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Sixth Circuit Rules in NCAA Referee First Amendment Lawsuit

A unanimous panel of the Sixth Circuit Court of Appeals [affirmed the dismissal](#) of all claims by an NCAA referee against popular sports radio hosts and a website, holding that the First Amendment barred the referee's state tort claims. The referee alleged that the defendants' commentary about his calls in an NCAA Elite Eight game, and about the fan reaction to his officiating after the game, encouraged fans to make harassing communications and post false negative online reviews of his roofing business. The Court held that the First Amendment protected the defendants' commentary because the comments constituted speech on a matter of public concern. It added that the statements alleged in the referee's complaint could not be characterized as "incitement" that was excluded from First Amendment protections, even at the motion to dismiss stage.

The suit arose from the fan reaction following the Elite Eight game in the 2017 NCAA Tournament between the University of Kentucky and the University of North Carolina, which Kentucky narrowly lost on a last-second shot by UNC. After the game, Kentucky fans and many in the media, including the defendants expressed widespread criticism of the referee's officiating. Some fans began posting negative and harassing comments about the referee's business online. Defendants discussed this fan conduct on-air and online. While the defendants repeatedly stated they did not condone or agree with efforts to disrupt the referee's personal life, the referee alleged that the content of the reporting on the fan conduct nonetheless signaled an implicit approval and encouragement.

The Sixth Circuit, in an opinion written by Judge Jeffrey Sutton, held the defendants' commentary was protected from state tort liability under the First Amendment to the U.S. Constitution. The Court observed that the U.S. Supreme Court has afforded special protection from tort liability for speech related to matters of public concern, and concluded that public commentary about a high-profile college sports event, as well as coverage of fan reaction

toward an official in such an event, fell within that category. The Court explained, “[p]ublic commentary about sports, some have said, is no less protected than commentary about ‘economics [or] politics.’” Opinion at 6 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 678 (1984) (Brennan, J., concurring in part and dissenting in part)).

The Sixth Circuit also rejected the referee’s argument that the defendants’ speech constituted “incitement” of unlawful conduct, which would be excluded from First Amendment protection. The Court held that the referee’s allegations did not satisfy the first element of the constitutional incitement test, because the defendants did not “specifically advocate” for listeners to take unlawful action. Opinion at 9. The Court noted that it may be possible to imagine cases when a speaker could use sarcasm or a “wink and a nod” to incite unlawfulness, even though the speaker’s literal words did not advocate unlawful conduct, but concluded, “that doesn’t describe this case.” Opinion at 11–12. The Court acknowledged that the defendants may have done a “poor job dissuading listeners from mischief,” but concluded, “a party cannot be sued for incitement merely because it failed to condemn the behavior of others with sufficient firmness or clarity.” Opinion at 12.

The Court emphasized the dangers of hinging First Amendment protection for speech on the reaction of third parties who hear it: “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.... Any other approach would especially burden the speech most in need of a safe harbor: discussions of hot-button and divisive social issues.” Opinion at 12.

The defendants were represented by Griffin Terry Sumner and Jason Renzelmann of Frost Brown Todd LLC. Jason Renzelmann argued the appeal.

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