

You Make the Call. . .



Volume 3, Number 2

{Fall 2000}

INDIANA COURT OF APPEALS HOLDS DRUG TESTING POLICY UNCONSTITUTIONAL

***Linke v. Northwestern School Corp.*, 734 N.E.2d 252 (Ind. Ct. App., August 21, 2000).**

On August 21, 2000, the Court of Appeals of Indiana held that drug testing students without individualized suspicion was violates of the Indiana Constitution.

Rosa and Reena Linke participated in extracurricular activities at Northwestern High School. In January of 1999, the Northwestern School Corporation (NSC) instituted a drug testing policy done by random urinalysis testing. The stated goal of the policy was to protect the health and safety of students, but NSC was also concerned with its image in the community. The Linkes signed the form consenting to the testing, but objected to the drug testing policy. They sued NSC claiming that the policy was unconstitutional under the Fourth Amendment of the United States Constitution and the Indiana Constitution. The Linkes moved for summary judgment, asking the court to find that the policy invaded their privacy rights. The trial court denied the Linkes motion.

The Court of Appeals began its review by discussing the United States Supreme Court's drug testing decisions. The court noted that the Supreme Court's review of such policies focuses on the presence of special needs which outweigh the testing's intrusion on the student's privacy rights. If special needs (usually protection of the health and safety of students) exist, no individualized suspicion is necessary to justify such testing.

The appellate court then looked at several Seventh Circuit cases that reviewed similar drug testing policies in the state of Indiana. In *Todd*, the Seventh Circuit upheld a policy that allowed testing of students involved in extracurricular activities as reasonable under the Fourth Amendment. In *Joy*, the Seventh Circuit followed *Todd*, and upheld a policy of drug testing students driving to school or participating in extracurricular activities. As the Indiana Court of Appeals noted, these cases were decided under the Fourth Amendment and followed Supreme

Court precedence permitting drug testing if there is a special need that outweighs the student's privacy interest.

In this case, the Court of Appeals instead relied on the Indiana Constitution and ruled that it provides greater protection against unwarranted drug testing than the Fourth Amendment. Following Indiana law, the court declined to "depart from requiring individualized suspicion to protect against the abuses associated with blanket suspicionless searches of school children."

Reversing the trial court, the Court of Appeals held that the NSC policy was unconstitutional under the Indiana Constitution because it was not based on any form of individualized suspicion.

SEVENTH CIRCUIT AFFIRMS TRIAL COURT DECISION PLACING LINDLAND ON THE MAT FOR OLYMPIC WRESTLING TEAM

Lindland v. United States Wrestling Ass'n, 227 F.3d 1000 (7th Cir., August 30, 2000).

On August 30, 2000, the United States Court of Appeals for the Seventh Circuit affirmed the United States District Court for the Northern District of Illinois' decision ordering that appellee Lindland be substituted for appellant Sieracki as a member of the Olympic wrestling team.

Keith Sieracki and Matt Lindland met twice in championship bouts to determine which wrestler would represent the United States in the 76 kilogram weight class of Greco-Roman wrestling at the 2000 Olympic Games. Sieracki won the first match by a score of 2-1. Lindland protested the results of this match, and, after USA Wrestling rejected his protest, he commenced arbitration against USA Wrestling under the Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220529(a). Arbitrator Burns then ordered a rematch which Lindland won by a score of 8-1. USA Wrestling did not accept the results of this rematch and instead presented Sieracki as its nominee to the United States Olympic Committee (USOC). The USOC sent Sieracki's name to the International Olympic Committee (IOC) as the United States representative in this weight class. Lindland was listed merely as a person eligible to compete in the event of an injury.

Lindland sought confirmation of the Burns arbitration award in federal court. In its first review of the case on August 24, 2000, the Seventh Circuit confirmed the Burns arbitration award, expecting that USA Wrestling would substitute Lindland's name for Sieracki's based on the results of their rematch. Later that same day USA Wrestling informed the USOC that Sieracki was still its nominee. As justification for its decision to defy the Seventh Circuit's order, USA Wrestling relied upon a second arbitration proceeding initiated by Sieracki. In this arbitration, arbitrator Campbell disagreed with the Burns award and directed USA Wrestling to make Sieracki its nominee for the Olympic wrestling team based on his victory in the first match.

In response to USA Wrestling's refusal to accept its confirmation of the Burns award, the Seventh Circuit issued a an August 25, 2000, writ of mandamus requiring the district court to ensure that USA Wrestling immediately implemented the Burns arbitration award.

On August 26, 2000, USA Wrestling finally complied with the Seventh Circuit's order, but the USOC refused to accept Lindland's nomination because USA Wrestling's substituted nomination was untimely since Sieracki's name had already been sent to the IOC. Lindland then asked the Illinois district court to compel the USOC to submit his name to the IOC. Sieracki responded by asking a different district court to confirm the Campbell arbitration award, which transferred Sieracki's request to the Illinois district court to consolidate the proceedings. The Illinois district court then ordered the USOC to request that the IOC substitute Lindland's name for Sieracki's. Subsequently, the IOC made this substitution. The court also denied Sieracki's petition to confirm the Campbell arbitration award.

Both decisions were appealed to the Seventh Circuit, which held that the Campbell arbitration award could not be confirmed because the arbitrator exceeded his authority and violated the Commercial Rules of the American Arbitration Association (AAA). Specifically, the Stevens Act and AAA Rules forbid an arbitrator from reviewing the decision of another arbitrator.

The Seventh Circuit also held that the order given to USA Wrestling to substitute Lindland's name also applied to the USOC. Although the USOC and USA Wrestling are independent bodies, the court found that they were acting in concert with one another and the USOC was also bound by the order.

As a result, the Seventh Circuit affirmed both the district court's order that Lindland be added to the team, and its refusal to confirm the Campbell arbitration award.

COURT APPROVES REVISED PLAN FOR ALLOCATION OF SETTLEMENT FUNDS TO RESTRICTED EARNINGS COACHES

Law v. NCAA, 108 F.Supp.2d 1193 (D. Kan., July 18, 2000).

On July 18, 2000, the United States District Court for the District of Kansas found that the revised plan of allocation of settlement funds from the NCAA to restricted earnings coaches was "fair, reasonable and adequate, and that it should be approved."

This litigation began in 1995 when restricted earnings coaches sued the NCAA claiming that the restricted earnings coaches rule (which limited the compensation of entry level coaches to \$12,000.00 for the academic year, and \$4,000.00 for the summer months) violated Section 1 of the Sherman Act. In its initial ruling the district court accepted the coaches' claim and entered summary judgment in their favor. *Law v. NCAA*, 902 F. Supp. 1394 (D. Kan. 1995), affirmed, 134 F.3d 1010 (10th Cir. 1998).

In January of 1996, the court issued a permanent injunction prohibiting the NCAA from promulgating this rule or any similar rule attempting to restrict coaches' compensation. *Law v. NCAA*, 1996 U.S. Dist. LEXIS 3479 (D. Kan. 1996).

After these initial rulings, the remaining issues regarding liability and damages were tried to a jury in April of 1998. Plaintiffs' damages expert eliminated claims by basketball and football coaches if their academic year actual salaries were below \$7,900.00 for basketball coaches and \$3,950.00 for football coaches. The expert concluded that the NCAA's restricted earnings rule had a lessened adverse financial impact on coaches at these lower salary levels than it did on coaches at the \$12,000.00 level. Accepting this expert testimony, the jury returned a verdict in favor of plaintiffs for \$22.3 million, trebled to \$66.9 million under the antitrust laws. *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998).

Soon after this verdict, the NCAA and plaintiffs reached a settlement whereby the NCAA agreed to pay \$54,500,000.00 to settle the lawsuits. The court approved this settlement but did not rule on the allocation of the proceeds among members of the plaintiff class.

Counsel then proposed a revised allocation plan that followed plaintiffs' expert testimony at trial. Under this revised plan, claims for coaches at the lower salary levels (\$7,900.00 for basketball coaches and \$3,950.00 for football coaches) were limited to the lesser of (1) the specific amount of damage to them calculated at trial, or (2) their actual academic-year salary. After reviewing this revised plan the court gave its preliminary approval to the plan and scheduled a hearing to determine its fairness toward all class members.

Twenty-six class members filed objections to the revised plan. However, counsel for the class of plaintiffs moved for the court to approve the revised plan of allocation.

The district court first established that a class action allocation plan will be approved if it is "fair, reasonable and adequate." 108 F.Supp.2d at 1196. The court explained that "[a]s a general rule, a plan of allocation that reimburses class members based on the type and extent of their injuries is reasonable." *Id.*

The class members who objected to the revised plan focused on the fact that they will receive less under the revised plan than they would have under the original settlement allocation. The court found that the revised plan is consistent with the economic theory and proof of damages presented by the plaintiffs' expert at trial. *Id.* Moreover, the court found that it is appropriate to weight the distribution of the settlement in favor of class members at the higher salary levels who were more likely to succeed in their claims. *Id.*

In approving the revised plan of allocation, the district court found that "the revised allocation plan is fair, reasonable and adequate," and granted class counsel's motion.

COURT FINDS THAT UNIVERSITY OF NEBRASKA IS COMMON LAW OWNER OF TRADE NAME "HUSKER AUTHENTICS"

White v. Bd. of Regents of University of Nebraska, 614 N.W.2d 330 (Neb., July 21, 2000)

On July 21, 2000, the Supreme Court of Nebraska upheld a district court opinion finding that the University of Nebraska's use of the trade name "Husker Authentics" gave the university common law rights in the name that are superior to those of appellant White.

In late 1995, the University of Nebraska's athletic department proposed the idea of establishing a shop for selling authentic apparel and equipment used by the university's sports teams. As part of this process, the university began test marketing soft and hard goods that they classified as authentic. Soft goods (T-shirts, sweatshirts and other apparel) were sold through a mail order catalog to season-ticket holders, boosters and alumni. The catalog was also distributed at a football game during the fall 1996 season. The catalog displayed a large "N" over which the word "Husker" was written in script, with the word "Authentics" underneath. The catalog also stated that "Husker Authentics" are distributed by the athletic department, adidas and catalog distributor Eastbay. Hard goods (footballs, posters, videos, photographs) were marketed in a similar manner but did not contain the words "Husker Authentics." Instead, the address listed on the order form for these products included "Husker Authentics."

On July 11, 1996, the university's Board of Regents filed an application with the Secretary of State to register the trade name "Husker Authentics," which stated that the first use of this name was in June of 1996 and that the nature of the business was "Sales of University of Nebraska-Lincoln licensed goods." Because the Board did not properly file its trade name registration application, the registration was subsequently canceled although the university was not made aware of this fact until June 30, 1997.

Appellant, White, owned and operated two stores in Lincoln, Nebraska, which sold various novelty items related to University of Nebraska athletics. White knew of the University's intent to open stores to sell "Husker Authentics" and feared it would negatively effect his business. White learned about the cancellation of the university's trade name application on June 26, 1997, and filed an application to register the trade name in his own name on the same day. His application stated that "Husker Authentics" was first used on the date of the application. Subsequently, White was granted registration of the trade name.

On June 30, 1997, the university attempted to re-register the trade name but was barred due to White's existing registration. Nevertheless, on August 27, 1997, the university opened a retail store under the name "Husker Authentics." In response, White sued the university requesting that it be enjoined from using the trade name he had registered. The university counterclaimed asserting that White violated its common law and statutory law rights in the "Husker Authentics" trade name.

The district court determined that White's registration was improperly granted because he had not actually used the trade name prior to registration. In reviewing the district court's opinion, the Nebraska supreme court did not focus on this issue. Instead it determined that the university had

prior common law rights to the trade name which were superior to those of White. These rights were established by the university's use of the trade name on signs, solicitations, and other documents in the ordinary course of its business. Therefore, consumers would reasonably associate "Husker Authentics" with the university.

In affirming the district court's decision, the supreme court held that because the university had acquired a common law right to the "Husker Authentics" trade name, the subsequent registration of the name by White was invalid and must be canceled.

DISTRICT COURT HOLDS NFL'S PROTECTION OF ITS TRADEMARKS DOES NOT VIOLATE ANTITRUST LAWS

Weber v. NFL, 112 F.Supp.2d 667 (N.D. Ohio, July 31, 2000).

On July 31, 2000, the United States District Court for the Northern District of Ohio granted the National Football League's motion to dismiss an antitrust claim against the NFL which alleged that the league's attempt to protect its trademark rights in domain names is an antitrust violation.

Steven Weber registered and paid for the domain names "jets.com" and "dolphins.com." After Weber listed the names for resale on his website, the NFL sent him a letter claiming that he had violated its trademark rights. In response, Weber sued the NFL arguing that the NFL violated Sections 1 and 2 of the Sherman Act by conspiring to control the market in these domain names.

The court began by analyzing the facts in light of a three part test for violations of Section 1 of the Sherman Act. The first part of the test focuses on evidence demonstrating the presence of a "contract, combination or conspiracy." Weber provided the NFL's letter telling him to refrain from using the domain names because he was infringing upon their trademark rights. The court, without explanation, found that this was sufficient evidence of a conspiracy or at least collusive action.

The second part of the test requires an effect on "interstate commerce." The court found that domain names are a valuable commodity in today's interstate economy and that the NFL and its member teams generate substantial revenue through use of its domain names. Therefore, the second part of the test was met.

The third part of the test requires an "unreasonable restraint of trade." The court found that Weber failed to prove that the NFL's mere legal efforts to protect its trademark rights constituted a restraint of trade. As a result, Weber's Section 1 claim was dismissed.

Under Section 2 of the Sherman Act, Weber needed to demonstrate that the NFL possessed monopoly power in the relevant market and engaged in anti-competitive conduct with a specific intent to monopolize and a dangerous probability to monopolize. The court also dismissed Weber's Section 2 claim because he mischaracterized the relevant market and did not prove that the NFL had attempted to control this market. Weber argued that the relevant market was limited

to the domain names "jets.com" and "dolphins.com." The court found instead that the relevant market consists of all domain names. Since the number of domain names is virtually limitless, the NFL could not possibly attempt to monopolize this market. Thus the district court also granted the NFL's motion to dismiss Weber's Section 2 claims.

FOURTH CIRCUIT HOLDS THAT BALTIMORE RAVENS AND NFL PROPERTIES INFRINGED ARTIST'S COPYRIGHTED LOGO

***Bouchat v. Baltimore Ravens*, 228 F.3D 489 (No. 99-1617), amended opinion reported at 2000 U.S. App. LEXIS 34656 (4th Cir., October 3, 2000).**

On October 3, 2000, United States Court of Appeals for the Fourth Circuit affirmed a federal district court's ruling that Baltimore Ravens, Inc. and National Football League Properties, Inc. infringed the copyrights of Frederick Bouchat.

Bouchat worked as a security guard at a state of Maryland office building and was also an amateur artist. In 1995, as news spread that an NFL team would be moving to Baltimore, Bouchat began drawing designs for the potential team based on his favorite name, the Ravens. Bouchat gave one of his designs to Eugene Conti who worked in the state building. Conti wanted to include a story about Bouchat in the employee newsletter and asked to arrange a meeting between Bouchat and John Moag, chairman of the Maryland Stadium Authority. At the meeting, Moag told Bouchat that the team was going to be named the Ravens, and Bouchat described his logo designs. Upon Moag's request, Bouchat faxed his drawings to Moag, including a design with the shield and the letter "B." Moag shared an office with Ravens owner Art Modell. Two months later the team unveiled their new logo consisting of a Raven holding a shield.

Bouchat and several co-workers noted the similarities between his drawings and the logo that the Ravens adopted. Bouchat obtained copyright registration for his shield drawing in August of 1996. The following May, Bouchat sued the Ravens and NFL Properties for infringing his copyrighted design.

After a trial, the jury returned a verdict in favor of Bouchat as to the shield drawing. The Ravens and NFL Properties then filed a motion for judgment notwithstanding the verdict, which the district court denied. The district court then certified several questions concerning Bouchat's copyright infringement claim for interlocutory appeal to the Fourth Circuit.

According to the Fourth Circuit, to prove copyright infringement, Bouchat needed to show that he owned the copyright to the work that was allegedly copied, and that the defendants copied protected elements of the work. The Ravens and NFL Properties argued they had no access to Bouchat's drawings, but the court found that the shared office space between Moag and Modell proved that they did have access to Bouchat's drawings.

The court then relied on the "strikingly similar" doctrine, which permits an inference of access in cases where the two works are so similar that there is a high probability of copying and there is

no reasonable possibility of independent creation by the parties. At trial, both side's expert witnesses testified that the parties' respective designs were so similar that they could not have been created independently from one another. The court agreed and found substantial evidence of copying by the Ravens, which supported the inference of the Ravens' access to Bouchat's drawings.

As a result, the Fourth Circuit affirmed the district court's holding that the Ravens and NFL Properties infringed Bouchat's copyrighted logo design.

"You Make The Call..." is a newsletter published twice a year (spring, fall) 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, [munsl@marquette.edu](mailto:munsli@marquette.edu). This publication is distributed via fax and email to individuals in the sports field upon request.

YMTC Staff:

Matthew J. Mitten, Professor of Law and Director, National Sports Law Institute

Paul M. Anderson, Author/Editor, Associate Director, National Sports Law Institute

NSLI Research Assistants- Ben Menzel, Kristin Muenzen, Lisa Nester, & Niki Sollinger