privacy; no device is secure. It's difficult to protect yourself when your host is controlling the threat vector.

Q: What are some of the measures governments should undertake?

A: The American Olympic Committee and its athletes, as well as other nations, should assume that they are being monitored at all times and use the Chinese communications networks judiciously. Individuals should refrain from communicating about such things as: Taiwan, Hong Kong independence or the Uyghurs. At the end of the day, maintaining a low cyber footprint can be the greatest strategy, however, if information and communications technology (ICT) is to be used, one should consider that Chinese government officials are listening in at all times. There are a few things that can be done to protect personal data. The use of stripped-down hardware or burner phones can limit the amount of data that can be exfiltrated. In the best-case scenario, participants should leave their personal devices at home.

Q: What role if any do athletes have in a cybersecurity breach?

A: Athletes are not cybersecurity professionals, and one cannot expect that they will use good cyber-hygiene. Acknowledging this, there can be no expectation of privacy or data security. Maintaining a low cyber footprint can aid in the protection of privacy and data. The use of stripped-down hardware or burner phones can limit the amount of data that can be exfiltrated. In the best-case scenario, participants should leave their personal devices at home.

Q: Do sponsoring companies have any exposure?

A: Sponsoring companies, like any foreign national, are vulnerable to data breaches. Utilizing strong passwords, two-factor authentication or two-step verification, especially for their sensitive data can minimize a company's vulnerability. Deploying updated antivirus software and configuring browsers to delete cookies can also help. However, it is important to note that these companies are operating in a hostile environment and are up against some one of the best cyber-spies in the world.

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Provision Promoting Diversity and Inclusion Draws Fans, Foes

By Charlie La Vine, GW Law 2L

(Editor's Note: What follows first Appeared in **My Legal Bookie***, a publication reporting on legal sports betting that is roduced by Hackney Publications.)*

Some Maryland residents believe every second that ticks by without passing the state's sports betting bill (House Bill 940) is a direct hit to the collection of precious tax revenue and the delay of potential well-paying jobs.

Many Marylanders attribute the delay to a specific provision in HB940 requiring companies to incorporate women and minorities into their business model. What was once envisioned as the bill's shining feature could now be perceived, by some, as its Achilles heel.

The ambiguity of some of the terminology within HB940 could be the crux of the problem. Specifically, some believe the gender and racial quotas noted in the bill are not clearly defined, and thus, may be deemed unlawful for such ambiguity. However, the Maryland's Sports Wagering Application Review Committee (SWARC) is trying to get out ahead of this issue by publishing an advisory opinion to bring clarity to the language surrounding the minority and women requirements.

Not everyone thinks such a clarification is necessary. According to Jeff Ifrah, of Ifrah Law, a Washington, D.C. based law firm with expertise in the gaming industry, the statute is already clearly worded. "Anyone applying for a Class B retail (not already named in the bill) or mobile license must put forth a good faith effort to include minority/woman partners in their sports wagering business," stated Ifrah. Furthermore, "It is clear that those who have added minority/women partners will be given priority for licensing over applicants that do not."

Ifrah thinks it is still an open question about what constitutes a 'good faith effort' and what percentage of minority/woman investment would actually satisfy the SWARC. "I believe after the diversity study is complete, and the SWARC evaluates its findings" the good faith effort will be understood by the applicants.

As the bill reads today, "[SWARC] must consider allowing early access to the mobile sports wagering market to entities with a ***meaningful partnership*** with minorities, women, and minority and women-owned businesses." (emphasis added). It also says that "an applicant for a sports wagering license seeking investors must make ***serious and good-faith efforts*** to solicit and interview a ***reasonable number*** of minority and women investors". (emphasis added)

With phrases like "*meaningful partnerships*," "*serious and good-faith efforts*," and "*reasonable number*" left undefined, this may be causing a delay in some companies' willingness to apply. Meanwhile, others applying believe the wording of the statute simply outlines what future applicants should *strive* for.

No matter one's view, the Class B businesses that do apply must meet the Minority Business Enterprise/Women Business Enterprise (MBE/WBE) requirements as written in the bill today.

One good sign that Class B companies will get some clarity soon occurred on November 18, 2021, when the Maryland Lottery Gaming Control Commission approved some Class A applicants. This will clear up some time needed, by SWARC, to now "focus on examining what (if any) gaps there are in racial and gender equality in sports betting," says Ifrah. He added that "they cannot move forward until this study is complete and analyzed." Once completed, it is believed that SWARC will be able to move forward on the Class B licenses (small business entities) and mobile sports betting applications.

As many Marylanders await the completion of the study, Class B companies are in a holding pattern. Since the lawmakers have stated that the intent [of HB940] was "to [maximize] the ability of minorities, women, and minority and women-owned businesses to participate in the sports wagering industry," they know what is at stake. While this intent remains a worthy goal, it is also proving to be a worthy opponent.

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Proposed Iowa Bill Continues Efforts to Reclassify Student-Athletes as Employees

By *Gregg E. Clifton* & *Bernard G. Dennis III*, of Jackson Lewis

Iowa lawmakers have expanded on federal efforts to make student-athletes employees. They have introduced legislation (H.F. 2055) to classify intercollegiate athletes at Iowa's state universities as state employees. This follows a year in which numerous state legislative efforts established name, image, and likeness rights for student-athletes and federal court decisions further impacted student-athletes' rights.

The bill also would allow the Iowa state board of regents to fix athlete compensation in the same way it sets compensation for school presidents and other state employees.

The bill was introduced by Representative Bruce Hunter (D-Des Moines), the ranking member of the Iowa House Labor Committee.

If approved, the bill would apply to athletes at Iowa's three public universities (University of Iowa, University of Northern Iowa, and Iowa State University), which all compete at the NCAA Division I level. None of the athletes at Iowa's private institutions (12 of which compete across the NCAA's three divisions) would be impacted and these student-athletes would not be considered employees of their schools under the terms of the bill.

The proposed Iowa legislation is consistent with the goals announced at the federal level by National Labor Relations Board (NLRB) General Counsel Jennifer Abruzzo in her September 28, 2021, memorandum.

She stated that, based on her interpretation of the National Labor Relations Act (NLRA), certain student-athletes are employees of their academic institutions.

She asserted that these student-athletes have been misclassified and that they should receive all the benefits and protections of employee status pursuant to the terms of the NLRA.

Although no student-athlete has been willing to initiate the process of asserting a violation of the NLRA that Abruzzo outlined in her memorandum, an unfair labor practice charge was filed against the NCAA by Michael Hsu, co-founder of the college basketball player advocacy group, the College Basketball Players Association. Hsu filed the unfair labor practice charge (Case No. 25-CA-286101) with Region 25 of the NLRB, in Indianapolis, accusing the NCAA of violating Sec. 8(a)(1) of the NLRA "by classifying college athletes as student-athletes."

Hsu could file a charge even though he is neither a student-athlete nor the recognized representative of any student-athlete because the NLRA does not require standing to file a charge and the NLRB's regulations provide that "any person may file a charge alleging that someone has engaged in . . . an unfair labor practice" (emphasis added). Hsu's charge is being investigated and, if the charge is transitioned into a formal complaint, an administrative hearing will likely be held later this year.

In addition, Senator Chris Murphy (D-Conn.) and Senator Bernie Sanders (D-Vt.) have introduced the College Athlete Right to Organize Act to amend the NLRA. It would amend the definition of employee under Section 2 of the NLRA to include student-athletes and provide student-athletes collective bargaining rights, regardless of any existing state law restrictions. The legislation provides jurisdiction to the NLRB to exercise authority over all institutions of higher education within intercollegiate sports for collective bargaining and labor disputes.

Further, the Johnson v. NCAA litigation is pending in the Eastern District of Pennsylvania. In Johnson, collegiate athletes argue they were employees of their institutions and are entitled to proper wages under the Fair Labor Standards Act. The plaintiffs succeeded in overcoming their institution and NCAA's attempts to dismiss their claims.

Finally, compensating college athletes has continued to gain momentum since the June 2021 U.S. Supreme Court decision in NCAA v. Alston and, in particular, Justice Brett Kavanaugh's concurring opinion questioning the NCAA and member schools' circular justification for not paying college athletes because colleges do not pay student-athletes. Shortly after Alston, the NCAA introduced a new policy allowing college athletes to be compensated for their name, image, and likeness.

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NCAA Compliance Professional Mullins Has What It Takes to Run a Clean Program

(What follows is shared from the Journal of NCAA Compliance, a subscription-based publication produced by Hackney Publications.)

Good photographers typically see a picture before anyone else sees it.

It's a skill that also benefits talented compliance professionals, who must recognize potential bylaw violations before the NCAA gets wind of them.

Not surprisingly, Jacob Mullins is both–the Associate Athletic Director for Compliance for Elizabeth City State University and a long-time NASCAR photographer for a racing website.

After he was recommended to us as an interview subject, we sought out Mullins and he graciously sat in for an interview, which follows below.

Question: When did you know you wanted to pursue a career in sports management and why?

Answer: I have always been involved in sports from my time being an athlete as child all the way through college. Growing up, just like every many other kids, I wanted to become a professional athlete. However, I knew that being a professional athlete wasn't in the cards, so I decided the second-best way to be a part of sports was to work in the field. When I enrolled as a first-year student at the University of Lynchburg, I had ambitions of being an athletic trainer, but it wasn't until my sophomore year that I decided I wanted to be an administrator and changed my major to sports management. On a track and field team trip, I had the opportunity to have a great conversation with my head coach, Dr. Jack Toms, who was also the athletic director at the University at the time. We spoke at length about what his role as an AD entails, why he does his job, and the passion that he had was the same passion that I had to help people reach their goals and ambitions. It was that conversation that spiked my interest in becoming a college athletic administrator. Over the next couple of years, I tried to learn as much as I could about college athletic administration, volunteered for experience, and did what I thought was needed to be successful. I enjoyed it so much that upon graduation from Lynchburg, I furthered my education at Ball State University where I earned my Masters in Athletic Administration for Higher Education. I enjoy helping people and sports, and this profession allows me to do just that.

Q: Have you had a mentor along the way and how have they helped?

A: I have had a few different mentors along my way to where I am today. I believe it's important to have different mentors to help you grow as a complete administrator as each person brings a different perspective to the position. I have had mentors in both the professional and personal space to help me not only become a better professional, but a better person. My first mentor was Mr. Terry Beattie, the current athletic director at West Chester University. I had the opportunity to learn from Terry as an intern at West Chester University while I completed my master's degree. I was able to gain a plethora of knowledge from him in facilities and event management. Another great mentor early in my career was Ms. Amy Sandt, the current Assistant Vice President of Recreational Services and Athletic Resources at Kutztown University of Pennsylvania. I had the opportunity to also work with Amy at WCU, but she mentored me on the development and fundraising side of athletics. Other mentors include, but are not limited to Dr. Karrie G Dixon, chancellor at Elizabeth City State University; Jody Law, former athletic director at Bryn Mawr College; Joan Braid, current head men's volleyball coach at Neumann University; Harry Stinson, athletic director at Lincoln University (PA); George Bright, athletic director at Elizabeth City State; and Cathie Rutledge, registrar at Lincoln University (PA). Having a strong group of mentors and the knowledge that I gained from each of them listed and others, has helped me in my professional career and is the foundation of how I present myself as a professional.

Q: What is the most rewarding part of your job?

A: The most rewarding part of my job is being able assist students in their endeavors in the classroom and on the playing field. I had a phenomenal support system while at Lynchburg where my professors, coaches and athletic administrators pushed me to succeed. They provided different avenues for me to be the best I can, and that is how I carry myself now. I enjoy working

with the students and getting to know them as a whole because they are so much more than just an athlete. I enjoy seeing how the student progresses personally while in college from an incoming student to graduation. One of my favorite days of the year is graduation as I'm able to see the students reach a monumental goal in their life. To see what they have been able to accomplish in just a small time is amazing and truly shows that if they set their mind to accomplish a goal, they can do it. I had a student-athlete once tell me right before graduation that they wanted to dropout when they were a sophomore for personal reasons, but after talking to me about my personal struggles in life and background, they decided to stay in school. In my role, I believe its all about what you do, not who you are.

Q: What is the most challenging aspect of it?

A: Since I'm student centric, the most challenging part of my job are those times when you are unable to help a student. Since you spend so much time with these students, you get to know them and their family, and they become of your extended family, it's hard when you exhaust all resources and are still unable to help them succeed.

Q: How has NIL impacted compliance professionals?

A: I feel that NIL has impacted the compliance profession in various ways depending on your involvement with NIL and your role on your campus. For larger institutions that have the means to have dedicated staff members in their office to monitor NIL activities will be different from smaller or one-person compliance offices, like myself. As a one-person shop for a DII institution, NIL impacts me differently as I'm tasked with staying up-to-date with the different rules, the education of my student-athletes and the assistance I'm able to provide them. Personally, I haven't dealt with NIL endorsements on my campus as much as I thought I would, but my challenge is keeping the students constantly educated with the different rules state-to-state, and helping them understand the impact these deals will have for them. I utilize my pre-season meetings with teams to talk about NIL and provide information that is not only beneficial, but timely. I encourage them if they have questions to contact me individually as each case is different. I try to help the students understand tax implications, how it impacts need-based aid, and the overall understanding what the contact means or provides and their responsibility. I ultimately see NIL in the coming years playing a larger role in the recruitment of student-athletes and making sure we are not crossing the pay-for-play line, which we have seen recently in the news at FBS schools. We, as compliance professionals, just need to be diligent and educated as things are ever changing.

Q: What advice would you give to someone just starting out in the compliance profession?

A: There is a lot of advice I would give someone just starting out in the compliance profession, but there isn't enough time in this interview to go over them all.

One of the most important things someone told me when I was getting started in compliance was not to take things personal because during your career you are going to be the bearer of bad news. If you are delivering bad news, be ready for anger and frustration from the other party, but know they are upset with the information being provided, not necessarily you. I have learned over time that if you are able to present solutions and offer other avenues for success, the conversation will go differently. I didn't know how true this would be until the first time I had to break the news to a student they were ineligible. I came prepared, had a plan of action, and some ideas on how they might be able to right their deficit, and although the student was upset and mad, we were ultimately able to get the student back on track and eligible the next semester.

Another bit of advice is to not be afraid to step outside your comfort zone, ask questions, and meet new people. One of the hardest things to do is ask for help, but in this profession, you must as you are not the only person to go through this. You can't also think that your question is not relevant/dumb/or it's the first time it has ever been asked, because I can assure you, it is relevant, isn't dumb and has been asked before. The last thing is to meet new people – colleagues in the profession, professionals on your campus, and the students at your school. I encourage this because you will work your colleagues and the better relationship you have with them, the easier is to ask those questions and seek help when needed. Get to know the student body, not just athletes. I personally try to meet someone new on campus every week. That helps me get out of the office, but more importantly, shows the campus I'm here

as an ally and resource, not just the "rules" guy. You'd be surprised on how far that goes when dealing with other departments, faculty/staff, and the students.

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International Olympic Committee pays tribute to long-time Director General and Sports Lawyer François Carrard

The International Olympic Committee (IOC) announced it was deeply saddened to learn of the death of its long-time Director General, François Carrard, at the age of 83. Mr Carrard led the IOC administration from 1989 until 2003, and served IOC Presidents Juan Antonio Samaranch and Jacques Rogge during his 14-year term.

With a Doctor of Law from the University of Lausanne, François Carrard spent two years at a law firm in Stockholm before being admitted to the Bar in 1967, when he joined the firm of Carrard & Associés. He specialised in sports law before becoming the IOC's Director General.

Mr Carrard developed the IOC administration during his time as Director General and made it fit for purpose. With his legal background, he played a crucial role supporting the IOC in driving its fundamental reforms in 1999 and 2000. Mr Carrard also played a key role in the setting-up of the World Anti-Doping Agency (WADA) and the introduction of the first World Anti-Doping Code. In addition, he was heavily involved in revamping the Olympic Charter and in the IOC Commission on Apartheid and Olympism. Mr Carrard acted as an outstanding communicator for the IOC after being appointed spokesperson for the IOC Executive Board (EB) under President Samaranch.

Mr Carrard led the IOC through seven editions of the Olympic Games and Olympic Winter Games, from Albertville 1992 until Salt Lake City 2002.

"François Carrard was a brilliant man with immense analytic skills and a very wide horizon. President Samaranch and the entire Olympic Movement could always rely on his invaluable advice. He was not only a man of law and sport, but also a great man of culture," IOC President Bach said. "I got to know François Carrard in my early days as an IOC Member. He was always a great guide and trustful advisor, and became a personal friend. This is why I am so grateful that the entire Olympic Movement and I could count on him until his very last days."

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News Briefs

Hogan Lovells Guides NHL's Tampa Bay Lightning and Owner Jeffrey Vinik in Groundbreaking Private Equity Investment

A team from global law firm Hogan Lovells advised the Tampa Bay Lightning and its owner, Jeffrey Vinik, in one of the first private equity investments in National Hockey League (NHL) history. The Tampa Bay Lightning are current back-to-back winners of the NHL's Stanley Cup, having won the finals by defeating the Dallas Stars in 2020 and the Montreal Canadiens in 2021. On December 31, 2021, Arctos Sports Partners made a minority equity investment into Vinik Sports Group, the owner of the Tampa Bay Lightning. Jeffrey Vinik retains control as majority owner, and there will be no change in the day-to-day operations of the Lightning. Further information on the transaction can be found here via the NHL official website. During 2021, the sports, media and entertainment group at Hogan Lovells advised on private equity investment transactions in professional sports teams in the National Basketball Association, Major League Soccer and the NHL. The Hogan Lovells team for the Tampa Bay Lightning transaction consisted of Craig Umbaugh, Mark Kurtenbach, Mark Weinstein, Christopher Weigand, James Adams and Bill Nunn.

Akerman's LaKeisha Marsh Named Adjunct Sports Law Professor

LaKeisha Marsh, who chairs Akerman's Government Affairs and Public Policy Practice Group as well as its Higher Education and Collegiate Athletics Practice, has taken on the added role of adjunct sports law professor at Northwestern University School of Professional Studies. Marsh will teach Legal & Ethical Issues in Sports at the school. Marsh has a history representing colleges, universities, and related institutions on federal and state regulatory compliance, accreditation, state licensure, institutional governance, and collegiate sports and NCAA compliance-related matters.

PSU Athletics Integrity Officer Robert Boland Steps Away to Devote Time to Sports Law, Teaching

Robert Boland, athletics integrity officer at Penn State, announced last week that he will step down from that position, effective March 1, 2022. Boland indicated he plans to return to the practice of sports law and to devote his time to other professional interests, including his teaching position at Penn State Law and the College of the Liberal Arts. Boland has held the athletics integrity officer position since June 2017. As athletics integrity officer, Boland has been responsible for review and oversight of matters relating to compliance and ethical obligations of the Department of Intercollegiate Athletics and for managing and overseeing the University's Athletics Integrity Program. During his tenure, he has been principally responsible for overseeing the University's athletics integrity program, which was established to promote the University's compliance with NCAA and Big Ten rules and regulations, as well as with the NCAA's and the Big Ten's standards of integrity for member institutions. An interim athletics integrity officer will be named prior to Boland's March departure date from the position. Boland, who has experience teaching classes in law, sports law, sports contracts and antitrust and collective bargaining in sports, will continue teaching at Penn State through spring semester 2022.

What Florida Schools Need to Know as High School Student-Athletes Seek NIL Compensation

Brett P. Owens, of Fisher Phillips, has written a piece on NIL in Florida. It begins: "When Florida's name, image and likeness (NIL) law went into effect this past summer, it created many opportunities for businesses that wanted to enlist college athletes as part of their marketing campaigns. A recently filed lawsuit has opened the door to a potentially new angle that Florida schools may need to soon manage: whether high school student-athletes are entitled to compensation for their NIL. What do you need to know about this new development and the volatile state of student-athlete compensation?" To review the full article, visit: **What Florida Schools Need to Know as High School Student-Athletes Seek NIL Compensation – Sports Law Expert**

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