

UE on Appeal

Significant appeals undertaken by United Educators (UE) on behalf of our members

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Warning: This newsletter contains references to graphic content related to harm of adults and minors.

Nebraska Supreme Court

State Supreme Court Upholds Summary Judgment Dismissal of Negligence Suit Against University Based on Valid Release

1 *The Nebraska Supreme Court upheld the validity of a waiver of liability release in a contract between a student-athlete and a university, affirming the dismissal of the student-athlete's negligence lawsuit against the university after he was injured during a required team workout.*

3 STUDENT-ATHLETE SIGNS RELEASE BEFORE JOINING SOCCER TEAM

5 Concordia University, a private institution, recruited Konrad Sinu to play for its intercollegiate men's soccer team and provided him athletic and academic scholarships. Before relocating to Nebraska from the United Kingdom, Sinu signed an assumption of risk and waiver of liability release. The release stated that signing the document was required before participation in university activities, including intercollegiate athletics.

6 The release appeared on one side of a single page with the title displayed in large, boldface type. The first sentence advised signatories to seek legal advice before signing the document if they had questions or concerns. The assumption of risk language acknowledged that, in signing, the individual fully recognized and appreciated "the danger and risks inherent in ... physical activity," which included participation in intercollegiate athletics.

The release included all "claims, demands, injuries, actions or cause of action for ... personal injury, or death" resulting from the student's presence at athletics-related activities. It didn't specifically mention negligence claims.

During his first semester, Sinu and his teammates engaged in a mandatory strength and conditioning workout. One exercise involved using an elastic resistance band secured to a squat rack post and pulled toward the user's face.

During the workout, in which teammates moved from one exercise station to the next in small groups, teammates altered the band's placement from how a university employee originally set it. When Sinu approached the station, he saw the band resting on a hook of the squat rack. He then performed the exercise, and the band slid off the hook — injuring his eyes.

Sinu (and his mother, who also signed the release) sued the university, claiming negligence. The university, among other affirmative defenses, asserted the claim was barred by the release they had signed and by the doctrine of assumption of risk.

RELEASE NOT AMBIGUOUS AND UPHELD AS VALID

The university moved for summary judgment prior to the discovery deadline. Before the hearing on the motion, Sinu moved for leave to file an amended complaint to add allegations that Concordia's "grossly negligent" actions caused his injuries. The court denied the motion, finding any amendment would be futile.

Sinu renewed his motion after discovery closed, and it again was denied. Following a hearing, the court granted the university's summary judgment motion and dismissed the complaint with prejudice. In doing so, the court rejected Sinu's arguments that the release was unconscionable, that it didn't release the university from liability from its own negligence, and that it didn't amount to an assumption of risk.

Sinu appealed, and the Nebraska Supreme Court moved the case to its docket in accordance with state statute.

The court didn't express an opinion about the release's indemnity provision, which was not a focal point of the litigation. As the court's discussion initially notes, the release, as an exculpatory clause, is a contractual provision relieving a party from liability resulting from a negligent or wrongful act and purports to deny an injured party the right to recover damages from the entity that may have negligently caused an injury. These clauses are generally enforceable only when and to the extent the intention to be relieved from potential liability was made clear and unequivocal in the contract, with the wording "so clear and understandable that an ordinary and knowledgeable party" will know what they're contracting away.

Rejecting Sinu's contention that the release's language was unclear, the court analyzed the release's plain language and

concluded its intended effect was clear, even though there was no specific reference to liability for negligence. The court noted the release's boldface title and plain language clearly demonstrating the university's intent to eliminate potential liability, finding that was the "only reasonable construction."

The court also rejected Sinu's argument that the release didn't unambiguously notify him he was releasing Concordia from its own negligence. The court also held the release didn't violate public policy, finding there was no disparity in bargaining power and Sinu wasn't compelled to sign the release.

Because the court found the release valid — barring Sinu's negligence claims — and affirmed summary judgment in the university's favor, it didn't address whether Sinu assumed the risk of his injury. The court further ruled the lower court didn't abuse its discretion in denying Sinu's motions for leave to amend as futile because the allegations in the proposed amended complaint didn't rise to the level of gross negligence.

THE BOTTOM LINE

The Nebraska Supreme Court used its discretion to put this appellate case on its docket in order to issue an opinion regarding a release's validity, highlighting the importance of clear, well-drafted language in contracts. Although the validity of contractual provisions varies by state, the court's analysis provides guidance for academic institutions everywhere to consider when entering into a contract with a student that includes a release. It's also important for institutions to consider whether legal review is needed to ensure the release or any other contractual provision is enforceable under a particular state's laws.

Sinu v. Concordia Univ., 313 Neb. 218 (Neb. Jan. 13, 2023).

RELATED UE RESOURCES

- [Understanding Waivers and Assumption of Risk Forms](#)
- [Checklist: A Guide for Reviewing Contracts](#)
- [Waivers: Getting One Consent at a Time](#)
- [Minors and the Use of Releases](#)
- [Improving Contracting on Campus: A Layperson's Guide to Understanding Contract Basics](#)

Discrimination and Retaliation Under the FMLA: A Primer on Pretext

In this decision, the U.S. District Court of Appeals for the Eighth Circuit (covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota) explains why an employee failed to demonstrate on summary judgment that Drake University's stated legitimate, non-discriminatory reasons for her termination were, in fact, pretext for unlawful discrimination or retaliation.

LONGTIME EMPLOYEE CHALLENGES HER PERFORMANCE-BASED TERMINATION

Margaret Corkrean worked at Drake University, a private university in Des Moines, Iowa, for 28 years. During her last 16 years, she worked as Budget and Office Manager for the College of Arts and Sciences, reporting directly to the Dean. In 2004, Corkrean was diagnosed with multiple sclerosis (MS). However, over the years, she was able to work well with other deans who supervised her without needing to file formal paperwork under the Family and Medical Leave Act (FMLA).

In July 2018, Gesine Gerhard became the Dean. By mid-August, Gerhard, who didn't know about Corkrean's MS diagnosis, was complaining to Drake's Provost about the challenges of working with Corkrean, including Corkrean's performance deficiencies and erratic work schedule. In mid-September 2018, when Gerhard met with Corkrean to discuss attendance and performance problems, Corkrean revealed her diagnosis and the fact she took some time off to attend to her medical needs.

After that meeting, Corkrean complained to HR about harassment and was given FMLA certification paperwork, which she completed and Drake approved. Corkrean understood that going forward, she needed to give Gerhard advance notice of FMLA-related absences. However, performance and attendance problems persisted, and Gerhard continued meeting with Corkrean about frequent unexcused absences and tardiness to work, unprofessional communications with staff, missed deadlines, budget-related issues, and other performance errors. These interactions led to another harassment complaint to HR in mid-June 2019.

A couple weeks later, Gerhard gave Corkrean a memo outlining performance and attendance concerns and listing improvement expectations. Gerhard emphasized

her concerns regarding attendance didn't include protected FMLA or medical-related absences. Corkrean responded by filing a formal harassment complaint against Gerhard with HR on July 10, 2019.

Contrary to policy, HR didn't investigate Corkrean's formal harassment complaint. Instead, on July 16, 2019, an HR rep met with Corkrean to discuss her FMLA leave and performance deficiencies and gave her a performance improvement plan memo, which warned "failure to achieve immediate and sustained improvement ... could result in further disciplinary action." The memo also explained how Corkrean should report and track her FMLA time, stated she wouldn't be penalized for using qualifying FMLA leave, and made clear she should notify HR of any retaliation.

When Corkrean was told these steps were intended to address her complaint, Corkrean said the plan was "good."

On Sept. 10, 2019, Corkrean filed an unfair labor practices complaint with the National Labor Relations Board (NLRB).

On Oct. 7, 2019, Drake fired Corkrean for ongoing performance deficiencies and failure to improve following the July meeting. Gerhard gave Corkrean a memo detailing her continued mistakes, dismissive attitude about her mistakes, and continued unapproved non-FMLA work absences.

Corkrean sued, alleging a variety of claims, including discrimination and retaliation under the FMLA. After the district court granted Drake's motion for summary judgment on all counts, Corkrean appealed.

PROXIMITY BETWEEN PROTECTED CONDUCT AND ADVERSE EMPLOYMENT ACTION, WITHOUT MORE, IS NOT ENOUGH TO PROVE PRETEXT

The FMLA entitles eligible employees up to 12 workweeks of leave during a 12-month period if they have a "serious health condition" rendering them unable to perform job functions. The FMLA makes it unlawful for an employer to interfere with, discriminate against, or retaliate against an employee for exercising rights under the FMLA or opposing any practices made unlawful by the FMLA.

In reviewing the district court's granting of summary judgment, the Eighth Circuit summarized the elements of discrimination and retaliation claims under the FMLA.

A plaintiff who lacks direct evidence of discrimination or retaliation must first make a *prima facie* case by showing each of the following:

- She engaged in protected activity under the FMLA.
- She suffered an adverse employment action.
- There was a causal nexus between the two.

If the plaintiff makes that showing, the employer must articulate a legitimate, non-retaliatory reason for the adverse employment action before the burden shifts back to the plaintiff to “demonstrate that the employer’s proffered reason is pretextual.”

The Eighth Circuit assumed without deciding that Corkrean had presented a *prima facie* case for both claims and skipped directly to the question of pretext. Corkrean didn’t dispute Drake’s “robust, well-documented set of legitimate reasons for [her] termination,” including a “plethora” of performance deficiencies and non-FMLA tardiness and attendance problems.

To raise a question of fact on pretext, a plaintiff must show the employer’s explanation isn’t credible because it has no basis in fact (which Corkrean couldn’t do) or persuade the court that a prohibited reason more likely motivated the employer.

Corkrean tried doing that by demonstrating:

- A “temporal connection” — a closeness in time — between her harassment complaints and negative performance reviews
- A temporal connection (one month) between the filing of her NLRB complaint and her termination
- Drake’s failure to follow its harassment-complaint processes

The court rejected the temporal proximity arguments in part because Gerhard complained about Corkrean’s performance

deficiencies at least a month before learning about her MS and need for FMLA absences. Moreover, in an FMLA case, the Eighth Circuit requires temporal proximity to be “very close” — and a one-month lag is “too long absent other evidence.”

Although finding Drake’s failure to investigate Corkrean’s harassment complaint to be a closer question, the court concluded Drake’s non-compliance with its harassment-complaint policies was “only slight” because HR developed an action plan, told her the plan was intended to address her complaint, and Corkrean told HR the plan was good.

Based on the record in this case, the Eighth Circuit concluded the minor deviation wasn’t enough to support a finding of pretext.

THE BOTTOM LINE



Problem employees who are “on thin ice” shouldn’t be able to insulate themselves by engaging in protected activity. As the Eighth Circuit stated, an employee who exercises their rights under the FMLA has no greater protection from termination for non-FMLA reasons than they did before exercising their rights.

Here, the court’s conclusion that Corkrean hadn’t proved pretext was buttressed by many things Drake did right: Maintaining robust documentation of the legitimate, non-discriminatory reasons supporting Corkrean’s termination; informing Corkrean in writing multiple times of what she needed to do to improve; being consistent in its explanation for her termination; taking the same action — termination — against another employee who made similar mistakes to Corkrean (but who hadn’t taken FMLA leave); and being careful to distinguish performance and unexcused attendance issues from FMLA leave.

Corkrean v. Drake Univ., 55 F.4th 623 (8th Cir. Dec. 13, 2022).

RELATED UE RESOURCES

- [Guide to Preventing Retaliation on Campus](#)
- [Legal Literacy for Supervisors](#)
- [Checklist: Assessing Your Employee Performance Evaluation System](#)
- [Properly Documenting Employee Disciplinary Actions](#)
- [Avoiding Supervisory Pitfalls](#)

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Basketball Coach Allegedly En Route To Purchase Equipment for University Was Not Acting Within Scope of His Assigned Duties

The Michigan Court of Appeals considered various factors to determine whether an employee driving on an alleged university-related errand was acting within the scope of his employment and thus covered by the university's employee indemnification policy.

EMPLOYEE CAUSED A FATAL AUTOMOBILE ACCIDENT

Todd Moyer was employed by Michigan State University (MSU) as the men's basketball program's Associate Strength and Conditioning Coach. On July 14, 2017, while driving from Michigan to Ohio to purchase a piece of exercise equipment posted for sale by the University of Dayton's Strength and Conditioning Coach, Moyer caused a car accident, killing Gladys Johnson and her daughter, Zakira Johnson.

The estates sued MSU and Moyer in the Michigan Court of Claims. MSU was granted summary disposition based on governmental immunity, but the estates also sought a declaration that Moyer was covered under MSU's employee indemnification policy in effect at the time of the accident. The Court of Claims, however, held that Moyer wasn't covered under the indemnification policy because he wasn't acting on MSU's behalf at the time of the accident. On appeal, the estates argued the Court of Claims erred in finding that no material fact existed regarding whether Moyer was acting as MSU's employee at the time of the accident. The estates appealed.

EMPLOYEE WHO CAUSED ACCIDENT WAS NOT PERFORMING ASSIGNED DUTIES

For Moyer to be covered by MSU's employee indemnification policy, he had to be engaged in the performance of MSU-assigned duties at the time of the accident. In addition, the policy could extend to a criminal action if the employee "had no reasonable cause to believe that his or her conduct was unlawful."

The court determined the estates couldn't establish a genuine issue of material fact as to whether Moyer could have reasonably believed his conduct causing the accident was lawful. As a result of the accident, Moyer was ordered to serve a prison sentence after being found guilty of two counts of reckless driving causing death and therefore, it wouldn't be reasonable for him to believe his conduct surrounding the accident was lawful.

The estates attempted to demonstrate that Moyer was acting in the performance of a duty assigned by MSU at the time of the accident, arguing Moyer's job duties included the procurement of strength and conditioning equipment. The court disagreed. Under MSU's policy, Moyer needed MSU's permission to travel on MSU's behalf and its authorization to purchase any strength and conditioning equipment, which he didn't request or receive.

No one at MSU knew he was purchasing the equipment or that he was traveling to Ohio on the day of the accident. The University of Dayton's Strength and Conditioning Coach testified he didn't know if Moyer had authority to purchase the equipment for MSU — he only assumed Moyer was doing so. Evidence also showed Moyer was planning to pay for the equipment with a personal check and that Moyer was interested in purchasing one of the pieces of equipment for himself.

After considering all evidence presented, the court affirmed the granting of summary disposition by the Court of Claims as no evidence was presented to create a genuine issue of material fact that Moyer was within the scope of his employment at the time of the accident.

THE BOTTOM LINE

The Michigan Court of Appeals' decision demonstrates that while there is no formula for determining whether an employee is acting within the scope of his assigned duties to an institution, various factors, including not following the institution's practices and protocols, are considered when making such a determination.

United Educators v. Michigan State Univ. Board of Trustees and Todd Matthew Moyer and Willie Williams et al., Case No. 359324 (Mich. App. Dec 22, 2022).

RELATED UE RESOURCES

- [Checklist: Safety in Student and Employee Transportation](#)
- [Transportation on Campus: Managing the Risk of Motor Vehicles](#)
- [Steering Clear of Liability: Motor Vehicle Report Checks for Employee and Student Drivers](#)

Accidental Shooting Victim at Off-Campus House Party Fails to Demonstrate University's Conduct Caused His Injuries

In this case, the Iowa Court of Appeals upholds a decision granting summary judgment to Drake University in an “exceptional” negligence case in which the relationship between cause and effect is so apparent and so unrelated to the university’s conduct that no reasonable jury could find its conduct was the proximate cause of a student’s off-campus injuries.

STUDENT SHOT BY BASKETBALL PLAYER AT OFF-CAMPUS HOUSE RENTED BY MEMBERS OF UNIVERSITY’S BASKETBALL TEAM

On Aug. 31, 2019, Nathaniel Miller, a Drake University student, was shot in the head by a bullet discharged from a pistol being handled by Tremell Murphy, also a Drake student and member of the basketball team. The accidental shooting occurred during a party Murphy hosted at the off-campus rental house he shared with other basketball team members.

Individuals at the scene reported to police that Miller fell and hit his head, although one officer noticed a bullet hole in the wall and a bullet casing also was located at the scene. Miller survived but suffered a brain injury.

About nine months later, Miller filed a negligence suit alleging that Drake, Murphy, and the house’s owners were liable for his injuries.

Miller sought to link his injury to Drake by asserting “upon information and belief” that a Drake basketball coach told Murphy to “deny involvement in Miller’s injuries” and that Murphy — “under the authority of a Drake University basketball coach” — delayed reporting a gunshot caused Miller’s injuries, which caused a delay in hospital staff providing Miller with proper medical care.

Drake filed a motion for summary judgment, which was granted. After the district court denied Miller’s motion to reconsider, enlarge, or amend the decision, Miller appealed.

NO ISSUE OF MATERIAL FACT REGARDING CAUSATION OF PLAINTIFF’S INJURIES

Miller claimed the district court erred when it granted summary judgment despite acknowledging that “[t]he question of whether a Drake University basketball coach instructed all the basketball players present at the incident to lie

about the cause of plaintiff’s injuries is unquestionably a factual issue that would not be appropriate for summary judgment.”

The appellate court held that summary judgment was nonetheless appropriate because Miller couldn’t establish a causal connection between the alleged conduct by the Drake coach and Miller’s medical care.

The court noted questions about causation are generally “best left to a jury,” but may be decided as a matter of law in exceptional cases when the relationship between cause and effect is so apparent and so unrelated to a defendant’s conduct that “no reasonable jury could conclude defendant’s fault was a proximate cause of plaintiff’s injuries.”

The court found Miller failed to present evidence raising a fact question about causation. Police officers responded to the incident after receiving a report of a gunshot or of someone falling. Because responding officers saw a bullet hole in a wall and found a bullet casing, first responders were aware a gunshot may have caused Miller’s injuries.

The court explained that Miller’s only support for his causation theory was his conclusory allegations in his pleadings implicating the Drake coach. Finding that Miller presented no evidence his medical care was ever delayed, “let alone what caused any alleged delay,” the appellate court affirmed the district court’s decision granting summary judgment to Drake.

THE BOTTOM LINE



Negligence cases often turn on factual disputes and therefore can’t be resolved through a summary judgment motion. But there are exceptions, including cases in which a plaintiff relies solely on conclusory allegations to establish a causal relationship between the defendant’s alleged conduct and plaintiff’s injury.

Miller v. Drake Univ., No. 22-0097 (Iowa App. Dec. 21, 2022).

RELATED UE RESOURCES

- [Gun Violence Claims: Trends and Lessons](#)
- [Firearms and Weapons Policies](#)



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