

College Athletics and the Law

Practical Guidance on Athletics Laws and Regulations

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Promote student-athlete accountability by following ADs' best practices

It might seem inconsequential to make student-athletes run extra laps or sit out the first half of a game for being late to practice or violating a team or university standard. In the highly competitive environment of collegiate athletics, many might be tempted to look the other way. But how you handle student-athlete misconduct has more of an impact than you might realize.

Holding student-athletes accountable can go a long way toward protecting your institution's reputation, preventing legal trouble, and encouraging student-athletes' development. But it's not easy.

That's why we asked several athletics directors to share their best practices for fostering student-athlete accountability. **Page 3.**

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New online resource addresses alcohol abuse

A partnership between NCAA Division III and NASPA—Student Affairs Administrators in Higher Education developed an online tool to help reduce the consequences of alcohol use and enhance student success through collaboration among student affairs and athletics professionals.

The Two-Minute Drill

Each month, this feature will include a legal pointer, lawsuits filed regarding college athletics, and other news regarding athletes and athletics departments nationwide.

The tool includes a Web portal with a supplemental training and implementation program. The portal features immediate feedback to students about their alcohol and drug behavior, institutional areas needing improvement, and best-practices for alcohol and drug programs. ■

For more, contact Leah Kareti at lkareti@ncaa.org. ■

App tests students' balance after head injuries

Wichita State University developed a new application that can help determine if injured student-athletes can safely return to sports after suffering concussions. Anyone with an iPad or smartphone could use the app to test a student-athlete's balance, a direct indicator of head injuries, *kwch.com* reports.

Developers say their app has proven just as reliable as balance-measuring machines, but without the big price tag. Most schools and even doctors don't have those machines because they cost several thousand dollars. The app is being tested in pilot programs, but isn't yet available to the public. ■

NCAA investigates infractions made by university officials

The NCAA is investigating compliance at the University of Alaska Fairbanks. Issues involved include advising 17 student-athletes and deciding their eligibility to play.

The infractions occurred during a four-year period through the spring of 2011, the *Fairbanks Daily News-Miner* reports. UAF self-reported the mistakes in June 2011 based on circumstances discovered by the university's NCAA compliance director. The university also filed supplemental reports with the NCAA in August and October 2011. ■

Ex-secretary sues university AD for sex harassment, retaliation

A former Jackson State University secretary recently filed a lawsuit accusing the university's athletics director of sexual harassment and retaliation.

Lolita Ward claimed her supervisor, Vivian Fuller, the AD, made sexually suggestive comments and gestures toward her. When she rejected Fuller's alleged overtures, Ward claimed Fuller treated her in an openly hostile manner and eventually fired her, *clarionledger.com* reports.

In addition to Fuller, the lawsuit names JSU President Carolyn Meyers and the university as defendants. The Equal Employment Opportunity Commission investigated and mailed Ward a right to sue letter in June. But the EEOC couldn't conclude whether Ward's information established statute violations.

Ward seeks damages of \$500,000 for lost wages, benefits, earning capacity and reputation as well as emotional distress. She also wants her job back. ■

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Follow game plan for holding student-athletes accountable

Athletics administrators can — and should — set the tone for student-athlete accountability as a priority, despite the highly competitive environment.

That's according to four athletics directors who shared their expertise with *College Athletics and the Law*. Brad Bates is AD at Boston College. Stan Morrison was AD at the University of California Santa Barbara and UC Riverside before retiring in 2011. Vincent Nicastro is AD at Villanova University. And Troy Tucker is AD at Northampton Community College and a member of the CATL Advisory Board.

Check out their game plan below for achieving student-athlete accountability on your campus:

- 1. Know what you stand for.** It's important to develop your own definition of success.
- 2. Set the tone.** It starts with recruiting. Tell coaches that even great athletes must be committed to the program and the college. ADs and coaches should address all student-athletes on the first day of the semester or season. Morrison speaks openly about his zero-tolerance policy, the bystander rule, "no means no," protected sex, morals, values and parents' expectations.
- 3. Get it in writing.** Prior to joining a team, have student-athletes sign an oath. Tucker's includes a pledge to pursue excellence in the classroom and in competition, hold themselves to the highest standards of sportsmanship, and demonstrate character and accountability while being positive role models in the community.
- 4. Set the example.** "Coaches who allow their student-athletes to get away with unacceptable behavior, or who behave poorly themselves, are only perpetuating the notion that those types of actions are acceptable," Tucker said.
- 5. Emphasize accountability.** Clarify that participating in sports is a privilege that brings opportunities and responsibilities. Explain how student-athlete misconduct can damage the reputations of institutions, coaches, teams and players.
- 6. Increase athletes' awareness of being in the public eye.** Find practical ways to demonstrate they're "perpetually in the spotlight and one bad decision can have very public ramifications that follow them throughout their lives," Bates said. Showcase a history of bad decisions and public consequences involving other student-athletes.
- 7. Tap existing resources.** Implement programming that fosters accountability by accessing expertise, speakers, grants and other resources that already exist on your campus or at conference offices, the NCAA, governing bodies and local organizations.
- 8. Consider legal concerns.** Always make sure consequences and procedures comply with the Clery Act, the Family Educational Rights and Privacy Act, free speech rights, and due process requirements. Seek guidance from your general counsel, student affairs' officials and faculty athletics representatives.
- 9. Bring student-athlete leaders into the process.** Ask them to help establish policies and rules for all student-athletes.
- 10. Avoid bans on social media or alcohol use.** "Lean on the university code/values and let the students know there are consequences if they're in violation," Nicastro said.
- 11. Ensure consequences are consistent, fair, educational and informed.** "If we are genuinely conscious of student development, then our actions and consequences should serve as developmentally meaningful," Bates said. Make sure everyone knows your rules, policies, philosophy and institutional mission in advance. Document hearings, meetings and discussions. Act quickly. Try to prevent resentment.
- 12. Don't play favorites.** Consider individual circumstances but provide the same consequences for top players as for those who don't play as much. Other players, faculty and staff will see you're serious about discipline and not just giving lip service.
- 13. Encourage diligence and courage in setting and enforcing standards.** "When you don't uphold the standard with consequences, you lose the entire team and they become dysfunctional," Morrison said. "Leadership must be diligent in helping those who fall to stand up and come back again and again."
- 14. Limit second chances.** "If you give third chances, you will lose all credibility," Morrison said.
- 15. Support coaches.** Make sure they know you're available for consultation. Support a coach's consequences, even if they differ from others' approaches, Morrison said.
- 16. Meet with student-athletes who receive game-related discipline.** "This reinforces to the student-athlete that I do mean what I say, but it also gives them a chance to give me their side of what happened," Tucker said.
- 17. Teach the art of apology.** "Kids don't know how to tell their teammates and coaches they're genuinely sorry for screwing up. ADs can teach that behind closed doors," Morrison said.

For more information, contact Bates at brad.bates@bc.edu, Morrison at Stanmack.morrison@gmail.com, Nicastro at vincent.nicastro@villanova.edu, or Tucker at tltucker@northampton.edu. ■

— TIMOTHY NEAL, ASSISTANT DIRECTOR OF ATHLETICS FOR SPORTS MEDICINE, SYRACUSE UNIVERSITY —

Promote sports medicine to decrease injury, liability

Athletics administrators can best protect their student-athletes from injury and their institutions from liability by supporting athletic trainers and other sports medicine staff as vital components of their athletics program.

But first you must overcome the challenge of dealing with coaches, players and parents who value winning above risk assessment, mitigation and management.

That's according to Timothy Neal, whose college sports medicine career spans 35 years. He's an athletic trainer and assistant director of athletics for sports medicine at Syracuse University. He's also a member of the *College Athletics and the Law* Advisory Board and author of the "Catastrophic Incident in Athletics Guideline" published in the *NCAA Sports Medicine Handbook*.

Neal considers the "ifs" of medical judgments, practice field obstacles, and lack of procedures/policies. "If we would have known of a certain medical condition, or if a coach had anticipated having a shelter in a lightning storm during practice, or if the student-athlete hadn't hidden his concussion from medical staff, resulting in second-impact syndrome," Neal said. Dismissed or unknown risks may accumulate into very real problems, he said.

Don't focus on how quickly injured student-athletes return to play, Neal said. "If the quality of care is at a high standard, then the return of the student-athlete is best served with fewer complications, and gives the student-athlete the opportunity to return to the field more expeditiously," he said.

The competitive nature of coaches and student-athletes might color their decisions or reactions to injuries, Neal said. Explaining how a medical judgment is in the best interest of the student-athlete's long-term well-being is vital to building relationships with coaches and student-athletes, he said. And so



TIMOTHY NEAL

is discussing how to effectively handle adversity and achieve goals. Neal also offered this advice:

> **Acknowledge inherent risks.** Apply this perspective from preparticipation physical screenings through every aspect of participation.

> **Put your duty of care into words and actions.** Defer to the team physician's final decision on medical clearance — even when it conflicts with others' interests. Accurately convey medical information. Anticipate questions on action plans and recovery.

> **Take concussion histories.** Research shows significant or repetitive concussions can lead to long-term or irreversible effects on cognitive, behavioral and physical well-being. Disqualifying an injured student-athlete from contact sports to protect the student also reduces the institution's liability, Neal said.

> **Learn case law, rules, and guidelines.** *Knapp v. Northwestern University* gave team physicians final say in medical clearance. *Krueger v. San Francisco Forty-Niners* established full disclosure of medical information by team physicians to athletes. *Kleinknecht v. Gettysburg College* established the duty-of-care institutions owe athletes. Monitor the National Athletic Trainers' Association statements on medical risk, injury care and prevention.

> **Understand athletic trainers' roles.** They don't just stand there covering games and practices. Their daily effort, expertise and judgment in assessing and managing risk can prevent litigation. Recognize their responsibility level by giving them decision-making authority and appropriate compensation.

> **Plan for psychological concerns.** Athletes' stress compounds the mental health challenges typical of young adults, studies show. Neal developed a plan to identify, refer and manage student-athletes with suspected or diagnosed psychological concerns.

You may contact Timothy Neal at tlnear@syr.edu. ■

Increase success by collaborating with athletic trainers, coaches

To build a successful athletics program, athletics directors need to collaborate with trainers, coaches and other staff. Follow these tips, offered by Timothy Neal:

✓ Ask athletic trainers for staffing recommendations and in-depth reviews of sports medicine statistics compared to previous years.

✓ Review end-of-year athletics training reports. Continually ask athletic trainers questions about risks to your

department and institution.

✓ Encourage attendance at medical and legal conferences and seminars. Ask staff members who attend to summarize the conferences' recommendations, noting your institution's standing in each area.

✓ Get to know your risk manager and general counsel before you need their help. Discuss trends, concerns, and ways to mitigate or manage potential risks. ■

Learn how new regs would affect your personnel practices

BURLINGTON, VT — As if you don't have enough compliance issues on your plate, here comes the Office of Federal Contract Compliance Programs with a new set of proposed regulations concerning the hiring of individuals with disabilities that could profoundly impact your personnel decisions, according to Megan Norris.

Norris, an attorney and managing director at the Detroit office of the Miller, Canfield, Paddock, and Stone, PLC law firm, spoke at the University of Vermont's Annual Conference on Legal Issues in Higher Education.

"Almost all higher education institutions are considered federal contractors because they receive federal money," she said. Therefore, most postsecondary institutions will be expected to comply with the proposed regulations, which Norris detailed as:

➤ **A national goal for 7 percent of the work force to be comprised of individuals with disabilities.** Norris said it's a hard number that applies across the board and by job group. At this point, "job group" is unclear, but it seems to apply to the institution as a whole, she said. However, further development may mean particular jobs throughout the institution would have to meet the goal (e.g., coaches, administrative assistants, faculty, etc).

➤ **All job applicants and employees asked to voluntarily and anonymously self-identify as individuals with a disability at pre- and post-offer stages and annually.**

Norris said annual self-identification imposes a significant record-keeping burden on colleges because it requires them to:

- List all employment opportunities with the nearest Employment One-Stop Career Center. Federal contractors would have to engage in at least three other outreach and recruitment efforts.
- Track and retain data for applicants and new hires, comparing individuals with disabilities to others, despite the anonymous, voluntary self-reporting component.
- Adopt written procedures for accommodations requests. Delay or denial of accommodations would require a written explanation to the individuals involved and the OFCCP.

The regulations would incorporate the new definition of "disability" created by the Americans with Disabilities Act Amendments Act of 2008, Norris said.

The OFCCP officials believe the benefits to society — such as increased recruitment and hiring of individuals with disabilities — would outweigh increased costs. The OFCCP estimates self-assessment

Review potential impact

"Having just survived an audit by the Office of Federal Contract Compliance Programs at the University of Delaware, we have serious concerns regarding the implementation of these regulations [regarding hiring quotas for individuals with disabilities] in the higher education community," Bindu Kolli said at the University of Vermont's Annual Conference on Legal Issues in Higher Education. She is director of policy compliance and equity at the University of Delaware.

"Although we recognize the goal of increasing work opportunities for individuals with disabilities is worthwhile and laudable ... I don't think they help to achieve that goal as seamlessly as they could otherwise," Kolli said.

Kolli highlighted the following concerns:

✓ **Cost estimates.** The OFCCP underestimated the administrative burden in terms of time and money required to update data-collection and applicant-flow tracking software, and to establish disability-focused recruitment relationships with organizations and career fairs, Kolli said. The University of Nebraska calculated compliance would cost thousands of dollars at smaller institutions and hundreds of thousands for larger institutions. The estimate for UN's compliance exceeded \$500,000.

✓ **Self-identification.** If applicants and employees don't self-identify, or do so anonymously, how can colleges assess their outreach and hiring efforts or determine if they're meeting the 7 percent goal by job group?

✓ **Annual training.** All personnel involved in recruitment, training, screening, selection, promotion and disciplinary processes would need annual training to comply. "That can add up to hundreds of people and we are supposed to do this for \$300 a year," Kolli said.

✓ **Other concerns.** Certain positions require specialized skills.

For more, contact Kolli at bkolli@udel.edu. ■

of outreach and recruitment could take 30 minutes; developing and implementing written accommodation procedures would take two hours; and management and administrative support would result in one-time costs of \$172 and total annual recurring costs of \$301.

But Norris said "many noted the OFCCP grossly underestimated the actual burdens and costs required to comply with the regulations...."

The OFCCP published rule-making notices in 2010 and 2011. After a strong public outcry, it extended the comment period to Feb. 21, 2012. At press time, the OFCCP hadn't published the final rules.

Contact Norris at norris@millercanfield.com. ■

Prevent 'wild' coaches from wreaking havoc on department

By Dave O'Brien and Timothy O'Brien

In the heat of the football season, there have been three recent incidents of coaches being accused of either physically contacting or verbally berating fellow coaches and/or student-athletes. This type of behavior wouldn't be tolerated in the classroom and it shouldn't be tolerated on the ball fields.

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1. Idaho State University Head Football Coach, Mike Kramer, was suspended for pushing a player to the ground during practice and causing injury.

2. Texas Tech University Head Football Coach, Tommy Tuberville, forcefully

grabbed the headphone off a graduate assistant on the sideline during a game. Tuberville was reprimanded by Big 12 Commissioner, Bob Bowlsby.

3. Washington State University Head Football Coach, Mike Leach, was accused of verbal and mental abuse by one of his players. WSU's president asked both the athletics department and the PAC 12 conference office to investigate the matter. Leach was fired a couple of years ago from Texas Tech amidst similar accusations.

Track the pattern

Unfortunately, coaches failing to maintain the appropriate level of control or perspective isn't a new phenomenon. In fact, a few years ago, the University of South Florida dismissed Jim Leavitt, its head football coach, when a school investigation determined he grabbed a player by the throat and slapped him during halftime.

And several years ago, Mark Mangino, Kansas University's head football coach, stepped down during a university investigation into numerous accusations that he verbally and physically abused Jayhawk players.

Also, Billy Gillispie recently resigned as head basketball coach at Texas Tech amidst allegations of player abuse during his one-year tenure at the institution.

The most famous incident of a coach losing control occurred at the 1978 Gator Bowl when Woody Hayes, The Ohio State University's head football coach, punched an opposing player following an interception late in the game. Hayes never coached again.

Frank Kush, Arizona State University's head football coach, was fired in 1979 when a former player sued the university and accused Kush of mental and

physical harassment including punching his face.

After a long history of temper tantrums, Bobby Knight, former Indiana University head basketball coach, was accused of choking a player during practice. In response, Myles Brand, Indiana's president, announced his zero-tolerance policy for abusive behavior. Knight was fired in 2000 after he grabbed the arm of a freshman who apparently didn't address him appropriately and with respect.

Over the years, highly competitive coaches have demonstrated an alarming indifference to proper coaching decorum, personal discipline and restraint, and teaching strategies.

For some coaches, winning becomes so important that the educational benefits of participation, character development and safety lose relevance. And when coaches succumb to this approach, serious problems often develop.

Take preventive actions

College athletics departments should take the following steps to prevent similar problems from occurring at their institutions:

- Emulate Brand's zero-tolerance policy against abusive actions and tactics by coaches.

- Ensure college coaching contracts explicitly provide the institution with the authority to terminate a coach's employment for this type of ethical breach.

- Review termination clauses in coaching contracts. They are usually broken down into two categories: termination for cause and termination without cause. Then make sure to explicitly state that physical or verbal abuse will trigger a for-cause termination, which relieves the school of any financial obligation to the coach.

- Add an additional contractual phrase allowing termination for cause. Consider using the following wording: The coach may be terminated for cause for failing to demonstrate a commitment to both ethical coaching practices and athlete/staff well-being. Specifically, the coach may be terminated for cause for any inappropriate physical and mental treatment of assistant coaches, staff and student-athletes.

- Understand the termination provisions in contracts when negotiating with coaches. Careful negotiation of the termination for-cause provision can protect the institution financially when a coach's conduct falls short of the standard expected.

Hopefully, by highlighting the importance of positive coaching attributes, we will no longer see coaches going wild on the sidelines. ■

Ignore pressure to act quickly: Pencil in time to think

Athletics administrators are measured in terms of results: what they and their staff members accomplish. But too often the pressure for results pushes decision-makers to do something — and do it fast — before they take time to consider the consequences. They need to take a step back and make thinking a priority.

No matter how busy you are, take the time for “purposeful thinking.” It could make a big difference in your career success and the success of your unit. Your thinking should involve:

➤ **Assessing the situation.** Know what’s happening as well as what’s not. Consider a project and its process. Is it on time and on budget? Why or why not? Consider what you and your staff need to do next. Know where you stand now before you act.

➤ **Diagnosing the issue.** Identify the situation, and if there’s a problem, decide what to do. Take care, but make it known that you need to make a decision within a given time frame. Hold you and your staff members to the process.

➤ **Considering consequences.** What does your diagnosis mean? You may have to go back to square one, but more often you can make an adjustment and correct the problem. Then consider what’s next.

➤ **Prioritizing thinking.** Smart managers delegate responsibilities so they have more time to think. You should also invite staffers to assess, diagnose and reflect right along with you. Making it clear you want them to challenge your thought processes may result in robust discussions and, occasionally, better ideas.

Sometimes it’s best to *not* solve problems immediately. As much as you need to think and plan, sometimes you need to take a deep breath and let a situation play out before you become personally involved. The purpose of authority is to act, so the concept of sitting back and watching is hard to grasp.

Cultivate patience before acting by:

• **Knowing the situation.** Think of the context

and your staff members’ capabilities. Good leaders know how to push their staffers the right way to get them to accept greater levels of responsibility to address a tough situation.

• **Letting the dice roll.** Decisions have consequences. If a new project isn’t on schedule, or a new hire isn’t getting up to speed as quickly as you expected, just wait and see what happens. Learn from

experienced negotiators: They prefer to let the other side commit before they do. This does take skill, but it also takes a belief in your own abilities to figure things out.

• **Taking the long view.** Emerging leaders might be tempted to exert their own influence rather than letting a situation unfold. But that can prevent your team from learning. Better to advise your staff to take action and let them determine what happens next.

And veteran athletics administrators may discover the traits that worked at lower level positions can eventually erode their ability to lead. For example, someone aggressive and bold on the way up may seem overbearing when he’s in charge. Or someone proud of leading by consensus at the hands-on level can be seen as overly cautious and unable to make key decisions in a more senior role.

This article was adapted from Leader to Leader, a Jossey-Bass journal. It was authored by John Baldoni, an internationally recognized leadership educator, executive coach, speaker and author. For more information on Leader to Leader, go to www.wiley.com and input the journal name in the search box. ■

Take time to stay focused

Sometimes athletics administrators lose touch with what their staff members need and want in a leader. Follow these suggestions to stay focused and engaged:

✓ **Rethink what you do.** Write down your roles and responsibilities. Reduce what you do to one or two key responsibilities. Off-load the other duties to staff members so you have more time to focus on key responsibilities.

✓ **Take a sabbatical.** Few athletics administrators can afford six months to a year away, but you can engage in sabbatical-like activities, e.g., volunteer efforts, teaching programs, networking with people off campus.

✓ **Look for new challenges.** What else do you want to do? Would you like to mentor up-and-coming administrators? Work for a different institution? Start a business? ■

CALL US, EMAIL US

Do you have a comment, question, suggestion or story idea?

If so, please contact:

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See how your student-athletes' graduation rates compare to national trends for Div I institutions

NCAA releases completion statistics

It's a stressful scenario when a student-athlete's GPA drops to the point of impacting eligibility and scholarships.

You know how student-athletes struggle to balance their practice and competition demands with their academics. It requires good time-management skills from the student-athletes and support from you and others in your department and across your institution.

But you also know that all that work to help support student-athletes pays off when you see them overcome the challenges to become successful both in their academics and in their sport — and to graduate.

According to data recently released by the NCAA, student-athletes at Division I institutions graduate at a higher rate than the general student population. And the student-athletes in the entering class of 2005 graduated at the highest rate in history for this group of students. That's the last year for which data is available.

Trends in Graduation Success Rates and Federal Graduation Rates at NCAA Division I Institutions provides statistics on student-athletes' graduation rates overall, by sport, and by demographic categories.

The report uses the federal graduation rate that assesses only first-time, full-time students in a cohort and counts them if they graduate within six years from institutions where they first enrolled. That data allows comparisons between student-athletes and the general student body.

The NCAA also considers the graduation success rate. That includes transfer students, students who begin midyear, and nonscholarship student-athletes in some cases. It omits students who left an institution in good standing before exhausting their athletic eligibility.

The report's findings include:

➤ Student-athletes in the entering class of 2005 graduated at their highest rate in history — 65 percent — according to the Federal Graduation Rate. That is two percentage points higher than the FGR for the general student population at Division I institutions.

➤ Only white male student-athletes who entered in 2005 graduated at a lower rate than white males in the general student population. They trailed the overall FGR by one percentage point.

➤ African-American male student-athletes graduated at a 10 percentage point rate higher than African-American males in the overall student population. They finished at a rate of 49 percent, compared with 39 percent for their peers among the general student population.

➤ Among African-American females, 64 percent of student-athletes graduated compared with 48 percent in the general student population.

➤ Graduation Success Rates rose in all demographic groups of student-athletes in the class entering in 2005, compared with the class that entered in 1995 (see box).

➤ Gains in GSR were apparent across sports, but men's basketball saw particular improvement between 1995 and 2005. The rate increased from 56 percent to 74 percent.

White male basketball players graduated at a rate of 89 percent, compared with 76 percent 11 years earlier.

And African-American male basketball players graduated at a rate of 67 percent, up from 46 percent when the NCAA started tracking the GSR.

Find a summary of the data and a link to the full report at www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2012/october/2012+gsr+release. ■

Graduation Success Rates for 1995, 2005

Graduation Success Rate data was first collected for student-athletes in 1995, and that was the last year previous initial eligibility rules were used. Below, see how the 1995 GSRs compare with those from 2005.

Student-athlete group	1995	2005
Overall	74%	81%
White	81%	86%
African-American	56%	66%
White Males	76%	82%
African-American Males	51%	62%
White Females	89%	91%
African-American Females	71%	76%

Source: *Trends in Graduation Success Rates and Federal Graduation Rates at NCAA Division I Institutions*, NCAA, 2012. ■

Was coach terminated for unlawful, discriminatory reasons?

Mark Hernandez sued his former employer, William Rainey Harper College, under Title VII of the Civil Rights Act of 1964. He alleged the college discriminated against him because of his Mexican national origin, among other claims.

Hernandez worked at the college as an adjunct faculty member and head baseball coach during 2007–08. Under the college’s policy, new employees had to

You Make the Call

This regular feature details a recent court case. Review the facts. Think about how you would have handled the situation. Then test your legal knowledge by trying to determine how the court ruled.

submit to a criminal background check. The initial check didn’t require fingerprinting. Instead, the employee’s name and vital information were submitted for a statewide records search. If the records

search returned a “conviction hit,” the new hire had to submit fingerprints for a more thorough check.

Because Hernandez’s initial background check returned possible convictions, he was asked to submit to a fingerprint check. Hernandez claimed a campus police officer told him it was because he had a common last name. Hernandez alleged in his lawsuit the statement was evidence of discrimination because of his national origin.

Also, the evidence indicated student-athletes and other college employees formally complained about his behavior, calling him arrogant and rude. Hernandez was asked to make efforts to modify his behavior but refused. He said in an email he wasn’t willing to make any changes because “while in the middle of a baseball season facing many time constraints [I cannot] give explanation for thin-skinned reactions by others not affiliated within a highly competitive athletic department.”

The college moved for summary judgment, alleging two nondiscriminatory reasons for Hernandez’s

termination: (1) his poor interpersonal communication with college employees and student-athletes and (2) his coaching philosophy. The college contended Hernandez focused excessively on recruiting an elite team to the detriment of his students’ experience.

Hernandez v. William Rainey Harper College, No. 10 C 2054 (N.D. Ill. 10/27/11).

Did Hernandez’s claims survive summary judgment?

A. Yes. Hernandez gave valid reasons for his unwillingness to change his behavior midseason.

B. Yes. The college’s reasons to terminate Hernandez were a pretext for a discriminatory animus based on his national origin.

C. No. The college had sufficient reason to fire Hernandez because of his allegedly poor communication skills.

D. No. Hernandez was a contract employee who could be fired at will by the university.

Correct answer: D.

The court granted summary judgment to the college ruling that even if it confined its analysis to Hernandez’s allegedly poor intercommunication skills, he did not show the existence of a genuine issue of fact on this point. Also, the judge said no reasonable jury could find the college’s reasons “insufficient to warrant the discharge.”

The judge noted courts don’t evaluate an employer’s business judgment or the wisdom of a termination decision, but rather “only [assure] that such decisions aren’t intended to provide cover for illegal discrimination.”

Relying on Seventh Circuit case law, the judge stated that “when a defendant has offered multiple nondiscriminatory reasons for its hiring decision, showing that one of these reasons is pretextual is not enough.”

Editor’s note: This feature is not intended as instructional material or to replace legal advice. ■

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CAMPUS ATHLETICS AND THE LAW

QUICK STUDY

An overview of the key topics faced by athletics administrators with citations to noteworthy cases, statutes, regulations and additional sources.

Student-Athletes in Higher Education

Overview

Issues related to student-athletes present special circumstances that sometimes have to be resolved by the courts or the Office for Civil Rights. Check out some recent decisions and rulings concerning claims by student-athletes.

Key Rulings

- After being dropped from Whittier College's basketball team as a sophomore, a student-athlete complained to OCR she was treated differently because of her shared ancestry and ethnicity (Jewish). The head coach said she was dropped because her overall skills weren't at the same level as her teammates. Because OCR couldn't find evidence of discrimination in any interactions between the student-athlete and her coach, it concluded the complainant wasn't subjected to discrimination. *Letter to: Whittier College*, No. 09-11-2013 (OCR 06/15/11).

- William Russell played basketball for the University of San Francisco from 1953 to 1956. He signed release forms authorizing the NCAA to use his name and images to promote its events and activities. But he wasn't allowed to negotiate for any compensation for the NCAA's continued use of his name and images after his college days. He sued the NCAA, alleging it illegally acted in restraint of trade. The NCAA moved to dismiss, alleging the statute of limitations had expired for part of the case. But the judge denied the motion, ruling Russell clearly alleged the harm and collective effect of the NCAA's overall plan prevented him from sharing in licensing revenue obtained through the use of his college likeness on an ongoing basis. *Russell, on behalf of himself and all other similarly situated v. National Collegiate Athletic Association, et al.*, No. 11-4938 CW (N.D. Cal. 05/16/12).

What You Should Know

- **Student-athletes claiming discrimination after being dropped from a team must produce evidence that would lead a reasonable fact-finder to conclude the decision wasn't based on their athletic skills.**

- **Student-athletes may have a right to sue to recover for lost revenues if the NCAA continues to use their images without their authorization to promote events on an ongoing basis after the athletes have left college.**

- **In filing an antitrust claim against the NCAA, a complainant can't allege for the first time on appeal that a market may exist with regard to student-athletes. That claim must be introduced at the trial court level.**

- **A student-athlete is legally deemed to have accepted personal responsibility for all risks inherent in a sport, such as being struck by a baseball. ■**

- An NCAA bylaw prohibited colleges from offering multiyear athletics scholarships between 1973 and 2012. In 2006, Joseph Agnew enrolled at Rice University on a full athletics scholarship. But due to football injuries, he couldn't play during his senior year and had to pay tuition at full price. Agnew sued the NCAA, claiming its cap on the number of scholarships per team and its pre-2012 prohibition of multiyear scholarships had an anticompetitive effect on the market for student-athletes, in violation of the Sherman Act.

After the trial judge dismissed the case, the appeals court affirmed. It ruled that although a market may exist with regard to student-athletes, Agnew failed to make that allegation in his complaint. Therefore, it couldn't be brought up for the first time on appeal. *Agnew, et al. v. National Collegiate Athletic Association*, No. 11-3066 (7th Cir. 06/18/12).

- Shawn Bukowski was injured on campus while practicing pitching indoors. He sued Clarkson University and the head coach, claiming his risk of being injured was enhanced because the pitching facility lacked an L-screen and appropriate lighting. The court ruled for the defendants, and the appeals court affirmed. Both asserted that a player is legally deemed to have accepted personal responsibility for all risks inherent in a sport, such as being struck by a baseball. *Bukowski v. Clarkson University, et al.*, No. 107 (N.Y. 06/05/12). ■

TITLE IX

Students can't prove sex harassment by school's wrestling coach

Case name: *Does 1, 2 and 3 v. Boulder Valley School District, et al.*, No. 11-cv-02107-PAB-KLM 9 (D. Col. 09/25/12).

Ruling: The U.S. District Court, District of Colorado dismissed the plaintiffs' claims they were subjected to sexual harassment under Title IX by their wrestling coach.

What it means: A school — including a college or university — can't be held liable for its employees' actions unless they have actual notice of such actions.

LAWSUITS & RULINGS
This regular feature summarizes recent court or agency records in rulings affecting athletics.

Summary: Travis Jon Masse was a college student in 2003, studying to be a teacher. As a part of his coursework, he did a field placement at Monarch High in the Boulder Valley School District. Shortly thereafter, he was terminated for making "unsolicited and unwelcome calls" to a female student.

After Masse graduated, he became a teacher and wrestling coach at Broomfield High, which was also in the Boulder Valley district.

In 2008, Masse sent several sexual text messages to a female student, and soon began having sex with her. In 2009, the wrestling team went to a tournament and Masse had sex there with the same female student.

Masse also sent sexual texts to another female student. However, he didn't engage in unlawful sexual contact with her.

During the same year, Masse sent sexually explicit text messages to a third female student during school

hours and eventually had sex with her.

After Masse was arrested, the students sued the school district and others, asserting several theories. The district responded with a motion to dismiss.

The students' first claim was that the district discriminated against them on the basis of gender in violation of Title IX. In support of that theory, they claimed the superintendent and the Broomfield High principal knew all about Masse's termination from the field placement position at Monarch High, and that Masse had openly consumed alcoholic beverages in front of the wrestling team.

But District Judge Philip Brimmer said those incidents were insufficient because there was nothing to show the "unsolicited and unwelcome" calls were sexual in nature. He also ruled the Monarch High incident six years earlier was too distant in time to give adequate notice to anyone in authority that Masse posed a risk to students.

Finally, he ruled the consumption of alcohol was too unrelated to the issues of the case, and there wasn't proof the district knew about it.

The students also alleged the district should have investigated Masse because it was "common knowledge" he was attempting to prey on students. But Judge Brimmer ruled that wasn't enough because there weren't allegations that other school district employees were also having unlawful relationships with students.

Finally, the students claimed the district failed to issue clear guidelines concerning the use of electronic technology and failed to monitor its use.

Once again, the judge ruled that the actions of one teacher didn't impose such duties upon the district. Because the students had failed to sufficiently allege the district was aware of the illegal conduct, the judge ruled it couldn't be found liable. ■

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RESOURCES / IDEAS

Develop winners

Would you like to know how you can lead your student-athletes and staff members to success?

If so, check out the new book, *How To Shine: Insights into unlocking your potential from proven winners*, by Simon Hartley.

Hartley shares advice and tips culled from his many years talking to and coaching winners, from champion football players and Olympians to champions of business.

For more information, go to www.wiley.com and type the title in the search engine. ■

Manage injuries

Athletics administrators, coaches and trainers should know how to manage student-athletes' injuries.

Find guidance in the *Handbook of Sports Medicine and Science — Sports Therapy Services: Organization and Operations*, edited by James E. Zachazewski and David J. Magee.

This new book provides practical guidance for managing injuries before, during and after sporting events. It also covers nutrition and travel logistics.

For more information, go to www.wiley.com and type the title in the search engine. ■

NAMES IN THE NEWS

- Charles Bloom was hired as the University of South Carolina's senior associate athletic director for external affairs. Bloom spent 17 years directing the Southeastern Conference's media and public relations efforts.

- Jean Lenti Ponsetto had her contract extended as DePaul University's AD.

- Dave Nottke was promoted to senior associate AD for development and external affairs at the University of Toledo. He previously was associate AD for development and major projects. ■

WILLIAM S. HUSAK, AD, LOYOLA MARYMOUNT UNIVERSITY

Set tone for academic, athletic balance

When athletics directors strive to help student-athletes achieve balance between sports and academics, their student-athletes and coaches might be the biggest obstacles.

It's a scenario very familiar to William S. Husak. He worked as a faculty member for more than two decades before becoming AD at Loyola Marymount University.

"There's that tension between coaches, administrators and faculty as to what is the proper amount of attention academics should receive in the life of a student-athlete," Husak said. "Coaches need to win and graduate their athletes — not just keep them eligible — while faculty are mostly interested in high classroom performance."

Of course academic centers for student-athletes can ensure they connect with tutors and professors and actually study during study halls, Husak said. But ADs can set the expectations and tone for staff and student-athletes, he said.

"Coaches are competitive just like athletes. If you set the bar high, they will strive to reach it," he said. "In the short term, setting the bar high may be viewed as a challenge or an obstacle. In the long term, if the goals are achieved, they become tremendous assets in recruiting, garnering institutional support, and creating a public image of excellence," he said.

Husak also found a way to prevent the problem of student-athletes not earning enough credits to graduate by the time their eligibility runs out, or dropping out to play professionally even though they were on track to graduate. He places all student-athletes on a four-year schedule to graduate with an expectation of completing 15 units per semester, in season or out.

Initially, coaches resisted. But that faded in two years when they saw student-athletes' higher GPAs, improved graduation rates, fewer conduct problems and better winning percentages. Also, more student-athletes left LMU with undergraduate and master's degrees, and the institution didn't spend scholarship money on those who took another year to graduate, Husak said. "It was a great selling point to parents and recruits who wanted to ensure the athlete would earn a degree," he said.

The four-year schedule also helps when student-athletes get drafted before or during their senior year. "They're so much closer to graduating that coming back for a semester or two to earn that degree is viewed as possible, whereas to return for three or four semesters seems insurmountable," Husak said. Soccer coaches took the principle further by placing soccer players on a three-and-a-half year schedule, just in case they're recruited during senior year.

When coaches seem more concerned with wins than degrees, Husak acknowledges their viewpoint but explains his philosophy: "I don't see winning and academic achievement as being an either/or proposition, or mutually exclusive." He also expects coaches to develop the student-athlete's whole person — spirituality, leadership, citizenship and service.

"You can never have enough conversation about this balance and you must keep your rewards and recognition system aligned with your beliefs... and with your university's expectations," Husak said.

Contact William Husak at whusak@lmu.edu. ■

A Conversation With ...

Each month, we'll ask an expert to give advice on how to keep your programs outstanding.