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Ohio State, Urban Meyer and the NCAA Division I Manual

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Ohio State, Urban Meyer and the NCAA Division I Manual

By Adam Epstein

The Ohio State University (OSU) was bombarded recently with allegations of misconduct on various fronts involving its athletic department. A former team doctor, a former diving coach, a former assistant football coach, and the head football coach were accused of misdeeds directly or indirectly-related to their relationship with OSU.

The most publicly debated issue was related to Urban Meyer, the head football coach, and whether he followed proper university procedure or possibly violated his own contract related to a claim of spousal, domestic abuse by one of his former assistant coaches, wide-receiver coach Zach Smith (Zach). Television, radio, the internet and social media blew up with reports and opinions about the various problems at the Columbus, Ohio flagship institution.

After an investigation costing \$500,000 and managed by a law firm which produced a twenty-three-page report, Meyer was suspended for the first three games of the 2018 season, OSU's athletic director Gene Smith was also suspended without pay from August 31 through September 16. Both were suspended without pay. The OSU-sponsored investigation concluded Meyer "misspoke and made misstatements" but "did not...deliberately lie." In fact, the only person who lost their job as a result was Zach, who had already been terminated.

However, controversy and legal issues are nothing new to OSU, its athletic department, its coaches and its student-athletes. Remember the infamous punch by OSU's iconic head football coach Woody Hayes after Clemson's Charlie Bauman intercepted quarterback Art Schlichter's pass in the 1978 Gator Bowl which led to Hayes firing almost immediately thereafter? (Okay, if you do not remember or were not born yet, just YouTube it). This article summarizes some of the more prominent sports law cases or

compliance incidents over the last 20 years related to OSU.

COACH URBAN MEYER

When Urban Meyer "misspoke" at a 2018 pre-season press conference when he said, "There was nothing..." about whether he knew about claims of domestic abuse by former assistant coach Zach (terminated on July 23) against Smith's ex-wife Courtney Smith in 2015 (divorced in 2016). Meyer essentially claimed ignorance. It is noteworthy that Zach is also the grandson of former OSU head coach Earl Bruce. In fact, Meyer credited Coach Bruce with being a "mentor" in his August 22, 2018 speech following his publicly announced suspension.

After the August 1 Facebook revelation by reporter Brett McMurphy about the Smith's domestic abuse claims, Coach Meyer was put on administrative leave by OSU and an investigation ensued. Zach was also Meyer's assistant at the University of Florida, the same institution in which he also had allegedly committed domestic abuse against his wife as well.

Sports lawyers and others involved in reporting and social media immediately did the right thing: they analyzed Meyer's contract with OSU to determine whether Meyer's contractual responsibilities with OSU addressed domestic violence, misconduct in general such as violations of laws and university policies and rules, including transgressions by his assistant coaches.

Meyer's initial contract with OSU was signed in 2011, with extensions in 2015 and 2018. Relevant excerpts from Meyer's 2018 contract extension includes that he could be fired "for cause" under new paragraph 4(e):

Coach shall promptly report to Ohio State's Deputy Title IX Coordinator for Athletics any known violations of Ohio State's Sexual Misconduct Policy (including, but not limited to, sexual harassment, sexual

assault, sexual exploitation, intimate violence and stalking) that involve any student, faculty, or staff or that is in connection with a university sponsored activity or event. If Ohio State's Deputy Title IX Coordinator for Athletics is not available, the Coach shall make such report promptly to Ohio State's Title IX Coordinator. Any emergency situation should be immediately reported to 911 and/or law enforcement. For purposes of this section 4.1 (e), a "known violation" shall mean a violation or an allegation of a violation of Title IX that Coach is aware of or has reasonable cause to believe is taking place or may have taken place.

There are also plenty of other places in Meyer's contract which address his duty to not act in a manner that would adversely reflect upon OSU or its athletic problems. From a different angle, one might note that the most recent version (2018-2019) NCAA Division I Manual also continues to include among its bylaws, on page 50:

11.1.1.1 Responsibility of Head Coach. An institution's head coach is presumed to be responsible for the actions of all institutional staff members who report, directly or indirectly, to the head coach. An institution's head coach shall promote an atmosphere of compliance within his or her program and shall monitor the activities of all institutional staff members involved with the program who report, directly or indirectly, to the coach. (Adopted: 4/28/05, Revised: 10/30/12, 7/16/14)

It certainly can be debated whether Meyer violated his contract with OSU and whether he violated any NCAA rules. However, there is no doubt that the situation involving his former coach and the subsequent denial that Meyer knew anything about it does bring OSU once again into the forefront of discussion in sports law and compliance circles.

The following examples provide short See OHIO STATE on Page 6

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summaries of other cases involving OSU that demonstrate the Meyer situation is nothing new to OSU. I use many of these examples in my sports law class, and I have written an academic article, "Ohio and Sports Law" which addresses these examples, and many others from the state of Ohio, in much greater detail.¹

COACH JIM O'BRIEN

Hired in 1997, OSU head basketball coach Jim O'Brien was terminated in 2004 though there were still three years remaining on his contract. The athletic director at the time, Andy Geiger, ended the relationship with O'Brien after the coach admitted giving a \$6,000 loan to a prospective Serbian recruit, six years prior. The more intriguing legal aspect to the O'Brien termination, however, was that O'Brien sued alleging that based upon the contract, he could not be terminated unless he had committed a "material breach" of his contract, the expression used in his agreement.

Indeed, an Ohio trial court held that even though O'Brien violated NCAA rules and did not disclose the violation, such misdeed was not a "material breach" and therefore OSU could not utilize a "for cause" termination on that basis alone. In the end, OSU was forced to pay O'Brien approximately \$2.5 million, which included interest, for the breach of the employment contract. The case survived an appeal by OSU as well, thereby setting an example for coaches, their agents, and general counsel at universities involved in drafting coaching contracts. In fact, O'Brien's successor, Coach Thad Matta, had 15 grounds for termination specifically addressed in his agreement.

MAURICE CLARETT

When it comes to antitrust and labor law, former OSU running back Maurice Claret holds a special place in sports law for his legal battle in which he attempted to force the National Football League (NFL) to allow him to become draft eligible. The Youngstown, Ohio native and Big 10 Freshman of the Year helped lead OSU to a national championship in 2002. Many recall his various off-the-field troubles, though, which played a major part in Claret leaving OSU before his second season in 2003-2004.

Claret requested that he be considered for the NFL draft that spring. At first it looked like Claret would get that chance even though NFL eligibility rules since 1990 required three full seasons to have passed after the player's high school graduating class. Not yet three years removed, the U.S. District Court for the Southern District of New York in 2004 ordered that Claret be eligible (authored by Judge Shira A. Scheindlin).

However, the U.S. Court of Appeals (Second Circuit) reversed and opined that the non-statutory labor exemption (in plain English, a collectively bargained agreement trumps an antitrust claim) barred Claret's challenge, though some still believe that the so-called side-agreement between the NFL and NFLPA never really was reduced to a writing. In the end, the Second Circuit sacked Claret and his legal team (authored by then Court of Appeals judge Sonia Sotomayor).

COACH JIM TRESSEL

Having recruited Claret and leading OSU to a national championship in 2002, Jim Tressel led OSU as their head coach from the 2001 season to 2010 (though the 2010 wins were later vacated due to Tressel using ineligible players). Prior to coaching at OSU, Coach Tressel coached Youngstown

State University (YSU) for fifteen seasons and won four 1-AA national championships (they are called FCS today). Indeed, he was a very respected and influential figure in Ohio. So much, in fact, that OSU's president at the time, Gordon Gee, stated regarding potentially firing Coach Tressel for an ensuing scandal, "No. Are you kidding? Let me just be very clear. I'm just hopeful the coach doesn't dismiss me."

Unfortunately for OSU and Tressel, the university was placed in the national spotlight under troubling circumstances after numerous allegations of violations of NCAA bylaws by him and at least six of his players involving sports memorabilia in exchange for tattoos. The NCAA banned OSU from a post-season bowl game the following year due to this *Tattoo-gate* scandal as it was revealed that eight players took cash and tattoos in exchange for jerseys, rings and other memorabilia.

Emails demonstrated that Tressel was informed of the situation in 2010 but did not inform OSU's compliance office or the NCAA about the matter. Tressel resigned in May 30, 2011 as a result after the university had already suspended him and fined him \$250,000 for failing to report the wrongdoing. Tressel also received a "show-cause" penalty for five years. On May 9, 2014, Tressel was announced as the President of YSU.

OTHERS

The above examples provide excellent opportunities for sports law professors and students to explore OSU and its relationship to sports law in general. There are many others worth exploring, however, not related to "people." For example, Ohio University's mascot *Rufus* drew national attention on September 18, 2010, due to his attack on OSU's *Brutus Buckeye* mascot when Rufus

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¹ See Adam Epstein, *Ohio and Sports Law*, 25 MARQUETTE SPORTS L. REV. 363-397 (2015), <http://scholarship.law.marquette.edu/sportslaw/vol25/iss2/2/> (providing further details for this article).

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tackled Brutus at Ohio Stadium as the OSU team ran onto the field in Columbus that same year. The incident is available on YouTube. Much discussion could be had on potential personal and institutional liability related to such mascot violence.

Another battle between the same two schools took place behind the scenes involved lawyers and who owned the rights to the word *Ohio* for federal trademark purposes. In 1995 "Ohio" became the official trademark of the Ohio University (OU). However, OSU filed a complaint with the U.S. Patent and Trademark Office to cancel OU's trademark rights over the word. In 1998, the university presidents of both schools agreed to allow OU to keep *Ohio* as their trademark, but OSU can use *Ohio* when it has historical significance such as *Script Ohio* and the Ohio Stadium.

CONCLUSION

It is a unique time to be involved in college

sports whether as a coach, student-athlete, administrator, compliance officer or a fan. In the hashtag era, OSU continues to provide sports law with a plentitude of sports law-related examples for professors, students, compliance officers and general counsel, the latest involving Urban Meyer. It would not be incorrect to claim that the Big Ten leads the way with discussion of recent impropriety and scandals on an annual basis, not just OSU.

While hindsight is 20-20, coaches and universities best be forthright and proactive in addressing and eliminating wrongdoing when it is discovered no matter how embarrassing the circumstances and regardless of the possible penalties. In 2018 and beyond, avoidance and inaction will just delay an inevitable revelation via Facebook post or Twitter tweet which will then turn into an unmanageable storm with unenviable consequences, whether in Ohio, the Big Ten, or elsewhere. ■

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REFERENCES

- 2018-2019 NCAA Division I Manual (August Version), Retrieved from <http://www.ncaapublications.com/p-4547-2018-2019-ncaa-division-i-manual-august-version-available-august-2018.aspx>
- Associated Press (2018, August 23). *Ohio State suspends Meyer for first 3 games*. Retrieved from <https://www.msn.com/en-us/sports/ncaafb/ohio-state-suspends-meyer-for-first-3-games/ar-BBMhISY>
- Epstein, A. (2015). *Ohio and Sports Law*, 25 Marquette Sports Law Review 363-397. Retrieved from <http://scholarship.law.marquette.edu/sportslaw/vol25/iss2/2/>
- Murphy, D. & Dinich, H. (2018). Ohio State suspends coach Urban Meyer, AD Gene Smith. Retrieved from http://www.espn.com/college-football/story/_/id/24449427/ohio-state-suspends-coach-urban-meyer-ad-gene-smith.
- The Ohio State University (2018). *Public Records related to the investigation into allegations involving Urban Meyer*. Retrieved from <https://news.osu.edu/public-records-related-to-the-investigation-into-allegations-involving-urban-meyer/>

Drake Group Questions Division I Basketball Rules Changes

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There are numerous local, national and institutional scholarships available from multiple sources for which these students might be able to qualify. It seems unlikely that the NCAA will or could maintain a list of such sources that the athletes need to try in order to determine whether the search has been 'exhaustive.'

Polite added that The Drake Group "is disappointed that the NCAA continues to ignore the athlete employment issue, which was the primary underlying issue in the FBI investigation of the NCAA basketball debacle and which the Rice Commission Report also ignored.

"Athletes should be allowed to earn money outside of school by exploiting their names, images, and likenesses (NILs)

just as any other student with a special talent.' Three fairly simple oversight rules previously proposed by The Drake Group could control improprieties. The member institution should be required to review written terms of any NIL agreement to ensure conformance with the following stipulations or conditions: (1) use does not include the name, marks, institutional colors, or affiliation, implied or otherwise, of the student's institution or the use of institutional facilities or properties for such engagement; (2) the institution's employees or others engaged by the institution are not involved (i.e., identification of possible employment opportunities, introductions, etc.) in obtaining the employment; and (3) the employer attests that the remuneration

is commensurate with the going rate in that locality for services and the athlete is paid only for work specifically described and actually performed."

Finally, Polite addressed what he called the NCAA's "most significant reform failure.

"The Drake Group is particularly concerned that the NCAA continues to ignore its responsibility to find member institutions guilty of academic fraud committed for the purpose of maintaining athlete eligibility," he said. "Expecting institutions to self-police in this area is unrealistic and a serious dereliction of duty with regard to the basic responsibilities of a national athletic governance organization." ■