

# Enhanced Risk of Harm to One's Self as a Justification for Exclusion from Athletics

Matthew J. Mitten  
*Marquette University Law School*

Follow this and additional works at: <http://scholarship.law.marquette.edu/sportslaw>

 Part of the [Entertainment and Sports Law Commons](#)

---

### Repository Citation

Matthew J. Mitten, *Enhanced Risk of Harm to One's Self as a Justification for Exclusion from Athletics*, 8 Marq. Sports L. J. 189 (1998)  
Available at: <http://scholarship.law.marquette.edu/sportslaw/vol8/iss2/4>

This Symposium is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

# ENHANCED RISK OF HARM TO ONE'S SELF AS A JUSTIFICATION FOR EXCLUSION FROM ATHLETICS

BY MATTHEW J. MITTEN\*

This article discusses an athlete's legal right to participate in sponsored athletic competition<sup>1</sup> with a physical abnormality that exposes him or her to an enhanced risk of injury or death. For purposes of this discussion, I assume that the athlete has the necessary physical skills and abilities to successfully play the sport with a physical impairment (*e.g.*, a cardiovascular or spinal abnormality or a missing or non-functioning paired organ such as an eye or kidney) and that his or her participation does not create an increased risk of physical injury to others. However, the athlete may be exposed to a substantially enhanced risk of personal injury by participating in a sport. A lack of available scientific data and reliable clinical studies may cause sports medicine experts to disagree regarding whether this increased risk of harm, created by the athlete's physical abnormality, justifies medical disqualification from athletic competition.

Considering the uncertainties present in sports medicine and the impossibility of accurately predicting whether a physically impaired athlete will actually experience serious injury or death during sports participation as a result of his or her medical condition what is the appropriate judicial construction of federal laws prohibiting medically unjustified discrimination? Resolution of this issue requires proper delineation of the respective bounds of an impaired athlete's liberty interest in having an opportunity to participate in sports and a team's right (or that of a sports league or sponsoring organization) to establish reasonable minimum physical standards that must be satisfied by all participants. How

---

\* Professor of Law, South Texas College of Law of Texas A&M University, Houston, TX. B.A., 1981, The Ohio State University; J.D., 1984, University of Toledo College of Law. The author filed an amicus brief on behalf of the American Medical Society For Sports Medicine and the American Osteopathic Academy of Sports Medicine in support of Northwestern University in *Knapp v. Northwestern Univ.*, 101 F.3d 473 (7th Cir. 1996). I gratefully acknowledge the insightful comments of Professors Bruce W. Burton and Gerald T. Wetherington, research assistance of Twila L. Baker, and secretarial assistance of Helen Flores in connection with this article.

1. The term "sponsored athletic competition" refers to organized team athletic events from youth to professional league levels of competition as well as individual sports organized and sponsored by various entities.

we resolve this question implicates broader social values such as the limits of libertarianism and acceptable communitarian protection of others' health and safety, because sports is a microcosm of society in many respects.<sup>2</sup>

I begin by considering the legal nature of an amateur athlete's protected interest in participating in organized athletic competition and the legal rights and duties arising out of sponsorship of amateur sports by a team or other organization. Next I review and analyze the historical development of case law concerning the federal rights of physically impaired amateur athletes to participate in their chosen sports under the Rehabilitation Act of 1973<sup>3</sup> and propose a legal framework for resolving participation disputes involving amateur athletes. I then discuss the implications of this analysis for future claims under the Americans With Disabilities Act of 1990<sup>4</sup> (hereinafter "ADA") by impaired professional athletes who have been medically disqualified to play a sport because of a physical impairment.

## I. PARTIES' RESPECTIVE LEGAL RIGHTS AND PROTECTED INTERESTS

### A. *Athletes*

Organized amateur athletic competition begins with youth sports during elementary school years such as Little League baseball and gymnastics, includes interscholastic competition during high school, extends to intercollegiate sports during college, and encompasses Olympic sports during the teens through mid-life. Youth and high school sports are extracurricular activities engaged in by athletes who generally are minors. Participants typically play these sports mainly for the social, educational, and physical benefits of athletic competition, but some particularly talented high school athletes seek a college athletic scholarship. Most participants in intercollegiate athletics are adults, and although they are primarily considered to be students, playing a sport at the college varsity level often is more than merely an extracurricular activity for the participating athletes. In some instances, a college athlete plays a sport to develop the skills necessary for future participation at the professional or Olympic levels of competition. Olympic athletes usually are adults

---

2. See generally D. STANLEY EITZEN & GEORGE H. SAGE, *SOCIOLOGY OF NORTH AMERICAN SPORT* 43-55 (6th ed. 1997) (examining the reciprocal relationship between sports and societal values); DREW A. HYLAND, *PHILOSOPHY OF SPORT* 1-32 (1990) (recognizing that values in sports are, in part, a reflection of society's values).

3. 29 U.S.C.A. §§ 701-796 (1985).

4. 42 U.S.C.A. §§ 12101-12213 (1995).

(although some, such as most female gymnasts, are minors) with unique talents providing them with the opportunity to participate in international competition against other elite athletes.

Participation in amateur sports at any level of athletic competition generally is considered to be a privilege rather than a legally protected right. Although some courts hold that a high school student cannot be arbitrarily denied an opportunity to participate in interscholastic sports competition,<sup>5</sup> that sports are an integral part of one's scholastic and social development,<sup>6</sup> or that athletic competition is vital to obtaining a college education by means of an athletic scholarship,<sup>7</sup> courts generally refuse to recognize a constitutional right to play interscholastic sports.<sup>8</sup> Similarly, there is no constitutionally protected liberty or property interest in playing intercollegiate athletics.<sup>9</sup> Although a college athletic scholarship is a contract between the student-athlete and his or her university,<sup>10</sup> it does not guarantee either a position on the team or playing time.<sup>11</sup> The national governing body for each Olympic sport has a contractual relationship with its member athletes,<sup>12</sup> and the Amateur Sports Act of 1978 gives the organization the exclusive right to determine the membership of its national team for purposes of international competition, so there is no legal right to participate in Olympic sports.<sup>13</sup> Thus, the relationship between an amateur athlete and the sponsoring educational institution or athletics organization is legally considered to be consensual in nature.

### *B. Teams and Athletics-Event-Sponsoring Entities*

An athlete may be medically disqualified by the team physician, or event sponsor's medical personnel, if a physical abnormality exposes him or her to a medically unreasonable risk of injury. A sponsoring educational institution or athletic organization may be reluctant to permit a

---

5. *Indiana High Sch. Athletic Ass'n, Inc. v. Avant*, 650 N.E.2d 1164 (Ind. Ct. App. 1995).

6. *Florida High Sch. Activities Ass'n, Inc. v. Bryant*, 313 So.2d 57 (Fla. Dist. Ct. App. 1975).

7. *Boyd v. Board of Dirs. of McGahee Sch. Dist.*, 612 F. Supp. 86 (E.D. Ark. 1985).

8. *Albach v. Odle*, 531 F.2d 983 (10th Cir. 1976); *Tiffany v. Arizona Interscholastic Ass'n, Inc.*, 726 P.2d 231 (Ariz. Ct. App. 1986).

9. *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1352-53 (9th Cir. 1981); *Hawkins v. Nat'l Collegiate Athletic Ass'n*, 652 F. Supp. 602, 610-11 (C.D. Ill. 1987).

10. *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379-381 (N.C. Ct. App. 1972).

11. *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940 (D. Kan. 1987).

12. *Harding v. United States Figure Skating Ass'n*, 851 F. Supp. 1476 (D. Or. 1994).

13. 36 U.S.C.A. 393 (5), (7) (1997); *DeFrantz v. United States Olympic Comm.*, 492 F. Supp. 1181 (D.C. 1980) (athlete has no constitutional right to participate in Olympics).

talented, but physically impaired athlete, to participate in a competitive sport without medical clearance. The organization may also be concerned about potential legal liability from allowing an impaired athlete to participate. Apart from legal liability, the team or event sponsor also may have a paternalistic desire to protect a physically impaired athlete's health and safety by refusing to allow potential exposure to a risk of serious harm during athletic competition. In addition, there may be concern about potential psychological harm to others participating in the game or event or the detrimental effects of adverse publicity on the team or event sponsor's reputation if a physically impaired athlete suffers serious injury or death.

Courts have held that both public educational institutions<sup>14</sup> and private athletic governing bodies<sup>15</sup> have a legitimate interest in protecting an athlete from injury during athletic competition. Although these cases involved federal or state constitutional challenges to mandatory drug testing (rather than Rehabilitation Act or ADA claims), they recognize that a team or athletic event sponsor has at least some inherent right to protect an athlete's health and safety.<sup>16</sup> Moreover, outside the context of athletics, there are several judicially recognized social justifications for preventing people from engaging in potentially dangerous activities and harming themselves. For example, minimizing the public cost of injury treatment and disability;<sup>17</sup> avoiding the loss of productive members of society;<sup>18</sup> and preventing the loss of economic support and/or consortium to the injury victim's family<sup>19</sup> are valid objectives.

Even if a team or sponsor of an athletic event has a general *legal right* to protect the health and safety of participating athletes, the extent of its

---

14. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 662 (1995) (public high school has "important" interest in screening for drugs that "pose substantial physical risks" to athlete himself or herself). *Accord* *Picou v. Gillum*, 874 F.2d 1519, 1521 (11th Cir. 1989) (upholding state law requiring motorcyclists to wear protective headgear and rejecting plaintiff's claim that federal Constitution "forbids enforcement of any statute aimed only at protecting a State's citizens from the consequences of their own foolish behavior and not at protecting others.")

15. *Hill v. NCAA*, 865 P.2d 633, 637 (Cal. 1994) (finding that private governing body for intercollegiate athletics has valid interest in protecting health and safety of drug-ingesting athletes).

16. Some courts, however, have questioned whether "governmental concern for the health and safety of anyone who knowingly and voluntarily exposes himself or herself to possible injury can ever be an acceptable area of intrusion on individual liberty. . ." *Hoover v. Meiklejohn*, 430 F. Supp. 164, 169 (D. Colo. 1977).

17. *Picou*, 874 F.2d at 1522; *Simon v. Sargent*, 346 F. Supp. 277, 279 (D. Mass. 1972); *State v. Laitinen*, 459 P.2d 789, 791-92 (Wash. 1969).

18. *Robotham v. State*, 488 N.W.2d 533, 541 (Neb. 1992).

19. *In re Winthrop Univ. Hosp.*, 490 N.Y. S.2d 996 (1985).

*legal duty* to protect an athlete from a voluntarily assumed enhanced risk of injury is uncertain. In *Orr v. Brigham Young University*,<sup>20</sup> a federal district court refused to impose a legal duty on a university to prevent an adult athlete from continuing to play intercollegiate football to avoid aggravating a pre-existing injury. The court rejected the player's contention that, by allowing him to participate, the university "assumed the responsibility for his safety and deprived him of the normal opportunity for self protection."<sup>21</sup> Another court has suggested that a high school's legal duty to protect a physically impaired athlete from voluntarily assumed risks is limited to ensuring that the athlete (and parents if he or she is a minor) is fully informed of an enhanced risk or severity of threatened injury, in order to enable him or her to make a rational participation decision.<sup>22</sup>

Although the doctrines of express assumption of risk<sup>23</sup> or sovereign immunity<sup>24</sup> may immunize a team or event sponsor from tort liability for allowing a physically impaired athlete to participate, uncertainty concerning legal liability is a legitimate interest to a team or sponsor of an athletic event.

Although a sponsor of an amateur athletic event has both a legitimate interest in protecting an impaired athlete's health and safety, and a justifiable fear of legal liability if it does not do so, its interest in safeguarding other participants from psychological injury and protecting its own reputation seem less compelling. Considered alone, possible harm to team morale is not entitled to as significant weight when balanced against the exercise of an athlete's federally protected civil liberties.<sup>25</sup> And, it may be difficult to establish that serious injury to, or even the death of, a physically impaired athlete who voluntarily chooses to participate in a sport, with full knowledge of an enhanced potential risk of

---

20. 960 F. Supp. 1522 (D. Utah 1994).

21. *Id.* at 1526. See generally Barbara J. Lorence, *The University's Role Toward Student-Athletes: A Moral or Legal Obligation?*, 29 DUQ. L. REV. 343, 355 (1991) (arguing against "imposing a custodial duty on colleges and universities to protect 'adult' students, even those with known health risks, who decide to participate in school-sponsored athletic events . . .").

22. *Poole v. South Plainfield Bd. of Educ.*, 490 F. Supp. 948, 953-54 (D. N.J. 1980).

23. See generally Matthew J. Mitten, *Liability of Sports Medicine Providers and Related Entities*, 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS, Chap. 14A, §§ 14A.04[3] and 14A.05 [5] (G.A. Uberstine Ed. 1997).

24. *Id.* at §§ 14A.04[4] and 14A.05[6].

25. *Hysaw*, 690 F. Supp. at 946.

harm, will significantly injure the reputation of the team or event sponsor.<sup>26</sup>

## II. REHABILITATION ACT CASES DEFINING AMATEUR ATHLETES' PARTICIPATION RIGHTS

To prevail on a claim that exclusion from a sport or athletic event violates the Rehabilitation Act, an athlete must prove: 1) he or she is "disabled"; 2) he or she is "otherwise qualified" for the position or opportunity sought; 3) he or she has been excluded from the position solely because of his or her disability; and 4) the position or opportunity exists as part of a program or activity receiving federal financial assistance.<sup>27</sup> It is not necessary that an entity's athletic program directly benefits from federal funds. A public or private elementary or secondary educational institution, as well as any other sponsor of an athletic event, is covered by the Rehabilitation Act if any aspect of it receives any form of federal funding.<sup>28</sup>

A physically impaired athlete also could assert that his or her exclusion from a sport violates the ADA, although cases challenging such exclusion, because of increased risk of injury to one's self, thus far have only been brought under the Rehabilitation Act. Such a claim requires proof of essentially the same elements as a Rehabilitation Act claim<sup>29</sup> except that, instead of showing that the defendant receives federal funds, the athlete must prove that the defendant is covered by the ADA's "public entity"<sup>30</sup> or "public accommodation"<sup>31</sup> provisions. A sponsor of an amateur athletic event that is not covered by the Rehabilitation Act because it does not receive federal funds may nevertheless be covered under the ADA's public entity or public accommodation sections.<sup>32</sup> Un-

---

26. *Pahulu v. Univ. of Kansas*, 897 F. Supp. 1387, 1389 (D. Kan. 1995) (university athletics director acknowledged that university will suffer no foreseeable harm to its reputation if physically impaired player is allowed to continue playing football); *Wright v. Columbia Univ.*, 520 F. Supp. 789, 794 (E.D. Pa. 1981) ("Columbia [University] has never asserted that it would be harmed by plaintiff's intercollegiate football career. . .").

27. *Knapp v. Northwestern Univ.*, 101 F.3d 473, 478 (7th Cir. 1996).

28. Matthew J. Mitten, *Amateur Athletes With Handicaps or Physical Abnormalities: Who Makes the Participation Decision?*, 71 NEB. L. REV. 987, 1008-09 (1992). Public educational institutions are not immune from suit under the Rehabilitation Act or the ADA. See *Mayer v. Univ. of Minnesota*, 940 F. Supp. 1474 (D. Minn. 1996).

29. See generally, Adam A. Milani, *Can I Play?: The Dilemma of the Disabled Athlete in Interscholastic Sports*, 49 ALA. L. REV. (forthcoming 1998).

30. 42 U.S.C.A. §§ 12131 & 12132 (1995).

31. 42 U.S.C.A. § 12181(7)(L) (1995).

32. *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342, 344 (D. Ariz. 1992) ("public accommodation" includes Little League Baseball and its games").

less otherwise noted, I will consider both laws together in addressing a physically impaired amateur athlete's legal right to participate in sports.<sup>33</sup>

A person with a physical impairment which substantially limits one or more of his or her major life activities, or has a record of such impairment, or is regarded as having such an impairment, is considered to be "disabled" and covered by the Act.<sup>34</sup> The first Rehabilitation Act suits were brought by high school or college athletes with either a missing or non-functioning eye or kidney who had been excluded from participating in a contact sport. Courts either assumed that these athletes satisfied the Act's definition of an individual with a "disability," or found this requirement satisfied without engaging in extensive analysis.<sup>35</sup>

In resolving these initial cases, courts focused on the requirement that an athlete be "otherwise qualified" to participate in a sport despite a physical abnormality. In a 1977 case, *Kampmeier v. Nyquist*,<sup>36</sup> the Second Circuit ruled that a high school's refusal to permit one-eyed athletes to play contact sports complied with the Act despite conflicting physician participation recommendations. Although the plaintiffs had the requisite ability and skill to play basketball, and their medical condition did not expose others to an enhanced risk of injury, they were not allowed to participate because of an enhanced risk of injury to themselves.

Neither the Act nor its implementing regulations regarding interscholastic or intercollegiate sports directly address whether an enhanced risk or severity of injury to an athlete is a legally valid justification for exclusion from school-sponsored athletics.<sup>37</sup> Without citing any judicial precedent, the *Kampmeier* court held that a "substantial justification" is required to exclude an impaired athlete from participation in a sport.<sup>38</sup>

The court found that the team physician's medical recommendation, against participation, which was consistent with then current American Medical Association guidelines, because plaintiffs would be subjected to a perceived "high risk" of injury during athletic competition, provided a "substantial justification" for the school's decision.<sup>39</sup> Other examining

---

33. The ADA is patterned after the Rehabilitation Act, and courts generally rely on cases construing similar provisions of the Rehabilitation Act in interpreting the ADA. *See generally* Milani, *supra* note 29.

34. 29 U.S.C.A. § 706(8)(B) (1985).

35. *See, e.g., Wright*, 520 F. Supp. at 791 (parties do not dispute that football player with sight in only one eye is handicapped individual covered by the Act).

36. 553 F.2d 296 (2d Cir. 1977).

37. 34 C.F.R. § 104.37(c) and 104.47(a) (1997); 45 C.F.R. § 84.37(c) and 84.47(a) (1997).

38. 553 F.2d at 299.

39. *Id.*



physicians medically cleared the plaintiffs to play interscholastic basketball, based on their belief that special goggles would adequately protect the plaintiffs' eyes from injury during competition. Observing that the team physician had nevertheless concluded that participation in contact sports with protective gear would still present an unreasonable risk of eye injury, the court found "little evidence – medical, statistical, or otherwise – which would cast doubt on the substantiality of this rationale."<sup>40</sup>

Finding that public high schools have "a *parens patriae* interest in protecting the well-being of their students,"<sup>41</sup> the court held that the plaintiffs are not "otherwise qualified" to play interscholastic basketball. Despite recognizing the important role of athletics in the life and growth of children, and that the plaintiffs were being deprived of an opportunity to play their chosen sports, the court observed that they still had the option of participating in noncontact sports.<sup>42</sup>

In a 1979 case not involving athletics, *Southeastern Community College v. Davis*,<sup>43</sup> the Supreme Court held that, under the Act, an educational institution may require a person to possess "reasonable physical qualifications" necessary to *protect others' safety* as a condition of participating in its programs and activities. Although "mere possession of a handicap is not a permissible ground for assuming an inability to function," the Court ruled that a school need "not lower or substantially modify its standards to accommodate a handicapped person."<sup>44</sup> The Court concluded that an individual is "otherwise qualified" if "able to meet all of a program's requirements *in spite of* his handicap,"<sup>45</sup> but did not determine whether risk of harm to one's self is a valid reason to exclude him or her from an activity.

In *Poole v. South Plainfield Board of Education*,<sup>46</sup> a federal district court held that a high school's refusal to permit a student to wrestle with only one kidney violated the Act because other "respectable medical authority" cleared him to participate. Without citing or discussing *Kampmeier*, the court rejected the school's argument that the student was not "otherwise qualified" because he was unable to obtain medical clearance from the team physician with only one kidney. Relying on *Da-*

---

40. *Id.*

41. *Id.* at 300.

42. *Id.*

43. 442 U.S. 397, 414 (1979).

44. *Id.* at 405 and 413.

45. *Id.* at 406, 407, n.7 (emphasis added).

46. 490 F. Supp. 948, 953 (D. N.J. 1980).

*vis*, the court found that the student was "otherwise qualified" because, with the exception of his failure to pass the team physician's examination, he satisfied all of the wrestling program's requirements and did not pose a risk of increased injury to others "in spite of the fact he was born with one kidney."<sup>47</sup>

The *Poole* court did not directly address whether requiring an athlete to pass the team physician's medical examination, *to protect his or her own safety*, is a permissible "reasonable physical qualification" under *Davis*. *Poole* also did not consider whether an athlete's failure to satisfy this school-established requirement was a legally valid "substantial justification" for exclusion under *Kampmeier*. Instead, *Poole* relied on a 1978 Department of Health, Education, and Welfare policy interpretation of the Act's regulations prohibiting schools from categorically excluding athletes who have a missing or non-functioning organ from playing contact sports.<sup>48</sup>

The *Poole* court found that the Act's purpose 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,"<sup>49</sup> thereby according great weight to an impaired athlete's interest in individual autonomy. The court held that the school's interest in protecting a student's physical health did not justify excluding him from contact sports and was not a proper exercise of its *in loco parentis* authority when his parents supported his decision to participate in wrestling.<sup>50</sup> The court also suggested that, because the school had alerted plaintiff and his parents of the potential health risks of playing with his physical abnormality, it would not be legally liable for any injuries he suffered as a result of wrestling in his condition.<sup>51</sup>

Similarly, in *Wright v. Columbia University*,<sup>52</sup> another federal district court held that the Act required a university to permit an outstanding athlete with sight in only one eye to play football. Distinguishing *Kampmeier* by accepting the testimony of the plaintiff's ophthalmologist that, "no substantial risk of serious eye injury related to football exists[.]" the court rejected the school's reliance on the team physician's

---

47. *Id.* at 953.

48. *Id.* at 954. See generally Mitten, *supra* note 28, at 1016-17 (discussing HEW policy interpretation).

49. 490 F. Supp. at 953-54.

50. *Id.* at 952-53.

51. *Id.* at 954.

52. 520 F. Supp. 789, 793 (E.D. Pa. 1981).

contrary medical opinion.<sup>53</sup> The plaintiff testified that "he seriously considered and appreciates the risks incident to playing football with impaired vision and willingly accepts them."<sup>54</sup>

The court found that he was "otherwise qualified" to play, and the university was not forced to "lower or . . . effect substantial modifications of its standards,"<sup>55</sup> which would be a valid defense to his exclusion under *Davis*. Following *Poole*, the court found that the plaintiff "is indeed an intelligent, motivated young man who is capable of making this decision which affects his health and well-being."<sup>56</sup> Holding that the Act "prohibits 'paternalistic authorities' from deciding that certain activities are 'too risky' for a handicapped person,"<sup>57</sup> the court noted that excluding the plaintiff would deprive him of an opportunity to participate fully in an intercollegiate football program that also may preclude him from a future professional football career.<sup>58</sup>

In *Grube v. Bethlehem Area School District*,<sup>59</sup> a federal district court held that a high school's decision to exclude an excellent player with one kidney from its football team in accordance with its team physician's recommendation violated the Act. While adopting *Kampmeier's* "substantial justification" standard, the court found it was not satisfied based on the evidence of record. The court framed the key issue as whether the risk of injury to the plaintiff "is significant enough to make this concern any justification" for the school's action.<sup>60</sup> Because the plaintiff's personal physician concluded that "there is no medical reason why [he] cannot play football" with appropriate protective padding, and, most importantly, the opinion of other physicians recommending against his participation "lacks a medical basis," the court found no "substantial justification" for preventing the plaintiff from playing football.<sup>61</sup>

The school was concerned about potential legal liability if the plaintiff lost his one functioning kidney while playing football. According to the court, this also was not a "substantial justification" for excluding him from the sport, because he and his parents were willing to release the school from liability if he injured his kidney, while playing football.<sup>62</sup>

---

53. *Id.* at 793-94.

54. *Id.* at 793.

55. *Id.* (citing *Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979)).

56. *Id.* at 794.

57. 520 F. Supp. at 794 (citing *Poole*, 490 F. Supp. at 954).

58. *Id.* at 793.

59. 550 F. Supp. 418 (E.D. Pa. 1982).

60. *Id.* at 424.

61. *Id.* at 423-24.

62. *Id.* at 424.

Concluding that the "plaintiff is being deprived of an important right guaranteed by federal legislation," the court noted that he is a "collegiate caliber football player" who might earn a college athletic scholarship if allowed to continue playing high school football.<sup>63</sup>

After *Poole*, *Wright*, and *Grube* were decided, in *Alexander v. Choate*,<sup>64</sup> the United States Supreme Court clarified *Davis* by holding that an entity covered by the Rehabilitation Act "need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, [but] it may be required to make 'reasonable' ones." This case did not involve the application of the Act to athletics, but suggests that physically impaired athletes are legally entitled to reasonable accommodations necessary to enable them to compete in a sport with their medical condition.

In 1987, the United States Supreme Court decided another important case under the Act by considering when it is legally permissible to exclude a physically impaired person from an activity or program to *prevent a risk of harm to others*. In *School Board of Nassau County, Fla. v. Arline*,<sup>65</sup> the Court held that the Act does not prohibit disparate treatment of the handicapped necessary to avoid "exposing others to significant health and safety risks." The Court explained that "in determining whether an individual is 'otherwise qualified,' she or he is entitled to an opportunity to have [one's] condition evaluated in light of medical evidence."<sup>66</sup> The decision to exclude an individual from a particular program or activity must be based on "reasonable medical judgments given the state of medical knowledge."<sup>67</sup> The nature, duration, probability, and severity of harm likely to result from the handicapped individual's participation, and whether it can be effectively reduced by reasonable accommodation, are factors to be considered.<sup>68</sup>

After *Arline*, a minor athlete asserted an absolute right to play high school football under the Act, despite unanimous agreement by examining physicians that he should not play with a serious heart condition that could be fatal. In *Larkin v. Archdiocese of Cincinnati*,<sup>69</sup> in an unreported

---

63. *Id.* 424-25.

64. 469 U.S. 287, 300 (1985).

65. 480 U.S. 273, 287 (1987).

66. *Id.* at 285.

67. *Id.* at 288 (citation omitted).

68. *Id.*

69. Partial Transcript of Proceedings, No. C-1-90-619 (S.D. Ohio, filed Aug. 31, 1990) (oral findings of fact and conclusions of law supporting denial of injunctive relief and dismissal of complaint) at 15-16 [hereinafter "Partial Transcript"]. See generally Mitten, *supra* note 28, at 1014-16 for a more thorough discussion of this case.

oral opinion issued from the bench, Judge Herman J. Weber held that, although the plaintiff was "handicapped," the school's acceptance of unanimous physician recommendations that he not continue playing football, did not violate the Act. The court ruled that the plaintiff's inability to satisfy an Ohio High School Athletics Association by-law requiring "a physician certification" of medical fitness as a condition of participation in interscholastic athletics was a "substantial justification" for the school's decision to exclude him.<sup>70</sup> The court also recognized that, under Ohio law, the plaintiff's parents could not validly waive their minor son's potential legal claims if he were injured while playing football.<sup>71</sup> Without citing *Arline* or *Kampmeier*, *Larkin* implicitly relies on their holdings in concluding that exclusion of an athlete from a sport, based on a reasonable medical judgment that athletic participation would expose him or her to an enhanced risk of serious injury or death, does not violate the Act.

Recent Rehabilitation Act cases brought by athletes challenging their medical disqualification from a sport, specifically consider whether an athlete is "disabled" under the statute, as well as whether he or she is "otherwise qualified" to participate. In *Pahulu v. University of Kansas*,<sup>72</sup> the court upheld a public university's decision not to allow Alani Pahulu to continue playing college football after being medically disqualified by the team physician. After experiencing transient quadriplegia while making a tackle during a scrimmage, he was found to have an abnormally narrow cervical canal. After consulting with a neurosurgeon, the team physician concluded that he was at extremely high risk for sustaining permanent, severe neurological injury, including permanent quadriplegia, if he resumed playing college football. The university agreed to honor his athletic scholarship, although he was not permitted to play football. Nevertheless, he wanted to continue playing because three other medical specialists concluded that his spinal abnormality did not expose him to a greater risk of permanent paralysis than any other player.

The court first considered the Act's requirement that the plaintiff have a physical impairment which substantially limits one or more of his major life activities. It found that his congenitally narrow cervical canal is a physical impairment, and applying a subjective standard, that inter-collegiate football is a part of the student's major life activity of learn-

---

70. Partial Transcript at 16.

71. *Id.* at 11-12.

72. 897 F. Supp. 1387 (D. Kan. 1995).

ing.<sup>73</sup> However, the court held that he is not "disabled" under the Act because his exclusion from football does not substantially limit his opportunity to learn since he retained his athletic scholarship, which provided him with continued access to all academic services, and he was allowed to participate in the university's football program in a role other than as a player.<sup>74</sup>

Without citing any of the foregoing cases, the court also held that the student is not "otherwise qualified" because he was not able to satisfy all of the football program's requirements in spite of his disability, namely, medical clearance from the university's team physician to play football. The court found that the team physician's "conservative" medical opinion is "reasonable and rational" and "supported by substantial competent evidence" for which it is "unwilling to substitute its judgment."<sup>75</sup>

In *Knapp v. Northwestern University*,<sup>76</sup> the Seventh Circuit reversed the lower court's holding that Northwestern University violated the Rehabilitation Act in following its team physician's medical recommendation that an athlete with a heart condition known as idiopathic ventricular fibrillation not play intercollegiate basketball. As a high school senior, Nicholas Knapp suffered sudden cardiac arrest while playing recreational basketball, which required cardiopulmonary resuscitation and defibrillation to restart his heart. Thereafter, he had an internal cardioverter-defibrillator implanted in his abdomen. He subsequently played competitive recreational basketball without any incidents of cardiac arrest for two years and received medical clearance to play college basketball from three cardiologists who examined him.

Northwestern agreed to honor its commitment to provide Knapp with an athletic scholarship, although it adhered to its team physician's medical disqualification from intercollegiate basketball. This recommendation was based on Knapp's medical records and history, the 26th Bethesda Conference guidelines for athletic participation with cardiovascular abnormalities,<sup>77</sup> and opinions from two consulting cardiologists who concluded that Knapp would expose himself to a significant risk of ventricular fibrillation or cardiac arrest during competitive athletics.

---

73. *Id.* at 1390-93.

74. *Id.* at 1393.

75. *Id.* at 1394.

76. 101 F.3d 473 (7th Cir. 1996), *cert. denied*, 117 U.S. 2454 (1997).

77. 26<sup>th</sup> Bethesda Conference Recommendations for Determining Eligibility for Competition of Athletes With Cardiovascular Abnormalities, 24 JOURNAL OF THE AMERICAN COLLEGE OF CARDIOLOGY 845-899 (1984).

All medical experts agreed on the following facts: Knapp had suffered sudden cardiac death due to ventricular fibrillation; even with the internal defibrillator; playing college basketball placed Knapp at a higher risk for suffering another event of sudden cardiac death compared to other male college basketball players; the internal defibrillator has never been tested under the conditions of intercollegiate basketball; and no person currently plays or has ever played college or professional basketball after suffering sudden cardiac death and having a defibrillator implanted.<sup>78</sup>

The lower court held that Knapp is “disabled” under the Act. The parties did not dispute that Knapp is perceived as having a permanent cardiovascular impairment, which is a physical impairment under the statute. The court found that intercollegiate basketball is a major life activity for Knapp, because it “is an important and integral part of [his] education and learning experience.”<sup>79</sup> Because practicing with the team and competing in games is necessary for learning discipline, teamwork, and perseverance, the trial court concluded that Northwestern’s refusal to allow Knapp to play substantially limits his ability to play college basketball.

The Seventh Circuit disagreed with the lower court’s conclusion and held that Knapp is not “disabled” under the Act. The appellate court held that “[p]laying intercollegiate basketball obviously is not in and of itself a major life activity.”<sup>80</sup> Finding that learning is the affected major life activity, the court concluded that playing intercollegiate basketball is “only one part of the education available to Knapp at Northwestern.”<sup>81</sup> Consistent with *Pahulu*, the court observed that Knapp’s “inability to play intercollegiate basketball at Northwestern forecloses only a small portion of his collegiate [learning] opportunities”<sup>82</sup> and does not substantially limit his college education because his athletic scholarship continues, thereby allowing him full access to all of the university’s other programs and activities.

The parties agreed that Knapp is not “otherwise qualified” under the Act if there is a “genuine substantial risk” that he could be seriously injured while playing basketball at Northwestern.<sup>83</sup> The lower court noted that all medical experts agreed on the underlying basic scientific

---

78. *Id.* at 477-78.

79. *Knapp v. Northwestern Univ.*, 942 F. Supp. 1191, 1195 (N.D. Ill. 1996).

80. *Knapp*, 101 F.3d at 480.

81. *Id.* at 481.

82. *Id.* at 482.

83. 942 F. Supp. at 1196.

and medical principles, but that, because no one had ever played college basketball with an implanted defibrillator, the risk that Knapp would suffer another incident of cardiac arrest while playing could not be objectively quantified.<sup>84</sup> Medical experts disagreed whether the risk of injury to Knapp was substantial enough to medically justify his exclusion from intercollegiate basketball.

The lower court conceded that excluding Knapp from an “‘unessential’ activity,” such as intercollegiate basketball, that creates an increased uncertain risk of serious personal injury “is clearly rational in the medical profession,” given the absence of proven safety.<sup>85</sup> However, the court concluded that the Act “require[s] a judicial decision on the substantiality of the risk” necessitating consideration of “the testimony of all the experts who testified and determin[ing] which are most persuasive.”<sup>86</sup> After weighing the experts’ testimony, the court found that the risk of injury to Knapp while playing college basketball is not medically substantial and that the implanted defibrillator most likely would restore his heart beat to normal if Knapp’s heart rate became abnormal during strenuous physical exertion.<sup>87</sup>

The Seventh Circuit again disagreed with the lower court and concluded that Knapp is not “otherwise qualified” to play basketball at Northwestern under the Act. Citing *Davis*, the appellate court held that a university legally may establish legitimate physical qualifications that an individual must satisfy in order to participate in its athletic program.<sup>88</sup> Agreeing with the lower court and the parties that a “significant risk of personal physical injury” that cannot be eliminated justifies medical disqualification from an activity, the court framed the controlling issue as, “[W]ho should make such an assessment[?]”<sup>89</sup>

Holding that Knapp’s exclusion from Northwestern’s basketball team was legally justified, the Seventh Circuit explained:

We disagree with the district court’s legal determination that such decisions are to be made by the courts and believe instead that medical determinations of this sort are best left to team doctors and universities as long as they are made with reason and rationality and with full regard to possible and reasonable accommodations. In cases such as ours, where Northwestern has ex-

---

84. *Id.* at 1196.

85. *Id.* at 1197.

86. *Id.* at 1196-97.

87. *Id.* at 1197-98.

88. 101 F.3d at 482.

89. *Id.* at 483.



amined both Knapp and his medical records, and considered his medical history and the relation between his prior sudden cardiac death and the possibility of future occurrences, has considered the severity of the potential injury, and has rationally and reasonably reviewed consensus medical opinions or recommendations in the pertinent field – regardless whether conflicting medical opinions exist – the 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.

...

We do not believe that, in cases where medical experts disagree in their assessment of the extent of a real risk of serious harm or death, Congress intended that the courts – neutral arbiters but generally less skilled in medicine than the experts involved – should make the final medical decision. Instead, in the midst of conflicting expert testimony regarding the degree of serious risk of harm or death, the court's place is to ensure that the exclusion or disqualification of an individual was individualized, reasonably made, and based upon competent medical evidence. So long as these factors exist, it will be the rare case regarding participation in athletics where a court may substitute its judgment for that of the school's team physicians.

...

In closing, we wish to make clear that we 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.<sup>90</sup>

---

90. *Id.* at 484-85 (emphasis in original).

### III. SYNTHESIS AND CRITIQUE OF REHABILITATION ACT PRECEDENT

Federal trial and appellate courts, thus far, have resolved claims brought by physically impaired amateur athletes on a case-by-case basis, without clear direction from Congress or explicit guidance from the Supreme Court. Neither the Rehabilitation Act nor its accompanying regulations specifically address whether exclusion of a skilled athlete, with a physical abnormality from a desired sport substantially limits a "major life activity."<sup>91</sup> Moreover, the Act is silent regarding whether a risk of physical harm solely to one's self precludes an athlete from being "otherwise qualified," and the Supreme Court has not yet considered this issue.

In construing the Act's requirements that an athlete be both "disabled" and "otherwise qualified" to participate, it appears that courts are implicitly balancing the athlete's interest in playing a sport with the sponsoring institution's interest in protecting the health and safety of participants. The foregoing cases illustrate that courts recognize that athletic competition is a valued component of both high school and college education, but are divided regarding the importance of athletics in a student's learning experience. On the other hand, the judiciary considers the protection of an athlete's health to be a legitimate objective, regardless of whether an educational institution has an affirmative legal duty to prevent a student from harming one's self, but does not always consider this interest to be paramount. Courts usually struggle to weigh appropriately the parties' conflicting interests particularly when medical experts are divided in their participation recommendations.

#### *A. Exclusion From Amateur Athletics as Substantially Limiting a Major Life Activity*

In determining whether an individual athlete's exclusion from athletics substantially limits a major life activity, courts should accord greater weight to the importance of athletic competition in high school and college education. Although most students do not participate in intercollegiate or interscholastic sports, it is appropriate to apply a subjective test in resolving this issue because the Act references "such person's major life activities,"<sup>92</sup> thereby indicating the necessary individualized nature of this inquiry. Consistent with this language, some courts have held that athletics are sufficiently intertwined with education, such that they con-

---

91. See 29 U.S.C.A. § 706(8)(B) (1985); 34 C.F.R. § 104.3(j)(2)(ii) (1997); 45 C.F.R. § 84.3(j)(2)(ii) (1997).

92. 29 U.S.C.A. § 706(8)(B) (1985) (emphasis added).

stitute a major life activity for particular individuals playing interscholastic or intercollegiate sports.<sup>93</sup>

At the high school level, interscholastic athletics play an integral role in enabling participants to earn better grades and develop social skills by teaching discipline, teamwork, commitment, motivation, and hard work.<sup>94</sup> The vast majority of people do not participate in structured competitive athletics beyond high school, and their last opportunity to take advantage of these important educational benefits occurs during this formative four-year period.

Intercollegiate athletics play a different role in the educational process for the relatively small number of college students participating in them, but they are an important part of a university's primary mission of helping an individual maximize one's learning and career potential – whether it be academic, physical, or artistic prowess or a combination of these talents. Moreover, in other contexts, courts have recognized that intercollegiate athletics are an integral component of American higher education and provide invaluable lessons that help further general life success and careers outside of professional sports.<sup>95</sup>

Whether exclusion from intercollegiate or interscholastic athletics substantially limits one's opportunity to learn must necessarily be considered on an individualized basis.<sup>96</sup> Even if there are other educational benefits available to excluded physically impaired athletes, they are being denied an equal opportunity to participate fully in all of an educational institution's programs and activities which are generally available to all persons with the requisite skills and abilities.<sup>97</sup> If physically impaired high school and college athletes are not covered by the Act, such

---

93. *Pahulu*, 897 F. Supp. at 1391; *Sandison v. Michigan High Sch. Athletic Ass'n*, 863 F. Supp. 483, 488-89 (E.D. Mich. 1994), *rev'd on other grounds*, 64 F.3d 1026 (6th Cir. 1995). See generally *Milani*, *supra* note 29.

94. 863 F. Supp. at 488-89. See generally *Milani*, *supra* note 29.

95. *Cohen v. Brown Univ.*, 991 F.2d 888, 891 (1st Cir. 1993); *Kondos v. West Virginia Bd. of Regents*, 318 F. Supp. 394, 396 (S.D. W. Va. 1970), *aff'd*, 441 F.2d 1172 (4th Cir. 1971); *Harris v. Univ. of Michigan Bd. of Regents*, 558 N.W.2d 225, 230 (Mich. Ct. App. 1997); *Greenhill v. Carpenter*, 718 S.W.2d 268, 271 (Tenn. Ct. App. 1986).

96. *Knapp*, 101 F.3d at 481.

97. *Milani*, *supra* note 29. In challenging exclusion from amateur athletic sports or events outside of interscholastic or intercollegiate sports, a physically impaired athlete must demonstrate that such exclusion substantially limits a major life activity. The same arguments discussed above can be made regarding the educational benefits of participation in youth sports, although they are somewhat more attenuated outside the context of school-sponsored sports. There is, however, a stronger argument that excluding an elite athlete who has trained for many years for an Olympic sport substantially limits what is for him or her a major life activity.

an athlete is deprived of his or her federal right to have one's medical condition individually evaluated as well as the full potential educational benefits of competitive athletics if he or she is found to be "otherwise qualified" under the Act. Accordingly, it would further the Act's objectives of prohibiting medically unjustified discrimination against physically impaired persons by ensuring that these athletes are protected by the Act.

*B. "Otherwise Qualified" to Participate in Amateur Athletics*

In *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>98</sup> the United States Supreme Court ruled that handicapped persons are not a suspect or quasi-suspect class justifying heightened scrutiny of alleged discrimination. Under *Cleburne*, to successfully defend a denial of equal protection of the law claim, a public school can justify the exclusion of a physically impaired athlete from a sport if its decision is rationally related to a legitimate objective such as protecting his or her health and safety. However, unlike the federal Constitution, the Rehabilitation Act requires that a covered educational institution or entity have more than merely a rational basis for discriminating against a physically impaired athlete.<sup>99</sup> Courts have struggled to formulate the appropriate legal standard justifying exclusion of a physically impaired athlete from a sport for medial reasons.

The *Larkin* court properly rejected the contention that the Act creates an absolute right for a physically impaired amateur athlete to participate in a sport, even if there is universal agreement among physicians that his or her medical condition creates a significant risk of serious personal injury or death.<sup>100</sup> Absent clear legislative intent supporting such a position, it is extremely unlikely that Congress intended the Rehabilitation Act to be a means of forcing covered entities to enable amateur athletes to take potentially life-threatening risks in a sport that is merely an avocation. To the contrary, in *Davis*, the Supreme Court held that the Act does not prohibit an educational institution from requiring that its students possess "reasonable physical qualifications" in order to participate in its programs and activities.<sup>101</sup>

---

98. 473 U.S. 432 (1985).

99. See, e.g., *Jacobson v. Delta Airlines, Inc.*, 742 F.2d 1202, 1206 (9th Cir. 1984), cert. denied, 471 U.S. 1062 (1985); *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372, 1383 (10th Cir. 1981); *Casey v. Lewis*, 773 F. Supp. 1365, 1371 (D. Ariz. 1991).

100. See generally notes 69-71 and accompanying text.

101. *Davis*, 442 U.S. at 414.

In construing the Act's "otherwise qualified" requirement, as applied to athletics, some courts hold that an athlete with a physical abnormality may be excluded from a sport only if there is a "substantial justification" for doing so.<sup>102</sup> Even if this specific terminology is not used, or the appropriate legal standard is phrased somewhat differently, courts generally agree that the Act permits an athlete to be medically disqualified, if necessary to prevent a significant risk of serious personal injury such as a permanently crippling injury or death.<sup>103</sup> Courts have adopted a similar judicial standard regarding the legally permissible exclusion of handicapped persons from covered employment opportunities under the Act.<sup>104</sup>

Judicial formulation and acceptance of the "significant risk of serious injury" standard as a legal justification for excluding a physically impaired athlete from a sport does not, however, resolve the key issue in determining whether an athlete is "otherwise qualified" to participate. As the *Knapp* appellate court recognized, this issue is, "Who should make such an assessment"<sup>105</sup> when there is no definitive scientific evidence and medical experts conflict in their athletic participation recommendations? There are three theoretical models of decision-making that have been adopted by courts in construing the Act as it governs athletes which I will term as: 1) the judicial/medical fact-finding model; 2) the athlete informed consent model; and 3) the team physician medical judgment model.

---

102. *Kampmeier*, 553 F.2d at 299; *Grube*, 550 F. Supp. at 423; *Wright*, 520 F. Supp. at 793; Partial Transcript, No. C-1-90-619, at 16.

103. See generally notes 36-90 and accompanying text. Some legal scholars also have advocated that this is the proper standard to apply under the Rehabilitation Act. Cathy J. Jones, *College Athletes: Illness or Injury and the Decision to Return to Play*, 40 BUFF. L. REV. 113, 206 & 212 (1992); Steven K. Derian, *Of Hank Gathers and Mark Seay: Who Decides Which Risks an Athlete Is Allowed to Undertake?*, 5 UCLA J. ED. 1, 15 (Summer 1991). One commentator asserts that, because Congress recognized a threatened harm to others' defense in the ADA's employment provisions [42 U.S.C.A. §§ 12111(3) (1995) and 12113 (1995)] without expressly establishing a threatened harm to self defense, a physically impaired amateur athlete has an absolute right to participate in athletics even if doing so would expose him or her to a significant risk of serious injury. Milani, *supra* note 29. Another commentator argues that the ADA should be construed consistently with the Rehabilitation Act to allow a covered entity to legally exclude an amateur athlete from a sport to prevent exposure to a significant risk of substantial harm to one's self. Jones, at 206-07 & 212.

104. The Rehabilitation Act's regulations relating to employment provide that a handicapped person is not "qualified" to perform the essential functions of a position if he or she cannot do so without endangering their own health and safety. 29 C.F.R. § 1613.702(f) (1997). Mitten, *supra* note 28 at 1019 (collecting cases holding that exclusion from employment to prevent significant risk of substantial harm to one's self is legally valid).

105. *Knapp*, 101 F.3d at 483.

## 1. Overview of Three Decision-Making Models

Under the judicial/medical fact-finding model, which was used by the *Knapp* trial court, a court resolves conflicting medical testimony regarding whether a disabled athlete's condition creates a significant risk of substantial injury while playing a sport. The *Knapp* trial court judge concluded: "Congress has required a judicial decision on the substantiality of the risk" and "I must consider the testimony of all the experts who testified and determine which are most persuasive."<sup>106</sup> This model requires a court to determine whether there is a valid basis for medically disqualifying an athlete from participation as a matter of fact.

The athlete informed consent model permits the athlete (and his or her parents or guardian if he or she is a minor) to decide whether to participate if respectable medical authority provides clearance to play the sport. Under this model, the athlete is allowed to participate even if he or she has been medically disqualified by the team physician if willing to waive any potential legal claims against the educational institution or sports event sponsor for injury that occurs while playing with his or her physical impairment.<sup>107</sup> As the *Poole* court explained:

Life has risks. The purpose of [the Act], 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. . . . The [school's] responsibility is to see that he does not pursue this course in a foolish manner. They therefore have a duty to alert Richard and his parents to the dangers involved and to require them to deal with the matter rationally.<sup>108</sup>

*Poole* suggests that an athlete must obtain medical clearance from his or her chosen physician in order to have an autonomy right to participate in sports under the Act.

Under the team physician model, a school has a valid legal justification, as a matter of law, for excluding an athlete who has been medically disqualified by the team physician. The school is entitled to rely on its team physician's reasonable opinion that the athlete's disability exposes him or her to a significant risk of substantial injury during athletic com-

---

106. 942 F. Supp. at 1196-97.

107. See *Poole*, 490 F.Supp. 948; *Wright*, 520 F.Supp. 789; and *Grube*, 550 F.Supp.418; discussed in notes 46-63 and accompanying text.

108. *Poole*, 490 F. Supp. at 953-54.

petition, even if other physicians have provided medical clearance.<sup>109</sup> In *Knapp*, the Seventh Circuit held:

[M]edical determinations of this sort are best left to team doctors and universities as long as they are made with reason and rationally and with full regard to possible and reasonable accommodations. . . . 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 potential injury, not to determine on its own which evidence it believes is more persuasive.<sup>110</sup>

Each of these three models has its respective pluses and minuses. The litmus test, however, is which model best furthers Congressional intent in formulating the Rehabilitation Act, accords with Supreme Court precedent construing the Act, and furthers public policy? For the following reasons, I believe the team physician model accomplishes these objectives better than the other two models.

## 2. Judicial/Medical Fact-finding Model

The judicial/medical fact-finding model is consistent with some other cases construing the Act outside of the athletics context. These cases hold that the trial court must make a *de novo* assessment of the risk of personal injury to a disabled person.<sup>111</sup> This model enables the court to disregard a reasonably conservative medical opinion disqualifying a disabled athlete to protect his or her health in favor of a more liberal medical opinion that would permit participation, contrary to the school's legitimate safety interests. In determining whether there is a significant risk of substantial harm to a disabled athlete as a matter of fact, a court would not be bound by the team physician's medical opinion.

This model, however, conflicts with Supreme Court precedent under the Act. *Davis* holds that an educational institution legally may require that its students possess "reasonable physical qualifications" in order to participate in its programs and activities.<sup>112</sup> It also contravenes the *Arline* holding that physically impaired persons may be legally excluded

---

109. See *Knapp*, 942 F.Supp. 1191 (and text and discussion in notes 83-90); *Kampmeier*, 553 F.Supp.296 (and text and discussion in notes 36-42); and *Pahulu*, 897 F.Supp. 1387 (and text and discussion in note 75).

110. 101 F.3d at 484.

111. See, e.g., *Wood v. Omaha Sch. Dist.*, 25 F.3d 667, 669 (8th Cir. 1994); *Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991); *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985); *Doe v. New York Univ.*, 666 F.2d 761, 779 (2d Cir. 1981); *Pushkin v. Regents of the Univ. of Colorado*, 658 F.2d 1372, 1390 (10th Cir. 1981).

112. 442 U.S. at 414.

from activities "based on reasoned and medically sound judgments."<sup>113</sup> According to the Court, the purpose of the Act is to protect a physically impaired person "from deprivations based on prejudice, stereotypes, or unfounded fear" and to provide an opportunity to have one's condition individually evaluated in light of medical evidence."<sup>114</sup> The Act should not be construed to require courts to exhaust scarce judicial resources attempting to resolve an issue of medical uncertainty on which there is no consensus among medical experts.<sup>115</sup>

If Congress had actually intended to limit a school's legal ability to exclude an athlete from a sport, consistent with its team physician's medical judgment, it could have established an explicit statutory framework for this purpose. For example, a New York education law statute expressly provides a judicial procedure for enabling a physically impaired athlete to participate in interscholastic athletics despite an inability to obtain medical clearance from the school physician.<sup>116</sup> A petition seeking court-ordered participation must be accompanied by affidavits from two physicians testifying that the athlete's participation would be "reasonably safe."<sup>117</sup> The court will order the school to permit participation if it finds that participation in a sport would be in the athlete's best interests and reasonably safe.<sup>118</sup> The statute immunizes a school district from liability for injury sustained by a physically impaired student while participating in athletics pursuant to a court order.<sup>119</sup>

The New York statute effectively requires a court to resolve conflicting medical opinions, as a matter of fact, in determining whether athletic participation would be reasonably safe. This is consistent with the state legislature's intent as reflected in the express language of the statute. In accordance with this explicit statutory authorization, a New York appellate court affirmed the lower court's order allowing an athlete to partici-

---

113. 480 U.S. at 285.

114. *Arline*, 480 U.S. at 287, 289.

115. "Judges are not trained scientists. They inevitably lack the scientific training that might facilitate the evaluation of scientific claims or the evaluation of expert witnesses who make such claims. They typically are generalists, dealing with cases that may vary widely in respect to substantive subject matter. Their primary objective is usually process-related: That of seeing that a decision is reached fairly and in a timely way." STEVEN G. BREYER, *THE INTERDEPENDENCE OF SCIENCE AND LAW*, Address at Annual Meeting of The American Ass'n for the Advancement of Science, Philadelphia, PA, Feb. 16, 1998, at 6.

116. N.Y. Education Law § 3208-a (McKinney Supp. 1997).

117. *Id.* at § 3208-a(2).

118. *Id.* at § 3208-a(3).

119. *Id.* at § 3208-a(4).



pate in a sport contrary to the team physician's medical judgment.<sup>120</sup> However, the Second Circuit, refusing to resolve conflicting testimony by medical experts, held that the same athlete did not have a federal right to participate under the Rehabilitation Act without medical clearance from the team physician.<sup>121</sup>

The judicial/medical fact-finding model allows a court to substitute its judgment on medical issues for that of the team physician, which may thereby adversely affect the quality of sports medicine care rendered to athletes. The law should not create an incentive for a team physician to place greater weight on legal rather than medical considerations when evaluating athletes' physical fitness.<sup>122</sup> This model encourages athletes, motivated by economic or psychological reasons, to shop for favorable opinions in order to obtain medical clearance to play a sport and facilitates second-guessing of the team physician's medical judgment. The team physician/athlete relationship is based on a trust relationship that will be seriously compromised if a court interferes with the exercise of medical judgment exercised to protect an amateur athlete's health and safety.<sup>123</sup>

### 3. Athlete Informed Consent Model

The athlete informed consent model is based on a strong libertarian philosophy that would enable a physically impaired athlete to voluntarily assume the risk of a potentially serious injury, which is not medically certain, or even likely, to occur.<sup>124</sup> This philosophy promotes individual

---

120. *Kampmeier v. Harris*, 411 N.Y.S.2d 744 (1978). See also *Pace v. Dryden Central Sch. Dist.*, 574 N.Y.S.2d 142 (1991). See generally *Milani*, *supra* note 29; & *Mitten*, *supra* note 28 at 1026-28.

121. *Kampmeier v. Nyquist*, 553 F.2d 296 (2nd Cir. 1978).

122. In *Penny v. Sands*, Case No. H89-280 (D. Conn., filed May 3, 1989), an athlete alleged that a cardiologist was negligent for withholding medical clearance to play college basketball due to his potentially life-threatening heart condition. He claimed economic damages of \$1,000,000 because Central Connecticut State University relied on this physician's recommendation to exclude Penny from its basketball program for two years, which allegedly harmed his anticipated future professional basketball career. The university eventually allowed Penny to resume playing intercollegiate after two other cardiologists medically cleared him to do so. Penny voluntarily dismissed this case before the court decided the merits of his claim. He subsequently collapsed and died suddenly while playing in a 1990 professional basketball game in England. See generally Matthew J. Mitten, *Team Physicians and Competitive Athletes: Allocating Legal Responsibility For Athletic Injuries*, 55 U. PITT. L. REV. 129 (1993).

123. *Mitten*, *supra* note 122, at 138-42.

124. Some amateur athletes are willing to take potentially life-threatening risks to participate in competitive sports. See *Mitten*, *supra* note 28, at 993-94. A recent study reveals that college athletes engage in significantly more high risk behaviors than their non-athletic peers. Aurelia Nattiv, *Lifestyles and Health Risks of Collegiate Student-Athletes*, NCAA SPORTS SCI-

autonomy over communality and is espoused in John Stuart Mill's seminal work *ON LIBERTY*.<sup>125</sup> In relevant part, Mill states:

That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

. . .

[The] principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow-creatures, so long as what we do does not harm them even though they should think our conduct foolish, perverse, or wrong.

. . .

Each is the proper guardian of his own health, whether bodily, or mental or spiritual.<sup>126</sup>

When I initially considered this issue, I adopted a libertarian position and argued that there is no legal justification under the Act for excluding a physically impaired athlete from intercollegiate or interscholastic athletics if competent physicians have conflicting participation recommendations based on an individualized examination of the athlete and a differing evaluation of the medical risks.<sup>127</sup> I asserted that, when there is no definite scientific answer or consensus among medical experts, and there are different credible conclusions regarding the medical risks of participating, a physically impaired athlete (and parents or guardian if he or she is a minor) has a legal right to choose to participate in school-sponsored athletics. Arguably, the Act's "reasonable accommodation" requirement mandates that the team or athletic event sponsor allow the athlete to choose the physician(s) whose assessment of the medical risks controls. Court-ordered athletic participation under the Act should create an implied immunity absolving a school from tort lia-

---

ENCES EDUCATION NEWSLETTER, at 2 (Spring 1996). Other athletes, such as Olympic luge racer Duncan Kennedy, who was born with a bleeding brain stem known as arteriovenous malformation, choose not to participate in a sport even with medical clearance. Mike Dodd, *Kennedy Decides to End Luge Run*, USA TODAY, Dec. 15, 1997, at 12C; Bill Sullivan, *One Last Chance - Kennedy Battles Bleeding Brain Stem, Puts Luge Medal in Doubt*, HOUSTON CHRON., Dec. 14, 1997, at 5B.

125. JOHN STUART MILL, *ON LIBERTY* (1986).

126. *Id.* at 16 & 19.

127. Mitten, *supra* note 28, at 1016-26.

bility if an athlete suffers injury relating to or caused by one's physical abnormality.<sup>128</sup>

This model embodies the philosophy that the Act prohibits a school or sponsor of an athletic event from substituting its decision for that of a fully informed athlete who chooses to participate in athletics based on credible medical clearance. The physically impaired athlete has a right to exercise his or her individual autonomy and choose to accept an enhanced, but medically uncertain risk of injury, free of a school's paternalistic concerns.

The primary weakness of the athlete informed consent model is its de-emphasis of a school's legitimate interest in protecting a physically impaired athlete's health and safety.<sup>129</sup> Courts have recognized that the relationship between an educational institution and its athletes is consensual in nature.<sup>130</sup> Also, *Davis* holds that a school may legally establish reasonable physical qualifications to ensure the safety standards that must be satisfied in order to participate in its programs and activities.<sup>131</sup> Nevertheless, this model provides a physically impaired athlete who has been medically disqualified by the team physician with a federal right to participate in a sport if he or she is able to obtain medical clearance from another physician.

Even if one accepts Mill's libertarian view that an individual should not be prevented from engaging in activities that may endanger one's health, this philosophy does not support a construction of the Act requiring a school to involuntarily permit a medically disqualified athlete to participate in its athletic program. Properly interpreted, Mill's philosophy supports a physically impaired athlete's right to refuse medical treatment and to individually engage in athletic activities that threaten his or her health, but it does not justify requiring the sponsor of an athletics event to involuntarily provide a playing field for endangering one's personal health. For example, a long distance runner with a potentially life-threatening cardiovascular abnormality that may be aggravated by strenuous exercise cannot be forced to undergo a recommended medical procedure or prevented from running on one's own. However, he or she should not have a legal right to participate on the university's cross

---

128. *Id.* at 1023 & 1025-26.

129. Such a liberal individualistic view disregards the communitarian philosophy that we are each other's keepers and have a responsibility to look out for the welfare of others. AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* (1993).

130. *See supra* notes 5-12 and accompanying text.

131. *See supra* notes 43-45 and accompanying text.

country team even if physically able to do so, after being medically disqualified by the team physician. Properly considered, Mill's libertarian philosophy does not affirmatively support requiring the school to allow him to participate even if other physicians provide medical clearance. A team or sponsor of an amateur athletic event should not be legally required to provide the arena for an uncontrolled medical experiment that may have tragic consequences.<sup>132</sup>

#### 4. Team Physician Medical Judgment Model

All things considered, the team physician medical judgment model strikes the appropriate balance between an amateur athlete's interest in athletic participation and the team or athletic event sponsor's interest in protecting the health and safety of participants. Under this model, an athlete receives an individualized evaluation of his or her physical condition and may be legally excluded only "based on reasoned and medically sound judgments."<sup>133</sup> All medically relevant factors relating to the personal health risks created by the athlete's physical impairment such as the nature, duration, probability, and severity of harm, as well as whether reasonable accommodations will effectively eliminate or safely reduce the risk of injury are considered.<sup>134</sup>

Exclusion is permissible only if the court finds the team physician has a reasonable medical basis for determining that athletic competition creates a significant risk of substantial harm to a physically impaired athlete.<sup>135</sup> A court is much better equipped to evaluate whether there is a reasonable basis for medically disqualifying an impaired athlete than to resolve, as a matter of fact, a medical issue when physicians have conflicting opinions. This model creates a presumption favoring the team physician, but it does not establish an irrefutable presumption that the team physician's medical judgment is correct or require a court to defer to it. For example, there may be no reasoned medical basis for excluding athletes with a missing or non-functioning paired organ from a contact sport. In this situation an athlete has the same risk of injury in terms of

---

132. In recent years Boston Celtics basketball player Reggie Lewis and Loyola Marymount University basketball player Hank Gathers, who both had known cardiovascular abnormalities, died while playing basketball. See Mitten, *supra* note 122, at 129-31.

133. *Arline*, 480 U.S. at 285.

134. *Knapp*, 101 F.3d at 484-85.

135. *Id.* at 483. Accord *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993) ("Proposed testimony must be supported by appropriate validation - i.e., 'good grounds,' based on what is known. In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability.")

the probability of personal harm to a paired organ as any other participant.<sup>136</sup> Although the consequences of an injury to a single eye or kidney may be more severe, protective gear or padding probably will effectively reduce this risk. This is the same result that the *Poole*, *Wright*, and *Grube* courts reached while using the athlete informed consent model.<sup>137</sup> Thus, under the team physician model, athletes have a legal right to participate under the Act if there is no valid medical basis for disqualifying them.<sup>138</sup>

The team physician medical judgment model best furthers the legitimate goal of enhancing the quality of sports medicine care rendered to athletes. Although one of the team physician's objectives is to avoid the unnecessary restriction of athletic activity, his or her paramount legal and ethical responsibility is to protect an athlete's health.<sup>139</sup> Judicial recognition of the team physician's legal authority to medically disqualify a physically impaired athlete, without fear of unnecessary second guessing, creates a strong incentive to render high quality care to athletes.

The *Knapp* appellate court held that a team physician may rely on consensus guidelines regarding the advisability of athletic participation when an athlete has physical abnormalities.<sup>140</sup> Such guidelines are particularly helpful to a physician if the medical risks of playing a sport are uncertain.<sup>141</sup> As the *Knapp* appellate court explained, "[S]uch guidelines should not substitute for individualized assessment of an athlete's particular physical condition, [but] the consensus recommendations of several physicians in a certain field do carry weight" in judicial determination of

---

136. *Greenwood v. State Police Training Center*, 606 A.2d 336, 343 (N.J. 1992) (finding that "risk of damage to Greenwood's left eye is as insubstantial as it is to any other trainee.")

137. See generally notes 46-63 and accompanying text.

138. The following illustration presents an interesting case under this model. After permitting Danee Mastagni to participate in the university's intercollegiate swimming program for almost three years, Texas A&M University's team physician medically disqualified her after she passed out in the pool during a race. She has Parkinson-White Syndrome, which is an abnormal electrical conduction pathway in her heart. The American Heart Association says that persons with this syndrome can lead normal lives with no restrictions on their activities, and university medical personnel previously accepted medical clearance recommendations from her treating specialists. Although she may experience fainting spells during strenuous workouts, her condition is not life-threatening. Tom Turbiville, *Diver Down*, *AGS ILLUSTRATED*, Nov. 8, 1997, at 24. These facts raise the issue of whether there is a reasonable medical basis for excluding her from the University's swimming team.

139. Mitten, *supra* note 122, at 138-42.

140. 101 F.3d at 485. In *Arline*, the Supreme Court held that "courts normally should defer to the reasonable medical judgments of public health officials" in deciding claims under the Rehabilitation Act, but did not consider whether the medical judgments of private physicians should be given deferential weight. See *Arline*, 480 U.S. at 287-88.

141. Mitten, *supra* note 122, at 150-52.

whether there is a reasonable medical basis for disqualifying a physically impaired athlete.<sup>142</sup>

Although use of the team physician medical judgment model may preclude an athlete from engaging in competitive athletics at a particular school, it would not necessarily prevent an athlete from playing elsewhere. As the *Knapp* appellate court observed: "[On] the same facts, another team physician . . . might reasonably decide that Knapp met the physical qualifications for playing on an intercollegiate basketball team."<sup>143</sup> After losing his Rehabilitation Act suit against Northwestern University, Nick Knapp transferred to Northeastern Illinois University and received medical clearance to play college basketball.<sup>144</sup>

The team physician medical judgment model places legitimate communitarian health and safety concerns above an athlete's libertarian personal autonomy interests. If all concerned parties – the athlete, team physician, and school – cannot agree on the acceptability of assuming an enhanced but medically uncertain risk on the playing field, it is better to err on the side of caution.<sup>145</sup>

#### IV. PHYSICALLY IMPAIRED PROFESSIONAL ATHLETES' POTENTIAL CLAIMS

A disability discrimination claim brought by a professional athlete most likely would have to be asserted under the ADA because entities and organizations sponsoring professional sports generally do not receive federal funding.<sup>146</sup> Depending upon the particular sport, the

---

142. 101 F.3d at 485. Using guidelines as a means of categorically excluding all athletes with certain physical abnormalities, rather than providing an individualized medical evaluation, would violate the Act. See, e.g., *Bombrys v. City of Toledo*, 849 F. Supp. 1210 (N.D. Ohio 1993). A blanket exclusion of all persons with a particular physical abnormality without an individualized examination of his or her medical condition also violates the ADA. *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342 (D. Ariz. 1992).

143. 101 F.3d at 485.

144. In November, 1997, his heart defibrillator misread his heart rhythm and activated itself while Knapp was warming up before basketball practice. After reprogramming this device, his cardiologists cleared him to resume playing college basketball. Bill Liesse, *Knapp Step Away From Action*, PEORIA STAR J., 1997 WL 7687563, Dec. 28, 1997; Gene Wojciechowski, *Shocker Is This Player Still Wants the Ball*, CHI. TRIB., 1997 WL 3618045, Dec. 6, 1997.

145. *Hill*, 865 P.2d at 633 (scientific controversy regarding safety risks in connection with athletics participation dictates caution and prudence).

146. Although currently there are no ADA cases considering whether a physically impaired professional athlete may be excluded because of a risk of harm to one's self, a professional hockey player with sight in only one eye relied upon the New York Human Rights Law to successfully challenge a league bylaw that categorically rendered him medically ineligible to play for any league team. *Neeld v. American Hockey League*, 439 F. Supp. 459 (W.D.N.Y. 1977).

ADA's provisions relating to employers,<sup>147</sup> public entities,<sup>148</sup> or places of public accommodation,<sup>149</sup> may apply. For example, a federal magistrate recently held that the Professional Golfers Association Tour is subject to the ADA in a suit brought by a physically impaired golfer seeking to ride in a golf cart in order to play professional golf.<sup>150</sup> Like similar claims brought by amateur athletes under the Rehabilitation Act, the key issues under the ADA are whether a professional athlete is "disabled" and whether exclusion solely because of an enhanced risk of physical harm to one's self is legally valid.

*A. Exclusion from Professional Athletics as Substantially Limiting a Major Life Activity*

To be protected by the ADA, a professional athlete must have a "disability," which requires proof that his or her physical impairment substantially limits a major life activity, has a record of such an impairment, or is regarded as having such an impairment.<sup>151</sup> The ADA's regulations broadly define "physical impairment," which encompasses a permanent condition such as a missing or non-functioning paired organ (e.g., an eye or kidney), spinal stenosis, or a cardiovascular abnormality.<sup>152</sup> Although these regulations expressly list "working" as a major life activity,<sup>153</sup> courts have held that the exclusion of a physically impaired person from only a particular job for a single employer or a narrow range of jobs does not substantially limit one's ability to work if he or she is eligible for other employment. For example, an individual with a physical abnormality which disqualifies him or her from a particular occupation such as a policeman,<sup>154</sup> or fireman,<sup>155</sup> but does not otherwise substantially limit another major life activity, is not "disabled" under the ADA.

The Equal Employment Opportunity Commission's (hereinafter "EEOC") interpretive guidelines, which accompany the ADA's regulations governing employment, provide that an individual is not substantially limited in working if he or she "is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent."<sup>156</sup> An

---

147. 42 U.S.C.A. § 12111(5)(A) (1995).

148. 42 U.S.C.A. § 12131 & 12132 (1995).

149. 42 U.S.C.A. § 12181(7)(L) (1995).

150. *Martin v PGA Tour, Inc.*, 984 F.Supp. 1320 (D. Or. 1998).

151. 42 U.S.C.A. § 12.102(2) (1995).

152. 29 C.F.R. § 1630.2 (h)(i) (1997).

153. 29 C.F.R. § 1630.2 (I) (1997).

154. *Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989).

155. *Welsh v. City of Tulsa, Oklahoma*, 977 F.2d 1415, 1417 (10th Cir. 1992).

156. 29 C.F.R. § 1630, Appendix § 1630.2(j) (1997).

illustrative example is “a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball.”<sup>157</sup> The baseball player’s physical impairment does not substantially limit his ability to engage in most other employment or other major life activities such as “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, [or] learning.”<sup>158</sup> This illustration suggests that a physically impaired professional athlete is not “disabled” unless he or she proves that the impairment substantially limits a major life activity other than merely working as a professional athlete.

Strict application of the “substantially limits a major life activity” requirement can lead to the result that certain physically impaired professional athletes are covered by the ADA, whereas, others are not. For example, a blind or deaf athlete is “disabled” because either impairment substantially limits, respectively, the major life activity of either seeing or hearing. On the other hand, an athlete with spinal stenosis or a cardiovascular abnormality may not be able to prove that either medical condition substantially limits a major life activity.<sup>159</sup> Yet the blind or deaf athletes are legally entitled to an individualized evaluation of their respective medical conditions, whereas, the other athletes are not. This is despite the fact that all of these athletes have the unique skills needed to play professional sports in spite of their physical impairment and are eligible for other non-athletic employment. There is no principled justification for protecting some physically impaired professional athletes under the ADA, but not others.

Even if a professional athlete’s physical impairment does not actually substantially limit a major life activity, he or she should be able to show he or she is regarded as substantially limited in the major life activity of working, which is an alternative means of satisfying the ADA’s definition of “disability.”<sup>160</sup> In construing the same statutory language under the Rehabilitation Act, the Supreme Court observed that “[C]ongress acknowledged that society’s accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment.”<sup>161</sup> Therefore, the “disability” requirement is satisfied when a person is regarded as substantially limited in a major life activity, according to the Court, because “[s]uch an

---

157. *Id.*

158. 29 C.F.R. § 1630 (i) (1997).

159. Courts have held that college athletes with either of these conditions are not “disabled” under the Rehabilitation Act. *See supra* notes 73-74 and 79-82 and accompanying text.

160. 42 U.S.C.A. § 12102(2) (1995).

161. *Arline*, 480 U.S. at 284.



impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."<sup>162</sup>

As a practical matter, a professional athlete is likely to assert an ADA claim only if the governing body for a professional sport, or all of the teams in a professional league, refuse to provide him or her with an opportunity to participate in a sport on the ground that his or her physical impairment is perceived as creating an undue risk of harm to him/herself. If a person is totally excluded from employment as a professional athlete, solely because of a fear that his or her physical impairment exposes him or her to an enhanced risk of personal injury, this effectively and substantially limits his or her ability to work because of all potential employers' negative reactions. Professional athletes train for many years to develop the specialized and unique skills necessary to earn their living.<sup>163</sup> These long years of training and commitment constitute a major life activity for a professional athlete,<sup>164</sup> and exclusion from a professional sport because of a perceived risk of harm to one's self substantially limits this major life activity.

The ADA's central purpose is to ensure that discrimination against a physically impaired person is medically justified based on an individualized evaluation of one's condition, rather than on an unfounded generalization or stereotype about the potential effects of a physical impairment.<sup>165</sup> As a matter of policy, it is appropriate to treat all physically impaired professional athletes the same in determining whether they are protected by the ADA. Each of them should have "the opportunity to have [his or her] condition evaluated in light of medical evidence,"<sup>166</sup> and the federal right to participate in one's chosen profession, namely professional athletes, unless exclusion therefrom is medically justified.

---

162. *Id.* at 283.

163. Enjoining a professional hockey league from preventing a one-eyed player from participating, one court observed: "The denial to plaintiff of an opportunity to play professional hockey in the AHL will result in the possibility of irreparable harm to plaintiff's professional hockey career. A young athlete's skills diminish and sometimes are irretrievably lost unless he is given an opportunity to practice and refine such skills at a certain level of proficiency." *Neeld*, 439 F. Supp. at 461.

164. One court has held that "intercollegiate athletics can be a major life activity" for a college athlete. *Pahulu*, 897 F. Supp. at 1393. Accordingly, a professional sport is a major life activity for a professional athlete.

165. *Anderson*, 794 F. Supp. at 342.

166. *Arline*, 480 U.S. at 286.

B. "Otherwise Qualified" to Participate in Professional Athletics

The ADA expressly states that a "significant risk to the health and safety of others"<sup>167</sup> is a legitimate basis for excluding a disabled person from employment, but does not state whether a risk of harm to one's self justifies discrimination against a physically impaired employee. However, the EEOC's employment regulations interpreting the ADA provide that "a significant risk of substantial harm to the health or safety of the individual or others" justifies exclusion from employment.<sup>168</sup> These regulations adopt the Supreme Court's *Arline* standard under the Rehabilitation Act, which requires an individualized medical assessment of a physically impaired person's condition in making this determination.<sup>169</sup>

Courts are divided as to whether risk of harm to one's self is a legally valid basis for exclusion from employment or other activity under the ADA.<sup>170</sup> In *Devlin v. Arizona Youth Soccer Association*,<sup>171</sup> a federal district court refused to strike a sports organization's affirmative defense that its exclusion of a youth soccer player is justified, because his participation "will pose a substantial risk of harm to him." The court allowed the soccer league to assert this defense and concluded, without elaboration, that there are unresolved issues of law and fact regarding this issue. However, in *Kohnke v. Delta Airlines, Inc.*,<sup>172</sup> another federal district court ruled that "potential harm to a disabled person himself" is not a permissible justification for employment discrimination under the ADA. The court held that the EEOC regulation, recognizing this defense, is contrary to the ADA's express language and its legislative history.

A professional sports team or event sponsor has a legitimate interest in protecting the health and safety of all participating athletes. Absent very clear evidence that this furthers congressional intent, the ADA should not be construed to completely disregard this valid interest by refusing to recognize a defense based on a significant risk of substantial

---

167. 42 U.S.C.A. § 12113(b) and 42 U.S.C.A. § 12111(3) (1995).

168. 29 C.F.R. § 1630.2(r) (1997) (emphasis added).

169. *Id.* See *supra* notes 65-68 and accompanying text.

170. Legal scholars also disagree whether risk of harm to one's self should legally justify exclusion of a physically impaired athlete from a sport under the ADA. Professor Adam Milani asserts that judicial recognition of a risk of harm to one's self defense is inconsistent with Congress' intended objectives in enacting the ADA. Milani, *supra* note 29. On the other hand, Professor Cathy Jones argues that exclusion of a physically impaired athlete should be legally permitted if necessary to prevent exposure to "a substantial risk of irreversible serious bodily injury or death to the athlete . . . which cannot be substantially prevented through 'reasonable accommodation.'" Jones, *supra* note 103, at 206 & 207.

171. 1996 WL 118445, at 4 (D. Ariz. 1996).

172. 932 F. Supp. 1110, 1113 (N.D. Ill. 1996).

personal injury to a professional athlete.<sup>173</sup> The ADA should not be judicially construed to provide an absolute right for a professional athlete to participate in a sport, even if he or she is unable to obtain medical clearance from any competent physician, including the one(s) of his or her choosing.

Unlike an amateur athlete, however, a professional athlete should not be bound by the team physician's medical judgment, regarding whether the athlete's physical impairment creates exposure to a significant risk of substantial personal harm. A professional athlete has a greater interest in pursuing his or her livelihood, with its potential multi-million dollar earning potential, than an amateur athlete does in participating in sports as part of the educational process or for other personal objectives.<sup>174</sup> Even though sponsors of amateur and professional sports both have a legitimate interest in protecting the health and safety of participants, a professional athlete's participation interests are entitled to more weight than those of an amateur athlete. Because exclusion from a professional sport has some significant adverse consequences to an athlete, he or she should be permitted to obtain second opinions regarding the medical risks of participation with his or her impairment.<sup>175</sup>

I propose adopting the athlete informed consent model for professional athletes, which would enable a professional athlete to choose to participate, despite medical disqualification by the team physician, if other competent medical authority clears him or her to play. Under this model, a physically impaired professional athlete has a legal right to choose to participate in a sport only if there is respected medical authority clearing him or her to do so. A professional athlete would not be conclusively bound by the team physician's recommendation that he or she be medically disqualified, but rather may select the physician(s) whose determination of the medical risks of playing a sport with his or her physical impairment would be controlling. For example, although they were precluded from playing intercollegiate sports under the team physician medical judgment model, the ADA would provide Nicholas

---

173. For a discussion of my arguments against construing the Rehabilitation Act in a similar manner, see *supra* notes 100-104 and accompanying text.

174. A physically impaired amateur athlete with the requisite ability and skills to play a professional sport may have a legal right to choose to participate at the professional level of competition. See *infra* note 176 and accompanying text.

175. In this regard, collective bargaining agreements governing the relationship between a league of professional teams and the players' union already may provide a player with the right to obtain a second medical evaluation of an employment-related injury or illness. See, e.g., Jeffrey S. Moorad, *Negotiating for the Professional Baseball Player*, 1 *LAW OF PROFESSIONAL AND AMATEUR SPORTS* 5-82, Chap. 5 (G.A. Uberstine, ed. 1997).

Knapp and Alani Pahulu with an opportunity to participate in professional sports, under the athlete informed consent model, because respected medical authority cleared them to participate.<sup>176</sup>

Under my proposed athlete informed consent model, a court's role would be to ensure that there is a reasonable medical basis for clearing a physically impaired professional athlete to participate in a sport. The court should not resolve conflicting testimony by medical experts as a matter of fact, but should limit its judicial inquiry to whether medical clearance of a professional athlete is "individualized, reasonably made, and based upon competent evidence as a matter of law."<sup>177</sup> If so, a professional athlete is permitted to participate if he or she chooses to assume the risk of future personal injury resulting from his or her physical impairment while playing the sport. The team or sponsoring entity should be immunized from tort liability for allowing a physically impaired professional athlete to choose to participate under these circumstances.<sup>178</sup>

## V. CONCLUSION

Determining whether a physically impaired athlete has a legal right under the Rehabilitation Act or ADA, to participate in a sport or athletic event, despite an enhanced risk of personal harm requires consideration of both the athlete's libertarian autonomy interest in participating and the athletic event sponsor's communitarian interest in protecting the athlete from an unreasonable risk of injury. Each side's interests are legitimate, but neither side's rights are absolute. I believe that the team physician medical judgment model best balances these respective interests in the context of amateur athletics whereas, the athlete informed consent model most appropriately balances these interests in the context of professional athletics, because professional athletes have a more substantial interest in participating in sports than do amateur athletes.

---

176. This model allows a professional athlete to participate despite medical disqualification by the team physician or athletic event sponsor's medical personnel if current consensus guidelines indicate playing a sport with a particular physical abnormality is medically safe.

177. This standard of review is the same as that used by the *Knapp* appellate court in applying the team physician medical judgment model. 101 F.3d at 485.

178. Mitten, *supra* note 28 at 1023-24; Jones, *supra* note 103 at 209-210.

