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Legal Issues in
COLLEGIATE ATHLETICS
A Report of Court Decisions, Legislation and Regulations Affecting Collegiate Athletics

Sweets Are Bad for You…Don't Jay Walk… Don't Rush the Field - How Incentives to Change Crowd Behavior Have Often Failed

By Gil Fried, Professor, University of West Florida

Way back in 2004, the Southeastern Conference (SEC) passed rules fining teams when their fans stormed the field. It was hoped that these fines would change fan behavior. It was assumed that schools would try to prevent or minimize the likelihood of fan crowd rushes to avoid having to pay a fine. Crowds rushing the field were a concern not just for fans possibly injuring themselves, but also for players, coaches, officials, and others who could be injured.

As would be expected, the fines did not work as they were hoped. When crowds rushed the field, instead of the schools paying their own money, crowd funding was used to raise money so the universities would not need to pay out of their own pockets.

As is normally seen with crowds, other conferences joined the bandwagon and then various conferences adopted similar rules and penalties. These penalties were increased by the SEC during the 2015 SEC Spring Meetings and are supposed to be imposed for violations in all sports sponsored by the Conference. Institu-

See SWEETS on page 9

College Wrestling Coach Quits, Sues, and Loses

By Jeff Birren, Senior Writer

Robert Zenie was hired by the College of Mount Saint Vincent ("CMSV") in 2015 as the wrestling coach and an assistant athletic director. He was then 46 years old. At the time he had "little or no experience working in collegiate athletics, whether in an administrative capacity or as a head coach" (*Zenie v. Coll. Of Mount Saint Vincent,* S.D.N.Y., Case No. 18-CV-4659 (JMF), at 1/2, *("Zenie v. CSMV"), (9-14-2020)).*

By 2017, Zenie was complaining to the athletic department about various things, including not being promoted to associate athletic director. He quit in September 2017, and in 2018 Zenie sued CMSV (Id. at 4). He alleged "a slew of claims" including age discrimination and Title VII of the Civil Rights Act of 1964.

CMSV's motion for summary judgment was granted in 2020. Zenie appealed, and in December 2021 the Second Circuit affirmed in an unpublished opinion (*Zenie v. College of Mt. St. Vincent,* ("*Zenie*") U.S.C.A., Second Circuit, Case No. 20-3535-cv, 2021 U.S. App. LEXIS 37790, (12-21-21)).

Background

Zenie attended Long Island Lutheran

See WRESTLING on page 10

In This Issue

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Department of Education Takes First Step Toward Release of Proposed Amendments to Title IX Regulations

By Susan D. Friedfel, Joshua D. Whitlock, Carol R. Ashley, Crystal L. Tyler and Laura A. Ahrens," of Jackson Lewis

The U.S. Department of Education's Office for Civil Rights (OCR) has announced that it has sent its draft proposed amendments to Title IX of the Education Amendments of 1972 to the Office of Information and Regulatory Affairs (OIRA) for internal review. Submission of the Notice of Proposed Rulemaking (NPRM) is the first formal step in the federal regulation revision process.

The announcement highlights the Department's focus on advancing efforts as set out in President Joe Biden's executive orders on guaranteeing an educational environment free from sex discrimination and preventing and combating discrimination based on gender identity and sexual orientation. These prioritization efforts likely are reflected in the Title IX NPRM, as they have guided the Department throughout the comprehensive review process of the 2020 Title IX amendments. (See our article, U.S. Department of Education Will Protect LGBTQ+ Students.) Changes to the procedural requirements for handling complaints, particularly in higher education, are expected.

The 2020 regulations remain in effect while the rulemaking process is ongoing; however, the Department noted that, following a ruling from a federal district court, OCR has ceased enforcement of the Title IX regulatory requirement regarding the prohibition against relying on statements not subject to cross-examination at a live hearing. Schools should continue to ensure Title IX compliance according to the language of the 2020 regulations and may refer to the Department's Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) and Appendix for compliance guidance.

Assistant Secretary for Civil Rights Catherine Lhamon noted, "[T]his submission is part of our comprehensive commitment to ensure that schools are providing students with educational environments free from sex discrimination, including sexual violence and discrimination based on sexual orientation and gender identity—it is one step of many taken and more to come."

Review of the NPRM by OIRA and the Department of Justice may take up to three months. The purpose of internal reviews is to conduct a cost-benefit analysis and promote public accountability related to the proposed regulations. Following this review, the NPRM will be published in the Federal Register. Once the NPRM is published, members of the public will have the opportunity to provide comments on the proposed preamble and regulations.

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Dealing with Gender Discrimination in College Athletics

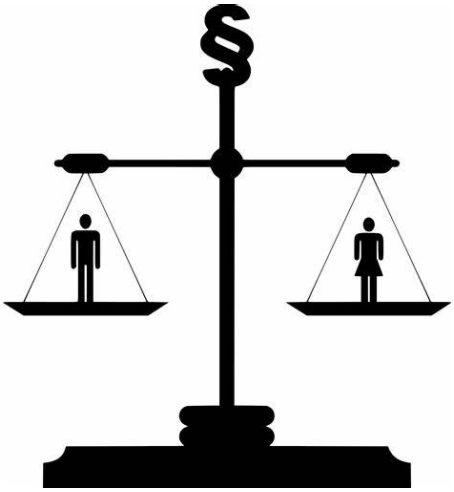
By Martin Edel and Isabelle Bruner[1]

Gender inequality is alive in college athletics. Gender inequities exist in differences between men's and women's athletic facilities, athletic equipment, coaching experience and salaries, and amounts spent and allocated to men's and women's sports.[2] Schools may take no action and risk complicity and a rash of costly lawsuits. Or colleges may become pro-active in identifying and addressing gender inequity for a fraction of the cost of litigations and settlements, and reap the additional benefits of being consistent with their core values and the law, enhancing recruitment of athletes and staff, improving morale, creating additional revenue opportunities, and becoming more diverse.

The NCAA, Federal Law and State Law Preclude Discrimination

The NCAA, federal and state law prohibit gender discrimination. The new NCAA constitution, approved in January 2022, includes gender equity as a core principle. It provides: "The Association is committed to gender equity. Activities of the Association, its divisions, conferences and member institutions shall be conducted in a manner free of gender bias. Divisions, conferences and member institutions shall commit to preventing gender bias in athletics activities and events, hiring practices, professional and coaching relationships, leadership and advancement opportunities" (Article 1, Section G).

In addition, Article 2, Section A.2.c reads: "The Association shall promote gender equity, diversity and inclusion in all aspects of intercollegiate athletics." And, "It is the responsibility of the Association and each division, conference and member institution to comply with federal and state laws and local ordinances, including with respect to gender equity, diversity and inclusion (Article 6, Section C).



Federal law also prohibits gender discrimination and harassment. Title IX of the Education Amendments of 1972 provides, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Title IX applies to the vast majority of schools. The EEOC and other federal agencies have promulgated rules and regulations that implement the gender equality laws. Violation of federal laws can result in loss of governmental funding. Courts also have become involved in protecting against gender discrimination. And some states have enacted laws that create rights for victims of discrimination, harassment and cyberstalking.

Recent Developments Create a Clarion Call for Colleges to Become More Involved in Identifying and Addressing Gender Discrimination

In the Final Four this year, there was significant media coverage of disparities in facilities between the men's and women's Final Four. In August, 2021, the NCAA addressed these concerns by issuing a report on Gender Equity. With respect to women's Final Four Basketball, the report concluded:

The NCAA's broadcast agreements, corporate sponsorship contracts, distribution of revenue, organizational structure and culture all prioritize Division I men's basketball over everything else in ways that create, normalize and perpetuate gender inequities. At the same time, the NCAA does not have structures or systems in place to identify, prevent or address those inequities.

In October, 2021, the NCAA released the second half of its Gender Equity report. It focused on the NCAA's 84 other championships, which impact over 500,000 student-athletes and encompass 23 sports and three divisions. The Report found "the same structural and cultural issues that impact Division I basketball pervade the NCAA and have shaped its treatment of other championships," i.e., prioritizing revenue-producing championships. It concluded:

[This same pressure has led the NCAA to invest more—and in some instances considerably more—in those championships that it views as already or potentially revenue-producing, while minimizing spending for other championships. Because the mere handful of

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championships that the NCAA views as revenue-producing are exclusively men's championships—Division I baseball, men's basketball, men's ice hockey, men's lacrosse and wrestling—this has significant implications for efforts to achieve gender equity between the men's and women's championships in those sports. The NCAA's simultaneous failure to put in place systems to identify, prevent, and address gender inequities across its championships has allowed gender disparities in these and other sports to persist for too long.

The NCAA findings are not limited to the national organization or to championships. Instead, the NCAA Report is a "call to arms" to all colleges and universities based on the same challenges that the NCAA faces, namely, actual or perceived financial dependence on men's sports over women's sports, lack of communication between staff for men's and women's teams, a broader campus culture that may perpetuate gender inequities, and a lack of systems or guidelines in place to identify and address issues.

What You Can Do

Completing a Title IX checklist or a generalized annual or biennial survey does not meet colleges' obligations under NCAA Rules, federal law or state laws. Similarly, generalized surveys or anti-discrimination on-line programs often are insufficient to stem the tide of gender inequity.

There are increasing numbers of gender discrimination lawsuits filed against colleges. The cost of defending or settling lawsuits can be far greater than the cost of a vigorous assessment program to identify and address gender concerns. Educational institutions need to reevaluate their approaches to gender inequality. They need – on pain of violating NCAA regulations, federal and state law, and the schools' culture – to take action to identify and address gender inequality and develop plans for eliminating barriers to inclusion in the sports programs. Schools that fail to identify and respond appropriately or remain silent risk being perceived as endorsing the cultural and systemic issues which have sparked outrage from many student-athletes, coaching and other staff, alumni and sponsors and, in some cases, costly litigations. These risks underscore the value of an objective cultural assessment for any college or university that seeks to work toward meaningful change, ensure institutional accountability, and maintain the support of past, current and future constituents.

How many schools have conducted gender reviews that are more involved than completing a Title IX checklist or showing the results of an annual or biennial survey? We have sampled 100 colleges (a mix of public and private among all three NCAA divisions) and found that since 2018, only 18 schools (18%) have reviewed or are planning to conduct a gender equity review of their athletics department and program to adopt a "Gender Equity Plan."[3] Most of these schools promised these reviews in settlements after facing Title IX lawsuits.

There is more that must be done to make colleges and universities more *diverse and inclusive,* to attract *student-athlete* recruits and transfers, to locate *enhanced revenue opportunities with sponsors, to increase campus morale by showing a commitment to listening to and addressing concerns,* and to *mitigate against the risks* and costs of lawsuits.

For additional information on taking meaningful steps to identify and address gender inequities, contact us.

Isabelle Bruner

Martin Edel

3 Data based on publicly available information. Schools may be conducting gender equity reviews of their athletic departments without publicizing it.

NIL Activities Leave NCAA in a Tricky Spot

By Patrick Stubblefield of Freeman | Lovell

Following the NCAA v Alston Supreme Court opinion, the NCAA scrapped its proposal related to name, image, and likeness in favor of an interim policy that was significantly pared down. The policy states, generally, that NCAA Bylaws continue to prohibit pay-for-play and improper recruiting inducements.[1]

The NCAA instructed schools and conferences to come up with their own NIL policies that were consistent with their state's NIL law if such a state NIL law exists. This left schools scrambling to draft their own NIL policies and has created a patchwork framework of institutional policies, conference policies, loose NCAA guidelines, and disparate state laws to contend with for anybody wishing to navigate the NIL landscape.

In a recent *Inside Higher Ed* article[2], Thilo Kunkel, a professor and director of the Sport Industry Research Center at Temple University commented, "With the lack of a framework, people are going to start bending the rules." In fact, accusations to that effect have already begun to occur. In a recent interview, Texas A&M's head football coach, Jimbo Fisher vehemently defended against such accusations amidst signing a historical recruiting class[3].

The NCAA's message has been consistent since they put their interim policy in place – they are looking for federal legislation to provide a national framework surrounding NIL. Congress does not seem to be in any hurry to pass such legislation. According to Business of College Sports' Name, Image, and Likeness Legislation Tracker[4], there are currently eight federal bills that have been proposed. Yet seemingly none have been vigorously debated, and there will certainly be some deep-seated differences between Republicans and Democrats with regard to the substance of those bills. Some of those differences began to emerge during the summer when democrats seemed to be in favor of larger, more sweeping legislation that addressed a range of issues in intercollegiate athletics whereas Republicans seemed more content to focus on the singular issue of NIL. It's becomingly increasingly clear that an NIL framework coming from Washington is unlikely, at least anytime soon.

This places the NCAA in a tricky spot. The NCAA was heavily criticized when it initially announced that it would not pass, or even vote, on an NIL framework. To a certain degree, those criticisms are still being levied towards the NCAA from external constituents and are growing louder from the NCAA's membership who wants there to be a level playing field with regard to NIL rules.

The NCAA seems to be somewhat active behind-the-scenes which may signal that they are gathering information to determine what, if anything, they can do to govern NIL. Reports began to surface that certain schools with team wide deals had received inquiries from the NCAA seeking information about those deals[5]. Although it was later clarified that these were not "investigations" but rather "information seeking" inquiries, team wide deals nevertheless came under greater scrutiny[6]. In a recent article for Inside Higher Ed, I was quoted as saying that "the line between an NIL opportunity and a pay for play and a recruiting inducement is paper-thin.[7]" Using BYU's deal with Built Bar as an example is instructive.

Earlier this year, Built Bar entered into a multi-year endorsement deal that saw all 123 players of the BYU football team sign separate deals with Built Brands, LLC. Naturally, some questioned whether this arrangement constituted a prohibited pay for play arrangement under the NCAAs interim policies. Some pointed out that many of those 123 players offered no significant value to Built Bar from a marketing perspective, suggesting that such an arrangement must then be a pay for play arrangement. Conversely, Built Bar was successful in acquiring a significant amount of publicity for its arrangement with the BYU football team, and from a marketing perspective, must have considered the outcome a resounding success. However, the NCAA has not yet publicly challenged an NIL opportunity, and how the NCAA would analyze such a case is not yet fully known. It is also important to note that BYU is situated in Utah which currently has not passed NIL legislation. There may exist further uncertainties in states that have passed NIL laws because these laws have not been tested in the court system yet either.

One final consideration that overshadows the entire NIL landscape is what to make of the Supreme Court's ruling in *Alston v. NCAA*. The Supreme Court declined to consider the NCAA's argument that "because of the special characteristics

1 http://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf

2 https://www.insidehighered.com/news/2022/01/04/ack-clear-ncaa-rules-creates-confusion-around-nil

3 https://www.espn.com/college-football/story/_/id/33202615/texas-football-coach-jimbo-fisher-fires-back-clown-acts-criticizing-aggies-relying-nil-deals-recruiting-trail

4 https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/

5 https://www.sportico.com/leagues/college-sports/2021/ncaa-byu-miami-nil-probe-1234650215/

6 https://www.washingtonpost.com/sports/lack-of-detailed-nil-rules-challenges-ncaa-enforcement/2022/01/28/8d99304a-8086-11ec-8cc8-b696564ba796_story.html

7 https://www.insidehighered.com/news/2022/01/04/lack-clear-ncaa-rules-creates-confusion-around-nil

Baylor University 'Heading' to Federal Court After Former Female Soccer Player Suffers Multiple Traumatic Brain Injuries

By Gina McKlveen

Former Baylor University women's soccer star Eva Mitchell filed a complaint last month in the U.S. District Court for the Western District of Texas claiming that Baylor knew Mitchell sustained multiple concussions and failed to protect her from "repetitive, aggressive, and unnecessary heading drills."

The "drills" were conducted during practice by then head coach Paul Jobson using overinflated soccer balls that were fired from a high velocity machine, which caused her severe and continuous neurological damage, according to the complaint.

Jobson has since resigned from his coaching position at the University. Meanwhile, Mitchell's complaint states that she requires full-time assistance from her family to accomplish even the most basic living activities.

The complaint, filed by Mitchell's attorneys Robert Stem and Jason Luckasevic, demands a jury trial to determine compensatory, consequential, and punitive damages including recovery for Mitchell's past and future physical pain and suffering, mental anguish, medical expenses, loss of earning capacity, and physical impairment. The complaint describes her injuries as "persistent and debilitating dizziness with diagnoses of post-concussion syndrome, persistent postural-perceptual dizziness, central vestibular disorder, dysautonomia, depression and anxiety" and further alleges the uncertainty of whether Mitchell will ever fully recover from these injuries, thus diminishing her once promising soccer-playing prospects. However, whether Mitchell will receive a favorable verdict in her case against the Big 12 university is also uncertain given recent outcomes against NCAA athletes, like football player Matthew Onyshko, for similar concussion and other brain-related injuries in federal court jury trials.

In response to Mitchell's allegations of vicarious liability and negligence, Baylor will be positioned defensively, disclaiming any of Mitchell's assertions that its "reckless, intentional, wanton, and depraved acts and omissions" led to her injuries. Therefore, expect Baylor to double-down on its strict adherence to concussion injury protocol and emphasize its commitment to the health and safety of all its student-athletes.

Although Mitchell's collegiate soccer career did not begin at Baylor, her injuries there have brought her playing days to a swift end. Mitchell spent her freshman season at the University of Kentucky where she was one of just three players to earn a starting position in every game while leading her team as a top scorer. Her standout skills caught the attention of Baylor University. She was recruited based on her exceptional soccer talent and awarded an athletic scholarship, which she accepted. From the Spring semester of 2019 through the Fall Season of 2020, Mitchell played as a Midfielder/Forward for the Baylor University Women's Soccer Team.

Within Mitchell's time at Baylor, two specific instances alleged in the complaint were the actual and proximate cause of her on-going head injuries.

The first instance occurred at a practice in February 2019 where Mitchell and her teammates were forced to participate in heading drills conducted by Jobson and his coaching staff. The complaint also alleges that Baylor was the "only women's soccer program in the country" using this drill. Baylor coaches repeatedly punted "overinflated balls the width of the field required the girls to advance the ball as far as possible using their heads." Upon impact, Mitchell's complaint states that she "felt like her brain was smashed after she took the first header during this drill," but she was nevertheless required to continue the drill for another seven to eight turns.

Following this practice, Mitchell and most of her teammates visited the team's athletic trainer, Kristin Bartiss, expressing symptoms and signs of a concussion. Mitchell was then diagnosed with her first concussion related to the header drills. Further investigation by Mitchell's father reveled that her concussion was likely caused by the soccer player's "weak neck" and by Jobson "using overinflated balls shot too hard out of a ball launching machine which were hardened even further by the cold weather" of that February practice.

At this point, Mitchell's complaint claims Baylor was "on notice Coach Jobson's aggressive coaching and was aware of his heading drills increasing the risk of harm and injury to players, and in fact causing concussions to Ms. Mitchell and symptoms to some of the other women players on the team."

Yet, a second instance took place in August 2020 during a three-day practice period several months after Mitchell had recovered from her first concussion. Once again, Jobson and his staff forced Mitchell and her teammates to participate in repetitive and aggressive header drills using the same tactics as before with overinflated balls, shot from a long distance using a machine exerting extreme velocity and force. Mitchell's complaint states that she "felt threatened to participate [since]

she had been removed from a game [...] after she failed to "head" a line drive shot during a game." Mitchell was also concerned about losing her scholarship and her starting position if she refused to participate. As a result, Mitchell sustained a second—more severe—concussion that has taken her permanently off the field and is taking Baylor to court. Ultimately, a Texas jury may decide whether Baylor's coaching staff took the phrase "Get your head in the game" a step too far.

King's College Teams Up With Spry To Help Manage Compliance and Education

Spry, a technology solution designed to help colleges and universities navigate the rapidly evolving Name, Image, and Likeness (NIL) landscape, has announced an agreement with King's College, an NCAA Division III school in Wilkes-Barre, PA, to help the school's athletic department manage NIL and empower its students through education.

King's College sponsors 29 intercollegiate men's and women's sports in NCAA Division III and is a member of the Middle Atlantic Conference.

Spry makes it possible for a student-athlete to disclose business opportunities to their institution in a seamless, transparent way to maintain compliance with all NIL regulations. Moreover, this platform enables compliance departments to identify potential conflicts of interest between existing institutional contracts and student-athlete opportunities, and then respond to incoming requests.

"Athletic departments and student-athletes need tools to help them navigate compliance issues that developed as a result of the new legislation allowing student-athletes to profit from their name, image, and likeness," said Lyle Adams, the founder and CEO of Spry and member of Wake Forest's 2007 NCAA champion soccer team. "Spry has developed robust, cost-effective compliance-focused solutions to guide athletic departments and student-athletes with NIL compliance issues." "King's is excited about the opportunity to work with Spry and give our student-athletes an opportunity to navigate through NIL," stated Assistant Athletic Director Jessica Huda. "We feel this will make it easier for them to keep track of their opportunities and have a better understanding of what NIL is and how they can benefit from it."

Third Circuit Expands Liability for Colleges & Universities in Title IX Decision

By Ashley R. Lynam or Kacie E. Kergides

A series of procedural missteps and policy failures led to the tragic murder of a college student on the campus of Millersville University in 2015. Almost seven years later, the parents of the victim won a significant victory in the Third Circuit, which recently found the school could be held liable under Title IX for its deliberate indifference to sexual harassment perpetrated by a non-student guest. The decision, discussed in detail below, is part of a growing national trend holding colleges and universities responsible, both under Title IX and tort law claims, for the safety of their students.

Karlie Hall was murdered in her Millersville University dorm room by her then-boyfriend, Gregorio Orrostieta, in 2015. Hall was a student at the school. Orrostieta was not. Orrostieta was, however, a frequent visitor to the campus and subject to the terms of a guest policy maintained and enforced by the school.

Orrostieta's aggressive and often violent behaviors towards Hall were known to and documented by various university actors. For instance, in the fall of 2014 Orrostieta was removed from Hall's dorm room by a resident advisor, and later removed from campus by the police. However, campus police failed to complete an incident report per school policy. Hall's resident advisor drafted her own incident report but university administration failed to forward it the school's Title IX coordinator as required by school policy. These facts, and others, formed the basis of Halls' argument that the school acted with deliberate indifference to known sexual harassment on campus.

Millersville University argued successfully to a lower court that it could not be held liable for the actions of a non-student guest on campus because it *lacked notice* that deliberate indifference to sexual harassment, *if per-*

petrated by a non-student guest, could result in Title IX liability. Millersville cited an absence of precedent for such a specific finding in both the Third Circuit and Supreme Court.

The Halls appealed to the Third Circuit, arguing that the plain language of Title IX put Millersville on sufficient notice of liability under these circumstances. The Third Circuit agreed, relying on both the plain language of Title IX as well as Supreme Court precedent. In Davis v. Monroe County Board of Education, 526 U.S. 629, for example, the Supreme Court explicitly held that Title IX proscribes sexual harassment with sufficient clarity to satisfy the notice requirement of the Spending Clause, and that damages liability exists where the Title IX funding recipient exercises substantial control over the harasser and the context in which the known harassment occurs. Although Davis involved actions between two students, the Supreme Court holding contemplates *control* as the standard of application of Title IX liability, which Millersville indeed exercised over Orrostieta, even as a non-student guest, through its various policies.

It is worth noting that Millersville's Title IX policy at the time was atypically broad in application, covering "all areas of Millersville operations, programs, and sites, and include[d] the conduct of employees, students, visitors/third parties, and applicants." However, even under current Title IX regulations and more narrowly tailored policies, colleges and universities should expect the level of control exercised by the institution over the parties to serve as the primary point of analysis in liability decisions.

Perhaps more importantly, this holding is a part of a greater trend, pushed forward by well-reasoned and creative attorneys and increasingly receptive courts to hold schools at all levels responsible for the safety and well-being of their students.

As colleges and universities prepare for the anticipated Biden administration changes to Title IX regulations promised to come in April of 2022, this decision serves as a poignant reminder for institutions to abide by their own policies. Consistency in policy procedure and implementation are of paramount importance to avoid creating a triable issues of fact and liability for the institution.

Hackney Publications Recognizes Sports Law Profession with Second Annual '100 Law Firms with Sports Law Practices You Need to Know About' Portal

Hackney Publications announced today the second annual "100 Law Firms with Sports Law Practices You Need to Know About," a portal that serves as a resource for those in need of experienced and capable legal counsel in the sports law arena.

The firms are listed alphabetically, an ode to the difficulty in actually ranking such firms.

"There are firms on this list that offer a complete menu of sports law specialties, while there are others that specialize in one particular area," said Holt Hackney, the founder of Hackney Publications, which has been publishing sports law periodicals for more than two decades.

"The firms selected for the list were chosen based on our objective perspective as journalists as well as our readers," added Hackney. "They were included in the list as a service to the industry and as a way to give sports industry participants a guide from which to select legal representation."

Another feature of the site is the search by specialization feature, where those in search of expert legal counsel can narrow their search by zeroing in on certain areas of sports law.

Hackney noted that the portal has synergy with Sports Law Expert, a blog that features regular free content as well as a directory of legal experts and their particular specialty. "This directory has been around for a decade and has led to new business for many attorneys as well as expert witness engagements for the academic community," said Hackney.

Among the many firms included on the list are:

- Boies Schiller Flexner LLP
- Bailey & Glasser, LLP
- Cadwalader, Wickersham & Taft LLP
- Drew Eckl & Farnham LLP
- Freeman Lovell, PLLC
- Goldstein & McClintock LLLP
- Herrick, Feinstein LLP
- Ifrah Law
- Jackson Lewis P.C.
- Jenner & Block
- Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
- Montgomery McCraken

- Nelson Mullins Riley & Scarborough LLP
- PARRON LAW
- Ricci Tyrrell Johnson & Grey, PLLC
- Rifkin Weiner Livingston LLC
- Robinson, Bradshaw & Hinson, PA
- Segal McCambridge Singer & Mahoney
- Thompson Coburn

Of the 13 periodicals Hackney publishes, Sports Litigation Alert (subscription-based) is the core periodical, publishing 24 times a year. Each Alert features five case summaries and eight to ten articles. All pieces are written by expert attorneys, professors, law students, and staff. The Alert is a staple in higher education, where it is used in close to 100 sports law classrooms in any given semester. It also features a searchable archive of more than 3,000 case summaries and articles.

Hackney also publishes six other subscription-based periodicals, three in the collegiate athletics space – Legal Issues in Collegiate Athletics, the Journal of NCAA Compliance, and NIL Institutional Report – as well as Legal Issues in High School Athletics, Concussion Litigation Reporter, and Professional Sports and the Law.

In addition, there are six complimentary publications, including Sports Facilities and the Law, Esports and the Law, My Legal Bookie, Title IX Alert, Sports Medicine and the Law, and Concussion Defense Reporter

Sweets Are Bad for You

Continued from page 1

tional penalties range from $50,000 for a first offense to fines of up to $100,000 for a second offense and up to $250,000 for a third and subsequent offenses.

Recently, both the Big 12 Conference and the Southeastern Conference fined member institutions for failing to control crowds at basketball games. The University of Texas was fined by the Big 12 conference this season after fans stormed the court after a victory against the University of Kansas. The conference specifically examined the university's court storming plan and how it did not provide adequate protections to safeguard visiting team personnel.

Similarly, the SEC announced a fine against the University of Arkansas for a violation of the league's "access to competition area" policy when Arkansas fans stormed the court after an early February win against Auburn University. This was not Arkansas' first brush with the conference and violating this rule. The university was fined $250,000 for a third offense as Arkansas was fined earlier this past academic year for a violation following its football game against Texas.

These fines, and how frequently they occur and how frequently fans (primarily students) rush fields and courts, clearly show that these penalties do not work. That led me to explore what might motivate people to change their behavior. This is important because over the last 20 years we have seen an uptick in strategies such as fan codes of conduct, banning fans from venues, increased security presence, increase use of technology, and other strategies to improve crowd behavior. Thus, what works?

An article in the *Journal of Economic Perspectives* entitled, When and Why Incentives (Don't) Work to Modify Behavior (Uri Gneezy, Stephan Meier, and Pedro Rey-Biel) published in 2011 (doi=10.1257/jep.25.4.191) examined whether incentives to pay students to receive better grades or encourage them to read actually worked. Sometimes incentives will do their job and encourage students to improve their performance. Other times the incentive will do the exact opposite and discourage strong performance. As an example, offering incentives for improved academic performance may signal that achieving a specific goal is difficult, that the task is not attractive, or the student is not a strong student, and they need a reward to do well. Furthermore, once the motivation is removed, will there be interest in continuing to do well academically? Sometimes there was short-term success from incentives and at other time, the long-term change was not seen for years. This is where intrinsic and extrinsic motivation both need to be explored to help determine what might motivate someone. The same holds true for punishment and what might motivate someone to stop a certain behavior.

Red light cameras are a good example. These cameras often provide for significant fines if a driver runs through a red light. Instead of slowing down traffic and reducing the number of injuries, these cameras often caused more speeding and more accidents with people trying to get through a light as fast as possible or to slam on breaks to avoid a fine, thus resulting in an accident. This is an example of the law of unintended consequences.

One interesting study highlighted the potential backfiring of penalties. In one experiment an Israeli daycare began charging parents a small fine for arriving late. The result was an increase in the number of late pick-ups even in the short run. The parents did not initially know how important it was to arrive on

time. When the parents registered for the daycare, they did not have a penalty for arriving late. The relatively small fine signaled that arriving late was not very important. Thus, parents took to arriving later and paying the fine.

The question is does a fine work to change behavior? There are numerous studies that examined the benefits of exercise, yet many people do not get enough exercise. Similarly, there are numerous studies that people know the harm caused by smoking (or alcohol, or other possible vices), yet people often continue and justify their behavior for various reasons.

So, what does this mean to fines for crowd rushes. The first thing to realize is that there is a tangible benefit for a behaved crowd, and that is a safer environment. Many fans do not think anything will happen to them. Thus, public service announcements (PSAs) from fans who have been seriously injured could be a benefit. Furthermore, PSAs played throughout the game on scoreboards can be effective if the message is from peers, star athletes, and head coaches. Students especially might change their behavior if they realize that they will be prosecuted or subject to prosecution under a school's codes of conduct- which could include being expelled from a university.

The reason why one rarely sees professional sport field/court incursions is that the penalty would be significant and harsh. When schools are fined, the students do not see the harm to themselves. If students were to be personally fined or otherwise punished, they might change their behavior. I am not trying to be a stick in the mud and as the saying goes, it is all fun and games until someone gets hurt. Well people have been hurt and there will be more harm in the future until rules/policies are changed.

College Wrestling Coach Quits, Sues, and Loses

Continued from page 1

High School and as a wrestler he was "a two-time Private School State place winner" (https://cmsv.com/news), "Zenie becomes Wrestling program's third head coach" (2015/8/20)). He then attended Worcester Polytechnic Institute in Worchester, MA and received a B.S. in Industrial Engineering. Zenie worked on the construction of bulkheads, fixed and floating docks, and waterfront homes.

His coaching career began in 1989 as an assistant coach at Herricks High School. Zenie was head coach at Wagner College from 1993-1994. He began working with USA Wrestling in 2008 where he had several different positions, including the New York State National Duals Team Coach and Fargo Team Leader (Id.). Zenie returned to high school coaching in 2011. He was hired at CMSV in 2015.

According to Zenie's lawsuit, his job entailed managing and scheduling use of the school's athletic facilities, proposing the wrestling team's annual budget, and coaching the wrestling team (*Zenie v. CMSV* at 2). Zenie began to have conflicts with the Athletic Department in 2017 over the wrestling program's budget. He was also unhappy when, that same year, he was not promoted to Associate Athletic Director, but a younger person was. It was explained to Zenie that position was "matched with the head coach of one of the leading sports at the College" but not one of the minor programs (Id. at 3).

Zenie complained to the Human Resources department but his "complaint was not formally addressed." In 2017 he "received a formal evaluation" that said he was "very good" at various aspects of his job. However, Zenie continued to complain about the Athletic Department's hiring policies and was observed "criticizing the department in front of potential hires and other co-workers."

On September 5, 2017, he received a letter from the Dean of Students that mentioned his "souring demeanor and how it was affecting his 'professional judgment when interacting with his colleagues" (Id. at 3/4). Zenie thought this was a "gross misrepresentation" and "resigned the same day" (Id. at 4). He filed a charge with the EEOC on January 26, 2018, and one month later he received a Right to Sue Notice. Zenie filed his Complaint on May 25, 2018. He sued both CMSV and Athletic Director Barima Yeboah. At the time, "Zenie is representing himself" (employerinsight.wordpress.com, "Ex-Wrestling Coach Sues College for Age Discrimination" (6-6-18)).

In the District Court

Zenie soon had counsel. CMSV and Yeboah did not file a motion to dismiss but answered on July 20, 2018. Mediation failed, and from there it was on to discovery motions heard on both 1/23/19 and 5/02/19. The defendants filed a motion for summary judgment in August 2019. Zenie's counsel needed help from the Court in filing its opposition electronically "because of the size of the documents… it is necessary to break them up" and "this has taken additional time to upload" (*Zenie v. CMSV*, Order at 2 (10-8-19)). The defendants also needed help for extra time to reply and to file extra

pages. That, too, was granted (*Zenie v. CMSV,* Order (10-14-19)).

The Court ruled on the motion on September 14, 2020. It used the usual summary judgment standard that there must be "no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law" (*Zenie v. CMSV* at 4). The Court first dealt with the age discrimination claim. Zenie's problem was simple. To be promoted to Associate Athletic Director, he had to be either the men's or women's basketball head coach, and Zenie "had zero experience coaching basketball" (Id. at 5). Furthermore, "the record does not support an inference that the College's failure to promote Zenie was due to his age, let alone that age was the but-for cause of that decision" (Id. at 6). Indeed, Zenie "does not show that he was treated differently from his younger co-workers." There was also "no evidence that those involved in the decision … made disparaging comments about Zenie's age, adversely compared him to candidates due to any difference in age, or fostered an environment that disfavored older employees."

Zenie argued that the defendants "failed to provide him with clear reasons for not promoting him" but "that alone is insufficient to establish discriminatory intent" (Id. at 7). Moreover, "the record does in fact reflect that there was a good reason" to promote the other candidate because that person had experience coaching basketball. Finally, Zenie failed to establish a claim for constructive discharge. Courts "have repeatedly held that an employee's dissatisfaction with his job duties or performance evaluation, criticism by a supervisor, being unfairly disciplined, not being promoted to a desired position, and demotion do not meet the 'intolerable' threshold" (Id. at 8). The motion for summary judgment "must be and is granted" for those claims.

Federal Retaliation Claim

Zenie "strangely" brought the claim "pursuant to Title VII, not the ADEA" but "Title VII has no application here, however, as it is concerned with 'race, color, religion, sex, or national origin,' not age, 42 U.S.C. §2000e-2(a)" (Id. at 8). Zenie argued that the law is "substantially identical", and the Court ultimately decided that "there is no reason to refrain from addressing the substance of his ADEA retaliation claim, as it is fully briefed." His problems continued. Zenie sued Yeboah individually, yet "there is no individual liability under the ADEA (or Title VII, for that matter." Consequently, "there is no basis for Zenie's claim about Yeboah" (Id. at 8/9).

The retaliation claims required Zenie to "show (1) participation in a protected activity; (2) the defendant's knowledge of the protected activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action." (Id. at 9). His claim "falls woefully short. For one thing, Zenie does not identify the protected activity. The closest he comes is to allege that he complained to Human Resources that the College was showing favoritism towards younger, inexperienced candidates." "Needless to say, a plaintiff cannot bring a retaliation claim where the alleged retaliation took place before the plaintiff's protected activity."

Zenie also failed to "point to evidence that President Flynn—the person who made the decision to hire Mooney—even knew about the complaints." Finally, Zenie cited "actions taken later" but "he identifies no evidence linking those actions to his complaints many months earlier." "In short, any ADEA retaliation claim must be and is dismissed."

State Law and "Local Law" Claims

Zenie also brought claims under state and local law including his "analogous claims for age discrimination and retaliation" and for "hostile work environment" (Id. at 10). The Court accepted jurisdiction over the age and retaliation claims because "it is well established that the standards for evaluating them are the same as the standards under the ADEA" so "it would be the height of inefficiency to defer a decision on [his analogous] NYSHRL claim(s) to a state court." Those claims "are dismissed for the same reasons." The Court declined to accept jurisdiction over Zenie's other state and local claims, in part because he had not alleged a federal counterpart, and because those claims "are subject to a different standard" (Id. at 11). Those claims were "dismissed without prejudice to his refiling them in state court." The Clerk was directed to terminate" the case, "to enter judgment in Defendants' favor, and to close the case."

In the Second Circuit

Zenie filed a Notice of Appeal on October 14, 2020, though his counsel was not yet admitted to practice before the Circuit (Doc. #5, (10-15-20)). Prior to oral argument, Zenie's counsel filed four documents that the Court declared "Defective" and required a corrected document (Doc. #34, #66, #76, #78.). The defendants filed two such defective documents that also required a "Corrected" document (Doc. #41, #71). Eventually the appeal was fully briefed.

The Circuit held oral argument on December 15, 2021 and issued its opinion six days later. It is a mere two pages of analysis. The Circuit stated that it reviews a grant of summary judgment de novo. It is appropriate "only where 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law'" (*Zenie* at 4). The Court used a burden-shifting framework and assumed "without deciding that Zenie

has established a primage facie case of age discrimination for the College's failure to promote him to Associate Director of Athletics." However, the school wanted the candidate to "also coach basketball, which Zenie has never done. Given this gap, Zenie's credentials were not 'so superior' to those of James Mooney, the candidate hired by the College, that no 'reasonable person…could have chosen [Mooney] over [Zenie] for the job in question.'" Moreover, Zenie "presents no evidence of comments about his age that would support an interference of discrimination."

Zenie argued that CMSV "could have paired the Associate Director position with a non-basketball coaching position." However, given the lack of evidence that CMSV's "pairing of these positions was a pretext for discrimination, we must defer to the College's judgment." Zenie also failed to show that his position "was rendered so intolerable that [ ] he was compelled to quit." He had some complaints, but "dissatisfaction with work assignments, reduced promotion opportunities, and criticism of one's work do not establish constructive discharge" (Id. at 4/5).

Although he produced evidence that others had "disparaged him to the College President," "there is no evidence that Zenie was aware of these private comments prior to his September 5, 2017 resignation—and, indeed, Zenie's federal complaint in this case does not mention them—they could not have made Zenie's work conditions 'intolerable'" (Id. at 5).

The retaliation claim fared no better, in part, because CMSV's president "who decided to pair the Associate Athletic Director positions with the basketball coaching positions for which Zenie was not qualified, was not aware of Zenie's internal complaints about age discrimination." Others knew about Zenie's complaints, but his complaints, and cuts to the wrestling budget "began well before [Zenie] had ever engaged in any protected activity," so "an interference of retaliation does not arise."

The Circuit stated that it had "reviewed all of the arguments raised by Zenie on appeal and find them to be without merit." It therefore affirmed the grant of summary judgment. Zenie filed a Petition for Rehearing on January 5, 2022 (*Zenie*, Doc. #102). The panel denied the request two days later (*Zenie*, Order, Doc. #107 (1-7-22)). The Circuit issued its Judgment Mandate (*Zenie*, Doc. #108 (1-14-22)), that was received by the District Court the same day (*Zenie v. CMSV,* Doc. #93).

Conclusion

Zenie is now on the clock as to for filing for certiorari in the Supreme Court. The Circuit opinion was unpublished, so his chances are small. The case will now likely return to the District Court to assess the defendants' costs that Zenie will be required to pay. It is great to have enthusiasm for a case, but unless Zenie can craft a settlement that releases him from the costs, this will have been an expensive process for a case that was likely doomed from the start.

Georgia Tech Athletics Adds Senior Counsel

Cameron Cilano will fill the new position of senior counsel for athletics within Georgia Tech athletics' administration, director of athletics Todd Stansbury announced on Tuesday.

Stansbury, who also announced a chief of staff appointment, said that "both of these new positions will play significant roles in furthering our strategic priorities of creating the culture, infrastructure and resources necessary to 1) recruit, 2) develop Everyday Champions who will change the world and 3) win."

As senior counsel for athletics, Cilano oversees all legal affairs within the Georgia Tech Athletic Association, including contracts and ethics. He originally came to Georgia Tech in October 2019 and served in the Institute's Office of Legal Affairs as counsel for employment and litigation, as well as student life and academic affairs. He remains a member of the Institute's Office of General Counsel while serving as the athletics department's in-house counsel.

Cameron Cilano

A Rochester, N.Y. native, Cilano played baseball at St. John's University in New York City before transferring to the University of North Carolina at Charlotte, where he graduated with a bachelor's degree in political science and government in 2015. He went to law school at the University of Georgia, where he earned a J.D. in 2018, and is a member of the state bar in Georgia and North Carolina.