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Inter-Collegiate Athletics, Disability and the Rehabilitation Act: Where Does the Issue Lie?

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INTER-COLLEGIATE ATHLETICS, DISABILITY AND THE REHABILITATION ACT: WHERE DOES THE ISSUE LIE?

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I. INTRODUCTION

In 1990, Loyola Marymount basketball star Hank Gathers collapsed in the middle of a basketball game. Gathers died because of a heart disorder. Other inter-collegiate athletes have died unexpectedly on the playing field from similar physical conditions.[1] Some universities have taken action to avoid another Gathers story by preventing athletes with certain health problems from participating actively in inter-collegiate athletics.[2] Those athletes affected by the universities' actions, however, have not accepted

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[1] Dale Taylor, a Southern University linebacker, suffering from the same condition as Hank Gathers, collapsed and died during conditioning drills. Associated Press, *Southern University Linebacker Dies During Practice*, THE DETROIT NEWS, Jan. 28, 1998.

[2] *See* Knapp v. Northwestern, 101 F.3d 473 (7th Cir. 1996); Pahulu v. University of Kansas, 897 F.Supp. 1387 (D. Kan. 1995). Athletes at these universities are allowed to maintain their scholarships and receive all the other benefits shared by inter-collegiate athletes. *Knapp*, 101 F.3d at 477.

restriction on participation idly. They have brought actions for injunctions against the universities under the Rehabilitation Act of 1973.[3] The student-athletes claim that they are disabled within the meaning of the Rehabilitation Act because, for them, athletics constitutes *learning*, a *major life activity*.[4] Therefore, they argue that the universities violated the Act by imposing a *substantial limitation* on a *major life activity*.[5]

Recent case law has been split on whether athletics is a *major life activity*[6] and the Supreme Court has never addressed the issue. The lower courts are also split on the issue as to whether a subjective standard or an objective standard should be applied in determining whether inter-collegiate athletics is a major life activity.[7] The courts agree, though, that regardless of whether athletics can be considered a major life activity, the athlete must be "otherwise qualified,"[8] as set forth below.

The two leading cases on these issues, specifically in the arena of inter-collegiate athletics, are *Pahulu v. University of Kansas*[9] and *Knapp v. Northwestern University*.[10] *Knapp* and *Pahulu* disagree on whether athletics constitute a *major life activity*.[11] However, both uphold the university's right

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[3] 29 U.S.C. § 794(a)(1997). Neither claimant in *Knapp* or *Pahulu*, the only cases dealing specifically with the issues raised in this Article, brought suit under the American with Disabilities Act (ADA). Private universities are covered under Title III of the ADA, 42 U.S.C.S. 12181 (7)(J)(1997), and public universities are covered under Title II of the ADA. *See* 42 U.S.C.S. 12131 (1)(B) 1998.

The problem with this argument is that authority exists holding that, "[b]ecause of the substantial similarity between the ADA and Rehabilitation Act, courts normally treat precedent under the two statutes as interchangeable." *See* Valle v. The City of Chicago, 982 F.Supp. 560, 562 n. 2 (1997), citing to Gile v. United Airlines, 95 F.3d 492, 496 (7th Cir. 1996). *But cf.* Amy L. Hennen, *Protecting Addicts in the Employment Arena: Chartering a Course Toward Tolerance*, 15 LAW & INEQ. 157 (1997), citing to Kathy A. Wolverton, *Protecting Alcoholics Under the Americans with Disabilities Act and New York law: A Statutory Tug of War*, 57 ALB. L. REV. 527, 541 (1993) (questioning the value of applying cases under the Rehabilitation Act and those under the ADA interchangeably because the Rehabilitation Act only applies to the federal government and employers receiving federal assistance and the ADA applies to the private as well as the public sector). In addition, case law in the athletic and academic setting has also applied the ADA. *See* Martin v. PGA Tour, Inc., 1998 WL 67529 (D.Or.); Sandison v. Michigan High Sch. Athletic Ass'n (MHSSA), 64 F.3d 1026 (6th Cir. 1995); McPherson v. MHSAA, 119 F.3d 453 (6th Cir. 1997). Thus, why claims where not brought under the ADA is an open question. Nevertheless, for purposes of this article, the analysis will focus on the Rehabilitation Act.

[4] *See Knapp*, 101 F.3d 473; *Pahulu*, 897 F.Supp. 1387 .

[5] *Pahulu*, 897 F.Supp. at 1390,1391; *Knapp*, 101 F.3d at 478,479.

[6] *See Pahulu*, 897 F.Supp. at 1393; *Knapp*, 101 F. 3d at 481.

[7] *See id.* at 1392,1393; *id* at 481.

[8] *See id.* at 1389, citing to 29 U.S.C. § 794 and Eivins v. Adventist Health Sys. E. & Middle Am., Inc., 651 F.Supp. 340,341 (D.Kan. 1987); *Knapp, 101 F.3d* at 478, citing to Byrne v. Bd. of Educ., Sch. of W. Allis-W. Milwaukee, 979 F.2d 560, 563 (7th Cir. 1992).

[9] *Pahulu*, 897 F.Supp. 1387.

[10] *Knapp*, 101 F.3d 473.

[11] *See Knapp*, 101 F.3d 473, 481; *Pahulu*, 897 F.Supp. 1387, 1393.

to prevent the athlete from competing because the athlete was not "otherwise qualified" for the position sought.[12] These cases demonstrate that only after concluding that an athlete is otherwise qualified, taking into account the risk of future injury, does it become necessary to address whether athletics constitutes a *major life activity*.

However, both cases fail to adequately frame their opinions. They present an otherwise qualified analysis that does not fully address a second and interrelated issue: whether the university can reasonably accommodate the athlete.[13] Recently, the importance of the reasonable accommodation analysis was demonstrated in the popular case of *Martin v. PGA Tour.*[14] In *Martin,* the court held the requested accommodation of a golf cart to assist a professional golfer with a congenital deformity in his severely atrophied right leg, which weakened during competition, was eminently reasonable under the American With Disabilities Act.[15] The Supreme Court also recognized the importance of a university's ability to reasonably accommodate a student in *Southeastern Community College v. Davis.*[16] Further, the regulations promulgated pursuant to the Rehabilitation Act provide guidance as to what modifications post-secondary institutions are required to make.[17]

Once the *otherwise qualified* analysis and *reasonable accommodation* analysis are satisfied, the courts can analyze which test should be applied in

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12 *See Knapp*, 101 F.3d 473, 482; *Pahulu*, 897 F.Supp. 1387, 1393.

13 *See* Patricia A. Solfaro, *Civil Rights - Courts Should Use A Individualized Analysis When Determining Whether To Grant A Waiver Of An Athletic Conference Age Eligibility Rule,* 7 SETON HALL J. SPORT L. 185 (1997), citing to Johnson v. Florida High Sch. Activities Ass'n, Inc., 899 F.Supp. 579, 584 (M.D. Fla. 1995), *vacated in* 102 F.3d 1172 (11th Cir. 1997); Dennin v. Connecticut Interscholastic Conferences, Inc., 913 F.Supp. 663 (2d Cir. 1996). In deciding whether the plaintiff has established a substantial likelihood of prevailing on the merits as to both the Rehabilitation Act claim and the Americans with Disabilities Act claim, the most important issue is the "otherwise qualified" requirement as supplemented by the "reasonable accommodation" requirement.

14 *Martin,* 1998 WL 67529.

15 *Id.* at *12.

16 In Southeastern Cmty. Coll. v. Davis, 442 U.S. 397 (1979), a blind individual brought an action against a university under the Civil Rights Act of 1871 and the Rehabilitation Act of 1973 because she was denied admission to nursing school because of a hearing disability, the Court held that her disorder could not have been accommodated according to the Code of Federal Regulations' requirements for post-secondary institutions on auxiliary aids. *See* 34 C.F.R. § 84.44 (1997). It also would have imposed, contrary to the Rehabilitation Act's directives, substantial modifications to the academic program and the curriculum. *Davis,* 442 U.S. at 405. Even though the court held that the modifications necessary to accommodate a nurse applicant with a hearing disability was beyond those required by the regulations because they would fundamentally alter the nature of the program, the court also held that, "Identification of those instances where a refusal to accommodate the needs of the disabled person amounts to discrimination against the handicapped continues to be an important responsibility." *Id.* at 410, 413.

17 34 C.F.R. § 84.44 (1997).

determining whether inter-collegiate athletics is a major life activity. There are three approaches a court can take: a subjective test, which simply focuses on the individual's feelings towards the role of athletics in his life; an objective test that focuses on objective factors applicable to the individual; or an objective test that focuses on objective factors applicable to the average person. The purely subjective test is not applied. The test is not workable because it puts in motion a slippery slope of ruling any activity a major life activity simply because an individual *feels* it is a major life activity. Courts have chosen, and should choose, between the objective test as to the individual[18] and the objective test as to the average person, on which to base their analysis. Case law applying the objective test as to the individual has consistently argued that athletics could constitute a *major life activity*. The objective test as to the average person has conventionally been applied by the courts in arguing against classifying athletics as a major life activity.[19]

Only when the athlete can prove that he is otherwise qualified and the university can reasonably accommodate him, should he be allowed to argue that the objective test as to the individual is applicable in assessing whether the sport is a major life activity for him. However, if a court chooses to apply the objective test as to the average person, an individualized inquiry as to the objective value athletics has on the athlete's life would be irrelevant.

Regardless of the preliminary issues that need to be addressed, there is no doubt that the question of whether inter-collegiate athletics constitute a major life activity is a pressing issue that needs to be resolved. Resolving the issue would be helpful in future cases similar to *Pahulu* and *Knapp* where an athlete may be considered otherwise qualified and able to be reasonably accommodated. In addition, the issues presented arise outside of the context of inter-collegiate athletics in cases dealing with diseases and disorders where one limitation on the claimant is that he is physically unable to participate in athletics.[20] Addressing whether inter-collegiate athletics is a major life activity helps courts deal with claims under the Rehabilitation Act factually different than those presented in this article.

This article presents an orderly analysis of the issues courts need to resolve first before deciding whether inter-collegiate athletics can constitute a major life activity for the athlete. Part II starts by introducing the Rehabilitation Act and the difficulties encountered by the courts since its

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[18] The objective test as to the individual is the same as the subjective test applied by the courts. *See Pahulu*, 897 F.Supp at 1392,1393; *Knapp*, 101 F.3d at 481. The courts applying the subjective standard actually are applying objective factors as to the individual. Anytime this Comment addresses the objective test as to the individual, it refers to the subjective test as applied by the courts.

[19] *See Pahulu*, 897 F.Supp at 1392; *Knapp*, 101 F.3d at 480-82.

[20] *See* Doe v. Dolton Elementary Sch. Dist., 694 F.Supp. 440 (N.D. Ill. 1988); *See also* Scharff v. Frank, 791 F.Supp. 182 (S.D. Ohio 1991).

passage in interpreting its provisions. This Part discusses how the courts assess claims arising under the Rehabilitation Act. Part III analyzes the standard used in determining whether an inter-collegiate athlete is *otherwise qualified*. This Part also analyzes the arguments the universities and athletes will make in addressing whether a university can reasonably accommodate an athlete. Part IV analyzes the objective test as to the individual and the objective test as to the average person, as applied by courts in determining whether inter-collegiate athletics is a *major life activity*. Part V contends that the objective test as to the individual is the correct standard to be used in determining whether athletics is a *major life activity*. Finally, the article concludes with an overview of the present situation and the need to resolve these disputed issues.

II. THE REHABILITATION ACT AND THE DIFFICULTIES ENCOUNTERED IN INTERPRETING ITS PROVISIONS SINCE ITS PASSAGE

A. *The Rehabilitation Act*

The Rehabilitation Act of 1973 was passed for the express purpose of providing "even handed treatment of qualified handicapped persons and to prevent discrimination because of a perceived inability to function in a particular program."[21] The Act was "meant to enable handicapped persons to achieve their full productive capability, foster their self-sufficiency and independence, and integrate them into the community."[22] In order to prevail under the Rehabilitation Act, an individual must prove that: (1) he is disabled within the meaning of the Act, (2) he is otherwise qualified for the position sought, (3) he has been excluded from the position solely because of his disability, and (4) the position exists as part of a program or activity receiving federal financial assistance.[23] Requirements one and two are 'hurdles' the athletes must overcome, while requirements three and four are more easily satisfied.

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[21] 34 C.F.R. § 104.47 (1997).

[22] Donald Jay Olenick, *Accommodating the Handicapped: Rehabilitating Section 504 After* Southeastern, 80 COLUM. L. REV. 171, 173 (1980), citing to 29 U.S.C. § 701 (1976) (current version at Rehabilitation Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 122(a), 92 Stat. at 2984) (statement of purpose); S. REP. NO. 1135, 92d CONG., 2d Sess. 3 (1972); S. REP. NO. 318, *supra* note 6, at 3-4, 18-19, [1973] U.S. CODE CONG. & AD. NEWS at 2077-79,2091-92; S. REP. NO. 1297, *supra* note 3, at 31-47, 55-58, [1974] U.S. CODE CONG. & AD. NEWS at 6382-97, 6405-08; 119 CONG. REC. 24,586 (1973) (remarks of Sen. Cranston); 118 Cong. Rec. 9495 (1972) (remarks of Senator Humphrey); 119 CONG. REC. 24,566, 24,589 (1973).

[23] 29 U.S.C. § 794 (1997).

With respect to requirement one, 29 U.S.C. Section 706(8)(B)[24] defines when an individual could be considered disabled. An individual with a disability is:

> [A]ny person who: (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.[25]

The regulations provide, in essence, that "a 'physical impairment' is any physiological disorder or condition that affects a bodily system."[26] Regulations promulgated pursuant to the Act define *major life activity* as basic functions of life "such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[27]

With respect to requirement two, the regulations define a qualified handicapped individual as one "who meets the academic and technical standards requisite to admission or participation" in the educational program[28] and an otherwise qualified individual as one "who is able to meet all of the program's requirements in spite of his handicap."[29]

B. Difficulties Encountered Since Its Passage

Knapp and *Pahulu* have directly addressed the issue of whether athletics can be considered a major life activity for inter-collegiate athlete's such that a university's refusal to allow them to compete because of the risk of possible

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[24] 29 U.S.C. § 706(8)(B)(1997).

[25] *Id.*

[26] *See* William C. Tausigg, *Weighing In Against Obesity Discrimination*: Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals *and The Recognition Of Obesity As A Disability Under The Rehabilitation Act And The Americans With Disabilities Act*, 35 B.C. L. REV. 927, 936 (1994); *See* 45 C.F.R. § 84.3(j)(2)(i); 29 C.F.R. § 1630.2(h) (Physical impairment means "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive genito-urinary; hematic and lymphatic; skin; and endocrine." 45 C.F.R. § 84.3(j)(2)(i). In addition, "in Appendix A to the health and Human Services ('HHS') regulations, 'Analysis of Final Regulation,' HHS expands on its definition of impairment by stating that it includes 'drug addiction and alcoholism' and 'any condition which is mental or physical but whose precise nature is not at present known.' 45 C.F.R. § 84, App. A, Subpart A(3)." Tausigg, William C. "Weighing In Against Obesity Discrimination: *Cook v. Rhode Island*, Department of Mental Health, Retardation, and Hospitals And The Recognition Of Obesity As A Disability Under The Rehabilitation Act And The Americans With Disabilities Act", 35 B.C. L. REV. 927, 963 n.80 (1994).

[27] 45 C.F.R. § 84.3(j)(2)(ii) (1997).

[28] 45 C.F.R. § 84.3(k)(3) (1997).

[29] *Id.*

future injury from a physical condition would be a substantial limitation on a major life activity. These cases, however, do not fit neatly into the Rehabilitation Act analysis.[30] For instance, the possibility of a heart or neurological problem on the playing field is not a continuing problem like common disabilities such as blindness or paralysis. Whenever an athlete with a heart or neurological disorder is competing, but not suffering the disorder, he is, in essence, not disabled at that time.[31] However, the athlete's disorder does pose a constant risk against all major life activities if the feared injury actually results in substantial injury or death.[32] Since the passage of the Rehabilitation Act, many courts have attempted to define the boundaries of what is meant by a *substantial limitation* and a *major life activity*.

With respect to *substantial limitations*, the Department of Health and Human Services openly acknowledged in commentary after the regulations were passed that it "did not believe that a definition is possible at this time."[33] Although the Department defined *major life activity*, claims of disability in the context of athletics were not easily classified into the Code's enumeration.[34] The two major life activities *Pahulu* and *Knapp* noted athletics could fall under are *learning* and *working*.[35] However, the courts focus their opinions on *learning*.[36] In *Pahulu*, a college student was disqualified from participating

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30 *Knapp*, 101 F.3d at 479.

31 *Id.*

32 *Id.*

33 34 C.F.R. § 104, App. A at 372; 84 C.F.R. § 84, App. A at 355; *Pahulu*, 897 F.Supp. at 1392-93.

34 *See* Frederick B. Weber, Pahulu v. Univ. of Kansas, 6 DEPAUL-LCA J. ART & ENT. L. 271, 273 (1996) (stating "[t]he court had no trouble concluding that Plaintiff's condition was a physical impairment. The real issue in the court's analysis of whether or not Plaintiff was 'disabled' within the meaning of the Act, was whether or not playing college football was a major life activity)."

35 *Pahulu*, 897 F.Supp. at 1391; *Knapp*, 101 F.3d at 479. *See also* Weber, *supra* note 34, at 273, stating "A recurring theme in the cases and regulations was that major life activities included both learning and working."

36 *Pahulu*, 897 F.Supp. at 1391; *Knapp* at 479. This article will limit its analysis to *learning*, as did the courts in *Knapp* and *Pahulu*, because it is the most viable argument for the athletes. Although the argument can be made that athletics is in and of itself a major life activity (this is rejected in *Knapp* at 480), this was not argued by either Knapp or Pahulu and involves an analysis not within the scope of this article. However, the possibility of raising the argument that athletics may constitute *working*, another enumerated major life activity warrants sufficient importance to briefly address the issue.

For many athletes, choosing to compete in professional athletics is one of the most important career moves in their lives. Athletics has become for some their source of livelihood. In determining whether inter-collegiate athletics constitutes *working*, an argument may be made, as did the district court opinion in *Knapp*, that the individual must prove that he has a substantial economic interest that affects his ability to earn a livelihood. *See* Knapp v. Northwestern Univ., 1996 WL 495559 (N.D.Ill. 1996), *rev'd in Knapp*, 101 F.3d 473. The district court held that "[i]n order for this Court to interfere in the internal operations of Northwestern University, the NCAA or the Big 10 Conference, Knapp must establish a substantial economic interest that affects his ability to earn a livelihood." *Id.* at *2. Although the district court opinion was overruled, the Court of Appeals does not address the criteria in the university-athletics

in athletics by a team physician upon discovery of a congenitally narrow cervical canal. There was a high risk that there may be a repeat occurrence with potentially severe neurological injury. The court held that athletics might constitute a major life activity for the individual athlete under the category of *learning*. In contrast, the court in *Knapp* prevented a student-athlete from playing on the basketball team because of a heart disorder. There was a small risk of future injury. The court held that athletics is not, in and of itself, a *major life activity*.

The courts are not only split on the issue of whether inter-collegiate athletics can constitute a *major life activity*, but also on whether athletics in general can constitute a major life activity. In *Doe v. Dolton Elementary School District*,[37] the court viewed contact sports as a major life activity for a child with A.I.D.S.[38] However, in *Sharff v. Frank*,[39] the court held that a postal worker with a history of musculoskeletal injuries was not substantially impaired in a major life activity when she could not participate in competitive sporting events and other unusually demanding physical activities.[40]

Courts have also been split on whether to apply an objective standard as to the individual, or an objective standard as to the average person, in determining whether athletics constitute a *major life activity*. In *Dutton v.*

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setting for establishing whether athletics can constitute *working* and no other case law address this issue in the fact scenario presented in this article.

Case law argues against classifying the possibility of a professional career in athletics as a present economic interest. For instance, it is well established that "[w]hile participation in intercollegiate athletics has been recognized as a training ground for a professional basketball career, the possibility of obtaining that professional basketball career is too speculative to even constitute a present economic interest." *See Knapp*, 1996 WL 495559 *2 (the lower court *working* analysis was not addressed, in the court of appeals), citing to Hawkins v. NCAA, 652 F.Supp. 602, 611(C.D. Ill. 1987); Colorado Seminary v. NCAA, 417 F.Supp. 885, 895 (D.Co. 1976), *aff'd* 570 F.2d 320 (10th Cir. 1978).

However, the argument can be made that Hank Gathers was a promising young athlete whose possibility of a professional career in athletics was not mere speculation. It was most likely going to happen. Thus, in determining whether athletics can constitute the major life activity of working, the courts should apply a case-by-case determination. This determination involves weighing objective factors specific to the individual in assessing the possibility of a future career in athletics. The end result will be that only a relatively few athlete's can claim that athletics constitutes *working* for them under the present economic interest argument.

Another possible argument for classifying athletics as *working* is that an athletes scholarship and, consequently, financial well-being is dependent on his performing on the team. Athletics constitutes *working* because the scholarship money is given in return for a service provided through the *employer*, namely, the university. This was not an issue in the two cases because athletes were allowed to keep their scholarships.

37 *Doe*, 694 F.Supp. 440.

38 *Id.* at 445.

39 *Scharff*, 791 F.Supp. 182.

40 *Id.* at 182.

Johnson County Bd. Of County Commissioners,[41] the court held that a "[p]laintiff's status as a disabled individual is a highly fact-sensitive issue, requiring an individualized inquiry and a case-by-case determination."[42] *Pahulu* extends this reasoning by applying an objective standard as to the individual when determining the underlying issue of whether athletics can constitute a major life activity. *Knapp*, though, favors an objective test as to the average person in resolving the issue.[43] As in *Knapp*, the court in *Welsh v. City of Tulsa, Okla.*,[44] also appears to adopt an objective standard as to the average person in defining major life activity by holding that the major life activity of working does not mean working in a job of one's choice.[45]

Notwithstanding the foregoing, an athlete must be deemed otherwise qualified and capable of being reasonably accommodated before the courts have to address which standard to apply in determining whether athletics is a *major life activity*.

III. *OTHERWISE QUALIFIED* AND THE ROLE OF *REASONABLE ACCOMMODATION*

A. *The Standard Used In Determining Whether An Individual Is Otherwise Qualified*

It is well accepted that whether a person is *otherwise qualified* under the Rehabilitation Act is primarily a factual inquiry.[46] *Pahulu* and *Knapp* recognize the right of the university to determine that an individual is not otherwise medically qualified to play. *Knapp* held that the role of the court was to "make sure that the decision-maker (the university) has reasonably considered and relied upon sufficient evidence specific to the individual and the potential injury, not to determine on its own which evidence it believes is more persuasive."[47] The courts held that universities are only required to make a rational and reasonable determination that the athletes were not *otherwise qualified* to perform the activity when the possibility of future injury exists.

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41 Dutton v. Johnson County Bd. of County Comm'rs, 859 F.Supp. 498 (D.Kan. 1994).

42 *Id.* at 506.

43 *Knapp*, 101 F.3d 473, 481.

44 Welsh v. City of Tulsa, Okla., 977 F.2d 1415 (10th Cir. 1992).

45 *Knapp*, 101 F.3d at 481, citing to *Welsh*, 977 F.2d at 1417.

46 *See* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) (With respect to the otherwise qualified analysis, the Supreme Court stated that, "[t]o answer this question (whether Arline was otherwise qualified) in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact." *Id.* at 287. *See also Pahulu*, 897 F.Supp. at 1394, citing to McGee v. Rice, 21 F.3d 1121 (10th Cir. 1994) (unpublished).

47 *Knapp*, 101 F.3d at 484.

In determining whether someone is *otherwise qualified*, the risk of injury can be a decisive issue. In *School Bd. of Nassau County v. Arline*, the Supreme Court held that the inquiry into whether someone is otherwise qualified should include "[f]acts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk . . ., (b) the duration of the risk . . ., [and] (c) the severity of the risk . . . ."[48]

In the context of inter-collegiate athletes, *Knapp* applies the standard used in *Montolete v. Bolger*.[49] Applying *Arline's* reasoning, the court in *Montolete* held that "in order to exclude such individuals, there must be a showing of a reasonable probability of substantial harm."[50] The court further held that the employer:

> must gather all relevant information regarding the applicant's work history and medical history, and independently assess both the probability and severity of potential injury. This involves, of course, a case-by-case analysis of the applicant and the particular job.[51]

In *Pahulu* and *Knapp*, the courts held that the severity of the potential injury was high, namely death,[52] and, therefore, the athletes were otherwise qualified.

Because it is a case-by-case analysis, there is the possibility that an athlete may be deemed otherwise qualified, thus bringing into issue whether athletics can be considered a *major life activity*. Even in *Knapp*, the court acknowledged another team physician reviewing the same information available to those at Northwestern University might reasonably decide that Knapp met all the physical qualifications for playing on an inter-collegiate basketball team.[53]

In addition to weighing risk of injury and other pertinent factual determinations in determining whether an individual is *otherwise qualified*, courts must also take into account whether an athlete can be reasonably accommodated. *Pahulu* and *Knapp* failed to demonstrate the importance of the reasonable accommodation analysis to the otherwise qualified analysis by *glossing* over the issue, ignoring real costs in accommodating the athletes.

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48 *Arline*, 480 U.S. at 288.

49 *Knapp*, 101 F.3d at 483.

50 *Id.*; *Mantolete*, 767 F.2d at 1422.

51 *Knapp*, 101 F.3d at 483; *Mantolete*, 767 F.2d at 1422.

52 *Knapp*, 101 F.3d at 483.

53 *Id.*

B. *Reasonable Accommodation Analyzed*

The Supreme Court in *Southeastern Community College v. Davis* and *School Board of Nassau County v. Arline*, demonstrated the importance of the reasonable accommodation analysis in the university-student setting and the employment setting.[54] Assuming the educational institution abides by the regulations' requirements for auxiliary aids, Section 504 of the Rehabilitation Act does not impose a requirement that an educational institution lower or effect substantial modifications of standards to accommodate a handicapped individual.[55] For the athletes to prevail, the modifications cannot fundamentally alter the essential nature of the program.[56]

In light of the importance the regulations and the Supreme Court accord to the issue of reasonable accommodation, *Pahulu* and *Knapp* fail to fully address whether the universities can reasonably accommodate the respective athletes. In *Pahulu*, the court does not discuss the issue of reasonable accommodation while in *Knapp* the court simply assumes that the athlete can be reasonably accommodated. The court in *Knapp* cites to *School Bd. of Nassau County v. Arline,*[57] where the Supreme Court stated that "when a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any reasonable accommodation by the employer would enable the handicapped person to perform those functions."[58] The court, though, merely mentions that the only apparent accommodation is an internal defibrillator.[59] Although it cites to *Davis*, it does not address its reasonable accommodation analysis. Further, *Pahulu* and *Knapp* do not address whether individual costs in accommodating the athletes, such as the purchase of emergency equipment specific to the individual athletes disorder, the presence of emergency personnel at the sporting event, and the possible alteration in the manner in which team practice is conducted would fundamentally alter the essential nature of the athletic program.

Section 84.44(a) of the Code provides modification guidelines for post-secondary institutions in academic programs should a handicapped student need such measures. The measures that may be taken by these institutions include "modifications in the length of time permitted for degree requirements; substitutions of specific courses required for a particular

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54 Olenick, *supra* note 22, at 179.

55 *Davis,* 442 U.S. at 413.

56 *Id.* at 410. *See also* Olenick, *supra* note 22, at 189.

57 *Arline*, 480 U.S. 273.

58 *See Knapp,* 101 F.3d at 482, citing to *Arline*, 480 U.S. at 287-88.

59 *Knapp,* 101 F.3d at 483.

degree, and adaptation of the method of instruction in specific courses."[60] In addition, examples of auxiliary aids "include taped texts, classroom equipment adapted for use by students with manual impairments, and other similar services and actions."[61]

The universities may argue that should the post-secondary institution regulations apply in the university-athlete setting, the required modifications for accommodating the athletes would fall outside the regulations' requirements for reasonable accommodation. The Code provides that "individually prescribed devices . . . or other devices of a personal nature" are not required.[62] Universities would have to provide special equipment, such as an internal defibrillator in *Knapp,*[63] in the immediate vicinity of the athlete during practice and at game time in case the physical impairment flares up while the athlete is playing. In addition, emergency personnel presently may have to be present during every game.

Accommodating the individual may also change the essential nature of the program. The whole team would have to stop the program and modify practice schedules accordingly for any close calls the athlete may undergo. For instance, during basketball practice athletes are required to work together in unison as a team. An athlete with a heart defect may feel he needs to slow down, thus affecting the practice session. The program would accordingly have to adjust and work around the athlete's disorder. The result would be a less efficient practice in order to accommodate one athlete.[64]

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[60] 45 C.F.R. § 84.44(a) (1997); *See* Olenick, *supra* note 22, at 179.

[61] 45 C.F.R. § 84.44 (1)(a),(d),(2) (1997).

[62] 45 C.F.R. § 84.44(d)(a) (1997) ("Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature."). *See* Olenick, *supra* note 22, at 179.

[63] *Knapp,* 101 F.3d at 483.

[64] Another possible argument the universities may make is that third parties, such as coaches, athletes, parents, and friends may be in a constant state of fear that the problem may flare up. If the problem flares up, many will have to suffer the shock of witnessing an injury, or even a death.

The Supreme Court has expressly forbidden the consideration of such factors in the § 504 analysis. The Court in *Arline* stated, "Congress's desire to prohibit discrimination based on the effects of a person's handicap may have on others was evident from the inception of the Act." *Arline,* 480 U.S. at n.9, 1129. The Court further stated that:

> [F]or example, Representative Vanik, whose remarks constitute "a primary signpost on the road toward interpreting the legislative history of s. 404," Choate v. Alexander, 469 U.S. 287 (1985), cited as an example of improper handicap discrimination a case in which "a court ruled that a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance produced a nauseating effect" on his classmates.

117 Cong.Rec. § 45974 (1971). *See also* 118 CONG. REC. 36761 (1972) (remarks of Sen. Mondale) (a

The athletes, on the other hand, may explain away these costs as peripheral to the real cost at issue here, the inability of an athlete to participate in an activity that he values. In addition, the costs imposed on the university are well within the guidelines of 45 C.F.R. 84.44 because all that is required is minimal protection from injury. The added equipment costs are standard auxiliary aids. Just as a ramp is used to accommodate a disabled individual confined to a wheelchair, so can an internal defibrillator be provided to an individual with a heart problem. The equipment is not a personal device as all individuals possessing such a disorder use it. Such a device would most likely not have disqualified the nurse applicant in *Davis*. Athletes may also argue that emergency personnel routinely attend sporting events, and any specific equipment necessary to meet the individual athlete's needs will not impose a significant additional cost. Therefore, their presence at a sporting event is not an unusual occurrence that would impose an additional cost.

Furthermore, accommodating the athletes will not modify the essential nature of the program. First, the disorder will most likely not "flare up."[65] Second, should the disorder flare up, this would be a sporadic and rare occurrence that will not change the essence of practices and competition. Just as adaptation of the method of instruction in specific courses may be imposed on the University,[66] so can adaptation of the manner of practice. In addition, there are numerous cases throughout any given year of athletes suffering unexpected incidents of sprains, tears, and broken bones during practice.[67]

Thus, the possibility that an athlete can be reasonably accommodated and be considered otherwise qualified, necessitates analysis of the standard that should be applied in determining whether inter-collegiate athletics can be considered a *major life activity*.

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woman 'crippled by arthritis' was denied a job not because she could not do the work but because "college trustees [thought] 'normal students shouldn't see her'"); *Id.* at 525 (remarks of Sen. Humphrey); *cf.* Macgregor, *Some Psycho-Social Problems Associated with Facial Deformities*, 16 AM. SOCIOLOGICAL REV. 629 (1961). *Arline*, 480 U.S. at n.9, 1129.

[65] *See Knapp*, 101 F.3d at 483 ("In regard to the probability of injury, Dr. John H. McAnulty, one of Knapp's experts, testified that the annual risk of death to Knapp as a result of his cardiac condition under a worst-case scenario is 2.4 percent and that playing intercollegiate basketball would elevate this annual risk to 2.93 percent, or 1 in 34."). The universities may argue against the athlete's contention of the small risk of injury and say that these statistics are not worth the gamble.

[66] 45 C.F.R. § 84.44(a)(1997). *See* Olenick, *supra* note 22, at 179.

[67] In addition, as mentioned above, in *Martin*, 1998 WL 67529, the court held that under the Americans With Disabilities Act, the requested accommodation of a golf cart to assist a professional golfer with a congenital deformity in which his right leg is severely atrophied and weakened during competition was eminently reasonable. *Id.* at *12.

IV. THE OBJECTIVE TESTS AND RESPECTIVE MODELS

A. The Objective Tests Presented and Compared

Before analyzing whether inter-collegiate athletics is a major life activity, courts should decide whether to apply an objective test as to the individual or an objective test as to the average person. The Rehabilitation Act, along with its regulations, "give little guidance regarding whether the determination of what constitutes a major life activity turns on an objective standard (objective standard as to the average person) or subjective standard (objective standard as to the individual person)."[68] Knowing the differences behind the arguments for applying each test is important because it provides a basis from which to identify the arguments on either side of the issue of whether inter-collegiate athletics can constitute a *major life activity*.

The objective test as to the individual finds support in the accepted notion that whether an individual is disabled is an individualized inquiry, determined on a case-by-case basis.[69] *Major life activities* are defined in a more individualized manner during the *substantial limitation* analysis pursuant to the regulation's definition of disability.[70] Specifically, the fact-finder must look at whether the physical impairment is a significant burden to the particular person.

The objective test as to the individual implicitly acknowledges that inter-collegiate athletics may be a major life activity for some individuals. It is based on the simple premise that for individual-athletes, athletics can constitute *learning*. A factual inquiry is necessary in applying this test, as the courts must measure the importance of athletics for the individual athlete.

In contrast, in determining whether athletics is a major life activity, the objective test as to the average person looks at objective factors as applied to the average person.[71] This test allows the courts to prevent athletics from being classified as a major life activity *for everyone*.

Knapp applies the objective test as to the average person and cites to the definition of *major life activity* in the regulations promulgated pursuant to the Rehabilitation Act.[72] The court held that the activities mentioned (i.e. walking, breathing, learning, and working) were basic functions, "not more

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68 *Knapp*, 101 F.3d at 480. *See infra* note 18.

69 *Dutton*, 859 F.Supp. at 506.

70 *Knapp*, 101 F.3d at 481.

71 *Knapp*, 101 F.3d at 480.

72 34 C.F.R. § 104.3(j)(2)(ii)(1997); 45 C.F.R. § 84.3(j)(2)(ii)(1997).

specific ones such as being an astronaut, working as a firefighter, driving a race car, or learning by playing in Big Ten basketball."[73]

Similarly, those advocating an objective test as to the average person contend that to be considered a major life activity the activity has to be universally performed.[74] Activities that are frequently or universally performed implies a narrow interpretation of the Code's definition of major life activities.[75]

The defendant in *Abbott v. Bragdon,*[76] where an HIV-positive woman sued a dentist claiming his refusal to treat her in his dental office violated the Americans with Disability Act (ADA), adopts this reasoning in arguing the term *major life activity* does not embody lifestyle choices or activities that people choose not to do, in other words, performed infrequently.[77] He argued and cited authority supporting that many choose not to have children and thus childbearing is not a major life activity.[78]

This argument was held deficient in *Abbott* for two reasons. First, the Supreme Court in *School Board of Nassau County v. Arline*, held that the definition of major life activity pursuant to the Rehabilitation Act, was accorded "a broad definition, one not limited to so-called 'traditional handicaps.'"[79] Use of the words "such as" clearly conveys the hypothesis that the definition merely lists examples, and is not meant to be all-inclusive.[80] In addition, if Congress would have intended that the definition be construed narrowly, "it surely would have written new, more restrictive language instead of borrowing a descriptive phrase notable for its breadth."[81]

Secondly, there is either no requirement that an activity be performed frequently or universally to be considered a major life activity.[82] The regulations convey no legislative intent that frequency or universality be a

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[73] *Knapp,* 101 F.3d at 481.

[74] *Id.* at 480; *see also* Abbott v. Bragdon, 107 F.3d 934, 940-41 (1st Cir. 1997), *cert. granted in* 522 U.S. 991, *vacated in* 524 U.S. 624.

[75] *Abbott,* 107 F.3d 934, 941.

[76] *Id.*

[77] *Id.*

[78] *See Abbott,* 107 F.3d at 940, citing to Krauel v. Iowa Med. Ctr., 915 F.Supp. 102, 106 n.1 (S.D. Iowa 1995) *aff'd,* 95 F.3d 674 (8th Cir. 1996) ("[S]ome people choose not to have children, but all people care for themselves, perform manual tasks, walk, see, hear, speak, breathe, learn, and work, unless a handicap or illness limits them.").

[79] *Abbott,* 107 F.3d. at 940, citing to *Arline,* 480 U.S. at n.5, 280.

[80] *Id.* at 940. The court's reasoning in *Abbott,* although in support of the objective test as to the individual, may be extended to support the reasoning that athletics is major life activity in and of itself. However, as mentioned above, that issue is beyond the scope of this article.

[81] *Abbott,* 107 F.3d at 941. *See also* Doe v. Kohinast & Graf, P.C., 862 F.Supp. 1310, 1320 (E.D. Pa. 1994).

[82] *Abbott,* 107 F.3d at 941.

limiting factor in classifying an activity as a major life activity.[83] Even some of the enumerated activities in the regulation's definition are not performed universally. In fact, "[m]ost acts that human beings perform – or refrain from performing – have elements of volition."[84] For instance, not everyone chooses to work. This is a lifestyle choice for many rich individuals. Even speaking is not universally chosen as part of one's life as many monks have taken a vow of silence.[85]

Proponents of the objective test as to the average person also rely on the regulations pursuant to the equal employment provisions of the ADA. In *Pahulu*, the defendants relied on the objective test as to the average person using the ADA's definition of "substantially limits"[86] to demonstrate that the major life activity must pertain to the general public. The *Pahulu* court held, however, that the case it was dealing with did not involve employment disability discrimination and accordingly, the ADA regulations were not applicable.[87]

B. *Models of Preventing Discrimination*

The objective test as to the individual and the objective test as to the average person lead to two different models for preventing discrimination

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[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] The definition states:

> "(i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) [s]ignificantly restricted to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. . . (3) With respect to the major life activity of working -- (i) [t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(1994). *See Pahulu*, 897 F.Supp. at 1392.

[87] *Pahulu*, 897 F.Supp. at 1392. In addition, as the leading proponent of the objective test as to the average person in the context of inter-collegiate athletics, the *Knapp* court, argued that the major life activity of *working* does not necessarily include working at the job of one's choice. *Knapp*, 101 F.3d at 481-82, citing to *Welsh*, 977 F.2d 1415. This argument implies that participating in inter-collegiate athletics is not a *major life activity* simply because one can compete in the activity of one's choice.

With respect to the *Welsh* argument, referred to in *Kanpp*, *Pahulu* noted that the cases where the courts interchangeably applied the regulations of the Rehabilitation Act and the ADA were in the context of employment discrimination, not the university-student setting. *Pahulu*, 897 F.Supp. at 1393, citing to *McGee*, 21 F.3d 1121; Chandler v. City of Dallas, 2 F.3d 1385, 1391 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994); Farley v. Gibson Container, Inc., 891 F.Supp. 322, 325 n. 1 (N.D.Miss. 1995); *Dutton*, 859 F.Supp. at 504. The court also stated that no authority was presented that authorized "reliance upon ADA regulations in all Rehabilitation Act contexts." *Knapp*, 101 F.3d at 1393.

against disabled athletes. Analyzing both models are important in that they demonstrate the standard of reasoning courts have and will apply in resolving discrimination claims in the university-athlete context. The objective test as to the individual, favors a "Be All You Can Be" model for preventing discrimination, while the objective test as to the average person, favors a practical model. The objective test as to the individual argues that objective factors as to the individual allow him to compete in the sport and achieve his full potential. The ultimate focus is on the athlete. In the "Be All You Can Be" model, the individual's interests take priority over the interests of the university, which are viewed as a limiting factor. This model favors subordinating the costs associated with reasonably accommodating the individual-athlete to the value the student accords to objective factors associated with competing on an inter-collegiate team.

On the other hand, the objective test as to the average person weighs all the variables in a more practical manner. The ultimate focus is on the average person and the added costs in allowing athletes to compete. The average person does not typically value competition as much as the individual-athlete bringing suit. The athlete takes on the lesser degree of value accorded to the average person. This practical approach also weighs heavily the costs associated with reasonably accommodating the athlete.

V. THE OBJECTIVE TEST AS TO THE INDIVIDUAL: THE BETTER CHOICE

A. *Definitional Approach*

Having presented the tests used for determining whether athletics is a major life activity and their respective models for preventing discrimination, this part demonstrates how the objective test as to the individual and the "Be All You Can Be" model for preventing discrimination is the correct standard for resolving whether athletics can be considered a *major life activity* for a student-athlete.

Before analyzing the athlete's claim that athletics is a *major life activity* because it constitutes *learning*, this part will present a purely definitional analysis of the term *major life activity*, as well as interpret the scope of the regulation's definition of the term.

In *Abbott v. Bragdon*,[88] the court, in rejecting commonly used arguments against classifying reproduction and all that activity encompasses as a major life activity,[89] used a definitional approach in interpreting the term's

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[88] *Abbott*, 107 F.3d 934.

[89] *Id.* at 941.

meaning. The Supreme Court has turned to dictionary definitions in similar situations to that in *Abbott.*[90] The court in *Abbot* held that it was obliged to construe the term's meaning in accordance with its ordinary meaning since there was no statutory definition.[91] The term *major* is defined[92] as meaning "greater than others in importance or rank."[93] The term is also defined[94] as meaning "greater in dignity, rank, importance, or interest."[95] The court in *Abbott* correctly held that an activity's inclusion under the *statutory rubric* of *major life activity* is determined by its significance.

This article argues that athletics should constitute a *major life activity* for an athlete who can prove that the benefits associated with participating in athletics' are of significant importance in the athlete's life. This leads us to analyze how inter-collegiate athletics can be significant enough in the life of a college athlete to constitute *learning*.

B. *Learning From Athletics*

Many virtues are learned merely by participating in sports. Athletics can educate an individual in a variety of ways. Many student-athletes acquire virtues that are not always so easily attained by experiencing the rigors of athletics. Common virtues athletes claim they have learned from athletics include discipline, perseverance, and how to be a team player.

For instance, the athlete in *Pahulu* stated that through football "he has learned to be a team player; he has learned discipline; he has met people and been inspired to want a better life for himself; he has learned to care about his appearance; and his grades improved once he started playing football."[96] In addition to Pahulu's own testimony, Pahulu's father testified to the educational and growth benefits Pahulu acquired from participating in sports.[97] Pahulu's coach and a defendant also both testified "athletics is an important component of learning."[98]

Knapp also felt that he learned a great deal from athletics. He stated that "he does not believe he can obtain confidence, dedication, leadership,

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[90] *Id.* at 940; citing to Bailey v. United States, 516 U.S. 137 (1995); Smith v. United States, 508 U.S. 223, 229 (1993).

[91] *Abbott,* 107 F.3d at 939.

[92] *Id.* at 939-40, citing to AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1084 (3d ed. 1992).

[93] *Id.*

[94] *Id.* at 939-40, citing to WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 718 (1989).

[95] *Id.*

[96] *Pahulu,* 897 F.Supp. at 1393. *See also* Case Law Development, *Education, High School Sports; Age Limit; Learning Disabilities,* 19 MENTAL & PHYSICAL DISABILITY L. REP. 770, 771 (1995).

[97] *Pahulu,* 897 F.Supp. at 1393.

[98] *Id.*

perseverance, discipline, and teamwork in any better way."[99] Knapp's statement depicts an individual that values athletics so much that, to him, it is the best means to learn the virtues that guide an individual to success not only in athletics, but also in other areas of one's life. In light of this, the *frequency and universality of the activity* approach that *Knapp* applied in its reasoning warrant scrutiny.[100]

In strictly interpreting the regulatory definition, the court in *Knapp* held that athletics is not a basic function such as walking, breathing, and speaking. Although athletics can be a learning experience for many, not everyone values athletics in the same light as walking, breathing, and speaking. Not everyone can afford to go to college and play inter-collegiate athletics.[101] Furthermore, preventing an athlete from playing inter-collegiate sports does not mean that they have not learned. Competing in inter-collegiate sports therefore "cannot be held out as a necessary part of learning for all students."[102]

The problem with this reasoning is that the ability to learn through other avenues does not preclude the avenue in question from being classified as a major life activity. Many areas of learning are not necessary for an individual's learning process, but they are still part of the learning process. Someone who has a learning disability can have a hard time learning the object of the disability, but still learn other things. Courts view the individual as disabled because of the importance that disability has had on that person's life. This is consistent with John Rawl's view that:

> [A] person's good is determined by what is for him the most rational long-term plan of life given reasonable favorable circumstances. A man is happy when he is more or less successfully in the way of carrying out this plan. To put it briefly, the good is the satisfaction of rational desire. We are to suppose, then, that each individual has a rational plan of life drawn up subject to the conditions that confront him. This plan is designed to permit the harmonious satisfaction of his interests. It schedules activities so that various desires can be fulfilled without interference. It is arrived at by rejecting other plans that are either less likely to succeed or do not provide for such an inclusive attainment of aims. Given the alternatives available, a rational plan is one which cannot

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99 *Knapp*, 101 F.3d at 479.

100 *Id.* at 480-81.

101 *Id.* at 480.

102 *Id.*

> be improved upon; there is no other plan which, taking everything into account, would be preferable.[103]

For athletes such as Pahulu and Knapp, a life plan includes playing inter-collegiate athletics, and there is no better avenue for them to learn the virtues athletics teaches them. As long as athletics is an important part of the athlete's learning process, there is nothing in the regulation's definition to suggest he cannot claim a disability. *Knapp* acknowledges the ability to learn from athletics, but adds its own limitations for claiming disability under *learning*.

The court in *Knapp* also followed the Sixth Circuit's reasoning in *Jasany v. United States*[104] in holding that athletics cannot constitute *learning* for the athlete because the terms *major life activity* and *substantial limitation* must be viewed as a whole, not separately.[105] The court in *Jasany* held, "An impairment that affects only a narrow range of jobs can be regarded either as not reaching a major life activity or as not substantially limiting one."[106] As mentioned above, *Knapp* reasoned that the athlete's ability to learn was not substantially limited because there were other avenues from which he could learn. Knapp kept his scholarship, and was allowed to participate in all other academic and extra-curricular activities.[107] Knapp could possibly have learned the same virtues if he played as part of the team in a non-competitive manner.[108] The logical extension of the Sixth Circuit's reasoning is that inter-collegiate athletics is not a major life activity because it does not substantially limit an individual's overall ability to learn.

However, there is no basis in the regulations for the contention that *major life activity* and *substantial limitation* need to be viewed as a whole.[109] In addition, case law directly goes against *Knapp's* reasoning that *major life activity* and *substantial limitation* need to be viewed as a whole. *Pahulu* held that inter-collegiate athletics may constitute a major life activity but also held that there was no substantial limitation.[110]

Regardless of *Knapp's* flawed reasoning, athletics is viewed as an important part of an individual's learning process. Courts have recognized "the importance of physical education and participation in athletic activities

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103 JOHN A. RAWLS, A THEORY OF JUSTICE 92-92 (The Belknap Press of Harvard University Press, Cambridge, MA 1971).

104 Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985).

105 *Knapp*, 101 F.3d at 479, 480.

106 *Id.*, citing to *Jasany*, 755 F.2d 1244, 1249 n.3.

107 *Id.* at 477.

108 *Id.* at 480.

109 The regulation merely states: "[a] substantial limitation on a major life activity," 29 U.S.C. § 794(a)(1997).

110 *Pahulu*, 897 F.Supp. at 1393.

on American college campuses is well accepted . . . [I]nter-collegiate, club, or intramural sports sponsored by the college must also allow participation by disabled students on a non-discriminatory basis."[111] In *Swann v. Charlotte-Mecklenburg Board of Education,*[112] the Supreme Court recognized athletics as part of the educational process in the context of racial integration and the enforcement of Title IV.[113] In *Brenden v. Independent School District,*[114] the court held that discrimination in high school interscholastic athletics constitutes discrimination in education.[115] In addition, the regulations serve to guarantee "disabled students the often intangible benefits of nonacademic social interaction. The provision of physical education and athletic programs,. . . is particularly important."[116]

Thus, athletics clearly has an important role in the learning process of many athletes. Applying the objective test as to the average person, a representation of the average person formed by an overwhelming majority of individuals who do not partake in inter-collegiate athletics, would unjustly minimize the importance of inter-collegiate athletics in the claimant's learning process.

VI. CONCLUSION

Having presented the objective test as to the individual, the objective test as to the average person, and the avenues by which athletes may argue that inter-collegiate athletics constitutes learning, this article concludes that the most equitable and just standard to apply is the objective test as to the individual. Inter-collegiate athletics may be considered a major life activity because of its importance to individual athletes.

The Rehabilitation Act applies to those specific individuals who have been unjustly prevented from participating in an activity of significant importance to them because of a physical impairment. The objective test as to the average person does not live up to the purpose of the Rehabilitation Act. The objective test as to the average person measures an activity's viability as a major life activity in comparison to the average person. There is no doubt that the average person values "breathing, seeing, hearing,

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111 *Id.* at 1391, citing to LARA F. ROTHSTEIN, DISABILITIES AND THE LAW § 7.11 (1992).

112 Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

113 *Id.*

114 Brenden v. Indep. Sch. Dist. 742, 477 F.2d 1292 (8th Cir. 1973).

115 *Id.* at 1298.

116 Timothy M. Cook & Frank J. Laski, *Beyond* Davis*: Equality of Opportunity for Higher Education for Disabled Students Under the Rehabilitation Act of 1973*, 15 HARV.C.R.-C.L.L.REV. 415, 459 (1980).

speaking, and walking."[117] These activities assume great importance to the average person and to *every* individual.

However, learning and working are inherently more versatile and flexible than the other enumerated major life activities. The other basic enumerated major life activities lead to the same result regardless of whether the objective test as to the individual or average person is applied. An individual, though, has the freedom to choose how to learn and how to work. This requires the fact-finder to assess all the facts in deciding whether a particular form of learning or working falls under the enumeration for that specific individual. Thus, in depriving an athlete of the chance to prove the importance of the activity as to himself, a court is not according the regulatory definition of major life activity a "broad interpretation,"[118] flexible to the particular circumstances.

Many who excel in life because they have learned discipline and hard-work attribute their success to the virtues they learned through participating in athletics. As to them athletics has assumed such a level of significance in their lives that it becomes a major life activity. This key word is *becomes*, which in and of itself implies an individualized determination.

In summation, case law addressing whether an individual-athlete has a claim against a university for preventing him from participating in inter-collegiate athletics because of a physical condition that may pose a risk of injury to himself or others in the future is in a state of disarray. The two leading opinions on the issue, *Knapp* and *Pahulu*, cannot agree on important issues in the analysis. Both cases fail to adequately frame their opinions by not discussing at length the various considerations in reasonably accommodating the respective athlete. Until these issues are adequately addressed and resolved, the athlete who sufficiently values competing in inter-collegiate athletics so that it is a major life activity *for him* risks being at the mercy of a court that chooses to apply the objective standard as to the average person.

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117 *See* note 27.

118 *Abbott*, 107 F.3d at 940, citing to *Arline*, 480 U.S. at n.5, 280.