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Applying Anti-Discrimination Law To Public Accommodations

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In a notable recent decision in *Rothman v. U.S. Tennis Association*, Judge Denise Cote of the Southern District of New York held that the U.S. Tennis Association (the USTA) was not obligated to adjust the schedule for an amateur tennis tournament to accommodate the religious observance of Orthodox Jewish competitors.[1] The court ruled that the plaintiffs—the members of a 55-and-over amateur tennis team made up mostly of Sabbath-observing Orthodox Jewish players—had failed to demonstrate that the USTA's scheduling decisions, in particular requiring teams to play tournament matches on Saturdays, were made with a discriminatory intent.

This decision is the first in the U.S. Court of Appeals for the Second Circuit and one of the few in the country to address whether federal antidiscrimination laws require private businesses to accommodate their customers' and other constituents' religious observances. The Rothman decision makes clear that, so long as they do not act with any discriminatory intent, business policies and decisions of private businesses will not be disturbed simply because those policies or decisions conflict with some constituents' religious observances. The authors represented the USTA in this case.

Background

The plaintiffs' tennis team had qualified for the USTA Eastern Section's 2014 55-and-over sectional championship. The tournament had originally been scheduled for Friday, Sept. 26, through Sunday, Sept. 28. Early in the season, the Eastern Section rescheduled the championship to Saturday, Sept. 27, through Monday, Sept. 29, to accommodate Rosh Hashanah. Each team in the tournament was scheduled to play two team matches on each of the first two days of the tournament and one team match on day three.

After qualifying, the plaintiffs requested that the USTA rearrange the tournament schedule to allow them to compete without playing matches on Saturday so as to allow them to observe the Jewish Sabbath. Alternatively, the players asked for relief from the association's forfeiture rules, allowing them to forfeit Saturday's matches without penalty. After the Eastern Section declined to alter the schedule because of logistical, safety, and fairness concerns, the team sued in the Southern District of New York under federal and state anti-discrimination laws, including 42 U.S.C. §§1981, 1985, and 2000a—prohibiting discrimination in contracts and public accommodations and conspiracy to violate civil rights—and New York state civil rights laws.

The plaintiffs argued that the association had unlawfully discriminated against them by failing to accommodate their religious observance. The plaintiffs moved for a mandatory injunction requiring the USTA and the Eastern Section to either rearrange the tournament schedule or to allow them to forfeit their Saturday matches and continue to compete in the tournament, which would have violated a recently enacted USTA rule against forfeitures.

The Court's Decision

After expedited briefing on the plaintiffs' motion and oral argument, Cote rendered her decision on the record at the conclusion of the Sept. 24 hearing, denying the motion.[2]

The crux of the court's decision was the determination that the Rothman plaintiffs had not shown the required discriminatory intent. All of the plaintiffs' claims required them to show that the associations's actions were motivated by some "invidiously discriminatory animus."[3] Based on the allegations in the complaint and the record before the court, Cote determined that the Rothman plaintiffs could not show a likelihood of successfully demonstrating discriminatory intent. First, the court found that it was "on its face not discriminatory to schedule a recreational event for amateur players on a weekend."[4]

The court also noted that the Eastern Section "already showed sensitivity to religious observers by shifting the schedule for this tournament to accommodate the Rosh Hashanah holiday " and "[w]hen it could accommodate the needs of a single player [in the past] they were able to do so."[5] The court noted, however, "[t]he challenge presented by a much more complex schedule for an entire tournament would require significant logistical adjustments and impositions on third parties who are travelling and who have relied for a period of time now on the identified schedule."[6]

Based on the USTA's previous record of making accommodation for religious observers, and the complexity of the schedule that the plaintiffs asked the association to alter, the court found that "there is no circumstance to suggest intentional discrimination in the setting of the schedule" for the section championships.[7] With respect to the plaintiffs' request that they be allowed to forfeit their Saturday matches and continue to play in the tournament, the court noted that the association had a

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"race neutral" rule prohibiting forfeitures and that "[t]here are good, sound policy reasons for adoption of the rule which are not disputed by the plaintiff."[8]

In addition to its ruling about the lack of discriminatory intent, the court also addressed the plaintiffs' argument that the USTA was acting "under color of state law" in organizing the sectional championships. Because one of the plaintiffs' federal discrimination claims rested on an alleged violation of their constitutional rights, they were required to demonstrate that the defendants were state actors or were acting under color of state law.[9]

Generally, a private entity like the USTA may be deemed to act under color of state law if either (i) the state has exercised "coercive power or provided such significant encouragement" to the private actor that the private party's actions can be imputed to the state, or (ii) there is a sufficiently close nexus between the state and the challenged action such that the private party's actions may be treated as that of the state.[10] In determining whether a private entity is acting under color of state law for purposes of federal antidiscrimination law, courts have inquired whether the government placed its imprimatur on or otherwise "put its weight on the side of" the challenged action.[11]

In the Rothman case, the plaintiffs argued that, because the sectional championships were to be played in a public park, the USTA should be treated as a state actor or acting under color of state law. Courts typically have required far more extensive state involvement to find that a private entity acted under color of state law. For example, in *Lansing v. City of Memphis*, the U.S. Court of Appeals for the Sixth Circuit determined that the "Memphis in May" festival was not acting under color of state law, despite the fact that the festival received public funding and was held in a public park and on streets the city closed to traffic for the festival.[12] Consistent with this case law, the court in *Rothman* determined that "[u]se of a public park is not sufficient for the actor to have been acting un-der color of state law."[13]

Discussion

The court's decision in *Rothman* is significant because, as the court noted, "[w]eekend play is part and parcel of the scheduling of amateur [sporting events]." At the same time, of course, respecting religious observance is an important public value and, for many Jews, Christians, and Muslims, religious observance involves a day of rest when participation in competitive sporting events is prohibited. The Rothman case appears to be the first in the Second Circuit addressing this tension. And the case has potentially broader ramifications for other private businesses that are subject to federal and state antidiscrimination laws.

In holding that the organizers of an amateur sporting event are not obligated to alter a facially neutral tournament schedule to accommodate the religious belief of participants, the court agreed with the few cases outside the Second Circuit addressing the question.[14] In one of those cases, *Akiyama v. U.S. Judo*, a court in the Western District of Washington held that an organizer of amateur judo matches was permitted to enforce a facially neutral rule that all participants bow toward a statue before matches, despite the fact that bowing at inanimate objects violated a participant's religious beliefs.[15]

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The court there explained that "Absent more, the fact that a proprietor has decided to offer his or her services to the public in a way which could impact a religious practice or belief, whether it be by conducting business only on Sundays, by failing to keep a Kosher kitchen, by failing to include fish on the menu during Lent, or by prohibiting smoking, raises no inference of discrimination."[16]

The court's decision in *Rothman* will give comfort to organizers of amateur sporting events (and other operators of public accommodations) that, as long as they do not act with any discriminatory intent, their policies and decisions will not be disturbed simply because they conflict with potential participants' or customers' religious observances. That said, in finding a lack of evidence of discriminatory intent, the court relied on the USTA's history of sensitivity to religious observers.

The association's past history was particularly important in the Rothman case because the plaintiffs conceded that they lacked direct evidence of discriminatory intent and, instead, sought to prove circumstantial evidence of discrimination. In other contexts, where a plaintiff seeks to prove discrimination through circumstantial evidence, the courts have found that a past history of accommodation weighs against any inference of discriminatory intent.[17]

The decision in *Rothman* makes clear that previous practices will be relevant in determining intent in public accommodation cases, as well. Accordingly, in addition to all of the other reasons that businesses and other organizations should be sensitive to their constituents' religious practices, *Rothman* shows that a history of sensitivity and reasonable accommodations to religious beliefs when practicable may help protect an organization if its practices are challenged as allegedly discriminatory.

1. *Rothman v. United States Tennis Assoc.,* No. 14 Civ. 7618 (DLC) (SDNY Sept. 24, 2014).
2. The hearing transcript is reflected in the electronic case docket and will become available there.
3. *Reynolds v. Barrett*, 685 F.3d 193, 201 (2d Cir. 2012) (considering a Section 1985 claim).
4. Sept. 24 Tr. at 18:20-21.
5. Id. at 18:22-19:2.
6. Id. at 19:3-7.
7. Id. at 19:7-8.
8. Id. at 19:14-15.
9. See *United Bd. of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825, 831-832 (1983).
10. *Atkinson v. B.C.C. Assocs.*, 829 F.Supp. 637, 644 (SDNY 1993).
11. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974).
12. 202 F.3d 821 (6th Cir. 2000).
13. Sept. 24 Tr. at 17:15-16.
14. In *Boyle v. Jerome Country Club*, 883 F.Supp. 1422, 1431 (D. Idaho 1995), for example, a court in the District of Idaho held that a country club was not required to alter the schedule for a golf tournament to accommodate the religious observance of a Mormon golfer whose religious beliefs prevented him from playing golf on Sunday.
15. 181 F.Supp.2d. 1179 (W.D. Wash. 2002).
16. Id. at 1184.
17. See *Yoselovsky v. Associated Press*, 917 F.Supp.2d 262, 277 (SDNY 2013) (in employment discrimination suit, defendants' previous accommodations to Orthodox Jewish plaintiff's Sabbath observance rebutted inference of discriminatory intent); *Shah v. Eclipsys Corp.*, No. 08 Civ. 2528, 2010 WL 2710618, at *12 (EDNY July 7, 2010) (in employment dispute, employer's previous decision to grant medical leave undercut disability discrimination claim).