

LIABILITY

Appeals panel throws pitcher's claim out of court

Case name: *Bukowski v. Clarkson University, et al.*, No. 510051 (N.Y. App. Div. 07/14/11).

Ruling: The Supreme Court of New York, Appellate Division affirmed a trial court's dismissal of Shawn Bukowski's damages claim against Clarkson University.

What it means: Student-athletes are deemed to have assumed the commonly known risks inherent in their sport. As a result, a university's legally enforceable duty to reduce the risks of the activity is limited to making the conditions as safe as they appear to be.

Summary: Bukowski sued Clarkson University to recover for damages sustained during baseball practice as a freshman pitcher on the institution's Division III intercollegiate team. He was pitching from an artificial mound at regulation distance in an indoor training facility when the batter hit a line drive that struck him in the face.

At trial, Bukowski acknowledged he was an experienced baseball player who was aware of the risk of being struck by a batted ball while pitching. He admitted he was familiar with the indoor training facility where the team practiced and had practiced there regularly for at least a month before the accident. He also testified he had been informed by his coaches at least two weeks before the accident that they intended to hold "live" practice without a protective screen in the indoor facility.

At the conclusion of the presentation of testimony,

the trial judge granted the university's motion to dismiss on the ground that Bukowski had assumed the obvious risk of being hit by a line drive.

Bukowski appealed, arguing the jury should be allowed to decide whether the risk of being hit by a ball was unnecessarily enhanced by the backdrop and lighting of the indoor facility and failure to use the protective screen.

The appeals court stated that organizers of sporting activities owe a duty to exercise reasonable care to protect participants from injuries arising out of unassumed, concealed or unreasonably increased risks. However, voluntary participants in sporting activities are deemed to have assumed commonly known risks inherent in the activity.

Therefore, any legally enforceable duty to reduce the risks of the activity is limited to making the conditions as safe as they appear to be.

Whether Bukowski was pitching in an indoor or outdoor facility, the risk of being hit by a ball is inherent in baseball and the conditions in which he was pitching were readily observable, the panel stated.

As a result, the appeals court affirmed the trial court's dismissal of Bukowski's claims. ■

LAWSUITS & RULINGS

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TITLE IX

University restructures to comply with Title IX

Case name: *Letter to: University of California-Irvine*, No. 09-09-2169 (OCR 09/29/10).

Ruling: The Office for Civil Rights determined the University of California-Irvine was not in compliance with Title IX's equal participation opportunities requirements. The university entered into a resolution agreement to resolve the non-compliance issues.

What it means: Although student-athletes can be counted twice for determining compliance with Title IX's three-part test, they can be counted only once for determining substantial proportionality of athletic financial assistance.

Summary: The Office for Civil Rights investigated a complaint alleging that the University of California-Irvine did not provide equal opportunity

to male and female athletes in the selection of sports and levels of competition.

The complainant also alleged the university did not provide athletic financial assistance to students of both sexes proportionate to their actual participation in the intercollegiate athletics program.

Until the 2009–10 academic year, the university met Title IX's requirements by complying with prong two of the three-part test. The university had never cut a women's team and consistently added women's teams.

However, due to budgetary constraints, the university cut approximately \$1 million from its program in the 2009–10 academic year. So starting that year, the university chose to comply with prong one of the three-part test.

Under prong one, the university must provide participation opportunities for both sexes that are substantially proportionate to their respective enrollments. OCR's Policy Interpretation defines "participants" as those athletes who:

- Receive institutionally sponsored support normally provided to athletes (for example, coaching, equipment, etc.).

- Participate in organized practice sessions and other team meetings and activities on a regular basis during a sport's season.

- Are listed on the eligibility or squad lists maintained for each sport.

- Cannot meet any of the above criteria because of injury, but continue to receive financial aid on the basis of athletic ability.

Athletes who participate on more than one team are counted in each sport. Also, athletes do not need to compete to be counted as participants, nor do they need to be full-time students if they otherwise meet the definition of participant.

The agency determined that in the 2009–10 academic year, male students comprised 46.37 percent of all students enrolled full-time at the university. Based on the rosters provided by the university, male athletic participation amounted to 50.53 percent and female athletic participation was 49.47 percent of the total number of athletes in the program.

To determine whether there is “substantial proportionality,” OCR looks to the average team size for the underrepresented sex and compares it to the additional number of athletes of that gender needed to be exactly proportionate.

At UC Irvine, the average female team had 21 athletes and the additional number of female athletes required for exact proportionality was 34.

However, during the investigation, members of the women's indoor track team alleged that they should not be counted as participants because it was not a “real team.” Rather, they saw participation in the team as extended practice before the outdoor track season began.

As a result, OCR concluded the women's indoor track team did not represent genuine participation opportunities and recalculated the number of additional female athletes that would be required to achieve exact proportionality.

Under the new calculation, exact proportionality would require 56 additional female participants. Because 56 athletes could constitute at least two average-sized teams in the university's athletic program, OCR concluded that the university did not meet prong one of the three-part test.

The agency also determined male athletes did not receive a substantially proportionate share of athletic financial assistance. The OCR explained that for purposes of this calculation, athletes who participate on more than one team are counted only once. To meet substantial proportionality, the percentage of athletic financial assistance provided to each gender should be within 1 percent of the participation rates. But male athletes at the university accounted for only 47.67 percent of the financial budget despite the fact that they comprised 55.42 percent of student-athletes.

The university entered into a resolution agreement with OCR to address the compliance concerns identified during the investigation. ■

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