

Sports Litigation Alert

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It Happened In Happy Valley

“The failure of President Graham B. Spanier, Senior Vice President–Finance and Business Gary C. Schultz, Head Football Coach Joseph V. Paterno and Athletic Director Timothy M. Curley to protect children by allowing Gerald A. Sandusky unrestricted and uncontrolled access to Pennsylvania State University facilities reveals numerous individual failings, but also reveals weaknesses of the University’s culture, governance, administration, compliance policies and procedures for protecting children. It is critical for institutions and organizations that provide programs and facilities for children to institute and adhere to practices that have been found to be effective in reducing the risk of abuse. *Equally important is the need for leaders of those institutions and organizations to govern in ways that reflect the ethics or values of those entities.*” (Emphasis added)

— Report of the Special Investigative Counsel
Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky, Chapter 10, p. 127

By Robert Wallace

This is the opening paragraph in Chapter 10 of the shocking and critical report presented by former FBI Director Louis Freeh to the Board of Directors of Penn State University after his firm’s investigation into the criminal activity of Gerry Sandusky, Sandusky’s conviction, and the University’s handling of the matter.

In 144 pages of text and another 123 pages of additional documents, the report details an appalling pattern of behavior at Penn State that resulted in numerous cases of child abuse and at least 13 years of either ignoring or covering up the facts of the horrific acts occurring on its campus.

Top officials at the University, all the way to the office

of the President, did nothing to learn or investigate what was happening on its campus despite years of signs that something was terribly amiss with the actions and behavior of Gerry Sandusky, its former defensive coordinator and the face of the University-supported charity The Second Mile Fund.

These Penn State leaders failed to live up to their legal responsibility to provide a safe environment for children, and when given evidence that one did not exist, failed again to take affirmative steps to report anything to the proper authorities. They also abdicated their moral responsibility as educators and as stewards to the University’s populace to understand what constitutes right and wrong and to exercise proper judgment when confronted with those decisions.

As we all know now, Sandusky was tried, convicted, and is expected to spend the rest of his life in prison.

Paterno was fired as head coach, a position that he held for 46 years, and died months later. His reputation has been devastated, and the years of accolades are now turning into repudiation of his previously pristine image. The bronze statue which was prominently erected in front of the football stadium has been removed so as not to be a constant reminder of what transpired.

Schultz, the university’s senior vice president of finance and business, and Curley, its athletic director, are on trial for their omissions and for lying about it.

Penn State president Spanier, who previously basked in Paterno’s glow of the utopian college football program, was fired, his professional reputation in tatters.

The University is in turmoil internally and the NCAA has recently sanctioned it with harsh penalties leveled at its football team, including a \$60 million fine, a four-year bowl

Wallace is a partner at Thompson Coburn LLP. He is a past president of the Sports Lawyers Association and former general counsel for the St. Louis Rams. He can be reached at rwallace@thompsoncoburn.com



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prohibition, and lost scholarships.

However, what is most shocking — and the Freeh report makes it unmistakably clear — is that those in charge were more concerned about preserving their money-making football machine and placating their powerful football coach than they were about anything else, including the welfare of innocent at-risk young boys who believed they were being cared for but instead were being exposed to abuse by Sandusky, a University icon.

The Freeh report details Sandusky's access to University facilities, his special treatment and the University's complicity in ignoring the role it played in providing opportunities for Sandusky to continue his preying. As Freeh wrote in the report, "the lack of emphasis on values and ethics-based action created an environment in which Spanier, Schultz, Paterno and Curley were able to make decisions to avoid the consequences of bad publicity." (Freeh Report at 130-31)

The outrage over the underlying crimes and the severity of punishment to those involved in the action, inaction or cover-up has a lot to do with the fact that the victims were children, and that the institution that failed to protect them was an educational one. The report clearly found that the University lacked empathy for child abuse victims and that the Board of Trustees failed to exercise its fiduciary responsibility to make a reasonable inquiry when one was needed. The Board followed "a President who discouraged discussion and dissent" (Id at 17) and believed that looking further into the Sandusky issue would create an outside investigative group in some shape or form that would become permanent. (Id at 80)

Protecting the football program and pleasing Paterno was more important than just about anything else on the campus. Coach Paterno, who had an outstanding graduation rate and was never charged with violating any NCAA rules, was one of the country's most iconic college football coaches. Before the recent penalty vacating thirteen years of wins, he was college football's all-time leader in wins. He received much national and local praise and enjoyed a very lofty position on the Penn State campus. As a University employee told Freeh when asked about his observation of a Sandusky assault and his reluctance to report it,

"...[it] would have been like going against the President of the United States in my eyes. I know Paterno has so much power, if he wanted to get rid of someone, I would have been gone ...Football runs this University and [it] would have closed ranks to protect the football coach at all costs." (Id at 65)

This employee's observation was not without merit. Paterno had previously exercised his power when he in effect had Vice President of Student Affairs Vicky Triponey fired because she battled with him over whether Penn State football players were to be governed by University rules or a

separate set of rules decided by Paterno. (See "Meet Vicky Triponey, the woman who stood up to Joe Paterno at Penn State," by Steve Politi, Newark Star-Ledger, dated July 20, 2012).

As the Freeh Report states "(f)or the past several decades, the University's Athletic Department was permitted to become a closed community... The Athletic Department was perceived by many in the Penn State community as 'an island' where staff members lived by their own rules." (Freeh Report at 139). "Witnesses consistently told Freeh that Paterno was in control of the football facilities and knew everything that was going on." (Id at 51)

The Freeh Report put it simply: "there is an over-emphasis on 'The Penn State Way' as an approach to decision-making, a resistance to seeking outside perspectives, and an excessive focus on athletics that can, if not recognized, negatively impact the University's reputation as a progressive institution." (Id at 129) Paterno often spoke of "The Penn State Way" and was the embodiment of that philosophy. The report recommended that there be a definitive effort directed toward "the integration of the Athletic Department into the greater University community." (Id at 128) The report called for reform in the way the University hired, trained and supervised employees and, especially in the athletic department, how it defined lines of authority, responsibilities and reporting relationships. (Id at 133).

Penn State has a long road back in trying to return to football relevance, but more importantly, it has a long road back to University credibility and respectability. This University lost its way in pursuit of football dominance and allowed its successful football coach to operate with no supervision or accountability as long as he won games. He was the most powerful person on the campus and for years fostered an image of standing for what right is in college athletics. This scandal exploded that myth and severely damaged the University.

The question now: Do we look at this matter as an isolated instance, or is there a wider problem on many college campuses regarding the unchecked power of a successful coach and a successful athletic program?

If you are a leader at one of these institutions, what would you do to make sure that you and your school are never in the position that Penn State found itself in? And if confronted with a serious problem, are you equipped to deal with it?

I asked my partner, Jan Paul Miller, a former U.S. Attorney who advises clients on compliance issues, whether he has any advice for these leaders. He told me that universities, especially those with high profile athletic programs, now are coming under the same sort of scrutiny that other businesses and industries have endured for years.

Miller said, "Businesses that deal with the federal government in particular are used to being under the micro-

scope. Anyone in the healthcare industry and any government contactor knows how important it is to have an active, independent compliance program in place. It is vital to the continued success of these types of businesses to be able to monitor compliance within the business, provide a safe environment for employees to report problems without fear of retaliation, and to take proactive steps when a problem is uncovered. Invariably, the results are far better for the business if it finds, deals with, and discloses any problems on its own than if it ignores or covers up problems and reacts only when the authorities find out about them.”

Miller continued, “It appears that universities have been slow to recognize the need for and benefits of a healthy compliance program. Rightly or wrongly, universities — even private universities — are viewed as public institutions responsible for and answerable to the greater community. Too often, they react to an internal problem by focusing only on the short term gains offered by glossing over it. As the Penn State fiasco shows, such a short-sighted approach can have devastating long term consequences.”

I asked Miller what steps a university should take to protect against a Penn State situation. He said, “First, the university has to install an independent, experienced compliance officer. The compliance officer must be given the authority to draft effective, university-wide compliance policies and procedures. The compliance officer must have the authority to hire outside counsel to conduct internal investigations when necessary. This officer must report directly to the head of the university, not the head of any department that he or she is reviewing.”

“Second, the university must allow the compliance officer to set up an anonymous internal mechanism through which anyone can report potential violations of compliance policies.”

“Finally, and most importantly, when a problem is found, the university, through the compliance officer, must have a complete, objective, independent investigation performed. It must take steps to appropriately punish any wrongdoers. It must take steps to correct whatever holes in its procedures allowed the violation to occur. And it must voluntarily and

forthrightly disclose the results of its investigation before the authorities come knocking.”

Miller concluded, “It is never easy to come forward and say someone in your institution did wrong. But the old saying ‘the cover up is worse than the crime’ still holds true. While internally mandated compliance and self-disclosure of problems can be painful in the short term, it is still the best way to deal with the pain.”

In the Penn Station situation, hindsight directs one to recognize the wisdom of Miller’s advice. Although Penn State is not able to take advantage, others have the opportunity to learn from this tragic course of conduct.

Conclusion

In the wake of the Penn State disaster, the NCAA correctly called for a change in culture as it pertained to big-time college athletics. Priorities need to be examined and constantly re-examined. Lines of authority and an unequivocal understanding by all university trustees, employees, students, sponsors and boosters of the educational mission of the institution is critical and cannot be forgotten or ignored.

As we have discovered in other industries that became “too big to fail,” if universities do not claw back some of the power from their athletic departments or powerful (winning) coaches or boosters, these types of problems are certain to reappear. Let’s hope those in charge have learned from this painful chapter and take the necessary steps so that this kind of unchecked power does not lead to a recurrence on our campuses of such unacceptable, damaging behavior.

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Our Offices

Chicago

55 East Monroe Street
37th Floor
Chicago, IL 60603
312.346.7500

St. Louis

One US Bank Plaza
St. Louis, MO 63101
314.552.6000

Southern Illinois

525 West Main Street
Belleville, IL 62220
618.277.4700

Washington, D.C.

1909 K Street, N.W.
Suite 600
Washington, D.C. 20006
202.585.6900



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