

You Make the Call. . .



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Bowers v. National Collegiate Athletic Association. 974 F.Supp. 459 (D. NJ 1997) & 9 F.Supp.2d 460, 1998 U.S. Dist. LEXIS 8552 (D. NJ 1998).

NCAA FOUND AMENABLE TO SUIT UNDER TITLE III OF THE AMERICANS WITH DISABILITIES ACT AND ELIGIBILITY RULES SCRUTINIZED

Michael Bowers is a learning disabled student-athlete who was forced to enroll in special education courses to meet high school requirements. As a result of the courses he took, and miscommunication in the information provided to the NCAA, Bowers was declared as a nonqualifier by the NCAA, meaning that he was ineligible to participate in athletics or to receive financial aid during his freshman year in college.

Bowers subsequently sued the NCAA asking for a preliminary injunction from the New Jersey District Court to force the NCAA to grant him the status necessary to participate in athletics and receive an athletic scholarship. In addressing his complaint, the Court first asked the NCAA to consider a waiver of the eligibility rules for Bowers but such a waiver was denied.

In following much of the same reasoning as other courts which have considered this issue (i.e. Ganden), the district court herein determined that what Bowers was really asking for was a "virtual elimination of the 'core course' requirement, rather than a mere 'modification' or 'accommodation' required by the ADA, which the NCAA already provides," through its waiver process.(p.466) As the court discussed, "the ADA 'does not require the NCAA to simply abandon its eligibility requirements, but only to make reasonable modifications to them.'" (p.466) The Court then followed the ruling in Ganden "finding that a complete abandonment of the "core course" requirement would fundamentally alter the nature of the privilege of participation in the NCAA's intercollegiate athletic program."(p.467) Therefore, the Court also followed Ganden and denied Bowers motion for a preliminary injunction.

The Bowers case returned to the district court in June of 1998. The second Bowers case dealt with the NCAA's motion to dismiss Bowers' First Amended Complaint. Despite Bowers mistaken allegation that Title II of the ADA applied to the NCAA, in a groundbreaking decision the court initially noted that Title III applies to the NCAA. Specifically the court stated that "Bowers has adequately alleged that the NCAA owns, leases (or leases to), or operates the place of public accommodation and that he was denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of that place of public accommodation."(p. * 56).

As to the NCAA being an "operator" of a "place of public accommodation," after reviewing a significant amount of case law, the court stated that the issue boils down to whether the NCAA "manages, controls, or regulates the place of public accommodation" in such a way that it denied Bowers enjoyment of the accommodation in a discriminatory fashion. (p. *80). The court found that Bowers had provided significant facts to demonstrate the NCAA's "operation" under this test because, the NCAA's enforcement power caused him to be declared ineligible and therefore, to be denied access to intercollegiate athletics; the NCAA establishes these standards which caused his ineligibility, as a result he could not participate in practice or games, or receive scholarship money; and the NCAA leases and operates facilities which are places of public accommodation. Therefore, the NCAA's motion for summary judgment asking the court to determine that it was not an "operator" as defined under Title III was denied.

Finally, as to the NCAA's motion to dismiss the claim that it discriminates against the learning disabled through its eligibility rules, the court found that the NCAA's waiver process and other accommodations still might not be enough to avoid a claim of discrimination. In his Amended Complaint, Bowers no longer sought a complete change in the NCAA "core course" requirements, instead he restricted his claim to a modification more closely tied to his particular situation. The court found it inappropriate to determine the merits of this amended claim at the motion stage.

As a result, the case was allowed to proceed toward trial on the merits of these issues.

The United States vs. The NCAA. Civil Action No. _____,

JUSTICE DEPARTMENT SUES NCAA OVER ELIGIBILITY REQUIREMENTS, SUIT ENDS IN CONSENT DECREE

As a result of Bowers and several other cases, the NCAA made some initial rules changes in 1997 - (1) learning disabled students would be able to apply for waivers on their own without leaving an NCAA school as was necessary in the past; (2) by March 1, 1997, high schools were to begin filling out forms designating classes for disabled student-athletes allowing the NCAA to have a list before any appeals were filed; (3) students would be certified as learning disabled before they graduate from high school; and (4) learning disabled student-athletes would be able to take summer courses after their senior year that will be counted toward their NCAA eligibility.

Even with these changes, by October of 1997, the Justice Department sent a letter to the NCAA stating that "'several aspects' of the organization's initial eligibility requirements violate Title III of the ADA," and finding "the NCAA's application of academic standards in regard to learning-disabled student-athletes as too 'rigid'. . .[while] recommend[ing] 'remedies' that could head off legal action." The Department pointed to the fact that the NCAA excludes many courses from the "core course" requirement that are designed to accommodate students with learning disabilities, and that the waiver process is "fundamentally flawed" leaving learning disabled student-athletes at a disadvantage. The Department also noted that even in cases where disabled student-athletes are given "partial qualifier" status, the restrictions on these student-athletes (not being allowed to practice and losing a year of eligibility) were too great.

In conclusion, the Department stated that "modifications in several NCAA policies are necessary, that reasonable modifications are available, and that these modifications would not fundamentally alter the nature of the NCAA's program."

As a result of this letter and various other complaints, the Justice Department brought the NCAA to court in the District of Columbia. In its complaint the Department raised several allegations against the NCAA based on its violations of Title III of the ADA. First, the Department alleged that the NCAA's eligibility criteria for entering student-athletes, "screen out or tend to screen out individuals with disabilities from fully and equally enjoying the goods, services, facilities, privileges, advantages or accommodations that it offers," in violation of Title III. Second, the Department alleged that the NCAA failed to make up for this behavior through reasonable modifications of its policies. Third, the Department alleged that the NCAA's policies denied students with learning disabilities an opportunity to benefit from the services it offers. Finally, the Department alleged that the services provided to these disabled individuals are not equal to or are separate from those afforded to students without disabilities. Throughout its allegations the Department stated that all of this conduct demonstrated a pattern and practice of discrimination against learning disabled student-athletes.

As a resolution to this dispute, and in order to avoid the delay and costs of a trial, the NCAA and the Department entered into a Consent Decree in May of 1998. Under the Decree the NCAA agreed to undertake five changes:

- 1) The NCAA will now certify classes designed for student-athletes with disabilities as "core courses" if they provide them with the same type of "knowledge and skills as other college-bound students,"
- 2) Learning disabled student-athletes can now earn back their lost year of eligibility if they can demonstrate that they can make substantial progress toward academic success,
- 3) The NCAA will now include experts on disabilities when evaluating waiver requests and will review the student-athlete's high school preparation and performance when making a decision,
- 4) The NCAA will now designate an ADA Compliance Officer who will assist the staff and serve as a liaison to students, &
- 5) The NCAA agreed to pay a total of \$ 35,000.00 to four disabled student-athletes who had been adversely affected by the old rules.

The NCAA made it clear that it voluntarily entered into this Decree and did not waive its position that it was not a place of public accommodation as defined under Title III of the ADA. Therefore, the NCAA still claimed that it was not amenable to suit under Title III.

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[NCAA CONSENT DECREE](#)

Meling v. St. Francis College, 3 F.Supp.2d 267 (1998).

ST. FRANCIS COLLEGE'S DISMISSAL OF ASSOCIATE PROFESSOR OF PHYSICAL EDUCATION VIOLATES THE AMERICANS WITH DISABILITIES ACT

On March 31, 1998, the District Court of New York found that St. Francis College's dismissal of an associate professor was discriminatory under the ADA.

Full time associate professor of physical education Barbara Meling brought an action against her employer, St. Francis College. Meling had been injured in a car accident. She suffered fractures and injuries to her shoulder and knee which limited her ability to walk, stand, and sit for long periods of time. Meling's injuries forced her to take a leave of absence from St. Francis. The college would not accept her back unless she could return to work without any restrictions. In response, she suggested accommodations that would facilitate her return. St. Francis refused to explore these options and replaced Meling. As a result, she alleged that her dismissal was a case of discrimination under the ADA.

The trial court found that Meling met the definition of disabled under the ADA; i.e., a person is disabled if they have a physical impairment which substantially limits performance of one or more major life activities, has a record of this type of impairment, or is regarded by their employer to have this type of impairment. Major life activities have been interpreted as the basic activities an average person can undertake without major difficulty. This definition includes Meling's inability to walk, sit and stand for extended periods of time.

It was further found that St. Francis dismissed Meling based on her disabled status. A jury awarded Meling compensatory damages of \$225,000.00, punitive damages in the amount of \$150,000.00, and back pay of \$141,251.00. The court also reinstated her employment at St. Francis College. In response, the college moved for a new trial asserting that the trial court erred as a matter of law when it concluded that Meling was disabled under the ADA.

The appellate court held that the evidence was sufficient to reasonably conclude that Meling was disabled under the ADA definition. Further, it found that St. Francis relied on this status as the reason for her dismissal. Specifically, St. Francis showed a disregard for Meling's rights under the ADA by not seeking out expert advice about Meling's disability and possible accommodations. The court stated that this supported her award of punitive damages.

It was demonstrated that Meling was quite capable of serving as a physical education instructor. Most of the courses she was scheduled to teach were strictly lecture courses and did not require physical activity. The courses that required physical demonstrations could have employed the use of student demonstrators. This practice is recognized as appropriate and is used in this area of instruction. Meling did find employment at another college as a physical education professor following her dismissal from St. Francis. This further demonstrated that she was capable of this type of work.

The court reinstated Meling as an associate professor of physical education at St. Francis. However, Meling requested that she be reinstated with tenure, but the court did not grant this

request. Colleges and universities require special abilities to manage the academic appointments and awards of tenure. The decision of tenure carries with it a significant commitment by the professor and the institution. The court stated that it was not equipped to make such a determination. Further, the court stated that St. Francis had undergone personnel changes and with her abilities Meling could quite possibly achieve tenure. Meling had proven her abilities through her employment at St Francis and another college. Her disability did not affect her work performance, despite the fact that her work was in the area of physical education.

Meling's case demonstrates to sports employers the necessity in making reasonable accommodations for disabled employees under the ADA. The ADA then helps provide opportunities for people with disabilities to be judged on their efforts and not on their limitations.

Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998)

CITY OF BOCA RATON FOUND VICARIOUSLY LIABLE FOR SEXUAL HARASSMENT OF LIFEGUARD COMMITTED BY HER IMMEDIATE SUPERVISORS.

On June 26, 1998, the Supreme Court of the United States found the City of Boca Raton, Florida, to be vicariously liable for the sexual harassment of former city lifeguard Beth Ann Faragher by her immediate supervisors, Bill Terry and David Silverman.

The case was originally decided in favor of Faragher by the United States District Court for the Southern District of Florida (864 F.Supp. 1552), but was reversed in part by the Court of Appeals for the Eleventh Circuit (111 F.3d 1530).

Faragher brought this suit under Title VII of the Civil Rights Act of 1964 (§ 703 (a)(1), 42 U.S.C.A. § 2000e-2(a)(1)), alleging that Terry and Silverman created a "sexually hostile atmosphere" at work by degrading her and the other female lifeguards with "uninvited and offensive touching" and by making vulgar and offensive remarks about women. The District Court concluded that this conduct constituted an abusive and discriminatory working environment. The District Court also felt that the conduct of Terry and Silverman was so pervasive that the City reasonably should have known about the conduct, or the possibility of such conduct, and was therefore vicariously liable for the conduct of its employees.

The Court of Appeals agreed that this was a discriminatory working environment, but found that the City could not be held liable for the actions of two employees acting out of the scope of their employment. The Court based its decision on R(2d) of Agency § 219(2)(d), which provides that an employer "is not subject to liability for the torts of his servants acting outside the scope of their employment unless...the servant...was aided in accomplishing the tort by the existence of the agency relation." The Supreme Court, headed by Justice Souter, viewed it differently.

In the Supreme Court opinion, Justice Souter concluded that an employer is vicariously liable for discriminatory acts of a supervisor, subject to an affirmative defense that analyzes the reasonableness of the employer's conduct, as well as that of the plaintiff. In other words, upon an analysis of the conduct of both the employer and the employee, if the employer can show that

they took sufficient steps to prevent such conduct from occurring, or that the employer reasonably should not have known about such conduct, they will not be liable for the actions of third parties.

The Court analyzed the conduct of all of the parties involved and concluded that this affirmative defense did not apply. Among the reasons for this conclusion was the fact that the City had a sexual harassment policy in place for five of the six years that Faragher worked as a lifeguard in Boca Raton (and revised it in 1990); but many lifeguards, including Terry and Silverman, were never made aware of the policy. If the City had gone to the trouble of producing and revising such a policy, at the very least it should have to disseminated it properly.

Also, Faragher told her third immediate supervisor, Robert Gordon, of the harassment, but he did not report it, or question the other two supervisors. The Court determined that this added up to knowledge or at least constructive knowledge of the conduct.

The Court also based its decision in part on the notion that an employer can reasonably anticipate the possibility of such conduct taking place in the workplace. Furthermore, the City made no effort to keep track of the supervisors' conduct. This fact combined with the City's failure to disseminate its sexual harassment policy effectively, helped Justice Souter to conclude that the City did not exercise reasonable care to prevent the harassment of Faragher and her colleagues.

In the sports industry prior decisions like *Doe v. Taylor Independent School District* (15 F.3d 443), have put college athletic administrators on notice that they should take all necessary precautions, including the implementation of sexual harassment policies, to prevent this type of behavior from occurring on campus and in the locker rooms.

In professional athletics, management should make sure that sexual harassment policies are in place and that all employees are made aware of them. This decision presents an even stronger case for the need to have a properly disseminated sexual harassment policy in place to limit liability of the university, athletic department or professional team.

Furthermore, most other sexual harassment cases have been brought under 42 U.S.C. § 1983 or Title IX. This decision provides another option for victims of sexual harassment to seek remedies. While Title VII does not explicitly protect against sexual harassment in the workplace, this Supreme Court decision solidifies the necessity of an employer taking steps toward preventing this type of behavior from occurring in the workplace.

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