Route To: ___/___/___/___

February 2019 Volume 20, Issue 4

Legal Issues in COLLEGIATE ATHLETICS

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

IN THIS ISSUE

Vanderbilt University has named Malcolm Turner as the university's new vice chancellor for athletics and university affairs and athletics director. Turner, a member of the NBA's senior leadership team and president of the NBA G League, will join the university on Feb. 1, 2019. He replaces David Williams, the current Vice Chancellor for Athletics and University Affairs and Athletics Director, who is retiring from the athletic department to focus on the Vanderbilt Law School's commitment to a program devoted to sports law.

HOLT HACKNEY
Editor and Publisher

DAVID STIRT
Assistant Editor

JEFF BIRREN, ESQ.
Contributing Writer

ELLEN STAUROWSKY, ED.D.
Contributing Writer

THE ROBERTS GROUP
Design Editor

Please direct editorial or subscription inquiries to Hackney Publications at:

P.O. Box 684611
Austin, TX 78768
(512) 716-7977
info@hackneypublications.com

Legal Issues in Collegiate Athletics is published monthly by Hackney Publications, P.O. Box 684611, Austin, TX 78768. Postmaster send changes to Legal Issues in Collegiate Athletics Report. Hackney Publications, P.O. Box 684611, Austin, TX 78768.

ISSN: 1527-4551

Legal Issues in COLLEGIATE ATHLETICS

Appellate Court Reverses Lower Court, Finds Former College Coaches' Breach of Contract Claim Can Continue

A Florida state appeals court has reversed the findings of two lower courts, and ruled that two former Florida A&M University coaches should be allowed to present their breach of contract claim at trial.

Specifically, the First District Court of Appeal reversed the 2017 circuit court decisions, which recognized FAMU's legal right to fire head football coach Earl Holmes and head basketball coach Clemon Johnson without paying the remainder of their contracts.

"We find, based on the expressed terms of the agreements and reading the agreements and incorporated regulations as a whole, that ambiguities exist such that FAMU was not entitled to judgment as a matter of law. Accordingly, the summary judgments are reversed, and the cases are remanded for further proceedings," according to the DCA ruling.

By way of background, Holmes struggled as the university's football coach, going 6-16 before he was fired in 2014. In January 2015, he filed a civil lawsuit against FAMU claiming he was owed the remaining $400,000 on his contract. Johnson, meanwhile, was fired in 2014 in the third year of a four-year contract. He amassed a record of 32-64. He also sought the remainder on his contract.

FAMU attorneys argued before the lower courts that the "unambiguous language" of the agreement provided FAMU Board of Trustees the right to terminate the coaches' agreement with a 60-day notice. Attorneys said this was consistent with employment agreements it had with its other head coaches.

The coaches' attorney countered that while FAMU had the right to fire the coaches "for cause," it chose not to, instead opting to use the 60-day notice inside the contract, which absolved the university from any settlement.

"You can't say you have a four-year contract and have cause in the contract and then insert this provision that says you can be terminated without cause," the attorney told the media. "The appellate court ruled it ambiguous."

In its conclusion, the appeals court wrote:

> "Because of conflicts in the express terms of both coaches' contracts, including FAMU's regulations incorporated therein, the early terminations of these employment contracts without cause merely upon sixty days' notice may have violated the specific terms of the contracts. Because of this ambiguity FAMU was not entitled to judgment as a matter of law. Accordingly, the summary judgments for FAMU and against Holmes and Johnson are reversed as to all counts, and the cases are remanded for further proceedings."

For an in-depth read of the issue as it relates to this particular case, check out Marty Greenberg's article here: https://law.marquette.edu/assets/sports-law/Earl%20Holmes%20Article%2010.10.pdf

The appeals court decision can be read here: https://www.courtlistener.com/opinion/4567437/earl-holmes-v-florida-am-university-by-and-through-etc/ ■

lica

Wani v. George Fox University — A Case Study in Handling Student-Athlete Complaints on Field and In Locker Room

By Dylan Henry and Kim Sachs

In the following article, we summarize the case of *Wani v. George Fox University*, and we discuss two takeaways from this case that universities and its employees should consider in order to minimize potential liability stemming from alleged physical and non-physical harm to a student-athlete both on the field and online.

In 2017, Samuel Wani ("Wani"), a former football player at George Fox University ("GFU"), filed a federal lawsuit in Oregon against GFU, nine GFU employees, and a former teammate seeking over $70 million in damages. He alleged that the Defendants were negligent and discriminatory in handling an injury to his thumb and that they improperly handled his complaint of racial harassment by a former teammate. His complaint alleged six causes of action: cyberbullying, negligence, medical fraud, racial discrimination, HIPAA violations, and breach of contract. After a series of motions, the Court dismissed all of Wani's claims except for his personal injury action, which is the only claim that remains in litigation.

Refusal to Seek a Second Opinion and Racial Discrimination in Medical Treatment

Wani's issues with GFU began in the summer of 2015 when Wani transferred to GFU and joined the football team. During the first week of practice, Wani injured his thumb. Gregg Boughton ("Boughton"), GFU's head football athletic trainer, evaluated Wani's thumb and diagnosed a sprained thumb ligament, and proceeded to ice and splint Wani's thumb during down time and taped Wani's thumb for practices. Wani disagreed with the diagnosis; he insisted he fractured his thumb. Boughton regularly examined Wani's thumb over the next three days and decided to continue the ice-tape-splint regiment. Wani requested another doctor examine his thumb, but Wani claimed Boughton refused this request. Wani also claims that around this same time head coach Chris Casey ("Casey") issued an edict that players were not allowed to leave practice without approval from Casey or a head athletic trainer.

Two weeks later, Wani took it upon himself to seek a second opinion. The hospital radiologist concluded that an x-ray of Wani's thumb showed no fracture, but the attending emergency department physician nevertheless diagnosed Wani with a closed left thumb fracture. Wani had to wear a thumb splint for two weeks and then "weaned" to a wrist cast. GFU football team's volunteer doctor eventually reviewed the x-ray film of Wani's thumb and also concluded that no fracture appeared in the x-ray.

Wani contended that his thumb never fully healed, and he alleged that Casey's edict that players could not leave practice, and Boughton's refusal to let Wani leave practice, and his disregard for Wani's assertions that the thumb was broken caused further injury. The Court found that Wani's contentions sufficiently stated a claim for negligence (duty, breach, causation, and damages). Boughton, as head athletic trainer, had a duty to treat student-athletes adequately, which he breached by failing to send Wani to the doctor for evaluation. Wani alleged this breach caused further damage to his thumb and ultimately led him to undergo reconstructive thumb surgery in November 2016.

Wani sought to hold GFU liable for negligence related to his personal injury, a common cause of action in the sports-injury world—as well as racial discrimination related to his personal injury, a claim less common in the sports-injury world. He contends the GFU coaching staff (specifically Boughton) refused to refer black football players to outside medical providers while permitting white players to obtain immediate and premium treatment, but the Court found these contentions wholly unsupported by the record.

Cyberbullying by Teammate

Around the same time that Wani was dealing with his thumb injury, he learned that his teammate Dominic Fix-Gonzalez ("Fix-Gonzalez") was bullying him on social media. According to court documents, Fix-Gonzalez posted several photos of Wani on Instagram; one of the photos depicted Wani with a "deeply blackened face," and another superimposed an image of a mop over Wani's head. Upon learning of these pictures, Casey met with the entire staff and team to discuss GFU's policies. He also met with Fix-Gonzalez individually, informing him of the seriousness of Wani's complaints. When Associate Dean of Students Dave Johnstone ("Johnstone") got wind of the situation, he also investigated the matter and forwarded his findings to Dean of Students Mark Pothoff ("Pothoff"), who ultimately stripped Fix-Gonzalez of his good standing with GFU and demanded Fix-Gonzalez issue an apology and engage in cultural sensitivity training.

Despite these actions, Wani claimed he was disappointed by GFU's handling of the cyberbullying incident. In his

See A CASE STUDY on Page 4

A Case Study in Handling Student-Athlete Complaints

Continued From Page 3

lawsuit, he alleged that the responses of Casey, Johnstone, and Pothoff were racially motivated, a claim that the Court ultimately dismissed.

As counsel to athletic trainers and universities, the *Wani* case presents two issues our clients commonly face: how to address requests for additional medical treatment, and how to deal with athlete-to-athlete disputes. Based on our experience in this area of law, we have analyzed *Wani* andprovided effective takeaways for athletic programs and staff faced with these issues. Coaches and athletic trainers should use *Wani* as a learning tool and an opportunity to audit their own policies and practices to reduce their exposure to liability in the future. Perhaps most importantly, coaches and athletic trainers should keep informed of these issues and continue to stay up to date with important legal developments.

Takeaway # 1—Support Athletes Who Want a Second Opinion . . . and Document

The Wani case presents an issue athletic programs commonly face: what to do when an athlete wants a second opinion? The answer is simple: support the athlete's request. As counsel to athletic trainers and universities, we emphasize that a program should never deny an athlete the ability to seek additional medical treatment, or maintain a culture where seeking additional medical treatment is discouraged. In today's litigious society, doing so will inevitably expose the program to additional allegations that the program's actions or culture led to further harm. Supporting an athlete's request for additional medical treatment can also help mitigate the risks associated with potential misdiagnoses by the program's medical staff, while simultaneously strengthening the relationship of trust between the athlete and program.

Before the season even begins, programs should ensure that a policy is in place that prohibits denying or discouraging an athlete from obtaining additional medical treatment, and ensure that the staff and athletes are educated on the policy's prohibitions. Further, a program's medical staff should compile a list of referral resources and establish a referral procedure before an athlete makes a request for a second opinion.

Of course, schools are not prisons. An athlete is technically free to seek additional medical treatment regardless of a program's culture or coach's rule. An athlete, however, may not see it that way. Programs need to acknowledge the power imbalance (or perceived imbalance) in the athlete-program relationship that leads athletes to believe they do not have free choice and that they must do as the staff or culture dictates. Injured student-athletes already face a host of pressures that push them to continue playing while injured (lack of playing time, letting the team and staff down, loss of scholarship). The additional pressures such as going against the program's culture or coach's rule should not discourage an athlete from seeking outside medical treatment. A program should make clear to its athletes that it will assist and support an athlete in a time of injury, including seeking additional medical treatment, if necessary.

Programs must also ensure that members of its staff document their actions should they ever need to provide written proof of what they did or said. In the *Wani* case, a note from the athletic trainer stating that he discussed with Wani the options for seeking additional medical treatment, coupled with a formal policy, would have gone a long way in defeating Wani's claim that the athletic trainer or coach refused or discouraged Wani from seeking additional medical treatment. Further, documentation can help defeat claims such as Wani's claim that GFU decided which athletes got premium medical care and which athletes did not based on their race, a claim the Court found to be baseless based on GFU's documentation.

Takeaway # 2—Follow Your Program's Policies When Handling Athlete-to-Athlete Issues . . . and Document

The *Wani* case is also a good reminder that athletic programs need to be concerned with more than just an athlete's physical safety and wellbeing, and that an institution could be sued for maintaining an environment that permits harassment and discrimination among its athletes. In short, a school must have anti-harassment, anti-discrimination, and complaint procedure policies in place; must train and educate the staff and athletes on the policies (what they prohibit, who receives and investigates complaints, what to do when a complaint is received); and follow the policies and complaint procedures to the letter.

Immediately after Wani notified Coach Casey of the racial harassment, he held an unscheduled team and staff meeting to discuss GFU's policies, and he met privately with the alleged harasser to discuss the seriousness of Wani's complaint. It is unclear if this was in accordance with GFU's policies. Most likely,

See A CASE STUDY on Page 8

lica

Amani Elijah Bledsoe v. NCAA Concludes: The NCAA is Still Not a State Actor

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

The University of Oklahoma's defensive lineman, Amani Elijah Bledsoe, started in all 14 games this past season, which culminated in a tough loss against the number one seed, the University of Alabama, in the College Football Playoff semi-finals at the Orange Bowl. Unfortunately for Mr. Bledsoe, this was not his only devastating loss of the year. About two weeks prior to the Orange Bowl, on December 11, 2018, Bledsoe's lawsuit against the NCAA, which he initiated back in August 2017, finally came to an end when District Judge Jeff Virgin granted the NCAA's motion for summary judgment, ending Mr. Bledsoe's case and leaving the NCAA's Drug Testing Program unchanged.

Back in October 2016, Mr. Bledsoe failed a random drug test by the NCAA when his sample tested positive for clomiphene, which was found in a supplement Mr. Bledsoe had consumed. Mr. Bledsoe appealed the positive test to the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports, but it was ultimately denied and a suspension of 1 year was imposed. He subsequently filed a lawsuit in Oklahoma state court against the NCAA, seeking a finding in the form of a declaratory judgment that the NCAA's doping appeal process was unconstitutional because it violated both his substantive[1] and procedural[2] due process rights under the Due Process Clause of the Oklahoma Constitution[3]. In order to prevail on his claims, Mr. Bledsoe had to prove that (i) the NCAA was a "state actor"[4] and (ii) the substantive right at issue (i.e. playing college football) is an interest protected by the Oklahoma Constitution.

While the NCAA tried to end the case in 2017 by filing a motion to dismiss for failure to state a claim, Judge Virgin denied this initial NCAA motion after a hearing was held on November 20, 2017.5 Consequently, after a flurry of submissions, the NCAA filed a motion for summary judgment, as did Mr. Bledsoe. Mr. Bledsoe argued there were no material facts in dispute since the NCAA was a state actor6, the NCAA failed to consider all of Mr. Bledsoe's evidence or even apply its own rules appropriately7, and the suspension directly affected his liberty interests in making a living playing professional football, his reputation, and the guarantees associated with his athletic scholarship from the University of Oklahoma.8

The NCAA argued that summary judgment should be granted because the Supreme Court of the United States had already ruled that the NCAA is not a state actor, other courts have concluded participation in collegiate football is not a protected interest under the Due Process Clause, and even if Mr. Bledsoe was able to meet the two circumstances above, the facts presented to the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports do not demonstrate that Mr. Bledsoe deserved a reduced sanction[9].

In his two-page decision, Judge

1 See, Petition, Aug. 24, 2017, p. 9 (substantive rights argued, include his right to play football for Oklahoma University, develop as a student-athlete, and "invest his time, resources, and efforts into . . . developing his skills to earn a living" as a coach or NFL player).

2 See, Id. at p. 16 (procedural rights argued include "[t]he NCAA arbitrarily, capriciously, and unlawfully enforced" its bylaws and denied Mr. Bledsoe's appeal, it "administered . . . quasi-criminal punishments . . . on a strict liability basis without any type of knowledge, intent, or *mens rea* component[,]" and the NCAA lacked "an appropriate level of procedural safeguards.").

3 Article II, Section 7 of the Oklahoma Constitution: "No person shall be deprived of life, liberty, or property without due process of law."

4 See, National Collegiate Athletic Association's Reply Brief in Support of Motion to Dismiss, Nov. 13, 2017, p. 2 ("[T]o state a valid claim under the Due Process Clause, Plaintiff must show that the NCAA essentially functioned as the State of Oklahoma in adopting and applying its Drug Testing Program in this case.").

5 Ruling and Order, RE: Motion to Dismiss Denied, District Judge Jeff Virgin, November 21, 2017.

6 See, Petition, p. 11 (Mr. Bledsoe argued the NCAA was a "state actor" because (1) the NCAA is "so dominant in its field that membership in a practical sense is not voluntary but economically necessary for" Mr. Bledsoe and OU, and (2) the NCAA is pervasively entwined with "public institutions and public officials").

7 Plaintiff Amani Elijah Bledsoe's Motion for Summary Judgment, Oct. 25, 2018, pp. 18—24. (Mr. Bledsoe argued the NCAA grossly erred in finding he did not fit within the two exceptions provided in the NCAA's anti-doping rules, namely the "sabotage" exception—or where a third-party administers a substance to the athlete, unbeknownst to the athlete—and "trusted approval" exception—or where the athlete, before using a product, went to an athletics administrator and the administrator assured the athlete that the product had no banned substances in it).

8 Id. pp. 14-18.

9 Defendant National Collegiate Athletic Association's Reply Brief in Support of Motion for Summary Judgement, December 6, 2018, p. 8 ("Plaintiff cannot assert the 'sabotage defense' because he admits that he prepared his own drink from an unopened container of Anabolic Peak, so he cannot claim that the substance was directly administered to him by another person.

Plaintiff cannot assert that he complied with the requirement to check all supplements with the Head Athletic Trainer before ingesting them because he concedes that he consumed the supplement without having done so.

Plaintiff cannot assert that [Oklahoma University] did not provide an adequate education program about supplements because he admits he informed the NCAA Appeal Committee that [Oklahoma University] provided him adequate education and training about the risks of using supplements.

Plaintiff cannot assert that he could not fully comprehend [Oklahoma University's] warning and directives about the use of supplements based on his undiagnosed ADHD because he admits he knowingly elected not to raise the issue of his alleged ADHD during appeal or as new evidence thereafter.").

See THE NCAA on Page 6

The NCAA is Still Not a State Actor

Continued From Page 5

Virgin dismissed Mr. Bledsoe's motion for summary judgment and granted the NCAA's motion for summary judgment under the "state actor" prong of the Due Process Clause analysis. In particular, Judge Virgin found the precedent set by *NCAA v. Tarkanian*10 clearly established the NCAA is not a state actor and thus cannot violate the Due Process Clause of the Oklahoma Constitution. While Mr. Bledsoe cited both *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*11 and *Board of Regents of University of Oklahoma v. NCAA*12 in an attempt to show the NCAA can be classified as a state actor13 and thus "judicial intervention" for constitutional claims against the NCAA was necessary14, Judge Virgin found the NCAA demonstrated that, contrary to Mr. Bledsoe's argument, the cases he cited actually supported the NCAA's position that it was not a state actor. Using those cases, the NCAA pointed out that in *Brentwood Academy*, "the [U.S.] Supreme Court reiterated its holding in *Tarkanian* that the NCAA is not a state actor, and then explained that a statewide athletics association is critically different than the NCAA . . . ."15, and that *Board of Regents* did not address claims under the Oklahoma Constitution and in fact explicitly noted the NCAA was not a state actor.16

Because the NCAA was deemed not to be a state actor, "no material facts remain[ed] in dispute" and Judge Virgin granted the NCAA's motion for summary judgment.17 Consequently, the holding of *Bledsoe* reiterated that the NCAA is not a state actor and is insulated from constitutional claims. The decision did not, however, address the validity of the NCAA Drug Testing Program. As this demonstrates, such an anti-doping program is very difficult to challenge, let alone dismantle. ■

10 488 U.S. 179 (1988).

11 531 U.S. 288, 290 (2001) ("The issue is whether a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools may be regarded as engaging in state action when it enforces a rule against a member school.").

12 313 P.3d 891 (Okla. 2013).

13 See, *Brentwood Academy*, at 291 ("We hold that the association's regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association, there being no offsetting reason to see the association's acts in any other way.").

See, *Board of Regents*, at 898 ("In [*Christian Heritage Academy v. Oklahoma Secondary School Activities Association*] . . ., the court concluded that the OSSAA was subject to the Fourteenth Amendment, because it was a state actor. The court held that the OSSAA's conduct constituted state action because of the pervasive entwinement of public institutions and public officials in the composition and workings.").

14 See, Plaintiff Amani Bledsoe's Response in Opposition to Defendant NCAA's Motion to Dismiss, Oct. 10, 2017, p. 16 ("In [*Bd. Of Regents of Univ. of Oklahoma v. Nat'l Collegiate Athletic Ass'n,*] [t]he Supreme Court of Oklahoma . . . laid a strong foundation for judicial intervention into NCAA actions for constitutional claims . . . .").

15 Defendant National Collegiate Athletic Association's Motion for Summary Judgment and Brief in Support Thereof, Oct. 31, 2018, p. 16.

16 See, Defendant National Collegiate Athletic Association's Reply Brief in Support of Motion for Summary Judgment, Dec. 6, 2018, p. 3 ("Plaintiff attempts to characterize the decision of Board of Regents as having 'laid a strong foundation for judicial intervention into NCAA actions for constitutional claims.' This argument fails for two reasons: (1) the Board of Regents decision involved federal and state antitrust claims, not claims under the Oklahoma Constitution; and (2) the court in Board of Regents specifically held, "NCAA activities are not state action.").

17 Ruling and Order, Dec. 11, 2018.

Law Firm Says Forced Resignation of MSU Official Is 'Fresh Start'

The law firm of Goldman Scarlato & Penny, P.C., which represented many of the Michigan State University (MSU) victims in the abuse scandal, pounced on the January 17, 2019 news that the MSU Board of Trustees accepted and accelerated John Engler's resignation and picked a new interim president.

This announcement comes on the heels of Engler's comments to the Detroit News editorial board where he is reported to have said that some of the Nassar assault survivors were enjoying the spot light. Attorney Melissa Hague, who represents several victims who were assaulted and abused by Nassar, and whose claims against MSU have not yet been resolved, offered the following comments: "We are hopeful that this change in administration signals a change in how MSU has been treating the forgotten Nassar victims. To date, MSU has made no indication that it will afford these forgotten Nassar victims the same justice and closure it has afforded to the other Nassar victims. These girls, who include minors and Olympians who were repeatedly abused by MSU's sports medicine doctor, deserve equal justice. The past administration's failure to acknowledge this has marginalized the abuse these girls have suffered and has perpetuated that abuse which has caused severe trauma to many of these young girls."

lica

Court: Athlete With One Kidney Can Continue ADA Claim

A federal judge from the Southern District of Mississippi has denied a university's bid to dismiss the claim of a football player, who alleged that he was denied an opportunity to play football because he has one kidney, violating federal disability laws.

The plaintiff in the lawsuit was Deven Hammond, a student and football player at the University of Southern Mississippi (USM), who only has one kidney. According to Hammond, USM's football staff enticed him to transfer from LSU to USM by offering him a full scholarship if he worked his way onto the team's two-deep roster. After Hammond transferred, he received a physical evaluation at USM's Student Health Services Center. The report noted that Hammond had only one kidney, but cleared him to play without restrictions.

"I was cleared to play and was practicing and working out and everything for the whole month of June up until the point I went and told the (head athletic trainer) about the situation," according to Hammond. The athletic trainer told the him he had "to stop practicing." The athletic trainer, allegedly, then took Hammond to a "family medicine doctor who acted as the team physician," who affirmed the athletic trainer's decision and pointed to "the liability of his condition," according to the complaint.

Hammond sought a second opinion as permitted by USM's Sports Medicine Policies and Procedures, and his nephrologist stated that no restrictions were necessary. The plaintiff also offered to execute a waiver of liability. But USM rebuffed the offer. The plaintiff's attorney suggested in the complaint (https://www.documentcloud.org/documents/4313359-Deven-Hammond-civil-suit.html) that "it has been black-letter law since the 1980s that barring a student with one kidney from playing football after he offers to sign a waiver of liability is a violation of federal anti-discrimination laws. Grube v. Bethlehem Area School District, 550 F. Supp 418 (E.D. Pa.. 1982) (a football team's doctor advised against a student with one kidney playing football, but an expert cleared him to play and the student offered to sign a waiver of liability. The court granted a preliminary injunction because 'the plaintiff is being deprived of an important right guaranteed by federal legislation.')

"As one court put it, the purpose of federal anti-discrimination laws is 'to permit handicapped individuals to live life as fully as they are able, without paternalistic authorities decided that certain activities are too risky for them.' Poole v. South Plainfield Board of Education, 490 F.Supp. 948, 953-954 (D.N.J. 1980)."

Thus, Hammond sued USM in federal court, asserting, among other things, claims of discrimination under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Act). USM filed a motion to dismiss.

Tackling the ADA portion of the claim first, the court noted that to establish a claim of discrimination under the ADA, a plaintiff must prove: "(1) that he has a qualifying disability; (2) that he is being denied the benefits of services, programs, or activities for which the public entity is responsible, or is otherwise discriminated against by the public entity; and (3) that such discrimination is by reason of his disability." Miraglia v. Bd. of Supervisors, 901 F.3d 565, 574 (5th Cir. 2018). The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment . . . ." 42 U.S.C. § 12102(1).

The fact that the plaintiff only has one kidney constitutes a "physical impairment" as contemplated by the ADA, according to the court. It also considered the following fact pattern alleged by the plaintiff:

The athletic trainer removed Hammond from practice after learning he only had one kidney.

The team physician would not clear him to play football because he only had one kidney.

McCall continued to hold him from practice after receiving a report from his nephrologist, based on the belief that playing football with one kidney posed a liability issue for the school and a danger to the plaintiff's health.

The plaintiff alleged that agents of the defendant's athletic department told other schools that he did not pass a physical because he had only one kidney.

"For a 'regarded-as' discrimination claim, the plaintiff is not required to allege or prove that the impairment substantially limited a major life activity, or that the defendant believed it did," wrote the court. "All that the plaintiff has to show is that the defendant knew of the impairment and withheld public services or benefits because of it. 42 U.S.C. § 12102(1), (3)(A); Burton, 798 F.3d at 230; Williams, 717 F. App'x at 449. The allegations listed above, accepted as true, are sufficient to meet that burden. Therefore, they are sufficient to demonstrate that the plaintiff had a disability as defined by the ADA."

Turning to the defendant's argument that it enjoys sovereign immunity from suits under the ADA, the court wrote that the Eleventh Amendment provides: "The Judicial power of the United States

See COURT: ATHLETE on Page 8

Court: Athlete With One Kidney Can Continue ADA Claim

Continued From Page 7

shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The court added that "this amendment protects states from being sued in federal court. Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 276 (5th Cir. 2005). But the protection is not absolute. Id. First, states can waive their sovereign immunity. Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448, 451 (5th Cir. 2005). Second, 'Congress may abrogate state sovereign immunity pursuant to the enforcement power conferred by § 5 of the Fourteenth Amendment.' Id."

Elaborating on this, it noted that "state universities receiving federal financial assistance have waived sovereign immunity from suits for damages under Section 504 of the Rehabilitation Act. See Pederson v. Louisiana State Univ., 213 F.3d 858, 876 (5th Cir. 2000). It is apparently undisputed that the defendant receives federal funding. Therefore, the defendant waived its sovereign immunity with respect to the plaintiff's claim under Section 504."

This may also be true for claims brought pursuant to Title II of the ADA, "where it found that sovereign immunity did not bar identical claims under § 504." Campbell v. Lamar Inst. of Tech., 842 F.3d 375, 379 (5th Cir. 2016); Bennett-Nelson, 431 F.3d at 455. The 5th Circuit has yet to rule. And the district court was unwilling to decide that issue until it has to, declining to "address whether Title II of the ADA constitutes a valid abrogation of sovereign immunity with respect to the plaintiff's ADA claim, having concluded that the plaintiff's identical Section 504 claim is not barred by sovereign immunity."

The court also rejected the defendant's argument that it enjoys sovereign immunity from monetary damages with respect to the plaintiff's Rehabilitation Act claim. ■

Deven Hammond v. University Of Southern Mississippi; S.D. Miss.; CIVIL ACTION NO. 2:18-CV-150-KS-MTP, 2018 U.S. Dist. LEXIS 193959; 11/14/18

Attorneys of Record: (For plaintiff) William Brock Most–PHV, LEAD ATTORNEY, PRO HAC VICE, LAW OFFICE OF WILLIAM MOST, LLC, New Orleans, LA; Garret S. DeReus–PHV, PRO HAC VICE, BIZER & DEREUS, LLC, New Orleans, LA; Jacqueline K. Hammack, THE BIZER LAW FIRM, LLC, New Orleans, LA. (for defendants) Pope S. Mallette, PRO HAC VICE, John Andrew Mauldin, MAYO MALLETTE, PLLC, Oxford, MS.

A Case Study in Handling Student-Athlete Complaints

Continued From Page 4

Coach Casey should have immediately reported this complaint to the proper GFU administrators, and then let the investigation run its course. A program should not maintain a culture of handling things "in house" and should strive to follow the policies at all times under all circumstances.

Ultimately, the matter was reported (by a student) to the Associate Dean and Dean of Students, who also investigated the matter and stripped the harasser of his good standing with GFU and demanded he issue an apology and engage in cultural sensitivity training.

By acting promptly, and in accordance with its policies, a school can help reduce its exposure to liability from harassment and discrimination claims. Just like with providing medical treatment to student-athletes, carefully and purposefully documenting what was said and done is crucial in these situations as well, and it can prove to be a silver bullet to the plaintiff's case in a lawsuit down the road. ■

Dylan Henry **Kim Sachs**

Dylan Henry and Kim Sachs are associates in Montgomery McCracken's Litigation Department and members of the firm's catastrophic sports injury defense team. The team represents universities, schools, athletic trainers, and other sports programs and staff in a variety of sports-related and head injury litigation, which include claims for negligence (e.g., failure to warn, premature return to play), products liability, breach of contract, and professional malpractice, and advises clients on complying with various rules, regulations, and laws, and maintaining policies in compliance with best practices and industry standards.

lica

Court Dismisses Former College Kicker's Claim He Was Cut in Violation of Disabilities Laws

A federal judge from the Eastern District of Louisiana has dismissed with prejudice the claim of a former Tulane University football player, who alleged that the school and several individual defendants cut him from the team because of his learning disability in violation of federal and state law.

Plaintiff Brandon Purcell enrolled at Tulane University in the fall of 2013, and walked on to the football team as a kicker. Purcell claimed that he suffers from a learning disability, which necessitated certain academic accommodations, including double time to take tests, a sound-reduced environment, and a note taker. He also alleged that due to his disability, he has better concentration in the morning. Accordingly, his athletics academic advisor, Ruben Dupree, approved him for 8 a.m. classes. This represented a departure from the general rule that Tulane football players should not take morning classes.

In the spring of 2015, Purcell was taking 8 a.m. classes five days a week. Nevertheless, he was scheduled for a training session from 7-8:30 a.m. He stated that he would attend the initial portion of the workout, leave for his 8 a.m. classes and return to work with his coach after class to complete the missed portion of the workout. On March 4, 2015, Purcell claimed he was called into the office of special teams coach Doug Lichtenberger and was dismissed from the football team. He alleged that Coach Lichtenberger told him that he was a "hindrance" and a "bad example for the team."

Purcell then contacted Athletic Director Rick Dickson and head football coach Curtis Johnson complaining of discrimination, hostile learning environment, retaliation, and intentional infliction of emotional distress. He alleged that Lichtenberger improperly used Purcell as an example of bad behavior, inciting other members of the football team to harass him and causing emotional distress.

Later that month, Purcell met with Assistant Athletic Director Barbara Burke, who allegedly indicated that he had been removed from the team because there were too many kickers. The plaintiff alleged that the reason is pretextual, claiming that he outperformed other kickers who remained on the team. Purcell ultimately met with Dickson, and demanded an explanation why he was removed from the team, according to the court. Dickson declined to intervene in the matter. He then met with Coach Johnson, Coach Rob Phillips, Coach Byron Ellis, and Coach Wayne Cordova to discuss the matter. The plaintiff alleged that they continued to assert pretextual reasons for his removal from the team.

After this meeting, Purcell continued to train with the team. However, he alleged, he suffered increased abuse and retaliation. He also alleged that his former friends and teammates participated in the abuse, making both physical threats and anti-Semitic comments toward him. The plaintiff then filed a complaint with Wendy Stark of Tulane's Office of Institutional Equity. Due to the reported increased retaliation, Stark began an independent investigation of the situation. He alleged that Stark failed to maintain confidentiality and participated in the conspiracy and cover up of the disability discrimination, hostile learning environment, retaliation, defamation, and intentional infliction of mental distress.

The situation got worse before it got better, leading to the filing of a lawsuit, brought pursuant to federal and state law against Tulane University and, in some cases, more than a dozen individual defendants.

The defendants moved to dismiss the various claims, pursuant to Federal Rule of Civil Procedure 12(b)6, or the failure to properly state a claim. The court granted the motion, but left the door open for the plaintiff to re-file his complaint. The plaintiff obliged, and parts of his claim were dismissed again.

Pursuant to the latest complaint, the only remaining defendants are the administrators of the Tulane Educational Fund (Tulane) and Byron Ellis, Tulane's Director of Football Operations. The claims that remain against Tulane include alleged violations of the Americans with Disabilities Act (ADA), the Rehabilitation Act (Act), and the Louisiana Civil Rights Act for Persons with Disabilities. The remaining claims against Ellis include a Louisiana state law defamation claim by Purcell and associated state law loss of consortium claims by his parents.

In its analysis, the court immediately dismissed the ADA claim for "lack of standing."

Turning to Section 504 of the Act, the court quoted from the statute, which provides:

"No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

"The Act defines an 'individual with a disability' as 'any individual who has a

See COURT DISMISSES on Page 10

Court Dismisses Former College Kicker's Disability Claim

Continued From Page 9

physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment.' The Act further defines 'program or activity' to include 'all the operations of . . . a college, university, or other postsecondary institution.'"

The court assumed that Purcell's learning disability "qualifies him for protection under the Rehabilitation Act and that Tulane qualifies as a program under the Act from which Purcell cannot be excluded based on his disability. The question, then, is whether Tulane violated the Act when it released Purcell from its football team.

"Purcell alleges that Tulane violated the Act in three distinct ways. First, he claims that Tulane discriminated against him because of his disability when he was cut from the football team in March 2015, subsequently reinstated, and then cut again in August 2015. Second, Purcell claims that Tulane allowed a hostile environment to flourish because 'Purcell was subjected to harassment as a result of complaining about discrimination.' Third, and finally, Purcell claims Tulane retaliated against him by cutting him from the team a second time after Purcell complained to the university that he was cut the first time because of his disability."

The court went on to address each individually.

On the first point, it wrote that "to succeed on a discrimination claim under the Act, a plaintiff must show that he suffered discrimination solely because of his disability." Purcell made his argument by noting that special teams coach Lichtenberger told him he was cut "because he missed too many practices because he had taken morning classes "because of his disability. The court found that the plaintiffs' argument "suffers from fatal flaws. At the outset, this Court notes that Purcell's disability accommodation plan did not mandate that he take morning classes. He in fact took many afternoon classes throughout his education at Tulane, eventually graduating with a 3.6 cumulative GPA. . . . Further, Coach Lichtenberger testified that he did not even know about Purcell's disability when he cut Purcell from the team in March 2015." For this and other reasons, the plaintiff failed to carry his burden that the real reason he was cut was because of his disability.

On the second point, the court noted that for the plaintiff to show there was a hostile environment in violation of the Act, he would need to prove: "(1) he was an individual with a disability, (2) he was harassed based on his disability, (3) the harassment was sufficiently severe or pervasive that it altered the condition of his education and created an abusive educational environment, (4) [defendant] knew about the harassment, and (5) [defendant] was deliberately indifferent to the harassment. Even assuming Purcell qualifies as a disabled individual protected by the Act, the plaintiff has failed to provide evidence showing Purcell was harassed based on his disability," wrote the court in dismissing the claim.

On the final point, the court wrote that "to establish a prima facie case of retaliation under the Act, a plaintiff must show: (1) he engaged in a protected activity; (2) the defendant took an adverse action against him; and (3) a causal connection existed between the adverse action and the protected activity." The defendant cut the plaintiff "for non-retaliatory reasons" and the plaintiff "has failed to provide evidence that the second cut would not have occurred, but for Purcell's complaints about his initial cut. As such, Tulane is entitled to summary judgment on this claim." ■

Brandon Purcell, et al. v. Tulane University of Louisiana, et al.; E.D. La.; Civil Action NO: 16-1834, 2017 U.S. Dist. LEXIS 212371; 12/18/18

Attorneys of Record: (for plaintiffs) Wanda Anderson Davis, LEAD ATTORNEY, Leefe, Gibbs, Sullivan, Dupre & Aldous, Metairie, LA. (for defendants) Maria Nan Alessandra, LEAD ATTORNEY, Kim M. Boyle, Phelps Dunbar, LLP (New Orleans), New Orleans, LA.

Epstein to Serve as CMU Faculty Athletic Rep

Central Michigan University President Bob Davies has appointed Dr. Adam Epstein, a sports law professor, to serve as a faculty athletic representative (FAR).

Epstein, along with another professor from outside sports law who will share the FAR role with him, replace management professor Kevin Love, who has served in the role for 15 years.

FARs represent the university in its relationship with the National Collegiate Athletics Association and the Mid-American Conference, advocating for student-athletes' health, wellness, athletic success and academic integrity. In this role, Epstein will regularly interact with students in a variety of ways, including observing them in the classroom and during competition. The position reports directly to the president and works with students, coaches and athletics staff to address a variety of issues such as mental health, academic standing, ethical behavior and conduct.

Davies said that he "trusts" that the FARs "will help to uphold our university's distinction and culture of being one of only 13 Division I programs in the nation to never have a major NCAA rules infraction."

lica

Auburn Researchers: Additional Rules for Player Safety Will Impact Popularity of College Football

News of traumatic brain injuries and suicides among professional and college football players has made many question the violent nature of the game. Rule changes, such as the NCAA's targeting rule, have been imposed to promote player safety, and yet concussions continue to occur.

Using Auburn University's functional magnetic resonance imaging, or fMRI, machine, to study the brain functions of college football fans and non-football fans when they were exposed to violent imagery, a team of researchers suspect additional regulations that improve player safety and make the game less violent could impact fandom.

Auburn Associate Professor David Martin in the Department of Nutrition, Dietetics and Hospitality Management posed it as such: "If we have fans who are attracted to the violence aspect of the sport and we start to sanitize it to make it safer for the players, at what point do we start to lose fans?"

The team of researchers in electrical engineering, psychology, psychiatry and hospitality found fans to be less empathic to violence in the game and violence in general than non-fans.

"This finding does not demonstrate that football enthusiasts are more prone to violence or less sensitive to violent imagery, but instead, that violence within the context of football may provide less affective arousal compared to general violence," the study reads.

While social and behavioral effects of violence in movies and video games have been studied extensively, much less is known about how sports affect perceptions of violence.

Areas of the brain that indicate emotion regulation, perception of others' pain and the nerve origin of violent behavior were less active in football fans, according to the study, published in Frontiers in Public Health. This decreased empathetic response and perhaps altered behavioral responses in otherwise healthy people are often associated with increased or repeated exposure to violence.

With rising concerns over players' health — such as the correlation between repetitive brain trauma and incidents of chronic traumatic encephalopathy, or CTE, depression and suicidal risk — recent rule changes have been imposed to increase player safety. For instance, the NCAA instituted the targeting rule in 2013 that calls for a player to be ejected if he makes contact with a defenseless opponent above the shoulders. The National Football League adopted the NCAA's rule in 2017.

Brain trauma is an issue for professional athletes, as well as youth football players, who may also be exposed to large numbers of repetitive head collisions. Therefore, concussions and sub-concussive blows to the head commonly found in football can be considered an urgent public health burden which requires a policy response either from the government or the sporting body.

So far, the NCAA targeting rule has been met with marginal resistance from football fans.

However, the research team found previous research that said fans find the most enjoyment in the unscripted, on-the-field violence of college football. Previous studies also indicated violence in sport to have a socio-cultural impact, meaning the exposure to violence and aggression may cause some sports fans to be more prone to acts of violence. Their impulsive behaviors may result in destructive acts of violence and their muted perceptions of pain may increase suicidal risk.

Martin's own research also examines the consumer behavior side of college football.

"This issue of traumatic brain injury has really driven the changes that are happening in the world of sports," he said. "I'm interested in what happens to Auburn University and the city of Auburn, or any college town, if college football gets regulated away.

"We know that when college football does well, corporate sponsorships increase, undergraduate applications increase and alumni support increases. So the success of football is very much tied to the success of the university as a whole. If football were to go away or if it were to change so dramatically that alumni and fan support is lessened, that has huge economic implications for the university, the city and the country."

Regulations limiting the game of football may not be far off as researchers across the country are working on a non-evasive way to diagnose CTE. Currently, the only way to detect it is a post-mortem autopsy. Once the new testing method is available, Martin said youth, high school, college and professional football players can be tested and researchers will know, "with a high degree of certainty, what percentage of those players will have permanent brain damage."

"To me, that will be a very important day," he proclaimed. "I don't know what the percentage has to be for there to be a major change in football, but it will either regulate the game out of existence or people just won't play it anymore."

The study was conducted by Martin, Electrical Engineering Associate Professor Gopi Deshpande and Psychology Professor Jeffrey Katz from Auburn; Psychology Assistant Professor Thomas Daniel from Westfield State University in Westfield, Massachusetts; Kyle M. Townsend, clinical assistant professor of hospitality at Georgia State University in Atlanta; and Postdoctoral Research Fellow Yun Wang at Columbia University in New York.

Sports Lawyer Takes the Helm as Vanderbilt Athletics Director

Vanderbilt University has named Malcolm Turner as the university's new vice chancellor for athletics and university affairs and athletics director. Turner, a member of the NBA's senior leadership team and president of the NBA G League, will join the university on Feb. 1, 2019. He replaces David Williams, the current Vice Chancellor for Athletics and University Affairs and Athletics Director, who is retiring from the athletic department to focus on the Vanderbilt Law School's commitment to a program devoted to sports law.

"I set out to find a thought leader with the skill set and vision to manage the next stage of transformation for Vanderbilt Athletics, and that's exactly what we found in Malcolm Turner," Vanderbilt University Chancellor Nicholas S. Zeppos said. "Malcolm is a proven executive with deep expertise in multiple business disciplines including management, marketing and development across the sports landscape of teams, leagues, facilities and major events. He also carries a deep and personal commitment to education, evidenced by his own academic achievements and his extensive community service. His exceptional skills, combined with his passion for education and drive for excellence, will bring immense value not only to the Vanderbilt Commodores, but to the rest of the university and to the entire Nashville community."

Turner's tenure as president of the NBA G League is hallmarked by growth, expansion and transformation.

Under Turner's leadership, the NBA G League has enjoyed unprecedented growth across all areas of its business and

Malcolm Turner

basketball operations — from record numbers of NBA G League alumni in the NBA, to a first-of-its-kind expanded entitlement partnership with Gatorade, to innovative new player contract types. A champion for NBA Two-Way Contracts (newly incorporated in the NBA's current Collective Bargaining Agreement) and NBA G League Select Contracts (newly announced as part of the G League's recently launched professional path), Turner's vision deepened the league's commitment to player development.

His hire drew the praise of David Stern, NBA Commissioner Emeritus and one of the most accomplished commissioners in the professional sports history.

"Malcolm is an exceptionally talented executive and an all-around great person," he said. "The NBA benefited tremendously from his leadership, acumen, and collaborative mindset — he's one of a kind. He expanded the NBA's development league in unprecedented ways to form the successful G League, and enhanced the league's commitment to player, coach and staff development. I have no doubt he will bring that same commitment to excellence and impact to Vanderbilt's Athletics Program."

Prior to joining the NBA, Turner worked at Wasserman Media Group, where he helped build the firm's preeminent Consulting Division as its managing director, creating and managing sports, entertainment, venue and new product launch strategies for leading corporate brands and properties. He went on to help build a multinational footprint for this practice before launching Wasserman's Golf Division as one of the leading golf management teams representing some of the game's top personalities and brands. Prior to Wasserman, he served as senior vice president and a member of the leadership team of OnSport, a North Carolina-based sports and entertainment consulting firm (later acquired by Wasserman) that managed strategic initiatives for Fortune 100 brands across the NBA, NFL, MLB, NASCAR, Madison Square Garden, STAPLES Center and other marquee properties. The firm also represented the media rights for prominent rights-holders in the professional and college sports landscape.

Turner graduated from the University of North Carolina at Chapel Hill and went on to earn joint J.D./.M.B.A. degrees from Harvard University. ■