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Brentwood Academy v. Tennessee Secondary School Athletic Association, 180 F.3d 758 (6th Cir. June 21, 1999) & 190 F.3d 705 (6thCir. Aug. 30, 1999).

6TH CIRCUIT FINDS THAT TSSAA IS NOT A STATE ACTOR AND OVERTURNS DISTRICT COURT DECISION ENJOINING USE OF RECRUITING RULE.

The federal district court's decision in Brentwood Academy was discussed in Volume 1, Number 3. On appeal to the 6th Circuit, the Tennessee Secondary School Athletic Association (TSSAA) argued that the district court incorrectly determined that it was a state actor, and that, even if it is a state actor, the court erroneously ruled that the recruiting rule violated the First Amendment.

The appellate court observed that Brentwood Academy must show that the TSSAA is a state actor to prevail on a First Amendment claim. After noting that the TSSAA is a voluntary association, receives no state funding, and is not legislatively authorized to regulate interscholastic athletics, the court determined that TSSAA was not an arm of the Tennessee government.

The Sixth Circuit then considered whether TSSAA is so intertwined with the government to justify treating it as a state actor. Examining the Supreme Court's Blum trilogy and its own precedent, the court of appeals pointed to three different tests that it has used to resolve this issue. The public function test asks whether "'the private entity exercises powers which are traditionally exclusively reserved to the state.'" The court determined that the coordination of interscholastic athletics is not such a public function. The state compulsion test "requires that the party seeking to establish state action prove that the state has so coerced or encouraged a private entity to act that the choice of that entity must be regarded as the choice of the state." The court held that this test is not satisfied because the State of Tennessee's interaction with TSSAA has been minimal. The symbiotic relationship test considers whether "there is ' a sufficiently close nexus between the state and the challenged action of the latter [that] may be fairly treated as that of the state it self." After analyzing precedent applying this test, the court found that it does not support a finding that TSSAA is a state actor.

In conclusion, the court held that Brentwood could not show that TSSAA is a state actor. Therefore, the court did not consider the merits of Brentwood's First Amendment claim. As a

result, the Sixth Circuit reversed the district court's grant of summary judgment in favor of Brentwood, vacated the injunction, and remanded the case for further proceedings.

Brentwood immediately asked for a rehearing en banc claiming that the panel's decision conflicted with its own precedent. After referring the issue to the original panel for reconsideration, the full court denied Brentwood's petition.

Mercer v. Duke University, 190 F.3d 643 (4thCir., July 12, 1999)

CONTACT SPORT EXCEPTION TO TITLE IX INAPPLICABLE WHEN UNIVERSITY ALLOWS MEMBER OF OPPOSITE SEX TO TRY OUT FOR CONTACT SPORT TEAM.

Heather Sue Mercer was an all state kicker in football at Yorktown Heights High School in New York. Upon enrolling at Duke University in 1994, Mercer decided to tryout for the football team as a walk-on kicker. Although she did not make the team, she served as a team manager and participated in practices and conditioning drills in 1994.

In 1995 the team's seniors on the team selected Mercer to participate in an intrasquad scrimmage game which ended with her kicking the game winning field goal. The kick was shown on ESPN, and Duke's head football coach told Mercer and the media that she had made the team. Although Mercer practiced with the team and appeared in the team photo,she did not participate in any 1995 games.

During this time Mercer alleged that she was subjected to various forms of discriminatory conduct. She was not allowed to attend summer football camp, or dress or sit on the sidelines during football games, and she was subjected to a number of offensive comments from the head coach. Soon after, before the 1996 season, Duke's head coach removed Mercer from the team.

In September of 1997, Mercer sued Duke University and its head football coach alleging violations of Title IX. She claimed that the decision to exclude her from the team was based on her sex, as the head coach allowed less qualified walk-on male kickers to remain.

After the trial court dismissed her claim for failure to state a claim upon which relief could be granted, Mercer appealed to the 4th Circuit Court of Appeals.

The appellate court began by discussing regulations promulgated by the Department of Health, Education, and Welfare (HEW) regarding the applicability of Title IX to athletic programs, specifically 34 C.F.R. § 106.41 which has a specific provision regarding separate teams. The court observed that this provision has a specific exception to the general prohibitions against differential treatment of athletes on the basis of sex. This regulation allows covered institutions to "operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport," and "permits covered

institutions to operate separate teams for men and women in many sports, including contact sports such as football, rather than integrating those teams."

If a program offers a team "in a particular sport for members of one sex but operates and sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a a contact sport." The Fourth Circuit noted that the text of this sentence is incomplete because it does not address what requirements apply to single sex teams in contact sports.

The court proposed two alternative answers: (1) members of the excluded sex must be allowed to try out unless the sport is a contact sport and the antidiscrimination regulations do not apply to contact sports; and (2) members of the excluded sex must be allowed to try out unless the sport is a contact sport, in which case the members of the excluded sex need not be allowed to try out, but the antidiscrimination provisions apply if they are permitted to try out. In justifying its decision to adopt the second alternative, the court pointed out that, if HEW intended to allow for a blanket exception for contact sports from Title IX's antidiscrimination provisions, it could have done so. However, the court construed the language pertaining to contact sports to merely except them from the participation requirement imposed on non-contact sports.

In summary, the court held that a university may choose not to permit a member of the opposite sex to tryout for a contact sport team. Yet, "[o]nce an institution has allowed a member of one sex to try out for a team operated. . .for the other sex in a contact sport," the institution is subject to the general antidiscrimination regulations imposed by Title IX. Therefore, the Fourth Circuit reversed the trial court decision and remanded the case to the trial court for further proceedings.

Adidas America, Inc., v. National Collegiate Athletic Association (NCAA), 64 F.Supp.2d 1097 (D. Kan., Aug. 16, 1999).

ADIDAS ANTITRUST CLAIM AGAINST NCAA DISMISSED.

Adidas America's unsuccessful motion for a preliminary injunction against enforcement of an NCAA bylaw regulating the size of logos on player uniforms was discussed in Volume 2, Issue 1. The case returned to the district court on the NCAA's motion for judgement on the pleadings.

Adidas contracts with NCAA member institutions and their coaches to advertise and promote Adidas' products. Pursuant to these contracts Adidas provides cash, free or discounted shoes and apparel, and other goods and services to a school's teams, coaches, or athletic program. In exchange Adidas obtains promotional rights, the most important of which is the teams' or coach's agreement to wear Adidas' trademarked apparel in competition, practice and other athletic activities. The association of an apparel manufacturer's brand with a particular team, athlete or coach serves to authenticate the brand as a high quality product that serves the high performance needs of college athletics.

Adidas sued the NCAA claiming that it illegally restricts the sales of such promotional rights through the enforcement of Bylaw 12.5.5 which limits the amount of advertising that may appear on a student-athlete's uniform and equipment during intercollegiate competition. Specifically, Adidas claimed that the NCAA unreasonably restrained trade and engaged in a group boycott in violation of §1 of the Sherman Act and attempted to monopolize trade in violation of §2.

As the court explained, the first step in antitrust analysis is to define the relevant market or markets allegedly restrained by defendant's conduct. Because it includes its own products as well as all reasonable substitutes, Adidas had to allege a relevant market that includes all advertising vehicles that are reasonably interchangeable with NCAA promotional rights on athletic apparel.

In regard to its §1 claim, Adidas proposed three possible relevant markets: (1) the market for the sale of promotional rights by institutions or on their athletic apparel and footwear used in connection with NCAA controlled athletics; (2) the market for the sale of college uniforms and related athletic apparel and footwear; and (3) the market for the sale of athletic apparel and footwear to the general public. In regard to its §2 claim Adidas alleged that the relevant market was the market for the sale of NCAA promotional rights.

Adidas alleged that there are "no other vehicles that are interchangeable with NCAA promotional rights on athletic apparel used in intercollegiate competition." However, while Adidas demonstrated that such rights are an excellent advertising vehicle, it could not properly allege that such rights were themselves a relevant market for antitrust purposes. Specifically, Adidas failed to demonstrate why other similar forms of advertising (e.g., sponsorship with professional leagues or the Olympics) are not reasonably interchangeable with NCAA promotional rights. Also Adidas could not explain why such alternative sponsorships would not successfully achieve Adidas' goals of enhancing and authenticating its brand name. Therefore, the court concluded that the market for the sales of NCAA promotional rights is not an appropriate relevant market for antitrust purposes under §1 or §2. Regarding Adidas' claims that the market for apparel and footwear to consumers (i.e. the market for the sale of sports merchandise) is a restrained relevant market, the court found that Adidas never presented any factual allegations to demonstrate how Bylaw 12.5.5 caused it injury in this alleged market.

Because Adidas could not show the requisite anticompetitive effect in a properly defined relevant market, and its antitrust claims against the NCAA could not be supported, the court granted the NCAA's motion for judgement on the pleadings.

Montalvo v. Radcliffe, II, 167 F.3d 873(4th Cir., Feb. 12, 1999)

KARATE PROGRAM'S DECISION TO EXCLUDE YOUTH WITH AIDS FROM FULL CONTACT KARATE CLASSES AND OFFER TO PROVIDE PRIVATE LESSONS WAS REASONABLE ACCOMMODATION THAT DID NOT VIOLATE THE ADA.

Southside Virginia Police Karate Association, Inc., owned by James Radcliffe, operates a karate school in Colonial Heights, Virginia, known as U.S.A. Bushidokan. The school teaches exclusively traditional Japanese, combat-oriented martial arts rather than the family-oriented fitness programs offered by most schools. This combat-oriented martial arts style involves substantial body contact, and participants' sparring often causes minor bloody injuries.

In May of 1997, Michael Montalvo, a 12-year old boy with AIDS applied to begin taking karate classes. In the membership application Michael's father warranted that Michael was in good health and suffered from no illness or condition that would "possibly be infectious to others." The Montalvos never disclosed to U.S.A. Bushidokan or to Radcliffe that Michael had AIDS.

On the same day Radcliffe received information from an anonymous source that Michael had AIDS, but the Montalvos denied this allegation. After receiving an affidavit from Michael's physician certifying his fitness to begin karate class Michael was allowed to participate. After the first class Radcliffe called Michael's father and asked that he have an AIDS test, at which time he finally admitted that Michael had AIDS. In response, Radcliffe met with the Montalvos and told them that Michael would not be allowed to participate in the full contact group karate classes due to the risk of infection to other participants. However, he offered to give Michael private lessons. The Montalvos declined this offer because Michael had signed up for karate lessons to participate in the same classes with his friends.

The Montalvos instituted this lawsuit alleging that U.S.A. Bushidokan and Radcliffe had violated Michael's rights under the Americans With Disabilities Act (ADA) and the Virginia Persons With Disabilities Act. The district court found that allowing Michael to participate in full contact karate classes would present a direct threat to the health and safety of instructors and other students in the class because of the risk of transmission of the HIV virus. The court concluded that forcing the class to change to a softer form of karate would be an unreasonable modification not required by the ADA and that Radcliffe's offer to provide personal training to Montalvo was a reasonable accommodation under the ADA.

The Montalvos appealed the district court's rejection of their claims. Specifically, they alleged that the district court erred in finding that (1) Michael's condition posed a direct threat to other participants safety, and (2) that the offer of private lessons was a reasonable accommodation that complied with the ADA.

The Fourth Circuit initially held that Title III of the ADA applied to U.S.A. Bushidokan, as a place of public accommodation and that Michael was a disabled individual covered by the ADA. U.S.A. Bushidokan conceded that it denied him admission to group lessons because he has AIDS but claimed that such exclusion was legally justified as he posed a "direct threat" to other members of the karate class. The court focused its discussion on the following two issues: (1) whether Michael's condition posed a significant risk to the health and safety of others, and (2) whether reasonable modifications are available to eliminate this risk and to enable him to participate in group lessons.

In analyzing the first issue, the court found evidence that Michael's condition posed a significant risk of harm to others in the karate class. Both sides' experts testified that blood to blood contact

is a means of HIV transmission and that AIDS is inevitably fatal. The type of training in the group karate classes resulted in many bloody injuries, and, even though U.S.A. Bushidokan has a policy of constantly monitoring for injuries, the continuous nature of the contact prevented elimination of such injuries. As a result, as the district court found, there was a high risk that even with precautions there would be a significant number of bloody injuries, and the risk of a student transmitting the HIS virus through such conduct was significant. Moreover, the mode of transmission of the disease (blood-to-blood), the duration of the risk (length of Michael's life), and the severity of the risk (AIDS is inevitably fatal), established a significant risk to the health and safety of others if Michael were allowed to participate in group classes. As the court explained, when the disease at risk of transmission is inevitably fatal, "even a low risk of transmission could still create a significant risk."

As to the second issue, even given the significant risk posed, U.S.A. Bushidokan would still be required to admit Michael to group classes if a reasonable modification would have eliminated the risk. As the court explained, "[t]he only modification [that is] . . . both effective in reducing risk to an insignificant level and in maintaining the fundamental essence of U.S.A. Bushidokan's program was its offer of private karate classes." To force the program to be altered by presenting a "softer" type of martial arts training would alter the fundamental nature of and be an unreasonable modification of the program. While Michael is not required to accept U.S.A. Bushidokan's proposal, the mere fact that he rejected the proposal did not establish a violation of the ADA.

Olinger v. United States Golf Association, 55 F.Supp.2d 926 (N.D. Ind., May 20, 1999)

USE OF GOLF CART WOULD FUNDAMENTALLY ALTER AND BE AN UNREASONABLE MODIFICATION OF THE U.S. OPEN COMPETITION.

A case similar to the Martin v. PGA case reported in Volume 1, Number 1, involved Ford Olinger, a disabled golfer who wanted to play in the May 24, 1999 local qualifying tournament for the U.S. Open. To participate Olinger needed to use a golf cart because his disability, bilateral avascular necrosis, impairs his ability to walk. The United States Golf Association (USGA) forbids the use of carts by participants in the U.S. Open and its qualifying rounds.

Olinger sued the USGA claiming discrimination under the ADA. The USGA moved for summary judgment claiming that it was not an owner, lessor, lessee or operator of a place of public accommodation as required under the ADA. In deciding this motion, the court focused on Title III of the ADA, stating that for it to apply, the USGA must be classified as an owner, lessor, lessee, or operator of a place of public accommodation. According to the court, an entity is an "operator" under this provision of the ADA even if its operation of the place of public accommodation is "only for a short time." Moreover, many places of public accommodation are open only to specific invitees as would be a golf course used for the U.S. Open. Denying the USGA's motion, the court held that "[t]he ADA applies to the areas of competition during the U.S. Open championship and qualifying rounds as well as to the gallery and the areas outside the

ropes" and "[i]nsofar as the USGA operates a place of public accommodation, it is subject to Title III of the ADA."

At trial, the court focused on whether the requested modification of the competition, the use of a golf cart, is a reasonable modification, or if it would fundamentally change the nature of the activity in a manner not required by the ADA. According to the court, Olinger first had to show that his requested modification is reasonable in a general sense. By showing that the game and rules of golf do not expressly forbid the use of a cart, he was able to meet this burden. Therefore, the burden shifted to the USGA to show that the use of a golf cart would actually fundamentally alter the nature of the competition itself.

As the court explained, "[t]he proper inquiry. . .is not whether the requested accommodation would amount to a fundamental alteration in the game of golf. ..but rather whether the requested accommodation would constitute 'a fundamental alteration in the nature of a program' . . .and the 'program' here at issue is the U.S. Open."

The court was persuaded by expert testimony that the use of a cart may provide a golfer with a competitive advantage over a golfer who walks the course. As the court explained, when deciding a case under the ADA, it must make an individualized decision concerning the plaintiff, yet, a court evaluating a requested accommodation's impact on an activity or program must also give full consideration to that impact. As the court concluded, "[t]o require that someone be given the discretion to allow one competitor a potential advantage (the use of the cart) denied to others would fundamentally alter the nature of the competition." Therefore, the court entered judgment for the USGA.

Giordano v. Ridge, 737 A.2d 350 (PA, Aug.31, 1999)

PENNSYLVANIA COURT UPHOLDS THE CAPITAL FACILITIES DEBT ENABLING ACT

Giordano, a taxpayer in the state of Pennsylvania, brought suit alleging that enactment of the Capital Facilities Debt Enabling Act violates Article VIII of the Pennsylvania Constitution which does not allow the state to incur debt on behalf of the state and/or by pledging credit of the Commonwealth to an individual, company, corporation, or association." In response, the state argued that Giordano failed to state a legal claim on which relief could be granted.

Chapter 5 of the Capital Facilities Debt Enabling Act is designated to enable the funding of sports facilities. Giordano argued that this chapter is unconstitutional because sports facilities do not benefit all taxpayers, and that it is truly the sporting organizations themselves that benefit from the funding of such facilities. Therefore, he alleged that the state is incurring debt on behalf of itself and giving the money to a corporation in violation of the Pennsylvania constitution.

Construing the meaning of Article VIII, the court determined that the state is allowed to conduct various financial transactions and the terms pledge or loan of credit are terms of art referring to

these financing devices." In the court's analysis, this language is clearly not intended to prohibit other sorts of financial transactions between the state and private citizens or corporations. The court concluded that the money flows from the Commonwealth to a municipality or municipal authority and not directly to the private entity. Therefore, the court held that taxpayer ha[d] failed to state a claim of unconstitutional incursion of debt or pledging of the credit of the Commonwealth and upheld the constitutionality of the challenged legislation.

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