IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LUCAS SMITH,

OPINION and ORDER

Plaintiff,

01-C-0678-C

v.

CHIPPEWA FALLS AREA
UNIFIED SCHOOL DISTRICT
and BOARD OF EDUCATION,

Defendants.

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Plaintiff Lucas Smith brought this civil action for injunctive relief and money damages against defendants Chippewa Falls Area Unified School District and Board of Education in the Circuit Court for Chippewa County, Wisconsin. Plaintiff alleged that defendants had violated his rights under the Wisconsin Constitution, the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 when they suspended him from participation on the wrestling team at Chippewa Falls High School for the remainder of the school year, without providing him a hearing that met the state and federal constitutional prerequisites of due process. Plaintiff sought an emergency preliminary injunction, asserting

that he will suffer irreparable harm if he is not allowed to wrestle on the high school team. Defendants removed the case to federal court on December 5, 2001, pursuant to 28 U.S.C. § 1441(b), because it is a civil action founded on a claim or right arising under the Constitution of the United States.

Before scheduling the motion for preliminary injunction for an evidentiary hearing, I asked counsel to brief the question whether plaintiff has a liberty or property interest in participating on the high school wrestling team because my initial review of the complaint suggested that he might not have either interest. Having now had the benefit of the briefing, I conclude that no evidentiary hearing is necessary because plaintiff cannot show he has a liberty or property interest at stake that entitles him to the federal constitutional protections of due process. With no substantial federal question at stake and the likelihood that this case will be dismissed for lack of any such question, I decline to take up plaintiff's supplemental state claim. It is a complex claim that should be decided by a state court. Accordingly, I will deny plaintiff's motion for a preliminary injunction in all respects.

Plaintiff's "brief" consists of nothing more than the reproduction of a portion of an opinion written by the Honorable Lynn Adelman in a case involving a challenge similar to the one brought by plaintiff in this case. Butler v. Oak Creek-Franklin School District, 116 F. Supp. 2d (E.D. Wis. 2000). Although Judge Adelman denied the plaintiff's motion for a preliminary injunction, he found that the student might have a *property* interest arising out

of state laws and regulations that required due process protection. He found no grounds for the plaintiff's assertion that he had a constitutionally protected *liberty* interest in not being removed from an athletic team. I infer from the fact that plaintiff has said nothing about a liberty interest but has rested instead on Judge Adelman's opinion that he does not dispute the judge's conclusion that removal from team sports raises no liberty interest and that he is not asserting such a claim in this court.

With all respect to Judge Adelman and his careful analysis of the law, I cannot agree with his conclusion that a student barred from participating in high school athletics might have a property interest in such participation that makes the due process clause of the United States Constitution applicable. To have such an interest a plaintiff must show that he has a legitimate claim of entitlement and not just a mere expectation. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). "A 'legitimate claim of entitlement' is one that is legally enforceable – one based on statutes or regulations containing 'explicitly mandatory language' that links 'specified substantive predicates' to prescribed outcomes." Miller v. Crystal Lake Park District, 47 F.3d 865, 867 (7th Cir. 1995) (quoting Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 463 (1989)). Property interests may arise from "mutually explicit understandings," that is, a contract, as well as from statutory language.

I can find no reference in Judge Adelman's opinion to any source that sets out a specified substantive predicate to a prescribed outcome, such as language to the effect that

"students participating in interscholastic athletics at public high schools cannot be barred from continuing to do so unless they violate a state law or regulation promulgated by the Wisconsin Department of Public Instruction." The sources that he cites concern themselves with procedures. For example, Wis. Stat. § 118.125 governs pupil records, their use, maintenance and confidentiality. Subsection 5(b) prohibits school districts from using law enforcement records as the sole basis for expelling or suspending a pupil or disciplining a pupil under the school district's athletic code. Wis. Stat. § 118.127(2) governs the school district's disclosure of law enforcement records, including their use for disciplining students under the athletic code. Judge Adelman thought that the special reference to athletic discipline in these two statutes demonstrated the state's recognition that "when a school offers the opportunity to participate in high school athletics, it is an important benefit and can be taken away only in a reasonable manner." Butler, 116 F. Supp. 2d at 1049. He found additional support for his conclusion in a 1949 Attorney General's Opinion addressing various topics related to the Wisconsin Interscholastic Athletic Association, see 38 Wis. Op. Att. Gen. Wis. 85 (1949), The Wisconsin Interscholastic Athletic Association Rules of Eligibility and the Oak Creek High School Student/Parent Handbook. The Attorney General's Opinion was that rules governing student athletes must be reasonable and must be applied in a reasonable manner.

Judge Adelman found that the WIAA Rules of Eligibility required participating

schools to provide an opportunity for a hearing to any student accused of an athletic code violation. (Plaintiff did not supply the rules of eligibility to this court so I cannot tell what else the rules provide.) Finally, he was persuaded by the omission from the school's handbook of any reference to participation in athletics as being a privilege, in contrast to a similar reference in relation to other school activities, that a student participating in athletics would expect that he would be allowed to continue unless there was a basis for a suspension and an opportunity for the student to deny the accusation. Butler, 116 F.3d at 1049.

The state laws cited by Judge Adelman prescribe certain procedures and nothing more. The establishment of procedural entitlements does not make the procedural protections property themselves, enforceable under the United States Constitution. Archie v. City of Racine, 847 F.2d 1211, 1217 (7th Cir. 1988) (citing Olim v. Wakinekona, 461 U.S. 238, 248-51 (1983), among other cases). Regulating the use of certain records in athletic disciplinary proceedings is a far cry from saying that an athlete has a right to continued participation on a sports team unless and until he violates a specific provision of the law, regulations or school policy.

As for the Attorney General's Opinion, it is merely the Attorney General's interpretation of state law; it is not an independent source of a substantive state right. The WIAA Rules of Eligibility impose requirements on member schools; it is not reasonable to think that these rules would be a source of enforceable rights for student athletes.

(Additionally, the Chippewa Falls High School handbook on student activity makes clear what the Oak Creek-Franklin School District handbook did not, by saying specifically that "[t]he co-curricular activity program is a privilege that complements the academic program.")

The majority of courts that have considered the question have concluded that participation in interscholastic athletics is not a protected property right. See, e.g., Brands v. Sheldon Community School, 671 F. Supp. 627, 631 (S.D. Iowa 1987) (collecting cases). The possibility of qualifying for an athletic scholarship does not change the analysis. "Once awarded, a college scholarship may give rise to a property interest in its continuation . . . . [However], when scholarships are awarded at the discretion of a college coach, and such discretion has not yet been exercised, no property interest in the receipt of a scholarship can exist, and the plaintiff cannot invoke his expectation that he would earn a scholarship at the state tournament in order to claim a property interest in wrestling there." Id.

Butler is one of the few cases in which a court has held that a student might have a property right in continued participation in athletics. It relies in part on Davis v. Central Dauphin School District School Board, 466 F. Supp. 1259 (M.D. Pa. 1979), in which the court reached the same result. It is worth noting that not only are these cases in the minority, but that in both cases the courts denied the student plaintiffs preliminary injunctive relief after finding that they had received all the protection to which they were entitled by having advance notice of the charges against them and an opportunity to tell

their side of the story. These results conform to the holding in Goss v. Lopez, 419 U.S. 565 (1975), a case involving a temporary suspension from school, which the Court found was an adverse action that implicated the due process clause. The Court held that even when the school's action brings the due process clause into play, students are entitled to no more than oral or written notice of the charges against them and, if they contest the charges, an explanation of the evidence against them and an opportunity to present their side of the story, which may be merely an informal discussion between the student and principal. Id. at 581-82. Thus, even if I were to find that plaintiff had an arguable due process claim based on his removal from the wrestling team, I would have to deny his motion for a preliminary injunction because the allegations of his complaint make it clear that he was provided more procedural protections than those to which he was entitled under the United States Constitution.

I conclude that plaintiff has failed to show that he would have even the slightest likelihood of showing ultimate success on the merits of his due process claim. Therefore, it is unnecessary to discuss the other prongs of the showing that a plaintiff must make to obtain a preliminary injunction, such as the lack of any legal remedy, irreparable harm, the interests of the public and the relative harms to both sides.

ORDER

IT IS ORDERED that the motion for preliminary injunction filed by plaintiff Lucas Smith is DENIED for plaintiff's failure to show that he has any likelihood of ultimate success on his claim that his continued participation on the Chippewa Falls High School wrestling team denies him a property interest implicating the protections of the due process clause of the Fourteenth Amendment of the United States Constitution.

Entered this 19th day of December, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge