

Legal Issues in

COLLEGIATE ATHLETICS

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

Presented by Ice Miller LLP

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HOLT HACKNEY
Editor and Publisher

THE ROBERTS GROUP
Design Editor

This special version of Legal Issues in Collegiate Athletics has been created in cooperation with Ice Miller LLP. The firm's lawyers and professionals have more than 30 years of cumulative NCAA experience, recently served as NCAA staff members, have firsthand student-athlete and coaching backgrounds, and are well-versed on NCAA rules, regulations and procedures. The Collegiate Sports Practice also has extensive experience with and detailed knowledge of the NCAA infractions and waivers processes, and the operation of the NCAA governance structure.

Please direct editorial or subscription inquiries to Hackney Publications at:

P.O. Box 684611
Austin, TX 78768
(512) 632-0854
info@hackneypublications.com

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Former Strength Reaches Settlement with SDSU after Protracted Litigation

San Diego State University reached a settlement with Dave Ohton, its former strength coach, last month for \$2.7 million.

Ohton had claimed he was fired after he cooperated with investigators, who were looking into improprieties within the SDSU athletic department.

In the winter of 2003, Ohton's had provided a written document in response to an internal audit of the department, in which he wrote:

"I did not travel at all this past year [the 2002-03 season], and I heard the stories about how [head football] Coach Tom Craft got seriously drunk the night before the Idaho game [in Idaho], and he had to be assisted by several of his assistants back to the hotel. A few boosters informed me that it was a despicable sight to see a drunken Craft being helped through the lobby. The next day, Idaho beat us 48-36, and we were heavily favored to win. Several weeks later, against some of our football coaches were seen walking out of a strip club at 1 a.m. We lost that game 15-8 and again, we were favored. It begs the question, if I know about these drinking episodes and I'm in San Diego, don't you think our football administrators know?"

Ohton was fired later that year. He claimed in a lawsuit that "members of San Diego State University's administration and staff violated Government Code section 8547 and retaliated against one of their colleagues because he cooperated with investigations into SDSU's athletics department." Section 8547 guarantees protection against retribution for state employees who report work-place violations.

In addition to Head Football Coach Tom Craft, Ohton named the university and the California State University system as well as the following administrators as defendants: Athletic Director Gene Bartow, Defensive Coordinator Thom Kaumeyer, Director

Ohton had claimed he was fired after he cooperated with investigators, who were looking into improprieties within the SDSU athletic department.

of Football Operations Dave Powroznik, Vice President for Business and Financial Affairs Sally Roush and Director of Human Resources Sue Blair.

The defendants moved for summary judgment. The trial judge granted the motion, finding that CSU met its responsibilities when it investigated the plaintiff's retaliation claims, which were made after Ohton sought protection under the California Whistleblower Protection Act. Ohton successfully appealed that ruling, when a panel of judges concluded that the defendants did not meet their obligations (*Sports Litigation Alert*, May 11, 2007). It remanded the case back to the trial court.

In a procedural ruling, the trial court again denied Ohton, prompting another appeal. Once again, the appeals court overturned the trial court (*Sports Litigation Alert*, Feb. 12, 2010), setting the stage for trial in May of 2011.

University attorney Marlene Jones told the media that insurance will cover all but \$350 thousand of the settlement cost and that insurance also funded most of the legal expenses, which the *San Diego Union Tribune* reported was close to \$1 million. "The litigation could have gone on for several more years," Jones told the media. "Both parties felt it was in their best interest to end it." ■

Ohton was represented by Attorney Dennis Schoville.

From Inside Looking Out: Racism in Men's Collegiate Coaching

By Marlon LeBlanc, Head Coach,
Men's Soccer, West Virginia
University.

I would like to describe how I ended up at West Virginia University as head coach of the men's soccer team because I think it pertains to what I am going to discuss. For the six years prior to being hired as head coach at WVU, I was an assistant coach at Pennsylvania State University.¹

In the summer of 2006, the men's soccer coach at West Virginia University was fired for committing NCAA violations.²

1 Marlon LeBlanc Was Named Men's Soccer Coach at West Virginia on Wednesday, Centre Daily Times, Aug. 10, 2006, at C2, available at 2006 WLNR 13801822.

2 LeBlanc Takes WVU Reins 16 Days Before Start

What follows is a chapter from Reversing Field: Examining Commercialization, Labor, Gender, and Race in 21st Century Sports Law by andré douglas pond cummings, which is available at www.wvupress.com. Cummings, an expert in race relations in sport and professor of law at West Virginia University College of Law, invited multiple authors, including LeBlanc, to write chapters in the book.

was hired two days before the first day of preseason practice.³ I literally met my team on the field. I honestly do not believe I would be the head coach of West Virginia University's men's soccer program if the circumstances had not been what they were at the time. I am not so sure I would have

of Season, Soccertimes.com, Aug. 10, 2006, <http://www.soccertimes.com/ncaa/2006/mnews/aug10.htm>.

3 Id.

had a chance at the opportunity if there had been time to conduct a national search, if it was not right before the start of the season, and if other people had a chance to throw their names in contention. I was passed over for three other positions before I was offered the WVU job.

I am very passionate about the topics of minority head coaches and racism in

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Foundation Says Title IX Equality Only Applies To College Sports

In a recent letter from Pacific Legal Foundation to the Office for Civil Rights, the conservative legal foundation stated that the Title IX policy used to measure a school's compliance with the gender-equity law only applies to "intercollegiate" sports – not high school.

"The Three-Part Test policy interpretation that narrowed the methods used for demonstrating compliance with Title IX for intercollegiate sports does not apply to high schools," said an attorney with Pacific Legal Foundation in the official letter to the OCR. "Moreover, because of the problems the Three-Part Test has created at the intercollegiate level, it should be revisited."

The foundation is questioning the 1979 policy interpretation that established the "three-part test" which lays out the requirement that athletic programs offer equal opportunities for men and women through three options: 1.) offering athletic opportunities that are proportionate to overall enrollment, 2.) demonstrating the program has a history of expanding opportunities for women, or 3.) demonstrating that the

program is meeting the athletic interests and abilities of its student body.

Specifically, Pacific Legal Foundation argues that the policy uses the word "intercollegiate," not "interscholastic," and that the three-part test violates the equal protection clause of the Constitution, because the Department of Education has not offered evidence to justify applying the test to high schools.

Those in opposition to the legal foundation's position state that the policy was interpreted in 1979, and there have been prior cases where the Office for Civil Rights has shown how and why the three-part test applies to interscholastic institutions.

"Title IX applies to institutions receiving Federal Funding, and interscholastic institutions do just that," said Helen Grant, the principal of Helen Grant Consulting, a firm that specializes in Title IX program reviews and consulting. "We must remember, too, that intercollegiate sports gain student-athletes from club, and predominantly, interscholastic sports."

Grant holds that there has to be regulations that ensure participation by women

in the same range of sports opportunities as men: "hence, Title IX."

The Pacific Legal Foundation raised this same policy issue in 2008, requesting the OCR to clarify the three-part test's application to high school athletics. The Office replied with a letter noting that several courts have applied the test to high schools and quoted language in the original policy interpretation that refers to high schools:

"No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient..."

The OCR rejected the argument that the test violates the equal protection clause.

"I don't think Pacific Legal Foundation's stance will be supported," said Donna Lopiano, the president of Sports Management Resources and the former head of the Women's Sports Foundation. "Title IX, specifically section 106.41, applies to both interscholastic and collegiate athletics." ■

Donald Remy Set to Take Over as NCAA General Counsel

By Alana C. Newhook

NCAA President Mark Emmert announced this winter that he has selected a new General Counsel and Vice President of Legal Affairs for the NCAA.

Emmert gave the nod to Donald Remy, who began his new position as general counsel in March. Remy, currently a partner at the Washington, D.C. law firm of Latham & Watkins, LLP, said he could not be happier with the outcome.

“I am very excited to have the opportunity to provide the NCAA seasoned legal counsel and strategic advice to assist in the organization’s goal to enhance the environment in which student-athletes thrive both academically and athletically,” said Remy. “It’s an honor to be part of an organization that plays such a critical role in developing and preparing our future leaders.”

While Remy specializes in litigation at Latham & Watkins, his extensive legal experience and continuous support for amateur athletics suggest that his transition from Washington, D. C. to Indianapolis will be a smooth one.¹ Prior to working with Latham & Watkins, LLP, Remy was the deputy assistant attorney general of the Department of Justice’s civil division. He also spent six years as the deputy general counsel, chief compliance officer, and vice president of litigation at Fannie Mae.²

Remy’s predecessor, Elsa Cole, stepped down from the post in August 2010. Cole held position of general counsel for the NCAA for 13 years and her departure left some large shoes to fill.³ Cole was the NCAA’s first general counsel, created the

1 Id.

2 Brian Baxter, *Latham Partner Donald Remy Headed to NCAA as New Legal Chief*, (Jan. 7, 2011), <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202477601300&slreturn=1&hbxlogin=1>.

3 Brian Baxter, *Ex-Fannie Mae Deputy CC Donald Remy Lands NCAA General Counsel Job*, (Jan. 11, 2011), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202477572259>.



Donald Remy

NCAA’s legal department.⁴ In January of 2011, Cole was named general counsel of the Michael & Susan Dell Foundation in Austin, TX.

After Cole’s departure, Scott Bearby took over the reins as the interim in-house counsel for the NCAA and will continue to do so until Remy can take over the position in March.⁵ His first tasks as head legal counsel will be to assess the immediate and long-term needs of the NCAA and confirm that the legal department is best supporting the needs of student-athletes, the association, and its members.⁶

“I believe that practical solutions to difficult legal issues should be applied to

4 Josh Karp, *The Game Changer*, Superlawyers Corporate Counsel Edition (Sept. 09), <http://www.superlawyers.com/indiana/article/The-Game-Changer/cc856816-d116-4b4d-9a02-c1745cae6a03.html>.

5 Brian Baxter, *Ex-Fannie Mae Deputy CC Donald Remy Lands NCAA General Counsel Job*, (Jan. 11, 2011), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202477572259>.

6 *NCAA Selects Donald Remy as General Counsel and Vice President of Legal Affairs*, (Jan. 2, 2011), https://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Media+and+Events/Press+Room/News+Release+Archive/2011/Announcements/20110103+Remy+VP+Legal+Rls.

protect the best interests of the student-athlete,” Remy said. “I look forward to working closely with the many professionals on the NCAA staff and in membership to advance the mission of the Association.”

Remy’s passion for sports has been a constant through his legal career. Once he starts his new position with the NCAA, Remy will be general counsel but whether he will still be referred to as coach is another matter. For a decade, Remy has been an ardent supporter of athletics in his role as an amateur athletic coach.⁷ Remy, who stated his favorite sport is football, will get to continue to support amateur athletics in his new role with the NCAA whether or not he continues to be a coach.⁸

Emmert implied that Remy had the perfect background for the job.

“Donald’s selection resulted from an extensive national search and I found his formidable legal talents, coupled with his longstanding commitment to amateur athletics, make him the ideal candidate for serving on my team and leading the NCAA’s legal department,” said Emmert. “Indeed, Donald has made a significant impact throughout his distinguished 20-year legal career, and I am confident that he will be a valuable asset to the NCAA and its members. We are excited he is joining us and look forward to the wealth of experience, leadership and energy he brings to the job.”

Newhook is currently a third-year law student at the Dedman School of Law at Southern Methodist University. ■

7 *NCAA Selects Donald Remy as General Counsel and Vice President of Legal Affairs*, (Jan. 3, 2011), https://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Media+and+Events/Press+Room/News+Release+Archive/2011/Announcements/20110103+Remy+VP+Legal+Rls.

8 Brian Baxter, *Ex-Fannie Mae Deputy CC Donald Remy Lands NCAA General Counsel Job*, (Jan. 11, 2011), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202477572259>.

Scholarship Equity

Have you Reviewed Athletics Related Financial Aid Ratios?

By Barbara Osborne, Of Counsel, Ice Miller Collegiate Sports Practice

It is almost 40 years since Title IX of the Education Amendments of 1972 became law and most administrators working in college athletics believe they understand the law. However, a recent study of college athletics administrators and coaches indicated that almost half failed a basic Title IX literacy test (Staurowsky & Weight, 2011). Title IX is most often referenced relative to participation opportunities for women in athletics programs. However, inasmuch as the legislation pertains to all educational institutions that receive federal funding, it is designed to protect equal opportunities for both genders in all educational programs. Accordingly, Title IX has provided ground for causes of action not only on the basis of unequal playing opportunities, but for protection against sexual harassment, pregnancy discrimination and employer retaliation. This article focuses very narrowly on the first requirement of the 1975 Regulations (34 C.F.R. Part 106.41), that athletically related financial assistance be allocated in proportion to the numbers of male and female students participating in intercollegiate athletics.

It is not surprising that the majority of athletics administrators are unclear about Title IX, as confusion regarding the practical application of the law has existed from the time of its enactment. In 1975, the U.S. Department of Education (then the Department of Health, Education, and Welfare) issued Regulations (34 C.F.R. Part 106.41) that provided more clarity to college and university athletics programs of the expectations in providing equitable opportunities for female and male athletes under Title IX. The Regulations required educational institutions that received federal funding to provide athletics scholarships proportionately for men and women, to provide benefits and treatment in athletics program components equivalently, and to

provide equal athletic opportunity to both sexes [34 C.F.R. Part 106.41(c)(1-10)]. In order for a school to be in compliance, all three of these areas were to be satisfied, and the Office of Civil Rights (OCR) evaluated the athletics program as a whole, comparing the men's and women's programs as related to each component.

It was apparent that confusion persisted

A review of scholarships data for all NCAA Division I and II athletics programs (n=617), imported from the Equity in Athletics Data Analysis Cutting Tool provided by the U.S. Department of Education, revealed that only 24 percent of institutions were in compliance with the scholarships regulation.

after the implementation of the Regulations. Although all institutions were to be in compliance by 1978, OCR provided a Policy Interpretation in 1979 to outline the standards that it would use in assessing compliance. The Policy Interpretation was presented in three sections: scholarships; program areas; and interests and ability. Compliance with the scholarships requirement is a straightforward mathematical formula: the total amount of scholarship aid made available to male and female student-athletes must be substantially proportionate to their participation rates. The Policy Interpretation does not require a ratio of strict proportionality – it allows for slight variance based on legitimate, nondiscriminatory factors (such as the difference between in-state and out-of-state tuition or when a school

is establishing a new program and wants to introduce scholarship funding equally over four or five years) [45 CFR 88.37(c) and 88.4a(c)].

A review of scholarships data for all NCAA Division I and II athletics programs (n=617), imported from the Equity in Athletics Data Analysis Cutting Tool provided by the U.S. Department of Education, revealed that only 24 percent of institutions were in compliance with the scholarships regulation. For purposes of this study, compliance was narrowly defined as a differential of plus or minus two percent of the percentage of athletics-related grant-in-aid dollars spent on female student-athletes minus the percentage of female student-athletes. A negative proportion meant that the institution was providing too little scholarship funding for female athletes, while a positive proportion indicated that schools were providing more scholarship funding for female athletes than the amount proportionately required. Twenty-six percent of schools are under funding athletics scholarships for female student-athletes, and surprisingly, 50 percent are proportionately overfunding scholarships for female athletes.

When the data is sorted based on an institution's NCAA classification, some surprising findings were revealed. The majority of Division I Football Bowl Subdivision (FBS and formerly I-A) schools — 72 institutions (58 percent of that division) — were below the required scholarship funding for female student-athletes. The results for the Division I Football Championship Subdivision (FCS and formerly I-AA) schools were mixed: 36 schools (31 percent) were below the required scholarship funding for female student-athletes, 39 schools (33.33 percent) were in compliance, and 42 schools (36 percent) were disproportionately overfunding scholarship money on female student-athletes. However, results for Division I institutions that do

See HAVE YOU on Page 11

Court Dismisses Copyright Claim Against Georgia Athletics

A federal judge from the Middle District of Georgia has dismissed the claim of a plaintiff, who alleged that the University of Georgia and several individual defendants within the athletic department used “professional materials, music, dances, lyrics, voices, songs, and entertainment,” which the plaintiff had allegedly created, without compensating the plaintiff.

The court found, specifically, that the school was entitled to immunity, while a claim against a football game announced was dismissed as frivolous.

The claim was brought by Louis E Williams, who represented himself in the litigation. Williams alleged that he wrote a song in junior high school, Dooley Junkyard Dogs, which has been played over the past 40 years, in alleged violation of his copyright.

He named the UGA Athletics Department, Vince Dooley, Damon Evans (as UGA Athletics Director), Greg McGarity (as UGA Athletic Director), Mark Richt (as UGA head football coach), Larry Munskin (football announcer), Fred C. Davis (as UGA President), Michael F. Adams (as UGA President), and the UGA Board of Regents as defendants.

In his complaint, the court wrote that he generally states that he “demands \$30 million for the use of his professional materials, music, dances, lyrics, voices, songs, entertainments, and etc., thereby, causing him, damages and incorrigible and irreparable injuries.”

The plaintiff also claimed that he “helped Mr. Vince Dooley to have winning seasons in football” and to “become Athletics Director for a number of years” because Dooley used the plaintiff’s “professional materials.” Further, he demanded “another \$50 million for the harms, hurts, wrongs and damages and incorrigible and irreparable injuries” and claimed that the defendants are subjecting him to “cruel and unusual punishment.”

In addition to the copyright infringement, the court concluded that the plaintiff “may be attempting to state a claim against the defendants for a violation of the Eighth Amendment to the United States Constitution.”

The plaintiff moved to proceed in forma pauperis in his action, leading to the judicial determination.

“A copyright infringement claim is thus barred by sovereign immunity if brought against a state or state entity,” wrote the court, citing Nat’l Ass’n of Bds. of Pharmacy v. Bd. of Regents of Univ. Sys. of Ga., 2008 U.S. Dist. LEXIS 32116, 2008 WL

1805439, at 16 (M.D. Ga. 2008). Similarly, his Eighth Amendment claim was also barred by sovereign immunity.

The only remaining defendant, not protected by sovereign immunity, was football commentator Larry Munskin.

The court began its analysis by quoting the plaintiff’s allegations that Munskin “used” the plaintiff works until he retired by saying, while on the air: “Y’all come on and play, that, James Brown Song; Dooley Junkyard Dogs Ronnie Swope, he will hit you and he will knock you. Dooley Junkyard Dogs The Benches are Rocking and Bending. Dooley Junkyard Dogs.”

The court continued, noting that “to state a claim for copyright infringement, a plaintiff must show: ‘(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.’ *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1232-33 (11th Cir. 2010). To satisfy [the] first prong, a plaintiff must prove that the work . . . is original and that the plaintiff complied with applicable statutory formalities. *Id.* A ‘certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the

copyright and of the facts stated in the certificate.’ *Id.* (quoting 17 U.S.C. § 410(c)).”

The plaintiff did not “allege in his complaint that he has ownership of a valid copyright in any material.” He also did not allege that “he created an original piece of work, that he obtained a copyright over that work, or that defendant Munskins has somehow copied parts of that work that are original. At most, the plaintiff has alleged in a conclusory fashion that he wrote a song in junior high school, which has been played over the past 40 years, and that defendant Munskin would ask that that song be played on the radio. Even giving the plaintiff every benefit as a pro se complainant, these allegations clearly do not state a claim for copyright infringement against defendant Munskin. In other words, his complaint is based on an ‘indisputably meritless’ legal theory. *Carroll v. Gross*, 984 F.2d 392, 393 (11th Cir. 1993). As such, the plaintiff’s complaint should be dismissed as frivolous under 28 U.S.C. § 1915(e)(2)(B)(i).” ■

Louis E. Williams v. University of Georgia Athletics Department, et al.; M.D. Ga.; CASE NO. 3:10-CV-81 CDL-MSH, 2010 U.S. Dist. LEXIS 134214; 11/24/10

“A copyright infringement claim is thus barred by sovereign immunity if brought against a state or state entity,”

Court Grants Summary Judgment to University, Athletics Officials in Title IX Retaliation Case

A federal judge from the District of Hawaii has effectively dismissed the retaliation claim of the former head coach of the University of Hawaii women's basketball team, who complained of gender inequities between the men's and women's basketball programs at UH.

In granting the motions for summary judgment from both the individual defendants and UH, the court found that the individual defendants possessed governmental immunity, while UH demonstrated enough valid reasons for terminating the plaintiff.

Hawaii hired James A. Bolla in 2004. Three years later, the school extended his contract an additional four years.

In March 2008, UH hired defendant James Donovan as its new athletic director. Shortly thereafter, Donovan met with the head coaches of the various sports to discuss what they needed to make their programs successful. Bolla alleged that he told Donovan at this meeting that he wanted the women's basketball program to be put on equal footing with the men's basketball program, in compliance with Title IX. He wanted things like a secretary, more coaches, increased budget, the ability to use buses instead of cars, and summer school for the student-athletes.

Donovan claimed that, shortly after his meeting with Bolla, he began hearing complaints from student-athletes about Bolla's conduct as a coach. On April 30, 2008, Donovan appointed UH human resources specialists to do a fact-finding investigation regarding those complaints. Donovan claimed that he told Bolla about the investigation and that he was expected to cooperate.

On July 30, 2008, the specialists submitted a report to Donovan about the complaints. This report contained six letters from student-athletes detailing their complaints against Bolla and noted that some

of these complaints had been made to the previous athletic director's administration but had not been responded to. The report included some extremely complimentary descriptions of Bolla. Some of those complimentary descriptions indicated that the student-athlete complaints were really about Bolla's coaching style, which had a history of being effective.

On August 22, 2008, after reviewing the fact-finding report, Donovan issued a written reprimand to Bolla. Among other things, Donovan reviewed Bolla's offer to change a student's scholarship from an athletic scholarship to a manager's scholarship based on the student's pregnancy. Donovan informed Bolla that, even if Bolla was trying to help the student, a coach could not make such a change and that Bolla should have left the matter to the student. Donovan cautioned Bolla against further unauthorized discussions and reviews of student-athletes' medical conditions. Donovan reprimanded Bolla for inappropriate remarks concerning sexual orientation and for threatening to kick a student-athlete off the team for something her parent had said. Donovan said that, if Bolla entered the women's locker room without first checking to see whether everyone was dressed, that conduct was also improper. Finally, Bolla was reprimanded for "verbal abuse and manipulation" of student-athletes. Donovan told Bolla "that any further inappropriate and unprofessional behavior and conduct will not be tolerated. If such violations ever occur again, I will immediately take appropriate corrective action, up to and including discharge."

In January 2009, Bolla was interviewed by Dave Reardon, a reporter for a daily Honolulu newspaper. Bolla said that he spoke to Reardon in his capacity as the women's head basketball coach at UH. Bolla said that, in answer to Reardon's questions, he complained about UH's failure to provide gender equity in the women's basketball

program. However, Reardon's published articles contained no mention of that. However, he did include quotes from Bolla criticizing the lack of support.

In January 27, 2009, Donovan reprimanded Bolla for his criticism about the public comments. Bolla was told not to say anything further that could be construed as inflammatory to the general public or ultimately derogatory about the UH athletics department."

In early 2009, Donovan received a complaint from a student-athlete who said that, during a 2008 practice, Bolla kicked her in the buttocks hard enough to move her several feet.

On February 6, 2009, Donovan appointed UH human resource specialists to perform another investigation. On February 9, 2009, without yet having the written report, Donovan suspended Bolla with pay.

On or about March 5, 2009, the specialists issued a report describing the alleged kick and additionally noting that, during the course of the investigation, they had learned that Bolla had told other student athletes: "If that were me, I would have broken your f***ing arm" and "You can take that one-handed pass and shove it up your a**." Bolla was also said to have told a student that she needed to go to a psychologist and another that she should be tested for Attention Deficit Disorder.

Donovan said that he believed the 2009 report was accurate. On or about March 13, 2009, Donovan wrote to Bolla to say that, based on the report's summary of Bolla's statements and the "kick," he was concluding that Bolla had acted unprofessionally, inappropriately, and even violently. According to Donovan, because Bolla had previously been reprimanded and told that further violations would result in appropriate corrective actions, Donovan See COURT GRANTS on Page 9

From Inside Looking Out: Racism in Men's Collegiate Coaching

Continued from Page 3

collegiate athletics because they are subjects that hit close to home. In recent years, there have been repeated conversations and debate about minority coaching in the professional ranks, NFL football, college basketball, and even professional team presidents and general managers, but rarely is there any debate or mention of racism in college soccer.

There are a total of 206 programs in Men's Division I Soccer.⁴ Of those 206 programs, only 9 have African American head coaches, including West Virginia University, Cincinnati (Hylton Dayes),⁵ Providence (Chaka Daley),⁶ Yale (Brian Tompkins),⁷ Holy Cross (Elvis Comrie),⁸ Bowling Green (Fred Thompson),⁹ Howard (Michael Lawrence),¹⁰ Alabama A&M (Salah Yousif),¹¹ and FIU (Munga

Eketebi).¹² Since 2001, there have been approximately ninety-three openings for head coaching positions. Only four of those hires have gone to an African American. This is a very problematic number.

The numbers alone tell a good bit of the story. You can correlate how many African American players are actually playing college soccer in the United States with the number of African American coaches with head coach positions. Here at West Virginia University, there are only two African American players on a squad of twenty-six.¹³ That means that only 8 percent of the players at West Virginia University are African American.¹⁴ Fortunately, we already have commitments from seven African American players, so in 2009 about 25 percent of the team will be African American.¹⁵

Even though there are a good number of African Americans playing at the Division I level, African Americans are severely underrepresented from a coaching standpoint. As previously stated, only 9 of the 206 head coaches at the NCAA Division I level are African American. That represents only 4 percent. In the 2006 World Cup for the United States team, of the starting eleven players, four were African American.¹⁶ A total of four of the twenty-three players on

the roster were African American.¹⁷ Yet, at the international level, there has never been an African American head coach for the United States National Team. The fact that the United States National Team has never had an African American head coach is shocking.

At the collegiate level, in 2007, there were a total of twelve open soccer head coach hires. Of the twelve new head coaches, only two were African American hires, one of which happened to be at a predominately black institution, Howard University, which replaced a black coach. The second black coach hired in 2007 was at Florida International University.¹⁸ In 2006, there were twenty soccer head coach hires, but only one was African American: me at WVU. In 2005, there were seventeen head coach hires, but none of them were African American. In 2004, there were eleven new soccer head coach hires, but only one was African American: Fred Thompson at Bowling Green.¹⁹ In 2003, there were eleven hires, but none were African American. In 2002, ten hires and, again, none were African American. In 2001, there were twelve hires, and only one of them was African American: Hylton Dayes at Cincinnati.²⁰ Only 4 percent of the new head coach hires over the last seven years have gone to African Americans. I repeat, out of the ninety new head coach hires over the past seven years, only four were new black head coaches. Last year

4 NCAA Sports Sponsorship: Division I Men's Soccer, NCAA.org, <http://web1.ncaa.org/onlineDir/exec/sponsorship> (last visited Sept. 10, 2010).

5 Men's Soccer: Roster: Head Coach: Player Bio: Hylton Dayes, GoBears.com, http://gobearcats.cstv.com/sports/m-soccer/mtt/dayes_hylton00.html (last visited Feb. 21, 2009).

6 Men's Soccer: Meet the Team: Coaches: Head Coach: Chaka Daley, Friars.com, http://friars.cstv.com/sports/m-soccer/mtt/daley_chaka00.html (last visited Feb. 21, 2009).

7 Men's Soccer: Roster: Coaches: Head Coach: Brian Tompkins, YaleBulldogs.com, http://yalebulldogs.cstv.com/sports/m-soccer/mtt/tompkins_brian00.html (last visited Feb. 21, 2009).

8 Men's Soccer: Elvis Comrie, GoHolyCross.com, http://goholycross.cstv.com/sports/m-soccer/mtt/comrie_elvis00.html (last visited June 30, 2009).

9 Men's Soccer: Fred Thompson, BGSUFalcons.com, http://bgsufalcons.cstv.com/sports/m-soccer/mtt/thompson_fred00.html (last visited Feb. 21, 2009).

10 The Official Site of Howard Athletics, HowardUniversity.com, http://www.howard-bison.com/athletics/staff/bios/lawrence_michael (last visited July 9, 2009).

11 Salah Yousif, Head Men's Soccer Coach, Ala-

bama A&M Athletics, <http://aamusports.com/staff.aspx?staff=13> (last visited July 19, 2009).

12 Men's Sports: Men's Soccer: Coaching Staff: Munga Eketebi, FIUSports.com, http://www.fiusports.com/SportSelect.dbml?DB_OEM_ID=11700&KEY=&SPID=4758&SPSID=49051 (last visited July 12, 2009).

13 Men's Soccer: 2007 in Review, MSNSportsnet.com, <http://www.msnsportsnet.com/content/msoccer5.pdf> (last visited Feb. 21, 2009).

14 Id.

15 Men's Soccer: Roster, MSNSportsnet.com, <http://www.msnsportsnet.com/page.cfm?sport=msoccer&show=roster> (last visited July 12, 2009).

16 World Cup 2006 Profile, SI.com, http://sport-sillustrated.cnn.com/2006/soccer/specials/world_cup/2006/profile.usa/index.html (last visited July 11, 2009).

17 2006 United States World Cup Roster, DocSports.com, <http://www.docsports.com/world-cup/roster/2006-usa.html> (last visited Feb. 21, 2009).

18 FIU Names Munga Eketebi as Head Men's Soccer Coach, FIUSports.com, http://www.fiusports.com/ViewArticle.dbml?DB_OEM_ID=11700&ATCLID=897636 (last visited Feb. 21, 2009).

19 Bowling Green State U: New Men's Soccer Coach Brings Hope to Bowling Green, Accessmylibrary.com, http://www.accessmylibrary.com/coms2/summary_0286-13160337_ITM (last visited Jan. 25, 2009).

20 See supra note 5.

From Inside Looking Out: Racism in Men's Collegiate Coaching

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there were only a total of eight African American head coaches, three of whom were in the NCAA tournament. There are a total of forty-eight spots in the NCAA tournament for men's soccer, and three of the eight African American head coaches took their teams to the tournament.

The truth is that there is a major problem with racism in college soccer, but it is not high on the list of priorities for many, though it is occurring across the board. It is important that people know that there are quality black coaches. Keep in mind that when I took over this program at WVU, it was a mess. There were many things, aside from coaching, that went into turning this program around.

Last year our team went 15–3–3 and 9–0–1 in the Big East.²¹ We had the most wins for the men's soccer team in the history of West Virginia University.²² No

other team had ever gone undefeated in the Big East. We were Big East regular-season champions. I was privileged enough to win the national Coach of the Year award as well as the Big East Coach of the Year, amongst others.²³ With that being said, from a salary standpoint, I do not earn even the average of what rival Big East coaches make. I like to think that I have achieved the merit and qualifications required for a head coach position.

I would be remiss to fail to point out that I think that administrators know these salary numbers because I believe they do.

Even though I have hope that the successes of myself and other minority coaches will open the doors for others, it is hard not to be pessimistic. I think that if we continue to have opportunities to talk and create forums, it helps advance the changes that we are trying to make, and it helps bring a spotlight on the problems that we have in collegiate athletics. I like to think that the good in people will eventually outweigh

the numbers that I have shared with you today. I am confident that the successes of our good black coaches will be rewarded at some point. ■

Court Grants Summary Judgment in Title IX Retaliation Case

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terminated Bolla.

Bolla sued, claiming he was punished more severely than other coaches for similar conduct. He argued that the individual Defendants violated his First Amendment rights by retaliating against him for his exercise of his Title IX rights. Bolla argued that the school had violated Title IX in retaliating against him for his gender inequity complaints.

The first argument failed for a couple of reasons, the most significant of which may have been that **the individual defendants were entitled to qualified immunity.**

The doctrine of qualified immunity protects government officials from “liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known,” wrote the court, citing *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009). “Bolla’s factual allegations fail to make out a violation of a constitutional right.”

As for the claim against UH, the court found for the plaintiff since, “Bolla fails to raise a genuine issue of fact as to whether UH’s proffered reasons for terminating him were pretextual.” ■

James A. Bolla v. University Of Hawaii et al.; D. Hawaii.; CIV. NO. 09-00165 SOM/LEK; 2010 U.S. Dist. LEXIS 134143; 12/16/10

Attorneys of Record: (for plaintiff) R. Steven Geshell, LEAD ATTORNEY, Honolulu, HI. (for defendants) John-Anderson L. Meyer, Kenneth S. Robbins, Sergio Rufo, LEAD ATTORNEYS, Robbins & Associates, Honolulu, HI.

21 See Men's Soccer: UNC Greensboro 2, West Virginia 1, NCAA.com, <http://www.ncaa.com/sports/m-soccer/spec-rel/111506aal.html> (last visited Jan. 25, 2009); see also No. 6 Men's Soccer Makes Home Debut against No. 20 West Virginia Friday Night, TheACC.com, <http://www.theacc.com/sports/m-soccer/spec-rel/090607aaa.html> (last visited Sept. 10, 2010).

22 See Men's Soccer: UNC Greensboro 2, West Virginia 1, *supra* note 21.

23 See LeBlanc's West Virginia Poised to Become Div. I Power, NSCAA.com, Black Soccer Coaches Committee, <http://www.nscaa.com/downloads/Fall2008Newsletter.pdf> (last visited July 12, 2009); see also Marlon LeBlanc, WVUstats.com, http://www.wvustats.com/msoccer/coach.php?team_id=308&person_id=35 (Jan. 25, 2009).

Settlement Reached Between Colorado, Former Coach

The University of Colorado has reached a settlement with former women's basketball coach Kathy McConnell-Miller in which she will receive an additional \$371,280.52. McConnell-Miller, who was fired in March of 2010, had already received \$203,142 from the school upon her termination.

The Boulder Daily Camera reported that McConnell-Miller's claim to the additional settlement money arose from an allegation that the university treated the women's basketball program different than the men's program in violation of Title IX.

A joint statement by McConnell-Miller and the university read, “The University of Colorado, Department of Athletics has agreed to pay former head women's basketball coach Kathy McConnell-Miller the amount of \$371,280 in final compensation.

The University and Coach McConnell-Miller had initially disagreed about the amounts of compensation owed under her contract for employment, but were able to amicably resolve their differences. The parties have agreed not to further discuss their agreement.”

News Briefs

Woman Sues TCU for Fraud over Recruitment of Athletes

A student, who claimed she was sexually assaulted by student athletes, has sued Texas Christian University, claiming that it ignored the criminal records, unsavory behavior and academic failings of the athletes, putting her at risk. Specifically, the plaintiff alleged that the university engaged in fraud by allegedly telling her it didn't recruit "miscreant" athletes. In a statement, George Haratsis, a Fort Worth attorney who is representing TCU, said: "We strongly disagree with the plaintiff's position that TCU acted fraudulently in any communication with the plaintiff and expect to establish that point in court. Once the incident that is the basis of this lawsuit came to the attention of TCU officials, TCU's response was immediate and forcible. The three students involved were immediately removed and ultimately expelled from the university. The university also provided appropriate care and support to the female student through its victim's advocacy program and cooperated with the local authorities."

Emmert Takes Firm Stand on Compensation for Student Athlete Issue

NCAA's President Mark Emmert told an audience at a Town Hall Los Angeles luncheon college athletes will not be compensated as though they were professionals during his tenure with the association. "They are student-athletes," he said. "They are not our employees, they don't work for us. They are our students, so we don't pay them." He added that the experience of being a college athlete and getting an education should be enough of a reward. "They get to have experiences that very few students get a chance to enjoy," he added. "If they take full advantage of it, they will have spectacular opportunities in life."

Coach Bans Twitter after Player Makes Negative Comments

Mississippi State University basketball coach Rick Stansbury banned his team from using Twitter last month after players posted critical comments on the social networking site following a loss. The offending comment was made by starting guard Ravern Johnson, who wrote: "starting to see why people Transfer you can play the minutes but not getting your talents shown because u watching someone else wit the ball the whole game." Johnson and another player also criticized fans, according to the Jackson Clarion-Ledger. Stansbury later explained his decision in a statement: "Some young men just don't understand once they put something out there for everyone to see, there is no taking it back."

Domain Owner Sues Pac-10 Conference

The owner of the Pac12.com domain name, Austin Linford, has sued the Pac 10 Conference in an effort to keep his domain name. The suit, which is available at <http://domainnamewire.com/wp-content/pac12-pac10-lawsuit.pdf>, was filed after the conference reportedly filed a UDRP complaint (<http://domainnamewire.com/wp-content/pac12-wipo-filing.pdf>) with the World Intellectual Property Organization to get the domain name Pac12.com. Linford is asking for a declaratory judgment of non-infringement. In addition to owning Pac12.com, Linford has registered Pacific12.com and PACtwelve.com.

Cal to Reinstate Some Sports, Others Remain Shuttered

The University of California at Berkeley has announced that men's rugby, women's lacrosse and women's gymnastics have raised enough money and will retain varsity status at the school, while baseball and men's gymnastics failed to meet their fund-raising objectives and will be shuttered starting with the 2011-12 season. Chancellor Robert Birgeneau had announced in September that all five programs would be shuttered. But after UC Berkeley officials received \$12 million to \$13 million in pledged donations to reinstate the rugby, lacrosse and gymnastics programs, enough money to fund the next seven to 10 years, the school reconsidered. "This was always about our ability to fund the program," said Athletic Director Sandy Barbour during a press conference. "This was about getting our expenses down to a point where we had a financial model that fit with what the university was providing us in terms of institutional support."

University of Oklahoma Reports Secondary Violations

The University of Oklahoma has acknowledged that coaches within the football program violated NCAA rules pertaining to off-season workouts. Specifically, the school reported in a letter to NCAA Director of Secondary Enforcement Chris Strobel that the assistant coaches had improperly questioned players about their lack of participation in voluntary offseason workouts, and that some players had been working out more than the allowed eight hours per week. Reportedly, the university started the investigation after a player refused to sign a weekly practice log as well as provided school's compliance director with a recording of a coach asking why he had missed a voluntary workout. Other violations occurred when football players, in addition to their off-season workouts, participated in weekly Pilates sessions, which exceeded the NCAA's eight-hour weekly limit on off-season workouts. ■

Scholarship Equity

Have you Reviewed Athletics Related Financial Aid Ratios?

Continued from Page 5

not sponsor football (formerly I-AAA) were dramatically different. Only six schools (6 percent) were below the required scholarship funding for female student-athletes, and 75 institutions (more than three-quarters at 77 percent) were over awarding scholarship money to female student-athletes proportionately when compared with men.

It might be easy to identify football as the problem for cases when there is an under funding of female scholarships; however Division II schools with football were also proportionately over funding women's scholarships. Eighty five institutions (55.56 percent) spent more scholarship money than required on female student-athletes, 38 institutions (24.84 percent) were in compliance, and 30 institutions (19.61 percent) were below the required scholarship funding for female student-athletes. This trend continues at Division II schools without football: 85 institutions (66 percent) spent more scholarship money than required on female student-athletes, 27 institutions (21 percent) were in compliance, and 17 institutions (13 percent) were under funding scholarships for female student-athletes.

With more than three-quarters of institutions (76 percent) out of compliance with the scholarships regulation, is there a problem? It's fairly easy to say that the 26 percent of institutions that are under funding athletics scholarships for female student-athletes have a problem. But what about the 50 percent of institutions that are over-funding athletics scholarships for female student-athletes? Neither the Regulations nor the Policy Interpretation provides any guidance for this situation. In *Gonyo v. Drake University* (1993), the plaintiffs (members of the wrestling team) argued that they were being discriminated against because a disproportionate amount of scholarship funding was spent on female student-athletes in violation of Title IX. Drake countered that

the university was trying to encourage greater athletic participation by women through offering more scholarship money to women because women had historically been (and were still) underrepresented in their athletics program. The court granted summary judgment to the university. However, before all of the schools who are over-funding women's scholarships believe this practice is justified by the *Gonyo v. Drake University* case, it is important to note that the court's opinion relative to scholarships was only dicta and not precedent. The holding in the case relies on the participation opportunities/effective accommodation requirement and the three-part test. According to OCR, the total amount of scholarship aid made available to male and female student-athletes must still be substantially proportionate to their participation rates.

The substantial proportionality requirement for funding athletics scholarships is a pragmatic approach for providing equity for male and female student-athletes. Institutions that are under funding scholarships for female athletes need to increase scholarship funding. Institutions that are currently over funding scholarships for female athletes need to increase participation opportunities for women. Increasing non-scholarship participation opportunities will increase female student athletes overall participation rates, decreasing the relative percentage of scholarship funding to female student-athletes, thereby increasing scholarships proportionality and eliminating a potential reverse discrimination problem (e.g., *Gonyo v. Drake University*). Decreasing scholarship opportunities for women is not likely an option, as none of the institutions that are over-funding scholarships for female student-athletes are in compliance with the proportionality requirement of the three-part test measuring participation opportunities. Decreasing scholarships may decrease female student-athlete participation which would

further exacerbate a negative female-to-male ratio in proportion to the female-to-male ratio in the overall student body. Additionally, in the same way that decreasing male student-athlete opportunities in order to reach proportionality is a "disfavored practice" according to OCR guidance, decreasing female student-athlete scholarships would not serve the underlying purpose of Title IX to increase opportunities. ■

If you have any questions regarding the article, please contact Ice Miller Collegiate Sports Practice, Barbara Osborne, at barbara.osborne@icemiller.com or (317) 236-2465.

This publication is intended for general information purposes only and does not and is not intended to constitute legal advice. The reader must consult with legal counsel to determine how laws or decisions discussed herein apply to the reader's specific circumstances.

West Point Hires Corrigan As Athletic Director

Army superintendent David Huntoon announced recently that West Point has hired **Boo Corrigan** as its AD.

Corrigan, Duke University's senior associate athletic director for external affairs, replaces Kevin Anderson, who left for Maryland last October. Corrigan is the son of former Atlantic Coast Conference Commissioner Gene Corrigan.

Others who had reportedly interviewed for the job included Columbia athletic director M. Diane Murphy and Sean Frazier, Wisconsin's senior associate athletic director for operations.

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Family of Student Athlete Sues University of Mississippi

The family of an Ole Miss football player, who died after an offseason workout, has served the University with a Notice of Claim, which is a statutory prerequisite to filing a lawsuit against a public entity in Mississippi.

Bennie Abram, a walk-on junior defensive back, was participating in the first day of spring practice on Feb. 19, 2010, when he collapsed. Allegedly, athletic trainers treated him on the field before he was taken to Baptist Memorial Hospital in Oxford, Miss. He was reportedly conscious when he arrived at the hospital, where he went into cardiac arrest and died six hours later.

An autopsy reportedly showed that the 20-year-old's death was due to complications from sickle cell trait (SCT) with exertion as well as a contributing factor of cardiomegaly, an inflammation of the heart.

The Houston-based Lanier Law Firm, which is representing the plaintiff, noted in a statement that SCT "appears in almost 10 percent of the African-American population, and less commonly in all races.

Believed to be the leading killer of Division I football players, the condition has been linked to at least nine deaths of college athletes since 2000."

Lead attorney Gene Egdorf added that "student-athletes shouldn't be dying because of sickle cell. The only reason that it turns fatal is because someone along the way made mistakes or intentionally disregarded the well-established guidelines for training, monitoring, and treating these student-athletes."

The university issued the following statement from Athletic Director Pete Boone:

"The tragic loss of Bennie was immeasurable to not only the Abram family, but also the Ole Miss family. The well-being of our student-athletes has and always will be our highest priority. We reviewed all the actions taken by our medical professionals, athletic trainers and coaches and found that medical protocol and emergency action plans complied with the Best Practices at that time for such cases. We are surprised by this letter from the attorneys and are

confident that the facts confirm that we followed the proper procedures."

Sports lawyer Christopher Fusco of Calahan & Fusco, LLC recently opined that "the letter from The Lanier Law Firm goes far beyond what information Mississippi law requires a Notice of Claim to contain. It is obviously designed to paint Ole Miss and its coaching staff in a negative light through the media.

"However, if some of the allegations are true, Ole Miss could be legally liable for Abram's death. Abram's family must show that Ole Miss departed from the standard of care that it was required to follow for athletes with SCT.

"On the other hand, just because Abram died during a football workout does not make Ole Miss or anyone else responsible. Assuming Abram was advised of his diagnosis (and there is no indication he wasn't), he chose to play football, an inherently intense sport. If the coaching staff followed NCAA guidelines and the applicable standard of care, it satisfied its duty to Abram." ■

Personnel Moves

Judy Van Horn, a Frank Kara Leadership Award winner and associate director of compliance and senior women's administrator at Michigan, was recently named the senior associate athletic director/senior woman administrator at University of South Carolina.

Merlene Aitken has been named North Carolina A&T's interim Associate Director for Compliance. Aitken's previous experience includes serving as Assistant Athletics Director for Compliance at the University of Kansas and the Director of Compliance at the University of Washington.

Loren "Randy" Geller was appointed University of Oregon's general counsel over the winter. Promoted from his position as deputy general counsel, Geller was deemed the best candidate after a nationwide search

was conducted to find a replacement for former general counsel Melinda Grier.

Former University of Georgia athletic director **Damon Evans** was reportedly hired by a Boston marketing. The firm's chief executive officer is reportedly a UGA alumnus and donor. Evans' resignation from Georgia athletics came as a result of a controversial DWI arrest in July.

Florida Gulf Coast Director of Athletics Ken Kavanagh has announced that **Shelana Poindexter** has been named the Director of Compliance at the school. Poindexter takes over the compliance role from Jessica Rouse, who now serves as FGCU's Athletic Academic Coordinator. Poindexter served the past two seasons as the Associate A.D. for Compliance and Student-Athlete Welfare at

Georgian Court University, while also having the role as Senior Woman Administrator.

West Virginia University's first athletic compliance director, **Roger Jeffries**, has passed away. Jeffries joined the WVU athletic staff in 1979 and was promoted to assistant athletic director for development in 1982. Seven years later, he was named the school's first compliance director when Ed Pastilong was named AD.

University of California, Riverside Athletic Director **Stan Morrison** will retire effective August 15, 2011. Morrison is nationally known for his work on the NCAA Men's Basketball Committee – and for his almost 50 years of service to collegiate student-athletes as a coach, athletics administrator, and academic mentor. ■