

PHYSICIAN NIXES POST-INJURY RETURN TO FOOTBALL

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The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability. Title II of the ADA applies to public entities, including public parks and recreation agencies and public educational institutions. With or without reasonable accommodations, the ADA requires individuals with disabilities to be “otherwise qualified” for a particular program or activity. To be otherwise qualified, a disabled individual must meet the essential eligibility requirements for program participants. A disabled individual is not otherwise qualified when participation would pose a “direct threat” of serious injury or death to the participant or others. Moreover, the ADA would not require accommodations that fundamentally change an activity or pose an undue financial or administrative burden on the public entity.

As illustrated by the case described herein, federal courts will generally defer to the reasonable medical judgment of an agency’s designated physician when an “otherwise qualified” and/or “direct threat” determination for a disabled participant is based upon competent and individualized medical evidence.

CATASTROPHIC HEATSTROKE

In the case of *Class v. Towson University*, 806 F.3d 236; 2015 U.S. App. LEXIS 19772 (4<sup>th</sup> Cir. 11/13/2015), plaintiff Gavin Class alleged Towson University (TU) had violated Title II of the Americans with Disabilities Act (ADA) when he was excluded from the football program.

On August 12, 2013, during a football practice in 91 degrees of heat, Class collapsed with “exertional heatstroke.” He was transported to a hospital shock trauma unit where he remained in a coma for nine days and almost died. Multiple organ failure necessitated a liver transplant and numerous additional surgeries.

In January 2014, following a protracted recovery, Class returned to classes at TU and sought reinstatement on the football team. Applying its “Return-to-Play” policy, TU refused to clear Class to play football. TU based its decision on the opinion of the TU team physician, a board certified sports medicine doctor. The team physician thought it would present an unacceptable risk of serious injury or death to allow Class to participate in the football program. TU’s “Return-to-Play” policy gave the team physician “final authority” over the decision.

In his complaint, Class alleged his “inability to regulate his body temperature and his susceptibility to heatstroke” constituted a “disability” under the ADA. Moreover, Class claimed he was “qualified to play intercollegiate football if Towson University agreed to his proposed accommodations.”

The federal district court found TU had violated the ADA by denying Class the requested reasonable accommodations. TU appealed. On appeal, assuming Class was indeed “disabled” under the ADA, TU claimed Class was not an “otherwise qualified” individual for the football program with the requested accommodations. As noted by the federal appeals court, following his organ transplant hospitalization, Class had a heightened risk of infection and subsequent heatstroke.

## HEAT TOLERANCE TESTING

Because Class was a student-athlete seeking to return to play after an injury, TU's athletic staff had the team physician review his request. Following a review of his medical records, TU's team physician along with a team of board certified physicians in sports medicine unanimously concluded "Class could not safely participate fully in Towson University's football program."

Thereafter, TU had an institute conducting research on heat stroke and heat illness review Class' medical records and conduct a series of heat tolerance tests. Following this process, the recommendation was for Class to "only exercise in cool environments ranging from low to high intensity (including football practices), and only low to moderate intensity in warmer environments." Further, the institute's report recommended further testing "prior to any intense conditioning that is done in a warm to hot environment" to determine how Class would respond to "high exercise intensity coupled with heat exposure" if he was allowed to return to football practice in August.

Based on this report and the earlier review of the medical records, TU's team physician again refused to clear Class for participation in the football program. In the opinion of the TU team physician, Class had not demonstrated that he had "sufficient heat tolerance to handle competitive football practices, including scrimmages, and play outdoors in seasonal heat." In particular, the TU team physician noted that the heat tolerance tests conducted on Class "did not adequately mimic the conditions that Class would face playing competitive football." Further, "Class had not passed any test wearing the specialized padding recommended to protect his liver and the standard football gear, including the pads and helmet required for playing football."

Consistent with NCAA requirements and national best practices, Towson University applied its written Return-to-Play Policy, which provided that the University's Team Physician has the final and autonomous authority in deciding if and when an injured student-athlete may return to practice or competition. Moreover, TU's policy expressly provided "[a] student-athlete's private physician DOES NOT have any jurisdiction as to the participation status of the student-athlete." (Emphasis of Court).

## REINSTATEMENT DEMAND

Class retained legal counsel and made a formal demand to be fully reinstated in the football program. In response, based on the advice of medical professionals, TU maintained Class was "unable to return to playing football safely" and "no reasonable accommodation can be made to adequately protect him from potentially devastating health effects." Moreover, in the opinion of TU's physicians, "[r]outine temperature monitoring alone would not adequately provide for his safety, and the sports medicine professionals cannot fashion a reasonable or practical precaution that would adequately protect Mr. Class from another serious heat related illness."

In his complaint alleging violation of the ADA, Class contended he was "disabled" within the context of the ADA based on his "inability to regulate his body temperature and susceptibility to heat stroke substantially limit major life activities, including regulating body temperature, walking, standing and running, when he experiences a heat stroke." However, with "reasonable accommodations" required by the ADA for qualified individuals with a disability, Class claimed he could "fully return to football." Based on the institute report, Class contended "reasonable

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accommodations” would include TU monitoring his body temperature when performing new/unique exercise or conditioning sessions; monitoring his fluid needs and match his fluid losses; and conducting all exercise progression at the discretion and direct observation of a medical professional.

At trial, an athletic trainer and Ph.D. in exercise physiology, the chief operating officer of the institute which had issued a heat tolerance report on Class, testified that a “CorTemp” system would effectively monitor Class’ body temperature. Specifically, Class would “ingest a small electronic device that would track his internal body temperature and communicate the readings through a low-frequency radio waves to a nearby handheld monitor.” Further, the “CorTemp” system “would require that the monitor be positioned near Class for 3 to 5 seconds every 5 to 10 minutes, which would provide data with sufficient frequency to allow Class to cease physical activity before his internal temperature reached the dangerous level at which a heatstroke could occur.”

In the professional opinion of TU’s team physician, this testing and monitoring procedure did not alter her professional judgment to not clear Class "to return to football.” TU’s team physician reiterated her concern that the testing and monitoring system “was not conducted under conditions that mimicked actual football practice and games and in an environment reflecting Baltimore's heat and humidity.”

### OTHERWISE QUALIFIED?

Assuming Class was a “disabled individual” under the ADA based on an inability to regulate his body temperature during exertion, the federal appeals court noted that Class had to prove that he was "otherwise qualified" to participate in Towson University's football program. Specifically, Class would have to by establish “(1) that he could satisfy the essential eligibility requirements of the program and (2) if not, whether 'any reasonable accommodation by Towson University would enable him to meet these requirements."

Moreover, in conducting an “otherwise qualified” inquiry under the ADA, the federal appeals court acknowledged it “must be guided by facts, based on reasonable medical judgments given the state of medical knowledge, about the nature of the risk posed by an individual's participation in the program.”

According to TU, requiring clearance by the team physician under its Return-to-Play policy was an “essential eligibility requirement for participation in its football program.” TU maintained their policy reflected “the need that participation in athletics be conducted in a healthy and safe manner.”

Further, in determining “whether an educational institution's eligibility requirement is essential and whether it has been met,” the federal appeals court would “accord a measure of deference to the school's professional judgment.” Moreover, as noted by the court, the NCAA had filed an “amicus” (i.e., friend of the court) brief in this case supporting TU’s policy:

The NCAA, as amicus, explains that decisions about the impact of health and safety risks on players "are made daily" concerning a host of "medical conditions, such as concussion, cervical spine trauma, cardiac arrest, knee injuries, and more." Granting the Team Physician final clearance authority, a policy that is

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consistent with NCAA guidelines and national best practices, is a fair and reasonable manner for Towson University to coordinate these essential determinations for the unique and dynamic medical profiles of its several hundred student-athletes.

Accordingly, the federal appeals court concluded “Towson University's requirement that a student-athlete obtain the Team Physician's clearance before returning from injury is legitimately an essential eligibility requirement.”

In general, Class did not dispute that the required medical clearance was a legitimate and essential eligibility requirement for returning to football after an injury. However, under the circumstances of this particular case, Class contended “the Team Physician's medical opinion was based on her feelings, not on any medical or scientific evidence.” In so doing, Class claimed the team physician had “virtually no experience in dealing with heat stroke” and “never explained why it would be unsafe for Class to return to the football field.”

As characterized by Class the team physician “merely stated that she was concerned about his ability to thermoregulate, that she was concerned that he had a propensity for heat stroke, that any future heat stroke could be catastrophic.” Further, Class claimed the team physician “acknowledged that she was not aware of any scientific literature or research that supported her opinion.”

### GOOD FAITH MEDICAL DECISION

According to the federal appeals court, the specific issue within the context of the ADA was “whether the Team Physician's opinion was reasonable -- i.e., whether it was individualized, reasonably made, and based upon competent medical evidence.” In resolving this issue, the court acknowledged that it would “give the Team Physician's decision -- and derivatively, Towson University's decision -- a measure of deference.” That being said, in “considering whether the decision is reasonable,” the court further noted that it “must be satisfied that it was consistent with the University's statutory obligations to provide reasonable accommodations and not a pretext for illegal discrimination” prohibited by the ADA.

[I]n evaluating reasonableness, we must determine whether the Team Physician's decision and, derivatively, Towson University's decision (1) was a good-faith application of its policy to protect the health and safety of student-athletes, (2) was in compliance with the University's statutory obligations to provide reasonable accommodations, and (3) was not a disguise for discrimination under the ADA...

In the opinion of the court, a review of the record in this case indicated “Dr. Kindschi and Towson University applied the Return-to-Play Policy in good-faith and that the decision not to fully reinstate Class was not simply a pretext for unlawful discrimination.” Accordingly, the court focused its attention on “whether Dr. Kindschi and Towson University reasonably considered Class' proposed accommodations.”

### UNREASONABLE ACCOMMODATIONS?

As cited by the court, Class had proposed accommodations that he claimed “would satisfy

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Towson University's need for his healthy and safe participation in the football program.” Accordingly, Class contended the requested accommodations were reasonable within the context of the ADA and would “render him ‘qualified’ under Towson University's Return-to-Play Policy.” In addition to the “use of padding to protect his abdominal wall” weakened by multiple surgeries, Class proposed the following accommodations:

- (1) the condition that Class' internal temperature be closely monitored and
- (2) the condition that all exercise be done at the discretion and under the direct observation of a medical professional.

In response, TU claimed the proposed accommodations were “unreasonable,” and therefore not required by the ADA because the requested procedures “would not effectively satisfy Towson University's safety concerns” and “would not effectively reduce Class' risk of heatstroke.” Moreover, TU contended these proposed accommodations “would require fundamental changes in the nature of the football program.”

As cited by the federal appeals court, the ADA would not require a proposed accommodation under the following circumstances:

[A]n accommodation is unreasonable... if there is a high likelihood that the accommodation would not effectively allow the disabled individual to meet the eligibility requirements, or if it requires a fundamental alteration in the nature of the program.

In the opinion of the TU team physician, the requested accommodations would not “effectively eliminate the risk of a second catastrophic heatstroke. On the contrary, according to the team physician, “Class' full participation in the football program, even with the proposed accommodations, would unacceptably expose him to the risk of another heatstroke that could be fatal.”

As described by the federal appeals court, the role of the judiciary in such cases was limited to determining whether the team physician’s “professional judgment was supported by the record,” not “to agree or disagree with Dr. Kindschi's opinion or to weigh whether her evaluation is more persuasive than another doctor's.” In this particular instance, the federal court found the team physician’s professional judgment was supported by the record.

As noted by the court, Class himself had admitted to an "inability to regulate his body temperature and susceptibility to heat stroke." Further, evidence at trial had indicated “Class may be at an increased risk of a reoccurrence of heat stroke as a result of his original injury.”

Accordingly, the appeals court found the opinion of the TU team physician that “Class could not play football without the risk of serious injury or death was well supported.”

### UNREASONABLE HEALTH/SAFETY RISK

As noted by the court, the only remaining issue was whether it was reasonable for the team physician to conclude that the requested “temperature monitoring accommodation would not sufficiently reduce this risk” of serious injury or death.

In the opinion of the TU team physician, “the proposed accommodation to monitor Class’ internal body temperature throughout his football activity... would not adequately meet the needs of health and safety.” Specifically, the team physician was concerned “about the reliability of where the electronic heat sensor was in the GI system” because “digestion is a fairly individualized and even day-to-day process.” As applied to Class, the team physician found the team heat sensor “unreliability would be compounded by the difficulty of figuring out two-a-day practices with one CorTemp sensor.”

Moreover, the team physician indicated “she would not feel comfortable having Towson University’s trainers monitor Class’ internal temperature without a physician present.” In the opinion of the team physician, monitoring Class’ internal temperature was outside the beyond the scope of the TU trainers’ role. Moreover, even if “well implemented,” the team physician found the monitoring program “would not eliminate the meaningful risk of catastrophic reinjury.”

As noted by the federal appeals court, the expressed concerns of TU’s team physician were similarly reflected in the testimony of the institute officer which had issued the requested heat tolerance report on Class. Specifically, the institute officer conceded “the internal temperature monitoring could not ensure that Class would not suffer from another heatstroke while playing or practicing.” On the contrary, in the opinion of the institute officer, “[t]he monitoring would only facilitate the discretionary decision of whether it was necessary to remove him from the game or practice.”

In the opinion of federal appeals court, implementation of the requested monitoring procedure “would not guarantee” that Class would be removed from participation “sufficiently early” to avoid further injury. Moreover, the court found removing Class from football activity would effectively “deny Class the very participation that he seeks by the accommodation.” In light of such “serious caveats and precautions” surrounding a return to football for Class, the federal appeals court found the team physician’s decision was reasonable under the circumstances.

[Class] could not play as the coach might need if playing were to raise his internal temperature to a dangerous level, which itself would be an individualized threshold, would not be known with any certainty, and would be predicted only as a discretionary medical judgment that could prove to be wrong... And no one disputed that the monitoring effort would be conducted against the continuous and heightened risk of heatstroke and the reality that numerous athletes had died or suffered serious injury from it -- including Class himself.

#### REASONABLE MEDICAL JUDGEMENT

As noted by the court, the applicable legal standard for reviewing the team physician’s decision was whether the team physician’s “judgment was reasonable -- i.e., whether it was individualized to Class, was reasonably made, and was based on competent medical evidence.” In this particular instance, the federal appeals court found the team physician’s decision was “supported by legitimate health and safety concerns, manifested by the medical records, which were not eliminated by the proposed monitoring system.” In so doing, as a general principle, the federal court acknowledged “Courts are particularly ill-equipped to evaluate the medical ineffectiveness of proposed accommodations in safeguarding against significant health risks.”

On the same facts, another team physician at another university, reviewing the

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same medical history, physical evaluation, and medical recommendations, might reasonably decide that Class met the physical qualifications for playing on an intercollegiate [football] 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 that decision must be respected.

### FUNDAMENTAL ALTERATION

On appeal, TU had also contended “the temperature monitoring and medical supervision proposed by Class would fundamentally alter the nature of its football program.” The federal appeals court agreed.

As characterized by the federal appeals court, the proposed accommodations by Class would require TU to monitor his exercises and activities in the football program under the “direct observation of a medical professional.” To do so, however, the court found “Class' proposed accommodations would require Towson University's Team Physician to allow Class to play football and supervise his participation when, in her medical judgment, she has concluded that he should not be playing football under the circumstances.”

In the opinion of the federal appeals court, the TU team physician’s role was an “essential aspect of the football program. Accordingly, the court found Class’ proposed modification would “constitute a fundamental alteration in the nature of the [football] program” to effectively require the TU team physician to “allow Class to play football and supervise his participation when, in her medical judgment, she has concluded that he should not be playing football under the circumstances.”

### CONCLUSION

As a result, the federal appeals court concluded “the Team Physician’s judgment and, derivatively, Towson University's judgment to reject Class' proposed accommodations were not unreasonable in the context of the risks.” The federal appeals court, therefore, reversed the judgment of the federal district court that found TU had violated the ADA by denying Class the requested reasonable accommodations.

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