Cullen | Dykman

Interest Groups Support NCAA's Anti-Felon Policy on Appeal

January 14, 2016

Recently, three interest groups filed an amicus brief to support the National Collegiate Athletic Association's ("NCAA") policy that bars anyone who has been convicted of a felony from coaching in NCAA-certified high school tournaments.

By way of brief background, in 2003, the NCAA adopted a policy that barred all convicted felons from coaching NCAA-certified tournaments held for recruiting high school students to NCAA Division I Schools. In 2006, the NCAA modified the policy to allow individuals with non-violent felonies older than seven years to coach in these types of tournaments. However, in 2011, the NCAA subsequently reverted back to the original policy that bans all convicted felons from coaching NCAA-certified recruitment tournaments.

Dominic Hardie, an African-American coach of several high school women's basketball teams, was convicted of a drug felony in 2001 and was allowed to coach under the 2006 amendment; however, his renewal request for certification to coach was denied in accordance with the 2011 amendment. In 2013, Hardie filed a racial discrimination lawsuit in the U.S. District Court in San Diego, claiming that the NCAA's policy violates Title II of the Civil Rights Act of 1964 ("Title II") because the policy creates a disparate impact on African-Americans.

Title II states: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a).

According to the complaint, "Mr. Hardie is now barred for life from coaching, or otherwise interacting with his teams, at NCAA-certified basketball tournaments" because of a single felony conviction in 2001. "Policies that categorically exclude individuals with felony convictions are known to have a disparate impact on African Americans. Nationwide, African Americans are overrepresented in nearly every stage of the criminal justice process. African Americans are arrested at higher rates, convicted at higher rates, and incarcerated at disproportionate levels compared with their representation in the general population," said Mr. Hardie in the lawsuit.

Interestingly, the disparate impact doctrine has been recognized in Title VII cases, which prohibits employers from discriminating against employees on the basis of race, sex, color, national origin, and religion. Pursuant to the disparate impact doctrine as applied under Title VII, employers are prohibited from implementing a facially

neutral employment practice or policy that has a discriminatory effect or application. However, neither the United States Supreme Court nor the U.S. Court of Appeals for the Ninth Circuit has answered the question of whether the doctrine of disparate impact is applicable under Title II.

The district judge in this case, Judge Gonzalo P. Curiel, in granting the NCAA's motion for summary judgment, held that the text, legislative history, and judicial interpretation do not allow the disparate impact doctrine to be applied under Title II. Judge Curiel noted that "in light of Title II's ambiguity and the lack of precedent, many courts have avoided deciding the issue." Hardie v. Nat'l Collegiate Athletic Ass'n., 97 F. Supp. 3d 1163, 1165 (S.D. Cal. 2015).

Hardie filed an appeal in the U.S. Court of Appeals for the Ninth Circuit in April 2015. Most recently, the Pacific Legal Foundation, the Center for Equal Opportunity, and the Competitive Enterprise Institute filed an amicus brief in December 2015, arguing that Congress never indicated that it intended the disparate impact doctrine to be used in Title II claims. The brief argues that "disparate impact liability is problematic because it encourages what the Equal Protection Clause forbids: discrimination on the basis of race."

Employers are encouraged to check local case law in connection with Title II disparate impact claims, as jurisdictions have expressly taken opposing views on its applicability.

If you have any questions or concerns regarding employment or education-related issues, please contact James G. Ryan at jryan@cullenanddykman.com or at 516-357-3750.

Thank you to Garam Choe, a law clerk at Cullen and Dykman, for his help with this post.