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The Clash of Sports Officials and Fans: When Free Speech Borders Harassment *Higgins v. Kentucky Sports Radio, LLC* United States Court of Appeals for the Sixth Circuit

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Abstract

In the case of Higgins v. Kentucky Sports Radio LLC (2020), John Higgins was officiating an Elite Eight March Madness game in 2017, where the University of Kentucky (UK) was facing the University of North Carolina at Chapel Hill (UNC). After UK lost the game, Kentucky fans were upset and blamed Higgins for the loss. Two of these fans included Matthew Jones and Drew Franklin, a host and writer for Kentucky Sports Radio, respectively. Following the loss, Jones and Franklin criticized Higgins and his roofing business through their radio station. His business was bombarded with calls, death threats, and negative reviews. Higgins sought damages in excess of $75,000 from Kentucky Sports Radio for inflicting harm through their commentary. The purpose of this law review is to examine the rights of sports officials and fans, summarize the case facts and court decisions, and determine how the ruling impacts sports officials broadly.

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Introduction

Sports officials have been around for centuries. The first emergence of sports officiating was at the ancient Olympic Games in 776 BC. The sports official position was a highly sought-after and important role, only reserved for the noble class. These sports officials, or 'Hellanodics', underwent extensive preparation before the Olympic Games, including swearing the oath of office to be fair and maintain the integrity of the Games (Duvinage, 2012). While sports officiating has changed over time (e.g., more accessible position, representing various levels of sport and qualifications) it still holds the same importance to the game and the spectator. Sports officiating also has the same goal—to preside over competitive sporting events and maintain the standards of play (U.S. Bureau of Labor Statistics, 2022).

With the growth of social media, the creation of instant replay, and the increased streaming access of games, fans are more involved in the game than ever before (Branch, 2019). The job of being a sports official has become increasingly more difficult. It has become increasingly more common for sports officials to experience greater criticism, be accused of incompetence, and be blamed for game outcomes. Sports officials are under the highest amount of scrutiny than they have ever been. Within the sport of basketball, although it is played between two teams, a third team has been formed: the officials. The purpose of this law review is to examine the case of *Higgins v. Kentucky Sports Radio, LLC* (2020) and discuss implications for sports associations, sports officials, and radio commentators.

Facts of the Case

On March 26, 2017, John Higgins was refereeing an Elite Eight basketball game between The University of North Carolina at Chapel Hill (UNC) and the University of Kentucky (UK) during the NCAA March Madness tournament. Scoring with less than a second left on the clock, UNC pulled away with a win while the UK coaches, players, and fanbase were livid with the outcome. Post-game press conferences and opinions from UK's players and coaches were not favorable toward Higgins' calls. Higgins was critiqued by John Calipari, UK's head coach, in the press conference immediately preceding the game, saying, "It's amazing that we were competitive in

a game where [the referees] practically fouled out my team." Later, he said it was "amazing" that they had a chance to win. The heaviest criticism, however, came from Matthew Jones, a host for Kentucky Sports Radio. Jones criticized the way Higgins called fouls by calling the officiating "putrid" and referenced other previous matches in which Higgins was refereeing where Kentucky lost, saying Higgins had been "part of some of Kentucky's most painful losses." Soon after the game, the unsatisfied Kentucky fans learned of Higgins' business, Weatherguard Roofing. An anonymous user posted a video titled, "John Higgins[']s Sabotage of Kentucky," and provided a link to Facebook at the end of the video to leave a negative review for Higgins' roofing business. Although Jones did not promote the fans leaving negative reviews of Higgins' business, he did devote airtime on his talk show to talk about his refereeing.

Another employee of Kentucky Sports Radio, writer Drew Franklin, published on the company's website a series of articles that criticized Higgins' refereeing. The following day, Franklin posted an article mentioning Higgins' roofing business was "getting CRUSHED on its Facebook page." Franklin stated that Kentucky Sports Radio did not condone what was occurring to Higgins' business, yet he continued to reproduce comments that were fake and abusive toward the referee. Jones later referenced the comments that were falsified and abusive, saying that they were "funny" and asked "how many of those [commentors] would like to write" for Kentucky Sports Radio.

As a result of these comments, Higgins' business suffered irreversible damage. Two days after the games, 3,000 calls were received, causing the voicemail system to crash. Thus, real customers could not reach Higgins and many false claims for service were surfacing. The reputational harm of the business dropped his ratings on Google by more than 3 stars because of over 181 false reviews that were created. He went from being the top-rated business in Omaha, Nebraska with 4.8 out of 5 stars to the worst-rated business with 1.2 out of 5 stars. Despite having a negative impact, it eventually led to threats to Higgins and his family. Of the 3,000 phone calls that were received to their business within the two days after the game, 800 of them were threatening. People were also calling the Higgins' home phone, where they received 30 threatening calls. Of the 30 calls to their home, at least 12 of them could have resulted in criminal inves-

tigations. To stop the negative reviews and reputable harm online, Higgins shut down Weatherguard Roofing's business page.

Case History

On Oct. 3, 2017, John Higgins, Carol Higgins, and Weatherguard, Inc. ("plaintiffs") filed a legal complaint against Matthew Jones, Drew Franklin, and Kentucky Sports Radio ("defendants") on the basis of intentional infliction of emotional distress, invasion of privacy, tortious interference with a business relationship or expectancy, and civil conspiracy. The defendants moved to dismiss the complaint for lack of jurisdiction. Once the case was transferred, with the court's permission, the plaintiffs filed an amended complaint adding claims of negligence, harassment, and engaging in harassing communications. The defendants filed a new motion to dismiss, arguing the alleged tortious speech that gave rise to the seven complaints is protected under the First Amendment to the U.S. Constitution. The district court granted the defendants' motion on the grounds that their speech was broadcast publicly (radio and online) and pertained to matters of public concern, and therefore, is protected under the First Amendment. In response, the plaintiffs appealed the case to the court of appeals.

Case Analysis

On appeal, the court reduced the seven complaints to a single theory of liability and deliberated whether the First Amendment freedom of speech and the press bars liability. The First Amendment protects radio commentators' speech—including inappropriate, offensive, or controversial language—to promote the "free flow of ideas and opinions on matters of public interest" (*Hustler Magazine, Inc. v. Falwell*, 1988). To determine if the First Amendment shields the defendants' speech from liability, the court first examined whether the speech involved a public or private concern. According to *San Diego v. Roe* (2004), a public concern is a "subject of legitimate news interest" or "a subject of general interest and of value and concern to the public," whereas a private concern is everything else.

Public or Private Concern

When considering the subject of the speech, the court found the defendants' commentary on Higgins' officiating a matter of

public concern due to the prominence of the sports industry and the role of a sports official. College sports is a multi-billion-dollar business impacting athletic programs and spectators alike (Parrot, 2021). Success in the March Madness tournament can boost athletic recruitment and student enrollment while also engaging the public in dialogue, dispute, memories, and excitement (*Higgins v. Kentucky Sports Radio, LLC*, 2020). The entertainment value of sports includes commentary about sports, such as periodicals dedicated exclusively to sports (*Time, Inc. v. Johnston*, 1971). Officiating is a notorious topic of discussion among spectators and commentators, given a referee's call can decide the outcome of a game (*Mayer v. Belichick*, 2010). As such, commentary about sports officiating is considered a matter of public concern.

In the case of *Higgins v. Kentucky Sports Radio, LLC* (2020), the court determined that "just as commentators must be able to discuss the quality of the officiating, they must be free to comment on the fans' reaction to the officiating." In response, the plaintiffs argued the defendants "should have left [Higgins'] roofing business out of it" as it was a private matter. However, the court found Higgins did not treat his Weatherguard, Inc. roofing business as a private matter, as he used his visibility and status as a referee to promote his business through his website "rooferees.com." Further, the court found the sports radio hosts discussed Higgins' business in relation to his performance as a referee, not attacking the business outright. Therefore, comments pertaining to Higgins' business were not deemed a purely private matter.

Higgins further questioned the issue of public concern by arguing the defendants' commentary "fanned the flames of his harassment," making the harassment a matter of interest to the public and thus subject to media coverage. However, the court found the fan harassment of Higgins' officiating separate from Kentucky Sports Radio's coverage. The radio station merely brought light to the fan harassment. Further, the court found Kentucky Sports Radio's coverage justified by the high-profile nature of the game Higgins officiated, regardless of the commentary pertaining to Higgins' harassment. Ultimately, the court found the defendants' commentary on Higgins' business also a public matter.

First Amendment Exceptions

Not all speech receives immunity under the First Amendment. Therefore, the plaintiffs argued exceptions to First Amendment protection: incitement to lawlessness and defamation. To demonstrate incitement to lawlessness, a plaintiff must show 1) the speech "explicitly or implicitly encouraged … lawless action;" 2) "the speaker intends that his speech will result in … lawless action;" and 3) "the imminent use of lawless action is the likely result of his speech" (*Bible Believers v. Wayne County*, 2015). Though the defendants occasionally approved "fans' over-the-top behavior," they did not specifically advocate for fans to attack Higgins' business. The commentary came in response to fan harassment rather than inciting that behavior.

When considering the speakers' intention, the sports radio hosts made at least six statements discouraging fans' harassment (e.g., "We here at [Kentucky Sports Radio] do not condone activity from Big Blue Nation on John Higgins' roofing company's Facebook page"). However, Higgins pointed to a statement made by Jones articulating, "maybe [he and his colleagues at Kentucky Sports radio] were to blame" for notifying fans that Higgins' roofing business uses the "rooferees" tagline. However, the court found this information to be public prior to the commentary, and thus was protected by the First Amendment. Higgins then argued that even if Kentucky Sports Radio discouraged lawless action, they did so with a "wink and a nod." While sarcasm can transform protected speech into incitement, the court found Kentucky Sports Radio's poor job condemning fan behavior did not mean they intended the harassment.

Next, Higgins claimed Kentucky Sports Radio should have censored themselves given the context of the Elite Eight game. However, the court clarified, "we cannot curtail a speaker's First Amendment protection on the grounds that an otherwise permissible message might touch a nerve with an easily agitated audience," describing the internet as a "vast and often unpleasant place" (*Brintley v. Aeroquip Credit Union*, 2019). Speech that reports on unpleasant subjects, such as controversial social issues, is in greatest need of protection. If unpleasant speech was prohibited, few people could speak freely. Collectively, the defendants' commentary was found to not incite lawlessness.

In a surprise and seemingly last-ditch effort, the plaintiffs introduced the claim of conspiracy to defame. Moreover, Higgins argued Kentucky Sports Radio conspired with its listeners to defame him. To prove defamation, the plaintiffs must show Kentucky Sports Radio acted with actual malice because they are public figures and "that it knowingly made false statements or acted with reckless disregard for the truth of its statements." The plaintiffs' complaint merely demonstrated Kentucky Sports Radio repeated "potentially false reviews generated by other users," which does not constitute defamation.

Court Decision

The court of appeals affirmed the district court's dismissal of the plaintiff's seven claims—asserting damages for unfavorable statements made about Higgins and his roofing business—based on the defendants' First Amendment rights. In their closing remarks, the judges emphasized the difference between commenting on harassment and causing it, pointing to the First Amendment protections afforded radio commentators. For sports officials, such as Higgins, they caution, "those who step into the public limelight, even temporarily, must face the hazard that sometimes comes with it."

Implications

The popularity of sports has continued to rise year after year in the United States. At the youth level, approximately 73% of high school students participate in organized sports (Aspen Institute, 2021), with parents and spectators increasingly invested in the outcome of games. While only 7% of athletes transition from high school to collegiate sports and only 2% of athletes transition from collegiate to professional sports (NCAA, 2020), viewership of collegiate and professional sports is widespread. In 2021, sports accounted for 95 of the top 100 programs watched on television (Karp, 2022). March Madness, specifically, has experienced a continuous increase in viewership over the years. The championship game in 2022 experienced the largest audience and the most minutes watched for a single game in March Madness history (NCAA, 2022). However, with the increase in popularity of sports comes an increase in scrutiny, especially of the officials. The *Higgins v. Kentucky Sports Radio, LLC* (2020) case illuminates strategies sports associations, sports officials, and radio commentators can take to mitigate harm.

Sports associations at all levels have an opportunity to directly and indirectly influence fan scrutiny of sports officials. As poor fan behavior has been found to contribute to the current shortage of officials (Niehoff, 2021), sports associations should be proactive in managing fans at the game. Dr. Jamieson (2021, para. 5) recommends six strategies to mitigate abuse of officials:

- Early detection and ejection of unruly fans
- Development of well-publicized codes of conduct
- Strict enforcement of codes of conduct
- Better ways to address player frustration and anger through training and coaching
- Increase the presence and action of security personnel
- Develop policies in support of state laws to better educate people on the consequences of their actions of intimidating and abusing officials

Directly addressing fan behavior during games may have a positive trickle-down effect and reduce fan harassment of officials outside of games.

To indirectly deter fan scrutiny of officials, sports associations can require heightened continuing education and facilitate regular sports-specific training for officials, such as pre-recorded demonstration videos and short quizzes, to increase officials' accuracy and consistency of calls. Officials can also be encouraged to watch the recorded games through video hosting services such as Hutl (Hite, 2021) and review the playback of their calls and positioning on the court/field to assess their performance for future improvement. Lastly, the opportunity to officiate high-profile games—where fan scrutiny intensifies—should be awarded to officials who have performed the best throughout the season, rather than just the veteran and highly regarded officials, as we currently see in the March Madness tournament (Forde, 2022).

For sports officials interested in using their visibility/status as a referee to secure business outside of officiating, they must recognize their (potential) public figure status limits their protection from fan harassment, which can impact their business. By using online platforms to promote their business, sports officials open themselves up to negative comments and reviews—potentially fueled by fan retaliation—that can impact their business. Officials should be aware of

the limited protections they receive when hosting a business page on social media. For example, Facebook's terms of service (2022) states, "We do not control or direct what people and others do or say, and we are not responsible for their actions or conduct (whether online or offline) or any content they share (including offensive, inappropriate, obscene, unlawful, and other objectionable content.)" A greater understanding of how a sports official's public figure status can be both helpful and hurtful will prepare officials for navigating the public eye.

Radio commentators may also glean socially conscious guidelines for their speech from the case reviewed. Though the host and writer for Kentucky Sports Radio were found not liable for inciting lawlessness or defamation, the court elected to encourage common decency—using one's platform to end harassment rather than aggravate it—which Kentucky Sports Radio fell short of. The First Amendment rights of radio commentators to engage in unpleasant speech is certainly reinforced by this case. However, commentators may consider the consequences of their speech and power to positively influence their listeners for a better society.

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