# Athletic Trainer's Retaliation Lawsuit Can Continue Against School Board and Superintendent

A federal judge has permitted a claim brought by an athletic trainer, who alleged the school district and its superintendent retaliated against her in connection with her whistleblowing activities, to continue, granting only part of the defendants' motion to dismiss.

The impetus for the lawsuit was plaintiff athletic trainer's formal complaint, in September 2014, to her supervisors in the school district, including the superintendent, that there were various legal and policy violations in connection with the student athletics program.

Specifically, her complaints included allegations that medications were being illegally administered to student athletes. Further, she alleged that a former coach for the football team allowed students, without medical clearance, to participate in team practices, ignored the heat indices and conducted contact drills "prior to the time allowed."

Further, the superintendent allegedly covered up the allegations, and the police department "visited" her in an attempt to intimidate her. In addition, the complaint alleges that in retaliation for these and similar complaints she made in September 2015, she was "removed from her position as athletic trainer for the football team," and was "ordered not to step on or near the football field."

The plaintiff sued the school district and superintendent, in her individual capacity, alleging that they retaliated against her for whistleblowing activities. This, she alleged, violated her rights under the First and Fourteenth Amendments to the U.S. Constitution and state laws. She also asserted common law causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing.

On Sept. 9, 2016, the defendants moved to partially dismiss her complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6), or the failure to state a claim upon which relief can be granted.

The court first considered her allegation that the defendants violated her right to free speech by retaliating against her for making protected communications. The claim relies on Section 1983, which provides that "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

*The plaintiff sued the school district and superintendent, in her individual capacity, alleging that they retaliated against her for whistleblowing activities. This, she alleged, violated her rights under the First and Fourteenth Amendments to the U.S. Constitution and state laws.*

"Thus, to sufficiently set forth a section 1983 claim, a complaint must allege the violation of a right secured by the Constitution or laws of the United States and that the alleged violation was committed by a person acting under color of state law." See Harvey v. Plains Twp. Police Dep't, 635 F.3d 606, 609 (3d Cir. 2011); see also West v. Atkins, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988).

In the second count, the plaintiff asserts similar state law claims.

The counts were considered together as one argument.

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Q & A

## ATHLETIC TRAINER TAMMI GAW CARVES OUT NICHE IN THE LEGAL FIELD

Tammi Gaw, Esq, MS, ATC, is used to shattering conventions. Not only has she excelled as an athletic trainer, but she is also a practicing attorney. She is the vice president of administration for the World Police & Fire Games and runs her own consulting firm, Advantage Rule (http://tammi-gaw.squarespace.com). It doesn't end there; Gaw is a contributing author of *Empower: Women's Stories of Breakthrough Discovery and Triumph.*

**Q: What came first, wanting to be a lawyer or athletic trainer?**

Ahh, the chicken or the egg. Athletic training was my first career, and I didn't go to law school until much later. That said, I've always been an advocate at heart so it is not a surprise that I chose two fields for which advocacy is a primary function. I still consider athletic training to be the field that contributed most to my professional growth and success.

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RETALIATION, *continued from page 06*

In its analysis, the court noted that a municipality may be liable under section 1983 only where the constitutional injury is alleged to have been caused by a municipal "policy" or "custom." In such cases, a policy can be set if a decisionmaker, whether a school board or superintendent, has enough authority to be considered "a final policymaker."

Thus, based on the information available at this, the motion to dismiss stage, it is plausible that the superintendent has final unreviewable authority as to the alleged actions taken against the plaintiff.

"Reading the complaint in the light most favorable to the plaintiff, [she] has plausibly alleged that [the superintendent] was in a position of final policy-making authority with respect to allegedly punitive actions against [her], and that the superintendent's actions should be deemed to bind the school district. Accordingly, the defendants' motion to dismiss the first and second counts as to the school district is denied."

Turning to the superintendent's motion to dismiss her Fourteenth Amendment claim, the defendants argued the complaint "failed to identify the particular right affected and fails to allege facts sufficient to hold [the superintendent]liable for a Fourteenth Amendment violation."

The judge did not agree.

The plaintiff's Fourteenth Amendment claim is plainly intertwined with the First Amendment claim, and the defendants "do not challenge the sufficiency of the pleadings for the First Amendment claim as to the superintendent. Simply put, the defendants' arguments seem to target claims that do not appear in the complaint," according to the court. Thus, the motion to dismiss the Fourteenth Amendment claims against the superintendent was denied.

Next, the judge considered her claims for breach of contract and breach of the implied covenant of good faith and fair dealing against the school district and superintendent. The defendants succeeded on their argument that the plaintiff "has not alleged the existence of an explicit employment contract, and the policy manual provision upon which she bases her claim cannot create an implied contract."

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## RELATED RESOURCES

+ NATA Code of Ethics
+ "Experiences With and Perceptions of Workplace Bullying Among Athletic Trainers in the Secondary School Setting"
+ "Experiences With Workplace Bullying Among Athletic Trainers in the Collegiate Setting"
+ "Perceptions of Workplace Bullying Among Athletic Trainers in the Collegiate Setting"
+ "Perceptions of Sexual Harassment in Athletic Training"

Q&A, *continued from page 06*

**Q: How has having a legal background helped you as an athletic trainer?**

While the athletic training curricula has advanced over the years, being a lawyer has given me much more knowledge and understanding of things ranging from risk management to protection against litigation than I ever learned in my athletic training curriculum. It has given me a more holistic approach to athletic training and also a platform from which to educate other ATs on legal aspects of athletic training.

**Q: How would you characterize the profession in terms of career advancement for female athletic trainers?**

It is improving in terms of women in the athletic training profession as a whole, but there is still progress needed in terms of gender breakdown at the head athletic trainer and professional sports levels. There also needs to be a greater push for racial diversity at all levels. NATA's most recent ethnicity demographic breakdown demonstrates that less than 10 percent are women of color. There is still much more work to be done to recruit and ensure our profession reflects not only the diversity of our athletes and patients, but society as a whole.

**Q: Are athletic trainers gaining enough voice in terms of preventing concussed athletes from returning to the field? Why or why not?**

It can depend on the setting and the specific school/team environment. Some settings understand the position of the athletic trainer as a lynchpin of the return-to-play protocol while others are

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# NCAA Bylaw Regarding Return-to-Play Decisions Set to Kick Off for Divisions II and III

In an effort to clarify concussion return-to-play protocol, the NCAA passed a measure, the Independent Medical Care bylaw, which requires all of its member institutions to designate primary athletics health care providers (defined as the team physician and athletic trainer) as impartial medical observers to ensure return-to-play decisions are made by qualified medical professionals instead of coaches, parents or players. The rule went into effect in October 2016 for Division I and goes into effect in August 2017 for Division II and III schools.

In an exclusive interview with *Concussion Litigation Reporter*, the NCAA's Chief Medical Officer, Dr. Brian Hainline, said the designated health care professional's authority is "unchallengeable." To that end, coaches are not permitted

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"to serve as the sole supervisor for any medical provider, nor have sole hiring, retention and dismissal authority over the provider."

Typically that designee will be a team physician or the school's head athletic trainer.

The language of the actual Independent Medical Care bylaw is:

"An active member institution shall establish an administrative structure that provides independent medical care and affirms the unchallengeable autonomous authority of primary athletics health care providers (team physicians and athletic trainers) to determine medical management and return-to-play decisions related to student-athletes. An active institution shall designate an athletics health care administrator to oversee the institution's athletic health care administration and delivery."

NCAA Chief Medical Officer Dr. Brian Hainline

Delving into the bylaw a little more deeply, member institutions must establish:

"Administrative Structure: The legislation requires an administrative structure that provides for the 'unchallengeable autonomous authority' of primary athletics health care providers (defined as the team physicians and athletic trainers) to have final decision-making authority for the diagnosis, management and return-to-play determinations for student-athlete care.

"Athletics Health Care Administrator: The legislation also requires the designation of an 'athletics health care administrator' to oversee a school's athletic health care administration and delivery. While primary athletics health care providers will retain unchallengeable autonomous authority to determine medical management and return-to-play decisions, the athletics health care administrator will play an administrative role serving as the primary point of contact to assure schools are compliant with NCAA health and safety legislation and inter-association recommendations."

## RELATED RESOURCES

+ **Athletics Health Care Administration Best Practices**
+ **NATA Endorses Three Consensus Statements Released by NCAA**
+ **NCAA: Independent Medical Care Best Practices**

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behind the times. The developments in the NFL involving concussion spotters clearly indicate our voices are being recognized more—but we have all seen failures in the concussion protocols that show there is still more work to be done.

ATs will always walk that fine line between maintaining trust with an athlete to honestly report their symptoms and the responsibility to inform the coach of the athlete's condition that could result in the athlete missing a game or more. When an AT works in a setting where there is significant pressure to return a player to the field, the AT may feel pressured to take a certain action. In that vein, there are several groups looking at changing the reporting structure on professional teams to include an independent doctor not employed by or beholden to the league or individual teams. I think most people, certainly those in the sports world, know the value athletic trainers bring to keeping athletes safe, healthy and playing. We must continue to advocate for ATs to be present at the table where these decisions are being made.

**Q: Who has been most influential in your career and why?**

There have been so many people over the years, but I think from an athletic training perspective, it has to be Anita Clark, MS, MA, ATC. She was the assistant athletic trainer at the University of Oklahoma when I started my career there and is one of the smartest and most professional people with whom I have ever had the privilege to work. I learned so much about medicine, patient interaction and how to handle the red tape of athletic training from her, which I have carried with me ever since. She retired recently, and it was a joy for many of us to stand up and tell her what she meant to us over the years.

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# Appeals Court Frees School District of Hospital Company's Indemnity Claim in Concussion Case

A state appeals court has ruled that when a school district settled a lawsuit brought by a concussed high school football player and his family, it effectively dismissed the indemnity claim against the school district brought by the hospital that treated the player.

In so ruling, the panel of judges found that the public policy of encouraging settlements outweighed the hospital's bid for relief.

The plaintiff sued after he suffered a head injury during a football game Sept. 5, 2014. He was taken to the hospital's emergency room where he was diagnosed with a minor concussion.

The plaintiff rested at home for a couple of days, bypassing both the classroom and practice field. He then went to see a doctor at a clinic in the hospital, who evaluated him and affirmed the diagnosis of a concussion. The doctor told him he was not to resume practice until Sept. 15, 2014. The plaintiff reportedly delivered the note from the clinic on Sept. 10, 2014, to his head coach.

The coach, allegedly, exchanged text messages about the plaintiff's symptoms with the athletic trainer, who was employed by the same hospital. The athletic trainer allegedly told the coach the plaintiff could possibly have the flu. She also allegedly told the head coach that an ImPACT test may help determine his readiness to return to play. The coach had the plaintiff take an ImPACT test. According to the lawsuit, the athletic trainer reviewed the results of the test Sept. 11, 2014, and determined he had passed the test, allegedly without reviewing the medical records at the hospital. The plaintiff was allowed to return that day to a noncontact practice.

*The hospital, however, questioned the applicability of the school district's case law, claiming it 'dealt only with equitable or common-law indemnity, and that the rule is different when the indemnity claim arises from a contract.'*

Just before the game Sept. 12, 2014, the coach and/or athletic trainer verbally cleared the player to play, according to the lawsuit, even though he had not been medically cleared by the physician at the hospital. He played.

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**Q: As both a lawyer and an athletic trainer, what do you think athletic trainers can do to better protect themselves against today's most common legal issues in sports medicine?**

Documentation is the most basic way for ATs to protect themselves. They must also remember and understand that their records could be discoverable or subject to subpoena in a lawsuit. Following best practice guidelines already in place by NATA and/or state law is something all ATs should do, regardless of the setting in which they are employed.

Second, athletic trainers occupy a unique space in that we are dedicated to our athletes and patients, but may also answer to teams, leagues or coaching staffs that have larger agendas. Lawyers are fortunate to have ethics hotlines that we can call if we find ourselves in a situation with a client that requires balancing zealous representation with adherence to the rules of professional conduct. Doctors have similar hotlines. I would like to see something like that for athletic trainers who find themselves in need of guidance on specific issues, particularly younger professionals who do not have mentors or others who they feel they can safely ask for help. In the absence of such a resource, ATs must take it upon themselves to stay on top of developments in risk management and liability. That is one of the reasons I am excited about this digest as a new resource for the NATA membership.

Finally, make an effort to self-educate and understand potential risks. I would like to see more CEUs covering liability and risk management because there is a feeling of "that doesn't apply to me" with respect to certain legal matters. If you work as an AT in a clinical setting, particularly one that bills Medicare, you need to understand anti-kickback statutes. If you work with minors, you need to understand how your state law treats waivers for participation of minors. If you have a social media presence, even one that purports to be anonymous, you need to understand how what you post could open you up to privacy and HIPAA violations, in addition to running afoul of the NATA Code of Ethics.