

Scarred Knights: Pragmatic Lessons for Employers Following Rutgers' Debacle

by Theresa A. Kelly and David K. Reid

In early April 2013, the now-infamous video of Rutgers University men's basketball coach Mike Rice leaked to the public, depicting Rice verbally and physically abusing his players.¹ Former assistant coach Eric Murdock claims to have brought Rice's conduct to the attention of Rutgers officials in the summer of 2012, and subsequently provided them with video evidence in Nov. 2012.² Murdock further alleges that Rutgers unlawfully terminated him in connection with his reports of Rice's behavior.³

After consulting with Rutgers' internal and external counsel, Athletic Director Tim Perneti decided to levy a suspension rather than terminate Rice for cause under his employment agreement.⁴ However, after the video leaked to the public in April, Rutgers reversed course and terminated Rice amid public outcry over his treatment of players.⁵ Perneti subsequently resigned and Rutgers charged the university's president, Robert Barchi, with rebuilding the athletic department.⁶ In the aftermath of the Rutgers saga, both public and private employers can learn valuable lessons to avoid similar mishaps in the future.

Rutgers' Investigation

It is unclear when university officials first became aware of Rice's abusive conduct and what steps Rutgers took during its investigation. Former assistant coach Murdock claims he alerted Rutgers' officials of Rice's behavior in the summer of 2012, and that certain university representatives, including Perneti, saw the video in Nov. 2012.⁷ This led to Rutgers' now highly criticized decision to suspend, rather than terminate, Rice in the middle of Dec. 2012.⁸

While the exact timing of events in the Rutgers case is somewhat murky, it is critical that employers act swiftly and decisively when investigating complaints of inappropriate behavior, especially when allegations

of physical abuse are present. Timing is key. Once an employee lodges a complaint of potentially unlawful, abusive or discriminatory behavior, the employer must immediately set the wheels in motion to address the complaint.⁹ This response typically involves reporting the complaint to human resources or legal counsel to conduct a full investigation.¹⁰ Those handling the investigation should carefully document all steps in the process, including the initial complaint, witness interviews and documents and visual evidence reviewed. The investigation should conclude with a written report memorializing the investigation process and results and actions to be taken, including any employee discipline, training or other remedial measures.¹¹

In the Rutgers situation, officials appear to have acted quickly, assuming they learned of the video in Nov. 2012, by conducting an investigation and suspending Rice within approximately two weeks.¹² However, the decision to impose the lesser penalty of suspension, rather than termination, for Rice, backfired when the video went public.¹³ In his settlement negotiations with the university in April 2013, Rice could have cited the university's initial decision to opt for a suspension to argue that Rutgers' termination was not justified. In addition, media reports suggest the terms of suspension may have been effective, as Rice did not continue the same abusive behavior toward players after his return.¹⁴ Months had passed since Rice's suspension when the university ultimately terminated him. By that time, the evidence of his misconduct had become stale, thereby strengthening his position at the bargaining table.

In hindsight, in the Rutgers case the better course may have been to bring a broader group of decision-makers into the process early to explore more fully the ramifications of the decision, including the impact of public opinion if the facts or video were disclosed. This approach may have avoided the major disconnect between what

the decision-makers viewed as appropriate discipline for Rice's infractions and the views of the general public and broader Rutgers' community on the issue.

Rice's Employment Agreement

At the center of the Rice controversy was the coach's employment agreement, which ran through April 7, 2015.¹⁵ At the time of its investigation in Nov. 2012, Rutgers still owed Rice approximately \$1.5 million in guaranteed compensation under the contract.¹⁶ If Rutgers terminated Rice without cause, the university was required to pay him 75 percent of his guaranteed compensation.¹⁷ However, if Rutgers terminated Rice for cause, he was not owed anything under the terms of the agreement.¹⁸

Under the contract, for cause termination included: "willful misconduct, act(s) of moral turpitude, conduct tending to bring shame or disgrace to the University as determined in good faith by the Director of Intercollegiate Athletics, [and] violation of University regulations, policies, procedures or directives..." among other listed violations.¹⁹ According to multiple reports, Rutgers felt Rice's conduct did not fit within the for cause termination definition, which impacted its decision to impose a suspension rather than termination in Dec. 2012.²⁰ Then, after Rutgers terminated Rice in April, the two sides reached a \$475,000 settlement.²¹

There are strong arguments on both sides regarding whether Rice's termination satisfied the for cause standard under the terms of his employment agreement. To avoid ambiguity, however, employers should include a clear definition of for cause termination in employment agreements.²² Terms such as "act(s) of moral turpitude" and "conduct tending to bring shame or disgrace to the University" are vague, and do not provide much clarity in a highly charged termination decision. A better approach may be to include a non-exhaustive list of terminable offenses. For example, employers can state that: "Termination of employment for cause is warranted if the employee commits an act of misconduct, including but not limited to, violations of the Company's rules or policies, falsification of records, physical assault or threats, theft of Company property, use of intoxicants or drugs on work premises," and so on. That way, the employer does not tie itself to an exhaustive list of terminable offenses, but provides concrete examples of the types of behavior that give rise to a for cause termination. Rice's behavior, taken as a whole, likely would have more squarely fallen within the four corners of a for cause definition of this type.

Murdock's Termination and Lawsuit

On April 5, 2013, Murdock filed a lawsuit in New Jersey state court alleging that Rutgers terminated him for reporting Rice's conduct.²³ Murdock claims he complained of Rice's abusive behavior on several occasions, but that university officials ignored his reports.²⁴ Then, on July 2, 2012, Murdock alleges Rutgers refused to renew his employment contract in retaliation for his complaints of Rice's abuse and misconduct.²⁵

Murdock claims Rutgers' failure to renew his contract violated New Jersey's Conscientious Employee Protection Act (CEPA), which protects whistleblowers from retaliation for reporting unlawful activity.²⁶ Murdock alleges Rutgers' stated reason for not renewing his contract was Murdock's attendance at a non-sanctioned basketball event, which he asserts was mere pretext.²⁷ Lastly, Murdock claims Rutgers took no action against Rice until Murdock presented university officials with video evidence of Rice's conduct in Nov. 2012.²⁸

Despite Murdock's allegation that Rutgers terminated him in July 2012, in fact it appears the university merely failed to renew his contract.²⁹ However, the distinction may be without a difference under the law, as a failure to renew an employee's contract may constitute an adverse employment action under CEPA.³⁰ Murdock's claim is an important reminder to employers that under CEPA, as well as New Jersey Law Against Discrimination, retaliation claims may arise where the employer declines to renew an employee's contract.³¹

Assuming Murdock's timeline of events is accurate, Rutgers could have taken an alternative course of action to avoid a potential whistleblower lawsuit. Murdock claims he made complaints of potentially unlawful behavior around the time he was negotiating a new contract with the university, in the summer of 2012.³² Regardless of the ultimate merits of such complaints, employers must address them and undertake a timely, thorough investigation. If the employer's internal investigation confirms the employee's complaint of inappropriate or unlawful activity, moving forward with any potential adverse employment action for the alleged whistleblower must be undertaken with careful scrutiny of the reasons and support for the adverse employment action.

In this example, Rutgers could have extended Murdock's contract on the condition that he was completely uninvolved in the misconduct. It appears one of Rice's other assistant coaches joined in the abusive behavior and resigned after disclosure of the video.³³ If Murdock was a participant, the conditional

language in his contract extension could provide the basis for early termination. However, by simply failing to renew Murdock's contract around the same time as his complaint, the university opened itself to risk of whistleblower litigation. Again, timing is critical in analyzing the potential risk of subjecting an employee to adverse employment action at or close to the time when the employee makes a report of alleged wrongful conduct.

Conclusion

The recent events at Rutgers represent the latest notable employer-employee relationship gone terribly wrong. The high degree of publicity that accompanied the release of the video caused outrage both in the public and within the Rutgers community. This response prompted Rutgers to re-think its decision to suspend Rice, resulting in termination for Rice and other resignations at the university. Lessons learned from the Rutgers saga for employers include the importance of

diligently investigating internal complaints, involving all key parties in both investigations and employment decisions, as well as carefully drafting employment agreements. Finally, employers should never assume their employment decisions will remain private and not open to scrutiny by the public or others. In this case, the disclosure of the video totally changed the landscape of the employment decisions that Rutgers had viewed as internal, private matters. The same is true today for employers operating in a sophisticated, wired environment where employees may use available technology to take their employment issues to the court of public opinion. ■

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Endnotes

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2. Mark Mueller, Lawyer Claims Rutgers Ignored Report of Abusive Behavior In Basketball Program for Months, *The Star Ledger*, April 5, 2013, available at http://www.nj.com/news/index.ssf/2013/04/in_rutgers_basketball_scandal.html.
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4. Brendan Prunty, Rutgers Suspends Mike Rice Three Games For Violation Of Athletic Department Policy, *The Star Ledger*, Dec. 13, 2012, available at http://www.nj.com/rutgersbasketball/index.ssf/2012/12/rutgers_head_coach_mike_rice_s.html#incart_river (updated Dec. 14, 2012); see also Star Ledger Staff, Mike Rice Fired: Statement From Rutgers President Robert Barchi, *The Star Ledger*, April 3, 2013, available at http://www.nj.com/rutgersbasketball/index.ssf/2013/04/statement_from_rutgers_preside.html (updated April 3, 2013).
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7. Steve Eder, Rutgers Officials Long Knew of Coach's Actions, *The New York Times*, April 6, 2013, available at <http://www.nytimes.com/2013/04/07/sports/ncaabasketball/rutgers-officials-long-knew-of-coach-mike-rices-actions.html?pagewanted=all>.
8. *Id.*
9. *Compare Aguas v. State*, 2013 WL 1136115, *9 (App. Div. March 20, 2013)(finding investigation that began a little over a month after plaintiff's complaint to be "reasonably prompt" when plaintiff went out on leave two days after employer became aware of allegations and never filed a written report), with *Velez v. City of Jersey City*, 358 N.J. Super. 224, 236, 817 A.2d 409 (App. Div.), *aff'd*, 180 N.J. 284 (2004) (finding factual issues existed "concerning

- the reasonableness of the City's dissemination, implementation, monitoring and enforcement of its sexual harassment policy" when plaintiff informed several supervisors and those supervisors in turn informed the persons responsible for conducting investigations, yet no investigation ever occurred).
10. *Aguas*, 2013 WL 1136115, at *9 (finding no material dispute that defendant/employer launched a comprehensive investigation into the alleged harassment when the inquiry endured for over a month and involved interviews of all relevant individuals and the taking of witness statements).
 11. The issue of timeliness and effectiveness of an investigation is of particular import in light of the fact that investigative materials, documents, interview notes, and investigative report, are discoverable in litigation. See *Payton v. New Jersey Turnpike Authority*, 148 N.J. 524 (1997).
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 17. *Id.*
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 20. *Id.*
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 22. See *Bowers v. Foto-Wear, Inc.*, 2007 WL 906417 (M.D. Pa. March 22, 2007)(District Court of Maryland, interpreting New Jersey law, found the contractual term "cause" for termination to be ambiguous when the contract did not expressly define the term but set forth the following "events" that would terminate the contract).
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 26. N.J.S.A. § 34:19-1 *et seq.*
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 28. *Id.*

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