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College Athletics Whistle-Blower Protection

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The National Collegiate Athletic Association (NCAA) bases its intercollegiate athletics governance principles on the concept of institutional control. The NCAA utilizes Form 16–2 to enable member institutions to comply with its rules and maintain institutional control. NCAA rules require intercollegiate athletics employees to report any NCAA violations and verify compliance with this mandate by signing Form 16–2 on an annual basis. Therefore, Form 16–2 is used as a tool to help maintain institutional control. However, neither the NCAA rules nor current legal remedies adequately protect athletic department personnel or university employees from the negative repercussions of whistle-blowing, which include termination, death threats, and other severe penalties. Given the severity of whistle-blower repercussions, additional protections are needed. Therefore, the purpose of this paper is to review the history of college athletics whistle-blower legal disputes and make recommendations that improve college athletics whistle-blower protection.

Keywords: whistle-blowing, NCAA, ethics, sport governance

The National Collegiate Athletic Association (NCAA) bases its compliance principles on the concept of institutional control. This concept requires university presidents to be responsible for NCAA rules compliance at their institutions (Kobritz & Levine, 2013; NCAA, 2016c). To further the principle of institutional control, the NCAA mandates that all intercollegiate athletics employees who work at the institution for more than a year sign Form 16–2 declaring they have reported any NCAA violations that occurred in the previous year. NCAA compliance and commitment to institutional control is dependent upon member institutions, by and through their employees, self-reporting rules violations. However, NCAA rules

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do not provide retaliation protections for employees who disclose those violations consistent with Form 16–2. In addition, despite numerous state and federal laws protecting whistle-blowers in a variety of business and industry segments, history shows intercollegiate athletics whistle-blowers are provided with insufficient legal protections. Reporting NCAA violations can lead to termination, death threats, suicide attempts, and other harms. Therefore, the purpose of this paper is to review the history of college athletics whistle-blower legal disputes and make recommendations that improve college athletics whistle-blower protection.

The first section of this paper examines the NCAA compliance and enforcement framework. Next, the complex fabric of available whistle-blower protections under federal, state, and common law are presented together with an examination of whistle-blower litigation in intercollegiate athletics. Lastly, this paper presents recommendations for implementing whistle-blower protections at all NCAA institutions either through current NCAA governance structures or through federal legislative and administrative avenues.

Overview of NCAA Principles of Compliance and Enforcement

The NCAA was formed over a century ago to combat dangers and brutality on the football field, professionalization, commercialization, and corruption (Kobritz & Levine, 2013). Many of these same issues persist to this day (Scales, 2009). Because membership in the NCAA is voluntary, each member willingly submits to the authority of the NCAA for all aspects of governance, including rulemaking, investigation, and enforcement (Potuto, 2010). Kobritz and Levine (2013, p. 32) posit that the NCAA's role now "vacillates between championing amateurism for its members and embracing commercialism, thus belying its original intention." Today, the NCAA, which consists of over 1,000 member institutions, is headquartered in Indianapolis, Indiana. Members include universities, colleges, conferences, and other related entities that are split into three divisions (NCAA, 2017). Researchers have been critical of the size of the NCAA, suggesting the number of actors involved make it especially difficult to reform (Benford, 2007). The NCAA Division I Manual refers to these bylaws as NCAA legislation, and thus the NCAA functions in a quasi-governmental manner (NCAA, 2016c).

Institutional Control

NCAA governance and legitimacy is based on the principle of "institutional control." This fundamental notion states that "it is the responsibility of each member institution to monitor and control its athletics programs, staff members, representatives and student-athletes to ensure compliance with the Constitution and bylaws of the Association" (NCAA, 2016b, p. xii). Institutional control means university presidents and chancellors must foster an environment of accountability.

Executive leadership is responsible for the acts of not just those within the athletic department but also of other actors who may interact with the university, including boosters. Researchers have previously questioned whether university presidents have taken this onerous duty of institutional control seriously (Dowling, 2001). Enforcing each of the NCAA rules and bylaws is nearly an impossible task,

as no person can control every aspect of an athletic program by oneself (Marsh & Robbins, 2003; Weston, 2011). In the event university leadership violates NCAA rules, the principle of institutional control holds the offending party or parties accountable to face the consequences pursuant to mechanisms as codified in NCAA legislation.

Importance of Self-Reporting of Violations to Enforcement and Compliance

Essential to the NCAA's plan to provide effective oversight for the integrity of intercollegiate athletics is the requirement imposed on institutions and athletic department personnel to self-regulate and self-report violations. The NCAA requires all members of an intercollegiate athletics staff to annually sign Form 16–2 (or the "Form"). The Form requires *all* intercollegiate athletic department staff members to certify that the institution is in compliance with all NCAA bylaws (NCAA Form 16–2, 2016). Specifically, NCAA Form 16–2 states, "By signing and dating this form, you certify that you have reported through the appropriate individuals on your campus to your chancellor/president *any knowledge of violations* of NCAA legislation involving your institution" (emphasis added; NCAA Form 16–2, 2016). Thus, the Form requires athletic department personnel to disclose any knowledge of NCAA violations concerning that individual's member institution.

By signing the Form, the individual represents that he or she has reported through the appropriate individuals on the employee's campus to the chancellor/president any knowledge of violations of NCAA legislation involving his or her institution (NCAA Form 16–2, 2016). All athletic department personnel must sign the same Form by September 15 of the following year. Failure to do so could result in the institution facing substantial penalties; however, there are few incentives for employees to actively disclose these violations absent protections for them. Big 12 commissioner Bob Bowlsby said it is both easy and advantageous for intercollegiate athletics programs to cheat because the NCAA struggles with rules enforcement (Trotter, 2014). Oklahoma State University football coach Mike Gundy said there are teams that consider the risk to be worth the reward (Trotter, 2014).

The Form's reporting obligations potentially place intercollegiate athletic department personnel in a difficult position should staff members become aware of an NCAA violation during a given year. Athletics staff who are aware of violations may choose not to disclose them and ultimately submit a false Form 16–2, which, if discovered, would threaten their future employment. Alternatively, they may choose to disclose the violation and become a whistle-blower with few safeguards from retaliation and potential threats to their career. Thus, this paper identifies the need for intercollegiate athletics whistle-blower protection, which would create a safe environment for reporting NCAA rules violations and encourage institutional control.

Whistle-Blower Protection Background

The term *whistle-blowing* does not refer to an event but rather to a process that takes into account a person's legal and moral compass, attitudes of other actors, both internal and external, and the potential discloser's financial and emotional

support system (Near & Miceli, 1985, 1995). Whistle-blowing is the disclosure by a current or former employee of "illegal, immoral or illegitimate practices under the control of [his or her] employers, to persons or organizations that may be able to effect action" (Near & Miceli, 1985, p. 4). Wendt (2014) views whistle-blowing as more concerning the law and defines the term as "employees who report an employer's illegal conduct or who refuse to commit illegal acts" (p. 90). De Maria (2008) considers a whistle-blower "a concerned citizen, totally or predominately motivated by notions of public interest, who initiates of her or his own free will an open disclosure about significant wrongdoing in a particular organizational role" (p. 866). Thus, the term may take different meanings. Generally speaking, however, whistle-blowing concerns matters of law, justice, and societal good.

Public sentiment concerning whistle-blowers is mixed. Depending on the segment of society, a whistle-blower's disclosure or general acts may be met with praise, disbelief, contempt, or a variety of other emotions (Hersh, 2002). More business-oriented citizens may interpret the acts of an employee attempting to expose fraud or an ethical violation as breaching that worker's duty of loyalty to the company. More societal-oriented citizens may argue whistle-blowers serve a material function of acting as a de facto watchdog who prevents injury from being committed against the public as a whole (Lewis, 2011).

Multiple factors impact a person's motivation to become a whistle-blower. Some factors are intrinsic, such as a person's motivation to take action, perception concerning the alleged wrongdoing, and their individual characteristics (Near & Miceli, 1985). Intrapersonal and interpersonal factors (Gundlach, Douglas, & Martinko, 2003) interact with external work-related factors such as a worker's perceived supervisor support, organizational loyalty or commitment, and other specific variables such as managerial status, pay grade, and interoffice dynamics (Caillier, 2013). Each factor is then weighed in a holistic analysis and the actor decides the prudent course of action. Ultimately, a whistle-blower is generally less concerned about filing an actual lawsuit and more focused on accomplishing organizational change (Near & Miceli, 1995, 2008). As Trotter (2014) observed, within intercollegiate athletics it can be easy, advantageous, and worth the risk to avoid rules compliance, which may suggest the ethical culture of college athletics organizations are ineffective at encouraging whistle-blowing. Kaptein (2011) examined the influence of the ethical culture of an organization on employees' responses to different types of observed wrongdoing. Interestingly, external whistle-blowing reflected weakness in the ethical culture of the organization, whereas internal whistle-blowing was positively related to several dimensions of ethical culture (Kaptein, 2011). In addition, athletics employees may experience a heightened sense of loyalty to the organization such that, if the organizational culture does not encourage reporting of misconduct, it could lead employees to conclude that such reporting would not be loyal to or consistent with the organization's interests.

Whistle-blowers often face retaliation as a result of their activities. Rehg, Miceli, Near, and Scotter (2008) define retaliation as the "undesirable action taken against a whistle-blower—in direct response to the whistle-blowing—who reported wrongdoing internally or externally, outside the organization" (p. 222). Employers may retaliate against a whistle-blower to discourage future whistle-blowing and reestablish organizational structure (Near & Miceli, 2008, citing Weinstein, 1979). Whistle-blowers may face retribution from both organizational insiders as well as

outside groups (Richardson & McGlynn, 2011). Employer and outsider retaliation may result in a loss of job, career, material goods, or even one's family (Alford, 2007). The emotional reaction from whistle-blowing profoundly impacts the participant and can last for years (Alford, 2007). However, whistle-blowers may have additional statutory and common-law protections as noted below.

Federal Whistle-Blower Protections

Several federal laws were created to foster whistle-blowing and protect whistle-blowers from retaliation. The False Claims Act (2010), which dates back to the days of the Civil War, was enacted to expose contractors who defrauded the federal government. It empowers others to file a false claim against a private party on behalf of themselves as well as the government (False Claims Act, 2010). Protection extends to those bringing the suit as well as anyone investigating or assisting the suit on behalf of the government. If successful, the person exposing the conduct is entitled to a percentage of the award. This statute, as amended, now extends to private citizens in specific areas. Other federal statutes protect whistle-blowing but limit possible beneficiaries.

The Whistle-Blower Protection Act of 1989 prohibits the federal government from retaliating against federal employees due to disclosures concerning certain activities. The federal law protects federal employees who reasonably believe the information disclosed evidences a violation of law or a gross waste or mismanagement of funds, along with several other dangers to the public (Whistle-Blower Protection Act of 1989). While the Whistle-Blower Protection Enhancement Act of 2012 expanded federal employee whistle-blower protections in several fundamental ways (Wendt, 2014), it still offered little protection for those in the private sector.

Several federal whistle-blower statutes protect individuals who disclose financial wrongdoing. In 2002, Congress passed the Sarbanes-Oxley Act (SOA), which provided special protection to individuals working within the corporate landscape to come forward and report securities fraud within publicly traded companies (SOA, 2002). This provided a whistle-blower a private cause of action in the event he or she suffered an adverse employment action as a result of the disclosure and criminalized employer retaliation (Rapp, 2012). Whistle-blower protection from employer retaliation or reprisals was provided so long as the protected activity was a contributing factor in adverse employment action (Watnick, 2007). However, such a disclosure would only receive protection if the discloser reasonably believed such action constituted a violation of the security laws (Wiener, 2010).

The SOA had drawbacks. The procedure to enforce SOA whistle-blower protection was complex (Dworkin, 2007) and recovery was limited to back pay and attorney's fees, and a claim carried a statute of limitations bar date of a paltry ninety (90) days (Earle & Madek, 2007). Punitive damages were also impermissible; thus recovery was limited. In addition, the individual's future employment prospects may be diminished because of the "scarlet letter" associated with whistle-blowing. The SOA failed to give meaningful protections to encourage whistle-blowing, which actually decreased the likelihood of whistle-blowing (Rapp, 2012).

Federal whistle-blower jurisprudence seemingly received an overhaul after the Great Recession of 2008. Revelations of fraud and unethical conduct within many of the nation's largest financial institutions led to sweeping changes through

the Dodd-Frank Act of 2010. The Dodd-Frank Act (DFA) amended federal law and empowered whistle-blowers to come forward and prevent or shed light on financially related unethical conduct. The DFA's bounty program promised to compensate individuals who voluntarily provided "original information that leads to a successful enforcement action yielding monetary sanctions of over $1 million" (Dodd-Frank Act, 2010; SEC, 2011). If information led to successful enforcement, the whistle-blower could be compensated between 10% and 30% of the total amount collected (Rudderman, 2012). Building off the SOA, the DFA protected whistle-blowers from discharge, demotion, suspension, harassment, or any other manner of discrimination as a result of a lawful act (DFA § 78u-6). However, despite the passage of these statutes, current federal protection for whistle-blowers simply does not cover athletics personnel who report NCAA violations, either voluntarily or as mandated by Rule 16–2. Thus, NCAA whistle-blowers have to look to other laws for protection.

State Whistle-Blower Protections

Most states have whistle-blower statutes; however, the scope of protection and protected activities varies by jurisdiction. Generally speaking, each state provides some level of protection, but the requirements necessary to receive protection are not uniform (see Sinzdak, 2008). Differences can include which classes of private employees are protected and the nature of the employer activity, such as whether such a purported violation poses "a substantial and specific danger to the public health or safety," as noted in a New York whistle-blower law (as cited in Sinzdak, 2008, p. 1638). State protections are further distinguished by whether the employee's reporting must be accurate, to whom the employee must report, and the available remedies for such claims (Wendt, 2014). Aron (2010) organizes the states into different continuums, showing that whistle-blower protection varies from state to state on scope of claims, scope of protection (broad or narrow), type of whistle-blower (passive, active, or both), employment status of whistle-blower (public, private, or both), and the accuracy of alleged violation. Because of such variations, identifying state whistle-blower protections can quickly become confusing or may cause a claimant to seek redress through alternative theories (see Table 1).

Alternative Theories of Recovery Under State or Federal Law

Wrongful Discharge. If whistle-blower protection does not exist under federal or state law, a few common-law remedies may serve as the final avenue of potential redress. Common law is built on the concept of precedent or *stare decisis,* meaning that courts must follow prior court decisions unless a higher court overturns the decision from a prior case. Thus, depending on the jurisdiction, a whistle-blower may find redress by filing a wrongful discharge lawsuit. However, Rapp (2012) points out that this patchwork of protection forces whistle-blowers to rely on murky and disorganized state common law. Such security is sporadic at best, often leading to haphazard treatment of whistle-blowers (Rapp, 2012). Thus, whistle-blower protection is not ensured.

Table 1 Summary of Legal Protections for Whistle-Blowers

Federal whistle-blower claims		
Enactment name and date	**Coverage**	**Limitations**
False Claims Act of 2010	Protects private citizens and anyone assisting the government in a suit against contractors who defraud the government	Covers actions of government contractors only
Whistle-Blower Protection Act of 1989/2012	Protects federal employees who reasonably believe violations of the law, gross waste, mismanagement of funds, and other acts pose a danger to the public	Protects federal employees; no protection for private sector or state employees
Sarbanes-Oxley Act of 2002	Protects persons who report securities fraud within publicly traded companies	Only covers securities laws violations; enforcement procedures are complex and bar punitive damages
Dodd-Frank Act of 2010	Persons who report finance-related unethical conduct	Scope is limited to financial sector and reports that yield monetary sanctions of at least $1 million
State law claims		
State whistle-blower statutes	In most states claims for a range of activities and persons	Substantial variation between states as to scope of claims, protections, and remedies
Wrongful discharge	Protects employees from retaliatory or wrongful discharge based on covenant of good faith and fair dealing	Must have clear public policy exception to employment at will; varies by state
Defamation	Tort action available for injuries to reputation based on false statements	Employer must make false statements for recovery, and recovery would be monetary rather than the ability to retain or resume career
Constitutional claims		
5th or 14th Amendment	May require due process before discharge	Only employees of public agencies (state actors) would be protected
1st Amendment	Federal or state employees who speak on matters of public concern	The matters of public concern cannot be something that falls under the duties and responsibilities of the employee to report

Common-law whistle-blower claims under wrongful discharge and the like operate as an exception to the common-law employment at-will doctrine due to the public policy rationale of providing a cause of action for retaliatory or unlawful discharge. Such a claim may arise under the covenant of good faith and fair dealing that is imbedded into every contract formed in society. However, the scope of this exception to the employment at-will doctrine is fairly narrow. For example, in some states wrongful discharge against public policy would occur only if the employer has violated a public policy explicitly stated in a statute and the employee was a member of the class of persons entitled to protection by the public policy in question. Wrongful discharge may also be actionable if the discharge is based on the employee's refusal to engage in a criminal act (Katz & Stiff, 2010). Yet, without the benefit of clear statutory language defining a public policy interest related to NCAA rules compliance and reporting, filing a common law cause of action for wrongful discharge may offer a weaker chance of recovery.

Defamation. A whistle-blower may suffer injury to his or her reputation due to a disclosure of information by a third party. If the damage is caused by a false statement, then the law of defamation may be a theory of recovery (see Restatement (Second) of Torts, 1977). Former Penn State University (PSU) football coach Mike McQueary won a defamation lawsuit against PSU that awarded him $12.3 million (Couloumbis, 2016; Tracy, 2016). McQueary, at the time an active PSU graduate assistant football coach, blew the whistle after he witnessed former PSU assistant coach Jerry Sandusky engaging in sexual conduct with a young boy. PSU subsequently defamed McQueary in a statement attempting to defend itself and some of its administrators (*McQueary v. Pennsylvania State University,* 2012; Tracy, 2016). While a defamation lawsuit can provide some financial compensation to whistle-blowers, not all whistle-blowers are defamed. In addition, a victory in a whistle-blower lawsuit does not necessarily allow whistle-blowers to resume their careers.

Constitutional Protections. An employee who has been terminated in retaliation for disclosing NCAA violations or other wrongful behavior within athletics may be able to assert constitutional violations based on the Fifth or Fourteenth Amendments for due process violations, or on the First Amendment for unconstitutional restraints of free speech. However, these constitutional protections only apply to governmental action; thus, private actors are not within its purview. So while neither the NCAA nor private educational institutions would be subject to these constitutional claims (*NCAA v. Tarkanian,* 1988; Potuto, 2012), the same cannot be said for public universities, which are considered state actors and subject to the U.S. Constitution.

The Fifth Amendment of the United States Constitution protects citizens from impermissible federal government acts that deprive one of life, liberty, or property without due process of the law (U.S. Const. amend. V). The Fourteenth Amendment of the U.S. Constitution contains the same language prohibiting state governments from depriving any person of life, liberty, or property without due process of the law (U.S. Const. amend. XIV § 1). Due process requires that certain substantive and procedural safeguards be implemented when a person's life, liberty, or property interest is at risk due to governmental action. Due process is intended to ensure that the proceedings taking place are fair (Green, 1992). Examples of elements

building due process include an unbiased tribunal, the right to present evidence, calling and cross-examining witnesses, taking testimony, and the opportunity to be represented by counsel (Green, 1992).

Due process claims were asserted by former Marshall University athletic department compliance officer David Ridpath when he was allegedly reassigned and deprived of due process as a result of reporting dubious conduct (*Ridpath v. Board of Governors Marshall University et al.,* 2006). Ridpath had discovered several questionable student-athlete activities that required him to notify the NCAA. His act led to an NCAA investigation and, ultimately, to sanctions levied against Marshall University. By fulfilling his job duties, Ridpath was reassigned, allegedly scapegoated for the sanctions, and effectively pushed out of university compliance as a result of his compelled reporting to the NCAA. This was all done without due process protection. Ridpath filed suit to assert his due process and other constitutional rights (see Kobritz & Levine, 2013; *Ridpath v. Board of Governors Marshall University et al.,* 2006). His initial lawsuit was successful; however, the parties eventually settled, preventing precedent from applying to other NCAA schools (Anderson, 2009).

The First Amendment protects the rights of federal or state employees to speak on matters of public concern (*Connick v. Myers,* 1983). In these cases, the interests of the employee as a citizen in speaking about matters of public concern must be balanced against the interests of the government employee to promote efficient operations of government services (*Pickering v. Board of Education,* 1968). Public employees may be able to avail themselves of these protections when they report misconduct to the media or speak publicly about observed misconduct. For example, former learning specialist Mary Willingham asserted First Amendment claims against the University of North Carolina (UNC) for acts of reprisal resulting from reporting and speaking to the media about academic concerns related to the UNC athletics program (*Willingham v. UNC,* 2014). When she spoke publicly and to members of the media about her athletic academic concerns, her complaint specifically alleged that she was speaking not in her official capacity but as a citizen on a matter of public concern. She asserted her interests outweighed UNC's interest in managing its working environment. Willingham claimed her speech was a substantial factor in UNC's decision to demote and retaliate against her (*Willingham v. UNC,* 2014, p. 21). She settled with UNC for $335,000 (Ganim, 2015).

Limitations and Risks Inherent to NCAA Form 16–2

NCAA Form 16–2 essentially mandates that athletics personnel become active whistle-blowers. By rule, should staff members become aware of a NCAA violation during a given year, these individuals face a no-win situation: they may (a) opt to not disclose the violation, falsely sign the form *and* risk reprisal or (b) opt to report the violation(s) *and* risk reprisal. If the employee chooses not to disclose, it is not only unethical, but it also leaves staff members vulnerable to future repercussions should they be discovered to have made a false representation to the NCAA on behalf of the institution. Conversely, if the individual, when confronted with Form 16–2's burden, reports the NCAA violation either at the time of its occurrence or before signing the form, such an act may effectively end that employee's career. This second option exposes personnel to professional and personal repercussions

that, in the past, have turned out to be immediate and impactful consequences for both voluntary and forced NCAA whistle-blowers.

The jeopardy attached to the second option is evidenced in a series of incidents that illustrate the career risk assumed when intercollegiate athletics report NCAA violations and/or ethical issues (Associated Press, 2007; *McQueary v. Pennsylvania State University,* 2012; *Murdock v. Rutgers et al.,* 2013). Louisiana State University assistant women's basketball coach Carla Berry resigned about a month after reporting improper conduct with players that led to the head coach's resignation (Associated Press, 2007). Rutgers University men's basketball director of player development Eric Murdock was terminated after he reported instances of student-athlete abuse by men's basketball head coach Mike Rice (*Murdock v. Rutgers et al.,* 2013). Penn State University essentially discharged, and blacklisted, assistant football coach Mike McQueary for cooperating with a police investigation of Jerry Sandusky. Whistle-blowing has serious repercussions.

Issues involving whistle-blowing are not confined to the intercollegiate athletics staff. Several academic professionals and nonathletics university staff members, who were not contractually obligated to report NCAA violations pursuant to Form 16–2, have paid a heavy price for reporting academic issues involving student-athletes. For example, Mary Willingham, the aforementioned UNC athletics learning specialist, received four death threats (Ganim, 2014), was demoted, and allegedly constructively terminated as a result of her efforts to expose student-athlete academic issues (*Willingham v. UNC,* 2014). She eventually resigned (*Willingham v. UNC,* 2014, p. 18). University of Georgia remedial English specialist Jan Kemp attempted suicide twice (Van Biema, 1986) after she endured harassment. Kemp was eventually terminated for revealing student-athlete academic issues (*Kemp v. Ervin,* 1986). University of Tennessee English professor Linda Bensel-Meyers was not only inundated with negative e-mails and phone calls, but she was also physically assaulted and battered by members of the public who, identifying with University of Tennessee athletics (Wann, Hunter, Ryan, & Wright, 2001), objected to her stating publicly that student-athletes were engaging in academic fraud (Associated Press, 2005a). Louisiana State University instructors Terrell Mayne and Catherine Owen settled with their employer after receiving hate mail and death threats when they reported student-athlete academic issues (Associated Press, 2005b). Even the seemingly most innocuous reporting by university faculty has resulted in adverse employment actions. For example, Binghamton University adjunct professor Sally Dear was notified she would not be retained after reporting student-athletes were arriving late to class and leaving early (Jaschik, 2010). Thus, tangible repercussions also exist for academic professionals who expose wrongdoing in intercollegiate athletics. Whether the whistle-blower works inside or outside of an intercollegiate athletics department, the availability of legal remedies for these repercussions is varied and inconsistent.

Intercollegiate Whistle-Blower Litigation

Several high-profile cases help illustrate the inconsistent legal remedies available to athletics and university personnel who report NCAA rules violations or expose misconduct related to athletics. Common themes of harm emerge from cases

involving intercollegiate athletics whistle-blowing. Eric Murdock was employed as director of player development for the Rutgers University men's basketball team from approximately July 2010 through the date of his alleged termination, July 2, 2012 (*Murdock v. Rutgers et al.,* 2013, p. 2). During that time, Murdock alleged he complained to his supervisors—defendants Mike Rice (head coach) and Tim Pernetti (athletic director)—about Rice's "battery, harassment, intimidation, bullying, and discrimination (including repeated use of hostile and insulting homophobic and racial slurs) against student-athletes, staff members, and others" (*Murdock v. Rutgers et al.,* 2013, p. 4). Rice's alleged actions also violated NCAA rules. Although Murdock was reportedly terminated for defying Coach Rice's orders, he alleged his firing was a "direct result" of his internal voluntary active whistle-blower activities (*Murdock v. Rutgers et al.,* 2013, p. 4). The parties eventually settled (Sargeant, 2016).

While Murdock was an internal voluntary active whistle-blower, former Penn State University assistant football coach Mike McQueary was placed in the role of a forced active whistle-blower. Traditionally, a whistle-blower may act either actively or passively, depending on his or her decisions. Aron (2010) defines active whistle-blowing as referring to situations where an employee reports an actual or perceived violation to an employer or participates in an investigation, hearing, or proceeding conducted by a public body regarding the alleged violation. Active whistle-blowers may report wrongdoing to either an internal source, such as an employer, or an external source, such as a governmental regulatory body or a news media outlet. In this situation, where a person is forced to reveal himself or herself as the one exposing the wrongdoing, the whistle-blower's individual rights may be trumped in favor of protecting society (Sinzdak, 2008).

Problems may arise when an employee becomes a forced active whistle-blower. Mandatory active whistle-blowing, where liability is imposed on an actor who fails to disclose misconduct despite the opportunity to do so, creates significant issues (Banick, 2011). Such a requirement may force an employee, who does not wish to come forward, to report externally. This could create a toxic working environment culminating with the whistle-blower's departure and/or being blackballed within a specific industry. Examples of forced whistle-blowing abound not just in the corporate world but also in the academic and collegiate athletic settings as well. Former coach Mike McQueary and former athletics administrator David Ridpath were forced into active whistle-blower roles, and both allegedly faced substantial adverse employment ramifications as a result of their actions.

In 2001, Penn State University assistant coach Mike McQueary informed PSU head football coach Joe Paterno that he had witnessed Jerry Sandusky, a former PSU assistant football coach, "engaging in highly inappropriate and illegal sexual conduct with a boy who appeared to be about 10 to 12 in the Support Staff Locker Room showers" (*McQueary v. Pennsylvania State University,* 2012, p. 3). Over a decade later, McQueary's status as a whistle-blower was cemented as he provided crucial testimony that led to Sandusky's arrest and indictment. Following these revelations, McQueary received death threats (Lynch, 2012). He was the only assistant coach who did not receive an interview to retain his position following a coaching change (Iaboni & Candiotti, 2012). As stated above, McQueary went on to win a $12.3 million whistle-blower and defamation lawsuit against Penn State University (Couloumbis; Tracy, 2016).

In addition to athletics department personnel, nonathletics university personnel that faced reprisal for reporting student-athlete academic issues have also filed complaints. In each case, the whistle-blower either resigned or was terminated. Although none of these individuals were required to sign NCAA Form 16–2, the severe consequences each person faced illustrates the need for protection for all employees. Former Louisiana State University kinesiology instructor Tiffany Mayne allegedly faced reprisal as a result of her expressing concern that student-athletes' works had been plagiarized (*Mayne v. LSU et al.,* 2005, p. 1). Mayne also allegedly was the victim of "student athlete [*sic*] class disruptions, class monitoring, grade changing, and harassment she was experiencing from the Academic Center for Student Athletes" (*Mayne v. LSU et al.,* 2005, p. 2). Mayne, after reporting these suspected NCAA rules violations, was not rehired when her contract expired (*Mayne v. LSU et al.,* 2005, p. 3).

Intercollegiate athletics whistle-blowers are often painted as "irrational, emotional and hysterical," and isolated from the athletic department (Richardson & McGlynn, 2011, p. 132). Despite these attacks, the whistle-blower most likely intends to help the university and community by bringing legal and/or ethical concerns to the public consciousness. However, given the zealous culture of some athletics fan bases, such revelations may be viewed as a threat not just by the athletic department or university but also by the community identity as a whole (Zagacki & Grano, 2005).

Some researchers assert whistle-blowers should be viewed as problem solvers (Richardson & McGlynn, 2011). Other researchers assert whistle-blowers can improve a company's effectiveness (Near & Miceli, 1985). In order for these potential benefits to be realized, the practice that forces a potential whistle-blower to choose between his or her career and his or her moral compass would have to cease. Therefore, protections must be afforded.

Recommendations for NCAA Whistle-Blower Protections

The NCAA is the first and best option to provide for whistle-blower protection, and such protection is well aligned with the NCAA's mission. Whistle-blower protections for intercollegiate athletics personnel alone would not address everyone who has displayed the courage to engage in intercollegiate athletics whistle-blower activities. The examples of Willingham, Kemp, Dear, and others illustrate that it is often academic professionals and nonathletics university staff members who step forward to report unethical behavior in intercollegiate athletics. Therefore, if the NCAA wishes to reinforce its commitment to institutional control on college campuses, NCAA whistle-blower protections must extend to all areas of campus.

The NCAA should cease using Form 16–2 and require member institutions to implement policies prohibiting retaliation in any form against an employee who reports NCAA violations either internally or externally. The NCAA already provides guidance and education to member institutions to aid them in meeting their legal obligations in a variety of areas, such as gender equity, prevention of sexual harassment and sexual violence under Title IX (NCAA, 2016a), and qualifying exemptions under the Fair Labor Standards Act (NCAA, 2016d). Cleveland State

University provides an example of individual university policy adopted to provide specific protections for whistle-blowers and prohibition of retaliation against people who act in good faith reporting wrongful conduct. Wrongful conduct expressly includes athletic noncompliance and violations of NCAA rules (Cleveland State University, n.d.).

NCAA institutions and their representatives create and enforce NCAA rules. Therefore, it may be in the financial self-interest of NCAA institutions to create whistle-blower protection policies. These policies—accompanied by an environment that embraces whistle-blowers as do-gooders rather than as adversaries—may have saved the University of North Carolina the money it dedicated to a public relations campaign against Mary Willingham (*Willingham v. UNC,* 2014) as well as a $335,000 settlement (Ganim, 2015). It may have also saved Penn State University $12.3 million from the McQueary judgments (Couloumbis, 2016; Tracy, 2016). Therefore, while legal and ethical issues indicate the NCAA should afford whistle-blowers protections to university employees, there are also financial incentives for these changes.

If the NCAA is unwilling to require whistle-blower protections, then these changes must come from an outside actor. The United States government provides options for a remedy if the NCAA fails to act. Specifically, Congress and the Department of Education are well suited to implement new intercollegiate athletics whistle-blower protections if the NCAA fails to do so. Congress has historically enacted legislation to address a variety of issues unique to the sport industry. The Sports Broadcasting Act of 1961, Baseball Fans and Communities Protection Act of 1997, Major League Baseball steroids hearings of 2005, and other examples demonstrate Congress's long-time interest in acting on behalf of the public interest when sport is involved. The NCAA whistle-blower matter is of similar importance and gravity given past cases.

From a policy perspective, three reasons are offered that should lead Congress to act on this matter. First, the public has an interest in ensuring that institutions of higher education behave in the public interest and protect their most ethical actors who willingly step forward to report inappropriate behavior. Second, the citizenry has an interest in ensuring that impressionable student-athletes are sent the right messages—that reporting unethical behavior makes you a leader rather than a pariah, and that once you graduate you should act in a similar ethical manner in your chosen profession. Third, it is in the citizens' interest to ensure public funds that help support many of our nation's great institutions are spent appropriately by institutions held to high ethical and legal standards.

Congressman Charles Dent of Pennsylvania has sponsored H.R. 2731—the National Collegiate Athletics Accountability Act (NCAA Act; Berkowitz, 2015). This bill was introduced in the House of Representatives in June 2015 and sought to provide several safety and financial protections to NCAA student-athletes (H.R. 2731, 2015). It has not progressed to law. However, this is the type of bill that has the potential to incorporate the intercollegiate athletics whistle-blower protections that are needed. The bill also provides evidence that Congress could be moved to act on intercollegiate athletics ethics issues.

Congress should pass an intercollegiate athletics whistle-blower protection act that provides all university staff members—including intercollegiate athletics personnel—with the requisite job protections, due process guarantees such as access

to legal counsel and an independent fact finder, and perhaps financial rewards that make acting in an ethical manner a safe, positive course of action. In the absence of these protections, whistle-blowing will continue to cause great harm to those who step forward.

Congress can ensure that NCAA student-athletes learn the right lessons about ethical conduct. Universities and their intercollegiate athletics programs should provide student athletes with firsthand examples that teach them that ethical work environments are positive work environments. Student-athletes should learn by example that those who abide by the highest levels of ethical conduct are leaders rather than pariahs. Congress has the ability to ensure that the NCAA and the intercollegiate athletics programs of its member institutions act in the same ethical manner we expect of the university as a whole. Congress's commitment to whistle-blower protection is reflected in the Sarbanes-Oxley Act and the Dodd-Frank Act, which both symbolize a commitment to serve the public interest. NCAA whistle-blower protections would simply build on Congress's interests in both sport and whistle-blower protection.

Second, the Department of Education could provide NCAA whistle-blower protection if Congress does not enact specific legislation. The federal government and its associated agencies continue to show an interest in providing whistle-blower protections. Veterans Affairs hospital whistle-blower protections provide greater protections to those who report unethical and/or illegal behavior at veterans hospitals (Hicks & Fahrenthold, 2014). The U.S. Government Accountability Office announced that the Department of Energy needs stronger whistle-blower protections to safeguard U.S. nuclear weapons (U.S. General Accountability Office, 2016). The Department of Education (DOE) has used leverage derived from public funds it provides to public universities to implement positive societal change programs. This is evidenced by the DOE's Title IX gender equity provisions. Combining federal government interest in whistle-blower protections with the DOE's power to use the leverage of public funds provided to public universities to impact positive change, the DOE is well positioned to mandate the NCAA whistle-blower protections recommended herein.

Conclusion

The NCAA must protect individuals who are willing to report wrongdoing in order for its rules compliance system to be effective and sustainable. This begins by eliminating NCAA Form 16–2 because, until whistle-blower protections are in place, history indicates that this form places intercollegiate athletics staff members at reasonable risk of tremendous harm. In addition, the NCAA must require member institutions to implement whistle-blower protections. Serious intercollegiate whistle-blower harm has occurred through the years without NCAA action. This history of inaction raises questions about whether the NCAA will act on this issue. In the absence of NCAA action, government oversight and intervention is required. The history of the issues surrounding intercollegiate athletics whistle-blowing (death threats, suicide attempts, termination) and the popularity of NCAA programs demonstrate a public interest for Congress to act by forcing the NCAA

and its member institutions to protect whistle-blowers. Should Congress fail to act, the U.S. Department of Education could step up to provide whistle-blower protections in a manner reflective of its actions related to Title IX.

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