DISABLED ATHLETES: A LAST VESTIGE OF COURT TOLERATED DISCRIMINATION?

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I. INTRODUCTION

A fateful coalition of outdated and misplaced NCAA guidelines, understandable but inappropriate medical bias, and a dubious judicial elitism have produced at least two rogue federal court decisions[1] against disabled athletes in the 1990s. These decisions have diluted the Rehabilitation Act of 1973[2] (the "Act") to a dangerous legal stratum of "separate but equal" theory which could invite new brands of tolerated discrimination against all disabled Americans.

Disabled athletes have intensely focused dreams, feelings, hopes and heart-felt ambition. For those with enough guts, grit, skill and determination, their ability to compete on an un-

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1. *See* Knapp v. Northwestern University, 101 F.3d 473 (7th Cir. 1996); Pahulu v. University of Kansas, 897 F. Supp. 1387 (D. Kan. 1995).

2. 29 U.S.C. §794 (1985).

even playing field is profoundly symbolic of all disabled human beings who face, and usually overcome life's cruel hurdles.

Often those hurdles are unavoidable and cannot be overcome—a blind athlete will never play in the NBA—but frequently life's obstacles are artificial hazards erected by others, sometimes with ill will, sometimes well intended. Congress and the courts have intervened significantly in the last quarter century beginning with the Act to protect all qualified disabled persons against the ravages of discrimination.[3] But just as the road to hell is paved with good intentions, many administrators and indeed these same courts are lured by false arguments into believing the disabled need protection from themselves. They believe that others can and should decide the fate of the disabled for them, and—at least regarding disabled athletes—the end somehow justifies the means.

Even though court interpretation of the Act has evolved soundly since 1973, two aberrant—and dangerous—decisions have surfaced in the 1990s, radically creating new law to deny two collegiate athletes the right to play on the very teams that recruited them from high school.[4] Both decisions distorted legal precedent to impose their own "we-know-what's-best-for-others" brand of elitist jurisprudence. These decisions should not be allowed to ignite a groundswell of similar judicial sentiment across other jurisdictions. For not only are disabled athletes now at risk, all persons with disabilities potentially now have two more hurdles to clear in combating discrimination in the workplace, schools or other institutions.

Is it dangerous for any blind bread-winner to brave the subway to work? Certainly it is, but should others deny the freedom to commute, work and enjoy the fruits of life—even if many others fail to comprehend such a difficult task? Put another way, just because some lives have been dealt a hand of heightened risks, should concerned others have the power to legislate the disabled off the subway "for their own good?" Fortunately, the courts and most people in general see the fallacy of such short-sighted reasoning. However, in the context of disabled athletes, the courts are vulnerable to the "we know best" syndrome in striking down the freedoms of legitimately disabled victims who otherwise should be federally protected

3. *See* 29 U.S.C. §794(a) (1985).
4. *See supra* note 1.

under the Act which, as it happens, is a quarter century old this year.

Many courts do recognize the rights of disabled athletes without fanfare. Nevertheless, two rogue jurisdictions have diluted the Act to little more than lip service when some disabled athletes—young adults with hat in hand, innocently expecting justice—are turned away on a dubious principle. As the Seventh Circuit and one Kansas district court see it, the courts know best in making life choices for these proud citizens.[5] In short, the Act may really apply only to others. The author has had occasion to represent scores of athletes over the past decade, one of whom was a disabled basketball star who inspired the Seventh Circuit to prove once again that bad facts make bad law.[6] Because the divergence of opinion among the circuits on these issues is great, the Supreme Court should—must—one day intervene to settle the rights of disabled athletes everywhere.[7]

II. The Philosophical Right to Decide

The Act is a statutory attempt at leveling the playing field for certain qualified disabled individuals.[8] The Act, of course, is only as good as the courts interpret it, and the system seems to work in most pertinent areas of concern—*except* for disabled athletes where an extraordinary "in loco parentis" mindset has created a legal inertia of sorts predicated on the "we-know-what's-best" mentality.[9] The result is a confused judiciary, with different federal circuits coming to radically different con-

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5. *See supra* note 1.

6. *See Knapp*, 101 F.3d 473, 476 (7th Cir. 1996).

7. In *Pahulu*, for example, the court believed the plaintiff football player was not "disabled" because he could experience the life activity of "learning" in places other than on the football field. *See Pahulu*, 897 F. Supp. 393-94. This creates dangerous precedent for employers—and courts—who are tempted to send disabled job applicants "down the street" to other prospective employers, and it certainly could have implications for one Casey Martin, the disabled golfer whose own issues with the Professional Golfers Association on the subject of "accommodation" have received great national publicity. *See* Marcia Chambers, *Judge Says Disabled Golfer May Use Cart on Pro Tour*, NY Times, Feb. 12, 1998, at A1.

8. *See* 29 U.S.C. §794 (1985).

9. *See, e.g.*, Wood v. Omaha School Dist., 25 F.3d 667 (8th Cir. 1994); Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991); Doe v. New York University, 666 F.2d 761 (2d Cir. 1981); Pushkin v. Regents of University of Colorado, 658 F.2d 1372 (10th Cir. 1981); EEOC v. Kinney Show Corp., 917 F. Supp. 419 (W.D. Va. 1996); Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988); Grube v. Bethlehem Area School District, 550 F. Supp.

clusions about defining disabilities and addressing the remaining elements of a prima facie claim under the Act.[10]

The bare-bone elements of a discrimination claim under the Act require an aggrieved plaintiff to establish at least the following:

> (1) The defendant perpetrator is a federal agency or receives federal funding;
> (2) The plaintiff has a "disability" [not always an easy determination];
> (3) The plaintiff is "otherwise qualified" for the task in question—that is, the plaintiff can perform *in spite of* the disability;
> (4) The plaintiff was discriminatorily denied an opportunity solely by reason of the disability;
> (5) The performance by plaintiff would not impose a material risk of undue harm to others; and
> (6) The activity in question would not impose *a likelihood of substantial harm to plaintiff*.[11]

There are intriguing nuances to all of the above standards, but the last test is a loaded gun, italicized to stress the importance of every word. The "right to decide for oneself" is philosophically at odds with a legal restriction against self-inflicted harm. The completely libertarian view would render the last test irrelevant where there is informed consent. In other words, once an informed adult plaintiff decides to pursue an activity, then the risk of self-harm is to be weighed and decided by that individual only. Those rights which philosophers grant to libertarians, however, are taken away by the text of the Act which mandates that there be no likelihood of substantial harm to oneself.[12]

What about a mere *possibility* of substantial harm? Mere possibilities, even if the perceived harm could be substantial, are not strong enough, for the statute and majority of evolving interpretations stick to the literal requirement that such harm be "likely."[13] Then what about a likelihood of less-than-substantial harm? Still the test would not be met, as harming

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418 (E.D. Pa. 1982); Wright v. Columbia University, 520 F. Supp. 789 (E.D. Pa. 1981); Poole v. South Plainfield Board of Education, 490 F. Supp. 948 (D.N.J. 1980).

10. *See supra* note 9.

11. 29 U.S.C. § 794 (1985). *See also* Southeastern Community College v. Davis, 442 U.S. 397, 400 (1979); *Grube*, 550 F. Supp. at 425; *Poole*, 490 F. Supp. at 949.

12. *See* 29 U.S.C. § 794 (1985).

13. *See id. See also Grube*, 550 F. Supp. at 425; Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985).

oneself is legally permissible under the Act; the harm is proscribed only if it is "substantial."[14] Some courts, however, get lost in a blend of the two issues, opening a door of judicial confusion. This seemed to be the greatest emotional obstacle in the Knapp case against Northwestern University, causing concern about the possible serious harm involved—death—even though some doctors testified at trial that either the likelihood was quantifiably small, or it could not be adequately measured or predicted.[15]

A good example of the Act at work can be found in *Wright v. Columbia University*,[16] a leading case regarding a disabled football player. Columbia University actively recruited John Wright, an outstanding high school running back who since infancy was blind in his right eye.[17] Once on board as a Columbia freshman, however, Wright was denied medical clearance and the incumbent opportunity to play college football, so he filed a discrimination action seeking injunctive relief under the Act.[18] Columbia cited the possibility of losing sight in the other eye, rendering his football career "too risky."[19] The court was impressed with Columbia's concern but not its legal argument, stating that "such motives while laudably evidencing Columbia's concern for its students' well-being, derogate from the rights secured to plaintiff under Section 504 [of the Act], which prohibits 'paternalistic authorities' from deciding that certain activities are 'too risky' for a handicapped person."[20]

The court was impressed with evidence from a highly qualified expert who testified no substantial risk of serious eye injury relating to football exists.[21] The plaintiff himself also testified that he seriously considered and appreciated the risks incident to playing football with impaired vision and willingly

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14. *See* 29 U.S.C. § 794.

15. See *Knapp*, 101 F.3d at 482-83. The Knapp decision begs this question: if the risk cannot be measured by medical testimony, does that render such risk benignly nil or dangerously high? The author, one of the attorneys of record in *Knapp*, believes and argues that since the burden of proof shifts to the defendant, the presumption should be the former.

16. 520 F. Supp. 789 (E.D. Pa. 1981).

17. *See id.* at 791.

18. *See id.* at 791.

19. *See id.* at 794.

20. *Wright*, 520 F. Supp. at 794.

21. *See id.* at 793.

chose to accept them.[22] The court also noted plaintiff was mature enough to make such an important decision.[23] The evidence showed that Wright had attained a "B" average after one year at Columbia, had previously received many high school scholastic and athletic awards, and was an intelligent, motivated young man.[24]

However, a 1995 Kansas case took the *Wright* fact pattern to a new level.[25] Alani Pahulu, a football player at the University of Kansas, was struck during Spring practice, briefly "experiencing numbness and tingling in his arms and legs."[26] Pahulu was found to have a congenitally narrow cervical canal, and upon consultation with a KU Medical Center neurosurgeon, the team doctor concluded that there was an extremely high risk of "potentially permanent severe neurological injury including permanent quadriplegia."[27]

The physician's careful opinion may have been sound medically, but the physician's job is not to interpret statutes. The physician's term "extremely high risk" is not the same as an objective legal test which relies upon "likelihood." For example if an individual hypothetically increases the already remote chance of quadriplegia in the general population by an incremental amount twenty-five percent by playing football, this may be too much additional risk from a sound medical point of view. However, from a legal, libertarian or philosophical vantage, the resultant risk is still nil. Therefore, although both medical and legal risks are fundamentally sound for their own purposes, they are not the same.

The *Pahulu* court was forced into a corner, for the University strenuously fought the plaintiff's right to play due to an apparent fear of bad headlines.[28] The published opinion shows the University argued that ". . . should Pahulu be injured, the defendants risk damage to their reputation."[29] The argument has surfaced elsewhere, and might be summed up as "the Hank Gathers defense." Gathers, of course, was the Loyola

22. *See id.*
23. *See id.* at 794.
24. *See Wright*, 520 F. Supp. at 794.
25. *See* Pahulu v. University of Kansas, 897 F. Supp. 1387 (D. Kan. 1995).
26. *Id.* at 1388.
27. *Id.*
28. *See id.*
29. *Pahulu*, 897 F. Supp. at 1388.

Marymount basketball star who dramatically dropped dead on the court during a game in progress—and on television, no less.[30] No other university desires liability or blame for such a harsh incident, but any wholesale discrimination against disabled athletes is a knee-jerk overreaction.

The struggling *Pahulu* court found a way, so it believed, to sidestep the complicated issue of legal risks versus medical risks, and the University's right to manage its football program versus Pahulu's right to play.[31] It simply came to the determination that Pahulu was not disabled![32] But the court got it grossly wrong, overreaching to substitute its own control over the law, its "medical" judgment over the objective truth. The Act defines an individual with a disability as ". . . any person who (i) has a physical or mental impairment which substantially limits one of more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment."[33] So how does that work against someone like Pahulu?

III. Major Life Activities: A Moving Target

If one cannot perform a major life activity, such as walking, driving a car, speaking, reading, running, playing softball, working, etc., the individual is deemed disabled under the Act.[34] Many courts have found that learning is also a life activity, and that interscholastic sports provide great enrichment and other cherished benefits for those who participate and, as such, are also deemed life activities in and of themselves.[35] In *Doe*, for example, the court suggested contact sports were a major life activity for the plaintiff, an elementary student with AIDS.[36]

Are life activities defined objectively or subjectively? Breathing and walking would appear to be universal life activities. Working is too, but some might argue that working is a

30. *See* Lawrence K. Altman, *As a Lawsuit Looms on Death of Gathers, Many Major Questions Remain Unanswered*, NY Times, Mar. 29, 1990, at B11.

31. *See Pahulu*, 897 F. Supp. at 1392-94.

32. *See id.*

33. *See* 29 U.S.C. §706 (8)(B) (1985).

34. *See* 45 C.F.R. §84.3 (j)(2)(ii) (1997); 29 U.S.C. §706(8)(B) (1985).

35. *See, e.g.*, Doe v. Dolton Elementary School District No. 148, 694 F. Supp. 440 (N.D. Ill. 1988).

36. *See id.* at 445. *See also Poole*, 490 F. Supp. 948; *Grube*, 550 F. Supp. 418.

privilege—or at least that it is not a major life activity for everyone. There is no end to the possible examples from singing, to driving, to swimming, to reading, to playing tennis, golf or even football or basketball. Many decisions find, hint or suggest that the test is subjective; that is, what is a major life activity to the aggrieved party?[37] In Pahulu's case, he certainly regarded football as a major life activity, but the University argued that "because the general population cannot play intercollegiate football, the activity is not a major life activity."[38] Remarkably, even the recalcitrant *Pahulu* court, which ultimately found in favor of the University, could not agree, specifically finding that ". . . for Pahulu intercollegiate football may be a major life activity, i.e., learning."[39]

But then the court and reality split company, by inventing a new law: the separate-but-equal exception to disabled people. How does this work? The court found that since the University was willing to maintain Pahulu's athletic scholarship, he maintained many ways to learn and therefore had no need for football.[40] Such is a great leap of logic and law, substituting the court's judgment as to which life activities are important to the individual, and then denying disabled citizens their rights under the Act by finding no disability at all. If a blind man can "learn" by listening to audio books on tape, does that mean he is not disabled? If a one-legged man can walk but not run, should the courts deny that he his disabled? The logic is a departure from sound legal reasoning and appears to be a transparent attempt to protect the University at the expense of Mr. Pahulu. Whatever the motive, the result endorsed discrimination as interpreted by the Act.[41]

IV. Performance in Spite of a Disability

There are two elements under the Act that are not particularly inflammatory and do not receive much fanfare, though both are important to note. First, if the defendant institution receives federal financial assistance, it is subject to the Act.[42]

37. *See* Knapp v. Northwestern University, 938 F. Supp. 508 (N.D. Ill. 1996), *rev'd* 101 F.3d 473 (7th Cir. 1996).
38. *See Pahulu*, 897 F. Supp. at 1389.
39. *Id.* at 1393.
40. *See id.*
41. *See* 29 U.S.C. § 794(a) (1985).
42. *See* 29 U.S.C. § 794(a) (1985).

Some institutions have argued that their athletic departments are separate entities which receive no federal funding, but that argument has failed with the courts.[43] If there is no federal assistance at all, the Act does not apply, which is why this particular Act (as opposed to the Americans with Disabilities Act ("ADA"))[44] is often not a tool for private industry defendants.[45] Universities, even if private institutions, generally receive some form of financial aid and are therefore usually subjected to the Act.

A major qualifying element for protection under the Act is the plaintiff's ability to perform "in spite of his or her disability."[46] Regardless of how "discriminatory" such may be, the proverbial blind man will never be an airline pilot or NBA star—notwithstanding the danger issues, he simply could not perform the task. Neither can a one-legged athlete play a full court NCAA basketball game, although one gets into tricky territory here because many athletes defy conventional logic. Consider the case of Kenny Walker, an All-American football player at the University of Nebraska who was deaf, or professional baseball player Jim Abbott, who proved that a one-handed pitcher can not only play baseball, he can do it successfully in the big leagues.[47]

Although there may be some close cases from time to time, the issue of performance usually is not the biggest hurdle, for plaintiffs in these types of cases are normally star athletes in college, high school or even middle school.[48] But often the issue of accommodation arises.[49] If an athlete has asthma, for

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43. *See Poole*, 490 F. Supp. at 951. *See also Wright*, 520 F. Supp. at 791.

44. 42 U.S.C. § 12133(b) (1995).

45. For example, golfer Casey Martin, won a highly publicized victory against the PGA over use of a motorized golf cart as an accommodation to his disability. *See* Chambers, *supra* note 7, at A1.

46. 29 U.S.C. § 794(a) (1985).

47. *See* Matthew J. Mitten, *Tamateur Athletes With Handicaps or Physical Abnormalities: Who Makes the Participation Decision*, 71 NEB. L. REV. 987, 989 (1992). Another interesting case involves Jeff Banister, who refused a leg amputation in high school against his doctor's recommendation, saying "I'd rather die thatn not be able to play baseball." *Id.* at 995, n.37. Banister went on to become a catcher for the Pittsburg Pirates. *See id. See also Wright*, 520 F. Supp. at 793 (discussing a student-wrestler with one kidney, a student who was blind in one eye that was interested in basketball, and a one-legged student interested in football).

48. *See Grube*, 550 F. Supp. at 419. *See also Pahulu*, 897 F. Supp. at 1394.

49. *See* Clifton Brown, *Martin Decision Could Increase Golf Course Traffic*, NY TIMES, Feb. 12, 1998, at C1.

example, perhaps some limited form of reasonable accommodation is necessary to eliminate a minor impediment that otherwise prevents a qualified individual from performing, such as having extra medicine or even oxygen at courtside. The courts will impose the accommodation on the institution if it can be done reasonably under the circumstances of each respective case. Sometimes the accommodation can be quite sophisticated, such as having a precautionary defibrillator at courtside, but the accommodation cannot be so elaborate as to change "the fundamental nature of the game" in question.[50] For example, there are many outstanding disabled basketball players in wheel chair leagues. However, to "accommodate" one of them by requiring the use of a wheelchair in a regulation, non-wheel chair Big-Ten conference game would not only change the fundamental nature of the game, it probably would pose an unreasonable hazard to the swift running, cutting and shooting athletes who could face serious injury negotiating the on-court wheel chair.

V. Risks of Harm

The Act does not bestow an entitlement for anyone to hold virtually any job or to play any sport at all costs. If the activity presents a harm to others, it will not—indeed could not—be tolerated.[51] One person's gain (the disabled athlete) would be another person's loss to injury—a net zero sum game which on its face is illogical. The potential examples are as endless as they are obvious: bus drivers with epilepsy, lifeguards with one arm, the above wheel chair basketball players in a regulation NCAA game, and the like. In one particularly interesting case the United States Supreme Court upheld a school's denial of admission to a deaf nurse trainee on the grounds that no matter how excellent her skills may have been, she still could not perform all the tasks at hand without her unfortunate lack of hearing sooner or later posing a danger to patients.[52]

The harder test, complete with more difficult, even gut wrenching choices, is the issue of harm to oneself. Do we not all have the freedom to determine our own fate in America even without the Act, which itself certainly enhances our liber-

50. *Grube*, 550 F. Supp. at 419.
51. *See* School Board of Nassau County v. Arline, 480 U.S. 273, 287, n.16 (1987).
52. *See* Southeastern Community College v. Davis, 442 US 397 (1979).

tarian rights to work and participate without discrimination? The answer is a qualified "yes," as the Act sets limits and prescribes the conditions under which it will protect a disabled athlete's liberty.[53] Disabled individuals are protected only if they can perform without incurring "the likelihood of substantial harm" to themselves.[54]

This test would likely be invoked, for example, to deny a hemophiliac's right to play tackle football. Under those circumstances, there is a certainty that the hemophiliac would experience the brunt of football as a contact sport, being knocked down, run over, undercut, tackled and otherwise run through a highly physical gauntlet. It is likely—not just a possibility—that such a player would receive bruises, lacerations and hematomas in virtually every game. It is also a near certainty that the harm experienced would be "substantial" in the form of uncontrolled internal and external bleeding, especially severe hematomas to joints, organs and the head—much of which would be life threatening every single game.[55]

If harm of a sort is likely, yet not substantial, as in a diabetic competing under controlled conditions, or someone with asthma participating in the mile run with benefit of oxygen on the sidelines, then the Act will protect the athlete's right to compete.[56] Some areas of concern are not so clear, however, such as when an individual with one kidney desires to play football. Is it possible he could injure, damage or lose the remaining kidney? Yes, it is possible, but probably unlikely. If it did happen would the harm be substantial? It seems it would, but still the occurrence itself may be found unlikely and, if so, that should end the issue.

In fact the Federal District Court for the Eastern District of Pennsylvania addressed the issue of a football player with one kidney in *Grube v. Bethlehem Area School District*.[57] Richard Wallace Grube and his parents invoked the Act seeking to en-

53. *See* 29 U.S.C. §794 (1985).

54. *See Wright*, 520 F. Supp. at 793.

55. Without prejudice to the text of numerous medical journals, the author was a 3-time past president of the Hemophilia Foundation of Illinois and has intimate personal knowledge of the hemophilia condition where the lack of blood clotting factors often escalates even the most benign bruising or bleeding into a major trauma threatening joints, internal organs or even life.

56. *See* 29 U.S.C. § 794 (1985).

57. 550 F. Supp. 418 (E.D. Pa. 1982).

join his high school district from precluding his participation on the football team.[58] Grube was a normal, healthy young man in all respects except he possessed only one kidney, the left one, ever since his right kidney had been removed when he was two years old.[59] He was also a well-rounded athlete with a history of great skill in football and other sports.[60] Grube had played competitive football since he was eight, and was a member in good standing of his former high school team at Freedom High in the ninth, tenth and eleventh grades.[61] He also participated in other such other sports as skiing, tennis, baseball and wrestling—even making and competing on the high school wrestling team.[62]

During the summer before his senior year, Grube attended team work-outs and participated in exercises and physical contact at his new high school.[63] He was rewarded with a first string starting position on the varsity football team.[64] A few days before the first scrimmage the Superintendent of Schools disqualified him from the team for medical reasons, citing Grube's one kidney, leading to Grube's injunction action.[65] The court found that the entire Grube family had executed releases accepting all pertinent legal and financial responsibility.[66] The court also found that Grube was disabled under the Act and was capable of playing in spite of his disability; that no unusual accommodation was required of the school; and that his participation would not pose a harm to other players.[67]

Because Grube had experienced a minor kidney injury the year before when a player rolled over onto him, which required no treatment although he was hospitalized one night for observation, his physician had referred him to Lehigh University to secure appropriate protective equipment in the form of a "flack jacket" which he wore thereafter.[68] The court was persuaded by testimony from an experienced expert physician whose pro-

58. *See id.* at 422.
59. *See id.* at 419.
60. *See id.*
61. *See Grube*, 550 F. Supp. at 419.
62. *See id.*
63. *See id.*
64. *See id.*
65. *See Grube*, F. Supp. at 419.
66. *See id.*
67. *See id.* at 425.
68. *See id.* at 420.

fessional opinion was that the risk of catastrophic injury to his remaining kidney was minute, in fact almost nil.[69] The court also found that Grube, who was about seventeen and one-half years of age, had a good understanding of the consequences of the risk, including an appreciation of kidney dialysis in the event he were to lose his remaining kidney.[70] Accordingly, the court did enjoin the school from interfering with Grube's right under the statute to play varsity football.[71] The possible harm was substantial, but the likelihood of it happening was deemed remote.[72]

Another prominent case involved both a kidney and a football player, but in a radically different context.[73] Mark Seay was a wide receiver for the Long Beach State when he was victimized by a gang shooting while visiting his sister in 1988.[74] He lost a kidney to one bullet, while another bullet remained lodged near his heart.[75] Long Beach State disqualified him from the football team for medical reasons, citing too much risk to his remaining kidney.[76] In August of 1989 Seay sued the University and the court denied Seay's request for injunctive relief on the supposed grounds that there "was no clear proof" that his existing kidney was functioning properly.[77]

The Seay case was set for jury trial in March of 1990 when the University relented and settled, obtaining a signed release and waiver from Seay with both parties agreeing Seay would wear a flak jacket.[78] He did. He also excelled and went on to a sparkling NFL career, no thanks to a court system that understandably, but improperly, had misjudged its own role as one *in loco parentis* at the expense of the Act.

Each case is unique, each instance of deciding a young person's fate gut wrenching. But judges should not decide the law as fathers or mothers, even though as parents they might im-

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69. *See Grube,* 520 F.Supp. at 421.
70. *See id.* at 422.
71. *See id.* at 425.
72. *See id.* at 423 and 425.
73. *See* Stefanie Krasnow, *A Hero Returns*, SPORTS ILLUSTRATED, May 7, 1990, at 14.
74. *See id.*
75. *See id.*
76. *See id.*
77. *See* Krasnow, *supra* note 73 at 14. This sounds like an excuse—the issue has no bearing upon the likelihood of further injury, it goes only to whether the injury would be substantial if it did occur.
78. *See id.*

pose a different standard. An incremental one percent risk of death may not be enough under the Act, but it might be more than enough for a concerned parent. This is logical not just for emotional reasons. Understandably the legal tests, burdens and levels of acceptable risks are simply different. The law requires "a likelihood of substantial harm,"[79] while many parents might have more stringent standards. The courts have a responsibility to plaintiffs, society, the law, and maybe even Congress, to distinguish both standards rationally and fairly.

VI. *THE SAGA OF NICHOLAS KNAPP V. NORTHWESTERN UNIVERSITY*

Most disabled athlete cases are emotionally charged. On the one hand is a youthful athlete, usually highly skilled with lofty ambitions fueled by years of intense work, dedication and success. Since disabled athletes have already overcome additional obstacles, their courage and commitment are heightened, the emotional stakes raised. Although the analogy is flawed, consider the personal tragedy and loss to all of society if a narrow minded court were to take the violin from Itzak Perlman, imposing its own belief that the intense travel demands upon a paraplegic soloist would be too demanding. Even though the facts of the analogy are unlikely, the potential emotional impact is right on point. To a star high school quarterback, a champion gymnast or sparkling figure skater, the stakes are just as high, the emotional investment and potential damage just as profound. Taking away their dreams may be the equivalent of ruining lives, so the decision should be made carefully, with emotional restraint and consistent with the law.

The task is more challenging when medical opinions differ or the severity of potential harm goes up. The temptation to confuse issues was never greater than in the case of Nicholas Knapp, whose condition pushed the Seventh Circuit to rewrite the discrimination test from an objective finding of risk to a subjective approach that creates a gaping "out-clause" for nearly all would-be discriminators.[80]

On November 7, 1995, Nicholas Knapp, an eighteen-year-

79. 29 U.S.C. §794 (1985).
80. *See Knapp,* 101 F.3d at 486.

old freshman student-athlete filed a shot heard 'round the basketball world when he file a complaint in federal district court against Northwestern University and its athletic director alleging violations of the Act.[81]

Nick Knapp was a six-foot-five-inch sharp-shooter for the Woodruff High School basketball team from Peoria, Illinois.[82] Prior to his senior year of high school, Nick was one of the best basketball players in the state of Illinois. He was recruited by many universities to play NCAA Division-I basketball, including Northwestern University in Evanston, Illinois, which offered him a four-year athletic scholarship that he orally accepted.[83]

Not long into his senior year of high school, Nick's heart abruptly stopped during a pick-up basketball game.[84] His father, a teacher at Woodruff High, happened upon the scene as paramedics were summoned. Nick was revived by means of cardiopulmonary resuscitation, electric shock defibrillation and emergency drug injections.[85] A few weeks later doctors implanted a precautionary internal defibrillator device into Nick's abdomen connected by internal wires to his heart.[86] This type of procedure, while new, was by no means experimental or radical, for many thousands of Americans now sport internal defibrillators for various reasons, including a number athletes around the country. None of his doctors could identify with certainty the cause of Nick's original heart stoppage and collapse, but neither could they find any credible evidence of a physical problem with the heart.[87]

Nick did not play varsity basketball that senior year, but he maintained superb classroom work, graduating as class valedictorian and scoring a stunning 32 on his college ACT test.[88] He enrolled at Northwestern University, which had already committed to honor his scholarship regardless of what may

81. *See Knapp,* 938 F. Supp. at 509.
82. *See Knapp,* 101 F.3d at 476.
83. *See id.*
84. *See id.*
85. *See id.*
86. *See Knapp,* 101 F.3d at 476.
87. The author, as one of Knapp's counsel of record, is paraphrasing events at trial, but none of the opinions rendered by the District Court or the Seventh Circuit contradicts the author's interpretation.
88. *See Knapp,* 101 F.3d at 476.

have transpired medically.[89]

On November 7, 1995, Northwestern's head team physician declared Nick medically ineligible to play on the men's basketball team.[90] The team physician did not examine Nick, but rather based his decision on Nick's medical records and upon the conclusions of a second team physician who performed "some type" of family-disputed exam on Nick, plus "published guidelines of two national medical conferences known as the Bethesda Conferences" (from 1984 and 1994).[91] The NCAA Constitution and Sports Medicine Handbook all grant the team physician the final word as to medical eligibility, a system that appears appropriate on its face but which fails miserably when applied to disabled athletes.[92]

The first problem stemmed from a number of fact issues regarding Nick's examination. Other than a routine physical given all the players, which Nick passed, Nick and his family strenuously deny that any of the doctors relied upon by Northwestern ever gave him an examination, thorough or otherwise.[93] The issue became highly charged when Nick and his family were referred by Northwestern to an outside specialist who also determined Nick should not play.[94] Emotions came to a near boil, however, for such physician reported he examined Nick, and Nick's family—some of which were present—vehemently contend he did not.[95] The issue is significant, because the other Northwestern physicians relied to some extent upon this outside report.[96] Knapp sued only one doctor throughout the ordeal, this outside specialist, and such litigation remains pending in the state trial court at this writing.[97]

Many disability controversies could be avoided by a modern, cogent NCAA policy which separates issues of disability

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89. *See id.*

90. *See id.* at 476-77.

91. *Id.* at 477. The parties dispute the facts. Knapp contends no exam occurred other than a routine team physical that did not address the heart condition. *See supra* note 87.

92. *See Knapp*, 101 F.3d at 477 n.1.

93. *See supra* note 87. Northwestern and its team of physicians testified they subscribed to appropriate procedures, notwithstanding the allegations of the Knapp family. *See id.*

94. *See id.*

95. *See id.*

96. *See id.*

97. *See supra* note 87. Although the author represented Knapp in conjunction with his claim under the Act, he does not represent him regarding this separate action.

from those of injury. The NCAA Sports Medicine Handbook gives the team doctor, who owes a great loyalty to the team and not the patient—an aberration to begin with—the absolute, unappealable final say on a player's medical status.[98] After studying reams of literature on the point, medical and legal, plus case law, and upon dozens of conversations with medical authorities retained as Nick's experts, it is apparent the NCAA guidelines (not rules, just guidelines) were intended to apply to injury situations. Since the Handbook addresses injury situations and makes no mention of pertinent disabilities, a rational reading of such Handbook guidelines leads to the logical conclusion the NCAA intended to keep coaches and school administrators from making medical decisions about whether an injured player was ready to play.[99] But neither a book of guidelines nor a team-retained physician has the training or authority to make a factual and legal determination about whether a student-athlete is (a) disabled under the law, (b) can perform in spite of the disability, (c) without harm to others or (d) the likelihood of substantial injury to oneself.[100]

Administrators and coaches could be biased in either direction, depending upon whether the issue of fielding a winning team is important or whether they have a bias toward caution and "playing it safe." But "playing it safe" is not what the Act is about; its purpose is to reserve the libertarian right to make one's own choice except in the most extreme circumstances defined under the law.[101] Team physicians have a separate bias: allegiance to the University powers that be which retain them; a responsible medical objective to err on the side of caution; and a fear of liability and public criticism, if not outrage if anything goes wrong—again, the Hank Gathers syndrome. In neither event is there are there procedures for a prior hearing or post-hearing review.

In Nick Knapp's case it was apparent at the injunction hearing and otherwise that the issue of his heart stoppage was inflammatory.[102] If his heart were to stop again, and if his defibrillator were to fail, then the result would almost cer-

98. *See Knapp*, 101 F.3d at 477, n.1.
99. *See id.*
100. *See* 29 U.S.C. §794 (1985).
101. *See id.*
102. *See Knapp*, 938 F.Supp at 511.

tainly be death. But the element of substantial harm should not be confused with the likelihood of the event. However, Nick had noteworthy cardiology experts from around the country in his corner, including the team cardiologist for another Big-Ten basketball program. All of them not only treated Nick but examined and tested him repeatedly, some testifying under oath that with the defibrillator in place the risk of substantial harm was anywhere from nil to perhaps around two or three percent.[103] Northwestern countered that such estimates were guesses at best, and that in any event the risks were too high according to University experts.[104]

After an evidentiary hearing in court with experts from both sides testifying under oath, the district court found for Nick Knapp, entering a temporary injunction against Northwestern. The University appealed to the Seventh Circuit[105] and so the emotional war over the future of Nick Knapp continued with the benefit of dozens of legal and medical arguments but without much credence to the one opinion that mattered most: Nick's.

VII. The Seventh Circuit Betrays the Act

As in *Pahulu*, the Seventh Circuit danced around the life activity issue by equating intercollegiate basketball with learning—and concluding that Nick Knapp could gain similar learning by participating with the team in another role.[106] Such not only exposes the Seventh Circuit's ignorance about intercollegiate athletics and athletes, it belies logic. Worst of all, it is an illegal interpretation of the Act. Such logic assumes life activities are interchangeable, rendering all disabled Americans at the mercy of employers, schools and other institutions who justify discrimination under the doctrine of "separate but equal," a long dead principal in every other area of discrimination—except, apparently, for those among us who are disabled. The Seventh Circuit seems to believe that if collegiate sports is a life activity of learning, then disabled ath-

103. *See Knapp,* 101 F.3d at 487.

104. *See id.* Note, however, the foregoing material is paraphrased from the author's personal recollection of the case.

105. *See Knapp,* 101 F.3d at 486. Such an appeal would logically be unnecessary if Northwestern were only concerned with liability or negative public opinion—after all, who could have criticized the university for following a court order?

106. *See id.* at 481-82.

letes who can otherwise perform could and should get their learning from reading. Perhaps those who can't walk can gain the same mobility via wheel chairs, so no doubt they are not disabled, either. The blind can still read Braille and hear and talk—so maybe they are out, too. The trouble is, we know where logic ends, but we cannot predict where precedent will end. Therein lies the danger in the Seventh Circuit's folly.

Parenthetically it is fortunate for millions of female athletes (who have benefited from federal antidiscrimination mandates since 1972) that the Seventh Circuit did not render the final word on Title IX legislation.[107] Would they still be "learning" from cheerleading and baking instead of playing before packed houses and national television audiences at Connecticut, Tennessee, Stanford, Illinois, UCLA, Purdue—and now even at the professional level?

Having not ravaged the Act enough, the Seventh Circuit also created a new standard for medically justified discrimination.[108] Instead of the medical standard for self-harm being a fact issue subject to an ultimate trial *de novo*, the Seventh Circuit concluded that if the discriminating employer can drum up enough support on its side, that is good enough to negate the discriminatory damage to a disabled plaintiff—athlete or not.[109] In arriving at such a result, the Seventh Circuit misreads [twists?] *Mantolete v. Bolger*[110] which imposed a duty upon an employer to "gather all relevant information regarding the applicant's work history and medical history, and independently assess both the probability and severity of potential injury."[111] This was clearly meant as an added burden of good faith on would-be discriminatory employers, not as a loophole escape hatch for discriminators who can feign good faith. The Act is not an intent statute. Discrimination lies with the result, not the intent, although a bad intent can certainly aggravate the condition.

The effect of the Seventh Circuit's "Rube Goldberg" intent test is to take the medical portion of the discrimination issue away from the courts. The Seventh Circuit would have us all

107. *See, e.g.*, Cohen v. Brown University, 991 F. 2d 888 (1st Cir. 1993).
108. *See Knapp*, 101 F.3d at 585.
109. *See id.*
110. 767 F.2d 1416 (9th Cir. 1985).
111. *Id.* at 1423.

believe the district courts have no jurisdiction to weigh the medical evidence in determining the standard of "no likelihood of substantial harm" mandated by the Act.[112] This flies in the face of *Chalk v. United States District Court*[113] which imposes upon a trial court the responsibility to conduct *de novo* assessments of the incumbent medical risks. The Seventh Circuit's contrary interpretation is diametrically opposed to a host of other appeals court decisions around the country.[114] It also abdicates a plethora of district court decisions.[115]

VIII. The Truth about Gathers and Knapp

A petition for writ of certiorari was filed with the United States Supreme Court in an effort to reconcile *Knapp* with the Act.[116] Such petition was denied, leaving a gaping hole in the rights of disabled athletes, indeed all disabled Americans who may now be subject to a new hybrid "separate but equal" test.[117] This is contrary to most relevant decisions among the circuits,[118] so just what *did* go wrong in the Knapp case, inspiring the Seventh Circuit to create new legal theory at the expense of the Act's integrity?

The late Hank Gathers posed the first problem.[119] As noted already his dramatic death on the basketball court created headlines that no one desires for various motives, including Northwestern University and its team doctors. But Gathers' situation was highly distinguishable from Knapp, and the Seventh Circuit should not have allowed emotions to rule.

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112. *See* 29 USC § 794 (1985).

113. 840 F.2d 701 (9th Cir. 1988).

114. *See, e.g.*, Wood v. Omaha School Dist., 25 F.3d 667 (8th Cir. 1994); Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991); Doe v. New York University, 666 F.2d 761 (2d Cir. 1981); Pushkin v. Regents of University of Colorado, 658 F.2d 1372 (10th Cir. 1981).

115. *See, e.g.*, EEOC v. Kinney Show Corp., 917 F. Supp. 419 (W.D. Va. 1996); Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988); Grube v. Bethlehem Area School District, 550 F. Supp. 418 (E.D. Pa. 1982); Wright v. Columbia University, 520 F. Supp. 789 (E.D. Pa. 1981); Poole v. South Plainfield Board of Education, 490 F. Supp. 948 (D.N.J. 1980).

116. *See* Knapp v. Northwestern University, 101 F.3d 473 (7th Cir. 1996), *petition for cert. filed,* 65 U.S.L.W. 3822 (U.S. June 16, 1997) (No. 96-1622).

117. *See* Knapp v. Northwestern University, 101 F.3d 473 (7th Cir.1996), *cert. denied,* 65 U.S.L.W. 3822 (U.S. June 16, 1997) (No. 96-1622).

118. *See supra* note 114.

119. *See* Altman, supra note 30, at B11. Gathers had died suddenly on the court during a Loyola-Marymount intercollegiate basketball game on March 4, 1990, generating headlines around the country. *See id.*

Just as Nick Knapp was a shining basketball star in the state of Illinois, Gathers had developed into a phenomenal basketball player at Loyola Marymount University in southern California, leading the nation in scoring and positioning himself as one of the best NBA prospects in recent memory.[120] On December 9, 1989, Gathers collapsed at the free throw line during a game in progress.[121] Although Gathers was unconscious as he was whisked off to Centinella Hospital, he did not die from the incident.[122] Eleven days later he was released from the hospital and medically cleared to play again, although trainers and doctors monitored him closely, eventually discovering a series of physical irregularities.[123] Gathers was placed on Propranolol in prescribed dosages to help regulate and control "ventricular ectopic activity" (heart rhythm).[124]

The drugs rendered Gathers sluggish and his play dropped off. Gathers and his coach complained to the doctors who in turn reduced his medication.[125] By March 2, 1990, the dosage had gradually been reduced from 240 milligrams per day to just forty, and Gathers' on-court performance perked up.[126] Just two days later on March 4, 1990, at 5:14 p.m., Hank Gathers again collapsed, this time dying during a televised basketball game against Portland before a live crowd of about 4,500 with millions more watching on television.[127] Northwestern University was understandably concerned about both the death and its own potential headlines. Their concern was not the problem—but overreacting, from Nick's view, was.

Gathers had a diagnosable heart condition;[128] Nick Knapp did not. Gathers was on medication for his condition.[129]

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120. *See generally* Altman, *supra* 30, at B11. Some of the facts of the Hank Gathers saga are from the Altman article, while others are based on the author's personal recollection of the tragedy.

121. *See id.*

122. *See id.*

123. *See* Altman, *supra* note 30, at B11.

124. *See id.*

125. *See id.*

126. *See generally* Altman, *supra* note 30, at B11.

127. *See* Altman, *supra* note 30, at B11. A wrongful death lawsuit filed by Gathers' family on April 16, 1990, against Loyola Marymount, coach Paul Westhead and a host of medical personnel was eventually settled for a reported $2.6 million in 1992. *See A Gathers Suit is Dismissed,* N.Y. Times, Sept. 10, 1962, at B16.

128. *See* Altman, *supra* note 30, at B11.

129. *See id.*

Knapp was not. Gathers was at risk because he weaned himself off necessary medication and had no precautionary internal defibrillator.[130] Knapp had no medication issues, and indeed came complete with a precautionary defibrillator. The risk of an on-court death to Gathers was mounting daily; such a risk to Knapp was nil. Nonetheless, the Seventh Circuit let down Knapp, the Act and potentially thousands of disabled Americans who may one day suffer a court diluted view of the law, if not of disabilities in general.

The next negative factor was the NCAA Sports Medicine Handbook and related guidelines.[131] It was never designed to address the specific issues of disabilities, and certainly there was no procedure in place to resolve conflicting medical opinions, none of which was rendered with the rights of disabled student-athletes under the Act.[132] Of course team physicians will have a bias toward caution, but they do not represent the athlete; rather, they are agents of the university and by definition are not objective and have little or no professional obligation toward the student athlete as a patient or as a human being in general. This is not a harsh criticism; it is simply a fact. So the NCAA should address the issue with new balanced guidelines and procedures for resolving disability issues. Its current rules logically apply only to injury situations, giving the team doctor final authority over the administration and coaches in evaluating injuries and clearing athletes to play—the apparent intent of which was to remove the bias of coaches intent on winning. But where disabilities are concerned, the NCAA does not eliminate the bias, it just moves the bias around.

These vague, if not inappropriate procedures went a long way toward heightening animosity between the University and its student Nick Knapp, whose own doctors and experts were shunned and dismissed.[133] Rather than embracing them to achieve a rational solution, the University fought them, fought Nick, fought the Act. It is certainly not healthy for universities in general to wage war against their students, so NCAA proce-

130. *See id.*

131. *See* National Collegiate Athletic Association, NCAA SPORTS MEDICINE HANDBOOK.

132. *See id.*

133. *See supra* note 87.

dures should be reviewed, modified and brought into the modern medical-legal era under the Act.

The district court judge in *Knapp* carefully weighed all testimony and concluded the incremental risk of substantial harm to Nick Knapp was far from likely, in fact it was very small.[134] Hardly any doctor could definitively say that playing basketball would increase Nick's risk—and if something did happen there was an overwhelming likelihood that his defibrillator would solve the problem automatically. Undaunted, the Seventh Circuit said Nick could "learn" other ways and sent him on his own way.[135]

IX. CONCLUSION

One old adage of the legal profession is that "bad facts make bad law." With an emotionally frenzied backdrop behind *Knapp v. Northwestern*, the Seventh Circuit fell for every red herring trap, swallowing the "we-know-best-for-you" bait hook, line and sinker. It created bad law by inventing two new standards: (a) applying the separate but equal excuse for employers and schools to discriminate against disabled Americans; and (b) taking medical fact finding away from the courts for a hearing *de novo*, accepting instead a "good faith reliance" test for discriminating defendants.[136] Such is illogical and dangerous, if not improper.

Therefore, team doctors should be removed as final arbiters of the disability issue. Their opinion should count, but they should not be the judge and jury to review and reconcile their own opinions under federal law. At least where college athletes are concerned, the NCAA should adopt fair and balanced rules to address disabilities in general, and conflicting medical opinions in particular. And all doctors, administrators and courts should avoid traps which confuse the *amount* of possible harm *given* a tragic event versus the *likelihood* of that event occurring. In Nick's case the ultimate harm would have been death, a consequence which prevented the Seventh Circuit from considering evidence that such a possibility was remote.

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134. *See Knapp*, 938 F.Supp. at 511-12.

135. *See Knapp*, 101 F.3d at 481. The Seventh Circuit, however, failed to mention what activities would provide the same "learning" opportunities as basketball.

136. *See id.* at 484.

Since the legal standard is "likelihood," the Seventh Circuit was wrong.

Congress or the Supreme Court should intervene to clarify the issue to avoid rogue decisions such as *Pahulu*, *Knapp* or the next aberration under the Act, whatever it may be. Although these issues are crucial to disabled student-athletes from coast to coast, they are not confined to sports. The *Knapp* and *Pahulu* decisions pose a threat to all disabled Americans who desire and deserve a discrimination free environment under the Rehabilitation Act of 1973.

Above all, no one should fall prey to the self serving "for-your-own-good" argument. This argument has provided the greatest excuse for discrimination since the beginning of recorded modern history, it has been used to keep blacks on the back of the bus, transport Jews into protective ghettos, and keep disabled Americans home and out of the productive workplace. No one, especially in a free society that professes liberty in general and abhors discrimination, should arbitrarily be denied equal protection under any law, including the letter, spirit and intent of the Rehabilitation Act to deny the essence of human liberty.

X. Post-Script

Nick Knapp left Northwestern to play basketball for Northeastern University—and play he did. As fate would have it, his defibrillator implant device later engaged itself causing a new round of tests which, apparently, were negative. Nick is alive and visibly well, but his future remains uncertain. If hindsight were the law, would this vindicate the Seventh Circuit? Clearly it should not. Bad law is still bad law. Indeed, Nick's proponents believe *their* argument is vindicated. The whole purpose of the defibrillator was caution—and so science and caution have in fact prevailed.