You Make the Call. . .

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Pederson v. LSU, 201 F.3d 388 (5th Circuit, Jan. 27, 2000).

FIFTH CIRCUIT HOLDS THAT LSU INTENTIONALLY VIOLATED TITLE IX

On January 27, 2000, the Fifth Circuit Court of Appeals reversed the Louisiana federal district court's decision and held that Louisiana State University (LSU) intentionally violated Title IX.

Beth Pederson, Lisa Ollar, and Samantha Clark alleged that LSU violated Title IX by not establishing a women's soccer team. Pederson also wished to establish a putative class consisting of "those female students enrolled at LSU since 1993" who wanted, but were not allowed to participate in varsity intercollegiate athletics due to LSU's failure to field teams in certain sports. *Id.* at 393. Cindy and Karla Pineda joined Pederson's claim after LSU decided against beginning a varsity women's fast-pitch softball team.

LSU argued that it did not violate Title IX since a proportionality test could not be used when considering violations of the statute. LSU also disputed Pederson's creation of a putative class. Finally, LSU argued that even if it had violated Title IX, any such violation was unintentional.

In addressing these issues, the district court held that a proportionality test could be used to determine whether LSU violated Title IX. The court held that since the student population at LSU was 49% female, while athletic participation was only 29% female, LSU was in violation of Title IX, a decision that the Fifth Circuit upheld.

The Fifth Circuit did; however, reverse the district court's holding that LSU's violation was not intentional. The Fifth Circuit held that although LSU may have ignorantly violated Title IX, it "need not have intended to violate Title IX, but need only have intended to treat women differently." *Id.* at 411. The court relied on statements made by university employees, particularly LSU's athletic director, to determine that LSU intentionally treated women differently.

Finally, the Fifth Circuit reversed the lower court's ruling decertifying Pederson's putative class. The court held that a class consisting of potential female student-athletes who were not given the opportunity to compete in varsity intercollegiate athletics met the necessary requirements for a putative class as set forth by Rule 23(a) of the Federal Rules of Civil Procedure.

In summary, the Fifth Circuit held that since LSU did not provide women with the same athletic opportunities as it did men, the school intentionally treated women differently. In doing so, the school intentionally violated Title IX.

Neal v. Board of Trustees of the California State Universities, 198 F.3d 763 (9th Circuit, Dec. 15, 1999).

NINTH CIRCUIT UPHOLDS REDUCTION OF MALE ATHLETIC SCHOLARSHIPS TO COMPLY WITH TITLE IX

On December 15, 1999, the Ninth Circuit Court of Appeals reversed a California federal court's decision granting a preliminary injunction and held that reducing the number of athletic scholarships for an over-represented gender is a suitable way for a university to comply with Title IX.

Because the percentage of athletic scholarships given to women was significantly less than the percentage of female undergraduates enrolled in the school, California State University - Bakersfield reduced the number of scholarships for its men's wrestling team. Stephen Neal and other plaintiffs were members of CSUB's wrestling team. They sought a preliminary injunction preventing the reduction and claimed that "gender-conscious remedies are appropriate only when necessary to ensure that schools provide opportunities to males and females in proportion to their relative levels of interest in sports participation." *Id.* at 767. However, the Board of Trustees argued that such a reduction is appropriate to correct an imbalance in the number of athletic scholarships given to a gender as compared to the percentage of students comprised by that gender.

The Ninth Circuit relied on *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993), which upheld a preliminary injunction ordering Brown to reinstate its women's gymnastics and volleyball programs in order to comply with Title IX. The Cohen court held that keeping the number of scholarships offered for each gender proportionate to the number of students of each gender is a safe harbor, that a university can use to comply with Title IX. Further, Cohen noted that a gender's level of interest in participating in athletics need only be considered if a university does not keep scholarships proportional to enrollment and does not show a history of expanding programs to meet a gender's interest and abilities. The Ninth Circuit reasoned that "[a]dopting [Neal's] interest-based test for Title IX compliance would hinder, and quite possibly reverse, the steady increases in women's participation and interest in sports that have followed Title IX's enactment." Neal at

Matthews v. NCAA, 79 F.Supp.2d 1199 (E.D. Wash., Dec. 1, 1999).

NCAA NOT SUBJECT TO AMERICANS WITH DISABILITIES ACT

On December 1, 1999, a Washington federal district court ruled that the Americans with Disabilities Act (ADA) does not apply to the NCAA or the PAC-10 Athletic Conference.

Anthony Matthews was a learning-disabled student-athlete at Washington State University (WSU). To accommodate Matthews' disability, the NCAA granted him two waivers under its "75/25 Rule," which enabled him to compete on WSU's football team during the 1997 season and be red-shirted for the 1998 season. The 75/25 Rule, as established by NCAA Bylaw 14.4.3.1.3, is one of the NCAA's minimum academic requirements. The rule provides that all student-athletes must earn at least 75 percent of the minimum number of credit hours required to maintain full-time student status. The rule further states that student-athletes cannot earn more than 25 percent of the required number of credit hours during the summer session. The purpose of the 75/25 Rule is to keep each student-athlete's workload on par with that of the general student body. Because summer school classes tend to be less demanding than regular academic year classes, the rule forbids student-athletes from making up credits by taking less-rigorous summer courses.

Matthews completed seven credits during the fall 1998 semester and nine during both the spring and summer 1999 semesters. This comprised only 64% of the required course load for the regular academic year. Consequently, when Matthews applied for a third waiver the Satisfactory Progress Waiver Committee of the NCAA denied it.

After being denied the third waiver, Matthews sued the NCAA and PAC-10 under the ADA seeking a preliminary injunction to stop them from declaring him academically ineligible for the 1999 season. Matthews alleged that by declaring him ineligible, the NCAA and PAC-10 discriminated against him by denying him full and equal enjoyment of a place of public accommodation as a disabled person. Relying on *Tatum v. NCAA*, 992 F.Supp. 1114 (E.D. Mo. 1998), Matthews asserted that the ADA applies to the NCAA because it is the operator of the athletic facilities used by its member institutions.

The court disagreed with the holding in Tatum. Tatum dealt with the NCAA's supposed control over ticket prices, goods sold, concession profits, press access and other factors, while the affidavits in the present case did not support the same factual findings. The court held that because the NCAA and PAC-10 do not regulate hours of operation, specify staffing requirements, or maintain on-site/off-site employees, etc., in the facilities they use for sanctioned events, they are not the operators of these public accommodations. Further, even assuming the ADA did apply to the NCAA and PAC-10, the court held that by granting Matthews two waivers they made reasonable accommodations for him as required under the ADA. The court stressed the importance of the academic requirements imposed by the NCAA and explained "to require [the NCAA] to continually issue waivers of its requirements for [Matthews] would be to completely dispense with its essential requirements." Matthews at 1207.

Horner v. Kentucky High School Athletic Association, 206 F.3d 685 (6th Cir., March 20, 2000).

SIXTH CIRCUIT HOLDS THAT KENTUCKY HIGH SCHOOL ATHLETIC ASSOCIATION DID NOT VIOLATE TITLE IX

On March 20, 2000, in a split decision, the United States Court of Appeals for the Sixth Circuit held that the Kentucky High School Athletic Association (KHSAA) did not violate Title IX when it refused to sanction girls' fast-pitch softball. This is the Sixth Circuit's second review of the case. Initially, the court reversed the judgment for the KHSAA on Horner's Title IX claim finding that issues of fact "abound[ed]" and remanded the case to the district court.

Lorie Ann Horner, along with eleven other plaintiffs, sued the KHSAA alleging it violated Title IX by not sanctioning girls' fast-pitch softball while sanctioning boys' baseball, the male equivalent sport. The basis for Horner's complaint was that "[KHSAA's] failure to sponsor fast-pitch softball for female students diminished the ability of female student athletes to compete for college fast-pitch softball athletic scholarships when compared with male student athletes who played high school baseball and then competed for college baseball athletic scholarships."*Id.* at 687.

Before the case was heard on remand, the Kentucky Legislature amended Bylaw 40 of statute § 156.070(2) to state: "[i]f a member school sponsors or intends to sponsor an athletic activity that is similar to a sport for which NCAA members offer an athletic scholarship, the school shall sponsor the athletic activity or sport for which the scholarships are offered. The athletic activities which are similar to sports for which NCAA members offer scholarships are: Girls' fast pitch softball as compared to slow pitch." KHSAA Bylaws, Div. IV, Bylaw 40.

On remand, the district court granted summary judgment for KHSAA, holding that: "(1) [Horner's] claims for class certification, injunctive relief, and declaratory relief under Title IX were moot because of the amendment to Ky. Rev. Stat. Ann. § 156.070; (2) the Title IX claims of Plaintiffs who had graduated were also moot; and (3) Plaintiffs' claims for monetary damages under Title IX failed because Plaintiffs had presented no evidence of intentional discrimination." Horner, 206 F.3d at 689.

In its analysis of this holding, the Sixth Circuit first noted that girls' opportunities were more limited than boys'. The Sixth Circuit then addressed whether or not the KHSAA intentionally discriminated against women by not sanctioning girls' fast-pitch softball. The court held that because "[p]laintiffs offered no proof on remand that their interests were not being met, despite allowing them to play on boys' fast-pitch softball teams," they failed to show that any Title IX mandate had been violated at all, let alone intentionally. *Id.* at 696. In making this determination, the majority granted summary judgment for KHSAA by applying a "discriminatory animus" standard that looks to whether an entity's actions focus upon women by reason of their sex and are directed specifically at women as a class. The court found that Horner did not present any

evidence to show an intentional violation of Title IX, and therefore, she had no claim against the KHSAA.

ESPN Inc. v. Office of the Commissioner of Baseball, 76 F.Supp.2d 383 (S.D. New York, Nov. 23, 1999).

EVIDENTIARY RULINGS SET STAGE FOR CASE INVOLVING PREEMPTION OF BASEBALL GAMES

On November 23, 1999, a New York federal court heard a case stemming from ESPN's preemption of late-season baseball games in favor of telecasting NFL games on Sunday nights in September 1998 and 1999 without Major League Baseball's (MLB) permission. ESPN's suit claimed that MLB's unreasonable withholding or delaying of permission to preempt Sunday night baseball games was a material breach of the parties' 1996 television rights contract. The decision involved the court's rulings on various evidentiary motions. In making these rulings, the court set out guidelines as to what ESPN and MLB could use as evidence at trial.

The court denied MLB's motion to strike ESPN's affirmative defense of election of remedies. The doctrine of election of remedies in contracts allows a party "to terminate the contract and recover liquidated damages or . . . continue the contract and recover damages solely for the breach." *Id.* at 387. The court held that MLB could not cancel the contract based on the 1998 breach since it continued performance. However, if the 1999 preemptions were found to be a material breach, MLB would have the right to cancel the contract.

The court then denied ESPN's motion to preclude MLB from proving or arguing that ESPN could not engage in "self-help." ESPN relied upon landlord-tenant cases in which a party is allowed to engage in "self-help" if the other party unreasonably withholds approval of a proposed action. The court found that these cases were irrelevant and held that ESPN had two options if it believed MLB unreasonably withheld permission to preempt. Either ESPN could have terminated the contract immediately and sought total contract damages, or it could have continued to perform under the agreement while seeking partial damages. Preempting baseball games against the wishes of MLB was not one of these options, nor was it proper performance under the contract terms. The court observed, "[i]f ESPN had a legal right to 'self-help' in that it could preempt games whenever it believed that [MLB's] disapproval was unreasonable, then [MLB] would effectively have no right to disapprove." *Id.* at 400.

Finally, the court interpreted the preemption provision of the contract. ESPN argued that any request for preemption must be approved unless MLB could "reasonably say that the preempting event is not [one] of significant viewer interest." *Id.* at 402. ESPN tried to strengthen its claim by bringing forth evidence of "preemptions" that MLB allowed in 1993. ESPN further alleged that MLB's reasons for refusing to grant preemption requests were to "extract extra-contractual concessions from ESPN amounting to millions of dollars. . ." *Id.* at 407. In support of its position, ESPN wanted to introduce into evidence two letters written by MLB showing their demands for granting ESPN's preemption request. The letters' terms called for an increase in the

fee schedule by more than $50 million for the remaining years of the agreement and extended the agreement for two years (2003 and 2004) at payments of $125 and $140 million dollars, compared to $39.9 million per year for 2001 and 2002 according to the 1996 agreement.

MLB interpreted the provision to allow them to deny a preemption request from ESPN for any reason, as long as the denial was reasonable. MLB also argued that the letters were part of settlement negotiations and inadmissible.

In its reading of the contract, the court found the 1993 "preemptions" unrelated to the case and held in favor of MLB because the procedure used in 1993 was different from the one set out in the 1996 agreement. The court held that the letters were admissible although they were part of settlement negotiations. The court stated that because the jury must decide whether MLB's withholding of its approval was unreasonable, it must determine why MLB disapproved, and the letters may provide insight into MLB's intentions.

Martin v. PGA Tour Inc., 204 F.3d 994 (9th Cir., March 6, 2000).

NINTH CIRCUIT AFFIRMS DECISION ALLOWING DISABLED GOLFER TO USE CART DURING PGA TOUR COMPETITION

In May of 1999, the Casey Martin case, which was first reported in Volume 1, Number 1, made its way the Ninth Circuit Court of Appeals as the PGA Tour appealed the decision of United States Magistrate Judge Coffin. Judge Coffin found that modification of the PGA Tour's normal procedures to allow Martin to walk during competition was a reasonable accommodation that did not fundamentally alter the nature of PGA golf tournaments. Martin, 994 F. Supp. 1242 (D. Or. 1998). Coffin then entered a permanent injunction requiring the PGA Tour to permit Martin to use a golf cart in PGA and Nike Tour competitions and in any qualifying rounds for those tours. *Id.*

In reviewing the magistrate's decision the Ninth Circuit initially considered whether a golf course hosting a PGA Tour event is a "place of public accommodation" as described in Title III of the ADA. The PGA Tour contended that, although the spectator areas of a tour event are a "place of public accommodation," the competitors' areas are not because the public has no right to enter these areas. The Tour also argued that the courses could not be places of public accommodation because its tournaments are only open to the nation's best golfers. In affirming the lower court's holding that the ADA applies to the PGA Tour, the Ninth Circuit explained that "[t]he fact that entry to a part of a public accommodation may be limited does not deprive the facility of its character as a public accommodation." Martin, 204 F.3d at 997. The Ninth Circuit also noted that because "users of a facility are highly selected does not mean that the facility cannot be a public accommodation." *Id.* at 998. Although in the end only the best players will participate, at the initial stages anyone can try out for qualifying school, and so the level of competition does not change the nature of the facility. *Id.* at 999.

The court then considered whether Martin's use of a golf cart during tournament events is a reasonable modification under Title III. This court focused on whether Martin's use of a cart would "fundamentally alter" the nature of PGA and Nike Tour competitions, thereby constituting an unreasonable accommodation that is not required to be made by the PGA Tour. The court concluded that permitting Martin to use a cart does not fundamentally alter the nature of PGA and Nike Tour competition. Instead the use of a cart gives Martin access to a type of competition he otherwise could not engage in because of his disability. As the court stated, "[t]hat is precisely the purpose of the ADA." Martin, 204 F.3d at 1000.

The Ninth Circuit rejected the argument that Martin's use of a cart would open the courts to future claims by other impaired athletes. As the court noted, each such claim would revolve around the same type of fact based inquiry and those reasonable accommodations that would not fundamentally alter the nature of the competition involved would be allowed.

Finally, the PGA Tour argued that it was improper for the district court to consider Martin's condition in determining whether riding a cart would give him an unfair advantage over other competitors, because it would be unduly burdensome to ask the organization to make such individualized assessments for other similarly situated golfers. In again rejecting the PGA Tour's arguments, the court concluded that this type of individualized assessment would not impose an intolerable burden on the Tour and that it was entirely proper for the district court to undertake such an assessment.

In summary, the Ninth Circuit affirmed the decision of the district court that a golf course is a place of public accommodation under Title III during a PGA Tour event and that Martin's use of a cart is a reasonable accommodation that does not fundamentally alter the nature of PGA and Nike Tour competitions.

The PGA Tour has subsequently field a writ of certiorari with the United States Supreme Court.

Olinger v. United States Golf Association, 205 F.3d 1001 (7th Cir., March 7, 2000)

SEVENTH CIRCUIT FINDS THAT USE OF CART BY DISABLED GOLFER WOULD FUNDAMENTALLY ALTER U.S. OPEN QUALIFYING COMPETITION AND IS AN UNREASONABLE MODIFICATION UNDER THE ADA

The day after the Martin decision was rendered by the Ninth Circuit, the Seventh Circuit rendered a contrary decision in a case concerning Ford Olinger, a physically disabled golfer who sued the USGA to use a cart during U.S. Open qualifying rounds. Contrary to Martin, the district court (opinion reported in Volume 2, Number 2) found that the use of a cart would provide Olinger with a significant unfair advantage in competition and would fundamentally alter the nature of the U.S. Open competition. Olinger, 55 F.Supp.2d 926 (N.D. Ind. 1999). Olinger appealed this decision to the Seventh Circuit Court of Appeals.

The district court found that the nature of the competition would be fundamentally altered by allowing Olinger to use a cart because it would "remove stamina. . .from the set of qualities designed to be tested in this competition." Olinger, 55 F.Supp.2d at 930. The district court explained that part of the set of tasks assigned to competitors in the U.S. Open includes striking a golf ball under great mental and physical stress. Olinger's use of a cart, while generally reasonable, would alter the competition by taking out this stress.

In affirming the district court, the Seventh Circuit found that Olinger's "use of a cart during the tournament would fundamentally alter the nature of the competition." Olinger, 205 F.3d at 1005. The court pointed to testimony from golfer Ken Venturi who won a famous U.S. Open competition while battling heat exhaustion and on the verge of a collapse. Venturi's testimony demonstrated to the court the incredible physical and mental stress necessary to compete in the U.S. Open.

The Seventh Circuit also agreed with the district court's finding that it would be an unnecessary administrative burden for the USGA to have to develop a procedure for evaluation of these requests for the use of a cart.

In the end, unlike the Ninth Circuit court in Martin, the Seventh Circuit found that "the decision on whether the rules of the game should be adjusted to accommodate [Olinger] is best left to those who hold the future of golf in trust."

The Seventh Circuit's decision in Olinger is almost directly in opposition to the Ninth Circuit's decision in Martin. The Ninth Circuit even referred to the district court decision in Olinger but stated that "[t]o the extent that other rulings in Olinger are inconsistent with our decision today, we respectfully disagree with it." Martin, 204 F.3d at 1002 n.9. It is now up to the Supreme Court to decide what reasoning to follow.

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