You Make the Call. . .

Volume 2, Number 3

{Winter 2000}

Cureton v. NCAA, 198 F.3d 107 (3rd Circuit, Dec. 22, 1999)

THIRD CIRCUIT HOLDS NCAA NOT SUBJECT TO TITLE VI

On December 22, 1999, the United States Court of Appeals for the Third Circuit overturned the Eastern District of Pennsylvania's decision permanently enjoining the NCAA from using Proposition 16 to establish eligibility standards for freshmen athletes. Cureton v. NCAA, 1999 WL 1241077 (3rd Cir. 1999). The Third Circuit determined that the NCAA is not a program or activity receiving federal funds and, therefore, is not amenable to Title VI.

Cureton and Shaw are African-American students-athletes unable to participate as freshmen in NCAA competition because they failed to meet the required SAT score of the NCAA's initial eligibility requirements - Proposition 16. Proposition 16 became effective in 1992. It increased the number of core courses required for freshman eligibility and utilized an index to determine eligibility based on a formula combining a high school student's GPA and SAT scores.

Shaw and Cureton filed their complaint against the NCAA alleging that the standardized test score component of Proposition 16 has an unjustified disparate impact on African-American student-athletes in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. Cureton v. NCAA, 37 F. Supp.2d 687 (E.D. Pa 1999) (Volume 1, Number 3). Title VI precludes discrimination on account of race, color, or national origin, under any program or activity receiving federal financial assistance.

The NCAA immediately filed a motion to dismiss the complaint and for summary judgment claiming that (1) there is no private right of action for unintentional discrimination under Title VI; (2) the NCAA is not subject to Title VI; and (3) the NCAA does not receive the federal funds necessary to subject it to Title VI. At the same time, the plaintiffs moved for partial summary judgment on the grounds that the NCAA does receive federal funding and is subject to Title VI.

The district court initially determined that there is a private right of action under Title VI and its accompanying regulations and that the NCAA is a program or activity covered by Title VI. The court found that the NCAA was subject to Title VI as a recipient of federal funds because the

NCAA is (1) an "indirect recipient of federal financial assistance" through its control over the block grant given to the National Youth Sports Program (NYSP), and (2) because member schools cede controlling authority to the NCAA over their federally funded athletic programs. Cureton, 37 F.Supp.2d at 694 (Volume 1, Number 3). After discovery, the court denied the NCAA's motion, holding that Proposition 16 does result in a disparate impact on African American students and thus violates Title VI.

The district court then focused on the NCAA's proposed justifications for Title VI given the obvious disparate impact on African Americans. The court concluded that none of the NCAA's justifications met the standards of Title VI, even though the statute would not condemn the use of the SAT in some way as an eligibility component. The court permanently enjoined the NCAA from continued operation and implementation of Proposition 16.

The NCAA unsuccessfully sought a stay from the district court. However, the Third Circuit granted the NCAA a stay from the lower court's decision on March 30, 1999.

Regarding the merits, the Third Circuit began its review with a discussion of Title VI, section 601. Under this section, the Supreme Court has determined that Title VI only prohibits discrimination in, or exclusion from, programs which receive federal funding on the basis of intentional discrimination. The plaintiffs did not allege intentional discrimination; instead, they relied on implementing regulations, which extend the prohibitions of section 601 to programs or activities that result in a disparate impact.

The court then focused its analysis on the district court's rationale for bringing the NCAA under Title VI as a recipient of federal financial assistance. The court first examined plaintiff's argument that the NCAA is an indirect recipient of federal funding because it controls the NYSP fund, a program that provides summer education and sports instruction for youths on NCAA member and non-member campuses. The Department of Health and Human Services provides federal financial assistance to the program.

The court pointed out that section 601 does not preclude recipients of federal funding from discriminating with respect to a program not actually receiving such funding. According to the court, "the language of Title VI is program specific as it relates to 'participation in.' '[denial of] the benefits of' or 'discrimination under' 'any program or activity receiving Federal financial assistance.' " Thus, regulations promulgated under section 602 to enforce the provisions of section 601 only apply to programs specifically receiving federal financial aid.

The regulations demonstrate this program specific nature by mandating that an application for such federal funding must include assurances of nondiscrimination. As the Third Circuit explained, "these provisions cannot possibly accommodate a reading of the regulations so that as a matter of course their discriminatory impact aspects are applied beyond the specific program receiving Federal assistance."

Even though Congress passed the Civil Rights Restoration Act of 1987 and modified Title VI to encompass programs on an institution-wide basis, the regulations have not been modified and remain program specific. The court held "to the extent this action is predicated on the NCAA's

receiving Federal financial assistance by reason of grants to the Fund, it must fail as the Fund's programs and activities are not in issue in this case."

The Third Circuit then addressed the district court's holding that the NCAA is a recipient of federal funds because it controls its members athletic programs that receive such funding. According to the appellate court, the critical inquiry in determining whether the NCAA is an indirect recipient of funds from its members is whether the NCAA is the intended recipient of the funds.

In NCAA v. Smith, 119 S.Ct. 924, 929 (1999), the Supreme Court found no evidence that member schools paid dues to the NCAA with federal funds earmarked for the schools. Relying on Tarkanian, the Third Circuit found that the NCAA does not control its members. As the court explained, "the ultimate decision as to which freshman an institution will permit to participate in varsity intercollegiate athletics and which applicants will be awarded athletic scholarships belongs to the member schools. The fact that the institutions make these decisions cognizant of NCAA sanctions does not mean that the NCAA controls them, because they have the option, albeit unpalatable, of risking sanctions or voluntarily withdrawing from the NCAA."

The court also noted that applying Title VI's regulations to the NCAA is inconsistent with the contractual character of section 601. There is no contractual privity between the NCAA and the government with regard to federal funds received by member schools, and the NCAA is in no position to accept or reject such funds. The mere fact that institutions voluntarily chose to follow NCAA rules as a condition of membership does not mean that the NCAA has controlling authority over these schools.

The court held that the NCAA is entitled to judgment as a matter of law because its conduct is not covered by Title VI. Therefore, it did not consider whether Proposition 16 has an illegal racially discriminatory impact. The NCAA is now free to enforce Proposition 16.

Stanley v. University of Southern California, 178 F.3d 1069 (9th Cir., June 2, 1999), cert. denied, 120 S.Ct. 533 (November 29, 1999)

FEMALE COACHES SUIT ALLEGING SEX DISCRIMINATION AND VIOLATIONS OF EQUAL PAY ACT ENDS

Marianne Stanley sued the University of Southern California (USC) for sex discrimination and retaliatory discharge in connection with a contract dispute over her salary as head women's basketball coach. Stanley alleged that her salary was not comparable to that of head men's basketball coach George Raveling and that she was discriminated against and discharged from her coaching position because of her complaint about this unequal pay. After various decisions in the case beginning in 1993, the dispute made its way to the Ninth Circuit Court of Appeals.

The Ninth Circuit initially reviewed Stanley's Equal Pay Act claim. As the court explained, Stanley has the burden of establishing a prima facia case by showing that employees of the

opposite sex are paid lower wages for equal work. To prevail she had to show that the jobs of head women's and men's basketball coach are "substantially equal." An analysis of whether the jobs are "substantially equal" focuses on (1) whether the jobs have a common core and are significantly identical, and (2) whether any additional tasks make one of the jobs substantially different.

While Stanley argued that her job was substantially equal to Raveling's, the university argued that there are significant differences because the men's coach bears greater revenue generating responsibility, is under greater media and spectator pressure, and generates more revenue for the school. A defendant may rebut a prima facie case by showing that the disparity in pay is based on some factor other than sex. The university demonstrated that Raveling has a markedly greater experience level and much better coaching qualifications than Stanley does. Nevertheless, Stanley could prevail by showing that the university's proffered explanation is actually a pretext for discrimination. However, Stanley's unsupported allegations that there were no differences in her qualifications or experience, did not meet this minimal burden. Therefore, the Ninth Circuit affirmed the lower court's decisions granting the university's motion for summary judgment on the Equal Pay Act claim.

Because of this finding that Stanley did not show any discriminatory conduct on the part of the university, her claims under the Fair Employment Housing Act, Title IX, and the California Constitution also failed.

As to her retaliation claim, Stanley alleged that the university retaliated against her because she insisted that USC honor its initial contract offer for a salary level equal to Raveling's, and would not accept a future offer at a lower level. However, the court found that USC's offer of a multi-year contract remained open and the university did not discharge her in response to any protected activity. In fact, her contract had expired and she was unable to renegotiate a new contract.

Stanley also asserted that there was an express contract formed with USC based on an alleged initial offer of a contract at a salary level equal to Raveling. However, the Ninth Circuit agreed with the lower courts that there was no evidence that there was a meeting of the minds regarding any such alleged offer and therefore, that no contract was formed.

Stanley then argued that an implied-in-fact employment contract existed under which USC led her to believe that she would be rewarded with a multi-year contract with equal pay for equal work if she produced a successful basketball program. The court found no evidence that her express written contract was modified in this way.

Stanley also asserted that USC violated an implied covenant of good faith and fair dealing when it failed to pay her a salary equal to Raveling's. The court held that such a claim requires proof of a valid contract, but that Stanley has no such contract upon which to base her claim.

For the foregoing reasons, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of USC. (Stanley's petition for writ of certiorari to the Supreme Court was subsequently denied in Stanley v. USC, 120 S.Ct. 533, November 29, 1999).

Hayden v. University of Notre Dame, 1999 WL 76115 (Ct. App. IN, September 28, 1999)

NOTRE DAME LIABLE FOR INJURY TO FOOTBALL FAN

On September 16, 1995, William and Letitia Hayden attended a football game on the Notre Dame campus. They were both season ticket holders and sat in their assigned seats behind the south end zone near the goalpost. During the second quarter, one of the teams attempted a field goal. The net behind the uprights failed to catch the ball and it sailed into the stands. The ball landed near the Haydens' seats. In a mass scramble to recover the football, Letitia Hayden was knocked down, causing her to injure her shoulder.

The Haydens claimed that Notre Dame failed to exercise due care to protect Letitia. Notre Dame moved for summary judgment claiming that it did not have a legal duty to protect her from intentional criminal acts committed by a third party. The trial court agreed and granted the university's motion.

On appeal, the Indiana Court of Appeals considered whether Notre Dame owed Letitia a duty under the circumstances. The Haydens argued that a duty existed because of Letitia's status as an invitee. Notre Dame did not dispute that Letitia was an invitee, but argued that it did not owe her a duty as an invitee to protect her from the criminal acts of a third party. The appellate court held that the test for determining when a landowner's duty to its invitees extends to protecting them against the criminal acts of third parties is a "totality of the circumstances" test. This test "requires landowners to take reasonable precautions to prevent foreseeable criminal activity against invitees." A court must look at all of the surrounding circumstances, including the nature, condition, and location of the land as well as prior similar incidents. However, the lack of any prior specific incidents of wrongdoing does not preclude a finding that the landowner should have known that such acts were foreseeable.

The court found that there were many similar prior incidents of fan misconduct. For example, Letitia was knocked off her seat earlier in the game as a natural result of the enthusiasm of other football fans. Applying the totality of the circumstances in this case, the appellate court held that Notre Dame should have foreseen that injury would likely result from the actions of third parties in lunging for the football after it landed in the seating area. Because the university owed a duty to Letitia, the trial court's summary judgment ruling was reversed.

Charpentier v. Los Angeles Rams Football Co., Inc., 89 Cal. Rptr.2d 115 (California Court of Appeal, 4th District, Division 3, Sept. 28, 1999).

SEASON TICKET HOLDER BREACH OF CONTRACT SUIT AGAINST TEAM DISALLOWED

Charpentier is a former Los Angeles Rams season ticket holder who alleged that the Rams breached his contract and defrauded him when the club moved to St. Louis after the 1994 season.

Charpentier alleged that he purchased tickets for the 1994 season, believing that he could renew them for the following year. In May of 1994, the team announced that it was invoking an escape clause in its stadium lease, although it claimed that it had no intention to move. According to Charpentier, the team had been actively discussing a potential move and had no intention of renewing existing ticket holders' season tickets for 1995. In January 1995, the Rams announced their move to St. Louis and began selling tickets there under a licensing fee arrangement without offering any renewal form to Charpentier.

In the Superior Court, Orange County, Charpentier's claims for breach of contract, fraud and breach of implied covenant of good faith and fair dealing were dismissed for failure to state a cause of action. Charpentier then appealed.

Regarding Charpentier's breach of contract claim, the appellate court found that he could not reasonably assert that the moving of the team broke any particular promise. Furthermore, in regard to the Rams' alleged failure to offer renewal of the season tickets to Charpentier, the court pointed out that the renewal interest is a privilege conditioned on the team's playing in Anaheim. Relying on other cases construing season ticket packages, the court stated that a reasonable Rams season ticket holder might have understood the contract to purchase season tickets to include a right to renew such tickets ahead of other prospective buyers if the team continued playing in Anaheim. However, such rights did not exist if the team moved to St. Louis.

However, the court found merit in the plaintiff?s fraud claim. As the court explained, a fraud claim requires assertion of (1) misrepresentation, (2) knowledge of this falsity, (3) intent to defraud, and (4) justifiable reliance. Charpentier's allegations that the team's announcements that it would not move were made purely to induce ticket sales were made with sufficient specificity. Moreover, he also adequately pled his justifiable reliance upon the team's promises because it is reasonable to assume that season tickets would not have been purchased if buyers had known of the team's intent to move. Therefore, this fraud claim was left for a jury determination of the factual allegations.

Finally, the court found no merit in Charpentier's claim that the team breached its covenant of good faith and fair dealing by not fielding a quality competitive team, and by allowing star players to leave in order to reap greater profits. As the court explained, the covenant of good faith is implied as a supplement to express contractual covenants to prevent a contracting party from engaging in conduct that frustrates the other party's rights to the benefits of the agreement. However, Charpentier did not by the right to watch a good team or to have what he might consider enlightened management decisions made. The Rams were not required to operate as Charpentier might have preferred or to repay the local fan loyalty in any way.

Therefore, the appellate court affirmed the superior court's dismissal of the breeches of the covenant of good faith and fair dealing and contract claims, but remanded the fraud claim for determination by a jury.

Johnny Blastoff Inc. v. Los Angeles Rams Football Co., 188 F.3d 427 (7th Cir., August 5, 1999)

RAMS HAVE PROTECTABLE RIGHT IN TEAM NAME AFTER MOVE TO ST. LOUIS

Blastoff, a corporation in the business of creating and marketing cartoon characters, filed a trademark application to register the mark "St Louis Rams" as the Rams, an NFL football club, were preparing to move from Los Angeles to St. Louis.

In response, the Rams sued Blastoff and moved for summary judgment arguing, among other issues, that the team had acquired rights to the "St. Louis Rams" mark prior to Blastoff and that registration of Blastoff?s marks would result in confusion with the Rams? marks. The district court granted the Rams? motion for summary judgment, which was affirmed by the Seventh Circuit.

On appeal, the Seventh Circuit concluded that the Rams had established protectable rights in its trademark. The court analogized the Rams? situation to that of the Indianapolis Colts, observing that the move of the Colts from Baltimore did not break the continuity of the team's name, or allow a third party to use its name. The Rams demonstrated both prior adoption of the mark and "use in a way sufficiently public to identify or distinguish the marked goods in an appropriate segment of the public mind as those of [the adopter of the mark]."

The court also upheld the lower court?s finding that the Blastoff marks would likely cause confusion with those of the Rams. As the court explained, whether there is a likelihood of confusion is a "question of fact as to the actual actions and reactions of prospective purchasers of the goods and services of the parties." The court relied on a seven factor test in determining whether a likelihood of confusion exists, while acknowledging that their relative importance must be judged on a case-by-case basis. The "keystone" of this analysis is likelihood of confusion as to affiliation, source, connection or sponsorship of goods and services among the relevant class of customers. Usually such confusion is "forward confusion," which occurs "when customers mistakenly think that the junior user?s goods or services are from the same source or are connected with the senior user?s goods or services."

However, in this case Blastoff relied on the doctrine of "reverse confusion," in which a large junior user saturates the market with a similar trademark to the senior user. Although the junior user does not seek to profit from the senior user's mark, the senior user is still injured because the public believes that there is some connection between the two. The court made clear that such a claim could not work as Blastoff was not such a senior user, and he had no protectable rights in the marks.

Blastoff argued that, because the Colorado State college football team also uses the name Rams, the Rams mark is generic and the Rams NFL team had lost an exclusive right to use the mark. As the court explained, a term may be considered generic if it is commonly used to designate a kind of goods or represents common linguistic usage for such goods. In this case, the Rams mark is

used to designate a team playing professional football and there are no other teams with the same name. Thus, the Rams mark is not the generic name of a professional football team.

Cardtoons v. Major League Baseball Players Association,182 F.3d 1132 (10th Cir., June 29, 1999)

TENTH CIRCUIT UPHOLDS DECISIONS GRANTING MLBPA NOERR-PENNINGTON IMMUNITY

Cardtoons, a manufacturer of parody trading cards featuring major league baseball players, contracted with Champs Manufacturing, Inc. to print cards. The Major League Baseball Players Association (MLBPA) sent letters to both Cardtoons and Champs, threatening litigation against each for their respective roles in the production and sale of the cards. The MLBPA claimed that the sale of such cards "?violat[ed] the valuable property rights of the MLBPA and its players.?"

Four days later, Cardtoons filed for a declaratory judgment on the issue of whether the cards violated the publicity and intellectual property rights of the MLBPA. In addition, Cardtoons sought injunctive relief to bar the MLBPA from interfering with third parties involved in the manufacturing and sale of the cards, namely Champs. Cardtoons further claimed that the MLBPA had tortuously interfered with Cardtoons? contractual relationship with Champs.

The district court found Cardtoons parody cards to be protected under the First Amendment, and thus vacated its initial decision in the favor of the MLBPA, entering declaratory judgment for Cardtoons. The Tenth Circuit affirmed the decision.

Subsequently, Cardtoons returned to district court to pursue its claim for tortious interference against the MLBPA and added claims in tort, negligence and libel. These claims stemmed from letters the MLBPA sent to Cardtoons and other card producers. The district court found both letters immune from liability under the "Noerr-Pennington" doctrine, dismissed Cardtoons? claims, and granted summary judgement for the MLBPA. Cardtoons appealed the grant of summary judgment, challenging the applicability of the Noerr-Pennington doctrine.

The Tenth Circuit initially explained that the Noerr-Pennington doctrine provides, "general immunity from antitrust liability to private parties who petition the government for redress, not withstanding the anticompetitive purpose or consequences of their petitions." Despite providing broad immunity, the doctrine does not protect conduct that disguises interference with business relations under the cloak of a legally viable lawsuit.

As the court explained, the Supreme Court has established a two-part definition of sham litigation: (1) the lawsuit must be objectively baseless - no reasonable litigant could realistically expect success on the merits; and (2) the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process as an anticompetitive weapon. This two-tiered process requires that an antitrust plaintiff prove the

threatened lawsuit is legally baseless before a court will consider evidence of its anticompetitive effects.

As the court explained, the focus of the standard's first prong is whether there is probable cause. If so, the defendant's conduct is protected by Noerr-Pennington immunity, and the second prong is irrelevant. Following the law in other Circuits the Tenth Circuit extended Noerr-Pennington immunity to prelitigation threats and held that such threats enjoy the same level of protection from liability as litigation.

The court found that the MLBPA had probable cause in threatening litigation against Cardtoons because its infringement suit was premised on a reasonable argument that its publicity rights outweighed Cardtoons' First Amendment rights. Probable cause for the MLBPA's claims existed even though Cardtoons had prevailed on this issue.

The court found also found probable cause for the MLBPA's litigation threats against Champs as a third party. Therefore, the MLBPA?s letter to Champs is protected by Noerr-Pennington immunity. In addition, the court found that this immunity extended to Cardtoons? claim of libel against the MLBPA.

Davis v. Monroe Board of Education, 119 S.Ct.1661 (Argued Jan. 12, 1999, Decided May 24 1999).

SUPREME COURT EXPANDS SCHOOL DISTRICT LIABILITY UNDER TITLE IX

This case involved the complaint of a fifth grade student, brought on her behalf by her parents, that a fellow student repeatedly sexually harassed her on school grounds. These alleged instances of harassment occurred not only in the primary classroom, but also in gym class and the hallway area of the school. The harassed student reportedly complained to school officials, including teachers and the principal after each incident. The student also reported each incident to her mother, who contacted not only the classroom teacher but also the school principal. She claimed that no action was taken in response to her daughter's allegations. In fact, at one point the principal informed the mother that perhaps she would need to be more vocal before measures would be taken against the offending student.

This perceived indifference was an essential part of Davis? Title IX claim alleging that school officials' such conduct violated Title IX. Davis claimed that her daughter?s grades had dropped because of the "hostile, intimidating, offensive, and abusive environment created by this harassment." The district court and the Eleventh Circuit found no grounds for a Title IX private cause of action based on these allegations.

However, the Supreme Court held that a school could be held liable for peer on peer harassment. The Court explained that school districts would only be liable if claimants demonstrated "deliberate indifference" to claims of harassment, as occurred here. Such liability is then limited

to situations where the school district has substantial control over the "harasser and the context in which such harassment occurs."

In the present case, the harassment occurred during school hours and on school grounds. Because a school board should have significant disciplinary authority over its students, the school district may be liable. The Court found it very importance that the student could seemingly demonstrate that the school board was aware of the incidences of harassment, yet made no effort to investigate or end the offenses. However, the Court cautioned that its ruling was not an attempt to require school districts to impose any particular disciplinary measures, which responsibility is within a district's discretion.

Washington v. IHSAA, 181 F.3d 840 (7th Cir., June 23, 1999)

STUDENT'S LEARNING DISABILITY PRECLUDES SANCTIONING BY ATHLETIC GOVERNING BODY

Eric Washington is a learning disabled student at Central Catholic High School in Lafayette, Indiana. Despite his long history of academic problems, he was allowed to advance to high school. During Washington?s freshman year in high school (1996-97), a school counselor suggested that he drop out because he was having severe difficulty with his schoolwork.

In the summer of 1997, Washington was playing in a three on three-basketball tournament when the Central Catholic coach, Chad Dunwoody, noticed his outstanding ability. Dunwoody, who was also a schoolteacher, convinced Washington to reenroll at Central Catholic. Dunwoody began serving as Washington?s academic counselor and suggested that Washington be tested for learning disabilities even though prior tests failed to indicate any disabilities. Results of new tests indicated that Washington does have a learning disability.

The Indiana High School Athletic Association (IHSAA) has a rule limiting athletic eligibility to eight semesters following the student?s commencement of the ninth grade. This rule was implemented to discourage coaches from red shirting their players and to promote competitive equality and student safety.

Washington applied for a waiver of the eight-semester rule under an IHSAA rule providing that the eight semester rule can be waived if a student withdraws completely from school due to an injury and receives no academic credit during that time. Washington also relied on a the hardship rule allowing the IHSAA to avoid strict construction of its bylaws if such enforcement would promote undue hardship in a particular case. The IHSAA denied Washington?s request for a waiver.

Washington then filed suit against IHSAA alleging violations of § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (a) and Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132. Both acts require reasonable modifications of a program or activity for the disabled if such modifications would not fundamentally alter the overall purpose of the subject activity.

The trial court held that a waiver of the eight-semester rule in Washington?s case would be a reasonable modification because such a waiver would not conflict with the rule's purposes. The IHSAA?s primary goal is to enhance education through athletics participation. The court ruled that failing to accommodate Washington would contravene this goal. The court of appeals affirmed this decision and held that the potential harm to the IHSAA would be insignificant if this rule is waived for Washington.

"You Make The Call..." is a newsletter published four times per year (spring, summer, fall, winter) by the National Sports Law Institute of Marquette University Law School, PO Box 1881, Milwaukee, Wisconsin, 53201-1881. (414) 288-5815, fax (414) 288-5818,munsli@marquette.edu. This publication is distributed via fax and email to individuals in the sports field upon request.

Editorial Staff:
Paul M. Anderson, Editor & Designer
Kirsten Hauser, Associate Editor
Daniel Miller & Eugene Laflamme, Contributors

