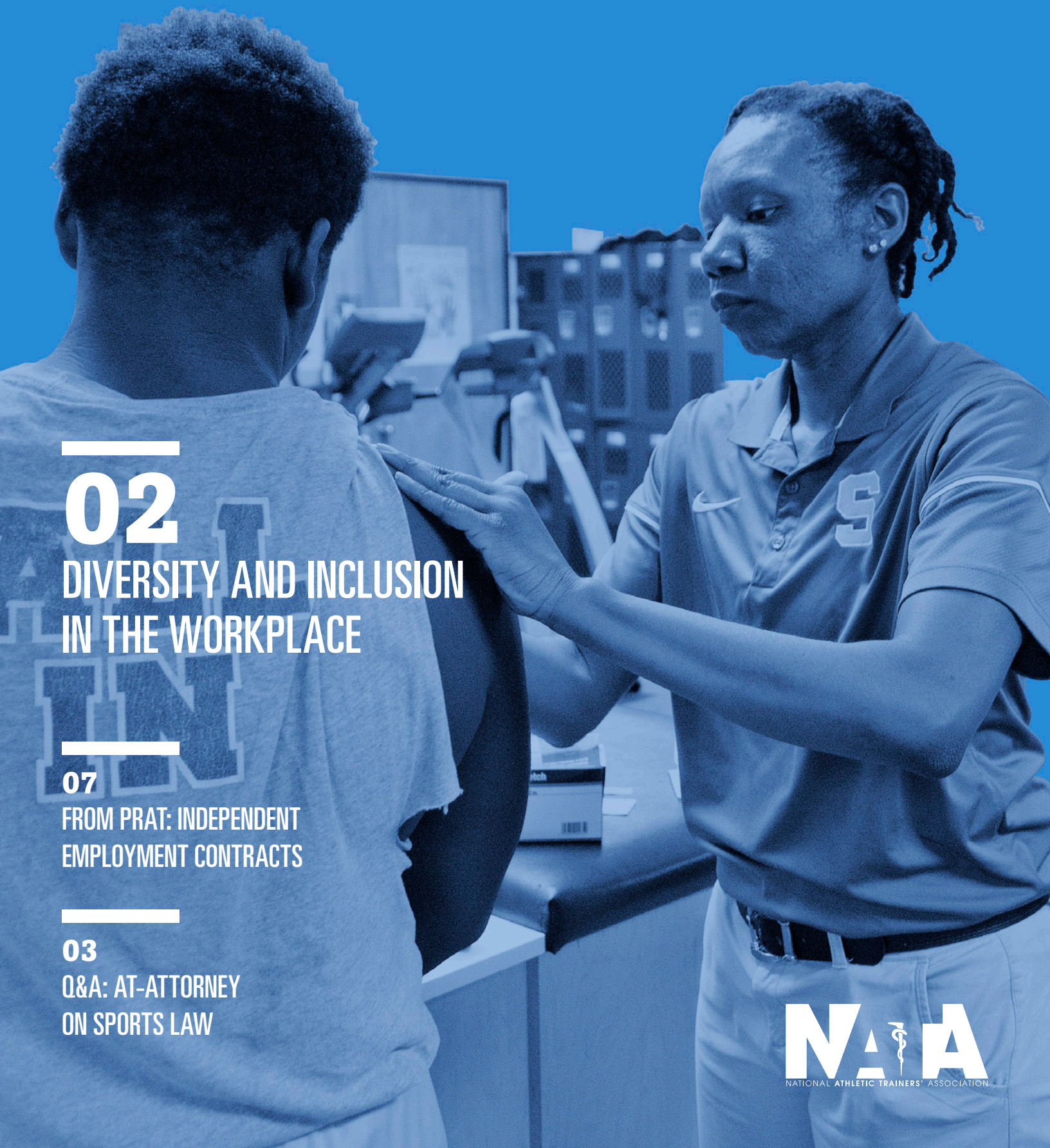
SPORTS MEDICINE

LEGAL DIGEST

QUARTERLY LEGAL NEWSLETTER FOR THE NATIONAL ATHLETIC TRAINERS' ASSOCIATION

SUMMER 2022



NATIONAL ATHLETIC TRAINERS' ASSOCIATION

IN THIS ISSUE

FEATURES

CASE SUMMARIES & LEGAL COMMENTARY

Q&A

REVIEWED BY

The content included in this issue was reviewed by the NATA Editorial Advisors, Pat Aronson, PhD, ATC; A.J. Duffy III, MS, AT, PT; Michael Goldenberg, MS, ATC, CES; Eric McDonnell, MEd, LAT, ATC; Tim Weston, MEd, ATC; and Cari Wood, ATC; and members of the NATA Professional Responsibility in Athletic Training Committee.

OP-ED

Diversity and Inclusion in the Workplace

What ATs Should Know About Creating a Safe Environment for Patients, Colleagues

BY JEFFREY KAWAGUCHI, PT, PHD, ATC, NATA ETHNIC DIVERSITY ADVISORY COMMITTEE

As health care providers in an ever-changing environment, the athletic training profession, like many other professions, has found itself at a crossroads. In the U.S., the diversity of the population is expanding and this is reflected in the active individuals athletic trainers treat. As athletic trainers, we have a professional responsibility to create an environment that is more reflective of those we serve. Although race and ethnicity are commonly the benchmark by which diversity is measured, it can also be measured by a diversity of thoughts, beliefs and actions. By adhering to our professional responsibility, we can promote not just a more diverse workplace, but a more inclusive environment for our colleagues and patients.

According to 2020 U.S. Census, the largest racial group in the United States is those who identify as white.[1] This group makes up the majority of the population (57.8%), with the remainder of the population made up of a "melting pot" of other races and ethnicities. However, there is

an inevitable transition in demographic pattern. In fact, according to the U.S. Census Bureau, no individual racial or ethnic group will constitute a majority by the year 2060.[1]

However, across almost all health professions, this distribution is not represented in the workplace and even more alarming is a lack of preparation of any health profession for the imminent increase in diversity. The profession that most closely replicates the current demographic distribution is medicine. According to the American Association of Medical Colleges, white people account for 56.2% of practicing physicians, followed by Asians who account for 17.1%; 5.8% identify as Hispanic and only 5% identify as Black.[2] But, the statistics are even more lopsided for other professions. According to the Sullivan Report, in dentistry, 86% identified as white, which was similar to the 86.6% in the nursing profession.[3]

This trend is mirrored in the demographics of athletic trainers, as well. According to NATA, in April, 80.64% of all NATA members were white, which increases to about 87.5% of NATA members who are in leadership positions.[4] The next closest race and ethnicity was Hispanic at 5.4% followed by those who identified as Asian or Pacific Islander at 4.26% and Black, who make up 4.18% of the membership.

It's alarming to compare these rates with the populations athletic trainers serve. According to the NCAA, in 2021, across all divisions, 63% of student athletes were white, 16% identified as Black and 6% identified as Hispanic.[5] The gap between the race of athletic trainers and those they serve became even greater when looking at the rates by sport. In football across all divisions, for example, 45% of the student athletes identified as white, 39% as Black and 16% as other. In basketball, 38% identified as white, 44% as Black and 18% as other. With these statistics, there is certainty that the diversity in the athletic training workplace falls below any matrix or standard set by populations, when representation is an important part of health care.

This transition the racial demographics is only one indicator of increasing diversity in the United States. As defined by the Global Diversity Practice, diversity could also be reflected in difference in age, gender, ethnicity, religion, disability, sexual orientation and education.

Thus in this article, I hope to demonstrate the need for increasing diversity in the athletic training profession and provide practical steps to move forward. However, to begin this process, it is important to have an understanding of where we are presently and how diversity is mandated.

Summary of Federal and State Laws

Since the early 1960s, much has changed to alter the racial makeup of the workplace in an attempt to address both the equality and equity of the situation. The enactment of non-discrimination laws began with Title VII of the Civil Rights Act of 1964, which changed the meaning of diversity. Specifically, the act prohibited discrimination based on race, color, sex, national origin and religion. Enforcement of this act was placed with the U.S. Equal Employment Opportunity Commission (EEOC), which is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or employee because of the person's race, color, religion, sex (including pregnancy, transgender status and sexual orientation), national origin, age (40 or older), disability or genetic information. The laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages and benefits. The act also prohibits retaliation against persons who complain of discrimination or participate in an EEOC investigation.

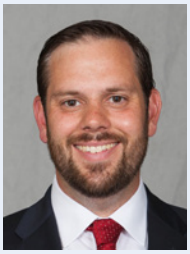
Subsequently, other laws were enacted to promote diversity beyond just race and ethnicity. The meaning of diversity has expanded to include individuals with disabilities, workers age 40 and older and veterans. However, the definition of diversity in the workplace isn't confined to the characteristics and status codified by law. Workplace diversity also includes differences in generation, culture and work styles and preferences. There are a number of additional federal and state laws prohibiting discrimination in workplace including:

- Age Discrimination in Employment Act of 1967, which as amended, prohibits discrimination based on age in all aspects of employment against persons 40 years old or older.
- Age Discrimination Act of 1975, which prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance.
- Americans with Disabilities Act of 1990, which prohibits discrimination against individuals with disabilities in employment, housing, public accommodation, education, transportation, communication, recreation, institutionalization, health services, voting and access to public services.

continued on page 04

Q&A

AT-ATTORNEY OFFERS UNIQUE PERSPECTIVE ON SPORTS LAW



Scott Armstrong, JD, ATC, NASM-CES

Scott Armstrong, JD, ATC, NASM-CES, is a career-advancing athletic trainer with a decade of experience as a director of sports medicine at two historically Black colleges and universities. Armstrong also has worked in the National Football League, the "Power 5" NCAA conferences and in the secondary school setting as an athletic trainer.

Currently, he's the athletic trainer for Atlantic High School in Port Orange, Florida. Armstrong is also developing a sports medicine and risk management consultancy for collegiate and secondary schools that will open later this year. The consultancy will focus on auditing departmental policy and procedures, recommending changes based on best practices, developing health care and risk management solutions and Title IX reviews and guidance, Armstrong said.

In addition to his experience, Armstrong is one of a growing list of ATs who has earned a law degree. Utilizing his unique experience and background, Armstrong sat down with NATA to share insight into how his experience as an athletic trainer informs his experience as an attorney and vice versa.

Q. You have a unique perspective as both an AT and an attorney. How has being an attorney impacted your experience as an AT?

I've always felt that, in a very practical way, ATs play a major role in risk management, both for their patients and employers. Going through law school and surviving to the end has sophisticated that view on an administrative and technical level. The juris doctorate degree has both shifted my

continued on page 04

Q&A, *continued from page 03*

perspective and increased my credibility when discussing liability and risk mitigation with other organizational stakeholders.

Q. What do you think are the most misunderstood aspects of the law that non-attorney ATs have?

Easy – HIPAA versus FERPA. The vast majority of ATs in the secondary school and collegiate settings use "HIPAA authorization" forms and require their patients to sign them so they can discuss and release health information to coaches and others as needed. The reality is that the vast majority of these schools don't meet the "covered entity" standard in the law and, therefore, HIPAA doesn't apply. However, the student's health record is almost certainly protected by FERPA.

There isn't necessarily a harm in over applying HIPAA, except that we're doing so in lieu of obtaining proper authorization to release details of a health/education record under the privacy law that most likely applies, which is FERPA. State-specific laws may also protect certain information in a health or education record.

I recommend working with your employer's general counsel to write a statement that broadly authorizes the use of the student's health and educational record from all applicable federal and state privacy laws on an as-needed basis to sufficiently communicate playing status and physical restrictions and to further the care being provided to the student.

Q. How have diversity, equity and inclusion developments impacted the practice of the AT in terms of treating patients?

Traditionally, many people would focus on race and ethnicity when they hear "diversity." This singular focus of diversity was at the expense of marginalizing individuals who are diverse in ways other than race. Fortunately, diversity, equity and inclusion programming is helping people understand

continued on page 05

DIVERSITY AND INCLUSION IN THE WORKPLACE, *continued from page 03*

- Equal Pay Act of 1963, which prohibits sex-based wage discrimination between men and women in the same establishment who are performing under similar working conditions.

- Executive Order 11246 of 1965, as amended, is a federal executive order applicable to federal government contractors that prohibits job discrimination against any employee or applicant for employment on the basis of race, color, religion, sex or national origin and it requires affirmative action programs for minorities and women to ensure equal opportunity.

- Rehabilitation Act of 1973 requires employers to take affirmative action to employ and advance in employment-qualified individuals with disabilities and prohibits discrimination against qualified individuals with disabilities under any program or activity receiving Federal financial assistance.

- Title IX of the Education Amendment of 1972 prohibits discrimination on the basis of sex or blindness under any education program or activity receiving Federal financial assistance.

- Vietnam Era Veterans' Readjustment Assistance Act of 1974, Section 402, as amended, prohibits job discrimination and requires affirmative action to employ and advance in employment-qualified Vietnam-era veterans and qualified special disabled veterans.

Benefits of a Diverse Workforce

There are a number of documented benefits to a diverse workforce; however, the bottom line is that a diverse workforce simply outperforms one that lacks diversity – this is especially well documented in the business world. According to McKinsey & Company, a management consulting firm that, in its 2019 analysis, suggested that companies in the top quartile of gender diversity on executive teams were 25% more likely to experience above-average profitability than peer companies in the fourth quartile.[6] This is up from 21% in 2017 and 15% in 2014. In the case of other markers, the findings are equally compelling. In their report, McKinsey & Company found that when comparing companies based on ethnic and cultural diversity, those in the top quartile outperformed those in the fourth by 36% in terms of profitability in 2019.

In an attempt to find the underlying constructs for this effect, it's important to acknowledge that very little research has been done specifically with a health-professions focus, which could be because it's a relatively new concept for health care. Because there is a lack of diverse health care professionals available, adequate sample sizes are difficult to obtain. Thus, many of the constructs for the effect of a diverse workplace come from research done in the field of business and are then extrapolated to health care.

According to Forbes, there are a number of benefits to a diverse workforce.[7] The first is that diverse teams boost creativity and innovation. A meta-analysis of more than 100 studies found the process of adapting to greater diversity stretches cognitive flexibilities, making every one on the team more creative and improving collective and individual judgement.[8] When people come from different backgrounds, have a variety of life experiences and see the world in unique ways, multiple perspectives are brought to the table. People from a variety of backgrounds offer a handful of solutions, rather than one uninspired solution, which can be based on the same cultural voice.

Next is the notion that workplace diversity creates greater opportunities for professional growth. Companies that embrace ideas and practices from different perspectives create an inclusive culture where the employees become ambassadors for the company. According to Zety.com, roughly 64% of candidates research a company online before applying for an opening. An integral part of this research is what makes the company an attractive place to work and, according to Glassdoor.com, one in three will not apply for a position at a company that lacks diversity.

How To Achieve A Diverse Workplace

As we look into the future of how the athletic training profession can work toward creating a diverse workplace, it's important to begin by recruiting and hiring diverse talent into current health profession positions. Here are some suggestions for creating a diverse workplace culture:

1. **Recruit a diverse pool of applicants.** In athletic training, many potential employers will use the NATA Career Center or other internet sources (LinkedIn, Indeed, etc.). Posting openings on job boards that specialize in diversity is another possible consideration.

2. **Highlight diversity on the career page on your website.** Be sure your company's diversity statement and any current initiatives are obvious on your career page and reference it in every job description that is being offered.

3. **Seek assistance from other professional committees and organizations.** You can reach out to professional organizations that work with diverse individuals. For example, within NATA, reach out to committees that promote and encourage diversity, including the NATA Ethnic Diversity Advisory Committee or the NATA LGBTQ+ Advisory Committee.

Retaining a diverse workforce is also important. Here are some ideas to consider when evaluating current retention practices:

1. **Conduct diversity training.** Diversity training can help employees become more aware of many of the barriers to diversity and inclusion. This step has also been identified as a means to motivate employees toward positive behaviors and attitudes, which is essential for creating and maintaining a respectful, inclusive workplace.

2. **Create an advisory council.** For this step, recruit a council of individuals who represent a diverse group who are committed to inclusion. This group could bring valuable insight to concerns about diversity, equity, inclusion and access that may otherwise go unnoticed. This group might also be able to create additional strategies that could further increase diversity.

3. **Request diverse referrals.** Ask current employees to refer job candidates they know from under-represented groups in your company

4. **Celebrate employee differences.** Invite employees to share their backgrounds and traditions in the workplace, including religious and cultural practices.

The Road Ahead

The road toward creating a diverse workplace will be long and winding. There inevitably will be many challenges to overcome, but, in the end, the potential dividends not just for future clinicians, but the many of patients they will serve in the future, hold much promise.

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Q&A, *continued from page 04*

diversity more thoroughly and that it could include gender, sexual orientation, socioeconomic status and education, among many other differentiating characteristics.

ATs who better understand diversity and how it may impact their patients can better develop inclusive programming to enhance the health outcomes of their patients. The changes we make in our practice may be small, like being aware that a colloquialism you use may have a different and negative meaning to someone else. However, actively identifying and adjusting how we interact could go a long way to minimize unconscious bias and developing an inclusive environment for your patients.

Socioeconomic status is a major player in this space, especially in high school and collegiate athletics. This certainly varies state to state, but if physicians and other practitioners you refer patients to don't accept Medicaid as a form of payment, don't have a wide range of appointment options or require transportation that you can't provide, then you have an inclusivity issue. You may not be able to solve each of these issues, but it is incumbent upon you as the AT to be aware that these could be barriers to your patients receiving care and you need to be prepared to guide them the best way you can.

Q. How have diversity, equity and inclusion issues impacted ATs in terms of their employment?

Historically, opportunities and salary in athletic training have disproportionately favored white men. To a certain extent, they still do; however, the demographics of ATs entering the profession are changing.

Regarding hiring, many ATs with hiring authority have preferred to hire individuals they "know." Maybe the hiring AT doesn't personally know the successful candidate, but they know someone who does, or they have a strong connection with where the candidate went to school, etc. This type of word-of-mouth and homogenous hiring should be avoided as it can create a barrier to equal employment opportunities.

continued on page 06

Q&A, *continued from page 05*

Employers with DEI education programs and training are likely ahead of the curve in identifying old hiring practices that have negatively affected diverse hiring.

Conversely, setting aside positions based on race, national origin, sex/gender or religion could also be discriminatory. If you are a hiring AT, don't undertake an affirmative action hiring plan on your own. You should receive guidance from your employer's human resources and general counsel offices.

The default in equal employment opportunity hiring is to 1. tailor your position requirements so they are sufficiently related to the job description, but not overly cumbersome, 2. advertise and recruit in a way that is visible and attainable to a diverse applicant pool and 3. utilize a matrix that grades applicants in a way that's not directly or indirectly based on the applicant's race, color, national origin, sex/gender or religion.

Q. Do you see any trends in state laws that impact ATs?

Individual states have consistently updated their practice acts for ATs over the past five to 10 years, and I'm optimistic that trend will continue. The specific changes being made have varied state by state and have included: updating the definition of an AT, updating requirements to become a licensed AT, broadening the scope of practice licensed ATs can legally perform, detailing standing orders requirements and recognition by workers' compensation statutes regarding reimbursement for services rendered.

Collectively, these changes are indicative of the growing understanding and respect for what we do as ATs, the strength of our education programs and potential for us to grow a presence in emerging settings.

Regarding how we practice, state legislatures, state agencies and athletic associations are consistently evolving best practice standards for medical issues, such as concussions, heat illness and cardiac screening. All three of these medical issues remain highly litigious and underscore the need for ATs to 1. be aware of specific changes in your state and 2. have appropriate professional liability insurance provided by their employer or purchased at their own expense.

CASE SUMMARY

Athletic Trainer Granted Qualified Immunity in Case Involving Basketball Player's Death

When an athletic trainer employed by a public secondary school is sued for negligence, the defense often used by their attorney is qualified immunity. That legal doctrine holds that, under certain conditions, government employees are shielded from liability in lawsuits that allege athletic trainers violated the rights of student athletes or failed to follow certain school district policies.

The doctrine of qualified immunity came into play in a Kentucky case that involved the death of a high school basketball player. The player had attended an after-school "open gym," where a boys' basketball coach was supervising and coaching the students. During the open gym, the player complained to other students that he was having trouble breathing.

After he experienced no improvement in his breathing, the player went to speak to the athletic trainer, who was employed by the local school district. The basketball player complained to the athletic trainer that his heart was racing. As he started to leave the athletic trainer's office, the lawsuit says, he told the athletic trainer "it's doing it," and then collapsed.

The athletic trainer immediately went to treat the player, rolled him on to his back, checked his breathing and pulse and, while doing so, instructed a football player in the office to call 911. The athletic trainer then began administering CPR and instructed another student to go find a coach. The player's coach then came into the office and began to assist the athletic trainer.

During this time, the athletic trainer also instructed another nearby student to call another athletic trainer, who had taken the only automated external defibrillator (AED) with her to a baseball practice. According to school district policy regarding the placement of AEDs in a building, "[t]he optimal response time is three minutes or less. . . . Survival rates decrease by 7-10% for every minute defibrillation is delayed."

When the other athletic trainer didn't initially answer her phone, the athletic trainer at the scene instructed two other students to retrieve another AED located in the school's foyer, approximately 325 feet from the athletic trainer's office. Once the students arrived with the AED, the AED's leads were applied to the player and delivered a shock when prompted. Before the AT could deliver a second shock, the local fire department arrived on the scene and assumed resuscitation efforts. The player was transported to a local hospital, but he couldn't be revived and died.

The player's mother filed suit in trial court against several school and district coaches and administrators, including the AT, both in their individual and official capacities. The trial court dismissed all official capacity claims against the athletic trainer and basketball coach, and the trial proceeded on the individual claims.

The complaint alleged that the coach was required, under school district policy, to immediately retrieve an AED. The complaint also claimed that the coach was negligent in having a student attempt to contact another individual to bring the portable AED to the athletic training facility rather than immediately sending a student to obtain the other AED located in the foyer of the school.

The coach and athletic trainer filed motions for summary judgment, claiming they were entitled to sovereign immunity. The trial court granted the athletic trainer's motion, dismissing the case, but denied the coach's motion, finding the claims against him were based on ministerial facts and, therefore, sovereign immunity was not applicable. Additionally, the trial court found that the coach wasn't immune under the state's AED and Good Samaritan statutes because he wasn't engaged in the athlete's medical treatment.

The coach and the player's mother appealed the trial court's ruling. The Kentucky Court of Appeals ruled that both the coach and the athletic trainer were entitled to governmental immunity in this case.

The court noted that the Kentucky Supreme Court has held that when an officer or employee of the state or county is sued in their individual capacity, that officer or employee is often entitled to qualified official immunity, "which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment." The application of qualified immunity "rests not on the status or title of the officer or employee, but on the function performed," the court stated. Specifically, the court said, "the

analysis depends upon classifying the particular acts or functions in question in one of two ways: discretionary or ministerial." A duty is ministerial "when the officer's duty is absolute, certain and imperative, involving merely execution of a specific act arising from fixed and designated facts," the court said.

In finding that the coach was entitled to qualified immunity, the Appellate Court analyzed whether school district protocol imposed a ministerial duty on him to retrieve the AED or whether his decision was a good faith judgment call made in a legally uncertain environment. The protocol instructs that certain actions must be taken when presented with an unresponsive victim: confirm the unresponsiveness of the victim, call 911, alert athletic and/or supervising staff, retrieve an AED and follow CPR and AED procedures until EMS arrives. The court concluded that it was mandatory and ministerial that those tasks be completed.

When the coach entered the athletic training facility, the court explained, the athletic trainer was already providing emergency care. The coach responded to an in-progress situation already being managed in which appropriate care was being rendered. The court held that as long as the AT's aid was appropriate, the coach can't be faulted for using his discretion in declining to take control from an individual with superior training and experience.

As it related to the AT, in noting that the negligence claims against him were dropped, the court found that the AT's decision-making process in determining how to retrieve the AED in this emergency situation was discretionary in nature. Further, the court stated that although the emergency action plan in place at the time made it mandatory for the AT to designate someone to retrieve the AED. However, his exercise of that discretion in who to designate, which AED to instruct that designee to retrieve and how long to wait prior to designating someone else to retrieve an alternate AED weren't specified by the EAP and instead remained at the AT's discretion. Therefore, because the AT's actions were discretionary, he was entitled to qualified immunity.

COLUMN

The Independent Employment Contract: A Foundation for Fair Compensation and a Defined Scope of Work

BY JAMIE L. MUSLER, LPD, LAT, ATC, AND KENDALL SELSKY, DHSC, LAT, ATC, NATA PROFESSIONAL RESPONSIBILITY IN ATHLETIC TRAINING COMMITTEE

Oh, the possibilities! Athletic trainers are recognized for their depth and breadth of knowledge and skills. The AT's ability to provide care in many different settings to a wide variety of patients has created endless employment opportunities. From educational settings, law enforcement, occupational, hospital, professional sports, camps, entertainment industry and military – not to mention the evolution of the gig worker, a person who works temporary jobs as an independent contractor or freelancer – the employment possibilities are endless and, in some cases, complex.

The growth of alternative or nontraditional work, including freelancing, temporary work, self-employment, per diem and contracted athletic training work, continues to grow and can be a great option, provided the AT understands the details of independent contract employment.

Employee vs. Contract Work

Like many aspects of law, there is not a clear statutory definition that outlines an employee versus a contracted worker. There are, however, several federal and state entities, including the Internal Revenue Service, Small Business Administration, Department of Labor and State Employment Agencies, that establish employment standards.

Some differences between contracted workers and employees include:

- An **independently contracted worker** provides AT services on a short-term or limited basis and provides services that are different from the entity's normal purpose. The AT uses their own equipment and supplies to complete their contracted work, and receives direct payment without payroll taxes being deducted. The entity that hires the AT shouldn't direct when, where or how the AT performs their services. A contracted worker will receive a Form 1099 to report their pay to the IRS, won't receive any benefits and must pay self-employment tax.

- An **employee** functions as part of an entity, or employer, and receives direct supervision over the work they perform. The employer controls what the AT does, when they do it and defines and evaluates the AT's performance. The employee will receive a W-2 form to report their pay to the IRS and benefits as well as their Social Security, Medicare and other pay deductions for reporting to the IRS.

The type of employment is a personal one and will be dictated by the AT's individual circumstances and the business or governmental needs. The contract is the AT's opportunity to clearly define and limit the scope of services, patient population and time as well as establish a cost for all services. When appropriate, the independent contract may be a suitable option for both parties. Contract law is complex and should address and define all aspects of the relationship including the following items.

Contract Terms

The contract should define the duration of the contract, the scope of the work and payment terms. The athletic trainer should assure that the contract clearly outlines the details of the contract, defines the scope of work and assures appropriate compensation. Details regarding the overall length of the contract should be specified with dates and times for the start and end of the contract period.

The AT will want to avoid ambiguous language, including references to a "season" or "until the project is complete," and advocate for specific dates and times in the contract. Similarly, the

continued on page 08

scope of the AT's work should be spelled out in sufficient detail so both parties fully understand the expectations. General terms, such as "athletic training," "coverage," "work hardening," "industrial medicine" and "provide care," should be avoided in place of specific services.

Finally, the contract terms should identify the financial considerations, including dates of payment, extra compensation for extended durations, fees for additional services not covered in the agreed upon scope and contract termination fees defined in other areas of the contract.

It may also be appropriate to include details regarding who will provide liability and other professional insurance, who is responsible for supplying medical supplies, what equipment will be needed to perform the services and what is the physical location for providing AT services. The contract should outline the process for scheduling the specified work, how schedule changes will be communicated and what the expectations are for last-minute schedule changes.

Responsibilities

The contract should establish limits for the scope of practice, population and scope of care provided. By connecting the scope of practice to the language in the appropriate state practice act, the AT ensures that the contract language complies with state laws and professional standards.

Each work setting may have a patient population that challenges the boundaries established by the scope of practice for ATs. For example, in the athletic setting, providing care for coaches and other team personnel may not be covered under professional liability insurance if the contract doesn't expressly include this population.

The contract should also establish the service requirements, including events, meetings and other required activities that the AT is expected to attend. While some contracts may be vague, suggesting the AT provides care for all events, it is an unrealistic expectation and may obligate the AT to unanticipated activities and diminish the financial value of the contract. Therefore, the contract should identify specific services, define the work hours and required events or meetings the AT must attend. Travel to and from locations or to attend required activities can impose a significant workload and cost that should be included in the contract terms and considered when determining the finances of the contract.

Professional Oversight

In most circumstances, ATs function under the direction of or in collaboration with a directing physician. This can be in the form of a team physician, supervising physician or referring physician. Regardless of the title, the directing physician must accept the responsibility for the AT's practice, including all activities included in the contract. To ensure agreement with the AT's practice patterns, the contract should define how this relationship is formalized. Does the business or agency provide the physician who serves in this role or is the AT responsible for providing all required components for legal practice including physician supervision?

An AT who is solely responsible for providing AT services to an organization must identify a supervising physician to oversee their practice and business. This supervision may have a cost and should be considered when the AT determines the total compensation of the contract.

Similar to traditional employment, the AT-physician relationship should be in the form of a contract and document all aspects of the relationship, including each parties' responsibilities, the expectations for communication and the method and format of establishing standing orders in compliance with state laws and regulations.

Performance Expectations

Performance expectation language requires careful consideration by the AT and business entity. In some instances, the AT is being contracted to provide expert knowledge and skills not otherwise available at the organization. Additionally, much of the AT's scope of service may be medical in nature and require discretionary reasoning. It may not be appropriate for the identified administrative supervisor to be responsible for evaluating the medical aspect of the AT's contract requirements.

This can be addressed by defining performance regarding results and not the specific means or process needed to meet the performance requirements. The contract language should define "what to do," but not "how to do it." As an example, a contracted AT in the industrial setting may be expected to reduce the employees' time out of work or the number of workers' compensation claims; however, the means for producing the desired results is left up to the discretion of the AT. In this case, the AT could be evaluated by an administrative supervisor on the data and not the medical aspect of the AT practice.

Compensation

Nobody wants to be underpaid, and the compensation clause of the contract should identify the financial terms and the schedule of payment. Payment can be defined in many ways, including an hourly rate, lump sum for the terms of the contract and fee for service. Individual circumstances will dictate the schedule and fees based on the services defined in the contract.

Because athletic training skills are so broad, it's in the AT's best interest to clearly define how and for what they will be compensated. For example, $100 per hour for first aid and emergency care for a sports practice is very different from $100 for an hour of athletic training services. The latter might include emergency care, injury diagnosis, treatment, rehabilitation, return-to-play decisions and documentation, and may, therefore, carry more responsibility and liability risk, justifying additional compensation. Similarly, the time required to perform industrial medicine at a company two days a week may be considerably different from providing care at a police academy for a 16-week cadet class.

It may be appropriate to structure the compensation based on the specific services. The rate per pre-participation physical exam may differ from the rate for event coverage or time performing rehabilitation and documentation.

The timing of payment should also be addressed in the contract. Does the AT expect a retainer fee prior to starting work, a percentage of the total contracted amount on fixed dates or full payment prior to the start of the contract to allow the AT to purchase needed supplies or arrange support services including physician supervision, if required in the contract?

Termination Criteria

The termination clause includes details for the AT and business entity to terminate the agreement. Termination at-will or mutual consent allows the business or athletic trainer to terminate the agreement at any time for any reason. At-will agreements provide the most flexibility for both parties, but also provides the least amount of protection. Termination for cause usually requires some form of misconduct or breach of the contract terms. The contract language should define the reasons for termination and may include, but are not limited to, violations of law, organizational policy and professional standards, poor judgement, misconduct, breach of confidentiality or failure to perform required duties.

While termination clauses are often complex, the AT should consider protecting their financial interests by including financial compensation for termination of at-will agreements and clearly define and understand the criteria for cause agreements. It can also be helpful for the AT to include language for the

termination of the contract based on actions of the business entity. Language including failure to provide medical supervision, lack of payment, lack of an appropriate work environment, failure to provide work resources may help protect the AT and define expectations for both parties.

Signatures

Contracts must be signed by both the party making the offer and the party accepting the offer. Generally, this is straightforward; however, the AT must assure that the signatory has the authority to enter into a contract for the business or agency. Most business entities designate certain individuals who have the authority to enter into a contract. In addition, it's usually in the AT's best interest to be the second or last person to sign if multiple signatures are required. This allows for a final review of any changes to the contract language and terms.

Contract law is complex, and regardless of the specific details, all contracts must be reviewed by legal counsel to assure the basic required components of a standard contract (offer and acceptance, awareness, consideration, capacity and legality) are included. The AT can and should use the contract to clearly define expectations and assure appropriate compensation and protection from an adverse relationship.

CASE SUMMARY

Court Rules Class Action Suit Alleging Title IX Discrimination Can Move Forward

In April, the Ninth Circuit Court of Appeals reversed a lower court decision and ruled that a Title IX sex discrimination class action suit brought by a group of female student athletes at the state's largest public high school against the Hawaii State Department of Education (DOE) and the local interscholastic association could proceed on the merits.

While the decision simply certified the class action, its repercussions for potential future litigation emanating from Title IX – now celebrating the 50th anniversary of its signing into law – are enormous. The lawsuit itself has implications for secondary schools and school districts that employ them.

The lawsuit against the high school and DOE was wide-ranging. In general, the complaint alleged that the DOE and the school's administration have had a systemic policy and practice of using limited resources and capacity to provide better athletic facilities and benefits to male athletes than to female athletes.

Specifically, the complaint alleged that the DOE's policies violated Title IX by discriminating against female athletes in these areas: athletic locker rooms, practice facilities and competitive facilities; equipment and supplies; scheduling of games and practice times; availability and quality of coaching; travel opportunities; publicity and promotion; and medical services and facilities.

It's this last element that impacts athletic trainers directly. The complaint states that female student athletes experience the inequitable provision of medical services, and inequitable access to such facilities in comparison to their male counterparts.

The complaint also states that the DOE uses funding, accepts contributions or allows funding, regardless of source, to provide unequal athletic treatment and benefits to male athletes as compared to female athletes with respect to medical services and facilities. This unequal provision of benefits has been longstanding and has led to – and will continue to lead to – unequal medical services and facilities over time, according to the lawsuit.

The lawsuit cites, as an example, that during the 2017-18 school year cross country season, on at least one occasion, female cross country athletes were seeking treatment from the athletic trainers in the gym, but the treatment they received did not compare favorably to that provided to the boys participating in the football program.

As a result of the DOE's discrimination, the complaint stated, the high school's female athletes have been put at increased risk of injury. For example, according to the complaint, a female water polo athlete was experiencing hyperventilation, a panic attack and muscle cramps. An athletic trainer with the high school wasn't present for the game, and the athlete fortunately relied on an athletic trainer not affiliated with the high school to address her medical needs.

Indeed, the complaint stated, athletic trainers are less likely to be present at girls' games than boys' games. The complaint said, for several years, the high school's athletic trainers did not attend a single girls' water polo game. The 2017-18 school year was the first year that the school's athletic trainers attended a girls' water polo game. Nonetheless, the athletic trainers attended only about three of the 12 games that the girls' water polo team played during the 2017-18 school year. Notably, the school's athletic trainers were utilized by the water polo team to address injuries each time they were present at games, showing that they play a necessary and valuable role in athletics. In comparison, at least one of the school's athletic trainers attends every boys' football or baseball game.

In late 2019, the U.S. district court in Hawaii denied the student athletes' class action status. The 2019 ruling ignored long-standing precedent and created an unfounded barrier for the student athletes to overcome, according to their attorneys, who immediately appealed to the district court ruling. The lower court ruling would have required hundreds of individual lawsuits, which would have grossly burdened the student athletes, the school and the courts, according to the attorneys for the student athletes.

In reversing, the lower court ruled, the three-judge panel of the Circuit Court of Appeals ruled in favor of the student athletes, asserting that the district court erred in denying class action status. The court acknowledged that, when the student athletes seek equity under Title IX, allegations of systemic discrimination favor class actions.

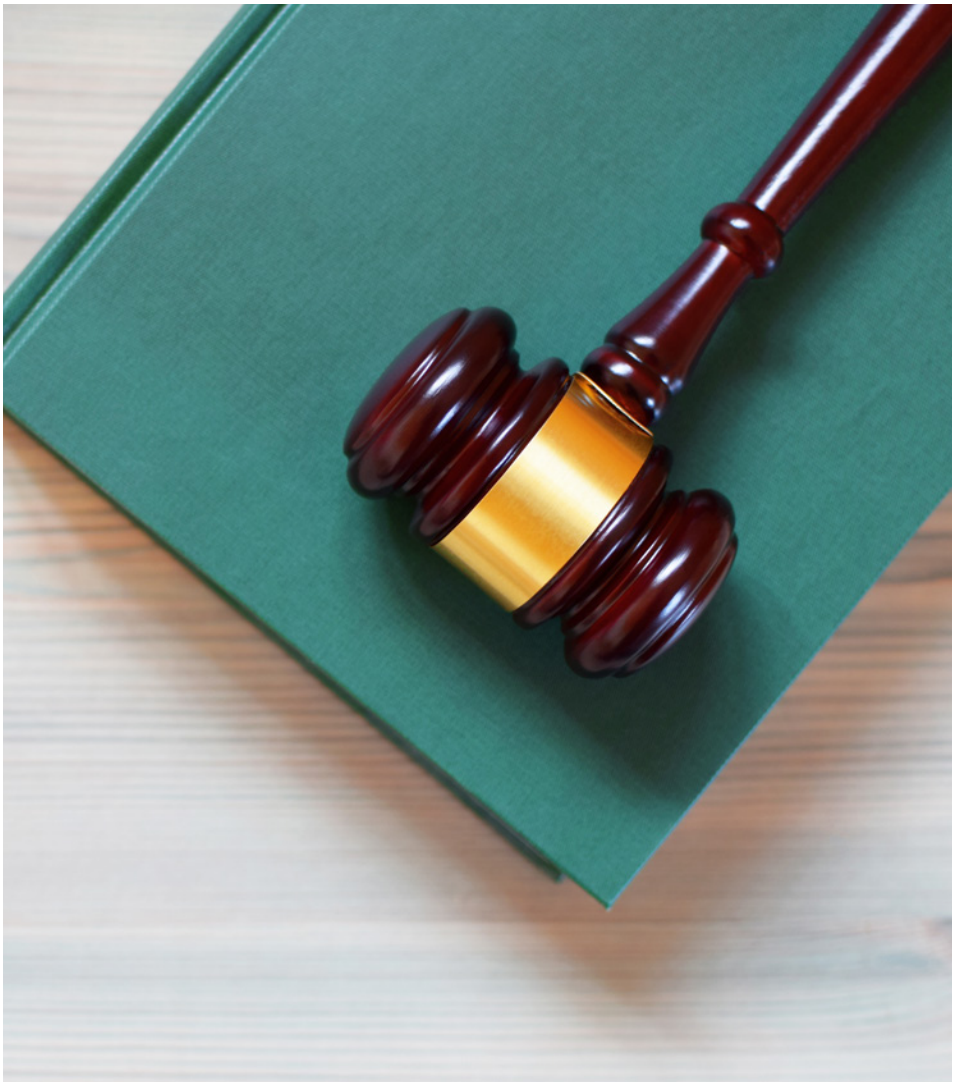
The court also found that the student athletes' claim for class-wide retaliation could proceed because of the chilling effect retaliatory actions have throughout the high school. The retaliation claim stems from the school's threat to cancel the girls' water polo program after the student athletes and parents raised concerns about gender-based athletic inequities.

LAW 101

Legal Terms Athletic Trainers Should Know

Read on for more legal terms to know, a key component of Law 101, our continuing series in *Sports Medicine Legal Digest,* created to break down some of the legal issues athletic trainers may face. From glossaries of common legal terms and in-depth reviews of historic cases in sports medicine law to the handling of administrative issues and understanding state laws, Law 101 is intended to help athletic trainers better understand the risks and responsibilities that come with being a health care provider to a wide variety of patient populations.

Additional legal terms to know can be found in the Fall and Winter 2021 issues of *Sports Medicine Legal Digest*.



Equal Protection Clause: The portion of the 14th Amendment to the U.S. Constitution that prohibits discrimination by state government institutions. The clause grants all people equal protection of the laws, which means that states must apply the law equally and can't give preference to one person or class of persons over another. It's one of the most common provisions in the Constitution cited by those alleging discrimination by a state governmental body.

Expert Witness: A witness with a specialized knowledge of a subject who is allowed to discuss an event in court even though they were not present. For example, an athletic trainer could testify about whether a concussion protocol was followed even though they were not involved in the particular case at trial.

Fiduciary Duty: An obligation to act in the best interest of another party. For instance, a board of education has a fiduciary duty to act in the best interests of the students, teachers and administrators that it represents.

Grand Jury: A group of citizens convened in a criminal case to consider the prosecutor's evidence and determine whether probable cause exists to prosecute a suspect for a felony. If a jury decides probable cause doesn't exist, the prosecutor wouldn't proceed with the case.

Interrogatories: A set or series of written questions sent to a party, witness or other person having information or interest in a case. It's used in the discovery phase of a case.

Mistrial: A fundamental error in a trial that ends the proceeding, such as the discovery that the defendant and a juror are relatives. When a mistrial is declared, the trial must start again with the selection of a new jury.

Opinion: A judge's written explanation of a decision of the court or of a majority of judges. A dissenting opinion disagrees with the majority opinion because of the reasoning and/or the principles of law on which the decision is based. A concurring opinion agrees with the decision of the court, but offers further comment. A per curiam opinion is an unsigned opinion of the court.

Preliminary Hearing: Also called a preliminary examination, this is a legal proceeding attempt to show that there is probable cause that a person committed a crime. If the judge is convinced probable cause exists to charge the person, then the prosecution proceeds to the next phase. If not, the charges are dropped.

Statute of Limitations: A statute that limits the right of a plaintiff to file an action unless it's done within a specified time period after the occurrence, which gives rise to the right to sue. Statutes of limitations can range from as few as one year, or even less, or to as many as 20 years or more, depending on the law and state.

Wrongful Discharge: When an employee is fired for reasons that aren't legitimate, typically, either because those reasons are not lawful or because they violate the terms of an employment contract. The plaintiff has the burden to show that they were, in fact, wrongfully discharged.