IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NOREEN P. KEMETHER	:	CIVIL ACTION
	:	
v.	:	
	:	
PENNSYLVANIA INTERSCHOLASTIC ATHLETIC ASSOCIATION, INC.	:	NO. 96-6986
	:	

MEMORANDUM AND ORDER
Re: Post Trial Motions

YOHN, J. November , 1999

Plaintiff Noreen Kemether brought this action under Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Pennsylvania Equal Rights Amendment ("ERA") alleging that the Pennsylvania Interscholastic Athletic Association, Inc. ("PIAA") discriminated against her based on her gender by refusing to give her the opportunity to officiate high school boys' interscholastic basketball games. After trial from December 7 to December 18, 1998, the jury returned a verdict against the defendant on all counts and awarded damages in the amount of $314,000. Presently before the court are defendant's post-trial motions for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) or, in the alternative, for a new trial under Federal Rule of Civil Procedure 59. Because defendant failed to move for judgment as a matter of law at the close of all of the evidence as required under Rule 50, and thereby failed to preserve its right to renew the motion post-trial , I will deny defendant's motion for judgment as a matter of law. Furthermore, as the verdict is not against the great weight of the evidence, I also will deny defendant's motion for a new trial.

I. BACKGROUND

After a jury verdict, the court cannot substitute its view of the evidence for that of the jury; accordingly, all evidence and inferences therefrom must be taken in the light most favorable to the verdict winner. See Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 691-92 (3d Cir. 1993) (as amended on petition for rehearing). The following recitation of the facts conforms to this principle. Defendant Pennsylvania Interscholastic Athletic Association, Inc. ("PIAA") is a statewide athletic association, organized as a non-profit membership corporation. PIAA's membership comprises approximately 1,300 Pennsylvania high schools and junior high schools, both public and private. PIAA's executive and administrative body is its Board of Control, which has "general control over all interscholastic athletic relations and athletic contests in which a member school of [PIAA] participates." See PIAA Const. art. VI, §1, art. VIII, § 1(A).

Noreen Kemether is a PIAA-registered official. In accordance with PIAA requirements, Kemether joined a local chapter of officials -- the Delaware County Chapter of PIAA Basketball Officials ("Delco Chapter"). During the regular season, basketball officials are selected to officiate games by assignors. Harry Sheldrake and James Faulkner were the assignors who assigned Delco Chapter officials to games in the Del Val league during the period at issue in this case. Kemether alleged, and the jury found, that PIAA had discriminated against female officials by refusing to evaluate women, a necessary step toward being assigned to regular season boys' junior varsity and varsity high school games, and by refusing to assign them to officiate those same games in the Del Val league.

During the post-season, PIAA makes all of the assignments of officials for playoff games. To be eligible for these assignments to post-season playoff games, an official must have officiated ten regular season varsity boys' games (to officiate boys' playoff games) or ten regular season varsity girls' games (to officiate girls' playoff games). Kemether claimed, and again the jury found, that this rule discriminates against female officials in that the rule makes it impossible for women to ever officiate boys' playoff games because they have no means of obtaining the requisite regular season experience due to the discriminatory practices of the assignors in the Del Val league.

II. RULE 50 (b) MOTION - JUDGMENT AS A MATTER OF LAW

Defendant's motion for judgment as a matter of law under Rule 50 challenges the sufficiency of the evidence supporting the jury's verdict with respect to a number of issues. As an initial matter, plaintiff objects to defendant's Rule 50 (b) motion on the ground that PIAA did not move for a judgment as a matter of law (also referred to as "directed verdict") at the close of trial, and thus failed to preserve its right to renew the motion post-trial.[1] PIAA contends that it did move for judgment as a matter of law at the close of trial pursuant to Rule 50 (a) and,

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[1] Rule 50 (b) states:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment--and may alternatively request a new trial or join a motion for a new trial under Rule 59.

Fed. R. Civ. P. 50 (b) (West Supp. 1999).

therefore, its present motion is properly before the court. In so asserting, defendant relies on one of its proposed jury instructions subtitled "Defendant's Point for Binding Charge No. D 32 or Motion for Directed Verdict." See Reply Brief in Supp. of Def. PIAA's Renewed Mot. for J. as a Matter of Law or, in the Alternative, Mot. for New Trial ("Def.'s Reply") at 1; Defendant Pennsylvania Interscholastic Athletic Association, Inc.'s (PIAA) Proposed Jury Instructions ("Def.'s Points for Charge"), at 38.

It is settled law in this circuit that failure to move for a directed verdict at the end of the evidence and prior to jury deliberation "wholly waives the right to mount any post-trial attack on the sufficiency of the evidence." Greenleaf v. Hopeman Bros., Inc., Nos. 97-1820, 97-1821, 1999 WL 240051, *10 (3d Cir. April 26, 1999); accord, Mallick v. International Bhd. of Elec. Workers, 644 F.2d 228, 233 (3d Cir. 1981) (holding that court may not grant Rule 50 (b) motion where party failed to move for judgment as a matter of law at close of all evidence), cert. denied, 477 U.S. 908 (1986). This rule demands more than just mechanical adherence, it requires that the specific grounds serving as the basis for the Rule 50 (b) motion also be raised in the motion for directed verdict at the end of trial. See Bonjorno v. Kaiser Aluminum & Chem. Corp., 752 F.2d 802, 814-15 (3d Cir. 1984) (stating that only those issues that were raised in motion for directed verdict may be considered by court when ruling on post-trial motion for judgment as matter of law); Stadtlander Drug Co., Inc. v. Brock Control Sys., Inc., 174 F.R.D. 637, 638 (W.D. Pa. 1997) (holding that oral request for directed verdict where no basis for motion was provided did not meet specificity requirement).

The Third Circuit has held that a request for a binding jury instruction may substitute for the requisite Rule 50 (a) motion, but only "if it is clear that the district court treated the request as

a motion for a directed verdict and ruled on it as such." Bonjorno, 752 F.2d at 815; accord, Mallick, 644 F.2d at 234 (holding that where judge did not treat request for binding instruction as motion or rule on it accordingly, request could not cure failure to move for directed verdict).

PIAA argues that it has met these requirements. First, defendant claims that its point for charge number 32 ("D-32") was labeled as a motion for a directed verdict, which distinguishes it from the requests for binding instructions considered in cases such as Bonjorno and Mallick which carried no such designation. See Def.'s Reply at 1. Second, PIAA asserts that the court "denied" defendant's point for charge number 32 while it "refused" other proposed instructions, which demonstrates the court's effort to differentiate D-32. See id. at 1-2. Finally, defendant argues that its present motion does not raise new matters that create any "unfair surprise" because the issues raised in the Rule 50 (b) motion were the subject of great debate throughout the course of the litigation. See id. at 2.

Under the Third Circuit's strict interpretation of the Rule 50 requirements defendant's request for a binding instruction does not suffice as a substitute for a Rule 50(a) motion. While it is true that D-32 bears the parenthetical subtitle "or motion for directed verdict" neither the court nor the parties treated it as such. First, defendant filed its proposed jury instructions on December 1, 1998, a week before trial commenced. At the time it was filed, neither party had presented its case and, therefore, the instruction could not have reflected what PIAA believed to be i-nsufficiencies in the evidence. Furthermore, PIAA did not reassert the instruction as a motion at the end of all of the evidence -- the appropriate time to move for a directed verdict under Rule 50 in order to preserve sufficiency-of-the-evidence issues for post-trial evaluation.

Second, the only mention of D-32 on the record appears during a discussion about the verdict sheet and the proposed instructions, in which the court stated, "With reference to D-32 which is defendant's request for a point for charge for a directed verdict I will deny that." N.T., December 17, 1998, at 3 (emphasis added). Despite the court's use of the term "directed verdict," the context of the reference clearly demonstrates that the court did not understand D-32 to be and was not treating it as a motion for judgment as a matter of law. And contrary to defendant's assertions, the court's "denial" of D-32 is not qualitatively different from its "refusal" of other subsequent proposed jury instructions -- in all instances the court was discussing proposed jury instructions and not a motion of any kind.

Finally, and most importantly, at no time did defendant present specific grounds for judgment as a matter of law. Neither did plaintiff respond to D-32 so as to reveal that she believed that a motion had been made.

In sum, defendant did not tender its request for a binding instruction as a motion at the end of all of the evidence, defendant did not state specific grounds for the motion, and neither the court nor plaintiff treated D-32 as a motion. Consequently, defendant's request for a binding instruction cannot substitute for a motion for judgment as a matter of law. See Allstate Ins. Co. v. Gammon, Nos. 86-3268, 86-3700, 1987 WL 10661 (E.D. Pa. May 8, 1987) (holding that request for binding instruction did not cure failure to move for directed verdict where no specific grounds were stated, request was not presented as motion at end of trial, and no argument was made despite fact that court referred to proposed instruction as "request for 'directed verdict'"), aff'd, 838 F.2d 73 (3d Cir. 1988).

Even accepting D-32 as a formal motion for judgment as a matter of law, the defendant's instant motion would still be denied. The entirety of D-32 reads as follows: "According to the law and the evidence, I instruct you that you must find in favor of Defendant PIAA and against Plaintiff on all of her claims against PIAA." Def.'s Points for Charge, at 38. Nowhere in the requested charge does defendant provide the basis for PIAA's belief that it was entitled to judgment as a matter of law -- no law was cited, and no particular areas of evidentiary insufficiency were noted. Because defendant failed to raise any of the issues included in the instant motion in D-32, which would have given plaintiff notice of any deficiencies in her case, it would be improper for the court to grant the renewed motion for judgment as a matter of law. See Bonjorno, 752 F.2d at 814 ("If the issue was not raised in the motion for the directed verdict at the close of all the evidence, it is improper to grant the JNOV on that issue."); Eisenberg v. Smith, 263 F.2d 827, 829 (3d Cir. 1959) (holding that request for binding instruction "thrown in" with many other points for charge containing "no hint of what the position of the party making the motion is" does not meet requirements of Rule 50 (a)), cert. denied, 360 U.S. 918 (1959)). Therefore, defendant's motion for judgment as a matter of law will be denied.

If PIAA's challenge of the jury's verdict based on the sufficiency of the evidence were not barred by it's failure to move for judgment as a matter of law at the end of trial, the court would nevertheless deny defendant's motion on its merits as follows.

When deciding a motion pursuant to Rule 50(b) the court "must determine whether the evidence and justifiable inferences most favorable to the prevailing party afford any rational basis for the verdict." Bhaya v. Westinghouse Elec. Corp., 832 F.2d 258, 259 (3d Cir. 1987), cert. denied, 488 U.S. 1004 (1989). Thus, the court "must view the record in the light most

favorable to the non-moving party," and may set aside the verdict only if the record does not contain the "'minimum quantum of evidence from which a jury might reasonably afford relief.'" Mosley v. Wilson, 102 F.3d 85, 89 (3d Cir. 1996) (quoting Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 691 (3d Cir. 1993)).

Defendant PIAA argues that the evidence put forth by Kemether is insufficient to support the jury verdict in her favor with regard to its finding that: (1) for regular season games, PIAA is responsible for the acts of the Delco Chapter and the assignors under various agency theories; (2) PIAA violated Title VII with respect to regular season games; (3) PIAA violated the Pennsylvania ERA with respect to regular season games; (4) PIAA violated Title VII with respect to post-season games; (5) PIAA violated Title IX with respect to post-season games; (6) PIAA violated the ERA with respect to post-season games; and (7) Kemether was entitled to compensatory and punitive damages.[2]

A. Liability for the Assignment and Evaluation of Officials During the Regular Season

1. Agency Issues

PIAA's liability under Title VII for discrimination in the assignment of regular season games hinged on a finding by the jury that PIAA was vicariously liable for the acts of the Delco Chapter which was liable in turn for the acts of the assignors, Sheldrake and Faulkner. As noted

[2] A number of PIAA's arguments regarding the sufficiency of the evidence appear to be, in actuality, objections to the jury instructions and the court's enunciation of the applicable law. Defendant has waived its right to rely on, as a basis of error post trial, those instructions to which it failed to object at trial. See Abraham v. Pekarski, 728 F.2d 167, 172 (3d Cir.), cert. denied, 467 U.S. 1242 (1984) (finding that because defendant failed to object to jury instruction on punitive damages at trial, it was foreclosed from raising issue in post-trial motion); Herman v. Hess Oil Virgin Islands Corp., 524 F.2d 767, 772 (3d Cir. 1975) (holding that Federal Rule of Civil Procedure 51 requires that objections to jury instructions be raised prior to jury deliberation). Where appropriate, the court has noted such instances of waiver.

in the court's earlier summary judgment decision, vicarious liability under Title VII is governed by "the general common law of agency" and not by the law of any individual state. Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2265 (1998). Relying on the court's enunciation of this general common law in the instructions, the jury found that PIAA was responsible for the acts of the Delco Chapter under three separate agency theories -- (1) that the Chapter was PIAA's servant; (2) that the Delco Chapter had apparent authority to act for PIAA; and (3) that the Chapter was aided in its discrimination of Kemether by an agency relationship with PIAA.[3] PIAA contends that the evidence presented at trial is insufficient to support a finding that PIAA was responsible for the Chapter's conduct under any of the three theories. While the court agrees that the record lacks the minimum quantum of evidence necessary to find that a master/servant relationship existed between PIAA and Delco with respect to the assigning and evaluation of officials, the record does contain sufficient evidence to support the jury's finding that PIAA is subject to vicarious liability under the theories that Delco had apparent authority and was aided by an agency relationship with PIAA.

a. Master/Servant Relationship

When one party agrees to have another act on its behalf, three possible relationships may exist, depending primarily upon the first party's control or right to exercise control over the actor. The actor may be: (1) a servant, who is always an agent, (2) an agent independent contractor, or (3) a non-agent independent contractor. American Tel. & Tel. Co. v. Winback &

[3] The jury also found that the Delco Chapter was responsible for the acts of Sheldrake and Faulkner. PIAA is not challenging the sufficiency of the evidence to support the jury's findings with respect to the relationship between the Chapter and the assignors.

Conserve Program, Inc., 42 F.3d 1421, 1437-39 (3d Cir. 1994), cert. denied, 514 U.S. 1103 (1995). Thus, the term agent may be used to refer to servants and some independent contractors.

The distinction between servant, agent independent contractor, and non-agent independent contractor ("non-agent") is critical due to the liability implications for the hiring party. In a servancy relationship, the principal, or master, "not only controls the results of the work but also may direct the manner in which such work shall be done, and a servant, in rendering the agreed services, remains entirely under the control and direction of the master." Jones v. Century Oil U.S.A., Inc., 957 F.2d 84, 87 (3d Cir. 1992) (quoting Smalich v. Westfall, 269 A.2d 476, 481 (Pa. 1970)). To have a master/servant relationship, however, the principal does not actually have to exercise its power to interfere with the servant's work. Rather, the principal must simply have the right to do so. See id. at 86 (stating that difference between independent contractor and servant is principal's right of control not actual exercise of control).

Accordingly, and with the agreement of the parties, the court instructed the jury that in order to find that a servancy relationship[4] existed between PIAA and Delco, it must find that: (1) PIAA had the power and authority to evaluate officials and assign them to regular season games; (2) PIAA consented to have Delco assign and evaluate officials during the regular season on behalf of PIAA; (3) Delco consented to make the assignments and evaluate officials on behalf of PIAA; and (4) PIAA had the right to control the manner and means by which Delco made the

[4] For the sake of simplicity, in its instructions to the jury and on the verdict sheet, the court used the word "agent" instead of servant. Thus, the first Jury Interrogatory asked "Do you find that the Delco Chapter of PIAA Basketball Officials was an agent of the PIAA with respect to the: (a) Assignment of regular season games? [jury could mark 'yes' or 'no'] (b) Evaluation of officials for assignment to regular season games? [jury could mark 'yes' or 'no']." In order to answer yes to either question in this interrogatory, the court instructed the jury that it had to find the four elements necessary to create a master/servant relationship. See N.T. Dec. 17, 1998, at 143-45.

assignments and evaluated the officials.[5] See N.T., Dec. 17, 1998, at 142-45. PIAA contends that the evidence does not support the jury's finding that any of the four factors were present thereby rendering unreasonable its conclusion that a master/servant relationship existed between PIAA and Delco.

I. Power to Evaluate and Assign Officials

Despite defendant's contentions, the record reveals sufficient evidence from which the jury could reasonably have concluded that PIAA possesses the power both to evaluate and assign officials. PIAA's constitution grants to the Board of Control "general control over all interscholastic athletic relations and athletic contests in which a member school of [PIAA] participates." Pl.'s Ex. 3, PIAA Const., art. VII. When joining PIAA, every member school must agree that "in all matters pertaining to interscholastic athletic activities the school shall be governed by the constitution and bylaws of PIAA." N.T., Dec. 11, 1998, at 101 (Def.'s Admissions). Every chapter must adopt a constitution and set of bylaws drafted by PIAA specifically for the chapters. See N.T., Dec. 10, 1998, at 136. Also, any rule or policy promulgated by the chapter must be consistent with PIAA's constitution and bylaws. See id. at 137-38. Nothing in the constitution carves out from PIAA's general control, the evaluation

[5] In its brief, PIAA characterizes the necessary level of control as being "the highest degree of control." Brief in Supp. of Def. PIAA's Renewed Mot. for J. as a Matter of Law or, in the Alternative, Mot. for New Trial ("Def.'s Brief"), at 5. Defendant does not explain what constitutes "the highest degree of control." Presumably, its use of this language simply refers to the master's right to control the manner and means of work as described in the jury instructions. Any argument that a master/servant relationship requires a greater degree of control than that detailed in the instructions would be waived as defendant did not request any such language in its proposed instruction and did not object to the absence of it in the jury charge. By failing to object to a jury instruction a party foregoes any subsequent reliance on the instruction as a basis of error. See Abraham, 728 F.2d at 172.

and/or assignment of officials. In fact, the testimony revealed that PIAA has assigned officials in certain circumstances and can discipline officials. See N.T. Dec. 10, 1998, at 113. PIAA also can request officials to submit reports on their conduct during regular season games. See N.T., Dec. 10, 1998, at 131 (Cashman testimony). From this, a jury could reasonably conclude that PIAA does have the power to assign and evaluate officials.

ii. Right to Control Manner and Means of Assignment and Evaluation

Jumping to the fourth element, although plaintiff did not provide specific citations, a review of the trial transcript reveals sufficient testimony to support the jury's finding that PIAA had the right to control the manner and means by which Delco assigned and evaluated officials. PIAA has substantial control over the chapters in that it approves and issues all chapter charters; requires all chapters to adopt a particular constitution and bylaws; establishes the minimum number of officers to be elected by each chapter; and mandates that each chapter hold a minimum number of meetings, monitor attendance at those meetings, and report back to PIAA on a yearly basis which officials have met their meeting attendance requirements. See id. at 44-47. PIAA also controls what officials wear, has established a code of ethics that they must follow, and sets the rules to be applied during basketball games. See N.T., Dec. 10, 1998, at 125-26. Viewing this evidence in the aggregate, the jury reasonably could have inferred that if PIAA had the right to control these aspects of a chapter's operations concerning officials' conduct, then it had the right to control the chapter's evaluation of officials.

As for PIAA's right to control the assignment process, the jury found, and PIAA does not contest, that the assignors were agents of the chapters. Given PIAA's general power to assign and evaluate and its ability to control significant elements of the chapter's operations and

administration, the jury also could have reached the reasonable conclusion that PIAA had the right to control the manner by which agents of the chapters assigned officials. Moreover, the record reveals that PIAA exerted actual control over the assignment process when it prohibited assignors from collecting fees from officials in exchange for game assignments. See id. at 62. Thus, the court agrees with plaintiff that sufficient evidence exists to uphold the jury's finding with respect to this element.

iii. PIAA's Consent to Have the Chapter Act on Behalf of PIAA and Delco's Consent to Act on Behalf of PIAA

While the evidence produced at trial provides a sufficient basis for the jury's findings regarding the first and fourth elements, the same is not true with respect to the second and third elements involving the issue of consent by PIAA and Delco. Plaintiff asserts that because: (1) PIAA knew about the Chapter's evaluation and assignment activities; (2) PIAA contacted Delco, offered it assistance with its evaluation process, and provided it with sample evaluation forms; (3) PIAA did not have any rules or policies prohibiting chapters from setting up evaluation systems; and (4) the evaluation of officials related to the Chapter's express responsibility of training and recruiting officials, that PIAA in effect consented to have the chapters evaluate and assign officials on its behalf. See Pl.'s Brief in Opp. to Def. PIAA's Renewed Mot. for J. as a Matter of Law ("Pl.'s Brief") at 20-22.

While it may be true that PIAA's consent need not be explicit or even intended as plaintiff contends, see Restatement (Second) of Agency (hereinafter "Restatement") § 221, Cmt. C, at 493-94 (1958), logic dictates that the substance of the consent must nevertheless encompass the desire to have an entity act on the principal's behalf. Neither the evidence cited by plaintiff

nor the record as a whole reveals any evidence from which a jury could reasonably infer that PIAA had consented to have Delco assign and evaluate officials on behalf of PIAA. At most, the evidence cited by Kemether demonstrates PIAA's knowledge and support of the Chapter's evaluation system and possibly of Delco's use of that system as part of the overall assignment process. This evidence, however, does not support a finding that the Chapter was evaluating or assigning officials for the benefit of PIAA or that PIAA consented to have the Chapter act on its behalf with respect to these activities. Absent some evidence from which the jury reasonably could have inferred any agreement between the parties that the assigning and evaluating of officials was carried out on behalf of PIAA, the court cannot sustain the jury's finding that a master/servant relationship existed between the Delco Chapter and PIAA and, therefore, would grant defendant's motion for judgment as a matter of law with respect to this issue if it were not procedurally barred.

b. Aided by Agency Relationship

Plaintiff's second theory underlying vicarious liability was that the Chapter and its agent assignors were aided in their discrimination by an agency relationship with PIAA.[6] The court instructed the jury that to find PIAA liable for Delco's acts under this theory, the jury had to find two things. First, the jury had to determine that the Delco Chapter was an agent[7] of PIAA "for some purpose other than assigning officials to games." N.T., Dec. 17, 1998, at 145. This

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[6] The aided in the agency relationship theory comes from Restatement § 219 (2)(d), which states that "A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . . he was aided in accomplishing the tort by the existence of the agency relation."

[7] Agent and agency relationship, as used throughout the instruction, were synonymous with servant and master/servant relationship. See note 4, supra.

required the jury to find that the four elements of a master/servant relationship existed between PIAA and Delco with respect to some activity other than the assignment of officials.[8] See id. Second, the jury had to find that "the chapter was aided in accomplishing discrimination in the assignment of officials by that agency relationship." Id. The court refused to instruct the jury that it must find that PIAA or its agent (i.e. servant) took a tangible employment action against Kemether, stating that "the tangible employment action is covered by the later parts of the charge. It is not part of a decision on the agency relationship . . . ." N.T., Dec. 17, 1998, at 15.

PIAA first asserts that Kemether failed to present sufficient evidence that a master/servant relationship existed between PIAA and Delco. After review of the record, the court disagrees. PIAA has general control over interscholastic sports in Pennsylvania. PIAA issues charters to local chapters when they are created and has the power to dissolve the chapters. See N.T. Dec. 10, 1998, at 47. Each chapter must adopt the PIAA-written constitution. See id. at 136-38. One of the responsibilities of the associate executive director of PIAA is to assist in training officials. See N.T. Dec. 10, 1998, at 41 (Lombardi testimony). In carrying out that training mission, PIAA relies on the chapters. See N.T., Dec. 10, 1998, at 132-33 (Cashman testimony). For example, rule books are sent to the chapters which then disseminate them to officials. See id. at 45 (Lombardi testimony). PIAA also requires officials to be members of a chapter and to attend six chapter meetings during the course of the basketball season. See id. at

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[8] The parties disagree about whether this theory of liability requires servancy or simply an agency relationship between PIAA and Delco. In its charge to the jury, the court specifically instructed the jury that it must find a master/servant relationship (referring to the four elements of servancy) in order to find that Delco had been aided by an agency relationship. As the evidence supports the jury's finding that the organizations' relationship met the more stringent requirements of a master/servant relationship, it is unnecessary to evaluate whether only simple agency is actually required.

113, 138-39 (Cashman testimony). One of these is a rules interpretation meeting at which the officials are instructed by the chapter rules interpreter on new rules adopted by PIAA and the manner in which PIAA wants certain game situations to be handled. See id. at 133. Prior to the chapter's rules interpretation meeting, the rules interpreters attend a rules interpretation meeting conducted by PIAA. See N.T., Dec. 8, 1998, at 169 (Thrasher testimony). Additionally, PIAA requires each chapter to track officials' attendance at meetings and to report back to PIAA each official's attendance record. See N.T., Dec. 9, 1998, at 232-33 (Watkins testimony).

Even this non-exhaustive list clearly provides the minimal evidence from which the jury could have determined that a master/servant relationship existed in that PIAA had the power and authority to train officials, that PIAA consented to have Delco train officials during the regular season on behalf of PIAA, that Delco consented to train officials on behalf of PIAA, and that PIAA had the right to control the manner and means by which Delco trained the officials.

PIAA also disputes that the Chapter was aided in accomplishing its discrimination by the agency relationship. Defendant contends that in order to prevail on this element, plaintiff must produce evidence beyond the agency relationship -- that plaintiff was required to prove that Delco took a tangible employment action against Kemether.[9] See Def.'s Brief at 21-23. In so

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[9] At trial, the jury was first tasked with determining whether PIAA could be held responsible for Delco's acts under three separate agency theories. After determining that PIAA could be held vicariously liable, the jury was then instructed to determine whether Kemether was discriminated against under Title VII, Title IX, and the Pennsylvania ERA. In applying the aided in the relation standard, evaluation of whether a tangible employment action occurred requires an initial determination that discrimination took place. See Burlington, 118 S. Ct. at 2265 ("[W]hen we assume discrimination can be proved, . . . the factors we discuss below [including presence of tangible employment action] . . . will be controlling on the issues of vicarious liability."). Because the jury was asked to decide the agency issue prior to any issues of discrimination, the court refused, over defendant's objection, to instruct the jury with respect to the tangible employment action in the agency section as it would appear to put the proverbial cart before the

arguing, PIAA relies on the Supreme Court's decisions in Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 1157 (1998), and Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998), and the Third Circuit's opinion in Durham Life Ins. Co. v. Evans, 166 F.2d 139 (3d Cir. 1999). Burlington and Faragher were companion cases involving sexual harassment of an employee by a supervisor. The Court held that where a supervisor's harassment of a subordinate culminates in a tangible employment action against the subordinate, the employer will be held vicariously liable for the supervisor's acts. See Burlington, 118 S. Ct. at 2269 (stating that liability is automatic where supervisor takes tangible employment action against subordinate); Faragher, 1118 S. Ct. at 2292-93 (same); see also Durham, 166 F.3d at 152 (under Burlington and Faragher "sex-based mistreatment by a supervisor . . . creates automatic liability when it rises to the level of a tangible adverse employment action"). Tangible employment actions are those that "constitute[] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[10] Burlington, 118 S. Ct. at 2268.

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horse. Discrimination having been found by the jury, see infra, however, the court will evaluate the tangible employment action issue in the discussion of this agency theory.

[10] Part of defendant's argument is that the tangible employment action must have altered her employment relationship with PIAA. Because neither Kemether nor PIAA contends that an employer/employee relationship existed between them during the regular season, the evidence necessarily cannot support a finding that an adverse employment action affected the parties' relationship. Defendant did not raise this particular issue at any time prior to jury deliberation and never requested language specifically referring to the employment relationship between PIAA and Kemether be added to the instructions. See N.T., Dec. 17, 1998, at 12-15.

Even if the court could now overturn the jury's verdict based upon a lack of evidence supporting a point that no party contended was an element to begin with, it would decline to do so for the following reasons. In the cases cited by defendant, the relationship between the parties was undisputedly that of employer and employee. See Burlington, 118 S. Ct. 2257 (1998);

Plaintiff presented sufficient evidence to sustain a jury finding that tangible employment actions occurred. For example, Delco, through its agent assignors refused to allow Kemether the opportunity to move up through the ranks of officials by refusing to let her officiate what were perceived by the assignors as the more prestigious boys' games. See N.T., Dec. 9, 1998, at 68 (Sheldrake testimony); N.T., Dec. 8, 1998, at 28 (Kemether Testimony); N.T., Dec. 9, 1998, at 142-43 (Faulkner testimony). One assignor also testified that he did not give her any assignments at all because she had filed suit against PIAA. See N.T., Dec. 8, 1998, at 146-47, 168. Both of these actions qualify as having effected significant changes in Kemether's employment. The jury could reasonably have concluded that Delco was able to take this action because it had been placed in the position of authority over the officials with respect to training and other related administrative duties.

The record contains the necessary amount of evidence from which a jury could reasonably find that PIAA and Delco had a master/servant relationship with reference to the

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Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998); Durham Life Ins. Co. v. Evans, 166 F.3d 139 (3d Cir. 1999). Therefore, the courts did not discuss how the aided in the relationship theory might apply in other contexts. In Burlington, the Court repeatedly noted that the aided in the agency theory has not been fully developed and that these cases do not provide the full scope of this theory as it applies in Title VII actions. See Burlington, 118 S. Ct. at 2269 ("Whatever the exact contours of the aided in the agency relation standard . . ."; "The aided in the agency relation standard . . . is a developing feature of agency law"). Thus, these cases clearly do not set the outer limits of the application of this agency theory. Furthermore, applying defendant's argument would foreclose the use of the aided in the agency relation standard in any Title VII case in which the defendant is not the employer of the plaintiff, e.g. in cases involving discriminatory practices of employment agencies or where the defendant interfered with plaintiff's employment with another entity. As the Supreme Court's decisions do not preclude application of the aided in the agency standard in this situation where the employment relationship affected by the agent's conduct is between the plaintiff and a non-defendant, the court sees no reason to analyze the evidence and jury verdict in light of defendant's suggested limitation.

training of officials and other related administrative duties which aided Delco in discriminating against Kemether in her assignments and evaluations. Consequently, defendant's motion for judgment as a matter of law on this issue would be denied.

c. Apparent Authority

Plaintiff's final theory for holding PIAA vicariously liable was that Delco acted with the apparent authority of PIAA and therefore, PIAA should be responsible for Delco's discriminatory conduct. Apparent authority arises when a person or entity manifests to third parties that another is the first party's agent. See Restatement §§ 8, 27. Apparent authority "is created by and flows from the acts of the principal." Fields v. Horizon House, Inc., No. 86-4343, 1987 WL 26652, *4 (E.D. Pa. Dec. 9, 1987). For the apparent principal to be liable for the conduct of the apparent agent, there must be "reliance upon, or belief in, statements or other conduct within an agent's apparent authority." Restatement § 265 (1).

Defendant makes three arguments regarding the lack of evidence supporting its liability under this agency theory. First, defendant contends that there must be a master/servant relationship between PIAA and Delco,[11] but that no such relationship exists on the record. Reference to many of the rules regarding the creation of apparent authority in the Restatement reveals that servancy is not a prerequisite to the existence of or liability pursuant to apparent authority. See, e.g., Restatement § 265 (referring to liability of "master or other principal" in

[11] Although PIAA now seeks to insert a master/servant relationship requirement into apparent authority, defendant did not request any such language in its proposed instruction and did not object to the absence of it in the jury charge. As stated earlier, failure to object to a jury instruction waives any subsequent reliance on the instruction as a basis of error. See Abraham, 728 F.2d at 172. Defendant appears to be trying to bypass this rule by framing the issue as one of insufficient evidence. Regardless, as discussed infra, defendant's objection to the instruction is without merit.

general rule regarding liability for conduct occurring within apparent authority or employment); Restatement § 27 (discussing creation of apparent authority in terms of principal and agent not master and servant); see also American Tele. & Tele. Co., 42 F.3d at 1439-40 (citing both New Jersey law and Sixth Circuit opinion and holding that apparent authority arises in "absence of an actual agency relationship").[12]

Defendant's second argument is that plaintiff failed to present sufficient evidence such that the jury could reasonably find that PIAA's statements or conduct caused Kemether to believe that Delco was PIAA's agent. The court disagrees. Based on the testimony, the jury was not unreasonable in finding that PIAA had put forth the impression that the chapters were part of PIAA and acted as its agent with respect to officials, in particular, with respect to the assigning and evaluation of officials. PIAA has general control over Pennsylvania interscholastic sports including demonstrated control over significant aspects of officiating. For example PIAA required all of the chapters to include the words "Chapter of PIAA Officials" in their names. N.T., Dec. 10, 1998, at 136 (Cashman testimony). PIAA required each official to be a member of a chapter. See N.T., Dec. 7, 1998, at 123-24 (Kemether testimony). PIAA used the chapters to disseminate information to the officials. See id. at 45 (Lombardi testimony). PIAA also sent information about the function of chapters to officials including the Athletic Officials Manual, which set out requirements for both chapters and officials. See N.T., Dec. 7, 1998, at 123-24 (Kemether testimony). As noted earlier, PIAA used the chapters to recruit and train officials. PIAA provided the contracts used by schools and officials. See id. PIAA mandated that any

[12] Although defendant objects to any reliance by the court on American Tele. &Tele. Co. due to the fact that it interprets New Jersey agency law, it should be noted that in its proposed point for charge on apparent authority defendant cited only this case.

game involving a PIAA-member school be officiated by a PIAA official, and in the Delco Chapter's jurisdiction, the Chapter through its agents, assignors Sheldrake and Faulkner, provided the only means by which PIAA officials could be assigned to PIAA games. See N.T., Dec. 7, 1998, at 131-32 (Kemether Testimony). One of the responsibilities of the PIAA District I officials representative is to attend and hold discussions at chapter meetings that involved, inter alia, discussions about the assignment process. See N.T., Dec. 15, 1998, at 60, 77. When Kemether filed her EEOC complaint, a PIAA official came to talk to the Delco Chapter about the action. See N.T., Dec. 10, 1998, at 56 (Lombardi testimony). In a letter to member officials, the Delco Chapter informed them that PIAA had instituted a rule prohibiting assignors from accepting money from officials in exchange for assignments. See N.T., Dec. 8, 1998, at 12 (Kemether testimony). PIAA materials, including the constitution and the officials manual, contain information on assignment of officials. See id. at 10-15.

The jury could reasonably have concluded that the cited testimony and other similar testimony evidences a relationship with and use of the chapters that could lead an official like Noreen Kemether to believe that the chapters were the agents of PIAA.

Defendant's final argument is that the record does not support a finding that Kemether relied on the apparent authority. Once again, defendant is now raising an objection to the instructions that was not raised prior to jury deliberation -- PIAA neither requested that the court instruct with regard to reliance, see Def.'s Point for Charge No. D5, nor objected to the charge as given. Again, the defendant appears to be trying to bypass its waiver of the issue by presenting it as a matter of insufficient evidence. See note 8, supra. Nevertheless, had the jury been instructed that Kemether had to rely on the apparent authority in order to find PIAA vicariously

liable, the court concludes that it could have found that such reliance occurred.

Kemether testified that she believed that in order to officiate public school games and to expand her refereeing abilities, she had to join PIAA and a local chapter. See N.T., Dec. 7, 1998, at 123. Consequently, believing the chapter to be an extension of PIAA, one could find that Kemether relied upon its connection to the PIAA system and the member schools in joining and expecting the Chapter to fairly evaluate and assign her to games such that she could advance to the best of her ability. Consequently, the court would deny defendant's motion for judgment as a matter of law with respect to apparent authority.

2. Title VII Discrimination

The jury considered two separate forms of discrimination under Title VII -- whether PIAA discriminatorily interfered with Kemether's employment relationship with the PIAA-member schools in violation of 42 U.S.C. § 2000e-2 (a)(1), and whether PIAA, acting as an employment agency, discriminated against Kemether in violation of 42 U.S.C. § 2000e-2 (b). Defendant contends that the evidence is insufficient as a matter of law to support a finding of discrimination under either theory because during the regular season, plaintiff was not an employee of or an individual seeking employment with PIAA-member schools, but, instead was an independent contractor.[13] Defendant also argues that the record does not contain the requisite

[13] Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Courts have interpreted the broadly worded phrase "otherwise to discriminate against any individual" as not requiring any showing of an employment relationship between a plaintiff and defendant. See, e.g., Christopher v. Stouder Mem'l Hosp., 936 F.2d 870, 874-76 (6th Cir.) (defendant denied privileges to private-duty scrub nurse), cert. denied, 502 U.S. 1013 (1991); Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1342 (D.C. Cir. 1973) (same); Pelech v. Klaff-Joss, LP, 815 F. Supp. 260, 262 (N.D. Ill. 1993); Burkey v. Marshall County Bd. of Educ., 513 F.

evidence to uphold the jury's finding that PIAA acted as an employment agency under § 2000e-2 (b).

The parties agreed that the test enunciated in Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 112 S. Ct. 1344 (1992), for determining whether an employment relationship exists for Title VII purposes applied in this instance. Accordingly, the court instructed the jury that it should consider the following factors in deciding whether Kemether was an employee of the schools: the schools' right to control the manner and means of officials' performance; the skills required; whether the schools furnish officials with equipment; the place of work; the duration of the relationship between the parties; whether the schools have the right to assign additional projects to officials; the extent of the officials' discretion over when and how long to work; the method of payment; the officials' role in hiring and paying assistants; whether the work is part of the regular business of the schools; whether the schools are in business; the provision of employee benefits; and the tax treatment of the officials.[14] See N.T., Dec. 17, 1998, at 160. Additionally, the court directed the jury to examine the totality of the circumstances in

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Supp. 1084, 1097 (N.D. W. Va. 1981) (citing Sibley, 488 F.2d at 1341-42). The plaintiff must, however, be the employee of a third-party employer. See, e.g., Diggs v. Harris Hospital-Methodist, 847 F.2d 270, 273-74 (5th Cir.), cert. denied, 488 U.S. 956 (1988).

[14] Rather than evaluating the sufficiency of the evidence in light of the Darden factors, defendant seems to want the court to decide the employee/independent contractor issue based on factors applied by the Fourth Circuit in Cilecek v. Inova Health Sys. Servs., 115 F.3d 256 (4th Cir. 1997), cert. denied, 118 S. CT.. 694 (1998). See Def's Brief at 33-35. The court declines defendant's invitation to do this on two grounds. First, for the reasons stated in the text infra, whether Kemether is an employee or independent contractor is an issue of fact for the jury. Second, the court instructed the jury on the basis of the Supreme Court's decision in Darden without objection from defendant. PIAA has waived its right to point to the jury instruction as a source of error, see Abraham, 728 F.2d at 172, and cannot circumvent its waiver by arguing insufficiency of the evidence based on law not included in the instruction.

determining whether Kemether was an employee because no single factor is decisive. Id. at 161.

Trial testimony elicited the following facts weighing in favor of finding that during the regular season, plaintiff and other officials are employees of the schools. The schools pay officials for regular season games. See N.T., Dec. 9, 1998, at 46 (Thrasher testimony) Schools set the times, dates, and locations where the officials will work. See N.T., Dec. 7, 1998, at 131-32 (Kemether testimony). The schools set the fees to be paid and officials have no power to negotiate the amount. See N.T., Dec. 9, 1998, at 42-44 (Thrasher testimony). The officials do not have any control over which games they will referee beyond alerting the assignor of their general availability and have no control over the level of game to which they will be assigned. See N.T. Dec. 14, 1998, at 52-52 (Wisniewski testimony). All of the officiating occurs at the schools. N.T., Dec. 9, 1998, at 46-47 (Thrasher testimony). Interscholastic sports are part of the schools' "business" which involves the education and personal development of students. Schools evaluate officials and can state whether they want particular officials working for them. See, e.g., N.T., Dec. 11, 1998, at 129-30 (Stephens testimony). As discussed previously, member schools created PIAA to organize and monitor interscholastic athletics and that organization sets the rules, establishes and enforces membership and uniform requirements, disciplines officials, and provides them with insurance.

Evidence weighing against a finding of an employment relationship includes the following. Officials may reject or accept any game assigned to them for what ever reason. See N.T., Dec. 8, 1998, at 146-47. Schools have no ability to interfere with an official's calls during the course of the game. See, e.g., N.T., Dec. 14, 1998, at 40 (Wisniewski testimony). The schools do not provide health benefits and do not withhold taxes from officials' paychecks. See

N.T., Dec. 9, 1998, at 43-44 (Thrasher testimony). Basketball officials market themselves to various assignors and schools in order to get assignments. See, e.g., N.T., Dec. 14, 1998, at 30. Schools do not have the power to impose additional work on officials. The duration of the relationship between the official and each school lasts only the length of the game. See N.T., Dec. 9, 1998, at 43 (Thrasher testifying that are paid at time of each game). The contract states that officials are independent contractors. See N.T., Dec. 8, 1998, at 145 (Kemether testimony). Finally, officials provide their own uniforms and whistles. See id. at 42-43.

Where the evidence could yield different conclusions as to whether an individual is an employee, the issue is properly presented to the jury to decide. See Martin v. United Way of Erie County, 829 F.2d 445, 451 (3d Cir. 1987) (holding that existence of evidence on both sides of employee issue created genuine issue of material fact so summary judgment inappropriate on ADEA claim); Stouch v. Brothers of the Order of Hermits of St. Augustine, 836 F. Supp 1134, 1141-42 (E.D. Pa. 1993) (same). Given the extent of the evidence on both sides of the issue, the question of whether Kemether was an employee of the schools was properly before the jury and the court finds no reason to disturb the jury's determination on that issue.[15]

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[15] PIAA cites Collegiate Basketball Officials Ass'n v. NLRB, 836 F.2d 143 (3d Cir. 1987), (hereinafter "CBOA"), to support its contention that plaintiff is an independent contractor and not an employee. In CBOA, the Third Circuit affirmed the National Labor Relations Board's determination that college basketball officials who were members of the Collegiate Basketball Officials Association were independent contractors of the Big East Conference and not employees. See id. at 149. Although the officials in CBOA appear similarly situated to Kemether and other PIAA officials, that case does not compel the court to find, as a matter of law, that plaintiff is an independent contractor. The court in CBOA, treated the Board's determination as being of a "factual nature" and confined its review to whether the conclusion was "supported by substantial evidence." Id. at 145. The court recognized that evidence existed to support either outcome, characterizing the issue as "a close one," while also noting that "[o]fficiating ill fits the usual distinction between independent contractors and employees." Id. at 148. Ultimately, the court held that "the Board [had] chosen between two rational, conflicting

In PIAA's other challenges to its liability under Title VII, it argues that PIAA itself did not interfere with plaintiff's employment with the schools or engage in discriminatory activity as an employment agency. There is substantial evidence, undisputed by defendant, that the Chapter and its agent assignors did interfere with Kemether's employment with the schools by limiting her assignments to girls' games and refusing to give her any assignments in some seasons. As the jury properly found that PIAA is responsible for the Chapter's and assignors' actions under agency principles, PIAA can be held liable for their unlawful interference. Likewise, while PIAA itself may not qualify as an employment agency, the Chapters and assignors clearly do.[16] Again, the jury's finding with regard to agency, allowed it to impute liability for the Chapter's and assignors' discriminatory employment practices to PIAA. Consequently, if the issue were properly before the court, I would deny defendant's motion for judgment as matter of law with respect to its liability under both sections of Title VII.

3. Title IX Discrimination

PIAA contends that its motion for judgment as a matter of law should be granted on the Title IX claim for two reasons. First, PIAA is not a recipient of federal financial assistance and,

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views of the record," and that the Court of Appeals was thus bound by the Board's factual finding.

The same can be said with regard to the case at bar. As previously discussed, evidence exists on both sides of the employee/independent contractor debate in this case as well. Like the Board's decision in CBOA, the jury's determination in this case, either way, would have been reasonable and supported by the record.

[16] As used in Title VII, "[t]he term 'employment agency' means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person." 42 U.S.C. § 2000e © (West 1994). The Chapters and assignors do both in providing schools with officials for their games and matching officials with employment opportunities at the schools.

therefore, is not subject to Title IX. See Def.'s Brief at 42. Second, the evidence does not show that PIAA itself had any rule or practice that classified officials based on gender in violation of the statute. See id. at 43.

a. Jurisdiction Under Title IX

Title IX prohibits exclusion from or discrimination under "any education program or activity receiving Federal financial assistance" on the basis of sex. 20 U.S.C. § 1681 (a) (1990). At trial, the parties stipulated that, if it proved necessary, the court would decide as a matter of law and fact the issue of whether PIAA is a recipient of federal funds such that it is subject to Title IX jurisdiction. See N.T., Dec. 17, 1998, at 4. The parties do not dispute that PIAA is an "education program or activity" as defined in the statute.

Defendant disputes PIAA's alleged status as a recipient of federal funds on a number of levels. First, PIAA correctly points out that plaintiff failed to present any evidence that PIAA itself receives federal funds. See Def.'s Brief at 42. Second, PIAA contends that no evidence exists in the record that any of the member schools receive federal funds. See id. Pursuant to the federal funding issue, plaintiff provided substantial evidence regarding the federal monies received by Pennsylvania school districts including those with schools in the Del Val League. See Pl.'s Exs. 121-125. In its Directory of Member Schools, PIAA lists each "PIAA Member School District" and the schools within that district according to their PIAA district number. Pl.'s Ex. 3, § III. Additionally, one PIAA official agreed that many of the PIAA-member schools do receive federal funding. See N.T., Dec. 14, 1998, at 83-84 (Cashman testimony). Despite defendant's argument to the contrary, the school districts and schools are functionally the same

in this analysis.[17] Whether PIAA-member schools obtain federal funds via the school districts or directly from the federal government, they qualify as recipients under Title IX. See 34 C.F.R. § 106.2 (h) (defining recipient to include entities receiving funds directly and indirectly); Grove City College v. Bell, 465 U.S. 555, 569 (1984) (holding that indirect receipt of federal funds encompassed within scope of Title IX).

Defendant's final argument is that even if the court were to equate the districts' receipt of federal funds with the individual schools having received federal funds, the Supreme Court's recent decision in National Collegiate Athletic Assoc. (NCAA) v. Smith, 119 S. Ct. 924 (1999), would nevertheless prevent application of Title IX to PIAA. See id. In NCAA, the Court held that the payment of dues by member schools to the NCAA was insufficient, without more, to subject the organization to Title IX. See NCAA, 119 S. Ct. at 929 (stating that federal funds "earmarked" for payment to the NCAA would have sufficed). PIAA argues that, like in NCAA, plaintiff has only shown that federally funded schools pay dues to the association, but that she has not shown the "something more" required by that Court. Absent any evidence that PIAA receives the federal funds given to the schools, defendant asserts that PIAA does not come under the auspices of Title IX.

Plaintiff acknowledges the applicability of NCAA, but contends that Title IX jurisdiction is appropriate on two alternate grounds not considered by the Court in that case and not addressed by defendant. See Pl.'s Brief at 48-51. First, plaintiff claims that the schools, which receive federal funds, have ceded controlling authority over a federally funded program to PIAA.

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[17] To argue, as PIAA, essentially does, that a school district may receive federal money and not disseminate any of those funds to the schools that comprise it is disingenuous at best.

As a result, PIAA is subject to Title IX even if it does not receive federal funding itself. See Pl.'s Brief at 49. This theory was discussed recently in Cureton v. National Collegiate Athletic Assoc., 37 F. Supp. 2d 687 (E.D. Pa. 1999), a Title VI case.[18] In Cureton, plaintiffs challenged a rule promulgated by the National Collegiate Athletic Association ("NCAA") claiming that the rule discriminated against African-American athletes. See id. at 689. In denying summary judgment, the court found that the NCAA was subject to Title VI despite the fact that there was no evidence that federal funds paid to member schools were then received by the NCAA. The court determined that the collegiate members of NCAA receive federal funds. Id. Next the court concluded that out of necessity, due to the nature of intercollegiate sports, these schools had placed the governance and promotion of intercollegiate athletic programs in the hands of a separate entity, the NCAA. See id. at 695. Furthermore, the schools had "granted to the NCAA the authority to promulgate rules affecting intercollegiate athletics that the members are obligated to abide by and enforce." Id. Consequently, the court ruled, "the NCAA [came] sufficiently within the scope of Title VI irrespective of its receipt of federal funds." Id.

Title IX and Title VI contain almost identical language (Title IX substitutes "sex" for the words "race, color, or national origin" used in Title VI) and were meant to be interpreted and applied in an identical fashion. See Cannon v. University of Chicago, 441 U.S. 677, 696 (1979); NCAA, 119 S. Ct. at 928 n.3. Therefore, the analysis in Cureton is equally applicable to the case at bar. Much of the evidence presented in this trial mirrors the facts cited by the court in Cureton to support its conclusion that the NCAA is subject to Title VI. Similar to the NCAA, PIAA is a

[18] The Supreme Court in NCAA v. Smith expressly declined to rule on this theory because the Third Circuit had not yet considered it. See NCAA, 119 S. CT.. at 930.

"voluntary membership association of public and private secondary schools." N.T., Dec. 12, 1998, at 101 (Def.'s Admissions). As discussed above, many of the schools comprising the association receive federal funds. PIAA has "general control over all interscholastic athletic relations and athletic contests in which a member school of [PIAA] participates."[19] N.T., Dec. 10, 1998, at 104 (Cashman reading from PIAA Constitution). To become a member of PIAA, a school must certify that it agrees to be governed by the PIAA constitution and by-laws "in all matters relating to interscholastic athletics."[20] Id. at 107; N.T., Dec. 12, 1998, at 101 (Def.'s Admissions). Non-compliance by a member school can result in the imposition of penalties or even expulsion. See id. Also like the NCAA, in its function as overseer of athletics, PIAA promulgates policies and rules that are binding on the member schools. See N.T., Dec. 12, 1998, at 101 (Def.'s Admissions). Finally, the discrimination in which PIAA and its agents were found by the jury to have been engaged involved officials who are an integral part of the interscholastic athletic basketball program which is sponsored by the federally funded member schools. On these facts the court concludes that PIAA is subject to Title IX jurisdiction because it has been ceded controlling authority over a federally funded program.

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[19] The cited section of PIAA's constitution reads in full: "The Board of Control shall have the following powers and duties: A. To have general control over all interscholastic athletic relations and athletic contests in which a member school of this Association participates." Pl.'s Ex. 3, PIAA Const. art. VII, § 1.

[20] The referenced portion of the constitution states:

> Each application for membership shall be signed by the principal and shall be accompanied by the annual dues and a resolution of approval executed by the School Board or the Board having jurisdiction over the applicant school. The resolution shall state that in all matters pertaining to interscholastic athletic activities, the school shall be governed by the Constitution and By-Laws of the P.I.A.A.

Pl.'s Ex. 3, PIAA Const., art. III, § 2.

Plaintiff's second argument for finding that PIAA meets the federal funds requirements closely resembles the theory detailed above. Plaintiff asserts that PIAA is a recipient of federal funds because it is the assignee of the member schools who are recipients of federal funds. See Pl.'s Brief at 50. In its regulations, the Department of Education has adopted a definition of recipient for Title IX purposes[21] which includes:

> any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

34 C.F.R. § 106.2 (h) (1992) (emphasis added). In neither its motion for post-trial relief nor its reply brief did defendant dispute that the schools have assigned to it the duty and function of running interscholastic sports in Pennsylvania. The court has found no case law from which it could conclude that defendant does not fit into a broad definition of an assignee.[22] Based on the foregoing, the court finds that PIAA is a recipient of federal funds on the ground that an entity to which federal financial assistance has indirectly been extended and which operates an education program (i.e. interscholastic sports) which benefits from such assistance has assigned, or alternatively ceded control over, the operation of said program to PIAA.

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[21] The Supreme Court has afforded this definition significant deference, see, e.g., National Collegiate Athletic Assoc., 119 S. Ct. at 929 (stating that Third Circuit had misread definition and "failed to give effect to the regulation in its entirety").

[22] Neither Title IX nor the regulations define assignee. Moreover, the court has been unable to uncover any cases defining the term in this context. Black's Law Dictionary defines assignee as "[a] person to whom an assignment is made; grantee." Black's Law Dictionary 118 (6th ed. 1990). An assignment includes "[t]he act of transferring to another all or part of one's property, interest, or rights." Id. at 119.

b. Discriminatory Conduct in Violation of Title IX

Defendant briefly disputes the jury's finding that it discriminated against Kemether in violation of Title IX, stating that no evidence exists that any "PIAA rule or practice erects a gender classification" or that "any rule or practice of PIAA has a disproportionate affect on women as compared with men." Def.'s Brief, at 43. The evidence, when viewed in the light most favorable to plaintiff, clearly demonstrates that defendant's agents and subagents had stated policies against assigning women officials to boys' varsity or junior varsity games. See, e.g., N.T., Dec. 9, 1998, at 67-68. Moreover, there was testimony that PIAA officials were aware of these policies and supported them as being in line with the attitudes of the member schools. See, e.g., N.T., Dec. 10, 1998, at 196-97 (Girifalco testimony). Because the evidence of record supports the jury's finding of discrimination under Title IX, defendant's motion for judgment as a matter of law on this issue, if properly before the court, would be denied.

4. Retaliation under Title VII and Title IX

To succeed on her claims of retaliation under Title VII or Title IX, plaintiff had to prove that: "(1) she engaged in activity protected by Title VII [or Title IX]; (2) [defendant] took an adverse employment action against her; and (3) there was a causal connection between her participation in the protected activity and the adverse action." Robinson v. City of Pittsburgh, 120 F.3d 1286, 1299 (3d Cir. 1997); accord, Topal v. Trustees of Univ. of Pennsylvania, 160 F.R.D. 474, 475 (E.D. Pa. 1995) (applying Title VII retaliation standard to Title IX). Defendant contends that the evidence does not show that PIAA took an adverse employment action against Kemether "that was serious enough to alter her employment status (under Title VII) or her status as a participant in a federally assisted program (under Title IX)." Def.'s Brief, at 43. PIAA's

argument assumes that it is not responsible for the conduct of the Delco Chapter and the assignors under agency principles and that the employment action had to have been taken by PIAA itself for liability to attach. See Def.'s Brief, at 43. Defendant does not argue, nor could it based on the evidence in the record, that there is insufficient evidence from which to find that the Chapter and assignors retaliated against plaintiff. See, e.g., N.T., Dec. 8, 1998, at 50-51, 74-75, 95-96 (Kemether testimony); Dec. 9, 1998, at 146-47, 158-59, 168, 176 (Faulkner testifying that Kemether did not receive assignments as a result of lawsuit). Because the jury found that PIAA is responsible for the Chapter's and assignors' retaliatory actions as a matter of agency law, and the court has found that there is sufficient evidence to support the verdict, defendant's argument that PIAA should not be held liable because it did not personally retaliate against plaintiff is without merit.

5. Pennsylvania Equal Rights Amendment

The Pennsylvania Equal Rights Amendment ("ERA") reads: "Equality under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."[23] Pa. Const. art. 1 § 28. Like many of defendant's arguments discussed previously, the linchpin of PIAA's challenge to the jury's finding that it violated the ERA is that PIAA is not responsible for the conduct of the Delco Chapter and the assignors under agency principles and

[23] The Pennsylvania Commonwealth Court has determined that "[t]he concept of 'equality of rights Under the law' . . . is at least broad enough in scope to prohibit discrimination which is practiced under the auspices of what has been termed 'state action'" and that "the activities of the PIAA [are] state action in the constitutional sense." Commonwealth ex rel. Packel v. Pennsylvania Interscholastic Athletic Assoc., 334 A.2d 839, 842 (Pa. Commw. Ct. 1975).

that liability can only arise out of PIAA's own conduct.[24] See Def.'s Brief at 40. Because the court has determined that the jury properly found that PIAA is liable for the discriminatory conduct of the Chapter and assignors, it would deny defendant's motion respecting this issue.

B. Liability for the Assignment of Officials to Post-Season Games

The remainder of defendant's arguments involve its liability for discrimination in the post-season during which time PIAA was directly responsible for the assignment of officials. The jury found that PIAA's manner of choosing individuals to officiate post-season playoff games violated Title VII, Title IX, and the Pennsylvania ERA. Defendant urges the court to find that insufficient evidence exists to support the verdict with respect to all three theories of liability considered by the jury.

1. Title VII

PIAA seeks judgment as a matter of law with regard to the finding that it is liable under Title VII for discrimination in the post-season on two grounds. First, relying on its earlier argument with respect to the officials' relationship to member schools, PIAA contends that plaintiff is an independent contractor and not an employee of PIAA and therefore Title VII does not apply. See Def.'s Brief at 45. Second, PIAA asserts that there is no evidence of intentional discrimination in that the record is void of any evidence showing that PIAA had a rule that classified male and female officials differently or that any such rule was implemented for discriminatory purposes. See Def.'s Brief at 45.

[24] PIAA seeks judgment as a matter of law with respect to the jury's finding that defendant violated the ERA on two related grounds. First, defendant contends that no evidence exists that "any conduct of PIAA itself had any negative effect on Ms. Kemether's opportunities during the regular season." Def.'s Brief at 40. Second, defendant claims that plaintiff did not allege "a PIAA law or rule that classifies officials." Id. at 41.

Regarding defendant's first argument, the court discussed at length in section II.A.2 supra the validity of the jury's finding that plaintiff was an employee of the member schools who hired her to officiate regular season games. The same analysis can be applied and many of the same factors are relevant to determining whether officials and PIAA have an employer and employee relationship during the post-season. Officials must submit their names to PIAA for consideration for post-season assignments. See, e.g., N.T., Dec. 15, 1998, at 85. Once selected, PIAA sets the time and place of each game. See N.T., Dec. 10, 1998, at 212 (Ruoff testimony); N.T., Dec. 11, 1998, at 104 (Def.'s Admissions). The officials must call the game according to rules adopted by PIAA. Additionally, officials must abide by PIAA's code of ethics and must wear a PIAA patch and uniform that complies with PIAA requirements. See N.T., Dec. 10, 1998, at 124-26. PIAA pays the officials a set fee for each game and officials have no power to negotiate that fee. See N.T., Dec. 10, 1998, at 212 (Ruoff testimony). PIAA controls the upward mobility of the officials in that it chooses officials for each successive round of play based on its own evaluation of their merit. See N.T. Dec. 14, 1998, at 103. PIAA requires each official to join a chapter and to attend a minimum number of chapter meetings each season. See N.T., Dec. 10, 1998, at 112-13. Additionally, as noted earlier, PIAA provides officials with various types of insurance as part of their membership in PIAA.

Although defendant presented evidence that would support a finding that the officials are independent contractors, the jury's determination that the officials are employees was not unreasonable. Therefore, defendant's motion for judgment as a matter of law would be denied with respect to this issue.

The court would also deny defendant's motion with respect to its second argument that a

finding of intentional discrimination is not warranted by the evidence. Review of the record reveals that the jury could reasonably have concluded that discrimination played a role in the implementation of PIAA's ten-game rule for post-season officials. There is evidence that PIAA officials knew that at least some chapter assignors did not assign women to boys' varsity games during the regular season. See N.T., Dec. 10, 1998, at 197 (describing discussion between female official and PIAA official about regular season prohibition against women officiating boys' games); N.T., Dec. 10, 1998, at 53, 65-66 (Lombardi testimony) (testifying that he had never seen women officiate boys' games); N.T., Dec. 10, 1998, at 147-48 (Cashman testimony) (same); N.T., Dec. 10, 1998, at 215-16 (Ruoff testimony) (same). The jury could reasonably infer that PIAA, therefore, implemented the ten-game rule knowing that women would never be able to meet the requirement as they were unable, due to the assigning practices during the regular season, to officiate ten boys' games. Additionally, PIAA officials were aware of the preclusive effect of the ten-game requirement on women. See, e.g., N.T., Dec. 10, 1998, at 203 (PIAA district official stating that he never received recommendations for women to officiate boys' playoff games because they were not eligible based on ten-game rule). There also was testimony that the regular season assigning practices reflected not only the convictions of the assignors but also those of the member schools. See N.T., Dec. 10, 1998, at 197. The jury properly could have inferred that one of the purposes of instituting the ten-game rule was to appease its membership and insure that women would not officiate boys' post-season games.

2. Title IX

PIAA seeks judgment as a matter of law with regard to the application of Title IX to Post-Season games on the basis that no evidence exists of a gender classification, rule, or practice that

has negative impact on female officials. See Def.'s Brief at 48. As discussed in the previous section, however, such evidence does exist. The ten-game rule adopted by PIAA precluded women from ever being considered for officiating positions in boys' post-season games and, thus, cut them off from an opportunity for professional growth and development.

3. Pennsylvania Equal Rights Amendment

Defendant's final challenge to the jury's findings on liability involves the ERA's applicability to the post-season. PIAA claims that plaintiff failed to provide any evidence that the ten-game rule has a disproportionate negative effect on female officials.[25] The record, however, is replete with evidence to the contrary. It was known to PIAA that, because of the ten-game rule and the inability of women to obtain assignments to regular season boys' games, female officials were only ever eligible to officiate girls' playoff games. The same, however, was not true for male officials who had the option of refereeing both boys' and girls' games at all times.

Assuming that plaintiff demonstrated a disproportionate negative effect, defendant argues, it is nevertheless entitled to judgment as a matter of law because a facially neutral rule that does not classify individuals on the basis of gender cannot violate the ERA.[26] See Def.'s

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[25] Defendant also makes this claim regarding its rule that each year officials must declare whether they want to be considered for boys' or girls' post-season games. Plaintiff, however, did not assert that this rule violates the ERA. See Pl.'s Brief at 58.

[26] The court, without objection, instructed the jury that it could find PIAA liable for violating the ERA if it found that "the action of PIAA and/or its agents had a negative impact on plaintiff because of her gender" and that PIAA had failed to prove that it had a compelling interest and "that the means adopted to achieve the goal are necessary and narrowly drawn to achieve that goal." N.T., Dec. 17, 1998, at 173-75. Defendant now seems to contend that the jury was incorrectly instructed on the law. Having failed to object to the instructions at trial, this issue is waived. See Abraham, 728 F.2d at 172. As discussed infra, however, even if it were not waived,

Brief at 46-47. In so arguing, defendant relies on three Commonwealth court cases: Snider v. Shapp, 405 A.2d 602 (Pa. Commw. Ct. 1979); Guinn v. Pennsylvania Unemployment Compensation Bd. of Review, 382 A.2d 503 (Pa. Commw. Ct. 1978); and Gilman v. Unemployment Compensation Bd. of Review, 369 A.2d 895 (Pa. Commw. Ct. 1977). In both Guinn and Gilman, female plaintiffs challenged a statute that rendered them ineligible for unemployment compensation after they voluntarily quit their jobs to join spouses in new locales, because they did not provide the sole or major financial support for their families. See Guinn, 382 A.2d at 504; Gilman, 369 A.2d at 896. The court determined that the classification imposed by the statute was economic and not one based on gender and so it did not violate the ERA. See Guinn, 382 A.2d at 505; Gilman, 369 A.2d at 897 n.3. Notably, in both cases the court observed in separate discussions that no reliable evidence of the law's discriminatory effect had been presented. See Guinn, 382 A.2d at 505; Gilman, 369 A.2d at 896 n.2.

The plaintiff in Snider argued that a law requiring political candidates to file financial disclosure statements would prevent women from running for office if their husbands, who often controlled the finances, refused to disclose the information. See Snider, 405 A.2d at 611. The court found that the burdens imposed on candidates by the statute "place[d] no more weight upon one sex than the other," and thus did not run afoul of the ERA. Id.

Based on these cases, defendant claims that PIAA's ten-game rule cannot be found to have violated the ERA as a matter of law even where it has a disparate impact on women. Defendant is mistaken in its belief that simply because a law, practice, or rule does not make a gender classification explicit that it cannot violate the ERA. Although not cited by defendant,

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the court would deny PIAA's motion as defendant's argument is without merit.

the Pennsylvania Supreme Court also rendered an opinion in Snider. In its decision, Pennsylvania's highest court noted that it had in the past found "'facially neutral . . . policies which have the practical effect of perpetuating . . . discriminatory practices'" to be violative of state law. Snider v. Thornburgh, 436 A.2d 593, 601 (Pa. 1981) (quoting General Elec. Corp. v. Human Relations Comm., 365 A.2d 649 (1976)). The court proceeded to evaluate the financial disclosure law in light of the premise that neutral classifications can violate the ERA. See id. In so doing, the court found that the statute at issue in Snider did not violate the ERA because the only discrimination being perpetuated resulted from the "purely private action" of husbands -- the financial disclosure requirement did not perpetuate discriminatory practices occurring "under law." Id.

More recently, the Commonwealth court also considered the possibility that "de facto" discrimination had occurred as the result of a facially neutral practice. In Pennsylvania Nat'l Org. for Women v. Commonwealth of Pennsylvania Ins. Dept., 551 A.2d 1162, 1164-65 (Pa. Commw. Ct. 1988), alloc. denied, 561 A.2d 744 (Pa. 1989), the plaintiff argued that the insurance commissioner's approval of equal rates for men and women for automobile coverage failed to take into consideration the disparity in mileage accrued by male and female drivers -- plaintiff contended that women drive less then men and so were less likely to be involved in accidents. The court held that plaintiff could not "prove 'de facto' discrimination by insisting without some support that the insurers' rate-making practices have a discriminatory effect.". Id. at 1167.

In light of Snider and Pennsylvania Nat'l Org. for Women, it appears clear that while a practice may purport to treat men and women equally, if it has the effect of perpetuating

discriminatory practices, thus placing an unfair burden on women, it may violate the ERA. Consequently, defendant's claim that a facially neutral rule or practice cannot violate the ERA is erroneous and its motion for judgment as a matter of law would be denied.

C. Damages

PIAA's argument that the court should recalculate the damages awarded plaintiff by the jury depends for its support on the court finding for defendant on one or more of the substantive issues discussed previously. See Def.'s Brief at 48-50 (stating that particular types of damages would not be available if court granted defendant's motion on agency or jurisdictional issues). As the court has determined that the jury's findings, with the exception of one theory of agency, are supportable in the record, no further discussion of damages is necessary.

IV. MOTION FOR A NEW TRIAL

In the alternative, defendant seeks to have the court grant a new trial pursuant to Federal Rule of Civil Procedure 59. The decision to grant or deny a new trial is "'confided almost entirely to the . . . discretion . . . of the trial court.'" Shanno v. Magee Indus. Enter., Inc., 856 F.2d 562, 567 (3d Cir. 1988) (quoting Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980)). The motion "should be granted when, in the opinion of the trial court, the verdict is contrary to the great weight of the evidence, thus making a new trial necessary to prevent a miscarriage of justice." Roebuck v. Drexel Univ., 852 F.2d 715, 736 (3d Cir. 1988). The court may grant a new trial even though it has determined that judgment as a matter of law is inappropriate. See id. at 736.

After consideration of the issues raised by defendant and discussed in prior sections of

this opinion, and after thoroughly reviewing the record, I find that the jury's verdict is not against the weight of the evidence and that a new trial is not necessary to prevent a miscarriage of justice. Therefore, defendant's motion for a new trial will be denied.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NOREEN P. KEMETHER	:	CIVIL ACTION
	:	
v.	:	
	:	
PENNSYLVANIA INTERSCHOLASTIC	:	NO. 96-6986
ATHLETIC ASSOCIATION, INC.	:	

ORDER

AND NOW, this day of November, 1999, upon consideration of defendant's Motion for Judgment as a Matter of Law or, in the Alternative, a New Trial, plaintiff's response thereto, and defendant's reply, IT IS HEREBY ORDERED that the motion is DENIED.

IT IS FURTHER ORDERED that judgment is entered in favor of the plaintiff, Noreen Kemether, and against the defendant, Pennsylvania Interscholastic Athletic Association, Inc., in the amount of $314,000.00 representing $4,000.00 in back-pay, $10,000.00 in lost future earnings, $75,000.00 in compensatory damages and $225,000.00 in punitive damages as awarded by the jury in its verdict.

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William H. Yohn, Jr., Judge