

Legal Issues in

COLLEGIATE ATHLETICS

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

Recent Incidents Highlight Need for Athletic Departments to Review Whistleblowing and Ethical Compliance Policies

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Recent well-publicized events at several major higher educational institutions have raised several pressing legal questions for employers. These high-profile incidents illustrate the tighter scrutiny that college athletic departments are facing and the potentially damaging ramifications when administrators fail to respond swiftly and effectively to internal complaints. At Rutgers University, video recordings of the school's basketball team's practices revealed abusive conduct by Men's Basketball Head Coach Mike Rice toward his players. After former Athletic Director Tim Perneti received copies of the footage from Eric Murdock, the former director of player development for the basketball program, Rutgers hired outside counsel to review Rice's conduct. Perneti then suspended Rice for three games and imposed a monetary fine. The tape subsequently aired on ESPN, triggering a public outcry and leading to Rice's termination and Perneti's resignation. Murdock recently sued Rutgers, claiming the university wrongfully terminated him because he reported Rice's

conduct.

At the University of Utah, swimming Coach Greg Winslow was suspended after allegations surfaced of Winslow's inappropriate relationship with a 15-year old swimmer while Winslow was the coach of an Arizona club team in 2007. Within days of Winslow's suspension, Yahoo! Sports ran a series of stories alleging Utah Athletic Director Chris Hill ignored "piles of letters" from the parents of the student athletes – dating as far back as 2008 – describing Winslow's abusive tactics. The complaints are stirring: The letters from parents to Hill included claims that Winslow forced a swimmer to perform underwater sprints until he blacked out, made a student athlete swim with a mesh bag over her head, made another swim underwater with a PVC pipe duct-taped to his back, bought beer for an underage swimmer, and had an inappropriate relationship with a female swimmer. Instead of retaining experienced outside counsel to investigate these complaints, the school chose only to formally investigate Winslow once, in December 2012. That investigation was conducted by the school's Office of Equal Opportunity, which recommended that Winslow not be disciplined. After Yahoo! Sports

published its report, Utah announced that Winslow's contract would not be renewed and that Utah president, David Pershing, had retained outside counsel to investigate Hill's handling of the previous complaints.

Over the last 18 months, whistleblower cases like the one Erik Murdock filed have surfaced at an alarming rate. Rutgers president Robert Barchi called the situation involving Rice and Murdock "a failure of process." While this may be partially true, as employment lawyers, we also call it a failure of policy. More specifically, this situation highlights the critical need for athletic departments to adopt policies and procedures for situations involving employee complaints. While all employers should have such policies in place, this is crucial for educational institutions because of the implications for student-athletes who may be adversely affected when a university employee acts inappropriately or unethically.

Intercollegiate athletic departments are under increased scrutiny to address and mitigate several risk factors: (1) Legal – swiftly addressing internal complaints and using an experienced, unbiased legal team to resolve them; (2) NCAA – the lack of internal reporting procedures may signal

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an absence of institutional control; (3) Financial – a national crisis will affect the department’s major donors and corporate sponsors; and (4) Reputational – not only for the school and prospective student athletes but also career derailment. To address and mitigate these risks, we recommend athletic departments do the following:

Level the playing field: Conduct a privileged risk assessment of existing policies, if any, regarding internal reporting procedures within the athletic department. Your athletic department should have an independent code of conduct and an internal reporting policy that provides employees with multiple channels for confidentially reporting concerns and complaints, including to any member of management, human resources or an anonymous report through a third-party hotline. It is imperative this policy contains anti-retaliation provisions, explicitly reassuring employees that they can report concerns confidentially without risk of retaliation. They should also provide for consistent and appropriate disciplinary action based on the results of an investigation. Policies should clearly state that they apply both within and outside of the athletic department. Your workplace’s culture of compliance and ethics should be prevalent on policies and noted on posters prominently displayed throughout your offices and in communications with employees.

Practice, practice, practice: Train your managers on what to do when they receive a complaint or concern from an employee. Teach them to be perceptive and to look for clues and ask questions when it is unclear if a complaint is officially being made. Provide a set of decision points to ensure they act appropriately when the ball is in their court. Reinforce to managers that an employee who makes a complaint has engaged in protected activity, and they must not retaliate against him or her. Managers should respond objectively rather than emotionally, take action in good faith and protect the long-term interests of the department and the institution.

Call a time out: Keep a close eye on the conduct and performance of your managers, without waiting for complaints to arise. When a complaint or concern is raised, consult your employment counsel and conduct a thorough, privileged investigation before taking action. Performance management practices should be based solely on fact. If the employee must be counseled, disciplined or terminated for a performance problem, ensure the documentation is in order. Involve senior-level decision-makers in the investigation and provide them with all the facts – both good and bad. Consider how other individuals – regardless of seniority – accused of similar misconduct have been treated and ensure that the disciplinary action is warranted by the facts.

Develop a strong defense: During and after an investigation, prepare for inadvertent or intended disclosures. This is crucial in this era of social media and electronic communication. If confidentiality is required, make sure you provide that instruction with appropriate safeguards so you do not violate the National Labor Relations Act. Before taking disciplinary action – or choosing not to do so – assume that decision will be on ESPN or Yahoo! Sports or some other media outlet. Are you comfortable with that? Does the documentation support this decision?

Only then should you proceed.

Remember a team is only as strong as its weakest link: When an investigation has concluded, take appropriate and decisive remedial action where warranted by the facts, provided such action is consistent with your policies and with advice from legal counsel. When employees perceive managers as breaking the rules or being abusive or unfair, this can be damaging for employee morale, leading to additional misconduct and risking legal liability. This is particularly crucial for managers involved in highly visible and emotionally driven sports in which they may have significant discretion in developing tools and methods to motivate, coach and inspire their student athletes. When emotions run high and the pressure increases, as is often the case in competitive sports, managers may make poor decisions or act inappropriately. In such situations, upon the completion of an investigation, they must be swiftly and effectively counseled, disciplined or terminated. Under-performing managers should ride the bench until issues concerning their conduct are addressed.

Recent events at Rutgers, Utah and several other athletic departments have demonstrated the damaging effects of employment practices that fail to swiftly and effectively address complaints about wrongful employee conduct. Colleges and universities risk legal liability and significant expense resolving unnecessarily complicated situations. Senior athletics staff members have seen their careers derailed and their professional reputations damaged—consequences that cannot be unwound. We encourage athletic departments to be proactive and work with experienced counsel to develop strong and clear policies and procedures for managing, investigating and acting upon complaints of misconduct. Such policies should help prevent inappropriate conduct going forward while also enhancing internal accountability in the department. ■

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