

TITLE IX ALERT

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Federal Court Judge: Private College Denied Due Process to Football Player Accused of Sexual Misconduct

By Brian G. Nuedling, Jackson Lewis

In a ruling that could have a drastic impact upon campus sexual assault proceedings under Title IX, a federal court judge in Tennessee has granted a temporary restraining order to a student, a former football player and fraternity member, preventing his expulsion from a private college because he may have been denied due-process rights in the adjudication of a sexual-misconduct case. This is the first time a judge has issued a decision specifically raising Title IX’s due process requirement involving a private institution.

In a rebuke of a campus hearing process used to determine the outcome of sexual assault cases, a the federal court judge found that a student may have been wrongfully

found culpable of violating a private school’s sexual misconduct policy because the student’s accuser had not attended a Title IX disciplinary hearing and had not been subject to either cross-examination or questioning by the school’s decision panel.

As recounted by the court in *John Doe v. Rhodes College*, No. 2:19-cv-02336-JTF-tmp (W.D. Tenn. June 14, 2019), the salient facts of the case are the following:

The Plaintiff and “Z.W.,” both of whom were football players and members of Sigma Alpha Epsilon, attended a fraternity event on the Rhodes campus around February 14, 2019. The Plaintiff was accompanied by “C.S.,” his date for the evening. During

See PRIVATE COLLEGE on Page 9



INSIDE THIS ISSUE	
Carroll College Golf Coach Claims Title IX Retaliation	2
Circuit Split on Student’s Due Process Right to Cross-Examination in Title IX Matters	3
Title IX Claims May Proceed under ‘Controlling Authority’ Theory	4
Former Minnesota Technical College Coach & Athletic Coordinator Settles Whistleblower Case	5
St. Cloud State University in Minnesota Violated Title IX, Federal Judge Rules	11

Court Dismisses Title IX Lawsuit Over University’s Cutting Women’s Ice Hockey Program

By Patrick L. Egan, Jackson Lewis

The federal district court in North Dakota has dismissed a lawsuit filed by 11 former members of the University of North Dakota’s women’s ice hockey team who alleged the University violated Title IX of the Education Amendments Act of 1972 when it discontinued the women’s ice hockey program. *Berndsen et al. v. North Dakota Univ. System*, 2019 U.S. Dist. LEXIS 102292, 2019 WL 2526180 (D.N.D. June 19, 2019).

The court ruled that the plaintiffs failed to state a claim on which relief could be

granted because they did not plead sufficient facts that, even taken as true, could support a plausible legal claim that the University committed unlawful acts.

The University terminated the women’s ice hockey team following the 2016-17 season. The plaintiffs then alleged the University failed to provide female students with “proportionately equal opportunities in intercollegiate athletics as compared with its male students” as mandated by Title IX. The plaintiffs alleged the University violated Title IX by terminating the women’s ice hockey program, improperly calculating

the opportunities for female participate in intercollegiate athletics, and overreporting the number of female students participating on various sports teams. The court rejected each of these.

Title IX prohibits discrimination on the basis of sex “in any ... intercollegiate ... athletics” offered by a recipient of Title IX funds. Under a 1979 policy interpretation of federal regulations, colleges and universities may meet this requirement (the “Three Part Test”) in three independent ways:

Provide participation opportunities for

See COURT DISMISSES Page 8

Carroll College Golf Coach Claims Title IX Retaliation

By Erica Zonder, J.D., M.S., Assistant Professor of Sport Management, Eastern Michigan University

Current Head Golf Coach Bennett MacIntyre filed a lawsuit on June 21, 2019, against Carroll College in Montana alleging Title IX retaliation, as well as wrongful discharge under Montana state law.

Background

According to the complaint, Plaintiff MacIntyre has worked at Carroll College (Defendant) in some capacity since 2006. He originally was hired as the Director of

Community Living, a full-time position with benefits, as well as being paid a stipend for being the Assistant and then Head Golf Coach. He was promoted to Associate Athletic Director in 2013, while remaining the Head Golf Coach.

It was at this time, he claims, that he became aware of a “significant disparity between the amount of funding” (*MacIntyre v. Carroll College*, 2019, p. 3) provided to male and female student-athletes, including disproportionate scholarships provided to males from fundraising. According to the complaint, by the fall of 2015, MacIntyre determined that the College was out of compliance with Title IX and brought his concerns to the school’s Title IX Coordinator in January 2016. After considering an independent audit, the school decided to have an internal audit conducted by the incoming Athletic Director.

The complaint also alleges that MacIntyre had never received a negative performance evaluation until he reported his Title IX concerns, after which the outgoing Interim Athletic Director gave him the “lowest marks available on the form” (p. 8). The day after this, MacIntyre was offered a two-year contract (July 1, 2016, to June 30, 2018) to be the full-time Head Golf Coach, with salary and benefits, at a reduction in pay from his Associate Athletic Director position. The Defendant “acknowledged” that the student-athletes deserved a full-time coach “just like every other sport” at the school (p. 9).

MacIntyre was informed in 2018 that the contract would not be renewed, but was offered a stipend agreement to continue as Head Coach, with a reduction in pay from \$38,031.60 to \$14,000 with increased responsibilities, including submitting written practice and work-out plans that were not required by other coaches, and an increase in participants without an increase in scholarships or recruiting budget. According to the complaint, the Defendant blamed the reduction on budget cuts, but MacIntyre

is the only coach to ever be dropped from full-time to stipend. Further, he was not offered any other position that would allow him to retain his full-time employment status while other coaches were given jobs within athletics to supplement their salaries. He was also moved from an office to a cubicle, becoming the only head coach without a secure office.

In June 2018, MacIntyre filed a grievance consistent with Carroll College’s policy, asserting retaliation for his “multiple requests to Defendant for compliance with Title IX” (p. 12). According to the complaint, the College brought in what they claimed was an independent investigator who is an alumnus of the school and the son of a former Carroll College President, and who had no experience with Title IX. The investigator’s report “verified,” among other issues, that the new Athletic Director is not a Title IX expert, the Defendant never asked the Athletic Director to perform a Title IX analysis, no athletic-specific Title IX training is provided to the coaches or student-athletes, the Title IX Coordinator/Director of Human Resources recognized that the change in employment to MacIntyre was a termination, other coaches viewed it as a termination, and MacIntyre continued to bring up his Title IX concerns in an exit interview (pp. 13-16). In 2019, MacIntyre again addressed gender disparities in a report as part of a Program Prioritization process. The complaint alleges this report was “sanitized” to remove any mention of Title IX concerns (p. 17). When asked about the changes, the complaint alleges the Athletic Director stated, “you can’t measure sexual discrimination” (p. 18). While the report was ultimately changed back, the golf program was put in the lowest priority category.



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See CARROLL on Page 10

Circuit Split on Student's Due Process Right to Cross-Examination in Title IX Matters

By Susan Friedfel, Crystal L. Tyler,
Jason Ross, Jackson Lewis

Constitutional due process does not mean a student accused of assault has the right to directly cross-examine his accuser in adjudications under Title IX of the Education Amendments of 1972 at state institutions of higher education, the federal appeals court in Boston has held. *Haidak v. University of Massachusetts-Amherst*, No. 18-1248 (1st Cir. Aug. 6, 2019).

This puts the U.S. Court of Appeals for the First Circuit at odds with the U.S. Court of Appeals for the Sixth Circuit (in Cincinnati) and the Department of Education's proposed Title IX regulations.

The First Circuit has jurisdiction over Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

Sixth Circuit Decision

In *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), the Sixth Circuit held that the University of Michigan's process for adjudicating sexual misconduct allegations did not meet minimum standards of due process. The Sixth Circuit reasoned that, as an arm of the State of Michigan, the school must provide constitutional due process to students accused of sexual misconduct. In so holding, the Sixth Circuit made a blanket finding that a student at a state institution accused of sexual misconduct is entitled to cross-examine his or her accuser, either directly or through an agent or representative. The Sixth Circuit has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee.

Baum had many state universities throughout the country revising their sexual misconduct policies to reflect the ruling.

Reflecting the Sixth Circuit's holding in *Baum*, the Department of Education's proposed draft Title IX regulations would guarantee accused students the right to

cross-examine their accusers in these proceedings. (See our article, [Department of Education Unveils Proposed Title IX Regulations](#).)

Background

The First Circuit case involves James Haidak and Lauren Gibney, two students at the University of Massachusetts-Amherst who were in a romantic relationship that began in 2012. In 2013, the University received a complaint that Haidak had assaulted Gibney. The University issued both parties a no-contact order.

Haidak allegedly violated the no-contact order. The University issued him a warning, then an interim suspension prior to conducting a hearing. The University found Haidak was not responsible for sexual misconduct, but it found him responsible for assault and for violating the no-contact order. As this was not the first time the University found Haidak to have committed assault, he was expelled.

Haidak sued the University, alleging that his due process rights were violated and that the adjudicatory process was in violation of Title IX. After the federal district court dismissed his claims in their entirety, he appealed to the First Circuit.

First Circuit Decision

The First Circuit agreed with the district court's dismissal on all counts, except as to Haidak's challenge of due process on the interim suspension.

The Court said the five-month interim suspension violated Haidak's due process rights because the University did not demonstrate his conduct was severe enough to merit an immediate suspension. It ruled the University should have provided him some level of process pre-suspension.

However, the Court was clear it was *not* holding that Haidak's due process rights were violated simply because he was af-

forded the opportunity to interrogate his accuser directly. Relying on *Baum*, Haidak had argued he was entitled to more than an assurance that his accuser would be questioned by an independent fact-finder. He contended he was entitled to cross-examine the accuser himself. The First Circuit disagreed. It said the Sixth Circuit took "the conclusion one step further than [the First Circuit] care to go, announcing a categorical rule that the state school had to provide for cross-examination by the accused or his representative in all cases to determine credibility."

The First Circuit held that an interrogation of the accuser by an independent fact-finder may be enough to satisfy the guarantee of due process. The Court drew a distinction between administrative hearings at colleges and universities and common law trials, cautioning against mixing them up. In holding that a blanket rule requiring direct cross-examination went too far, the Court reasoned that a university choosing to use an independent examiner still had to ensure adequate questioning of the accuser. The Court said, "A school cannot both tell the student to forgo direct inquiry and then fail to reasonably probe the testimony tendered against that student." If the school chooses to question the accuser in place of the accused, the Court holds, it must sufficiently probe the credibility of the accuser and the accusations.

The Court concluded that this case was a close call. It noted that many of the questions provided by Haidak to the fact-finder were stricken, and that there was a discernible difference in tone and manner in which the parties were questioned. Accordingly, the Court vacated dismissal of Haidak's claims challenging the constitutionality of the manner in which the University suspended him for five months without prior notice or an

See **CIRCUIT COURT** on Page 11

Title IX Claims May Proceed under ‘Controlling Authority’ Theory

By *Doriyon Glass, Jackson Lewis*

Denying a high school athletic association’s motion to dismiss a complaint alleging violations of Title IX of the Education Amendments of 1972, a federal district court has held, “the Plaintiffs have provided sufficient factual matter to plausibly allege that the [Oahu Interscholastic Association] may be subject to the anti-discrimination provisions of Title IX under a ‘controlling authority’ theory.”

In *A.B. v. Hawaii State Department of Education*, athletes on the female high school water polo and swim team filed a class action lawsuit against Oahu Interscholastic Association (“OIA”) and the Hawaii State Department of Education (“DOE”) alleging violations of Title IX. In their three-count complaint, the plaintiffs claim the defendants violated Title IX based on:

1. their failure to take remedial actions to meet the anti-discrimination provisions under Title IX, and their continued unequal treatment of female athletes;
2. their failure to provide female athletes with equivalent athletic participation opportunities; and
3. the DOE’s retaliation against the plaintiffs for their attempts to report or discuss the DOE’s practice of sex discrimination.

The DOE is a state administrative agency managing 292 schools in Hawai‘i, including the plaintiffs’ school, James Campbell High School (“Campbell”). The OIA is an unincorporated athletic association consisting of the DOE’s secondary schools in Oahu, which includes Campbell. The plaintiffs alleged that the DOE receives federal financial assistance and, therefore is subject to Title IX’s anti-discrimination provisions. Since the OIA’s Executive Director is a DOE employee and all five members of the OIA Executive Council are principals of DOE high schools, the plaintiffs contended that “the OIA is an instrumentality of, and is

controlled by the DOE, and that they are pervasively entwined.” Based on these connections, the plaintiffs alleged the OIA also receives federal financial assistance and is subject to the provisions of Title IX.

According to the plaintiffs’ complaint, female athletes at Campbell are treated worse, receive fewer benefits and fewer opportunities than male athletes, and the OIA’s policies and practices control or influence this disparate treatment immensely. The plaintiffs claimed their allegations are evidenced by OIA’s competitive facilities, scheduling of games, travel opportunities, and publicity and promotion of athletic teams. They also claimed that the DOE failed to provide its female athletes with athletic locker rooms, practice and competitive facilities, equipment and supplies, availability and quality of coaching, medical and training services and facilities, and publicity and promotion.

Further, the plaintiffs alleged that the DOE and the OIA consistently give better opportunities to boys’ athletic programs when determining facility use and scheduling, including allocating a majority of available Friday night spots to boys’ programs. In addition, they claimed the male athletes received better travel and publicity opportunities (for example, they were sent off the island for athletic competitions).

The OIA filed a motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), claiming it did not allege that the OIA receives federal funds as required under Title IX. The plaintiffs argued that the facts are sufficient in the complaint to support their theory that OIA indirectly receives federal funds and that the OIA is subject to Title IX because it is the controlling authority over the federally funded program.

Under Title IX, “[n]o 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.” 20

U.S.C. § 1681. Therefore, to be subject to Title IX liability, an entity must be a “program or activity” as defined by Title IX and receive “Federal financial assistance.”

Title IX broadly defines “program or activity.” The definition encompasses the operations of: a “department, agency, special purpose district, or other instrumentality of a State or of a local government”; a local educational agency; an “entire corporation, partnership, or other private organization, or an entire sole proprietorship”; and any other entity that is established by two or more of the foregoing entities. 20 U.S.C. § 1687.

The OIA argued that, because the plaintiffs’ complaint did “not allege that any federal funds were earmarked for the purpose of the OIA,” it was not liable under Title IX and was entitled to be granted its motion to dismiss.

The district court said that the plaintiffs’ complaint provided the following: the DOE “receives federal financial assistance and is subject to the anti-discrimination provisions of Title IX; that the OIA has controlling authority over the DOE’s interscholastic athletic programs, including competitive facilities; scheduling of seasons, games, and tournaments; travel; publicity and promotion; and budget that the OIA indirectly receives federal financial assistance; that the OIA acts under the control of and in close coordination with the DOE and makes decisions concerning interscholastic athletics at Campbell; and finally, that the Executive Director of the OIA is a DOE employee, and all five regular members of the OIA’s Executive Council are principals of DOE high schools and therefore also DOE employees.”

Accepting the plaintiffs’ allegations as true, as required when dismissal is sought based on Fed. R. Civ. P. 12(b)(6), the court concluded the plaintiffs had stated sufficient allegations to support a claim that the OIA is an indirect recipient of federal funds and subject to Title IX.

Former Minnesota Technical College Coach & Athletic Coordinator Settles Whistleblower Case

By Ellen J. Staurowsky, Ed.D., Senior Writer & Professor, Sport Management, Drexel University

Following years of litigation, a former coach and athletic coordinator for a Minnesota technical college, who alleged he was dismissed for reporting financial mismanagement, among other things, has agreed to settle the case for \$100,000.

In *Stolz v. Minnesota State College & University System and Dakota County Technical College*, No. 62-CV-16-3718 (2016), Cameron Stolz, a former employee who held multiple roles as an athletic coordinator, faculty member, and soccer coach, alleged he had been wrongfully terminated after raising concerns about misconduct by another head coach and a failure to comply with Title IX of the Education Amendments Act of 1972. In suing his former employer, Dakota County Technical College (DCTC), a part of the Minnesota State College & University (MnSCU) System, he sought to recover damages for back pay, front pay, compensatory damages, damages for emotional distress, and damages to reputation resulting from the retaliatory treatment to which he was allegedly subjected to.

Background

At the time of Stolz's hire in 2002, the athletic department was in the early stages of its development. Wrestling, as the first varsity sport to be offered at DCTC, was launched in 2000.¹ Two years later, Stolz was initially hired to develop and coach the women's soccer team. Within a year, his role expanded to include coaching the men's soccer team.²

According to Stolz's complaint, he designed and created the curriculum for associate and transfer degree programs in exercise, sport science, and sport management. He also oversaw the expansion of resources to support athletic teams, seeking and fostering relationships with local governments and corporate sponsors. He served as a regional representative for the National Junior College Athletic Association (NJCAA) and was recognized with the NJCAA Regional Coach of the Year Award in 2009. His teams perennially garnered national NJCAA rankings.

By 2008, Stolz received a promotion that resulted in his transition from a hybrid faculty/administrative position to full faculty, which carried with it a formal designation as athletic coordinator. While he continued to coach men's and women's soccer and teach sport management courses, his administrative role in athletics changed. As the athletic coordinator, he focused on ensuring that the day-to-day operations of the program ran smoothly and providing the vision for the continuing evolution of the program. Personnel (specifically, coaches), however, no longer reported to Stolz, but to an administrator responsible for human resources and budget management. He also was no longer overseeing the athletic department budget.

Under his leadership, the DCTC athletic department transitioned from NJCAA Division III to Division II. Stolz played a key leadership role in working alongside city authorities to fund and build a \$3-million soccer complex used by campus and com-

division affiliations within the NJCAA. Men's and women's soccer were listed as being in NJCAA Division I from 2002-2003 through 2010-2011, while the rest of the athletic department was listed as NJCAA Division III. In 2011-2012 the affiliation shifted for the entire athletic department and all programs being listed as NJCAA Division II.

munity constituencies. In February 2010, he took the lead in overseeing efforts to add women's volleyball and men's basketball and served as co-chair of an athletics task force to develop a plan for further growth in program, budget, and revenue streams.

Stolz's Efforts to Report Title IX Violations, Other Alleged Misconduct

In the spring 2012, Stolz, who was responsible for putting together the institution's federally mandated report under Title IX that documents the gender breakdown of resources within an athletic department (an EADA report), believed more funds were being allocated to men's programs, resulting in a growing disparity between the men's and women's programs. In terms of capital projects, DCTC's president, Ron Thomas, prioritized the building of a new baseball facility, despite the fact the field the softball players used was deteriorating and in need of significant upgrades. Operationally, men's programs received proportionally higher rates of funding for recruiting, travel budgets, promotions, out-of-season coach stipends, and funding for awards banquets. Female athletes were alleged to have been further denied the opportunity at times to even practice their sport.

Stolz tried to educate DCTC administrators about potential Title IX violations. He had several meetings in April 2012 with the dean of student affairs and the president. Receiving no response to his concerns, he moved on to a meeting with the director of human resources, who was also designated as the human rights officer. There, too, his attempts met with no response.

Stolz alleged that it was after those meetings that he started to experience an increasingly hostile environment in the workplace. He points to his exclusion from

See EX-MINN. on Page 6

1 Based on EADA reports, wrestling was offered at DCTC for four years, from 2002-2003 through 2005-2006.

2 According to EADA reports filed every year between 2003-2004 and 2017-2018, the DCTC athletic department held multiple

Ex-Minn. Coach & Athletic Coordinator Settles Whistleblower Case

Continued From Page 5

meetings with campus administrators that he had once been invited to. He reported that the administrative assistant assigned to him was relocated and no efforts were made to replace that person. In contrast to other employees who were recognized for meeting 10 years of service at the institution, his decade of service went unrecognized. And he claimed administrators were dismissive and rude when interacting with him.

By July 2012, Stolz had filed an anonymous complaint with the MnSCU vice chancellor's office detailing his concerns about DCTC's shortfalls in Title IX compliance and included other misconduct he perceived was happening at DCTC. Months passed without a response to his numerous complaints. He then was confronted with the prospect of completing DCTC's EADA report for submission in October 2012. He claimed that due to his complaint with the MnSCU chancellor's office, he was denied access he needed to fully complete that report. The fact that the DCTC human resource officer knew about his anonymous complaint with the state system was taken by him as a violation of the assurances given to whistleblowers that they would be protected when participating in the reporting process.

As evidence that he was facing retaliation, Stolz asserted in his complaint that DCTC officials in November 2012 wrongly decided to prevent him from teaching sport management courses in the curriculum that he had designed, saying he was not sufficiently qualified. Meetings in December 2012 with DCTC's president and dean of student affairs again yielded no results and further solidified to Stolz that administrators were not fully aware of Title IX's requirements.

In early-January 2013, his list of issues extended beyond Title IX violations. He thought the baseball coach was engaging in financial mismanagement and fraud, an allegation that the complaint notes led to

the deactivation of the coach's credit card by the dean of student affairs. At the urging of the dean of students, Stoltz documented the Title IX violations that existed and other areas of mismanagement. In so doing, he wrote about the lack of institutional control of the athletics department that manifest in DCTC's president, Ron Thomas, being a party to manipulations of athlete eligibility and enrollment. Shortly thereafter, in February 2013, Stoltz alleged he was told that the institution was in the process of searching for a new athletic director and that, while he could remain at the school and coach, he was urged to consider finding another job. Stoltz's complaint included the job description advertised, which outlined responsibilities identical to the ones he fulfilled with the additional requirement that successful applicants hold a master's degree, a credential that he did not have.

Stoltz's Retaliation Argument

Troubles associated with the management of the athletic program continued to be identified by Stolz through the early part of 2013. Concerns arose that federal work-study money was being used to pay baseball players to work at a private business owned by the head coach. Repeated efforts to inform administrators met with little action. However, less than a week after Stoltz submitted a written complaint to a DCTC vice president, President Ron Thomas resigned. By April 2013, Stoltz pursued matters through the MnSCU office of internal auditing. Within weeks, the DCTC baseball coach was fired, the search for a new athletic director had been cancelled, and arrangements were made for the softball team to play on a better field for the upcoming season.

As a new academic year got underway in July 2013, with new interim president Tim Wynes, expectations regarding Stoltz changed and his contract was to be handled

directly by President Wynes, rather than academic officers who handled such matters. After working without a contract for some period of time, Stoltz was informed by the human resources director, in a meeting with academic officers, that his load was being reduced from 26 to 18 credits (effectively a 30-percent reduction in load that resulted in a reduction in pay). Working through his union, Stoltz was able to have his assignment returned to its original 26 credit load with his pay restored.

The ensuing months produced other challenges from Stoltz's perspective. The ongoing investigation from the MnSCU auditor's office required creation of an athletics task force at DCTC to explore issues raised in Stoltz's complaint, one that was conditioned upon his status as an anonymous reporter. Initially, Stoltz was appointed to that task force in November 2013, but was eventually removed after the DCTC's chief financial officer allegedly announced to the group that one of its members was a whistleblower. This announcement allegedly was met with resignations from the faculty senator who declared that they did not wish to serve if a whistleblower was on the committee, while the human resources officer expressed a belief that a new athletic coordinator was needed. According to Stoltz, these declarations resulted in him being asked by President Wynes to temporarily step down from the task force. In so doing, in Stoltz's view, he had been exposed as the whistleblower. He eventually returned to the task force, experiencing harassment and embarrassment throughout the process.

In March 2014, Stoltz was confronted again with an effort to alter his contracted assignment. After serving the institution for 13 years, carrying workloads that constituted a full-time equivalency (FTE) or

See EX-MINN. Page 7

Ex-Minn. Coach & Athletic Coordinator Settles Whistleblower Case

Continued From Page 6

exceeded an FTE, he was given a contract that was reduced to a .82 FTE. Stoltz alleged that his request to be permitted to teach the courses he had designed and had taught previously to elevate his position back to that of a full-time was not approved and that the person hired to teach those courses was the husband of the director of student life and athletics administrator. Negotiations around his contract included questions regarding his status as a full-time faculty member and his eligibility for a tenured position.

In January 2015, Stoltz was informed that his status had been changed to that of a part-time employee. As a consequence, he was no longer eligible for employment benefits. Two months later, in March 2015, Stoltz was informed that his position as athletics coordinator was being eliminated and the responsibilities given to other coaches. He subsequently found out that the athletic coordinator role assignment was given to the head men's basketball coach. With the change in his faculty classification and elimination of his role as athletics coordinator, Stoltz's remaining assignment was that of men's soccer coach, a position that was credited at a .34 workload.

As he pursued appeals to the personnel decisions affecting his status as a full-time employee, he took his concerns regarding Title IX violations and the alleged acts of retaliation directed at him to the chair of the MnSCU trustees. This resulted in his case being brought to the attention of the head of human resources for the MnSCU. While a review of Stoltz's 2013 report was underway, it was discovered that sections of the report were missing.

Filing of a Title IX Complaint with the Office for Civil Rights & Termination

Having explored all available avenues with the MnSCU system to deal with the alleged

inequitable treatment of female athletes at DCTC and the retaliation he was experiencing, Stoltz proceeded to file a complaint with the United States Department of Education Office for Civil Rights (OCR) in April 2015, which prompted an investigation several months later. Between the time campus authorities were made aware of the OCR investigation and the fall of 2015, Stoltz's employment situation worsened. DCTC allegedly attempted to block his request to receive unemployment benefits. He cited the timing of conversations with the administrator in charge of student life and athletics as designed to discourage full candor with OCR investigators regarding the state of affairs in the athletic program and to threaten his employment. The public firing of Stoltz's assistant coach just days before the team's regional quarterfinals was seen as another step in the ongoing effort to make Stoltz's job more difficult and to affect his job performance. Stoltz was then notified that he was the subject of an investigation the same week OCR investigators were conducting interviews on campus. Several months later, Stoltz was informed that his contract to coach men's soccer would not be renewed and his relationship with the institution would end with that contract.

Whistleblower Case Filed in 2016 & Settled in 2019

After his termination, Stoltz sought relief under the Minnesota Whistleblower Act (Minn. Stat. § 181.932), breach of contract for denial of tenure status, breach of contract for unpaid wages, failure to pay wages promptly (Minn. Stat. § 181.13); failure to produce a copy of the personnel file (Minn. Stat. § 181.961); and retaliatory failure to produce a copy of the personnel file (Minn. Stat. § 181.964).

In April 2019, Mr. Stoltz settled with MnSCU and DCTC for \$100,000, representing payment for non-wage damages

(\$49,662) and attorneys' fees and costs. The parties further agreed to review Stoltz's work history pertaining to the credit load documented in his personnel file to determine if the reporting was in error. A correction of the personnel file, however, is at the sole discretion of DCTC and with an agreement that Stoltz is not entitled to any further compensation. The expressed reason for the settlement was to avoid further costs associated with litigation and further risk of litigation.

Takeaways

Those acquainted with whistleblower cases will find a familiar narrative in Stoltz's lawsuit. The attention to timelines, events, and personnel decisions as represented in the complaint paint a picture of an employee who had to navigate a compromised environment. The special investigation undertaken in 2013 by MnSCU revealed that then-President, Ron Thomas, exerted what was described as an "inordinate amount of influence" over the athletic department and directly overseeing its operation. According to Christopher Magan (2016), a local reporter for the *Pioneer Press*, "...the athletic department had a 'culture of bypassing budgetary expectations and procedural requirements.'" At the time President Thomas resigned, the internal investigation noted that there were "irregularities in spending and bookkeeping for the DCTC Foundation" and "poor oversight of sports fees and fundraising" (Magan, 2016).

Lending credibility to the timing of Stoltz's complaint in 2012, an examination of athletics-related financial aid allocations as publicly reported in the Equity in Athletics Disclosure Act (EADA) report in 2007 (the first year DCTC reported offering grants-in-aid) through 2017 shows an abrupt shift in 2012. During the first

See EX-MINN. on Page 8

Ex-Minn. Coach & Athletic Coordinator Settles Whistleblower Case

Continued From Page 7

five years, female athletes received more money in the form of athletic scholarships than male athletes. In real dollars, the discrepancy in allocation between female and male athletes ranged from \$0 to \$5,145, with the average at \$2,311. In 2012, the total amount of athletics-related financial aid more than doubled from \$42,312 to \$87,667, with the gap favoring male athletes by \$28,133. That shift is also seen in the revenue allocations where the baseball programs budget increased by more than \$77,000 during that time period, while volleyball's budget was reduced by \$27,000. Other claims are not as strong, however.

For example, although Stoltz alleged that more money was being spent on recruiting male athletes, that is not borne out in the EADA report. That said, EADA reports are not always accurate and, given the internal investigations finding that there were irregularities in bookkeeping and spending, it is possible that the data in the EADA report warrants greater scrutiny.

Lingering questions, however, remain about this case. The results of the Title IX investigation by the Office for Civil Rights have not yet been released. Thus, there may be more to learn.

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Court Dismisses Title IX Suit Over University's Cutting Women's Ice Hockey

Continued From Page 1

male and female students that are "substantially proportionate to their respective enrollments";

Show a "history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members" of a sex underrepresented in participation in intercollegiate athletics;

If participation in intercollegiate athletics by one sex is underrepresented and the institution does not satisfy 2 above, it can demonstrate that "the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program."

The court stated that eliminating a program, in and of itself, did not tend to prove that female students had substantially disproportionate participation opportunities

as compared to male students. Further, the court rejected the argument regarding the relative participation opportunities for male and female students after the elimination of the women's ice hockey team, specifically rejecting the argument that the University improperly calculated the number of female students participating in intercollegiate athletics because it was without any alleged evidentiary support. Since the plaintiffs did not allege facts that could be viewed as sufficient to establish a violation by the University of Part 1 of the Three-Part Test, the court held they did not state a claim upon which relief can be granted.

The plaintiffs argued that the court should look beyond the Three-Part Test to find the University in violation of Title IX. They first asserted that the University did not provide female students "equal

treatment," which, in intercollegiate athletics, concerns schedules, facilities equipment, coaching, and the like. The court noted that the plaintiffs made no allegations to support this argument and rejected it.

Next, the plaintiffs argued that the University violated the "contact sports" section of the 1979 policy interpretation by eliminating the women's ice hockey team while maintaining the men's ice hockey team. The court noted that the plaintiffs offered no authority that the standard had been adopted. Further, the court observed that the contact sports standard was inconsistent with the statute, which provides that funds recipients may maintain single sex contact sports teams "where ... the activity is a contact sport."

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Private College Denied Player Due Process in Sexual Misconduct Case

Continued From Page 1

the event, C.S. consumed a large quantity of alcohol, smoked marijuana, and used cocaine. C.S. then became violently ill and was characterized as incapacitated, in-and-out of consciousness, vomiting, refusing to drink water, and speaking incoherently. The Plaintiff and four other members of the fraternity attempted to ensure that C.S. was not in danger, and the Plaintiff contacted a friend to pick up C.S. When the friend arrived, C.S. told her, “They raped me,” and stated that she wanted to go to a hospital. When they arrived at a hospital, C.S. stated that she had changed her mind and instead wanted to go home. C.S. identified two students who had allegedly raped her, though neither one was the Plaintiff. Asked whether anyone else was involved, C.S. indicated that she was unsure. C.S. then responded with a “thumbs down” when asked whether “the guys had sex” with her. The next morning, C.S.’s friend reported that “she thinks she was raped but doesn’t know if she is misremembering.”

On February 15, 2019, Rhodes published a notice that a sexual assault had been reported on campus, and police went to the school to question Rhodes students. During the next week, an organization known as “Culture of Consent” staged protests related to sexual assaults and the investigations of such incidents. The protests were directed toward the Rhodes administration and student body, fraternal organizations, and Rhodes football players. The organization staged similar protests three days after the school’s Title IX investigation had been completed and thirteen days prior to a disciplinary hearing during which the Plaintiff and Z.W., his male friend, were determined to have violated the school’s sexual misconduct policy and were ordered expelled.

Rhodes’ Title IX investigator interviewed 14 witnesses, excluding the Plaintiff and C.S. The court noted that none of the witnesses with personal knowledge of the events at the party corroborated C.S.’s claim that she

had been raped. One witness stated that he was in the presence of C.S. during the fraternity event, and that no sexual assault or inappropriate contact took place. The only evidence supporting C.S.’s version were the statements she made to the two friends while in a compromised condition.

On April 5, 2019, Rhodes charged the Plaintiff and Z.W. with violating the school’s sexual misconduct policy. On April 17, 2019, a hearing was held to determine whether a violation had occurred.

The court took issue with the hearing process, noting the following: The Plaintiff and Z.W. appeared at the hearing and denied wrongdoing. C.S., however, did not attend or participate in the hearing and was not subject to cross-examination or questioning by the decision panel. No witness testimony supported C.S.’s contention that she had been raped. The only testimony that related to the conduct of the Plaintiff and Z.W. toward C.S. was that they had attempted to help C.S. and had called her friends to pick her up. Every witness who had attended the party testified that they were regularly in the presence of C.S. and that nothing like a sexual assault had occurred.

Rhodes ultimately concluded that the Plaintiff and Z.W. were responsible for sexual misconduct by a preponderance of the evidence and ordered both of them expelled from the school. The Plaintiff then filed suit, alleging that Rhodes had violated Title IX based on “selective enforcement” and an erroneous outcome of its investigation. The Plaintiff further sought to enjoin Rhodes from enforcing its decision to expel him and withhold his degree.

In analyzing the Plaintiff’s request for injunctive relief, the court found that he had presented a “substantial likelihood of success” on the merits of his Title IX claim based on the theory of an “erroneous outcome.” Taken from a Second Circuit case, *Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994), the “er-

roneous outcome” is one of two methods for challenging a college’s disciplinary proceeding on grounds of gender bias under Title IX. Citing *Doe v. Miami University*, 247 F. Supp. 3d (S.D. Ohio 2017), the court noted that, to state an erroneous-outcome claim, a plaintiff must plead facts “sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding.” The erroneous-outcome theory also requires a “particularized . . . causal connection between the flawed outcome and gender bias.”

Here, relying on testimonial evidence and statements that C.S. had given prior to the hearing, the court suggested that the college’s hearing process was flawed as a matter of fundamental fairness. The court stated: “In cases involving sexual misconduct, an accused student must have the right to cross-examine adverse witnesses. To adequately assess credibility, which concerns both the accused and the accuser, there must be some form of live questioning of the accuser in front of the fact-finder; written statements of the accuser will not suffice.” The court concluded that the “nonappearance” of C.S. “appears to be a significant denial of due process.”

The court, therefore, enjoined Rhodes from enforcing its decision to expel the Plaintiff pending the outcome of the underlying litigation, as the Plaintiff had shown “a substantial likelihood that the proceeding by which he was expelled was improperly conducted in violation of due process and that there is a particularized connection between the flawed outcome and gender bias.”

The court, however, denied the Plaintiff’s request to enjoin Rhodes from refusing to confer to him an academic degree, since Rhodes had presented evidence showing that, even without the disciplinary proceeding, the Plaintiff had not satisfied all graduation requirements. If unsuccessful in his lawsuit, the Plaintiff will again be expelled from the school.

Carroll College Coach Claims Title IX Retaliation

Continued From Page 2

Count I: Title IX — Retaliation (20 U.S.C. § 1681)

Title IX's private right of action encompasses claims of retaliation against an individual because he has complained about sex discrimination. Plaintiff MacIntyre brought documented complaints and concerns to the Defendant's Title IX Coordinator, including disparate scholarship spending, participation opportunities, treatment, benefits, funding, resources, and employment opportunities based on sex. As a result of bringing numerous written and verbal complaints, the Plaintiff alleges suffered an adverse action — he was terminated, his new position provided a salary that was less than half of his previous full-time position, he lost benefits, he was moved out of his office, he was given additional responsibilities, he was not allowed to fundraise, and he was “told to keep quiet regarding his termination” (p. 20). If he had not voiced his concerns, he alleges he would not have suffered adverse actions. And the complaint alleges the Defendant's alleged reason that the Plaintiff was terminated, budgetary considerations, was pretext for retaliation.

Count II: Wrongful Discharge — Retaliation (MONT. CODE ANN. §39-2-904(a))

A discharge is wrongful under Montana law if it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy, and according to the complaint, Title IX's prohibition of the exclusion from participation, denial of benefits or discrimination under any education program on the basis of sex is public policy that “is inherent to the fundamental right that we are all created equal” (p. 21).

After the Plaintiff identified Title IX issues, the complaint alleges, the Defendant terminated his employment as a full-time employee, offered a new, lesser position at less than half of the salary, cut all of the Plaintiff's

benefits, moved his office to a cubicle in a different building, imposed mandates that other coaches were not required to follow, increased responsibilities and roster size, prevented any fundraising that other teams were allowed to have, changed his report to “sterilize” any mention of Title IX issues, and put the golf program in the lowest priority category. The complaint alleges all of these actions were in retaliation for bringing Title IX concerns to the school's attention.

Damages

Plaintiff MacIntyre asks for the following relief: An order declaring the Defendant violated his rights under Title IX by retaliating against him; injunctive relief reinstating him to his position as a full-time employee and Head Golf Coach; a restraining order prohibiting future harassment, discrimination, or retaliation; an award of compensatory damages and monetary relief, including emotional distress damages, attorneys' fees, and punitive damages.

Discussion

The goal of Title IX is undercut if funding recipients are allowed to retaliate against persons who object to discrimination against others (DOJ, 2019). In *Jackson v. Birmingham Board of Education* (2005), the U.S. Supreme Court ruled that when a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional discrimination on the basis of sex in violation of Title IX (para. 174). Further, reporting incidents of discrimination is integral to Title IX enforcement, so discouraging reporting through adverse employment action would “unravel” the Title IX enforcement scheme (para. 180). The Court also said that “teachers and coaches ... are often in the best position” to identify discrimination (para. 181). In *Jackson*, the Plaintiff, a high school teacher and the girls' basketball coach, complained about unequal

treatment. The Plaintiff subsequently began to receive negative work evaluations. To prevail on the merits, the Court held that Jackson would have to prove that the school board retaliated against him *because* he complained about sex discrimination, but, regardless, a reasonable school board would realize that institutions covered by Title IX cannot cover up violations of that law by discriminatory retaliation (para. 184).

MacIntyre, too, will have to show he suffered an adverse employment action because of his Title IX complaints. He has requested a jury trial. In 2018, a federal jury in Minnesota found for Plaintiff Shannon Miller in a Title IX retaliation case (amongst other claims). Miller, the former Women's Hockey Coach at University of Minnesota-Duluth, had complained about the disparities in funding between the men's and women's teams. She was told initially that “strictly financial” reasons (*Miller v. The Board of Regents of the University of Minnesota*, 2015, p. 5) led to her termination. The school later blamed a decline in her performance as the cause for her termination (Kraker, 2016). Miller had won five national championships. The verdict of \$3.74 million was later upped to \$4.2 million, but her request to be reinstated was denied (Warfield, 2019).

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St. Cloud State University in Minnesota Violated Title IX, Federal Judge Rules

By Gregg Clifton, Jackson Lewis

St. Cloud State University violated Title IX by providing fewer opportunities for women to compete in intercollegiate athletics while offering greater support to the school's men's athletic teams, a federal district court judge in Minnesota has ruled. *Portz et al. v. St. Cloud State University et al.*, No. 0:16-cv-01115 (D. Minn. Aug. 1, 2019).

The court ordered the University to immediately create gender equity within its athletic programs.

In 2016, the university decided to eliminate six men's and women's athletic programs, including tennis, women's skiing, and men's cross country. Ten female athletes sued the school alleging the school was biased toward men's sports and out of compliance with the gender equity requirements Title IX. The female athletes sought and secured an injunction temporarily securing continuation of the women's tennis and skiing programs.

In his 66-page order, Judge John R. Tunheim concluded the school has consistently provided greater opportunities for male student-athletes from 2003-2016, giving them up to 172 more opportunities

in one year during this 14-year period. Despite the school's efforts to close this gap and reducing it to less than 50 opportunities in 2017 and 2018, the Judge concluded the school's efforts were insufficient. Judge Tunheim stated that "[w]omen's participation opportunities have not consistently increased in more than a decade and significant disparities exist" in the treatment of men's and women's teams.

The Judge concluded that the school's decision to eliminate the women's sports was financially motivated, despite the fact that enough female students supported teams. Noting that the school had not added any intercollegiate programs for women since 1999, the Judge rejected the school's claim of lack of interest. He noted specific requests to elevate club sports teams to the intercollegiate competition level and survey results showing "great interest" by female students.

Judge Tunheim also found the men's teams are treated more favorable than every women's team. For example, he pointed out that the men's basketball team was given new uniforms each year and permitted to keep them, while the women's team had one set of uniforms

that was used multiple years and required to be returned to the school. The Judge also concluded the men's teams travel more frequently, with all costs covered by the school, while the women student-athletes rarely travel and frequently rely on their own fundraising efforts to cover their costs.

The Judge also concluded that facilities provided to the women were inferior and they had to maintain their own softball and baseball fields. In addition, while all of the athletes share the same trainer, the trainer was located in the men's locker room, which affect how quickly the athlete can receive access and assistance from the trainer.

The Judge ordered the school to take immediate steps to create more equity for female students, including the permanent maintenance of the skiing and tennis teams. In addition, he ordered the school to improve the practice, competitive, and locker room facilities to create comparable facilities for men and women, and to continue moving toward eliminating the gap in participation opportunities. The school must report on the University's compliance efforts every six months.

Circuit Split on Student's Right to Cross-Examination in Title IX Matters

Continued From Page 3

adequate hearing and remanded that portion of the case to the lower court.

Takeaways

The circuit split on cross-examination under Title IX takes on additional significance in light of the Department of Education's proposed regulations, which adopted the Sixth Circuit rule. It remains to be seen whether the Department will consider *Haidak* in

re-evaluating the proposed regulations, which would have a broader impact than either of these decisions, and applicable to all public schools and private schools accepting federal funds.

The immediate impact for public higher education institutions outside of the First Circuit is more confusion. *Haidak* represents a different standard than *Baum* and apparently approves the procedures that

most public institutions utilized prior to *Baum*. While the circuit split could set the table for U.S. Supreme Court review, many commentators are skeptical that the high court would grant take up the case if it is appealed.

As the law continues to change and evolve, university counsel should regularly review their policies and procedures for handling allegations of misconduct.