COURT OF APPEALS
DECISION
DATED AND FILED

November 30, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP650 **Cir. Ct. No. 2004CV472**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

KEITH MICHAEL BUKOWSKI A MINOR,
BY HIS PARENT AND JANINE A. OLSZEWSKI,

PLAINTIFFS-APPELLANTS,

V.

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Portage County: FREDERIC FLEISHAUER, Judge. *Affirmed*.

Before Vergeront, Deininger and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Keith Bukowski, a student at Stevens Points Area Senior High School (SPASH), a public school, appeals the dismissal of his lawsuit against the Wisconsin Interscholastic Athletic Association (WIAA). A

hearing was held on Bukowski's motion for a temporary injunction, to enjoin the WIAA from enforcing a rule preventing Bukowski from competing as a member of the SPASH girl's gymnastics team. The circuit court denied the motion. The parties then stipulated that the court's order denying Bukowski's motion for a temporary injunction would serve as a final judgment on the merits. The circuit court dismissed the case based on that stipulation. Bukowski argues that the circuit court erroneously denied his request for injunctive relief because the WIAA rule violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and Title IX of the federal Education Amendments of 20 U.S.C. § 1681 (1972) (Title IX). Bukowski further argues that the circuit court's decision to deny his request for injunctive relief violates the Wisconsin constitution[1] and the Wisconsin Pupil Discrimination Statute (WIS. STAT. § 118.13 (2003-04)).[2]

¶2 We conclude that, by bringing his claims against a party that is not a state actor and does not receive federal funds, Bukowski fails to meet the threshold for making an equal protection and Title IX claim, respectively. We further conclude that Bukowski has failed to fully develop both his Wisconsin constitutional argument and his WIS. STAT. § 118.13 argument. Thus, we do not address them on the merits. We therefore affirm the circuit court's judgment of dismissal.

[1] Bukowski does not identify the Wisconsin constitutional provision the WIAA allegedly violated.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

BACKGROUND

¶3 The WIAA is a voluntary, unincorporated, nonprofit organization of public and private high schools in the state of Wisconsin that organizes, directs and controls an interscholastic athletic program, promotes uniform standards and sets rules for member schools. Bukowski brought this action for injunctive relief, challenging a WIAA rule that prohibits students from competing in mixed gender interscholastic athletic competitions. At issue is Article VI of the WIAA constitution, which provides:

> **Section 6 – Co-ed Competition**
>
> A. The Board of Control shall prohibit all types of interscholastic activity involving boys and girls competing with or against each other, except (a) as prescribed by state and federal law and (b) as determined by Board of Control interpretations of such law.

In his complaint, Bukowski alleges that, because this rule limits his ability to compete on the SPASH girls' gymnastics team, the WIAA violates Title IX and WIS. STAT. § 118.13. He seeks an order enjoining the WIAA from discriminating against him because of his sex and requiring the WIAA to allow him to "try out and participate on the SPASH gymnastics team." Bukowski also filed an application for a temporary injunction, making the same allegations as in his complaint. Bukowski did not bring any claims against SPASH or against the SPASH gymnastics team. Nor did Bukowski plead a federal or state equal protection violation. Bukowski did, however, make equal protection arguments during the hearing on his motion for a temporary injunction, which the court considered.

¶4 After considering the parties' briefs and arguments at the hearing on Bukowski's motion, the circuit court denied Bukowski's motion for a temporary injunction. The parties then stipulated that the circuit court's decision was a final judgment; based upon this stipulation, the court dismissed the case on its merits with prejudice. Bukowski appeals.

STANDARD OF REVIEW

¶5 We first note the unusual procedural posture of this case. As we explained, Bukowski moved for a temporary injunction to enjoin the WIAA from discriminating against him on the basis of his sex and to permit him to try out and compete on the SPASH gymnastics team, now and in the future. At the hearing on Bukowski's motion for a temporary injunction, the court heard oral arguments. Based on the arguments, briefing by both parties, and evidentiary submissions attached to the parties' briefs, the court denied Bukowski's motion, concluding that the undisputed facts did not entitle Bukowski to relief. Following the circuit court's denial of his motion for a temporary injunction, the parties stipulated that the court's decision was a final judgment on the merits. Based on this stipulation, the case was dismissed on its merits with prejudice. It is from this final judgment dismissing the case that Bukowski appeals.

¶6 Because the court, with the parties' agreement, decided the case based on briefing with evidentiary submissions and argument, the procedural posture of this case is akin to that of a motion for summary judgment. Consequently, we apply a de novo standard of review as we do in reviewing summary judgment. *See* ***Converting/Biophile Labs, Inc. v. Ludlow Composites Corp.***, 2006 WI App 187, ¶13, No. 2005AP1628. At the same time, we recognize that the ultimate decision whether to grant the particular relief of an injunction is

discretionary with the circuit court. ***City of Milwaukee v. Burnette***, 2001 WI App 258, ¶8, 248 Wis. 2d 820, 637 N.W.2d 447. A party is entitled to summary judgment if there are no material facts in dispute and the party is entitled to judgment as a matter of law. ***Id.***

DISCUSSION

¶7 Before we address Bukowski's arguments, we first address the WIAA's assertion that Bukowski has failed to allege a cause of action under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. The WIAA points out that Bukowski failed to plead an equal protection claim and that, contrary to Bukowski's representation that he filed a motion with the circuit court to amend his complaint to include an equal protection claim, no such motion has in fact been filed. We observe that, although the WIAA is correct in its assertion that Bukowski did not plead an equal protection claim and that the record is devoid of any motion filed by Bukowski seeking court permission to amend his complaint accordingly, Bukowski made equal protection arguments during the hearing on his motion for a temporary injunction. We further observe that the circuit court considered Bukowski's equal protection argument, as well as the WIAA's counter argument, and decided the issue. From this we conclude the circuit court implicitly allowed Bukowski to amend his complaint to add the equal protection claim. We further note that both parties on appeal have argued the equal protection issue. Accordingly, we will consider Bukowski's equal protection argument.

¶8 Bukowski argues that the circuit court erred in denying his motion for a temporary injunction, asserting that the WIAA is a state actor and that, by enforcing its rule prohibiting boys from competing in girls athletics, it violated the

Equal Protection Clause of the Fourteenth Amendment. The WIAA counters that since Bukowski has failed to bring forth any evidence in his evidentiary submissions demonstrating that the WIAA was a state actor, the Fourteenth Amendment does not apply here. We agree with the WIAA.

¶9 Under well-established case law, to establish an equal protection claim under the Fourteenth Amendment, a plaintiff must establish through factual evidence that the defendant was a state actor. ***Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n***, 531 U.S. 288, 295 (2001).

> When considering whether private action should be attributed to the state under the public function test, the court conducts a historical analysis to determine whether the party has engaged in an action traditionally reserved to the state, and the plaintiff bears the burden of making that showing.

Wittstock v. Mark A. Van Sile, Inc., 330 F.3d 899, 902 (6th Cir. 2003). There is state action when the evidence shows "such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" ***Brentwood Acad.***, 531 U.S. at 295.

¶10 In ***Brentwood***, the Court concluded that the plaintiff sufficiently established such a nexus establishing that a nonprofit athletic association which regulated interscholastic sports among Tennessee's public and private high schools was a state actor. ***Id.*** at 290-91, 295-302. The plaintiff in ***Brentwood*** provided abundant evidence showing extensive entwinement with the State Board of Education ("State Board") and the organization and between the member public schools and the organization. ***Id.*** The Court concluded that there was sufficient evidence to establish that the organization was a "state actor." ***Id.*** For example, the evidence established that public schools provided much of the association's

financial support. ***Id.*** at 299. The evidence also showed that the public school officials were acting in their official capacity when they engaged in the association's ministerial acts; State Board members were appointed as members of the organization's board of control and legislative council; the state provided retirement benefits to organization members; and the state officially endorsed student participation in association-sponsored interscholastic athletics as a substitution for physical education requirements. ***Id.*** at 300-01.

¶11 There is no such evidence in this case. Here, Bukowski failed to produce any evidence, by affidavit or otherwise, demonstrating that the WIAA is a state actor. The only evidence Bukowski points to as purportedly establishing that the WIAA is a state actor is an affidavit by the superintendent of the Stevens Point School District, in which the superintendent averred that SPASH receives federal funding. This is not the type of evidence from which we can infer that the WIAA is a state actor. Even if the WIAA had received federal funds, the receipt of federal funds does not alone make a private entity such as the WIAA a state actor for equal protection purposes. As the WIAA points out, Bukowski is required to present evidence showing "that the State is so pervasively entwined with the management and control of the WIAA to the point of 'largely overlapping identity.'" *See* ***id.*** at 303. He has failed to present such evidence.

¶12 Bukowski also contends that the circuit court found that the WIAA was a state actor, relying on a statement made by the court during its oral ruling denying Bukowski's motion for a temporary injunction. The passage Bukowski relies on is, "'that to claim that the WIAA is not involved in State action is, in my mind, wrong.'" Bukowski's reliance on this statement is misplaced. It is clear that the court did not conclude that the WIAA was a state actor. This statement is taken out of context. The court said:

> But I believe if we got to the merits of the situation, and I think there is a Federal Wisconsin case out of the Eastern District that has already found that WIAA is involved in State action, and I think that if push came to shove and *we had more facts collected than we have in this type of hearing*, we would find that the WIAA is so intricately involved with all of the public high schools in the State of Wisconsin and that their rules and regulations impact those high schools and that each and every one of those high schools obtain Federal aid, that to claim that the WIAA is not involved in State action is, in my mind, wrong.

(Emphasis added.) Thus, while the court thought that more facts may have established that the WIAA was a state actor, it is clear that the court believed Bukowski did not produce this evidence.

¶13 There is a second reason why Bukowski's equal protection claim fails. The cases upon which Bukowski relies for his equal protection claim—***Regents of the University of California v. Bakke***, 438 U.S. 265 (1978); ***Brown v. Board of Education of Topeka***, 347 U.S. 483 (1954); ***Gratz v. Bollinger***, 539 U.S. 244 (2003); and ***Grutter v. Bollinger***, 539 U.S. 306 (2003)—all involve race discrimination claims, not gender discrimination claims. Constitutional claims of racial discrimination are evaluated under strict scrutiny analysis. ***Adarand Constructors, Inc. v. Pena***, 515 U.S. 200, 215, 218 (1995). Constitutional claims of gender discrimination are not subject to strict scrutiny analysis. *See* ***Bakke***, 438 U.S. at 302 ("gender-based classifications are not subjected to this level of [strict] scrutiny"). Instead, gender-based equal protection claims are subject to heightened scrutiny. *See* ***Nevada Dept. of Human Resources v. Hibbs***, 538 U.S. 721, 722 (2003) (under heightened scrutiny test, classifications which distinguish between males and females must serve important government objectives, the achievement of which is substantially related to the means employed) (citations omitted); *see also* ***United States v. Virginia***, 518 U.S. 515, 532-33 (1996)

(articulating same test, which the Supreme Court in that case called the "exceedingly persuasive" test, while explaining that it was not equating gender and race classifications). Because Bukowski's equal protection arguments rest on the wrong legal standard, the arguments are without merit.

¶14 Bukowski next argues that the WIAA violated his right under Title IX to participate on the SPASH girls' gymnastics program. However, Bukowski provides no legal authority supporting his Title IX claim. Title IX of the Education Amendments of 1972 prohibits sex discrimination "under any education program or activity receiving Federal financial assistance ...." 20 U.S.C. § 1681(a). Bukowski has the burden of establishing a Title IX claim. *See* ***Roberts v. Colorado State Bd. of Agric.***, 998 F.2d 824, 831 (10th Cir. 1993). Bukowski has failed to meet this burden. His Title IX argument on appeal consists solely of quoting the language of Title IX and then stating that "Title IX has been interpreted to provide that policies prohibiting boys from participation in girls' sport is a permissible means of attempting to insure equality of opportunity for girls in interscholastic sports and of redressing past discrimination." That is the entirety of his Title IX argument; Bukowski provides no further explanation of how Title IX applies to his circumstances and provides no relevant legal authority in the form of Title IX cases.

¶15 In addition, Bukowski fails to meet the threshold requirement under Title IX of establishing that the party being sued receives federal funding. In order to support a Title IX claim, Bukowski must demonstrate that the WIAA receives federal financial funding. 20 U.S.C. § 1681(a); *see also* ***Mary M. v. North Lawrence Community Sch. Corp.***, 131 F.3d 1220, 1224 (7th Cir. 1997). Bukowski has failed to meet this burden. He points to no evidence in the record establishing the existence of such federal funding. In contrast, Douglas

Chickering, Executive Director of the WIAA, averred that the WIAA is not a direct recipient of federal funds and that its income is derived from revenue received at regional, section and state tournament events. Bukowski has not countered those averments. The only evidence he has presented to counter the WIAA's evidence that it does not receive any direct federal funds is through the affidavit of the school district's superintendent, who averred that SPASH receives federal funding. But Bukowski fails to explain how such funds, going to the school, not to the WIAA, constitutes federal funding of the WIAA so as to bring the WIAA under Title IX's requirements. Without receiving federal funds, the WIAA is not subject to Title IX. 20 U.S.C. § 1681(a); ***Mary M.***, 131 F.3d at 1224.

¶16 Bukowski finally argues that his right to participate on the SPASH girls' gymnastics program violated WIS. STAT. § 118.13 and the Wisconsin constitution. However, he does not fully develop this argument. Bukowski's entire argument regarding § 118.13 and the state constitution comprises one sentence in his brief: "For all the above reasons the actions of the WIAA also violate the Wisconsin Constitution and WI Stat. 118.13." Thus, we do not consider it any further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). We have previously held that when a litigant devotes only a few lines of an appellate brief to a claim, simply referencing prior arguments "already stated," such litigants "unreasonably expect this court to select and apply cases and arguments from their brief's earlier sections." ***Calaway v. Brown County***, 202 Wis. 2d 736, 750, 553 N.W.2d 809 (Ct. App. 1996). Under these circumstances, we consider the issue inadequately briefed and decline to review it. ***Id.*** at 750-51 (citing ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to review an issue inadequately briefed)).

CONCLUSION

¶17 Bukowski has not established that the WIAA is a state actor or receives federal funds, subjecting it to the requirements of the federal Equal Protection Clause and Title IX, respectively. He also has failed to adequately develop both his state constitutional and WIS. STAT. § 118.13 arguments. We therefore affirm the circuit court's judgment denying his request for injunctive relief.

By the Court.—Judgment affirmed.

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