



Student Golfer's Lawsuit Lands In The Rough

By Rich Meneghello (Portland, OR)

A school's right to control student membership in extracurricular activities was upheld recently as a North Carolina judge dismissed a breach-of-contract lawsuit brought by a collegiate golfer expelled from the school's team. The story received national media attention because it involved a prestigious school (Duke University), the son of a famous politician (Andrew Giuliani, son of former NYC Mayor and Presidential candidate Rudy Giuliani), and a set of facts and allegations more befitting a soap opera than a college campus. Here's a summary:

In 2004, the head coach of Duke University's golf team recruited Andrew Giuliani to attend Duke and play on his nationally competitive team. Claiming that he was promised lifetime access to the school's athletic facilities, Giuliani chose Duke from among several other collegiate opportunities and joined the golf team, although he was not given a scholarship.

Golfer's Shots (On And Off The Course) Leave Something To Be Desired

It's clear that Head Coach Orrin Vincent and Giuliani did not get along. In early 2008, a series of unfortunate events occurred that led Coach Vincent to expel Giuliani from the team. The University claims that Giuliani threw an apple at a teammate with such force that it "exploded" when it struck his face, while Giuliani claims he and the teammate were engaged in mutual horseplay and that the apple merely "glanced" off his face.

Giuliani claims that he once casually flipped his putter toward his golf bag, and also leaned on his driver and accidentally broke it. The University's version is that Giuliani slammed his putter against his bag with such force that it shattered his driver, which Giuliani then replaced with another club during a round of play after lying to his coach, a violation of the rules which should have led to disqualification.

During a team-bonding football game, the University claims that Giuliani injured a teammate; Giuliani responded by saying he was simply playing harder than others. The University also claims that Giuliani verbally abused and physically confronted a coach, consistently violated the rules and integrity of the game (for example, walking ahead of his playing partner during a round), and "gunned" his car's engine outside of a private golf course thereby embarrassing the school.

"How About A Mulligan, Coach?"

In February 2008, Coach Vincent suspended Giuliani from the team because of his conduct and the negative impact his behavior had on his teammates. He offered to restore Giuliani's eligibility to play if and when all of his teammates supported Giuliani's reinstatement – a requirement that Giuliani's attorney characterized as "something out of *The Lord of the Flies*."

According to the University, that unanimous support never materialized. According to Giuliani, all of his former teammates confided to him privately that they supported him, but Coach Vincent instructed his former teammates to "back off" and limit their interactions with Giuliani. Several months later, Coach Vincent once again extended Giuliani the opportunity to rejoin the team for the 2008-09 school year should his teammates unanimously agree to his return, but the University alleges that five of the six returning members said no.

"Fore!" – Golfer Takes His Best Swing In Court

Giuliani appealed to University administrators to overturn Coach Vincent's decision and allow him to rejoin the team, but the school's General Counsel and Athletic Director upheld the coach's decisions, believing that membership on the team was "within the significant authority of the coach." Giuliani filed a lawsuit against the University and Coach Vincent in federal court, alleging, among other claims, breach of contract and a breach of good faith and fair dealing. He claimed that the recruiting pitch made to him was a verbal contract that had since been breached.

More importantly, he claimed that a series of documents issued by the school formed legally-binding promises which had been breached: the University's Student-Athlete Handbook, the Athletic Department's Policy Manual, and the University's Student Bulletin. Giuliani sought compensatory damages, punitive damages, and a ruling allowing him to use Duke's athletic facilities for the remainder of his life.

Judge Tees Off On Student

On May 19, 2009, Magistrate Judge Wallace Dixon issued a recommendation that Giuliani's lawsuit be thrown out. In an opinion laced with golf analogies and quotes from the movie "Caddyshack," Judge Dixon ruled that Giuliani's legal theory "slices far from the fairway." Under state law, just as an employee handbook or policy manual does not create a legal contract between employer and employee, the same holds true for non-binding student-policy manuals. Giuliani's reliance on the policy manuals to create a breach of contract lawsuit "is a swing and a miss."

One of the primary reasons for this ruling is the fact that the manuals were unilateral and could be altered at any time, as expressly stated in the manuals themselves. By this same reasoning, the judge dismissed the breach-of-good-faith and fair-dealing claim, writing that "this shot also lands in the drink," since there can be no such valid claim without an underlying contract. Plaintiff also brought other related claims, but they were summarily dismissed as "shanks" and "slow play" by the judge.

Lessons From The Greens

This case reinforces some valuable lessons for educational institutions. First and foremost, it serves as a great reminder that schools have broad rights to control student membership in their extracurricular activities. Schools should not feel hesitant to shape clubs and teams as they see fit. Second, all schools should review their policy manuals to ensure that they contain important language informing students that the manuals do not serve as binding contracts, and can be altered at any time without advance notice.

Finally, schools may want to consider having participants in extracurricular activities sign an acknowledgement confirming these important principles, thereby further reinforcing the school's ultimate authority in such matters.

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New Law, New Recordkeeping Headaches

By George Reeves (Columbia)

Under recently-enacted legislation, educational institutions may find themselves defending discrimination claims arising from tenure or other types of employment decisions made long ago.

The Lilly Ledbetter Fair Pay Act expands the time period in which employees can pursue discrimination claims related to employment compensation. The Act is named for Lilly Ledbetter who sued Goodyear Tire and Rubber Company, claiming that she was paid less money than equally or lesser qualified men over a span of nearly 20 years. Goodyear argued that Ledbetter's lawsuit was time-barred since the time limits for filing a charge of discrimination had long expired. The U.S. Supreme Court ruled in favor of Goodyear, holding that the time limits on Ledbetter's claim began to run when her employer made the allegedly discriminatory compensation decision.

Congress responded by enacting the Ledbetter Fair Pay Act, which expressly overrules the Supreme Court's decision. An unlawful employment practice occurs not only when an employer makes the initial allegedly discriminatory compensation decision but also "each time wages, benefits, or other compensation is paid." That means that, under this Act, each individual paycheck can now be considered a distinct unlawful employment act and restart the limitations period. The Act applies to claims of discriminatory compensation based on gender, age, race, disability and other protected classes.

Tenure Decision As A Discriminatory "Other Practice"

In the months following the enactment of the law, courts across the country have begun demarcating the scope of its protections. The Act provides that a violation occurs when a person becomes subject to a discriminatory compensation decision "or other practice." Two recent court decisions interpret "other practice" in ways schools will need to become familiar with.

In the first, a physician was offered a non-tenured position with a state university in 2002. At the time he was offered the position, he was promised that he would be recommended for tenure after one year and would be "fast tracked" to a tenure position. After serving as an assistant professor for one year, the doctor was not proposed for tenure.

In April of 2007, the university notified the doctor that his appointment as an assistant professor would not be renewed at the end of its term. In 2008 he sued, alleging that he had been discriminated against on the basis of age, race and religion. The university argued that because the alleged discrimination took place several years prior to his filing a charge of discrimination with the EEOC, the doctor's claims were time-barred and should be dismissed.

The court rejected the university's argument in light of the recently enacted Fair Pay Act. The court reasoned that, while his claims of wage discrimination were based on the university's decision not to propose him for tenure several years prior to his charge of discrimination, the professor's claim was not time-barred because that decision impacted his later compensation. The rationale behind the court's decision was that the wage-discrimination claim presumably included, or was tainted by, the university's earlier refusal to consider him for tenure. *Rehman v. SUNY*.

In a similar decision, a professor was denied tenure by a university in 2004, but did not file a charge of discrimination until 2006. The university sought to have her later lawsuit dismissed on the ground that she filed her charge well after the EEOC's limitation period expired.

The court disagreed, holding that the denial of tenure qualified as a "compensation decision" or "other practice" within the Fair Pay Act, because it affected compensation. As in the *Rehman* decision, the court allowed what would otherwise be a time-barred claim – not because of the act of discrimination itself, but because of the adverse affect of the earlier alleged discrimination on her later wages. *Gentry v. Jackson State*.

What Does This Mean for Your School?

The new law is primarily a procedural change, and does not impose any new substantive requirements. As a best practice you should already be frequently evaluating compensation and maintaining good records to justify compensation decisions. But as this Act gains notoriety, you should ensure that you have established appropriate guidelines for *all* compensation decisions, including those, such as tenure decisions, that will have an impact in the future.

The Act will also have a significant impact on recordkeeping. Because the Act references benefits and is not strictly limited to paychecks, even inactive employees on leave, retirees, or any other inactive or former employees who still receives some form of compensation from the organization, may be entitled to the Act's protections. That means you will need to maintain records of all compensation and benefits – including promotions, bonuses, stipends, for example – as well as tenure decisions and performance evaluations for these individuals as far back as possible.

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