You Make the Call. . .

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From The Editor

Welcome to the inaugural issue of You Make The Call. . . This newsletter will be published on a quarterly basis presenting analysis of the most recent cases in the sports law field. All research and writing for You Make The Call. . . is performed by the National Sports Law Institute. You Make The Call . . . will be available at the National Sports Law Institute website at www.mu.edu/law/sports/sports.htm. It will also be sent out via fax and email to individuals in the sports education field. If you are interested in receiving You Make The Call. . . please contact Paul Anderson at (414) 288-5815 or at munsli@vms.csd.mu.edu

Martin v. PGA Tour, Inc., 1998 WL 67529 (D.Or.)

PRO-GOLF ASSOCIATION ORDERED TO ALLOW DISABLED GOLFER THE USE OF A CART FOR TOURNAMENT PLAY IN ACCORD WITH THE AMERICAN'S WITH DISABILITIES ACT.

On February 19, 1998, Magistrate Judge Thomas Coffin of the United States District Court for the District of Oregon, ordered the Professional Golfers Association (PGA) Tour to allow golfer Casey Martin the use of a golf cart in rounds of tournament play. While the use of carts is permitted for the Senior PGA Tour and during qualifying rounds of tournament play, until this decision no golfer had ever been allowed to use a cart during regular PGA tournament play.

In an earlier decision, on January 30, 1998, Coffin held that the PGA Tour was subject to the ADA by being included within the definition of places of "public accommodation." (Martin v. PGA Tour, Inc., 984 F.Supp 1320 (D. Or. 1998)). Because of this earlier ruling and the fact that the PGA never contended that Martin was disabled, the central issue for this case was whether the cart use accommodation could be done without frustrating or fundamentally altering the purpose of the rule and nature of PGA and Nike Tour competitions.

Title III of the ADA provides that an individual shall not be discriminated against because of a disability from the equal enjoyment of goods, services, advantages, privileges, facilities or accommodations of any place of public accommodation. Included in discrimination is the failure

to reasonably modify policies and procedures, unless the entity can prove that such modification would fundamentally alter the nature of the good, service, advantage, privilege, or that such accommodation would somehow place an undue burden on such entity. Martin was required to bear the burden of proving that cart use would be a reasonable accommodation. The court held that this burden could be met by introducing evidence that would show cart use was reasonable in a general sense for this situation.

The court noted that no rule exists under United States Golf Association (USGA) rules of play prohibiting the use of a cart or requiring a golfer to walk as part of the game. The USGA rules do state in Appendix I that where rules of "local competition" prohibit the use of a cart, players shall walk at all times during the stipulated round. While the PGA and Nike Tournaments have adopted the USGA rules of play, they have also modified them with rules for local competition and conditions. Included in this modification is rule 6 of Appendix I, "Players shall walk at all times during a stipulated round unless permitted to ride by the PGA Tour Rules Committee." However, the court found that no written policy existed to guide the Committee in granting or denying of waivers of the walking requirement.

To determine whether the accommodation would fundamentally alter the nature of PGA competitions the court primarily focused on the purpose of the rule. The court held that tradition alone would not be enough to justify a denial of the requested modification.

The PGA asserted that walking was required to add "the element of fatigue into the skill of shot-making." The court relied on expert testimony to find that fatigue from walking was not a significant factor under normal circumstances. The testimony pointed out that most exhaustion is caused by heat or humidity and is a result of the loss of fluid- not walking. Furthermore, the court found that although Martin would not walk the average five miles during a round, even with the use of a cart he would still be required to walk approximately one and a quarter miles and face fatigue greater than an able bodied golfer as a result of his disability.

The court also considered the psychological factors involved in the use of a cart and the potential impact on the game that a modification of this type would have. While walking five consecutive miles might have some impact on a golfers psyche, the court found that it was not a significant factor where the walk is not continuous, and where golfer's can take there own pace and enjoy frequent opportunities for rest. The court found that Martin faces the same stress of competition that an able bodied golfer faces plus added "stress of pain and risk of injury." When given the choice in events such as the Senior PGA Tour or qualifying rounds of regular tournament play, most golfers prefer to walk. The court pointed out that if there was any advantage to riding in a cart, preference to walking would seem absurd.

Indeed, the court held that the use of a cart by Martin was a reasonable accommodation where Martin would suffer the same amount or greater fatigue than able bodied competitors, and where such accommodation would not fundamentally alter the nature of the PGA Tour's game.

R.M. Smith v. National Collegiate Athletic Association, 139 F.3d 180 (3rd Cir. 1998)

3rd CIRCUIT DENIES ANTITRUST CLAIM AGAINST NCAA ELIGIBILITY RULE UNDER SHERMAN ANTITRUST CLAIM, WHILE HOLDING THAT NCAA ELIGIBILITY REQUIREMENTS MAY BE SUBJECT TO TITLE IX.

In a recent and possibly groundbreaking 3rd circuit opinion, Renee Smith, a college volleyball player sued the NCAA claiming that the NCAA's "Postbaccalaureate Bylaw" (Bylaw 14.1.8.2) violated &#sect; 1 of the Sherman Act and Title IX.

R.M. Smith v. National Collegiate Athletic Association, 139 F.3d 180 (3rd Cir. 1998).

Smith was a member of the intercollegiate volleyball team at St. Bonaventure University during the 1991-92 and 1992-93 season. She did not participate in volleyball during the 1993-94 season and graduated from St. Bonaventure in 2 &#frac12; years. Soon after she enrolled at Hofstra University in its law school, and then in 1995 she enrolled at the University of Pittsburgh. St. Bonaventure does not have a law school. During her enrollment at Hofstra and Pittsburgh Smith attempted to participate in intercollegiate volleyball and was denied eligibility.

Two NCAA rules impact this situation. Initially, Bylaw 14.2.1 mandate that a student-athlete "shall complete his or her seasons of participation (4 seasons are the maximum allowed) within a five calendar year period." As Smith had begun participation in the 1991-92 season she would generally have been able to continue participating until the 1995-96 season.

However, as Smith had graduated and enrolled in a different school Bylaw 14.1.7 came into affect. This bylaw "provides that a student-athlete may not participate in intercollegiate athletics at a postgraduate institution other than the institution from which the student earned her undergraduate degree." *Id.* at 183.

In August of 1996, Smith instituted a lawsuit against the NCAA challenging its enforcement of Bylaw 14.1.7 and refusal to grant her a waiver of the rule on both antitrust and Title IX grounds.

On May 21, 1997, the district court dismissed her claim holding that the NCAA's refusal to grant a waiver was not the type of action amenable to antitrust attack, and that Smith did not adequately allege that the NCAA was subject to Title IX as a recipient of federal funds. R. M. Smith v. National Collegiate Athletic Ass'n, 978 F. Supp. 213 (W.D. 1997). Subsequently, Smith submitted an amended complaint which the district court denied. She then filed an appeal.

The 3rd Circuit began its review with a discussion of Smith's Sherman Act claim. In her appeal, Smith asserted that the district court erred in limiting application of the Sherman Act to the NCAA's commercial and business activities. Smith, 139 F.3d at 184. As the 3rd Circuit framed it, the issue was "whether antitrust laws apply only to the alleged infringer's commercial activities." *Id.* at 185.

The Court began its discussion of this issue by noting that "the Supreme Court has suggested that antitrust laws are limited in their application to commercial and business

endeavors." *Id.*Although no appellate court had addressed the application of antitrust laws to the NCAA's eligibility rules, several district courts had held that the Sherman Act "does not apply to the NCAA's promulgation and enforcement of eligibility requirements." *Id.* The 3rd Circuit agreed that the eligibility rules were not connected to the NCAA's commercial and business activities, and therefore, the Sherman Act did not apply.

The Court next approached Smith's Title IX claim. As the Court explained, the NCAA is subject to Title IX if it receives federal financial assistance as defined in the statute. In framing this issue, the Court noted that in cases dealing with &#sect; 504 of the Rehabilitation Act, the Supreme Court has made no distinctions between direct and indirect financial assistance. The Supreme Court had merely distinguished between "entities which indirectly benefit from federal assistance and those that indirectly receive federal assistance," holding only the latter amenable to Title IX. *Id.* at 188. Therefore, the 3rd circuit held that the NCAA is not merely an incidental beneficiary of federal funds. Given the breadth of the language of the Title IX regulation defining recipient, we hold that allegations in Smith's proposed amended complaint, that the NCAA receives dues from its members which receive federal funds, if proven, would subject the NCAA to the requirements of Title IX.

Id. at 189. Therefore, the case was remanded back to the Western District of Pennsylvania.

Law v. National Collegiate Athletic Association, 134 F.3d 1010 (10th Cir. 1998)

JURY ORDERS NCAA TO PAY $67 MILLION IN DAMAGES FOR VIOLATION OF SHERMAN ANTITRUST ACT AND CLAYTON ACT BY RESTRICTING THE EARNINGS OF COACHES.

On January 23, 1998, the 10th Circuit Court of Appeals upheld the decision of Kansas District Court Judge Kathryn H. Vratil regarding NCAA Bylaw 11.02.3 which designated restricted earnings coaches. After finding that the bylaw had a clear anticompetitive effect in restricting salaries, the Court then looked to the NCAA's justifications for the bylaw (retention of entry-level positions, cost reduction, and maintaining competitiveness) finding that all were invalid.

In a further decision related to this case, on Monday, May 4, 1998, a federal jury in Kansas City ordered the NCAA to pay nearly $22.3 million in damages as a result of this lawsuit. The penalty assessed includes back pay and court costs for 1,900 assistant coaches who had argued that their earnings had been improperly limited to a $12-$16,000.00 level beginning in 1992. The jury awarded damages of $ $11.2 million to men's basketball coaches, $1.6 million for baseball coaches, and $9.5 million for coaches of other sports. Therefore, as a result of the treble damages set for violations of the Sherman Act under &#sect; 4 of the Clayton Act, the NCAA is potentially liable for approximately $67 million.

Almost immediately, NCAA attorneys stated that they would appeal this award. NCAA officials fear that member schools would be forced to forfeit significant amounts of money from the NCAA's television package and that they were not allowed to explain that the restricted earnings rule was passed in order to provide job opportunities to new coaches at salaries comparable to graduate assistant wages. Soon after this decision the United State Circuit Court of Appeals in

Denver endorsed Judge Vratil's ruling. Still, the NCAA also planned to appeal the 10th Circuit's original decision in May of 1995, in which the Court upheld the Law Defendant's motion for summary judgment moving that the restricted earnings rule violated the Sherman Act.

Todd v. Rush County Schools, 133 F.3d 984 (7th Cir. 1998)

MANDATORY RANDOM DRUG TESTING REQUIREMENT FOR STUDENTS PARTICIPATING IN EXTRACURRICULAR ACTIVITIES FOUND CONSTITUTIONAL.

Could all public school students soon be subject to random, suspicionless drug testing? According to dissenting Judge Kenneth F. Ripple, without further clarification and refinement of the Vernonia standard applied in Todd, the Seventh Circuit Court of Appeals grant of summary judgment for Rush County Schools could be a step in just that direction. Todd v. Rush County Schools, 139 F.3d 571 (7th Cir. 1998). January 12, 1998, the Seventh Circuit used the Vernonia standard in holding that the Rush County Schools District's drug testing program was not a violation of the students Fourth or Fourteenth amendment constitutional rights.

The drug testing program requires students wishing to participate in extracurricular activities to consent to random suspicionless urine testing for nicotine, alcohol and unlawful drug use. Any student failing the drug test is given the opportunity to retest or explain the result by showing that they are lawfully taking medication, or that they have some other lawful excuse. After failing two tests or without satisfactory explanation, the student is barred from participating in extracurricular activities.

The court relied heavily on the decision in Vernonia which held that random drug testing of interscholastic athletes was not in violation of the constitution in reaching it's holding. According to Vernonia, the reasonableness of drug testing was to be determined by balancing the legitimate governmental interests with the intrusion of the persons Fourth Amendment rights.

The Seventh Circuit points out the similarities of Vernonia and the present case by indicating that successful extracurricular activities require healthy students. Further, the court points out that these activities, like organized athletics, are a privilege. Where the student is benefited from participation in the activities, the court found that bearing the burden of this additional obligation is not unreasonable, especially where these students have voluntarily chosen to participate.

In his dissent, Ripple, joined by Judge Rovner, emphasized the fact that athletes generally expect a lesser degree of privacy, that the Vernonia School District was facing a drug crisis, and that drug influenced athletic participants pose a threat of physical harm to the other participants. The dissent also points out that under the logic given by the majority, there appears to be no principled limitation for extending Vernonia student drug testing in public schools where academic pursuits also require healthy students.

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5818,munsli@marquette.edu. This publication is distributed via fax and email to individuals in the sports field upon request.

Editorial Staff: