

CLUB REFUSES TO MODIFY LEAGUE RULES FOR DISABLED COMPETITOR

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In the case of *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 149 L. Ed. 2d 904, 121 S. Ct. 1879 (2001), the Supreme Court of the United States determined that the use of a golf cart by a disabled professional golfer was a reasonable and necessary accommodation required by the Americans with Disabilities Act (ADA). In so doing, the Court found that the use of a golf cart by the disabled golfer, when all other contestants had to walk, would not “fundamentally alter” the nature of the professional tournament. In the opinion of the Court, the use of carts was not in and of itself inconsistent with the fundamental character of the game of golf, the essence of which has always been “shot-making.” As a result, the Court found the rule requiring all contestants to walk at some professional golf tournaments was “at best peripheral to the nature of PGA’s athletic events, and thus it might be waived in individual cases without working a fundamental alteration.” (See: “Peripheral Rule Waiver is not ‘Fundamental Alteration’ under ADA” James C. Kozlowski. *Parks & Recreation* . Sep 2001. Vol. 36, Issue 9)

In the case of *Kuketz v. Petronelli*, 443 Mass. 355; 821 N.E.2d 473; 2005 Mass. LEXIS 13, the Massachusetts supreme court applied the reasoning of *PGA v. Martin* to determine whether the requested waiver of a racquetball rule for a disabled participant would fundamentally alter the nature of a competition. In this particular case, a fitness club refused to permit a wheelchair racquetball player to compete in a highly competitive club league wherein the wheelchair player would be permitted to receive two bounces while his able-bodied “footed” opponents received only one bounce. Plaintiff Kuketz claimed the club’s refusal to accommodate his request constituted an act of discrimination on the basis of physical disability in violation of the Americans with Disabilities Act.

FACTS OF THE CASE

Stephen B. Kuketz, a paraplegic since 1991, was by 1995 a nationally ranked wheelchair racquetball player. In the fall of 1994, Kuketz joined the Brockton Athletic Club (club), a fitness club then owned and operated by MDC Fitness Corporation (MDC). The club sponsored a racquetball league in which men and women competed in divisions organized by gender and ability. The men's "A" league was the most competitive division.

In January 1995, Kuketz paid a nominal league fee and requested placement on the men's "A" league roster. Kuketz wanted to join the men's "A" league so that he could play racquetball against the best footed players available. In so doing, Kuketz hoped to prepare himself for competing in upcoming international wheelchair events.

Because of his disability, Kuketz is not competitive at any level of racquetball unless permitted to return the ball after its second bounce. He presumed that he would be

granted this accommodation in the club's "A" league, while his footed opponents would be required to return the ball after no more than one bounce.

The official rules of racquetball, which govern league play, provide that the "objective" of the game is "to win each rally" and that a player loses a rally when he is "unable to hit the ball before it touches the floor twice."

The rules further provide for a modification to the "standard rules" for wheelchair competition, and establish five different levels or "divisions" for such competition. Wheelchair players competing within these divisions must return the ball before the third bounce (i.e., "the ball may hit the floor twice before being returned"). Only in the "Multi-Bounce Division" may the ball "bounce as many times as the receiver wants though the player may swing only once to return the ball to the front wall."

The rules have no provision governing competitive play between a wheelchair player and a footed player. In this particular case, there was some dispute among the parties "whether in league play it is customary to afford wheelchair players a second bounce when playing against footed players who are afforded a single bounce."

Kuketz testified that he had played in the men's "A" league at the Raynham Athletic Club, where he was afforded two bounces against footed players, and that this practice was customary. When asked how he knew about the custom, he answered, "from other players' experiences." In a sworn statement, Geno Bonetti, cofounder of the National Wheelchair Racquetball Association, agreed with Kuketz. According to Bonetti, the practice of allowing a wheelchair player two bounces and an able-bodied player one bounce when competing against each other "was the custom known for the entire time [he] was actively involved in wheelchair racquetball, and from what [he could] gather, has been the custom since in non-tournament, club and/or recreational play."

In contrast, Otto Dietrich, the president of USRA and the national rules commissioner in 1995, disagreed with Kuketz. In his sworn statement, Deitrich stated that he was "not aware of any standardized custom or practice which governs play between a wheelchaired player and a footed player, during league play at clubs or in tournament play." Dietrich further stated that he had "never been involved in, refereed or witnessed a league or tournament in which a footed player played [against] a wheelchaired player."

In February, 1995, after consulting with other players in the league, the general manager of the club, Roslyn Petronelli, informed Kuketz that he would not be allowed to play in the men's "A" league. Petronelli cited safety reasons for not allowing Kuketz to play in the men's "A" league. She further testified that these safety concerns were based on discussion with the other players in the men's "A" league and her own expertise in the game (i.e., women's national racquetball champion in 1991).

Petronelli reasoned that the presence of a wheelchair on the court during a fast-paced game with "A" league footed players would be dangerous. Moreover, Petronelli opined

that the risk would be compounded by a lack of familiarity footed players would have with the differing nature of a game in which one player was permitted two bounces.

Petronelli, however, offered Kuketz two alternatives to playing in the "A" league: he could play in a lower-level league under the one-bounce rule or he could play in a wheelchair league that she would assist him in organizing. Kuketz declined both offers.

Kuketz subsequently filed a complaint with the Massachusetts Commission Against Discrimination (commission). Evidence clearly indicated that Kuketz was permitted to play at the club, including playing against footed players outside of league play. Kuketz, therefore, limited his alleged violation of the ADA on the club's refusal to allow him to participate in the men's "A" league.

In pertinent part, the Americans with Disabilities Act (ADA) provides that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." Title 42 U.S.C. § 12182(a)

In response, the club raised the above described safety reasons. In addition, the club argued that the ADA would not require it to waive the rules of the game to accommodate Kuketz. The trial court agreed. In the opinion of the trial judge, the ADA would not require the club to permit Kuketz two bounces in league-sponsored racquetball games against footed players because such a modification would "fundamentally alter the nature of the racquetball competition" As a result, the trial judge granted summary judgment for the club.

Kuketz appealed and his case was subsequently transferred to the state supreme court. On appeal, Kuketz contended that the trial judge erred "in finding that his requested modification constituted a fundamental alteration of the game of racquetball."

ON APPEAL

As noted by the state supreme court, "[t]he ADA was enacted in 1990 for the express purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

In particular, the court noted that Title III of the ADA confers rights to disabled patrons of places of public accommodation, "thus enabling individuals with disabilities to participate more fully in the mainstream of society with improved access to hotels, convention centers, entertainment and sporting events, and commercial establishments." (While Title III of the ADA prohibits discrimination on the basis of disability by public accommodations, Title II of the ADA similarly prohibits discrimination on the basis of disability by public entities, i.e., government.)

As cited by the state supreme court, the ADA defines discrimination to include the following:

[A] failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.
42 U.S.C. § 12182(b)(2)(A)(ii).

In addition, the ADA and implementing federal regulations define “disability” as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” 42 U.S.C. § 12102(2); 28 C.F.R. § 36.104 (2004).

In this particular instance, there was no dispute that Kuketz was “an individual with a disability” under the ADA.” Further, all parties agreed that the club was “a place of public accommodation” under Title III of the ADA which is defined to include “a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.” 42 U.S.C. § 12181(7)(L); 28 C.F.R. § 36.104.

The specific issue before the state supreme court was, therefore, whether a place of public accommodation (i.e., the club) unlawfully discriminated against an individual with a disability (Kuketz) when it refused to modify its policies and practices to allow a disabled participant to play in the men's "A" league under a two-bounce rule.

FUNDAMENTAL ALTERATION

As noted by the state supreme court, the United States Supreme Court has identified the following “three inquiries” in determining whether a particular refusal to modify policies and practices violates Title III of the ADA: (1) whether the requested modification is “reasonable”; (2) whether the requested modification is “necessary” for the disabled individual; and (3) whether the requested modification would “fundamentally alter” the nature of the competition. According to the state supreme court, there was “no necessary priority” among these three inquiries” and “[w]hether one question should be decided before the others likely will vary from case to case.”

In determining whether the requested modification was “necessary,” Kuketz stated that “it would be impossible [for a wheelchair player] to play the game with one bounce. The club conceded that an individual in a wheelchair, like Kuketz, could not play in the “A” league without being “given two bounces.”

On the issue of reasonableness, however, the state supreme court found significant dispute among the parties regarding the requested modifications, particularly “in light of the safety concerns raised by the defendants.” Similarly, the court found “disagreement on whether the modifications would fundamentally alter the nature of the game.”

As noted by the state supreme court, under Title III of the ADA, the plaintiff “bears the burden of proving that a requested modification is reasonable.” Once this burden is met, the ADA would then require the defendant to “make the modification unless it proves either that doing so would alter the fundamental nature of its business, or that the requested modification poses a direct threat to the health or safety of others.” 42 U.S.C. § 12182(b)(2)(A)(ii), (b)(3).

Applying these principles to the facts of the case, the state supreme court held “the allowance for more than one bounce in racquetball is inconsistent with the fundamental character of the game.”

The essence of the game of racquetball, as expressly articulated in the rules, is the hitting of a moving ball with a racquet before the second bounce. Giving a wheelchair player two bounces and a footed player one bounce in head-to-head competition is a variation of the official rules that would “alter such an essential aspect of the game”...

Kuketz acknowledged at his deposition that returning the ball after two bounces slows the pace of what is ordinarily a very fast game... [T]he speed at which the game is played is important and is one of the factors distinguishing players in different levels. There was other testimony that playing the game with two bounces also changes the strategy, positioning, and movement of the players during the game.

Further, the state supreme court found the requested “two bounce” modification “would be unacceptable even if it affected all competitors equally.”

The modifications sought by Kuketz create a new game, with new strategies and new rules. The club is certainly free to establish or enter into a league that plays this variation of racquetball, but it is not required by the ADA to do so.

We agree with the [trial] judge that implicit in the modified rules for wheelchair racquetball that permit two bounces, is that both players are in wheelchairs. The judge also found that even if Kuketz's requested modifications were construed as having “only a peripheral impact on the game,” the accommodation “might nevertheless give a disabled player ‘an advantage over others.’”

Having found the requested accommodation would fundamentally alter the nature of the competition, the state supreme court did not need to consider the “direct threat” alternative, i.e., “whether competitive play at this level between a footed and wheelchair player poses a significant risk of injury.”

On appeal, Kuketz had also argued that the club’s refusal to accommodate his needs was unjustified because “the defendants previously have accommodated the needs of less skilled players through the practice of ‘spotting’ points.” Specifically, Kuketz cited

Petronelli's testimony which described a practice in which "players are given a certain number of points at the start of a match." According to Petronelli, this practice was "typically employed when women players had to compete in the men's lower division leagues because of the scarcity of women players."

In the opinion of the state supreme court, in contrast to the requested "two bounce" modification, this practice was similar to a handicap in golf and "does not change an essential aspect of how the game is played."

Fitness and athletic clubs open to the public may choose to "level the playing field" in any number of ways, and such practices are not to be discouraged, but the law does not require modifications that change the fundamental rules of the sport.

Accordingly, having found that the requested "two bounce" modification would change the fundamental rules of the sport, the state supreme court affirmed the order of the trial court granting summary judgment in favor of the club and all other defendants.