

SUPREME COURT OF FANTASY JUDGMENT

Cameron Pettigrew, et al. v. Fidelity Investments, Inc.

ON PETITION FOR WRIT OF CERTIORARI FROM THE FANTASY SPORTS INDUSTRY

Decided December 26, 2009
Cite as 1 F.J. 10 (2009)

Factual Background

Cameron Pettigrew, a relationship manager in the Private Client Group at Fidelity Investment's ("Fidelity") Westlake, Texas office, was a self-proclaimed "Fidelity Man" and had been employed with the company since 2007.¹ He accumulated an impressive resume, which contained multiple company honors, including being the only person chosen for an exclusive, 10-member program (Future Leaders of Westlake) who was not already in a management position. In September 2009, he was offered a position at Fidelity's prestigious Wall Street branch, but Pettigrew said he chose to decline the offer due to the high cost of living in New York City.² While employed at Fidelity, Pettigrew was the commissioner and organizer of at least one office fantasy football league comprised of other Fidelity employees, including managers and team leaders, whereby each participant paid \$20 to join the league.

On October 20, 2009, Fidelity had in place and in effect company policies that were distributed via email which prohibited gambling activities and playing fantasy football on company time. Additionally, Fidelity blocks Internet access to any and all websites that have anything to do with fantasy sports and gambling — not to mention blocking sites like theonion.com, nintendo.com and thousands of other non work-related websites.³ According to an anonymous Fidelity employee who is also a commissioner of an office fantasy league, Fidelity "does grant access to

¹ <http://www.star-telegram.com/news/story/1825336.html>

² <http://fantasyfootball.fanhouse.com/2009/12/17/fired-over-fantasy-football-the-unfortunate-case-of-cameron-pet/22>

³ <http://www.fantasysportsbusiness.com/wordpress/2009/12/21/source-fidelity-tried-to-make-an-example-out-of-us/>

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nfl.com, espn.com, yahoo.com, etc.; but if you then try to click on one of their fantasy links, you will get a giant message on your screen letting you know that access to the fantasy section of that website has been blocked.”⁴

On October 20, 2009, Fidelity management discovered the aforementioned fantasy leagues after intercepting emails and instant messages directed towards Pettigrew, who admitted that he was aware of Fidelity’s policy, but claimed it was “poorly communicated and ignored by leadership.”⁵ He also argued that several other Fidelity leaders and managers participated in other office fantasy leagues notwithstanding the company’s policy.

Pettigrew says he never played fantasy football before coming to Fidelity.

"Last season I was approached by one of the managers who asked that I be in his league. I knew vaguely about the policy at the time but figured that if a manager was involved than the rule was probably just something of an outdated law, like how it's illegal in Michigan for a woman to cut her own hair without asking her husband first."⁶

Despite his efforts, Pettigrew’s instant message conversations with colleagues about Trent Edwards’ poor performance prompted Fidelity management to interrogate him for ninety minutes about his fantasy sports participation as if he was “some sort of international gambling kingpin”.⁷ After the interrogation was concluded, Pettigrew was sent home for the day.

On October 21, 2009, Pettigrew, along with three of his colleagues and fellow fantasy football commissioners, were informed via telephone that they were terminated from Fidelity. Said Fidelity spokesman Vin Loporchio:

⁴ <http://www.fantasysportsbusiness.com/wordpress/2009/12/21/source-fidelity-tried-to-make-an-example-out-of-us/>

⁵ <http://www.star-telegram.com/news/story/1825336.html>

⁶ <http://fantasyfootball.fanhouse.com/2009/12/17/fired-over-fantasy-football-the-unfortunate-case-of-cameron-pet/22>

⁷ <http://www.star-telegram.com/news/story/1825336.html>

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“We have clear policies that relate to gambling. Participation in any form of gambling through the use of Fidelity time or equipment or any other company resource is prohibited. In addition to being illegal in a lot of places, it can also be disruptive. We want our employees to be focused on our customers and clients.”⁸

Procedural History

Pettigrew and three other Fidelity employees were terminated on October 21, 2009 for violating company policies prohibiting gambling and playing fantasy football on company time. Despite his appeals to Fidelity, the Termination Explanation of his U5 form (Uniform Termination Notice for Securities Industry Regulation) reads “VIOLATION OF COMPANY GAMBLING POLICY INVOLVING FANTASY FOOTBALL.”⁹

Pettigrew, his colleagues, and the fantasy sports industry as a whole seek clarification of whether fantasy sports are considered gambling under the law and in the workplace. Pettigrew and his colleagues also seek an advisory opinion on whether they may have an actionable claim for wrongful termination against Fidelity.

The Supreme Court of Fantasy Judgment has accepted certiorari and provides the following opinion, which has been ruled on unanimously by the bench.

Issues Presented

- (1) Are fantasy sports considered a form of gambling?
- (2) Is there any legal recourse Pettigrew and the other terminated employees can take against Fidelity for wrongful termination?

⁸ <http://www.star-telegram.com/news/story/1825336.html>

⁹ <http://fantasyfootball.fanhouse.com/2009/12/17/fired-over-fantasy-football-the-unfortunate-case-of-cameron-pet/22>

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Decision

I. ARE FANTASY SPORTS CONSIDERED A FORM OF GAMBLING?

According to Paul Charchian, president of the Fantasy Sports Trade Association (“FSTA”), no fantasy sports company has been the subject of prosecution for gambling, and no individual person has been the subject of prosecution for gambling related to fantasy sports participation.¹⁰ Charchian also said that he was “worried that this case marks the start of a backlash by employers against the growing field on online sports gaming.”¹¹ While Charchian’s concerns are meritorious and justified, this Court will not allow the misconception about fantasy sports being considered a form of gambling to continue any further. What employers allow their employees to do on company time is left to them, but no longer will companies be permitted to associate, correlate or define fantasy sports participation as a form of gambling.

From the very infancy of this nation, the separation of powers has helped maintain and strengthen our democracy. That being said, this Court strictly defers to Congress for the determination of whether fantasy sports fall within the ambit of gambling. Quite clearly, Congress has excluded fantasy sports from the very definition of gambling. The Unlawful Internet Gambling Enforcement Act of 2006 (H.R. 4411) was intended to “prevent the use of certain payment instruments, credit cards, and fund transfers for unlawful Internet gambling, and for other purposes”. Under §5362 of the bill, the term “bet” or “wager” does not include...

- (viii) any participation in a simulation sports game, an educational game, or a contest that—

¹⁰ <http://fantasyfootball.fanhouse.com/2009/12/17/fired-over-fantasy-football-the-unfortunate-case-of-cameron-pet/22>

¹¹ <http://www.reuters.com/article/idUSTRE5BF5KQ20091216>

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- (I) is not dependent solely on the outcome of any single sporting event or nonparticipant's singular individual performance in any single sporting event;
- (II) has an outcome that reflects the relative knowledge of the participants, or their skill at physical reaction or physical manipulation (but not chance), and, in the case of a simulation sports game, has an outcome that is determined predominantly by accumulated statistical results of sporting events; and
- (III) offers a prize or award to a participant that is established in advance of the game or contest and is not determined by the number of participants or the amount of any fees paid by those participants.”¹²

Additionally, the Internet Gambling Prohibition Act of 2006 (H.R. 4777) also expressly excludes fantasy sports from its definition of gambling. The bill defines a “bet” or “wager” to include wagering on sporting events, lotteries and games of chance. A “bet” or “wager” does not include securities and commodities transactions, indemnity and insurance contracts, and fantasy sports leagues.¹³

Courts throughout the country, however, have long recognized that it would be “patently absurd” to hold that “the combination of an entry fee and a prize equals gambling, ”because if that were the case, countless contests engaged in every day would be unlawful gambling, including “golf tournaments, bridge tournaments, local and state rodeos or fair contests, . . . literary or essay competitions, . . . livestock, poultry and produce exhibitions, track meets, spelling bees, beauty contests and the like,” and contest participants and sponsors could all be subject to criminal liability.¹⁴

¹² [http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.4411:](http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.4411)

¹³ [http://thomas/loc.gov/cgi-bin/query/z?c109:H.R.4777:](http://thomas/loc.gov/cgi-bin/query/z?c109:H.R.4777)

¹⁴ *State v. Am. Holiday Ass’n, Inc.*, 727 P.2d 807, 809, 812 (Ariz. 1986) (en banc)

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Courts have distinguished between *bona fide* entry fees and bets or wagers, holding that entry fees do not constitute bets or wagers where they are paid unconditionally for the privilege of participating in a contest, and the prize is for an amount certain that is guaranteed to be won by one of the contestants (but not the entity offering the prize).¹⁵ Courts that have examined this issue have reasoned that when the entry fees and prizes are unconditional and guaranteed the element of risk necessary to constitute betting or wagering is missing.

“A prize or premium differs from a wager in that in the former, the person offering the same has no chance of his gaining back the thing offered, but, if he abides by his offer, he must lose; whereas in the latter, each party interested therein has a chance of gain and takes a risk of loss . . .

The fact that each contestant is required to pay an entrance fee where the entrance fee does not specifically make up the purse or premium contested for does not convert the contest into a wager.”¹⁶

In addition to the fact that fantasy leagues are not gambling and that stat service providers (i.e., ESPN, Yahoo, CBS Sports) do not win anything, participants suffer no “loss” in participating in the fantasy leagues.¹⁷ Fantasy sports participants pay a one-time, non-refundable entry fee to participate in the leagues, and receive in consideration for that fee the benefit of the stat provider’s extensive administrative, statistical and analytical services throughout the relevant sports season. Only at the end of the sports season are prizes awarded, in amounts fixed by the contracts that govern participation in the leagues. Accordingly, in paying for the right to participate in the leagues, participants simply do not “lose” anything, and certainly suffer no cognizable “gambling” loss. Whether or not a participant is a successful league manager, their entry fee never hangs in the balance in any way in connection with their participation in the

¹⁵ Humphrey v. Viacom, Inc., et al., No. 06-2768 (D.N.J., June 20, 2007)

¹⁶ Las Vegas Hacienda, Inc. v. Gibson, 359 P.2d 85, 86-87 (Nev. 1961).

¹⁷ See D.C. Code § 16-1702; Ga. Code Ann. § 13-8-3; 720 Ill. Comp. Stat. 5/28-8; Ky. Rev. Stat. Ann. § 372.020; Mass. Gen. Laws ch. 137, § 1; Ohio Rev. Code Ann. § 3763.02; N.J. Rev. Stat. § 2A:40-5; S.C. Code Ann. § 32-1-20.

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league.¹⁸ Indeed, once participants have selected their team and begin their season, the fee cannot be recovered. There is no “loss” on these facts, and this exchange of consideration is an “ordinary contract,” in which “both parties may ultimately gain by entering into the agreement.”¹⁹

Based on Congress’s unambiguous language in two separate bills regarding unlawful Internet gambling, it is clear to this Court that fantasy sports are not considered a form of gambling. Any further insinuation, inference or correlation made between fantasy sports and gambling would be irresponsible, incorrect, and potentially defamatory.

II. IS THERE ANY LEGAL RECOURSE PETTIGREW AND THE OTHER TERMINATED EMPLOYEES CAN TAKE AGAINST FIDELITY FOR WRONGFUL TERMINATION?

It is no mystery why companies such as Fidelity have policies prohibiting fantasy sports participation on company time and resources. After all, the very fact that such a policy even exists at Fidelity (albeit in email form) is the reason why Pettigrew and his colleagues were terminated. Said Fidelity spokesman Vin Loporchio: “We have clear policies that relate to gambling. Participation in any form of gambling through the use of Fidelity time or equipment or any other company resource is prohibited. In addition to being illegal in a lot of places, it can also be disruptive. We want our employees to be focused on our customers and clients.”²⁰

It is undeniable that the fantasy sports industry has a prominent role in today’s society and economy. Chris Russo, chairman and CEO of Fantasy Sports Ventures, served as the NFL’s senior vice president of new media and publishing from 2000-2006. He estimated that in 2000, the year he persuaded NFL Commissioner Paul Tagliabue to launch the league’s first official fantasy football competition, there were approximately 2 million people playing fantasy football

¹⁸ <http://sportingnews.com/contract/cancellation.html>

¹⁹ Martin v. Citizens’ Bank of Marshallville, 171 S.E. 711, 713 (Ga. 1933).

²⁰ <http://www.star-telegram.com/news/story/1825336.html>

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in the United States.²¹ Now, according to the FSTA,, an organization representing 110 member companies that was founded in the late 1990's to provide a forum for interaction between hundreds of existing and emerging companies in the growing fantasy sports industry, there are an estimated 27 million Americans participating in fantasy sports who generate over \$1 billion each year for the industry.²²

While it appears that the fantasy sports industry is immune to the current economic recession, a lot of other companies are struggling to survive and may not have sufficient staffing. Given these factors, some companies may be more sensitive than normal to employees who are wasting valuable company time. According to John Challenger, chief executive of the employment consulting firm Challenger, Gray & Christmas, fantasy football is costly to company productivity. In 2008, his consulting firm estimated that fantasy leagues cost Corporate America around \$10 billion annually.²³ He arrived at this figure based on 13.6 million people playing fantasy football (according to the FSTA) who earn an average annual income of \$100,000 and spend over an hour per week managing fantasy sports teams. Challenger opined that the average fantasy sports participant costs his/her company around \$45 per week in lost productivity.²⁴

While this Court previously cleared up the distinction between gambling and fantasy sports (see above), we grant the benefit of the doubt to Fidelity that their company policy included fantasy sports participation within the parameters of its guidelines. In fact, after the story was made public in a December 11, 2009 article written by Drew Davison of the Fort Worth Star Telegram,²⁵ Fidelity received enormous backlash and condemnation by the fantasy sports community for associating fantasy sports with gambling. Fidelity backtracked through Loporchio and acknowledged that fantasy sports were legally not considered gambling.

²¹ <http://www.usnews.com/money/business-economy/small-business/articles/2009/09/21/the-reality-of-fantasy-sports.html>

²² <http://www.fsta.org>

²³ <http://moneywatch.bnet.com/saving-money/blog/devil-details/can-you-be-fired-for-fantasy-football/1230/>

²⁴ <http://moneywatch.bnet.com/saving-money/blog/devil-details/can-you-be-fired-for-fantasy-football/1230/>

²⁵ <http://www.star-telegram.com/news/story/1825336.html>

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"We aren't making any judgments on fantasy leagues. If it is permitted legally, people can do this on their own time. Our company policies relate to the professional conduct of our employees. We do not want our company's equipment and resources to be used for these purposes." Loporchio added that the activities can be disruptive to the company's business and Fidelity wants their employees to be focused on customers and clients.²⁶

Challenger said that the key was Fidelity's corporate policy banning gambling/fantasy football on the job. This made it easy to dismiss an employee that's caught.²⁷ However, even if Fidelity did not have a policy prohibiting such activity, they could justly reprimand, suspend or fire an employee if it is believed their productivity is limited because he/she is spending more time on fantasy sports than business-related matters. While Challenger describes Fidelity's action as an apparent "capital punishment for a misdemeanor crime," he warns that employees should be careful about calling attention to their personal productivity gaps in an environment where there are a lot of people vying for your job.²⁸

Challenger's warning is given with good reason. That is because most employees in the United States are considered "at will" employees. Since the last half of the 1800's, employment in each and every state has been considered "at will," or terminable by either the employer or employee for any reason whatsoever. The employment at will doctrine avows that when an employee does not have a written employment contract and the term of employment is of indefinite duration, the employer can terminate the employee for good cause, bad cause, or no cause at all.²⁹ The law generally presumes that you are employed at will unless you can prove otherwise. There are three exceptions to the employment at will doctrine which can bring rise to actionable claims for wrongful termination: 1) public policy exception; 2) implied contract exception; and 3) covenant of good faith and fair dealing exception. This Court will examine the three exceptions to at will employment and determine whether Pettigrew and his colleague have an actionable claim.

²⁶ <http://fantasyfootball.fanhouse.com/2009/12/17/fired-over-fantasy-football-the-unfortunate-case-of-cameron-pet/22>

²⁷ <http://moneywatch.bnet.com/saving-money/blog/devil-details/can-you-be-fired-for-fantasy-football/1230/>

²⁸ <http://moneywatch.bnet.com/saving-money/blog/devil-details/can-you-be-fired-for-fantasy-football/1230/>

²⁹ Shane and Rosenthal, Employment Law Deskbook, §16.02 (1999)

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Under the public policy exception to employment at will, an employee is wrongfully discharged when the termination is against an explicit, well-established public policy of the State (such as firing an individual for filing a workers' compensation claim after being injured on the job, or for refusing to break the law at the employer's request).³⁰ Under Texas law, the public policy exception only applies based strictly on public policy derived from the state constitution and statutes. Since there are no provisions or amendments in the Texas state constitution, nor are there any statutes that clearly enunciate the relevant public policy, Pettigrew and his colleagues cannot invoke the first exception to the employment at will doctrine.

The second major exception to the employment at will doctrine is applied when an implied contract is formed between an employer and employee, even though no express, written instrument regarding the employment relationship exists.³¹ Unfortunately for Pettigrew and his colleagues, Texas has refused to recognize the implied contract exception. The Texas Supreme Court has held that a letter offering a position of employment, the classification of an employee as "permanent" rather than "temporary," and the identification in company documents of a scheduled retirement date for the employee some 22 years after employment was initiated were insufficient in sum to create an implied contract of employment for a specific duration.³² If Texas had recognized this exception, perhaps Pettigrew and his colleagues would have a meritorious argument. According to Pettigrew, he was aware of Fidelity's policy prohibiting gambling and fantasy football on company time, but he was unaware that a violation of this policy was a fireable offense. If Fidelity failed to codify its policies, procedures and penalties in an employee handbook or email document, then Pettigrew could argue that Fidelity breached its contract of employment. In cases where a company issues an employee handbook which outlines specific procedures, including reprimands and opportunities to correct one's behavior if

³⁰ Charles J. Muhl, Monthly Labor Review "The Employment At Will Doctrine: Three Major Exceptions" (January 2001)

³¹ Charles J. Muhl, Monthly Labor Review "The Employment At Will Doctrine: Three Major Exceptions" (January 2001)

³² Webber v. M.W. Kellogg Company, 720 S.W.2d 124 (Tex. 1986).

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an employee is alleged to have violated company policy, then other courts have analyzed such provisions according to the traditional requirements for the creation of a contract: offer, acceptance, and consideration.³³ Since Texas law does not recognize this exception to the employment at will doctrine, Pettigrew and his colleagues cannot invoke the second exception either.

The third exception to the employment at will doctrine is the exception for a covenant of good faith and fair dealing. This exception represents the most significant departure from the traditional employment at will doctrine.³⁴ Rather than narrowly prohibiting terminations based on public policy or an implied contract, this exception – at its broadest – reads a covenant of good faith and fair dealing into every employment relationship. It has been interpreted to mean either that employer personnel decisions are subject to a “just cause” standard or that terminations made in bad faith or motivated by malice are prohibited.³⁵ A majority of the states do not recognize this exception, including Texas, so Pettigrew and his colleagues have no actionable claim under this exception either.

Since no exception to the employment at will doctrine is applicable in this case, Pettigrew and his colleagues do not appear to have an actionable claim against Fidelity for wrongful termination. While this Court acknowledges the harsh nature of the punishment in comparison to the “crime” charged, it is beyond the scope and duty of the legal system to impose its will on corporations regarding their ability to terminate an at will employee who is in direct violation of a company policy. The only recourse this Court grants to Pettigrew and his colleagues is for Fidelity to amend the termination explanations on the employees’ U5 forms by removing any and all references to gambling. It would be inherently detrimental to Pettigrew and others to inappropriately be cited or referenced for gambling when clearly fantasy football participation

³³ Pine River State Bank v. Mettilee, 333 N.W.2d 622 (Minn. 1983).

³⁴ Shane and Rosenthal, Employment Law Deskbook, §16.03[8].

³⁵ Charles J. Muhl, Monthly Labor Review “The Employment At Will Doctrine: Three Major Exceptions” (January 2001) *citing* Shane and Rosenthal, Employment Law Deskbook, §16.03[8].

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does not fall within the definition of gambling. While a future at Fidelity is not in the cards for these gentlemen, there is no reason to prevent or diminish their chances for other employment opportunities despite this unfortunate incident and blemish on their respective resumes.

IT IS SO ORDERED.

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