Chicago-Kent Law Review

Volume 73
Issue 2 *Symposium on Race and Criminal Law*

Article 9

April 1998

Knapp v. Northwestern University: The Seventh Circuit Slam Dunks the Rights of the Disabled

Peter M. Spingola

KNAPP V. NORTHWESTERN UNIVERSITY: THE SEVENTH CIRCUIT SLAM DUNKS THE RIGHTS OF THE DISABLED

PETER M. SPINGOLA*

INTRODUCTION

On November 9, 1994, Nicholas Knapp and Northwestern University signed a National Letter of Intent. Knapp agreed to attend Northwestern on an athletic scholarship and play intercollegiate basketball for the university. At the time Knapp signed that letter, Northwestern officials were aware that on September 19, 1994, Knapp's heart had stopped following a pick-up basketball game in his high school gym. Northwestern officials also knew that when Knapp signed, it was his intention to take the floor as a member of the Wildcat basketball team.

After Knapp had enrolled at the university, Northwestern's team physician, Dr. Howard Sweeney, an orthopedic surgeon with no prior cardiovascular expertise, disqualified Knapp from playing intercollegiate basketball because of his cardiac history. Dr. Sweeney's exclusion decision prompted the school's Athletic Director, Rick Taylor, to write the Big Ten Conference and make the following statement: "Northwestern has committed to meet its scholarship obligation to Mr. Knapp, but, absent a court ruling to the opposite, will not allow the young man to participate as a team member in practice or games." In response to Taylor's letter, the Big Ten granted Northwestern leave to classify Knapp as a "medical non-counter"—an athlete whose athletic scholarship does not count against scholarship limits because that athlete never again will play intercollegiate basketball.

The Rehabilitation Act of 1973[1] was created precisely to protect people like Knapp. That statute serves to prevent institutions like Northwestern from branding qualified individuals as incapable and permanently disabled human beings, forcing them to forfeit participation in life's most major and fulfilling activities. Taylor was correct in

* B.A., Dartmouth College, 1993; J.D., Chicago-Kent College of Law, 1997. The author wishes to thank Robert A. Chapman, Lambda Legal Defense and Education Fund, Inc., Professor Howard C. Eglit, and James E. Abbott for their assistance in the writing and editing of this Comment.

1. 29 U.S.C. § 794(a) (1973).

his statement that only the courts can protect people like Knapp against discrimination of the kind to which Northwestern subjected its prized recruit.

So to the courts Knapp went. A federal district court in the Northern District of Illinois permanently enjoined Northwestern University and its athletic director, Rick Taylor, from barring Knapp from playing on the university's intercollegiate basketball team.[2]

In *Knapp v. Northwestern University*,[3] the United States Court of Appeals for the Seventh Circuit reversed, and ordered the trial court to enter summary judgment for Northwestern and Taylor.[4] In so doing, the appellate court snubbed existing case law and created an insurmountable burden for disabled persons who have been excluded from essential services or programs. Now, under *Knapp*, these individuals are without protection from arbitrary exclusion from services and programs they seek to enjoy. This Comment addresses the propriety of the Court of Appeals for the Seventh Circuit's ruling, and concludes that Northwestern's decision to exclude Knapp from its basketball program violates the letter and spirit of the Rehabilitation Act of 1973.

II. THE REHABILITATION ACT

Section 504(a) of the Rehabilitation Act of 1973 (hereinafter referred to as "Act") protects "otherwise qualified handicapped individual[s]" from discrimination on account of disability by recipients of federal financial assistance (hereinafter referred to as "recipients").[5] The purpose of the Act is to provide an "evenhanded treatment of qualified handicapped persons"[6] and to prevent discrimination based

2. *See* Knapp v. Northwestern Univ., 942 F. Supp. 1191, 1198-99 (N.D. Ill. 1996), *rev'd*, 101 F.3d 473 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 2454 (1997).

3. 101 F.3d 473 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 2454 (1997).

4. *See id.* at 486. In May 1996 Northwestern had filed a motion for summary judgment which the district court denied at the time it granted Knapp permanent injunctive relief.

5. *See* 29 U.S.C. § 794(a). The statute provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Id. "[The Act] applies to each recipient of Federal financial assistance . . . and to each program or activity that receives or benefits from such assistance." 34 C.F.R. § 104.2 (1995). It targets all federal fund recipients "in an effort to share with handicapped Americans the opportunities for an education, transportation, housing, health care, and jobs that other Americans take for granted." School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 277 (1987) (citing 123 CONG. REC. 13,515 (1977) (statement of Sen. Humphrey)).

6. Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979).

on a perceived "inability to function in a particular context."[7] A prima facie case of discrimination under the Rehabilitation Act requires a plaintiff to demonstrate that (1) she is a "disabled" individual; (2) she is "otherwise qualified" for the program sought; (3) she is excluded from the program solely because of the disability; and (4) the program from which she is excluded is part of a federally funded program.[8]

A "handicapped individual" means any person who "(i) has a physical impairment[9] which substantially limits one or more [of her] major life activities, (ii) has a record of such an impairment,[10] or (iii) is regarded as having such an impairment."[11] "Major life activities" in-

7. *Id.* at 405.

8. *See* Byrne v. Board of Educ., 979 F.2d 560, 563 (7th Cir. 1992). Section 504 allocates the burdens of proof as follows:

> 1) The plaintiff must establish a prima facie case by showing that he was an otherwise qualified handicapped person *apart from* his handicap, and was rejected under circumstances which gave rise to the inference that his rejection was based solely on his handicap;
> 2) Once plaintiff establishes his prima facie case, defendants have the burden of going forward and proving that plaintiff was not an otherwise qualified handicapped person, that is one who is able to meet all of a program's requirements *in spite of* his handicap, or that his rejection from the program was for reasons other than his handicap;
> 3) The plaintiff then has the burden of going forward with rebuttal evidence showing that the defendants' reasons for rejecting the plaintiff are based on misconceptions or unfounded factual conclusions, and that reasons articulated for the rejection other than the handicap encompass unjustified consideration of the handicap itself.

Pushkin v. University of Colo., 658 F.2d 1372, 1387 (10th Cir. 1981).

9. A "physical impairment" means:

> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

34 C.F.R. § 104.3(j)(2)(i).

10. "Has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." *Id.* § 104.3(j)(2)(iii).

11. 29 U.S.C. § 706(7)(B) (1973); *see also* 34 C.F.R. § 104.3 (defining "handicapped person."). The definition reflects Congressional concern for protecting the handicapped from (1) simple prejudice; (2) "archaic attitudes and laws;" and (3) "the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps." School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 279 (1987) (citing S. REP. NO. 93-1297, at 50 (1974)). "Is regarded as having an impairment" means:

> (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient [of federal financial assistance] as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments . . . but is treated . . . as having such an impairment.

34 C.F.R. § 104.3(j)(iv). The Act protects those who are regarded as having a physical impairment even when they do not. *See Arline*, 480 U.S. at 279. The detrimental consequences of illegal discrimination can be just as real for someone who is so "regarded" as for someone who actually has such an impairment. *See id.* at 284. The Supreme Court has aptly noted: "A person

clude, but are not limited to, "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."[12] Courts determine whether a person is "handicapped" within the meaning of the Act on a case-by-case basis.[13]

"An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."[14] For purposes of Section 504, an "otherwise qualified" handicapped individual is one who is able to perform the essential functions or meets the essential eligibility requirements of a position,[15] or one who, if unable to perform the essential functions of a position, can do so if the recipient engages in "reasonable accommodation."[16] If an accommodation imposes "undue financial and administrative burdens" on a recipient[17] or requires "a fundamental alteration in the nature of [the] program,"[18]

who . . . is regarded as having an impairment may at present have no actual incapacity at all. Such a person would be exactly the kind of individual who could be 'otherwise qualified' to participate in covered programs [under Section 504]." *Davis*, 442 U.S. at 405 n.6.

12. 34 C.F.R. § 104.3(j)(2)(ii). Congress used the phrase "such as" to indicate that the definition of "major life activities" was not all-inclusive, but rather, a nonexhaustive laundry list. *See* Pahulu v. University of Kan., 897 F. Supp. 1387, 1391 (D. Kan. 1995) ("The major life activities enumerated . . . are not an all inclusive list.").

13. *See* Dutton v. Johnson County Bd., 859 F. Supp. 498, 506 (D. Kan. 1994) ("status as a disabled individual is a highly fact-sensitive issue, requiring an individualized inquiry and case-by-case determination"); *Byrne*, 979 F.2d at 565 ("Whether or not a person is handicapped under the Act is an individualized inquiry, best suited to a case-by-case determination.").

14. *Davis*, 442 U.S. at 406.

15. "Qualified handicapped person" means:

(1) With respect to employment, a handicapped person who, with reasonable accomodation, can perform the essential functions of the job in question;

. . . .

(3) With respect to postsecondary and vocational educational services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's educational program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

34 C.F.R. § 104.3(k).

16. *Id.* § 104.12(a). Section 104.12(a) provides: "A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee . . . ." Section 104.12(b) provides: "Reasonable accommodation may include: (1) Making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions." *Id.* § 104.12(b).

17. *Davis*, 442 U.S. at 412.

18. *Id.* at 410. Courts consider the following factors to determine whether an accommodation would impose an undue hardship on a recipient:

(1) The overall size of the recipient's program with respect to [the] number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

it is not reasonable. Put another way, failure to hire or promote a disabled person is not handicap discrimination unless reasonable accommodation can overcome the effects of an individual's disability without presenting an undue burden on the recipient.[19]

Whether a recipient has in fact discriminated on the basis of handicap is the ultimate inquiry under the Act.[20] A recipient of federal financial assistance does not elude the proscription of the Act even if it acted in good faith[21] and/or had a rational basis for discrimination.[22] A recipient may, however, exclude an otherwise qualified disabled individual from its program if it has a substantial overriding justification for the exclusion.[23]

III. LEGAL LANDSCAPE

A. *Major Life Activity*

An athlete asserting the right to actively participate in a recipient's athletic program must first establish that participation in sports is a "major life activity." While the issue is not free from controversy, the balance of authority holds that sports competition constitutes a major life activity. Courts determine what constitutes a major life activity on an individualized basis, so a particular sport need only be a major life activity as to a particular plaintiff.[24]

34 C.F.R. § 104.12(c).

19. *See* School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 288 n.17 (1987) (citing 45 C.F.R. pt. 84, app. A (1985)).

20. *See* 29 U.S.C. § 794 (1973).

21. *See* Alexander v. Choate, 469 U.S. 287, 294-301 (1985).

22. *See* Pushkin v. University of Colo., 658 F.2d 1372, 1383 (10th Cir. 1981).

> The rational basis test is not applicable where there is an alleged violation of a statute, § 504, which prohibits discrimination on the basis of handicap. That statute by its very terms does not provide that a recipient of federal financial assistance may act in an unreasonable manner to promote legitimate governmental means, even if discrimination should be the result. Rather, the statute provides that a recipient of federal financial assistance may not discriminate on the basis of handicap, regardless of whether there is a rational basis for so discriminating. The inquiry has to be on whether the [recipient] has, in fact, discriminated on the basis of handicap. The mere fact that [a recipient] acted in a rational manner is no defense to an act of discrimination.

Id.; *see also* Pahulu v. University of Kan., 897 F. Supp. 1387, 1390 (D. Kan. 1995) (citing *Pushkin* and the inapplicability of the rational basis test in the context of Section 504).

23. *See, e.g.*, Kampmeier v. Nyquist, 553 F.2d 296, 299 (2d Cir. 1977) ("[E]xclusion of handicapped children from a school activity is not improper if there exists a substantial justification . . . ."); Grube v. Bethlehem Area Sch. Dist., 550 F. Supp. 418, 424 (E.D. Pa. 1982) (concluding that three physician opinions lacking medical basis cannot serve as a substantial justification for exclusion of disabled athlete).

24. *See Pahulu*, 897 F. Supp. at 1393 (finding that intercollegiate football may be a major life activity for a particular plaintiff); Sandison v. Michigan High Sch. Athletic Ass'n, Inc., 863 F. Supp. 483, 489 (E.D. Mich. 1994) (finding that interscholastic track and cross-country may be a major life activity for the "disabled" plaintiffs), *rev'd on other grounds and dismissed in part*, 64

Sports participation plays an integral role in the lives of dedicated, competitive athletes. The Knapps of the world often devote more time to developing their athletic skills than to any other life activity. Both the federal Department of Education and the Department of Health and Human Services, with the oversight and approval of Congress, have recognized the unique importance of physical activities to students attending college:

> In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.[25]

Following this lead, several district courts have concluded that intercollegiate or interscholastic sports are a major life activity. For example, in *Poole v. South Plainfield Board of Education*,[26] a New Jersey district court held that the school board violated the Act when it denied a student-athlete with only one kidney the right to actively participate in interscholastic wrestling.[27] The court concluded that the student-athlete and his parents had made a rational decision, based upon medical consultation, in favor of athletic participation, and that the exclusion of the student constituted illegal discrimination.[28]

Similarly, in deciding *Wright v. Columbia University*,[29] a federal district court concluded that the school violated the Act when it refused to allow a student-athlete with one eye to actively participate in

F.3d 1026 (6th Cir. 1995). Whether a person is "disabled" (i.e., has an impairment which substantially limits a major life activity) is an individualized determination, to be decided on a case-by-case basis. *See* Homeyer v. Stanley Tulchin Assoc., Inc., 91 F.3d 959, 962 (7th Cir. 1996); Byrne v. Board of Educ., 979 F.2d 560, 565 (7th Cir. 1992).

25. 34 C.F.R. § 104.47(a)(1) (1997); 45 C.F.R. § 84.37(c)(1) (1997). Similar regulations have been issued with respect to interscholastic sports:

> In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

34 C.F.R. § 104.37(c); 45 C.F.R. § 84.

26. 490 F. Supp. 948 (D.N.J. 1980).

27. *See id.* at 954.

28. *See id.* To be sure, the *Poole* court did not expressly address the issue of major life activity but could not have found a Rehabilitation Act violation without recognizing, at least implicitly, that intercollegiate sports (wrestling) constituted a major life activity for the plaintiff. *See also Grube*, 550 F. Supp. 418 (holding that a high school football player with one kidney was "disabled" within the meaning of the Act and enjoining the school district from precluding him from participating as a member of its football team).

29. 520 F. Supp. 789 (E.D. Pa. 1981).

its intercollegiate football program.[30] The court held that the athlete was "disabled" within the meaning of the Act,[31] and ultimately ordered Columbia to give him the opportunity to play in its intercollegiate football program.[32]

Scholarly commentary concerning the relationship of the Act to the right of student-athletes to participate in athletics further supports the proposition that competitive sports participation squares with the definition of major life activity:

> There can be little doubt that an athlete who has suffered a serious injury or illness and is precluded from playing because of that condition is an 'individual with [disabilities]' as defined by Section 504 and its implementing regulations, although there may be disagreement as to whether it is the preexisting condition or fear of future injury that creates the handicapping condition.[33]

A student-athlete seeking protection from discrimination vis-a-vis Section 504 is not sidelined even if a court finds sports participation is not, in and of itself, a major life activity. Sports participation provides dedicated athletes with very unique learning experiences, and learning is an enumerated life activity.[34] Along these lines, courts addressing the statutory right of student-athletes to participate in sports have found that sports participation is a unique learning experience subject to protection under the Act. To this end, a Michigan district court reasoned that interscholastic sports were a subset of learning and therefore a major life activity.[35] The court stated:

> Defendant downgrades the importance of interscholastic sports in plaintiffs' learning programs. [Plaintiff] has better grades as a result of his involvement on the cross-country and track teams and attributes his improved performance to his interaction with his cross-

30. *See id.* at 793-95.

31. *See id.* at 793.

32. *See id.* at 795; *see also* Doe v. Dolton Elementary Sch. Dist. No. 148, 694 F. Supp. 440, 445 (N.D. Ill. 1988) (holding that contact sports were a major life activity for elementary school student with AIDS). The *Doe* case is subject to two interpretations. One court has cited it for the proposition stated above. *See* Pahulu v. University of Kan., 897 F. Supp. 1387, 1391 (D. Kan. 1995). The more likely interpretation of *Doe*, however, is that *social interaction with one's peers* is the "major life activity" and an individual with AIDS who cannot participate in contact sports or experience sexual intimacy faces a "substantial limitation" on social interaction.

33. Cathy Jones, *College Athletes: Illness or Injury and the Decision to Return to Play*, 40 BUFF. L. REV. 113, 178-80 (1992); *see also* Mathew Mitten, *Sports Participation by "Handicapped Athletes,"* 10-SPG ENT. & SPORTS L. REV. 15, 17 (1992) (noting that "athletics constitutes a 'major life activity' for many people"); Matthew Mitten, *Amateur Athletes with Handicaps or Physical Abnormalities: Who Makes the Participation Decision*," 71 NEB. L. REV. 987, 1010 (1992) ("Athletics, which require the performance of strenuous manual tasks, constitute a 'major life activity' for many people.").

34. *See* 34 C.F.R. § 104.3(j)(2)(ii) (1995).

35. *See* Sandison v. Michigan High Sch. Athletic Ass'n, Inc., 863 F. Supp. 483, 489 (E.D. Mich. 1994), *rev'd on other grounds*, 64 F.3d 1026 (6th Cir. 1995).

> country and track teammates who encourage him to study and to be disciplined . . . . [P]laintiff has improved social relationships as a result of his participation on the cross-country and track teams . . . . Because participation on the cross-country and track team is an important and integral part of the education of plaintiffs, it is as to them a major life activity. Thus, plaintiffs' disability limits a major life activity as contemplated by ADA and the Rehabilitation Act.[36]

Likewise, in deciding *Pahulu v. University of Kansas*,[37] a Kansas district court concluded that "intercollegiate football may be a major life activity, i.e. learning."[38] In that case, the University of Kansas had disqualified a scholarship athlete with a congenitally narrow cervical canal from competing in its football program.[39]

As a matter of common sense, sports participation fits the rubric of "learning." Among other things, sports participation helps to instill in athletes positive character traits such as confidence, leadership, teamwork, discipline, dedication, perseverance, and patience. In addition, sports participation affords athletes the opportunity for recognition in their communities. Moreover, it fosters the ability to set priorities and goals, to compete, and to take coaching, direction, and criticism. In sum, applicable federal regulations, case law and common sense leave little doubt that sports participation by people like

36. *Id.*

37. 897 F. Supp. 1387 (D. Kan. 1995).

38. *Id.* at 1393; *see also* University Interscholastic League v. Buchanan, 848 S.W.2d 298, 302 (Tex. App. 1993) (noting that competitive athletics can benefit students emotionally); Brenden v. Independent Sch. Dist. 742, 477 F.2d 1292, 1298 (8th Cir. 1973) ("Discrimination in high school interscholastic athletics constitutes discrimination in education [under 42 U.S.C. § 1983]."). Even the NCAA recognizes the educational role that intercollegiate competition plays in the life of student-athletes:

> The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by doing so, retain a clear line of demarcation between intercollegiate athletics and professional sports.

NCAA Constitution, Art. 1 § 1.3.1 ("Basic Purpose"). Further, many universities recognize the educational element of intercollegiate sports. For example, Northwestern University takes this position regarding its athletic program:

> Intercollegiate athletics have long been an integral and visible aspect of Northwestern University life. The success of the athletic program does not rest solely on wins and losses. Rather, success in intercollegiate athletics at Northwestern University is inextricably linked to the educational mission of the University, especially with regard to the academic and personal development of student-athletes and the institution's commitment to honoring the highest standards of amateur competition.

1995 Presidential Directive on Self-Regulation of Intercollegiate Athletics, Northwestern Univ., (1995) (on file with the Chicago-Kent Law Review).

39. *See Pahulu*, 897 F. Supp. at 1388.

Knapp, either in and of itself or as a subset of learning, is a major life activity.[40]

B. *Substantial Limitation*

An athlete with a physical impairment that limits major life activities does not meet the Act's definition of a disabled individual. The law, as Congress wrote it, requires an individual to have an impairment that *substantially* limits his/her major life activities. In other words, not every impairment affecting major life activities is a *substantially* limiting one.[41] This issue is best illustrated by example. Assume a hospital denies a physician admission to its residency program because of an eye condition, i.e., strabismus.[42] The hospital defends on grounds that because its residency program requires long shifts, the physician, because of his eye condition, will be unable to work them. On these facts, the physician has an impairment (strabismus) limiting a major life activity (working). However, the hospital's exclusion does not *substantially* limit his ability to work[43] because not all residency programs require long shifts and the physician could pursue other residency programs better suited to his ability. In sum, the law does not protect the hypothetical doctor, because the Act does not secure for disabled individuals the program of choice.[44]

40. The underlying policy of the Rehabilitation Act—providing handicapped individuals with the opportunity to participate in activities in which they have the physical capability and skill to perform—lends even further credence to this proposition. A line of employment cases casts whatever "little doubt" there is on the notion that sports participation is a major life activity. *See* Scharff v. Frank, 791 F.Supp. 182, 184-85 (S.D. Ohio 1991) (finding that a letter carrier unable to engage in sports was not "handicapped" within the meaning of the Act); *see also* Taylor v. United States Postal Serv., 771 F. Supp. 882, 887 (S.D. Ohio 1990) (finding that a letter carrier unable to participate in football, basketball, softball, and running was not "handicapped" within the meaning of the Act), *rev'd on other grounds*, 996 F.2d 1214 (6th Cir. 1991); Stone v. Energy Serv., Inc., 1995 WL 368473 *4 (E.D. La. 1995) (finding that a plaintiff, who was unable to play sports, was not "disabled"). These cases, however, all involve *recreational* as opposed to organized interscholastic or intercollegiate sports. An obvious distinction exists between recreational sports (e.g., jogging, YMCA basketball) and interscholastic or intercollegiate sports. Recreational sports generally do not involve competition among highly trained and skilled athletes, nor do they require the tremendous time commitment and sacrifice on the part of its participants, which is so critical to the success of student-athletes and the athletic programs in which they participate.

41. *See* Roth v. Lutheran Gen. Hosp., 573 F.3d 1446, 1454 (7th Cir. 1995).

42. *Cf. id.*

43. "The key is the extent to which the impairment restricts a major life activity; the impairment must be a significant one." *Id.* at 1454. "The term 'substantially limits' means that the individual is either unable to perform, or significantly restricted as to the condition, manner or duration under which the individual can perform, a major life activity as compared to an average person in the general population." *Id.* at 1454 n.12.

44. *See Scharff*, 791 F. Supp. at 184-85 (finding that plaintiff, who suffered musculoskeletal injuries, was not substantially limited because she was merely excluded from a narrow range of jobs). That court stated:

Drawing from this analysis, in *Welsh v. City of Tulsa*,[45] the Tenth Circuit held that the City of Tulsa, Oklahoma, did not violate the Rehabilitation Act when its city physician disqualified an aspiring firefighter because he had decreased sensation in two fingers.[46] Notwithstanding the fact that the plaintiff "had a lifelong goal of becoming a firefighter and had obtained a college degree in Safety with the specific goal of becoming a firefighter,"[47] the court held that he was not substantially limited in a major life activity.[48]

In similar fashion, the *Pahulu* court held that the university disqualification decision, premised upon the substantial risk of injury to the scholarship athlete posed by his competing in intercollegiate football, did not substantially limit the major activity in his life that was at issue, i.e. learning.[49] The fact that the University of Kansas excluded the football player from only one extracurricular activity was enough for that court to conclude that he was not substantially limited, given that other activities at school would provide him with the same educational benefits.[50] The student continued to receive his scholarship, still had a role with the team, and was given access to all team benefits, except the opportunity to play, and so the court determined that the athlete could attend games, travel with the team, eat at the train-

> [W]e find that these impairments did not substantially limit one or more of the plaintiff's major life activities. The plaintiff's inability to engage in competitive sporting events and other unusually demanding physical activities did not constitute a substantial impairment of the plaintiff's major life activities. Furthermore, the fact that the plaintiff was temporarily unable to perform her work in the bakery does not demonstrate that she suffered from a substantial impairment of her major life activities. "An impairment that affects only a narrow range of jobs can be regarded as not reaching a major life activity or as not substantially limiting one." The fact that the plaintiff was unable to perform her job at the bakery, which required an unusual strain on her wrists, does not demonstrate that her physical impairments prevented her from performing more than a narrow range of jobs. Therefore, we find that the plaintiff does not have a record of impairment which substantially limited one or more of her major life activities.

Id. (citation omitted).

45. 977 F.2d 1415 (10th Cir. 1992).

46. *See id.* at 1416.

47. *Id.* at 1419.

48. *See id.* at 1419. In holding, the court stated:

> We agree . . . that an impairment that an employer perceives as limiting an individual's ability to perform only one job is not a handicap under the Act. Any other interpretation would render meaningless the requirement that the impairment *substantially* limits a *major* activity. "It was open to Congress to omit these limiting adjectives, but Congress did not do so." Finally, while we do not question the sincerity of Welsh's desire to become a firefighter, that desire, alone, is insufficient to bring him within the definition of a handicapped individual under the Act.

Id. (citation omitted) (emphasis added).

49. *See* Pahulu v. University of Kan., 897 F. Supp. 1387, 1393-94 (D. Kan. 1995).

50. *See id.* at 1393.

ing table, and reap the same educational benefits from intercollegiate football as players able to practice and play in games.

But does a recipient really satisfy the Rehabilitation Act by telling an individual who has trained for years—perhaps a lifetime—to participate in her chosen field that she can now join a different field or program and receive the same major life experience? This precise question was raised in *E.E. Black v. Marshall*,[51] in which the court answered as follows:

> [T]his type of definition [of "substantially limited"] drastically reduces the coverage of the Act, and undercuts the purposes for which the Act was intended. A person, for example, who has obtained a graduate degree in chemistry, and is then turned down for a chemist's job because of an impairment, is not likely to be heartened by the news that he can still be a streetcar conductor, an attorney or a forest ranger. A person who is disqualified from employment in his chosen field has a substantial handicap to employment, and is substantially limited in one or more of his major life activities. The definitions contained in the Act are personal and must be evaluated by looking at the particular individual. A [disabled] individual is one who "has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment . . . ." It is the impaired individual that must be examined, and not just the impairment in the abstract.[52]

E.E. Black involved a highly trained apprentice carpenter[53] who was denied employment because of a perceived congenital back abnormality and its accompanying risks in the context of performing tasks, including heavy labor.[54] The court ultimately concluded that the plaintiff was substantially limited in his pursuit of becoming a journeyman carpenter because no similar positions, i.e., positions of a carpenter, were available.[55]

51. 497 F. Supp. 1088 (D. Haw. 1980).

52. *Id.* at 1099.

53. He had accumulated 3600 hours of on-the-job training. *See id.* at 1091.

54. Medical opinion, though, stated that he could perform all of the necessary tasks of the job. *See id.* at 1091-92.

55. *See id.* at 1102. The court stated that the definition of "substantially limited" is broad in scope:

> Congress intended the coverage of the Act to be broad in scope and intended that questions as to that coverage be answered on a case-by-case basis. Both of these intentions would be defeated if the coverage of the Act were reduced because of narrow definitions of "substantially limits" and "substantial handicap to employment."

Id. In addressing the substantial limitation issue, the court noted:

> Factors that are important in the case-by-case determination are the number and types of jobs from which the impaired individual is disqualified . . . Next, it must be determined to what geographical area the applicant has reasonable access . . . Finally, the individual himself must be considered. His own job expectations and training must be taken into account.

C. *Otherwise Qualified*

If assimilation of a "disabled" student-athlete into a program would present a *substantial* risk of injury to herself or third parties, a recipient has a substantial justification under the Rehabilitation Act for an exclusion decision.[56] At the same time, exclusion decisions based upon fears of remote or minimal medical risks violate the letter and spirit of the Rehabilitation Act. "Any qualification based on the risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented easily, since almost all handicapped persons are at a greater risk [of injury]."[57] A mere elevation of risk, without more, is insufficient to find that a disabled individual is not "otherwise qualified."[58]

In *Poole*, the defendant argued that the student-athlete plaintiff, who had only one kidney, was not "otherwise qualified" to compete in

Id. at 1100-01. The EEOC codified these factors at the equal employment provisions of the Americans with Disabilities Act (42 U.S.C. § 12101). *See* 29 C.F.R. § 1630.2(j)(3)(ii) (1995). The EEOC also defined "substantial limitation" with respect to the major life activity of working in the same regulations:

> The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i). The Department of Education and the Department of Health and Human Services promulgated regulations pursuant to the Rehabilitation Act. *See* Pahulu v. University of Kan., 897 F. Supp. 1387, 1392 (D. Kan. 1995) (citing 34 C.F.R. § 104 (1995); 45 C.F.R. § 84 (1994)). These regulations do not define "substantial limitation." In commentary, both Departments acknowledge "the lack of any definition in the proposed regulation of the phrase 'substantially limits.' The Department does not believe that a definition of this term is possible at this time." *Id.* at 1392-93 (quoting 34 C.F.R. § 104, app. A at 372; 84 C.F.R. § 84, app. A at 355).

56. *See* Chiari v. City of League City, 920 F.2d 311, 317 (5th Cir. 1991) ("An individual is not qualified . . . if there is a genuine substantial risk that he or she could be injured or could injure others . . . ."); Doe v. New York Univ., 666 F.2d 761, 777 (2d Cir. 1981) (stating that the touchstone of the "otherwise qualified" issue is the "substantiality of the risk" to the disabled individual and others); *see also* Wolff v. South Colonie Cent. Sch. Dist., 534 F. Supp. 758, 762 (N.D.N.Y. 1982) (finding that plaintiff is not "otherwise qualified" where she is at a "substantial degree of physical risk" to her safety); Doe v. Dolton Elementary Sch. Dist., 694 F. Supp. 440, 445 (N.D. Ill. 1988) (finding that plaintiff with AIDS is "otherwise qualified" unless he poses a "significant risk" of infecting others). Based upon case law involving the Rehabilitation Act, the EEOC, pursuant to the ADA, has defined a direct threat of injury as a "significant risk of substantial harm." 29 C.F.R. § 1630.2(r).

57. Bentivegna v. United States Dep't of Labor, 694 F.2d 619, 622 (9th Cir. 1982).

58. *See* Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985).

> Individuals with handicaps are all too often excluded from school and educational programs . . . a more active and extensive effort than "non-discrimination" must be made to eliminate barriers to employment of the handicapped . . . . A mere "elevated risk" standard is not sufficient to insure handicapped people's "right to [programs] which complements their abilities."

Id. (citation omitted).

interscholastic wrestling because he could not pass a physical.[59] The Board of Education required that students pass the physical as a predicate to participation in interscholastic sports. The court, however, reasoned that the student-athlete had failed to pass the medical exam *because* he had only one kidney and noted:

> Although some doctors, and especially the school system's medical director . . . believe that it is inadvisable for a student with one kidney to participate in wrestling, there is also medical opinion, represented by the opinions of [plaintiff's two physicians], that [the plaintiff] could safely participate in the sport of wrestling. Giving the plaintiff the benefit of all doubts, it could be concluded that the better view was that participation in wrestling was safe for [the plaintiff].[60]

The court accordingly held that the plaintiff was "otherwise qualified" and so the defendant's exclusion of him violated the Act.[61] Specifically, the court ruled that the Board "had neither the duty nor the right under § 504" to substitute "its own rational decision over the rational decision of [the athlete and his family]."[62] The most telling language in the opinion was the following:

> It is undoubtedly true that injury to [the plaintiff's] kidney would have grave consequences, but so might other injuries that might befall him or any other member of the wrestling team. Hardly a year goes by that there is not at least one instance of the tragic death of a healthy youth as a result of competitive sports activity. Life has risks. The purpose of § 504, however, is to permit handicapped individuals to live life as fully as they are able, without paternalistic authorities deciding that certain activities are too risky for them.[63]

Similarly, in *Wright*, the Columbia University football player with one eye demonstrated through a highly qualified ophthalmologist that the risk of serious eye injury from playing intercollegiate football was not substantial.[64] Columbia argued that the athlete was not "other-

59. *See* Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948, 953 (D.N.J. 1980). The decision of the Board stemmed from legal and moral concern over possible damage to the student-athlete's remaining kidney. The Board's position was reflected in an opinion letter written by its physician:

> It is in the best interest of the students to bar them from contact sports despite the wrath from both students and parents. How can you justify and explain to the student who has one kidney and the other destroyed that his death or lifelong attachment to a kidney machine was worth the "glory."

Id. at 952.

60. *Id.*

61. *See id.* at 953-54. There was no question that the plaintiff had the ability to pin his opponents to the mat. *Id.*

62. *Id.* at 954.

63. *Id.* at 953-54.

64. *See* Wright v. Columbia Univ., 520 F. Supp. 789, 793 (E.D. Pa. 1981); *see also* Grube v. Bethlehem Area Sch. Dist., 550 F. Supp. 418, 424 (E.D. Pa. 1982) (holding that a football player

wise qualified" to play because contact sports could have rendered him sightless.[65] The court rejected the argument and stated:

> Such motives, while laudably evidencing Columbia's concern for its students' well-being, derogate from the rights secured to plaintiff under Section 504, which prohibits "paternalistic authorities" from deciding that certain activities are "too risky" for a handicapped person . . . . Moreover, the public interest is enhanced by plaintiff's "dramatic example" that "hard work and dedication to purpose can overcome odds."[66]

In *Pahulu*, however, the Kansas district court blazed new trails in the law when it excluded plaintiff, a scholarship athlete with a congenitally narrow cervical canal, from playing intercollegiate football for the University of Kansas. After finding that the exclusion decision did not substantially limit plaintiff's opportunity to learn, the court leaped to the conclusion that the athlete was not "otherwise qualified" to play because he could not "satisfy the program's requirements, e.g., medical clearance for participation . . . ."[67] Three specialists opined that the risk of permanent injury to the plaintiff from playing football was "no greater than any other player's risk."[68] The court, however, deemed the contrary conclusions of the university's physicians to be "reasonable and rational" and concluded that the disqualification decision was "supported by substantial competent evidence for which the court [was] unwilling to substitute its judgment."[69]

IV. *KNAPP V. NORTHWESTERN UNIVERSITY*

A. *Introduction*

On September 19, 1994, Nicholas Knapp experienced ventricular fibrillation[70] (hereinafter referred to as "VF") following a pick-up bas-

with one kidney could participate in interscholastic football because the defendant school district lacked a medical basis for the athlete's exclusion).

65. *See Wright*, 520 F. Supp. at 794.

66. *Id.* (citations omitted). The court also acknowledged that the plaintiff was a mature, intelligent, and motivated young man capable of making decisions affecting his health and well-being. *See id.* Indeed, other courts have held that college students are responsible adults fully capable of making their own decisions. *See, e.g.*, Bradshaw v. Rawlings, 612 F.2d 135, 140 (3d Cir. 1979) (noting that modern college students are adults and "vigorously claim the right to define and regulate their own lives").

67. Pahulu v. University of Kan., 897 F. Supp. 1387, 1393-94 (D. Kan. 1995).

68. *Id.* at 1394.

69. *Id.*

70. During an event of ventricular fibrillation, the heart fails to contract in its normal rhythm. Blood flow through the heart and to the rest of the body stops. This causes clinical cardiac death. If a normal heart rhythm is not restored within a very short time, VF can lead to brain damage, permanent injury to other vital organs and biological death. *See* MOSBY'S EMERGENCY DICTIONARY 165 (James G. Yvorra, ed. 1989).

ketball game in his high school gym.[71] Paramedics immediately revived Knapp through the use of cardiopulmonary resuscitation, electronic defibrillation and drugs.[72] On October 3, 1996, Knapp's physician implanted a cardioverter defibrillator[73] (hereinafter referred to as "ICD") in his abdomen to restart his heart in the event of recurrent VF.[74]

Several weeks later, Knapp and Northwestern University signed a National Letter of Intent which *required* Knapp—at the time rated among the best basketball players in Illinois—to attend Northwestern and play basketball for the Wildcats.[75] But on November 7, 1995, after Knapp had matriculated at Northwestern, Dr. Sweeney disqualified him from playing intercollegiate basketball because of the September 1994 VF episode and because Knapp had an ICD im-

71. *See* Knapp v. Northwestern Univ., 101 F.3d 473, 476 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 2454 (1997).

72. *See id.*

73. An implantable cardioverter defibrillator is an implantable device designed automatically to detect a serious "fast heart rhythm" such as VF or ventricular tachycardia. When an arrhythmia is detected, the device delivers a pre-programmed form of therapy to the heart to convert the abnormal rhythm back to normal. The components of Knapp's ICD include a generator implanted in his abdominal wall and wires or "leads" which extend from the generator through certain veins leading to his heart. The device is programmed to deliver an electrical discharge when it recognizes the preprogrammed criteria for a fast heart rate to restore the patient's normal cardiac rhythm. The device can deliver several discharges for an ongoing VF episode. It also has the capability to assess and reassess the patient's rhythm in a matter of seconds before delivering the discharge, since many heart rhythms, including VF, may stop spontaneously. ICDs can be "interrogated" by a physician in a matter of minutes to determine whether any malfunction in its performance exists. The ability of the ICD to restore fast heart rhythms to their normal rate has been recognized. The available data indicate that the ICD has at least a 95-99% success rate in restoring the normal heart rate following VF. *See* Affidavit of John H. McAnulty, M.D. at 4-5, Knapp v. Northwestern Univ., 101 F.3d 473 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 2454 (1997) (No. 95 C 6454) [hereinafter Affidavit of John H. McAnulty, M.D.]; *see also* David S. Cannom, *Internal Cardioverter Defibrillator: Newer Technology and Newer Devices*, CARDIAC ARRHYTHMIA 708 (Philip J. Podrid & Peter R. Kowey eds., 1995) ("All series show that the recurrent sudden death rate has been lowered to 2-3% or less per year with the ICD."). In addition, the device provides the physician with realtime information about its detection and therapy parameters and status. The device provides the accumulated data on its operation between interrogations, including stored electrograms, records of episodes detected and treated, and the efficacy of therapy. All of this information can be printed and retained in a patient's file. *See* Affidavit of John H. McAnulty, M.D., *supra*, at 5.

74. *See Knapp*, 101 F.3d at 476. Knapp's ICD was set to recognize VF if his heart reaches a rate of 220 beats per minute. The heart rate of an athlete exercising at maximum intensity is generally considered to be less than 200 beats per minute. *See* Affidavit of John H. McAnulty, M.D., *supra* note 73, at 13.

75. *See id.* At the time Knapp signed the letter of intent, Northwestern was aware that Knapp had experienced VF and received an ICD. Northwestern also knew that when Knapp signed the Letter of Intent, it was his intention to play basketball as a freshman. *See* Knapp v. Northwestern Univ., 942 F. Supp. 1191, 1194 (N.D. Ill. 1996), *rev'd*, 101 F.3d 473 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 2454 (1997).

planted.[76] Wishing to play basketball for Northwestern,[77] Knapp sued the university and its athletic director, Rick Taylor,[78] for injunctive relief[79] under Section 504 of the Rehabilitation Act of 1973.[80]

76. *See Knapp*, 101 F.3d at 476-77. In arriving at its exclusion decision, Northwestern relied heavily on the 26th Bethesda Conference, a national medical conference held in Bethesda, Maryland, to establish guidelines related to the eligibility of athletes with cardiac conditions to participate in sports. *See* 26th Bethesda Conference, *Recommendations for Determining Eligibility for Competition in Athletes with Cardiovascular Abnormalities*, 24 J. AM. C. CARDIOLOGY 845 (1994). Major players in cardiology and sports medicine participated in the 26th Bethesda Conference which was sponsored by the American College of Cardiology and the American College of Sports Medicine. The Conference's Co-Chairman, Barry J. Maron, M.D., Director of Cardiovascular Research at the Minneapolis Heart Institute Foundation, was one of two Northwestern expert witnesses at trial. Northwestern's other expert, witness Douglas Zipes, M.D., was the author of the recommendations of the Conference's Task-Force on Arrhythmias. The Conference found that:

> Competitive sports can place an athlete with a cardiovascular abnormality at medical risk because of an increase in work load on the heart or stress on the vascular system caused by increases in blood flow and pressure and increased body temperature. This may be reflected in an increased risk for sudden death, life-threatening cardiovascular alterations or disease progression.

Id. at 864.

> The efficacy with which [ICDs] will terminate a potentially lethal arrhythmia under the extreme conditions of competitive sports is currently unknown. For athletes with implantable defibrillators or antitachycardia devices, all moderate and high intensity sports are contraindicated.
>
> . . . .
>
> Athletes with these conditions [VF] that result in cardiac arrest in the presence or absence of structural heart disease cannot participate in any moderate or high intensity competitive sports.

Id. at 897.

77. Knapp did not participate as a player on the 1995-96 men's basketball team at Northwestern. During that period, his role was strictly limited to observing each practice or game. *See Knapp*, 101 F.3d at 477. On April 15, 1996, after completion of the 1995-96 basketball season, Northwestern submitted a "Petition for Waiver of Conference Rules" to the Big Ten Conference. Northwestern moved to have Knapp declared a "medical non-counter" so that his athletic scholarship would not count against the total number of allowable basketball scholarships that the school, as a member of the NCAA and the Big Ten, could have at one time. *See* Big Ten Rule 15.5.1.4 ("A tender awarded to a student-athlete may be exempted from the financial aid limitations if the student-athlete becomes injured or ill to the point the player will never be able to compete in intercollegiate athletics."). On May 8, 1996, the Big Ten approved the request to exempt Knapp as a "counter" beginning with the 1996-97 academic year. *See id.*

78. On May 2, 1996, following its submission of the Petition for Waiver to the Big Ten, Northwestern, through Rick Taylor, wrote its letter to the Big Ten requesting that it grant the Petition.

79. A court will grant injunctive relief only if a party seeking it establishes: 1) she has succeeded on the merits; 2) no adequate remedy at law exists, 3) irreparable harm will arise absent injunctive relief; 4) the balance of harms favors entry of injunction, and 5) the entry of the injunction will not harm the public interest. *See* United States v. Rural Elec. Convenience Coop. Co., 922 F.2d 429, 433 (7th Cir. 1991).

80. *See Knapp*, 101 F.3d at 477.

B. District Court Proceedings

The district court[81] held two evidentiary hearings at which five cardiologists testified regarding Knapp's present cardiovascular condition, the risk to him of future injury, and reasonable accommodations, if any. Although the court heard conflicting medical testimony, it ultimately concluded that Northwestern had violated the Act because it had excluded Knapp, an "otherwise qualified disabled individual," from its intercollegiate basketball program.[82] Accordingly, the court granted Knapp permanent injunctive relief and ordered Northwestern to afford him the opportunity to play for its basketball team.[83]

Initially, the district court concluded that "intercollegiate sports competition may constitute a major life activity."[84] The court recognized the "major role" that intercollegiate sports plays in a "student's education and learning process" and cited the relevant regulations and case law.[85] The court held that, "without doubt," high school basketball "has played a substantial role in Knapp's education and learning process" and is a major activity in his life.[86]

Next, the court determined that Northwestern "substantially limited" Knapp's ability to play intercollegiate basketball.[87] "It is the playing of basketball that teaches discipline, teamwork, and perseverance," the court reasoned, and "[t]hese traits are not developed by

81. *See* Knapp v. Northwestern Univ., 942 F. Supp. 1191 (N.D. Ill. 1996), *rev'd*, 101 F.3d 473 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 2454 (1997).

82. *See id.* at 1193-99. Northwestern acknowledged that it is a recipient of federal financial assistance. Northwestern also conceded that it "regarded" Knapp as having a "physical [cardiovascular] impairment" and that it excluded Knapp from its program solely on the basis of his impairment. Thus, the only questions for the court were whether Knapp was "disabled" and "otherwise qualified." *See id.* at 1194.

83. *See id.* at 1199; *see also* Matt O'Connor, *Judge orders NU to let recruit with heart problem play*, CHI. TRIB., Sept. 10, 1996, § 4, at 1.

84. *Knapp*, 942 F. Supp. at 1195.

85. *See id.*

86. *See id.* The court credited Knapp's affidavit, which stated:

> My participation in competitive basketball has provided me and could continue to provide me with a unique experience that I have not encountered in any other extracurricular activity in which I have been involved or in which I could possibly become involved. Among other things, competitive basketball has helped to instill in me the following character traits: confidence, dedication, leadership, teamwork, discipline, perseverance, patience, the ability to set priorities, the ability to compete, goal-setting and the ability to take coaching, direction and criticism. . . . Competitive basketball has also given me recognition in the community, and provided me with the opportunity to meet new people. . . . Competitive basketball has also supplied me with a meaningful outlet for intense physical exercise and an enjoyment and happiness that cannot be duplicated in an open gym or intramural setting.

Id.

87. *See id.* at 1196.

being a perpetual observer" of practice and games.[88] Although "Knapp continues to be a member of the team and continues to receive his scholarship, . . . he is not able to practice or compete with the team."[89]

Finally, based upon expert medical opinion, the court concluded that Knapp was "otherwise qualified" to play intercollegiate basketball for Northwestern.[90] That is, after listening to the testimony of five highly qualified cardiologists,[91] the court determined that the risk to Knapp of recurrent VF from playing intercollegiate basketball was not substantial.[92]

C. *Seventh Circuit Court of Appeals*

Northwestern and Taylor filed an emergency notice of appeal and sought a stay of enforcement of the injunction on September 27, 1996.[93] The Court of Appeals for the Seventh Circuit granted the stay pending appeal, entered an expedited briefing schedule, and heard oral arguments just weeks later.[94] After reviewing the legal determinations of the district court, the Seventh Circuit concluded that the trial court had abused its discretion and reversed it on every question of law on which it had ruled in construing the Rehabilitation Act.[95]

The appellate court opened its opinion with the major life activity issue. It expressed the view that "intercollegiate basketball obviously is not in and of itself a major life activity, as it is not a basic function of life on the same level as walking, breathing, and speaking. Not every-

88. *See id.*

89. *Id.* at 1194.

90. *See id.* at 1196-98.

91. Knapp's experts, whom the court credited, opined that although intense exercise could increase the risk to Knapp of recurrent VF, the risk was extremely low. The court found most persuasive evidence indicating that the risk of recurrent VF appears to decrease with time. *See id.* at 1197.

92. *See id.* at 1196. The "otherwise qualified" issue in the case turned solely on the substantiality of the risk; no one disputed that Knapp could "meet all of the program's requirements in spite of his handicap." *Id.*

93. *See* Knapp v. Northwestern Univ., 101 F.3d 473, 478 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 2454 (1997).

94. *See id.* The Seventh Circuit was well aware that practice for the 1996-97 Wildcat basketball season opened in early November and sought to resolve the dispute before the team's first practice.

95. *See id.* at 479-86. A district court's grant of a permanent injunction is reviewed for abuse of discretion. *See* United States v. Kaun, 827 F.2d 1144, 1148 (7th Cir. 1987). Legal conclusions receive de novo review; legal error may establish an abuse of discretion. *See id.* The Seventh Circuit determined that the Rehabilitation Act presented legal questions requiring de novo review. *See Knapp*, 101 F.3d at 478.

one gets to go to college, let alone play intercollegiate sports."[96] The court subsequently torpedoed Knapp's argument that intercollegiate sports may be one part of the major life activity of learning for certain students generally, and for Knapp in particular.[97] It "decline[d] to define the major life activity of learning in such a way that the Act applies whenever someone wants to play intercollegiate athletics . . . . [Major life activities] are basic functions, not more specific ones such as being an astronaut, working as a firefighter, driving a race car, or learning by playing Big Ten Basketball."[98]

Next, the court shifted to the issue of substantial limitation, warning that "what constitutes learning for a particular individual occurs within reasonable limits—coverage of the Rehabilitation Act is not open-ended or based on every dream or desire that a person may have."[99] It then quickly concluded that Knapp's ability to learn was not substantially limited:

> [L]earning through playing intercollegiate basketball is only one part of the education available to Knapp at Northwestern . . . . Knapp is an intelligent student and athlete, and the inability to play intercollegiate basketball at Northwestern forecloses only a small portion of his collegiate opportunities . . . . The Rehabilitation Act does not guarantee an individual the exact educational experience that he may desire, just a fair one.[100]

Even assuming the appellate court had concluded that Knapp was "disabled" under the Rehabilitation Act, it still was not inclined to afford him the opportunity to play intercollegiate basketball for Northwestern. The court applied its own version of the full court press and held, as a matter of law, that Knapp was not "otherwise qualified" to play for the Wildcats.[101]

At trial, experts for both parties had agreed on all the basic scientific principles, disagreeing only in their medical opinion on the ultimate question—the substantiality of the risk.[102] After reviewing the record, the appellate court acknowledged the conflicting opinion evidence regarding the risk posed for Knapp by his playing NCAA basketball.[103] Knapp's experts believed it was an acceptable risk;[104]

96. *Knapp*, 101 F.3d at 480.
97. *See id.* at 480-81.
98. *Id.* at 481.
99. *Id.*
100. *Id.* at 481-82.
101. *See id.* at 482.
102. *See* Knapp v. Northwestern Univ., 942 F. Supp. 1191, 1196-97 (N.D. Ill. 1996), *rev'd* 101 F.3d 473 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 2454 (1997).
103. *See Knapp*, 101 F.3d at 483-84.
104. *See id.* at 483. The court noted:

Northwestern's experts backed Dr. Sweeney in saying that the risk to Knapp from participation in NCAA basketball was unacceptable. Neither of Northwestern's highly qualified experts, however, were willing to attempt to quantify the precise risk involved.[105] The district court determined that when presented with conflicting opinion evidence regarding risk, where not a single scientific study squarely on point existed to quantify that risk, the decision as to whether Knapp should play NCAA basketball rested with the court.[106] The appellate court disagreed. It believed that when presented with conflicting medical testimony, courts ought to leave the medical decision to team doctors and universities as long as the determination was reasonable, rational and considerate of reasonable accommodations:[107]

> [T]he university has the right to determine that an individual is not otherwise medically qualified to play without violating the Rehabilitation Act. The place of the court in such cases is to make sure that the decision-maker has reasonably considered and relied upon sufficient evidence specific to the individual and the potential injury, not to determine on its own which evidence it believes is more persuasive.[108]

In closing, the Seventh Circuit offered these words:

> Dr. John H. McAnulty, one of Knapp's experts, testified at the injunction hearing that the annual risk of death to Knapp as a result of his cardiac condition under a worst-case scenario is 2.4 percent and that playing intercollegiate basketball would elevate this annual risk to 2.93 percent. . . . Dr. Brian Olshansky, another expert for Knapp, put Knapp's risk of death for the 1996-97 basketball season at no greater than 1 in 100. These estimates took into account Knapp's internal defibrillator . . . .

Id.

105. *See id.* at 483-84. "According to Dr. Barry J. Maron, one of Northwestern's experts, based on a 10-year study, the risk of nontraumatic death for the average male college basketball player is 1 in 28,818. Dr. Maron further testified that participation in intercollegiate basketball significantly increases Knapp's risk of death . . . ." *Id.* Maron could not define significant risk in terms of numbers but essentially believed an unquantifiable significant risk signals a substantial risk. Dr. Douglas Zipes, Northwestern's other expert, agreed. He went so far as to say that a .1 percent risk of death to Knapp from playing NCAA basketball was too much.

106. *See Knapp*, 942 F. Supp. at 1197. The district court stated:

> We have nothing more exotic here than highly qualified experts, in agreement on all the basic scientific principles and differing only in their medical judgment on the final question. . . . All possess the education, training and experience required to become experts and none disputes the expertise of the others. The range of disagreement is extremely narrow, confined only to the dimensions of the risk of recurrence and the effect of the passage of time on that risk. . . . [M]y task is to consider all the opinions and determine which are most persuasive. It is what the trial of disputes such as this will sometimes require. It might have been better to have left the choice to a panel of physicians, but Congress left it with the courts and the random assignment of this case has left it here with me.
>
> . . . .
>
> I again find the opinions of Drs. McAnulty, Rink and Olshansky to be persuasive and I find that the risk to Nicholas Knapp of a repeat epidsode is not substantial.

Knapp, 101 F.3d at 484.

107. *See id.*

108. *Id.*

> [W]e are *not* saying Northwestern's decision necessarily is the right decision. We say only that it is not an illegal one under the Rehabilitation Act . On the same facts, another team physician at another university, reviewing the same medical history, physical evaluation, and medical recommendations, might reasonably decide that Knapp met the physical qualifications for playing on an intercollegiate basketball team. Simply put, all universities need not evaluate risk the same way. What we say in this case is that if substantial evidence supports the decision-maker—here Northwestern—that decision must be respected.[109]

V. ANALYSIS

A. Introduction

In *Knapp*, the Court of Appeals for the Seventh Circuit improperly upheld Northwestern University's decision to bar Nicholas Knapp from participation as an active member in the Wildcat intercollegiate basketball program. In so doing, the court incorrectly ruled that: 1) Knapp was not a "disabled person" within the meaning of the Act; and 2) he was not "otherwise qualified" to play intercollegiate basketball for Northwestern.

Contrary to the court's legal determination, Knapp was "disabled" within the meaning of the Act because: 1) Northwestern perceived that he had a serious and permanent cardiovascular impairment; 2) the impairment, by precluding his participation in the university's intercollegiate basketball program, limited an integral and irreplaceable part of his educational experience; and 3) the impairment constituted a substantial limitation on his learning because, in light of Knapp's experience in competitive sports and his goals and expectations, no other activity or opportunity the university offered could provide the same educational benefit as he could receive from active participation in the intercollegiate basketball program.

Apart from these analytical miscues, the appellate court's most flagrant foul came when it decided against Knapp on the "otherwise qualified" issue. Knapp indeed was "otherwise qualified" to participate because playing basketball would not create a substantial risk of injury to him or to others. In reaching this determination, the district court weighed the testimony of all the witnesses and the facts presented regarding Knapp's medical condition—including the testimony of three well-qualified cardiologists who agreed that Knapp should be allowed to play intercollegiate basketball—and properly

109. *Id.* at 485.

chose *not* to defer to the opinions of either Northwestern's or Knapp's medical experts.

As part of its reversal of the district court, the Seventh Circuit created a legal standard that binds persons with disabilities and the courts to a recipient's subjective determination as to whether it has violated the Rehabilitation Act. The consequences of this aspect of the decision reach far beyond the facts of *Knapp*, or any single case for that matter. By requiring judicial deference to recipient decisionmakers, who in most cases possess no greater medical expertise than the court, but who may have institutional concerns not appropriately considered under the Rehabilitation Act, the court creates an insurmountable burden for persons with disabilities who have been excluded from essential services or programs. Simply stated, judicial deference to a recipient's assessment regarding the significance of a risk of serious injury does not provide substantive review of the recipient's decision but instead, creates an irrebutable presumption in favor of the recipient.

B. Knapp Is "Disabled" Within the Meaning of the Rehabilitation Act.

Knapp was "disabled" within the meaning of the Act and entitled to section 504's protections because: 1) Northwestern regarded Knapp as having a permanent cardiovascular impairment constituting a "physical impairment" under the Act; 2) intercollegiate sports can, and in Knapp's case did, play a major role in a student's education and learning process; and 3) competitive basketball was an important and integral part of Knapp's education and learning experience and the fact that Northwestern would not allow Knapp to play constituted a "substantial limitation" on Knapp's learning.

1. Northwestern views Knapp as having a permanent life-threatening cardiovascular condition that rises to the level of an impairment under the act.

Northwestern regarded Knapp as having a permanent life-threatening cardiovascular impairment—an abnormal heart. Northwestern itself conceded this point. The lens through which Northwestern saw Knapp provided it with a view of his heart condition which precluded Knapp's participation in intercollegiate basketball, whether for Northwestern or some other university.

The Act, however, protects those who are "regarded" as having a physical impairment even when they do not. Cardiovascular problems constitute a defined impairment under the regulations promulgated pursuant to the Act. Thus, there was no dispute that Knapp was "regarded as having . . . an impairment."[110]

2. Playing intercollegiate basketball is a major life activity because it is an integral part of the education and learning process.

The appellate court incorrectly concluded that intercollegiate athletics does not rise to the level of a major life activity merely because it is only a component, at most, of the learning process. The relevant federal regulations promulgated pursuant to the Act, case law addressing the right of student-athletes to compete despite physical impairments, scholarly commentary, and policy statements by the NCAA and major universities all support the conclusion that intercollegiate athletics do reach "learning." The *Knapp* court, however, rejected these authorities.

To be sure, regulations implementing the Americans with Disabilities Act[111] define "major life activities" as "those basic activities that the average person in the general population can perform with little or no difficulty."[112] However, as stated above, the argument that intercollegiate sports cannot be a major life activity because the "average person" may not have the skill to play them misses the point. Intercollegiate sports may be a major life activity, not just in and of themselves, as cases abound, but as a subset of learning. Not everyone can play intercollegiate basketball, but learning is an activity which the "average person" can and does perform.

110. 29 U.S.C. § 706(7)(B) (1994). Knapp does not take away with the left hand what he gives with the right by arguing that the risk of injury to him from playing intercollegiate basketball is not substantial while, at the same time, arguing that he is "disabled" and entitled to protection under the Act. The case law hews to no such line. The detrimental consequences of illegal discrimination can be just as real for someone who is "regarded" as having a physical impairment as for someone who actually has an impairment. *See* School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987). Further, Knapp may be eligible to seek relief as a "disabled person" under the Act because Northwestern claims to base its perception of his ostensible debilitating heart condition on the "record" of Knapp's heart problem, including the episode of ventricular fibrillation and subsequent receipt of an ICD. *See* 29 U.S.C. § 706(7)(B)(ii); *Arline*, 480 U.S. at 281; *see also* 34 C.F.R. pt. 104 app. A at 353 (record of heart disease or cancer are examples of conditions which establish "record" of impairment that substantially limits a major life activity).

111. 42 U.S.C. § 12101.

112. 29 C.F.R. pt. 1630 app. § 1630.2(i) at 402. "[T]he regulations interpreting the ADA provide guidance on how to interpret these [the Act's] terms . . . ." Hamm v. Runyon, 51 F.3d 721, 725 (7th Cir. 1995).

Here, Northwestern perceives that Knapp has a physical impairment that prevents him from playing intercollegiate basketball. Such a handicap places upon Knapp, as it would upon every "otherwise qualified" student-athlete, a limitation on the major life activity of learning. Put another way and consistent with the clear import of the district court's opinion, intercollegiate sports are, in general, an integral part of the major life activity of learning and certainly that is so for Knapp in particular.

Contrary to the appellate court's concern, this analysis does not define the major life activity of learning in such a way that the Act applies whenever someone wants to play intercollegiate athletics. An athlete seeking protection from discrimination under the Act must still proffer evidence demonstrating that she is both "substantially limited" in the major life activity of learning and "otherwise qualified" to participate in the program sought. It is the rare case—and Knapp's situation is rare—where an athlete with a disability is nonetheless capable of performing all the requirements of a service or program. The Rehabilitation Act will not apply to someone who wants to play Big Ten basketball, to be an astronaut, to work as a fire fighter, or to drive a race car, unless that person satisfies all three prongs of the Act. By analyzing the issue in a vacuum and putting the squeeze on the "major life activity" definition, the court debunks the ability of disabled individuals to secure protection under the Act in those rare cases.

3. A perceived serious cardiovascular condition that precludes a student-athlete from playing intercollegiate athletics substantially limits learning, a major life activity.

The district court examined the impact to Knapp of the disability Northwestern imputes to him—namely, his inability to be an active member of the basketball program. The court then correctly determined that such a perceived impairment would be a substantial deprivation for Knapp of an integral and irreplaceable component of the major life activity of learning. The district court easily found that playing intercollegiate basketball is an essential and integral part of Knapp's educational experience. After all, highly trained athletes, like Knapp, devote literally thousands of hours of time training and developing skills, and they reap significant educational benefits from that effort. Further, in recognition of Knapp's training and ability, Northwestern sought him out and provided him with a full scholarship so that he could be a "student-athlete"—an individual who attends classes *and plays intercollegiate sports for the university.*

The Seventh Circuit, however, chose not only to snub the district court's well-reasoned opinion, but existing case law as well. The court's analysis, in finding that Knapp is not "substantially limited," ignores the reasoning in *E.E. Black.* In that case, the court concluded that the plaintiff was substantially limited in his pursuit of becoming a journeyman because no similar positions were available to him.[113] Like the journeyman, Knapp trained extensively for the opportunity to play intercollegiate basketball. He accepted Northwestern's offer to attend school there with the expectation of playing intercollegiate basketball for its team. The disability that Northwestern imputes to Knapp, however, bars him from playing intercollegiate basketball, not just at Northwestern, but at any university.

The appellate court borrowed its reasoning on this issue from a line of employment cases[114] and inappropriately placed it into the nonanalogous context of athletics and education. That line of cases, which holds that exclusion from participation in one particular job does not substantially limit the major life activity of working, is not availing in a case like Knapp's. Here, one could argue, as Northwestern did, that exclusion from participation in one extra-curricular activity does not substantially limit learning because student-athletes, like Knapp, can engage in other extracurricular activities—perhaps the school band or debate team—and reap the same educational benefits as playing intercollegiate basketball. Such a narrow approach to the "substantial limitation" issue would serve only to perpetuate handicap discrimination.

Granted, the *Pahulu* court, also cited by the Seventh Circuit, chose to follow this exact approach. That court concluded that exclusion of a football player from Kansas' intercollegiate football team did not substantially limit that player's learning because he could participate in other extracurricular activities.[115]

But the Court of Appeals for the Seventh Circuit should have rejected the reasoning of *Pahulu* on this point and held that Northwestern's exclusion of Knapp from the school's basketball team did substantially limit his learning. The district court astutely explained why:

> I do not disagree that participation in the band or orchestra may give a student who has trained for years on a particular instrument an educational experience similar to that of intercollegiate athletics.

113. *See* E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1102 (D. Haw. 1980).
114. *See supra* note 40.
115. *See* Pahulu v. University of Kan., 897 F. Supp. 1387, 1393 (D. Kan. 1995).

> However, the law is not satisfied by telling a student who has trained for years to play basketball that the student can now play in the school band or orchestra instead and receive the same educational experience. It also undermines the purpose of the Rehabilitation Act not to allow a disabled individual to pursue his chosen field particularly so when that field is chosen without knowing of the disability. Furthermore, there are relatively few, if any, activities that demand the same level of teamwork, precision, and discipline as an intercollegiate sport to which a person can transfer particular skills.[116]

The limitation placed upon the major life activity of learning also cannot be offset, as the *Knapp* court would have it, by allowing Knapp to attend team meetings, practices and games as a passive observer and not an active participant, and by continuing his athletic scholarship with the university. Using nothing more than common sense, the district court correctly determined on this issue that:

> It is the activity of practice and competition that constitutes a large part of the learning experience for Knapp. Being able to attend games and travel with the team does not make up for not being able to practice with the team and have a reasonable chance to play in games. It is the playing of basketball that teaches discipline, teamwork, and perseverance. These traits are not developed by being a perpetual observer.[117]

Having an opportunity to actually play on the university's basketball team is simply not the same as being allowed to attend the school and merely watch the basketball team play. The Seventh Circuit, once again, improperly accepted the contrary conclusion on this issue in *Pahulu*. *Pahulu* concluded, after a detailed analysis, that intercollegiate football was a major life activity for the plaintiff. But then, in one paragraph without citation, the *Pahulu* court inexplicably ruled that Kansas' disqualification of the football player did not substantially limit him because he still had his scholarship, which allowed him to attend school for free and join extracurricular activities, including the opportunity to participate in the football program as an observer.[118]

This analysis was misguided. While receiving the scholarship provided Knapp an economic benefit, the scholarship itself is not what makes interscholastic athletics so educationally valuable. How the *Pahulu* court could have concluded that a student-athlete would obtain, even remotely, the same educational benefits from watching his

116. Knapp v. Northwestern Univ., 942 F. Supp. 1191, 1195 (N.D. Ill. 1996), *rev'd* 101 F.3d 473 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 2454 (1997).

117. *Id.* at 1196.

118. *See Pahulu*, 897 F. Supp. at 1393.

team as he could acquire from having the opportunity to be an active member of it is difficult to understand.

In sum, case law and common sense illustrate that the Seventh Circuit should have concluded that: 1) intercollegiate athletics may be an integral and unique component of learning, a major life activity; and 2) Knapp's physical impairment, as perceived by Northwestern, substantially limits his learning. It incorrectly determined that Knapp is not "disabled" within the meaning of the Act.

C. Knapp Is "Otherwise Qualified" to Play Intercollegiate Basketball.

1. The district court properly found the risk to Knapp from playing intercollegiate basketball is not substantial.

The district court assessed the testimony of the cardiologists at trial and concluded that the risk of injury to Knapp from playing intercollegiate basketball was not substantial. The court found that any risk to Knapp from his participation as an active member of the basketball team was, at most, remote or minimal. Therefore, because there was no question that Knapp possessed all of the skills necessary to play basketball for Northwestern, the court held that Knapp was "otherwise qualified" under section 504 of the Act.[119]

2. Because the district court found the risk to knapp is not substantial, Knapp is "otherwise qualified" to play intercollegiate basketball at Northwestern.

Because Knapp established that the risk to him from participation is not substantial, the district court properly ruled that Northwestern's permanent exclusion of him violates the Act. After all, a disabled person is "otherwise qualified" to participate in an activity if the risk to that person from participation is not substantial. The mere elevation of risk to Knapp from his playing intercollegiate basketball—a minimal or remote risk of recurrent cardiac episode which could not be restored to normal by his ICD—is without more, insuffi-

119. The district court also appropriately recognized that the increased risk to Knapp from playing intercollegiate basketball, not the total risk to Knapp of having a second cardiac event, to be the issue. After all, Northwestern did not exclude Knapp from the library merely because his risk of a cardiac event while studying is higher than the average student's. For the trial court to compare the total risk to Knapp to that of the average person in the general population would have been inappropriate because the starting point for assessing the risk to Knapp is based upon his prior cardiac episode.

cient to justify Northwestern's refusal to permit him to play for its basketball team.

In deciding this case, the district court drew from the decisions of several other courts. In the context of excluding a student-athlete from participating in a school's athletic program by reason of disability, courts have concluded that the law requires schools to allow the excluded student-athletes to participate where the risk to them is not substantial.

The evidence submitted compelled the district court to find that the risk to Knapp from playing intercollegiate basketball was not substantial. Accordingly, the court properly found Knapp is qualified to perform the essential function of the position he sought—competing for Northwestern's intercollegiate basketball team.[120]

3. The Rehabilitation Act requires courts, not recipients, to determine whether a disabled person is "otherwise qualified" to participate in an activity because the risk to that person from that activity is not substantial.

In accordance with the Act the district court was required to review Northwestern's exclusion of Knapp with *heightened scrutiny* and resolve the conflicting expert medical opinion concerning his medical condition to pinpoint the substantiality of risk to Knapp. After all, Northwestern sought to exclude Knapp solely by reason of the cardiac condition it imputed to him and the substantial risk which purportedly accompanied it.

The Seventh Circuit incorrectly determined that Northwestern's asserting a rational basis for excluding Knapp does, in itself, legally justify that decision. Rational behavior is no defense under the

120. Again, Knapp's case is not one where the physical impairment prevents him from performing the essential functions of the position he seeks. No one is saying Knapp's condition prevents him from running the floor, shooting three-pointers, or diving for loose balls. If that were the case, his disability would absolutely preclude him from participation because he could not perform the activity at the required skill level.

Any suggestion that the district court's decision will result in a flood of "eligibility" litigation is devoid of merit. Decisions like *Poole* and *Wright* have been available for over fifteen years. The adage "the proof is in the pudding" applies here—legal cases involving a student who can perform all of the functions of an active team member, like Knapp, but are still excluded because of a disability, real or impaired, are rare. At the same time, federal law explicitly prohibits universities which receive federal assistance from excluding an "otherwise qualified disabled" student-athlete from its intercollegiate teams on the basis of handicap. Thus, if a school's team physician denies a student the opportunity to participate on an intercollegiate team solely on the basis of that athlete's handicap and the student can prove in a court of law that he is not at substantial risk of injury, that student is entitled to relief under the Act.

Act.[121] Instead, the Act requires the trial court to employ special care in inquiring whether Knapp is in fact "otherwise qualified" to participate on Northwestern's basketball team. To allow a recipient like Northwestern to justify an exclusion decision by fears of death or injury based on remote, minimal, or unknown medical risks of future injury would undermine the policy of the Act because the risk to nearly all handicapped persons is greater than that of the average person.

Northwestern's reason for excluding Knapp was premised solely upon his cardiovascular impairment. To show that he was "otherwise qualified," Knapp presented medical evidence demonstrating that the risk to him from playing basketball was not substantially increased.

In *School Board of Nassau County v. Arline*,[122] the Supreme Court made clear that it is the trier of fact's responsibility "to conduct an individualized inquiry and make appropriate findings of fact" as to whether the risk to a disabled plaintiff is substantial.[123] Pursuant to this inquiry, a district court's findings should be based on "reasonable medical judgments given the state of medical knowledge."[124] Consistent with *Arline*, federal courts, like the district court here, have regularly weighed the conflicting opinions of medical experts and related facts in deciding whether a person can be excluded from an activity because the risk to that person is substantial. By acting as the final arbiter of disputes, the trial court protects the right of the disabled person to participate in activities for which she is qualified to perform as well as the recipient's interest in operating a program that does not place its participants at substantial risk of injury.[125]

121. The Rehabilitation Act was established to ensure that disabled persons would have the right to participate, even when the excluding decision-maker is well-meaning and has the best of intentions. The Tenth Circuit noted in *Pushkin v. Regents of the Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981) that "[d]iscrimination on the basis of handicap usually results from more invidious causative elements and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons." *Id.* at 1385.

122. 480 U.S. 273 (1987).

123. *See id.* at 287. The *Arline* court went on to say that "[s]uch an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks." *Id.*

124. *Id.* at 288.

125. *See, e.g.*, Wood v. Omaha Sch. Dist., 25 F.3d 667, 669 (8th Cir. 1994) (noting that the district court was required to weigh the testimony of competing medical experts to determine whether diabetic plaintiffs were "otherwise qualified" to drive school buses); Doe v. New York Univ., 666 F.2d 761, 779 (2d Cir. 1981) (in remanding the case to the district court for a trial on the merits, the Second Circuit instructed: "The court is required to perform the disagreeable task of considering Doe's entire psychiatric history and weighing the expert testimony on each side"); Davis v. Meese, 692 F. Supp. 505, 520 (E.D. Pa. 1988) (weighing conflicting evidence of medical experts concerning nature of risk to determine whether rejection of insulin-dependent diabetic

In *Knapp*, Northwestern failed to persuade the trial court that the risk to Knapp was substantial. Northwestern's experts relied almost exclusively on general medical guidelines concerning Knapp's purported cardiac problem.[126] Knapp's experts, his primary treating cardiologist and two of the leading electrophysiologists in the country, felt it inappropriate to rely solely upon broad classifications to render their opinions, but instead based their opinions on an individualized assessment of Knapp's current medical condition.[127] On this record, the district court determined that the general guidelines were not conclusive on the question of the risk to Knapp.[128]

When there is no dispute that a disabled person can perform all the tasks of an activity, but that person is excluded because of a fear that future participation could create a substantial risk of injury, the issue will often involve the resolution of conflicting medical opinions.[129] Where a "disabled" plaintiff is able to persuade a court that the risk to him is not substantial, courts' giving deference to a recipient's exclusion decision merely because that decision is rational and reasonable—as the Seventh Circuit did in *Knapp*—undermines the purpose and protections of the Act.

applicants for agent position was appropriate), *aff'd* 865 F.2d 592 (3d Cir. 1989). *See also* Wright v. Columbia Univ., 520 F. Supp. 789, 793 (E.D. Pa. 1981) (accepting medical opinions of plaintiff's opthamologist over those of Columbia's team physician in finding the risk to a one-eyed football player was not substantial); Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948, 952 (D. N.J. 1980) (finding medical opinions of plaintiff's experts persuasive and would not substitute those opinions for rational medical opinions of defendant school board).

126. *See supra* note 76.

127. Northwestern's experts never examined Knapp and never communicated with Northwestern's team physicians prior to trial.

128. Applying generalizations and groupings, like the Bethesda Conference Guidelines, to individual medical situations is a form of stereotyping used to justify exclusion decisions. *See Arline,* 480 U.S. at 287-88. A district court may give weight to the general guidelines of a national conference of a group of private physicians like those promulgated by the participants of the 26th Bethesda Conference and set forth in the document entitled the "Recommendations for Determining Eligibility for Competition in Athletes with Cardiovascular Abnormalities." The district court in *Knapp* gave serious consideration to those general recommendations. This should not mean, however, as the Seventh Circuit now holds, that the trial court must defer to the recommendations of a private medical conference or private physicians upon which the grantee claims to rely, especially when the disabled person has proven through competent evidence that the activity does not create a substantial risk of injury to him/her. At trial, Knapp successfully exposed the lack of scientific data relied upon by the 26th Bethesda Conference participants for those recommendations which arguably applied to him and the overly restrictive attitudes upon which those recommendations were based. In addition, Knapp introduced significant medical evidence through other well-respected cardiologists which the trial court ultimately found to be more persuasive as it concerned Knapp's situation.

129. "Years ago physicians who testified in court often said that medicine was an art and not a science. This is much less true today than it was in the 1960's . . . . *See* Mercado v. Ahmed, 756 F. Supp. 1097, 1101 n.7 (N.D. Ill. 1991). Yet there is still truth in the old saw . . . ." Knapp v. Northwestern Univ., 942 F. Supp. 1191, 1197 (N.D. Ill. 1996), *rev'd*, 101 F.3d 473 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 2454 (1997).

As the purpose of the Act is to promote inclusion and participation of disabled persons, to defer to the recipient's exclusion decision solely because the recipient can obtain a reasonable medical opinion from a hired medical expert is illogical.[130] In *Davis v. Meese*,[131] the Pennsylvania district court was faced with the dilemma of resolving competing qualified medical expert opinions rendered by private physicians on the issue of the acceptability of the risk of harm posed by the FBI's potential employment of insulin-dependent diabetics as special agents. Each side to the dispute presented expert medical testimony on the issue of risk. The *Davis* court determined that the Act required that this dispute needed to be resolved by the trial court without deferring to the reasonable medical opinions upon which the FBI was relying. The court stated:

> [I]n this case neither party challenged the qualifications of the other party's expert witnesses. Because of the divergence of medical opinion expressed by the experts, obviously complete deference cannot logically be given to each expert. Only by assessing the relative merit and strength of the opinions can a proper determination be made in this case . . . .
>
> . . . Where, as here, qualified medical opinion is divided as to what is an acceptable degree of risk, a decision must be made.[132]

Upon weighing the evidence on the factors of risk of harm to the handicapped applicants and to others from the potential employment of insulin-dependent diabetics as special agents, the *Davis* court made the factual determination that the risk was too great.[133] Accordingly, such applicants were not "otherwise qualified" for the position.

The district court here was faced with the same dilemma as the *Davis* court—conflicting views of qualified private physicians concerning the issue of substantiality of risk. Like the court in *Davis*, the court determined that deference to the opinions of Northwestern's doctors (or experts) was inappropriate.

In so ruling, the district court properly determined that *Pahulu* applied an incorrect standard on this issue. In *Pahulu*, the court declined to decide that the plaintiff was "otherwise qualified" because

130. The illogic of having a trial court "rubber stamp" an expert opinion is especially apparent when considering that experts often receive thousands of dollars to render medical opinions in litigation. The danger of "shopping" for expert medical opinion is one more reason courts should refrain from giving deference to either party's expert witnesses.

131. 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989).

132. *Id.* at 520.

133. *See id.*

the defendant university's decision was "reasonable and rational."[134] Consistent with the policy of the Act and other cases that have addressed the issue, the court here weighed the conflicting testimony and related evidence and reached its conclusion on the facts that the risk to Knapp was not substantial, and therefore, Northwestern could not exclude him.[135]

D. The Seventh Circuit Sidesteps the Supreme Court Decision in Arline.

1. Courts must make individualized inquiries and appropriate findings of fact.

Congress recognized that legitimate reasons might exist to justify the exclusion of a particular individual with a disability from a particular benefit or job.[136] However, realizing that allowing exclusion based upon the articulation of a legitimate concern might undermine any meaningful protection from discrimination, the Supreme Court, as stated above, has required courts to make an independent assessment as to the legitimacy of a recipient's concerns.[137] The *Arline* court squarely placed the responsibility for making an individualized inquiry, making findings of fact, and giving appropriate weight to the competing concerns of recipients and disabled individuals on the courts, not on recipients seeking to bar disabled persons from partici-

134. Pahulu v. University of Kan., 897 F. Supp. 1387, 1394 (D. Kan. 1995). The *Pahulu* court rendered its decision on this point in one paragraph without citation to any legal authority and without any other explanation for its decision.

135. One commentator has written:

> A college has no substantial justification for excluding a handicapped adult from school-sponsored athletics if competent physicians reach conflicting participation recommendations based on an individualized physical examination and different evaluation of the medical risks.
>
> . . . .
>
> The Act prohibits a university from substituting its decision for a considered decision of a fully-informed adult athlete to participate in athletics supported by a credible medical opinion.

Matthew J. Mitten, *Amateur Athletes with Handicaps or Physical Abnormalities: Who Makes the Participation Decision*, 71 NEB. L. REV. 987, 1021-22 (1992).

The standard which the district court and the *Davis* court employed, which calls for the trier of fact to act as the "neutral" arbiter of the opinion of medical experts, is more favorable to the recipient than the standard employed in *Wright v. Columbia Univ.*, 520 F. Supp. 789 (E.D. Pa. 1981). In *Wright*, the court found, consistent with Mitten's recommended approach, for the plaintiff student-athlete in deference to the medical opinions of his physicians and his decision on the risk issue. In light of the Act's policy of inclusion and protection of the right of the disabled person to have an equal opportunity to participate, such an approach is more consistent with the purpose of the Act than one that calls for blind deference to the excluding institution's private physician.

136. *See* School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987).

137. *See id.*

pation in their services or programs. The Seventh Circuit's decision in *Knapp*, which deferred completely to the exclusion decision made by Northwestern, conflicts with the Supreme Court's allocation of responsibility under the Rehabilitation Act.

The Seventh Circuit provided no explanation for its departure from *Arline*. Instead, it noted that the *Arline* court refrained from determining the weight to be given to the medical judgment of *private* physicians.[138] In *Arline*, a school teacher fired because she had tuberculosis sued the school board under the Rehabilitation Act.[139] The Supreme Court stated that in making an individualized "otherwise qualified" inquiry, "courts normally should defer to the reasonable medical judgments of *public health officials*."[140] The *Arline* court's observation that it was not addressing the weight to be given to the testimony of private physicians does not mean that it failed to address the very different question of who should make the requisite findings of fact based upon that testimony. In addition, far from indicating that the Supreme Court intended that the same level of deference accorded to the medical opinions of public health officials be accorded to the opinions of private consultants, the Supreme Court's notation on this point suggests that the deference afforded to private physicians should be less. This conclusion follows from the fact that while public health officials' role and responsibility is the objective assessment of medical risks and potential future harm to the public, private physicians simply do not play the same role or bear the same responsibility.

2. A court's findings of fact must include a determination as to the substantiality of the risk.

The Supreme Court also has provided instruction as to the exact findings of fact a district court must make before an individual can be excluded based upon risk of future injury. The requisite findings of fact include the following four factors: (1) the nature of the risk; (2) its duration; (3) its severity; and (4) the probability that the injury or harm will occur and the varying degrees of severity if it does.[141] Without explanation, the *Knapp* court essentially ruled that the fourth and final factor may be discounted by concluding that courts should re-

138. *See* Knapp v. Northwestern Univ., 101 F.3d 473, 485 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 2454 (1997).

139. *See Arline*, 480 U.S. at 287-88.

140. *Id.* at 288. (emphasis added).

141. *See id.*

frain from independently evaluating the significance of the risk of injury in any cases where the potential injury is serious harm or death.

The Seventh Circuit's conclusion that "consensus recommendations of several physicians in a certain field do carry weight"[142] does not support abdication of the courts' ultimate role—to determine whether all the factors contributing to a conclusion of significant risk have been appropriately and impartially considered. It must be within the province of courts to assess impartially whether a recipient's exclusion of a disabled person falls within the narrowly defined defenses of the Act. Otherwise, the determination as to whether a recipient has met the appropriate legal standard hinges upon the partisan point-of-view of the recipient. The Seventh Circuit itself conceded that "on the same facts, another team physician at another university, reviewing the same medical history, physical evaluation, and medical recommendations, might reasonably decide that Knapp met the physical qualifications for playing on an intercollegiate basketball team."[143] Consequently, the determination as to the legality of a disabled person's exclusion under the Act depends not on an individualized assessment of the quantifiable risks presented, but upon the recipient's subjective evaluation of what nature or level of risk is significant or intolerable. Such a result is antithetical to the Rehabilitation Act's primary purpose of protecting individuals with disabilities from deprivation of their rights based solely upon a recipient's articulation of an allegedly legitimate concern.[144]

E. Ramifications of Knapp v. Northwestern

A district court's review of a defendant's assessment as to the significance of risk presented by participation of disabled individuals creates an irrebutable presumption in favor of a recipient. Under *Knapp*, recipients are free to ignore or undervalue opposing evidence regarding the magnitude of risk, even when no one other than the disabled person is subjected to the risk. Plaintiffs and the courts may challenge only the recipient's process in making the determination but cannot challenge the substantive determination as to the significance of risk.

Creating an irrebutable presumption in favor of recipients alters the allocation of burdens under the Act. Under *Pushkin*, once the

142. *Knapp*, 101 F.3d at 485.
143. *Id.*
144. *See Arline*, 480 U.S. at 287-88.

plaintiff has made a prima facie case, the defendant-recipient has the burden of proving that the individual is not otherwise qualified which showing then can be rebutted by the plaintiff.[145] In *Knapp*, the Seventh Circuit hollows out the established allocation of burdens by allowing a recipient to avoid an impartial assessment of whether a risk is genuinely substantial. As the district court here and other courts recognize, judicial deference to a recipient's evaluation of the medical opinions of its private consultants as to whether a risk is sufficiently significant to justify exclusion of a disabled person from its programs or services, regardless of how reasonable and rational, would end meaningful protection under the Act.[146]

VI. CONCLUSION

Persons with disabilities routinely are excluded from obtaining necessary medical treatment, attending schools, and continuing to work based solely upon defendants' determinations that these persons present greater risks of future injury or harm than the defendants are willing to accommodate. Some defendants, like Northwestern, conclude, and argue in defense of their exclusion of disabled persons, that

145. *See* Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1387 (10th Cir. 1981).

146. In the short amount of time since *Knapp* was decided, the Seventh Circuit's new standard has already been attacked. As one district court observed:

> The *Knapp* decision would not have the Court make an independent determination of whether substantial risk and severity of injury is actually risked. *Knapp*, 101 F.3d at 484. Instead, *Knapp* holds that the "place of the court in such cases is to make sure that the decision-maker has reasonably considered and relied upon sufficient evidence specific to the individual and the potential injury, not to determine on its own which evidence it believes is persuasive." *Knapp*, 101 F.3d at 484. While an examination into the evidence relied upon by a decision-maker is important, a district court must also be permitted to determine whether "in light of [a plaintiff's] work history and medical history, employment of her would pose a reasonable probablility of substantial harm." *Mantolete*, 767 F.2d at 1424.
>
> The *Knapp* Court would allow an individual to be excluded from a position solely on the basis of the risk of severe injury if the decision to exclude was supported by substantial evidence. *Such a standard violates the very purpose of the Rehabilitation Act: no individual should be excluded from a position when he/she can meet all of the program's requirements in spite of his/her disability. See Davis*, 442 U.S. at 406. *Consequently, if a decision-maker unnecessarily excludes an individual on the basis of a disability, that decision should be overturned, regardless of the sufficiency of the evidence upon which it was based.* A trier of fact, therefore, ought to be permitted, under the Rehabilitation Act to determine if risk of injury caused by a disability is such that the individual has been needlessly excluded from participating in an activity, program, or job.

Mendez v. Gearan, 956 F. Supp. 1520, 1527 n.9 (N.D. Cal. 1997) (emphasis added).

The district court in *Knapp* noted that Northwestern may have made a rational decision that Knapp's risk is substantial based on reasonable evidence, but it correctly concluded that deference to the opinions of Northwestern's doctors (or expert witnesses) was inappropriate. The district court's recognition that it was to decide the issue of the substantiality of the risk when presented with conflicting medical evidence is consistent with the language of Section 504, the regulations issued under it and the decisions of the federal courts. The same cannot be said of the Seventh Circuit's decisions in *Knapp*.

any risk of harm—however unlikely to occur—is intolerable and justifies exclusion. Without meaningful enforcement of anti-discrimination laws such as the Rehabilitation Act of 1973, the individuals who are the subject of these determinations are left without protection from arbitrary exclusion from essential services or programs they seek to enjoy. It is the role of the courts to ensure meaningful enforcement.

Meaningful enforcement does not mean that every individual with a disability, whether it be Nicholas Knapp, the astronaut, the firefighter, or the race car driver, must be allowed to participate in every program, activity, service, benefit, or employment opportunity. It does mean that courts, regardless of whether they determine that the individual must be included or should be excluded, must make the ultimate determination of whether a risk of injury presented by inclusion of a person with a disability is significant as contemplated by the Rehabilitation Act.

The ability of persons with disabilities to exercise autonomy in basic life decisions, including those that may involve some level of increased personal risk, has been central to the struggle of the disabled to participate fully as equal citizens in our society. In evaluating the level of risk presented by the participation of a person with a disability, a defendant, and the medical consultants it employs, may inappropriately consider significant any risk of death or serious harm.[147] Because the judgment of the defending party, however reasonable, may not reflect the mandates of the law, to determine what is rational and reasonable in light of the Act's goal of inclusion and integration is the role of the courts, as triers of fact. This is particularly so in those cases where there is disagreement among competent medical experts.

The district court here heeded the mandate of the Act when it decided the issue of "substantial risk" of future harm—where that is the sole basis for exclusion—without deference to the medical opinions of Knapp's or Northwestern's private physicians. Only if courts continue this approach—followed by other circuit and district courts[148]—will the appropriate balance between the interests and the rights of the disabled person, for whom the Act was intended to pro-

147. For example, a defendant may inappropriately elevate institutional concerns such as liability in its assessment of the significance of a risk.

148. *See e.g.*, Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372 (10th Cir. 1981); Wood v. Omaha Sch. Dist., 25 F.3d 667 (8th Cir. 1994); Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981); Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd* 865 F.2d 592 (3d Cir. 1989); Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948 (D.N.J. 1980).

tect, and the legitimate interests of the defendant-recipient be maintained.

Northwestern University, a federally funded institution, sought to exclude Nicholas Knapp, a "disabled" person "otherwise qualified" to participate in one of its programs, solely on the basis of a disability Northwestern perceives Knapp to have. Northwestern's conduct violated the Rehabilitation Act.