# POTTGEN V. THE MISSOURI STATE HIGH SCHOOL ACTIVITIES ASSOCIATION

United States Court of Appeals, Eighth Circuit, 1994.
40 F.3d 926.

BEAM, CIRCUIT JUDGE.

[The Missouri State High School Activities Association (MSHSAA) bars high school students who have reached the age of 19 before their school year begins from participating in interscholastic sports during that year. Edward Pottgen had been forced to repeat two years in early elementary school due to what was later diagnosed as a learning disability. With the help of specialized educational services, Pottgen's learning problems were resolved and he was able to progress through regular high school classes at the normal rate. The two years he had lost earlier, though, meant that Pottgen had reached 19 shortly before his senior year in high school. That meant he was ineligible to play baseball on the high school team of which he had been a member for the previous three years.

Pottgen petitioned the MSHSAA for an exemption from the age rule, but the Association refused to grant him a disability-based waiver. Pottgen sued in federal district court and secured an injunction against applying the MSHSAA rule to him, based on the Rehabilitation Act and the Americans with Disabilities Act. On appeal, the judges agreed that the key question under both Acts was whether the age limit and its application to Pottgen was an "essential eligibility requirement" for high school sports.]

* * *

We find that MSHSAA has demonstrated that the age limit is an essential eligibility requirement in a high school interscholastic program. An age limit helps reduce the competitive advantage flowing to teams using older athletes; protects younger athletes from harm; discourages student athletes from delaying their education to gain athletic maturity; and prevents over-zealous coaches from engaging in repeated red-shirting to gain a competitive advantage. These purposes are of immense importance in any interscholastic sports program.

Even though Pottgen cannot meet this essential eligibility requirement, he is "otherwise qualified" if reasonable accommodations would enable him to meet the age limit. See *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 n. 17 (1987); *Kohl v. Woodhaven Learning Ctr.*, 865 F.2d 930, 936 (8th Cir.1989). Reasonable accommodations do not require an institution "to lower or to effect substantial modifications of standards to accommodate a handicapped person." *Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979). Accommodations are not reasonable if they impose "undue financial and administrative burdens" or if they require a "fundamental alteration in the nature of [the] program." *Arline*, 480 U.S. at 287 n.17 (citations omitted).

Since Pottgen is already older than the MSHSAA age limit, the only possible accommodation is to waive the essential requirement itself.[4] Although Pottgen contends an age limit waiver is a reasonable accommodation based on his disability, we disagree. Waiving an essential eligibility standard would constitute a fundamental alteration in the nature of the baseball program. Other than waiving the age limit, no manner, method, or means is available which would permit Pottgen to satisfy the age limit. Consequently, no reasonable accommodations exist.

---

[4] Other accommodations may exist when a younger student realizes that he will not be able to meet the age requirement when he is a senior. For example, MSHSAA allows eighth grade students to participate on a high school team if they will be ineligible as a high school senior. This accommodation permits students to play for four years at the high school level.

Since Pottgen can never meet the essential eligibility requirement, he is not an "otherwise qualified" individual. Section 504 was designed only to extend protection to those potentially able to meet the essential eligibility requirements of a program or activity. See *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768 (8th Cir.1987). As a result, the district court erred by granting the injunction based on Pottgen's Rehabilitation Act claim.

2. Title II of the ADA

* * *

To determine whether Pottgen was a "qualified individual" for ADA purposes, the district court conducted an individualized inquiry into the necessity of the age limit in Pottgen's case. Such an individualized inquiry is inappropriate at this stage. Instead, to determine whether Pottgen is a "qualified individual" under the ADA, we must first determine whether the age limit is an essential eligibility requirement by reviewing the importance of the requirement to the interscholastic baseball program. If this requirement is essential, we then determine whether Pottgen meets this requirement with or without modification. It is at this later stage that the ADA requires an individualized inquiry.

The dissent disagrees with this holding and would impose an individualized "essential eligibility requirement" inquiry at the first stage. We think this is not required, and for good reason. A public entity could never know the outer boundaries of its "services, programs or activities." A requirement could be deemed essential for one person with a disability but immaterial for another similarly, but not identically, situated individual. MSHSAA's interscholastic baseball program demonstrates this proposition. The dissent admits that the age requirement is "admittedly salutary" but believes it must fall away for Pottgen because an individualized fact-finding inquiry found him "not appreciably larger than the average eighteen-year-old" and not "a threat to the safety of others." If this is the query, MSHSAA would need to establish a fact-finding mechanism for each individual seeking to attack a program requirement. At that time, MSHSAA would have to show the essential nature of each allegedly offending program requirement as it applies to the complaining individual. The dissent's approach requires thorough evidentiary hearings at each stage of the process. Clearly the ADA imposes no such duty. Indeed, such an approach flies in the face of the *Arline* Court's statement that "accommodation is not reasonable if it either imposes 'undue financial and administrative burdens' [on the public entity] or requires 'a fundamental alteration in the nature of [the] program.' " 480 U.S. at 287 n.17.

Consistent with our Rehabilitation Act analysis, we find MSHSAA has demonstrated that the age limit is an essential eligibility requirement of the interscholastic baseball program. Again, Pottgen alleges he can meet the eligibility requirement if MSHSAA waives it for him. In conformity with our previous finding, we conclude that this is not a reasonable modification.

Thus, we find that Pottgen is not a "qualified individual" under the ADA. The district court erred in granting a preliminary injunction based on recovery under this Act.[1]

* * *

Reversed and remanded.

ARNOLD, CHIEF JUDGE, dissenting.

In my view, the courts are obligated by statute to look at plaintiffs as individuals before they decide whether someone can meet the essential requirements of an eligibility rule like the one

---

[1] For an argument *PGA Tour, Inc. v. Martin* supersedes the prior circuit split and mandates individualized review of waivers for high school athletes with disabilities who do not qualify to participate as a result of their state's maximum-age-limit regulations, see Jeffrey Mongiello, *Title II and High School Athletics Age Limits: Individualized Assessments for Student-Athletes with Disabilities After* PGA Tour, Inc. v. Martin, 89 U. Det. Mercy L. Rev. 35 (2011).

before us in the present case. Such an individualized inquiry, I believe, shows that the age requirement, as applied to Ed Pottgen, is not essential to the goals of the Missouri State High School Activities Association. I therefore respectfully dissent.

I have little to add to Judge Shaw's excellent opinion for the District Court. For me, this case is largely controlled by the words of the Americans With Disabilities Act of 1990, 42 U.S.C. § 12132, and by regulations issued under the Act. The statute provides, in relevant part, that

> no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

There is no doubt that Ed Pottgen has a learning disability (for which he is now adequately compensating), and that, by reason of this disability, he has become unable to meet the Activities Association's age requirements. The Court today holds, however, that Ed is not a "qualified individual."

The statute itself defines this term. "Qualified individual with a disability" means

> an individual with a disability, who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for . . . participation in programs or activities provided by a public entity.

42 U.S.C.A. § 12131(2). So, by the express words of Congress, it is not necessary for a person to meet all eligibility requirements. Instead, if a proposed modification of those requirements is "reasonable," a person can be a "qualified individual." The question therefore is whether it is "reasonable" to require the Activities Association to modify or waive the age requirement in the case of Ed Pottgen. The age criterion would not have to be abandoned completely: Ed would have been eligible if the requirement had been modified by only thirty-five days. He was that close to complete and literal compliance with all of the Activities Association's rules.

I agree with the Court that if a requirement is "essential" to a program or activity, a waiver or modification of that requirement would not be "reasonable" within the meaning of the statute. But how do we determine what is "essential"? The regulations interpreting the statute are of some help in answering that question. Under 28 C.F.R. § 35.130(b)(7) (1994),

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

Was high-school baseball competition in Missouri fundamentally altered when Ed Pottgen was allowed to play one more year? I think not, and here the District Court's findings of fact become important. According to the Activities Association itself, there are three reasons for the age requirement. First, there is a desire to protect the safety of younger athletes against whom an older athlete might compete. Second, the Association wishes to reduce the competitive advantage that results when older students play, because of their presumed greater maturity. And third, the Association wishes to discourage students from delaying their education to gain athletic maturity. There is no contention whatever in the present case that Ed Pottgen deliberately repeated the first and third grades in order to make himself eligible to play baseball another year at age nineteen. The District Court found, moreover, "that any competitive advantage resulting from plaintiff's age is de minimis." The Court further found that the Activities Association made no individualized review of plaintiff's circumstances and gave no consideration to the issue of safety when it denied plaintiff's request for a waiver of the age rule. Finally, the Court found that "plaintiff does not appear to constitute a threat to the safety of others." Plaintiff is not appreciably larger than the average eighteen-year-old.

In other words, the age requirement could be modified for this individual player without doing violence to the admittedly salutary purposes underlying the age rule. But instead of looking at the rule's operation in the individual case of Ed Pottgen, both the Activities Association and this Court simply recite the rule's general justifications (which are not in dispute) and mechanically apply it across the board. But if a rule can be modified without doing violence to its essential purposes, as the District Court has found in the present case, I do not believe that it can be "essential" to the nature of the program or activity to refuse to modify the rule.

The Court avoids this issue by holding that "an individualized inquiry into the necessity of the age limit in Pottgen's case . . . is inappropriate. . . ." With respect, I find no such principle in the words of the statute. If an eligibility requirement can be reasonably modified to make someone eligible, that person is a qualified individual. In determining this issue, it seems to me entirely appropriate to focus on the effect that modification of the requirement for the individual in question would have on the nature of the program. When the case is looked at from this point of view, it becomes clear that the Association could easily bend to accommodate Ed Pottgen without breaking anything essential. For these reasons, I would affirm the preliminary injunction entered by the District Court.

---

A subsequent case, *Sandison v. Michigan High School Athletic Association*, 64 F.3d 1026 (6th Cir.1995), followed much the same path as the majority in *Pottgen*. Because of a learning disability, Ronald Sandison fell behind his Michigan counterparts right in kindergarten. However, through special programs that have been developed for problems such as Sandison's "auditory input disability, which hampered [his] ability to distinguish between similar sounds," Sandison's problems were solved and he was able to attend and graduate from the regular high school. However, the student did not get to his final high school year until he was 19, and thus was ineligible to continue on the school's track and field team under a Michigan High School Athletic Association's rule that was essentially the same as Missouri's.

Sandison won injunctive relief from a federal judge who concluded that individualized reasonable accommodation was needed for learning disabled students, and that a waiver in Sandison's case would have been reasonable: (i) because he was not a star athlete as some older students might be, and (ii) track and field was not a contact sport that posed risks of injury from overage and oversized students. On appeal, the Sixth Circuit reversed that verdict for essentially the same reasons as the Eighth Circuit majority in *Pottgen*. The following passage captures their rationale for rejecting the view of the district court judge and Judge Arnold in his *Pottgen* dissent that only *individualized* accommodation was reasonable for these age-based eligibility rules.

> [T]he district court erred in finding that waiver of Regulation I § 2 constituted a reasonable accommodation. First, we agree with the court in *Pottgen* that waiver of the age restriction fundamentally alters the sports program. Due to the usual ages of first-year high school students, high school sports programs generally involve competitors between fourteen and eighteen years of age. Removing the age restriction injects into competition students older than the vast majority of other students, and the record shows that the older students are generally more physically mature than younger students. Expanding the sports program to include older students works a fundamental alteration.
>
> Second, although the plaintiffs assert that introducing their average athletic skills into track and cross-country competition would not fundamentally alter the program, the record does not reveal how the MHSAA, or anyone, can make that competitive unfairness determination without an undue burden. The MHSAA's expert explained that five factors weigh in deciding whether an athlete possessed an unfair competitive

advantage due to age: chronological age, physical maturity, athletic experience, athletic skill level, and mental ability to process sports strategy. It is plainly an undue burden to require high school coaches and hired physicians to determine whether these factors render a student's age an unfair competitive advantage. The determination would have to be made relative to the skill level of each participating member of opposing teams and the team as a unit. And of course each team member and the team as a unit would present a different skill level. Indeed, the determination would also have to be made relative to the skill level of the would-be athlete whom the older student displaced from the team. It is unreasonable to call upon coaches and physicians to make these near-impossible determinations.

Finally, we note that there is a significant peculiarity in trying to characterize the waiver of the age restriction as a "reasonable accommodation" of the plaintiffs' respective learning disability. Ordinarily, an accommodation of an individual's disability operates so that the disability is overcome and the disability no longer prevents the individual from participating. In this case, although playing high school sports undoubtedly helped the plaintiffs progress through high school, the waiver of the age restriction is not directed at helping them overcome learning disabilities; the waiver merely removes the age ceiling as an obstacle.

64 F.3d at 1035.

---

While the ultimate verdicts were the same, the circuit court opinions in *Pottgen* and *Sandison* adopted a much more limited reading of the "reasonable accommodation" standard in federal disability law than did the district court opinion in *Ganden* that we read earlier. As we will see in Chapter 12, in the 2001 decision in the *Casey Martin* "golf cart" case, the Supreme Court has accepted the use of an individualized determination of whether a rules waiver for a particular plaintiff would constitute a fundamental alteration under the ADA. We shall have to wait to see how this decision will become the standard and have much broader implications for disability claims lodged outside the sports context. In the meantime, the facts of these cases (and *Butts*) give us a somewhat more informed base upon which to judge the appropriateness of age restraints on otherwise eligible students participating in sports. What are your views on that score?