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ARTICLES

WADA DRUG TESTING STANDARDS*

RICHARD H. MCLAREN**

I. INTRODUCTION

The recently completed Floyd Landis¹ decision represents the most extensive and intensive examination to date of the laboratory procedures in use in World Anti-Doping Agency (WADA) accredited laboratories. Earlier cases have challenged the testing procedures² as, for example, in erythropoietin (EPO),³ nandrolone, and homologous blood transfusions,⁴ but none match the challenge in the Landis case, which went far beyond the testing methodology for the detection of testosterone.

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1. USADA v. Landis, AAA No. 30 190 0084 06 (Sept. 2007) (majority opinion).
2. For a discussion of those challenges, see Richard H. McLaren, *Revised or New Test Procedures: What CAS Requires*, 3-4 INT'L SPORTS L.J. 36 (2006).
3. Lazutina v. IOC, CAS 2002/A/370; Danilova v. IOC, CAS 2002/A/371; Lazutina v. FIS, CAS 2002/A/397; Danilova v. FIS, CAS 2002/A/398; Lazutina & Danilova v. IOC, Swiss Federal Tribunal, 4P. 267/2002 (2003); Muehlegg v. IOC, CAS 2002/A/374. Danilova and Lazutina appealed the CAS decision in the FT, Switzerland's supreme court, although they had been advised to suspend their appeal until the conclusion of Lazutina's appeal of her FIS suspension. The appeal of the CAS decision hinged on the fact that darbepoetin was not on the list of prohibited substances and that the test used was not IOC certified. The appeal was dismissed. Lazutina was stripped of her Olympic silver medal, although Danilova was permitted to retain the gold. Canadian Beekie Scott was awarded the Olympic silver medal as a result of Lazutina's suspension.
4. USADA v. Hamilton, AAA No. 30 190 00130 05 (2005); Hamilton v. USADA & UCI, CAS 2005/A/884.

The history of drug testing dates back nearly a century to 1928 when the International Amateur Athletics Federation, now known as the International Association of Athletics Federation (IAAF), banned the use of performance-enhancing drugs, which at that time were all exogenous. The IAAF was the first international federation to do so. This paper traces the recent history of doping tests in sport and the issues arising from drug-testing standards associated with the use of the "B" sample. The exploration of this history culminates in a discussion of twenty-first century cases that have focused on drug-testing standards and the methodology of testing for performance-enhancing drugs. These cases highlight an interesting and ever more sophisticated course of challenges to the increasingly technologically-sophisticated anti-doping analytical arsenal.

II. DRUG TESTING STANDARDS FROM THE 1960S TO THE 1980S

The early 1960s to late 1980s book-ended a period where the apex in testing for performance-enhancing drugs came with the announcement that Ben Johnson, the Canadian 100-metre sprinter who smashed the world record at the Summer Olympics in Seoul, had tested positive for the anabolic steroid stanozolol. Never before had a marquee athlete been caught at a competition and disgraced for engaging in the use of performance-enhancing drugs. It was *the* marker event that set off the drug-testing trend still evident today. The fallout in Canada was nothing less than overwhelming anguish and anger, resulting in the most extensive inquiry into drugs in sport by the former Chief Justice of Ontario, Charles Dubin.⁵ On the horizon, the forthcoming Major League Baseball Inquiry under Senator George Mitchell will mark the next chapter of self-examination by sport into the chemical warfare waged inside the bodies of athletes.

In the wake of a series of doping related scandals and deaths in the 1960s, sports authorities and nations alike finally stepped up to the challenge in the form of a more thorough intervention to prevent the use of performance enhancing substances. In 1965, France and Belgium each passed anti-doping laws in sport.⁶ A few months later in 1966, the IAAF made a decision to subject athletes to random doping tests at all future track-and-field competitions taking place at the Olympic Games or European

5. DUBLIN COMM'N, CANADA, REPORT OF THE COMMISSION OF INQUIRY INTO THE USE OF DRUGS AND BANNED PRACTICES INTENDED TO INCREASE ATHLETIC PERFORMANCES (1990).

6. Jan Todd & Terry Todd, *Significant Events in the History of Drug Testing and the Olympic Movement: 1960-1999*, in DOPING IN ELITE SPORT: THE POLITICS OF DRUGS IN THE OLYMPIC MOVEMENT 67 (Wayne Wilson & Edward Derse eds., 2001).

Championships.⁷ That same year, the International Olympic Committee (IOC) formed the IOC Medical Commission.⁸ The Medical Commission promulgated the first formal rules for Olympic competition in the form of IOC Medical Commission Anti-Doping Rules that were applied for the first time at the Winter Olympic Games in Grenoble, France, in 1968.

Even in light of these new measures, the scandals continued. It seemed that each time testing authorities amplified their efforts, a new doping agent appeared or the accused athlete's positive sample was simply ignored. Unsatisfactory chain-of-custody procedures⁹ and unreliable testing methodology¹⁰ resulted in both false positives and false negatives. This made it extremely difficult to put forth watertight cases. The result was that some competitors were gaining an unfair advantage by altering their physiology by means of chemical manipulation. In essence, athletes were playing the doping game far more adeptly than the testers and not getting caught. One athlete was quoted boasting that "when they get a test for that [new doping substance] we'll find something else. It's like cops and robbers."¹¹

Sample collection and laboratory testing procedures had to be standardized and regimented to counter this seemingly irreverent attitude that doping athletes displayed toward the testing process. Sports authorities with anti-doping programs required that the laboratories adhere to documented procedural standards for collection and testing. One of the landmarks of this push towards stricter procedure was the IOC's recognition in 1977 of a need for the accreditation of designated testing laboratories.¹² The IOC requirements for accredited laboratories eventually became the *de facto* standard for even non-Olympic sports testing laboratories.¹³ Of the numerous procedural requirements that would be formalized through anti-doping programs, one in particular has become a noticeable source of controversy—the "B" sample test. The purpose of this confirmatory test was originally to verify the initial adverse finding before an athlete's appointed delegates.¹⁴ This purpose, however, may have changed over the past three decades. The motivation behind the requirement of this test may have now metamorphosized over the years from scientific necessity to psychological

7. *Id.* at 68.

8. DRUG CONTROVERSY IN SPORT 26 (R.S. Laura & S.W. White, eds., 2005).

9. ROBERT VOY & KIRK DEETER, DRUGS, SPORT, AND POLITICS 78 (1991).

10. *Id.* at 77.

11. Todd & Todd, *supra* note 6, at 69.

12. *Id.* at 76.

13. BARRIE HOULIHAN, DYING TO WIN 155 (2nd ed., 2002).

14. DRUG CONTROVERSY IN SPORT, *supra* note 8, at 28.

crutch and has now become an athlete's right. It also appears that the "B" sample test may be used for little more than grounds for procedural tactics in the ensuing arbitration—for both the accused¹⁵ and accuser.¹⁶

Where exactly the "B" sample requirement of the testing process had its origins is difficult to pinpoint. Unreliable doping tests were perhaps the initial motivation for the "B" sample confirmation test, and so the origin may have been at the beginning of the 1960s. In the early days of testing in the 1960s and 1970s, laboratory technology was relatively unsophisticated and tests were based solely on the analysis of the athlete's urine sample. This single line of analysis often provided unreliable results.¹⁷ At the time, it appeared that the testers were wary of announcing a positive test due to the potentially destructive impact the allegation would have on the athlete's career. Scientists were reluctant to provide potentially inaccurate results as evidence used to fuel a fire.¹⁸ They were also concerned that the legal system might overturn laboratory results and were only willing to expose the laboratory to the legal system if there was certainty of a favourable outcome, preferably the confirmation of a positive test.

Given the poor accuracy of early laboratory testing techniques, the "B" sample emerged as the reasonable solution. Completed in front of various scientific, legal, and athletic delegates of the impugned athlete's choosing, the "B" sample test allowed for a level of certainty that had heretofore been absent. Since the athlete's hand-picked representatives were allowed to observe the process, "B" sample testing procedures made it more difficult to

15. A case in point may be the recent one of Marion Jones. Jones is a U.S. sprinter who won five medals at the Sydney Summer Olympics. Her "A" sample was positive for EPO in late June 2006 at the U.S. Track and Field Championships. However, she was cleared two-and-a-half months later, when her "B" sample came back negative. In October of 2007, Jones admitted to having lied to a federal agent about her past steroid use. A screening for EPO in a sample needs to be completed within a few days of acquisition in order to be reliable. The long delay between the "A" and "B" sample tests could have been the reason the "B" sample was sufficiently deteriorated to prevent confirmation. See further discussion of the Marion Jones case *infra* IV.A.iii.1.

16. See *USADA v. Landis*, AAA No. 30 190 0084 06 (Sept. 2007). In *Landis*, there were seven frozen "B" samples from other stages of the Tour de France aside from the sample taken at the 17th, where he had tested positive. *Id.* In an interlocutory award, the arbitration panel indicated that the remaining "B" samples could be tested by Carbon Isotope Ratio (CIR) testing using an IRMS instrument to determine if there was any exogenous testosterone present in the retained "B" samples. The accompanying "A" samples, which related to the seven frozen "B" samples, had never been subjected to the CIR test because in the initial screening of all prohibited substances the T/E ratio had not exceeded 4:1, the ratio which is the trigger point when a CIR test would normally be performed. Four of the seven results revealed exogenous testosterone and were used by USADA as collaborative evidence to rebut shifting burdens under the cycling anti-doping rules.

17. Michele Verroken & David R. Mottram, *Doping Control in Sport*, in *DRUGS IN SPORT* 334 (David R. Mottram ed., 3d ed. 2003).

18. VOY & DEETER, *supra* note 9, at 79.

dispute the positive “A” sample test. Any allegations by the athlete that the testing procedures were inadequate would be subject to rebuttal in arbitration proceedings, since the presence of the athlete’s representative at the “B” sample test allowed the athlete the opportunity to record and dispute inadequate testing techniques at the scene of the test itself. The “B” sample test also provided the testers assurance that the initial findings were scientifically correct. At that early stage of anti-doping development, the procedural requirement of the “B” sample was more a function of the unreliability of laboratory testing techniques than of the athlete’s right to review. In 1977, the IOC Medical Commission Chair, Prince de Merode, commented that in the future, the “B” sample test would be automatically performed,¹⁹ implying that the “B” sample test would be performed regardless of the athlete’s stance, if for no other reason than to ensure reliable test results. The future of the “B” sample was solidified.

Today, the “B” sample survives, partially because impartial peer review was not, and is not even today, a formal component of the testing process. This is one of the flaws of the integrity of testing programs.²⁰ The “B” sample requirement provides an informal process comparable to formal peer review. Although the athlete’s own experts cannot perform the testing procedures themselves for reasons of perceived conflicts, they can keep a watchful eye over the entire process, assuring the athlete that no step was skipped and no result was reached unfairly from the standpoint of methodology. This informal “peer review” made test results harder to dispute, as the athlete had taken part in the review process. The prescribed method for the collection and handling of the “B” sample is found in the International Standard for Testing v. 3.0.²¹ Section C.4 prescribes the requirements and method of urine collection, including the steps required to create “A” and “B” samples. The “A” and “B” samples are created from the same batch of urine as excreted by the athlete at a certain point in time.²² The onus is on the athlete to ensure that testing equipment is sealed and that seals have not been tampered with.²³ The

19. Todd & Todd, *supra* note 6, at 72.

20. David L. Black, *Doping Control Testing Policies and Procedures: A Critique*, in *DOPING IN ELITE SPORT*, *supra* note 6, at 31.

21. WORLD ANTI-DOPING AGENCY, *THE WORLD ANTI-DOPING CODE: INTERNATIONAL STANDARDS FOR TESTING 1* (3d ed. 2003), available at http://www.wada-ama.org/rtecontent/document/testing_v3_a.pdf.

22. *Id.* at Annex C, art. 4.13.

23. *Id.* at Annex C, art. 4.4. On the point of the onus, see *CCES v. Adams 2007* (Sports Dispute Resolution Centre for Canada), available at http://www.adrsportred.ca/resource_centre/pdf/English/NR-387788.pdf.

athlete is also to retain control of all samples until they are sealed.²⁴ This measure provides the athlete assurance that samples are correctly identified and that no contamination could have occurred without the athlete's knowledge before sealing. However, the fact that the athlete controls the samples places greater burden on the athlete to prove the source of an adverse analytical finding (AAF), especially where the athlete is alleging possible contamination. With increased protection of the athlete's right comes a greater burden of proof in arbitration proceedings following an AAF.

The "B" sample has always served as reassurance to the athlete with regard to the identity of the urine sample. The athlete is able to confirm that the urine sample is the sample given by the athlete and that the sample was not tampered with. The athlete has the ability to compare and confirm that the number stenciled in the glass of the sample bottle corresponds to the one on the athlete's copy of the doping control form. The "B" sample, if handled properly with impeccable chain-of-custody documentation, allows the athlete a modicum of confidence in the testing process.

III. ENTER GAS CHROMATOGRAPH/MASS SPECTROMETRY TECHNOLOGY

Testing technology has evolved to the extent that test results are rarely incorrect.²⁵ On this basis, it has been argued that the original purpose of the "B" sample has lost relevance. No longer is there a significant worry about the gross unreliability of testing techniques. Under these circumstances, one has to wonder why the "B" sample is really required at all any more. Technology has improved by leaps and bounds over that which existed in the 1970s and 1980s. The breakthrough moment in anti-doping testing was the 1983 Pan-American Games, where the power and reliability of new techniques was demonstrated.

This event saw the official introduction of gas chromatography/mass spectrometry technology, which was capable of identifying performance-enhancing substances through urine samples in quantities as low as one part per billion.²⁶ The result of the technology was that twenty-one medals were stripped for doping violations, including eleven gold medals. Scores of athletes decided to not even bother competing.²⁷ Some athletes may have even purposefully diminished their performances to avoid reaching the

24. WORLD ANTI-DOPING AGENCY, *supra* note 21, at Annex C, art. 4.5.

25. R. Craig Kammerer, *What Is Doping and How Is It Detected?*, in *DOPING IN ELITE SPORT*, *supra* note 6, at 20.

26. VOY & DEETER, *supra* note 9, at 88.

27. *Id.* at 85-86.

podium, as they would then have been required to provide a sample.²⁸

The sensitivity of the gas chromatograph/mass spectrometry technology brought the fight against anti-doping to a new level.²⁹ False positives and false negatives are no longer a result of unreliable equipment and methodology, so much as simple human error. By this point, the “B” sample was no longer required to confirm that scientific testing methodology worked as it should, but rather existed in order to provide a further control against human error in the testing process.

In 2003, the World Anti-Doping Agency (WADA) became the recognized governing body over doping in Olympic sport as well as a majority of international competitions. A press release in 2002 illustrated WADA’s position on the purpose of the “B” sample. WADA Director General David Howman explained that the “B” sample was intended to protect the rights of athletes by confirming a positive test. He explained further that the confirmation procedure was used to protect individuals.³⁰ This indicated that by this point, the “B” sample testing process had moved away from scientific need to the protection of the athlete’s rights. Furthermore, the knowledge that a positive finding will have to be replicated before a critical audience provides an added push to make sure the process is completed in accordance with all the rules.

IV. CHALLENGING THE TESTING METHODOLOGY

The initial reaction to testing by athletes alleged to have used a performance-enhancing substance was to attack the procedural aspects of the testing regime. Tactics included challenging the chain-of-custody and the methodology of sample collection. Today, the challenges lay more and more

28. *Id.* at 85.

29. In a note to the author dated 20 September 2007 from Dr. Francesco Botre, the Director of the WADA accredited laboratory in Rome, Dr. Botre advised as follows:

[T]he reliable and correct identification of a specific compound required the development of highly specific methods, in order to distinguish a synthetic steroid from an endogenous one, naturally present in the body. The success was achieved by a combination of specific procedures for the pretreatment of the sample with the availability of bench top “GC/MS” stations, i.e. instruments in which a gas chromatographer (GC), that is an instrument that allows to separate the components of a complex mixture, is interfaced to a mass spectrometer (MS), that is a detector by which is theoretically possible to identify any substance, provided a reference compound is available.

Letter from Dr. Francesco Botre, Dir. of the WADA accredited laboratory in Rome, to author (Sept. 20, 2007) (on file with author).

30. World Anti-Doping Agency, *WADA Clarifies B-Sample Procedure*, Nov. 22, 2006, <http://www.wada-ama.org/en/newsarticle.ch2?articleId=3115361>.

in the scientific methodology of drug testing. Attacks on the scientific methodology of various doping control tests have included calling into question the reliability of specific testing methods and have sparked changes in testing to keep up with the latest doping methods used by athletes. An athlete can call both the substantive and the procedural scientific aspects of drug testing into question because of the continuously evolving nature of the testing, where tests for substances like nandrolone and testosterone have been improved or new tests have evolved to identify blood transfusions, use of EPO, or even designer steroids like THG. As science progresses and testing procedures are refined, new information can be used to rebut existing testing procedures.

A. Substantive and Procedural Challenges: Doping Methods Examined

i. Erythropoietin

Erythropoietin (EPO) is a hormone that naturally occurs in the body and stimulates the production of red blood cells. Pharmaceutical EPO was developed in the late 1980s to treat anemic and critically ill patients. As a performance-enhancing agent, EPO is used by athletes to increase stamina and aerobic capacity, primarily in endurance sports such as running, cross-country skiing, cycling, and triathlon. There are several types of synthetically produced EPO, including recombinant EPO (rEPO), which is produced by splicing the human EPO gene with cultured animal cells, and darbepoietin, which is produced by a similar process, but uses a specially engineered EPO gene sequence. Naturally produced EPO is referred to as endogenous or urinary EPO (uEPO).

The IOC Medical Commission banned the use of EPO as a performance-enhancing substance in the early 1990s. In some cases, an athlete has a naturally-occurring high red blood cell count that could skew the EPO test results, and the athlete will have to demonstrate this with a series of confirming tests that measure the relative concentrations of red blood cells in the body. The presence of rEPO or darbepoietin in an athlete's body is indicative of its intentional administration of the substance because these synthetic forms are not naturally produced in the body. The evolution of the testing procedure for EPO illustrates the constant cops-and-robbers game between athletes that are one step ahead of the testing methods and laboratories struggling to produce scientifically viable procedures to detect them. The newly-developed tests are often subject to scientific attacks from athletes challenging AAFs in these developing areas, such as EPO.

In 2000 following the Sydney Olympic Games, EPO testing was first

introduced by the Laboratoire National de Dépistage du Dopage (LNDD), and the new test was adopted as the laboratory standard. The test was revolutionary in that it could purportedly distinguish between naturally occurring hormones present in the athlete's urine and synthetic pharmaceutical EPO. This "direct urine" test for EPO was used together with an indirect blood test. First, the laboratory would conduct an indirect blood test as a preliminary screening method, and if it suggested possible use of rEPO, the laboratory would then conduct a direct urine analysis. The direct urine test consists of several individual procedures. Essentially, rEPO and uEPO are separated based on their differing electrical charges by examining an image called an electropherogram. Endogenous uEPO molecules occupy a range in the central region of an electropherogram, and synthetic rEPO occupies the basic range of an electropherogram. Though the two forms can overlap on the image, it is usually readily observable whether or not rEPO is present in the sample. To account for the potential overlap between rEPO and uEPO, interpretation criteria were developed. In the early cases dealing with EPO, it was primarily these interpretation criteria that were contested by athletes.

The first case dealing with the validity of rEPO testing was that of the Court of Arbitration for Sport (CAS) in *Meier v. Swiss Cycling*.³¹ The CAS Panel in *Meier* established that the direct urine test could be applied to distinguish rEPO from uEPO and was valid in determining an AAF. Meier was the first athlete convicted of a doping offense based on the new direct urine test. Subsequently, in *UCI v. Hamburger*,³² CAS examined the interpretation technique of the 80% basic area percentage method (BAP)³³ method used by the laboratories. Though the laboratory in *Hamburger* was not required to use the BAP standard, it elected to do so in its analysis of the "A" sample. Though his "A" sample satisfied the 80% BAP standard, his "B" sample fell just short of the acceptable range. This rendered the initial AAF inconclusive, and Hamburger was exonerated.

The BAP method of interpreting EPO tests was challenged in *IAAF v.*

31. *Meier v. Swiss Cycling*, CAS 2001/A/345.

32. *UCI v. Hamburger*, CAS 2001/A/343 (2001).

33. The basic area percentage (BAP) method of interpreting the EPO test was described as follows in *IAAF v. MAR & Boulami*, CAS 2003/A/383:

[O]ne of the 100% r-EPO control samples is used to establish a horizontal dividing line . . . drawn at the bottom of the most acidic rung of the 100% r-EPO sample. . . . The EPO ladder of the athlete urine sample in question is then examined relative to the horizontal baseline. . . . [A] machine then measures what percentage of the surface area of these rungs appears above the horizontal baseline in the basic area of the gel.

This percentage figure is the BAP. It is one of several methods of interpreting the electropherograms although in the early testing days it was the predominant method.

*Boulami*³⁴ and *USADA v. Sbeih*,³⁵ and was ultimately rejected by CAS in *USADA v. Bergman*.³⁶ Bergman, an American cyclist, was charged with a doping offence by USADA though both his “A” and “B” samples were below 80% BAP range. The CAS Panel held that the 80% BAP range was never absolutely required for a conviction and that recently developed tests also suggested that Bergman’s samples were positive. CAS, in holding that the 80% BAP was not required, found that the Panel merely had to be satisfied that the risk of a false positive was at an acceptably low level so as to establish the doping offense. The current WADA testing procedure for EPO is described in the technical document TD2004EPO,³⁷ which eliminates the 80% BAP threshold for interpreting rEPO tests.

1. “Active” and “Effort” Urine

In addition to challenging interpretation procedures, athletes have called attention to rare phenomena that alter the profile of endogenous forms of uEPO. The case of Bernard Legat called attention of the anti-doping community to the previously unrecognized “active urine” phenomenon, and Rutger Beke’s case elucidated what is now known as the “effort urine” phenomenon. These two recently recognized phenomena describe situations in which the spontaneous restructuring of chemical compounds found in an athlete’s urine in rare circumstances can skew EPO test results.

The active urine phenomenon was first publicized in the case of Kenyan middle distance runner Bernard Legat. Legat’s “A” sample tested positive for rEPO in 2003 prior to a competition, and his “B” sample, tested a month later, exhibited the active urine phenomenon. Legat was subsequently exonerated. It was recognized in his case that the active urine phenomenon may occur in limited circumstances where the sample is stored at high temperatures, contains enzymatic activity, or is subject to bacterial contamination.³⁸ The presence of one or more of these factors could change EPO molecules in such a way that they would not appear on the test results as they normally would, thus creating the potential for a false positive result. Subsequently, the EPO

34. IAAF v. Boulami, CAS 2003/A/452.

35. USADA v. Sbeih, AAA No. 30 190 001100 03.

36. USADA v. Bergman, CAS 2004/O/679.

37. See WORLD ANTI-DOPING AGENCY, WORLD-ANTI DOPING AGENCY TECHNICAL DOCUMENT TD2004EPO: HARMONIZATION OF THE METHOD FOR THE IDENTIFICATION OF EPOIETIN ALFA AND BETA (EPO) AND DARBEPOIETIN ALFA (NESP) BY IEF-DOUBLE BLOTTING AND CHEMILUMINESCENT DETECTION 1 (2004) (hereinafter TD2004EPO).

38. See HANS HEID, REPORT OF B-SAMPLE TESTING IN THE LABORATORY OF PROF. W. SCHÄNZER, INSTITUTE OF BIOCHEMISTRY, GERMANY, SPORT UNIVERSITY, COLOGNE (2003), available at <http://www.letsrun.com/2003/lagatfull.doc>.

testing procedures were refined to include an additional “activity test” to screen for the active urine phenomenon, the procedure for which is also described in WADA Technical Document TD2004EPO.³⁹

Belgian triathlete Rutger Beke tested positive for EPO in September 2004 and was suspended from competition by the Flemish Disciplinary Commission. He was reinstated to competition after he successfully argued before the Commission in 2005 that his test results had been skewed by an internal process that changed EPO molecules following intense physical activity. This is now known as the “effort urine” phenomenon. In order to explain this newly recognized phenomenon was indeed occurring in his sample, Beke was subjected to vigorous testing with Belgian scientists. They discovered that Beke suffers from proteinuria, where unusually large amounts of protein are excreted in his urine during intense exercise. This could cause the EPO antibodies to bind to unrelated proteins and skew the test results. This is similar to the effort urine phenomenon that has been recognized by WADA in connection with nandrolone testing, as discussed below. Effort urine is a developing area of inquiry within EPO testing that likely only applies to very few athletes who display existing medical conditions similar to Beke’s.

2. Salt Lake Developments

EPO testing took a dramatic turn during the Salt Lake City Winter Olympic Games of 2002. The testing procedure for EPO was altered during the course of the Games as CAS heard the famous cross-country skiing trilogy⁴⁰ of cases dealing with a brand name synthetic version of EPO. Darbepoietin is a wholly synthetic version of rEPO that was referred to by the brand name Aranesp. The manufacturer designed the substance to be readily detectable through a simple visual test free of the possible interpretation problems associated with testing other forms of rEPO.

The first two cases of the trilogy dealt with Russian cross-country skiers Larissa Lazutina and Olga Danilova and were heard simultaneously by CAS. The *Lazutina* and *Danilova* cases challenged the validity of the new test based on the fact that the detection of darbepoietin had not been legally or scientifically accepted, and that the existing test for rEPO should not be applied for the detection of darbepoietin, a different substance. CAS rejected these arguments in favour of the testimony of expert scientific witnesses in

39. TD2004EPO, *supra* note 37.

40. *Lazutina v. IOC*, CAS 2002/A/370; *Danilova v. IOC*, CAS 2002/A/371; *Lazutina v. FIS*, CAS 2002/A/397; *Danilova v. FIS*, CAS 2002/A/398, Swiss Federal Tribunal, 4P. 267/2002 (2003); *Muehlegg v. IOC*, CAS 2002/A/374.

support of the test. Notably, CAS found that the existing test for rEPO could be applied to the detection of darbepoietin completely unaltered. For this reason, the test results for Lazutina and Danilova were upheld by CAS.

The third case in the trilogy was that of Spanish cross-country skier Johann Muehlegg, who also tested positive for EPO during the Salt Lake Games. Muehlegg's defense expanded on that of Lazutina and Danilova and was heard by a different panel than the first two. Muehlegg challenged the classification of darbepoietin as a prohibited substance, and this was rejected as darbepoietin was considered an analogue of a prohibited substance, and was thus prohibited itself. Muehlegg also argued that the Salt Lake City laboratory lacked the accreditation to perform the test at the time Muehlegg's sample was tested. CAS determined that the lack of accreditation was not prohibitive of the laboratory's testing for darbepoietin during the Games, so long as it was established to the satisfaction of the Panel that "the testing procedure . . . was in accordance with the prevailing standards and practices of the scientific community." CAS examined the existing scientific scholarship on the subject and determined that the test as it was performed did fulfill this requirement. Muehlegg finally challenged the test based on its ongoing development and the lack of specific thresholds. The athlete claimed that these factors showed that the test was unreliable as it was still in a trial stage. CAS also rejected these final arguments as the test reliably established Muehlegg's use of darbepoietin regardless of whether or not objective thresholds were used or the test was still being refined.

3. Current Trend: Negative "B" sample

Apart from faulty testing procedures, the short half-life of EPO could be to blame for a recent trend of negative "B" samples. Synthetic EPO has a short half-life, and delays in the testing of a "B" sample following a positive "A" sample for EPO could allow the degradation of EPO over time to the point where it is no longer present in any significant quantity in the sample.

There are a handful of examples in which the "B" sample's negative results have exonerated an athlete after an initial adverse analytical finding for EPO. The most recent high-profile case is that of American sprinter Marion Jones, who tested positive for EPO in 2006. Jones, a five-time Olympic medalist at the Sydney 2000 games, had been implicated by the press in the BALCO scandal through the involvement of her coach, Trevor Graham.⁴¹ She was also under suspicion of doping based on her ties to Ben Johnson's former

41. Mark Fainaru-Wada, *Graham Admits BALCO Role*, SAN FRANCISCO CHRON., Aug. 23, 2004, at D5, available at <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/08/23/SPGK88CPARI.DTL>.

coach and admitted drug-provider, Charlie Francis, as well as her former partners C.J. Hunter and Tim Montgomery, both of whom have admittedly used performance-enhancing drugs. Victor Conte, founder of BALCO, claimed to have provided Jones with illegal substances, and C.J. Hunter claimed to have witnessed her using them. At the time, Jones adamantly maintained that she did not use performance-enhancing drugs. Jones' "A" sample taken at the USA Track and Field Championships on June 23, 2006, tested positive for EPO. The results of the "A" sample test were leaked and reported in the *Washington Post*.⁴² Jones withdrew from the next upcoming meet in Switzerland citing "personal reasons." On September 6, 2006, Jones' "B" sample tests came back negative. The leak, combined with Jones' exoneration through "B" sample testing, was widely viewed as a blow to public perception of the reliability of drug testing. That perception may have been damaged even further when, in October of 2007, Jones testified before a U.S. District Court judge that she had lied to federal investigators about her past steroid use and admitted having used them until at least 2002. The price she paid was personal bankruptcy from the legal costs of fighting the charges and forfeiture of all medals and awards she received since September 1, 2000, including her five medals won at the Sydney Olympics.

Bernard Legat, a Kenyan-born U.S. distance runner, tested positive for EPO in Tubingen in August 2003. Legat, competing for Kenya at the time, was encouraged to withdraw from subsequent competitions by Athletics Kenya, who decided to keep the test results confidential until the "B" sample testing was complete. The results of the "A" sample tests, however, were leaked to the press before "B" sample testing was initiated. The results of the "B" sample were released a month after the "A" sample, with a negative finding. Legat then brought legal action against the IAAF for lost earnings, but was denied an award.

Additionally, cyclists Fabrizio Guidi, Massimo Strazzer, and Bo Hamburger—as described above—along with Spanish track gold medalist Juan Llaneras, have been acquitted of doping with EPO due to negative "B" samples. Triathletes Virginia Berasategui and Ibán Rodríguez were also acquitted when "B" samples from the Ironman Lanzarote 2005 were deemed unusable after WADA changed the testing criteria in the middle of the challenges to the AAFs. Olga Yegorova was eventually exonerated from charges of EPO doping when her "A" sample tested positive for EPO at a Paris meet in July 2001, at which she won the 3000 metre event. Paris

42. Amy Shipley, *M. Jones Failed Drug Test in June*, WASH. POST, Aug. 19, 2006, at E1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/18/AR2006081800926.html>.

officials neglected to take a blood sample from her at the time that would corroborate the positive result. Though the results of the positive test were leaked to the press, she was allowed to compete because the laboratory could not corroborate its findings.

The history of EPO testing examined along with the current challenges it presents shows the ongoing tension between athletes pushing the boundaries of doping, scientists developing reliable methods, and governing bodies searching for consistency and accuracy. Testing for EPO has been scrutinized since its inception in 2001 and will likely continue to be until the science in the area ceases to evolve. Allowing multiple, discrete challenges to testing methodology through CAS is an inefficient and prohibitively expensive way to refine the scientific and legal aspects of an emerging area such as EPO.

ii. Nandrolone

Nandrolone (19-nortestosterone) is an anabolic androgenic steroid used to enhance performance through the building of muscle mass. It is a prohibited substance under the WADA Code. Nandrolone precursors such as 19-norandrostenedione, 19-norandrostenediol, and norethisterone are commonly available as athletic supplements and are also prohibited substances.⁴³ Precursors, once ingested, can be metabolized into nandrolone and utilized by the body in the same manner as nandrolone. The use of nandrolone in sport was banned by the IOC in 1976.

The test procedure for nandrolone was originally based on the premise that there was no endogenous production of nandrolone in the human body.⁴⁴ The major metabolite of nandrolone is 19-norandrosterone (19-NA). It was initially thought that 19-NA was not produced endogenously in the body. Based on this premise, the presence of 19-NA in a sample, in any amount, had indicated the administration of a prohibited substance. However, in 1996, with the introduction of gas chromatograph/mass spectrometry (GC/MS) technology that could detect even minute quantities of substances such as 19-NA, it was quickly realized that low concentrations of 19-NA could be produced endogenously.⁴⁵ Published scientific studies later confirmed the

43. The IOC Medical Code Prohibited Class of Substance under *anabolic agents (class C)* was expanded to include these substances as of January 31, 1999. See IOC MEDICAL CODE (Jan. 1999 & Supp. 2000); EXPERT COMM., NANDROLONE REVIEW (2000) (report to UK Sports Council by Professor Vivian James, chairman of the Expert Committee, in January of 2000) (hereinafter NANDROLONE REVIEW); UK Sport, <http://www.uk sport.gov.uk>.

44. As discussed in *Bernhard v. ITU*, CAS 1998/222, ¶ 10.

45. *Id.*

endogenous production.⁴⁶ The endogenous production of 19-NA was first recognized in pregnant females,⁴⁷ but eventually it was determined that endogenous 19-NA could be produced in males as well.⁴⁸ As the scientific understanding of 19-NA grew, guidelines emerged, developed by various laboratories such that a positive result would not be reported unless the concentration of nandrolone in a urine sample exceeded set levels.⁴⁹ When it was found that nandrolone could be produced endogenously in the human body in small amounts, the discovery resulted in the implementation of a threshold for the substance in testing standards.⁵⁰

In 1999, UK Sport established the Nandrolone Review Group in response to an increased number of athletes testing positive for nandrolone. More recently, a spate of positive tests for nandrolone in the track and tennis communities has prompted anti-doping bodies to re-examine testing procedures. The legal challenge came when Greg Rusedski, a British tennis player, argued that the Association of Tennis Professionals (ATP) acted in a hypocritical manner in exonerating a series of tennis players after their AAFs showed the use of nandrolone. Rusedski's argument revolved around Bohdan Ulihrach, a Czech player who, along with six other unnamed players, was cleared when the ATP admitted the possibility that trainers could have been handing out tainted supplements.⁵¹ It was argued that Rusedski's AAF carried the same analytical fingerprint as the seven previous cases. Rusedski was

46. B. Bizec, F. Monteau, I. Gaudin, & F. Andre, *Evidence for the Presence of Endogenous 19-Norandrosterone in Human Urine*, 723 J. CHROMATOGRAPHY B: BIOMEDICAL SCI. & APPLICATIONS 157-72 (1999).

47. Y. Resnik, M. Herrou, L. Dehennin, M. Lemaire, & P. Leymarie, *Rising Plasma Levels of 19-Nortestosterone Throughout Pregnancy: Determination by Radioimmunoassay and Validation by Gas Chromatography-Mass Spectrometry*, 64(5) J. CLINICAL ENDOCRINOLOGY & METABOLISM 1086-88 (1987).

48. Bizec et al., *supra* note 46, at 157-72.

49. These guidelines, which established thresholds for the presence of 19-NA, were initially set out in IOC MEDICAL COMM'N SUBCOMMITTEE, ANALYTICAL CRITERIA FOR REPORTING LOW CONCENTRATIONS OF ANABOLIC STEROIDS (Aug. 1998). They can be found as an appendix to NANDROLONE REVIEW, *supra* note 43; *see also* UK Sport, <http://www.ukssport.gov.uk>. These guidelines had the nature of a recommendation addressed to the IOC laboratories and did not constitute a legal rule. *See Bernhard*, ¶ 11.

50. For scientific papers recognizing human production of nandrolone in small quantities, see Bizec et al., *supra* note 46, at 157-72; L. Dehennin, Y. Bonnaire, & P.J. Plou, *Urinary Excretion of 19-Norandrosterone of Endogenous Origin in Man. Quantitative Analysis by Gas Chromatography-Mass Spectrometry*, 721 J. CHROMATOGRAPHY B: BIOMEDICAL SCI. & APPLICATIONS 301-07 (1999). To view WADA's detection limits for Nandrolone, see WORLD ANTI-DOPING AGENCY, WORLD-ANTI DOPING AGENCY TECHNICAL DOCUMENT: REPORTING NORANDROSTERONE FINDINGS 2 (2004) (hereinafter REPORTING NORANDROSTERONE FINDINGS).

51. *Rusedski Cleared*, Mar. 10, 2004, BCC SPORT, available at <http://news.bbc.co.uk/sport2/h/tennis/3547917.stm>.

exonerated in 2004, and his challenge has diminished the integrity of the anti-doping testing process. The challenge this time was a legal one. Without the advanced technology required to match chemical fingerprints, Rusedski's legal argument would have failed. This is a prime example of advancing scientific standards increasing the stakes in the war against doping.

As a result of the series of positive findings for nandrolone, tests on commonly available supplements were also performed by the IOC at the IOC accredited laboratory in Cologne under the supervision of Dr. Wilhelm Schanzer. These tests found that a significant number of available supplements were contaminated with nandrolone. It was possible, therefore, for athletes to ingest nandrolone while using a supplement that was not prohibited. Warnings were issued to athletic associations to inform athletes of the possibility of ingesting nandrolone even when using non-prohibited supplements. The warning from the IOC shifted the legal burden to the athlete to ensure that the athlete did not inadvertently ingest nandrolone. This buffered the IOC's position, allowing anti-doping authorities to pursue doping athletes even where the defense alleged is that of "no fault"—in this case, the IOC's warning establishes that the athlete should have been aware of the possibility of nandrolone content in allowed supplements. The Cologne findings do not change findings of guilt or innocence, but do place the degree of guilt into some context.⁵² As a result of the Cologne study, athletes such as UK runner Mark Richardson, who had been previously found guilty of doping with nandrolone, have been reinstated by the IAAF.⁵³

Further controversy surrounding nandrolone has arisen around a particular study that has found that nandrolone metabolites may be produced even without the ingestion of nandrolone. Professor Ron Maughan at Aberdeen University found that athletes using allowed dietary supplements that did not include nandrolone as an ingredient produced higher concentrations of nandrolone metabolites in their urine when combined with vigorous exercise, stress, and dehydration. Thus, it was shown that nandrolone metabolites could be produced without the ingestion of nandrolone. This was termed "active urine phenomenon." The University of Aberdeen study is the only study that has resulted in this finding. The study has been criticized for using too small a control group to produce accurate results. It was discounted by an IAAF arbitration panel for a variety of scientific reasons, as well as the fact that Professor Maughan was not independent—he subsequently participated in the UK Athletics disciplinary committee that favoured track athletes Linford

52. Rachel Corbett, *New Studies Shed Light on Nandrolone*, 8(2) COACHES REPORT (2001), available at <http://www.sportlaw.ca/articles/coach/coach30.html>.

53. *Id.*

Christie, Dougie Walker, and Gary Cadogan who had tested positive for nandrolone. The athletes claimed that nandrolone could be produced under circumstances of high stress, vigorous activity, and the ingestion of certain food supplements. The bans on these athletes were later reinstated by the IAAF.⁵⁴ Despite the flaws that this argument has displayed, athletes have not been prevented from forwarding it in doping arbitrations. It is unlikely that arbitration panels will look favourably on this argument, given that it has already been discounted by an IAAF panel.

The threshold for nandrolone remains a rule under the WADA Code. The 2006 WADA Prohibited List clearly states that an AAF with respect to 19-NA will be considered to be proof of exogenous origin of the metabolite. The threshold for reporting an AAF for 19-NA is 2 ng/mL. The original limit for women was 5 ng/mL, but this has recently been reduced and is now 2 ng/mL, as it is for men.⁵⁵ This accounts for the established finding that natural occurrence of nandrolone peaks at 0.2 ng/mL in men and 0.6 ng/mL in women due to the use of birth control and other allowed medications. Despite the clear acceptance by CAS of the 2 ng/mL threshold for 19-NA, athletes continue to challenge that limit. In addition to arguing that the threshold is simply unreliable, athletes have also asserted that certain factors such as intense exercise can cause temporary production of nandrolone over the allowable limit. Other athletes have made challenges alleging errors in the way that the concentration of nandrolone metabolites is reported and calculated.

The nandrolone issue is wrought with controversy. Any attempt at infusing the field with clarity is welcome. However, the “B” sample fails to offer that clarity. Assuming that the reportable threshold for 19-NA can be disputed as being inaccurate, the athlete gains no legal protection from the testing of the “B” sample, as the levels of 19-NA in both the “A” and “B” samples should not differ if testing methodology is effective since nandrolone is not known to deteriorate as quickly as EPO. The testing of the “B” sample thus solely serves to confirm the “A” sample finding. Unless the “A” sample was subject to improper procedure resulting in a false positive, correct handling by laboratories in accordance with the International Standard for Laboratories should result in no benefit to the athlete from the existence or testing of the “B” sample.

54. *Walker to Fight on*, BBC SPORT, Aug. 22, 2000, available at <http://news.bbc.co.uk/sport2/hi/scotland/891340.stm>.

55. These limits with respect to an *Adverse Analytical Finding* for 19-NA are set out in REPORTING NORANDROSTERONE FINDINGS, *supra* note 50. The change to the limit for 19-NA in females occurred in August 2004, the effective date of the Technical Document.

iii. Human Growth Hormone

One of the most controversial performance-enhancing substances in sport today is human growth hormone (HGH). Doping authorities believe that HGH is abused on a wide-scale, and the testing methodology has yet to be established definitively. HGH appears to have been used by athletes for decades and was first banned by the IOC in 1989.⁵⁶ Research did not produce the first potentially useable screening process until a blood test was introduced by WADA at the 2004 Summer Olympic Games in Athens.⁵⁷ Yet, after approximately 300 athletes⁵⁸ were tested at the Games for the hormone, not a single test was reported to be positive. There has never been a positive test reported at any other major sporting event where testing for HGH has been implemented.

WADA has explained the lack of positive results to be a function of the time the blood sample is taken in relation to the time of administration of HGH. Testing for HGH is most likely to be reliable when the sample is taken without warning and out-of-competition.⁵⁹ Indeed, it appears that the window for the detection of HGH is extremely small. Oliver Rabin, WADA's Director of Science, admitted that the current blood test for HGH can only detect synthetic HGH in an athlete for approximately two days after injection.⁶⁰ The short window of opportunity explains the slew of negative findings for HGH at the Athens games. Since athletes were aware ahead of time that WADA planned to test for the hormone at Athens, HGH users had merely to discontinue its use two or more days before arriving at the Olympic Village. HGH was also screened for at the Turin Games with no positive results reported. Doubts about the reliability of the current HGH blood test will continue until a conclusive test can be developed.

In the summer of 2007, Sydney's Garvan Institute of Medical Research, a WADA-supported facility, announced a new HGH test. Like its predecessor, the test is performed on a blood sample but differs in that it identifies protein markers triggered by abuse of the hormone rather than the presence of a synthetic version of HGH. WADA hopes to use the test in conjunction with

56. *Drug Testing: Doping Test Expected for Athens*, N.Y. TIMES, Nov. 21, 2003, available at <http://query.nytimes.com/gst/fullpage.html?res=9B02E0DD153BF932A15752C1A9659C8B63>.

57. World Anti-Doping Agency, *Q&A: Human Growth Hormone Testing*, http://www.wada-ama.org/rtecontent/document/QA_hGH_En.pdf.

58. *Blood Fuels Feud over Growth Hormone Testing in American Team Sports*, INT'L HERALD TRIB. (Paris), Jan. 31, 2007, available at <http://www.iht.com/articles/ap/2007/02/01/sports/NA-SPT-US-HGH-Testing.php>.

59. World Anti-Doping Agency, *supra* note 57.

60. *Blood Fuels Feud over Growth Hormone Testing in American Team Sports*, *supra* note 58.

the one already in play in order to increase the probability of detecting the illegal administration of synthetic HGH.⁶¹

Some professional sports not under WADA jurisdiction have recognized HGH as a performance-enhancing substance and have accordingly banned it. However the enforcement of such a ban is little more than a smoke screen. The National Football League (NFL) and Major League Baseball (MLB), for instance, have decided to embrace a urine-sample test for HGH rather than the one currently in use and sanctioned by WADA.⁶² However, the overriding problem with a urine sample test for HGH is that no effective urine test actually exists. According to Don Catlin, the Chief of the WADA-accredited laboratory at UCLA, an effective urine test is years away.⁶³ Furthermore, numerous international scientific experts maintain that the most effective way to test for HGH is by way of blood sample, reasons for which lie in the fact that the HGH concentration in urine is less than one percent of that found in blood.⁶⁴ MLB has been under pressure to pass more stringent anti-doping measures to protect the credibility of the league. MLB is looking into using a blood test developed by WADA as it becomes commercially available—likely in late 2007.⁶⁵ The test was used on a limited basis at the 2004 Summer Olympics and the 2006 Winter Olympics.

It appears that testing for HGH in both Olympic and professional sport may not be a deterrent to an athlete's use of the substance at all. The WADA-sanctioned blood test is only effective within two days of administration of the hormone, and the urine test supported by professional sport is utterly unreliable. Since, to date, no athlete has been reported to have been using HGH as result of in-competition testing, if athletes are using HGH on the wide-scale basis they are believed to be, then the testing programs have failed.⁶⁶ Consequently the HGH ban is actually enforced only as a matter of conscience and ethic on the part of the athlete.

61. *New Test to Detect Human Growth Hormone May Catch Doping Athletes Experts Say*, INT'L HERALD TRIB. (Paris), June 18, 2007, available at <http://www.iht.com/articles/ap/2007/06/18/sports/EU-SPT-Human-Growth-Hormone.php>.

62. *Blood Fuels Feud over Growth Hormone Testing in American Team Sports*, *supra* note 58.

63. *Id.*

64. World Anti-Doping Agency, *supra* note 57.

65. Bob Nightengale, *Baseball on HGH. "We're Doing Everything We Can."* USA TODAY, Sept. 19, 2007, available at http://www.usatoday.com/sports/baseball/2007-09-13-baseball-hgh-policy_N.htm.

66. However athletes have been caught either in possession of or acquiring HGH.

iv. Blood Doping

Blood doping is a prohibited method under the WADA Code.⁶⁷ In addition to EPO, synthetic oxygen carriers and blood transfusions are performance-enhancing doping methods banned by WADA. Synthetic oxygen carriers are proteins or chemicals that have the ability to carry oxygen, and like EPO, increase stamina and aerobic capacity in athletes when utilized by the body. There are two types of blood transfusions used for doping: autologous transfusion of one's own blood and homologous transfusion of blood from a compatible donor. Tests for both synthetic oxygen carriers and homologous blood transfusions were introduced by WADA in 2004. Homologous blood transfusions are detected by measuring surface markers on blood cells that are unique to each person.

The test for homologous blood doping was developed by Dr. Michael Ashenden's team at Science and Industry Against Blood Doping and implemented at the 2004 Tour de France. The test includes a method called flow cytometry, where cells are shuffled through a detection-tube and a laser is used to identify antigens that have been marked with fluorescent dye. Blood from a single person will show an inherent antigen set, while the transfusion of blood from any other person will result in a test with more than one "spike." A positive test for homologous blood doping results where a significant number of different markers exist and are shown on paper as different "spikes."⁶⁸ WADA is currently developing testing procedures to detect autologous blood transfusions.

The flow cytometry test is sensitive, yet the potential for false positives exist.⁶⁹ The test uses polyclonal serum containing antibodies that react with several minor blood antigens. Polyclonal sera are less specific than monoclonal sera and may detect different substances. The result is a wider net cast, but also a larger ratio of false positives. Laboratories have moved to the use of monoclonal sera for commercial test, resulting in a more specific test, but also run the risk of false negatives, since monoclonal sera do not attach as well to antibodies as the polyclonal variety. A more accurate test would involve the testing of mitochondrial DNA instead of surface antigens. This test has yet to be developed for use in the fight against anti-doping.

67. WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE: THE 2007 PROHIBITED LIST INTERNATIONAL STANDARD 1 (2006), available at http://www.wada-ama.org/rtecontent/document/2007_List_En.pdf.

68. M. Nelson, M. Ashenden, Langshaw, & H. Popp, *Detection of Homologous Blood Transfusion by Flow Cytometry: A Deterrent Against Blood Doping*, 87 HAEMATOLOGICA 881 (2002).

69. M. Nelson, H. Popp, K. Sharpe, & M. Ashenden, *Proof and Homologous Blood Transfusion Through Quantification of Blood Group Antigens*, 88 HAEMATOLOGICA 1284-95 (2003).

Further criticism of the flow cytometry test at the point it was implemented by anti-doping bodies included the fact that the *Haematologica* article reported results on a very small set of tests and required further testing if results were to be considered accurate enough for use in anti-doping enforcement. Legally, however, WADA is adamant that the athlete is protected. WADA states that there must be “a distinct peak for two different markers on the histograms before it is concluded that a blood sample contains a mixed population of RBCs.”⁷⁰ In normal medicine, only a single peak with a shoulder or tail is necessary to indicate that there are mixed populations of RBCs. Thus, the standard is higher in anti-doping testing than in normal medical testing.

Tyler Hamilton, a U.S. cyclist, tested positive for homologous blood doping at the 2004 Olympics, then again at the 2004 Vuelta de Espana. The initial AAF at the Olympics failed to result in a confirmed doping case because of the deterioration of the “B” sample. The “B” sample had been frozen, resulting in an unusable sample that could not be tested to confirm the findings of the “A” sample. The incident was an example of the “B” sample’s potential to clear athletes from liability should due process not be followed. The “B” sample cannot implicate an athlete although it holds the potential for the athlete’s exoneration.

In the 2004 Vuelta de Espana time trials, Hamilton again tested positive for homologous blood transfusion. This time, the “B” sample findings confirmed the initial AAF, and Hamilton was suspended by an AAA/CAS tribunal. At the arbitration proceedings, Hamilton’s team questioned the accuracy of the tests and procedures as well as Ashenden’s test itself.⁷¹ The argument was rejected, although one of the panelists held that WADA had failed to accurately document the risks of false positives in the Ashenden blood test. WADA was criticized by the arbiter for not relying on objective or verifiable standards with regard to the issue of false positives.⁷² Although Hamilton was ultimately suspended for doping, the criticism of WADA as raised during his arbitration remains relevant. The athlete’s ability to raise arguments based on science and technology will be carefully considered by arbitration panels and may impact the ultimate finding of guilt or innocence. The science behind an AAF is rebuttable. In this case, the athlete challenged a thirty-year-old test to no avail. Still, the potential for a successful rebuttal

70. USADA v. Hamilton, AAA No. 30 190 00130 05 (2005); Hamilton v. USADA & UCI, CAS 2005/A/884.

71. USADA v. Hamilton, AAA No. 30 190 00130 05 (2005); Hamilton v. USADA & UCI, CAS 2005/A/884.

72. USADA v. Hamilton, AAA No. 30 190 00130 05 (2005); Hamilton v. USADA & UCI, CAS 2005/A/884.

argument by the athlete does exist.

Cycling has been the sport most plagued by allegations of blood doping. The recent Tour de France has resulted in a rash of positive tests from various cyclists. From his sample taken in July 2007 after stage thirteen of the Tour de France, Alexander Vinokourov of the Astana Team tested positive in both his "A" and "B" samples for homologous blood transfusion. Vinokourov challenged the testing procedures of the laboratory that handled the sample testing (LNDD), particularly the flow cytometry instrument that the laboratory had used. Vinokourov's team withdrew from the competition after his teammate Andrej Kashechkin also tested positive for homologous blood transfusion. Vinokourov was subsequently fired from Astana.⁷³ While it is unknown how Vinokourov will challenge the findings at the point this paper was written, representatives have stated that the rider has denied doping and believes that the blood anomalies in his body were the result of his crash a week prior to the test.⁷⁴ Thus it seems that the rider will challenge the fault requirement, rather than the science behind the test.

V. THE PENULTIMATE CHALLENGE

The *Landis* case is the high water mark to date of a case challenging the laboratory testing process not just in its methodology, which athletes certainly have challenged in relation to EPO, nandrolone, and blood transfusion, but also on the basis of the scientific procedures practiced in the laboratory itself. Landis challenged the analytical procedures and process of the laboratory as measured against the requirements set out in various technical documents produced by WADA.

The screening test for testosterone involves the use of the GC/MS test to determine levels of testosterone and epitestosterone in order to calculate a ratio. If that ratio exceeds 4:1, then a further test, taking two days and as much expense as testing of the entire Prohibited List, is carried out using carbon isotope ratio analysis. In the *Landis* case the majority of the Panel determined that the international standard for testing⁷⁵ had not been complied with in the analytical chemistry steps taken by the testing laboratory. As a consequence, it was found that the presumption in favour of the laboratory result was

73. *Astana Fires Kashechkin After "B" Sample Tests Positive for Blood Transfusion*, USA TODAY.COM, Aug. 13, 2007, http://www.usatoday.com/sports/cycling/2007-08-31-277911670_x.htm.

74. *Tour de France Will Go on Despite Latest Doping Bombshell*, ESPN.COM, July 25, 2007, <http://sports.espn.go.com/oly/tdf2007/news/story?id=2947358>.

75. See WORLD-ANTI DOPING AGENCY, WORLD-ANTI DOPING AGENCY TECHNICAL DOCUMENT TD2003IDCR: IDENTIFICATION CRITERIA FOR QUALITATIVE ASSAYS – INCORPORATING CHROMATOGRAPHY AND MASS SPECTROMETRY 1 (2003).

rebutted and the burden to show that breach did not cause the AAF shifted to the prosecuting agency, USADA. Since there was no evidence to refute the breach of the rules, the T/E ratio aspect of the doping allegation was dismissed in the *Landis* case.⁷⁶

The Landis team of legal experts also carried out an extensive attack on the analytical chemistry steps taken by the testing laboratory in using its GC/C/IRMS instrument and testing procedure to determine that there was an AAF for exogenous testosterone. There was a wide range of challenges to the steps, and some breaches of international standards were found to have occurred.⁷⁷ In the Panel's view, the difference with this test was that even though the presumption in favour of the laboratory was rebutted, there was evidence to indicate that the breach of the standards did not cause the AAF. This was largely due to the fact that the Tour de France is a stage race and seven other urine samples had been provided by Mr. Landis during the race. While there were no more "A" bottles with urine for those seven samples because the laboratory had used up the urine on the screening analysis,⁷⁸ there did remain in the freezer the companion "B" samples. In an interlocutory award, the Panel did not preclude USADA from having these seven samples analyzed. The results of those analyses showed that a further four of the seven "B" samples contained exogenous testosterone. These tests were not flawed by the same analytical procedures for there was a strong and experienced team of scientists representing Mr. Landis present when the testing of the "B" samples was carried out. Furthermore, the parties had agreed to the extraction of the electronic data files and the re-running of that data under the supervision of the Panel's scientific expert, Dr. Francesco Botre. The results of this re-running of the data files, including re-analysis on the most updated IRMS software, confirmed the original results. Thus, with the testing of the "B" samples and the re-running of the prior results, there was evidence to confirm that the breaches of the international laboratory standards had not caused the AAF. If they had done so there would have been an acquittal.

VI. CONCLUSION

The WADA-accredited laboratories have always been targets in the anti-doping defense of athletes. This is not surprising since they generate the evidence that is presumed to establish an anti-doping rule violation. While the scientists and the laboratories have continuously improved their techniques, as

76. *USADA v. Landis*, AAA No. 30 190 0084 06, ¶¶ 172-73 (Sept. 2007) (majority opinion).

77. *See id.* ¶ 225.

78. It is a standard procedure in most WADA accredited laboratories to not do any IRMS analysis unless the T/E ratio exceeds 4:1. *See id.* ¶ 174.

this paper outlines, they continue to be tested as to the reliability and validity of their testing procedures. The scrutiny of the laboratories reached a new, higher plain with the *Landis* case in that the testing methodology was not the primary challenge. Instead, the analytical chemistry procedures were alleged to be flawed. This new sphere of engagement is costly but apparently has some validity, for the WADA-accredited laboratory did not emerge from the Panel's decision with a clean bill of health and an unscathed reputation.

A STUDY OF DIVISION I ASSISTANT FOOTBALL AND MEN'S BASKETBALL COACHES' CONTRACTS

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&

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I. INTRODUCTION

Collegiate athletics has become big business in America, generating billions of dollars each year. Division I-A¹ football and men's basketball are among the most popular sports in America, and they are the revenue generators in collegiate athletics. Central Broadcasting Systems (CBS) and the National Collegiate Athletic Association (NCAA) are currently under an eleven-year, \$6 billion contract for the television broadcast rights for the NCAA Men's Basketball Tournament.² Fox is paying \$330 million for the right to broadcast the Fiesta, Sugar, and Orange Bowls from 2007-2010 and the right to broadcast the college football national championship games from 2007-2009.³

With so much money spent on collegiate football and men's basketball, it appears that successful programs in these sports offer universities an opportunity to generate significant revenue. The collegiate athletic programs

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This article and its related study are dedicated to the fine work of Merritt J. Norvell, Jr., Ph.D. and the NCAA Coaching Academy, which is held annually and strives for diversity and excellence in college coaching.

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1. The terms "Division I" and "Division I-A" will be used interchangeably in this article. Division I-A refers to the top division in collegiate football; whereas, Division I is the top division in collegiate basketball. There is no Division I-A in collegiate basketball.

2. Steve Wieberg, *When NCAA Games Are on the Line, so Are Big Bucks*, USA TODAY, Mar. 21, 2006, at 1C.

3. Larry Stewart, *Fox Lands BCS Deal for \$330 Million*, L.A. TIMES, Nov. 23, 2004, at D4.

that generate the most revenue are usually those with powerhouse football programs. In 2005-2006, the five schools generating the most revenue were Ohio State, Texas, Virginia, Michigan, and Florida, in that order.⁴ However, it is debatable whether winning programs really earn universities more money or provide them with other tangible benefits. As of 2001, only 40 of 117 Division I athletic programs reported that their athletic departments were self-sufficient.⁵ Regardless, every school strives for successful programs, and in recent years, most Division I schools have significantly increased their athletic spending as they attempt to achieve success. From 1995-2001, spending on Division I intercollegiate athletics increased about twenty-five percent, while general university spending increased only about ten percent after inflation.⁶

The heart of any successful collegiate athletic program is good coaching. In order to create and maintain winning athletic programs, schools need the best coaches they can hire. Coaches are vital to the success of the athletic program in every aspect. They are responsible for coaching the team and ensuring the success of the student-athletes on and off the field. The coaches also recruit the athletes, and the talent of the recruited athletes obviously has a direct correlation to the on-field success of an athletic program.

Head coaches receive most of the credit and criticism for the success of an athletic program or the lack thereof. Head coaches are the face of each athletic program, and they are well compensated for the high-pressure and high-profile positions they hold. Numerous Division I football and men's basketball coaches earn over \$1 million per year. For example, some of the top earning men's basketball coaches include Florida's Billy Donovan, Marquette's Tom Crean, and North Carolina's Roy Williams, who make approximately \$3.5, \$1.65, and \$1.6 million per year respectively.⁷ In college football, salaries are even higher with at least fourteen head coaches making \$2 million or more per year, including four coaches who earn over \$3 million per year.⁸ College football coaches' salaries recently reached a new plateau with Nick Saban

4. *College Athletic Programs Ranked by Revenue*, SPORTS BUS. J., June 4, 2007, at 18.

5. MaryJo Sylwester & Tom Witosky, *Athletic Spending Grows as Academic Funds Dry Up*, USA TODAY, Feb. 18, 2004, available at http://www.usatoday.com/sports/college/2004-02-18-athletic-spending-cover_x.htm.

6. *Id.*

7. Andy Katz, *Donovan, Magic Work Out End of Fleeting Relationship*, ESPN.COM, June 7, 2007, <http://sports.espn.go.com/nba/news/story?id=2895999>; Robbi Pickeral, *\$2M Question: Where Does Cash Come From?*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 12, 2006, at C1; Todd Rosiak, *Crean Gets Extension: He'll Guide Eagles Through 2016-'17*, MILWAUKEE J. SENTINEL, Sept. 20, 2006, at C1.

8. Bill Vilona, *Alabama's \$32 Million Man*, PENSACOLA NEWS J., Jan. 4, 2007, at 1A; *Highest Earning College Football Coaches of 2006-07*, COLLEGESPORTSREPORT.COM, Sept. 3, 2006, http://www.dopke.com/Archives_Pages/Coaching_Changes?DIACoachesComp2006.htm.

agreeing to a contract with the University of Alabama that will pay him \$4 million per year.⁹ Some of the other highest paid football coaches include Urban Meyer (\$2 million), Tommy Tuberville (\$2.231 million), and Steve Spurrier (\$1.75 million).¹⁰ However, it is important to remember that these salary figures include the coaches' entire compensation "package," which is further defined in Section III of this article. In addition to base salary, the package includes fringe benefits, outside income opportunities, and various perquisites. In addition to their lucrative contracts, head coaches also usually have lengthy contracts that provide them many legal protections.

While a head coach is the centerpiece of an athletic program, assistant coaches are also critical to the success of the program. Assistants perform numerous functions. For example, West Virginia assistant football coach Jeffrey Casteel's contract provides a list of ten duties, which includes coaching, budget administration, travel coordination, recruiting, media interviews, marketing of the football program, student-athlete discipline, tracking student-athlete academic progress, and compliance with NCAA, conference, and university rules.¹¹ Head coaches need competent assistants whom they can trust. Without quality work from top-notch assistants, athletic programs cannot be successful.

In recent years, there has been increased recognition of the importance of good assistant coaches. Pay to assistants has increased, and many assistants are now given written contracts that provide them some legal protections. However, many assistants still do not receive the recognition and protection they deserve. Their skills are crucial for the athletic program and the university as a whole, yet many do not receive adequate legal protections. Many assistants are highly paid employees in a volatile industry, and therefore, they should have written employment contracts that provide sufficient legal protection. Even those assistants who are not highly paid should receive a written employment contract because the continuity of their jobs is still very uncertain.

This article will identify the current legal rights and contract protections of Division I-A football and men's basketball assistant coaches regarding many important aspects of their employment, including compensation, perquisites, incentives, outside income, form of contracts, term of contracts, and termination provisions. This article will also explain what changes should be made to improve the legal rights and contract protections of assistant coaches.

9. Vilona, *supra* note 8.

10. *Highest Earning College Football Coaches of 2006-07*, *supra* note 8.

11. EMPLOYMENT CONTRACT BETWEEN WEST VIRGINIA UNIVERSITY AND JEFFREY A. CASTEEL (June 30, 2005).

Finally, this article will illustrate why all assistant coaches should have written contracts that resemble the written contracts usually given to head coaches.

The information in this article was derived from a study of assistant coaches' contracts. The contracts and other information used for the study were received through public universities' responses to open record requests. Open record requests can be made for any government documents that are available for public review. Because coaches at public state universities are state employees, their contracts are available for review through open record requests. Generally, contracts for coaches at private schools are not available for public review. Therefore, all of the contracts included in this study are from public universities.

The information came from fifty-three schools representing ten of the eleven conferences with Division I-A football and men's basketball.¹² All of the schools included in the study compete in football and men's basketball at the Division I-A level. Most schools provided information for both sports; however, some did not. Additionally, some schools do not have written employment contracts for some or all of their assistant coaches.

The open record requests were made during 2006 and early 2007. The information in this article reflects what was contained in those contracts and the other materials received in response to the open record requests. Additionally, this article includes information derived from newspaper articles and various other sources. Note that some of the information might no longer be accurate. For example, some coaches may have received new contracts and/or pay raises since we received this information. Other coaches might no longer be in the positions reflected herein. Regardless, all of the information reflects assistant coach employment information for the last two years and is current enough for purposes of this article.

II. ASSISTANT COACH COMPENSATION

Quality assistant coaches are in high demand in collegiate athletics, and the salaries paid to football and men's basketball assistant coaches have risen rapidly in recent years. Coaches' salaries have also increased at a much faster pace than sports revenues at universities. Average coaching compensation at Division I schools increased eighty-nine percent from 1997 to 2003, while sports revenues rose only sixty-six percent during the same period.¹³ The

12. No contracts or other information were received from Mountain West Conference schools.

13. Curtis Eichelberger, *Coaches' Pay Surge Roils Colleges: \$230,000 to Train Runners*, BLOOMBERG.COM, Mar. 29, 2005, <http://quote.bloomberg.com/apps/news?pid=nifea&&sid=aC2XHZdyzqN8#>.

inflation of assistant coaches' salaries at some universities has been even more dramatic. Current Purdue University (Purdue) head men's basketball coach Matt Painter earned \$190,000 during the 2004-2005 season, while he was still an assistant coach under Gene Keady.¹⁴ His \$190,000 salary marked a 154% increase from the \$74,880 Purdue paid its top assistant in 2000.¹⁵ Former University of Texas A&M defensive coordinator Carl Torbush earned \$250,000 for the 2004 season, which was an eighty-five percent increase over what Texas A&M had paid its top assistants only five years earlier.¹⁶

Assistant coach salaries have skyrocketed because top assistants are being pursued like never before, and therefore, head coaches and universities are forced to outbid the competition in order to assemble high quality coaching staffs and retain their coaches.¹⁷ The competition for assistant coaches includes other universities and professional teams. Some top assistants make lateral moves, taking the same or similar assistant coaching positions at other universities that offer increased compensation. For example, Mack Brown persuaded Gene Chizik to join his staff at Texas in January 2005.¹⁸ Chizik made the move from Auburn to Texas because Brown offered "him a \$295,000 salary and the title of assistant head coach."¹⁹

Assistant coaches are also leaving their positions to take head coaching positions at other universities. Being a head coach is likely the ultimate goal of most coaches; consequently, it is difficult for a university to retain an assistant who has been offered a head coaching position. Additionally, the coach will usually be compensated significantly better as a head coach, even if the coach is moving to a smaller program. It has become difficult for coaches at top programs to retain their top assistants because the smaller Division I programs have come calling to hire these assistants as their head coaches. Tom Izzo, the men's basketball coach at Michigan State University (MSU), is a prime example of this. In twelve years as the head coach at MSU, Izzo has seen six assistants move on to head coaching positions at other Division I programs.²⁰

If assistants are not lost to other universities, programs still face the possibility of losing assistants to professional teams. Some professional head

14. *Id.*

15. *Id.*

16. *Id.*

17. David Jones, *Assistants Striking It Rich*, FLA. TODAY, May 26, 2005, at D1.

18. *Id.*

19. *Id.*

20. Jeff Shelman, *Understated Izzo Spawns Underrated Coaches*, ESPN.COM, Nov. 9, 2005, <http://sports.espn.go.com/espn/print?id=2216439&type=story>.

coaches search for assistant coaches in the collegiate ranks. Moving on to become an assistant in the National Football League (NFL) or National Basketball Association (NBA) is generally a career advancement for collegiate assistant coaches; therefore, keeping these coaches in college is difficult. Additionally, the assistant coaches will usually receive much better compensation from professional teams. For example, former University of Southern California (USC) offensive coordinator Norm Chow reportedly made \$500,000 during his final season at USC.²¹ In all likelihood, this salary made Chow the highest paid assistant coach in college sports.²² However, in 2005, Chow left USC to take the offensive coordinator position with the Tennessee Titans for a reported \$900,000 per year.²³

It will always be difficult for head coaches and the universities they serve to retain the assistants who receive offers for coaching positions in the professional ranks. However, it is possible for universities to keep coaches. The University of Wisconsin (Wisconsin) recently managed to keep offensive coordinator Paul Chryst, despite the fact that the Dallas Cowboys offered Chryst their quarterbacks coach position.²⁴ Family reasons may have been the most significant factor keeping Chryst at Wisconsin, yet he still received a large pay increase and a longer contract to stay with the Badgers.²⁵ Wisconsin gave Chryst a new five-year contract that increased his pay from \$200,000 to nearly \$300,000 per year.²⁶ The contract also includes a \$50,000 annuity for each season Chryst stays at Wisconsin.²⁷ Chryst's situation shows how a school was able to keep a coach who was offered a job with a professional team. However, keeping Chryst was an expensive proposition for Wisconsin, and his pay raise is a reflection of how much assistant coaches' salaries are rising.

Paul Chryst was not the only Wisconsin football assistant coach to receive a substantial raise during 2007. The following table shows the pay increase and base salary of several Wisconsin assistant football coaches.

21. Jeff Caplan, *This is Why They Pay Them the Big Bucks*, FORT WORTH STAR-TELEGRAM, Apr. 20, 2006, at D12.

22. This seems to be a reasonable assumption considering that LSU's offensive and defensive coordinators are believed to be the highest paid assistants in the nation currently, making \$400,000 each. *Id.*

23. *Id.*

24. Jeff Potrykus, *Chryst Decides to Stick with Badgers: Assistant Turns Down Offer from Dallas*, MILWAUKEE J. SENTINEL, Feb. 22, 2007, at C2.

25. *Id.*

26. Jeff Potrykus, *Regents Show Chryst the Money*, MILWAUKEE J. SENTINEL, Mar. 10, 2007, at 5C.

27. *Id.*

Coach ²⁸	Title	Raise	New Salary Base
Paul Chryst	Offensive Coordinator	\$83,333.33	\$283,333.33
Bob Bolstad	Tight Ends Coach	\$32,000	\$135,000
Kerry Cooks	Secondary Coach	\$20,000	\$130,000
Henry Mason	Receivers Coach	\$20,000	\$150,000
Dave Doeren	Co-defensive Coordinator	\$17,500	\$192,500
Randall McCray	Defensive Line Coach	\$13,000	\$116,000
John Settle	Running Backs Coach	\$8,000	\$112,000
Mike Hankwitz	Defensive Coordinator	\$7,500	\$192,500
Bob Palcic	Offensive Line Coach	\$7,500	\$182,500

Universities will continue to face the challenge of keeping their coaches. Competing with professional teams for coaches will always be difficult for universities. Universities should focus more on preventing assistants from making lateral moves to other programs. The rapid escalation of assistant coach salaries will likely continue because quality assistant coaches are increasingly important to universities as collegiate athletics continues to grow as big business in America.

Despite the rapid growth of assistant coaches' salaries, assistants' salaries still pale in comparison to the salaries head coaches receive. Naturally, head coaches are entitled to more compensation. They are in control of the team and the athletic program. Additionally, they are in the spotlight and receive the bulk of the pressure and criticism. Still, assistants usually work just as hard as head coaches and are nearly as important to the success of the program. Yet, top assistants often receive a small portion of the compensation paid to head coaches. For example, University of Iowa (Iowa) head football coach Kirk Ferentz reportedly made \$2.84 million coaching Iowa in 2006.²⁹ Ferentz's top assistants, Norman Parker and Kenneth O'Keefe, had contracts with Iowa in 2004 that paid them \$153,442 each.³⁰ Parker and O'Keefe have likely received pay raises since 2004, yet they still probably make less than ten

28. *UW Football Salaries on the Rise*, JSONLINE.COM, July 12, 2007, <http://www.jsonline.com/story/index.aspx?id=632317>.

29. *Highest Earning College Football Coaches of 2006-07*, *supra* note 8.

30. EMPLOYMENT CONTRACT BETWEEN THE UNIVERSITY OF IOWA AND NORMAN J. PARKER § 3 (July 1, 2004); EMPLOYMENT CONTRACT BETWEEN THE UNIVERSITY OF IOWA AND KENNETH T. O'KEEFE § 3 (July 1, 2004).

percent of Ferentz's total compensation.

At most universities, the situation is very similar to that at Iowa. With pay this disproportional between head and assistant coaches, it appears that assistants are entitled to the increasing salaries seen in recent years. This is not to say that head coaches are overpaid or that their salaries should be reduced. Instead, universities should give assistants pay raises in an effort to close some of the gap between head coach and assistant coach compensation.

Pay discrepancy among assistants is another problem with assistant coach compensation. There is a large gap between what assistants make at Division I universities with major athletic programs and those universities with smaller programs. In analyzing contracts from fifty-three universities, we found a large pay range. In football, we found salaries ranging from \$56,300 for the offensive coordinator at Ball State University³¹ to \$400,000 each for the defensive coordinators at Georgia Tech and Louisiana State.³² The basketball salaries that we surveyed ranged from \$31,827 at Bowling Green State University³³ to \$165,230 at the University of North Carolina at Chapel Hill (UNC).³⁴

Obviously, the pay discrepancies are primarily the result of "major" athletic programs generating far more money than the smaller programs. It is logical that larger programs pay their coaches more. However, for many coaches at smaller programs, the pay is too low. These coaches are full-time, year-round employees of the universities, yet many of them are paid like part-time employees. Many assistants could probably make a better salary in a profession or vocation other than coaching. The importance of these assistants necessitates that they receive better compensation from their universities.

In this section, we have stated the salaries of some Division I assistant football and men's basketball coaches. The lists below provide several more assistant coaches' salaries. The lists should help to further illustrate the current state of Division I assistant coaches' salaries.

31. LETTER OF APPOINTMENT BETWEEN BALL STATE UNIVERSITY AND STANLEY P. PARRISH (Mar. 4, 2005).

32. EMPLOYMENT CONTRACT BETWEEN GEORGIA TECH ATHLETIC ASSOCIATION AND JONATHAN TENUTA § III (Jan. 1, 2006) [hereinafter TENUTA CONTRACT]; EMPLOYMENT CONTRACT BETWEEN BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE AND MARK A. PELINI § 3 (Feb. 1, 2005).

33. LETTER OF APPOINTMENT BETWEEN BOWLING GREEN STATE UNIVERSITY AND MARTIN RICHTER (June 16, 2006).

34. LETTER OF APPOINTMENT BETWEEN THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL AND JOE HOLLADAY (Oct. 4, 2005).

FOOTBALL COACHES

<u>COACH</u>	<u>SCHOOL</u>	<u>SALARY</u>
Stan Parrish*	Ball State	\$56,300
Mark Smith**	Ball State	\$72,000
Michael McCall*	Bowling Green	\$68,959
John Lovett**	Bowling Green	\$98,255
Douglas Ruse*	Arkansas State	\$77,358
Kevin Corless**	Arkansas State	\$80,626
Tim Albin*	Ohio	\$89,188
Jimmy Burrow**	Ohio	\$89,188
Ron Mendoza**	North Texas	\$93,000
Todd Ford*	North Texas	\$93,000
Howard Feggins*	Eastern Michigan	\$93,000
John Bond*	Northern Illinois	\$93,624
Denny Doornbos**	Northern Illinois	\$94,416
Dan Brown**	Fresno State	\$94,464
Taver Johnson**	Miami (Ohio)	\$95,000
Tim Rose**	Toledo	\$100,000
Todd Orlando**	Connecticut	\$105,000
Rob Ambrose*	Connecticut	\$111,000
Larry Kueck*	Marshall	\$130,000
Roy Wittke*	Arizona State	\$144,030
Bill Miller**	Arizona State	\$226,992
DeWayne Walker**	UCLA	\$150,000
Ron English**	Michigan	\$151,666
Michael DeBord*	Michigan	\$151,666
Mike Hankwitz**	Wisconsin	\$185,000
Craig Ver Steeg*	Rutgers	\$185,000
Ron Collins**	Colorado	\$200,000
Mark Helfrich*	Colorado	\$200,000
Rob Spence*	Clemson	\$200,000
Victor Koenning**	Clemson	\$230,000
Kevin Cosgrove**	Nebraska	\$225,000
Les Koenning, Jr.*	Texas A&M	\$225,000
Gary Darnell**	Texas A&M	\$285,000
Mark Pelini**	Louisiana State	\$400,000
Jonathan Tenuta**	Georgia Tech	\$400,000

*Offensive Coordinator

**Defensive Coordinator

BASKETBALL COACHES

<u>COACH</u>	<u>SCHOOL</u>	<u>SALARY</u>
Martin Richter	Bowling Green	\$31,827
John Stroia	Bowling Green	\$44,467
Lamonta Stone	Bowling Green	\$56,000
Ryan Pedon	Miami (Ohio)	\$31,854
John Cook	Arkansas State	\$36,500
Alvin Grushkin	Arkansas State	\$52,896
Shawn Forrest	Arkansas State	\$60,324
Dan Wilde	Eastern Michigan	\$47,500
Brian Townsend	Ohio	\$53,568
Kevin Kuwik	Ohio	\$62,168
John Rhodes	Ohio	\$78,023
William Howze	Ball State	\$50,000
Steven Flint	Ball State	\$60,000
Troy Collier	Ball State	\$70,000
Frederick Langley	Fresno State	\$50,004
Senque Carey	Fresno State	\$67,227
Heath Schroyer	Fresno State	\$97,776
William Fox	North Texas	\$70,000
Keith Booth	Maryland	\$63,129
Robert Moxley	Maryland	\$125,000
Michael Adams	Maryland	\$140,000
C.B. McGrath	North Carolina	\$70,725
Jerod Haase	North Carolina	\$95,940
Steve Robinson	North Carolina	\$140,712
Joe Holladay	North Carolina	\$165,230
Michael Jackson	Michigan	\$77,250
Andrew Moore	Michigan	\$82,400
John Swenson	Michigan	\$106,090
Nikita Johnson	Louisiana State	\$80,000
John Treloar	Louisiana State	\$135,000
Craig Carter	Rutgers	\$85,000
Darren Savino	Rutgers	\$100,000

James Carr	Rutgers	\$100,000
Andre LaFleur	Connecticut	\$89,456
George Blaney	Connecticut	\$125,156
Thomas Moore	Connecticut	\$140,456
Howard Moore	Wisconsin	\$90,802
Greg Gard	Wisconsin	\$133,532
Gary Close	Wisconsin	\$133,532
Scott Garson	UCLA	\$100,000
Kerry Keating	UCLA	\$162,000
Donald Daniels	UCLA	\$162,000
Dedrique Taylor	Arizona State	\$120,000
Ryan Archie	Arizona State	\$120,000
Mark Phelps	Arizona State	\$135,000

Many assistants are highly paid employees, and all assistants work in a volatile industry where they are highly susceptible to termination because of the constant pressure to produce winning teams. The combination of high pay and an insecure job makes a comprehensive employment contract vital for assistant coaches. Even those coaches who are not highly compensated should receive ample legal protection in the form of a multi-year contract with termination provisions because they have inadequate job security. Legal protection and lengthy contracts might be even more important for those lower-paid coaches because they usually will not have wealth built up to provide for their families in case of sudden unemployment.

III. PERQUISITES, INCENTIVES, AND OUTSIDE INCOME

For college coaches, compensation does not only include base salary. College coaches' compensation is usually measured in terms of the total "package." The package is composed of the institutional pay, outside income, fringe benefits, and perquisites. Many different forms of compensation can fall within these categories.

Institutional pay generally is restricted to base salary, annuities/longevity bonuses, and contractual bonuses. Outside income most commonly comes from shoe/apparel endorsements, television and radio shows, speaking engagements, personal and public appearances, and summer camps. In some situations, outside income and institutional pay will overlap because the school will contract with third party vendors instead of the coach doing so directly. The university then pays a portion of the vendor contract to the coach as guaranteed outside income for the coach. Universities do this because it gives

them increased control over the coaches' relationship with third parties.

Fringe benefits frequently include life and health insurance, paid vacation, retirement plans, and tuition waivers. Perquisites can include a variety of things, such as housing allowances, complimentary tickets, country club memberships, automobile usage, and moving expenses.

Most football and men's basketball head coaches have many opportunities for perquisites, bonus incentives, and outside income. In fact, base salary is not even the main source of income for many head coaches. For example, Steve Spurrier received a base salary of \$250,000³⁵ for the 2006 season, but Spurrier's total compensation from South Carolina was approximately \$1.3 million for the year, exclusive of incentives, benefits, and perquisites.³⁶ Spurrier's contract guarantees him \$500,000 of income from television, radio, and commercials and an additional \$500,000 of income from athletic apparel companies.³⁷

Most football and men's basketball coaches have similar arrangements to Spurrier. Oklahoma football coach Bob Stoops earned approximately \$3.45 million in 2006.³⁸ Stoops' income of \$2.5 million is accounted for in his contract; however, only \$200,000 of it is base salary.³⁹ Stoops earned \$1.7 million for performance of "personal services," such as radio and television appearances, shoe and apparel endorsements, and recruiting.⁴⁰ Oklahoma paid Stoops another \$600,000 for "appearance and speaking engagements on behalf of the University, unrelated to athletics for general University fundraising and promotional purposes."⁴¹ Ohio State football coach Jim Tressel earned just over \$2 million in 2006.⁴² Tressel received a base salary of only \$366,000,⁴³ but he was paid \$524,000 for radio and television appearances and \$429,000 for equipment and apparel agreements.⁴⁴

35. EMPLOYMENT CONTRACT BETWEEN UNIVERSITY OF SOUTH CAROLINA AND STEPHEN O. SPURRIER § 4.01 (Nov. 23, 2004) [hereinafter SPURRIER CONTRACT].

36. Jodi Upton, *Colleges Troubled by Coaches' Rising Salaries*, USA TODAY, Dec. 7, 2006, at 1C.

37. SPURRIER CONTRACT, *supra* note 35, § 10.02(c) & 10.03.

38. *Compensation for Div. I-A College Football Coaches*, USATODAY.COM, http://www.usatoday.com/sports/graphics/coaches_contracts/flash.htm (last visited Feb. 4, 2007).

39. EMPLOYMENT CONTRACT BETWEEN UNIVERSITY OF OKLAHOMA AND ROBERT ANTHONY STOOPS § IV(A) (Jan. 1, 2002) [hereinafter STOOPS CONTRACT].

40. *Id.* § III(C)(4).

41. *Id.* § IV(B)(2).

42. *Compensation for Div. I-A football Coaches*, *supra* note 38.

43. EMPLOYMENT CONTRACT BETWEEN THE OHIO STATE UNIVERSITY AND JAMES P. TRESSEL § 3.3 (June 16, 2003).

44. ANCILLARY ACTIVITIES AGREEMENT BETWEEN THE OHIO STATE UNIVERSITY AND JAMES P. TRESSEL 3-4 (June 16, 2003).

University of Tennessee (Tennessee) head basketball coach Bruce Pearl is a good example of a basketball coach who earns most of his pay from sources other than base salary. For the 2006-2007 season, Pearl earned a base salary of \$300,000.⁴⁵ Tennessee paid him an additional \$300,000 for radio and television appearances; \$300,000 for equipment, shoe, and apparel endorsements; \$150,000 for other endorsement contracts; and \$50,000 of guaranteed basketball camp revenue.⁴⁶ These figures equal \$1.1 million of annual compensation; however, when perquisites and bonuses are added to the equation, Pearl's total compensation is probably around \$1.5 million per year. Under Pearl's original contract, he was to make \$1.5 million in the final year of his contract, 2011-2012, exclusive of any bonuses or perquisites.⁴⁷ However, in July 2007, Pearl agreed to a one-year contract extension that will keep him with the Volunteers through the 2012-2013 season. The new agreement increases Pearl's annual total compensation package to \$1.3 million for the 2007-2008 season, with \$100,000 increases in each of the following five years.⁴⁸

The total compensation numbers reported above also include income from outside the university. For example, Stoops' salary and bonuses only account for nearly \$1.7 million of Stoops' \$3.45 million of total compensation.⁴⁹ The remainder comes from outside sources. The NCAA requires coaches to report their outside income annually. It should also be noted that these compensation figures do not include incentives, benefits, or perquisites.

The situation for assistant coaches is much different. For most assistants, base salary is the main source, and sometimes the only source, of compensation. Some assistants do have bonus incentives in their contracts, but the amounts available are relatively small. Furthermore, bonuses are generally not available for the many assistant coaches who do not have contracts. Assistants do receive normal employment benefits, such as health insurance and vacation time. Some assistants also receive perquisites, but not to the extent of head coaches. Finally, assistants usually are not guaranteed any outside income, and for those assistants who do have outside income guarantees, the amounts are generally small.⁵⁰

45. AMENDMENT NO. 1 TO THE EMPLOYMENT AGREEMENT BETWEEN THE UNIVERSITY OF TENNESSEE AND BRUCE PEARL art. II (Mar. 29, 2006) [hereinafter PEARL AMENDMENT].

46. *Id.* §§ III-V.

47. *Id.* §§ II-V.

48. *See id.*

49. *Compensation for Div I-A Football Coaches, supra* note 38.

50. In some situations, head coaches share the outside income with the assistant coaches. This most frequently occurs with respect to athletic shoes and apparel contracts and summer camps.

Former University of California at Los Angeles (UCLA) offensive coordinator James Svoboda had a clause in his contract guaranteeing him \$40,000 for royalty rights.⁵¹ However, Svoboda gave up his rights to “accept compensation or gratuities of any kind, directly or indirectly, from any athletic shoe, apparel, equipment, or other manufacturer in exchange for the use of merchandise manufactured by such person or entity during practice or competition by the University’s student-athletes.”⁵² This clause eliminated a potentially large source of income for Svoboda.

Generally, the assistants at the “major” programs have the best opportunities for perquisites, incentives, and outside income. These coaches have these opportunities because they are provided in written form either in an employment contract or a letter of appointment. Those assistants who do not receive any type of employment agreement will usually not receive the perquisites or incentives available to other coaches. These “at will” employees receive standard university employment benefits, such as health insurance and vacation time, but usually will not receive anything else. Normally, employment letters are also less advantageous for the coach than a regular contract. What follows are examples to illustrate the differences among assistants in relation to contractual perquisites, incentives, and outside income.

Former University of Maryland defensive coordinator Gary Blackney, who retired in November 2005, had a full-length employment contract that provided him several opportunities to earn money other than his base salary (\$146,728).⁵³ First, the contract guaranteed Blackney over \$100,000 of outside income.⁵⁴ The university guaranteed him \$94,101 for radio and television appearances.⁵⁵ He was also guaranteed \$4000 for other personal appearances,⁵⁶ and another \$4000 for performance of fund raising activities.⁵⁷ Second, Blackney received many perquisites, much like a head coach. The perquisites included travel expenses for work related activities, a \$6000 annual car allowance, six tickets to each regular season home and away Maryland football game, and two regular season men’s and women’s basketball tickets.⁵⁸

51. EMPLOYMENT CONTRACT BETWEEN THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AND JAMES SVOBODA § 4(c) (July 1, 2006).

52. *Id.* § 10(a).

53. EMPLOYMENT CONTRACT BETWEEN THE UNIVERSITY OF MARYLAND, COLLEGE PARK AND GARY BLACKNEY § 3.1 (July 1, 2005).

54. *Id.* §§ 5-7.

55. *Id.* § 5.1.

56. *Id.* § 6.

57. *Id.* § 7.

58. *Id.* § 10.

Finally, Blackney had numerous bonus incentives available. If all of the highest bonus levels were achieved, Blackney would receive \$160,000 in additional compensation per year.⁵⁹

University of California Defensive Coordinator Bob Gregory is another coach who benefits greatly from the perquisites, incentives, and outside income provided in his contract. Gregory makes a base salary of \$168,000 per year.⁶⁰ He also receives several employment benefits, including twenty vacation days, twelve sick days, a retirement plan, health insurance (including dental and optical), and life and disability insurance.⁶¹ Gregory also receives a \$62,000 per year "talent fee" as compensation for appearing on television, on the radio, and at alumni functions.⁶² He has the possibility of receiving an additional stipend of up to \$10,000 for work done in connection with university football camps.⁶³ The assignment to football camps and the stipend are at the discretion of the athletic director.⁶⁴ Like many coaches, the university also provides Gregory with a vehicle.⁶⁵ Finally, Gregory has the opportunity to earn several different bonuses, ranging from \$1500 to \$25,200.⁶⁶

Gregory's bonuses are based on the performance of the team and his defensive unit. Up to seven different bonuses of \$1500 can be earned for Gregory's defensive unit achieving certain Pac-10 and national defensive statistical rankings.⁶⁷ Gregory can also receive a bonus based on Pac-10 conference games won.⁶⁸ If they win five games, he receives a \$5100 bonus, \$13,500 for six wins, \$20,200 for seven wins, and \$25,200 for eight wins.⁶⁹ Finally, Gregory gets a \$6000 bonus if the team participates in a non-Bowl Championship Series (BCS) bowl game and \$10,000 if it participates in a BCS bowl game.⁷⁰

Coaches Blackney and Gregory benefit greatly from their contractual situations. The compensation, benefits, perquisites, outside income, and

59. *Id.* §§ 10.5-10.7 (adding together the amounts from 10.5(a), 10.6(a), and 10.7).

60. CONTRACT ADDENDUM TO THE EMPLOYMENT CONTRACT BETWEEN THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AND ROBERT GREGORY § 2 (Mar. 16, 2006).

61. *Id.* §§ 3-5.

62. *Id.* § 9.

63. *Id.* § 7.

64. *Id.* §§ 7, 9.

65. *Id.* § 8.

66. *Id.* § 6.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

incentives they receive appear to be common among coordinators at major Division I-A football programs; however, several assistant coaches are not so fortunate. Basketball assistants at the major programs receive some of the same perquisites and incentives as football coaches, but to a lesser extent. Coaches at smaller schools, in both football and basketball, rarely receive any of the perquisites and incentives mentioned above. For example, several schools we contacted reported that they do not have any type of written employment agreement for assistant coaches. These schools included Utah State University, Louisiana Tech University, the University of Louisiana at Monroe, the University of Louisiana at Lafayette, Ohio University, Kent State University,⁷¹ the University of Toledo,⁷² and surprisingly, the University of Michigan. Without a written contract, the coaches at these schools likely do not receive any perquisites, incentives, or outside income, with the exception of standard university fringe benefits.

Coaches with shorter, less-inclusive contracts also face significant disadvantages regarding perquisites, incentives, and outside income. Marshall University offensive coordinator Larry Kueck is an example of this. Kueck has a brief letter of appointment that is less than two pages in length.⁷³ Kueck's salary of \$130,000⁷⁴ is somewhat high for a smaller program, but he is given far fewer perquisites or incentives than many of the coaches at larger programs. Kueck is given all of the regular benefits of Marshall staff employees.⁷⁵ His only other benefits are a courtesy car and a mobile phone stipend.⁷⁶ He is also eligible for attendance incentives, but only up to \$3000 per year.⁷⁷ He is not entitled to any other bonuses or incentives, and the contract does not guarantee him any outside income.⁷⁸

Even those assistants at smaller programs who are fortunate enough to have full-length employment contracts, do not enjoy the same advantages as their counterparts at the larger programs. University of North Texas defensive coordinator Ron Mendoza has a comprehensive employment contract and a

71. Kent State provided a contract for defensive coordinator Pete Rekestis, but it reported that he was the only assistant coach at Kent State with an employment contract.

72. Toledo provided a contract for defensive coordinator Tim Rose, but it reported that he was the only assistant coach at Toledo with an employment contract.

73. LETTER OF APPOINTMENT BETWEEN MARSHALL UNIVERSITY AND LARRY KUECK (July 1, 2006).

74. *Id.* § 3.

75. *Id.* § 5.

76. *Id.* § 6.

77. *Id.* § 3.

78. *Id.*

base salary of \$93,000.⁷⁹ However, Mendoza is not guaranteed any additional compensation. Mendoza does receive a bonus of one month's salary if the team participates in a bowl game.⁸⁰ The only other bonus compensation available is "Merit Pay," which is given at the discretion of the athletic director.⁸¹ Mendoza does receive the regular University of North Texas benefits and a courtesy car or a car allowance.⁸² That is the extent of Mendoza's perquisites and incentives, which are obviously far less than those received by coaches at major programs, like Blackney and Gregory.

The following list provides some more examples of what perquisites, bonus incentives, benefits, and outside income other assistant coaches receive.

FOOTBALL COACHES

COACH	SCHOOL	PERQS, INCENTIVES, ETC.
Craig VerSteeg*	Rutgers	Fringe benefits of supervisory employee; \$7200 annual car stipend; Post-season bonuses available (ex.: One (1) month's salary for participation in non-BCS bowl game, two (2) month's salary for BCS bowl game, three (3) month's salary for National Championship Game)
Mark Pelini**	Louisiana State	Standard university benefits; Costs of moving to Baton Rouge; Bonuses for team performance available (ex.: 4% of salary for participation in SEC championship game, 16% for BCS Bowl, 24% for winning National Championship)
Dan Brown**	Fresno State	Standard university employee benefits; Unspecified bonuses for conference championships

79. EMPLOYMENT CONTRACT BETWEEN THE UNIVERSITY OF NORTH TEXAS AND RON MENDOZA (Jan. 10, 2007).

80. *Id.*

81. *Id.* § 3.04.

82. *Id.* § 3.01(b).

		and bowl games
Douglas Ruse*	Arkansas State	Standard university benefits
Paul Chryst*	Wisconsin	Standard "limited staff" benefits; Use of one car or a car allowance
Kenneth Wilson**	Nevada	\$25,000 for television, radio and personal appearances; Up to 50% of base salary (\$84,770.40) for camps; Air fare for spouse to one away game and one postseason game; Postseason bonuses (ex.: Up to 50% of monthly salary for postseason play)
Pete Rektsis*	Kent State	Standard university benefits; Use of an automobile; Several bonuses for team performance, GPA, attendance and graduation rates (ex.: \$2500 for division championship, \$5000 for conference championship, \$6000 for bowl appearance, \$2500 for 15,000 or more actual annual attendance, \$500 for team GPA of 2.5 or better, \$2500 for GSR of 80%)
Stan Parrish*	Ball State	None specified, but fringe benefits are implied
Tim Rose**	Toledo	Standard benefits for unclassified employee
Roy Wittke*	Arizona State	Standard university benefits; Football season tickets for immediate family plus six (6) additional seats; Several bonuses for graduation rates, GPA and team performance (ex.: \$15,000 for scholarship athletes' GPA of 2.80 or GSR of 85%, \$25,000 for BCS bowl game, \$5000 for final nation ranking of 1)
Victor Koenning**	Clemson	Fringe benefits; Unspecified

		bonuses; Courtesy car
Jonathan Tenuta**	Georgia Tech	Fringe benefits; Unspecified performance bonus available; Use of one (1) car and auto insurance; Six (6) season football tickets; Four (4) season basketball tickets; Reimbursement for work related travel and moving expenses; Free family country club membership

*Offensive Coordinator

** Defensive Coordinator

BASKETBALL COACHES

COACH	SCHOOL	PERQS, INCENTIVES, ETC.
Greg Gard	Wisconsin	Standard limited staff benefits; Car or car stipend
Dan Wilde	Eastern Michigan	Fringe benefits
Donald Daniels	UCLA	Fringe benefits; \$4500 annual car stipend
Cameron Dollar	Washington	Standard employee benefits; Courtesy car and auto insurance; Bonuses for team performance and academics (ex.: Possible one (1) month's salary for participation in NCAA Tournament)
James Carr	Rutgers	Fringe benefits; \$7200 annual vehicle stipend; Unspecified bonus for post-season play
James Holland	Alabama	Standard employment benefits; Complimentary university athletic event tickets; Complimentary Alabama apparel; Use of one automobile; Moving expenses to Tuscaloosa; Bonuses for team performance (ex.: 8.33% of annual salary for

		SEC regular or conference tournament championship, 8.33% for NCAA Tournament appearance)
John Treloar	Louisiana State	Fringe benefits; Social clubs memberships; Cell phone; Courtesy vehicle; Bonuses for team performance, graduation rate, and GPA (ex.: \$10,000 for NCAA Tournament selection, \$30,000 for Final Four appearance, \$20,000 for SEC regular season championship, \$25,000 for 80% GSR, \$12,500 for team GPA of 3.00 or higher)
Martin Richter	Bowling Green	Fringe benefits
Steven Flint	Ball State	None specified, but fringe benefits are implied
Shawn Forrest	Arkansas State	Standard university benefits
Thomas Moore	Connecticut	Fringe benefits; Four (4) tickets for all home, away and postseason basketball games; Two (2) tickets for any other Connecticut home athletic event; Reimbursement for work related travel expenses; Bonus for postseason (ex.: One (1) month's salary for Big East Championship, two (2) month's salary for NCAA Championship)
Joe Holladay	North Carolina	Fringe benefits; Postseason bonus (One (1) month's salary for post-season play)

Perquisites, bonus incentives, and outside income are very important for assistant coaches because they can greatly improve the compensation package for a coach. Two factors seem to affect the level of perquisites, bonuses, and outside income that an assistant coach receives. First, the level and size of the program are significant because the assistants at the major programs usually have the best perquisites and bonuses. Secondly, the existence of a written

contract and the length of the contract are also important. Assistant coaches with full contracts will normally receive better perquisites and bonuses.

Considering these factors, it is clear what can be done to improve assistant coaches' rights in this area. First, all assistants should demand full contracts where they can negotiate perquisites, bonus incentives, and outside income. Next, all assistant coaches, particularly at schools with smaller programs, should ask to receive better perquisites and bonus incentives. The schools with smaller programs often will not have the money to increase a coach's base salary, but they might be more willing to give the coach more opportunities to receive bonus incentives. Bonuses are tied into some type of success within the athletic program, and success usually equals increased revenue for the school. Therefore, when the bonuses are achieved, the school is usually in a better position to pay coaches more money.

IV. FORM OF CONTRACTS

In the past, few assistant coaches had any level of job protection. Like the vast majority of the American work force, assistant coaches did not have employment contracts. Without contracts, these coaches were "at will" employees. As "at will" employees, universities could terminate assistant coaches at any time without consequence, as long as the termination did not violate employment statutes. Today, most assistant football and men's basketball coaches at major universities have some form of contract. Whether that contract offers them any more protection than they would receive as an "at will" employee is another question that depends on the particular contract.

Assistant coaches' contracts are truly "all over the board" and come in a variety of forms. The contracts surveyed ranged from twenty-two pages (University of Alabama) to non-existent (several). Some assistants only have a letter of appointment, while others have an actual contract. For example, the University of Connecticut (Connecticut) has contracts that run ten pages or more with each of nine top assistants.⁸³ These contracts cover a variety of issues and resemble the contracts of Connecticut head coaches. On the opposite end of the spectrum are the University of North Carolina assistant basketball and football coaches. Their contracts are in the form of a one-page letter of appointment. The letter briefly discusses the coach's salary and rights, but does not address many of the issues covered in the Connecticut employment contracts.

The following table provides information about the length of some of the contracts we surveyed. Note that exhibits, addendums, and collateral

83. The nine assistants included three assistant coaches each from men's basketball, women's basketball, and football.

agreements are included in the length of the contract, but amendments are not. The table states when a letter of appointment is used instead of an actual contract.

FOOTBALL COACHES

<u>COACH</u>	<u>SCHOOL</u>	<u>LENGTH</u>
Stan Parrish*	Ball State	3 page letter
Roy Wittke*	Arizona State	4 page letter
Brent Darnell**	Texas A&M	1 page letter
Michael McCall*	Bowling Green	2 page letter
Victor Koenning**	Clemson	6 pages
Kevin Cosgrove	Nebraska	7 pages
Marc Trestman*	North Carolina State	3 page letter
Kevin Corless**	Arkansas State	1 page letter
Mike Levenseller*	Washington State	8 pages
Mike Hankwitz**	Wisconsin	3 page letter
Ron Mendoza**	North Texas	12 pages
Lawrence Fedora*	Oklahoma State	16 pages
Bob Gregory	California	7 pages
Howard Feggins*	Eastern Michigan	4 pages
Greg Hudson**	East Carolina	1 page letter

*Offensive Coordinator

**Defensive Coordinator

BASKETBALL COACHES

<u>COACH</u>	<u>SCHOOL</u>	<u>LENGTH</u>
Martin Richter	Bowling Green	2 page letter
Greg Gard	Wisconsin	2 page letter
Matt Woodley	Washington State	6 pages
Ryan Pedon	Miami (Ohio)	3 page letter
Dedrique Taylor	Arizona State	4 page letter
Kevin Mouton	Oregon State	3 pages
Shawn Forrest	Arkansas State	1 page letter
Dan Wilde	Eastern Michigan	4 pages
Cameron Dollar	Washington	6 pages
Pat Knight	Texas Tech	5 pages
Michael Maker	West Virginia	10 pages
Steven Flint	Ball State	3 page letter

John Treloar	Louisiana State	6 pages
Jeffrey Boals	Akron	2 page letter
Senque Carey	Fresno State	11 pages

For purposes of comparison, the tables below provide some examples of contract lengths for head coaches.

FOOTBALL COACHES

<u>COACH</u>	<u>SCHOOL</u>	<u>LENGTH</u>
Karl Dorrell	UCLA	18 pages
Gary Pinkel	Missouri	18 pages
Lloyd Carr	Michigan	9 pages
Steve Spurrier	South Carolina	15 pages
Bill Callahan	Nebraska	13 pages
Chan Galley	Georgia Tech	23 pages
Jerry Dinardo	Indiana	16 pages
Dan McCarney	Iowa State	12 pages
Jim Tressel	Ohio State	18 pages
Dennis Franchione	Texas A&M	13 pages

BASKETBALL COACHES

<u>COACH</u>	<u>SCHOOL</u>	<u>LENGTH</u>
Thad Matta	Ohio State	19 pages
Bill Self	Kansas	26 pages
Kelvin Sampson	Indiana	18 pages
Bo Ryan	Wisconsin	15 pages
Tom Izzo	Michigan State	9 pages
Lute Olson	Arizona	13 pages
Mike Davis	Alabama – Birmingham	17 pages
William Brown	Albany	17 pages
Jim Calhoun	Connecticut	17 pages
Jim Larranaga	George Mason	3 pages

While contracts for assistant coaches have become common, not all coaches have contracts. The University of Michigan (Michigan), which has one of the largest athletic departments in the nation, does not have contracts for assistant coaches. Michigan's letter responding to our open record

requests stated, "Confirming our telephone conversation today, I advised you that contracts for assistant coaches do not exist but that we will be providing current salary information."⁸⁴ Michigan's approach has become very rare at schools with major football and men's basketball programs. However, this approach is common at the smaller Division I programs. As was mentioned in the previous section, several smaller programs we contacted do not have any type of employment contract with assistant coaches. The following are the responses received from some smaller Division I programs.

Utah State University

All assistant coaches at Utah State University are considered "AT WILL" employees and do not have written contracts. Only our head football and men's and women's basketball coaches have written agreements.⁸⁵

Kent State University

Coach for basketball, the University has made a good faith search of its files and presents that Pete Rehtsis is the only Kent State University coordinator and the only Kent State University assistant football coach who has a contract. No assistant men's or women's basketball coaches have contracts at Kent State University.

I have attached Coach Rehtsis' contract. There are no other records responsive to your request. Please contact me if you have any questions.⁸⁶

Louisiana Tech University

Louisiana Tech University President, Dr. Dan Reneau, has asked me to respond to your recent correspondence and inform you that we do not have contracts for the coaches mentioned in your letter. There are no assistant coaches at Louisiana Tech University at this time with a contract.⁸⁷

84. Letter from Patricia J. Sellinger, Freedom of Info. Act Coordinator, Univ. of Mich., to Martin J. Greenberg, Attorney, Greenberg & Hoeschen LLC (July 12, 2006) (on file with author).

85. Letter from Ken Peterson, Senior Associate Director Business Operations, Utah State Univ., to Martin J. Greenberg, Attorney, Greenberg & Hoeschen, LLC. (Feb. 1, 2007) (on file with author).

86. Letter from David L. Ochmann, Associate University Counsel, Kent State Univ., to Martin J. Greenberg, Attorney, Greenberg & Hoeschen, LLC. (Feb. 6, 2007) (on file with author).

87. Letter from Jim Oakes, Athletic Director, La. Tech Univ., to Martin J. Greenberg, Attorney,

University of Louisiana at Monroe

In response to your recent request for copies of our contracts of our Assistant Coaches for Head Offensive Coordinator and Head Defensive Coordinator for football and the Assistant Coach for basketball, the persons who hold these positions at our University do not have contracts. These persons only receive their annual appointment letters.⁸⁸

Univeristy of Louisiana at Lafayette

This is in response to your request for a copy of the contracts of the following coaches: 1) Assistant Coach – Head Offensive Coordinator for football; 2) Assistant Coach – Head Defensive Coordinator for football; 3) Assistant Coach for basketball.

All three of these coaches are one-year or “at will” appointments, the same as members of the teaching faculty.⁸⁹

All assistants should have the right to a comprehensive contract, covering the full-range of issues pertinent to the coaches' employment. If the contract covers all the relevant issues, at least the coach has the opportunity to negotiate these issues. The coach should obtain legal counsel who can assist the coach by reviewing and possibly negotiating the contract. With a comprehensive contract and the assistance of legal counsel, an assistant coach should be able to get an employment contract that provides fair compensation and all the necessary protections.

We determined that there are five different types of assistant coaches' contracts, and that we can roughly fit each assistant coach contract we received into one of these groups. We have labeled the five groups of contracts as follows: (1) Short Letter of Appointment, (2) Long Letter of Appointment, (3) Short Contract, (4) Intermediate Contract, and (5) Full Contract. The appendices to this article provide good examples of each group. The Short Letter of Appointment is a one-page letter of appointment, which is common among those smaller schools that use contracts. The Long Letter of Appointment is a longer and more comprehensive letter of appointment,

Greenberg & Hoeschen, LLC. (Jan. 30, 2007) (on file with author).

88. Letter from Dr. Richard Hood, Executive Assistant to the President, Univ. of La. at Monroe, to Martin J. Greenberg, Attorney, Greenberg & Hoeschen, LLC. (Jan. 25, 2007) (on file with author).

89. Letter from Ray Authement, President, Univ. of La. at Lafayette, to Martin J. Greenberg, Attorney, Greenberg & Hoeschen, LLC. (Jan. 25, 2007) (on file with author).

usually two to four pages in length. The Short Contract is an actual contract, but a short version that ranges from one to three pages. The Intermediate Contract is a medium length contract of about four to seven pages. The Full Contract is usually eight pages or more and resembles those contracts usually received by head coaches.

V. TERM OF CONTRACTS

The term of collegiate coaches' contracts is a very important aspect of coaches' legal rights and protections. Most collegiate assistant coaches have only one-year contract terms. Under these one-year contracts, assistants must wait for the university to renew their contracts each year. The situation is much different for most Division I football and men's basketball head coaches who have multi-year contracts. Currently many head coaches are under contract for a term of at least five years. For example, in September 2006, Marquette University gave basketball coach Tom Crean an extension through the 2016-2017 season, giving Crean a ten-year term.⁹⁰ Bruce Pearl is in the midst of a six-year contract that is set to expire at the conclusion of the 2011-2012 season.⁹¹ Some examples of football coaches with contracts exceeding five-year terms are Ralph Friedgen (ten years),⁹² Bob Stoops (seven years),⁹³ Steve Spurrier (seven years),⁹⁴ Bill Callahan (six years),⁹⁵ and Karl Dorrell (six years).⁹⁶

The term of some head coaches' contracts constantly remains at its original length. This happens because the coach has a "rollover" provision. With a rollover provision, every year the term of the contract is extended by one year in order to keep the term of the contract the same as was originally agreed upon by the coach and the university. UCLA Head Football Coach Karl Dorrell is an example of a coach who has a rollover provision. Dorrell's rollover clause provides:

Commencing January 1, 2004, between January 1 and January 31 of each year this 2003 HC Agreement remains in effect,

90. Rosiak, *supra* note 7.

91. PEARL AMENDMENT, *supra* note 45, art. XVI.

92. AMENDED EMPLOYMENT AGREEMENT BETWEEN THE UNIVERSITY OF MARYLAND COLLEGE PARK AND RALPH FRIEDGEN § 2 (Jan. 1, 2002).

93. STOOPS CONTRACT, *supra* note 39, § II(A).

94. SPURRIER CONTRACT, *supra* note 35, § 3.

95. EMPLOYMENT CONTRACT BETWEEN THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA AND WILLIAM CALLAHAN § 1 (Jan. 9, 2004).

96. EMPLOYMENT CONTRACT BETWEEN THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AND KARL DORRELL § 3(a) (Aug 29, 2003) [hereinafter DORRELL CONTRACT].

the parties may mutually agree in writing to extend the Term of this 2003 HC Agreement for one additional year. This right may not be exercised if either party has advised the other that he/it is exercising any of his/its rights to terminate this 2003 HC Agreement or if this 2003 HC Agreement has terminated. Except as expressly provided for herein, "termination" means that the rights and obligations of the parties under this 2003 HC Agreement shall cease to exist as of the date of termination.⁹⁷

Rollover provisions are beneficial for coaches because they provide them with increased job security and other protections. If assistant coaches are able to get multi-year contracts, they should strive for rollover contracts in order to receive more protection.

In recent years, there has been a trend toward giving some assistant coaches longer-term contracts.⁹⁸ Longer-term contracts are far from prevalent among collegiate assistant coaches; however, it has become increasingly common, primarily among football assistants at major programs.⁹⁹ In the past few years, assistant football coaches at many programs, including Florida, Oklahoma State, Arkansas, and LSU, have received multi-year contracts.¹⁰⁰ The same forces driving up assistant coaches' salaries are also leading to longer-term assistant coach contracts. Giving assistant coaches longer-term contracts helps schools to keep assistants who might otherwise be lured away to a different coaching job. Additionally, top head coaches, such as Phil Fulmer, Mack Brown, and Bob Stoops, have pushed for longer-term contracts for their assistant coaches.¹⁰¹

The following table lists some of the assistant football coaches who have multi-year contracts and the length of their contracts.

COACH	SCHOOL	TERM ¹⁰²
Mark Pelini**	Louisiana State	3 years
Paul Chryst*	Wisconsin	3 years
Mike Hankwitz**	Wisconsin	2 years, 5 months
Bob Gregory**	California	2 years

97. *Id.* § 3(b).

98. Jones, *supra* note 17.

99. *Id.*

100. *Id.*

101. *Id.*

102. Note that the length of the term is rounded to the nearest month when necessary.

Victor Koenning**	Clemson	2 years
Jonathan Tenuta**	Georgia Tech	2 years, 6 months
James Franklin*	Kansas State	3 years, 3 months
Kevin Cosgrove**	Nebraska	2 years, 5 months
Mike Levenseller*	Washington State	3 years, 4 months

*Offensive Coordinator

**Defensive Coordinator

For purposes of comparison, the following table displays the terms of some head coaches, including those from the schools listed in the table above.

COACH	SCHOOL	TERM ¹⁰³
Les Miles	Louisiana State	7 years
Bret Bielema	Wisconsin	5 years
Jeff Tedford	California	8 years
Tommy Bowden	Clemson	7 years
Chan Gailey	Georgia Tech	5 years
Ron Prince	Kansas State	5 years
Bill Callahan	Nebraska	6 years
Bill Doba	Washington State	5 years
Nick Saban	Alabama	8 years
Urban Meyer	Florida	6 years
Mark Richt	Georgia	7 years
Jerry Dinardo	Indiana	5 years
Dan McCarney	Iowa State	7 years
Jim Tressel	Ohio State	6 years
Dennis Franchione	Texas A&M	6 years
Gary Pinkel	Missouri	5 years
Richard Rodriguez	Virginia	7 years
Mike Davis	Alabama-Birmingham	5 years
William Brown	Albany	5 years
Jim Calhoun	Connecticut	6 years
Jim Larranaga	George Mason	6 years

While there is a trend toward giving assistant football coaches multi-year contracts, one-year contracts are still the standard among assistant coaches. Even some head coaches at large state universities still do not receive multi-year contracts. An example of this is Montana, where the Board of Regents only recently decided to allow the University of Montana and Montana State

103. Note that the length of the term is rounded to the nearest month when necessary.

University to give the head football and basketball coaches multi-year contracts.¹⁰⁴ It also appears that multi-year contracts for assistants have not yet become part of college basketball. Top-notch basketball programs, such as North Carolina and Maryland, still only provide their assistant coaches with one-year agreements.

Multi-year contracts for assistant coaches may only occur at Division I-A football powerhouse schools now, but it appears that there is a growing movement toward providing all football and basketball coaches with more job security. Montana's recent move to allow multi-year contracts for its head coaches is something that is becoming increasingly common at smaller universities, as these universities try to hold onto their coaches. Assistant basketball coaches are also likely to start receiving multi-year contracts in the near future. It is probably a necessary move for universities, as they try to retain assistant coaches and maintain continuity in their coaching staffs.

All assistants should receive multi-year contracts because this will provide them with a greater level of security. If assistants get multi-year contracts, they will not need to worry whether their employment will be renewed each off-season. Multi-year contracts, combined with a liquidated damages provision that is tied to a termination without cause provision, will give assistant coaches a significantly increased level of job security and protection.

VI. EFFECT OF TERMINATION OF HEAD COACH

The job of coaching Division I football and men's basketball is a volatile position, considering the intense pressure to win that exists. College coaches do have better job security than their counterparts in the professional ranks; however, college coaches still work in an unpredictable industry where terminations occur each year. The following table displays the high volume of turnover among head football and men's basketball coaches in recent years. Note that the football statistics include Division I and I-AA schools.

BASKETBALL COACHING CHANGES

2005	60*
2004	41*
2003	43*

FOOTBALL COACHING CHANGES

2005	22*
2004	22*
2003	14*

104. *Regents Approve Multiyear Contracts for UM, MSU Coaches*, KXNET.COM, Sept. 28, 2006, <http://www.kxma.com/getArticle.asp?ArticleId=49738>.

2002	40*
2001	46*
2000	56**
1999	45**
1998	63**
1997	52**
1996	42**
TOTAL	488
Avg. per Year	48.8
Total Teams	334
Avg. % Turnover	14.6%

2002	18*
2001	32*
2000	38**
1999	53**
1998	59**
1997	44**
1996	48*
	350
	35
	239
	14.6%

* SI.com, USA Today.com* SI.com

** NCAA statistics** NCAA statistics

Many football coaches at high profile schools were fired following the 2006 season, including Mike Shula at Alabama, Glen Mason at Minnesota, and Larry Coker at Miami. When head coaches like Shula, Mason, and Coker are dismissed, generally their whole staff of assistants is also left unemployed. The fate of assistant coaches is usually tied to that of the head coach. The assistants' contracts usually call for automatic termination when the head coach is fired, or in the alternative, the contract gives the university "cause" to terminate the assistants if the head coach is terminated. This clause is included in the contracts because the universities want to give the new incoming head coach an opportunity to compile his own staff.

The following are a few examples of provisions in assistant football coaches' contracts that make their continued employment contingent on the head coach's employment.

James Franklin – Kansas State

IAC hereby employs Employee as an Assistant Football Coach at Kansas State University for the period beginning the 3rd day of January, 2006, and ending the 31st day of March,

2009, contingent upon Ron Prince's continued appointment as Head Coach and subject to the provisions contained herein.¹⁰⁵

Tim Rose – Toledo

If the Head Coach is removed, terminated or his contract or appointment expires or is terminated for any reason, then this agreement will automatically terminate effective as of the same date of the termination of Head Coach.¹⁰⁶

Lyle Setencich – Texas Tech

Coach acknowledges that this Employment Contract will automatically terminate immediately at such time as Mike Leach ("Leach") is no longer the Head Football Coach at University. If this Employment Contract is terminated pursuant to this provision as a result of resignation by Leach, Coach will be paid his monthly base salary through May 31 of such contract year, provided, however, that University shall be entitled to a credit for any compensation received by Coach for any employment or independent contractor services performed by Coach (the "Credit") during the period from termination of this Employment Contract through May 31 of that contract year. If this Employment Contract is terminated as a result of Leach being terminated by University, Coach shall be entitled to the base salary for the term remaining on this Employment Contract, provided, however, that University shall be entitled to the Credit for the remainder of the term of this Employment Contract. University shall be entitled to, and Coach shall provide upon request, any documentation University deems necessary to determine the amount of the Credit. University shall be entitled to reduce its monthly payment to Coach by the amount of the Credit. If the amount of the Credit is greater than the monthly base salary otherwise due to Coach, no payment shall be due to Coach by University.¹⁰⁷

105. EMPLOYMENT CONTRACT BETWEEN THE INTERCOLLEGIATE ATHLETIC COUNCIL OF KANSAS STATE, KANSAS STATE UNIVERSITY, AND JAMES G. FRANKLIN § 1 (Jan. 3, 2006).

106. EMPLOYMENT CONTRACT BETWEEN THE UNIVERSITY OF TOLEDO AND TIM ROSE § 2.0 (Mar. 24, 2005).

107. EMPLOYMENT CONTRACT BETWEEN TEXAS TECH UNIVERSITY AND LYLE SETENCICH § V(D) (Dec. 31, 2005).

Often the clauses connecting the assistant coach's employment term to that of the head coach are not necessary. Terminating the assistants is usually easy for the universities and without consequence because most assistants operate under a one-year contract; therefore, the university simply does not renew the assistant's contract in the off-season. There are also several assistant coaches who are "at will" employees, and consequently, can be terminated at any time by the university.

For those few coaches who do have multi-year contracts, the clause connecting the employment term of the assistants to the head coach is important. Without this clause, the university would not have cause to terminate the assistant. If the university still terminates the assistant, it would be without cause, and in most situations, the university would need to pay the coach liquidated damages. Obviously, this will depend on each individual contract and the rights provided to the assistant coach.

It is possible for assistant coaches to retain their jobs when the head coach is terminated, but this is rare. A situation where this could happen is if the head coach is terminated and dismissed during the season. If the head coach is terminated during the season, the assistant coaches will usually retain their positions for the remainder of the season. Usually, one of the assistant coaches will be promoted to replace the head coach for the remainder of the season. The university usually will not dismiss the assistants along with the head coach because replacing a whole staff in the middle of the season would be virtually impossible and would create chaos for the athletic program. However, in collegiate sports, head coaches are not normally dismissed during the season, so this situation does not occur often. If a head coach is terminated during the season, the assistant coaches are also usually let go when the season is over.

The other way assistant coaches can keep their jobs is to be selected for the new coach's staff. The new coach will usually have the option to choose his or her staff. If the new head coach likes a particular assistant coach or coaches, he can extend them a job offer to remain at the university. This can be a good situation for an assistant coach, but it also might be a difficult situation. Some assistant coaches might feel compelled to reject the job offer in order to remain loyal to the recently terminated head coach. This will be particularly true of long-time assistants who have worked with a particular head coach for many years. As a rule, however, assistant coaches usually will find themselves unemployed if their head coach has been terminated.

It is difficult for assistant coaches to contractually protect their position against a head coach termination. Most universities want the freedom to terminate the assistant coaches when the head coach leaves for any reason. However, some coaches have been able to achieve some protection against automatic termination. For example, termination of the head coach does not

give Georgia Tech freedom to terminate Defensive Coordinator Jonathan Tenuta. Georgia Tech “may terminate the employment of Coach without cause if the Head Coach resigns voluntarily.”¹⁰⁸ This clause protects Tenuta against termination if the head coach is terminated. It also appears to provide him liquidated damages in the event the head coach resigns, and consequently, Tenuta is terminated. The contract states that the head coach’s resignation gives Georgia Tech the right to terminate Tenuta “without cause,” not “for cause.” If it is classified as a termination “without cause,” Tenuta is entitled to liquidated damages.

Tenuta’s situation is rare. Usually, assistants can be freely terminated when the head coach is terminated or resigns. It is more common for assistant coaches’ contracts to provide liquidated damages if the head coach is terminated. For example, University of Nebraska Defensive Coordinator Kevin Cosgrove would be automatically terminated upon termination of the head coach, but Cosgrove would continue to receive his salary and fringe benefits, subject to mitigation, for the remainder of his contractual term.¹⁰⁹

Cosgrove’s situation is more common than Tenuta’s. Cosgrove’s contract also reflects the type of protection assistants should try to attain. Assistant coaches do not want the termination of the head coach to provide the university “cause” to terminate the assistant. Instead, assistants want their termination to be treated as “without cause” and the contract should provide for liquidated damages.

In an earlier section we stated that the longer the term of the contract, the better the protection for the coach. This is again true in the situation of a head coach termination. The contract should be multi-year so that the university cannot simply deny renewal of the assistant coach’s one-year contract. The longer the term, the lesser the chances are that the assistant coach’s contract happens to be up the year the head coach leaves his or her position. A longer remaining term also increases the liquidated damages the school will need to pay the coach.

VII. UNIVERSITIES’ EARLY TERMINATION RIGHTS

Probably the most important reason for assistant coaches to have written employment contracts is to provide them some level of protection when the university wishes to terminate them. Considering the minimal job security that exists in the coaching industry, contracts that provide assistants with protection in termination situations are vital. Most head coaches’ contracts

108. TENUTA CONTRACT, *supra* note 32, § VI.

109. EMPLOYMENT CONTRACT BETWEEN THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA AND KEVIN COSGROVE § 11(B) (Feb. 1, 2006).

address termination and provide the coaches some legal protection. Usually, a head coach's contract will limit the situations when the university has cause to terminate the coach. The contract will also allow the university to terminate the coach at any time without cause, but generally, the contract will provide the coach with some form of compensation if the university terminates the coach without cause during the term of the contract.

Most assistant coaches have very limited legal protection when it comes to termination. First, any coach without a contract has the most limited legal protection because he or she is an "at will" employee. Generally, employers can terminate "at will" employees with or without cause at any time, and usually suffer no consequences.¹¹⁰ Second, some assistant coaches with contracts have the same limited termination rights as those coaches without contracts. This is because these coaches' contracts do not address the issue of termination; therefore, they are also treated like "at will" employees in termination situations. Assistant coaches without contracts or with contracts that do not address termination are at risk of termination at any time, for virtually any reason.

Other assistant coaches are more fortunate because their contracts address termination. Generally, the contracts that address the subject of termination are those contracts that are longer and more comprehensive. Most of the contracts that address termination will provide the assistant coach with stronger legal rights and protection. These contracts will usually limit what constitutes "cause" for the university to terminate a coach. They will also provide the coach with some form of liquidated damages when he or she is terminated "without cause."

The following provisions are examples of termination "for cause" and termination "without cause" provisions from assistant coaches' contracts.

TERMINATION "FOR CAUSE" PROVISIONS

Jon Tenuta - Georgia Tech (Defensive Coordinator)

The Association may suspend or terminate the employment of Coach for cause. For purposes of this Agreement "cause" shall be understood to include, but not be limited to any of the following:

- A. Conviction of (or entry into pre-trial intervention as a result of) a crime involving moral turpitude or conviction for a

¹¹⁰ There are limitations on when employers can terminate employees at will. Employers will possibly suffer consequences when a termination violates employment statutes or public policy.

felony for which the penalty for conviction is more than one (1) year in prison and a fine of more than One Thousand Dollars (\$1,000.00) or involvement in conduct that the Association or the Georgia Institute of Technology may consider injurious to the reputation of the Association or the Institute.

B. Coach's failure to substantially perform any of the duties as set forth in this Agreement.

C. The committing of any major violation of NCAA Legislation by Coach while at the Institute or while previously employed at another NCAA member institution, or the committing of a series or pattern of secondary violations of NCAA Legislation while at the Institute.

D. The committing of a major violation of NCAA Legislation while Coach is at the Institute by any representative of the Institute's athletics interest with Director's actual knowledge.

E. Any cause adequate to sustain the termination of any other non-classified Association employee.
The Association may terminate the employment of Coach without cause if the Head Coach resigns voluntarily.¹¹¹

Craig Ver Steeg – Rutgers (Offensive Coordinator)

The University may impose discipline upon the Assistant Coach, up to and including termination of employment, for: (i) material breach of any provision of this contract, (ii) neglect of duty, (iii) willful misconduct, (iv) acts of moral turpitude, (v) conduct tending to bring shame and disgrace to the University as determined by the Director, (vi) violation of University rules, regulations, policies, or directives not remedied after thirty (30) days' written notice thereof to Assistant Coach, (vii) violation of the rules and regulations of the NCAA, Big East, or any other intercollegiate athletic organization with which the University may affiliate, (viii) a criminal conviction that would be the equivalent of a felony

111. TENUTA CONTRACT, *supra* note 32, § VI.

conviction, or (ix) absence from duty in excess of thirty (30) days without the Director's consent.

Should the University elect to terminate the Assistant Coach's employment under this Section VII. A, payment of salary and benefits shall cease as of the date of termination. In addition, and independent of any action that may be taken pursuant to the foregoing provisions of the Section VII. A, the Assistant Coach, if found in violation of NCAA regulations, shall be subject to disciplinary or corrective action as set forth in the provisions of the NCAA enforcement procedures, including suspension without pay or termination of employment for significant or repetitive violations.

Failure to impose disciplinary or corrective actions in any particular instance of breach or violation, or with respect to any particular conduct or incident, shall not act as a waiver of the University's right to later discipline or correct the Assistant Coach in connection with any breach, violation, conduct or incident, whether the same or different in degree or type.¹¹²

Kent Baer – Washington (Defensive Coordinator)

This contract may be terminated by mutual agreement of the Parties at any time. The University may terminate Employee's employment under this Agreement for good cause. Good cause shall include, in addition to and as examples of its normally understood meaning in employment contracts, Employee's failure to perform or comply with the duties or terms of this Agreement, significant or repetitive violations of NCAA rules, or significant or repetitive acts that are materially prejudicial to the best interests of the University.¹¹³

Tim Buckley – Iowa (Assistant Men's Basketball)

112. EMPLOYMENT CONTRACT BETWEEN RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY AND CRAIG VER STEEG § VII.A. (July 1, 2006) [hereinafter VER STEEG CONTRACT].

113. EMPLOYMENT CONTRACT BETWEEN THE UNIVERSITY OF WASHINGTON AND KENT BAER § 8 (Jan. 1, 2005).

The University may terminate or take any other disciplinary action, as it deems reasonable and appropriate, for cause. "Cause" as used in this Contract includes, but is not limited to:

(a) A major violation or significant or repetitive violations, as determined by the University, of an NCAA or other Governing Association rule or regulation by or involving a Coach;

(b) A major violation or significant or repetitive violations, as determined by the University, of an NCAA or other Governing Association rule or regulation by a coach of the Team, any University employee for whom Coach is administratively responsible or representative of the University's athletic interest of which, in the judgment of the University, Coach knew or should have known with reasonable diligence and oversight.

(c) Multiple intentional secondary violations, as determined by the University, of an NCAA or other Governing Association rules and regulations related to the Team of which, in the judgment of the University, Coach knew or should have known with reasonable diligence and oversight;

(d) A charge by a federal, state or local law enforcement authority or the commission any criminal offense by Coach which, in the judgment of the University, would tend to bring public disrespect, contempt or ridicule upon the University; or,

(e) Any conduct, as determined by the University, which constitutes moral turpitude or which would tend to bring public disrespect, contempt or ridicule upon the University, or which constitutes a substantial failure to perform in good faith the duties required of Coach in Paragraph 2 above.

In the event of a termination under this paragraph, University's sole obligation to Coach shall be payment of his/her salary provided for herein in Paragraph 3 through the date of termination for cause, and the University shall not be liable to Coach for any collateral business opportunities or other benefits associated with Coach's position as Assistant

Coach. Prior to termination for cause, University shall provide written notice of the charges asserted against Coach and a reasonable opportunity to defend against the charges.¹¹⁴

TERMINATION “WITHOUT CAUSE” PROVISIONS

Craig Ver Steeg – Rutgers (Offensive Coordinator)

1. The University may also terminate this contract as it deems necessary to further the best interests of the University. In such an event, and subject to Section VII. B.2 below concerning the Assistant Coach securing other employment, the University shall continue to pay the Assistant Coach’s salary and benefits, for the balance of the then-current term of this contract. The Assistant Coach agrees to accept any such payment as full settlement of all claims and demands which may accrue to the Assistant Coach under this contract. The Assistant Coach further agrees that the University shall not be liable for any claims or demands for loss of collateral income, business opportunities, expectations, or for any other direct, indirect or consequential damage or loss.

2. If this contract is terminated pursuant to Section VII. B.1, the Assistant Coach shall be required to exert reasonable efforts to secure other employment consistent with the Assistant Coach’s background, skills and experience. Upon securing such employment, the university’s obligation to continue salary and benefits pursuant to Section VII. B.1 above shall cease and the University shall not be liable for any other amount or item.¹¹⁵

Jeff Casteel – West Virginia (Defensive Coordinator)

In addition to the provisions set forth above, there also is reserved to University the right to terminate this Agreement without cause at any time. In the event that Coach is terminated pursuant to this section, University shall pay Coach (1) all base salary and incentive compensation actually earned and accrued but unpaid through the date of

114. EMPLOYMENT CONTRACT BETWEEN THE UNIVERSITY OF IOWA AND TIMOTHY P. BUCKLEY § 10 (May 4, 2006).

115. VER STEEG CONTRACT, *supra* note 112, § VII.B.

termination, and (2) an amount equal to the remaining base salary during the term of this Agreement, which sum shall be deemed to be liquidated damages and extinguish all rights of Coach to any further compensation, benefits, incentives and entitlements from University. Coach shall have no duty to mitigate, nor shall University have any right of offset.¹¹⁶

Michael Andrews – Florida State (Defensive Coordinator)

Subject to University approval, the University and SB shall have the right to terminate this Agreement without Cause at any time by paying to Coach such amount of money as is equal to the then remaining present value of Coach's unpaid base salary and other compensation as set forth in paragraphs A. and B. of Section III of this Agreement, including a pro rata share of compensation set forth in Sections III. A. and B. earned or accrued but not yet paid or disbursed. For purposes of this sub-section, "present value" shall be computed by reference to commercially accepted standards as are mutually agreed upon among the parties.¹¹⁷

Thomas Asbury – Alabama (Assistant Men's Basketball)

Unless the Contract is terminated pursuant to either Section 5.01(a) or Section 5.01(b), the University shall have the right at any time to terminate this Contract without cause and for its convenience prior to its expiration. Termination by the University without cause shall be effectuated by delivering to the Employee written notice of the University's intent to terminate this Contract without cause, which notice shall be effective upon the earlier of the date for termination specified in the notice or fourteen (14) days after receipt of such notice by the Employee. If the University exercises its rights under this Section 5.01(e) to terminate this Contract without cause, the Employee shall be entitled to damages only as provided for in Section 5.01(f) below, and Employee shall not be entitled to receive any further payments of base salary, talent

116. EMPLOYMENT CONTRACT BETWEEN WEST VIRGINIA BOARD OF GOVERNORS AND JEFFREY A. CASTEEL § VI.C. (June 30, 2005).

117. EMPLOYMENT CONTRACT BETWEEN THE UNIVERSITY OF FLORIDA STATE AND MICHAEL D. ANDREWS § V(A)(iii) (last amended Mar. 30, 2005) [hereinafter ANDREWS CONTRACT].

fee, or any other sum, compensation, perquisite, or benefit otherwise payable under this Contract, except Employee will be entitled to continue such life or health insurance benefits at Employee's own expense as required or permitted by law. The parties agree that if this Contract is terminated without cause, then Employee shall not be entitled to any hearing.

If the University terminates this Contract without cause prior to its expiration in accordance with the provisions of Section 5.01(e) hereof, the University shall pay, and Employee agrees to accept, as liquidated damages an amount equal to one-twelfth (1/12) of Employee's current base salary then in effect pursuant to Section 4.01 for each month or portion thereof (pro-rata) in the period from the effective date of termination to the end of the Contract term as specified in Section 3.01 above. The liquidated damages amount shall be paid to Employee in monthly installments commencing on the last day of the month in which the termination date occurs and continuing on the last day of each succeeding month until the date the Contract term would have ended as specified in Section 3.01 above. To the extent required by law, the liquidated damages amount shall be subject to deductions for state and federal taxes. The University's obligation to pay such liquidated damages shall be subject to Employee's duty to mitigate the University's obligation as specified in Section 5.01(j) hereof. The Employee will be entitled to continue such insurance benefits at Employee's own expense as required or permitted by law, but Employee will not otherwise be entitled to receive any further or additional compensation or employment or other benefit described in Article IV hereof. The parties have bargained for and agreed to the foregoing liquidated damages provision, giving consideration to the fact that termination of this Contract by the University without cause prior to its expiration may cause the Employee to lose certain benefits and incentives, supplemental compensation, or other athletically-related compensation associated with Employee's employment at the University, which damages are extremely difficult to determine with certainty or fairly or adequately. The parties further agree that the payment of such liquidated damages by the University and acceptance thereof by the Employee shall constitute adequate and reasonable compensation to the Employee for the damages and injuries

suffered by the Employee because of such termination by the University. The foregoing shall not be, nor be construed to be, a penalty.¹¹⁸

Ideally, assistant coaches want their contracts to address termination “for cause” and “without cause.” First, assistant coaches will want the contract to define cause by specifically enumerating all circumstances that will qualify as “cause” for the university to terminate the coach. The contract should state that “cause” is limited to those circumstances enumerated in the contract. Second, the assistant coach will also want a termination “without cause” provision that requires the university to pay the coach some amount of continued compensation or liquidated damages upon early termination. Often the measure of compensation will be the coach’s base salary, or a portion thereof, for each year remaining on the contract, subject, however, to mitigation of damages.

Termination provisions have obvious importance; nevertheless, the significance of these provisions is limited if an assistant coach is operating under a one-year contract. Often coaches with one-year terms are not terminated; instead, the university simply does not renew an assistant coach’s contract after the expiration of the one-year term. Termination provisions can protect one-year term coaches against in-season termination, but in-season terminations are not frequent. However, termination provisions are most significant for coaches with multi-year terms. As we discussed in an earlier section, multi-year contracts are preferential for assistant coaches. For assistant coaches with multi-year contracts, termination provisions are very important.

VIII. COACHES’ EARLY TERMINATION RIGHTS

Assistant coaches should also be concerned with the right to terminate employment early. Assistant coaches are often looking to escape their contracts in order to pursue other coaching opportunities. This is common among head coaches, but currently it is less of an issue among assistant coaches because most assistant coaches operate as employees “at will” or under a one-year term. Being an employee “at will” is beneficial for an assistant coach who wants to leave his or her position for another position. “At will” employees enjoy the right to leave a position of employment at any time. This is the other side of termination situations for “at will” employees.

118. EMPLOYMENT CONTRACT BETWEEN THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THOMAS S. ASBURY Art. V, § 5.01(e)-(f) (last amended Nov. 15, 2006).

“At will” employees can be terminated at any time, but they also enjoy the right to resign from their position at any time without repercussion.

Assistant coaches with one-year terms will also usually not have an issue with their “early termination” rights because their contracts expire each off-season, leaving them free to pursue employment elsewhere. They will only have a problem if they wish to leave during the middle of the season, but this is highly unusual in collegiate athletics.

In practice, assistant coaches’ early termination rights are only a relevant issue for those assistant coaches with multi-year contracts. Assistant coaches with multi-year contracts want to have the option available to leave if a better career opportunity becomes available. Most assistant coaches’ contracts will provide the coach with this right, but the assistant will usually be required to give the university notice. Some assistant coaches’ contracts will also require the coach to pay liquidated damages to terminate the contract early. The liquidated damages amount will usually be relatively small, and in most situations, the assistant coach’s subsequent employer will pay this amount. Hence, the assistant coach should not be overly concerned.

The following are examples of early “termination by coach” provisions from various assistant coaches’ contracts.

Michael Andrews – Florida State (Defensive Coordinator)

Upon thirty (30) days written notice the Coach may terminate this Employment Agreement. Upon such termination by Coach, the University and SB shall be under no further obligation to Coach, except to pay him such amounts as are due him for actual services already rendered up to the date of the termination, including a pro rata share of compensation set forth in Section III. A. and B. but not yet paid or disbursed, and the guarantee of Coach’s compensation hereunder by SB shall be extinguished.¹¹⁹

Dana Holgorsen – Texas Tech (Offensive Coordinator)

Coach may terminate his employment with University by giving written notice to University, subject to Article V. F. NON-COMPETE CONSIDERATION below.¹²⁰

119. ANDREWS CONTRACT, *supra* note 117, § V(B).

120. EMPLOYMENT CONTRACT BETWEEN TEXAS TECH UNIVERSITY AND DANA HOLGORSEN § V.C. (Dec. 31, 2005).

Victor Koenning, Jr. – Clemson (Defensive Coordinator)

Coach may terminate this Agreement by furnishing the University three (3) days written notice to accept other employment, provided that Coach shall also tender to the University liquidated damages in the amount of Fifty Thousand Dollars (\$50,000.00). Likewise, Coach's act of accepting another position shall be deemed to automatically terminate this agreement and shall release the University, its employees, officers, and trustees from any obligation hereunder.

Notwithstanding the foregoing, should Coach secure a position that a reasonable person within the football coaching profession would believe to be a professional advancement, or with the express written permission of the Head Football Coach, and approved by the Athletic Director, said amount shall be waived. Further, should Coach not receive a written intent to renew the terms of this employment agreement at least one year prior to the expiration date, then liquidated damages shall be waived should Coach accept other employment.¹²¹

Most head coaches' contracts require a payment of liquidated damages if the coach decides to leave early. In head coaches' contracts, the amount of liquidated damages will usually be much higher than it is with assistant coaches. The following are examples of liquidated damages provisions from head coaches' contracts that apply when the coach terminates the contract.

Thad Matta – Ohio State (Basketball)

If Coach is employed or performing services in a coaching position for another NCAA Division I school or for a professional basketball team, Coach will pay Ohio State as liquidated damages, and not as a penalty, \$500,000 to reimburse Ohio State for expenses including, but not limited to (i) searching for, recruiting and hiring a new head basketball coach and coaching staff, (ii) relocating a new head basketball coach and coaching staff, and (iii) buying out the

121. EMPLOYMENT CONTRACT BETWEEN CLEMSON UNIVERSITY AND VICTOR E. KOENNING, JR. § 4(f) (Feb. 13, 2006).

contract, if necessary, of the new head coach. Coach shall pay all such amounts to Ohio State within thirty (30) days after the date of Coach's termination.¹²²

Bill Self – Kansas (Basketball)

In the event Self should terminate this Agreement, for whatever reason, after the first twelve (12) months of the Agreement, Self shall pay or cause to be paid \$1,000,000 to KUAC as liquidated damages. The parties agree that such liquidated damages are reasonable compensation for losses that KUAC will incur and are not a penalty, and shall be due and payable within sixty (60) days following Self's termination or resignation.¹²³

Karl Dorrell – UCLA (Football)

In the event Coach terminates this 2003 HC Agreement and accepts employment at another PAC-10 Conference athletic program (including without limitation, any University of California PAC-10 institution) before January 31, 2009, or any extension of the Term, whichever is later, Coach agrees to pay UCLA liquidated damages in the amount of \$1,000,000 (one million dollars) within 90 (ninety) days of his acceptance of such employment;

In the event Coach terminates this 2003 HC Agreement and accepts employment at non-PAC-10 Conference NCAA Division A-1 athletic program or with a professional football team before January 31, 2009, or any extension of the Term, whichever is later, Coach agrees to pay UCLA liquidated damages in the amount of \$600,000 (six hundred thousand dollars) within 90 (ninety) days of his acceptance of such employment.¹²⁴

122. EMPLOYMENT CONTRACT BETWEEN THE OHIO STATE UNIVERSITY AND THAD M. MATTA § 5.3(c) (Mar. 8, 2005).

123. EMPLOYMENT CONTRACT BETWEEN THE UNIVERSITY OF KANSAS ATHLETIC CORPORATION AND BILL SELF § 6(C) (Apr. 21, 2003).

124. DORRELL CONTRACT, *supra* note 96, § 8(c)(i)-(ii).

The table below provides the amount of liquidated damages other coaches' contracts require them to pay.

Tommy Tuberville	Auburn (football)	\$6 million
Billy Donovan	Florida (basketball)	\$100,000
Mark Richt	Georgia (football)	\$2 million/year
Steve Spurrier	South Carolina (football)	\$500,000/year
Urban Meyer	Florida (football)	\$150,000/year
Tubby Smith	Minnesota (basketball)	\$3 million in 2007-2008; \$2 million in 2008-2009; \$1 million in 2009-2010; \$500,000 in 2010-2011; nothing after that

Assistant coaches will want their contracts to provide them with the right to terminate their contracts. Preferably, there will be no consequence for the assistant coach terminating the contract early. However, universities sometimes will require liquidated damages because they want to deter assistant coaches from leaving. If the university does require liquidated damages, the assistant coach should negotiate that the liquidated damages will not apply if the assistant coach is leaving for a better position, such as a head-coaching job. Generally, there is no need for assistant coaches to object to a notice requirement, so long as the notice period is reasonable. Overall, the assistant coach wants to ensure that he or she and the university have similar rights to terminate the agreement early.

IX. CONCLUSION

This article examined the varying rights and legal protections of collegiate assistant football and men's basketball coaches through a study of numerous Division I assistant coaches' employment agreements. From this study of employment agreements, several conclusions about assistant coaches' legal rights and contract protections were reached. Below is a list of the major conclusions:

- There is no pattern or consistency among assistant coaches' contracts.
- Assistant coaches' contracts differ greatly in length and sophistication.
- Many assistant coaches do not have written employment agreements.
- Most assistant coaches without employment agreements coach at smaller programs.
- There is an increasing recognition of the value of assistant coaches, which has resulted in rising assistant coach compensation.
- There is a compensation disparity between larger and smaller programs.
- There is a compensation disparity between football and basketball assistant coaches.
- Division I football coaches' compensation is rising fastest.
- Football coaches at major programs receive the best perquisites, incentives, and outside income opportunities.
- Most contracts are for a one-year term.
- Currently, multi-year term contracts only exist among assistant football coaches.
- Termination rights are essentially meaningless unless the contract is for a multi-year term.
- By virtue of the one-year term, liquidated damages are also basically meaningless.

From these conclusions, it is apparent that assistant football coaches at larger programs are in the best position among assistant coaches. Most basketball coaches and football coaches at smaller programs have lesser rights and protections. In general, assistant coaches do not have the rights and legal protections they should, and overall, assistant coaches appear to be an underrepresented group.

In order to attain these rights and protections, all Division I football and men's basketball assistant coaches should have competent legal representation that can assist them in reaching an employment agreement with the university. Assistant coaches should have full-length, comprehensive written contracts that are negotiated with the help of a legal professional. Ideally, assistant coaches will have multi-year term contracts that provide them substantial compensation and opportunities for perquisites, bonus incentives, and outside income. The contracts should address all relevant aspects of the assistant coaches' employment, particularly termination situations. Through the help of

a legal professional, all assistant coaches can attain all the rights and legal protections that they deserve.

APPENDIX

Assistant Football Coach

Dear _____

It is my pleasure to confirm your recent appointment as Assistant Football Coach. This appointment is subject to provisions of the University Personnel Policies for Designated Employees Exempt from the Personnel Act (EPA). A copy of this document was given to you when you were hired.

Your appointment will be for a specific term beginning _____ and ending _____. Your appointment may be renewed at the option of the Director of Athletics and/or the Chancellor of _____ or his designee. In that this appointment is for twelve (12) months or less, no further notice is required should it be determined that your appointment will not continue.

Your position is contingent upon the continuing availability of funds from the Department of Athletics' budget. If this funding is terminated, or redirected for other uses by the funding source, your position may end without notice. Every effort will be made, where possible, to give you no less than thirty (30) days notice that the funding has terminated and your position will end. If it is determined by the Director of Athletics and the Chancellor's Office that the program to which your position is assigned is to be curtailed or eliminated, your position also may end with every effort made to give you proper notice as indicated above. Please note that you will be expected to perform your duties in accordance with all applicable policies and procedures of the NCAA, Conference, and Department of Athletics, and to conduct yourself according to acceptable standards of performance and conduct for EPA employees at ECU.

Your annual salary is _____ and will be paid in semimonthly increments of _____. Your salary is subject to adjustments (annual increments) that may be authorized by the General Assembly of _____ and to the compensation policies of the Board of Trustees and the University Administration of _____ in its annual review and evaluation of EPA employees.

You will earn sixteen (16) hours annual leave and eight (8) hours sick leave per month. Any leave that you take must be reported to the Director of Athletics' office as soon as possible on a Form LR-4. In the case of annual leave, it should be requested in advance of its occurrence, unless emergency situations dictate otherwise. By accepting this appointment you agree to the provision that your twenty-four (24) days of annual leave are to be exhausted during the contractual term. The Director of Athletics or his designee reserve the right to direct you to take leave in order to assure that no leave is accumulated at the end of the term or for any other reason.

_____ please sign the enclosed Agreement designating your acceptance of the terms and conditions of this offer and return the original to my office as soon as possible. I look forward to your employment in the Department of Athletics and of your successful contributions to a winning tradition here at _____

Sincerely,

Director of Athletics

cc: Human Resources

An Equal Opportunity Affirmative Action Employer

Dear Coach

This letter is to document our discussions regarding the offer of a term appointment as Offensive Coordinator at [redacted]. As we discussed, the Department is amenable to giving you a term appointment of four years, provided that we agree to a liquidated damages clause in the event of our terminating your employment without cause prior to the expiration of the term, provisions relating to your termination of the appointment with permission and release by the university, and other terms contained in this offer letter.

The appointment is to a non-tenure track EPA professional position of Offensive Coordinator at [redacted]. This position carries a 1.0 FTE service obligation on a fiscal year basis. This is a term appointment for four years beginning on [redacted] and ending on [redacted]. The base salary for the period from [redacted] to and including [redacted] is [redacted]. Thereafter, the base salary is as follows:

Your base salary will be paid in twelve equal monthly installments each year. Your performance, and responsibilities will be reviewed annually according to established departmental evaluation criteria.

In addition to your annual salary you will be paid the following longevity incentives in a lump sum provided you are employed as Offensive Coordinator at [redacted] on such dates:

You will also be entitled to receive post-season bonuses earned in accordance with and subject to established NCAA and AOC policies and [redacted] Athletic department guidelines. With prior approval of the Athletics Director and Chancellor, and subject to compliance with the "Policy on External Professional Activities for Pay" of the [redacted] Board of Governors and University's Board of Trustees, NCAA regulations governing receipt of athletically related income and benefits from sources outside the University, and all other relevant state and federal policies and laws concerning conflict of interest, you may earn other revenue while employed by

the University. Such activities are independent of your University employment, and the University shall have no responsibility for any claims arising or related to such employment. This shall include engaging in any radio, television, motion picture, stage, writing or any similar activity, personal appearances, commercial endorsements, and football camps. Subject to specific reporting requirements established by the University, no outside activities will be allowed without having on file with the Athletics Director, a signed approval of the "Notice of Intent to Engage in External Professional Activities for Pay" prior to engaging in those activities.

The liquidated damages provision is as follows: If _____ terminates your employment without cause prior to the expiration of the term, the University will pay you liquidated damages in lieu of any and all other legal remedies or equitable relief, in the amount of the salary remaining under the term of your appointment, such amount to be paid on an annual basis. The University will not be liable to you for any collateral business opportunities or other benefits associated with your position. In accepting this appointment you acknowledge that this is an agreement for personal services and that termination of this agreement by the University prior to its natural expiration could cause you to lose certain benefits, supplemental compensation or outside compensation relating to your employment at the University which damages are difficult to ascertain with certainty. Therefore you and the University agree to this liquidated damages provision. Further, notwithstanding the above, you agree to mitigate the University's obligation to pay liquidated damages as follows: If you obtain new employment, the University's financial obligations shall be to pay you the difference between the salary you would have received as Offensive Coordinator and the salary in your new job. If your salary in a new job exceeds that which you would have been paid at _____ the University's financial obligations to you shall cease. Under no circumstances shall _____ be liable to you for any collateral business opportunities or other benefits.

The terms regarding your termination with permission and release by the University are as follows: In accepting this appointment you agree that you have special, exceptional and unique knowledge, skill and ability as a football coach which, in addition to the continuing acquisition of coaching experience at _____ University, as well as the University's special need for continuity in its football program, render your services unique. You recognize that the loss of your services to the University, without University approval and release, prior to the expiration of the term of this appointment or any renewal thereof, would cause an inherent loss to the University which cannot be estimated with certainty or fairly or adequately compensated by money damages. You therefore agree not to actively seek, negotiate for or accept employment, under any circumstances, without first obtaining written permission of the Chancellor and the Athletics Director, as a football coach at any institution of higher education which is a member of the NCAA or for any professional team participating in any professional league or conference in the United States or elsewhere requiring performance of duties prior to the expiration of the term of this appointment or any extension thereof. If after discussion, you wish to accept employment elsewhere as defined above, you must first obtain a release of this agreement from the Chancellor and Athletics Director, including a negotiated settlement to terminate the contract. Such release and settlement shall not be valid until accepted in writing by you and the Chancellor and the Athletics Director. Permission to discuss another position, release of this agreement or a negotiated settlement will be pursued in good faith and the university will not unreasonably withhold its approval or execution of a release for negotiated settlement.

You acknowledge and agree that given the public nature of _____ University, upon your acceptance of this appointment, this letter and the payment amounts and other terms and conditions contained in it shall not be confidential and shall be considered a public record within the meaning of the North Carolina Public Records Law, N.C.G.S. § 132-1 et seq.

This offer is subject to the approval of the Chancellor of _____ University. Upon that approval, you will receive a confirmation letter. Your employment is subject to the _____ Board of Governors and _____ Board of Trustees' "Employment Policies for University Employees Exempt from the State Personnel Act" which can be found at _____

If you do not have access to the Internet, please contact me for a copy. Employment in this position is subject to the laws of the State of North Carolina and all policies of the _____ system and _____ University. In addition, you are obligated at all times to comply with the principles, policies, and regulations of the National Collegiate Athletic Association and the Atlantic Coast Conference.

This letter constitutes the full terms of our employment offer and supersedes all other commitments either written or verbal that may be made to you. To accept this offer, please date and sign a copy of this letter and return to me as soon as possible but not later than _____

We look forward to a rewarding relationship. If I may be of help, please let me know.

Sincerely,

I accept the offer of employment described in the above letter and understand that it is not effective until approved by the Chancellor of _____ University.

EMPLOYMENT AGREEMENT AND NOTICE OF APPOINTMENT
FOR ASSISTANT MEN'S BASKETBALL COACH

This Employment Agreement and Notice of Appointment ("Appointment") confirms the conditions offered and accepted for the appointment of _____ (hereinafter ASSISTANT COACH) as a member of the coaching staff of _____ University in the Department of Intercollegiate Athletics.

1. ASSISTANT COACH shall have duties and administrative responsibilities as assistant coach of men's basketball. Those duties are further described in the ASSISTANT COACH's Faculty Position Description, which is on file in the Athletic Department and in the Office of Human Resources. ASSISTANT COACH's Faculty Position Description may change from time to time during the period of this Appointment at the discretion of the Athletic Director.
2. This Appointment is for a fixed term period beginning _____ and ending _____ at 1.0 FTE. This Appointment is subject to the rules of the University and of the State Board of Higher Education, including all provisions that apply to fixed-term appointments, except as otherwise provided herein.
3. The annual salary rate computed on a 12-month, 1.0 FTE basis shall be \$117,312.
4. ASSISTANT COACH agrees that as a condition of employment by the University ASSISTANT COACH will not engage in, support, or knowingly tolerate any action violative of any governing constitution, bylaw, rule or regulation of the Pacific 10 Conference (PAC-10) or the National Collegiate Athletic Association (NCAA). ASSISTANT COACH agrees to advise the Athletic Director immediately if ASSISTANT COACH has reasonable cause to believe violations have or will occur.
5. ASSISTANT COACH agrees that as a condition of employment by the University ASSISTANT COACH will not accept gifts, other than from immediate family, accept any employment outside the institution, engage in any business transactions or commerce, participate in any coaching clinics or camps, endorse any products or services, or appear for payment on any radio or television programs, without having first notified and secured the written approval of the Athletic Director and the President or designee. ASSISTANT COACH shall comply with the _____ Policy on Outside Professional Activities.
6. ASSISTANT COACH shall report to the Athletic Director on October 15 of each year all athletically-related income and benefits from sources outside the institution, including, but not limited to, income from annuities, sports camps, housing benefits, television and radio programs, and endorsement or consultation contracts with athletic shoe, apparel, or equipment manufacturers, received in the previous 12 months. The report shall be filed with the Athletic Director on October 15 of each year and shall cover the period from October 1 of the previous year to September 30 of the current year. If ASSISTANT COACH's employment with University initially commenced after October 1, the report shall cover that portion of the reporting period for which ASSISTANT COACH was employed. Reports shall be made on forms provided by the Director of

Intercollegiate Athletics. The Athletic Director shall forward reports to the President of the institution and a copy shall be retained in the faculty personnel file of the assistant coach. This report of income is separate and distinct from the prior approval of gifts and outside income required in Section 5.

7. This Appointment may be terminated prior to the end of the fixed-term period, or sanctions may be imposed, for any of the causes set out in the State Board of Higher Education's Administrative Rules. One of the causes, as defined by the State Board Rules, is failure to perform the responsibilities of an academic staff member. For the purposes of this Appointment, such failure shall include, but not be limited to:

- a) engaging in, supporting, or knowingly tolerating any action violative of any governing constitution, bylaw, rule or regulation of the NCAA or the PAC-10 Conference, during the period of this Appointment or at any time during the 2 years previous to the execution of this Appointment, whether at this or another institution,
- b) failure to comply with the attached Code of Ethics of the State Board of Higher Education, which is incorporated herein by reference, and
- c) failure to carry out faithfully and diligently all department-related duties and responsibilities as assigned by the Director of Intercollegiate Athletics or Head Coach or this Appointment.

In the event University terminates this Appointment for cause, University shall not be liable to ASSISTANT COACH for any loss of collateral business opportunities or any other benefits, prerequisites or income.

8. At any time after commencement of this Appointment, University may terminate this Appointment without cause by giving written notice to ASSISTANT COACH. The termination shall become effective no earlier than 15 days after receipt of the written notice. In the event of termination under this Section 8, and subject to the provisions of Section 8(a), University shall pay ASSISTANT COACH the amount of ASSISTANT COACH's annual base salary (as set out in Section 3) that would be due over the remaining term of the Appointment if it were not terminated. This amount shall be paid on a monthly basis prorated over the remainder of the term of the Appointment. ASSISTANT COACH understands and agrees that if this Appointment is terminated without cause, ASSISTANT COACH shall not be entitled to any benefits or compensation other than that set forth in this Section 8.

a. In the event of termination under this Section 8, ASSISTANT COACH agrees to make reasonable and diligent efforts to find new employment. After ASSISTANT COACH obtains such new employment, University's obligation to pay monthly salary shall cease unless ASSISTANT COACH's compensation in ASSISTANT COACH's new employment is less, when computed on a monthly basis, than the monthly obligation of University under this Section 8. In that event, University's obligation shall be reduced on a monthly basis by an amount equivalent to the compensation ASSISTANT COACH receives in his or her new employment. At any

time ASSISTANT COACH no longer serves in the initial employment after leaving the University, the University obligation, if any, under this Section 8 shall cease.

b. In the event of termination under this Section 8, ASSISTANT COACH agrees not to apply for unemployment compensation.

9. ASSISTANT COACH certifies that he or she has not knowingly been involved in violations of NCAA, PAC-10 Conference, or other intercollegiate athletic conference rules or regulations at this or any other institution in the two years immediately preceding the execution of this Appointment, and that he or she has not been the recipient of any disciplinary action including, but not limited to, termination or suspension from duties, by any other institution for violation of NCAA or PAC-10 Conference rules and regulations during the two years immediately preceding the execution of this Appointment.

10. ASSISTANT COACH shall be eligible to receive additional compensation for post-season competition in accordance with policies developed by the Athletic Director.

11. If ASSISTANT COACH participates in an sponsored camp, clinic or similar instructional event, payment shall be made on an overload compensation basis. The amount of payment shall be determined at the time the budget for the camp is approved in accordance with Department policies.

12. Tickets for Athletic competition may be provided in accordance with provisions in the Athletic Department Policies and Procedures Manual. University may cover the cost for ASSISTANT COACH's spouse and dependent children who are still living at home to accompany COACH to one away competition site that may include the PAC-10 Conference Tournament. University payment for such costs in all these cases shall be in the sole discretion of the Athletic Director and shall require his written authorization. "Costs" includes reasonable accommodations and meals at rates set by Athletic Department policy. ASSISTANT COACH may participate in the University's courtesy car program, subject to the provisions in the Athletic Department Policies and Procedures Manual.

ASSISTANT COACH understands that these benefits, if received, will be reported and likely are taxable.

MULTI-YEAR AGREEMENT

THIS AGREEMENT is made and entered into by and between
 University, hereinafter referred to as _____ and _____, hereinafter
 referred to as Coach.

WITNESSETH: That _____ hereby employs Coach as Assistant Football
 Coach at _____ University, and Coach accepts said employment under the following
 terms and conditions:

1. Term of Agreement. The term of this Employment Agreement shall be January 1, 2006 through December 31, 2008.
2. Compensation.
 - (a) Base Salary: The annual base salary rate shall be \$ 220,000.00 payable bi-weekly. Effective January 1, 2007, the annual base salary rate shall be \$230,000. Effective January 1, 2008, the annual base salary shall be \$240,000. The base salary may be amended upon mutual agreement of Coach and _____, by execution of a letter of amendment signed by _____ and Coach.
 - (b) Fringe Benefits: Coach shall be entitled to participate in the fringe benefits available to all athletic department employees.
 - (c) Bowl Bonus: Coach may, from time to time, receive bonus compensation, should the _____ football team participate in a post-season bowl game. The amount of bonus compensation shall be agreed between the Head Football Coach and the Athletic Director, but shall not exceed one-twelfth of his annual salary.
 - (d) Other Bonus: University, at its sole discretion, may award bonuses based upon extraordinary achievements such as,

but not limited to, conference championships, divisional championships, outstanding academic achievements, etc.

The amounts shall be from legally available funds and the amount of the bonuses shall be at the sole discretion of the University.

- (e) Courtesy Car: University may provide, at its sole discretion, a courtesy car for use by Coach. Provision of such case is not part of the consideration of this contract and may be revoked at any time.

3. Coach's Duties.

- (a) The duties of Coach shall be the usual and customary duties of an assistant football coach including, but not limited to, student-athlete recruitment, teaching and coaching football, monitoring and coaching the overall athletic and academic development of student-athletes, and any such other reasonable duties of an athletic nature as may be assigned by the Head Football Coach or the Athletic Director of University. Coach shall provide the University with his most dedicated and conscientious services and shall perform his duties with the highest standards of the profession.

- (b) Coach shall perform his duties in compliance with the policies and rules of the University, the State, the National Collegiate Athletic Association (NCAA), the Atlantic Coast Conference (ACC), and any other association, conference, or like organization with which the University is, or may become, affiliated. Coach shall report any or suspected violations of NCAA or ACC rules by staff, students, or other representatives of the University of which the coach knows, suspects, or should have known. Coach shall be liable to the university for any

monetary damage suffered as a result of intentional violations of NCAA, ACC, or University regulations. In addition, in accordance with NCAA Rule 11.2.2, Coach agrees to provide a written detailed account annually to the chief executive officer for all athletically related income and benefits from sources outside the institution. Approval of all athletically related income and benefits shall be consistent with the institution's policy related to outside income and benefits applicable to all employees.

4. Termination by University.

- (a) Termination for Cause. Should Coach fail to perform any of his duties and obligations stated in Paragraph 3 above, or found "in violation of NCAA regulations shall be subject to disciplinary or corrective action as set forth in the provisions of the NCAA enforcement procedures, including suspension without pay or termination of employment for significant or repetitive violations." NCAA Contractual Agreements, Bylaw 11.2.1. Should termination occur pursuant to Bylaw 11.2.1, University may terminate this agreement without further obligation or liability upon thirty (30) days written notice to Coach. Should Coach be arrested or convicted of a felony or crime of moral turpitude, University may terminate Coach without any further obligation.
- (b) Termination at the Convenience of the University. By giving written notice to Coach, the University shall have the right to terminate this employment without cause at any time. Coach agrees that any compensation remaining under this Agreement is subject to mitigation in the event terminates this Agreement and shall be reduced by any compensation from accrued leave.

(c) Duty to Mitigate: Notwithstanding the foregoing, Coach agrees to mitigate University's obligations to pay the foregoing payments by making diligent efforts to obtain full-time employment, business or professional income (for example, but not limited to, football coaching, media commentator, speaking engagements, teaching or other academic activities, consulting or participation in business or any other income producing opportunities). Coach shall begin making such diligent efforts to obtain such income as soon as practicable but not later than thirty (30) days following such termination and each thirty (30) days thereafter shall provide University with a written report of the specific efforts undertaken in this regard including the amount of income, if any, resulting directly or indirectly therefrom. University's financial obligation under this contract shall cease or be reduced commensurately by the amount of any such income.

Failure to make such diligent efforts shall be a material breach of this agreement and shall relieve of its obligations to pay any liquidated damages.

(d) Liquidated Damages: Alternatively, University at its sole discretion, may provide, in lieu of the provisions in Paragraph 4(b) and 4(c), liquidated damages in the amount of one-half of annual base salary times the number of years, or portion thereof, then remaining in this Agreement based on these conditions.

1. The University shall not exercise 4(d) prior to the end of the normal hiring period (April 30 of the year following the effective date of termination), unless Coach has not acted in accordance with the provision of 4(b)(c).

2. Should University exercise paragraph 4(d), University shall not exercise 4(c) at any future time.
 3. Once Coach secures full-time employment and University accepts mitigation pursuant to 4(c), University shall not thereafter exercise paragraph 4(d) while Coach is gainfully employed.
- (e) Consultation: University, at its sole discretion, may engage the services of Coach as a consultant beyond the term of this employment agreement. Such engagement shall not exceed one year. Coach shall not be entitled to participate in fringe benefits available to other Athletic Department employees. Said consulting contract is separate and distinct from the employment agreement.
- (f) Termination by Coach -- Liquidated Damages. Coach may terminate this Agreement by furnishing the University three (3) days written notice to accept other employment, provided that Coach shall also tender to the University liquidated damages in the amount of Fifty Thousand Dollars (\$50,000.00). Likewise, Coach's act of accepting another position shall be deemed to automatically terminate this agreement and shall release the University, its employees, officers, and trustees from any obligation hereunder.
- Notwithstanding the foregoing, should Coach secure a position that a reasonable person within the football coaching profession would believe to be a professional advancement, or with the express written permission of the Head Football Coach, and approved by the Athletic Director, said amount shall be waived. Further, should

Coach not receive a written intent to renew the terms of this employment agreement at least one year prior to the expiration date, then liquidated damages shall be waived should Coach accept other employment.

4. Elimination of Grievance Rights. Coach agrees that as part of the consideration for this agreement Coach waives any and all grievance rights under the South Carolina State Employee Grievance Procedure Act as it may be amended.
5. Complete Agreement. Coach and Clemson agree that this Agreement is the sole and complete Agreement between the parties and that all prior contracts and agreements for personal services between the parties are hereby cancelled.

IN WITNESS WHEREOF, the parties hereunto set their hands and seals this

13th day of February, 2006.

UNIVERSITY OF _____ ASSISTANT COACH AGREEMENT

This Agreement is made by and between the University of _____ ("the University") and _____ ("the Coach").

In consideration of the mutual covenants and conditions contained herein, the University and the Coach agree as follows:

1. Employment—Subject to the conditions stated in the provisions of this agreement, the University hereby employs the Coach as an assistant coach of the men's varsity football team at the University, and the Coach hereby agrees to and does accept the terms and conditions for said employment outlined herein. The Coach shall perform such duties as may be assigned in connection with supervision and administration of the football program, and such other duties and responsibilities usual and customary to an assistant head football coaching position in an intercollegiate program, as may be assigned by the University. The Coach shall work under the immediate supervision of, and report directly to, the Head Football Coach of the University ("the Head Coach"), and shall confer with this supervisor on all matters requiring administrative and technical decisions.

2. Term—The term of this Agreement shall begin _____, and shall terminate on _____ subject to the conditions herein. This employment agreement in no way grants the Coach a claim to tenure in employment, or any years of employment attributable to tenure within the University.

3. Compensation—In consideration for services and continuous satisfactory performance of the conditions of this Agreement by the Coach, the University promises to pay the Coach:
 - 3.1. A salary at the annual rate of _____ effective _____, payable in equal installments at the end of each regular University pay period.

 - 3.2. Except as herein provided, the Coach shall be entitled to the same non-financial personnel benefits that are provided to the University's Exempt Faculty Non-tenured Contract employees, except for annual leave which is not a benefit provided under this agreement.

 - 3.3. The foregoing compensation shall be subject to the same payroll deductions (for example, state and federal taxes, F.I.C.A. withholding, and retirement plans) that apply to the University's Exempt Faculty Non-tenured Contract employees.

4. Coach's Duties—In consideration of the annual salary and other benefits which may become due and payable to the Coach under provisions of this Agreement, the Coach does promise and agree as follows:
- 4.1 Faithfully and conscientiously to perform the duties assigned by the Head Coach and the Director of Athletics of the University of _____ ("the Director of Athletics"), as specified in paragraph 1 above, and to maintain the high moral and ethical standards commonly expected of the Coach as a leading representative of the Department of Intercollegiate Athletics at the University.
 - 4.2 To devote such time and attention and energy to the duties of assistant football coach as are required to faithfully discharge the duties as set forth herein, and as are required for promotion of the University's Athletic program; and to avoid any business or professional activities or pursuits that will conflict with his performance of the duties under this Agreement, or will otherwise interfere with the University's interests.
 - 4.3 To recognize and comply with the laws, policies, rules, and regulations of the Department of Intercollegiate Athletics ("ICA"), the University of _____, the National Collegiate Athletic Association ("NCAA"), and the Atlantic Coast Conference ("ACC") as now constituted or as may be amended during the term hereof, including NCAA bylaws 11.2 attached. This shall include adhering to ICA policies and procedures in critical areas, to include but not limited to, recruiting, compliance, university and team related travel, attending coaches meetings, and completing appropriate compliance forms. The Coach shall be responsible, through education and monitoring, to ensure all employees and other persons affiliated with the football program for which he is administratively responsible comply with aforesaid policies, rules and regulations. The Coach shall be accountable for violations by any employee or other persons affiliated with the football program for which he is administratively responsible for supervising or controlling; provided, with reasonable foresight and knowledge he should have prevented the occurrence. The Coach shall immediately inform the Compliance Officer of any suspected violations and assist in the investigation and reporting thereof, if requested.
 - 4.4 To acquit himself at all times in a professional and sportsman-like manner. The Coach recognizes he is a highly-visible representative of the University, whose conduct, both on and off the field, affects the reputation of the institution, the viability of its athletic programs and contracts, and the well-being of its student-athletes. The Coach will avoid profane, discourteous, or insulting behavior towards student-athletes, referees, spectators, and members of the media.
 - 4.5 Except as may be authorized in advance by the University's Professional Sports Counseling Panel and thereafter reported to it, to avoid contact with any person known to be acting or have a history of acting as a sports agent, a "runner", or any other individual employed by or performing services for them. The Coach will

conscientiously observe and enforce the regulations governing amateurism and the relationship between sports agents and student-athletes at the University of

- 4.6 The Coach agrees that academic progress and achievement of the student-athletes under this supervision is of the highest importance. The Coach agrees to adhere to the University's standards and goals for the academic performance of its student-athletes in his recruitment, supervision, and coaching of players. The Coach agrees to follow diligently any directives from the Head Coach and the Director of Athletics (or Designee) concerning such matters.
- 4.7 The Coach agrees to conscientiously observe all University, NCAA, and ACC rules pertaining to outside income. The Coach shall request in writing and must receive the prior written annual approval of the President of the University before negotiating for or receiving any athletically-related income or benefits from the sources outside the University. These sources include, but are not limited from:
 - a. Annuities;
 - b. Sports Camps;
 - c. Housing Benefits (including preferential housing arrangements);
 - d. Country-club memberships;
 - e. Complimentary ticket sales;
 - f. Television and radio programs; and
 - g. Endorsement or consultation contracts;
 - h. Other promotions.

The Coach's request to the President shall include the amount of income from each contemplated outside source.

- 4.8 With regard to outside income, the Coach reserves the sole right to control the use of his image in any advertising of products or services. In connection therewith, the Coach is authorized to represent himself as an Assistant Football Coach of the University during the term of this agreement and to appear in clothing containing University logos, and/or other insignia, both on and off University premises.
- 4.9 The Coach shall submit a written report to the Director of Athletics describing any athletically-related income and benefits from sources outside the University by June 30th of each year. The form of this report shall be determined by the Director of Athletics. The Director of Athletics may require reasonable additional or verifying information.

5. Radio and Television

5.1. The University, through the Department of Intercollegiate Athletics, will exercise reasonable efforts to obtain radio and television appearances for the Coach. Any revenues generated by such appearances shall be the sole and exclusive property of the University. In any year the University requires the personal appearance of the Coach in connection with any radio or television agreement, the University guarantees the Coach a payment of

Payment for these services shall be made on

5.2. With regard to any radio or television show obtained by the University pursuant to Paragraph 5.1., the Coach agrees to make appearances during the football season for such television and radio shows as are reasonably required at such times and places as are mutually convenient.

6. Personal Appearances on Behalf of the University -- The Coach shall be available for media and other public or private appearances at such times and places as the University, through the Department of Intercollegiate Athletics, may reasonably require and determine to be beneficial to promoting the University and its Intercollegiate Athletic Program. The Coach shall comply in all material respects with such requests. For these services faithfully performed by the Coach during each fiscal year, the University will pay the Coach

Payment for these appearances shall be made on or about,

annually.

7. Fund Raising Activities -- The Coach shall be available for public and private fund raising and development activities at such times and places as the University, through the Department of Intercollegiate Athletics, may reasonably require and determine to be beneficial to the University and its Intercollegiate Athletic Program. The Coach shall comply in all material respects with such requests. Fund raising shall include, but is not limited to, activities to foster the continued growth of the _____ and _____ Gridiron Network, to cultivate potential donors, and to solicit major gifts. It is understood that fund raising may require the Coach to participate in events organized by contributors and sponsors of Intercollegiate Athletic programs. For fund raising services faithfully performed by the Coach during each fiscal year, the University will pay the Coach

Payment for these appearances shall be made on or about _____ annually.

8. Services, Equipment and Apparel Endorsements

8.1 The University reserves the exclusive right to contract with commercial firms regarding the procurement or endorsement of services, equipment, or apparel that may be worn or used by student-athletes or Athletic Department personnel in practices and public performances. Any revenue generated from such agreements shall be the sole and exclusive property of the University.

- 8.2. Except as expressly provided in paragraph 5 ("Radio and Television") and paragraph 8.1. ("Services, Equipment and Apparel Endorsements"), if the Coach desires to engage in any endorsement, consulting, or broadcasting activities for a fee, the Coach shall first notify the Director of Athletics in writing. If the Director of Athletics does not prohibit, in writing and on a reasonable basis, such activity within 7 days of notice by the Coach, the Coach shall be entitled to engage in such activity.

9. Football Camps

- 9.1. The Coach shall not endorse, sponsor, approve or operate any sports camp on University premises without the specific written approval of the University.

10. Additional Financial Matters

- 10.1. The Coach shall conduct such travel as is necessary to carry out his duties as assistant football coach, and shall be entitled to reimbursement for travel expenses pursuant to the University's rules and rates therefor.
- 10.2. The University, through the Department of Intercollegiate Athletics, will provide the Coach with a car allowance in an annual amount of ~ payable in equal installments at the end of each regular University pay period, during the term of this agreement to lease a late-model automobile for his personal use. Anything to the contrary notwithstanding in this Paragraph 10.2, the Coach may use any car allowance received from the University as he sees fit.
- 10.3. The Coach shall receive use of six (6) tickets for regular season home football games and six (6) tickets for regular season away football games. The Coach will not offer these tickets for use by a person working (or who has worked) as a sports agent or a person employed by or performing services for a sports agent without the prior written approval of the Director of Athletics.
- 10.4. In addition to the tickets listed in 10.3, the Coach shall be eligible for the following complimentary tickets during the term of this contract:
- (a) Regular Season Tickets:
Two (2) regular season tickets for home men's basketball games.
Two (2) regular season tickets for home women's basketball games.
- (b) Post-Season Tickets – For any post-season competitions in which the Coach participates, he/she shall be eligible to receive six (6) complimentary tickets for his sport, subject to availability. The Coach may request the opportunity to purchase tickets at face value to post season competitions for other varsity teams, subject to availability.

As may be required by federal or state tax provisions, it shall be the responsibility of the Coach to report the value of benefits received under this paragraph and to pay any tax arising therefrom. Subject to NCAA rules, the use of these tickets is left to the Coach's discretion; however, the sale or exchange of these tickets can raise issues under State Ethics laws, including but not limited to, soliciting gifts or creating a conflict of interest. It is the responsibility of the Coach to consult with the University's legal office and/or the State Ethics Commission before selling or exchanging his/her tickets for any tangible benefit.

(c) Pass List - During the term of this contract, the Coach will be eligible to utilize the recruiting pass list for complimentary admissions to designated varsity competitions, including but not limited to football, women's basketball and men's basketball. The number of pass list admissions available to the Coach will be subject to availability and limited for use by high school or junior college coaches, and high school or junior college prospective student-athletes and their family members. Family, friends, prospect donors, or business associates are not eligible for admission on the recruiting pass list. Requests for inclusion on a separate pass list for prospective donors and business associates will be reviewed and managed on a case-by-case basis by an administrator assigned to that sport. All such requests should be submitted no later than two hours prior to game time but preferably earlier.

10.5. The University shall pay the Coach a bonus in each year that the football team is selected to compete in a Post-Season Bowl game. Said bonus will be as follows:

- a. The coach will be paid a bonus of _____ if the football team finishes the regular season in sole possession of first place in the ACC football standings.
- b. The coach will be paid a bonus of _____ if the football team finishes the regular season in a two-way tie for first place in the ACC football standings.
- c. The coach will be paid a bonus of _____ if the football team finishes the regular season in a three-way tie for first place in the ACC football standings.
- d. The coach will be paid a bonus of _____ if the football team finishes the regular season in a four-way tie for first place in the ACC football standings.
- e. The coach will be paid a bonus of _____ if the football team finishes the regular season in sole possession of second place in the ACC football standings.

- f. The coach will be paid a bonus of _____ if the football team finishes the regular season in a two-way tie for second place in the ACC football standings.
- g. The coach will be paid a bonus of _____ if the football team finishes the regular season in a three-way tie for second place in the ACC football standings.
- h. The coach will be paid a bonus of _____ if the football team finishes the regular season in a four-way tie for second place in the ACC football standings.
- i. The coach will be paid a bonus of _____ if the football team finishes the regular season in sole possession of third place in the ACC football standings.
- j. The coach will be paid a bonus of _____ if the football team finishes the regular season in a two-way tie for third place in the ACC football standings.
- k. The coach will be paid a bonus of _____ if the football team finishes the regular season in a three-way tie for third place in the ACC football standings.
- l. The coach will be paid a bonus of _____ if the football team finishes the regular season in a four-way tie for third place in the ACC football standings.
- m. The coach will be paid a bonus _____ if the football team finishes the regular season in sole possession of fourth place in the ACC football standings or tied for fourth place in the ACC football standings.
- n. The coach will be paid a bonus of _____ if the football team finishes the regular season in a two-way tie for fourth place in the ACC football standings.
- o. The coach will be paid a bonus of _____ if the football team finishes the regular season in a three-way tie for fourth place in the ACC football standings.
- p. The coach will be paid a bonus of _____ if the football team finishes the regular season in a four-way tie for fourth place in the ACC football standings.

- q. The coach will be paid a bonus of _____ if the football team finishes the regular season in sole possession of fifth place in the ACC football standings.
- r. The coach will be paid a bonus of _____ if the football team finishes the regular season in a two-way tie for fifth place in the ACC football standings.
- s. The coach will be paid a bonus of _____ if the football team finishes the regular season in a three-way tie for fifth place in the ACC football standings.
- t. The coach will be paid a bonus of _____ if the football team finishes the regular season in a four-way tie for fifth place in the ACC football standings.
- u. The coach will be paid a bonus of _____ if the football team finishes the regular season in sole possession of sixth place in the ACC football standings.
- v. The coach will be paid a bonus of _____ if the football team finishes the regular season in a two-way tie for sixth place in the ACC football standings.
- w. The coach will be paid a bonus of _____ if the football team finishes the regular season in a three-way tie for sixth place in the ACC football standings.
- x. The coach will be paid a bonus of _____ if the football team finishes the regular season in a four-way tie for sixth place in the ACC football standings.

The University's obligation under this paragraph will be paid to the coach on March 1 of each year during the life of this agreement.

- 10.6 At the end of each academic year, the Coach will be eligible to receive a bonus depending on the graduation rates of student-athletes in the men's football program.
 - a. The University shall pay the Coach a bonus of _____ provided that the graduation rate of the men's football program, as reported by the NCAA for the most recent reporting period, is 86% or higher.
 - b. The University shall pay the Coach a bonus of _____ if the reported graduation rate of the men's football program, as reported by the NCAA for the most recent reporting period, is less than 86%, but

greater than or equal to 76%.

- c. The University shall pay the Coach a bonus of _____ if the reported graduation rate of the men's football program, as reported by the NCAA for the most recent reporting period, is less than 76%, but greater than or equal to 65%.

Payment will be made on _____ following the date the NCAA report is available.

- 10.7. The University shall pay the Coach a bonus of _____ provided that with regard to all football student-athletes, the coach or any other member of the football staff:

- a. There are no violations of the University's Code of Student Conduct or its Code of Academic Integrity; and,
- b. There are no arrests, indictments, or convictions for any criminal or suspected criminal conduct; and,
- c. There has occurred no neglect or willful conduct which the Director of Athletics concludes violates the NCAA Constitution or the NCAA Operating Bylaws, especially this pertaining to ethical conduct.

Payment, if earned, will be made on _____

11. Termination

- 11.1. Notwithstanding paragraph 2, this Agreement shall terminate upon the occurrence of any of the following events, and except for the payment of any salary or other compensation, or installments thereof, which have accrued for services performed as of the date of termination, the rights and obligations of the parties shall cease:

- a. In the event of the Coach's death or permanent disability. A disability shall be presumed permanent for purposes of this paragraph if the Coach is unable to perform his normal and customary duties for a continuous period in excess of 180 days.
- b. In the event of the Coach's resignation from University employment or upon his acceptance of other employment (subject to paragraph 12 herein).
- c. In the event of cause as determined by the Director of Athletics; provided, however, the Coach will first receive written notice and be accorded an opportunity to be heard in a meeting with the Director of Athletics. The decision

of the Director of Athletics shall be final.

Cause shall include material misconduct, moral turpitude or a pattern of unprofessional-like behavior, insubordination, refusal, neglect, or failure to render services or otherwise fulfill completely the duties and obligations established in this agreement. Cause includes neglect or willful conduct which the Director of Athletics concludes violates the NCAA Constitution or the NCAA Operating Bylaws, especially those pertaining to Ethical Conduct. If the Coach is found in violation of NCAA regulations, he shall be subject to disciplinary or corrective action as set forth in the provisions of the NCAA enforcement procedures, including suspension without pay or termination of employment for significant or repetitive violations. The Director of Athletics may suspend (with or without pay) or reassign the coach pending an investigation, decision, or other matter relating to the existence of cause for termination.

11.2. In addition to the reasons for termination set forth in the preceding paragraph, the performance of work under this Agreement may be terminated by the University whenever the University determined that termination is in its best interests. Any such termination shall be effected by delivery to the Coach of a written Notice of Termination specifying the date upon which such termination becomes effective. In the event of a termination pursuant to this paragraph, the Coach shall be entitled to continue to receive for the remaining portion of the term of this agreement as if he were still employed:

- a. The salary as provided in paragraph 3.1;
- b. The Radio and Television payment provided in Paragraph 5.1; and
- c. The automobile payment provided in 10.2.

However, the Coach shall have an affirmative duty to mitigate amounts paid by the University by actively seeking employment in his profession during the remaining portion of the term. In the event the Coach secures other employment, whether compensated or uncompensated, during the remaining portion of the term of this Agreement, he is obligated to notify the University in writing of the terms of that employment before the first day of said employment, including salary and any additional compensation. The University has the right to reduce continuing payment obligations to the Coach to the extent that he earns other salary and additional compensation. In the event of uncompensated employment, or employment below the fair market value of such employment (hereinafter collectively referred to as "Volunteer Employment"), the University has the right to reduce the continuing payment obligations to the Coach in the amount of the fair market value of the Volunteer Employment, plus the amount of any other additional non-salary compensation received. Fair market value shall be the salary received by similarly situated coaches employed by the entity receiving the Coach's Volunteer

Employment services. Failure to notify the University as required under this paragraph shall be considered a material breach of this Agreement, and shall relieve this University from all future obligations to make payments to the Coach under this Agreement.

12. Actions other than Termination

- 12.1 Notwithstanding anything in Paragraph 11.1.c, above, in the event the Director of Athletics determines the Coach to have engaged in material misconduct, moral turpitude or a pattern of unprofessional-like behavior, insubordination, refusal, neglect, or failure to render services or otherwise fulfill completely the duties and obligations established in this agreement, it shall lie in the discretion of the Director of Athletics to take action other than termination; provided, however, the Coach will first receive written notice and be accorded an opportunity to be heard in a meeting with the Director of Athletics. The decision of the Director of Athletics shall be final. Actions the Director of Athletics may take include, but are not limited to, a written reprimand, a suspension (with or without pay), a forfeiture of future bonuses or benefits; loss of a planned salary increment or merit raise, probation, or permanent reassignment.
- 12.2 The Director of Athletics may suspend (with or without pay) or reassign the Coach pending an investigation, decision, or other matter relating to the existence of cause for action under this paragraph.
- 12.3 In the event that the Head Football Coach accepts other employment or otherwise voluntarily terminates his employment agreement with the University, then the Director of Athletics or designee may modify the duties, responsibilities, and/or reporting relationship of the Assistant Coach. Such reassignment to another similar or comparable position shall be made with consideration of the employee's knowledge, skills, abilities, and salary. The Director of Athletics or designee shall provide the Coach with two weeks written notice of reassignment prior to the effective date of the action. Failure to report to the reassigned position shall be considered an immediate voluntary resignation.

13. Other Employment

- 13.1 The Coach hereby represents to have special, exceptional, and unique knowledge, skill, and ability as a football coach which, in addition to future acquisitions of coaching experience at the University, as well as the University's special need for continuity in its football program, will render the Coach's services unique. The Coach recognizes that the loss of Coach's services to the University, without University approval and release, prior to the expiration of the term if this contract or any renewal thereof, would cause an inherent loss to the University which cannot be estimated with certainty, or fairly or adequately compensated by money

damages.

- 13.2 The Coach therefore agrees and hereby specifically promises, not to accept employment, under any circumstances, as a football coach at any institution of higher education which is a member of the National Collegiate Athletic Association, or for any football team participating in any professional league or conference prior to the expiration date of this contract or any extension thereof, without first obtaining a release of this contract, or a negotiated settlement thereof in writing accepted by the Coach and the Director of Athletics, which settlement will not be unreasonably withheld.
14. Relationship Between the Parties--The relationship between the Coach and the University shall be determined solely by the terms and conditions of this contract.
15. Limitation of Remedies--The parties agree that neither party shall be liable for any collateral or consequential damages of any kind, including damages for lost collateral, business opportunities, or compensation arrangements set forth herein, or for costs and attorneys fees in the event of a breach hereunder.
16. Assignment--Neither party may assign, transfer, alienate, or encumber any of its rights or obligations hereunder without the express written consent of the other party.
17. Governing Law--This Agreement shall be governed by and construed under the laws of the Sovereign State of
18. Severability-- If any provision of this Agreement shall be determined to be void, invalid, unenforceable, or illegal for any reason, it shall be ineffective only to the extent of such prohibition and the validity and enforceability of all the remaining provisions shall not be affected thereby.
19. Modifications--This Agreement constitutes the entire understanding between the University and the Coach and may not be altered except by a written amendment duly executed by both parties.
20. Confidentiality--Except as required by law and the NCAA or ACC rules, the terms of this contract, except for the term of the contract and the annual salary, shall not be disclosed to any outside party without the consent of both parties hereto.

IN WITNESS WHEREOF, the Coach and the authorized representative of
the University have executed this Agreement on this _____ day of _____,

University of

Outside Income Agreement (Bylaw 11.2.2)

NCAA Bylaw 11.2.2 - Athletically Related Income:

This form is to be used by athletic department staff members and full-time coaches (head or assistant) as a means of reporting annual athletically related income and benefits received from sources outside the institution which are not already contained in an employment contract.

TO COMPLETE: Please indicate in the space below the actual dollar amount received for all athletically related income for the term. If you did not receive any athletically related income, please check the box, sign the form and return it to the Office of Athletic Compliance.

Check here if no outside income was earned for the previous academic year.

Source of Athletically Related Income	Actual dollar amount
Use of a Vehicle	_____
Sponsoring Engagements	_____
Sports Camps or Clinics	_____
Complimentary Ticket Sales	_____
Endorsement or Consultation Contracts (circle one)	_____
A. Athletic Shoes	_____
B. Apparel	_____
C. Equipment	_____
Television Appearances or Commercials	_____
Radio Appearances or Commercials	_____
Income from corporations in exchange for charitable work	_____
Annuities	_____
Salary Supplement (From outside the department)	_____
Housing Benefits	_____
Country-Club Membership (From outside the department)	_____
Other (please specify below)	_____

I hereby certify that the above information is true and accurate and conforms to all NCAA, conference and institutional regulations governing outside income. I will notify the chief executive officer of any new information or sources of income that may occur in the future.

Athletic Staff Member/ Coach - PRINT NAME

Signature

Date

CHIEF EXECUTIVE OFFICER APPROVAL

EDUCATIONAL ATHLETIC EMPLOYMENT AND CIVIL RIGHTS: EXAMINING DISCRIMINATION BASED ON DISABILITY, AGE, AND RACE

DIANE HECKMAN*

- I. INTRODUCTION
- II. DISABILITY DISCRIMINATION
 - A. *Individuals with Disabilities Education Act (IDEA)*
 - B. *Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act)*
 - C. *Americans with Disabilities Act of 1990 (ADA)*
 - i. Title III: Public Accommodation
 - 1. Generally
 - 2. *PGA Tour, Inc. v. Martin*
 - ii. Title II: Public Entities
 - iii. Title I: Employment
 - iv. Current Considerations
 - D. *Athletic Employment*
 - i. Physical Education Teachers or Professors
 - ii. Coaches
 - iii. Officials

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III. AGE DISCRIMINATION

A. *Age Discrimination in Employment Act of 1964 (ADEA)*B. *Intercollegiate Athletic Departments*

- i. Coaches or Athletic Directors
- ii. Other Athletic Department Employees

C. *Interscholastic Athletic Departments*

IV. RACE DISCRIMINATION

A. *Legal Predicates*

- i. Fourteenth Amendment
- ii. Title VII of the Civil Rights Act of 1964 (Title VII)
- iii. Title VI of the Civil Rights Act of 1964 (Title VI)
- iv. Section 1981 Action

B. *Coaches*

- i. Hiring-Related Cases
- ii. Termination Cases

V. CONCLUSION

APPENDIX: CHART – FEDERAL CIVIL RIGHTS LAWS INVOLVING ATHLETIC DEPARTMENT EMPLOYMENT

I. INTRODUCTION

Athletic departments have always been unique fiefdoms within educational institutions. This concerns not only the physical aspects, as they are usually situated in a separate domain apart from the main area that houses the typical classrooms, are the only departments that historically have operated overwhelmingly segregated programs for male and female student-athletes, and were given a legal patina, which sanctioned this status quo.¹ The 1960s

1. See Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2000) [hereinafter Title IX] (prohibiting discrimination on the basis of sex in educational programs and activities that receive federal funds); see also the implementing regulations, 34 C.F.R. § 106.34 (2006) (recently revised regulation; however, its inception in 1975 broadly allowed for single-sex physical education classes) (there has been no case law since Title IX's passage in 1972 challenging this regulation's application to physical education classes); 34 C.F.R. § 106.41(b) (2006) (allowing

and early 1970s ushered in a cornucopia of federal statutes aimed at eradicating discrimination based on an individual's civil rights due to the person's race,² religion,³ national origin,⁴ sex,⁵ disability, and age. This includes the following statutes highlighted in this exposition: Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991⁶ (Title VII) (race, sex, national origin, and religion); the Individuals with Disabilities in Education Act⁷ (IDEA) (disability); Rehabilitation Act of 1973⁸

for separate interscholastic, intercollegiate, club, or intramural teams where the sport is a contact sport or competitive skill is triggered); 34 C.F.R. § 106.41(c) (2006) (directing equal opportunity when separate athletic programs are provided for males and females). There has been ample case law contesting 34 C.F.R. § 106.41. See Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1 (1992) [hereinafter Heckman, *Women & Athletics*]; Diane Heckman, *On the Eve of Title IX's Twenty-Fifth Anniversary: Sex Discrimination in the Gym and Classroom*, 21 NOVA L. REV. 545 (1997) [hereinafter Heckman, *Sex Discrimination in the Gym*]; Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletic Programs*, 7 SETON HALL J. SPORT L. 391 (1997) [hereinafter Heckman, *Scoreboard*]; Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 551 (2003) [hereinafter Heckman, *The Glass Sneaker*].

2. See *infra* note 6.

3. *Id.* For claims based on religion, see 42 U.S.C. § 2000e-(2)(e) (2000) (businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion). See also U.S. CONST. amend. I; Nedra Rhone, *Ruling Says LI Teacher Bias Victim; EEOC: Coach Denied Posts Because He Isn't Italian*, NEWSDAY (N.Y.), Jan. 25, 2002, at A4 (EEOC ruled a Jewish physical education teacher was denied a high school coaching position at a Long Island public high school due to his religion). For cases involving a religion basis, see generally Diane Heckman, *Educational Athletics and Freedom of Speech*, 177 EDUC. L. REP. 15, 15 n.2 (2003) [hereinafter Heckman, *Freedom of Speech*] (listing cases involving freedom of religion and academic athletic employment) (the commentary provides an exposition of the First Amendment's freedom of speech protection involving athletic employees working at educational institutions); Diane Heckman, *One Nation Under God: Freedom of Religion in Schools and Extracurricular Athletic Events in the Opening Years of the New Millennium*, 28 WHITTIER L. REV. 537 (2006) [hereinafter Heckman, *One Nation Under God*].

4. For national origin claims, see 42 U.S.C. § 2000e-2(a) (2000); 29 C.F.R. § 1606.8 (2006) (EEOC Guidelines on Discrimination Because of National Origin). While there is no case law concerning educational athletic department employees, see generally *Dowling v. United States*, 476 F. Supp. 1018 (D. Mass. 1979) (finding no Title VII violation in this case commenced by discharged Canadian professional hockey referee who sought damages from the U.S. Immigration and Naturalization Service, U.S. Department of Labor, the NHL, and the World Hockey Association).

5. See 20 U.S.C. §§ 1681-1688; 34 C.F.R. § 106.34; 34 C.F.R. § 106.41(b)-(c); Heckman, *Women & Athletics*, *supra* note 1; Heckman, *Sex Discrimination in the Gym*, *supra* note 1; Heckman, *Scoreboard*, *supra* note 1; Heckman, *The Glass Sneaker*, *supra* note 1.

6. The most significant civil rights statute is Title VII, 42 U.S.C. § 2000e (2000), which governs the elimination of discrimination in employment based on an individual's sex, race, national origin, and religion.

7. 20 U.S.C. § 1400 (2000).

8. 29 U.S.C. § 794 (2000).

(Rehabilitation Act) (disability); Americans with Disabilities Act of 1990⁹ (ADA) (disability); the Age Discrimination in Employment Act of 1967¹⁰ (ADEA) (age); and Title VI of the Civil Rights Act of 1964¹¹ (Title VI) (race). All of these federal statutes would potentially target educational institutions.¹²

This survey article profiles athletic employment at educational institutions and its interaction with federal statutory civil rights laws prohibiting discrimination based on disability, age, and race.¹³ The exposition highlights the significant elements of the applicable statutory laws and excavates the case law rendered by the judiciary within the last forty years, with an emphasis on recent decisions. While there has been an abundance of cases challenging the elimination of societal and institutional sex discrimination involving athletic endeavors,¹⁴ there has been minimal case law addressing the other areas of discrimination concerning athletic directors, coaches, physical education teachers, officials, and other athletic department support staff. Nonetheless, educational institutions and athletic departments must be cognizant of the panoply of federal statutes protecting individual citizens from discrimination by others, which may include other individuals, governmental or public entities, or private entities. Each statute has its own jurisdictional requisites, which must be reviewed.¹⁵ A review should also be made to ascertain whether there is any comparable state legislation.¹⁶

The major issue in the formation of our country was determining the power of the central federal government versus the sovereignty of the individual states. The concept of federalism, recognizing this dual distribution

9. 42 U.S.C. §§ 12101-12213 (2000).

10. 29 U.S.C. §§ 621-634 (2000).

11. 42 U.S.C. § 2000a (2000).

12. See *Weaver v. Ohio State University*, No. C2-96-1199, 1997 WL 1159680 (S.D. Ohio June 4, 1997), where the Ohio district court stated:

It is noteworthy that two of the pre-existing federal laws which prohibited discrimination in employment were amended by § 906 of Pub. L. 92-318, the same statute which contained the operative and enforcement provisions of Title IX (§§ 1681 and 1682). These amendments to the Equal Employment Opportunities Act, Title VII . . . and the Equal Pay Act, . . . brought employees of educational institutions engaged in educational activities within their coverage and prohibited discrimination on the basis of sex.

Id. at *6.

13. This article is a companion piece to one investigating sex discrimination. See Diane Heckman, *No Girls Allowed: Excavating Forty Years of Sex Discrimination Involving Educational Athletic Employment*, 18 SETON HALL J. SPORT L. (forthcoming 2008) [hereinafter Heckman, *Forty Years of Sex Discrimination*].

14. *Id.*

15. See *id.* at 4-7.

16. *Id.* at 3 n.8.

of power, is present in the United States Constitution in a number of provisions, including the Eleventh Amendment.¹⁷ The biggest land mine for all the federal civil rights statutes is whether the express or implied statutory ability of a citizen to commence a lawsuit in a federal court against a state entity runs afoul of the Eleventh Amendment. Thus, the most significant inquiry today becomes the operation of the Eleventh Amendment, which would preclude citizens of a particular state from being able to sue a state or an “arm of the state”¹⁸ in a federal court for monetary damages based on the governing federal statutes. For the first time in sixty years, during 1996, the Supreme Court in *United States v. Lopez*¹⁹ ruled that a congressional statute aimed at protecting the nation’s youth attending schools, specifically by regulating the possession of firearms near schools, was unconstitutional as not having met the interstate commerce connection upon which the statute was based.²⁰ This followed with the Rehnquist Court emasculating a number of other federal statutes by determining that they violated the Eleventh Amendment by trampling on the sovereign immunity of states, starting with *Seminole Tribe of Florida v. Florida*.²¹

17. U.S. CONST. amend. XI, which states, “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” This amendment has been held applicable to citizens attempting to sue the state in which they reside. See *Williams v. Dist. Bd. of Trs. of Edison*, 421 F.3d 1190, 1192 (11th Cir. 2005) (stating, “The Eleventh Amendment bars federal courts from entertaining suits against states Although the text of the Eleventh Amendment does not appear to bar federal suits against a state by its own citizens, the Supreme Court long ago held that the Amendment bars these suits.”) (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)); Diane Heckman, *The Impact of the Eleventh Amendment on the Civil Rights of Disabled Educational Employees, Students and Student-Athletes*, EDUC. L. REP. (forthcoming 2008) (manuscript at 2, on file with author) [hereinafter Heckman, *The Impact of the Eleventh Amendment*].

18. Unlike the Fourteenth Amendment, which applies to state entities and private entities engaged in state action, the Eleventh Amendment pertains to a narrower subset containing states and “arms of the state.” U.S. CONST. amend. XIV. See *Williams*, 421 F.3d at 1192, wherein the Eleventh Circuit identified four elements to determine if an arm of the state is involved, stating: “(1) how the state defines the entity; (2) what degree of control the state maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgment against the entity.” In *Williams*, the court determined that the defendant-Florida community college was an arm of the state. *Id.*; see also Heckman, *The Impact of the Eleventh Amendment*, *supra* note 17, (manuscript at 8). See generally Diane Heckman, *Fourteenth Amendment Procedural Due Process Governing Interscholastic Athletics*, 5 VA. SPORTS & ENT. L.J. 1, 4-5 (2005) (addressing whether the defendant is a proper party defendant for Fourteenth Amendment purposes).

19. 514 U.S. 549 (1995) (finding the underlying statute, the Gun Free Schools Act of 1990, 18 U.S.C. § 922(a) (1990), exceeded the Congressional powers contained in the Commerce Clause of Article I of the U.S. Constitution. U.S. CONST. art. 1, § 8 cl. 3 allows Congress “[t]o regulate [c]ommerces with foreign [n]ations, and among the several [s]tates, and with the Indian Tribes”).

20. *Id.* at 567.

21. 517 U.S. 44 (1996) (Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1)(C) (1996)); see *infra* text accompanying notes 79, 109-14, 124-29 (ADA related); text *infra* text accompanying notes

Oversight of the civil rights statutes can be triggered by the entities' receipt of federal funds, such as with Title VI, Title IX, and the Rehabilitation Act, or due to some specific activity that the defendant engaged in, such as with Title VII and the ADEA, which apply to the employees of certain employers provided the business has an interstate commerce connection; the IDEA, which covers certain providers of specific educational services for the disabled; and the ADA, which can apply to a multitude of entities. The Civil Rights Remedies Equalization Act (Equalization Act)²² applies to a number of civil rights laws that require receipt of federal funds, including the Rehabilitation Act and Title VI. It states:

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973 . . . , [T]itle IX of the Education Amendments of 1972 . . . , title VI of the Civil Rights Act of 1964 . . . , or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.²³

Since the nation's educational system is permeated by public educational institutions on the K-12 and post-secondary levels, the Eleventh Amendment can operate as a fatal knockout punch for those employed there, including the athletic department personnel, seeking remediation for violation of their federal civil rights.

Part II introduces legislation governing the prohibition of discrimination based on disability. Part III showcases the interaction between athletic employment and age discrimination. Part IV transmits the statutory law and case law barring discrimination based on an individual's race. The accompanying appendix profiles the salient aspects of the federal civil rights statutes.

229-36 (ADEA related).

22. 42 U.S.C. § 2000d-7 (2000) (eff. Oct. 21, 1986).

23. *Id.* (Equalization Act).

II. DISABILITY DISCRIMINATION

Whether the increase in the number of disabled athletes nationally²⁴ coincides with the increase in the number of disabled physical education teachers, coaches, officials, and other athletic department personnel remains an open question due to confidentiality concerns.²⁵ It is still unusual to have a physically disabled physical education teacher or coach on the K-12 or college level unless that individual subsequently becomes disabled after being employed.²⁶ Presently, there are three federal laws that may have an impact on preventing discrimination involving disabled employees of athletic departments in educational institutions: the Rehabilitation Act, the IDEA, and the ADA.²⁷ For these statutes:

first, examine the jurisdictional requirements, including what constitutes 'disabled' under the particular statute involved and what is the needed basis to trigger the statute's application over a particular [school or] athletic association; second, determine what procedural requirements are imposed, including whether an administrative complaint must first be filed with an executive agency before commencing a federal lawsuit; and third, examine what constitutes a *prima facie* case.²⁸

While all three federal statutes have references to disabled employees, in general, the ADA is the primary statute for positing disability discrimination in employment. The three statutes are individually reviewed based on their chronological enactment as law.

A. Individuals with Disabilities Education Act (IDEA)

The IDEA,²⁹ a synthesis of two earlier statutes (one originally enacted in

24. For example, Aimee Mullins became a member of Georgetown University's track team despite the use of two prosthetic limbs. *See generally* Kate Macmillan, *Wonder Woman: Prosthetic Legs Won't Slow Aimee Mullins Down*, SI.COM, June 22, 2007, <http://sportsillustrated.cnn.com/2007/sioncampus/06/20/aimee.mullins/index.html>.

25. *See* Health Insurance Portability and Accountability Act (HIPPA), 42 U.S.C. § 1320d-2 (2000) (qualified privacy afforded individuals due to medical services provided).

26. *See* Viv Bernstein, *Still Games to Coach, Players to Teach, Miles to Go*, N.Y. TIMES, Mar. 2, 2006, at D6 (successful women's basketball coach at North Carolina State University who is battling cancer).

27. *See* Diane Heckman, *Athletic Associations and Disabled Student-Athletes in the 1990's*, 143 EDUC. L. REP. 1 (2000) [hereinafter Heckman, *Athletic Associations*] (for a detailed exposition of the three statutes and resultant case law).

28. *Id.* at 3.

29. 20 U.S.C. §§ 1400-1500 (2000); *see also* 34 C.F.R. pt. 300 & pt. 301 (2006) (new

1970),³⁰ is aimed at supporting special education to allow disabled students the right to receive a free appropriate public education³¹ (FAPE) “[t]hat emphasizes special education and related services designed to meet their unique needs and prepare them for *employment* and independent living,” among other goals.³² The IDEA became effective on October 30, 1990.³³ On June 4, 1997, President William J. Clinton signed the IDEA Amendments of 1997 into law. During 2004, further revisions were made during the George W. Bush administration to fund and extend the IDEA legislation.³⁴ The offering of physical education instruction is included, and the 1997 amendments now refer to extracurricular activities, which include opportunities to participate in interscholastic athletics.³⁵ While this statute is primarily directed toward students, embedded within the IDEA is one provision directed toward employment. Section 1405 of the statute deals with the “[e]mployment of individuals with disabilities” and states, “The Secretary shall ensure that each recipient of assistance under this chapter makes positive efforts to employ and advance in employment *qualified* individuals with

implementing regulations).

30. See Education of the Handicapped Act, Pub. L. 93-380, 88 Stat. 579 (codified as amended at 20 U.S.C. §§ 1400-1485 (1988)) (enacted in 1970; followed by amendments in 1974); Education for All Handicapped Children Act, P.L. 94-142, 20 U.S.C. § 1401 (enacted on Nov. 29, 1975); Heckman, *Athletic Associations*, *supra* note 27, at 9.

31. *Free appropriate public education* (FAPE) is defined to mean

[s]pecial education and related services that – (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(8); see also 34 C.F.R. § 300.121 (2006) (“Each State must have on file with the Secretary information that shows that, subject to 34 C.F.R. § 300.122, the State has in effect a policy that ensures that all children with disabilities aged 3 through 21 residing in the State have the right to FAPE, including children with disabilities who have been suspended or expelled from school.”).

32. 20 U.S.C. § 1400(d) (2000) (emphasis added).

33. *Id.* § 1403(c).

34. Pub. L. 108-446, 118 Stat. 2803 (Dec. 3, 2004) (known as the “Individuals with Disabilities Education Improvement Act of 2004”); see also Susan G. Clark, *Judicial Review and the Admission of “Additional Evidence” Under the IDEIA: An Unusual Mixture of Discretion and Deference*, 201 EDUC. L. REP. 823 (2005); Ronald D. Wenkart, *An Essay. Unfunded Federal Mandates: The No Child Left Behind Act and the Individuals with Disabilities Education Act*, 202 EDUC. L. REP. 461, 462 (2005) (The “IDEA was envisioned as a federal-state partnership in which Congress would provide 40 percent of the cost and the states would pay 60 percent. Twice Congress has chastised itself for its failure to keep its promise, once in a 1994 statute and once in a 1999 resolution, but it has never increased funding to the 40 percent level.”).

35. 34 C.F.R. § 300.306 (2006) (emphasis added).

disabilities in programs assisted under this chapter.”³⁶ However, there is no case law under the IDEA investigation claims by athletic department employees. Parenthetically, there is a provision pertaining to the IDEA expressly abrogating Eleventh Amendment immunity,³⁷ albeit the Supreme Court has not addressed whether this provision, along with a proper Fourteenth Amendment nexus, would withstand such an attack by K-12 public schools.³⁸

B. Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act)

The Rehabilitation Act was enacted in 1973.³⁹ This statute prohibits discrimination based upon disability and is applicable to educational programs and activities if they are recipients of federal funds. It directs:

No *otherwise qualified* individual with a disability in the United States, as defined in section 705(20)⁴⁰ of this title, shall, *solely by reason of her or his disability*, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under *any program or activity* receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.⁴¹

As one court opined, “The purpose of the Rehabilitation Act ‘is to prevent old-fashioned and unfounded prejudices against disabled persons from interfering with those individuals’ rights to enjoy the same privileges and duties afforded to all United States citizens.’”⁴²

In order to establish a *prima facie* employment case under the Rehabilitation Act, an individual must prove the following elements: (1) the activity or program received federal funding; (2) the plaintiff is “disabled” within the meaning of the statute; (3) the defendant discriminated against the

36. 20 U.S.C. § 1405 (Employment of Individuals with Disabilities) (emphasis added).

37. *Id.* § 1403 (2000).

38. See Heckman, *The Impact of the Eleventh Amendment*, *supra* note 17 (manuscript at 11). The IDEA is not applicable to post-secondary education as would be offered by colleges and universities.

39. 29 U.S.C. § 794 (2000).

40. *Id.* § 705(20) (2000).

41. *Id.* § 794(a) (promulgation of rules and regulations) (emphasis added). The terms “program” and “activity” are defined at 29 U.S.C. § 794(b).

42. *Doe v. Eagle-Union Cmty. Sch. Corp.*, 101 F. Supp. 2d 707, 713 (S.D. Ind. 2000) (quoting *Morrison v. Comm’r of Special Serv.*, No. CV 94-5796 RJD, 1996 WL 684426, at *3 (E.D.N.Y. Nov. 18, 1996)).

plaintiff in an employment decision based on the individual's disability; and (4) the plaintiff is "otherwise qualified" to be employed or receive employment benefits, or that the individual may be "otherwise qualified" via "reasonable accommodations."⁴³

First, it is imperative to establish that the defendant is a *recipient of federal funds*.⁴⁴ This statute is not restricted to just "educational" programs and activities. The Rehabilitation Act can cover kindergarten through college (K–graduate school) in both private and public schools, provided that the educational institution program or activity is a recipient of federal funds,⁴⁵ which is examined on an individual basis.

Second, an individual must establish that he or she meets the statutory definition of being disabled. The term "disabled" is now used in place of "handicapped," although not all statutory language has been updated. The Rehabilitation Act defines a "handicapped" individual,⁴⁶ which is the same definition utilized by the ADA.⁴⁷ The word "disability," as applicable to employees, is defined to mean "any individual who—(i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and (ii) can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to subchapter I, III, or VI of this chapter."⁴⁸ This element requires satisfaction of three prongs. Initially, a plaintiff must establish that he or she has a physical or mental impairment. The statute expressly provides that certain conditions, such as alcoholism, are not covered when employment is involved.⁴⁹ Additionally, this law allows for the exclusion of employment of

43 See Heckman, *Athletic Associations*, *supra* note 27, at 8 (citations of underlying cases omitted) (revising the factors from the student or student-athlete viewpoint to the employee viewpoint).

44. 29 U.S.C. § 794(a) (2000).

45. See Civil Rights Restoration Act of 1987 (1988 amendments), 29 U.S.C. § 794(a) (utilizing a broad application and applying to the Rehabilitation Act).

46. The regulation states: "(1) *Handicapped persons* means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 34 C.F.R. § 104.3(j)(i) (2006) (emphasis added).

47. See *infra* text accompanying note 69.

48. 29 U.S.C. § 705(20)(A).

49. See 29 U.S.C. § 705(20)(C)(v), which states,

For purposes of sections 793 and 794 of this title as such sections relate to employment, the term, 'individual with a disability' does *not* include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.

individuals with certain diseases or infections, stating:

For purposes of sections 793 and 794 of this title, as such sections relate to employment, such term, [‘individual with a disability’] does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.⁵⁰

Simply having a certain disability will not suffice; the individual must also establish that the particular impairment interferes with a major life activity,⁵¹ which has been defined explicitly to include “working.”⁵² And finally, the individual must prove that prior to the adverse employment action taken by the defendant employer or potential employer, the educational institution knew of the individual’s condition (essentially implicating that the defendant was actively placed on notice) or the individual was regarded as having a disabling condition (essentially attributing a constructive notice).⁵³ Vocational rehabilitation services may also come into play for disabled individuals.

Third, the plaintiff must establish that an adverse action taken by the educational institution against the disabled individual was due to that individual’s disability and not due to other legally-sanctioned, legitimate business reasons. Finally, the plaintiff must then establish that he or she was qualified for the position or would have been “otherwise qualified.” A qualified handicapped person means “(1) with respect to employment, a handicapped person who, with reasonable accommodation, can perform the

Id. (emphasis added).

50. *Id.* § 705(20)(D). An individual would not be deemed disabled or impaired due to the following conditions: homosexuality, bisexuality, transvestitism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairment, or other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current illegal use of drugs. *Id.* § 705(20)(E)–(F).

51. “Major life activities” is defined to mean “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 34 C.F.R. § 104.3(j)(2)(ii) (2006). The list is not exclusive.

52. *Id.*

53. *See generally* Costello v. Univ. of N.C. at Greensboro, 394 F. Supp. 2d 752 (M.D.N.C. 2005) (concerning intercollegiate male golfer), *on further motion*, 2006 WL 3694579 (M.D.N.C. Dec. 14, 2006) (finding the student-athlete was not disabled); Stearns v. Bd. of Educ. for Warren Twp. High Sch. Dist. No. 121, No. 99-C-5818, 1999 WL 1044832 (N.D. Ill. Nov. 16, 1999) (concerning interscholastic male basketball player).

essential functions of the job in question.”⁵⁴

Some critical procedural and jurisdictional aspects are discussed for the various statutes. First, the Rehabilitation Act imposes no administrative filing requirement for an aggrieved individual. Second, the Rehabilitation Act contains no explicit statute of limitations. Generally, courts tend to borrow the limitations period from the applicable state statute of limitations for personal injury actions; however, for employment-related matters, reference to the Americans with Disabilities Act would be required.⁵⁵ Third, generally, compensatory damages are permissible, presumably like Title IX.⁵⁶ However, punitive damages are not allowed.⁵⁷ Fourth, the jurisdictional reach over governmental entities is explored. In *Lane v. Pena (Pena)*,⁵⁸ the Supreme Court determined that the Rehabilitation Act infringed upon the federal government’s authority in dismissing a disabled cadet attending the Merchant Marine Academy, which was overseen by the U.S. Department of Transportation.⁵⁹ The opinion foreclosed the ability of the plaintiff to seek monetary damages from the federal government pursuant to the Rehabilitation Act.⁶⁰ The Supreme Court has not ruled on whether the Eleventh Amendment impinges upon the states’ sovereign immunity.⁶¹

54. 34 C.F.R. § 104.3(l)(i) (2006).

55. 42 U.S.C. §§ 12111-12117 (2000).

56. Both statutes are devoid of any explicit statutory language concerning allowing monetary damages for aggrieved individuals. See *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992) (allowing monetary damages in a Title IX action when intentional discrimination is proven); see also *K.M. ex rel. D.G. v. Hyde Park Cent. Sch. Dist.*, 381 F. Supp. 2d 343, 358 (S.D.N.Y. 2005) (ruling that “[a] plaintiff may recover money damages under the ADA or Section 504 by showing a statutory violation resulted from ‘deliberate indifference’ to those rights secured the disabled by those statutes”); *Ali v. City of Clearwater*, 807 F. Supp. 701, 705 (M.D. Fla. 1992) (stating, “Furthermore, the *Franklin* Court’s reliance on *Guardians* and *Darrone* make it clear that Section 504 should be interpreted similarly to Title IX; that is, in cases of intentional discrimination, damages are not limited to those equitable in nature”); *Tanberg v. Weld County Sheriff*, 787 F. Supp. 970 (D. Colo. 1992) (allowing for compensatory damages, citing Title IX and *Franklin*).

57. 29 U.S.C. § 794(a) (2000) (remedies and attorney’s fees); see also *Barnes v. Gorman*, 536 U.S. 181 (2002) (disallowing punitive damages for both this statute and the ADA); *Brown v. Unified Sch. Dist. No. 500*, 338 F. Supp. 2d 1229 (D. Kan. 2004) (disallowing punitive damages by an employee against a school district, pursuant to the ADA), *on further consideration*, 368 F. Supp. 2d 1250 (D. Kan. 2005).

58. 518 U.S. 187 (1996).

59. *Id.* Lower courts had held federal prisons educational programs were not subject to Title IX despite their obvious federal funding.

60. *Id.* at 199-200.

61. See Equalization Act, 42 U.S.C. § 2000d-7(a)(1) (2000) (eff. Oct. 21, 1986) (explicitly applicable to the Rehabilitation Act). For lower court cases addressing Eleventh Amendment considerations, see *Miller v. Texas Tech University Health Sciences Center*, 421 F.3d 342 (5th Cir. 2005) (finding that state agencies were not insulated by the Eleventh Amendment, where state agencies accepted federal funds and thus they could be subject to lawsuits in federal courts pursuant

The first Supreme Court review of a Rehabilitation Act educational employment case occurred during 1987, with the Court sanctioning the statute's basic purpose. In *School Board of Nassau County, Florida v. Arline*,⁶² a female teacher was dismissed from her elementary school teaching position after suffering a third relapse from tuberculosis. First, the Court examined whether an individual with tuberculosis, a contagious disease, was a "handicapped individual" within the meaning of the Rehabilitation Act, and secondly, whether the individual was "otherwise qualified" to teach with such condition. The Supreme Court found that she was a "handicapped individual" within the meaning of the Act. The Court stated:

Arline's contagiousness and her physical impairment each resulted from the same underlying condition, tuberculosis. It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.⁶³

Furthermore, the Court advanced, "Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of [Section] 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others."⁶⁴ Finally, since the record demonstrated insufficient evidence to determine if the plaintiff was "otherwise qualified," the case was remanded on this issue. This Court decision would provide the backdrop for subsequent cases pertaining to all educational employees, including athletic department employees.

Since passage of the ADA,⁶⁵ the Rehabilitation Act underscores

[t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title 1 of the Americans with Disabilities Act of 1990 and the provisions of section 501 through 504, and 510, of the Americans with

to the Rehabilitation Act), *cert. denied sub nom. Louisiana Department of Education v. Johnson*, 546 U.S. 1170 (2006); *Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474, 490, 498 (4th Cir. 2005) (Eleventh Amendment sovereign immunity waived concerning the Rehabilitation Act). See Heckman, *The Impact of the Eleventh Amendment*, *supra* note 17 (manuscript at 15).

62. 480 U.S. 273 (1987).

63. *Id.* at 282.

64. *Id.* at 284.

65. 29 U.S.C. § 794(d) (2000).

Disabilities Act of 1990, as such sections relate to employment.⁶⁶

This accounts for the decrease in Rehabilitation Act cases for public school and university athletic department employees, although it has not been totally usurped for those employed in the sports field.⁶⁷

C. *Americans with Disabilities Act of 1990 (ADA)*

President George H.W. Bush signed the ADA⁶⁸ into law on July 26, 1990, although it was not effective until July 26, 1992. This statute is rather remarkable, as unlike the Rehabilitation Act, where the educational program or activity must receive federal funds, the ADA may involve private entities and private individuals, including the private owners and operators of places of public accommodations, as defined within the statute. The ADA and the Rehabilitation Act focus on whether the defendant has provided a reasonable accommodation to an individual on the basis of a known disability. The ADA, like the Rehabilitation Act, defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."⁶⁹ The term "major life activities" is defined as:

66. See *id.* § 705(20)(A).

67. See *infra* text accompanying notes 159-69 (concerning Schultz v. YMCA of the United States, 139 F.3d 286 (1st Cir. 1998), and community-related athletic employment); see also *infra* text accompanying note 127 (regarding the Supreme Court's decision in *Garrett* finding the Eleventh Amendment protected public universities deemed "arms of the state" from being sued for monetary damages via Title I of the ADA).

68. See Heckman, *Athletic Associations*, *supra* note 27, at 12 (referring to Pub. L. 101-336, § 1, 104 Stat. 327 (1990) (codified as amended in 42 U.S.C. §§ 12101-12213)); see also 42 U.S.C. § 12117(a) (incorporating by reference Title VII procedures into ADA Title I actions. 42 U.S.C. § 2000e-5(e)(1)). The Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(e) (2000), also pertains to this civil rights statute.

69. 42 U.S.C. § 12102(2). In *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1082 (10th Cir. 1997), the Tenth Circuit Court stated:

Similarly, it would be illegal for an employer to discriminate against a qualified employee because that employee had a family member or a friend who had a disability, if the employer knew about the relationship or association, knew that the friend or family member has a disability, and acted on that basis. Thus, if an employee had a spouse with a disability, and the employer took an adverse action against the employee based on the spouse's disability, this would then constitute discrimination.

Id. at 1082. The court also noted "that the protection afforded to non-disabled employees who have an association with a disabled person differs in one significant respect from that afforded to disabled employees. This difference is the application of the ADA's 'reasonable accommodation' requirements." *Id.* at 1083.

“functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.”⁷⁰ The term “substantially limits” means:

- (i) [u]nable to perform a major life activity that the average person in the general population can perform; or (ii) [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.⁷¹

This comprehensive legislation, unlike other statutes, is divided into different areas depending on either the nature of the activity or the entity involved: Title I oversees employment relationships, Title II covers public entities, and Title III addresses public accommodations. This cobbling together of somewhat disparate areas into one statutory scheme provides for lack of uniformity.

The ADA prohibits retaliation against individuals who raise the specter that an employer may be engaging in this type of discrimination.⁷² On the procedural front, an aggrieved individual seeking relief for employment pursuant to Title I (employment) claims must first file an administrative complaint and exhaust administrative remedies;⁷³ whereas, an individual pursuing remedies under Title II (public entities) or Title III (those providing

70. 29 C.F.R. § 1630.2(i) (2006); *see also* Hanig v. Yorktown Cent. Sch. Dist., 384 F. Supp. 2d 710, 715 (S.D.N.Y. 2005) (noting that the EEOC found that a public high school guidance counselor was not deemed disabled due to her dyslexia and dysgraphia, which the plaintiff indicated interfered with her writing skills, an integral part of her having to send written letters of recommendation on behalf of her students to colleges and universities).

71. *Id.* at § 1630.2(j)(1); *see, e.g.*, Meling v. St. Francis Coll., 3 F. Supp. 2d 267 (E.D.N.Y. 1998) (discussed within).

72. 42 U.S.C. § 12203(a) (applying when an individual has “opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing”). The Eighth Circuit Court in *Amir v. St. Louis University*, 184 F.3d 1017, 1025 (8th Cir. 1999), stated, “In order to establish a prima facie case of retaliation, a plaintiff must show (1) that he engaged in a statutorily protective activity, (2) that an adverse action was taken against him, and (3) a causal connection between the adverse action and the protected activity.” *See also* Treglia v. Town of Manlius, 313 F.3d 713, 719 (2d Cir. 2002) (identifying the prima facie elements, including another element that the employer was aware of the employee’s protected activity); Hanig v. Yorktown Cent. Sch. Dist., 384 F. Supp. 2d 710, 725 (S.D.N.Y. 2005) (finding that a claim for ADA retaliation cannot succeed where the plaintiff was no longer employed by the public school district).

73. *See* Smith v. Park County Sch. Dist. No. 6, No. 99-8023, 1999 WL 1136762, *1 (10th Cir. Dec. 13, 1999) (concerning the failure of the plaintiff to exhaust the administrative remedies with respect to his ADA claim, by not filing a charge within 300 days of the alleged violation).

public accommodations) apparently may proceed straight to court, although there is some case law requiring that the entity must be placed on notice prior to filing a lawsuit pursuant to Title III. For Title I (employment-related), the individual must file an administrative complaint with the EEOC within 180 days (as with Title VII actions),⁷⁴ since the ADA mandates compliance with the administrative procedures of Title VII. For Title II (public entities), there is no express statute of limitations, so federal courts borrow the comparable state statute of limitations, generally based on the limitations period used for personal injury actions. The Civil Rights Act of 1991,⁷⁵ applicable to Title VII lawsuits, also covers Title I (employment) of the ADA, and allows the awarding of compensatory damages, depending on the number of employees within an establishment, with a maximum award of \$300,000,⁷⁶ as well as the right to a jury trial. Punitive damages are not permitted for Title I cases.⁷⁷ For a Title II (public entities) claim, the individual would need to prove intentional discrimination to obtain monetary damages. However, in a case commenced by a student-athlete, a Georgia district court ruled that monetary damages were unavailable when involving public accommodations covered under Title III,⁷⁸ although injunctive relief is permitted. Since the new millennium, the Supreme Court has ruled on ADA cases involving the Eleventh Amendment as it concerns Title I (employment) and Title II (public entities), which are discussed within.⁷⁹ The specific titles will be reviewed in reverse order: Title

74. 42 U.S.C. § 2000e-5(e)(1) (requiring an individual to file an administrative complaint with the EEOC, or if permissible by state law, allowing a dual filing with the state agency, which must be done within 180 days of the offending action. The time limit may be extended to 300 days); *see also* Heckman, *Forty Years of Sex Discrimination*, *supra* note 13, at 11.

75. 42 U.S.C. § 2000e-5(e).

76. *See id.* § 1981a(b)(3)(D).

77. *See* 29 U.S.C. § 794(a); *Barnes v. Gorman*, 536 U.S. 181 (2002); *Brown v. Unified Sch. Dist. No. 500*, 338 F. Supp. 2d 1229 (D. Kan. 2004), *on further consideration*, 368 F. Supp. 2d 1250 (D. Kan. 2005).

78. *See Cole v. Nat'l Collegiate Athletic Ass'n*, 120 F. Supp. 2d 1060 (N.D. Ga. 2000) (concerning a claim that the NCAA's academic eligibility rules violated the ADA; the court granted the NCAA's motion to dismiss the action).

79. *See* 42 U.S.C. § 12202 (state immunity):

A State shall not be immune under the [E]leventh [A]mendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of [the requirements of] this chapter [R]emedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

See infra text accompanying note 127 concerning the decision in *Garrett* (where there was no mention of this specific statutory provision in the opinion); *see also* *Erickson v. Bd. of Governors State Colls. & Univs. for N.E. Ill. Univs.*, 207 F.3d 945 (7th Cir. 2000) (ruling that Title I does not abrogate Eleventh Amendment immunity), *cert. denied sub nom.* *United States v. Bd. of Govs. of*

III, Title II, and then Title I.

i. Title III: Public Accommodations

1. Generally

Title III prohibits disability discrimination by private entities providing public accommodations.⁸⁰ It does not apply to public entities. It mandates that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by *any person* who owns, leases (or leases to), or operates a place of *public accommodation*.”⁸¹ The Title III component “defines a ‘public accommodation’ as ‘a private entity . . . which affects commerce through the operation of a concert hall, stadium, or other place of exhibition or entertainment, a nursery, elementary, secondary, . . . school, or other place of education, or a gymnasium . . . or other place of exercise or recreation.’”⁸² Thus, the statute expressly applies to an assortment of sporting venues.

The ADA instructs that reasonable modifications are required. “Discrimination” has been defined to include:

a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, *unless* the entity can demonstrate that making such modifications *would fundamentally alter the nature* of such goods, services, facilities, privileges, advantages, or accommodations.⁸³

Thus, reasonable accommodations are required unless it can be demonstrated that such modifications would fundamentally alter the nature of the accommodations.⁸⁴ Additionally, entities may exclude disabled

State Colls. & Univs. for N.E. Ill. Univ., 531 U.S. 1190 (2001).

80. 42 U.S.C. §§ 12181-12189 (2000); *see also* 28 C.F.R. §§ 36.101–.608 (2006) (implementing regulations).

81. 42 U.S.C. § 12182(a) (emphasis added).

82. *See Heckman, Athletic Associations, supra* note 27, at 13 (citing 42 U.S.C. § 12181(7)) (identifying twelve categories) (emphasis added).

83. 42 U.S.C. § 12182(b)(2)(A)(ii) (emphasis added); *see also* 28 C.F.R. § 35.130(b)(7) (2006).

84. *See Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999) (ruling that an academic institution must make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability pursuant to both the

individuals who pose a significant risk to the health or safety of other individuals. It states, "Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others."⁸⁵ The statute elaborates, "The term 'direct threat' means a significant risk to the health or safety of others that can not be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services."⁸⁶ The next case addressing public accommodations received national attention and showcased the David versus Goliath aspect of the disabled athlete battling against the governing sports entity in a very visible and accessible fact pattern.

2. *PGA Tour, Inc. v. Martin*

During 2001, in *PGA Tour, Inc. v. Martin*,⁸⁷ for the first time the Supreme Court examined a case pertaining to any disabled individual involved with athletics under any of the federal disability statutes. Although the professional golfer was an independent contractor rather than an employee of the PGA Tour, the case holding may be pertinent for other ADA cases involving athletic department employees. Casey Martin, "a golfer with a circulatory

Rehabilitation Act and the ADA; however, neither statute requires the school to make a fundamental or substantial modification to its programs or standards).

85. 42 U.S.C. § 12182(b)(3).

86. *Id.*

87. 532 U.S. 661 (2001) (finding that allowing a disabled professional golfer to use a golf cart during professional tour events constituted a reasonable accommodation). Both the district court and Ninth Circuit Court allowed Martin to use the golf cart. *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242 (D. Or. 1998) (granting the golfer an injunction allowing him to use the golf cart, whereupon the PGA Tour appealed the decision), *aff'd*, 204 F.3d 994 (9th Cir. 2000), *aff'd*, 532 U.S. 661 (2001). See generally Alison M. Barnes, *The Americans with Disabilities Act and the Aging Athlete After Casey Martin*, 12 MARQ. SPORTS L. REV. 67 (2001). However, the Seventh Circuit Court, in another case, rendered pre-*Martin*, prohibited a golfer with a hip condition from using a cart in other golf events. See *Olinger v. U.S. Golf Ass'n*, 55 F. Supp. 926 (N.D. Ind. 1999), *aff'd*, 205 F.3d 1001 (7th Cir. 2000), *cert. granted, judgment vacated*, 532 U.S. 1064 (2001), *on remand*, No. 99-2580, 2001 WL 1029125 (7th Cir. Sept. 4, 2001) (referring the case back to the district court in light of the *Martin* decision); see also *Leiken v. Squaw Valley Ski Corp.*, No. Civ. S-93-505, 1994 WL 494298 (E.D. Cal. 1994) (agreeing to consolidate an individual action with a class action, commenced pursuant to Title III of the ADA, commenced by individuals challenging the ski resort policy forbidding persons with wheelchairs from using cable cars). In *Akiyama v. U.S. Judo Inc.*, 181 F. Supp. 2d 1179, 1184 (W.D. Wash. 2002), in a case analyzing whether individuals that were required to bow to others violated their freedom of religion, the Washington district court, commenting on the landmark decision in *Martin*, stated, "The Supreme Court has also made clear that there is no 'rules of competition' exception to the anti-discrimination laws; such rules are not immune from judicial review and may be subjected to the appropriate tests for identifying 'discrimination.'"

problem that would clearly be exacerbated if forced to walk the course, sought to use a golf cart during a Professional Golf Association (PGA) Tour event, pursuant to the ADA.”⁸⁸ The PGA claimed that walking was part of the game and barred Martin’s use of a golf cart during professional tour events.⁸⁹ Both the National Collegiate Athletic Association (NCAA) and the PGA Senior Tour allowed the use of carts for its golfers.⁹⁰ There was no question that Martin was disabled or that the Tour’s action was predicated solely on the disability of Martin. Simply put, with the use of a cart, Martin could participate, and without it, he would be unable to participate.

The Magistrate judge found that the ability to plan and execute golf shots was an inherent, essential part of the game of golf, as opposed to the ability to walk distances, which the Magistrate found to be incidental to the game.⁹¹ When given his requested accommodation, Martin was able to perform his chosen work, and thus, the Magistrate ordered the PGA to allow the golfer to use a golf cart.⁹² The Ninth Circuit Court of Appeals affirmed the district court’s decision granting an injunction, directing that the PGA Tour could not prevent Martin from using a cart during PGA tournament events.⁹³

On appeal to the Supreme Court, the two contested issues were whether the PGA Tour, Inc., clearly a private entity, engaged in actions under the ADA’s definition of public accommodation, contained in Title III, and secondly, whether allowing a disabled golfer to use a cart in professional competitions constituted a reasonable accommodation.⁹⁴ In another divided decision,⁹⁵ the Supreme Court issued an affirmative response to the first

88. See Heckman, *Athletic Associations*, *supra* note 27, at 15 n.66.

89. *Martin*, 532 U.S. at 670-71.

90. *Id.* at 667-68.

91. *Id.* at 690.

92. *Id.*

93. *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242 (D. Or. 1998), *aff’d*, 204 F.3d 994 (9th Cir. 2000).

94. *Martin*, 532 U.S. at 664-65.

95. *Id.* at 661. Justice Scalia wrote a dissent, joined in by Justice Thomas, claiming that the majority was wrong on both counts of whether the PGA came under the definition of a public accommodation and secondly, whether allowing use of the cart did constitute a fundamental alteration. The dissent opined,

The statute, of course, provides no basis for this individualized analysis that is the Court’s last step on a long and misguided journey. The statute seeks to assure that a disabled person’s disability will not deny him *equal access* to (among other things) competitive sporting events—not that his disability will not deny him an *equal chance to win* competitive sporting events.

Id. at 703 (Scalia, J., dissenting) (emphasis in original). Justice Scalia, who also criticized the opinion for opening the area to a floodgate of litigation, wrote, “The Court guarantees that future

inquiry.⁹⁶ The Tour held events at courses that were deemed public.⁹⁷ The private golf courses were open to the public, who were allowed to attend and be a part of the gallery. Additionally, the Q (qualification) school was open to the public, provided the individual paid \$3000 and submitted two letters of reference.⁹⁸

The Court then tackled the second issue. As indicated, the ADA regulations require a public entity to “make reasonable accommodations in policies . . . when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service.”⁹⁹ Did allowing Martin to use the cart constitute a reasonable accommodation or would it result in a fundamental alteration to the game of golf? The Court explored what were the *essential versus incidental* elements of this sport. It stated:

The use of carts is not inconsistent with the fundamental character of golf, the essence of which has always been shot-making. The walking rule contained in [the PGA Tour’s] hard cards is neither an essential attribute of the game itself nor an indispensable feature of tournament golf . . . Further, the factual basis of petitioner’s argument—that the walking rule is “outcome affecting” because fatigue may adversely affect performance—is undermined by the District Court’s finding that the fatigue from walking during a tournament cannot be deemed significant.¹⁰⁰

Thus, the Court concluded walking was not deemed fundamental to the essence of this particular sport, but rather, it was an incidental aspect of the game of golf.

Additionally, the Court required that the entity involved must conduct an individualized inquiry. The Court stated, “Even if petitioner’s factual predicate is accepted, its legal position is fatally flawed because [the PGA Tour’s] refusal to consider Martin’s personal circumstances in deciding whether to accommodate his disability runs counter to the ADA’s requirement

cases of this sort will have to be decided on the basis of individualized factual findings. Which means that future cases of this sort will be numerous, and a rich source of lucrative litigation.” *Id.* at 702. This prognostication has not materialized.

96. *Id.* at 677.

97. *Id.*

98. *Id.* at 665.

99. 28 C.F.R. § 35.130(b)(7) (2006).

100. *Martin*, 532 U.S. at 663.

that an *individualized inquiry* be conducted.”¹⁰¹ Then, the Court concluded the use of the cart by this disabled individual would not result in a fundamental alteration.¹⁰² Martin’s use of the golf cart did not provide him with any unfair advantage.¹⁰³ The Court upheld that herein it would be a reasonable accommodation to allow a professional golfer with a disability to use a golf cart.¹⁰⁴ The Court’s expansive discourse on what constitutes a reasonable accommodation should serve disabled athletic department employees seeking relief under the ADA under both Title I and Title II.

ii. Title II: Public Entities

Title II is modeled on the Rehabilitation Act and governs public entities.¹⁰⁵ The array of public entities entails any department, agency, special purpose district, or other instrumentality of a state or local government.¹⁰⁶ Thus, it is clear that all state colleges and universities and public schools would be included. Title II imparts: “Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”¹⁰⁷ Title II defines a qualified individual with a disability as “an individual, . . . who, with or without reasonable modifications to rules, policies, or practices . . . or the provision of auxiliary aids and services, meets the *essential . . . requirements* for the . . . participation in programs or activities provided by a public entity.”¹⁰⁸

On May 17, 2004, in *Tennessee v. Lane (Lane)*,¹⁰⁹ the Rehnquist Court, in a divided opinion, determined that state entities would not be insulated by the

101. *Id.* (emphasis added); see *Dennin v. Interscholastic Conn. Athletic Conf., Inc.*, 913 F. Supp. 663 (D. Conn.) (pre-*Martin* case, requiring an individualized analysis by the state athletic association, concerning a disabled interscholastic swimmer with Downs Syndrome), *judgment vacated*, 94 F.3d 96 (2d Cir. 1996).

102. 532 U.S. at 690.

103. *Id.*

104. *Id.*

105. 42 U.S.C. §§ 12131-12165 (2000). Enforcement of Title II is predicated on the Rehabilitation Act. *Id.* § 12133; see also 28 C.F.R. §§ 35.101-999 (2006).

106. 42 U.S.C. § 12131(1); see also *Transp. Workers Union of Am. v. N.Y. City Transit Auth.*, 342 F. Supp. 2d 160 (S.D.N.Y. 2004) (holding the plaintiffs could use Title II of the ADA to assert an employment disability-based claim, thus the union could assert both Title I and Title II against the municipal department).

107. 42 U.S.C. § 12132.

108. *Id.* § 12131(2) (emphasis added).

109. 541 U.S. 509 (2004).

Eleventh Amendment in a case concerning access by disabled individuals to Tennessee state courthouses.¹¹⁰ Disabled individuals, who used wheelchairs, were not afforded accommodations, such as elevators, to reach the upper floors of the Tennessee state court buildings and were left to literally crawl up the steps if no one was available to carry them up the staircases.¹¹¹ It should be stressed that this was not a unanimous decision with Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas filing a dissent.¹¹² Aside from the specific decision rendered for these plaintiffs, the issue arises as to whether this holding should be narrowly confined only for access to state courthouses or expansively applied to all state entities covered under Title II. Justice Stevens, writing for the majority, recognized the underlying problem, stating, “[N]othing in our case law requires us to consider Title II, with its wide variety of applications as an undifferentiated whole.”¹¹³ Thus, the Court resisted giving a blanket approval to all Title II premised actions, which will engender future litigation to flesh out the boundaries of the state sovereignty. Although, the Court did recognize that Title II was enacted to address pervasive discrimination “in such critical areas as . . . *education*.”¹¹⁴

iii. Title I: Employment

Title I covers the area of employment¹¹⁵ and requires the employment of at least fifteen employees¹¹⁶ for a business that involves interstate commerce. The potential employee or employees must be able to “perform the essential functions of the employment position” with or without a reasonable accommodation.¹¹⁷ The statute requires that a reasonable accommodation be made by the employer for the disabled employee, provided it does not constitute an undue hardship. The term “reasonable accommodation” as defined in the ADA

110. *Id.*

111. *Id.* at 513-14.

112. *Id.*

113. *Id.* at 528. However, it should be stressed that the Supreme Court recognized that Congress documented “[a] pattern of unequal treatment in the administration of a wide range of public services, programs and activities, including the penal system, public education, and voting.” *Id.* at 524.

114. *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 487 (5th Cir. 2005) (quoting 42 U.S.C. § 12101(a)(3)) (emphasis in original).

115. 42 U.S.C. §§ 12111-12117. Religious entities are provided an exemption. *Id.* § 12113(c); see also 29 C.F.R. §§ 1630.1-.16 (2006) (implementing regulations).

116. 42 U.S.C. § 12111(5)(A) (“The term ‘employer’ means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person.”).

117. *Id.* § 12111(8).

may include (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.¹¹⁸

The term “undue hardship” takes into account financial considerations and the level of difficulty in attempting to provide such accommodation.¹¹⁹ As indicated, the term “working” constitutes a major life activity.¹²⁰ The regulations provide further amplification of the term “working,” identifying:

The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does *not* constitute a substantial limitation in the major life activity of working.¹²¹

In order to establish a *prima facie* ADA Title I employment case, the following must be established:

(1) [The plaintiff] is an individual with a disability according to the statute; (2) [the plaintiff] is “otherwise qualified” to perform the job requirements, with or without [a] reasonable accommodation; (3) [the plaintiff has] suffered an adverse employment decision; (4) [t]he employer knew or had reason to know of [the plaintiff’s] disability; and (5) [t]he position remained open after the adverse employment decision or the disabled individual was replaced.¹²²

118. *Id.* § 12111(9).

119. *Id.* § 12111(10) (noting four enumerated factors that may be considered when considering whether the action would constitute an undue hardship); *see also id.* § 12111(10)(b) (i)-(iv).

120. 29 C.F.R. § 1630.2(i) (2006) (defined as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working”). The Tenth Circuit Court held “communicating” was not a major life activity. *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir. 1999).

121. 29 C.F.R. § 1630.2(j)(3)(i) (emphasis added).

122. *See Swanson v. Univ. of Cincinnati*, 268 F.3d 307, 314 (6th Cir. 2001) (concerning a former surgical resident); *see also Macy v. Hopkins County Sch. Bd. of Educ.*, 484 F.3d 357, 363 (6th Cir. 2007). Another court stated,

Here, the job description and responsibilities would be a critical aspect, especially in hiring and termination cases.

iv. Current Considerations

First, recent Supreme Court decisions have made it more difficult for potential plaintiffs to qualify that they meet the disability criteria necessary to proceed with their disability claims. The Supreme Court found that if individuals with certain conditions were able to take certain medicine or use certain devices or aides, then they would not in fact be deemed disabled.¹²³ This action has appreciably lessened the pool of individuals who have disabling conditions but are not now deemed *de jure* “disabled” for ADA application.

Second, while this statute broadened the categories of potential defendants, and the ADA statutory scheme covers states and arms of the state, the Supreme Court dramatically curtailed the applicability of the ADA to certain educational employers as potential defendants. The Court ruled on a Title I claim in *Board of Trustees of the University of Alabama v. Garrett*, which involved a consolidated case, including the university’s termination of the plaintiff, a registered female nurse, who had been undergoing treatment for breast cancer.¹²⁴ On February 21, 2001, the Supreme Court, in a split

a plaintiff must show that (1) his employer is subject to the ADA; (2) he has a disability under the meaning of the ADA; (3) he could perform the essential functions of his job, with or without reasonable accommodation; and (4) his disability was a factor that led to his termination. . . . Once the plaintiff alleges a prima facie case, the burden shifts to the employer to rebut the presumption of discrimination by articulating a legitimate nondiscriminatory reason for the termination adverse employment action.

Sanzo v. Uniondale Union Free Sch. Dist., 381 F. Supp. 2d 113, 117 (E.D.N.Y. 2005). The *Sanzo* court also found that “incidents of misconduct and incompetence only further provide legitimate nondiscriminatory reasons for [a school employee’s] termination.” *Id.* at 118. The court also noted, “Similarly, New York courts use the same *McDonnell Douglas* framework to analyze cases of employment discrimination under the [New York Human Rights Law, found at N.Y. EXEC. LAW §§ 290-301 (McKinney 2006)].” *Id.* at 118.

123. In recent years the Supreme Court issued a number of decisions that narrowed the potential class of disabled employees. See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999) (discussed in Heckman, *Athletic Associations*, *supra* note 27, at 12 n.52). The Court, in this collection of cases, determined that if a corrective device or medication ameliorated or regulated the medical condition then the employee would no longer be deemed disabled pursuant to the ADA. See also Daniel Egan, Comment, *The Dwindling Class of “Disabled Individuals”: An Exemplification of the Americans with Disabilities Act’s Inadequacies in D’Angelo v. Conagra Foods Inc.*, 81 ST. JOHN’S L. REV. 491 (2007).

124. 531 U.S. 356 (2001), *on remand*, 344 F.3d 1288 (11th Cir. 2003), *on remand*, 354 F. Supp. 2d 1244 (N.D. Ala. 2005), *opinion after remand*, 359 F. Supp. 2d 1200 (N.D. Ala. 2005).

decision, concluded that the Eleventh Amendment would preclude application of Title I of the ADA to arms of the state, which would by extension include this public state university, as it impugns the sovereignty of states, when claimants were seeking monetary relief for such disability discrimination in employment.¹²⁵ Here, the ADA has a specific provision abrogating Eleventh Amendment immunity toward the state.¹²⁶ Nevertheless, the Court, in a 5-4 decision authored by Chief Justice Rehnquist, ruled that the ADA exceeded Congress's § 5 authority of the Fourteenth Amendment (since the Fourteenth Amendment was enacted subsequent to the passage of the Eleventh Amendment).¹²⁷ Essentially, to pass judicial muster, a federal statute allowing a citizen to sue a state or arm of a state must have a proper Fourteenth Amendment § 5 nexus. In reviewing the three-tier analysis the Court uses for equal protection purposes pursuant to the Fourteenth Amendment, disability is not placed either within the first strict scrutiny analysis reserved for fundamental rights or suspect classes (race, national origin, or alienage), or even second intermediate test analysis (sex and birth legitimacy), but according to the Court is relegated to the third rational relationship test.¹²⁸ Thus, the Court stated that the Constitution bars only "irrational" discrimination and that it would be "entirely rational and therefore constitutional for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities."¹²⁹

While *Garrett* involved a state university, whether other state universities and local public school districts also come under the umbrella of "arms of the state" now becomes a critical element.¹³⁰ The *Garrett* decision has effectively negated Title I's application for employees working or seeking to work at state entities. Query, whether this decision would also apply to Title II and Title III of the ADA when it involves state entities, such as public schools, other state institutions, and public state parks. Three years later, in *Tennessee v. Lane*, the Court found that individuals could sue states that did not provide access to

125. 531 U.S. at 360.

126. *See supra* note 79.

127. U.S. CONST. amend. XIV, which states in principal part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

See Garrett, 531 U.S. at 356 (pertaining to the Fourteenth Amendment).

128. *See Heckman, One Nation Under God, supra* note 3, at 540 n.10.

129. Linda Greenhouse, *The High Court's Target: Congress*, N.Y. TIMES, Feb. 25, 2001, § 4, at 3 (quoting Chief Justice William H. Rehnquist).

130. *See Heckman, Forty Years of Sex Discrimination, supra* note 13, at 4.

the state judicial systems pursuant to Title II of the ADA.¹³¹ Disabled employees are now utilizing Title II to sue state entities in order to circumvent the judicial roadblock caused by the *Garrett* decision. Whether this legal strategy will prove successful remains to be seen. Surprisingly, only a handful of cases have been commenced involving athletic department employees since the ADA's effective date.

D. Athletic Employment

i. Physical Education Teachers or Professors

Due to confidentiality factors,¹³² it is unknown how many disabled individuals are hired as physical education teachers or interscholastic and intercollegiate coaches. While individuals who subsequently become disabled may be protected by the federal statutes, it is remarkable that more cases have not been instituted within the last forty years by disabled individuals confronted with the inability to obtain employment or being subjected to an adverse action during their employment concerning athletic endeavors at schools. Two cases are profiled involving educational institutions: the first case concerns a disabled individual seeking to become a physical education teacher who sought relief under a state statute, and the second case involves a physical education professor who was terminated after she became disabled and who asserted a violation of the ADA. A third case regarding a disabled individual, who worked for a private employer and sought relief under the Rehabilitation Act, is also profiled due to its instruction in this area.

The next case exemplifies the problems faced by disabled individuals seeking employment in the athletics field. In *Zimmerman v. Minot Public School District, No. 1*,¹³³ the North Dakota Supreme Court found no violation of a state human rights law,¹³⁴ which prohibited discrimination based on disability, when a local school district did not hire a hearing-impaired applicant for the opening as a middle school physical education teacher.¹³⁵ Zimmerman annually filed applications with the school district regardless of

131. 541 U.S. 509 (2004); *see also supra* text accompanying note 99.

132. *See supra* note 25 (concerning HIPAA medical privacy law); *see also* Family Educational Rights and Privacy Act, 20 U.S.C. § 1232 (2000) (providing confidentiality as to certain school records, including medical records).

133. 574 N.W.2d 797 (N.D. 1998).

134. N.D. HUMAN RIGHTS ACT, N.D. CENT. CODE § 14-02.4 (2007).

135. 574 N.W.2d at 798.

whether any vacancies existed.¹³⁶ When an opening occurred, the school district interviewed nine applicants.¹³⁷ The plaintiff had been providing physical education instruction for a number of years at a school for the deaf and had graduated with an education major and a physical education minor and a lower grade-point-average (2.50) than the applicant chosen.¹³⁸ The plaintiff expressed interest in coaching two sports not available at this particular school, while the individual hired indicated an interest in coaching the four sports offered.¹³⁹ The applicant who was hired had no teaching experience, but had student-taught at the middle school with excellent recommendations; he graduated with a major in physical education and a higher grade-point-average (3.70) than the plaintiff.¹⁴⁰ The trial court concluded the school district had advanced legitimate non-discriminatory reasons for its decision.¹⁴¹ The appellate court affirmed the lower court's determination, finding the trial court had not committed any error therein, and thus sanctioned the school district's hiring action.¹⁴²

In *Meling v. St. Francis College*,¹⁴³ a terminated professor of physical education sued alleging her termination from this small New York Catholic college violated the ADA.¹⁴⁴ In 1993, Meling had been injured in an automobile accident.¹⁴⁵ As a result, she received a medical leave of absence for the fall 1993 and spring 1994 semesters.¹⁴⁶ The professor applied for disability for the following fall 1994 semester, whereupon the private college informed the professor that she could only receive a one-year medical leave.¹⁴⁷ Her physician informed the college that she could return to work for "light duty only."¹⁴⁸ She sought to resume teaching, but wanted certain modifications and assistance—essentially, she was seeking a "reasonable accommodation."¹⁴⁹ During this period, the professor had also filed for governmental disability benefits, whereupon a claimant would identify

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 799.

142. *Id.* at 800.

143. 3 F. Supp. 2d 267 (E.D.N.Y. 1998).

144. *Id.* at 267.

145. *Id.* at 270.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

whether he or she was partially or completely disabled, as benefits were contingent upon such classification after proving eligibility.¹⁵⁰ Meling apparently had indicated that she was totally disabled. The college subsequently discharged Meling from her position.¹⁵¹

At the conclusion of the trial, a New York federal jury awarded Meling \$225,000 in compensatory damages and \$150,000 in punitive damages, and it ordered her reinstatement to the faculty.¹⁵² The defendant-college moved to prevent entry of the favorable award as a final judgment while the plaintiff cross-moved, seeking her reinstatement with tenure.¹⁵³ First, the Eastern District Court of New York aligned itself with the jury determination that the plaintiff was disabled pursuant to the ADA, based on the limitation of her abilities of walking, standing, sitting, reaching, and lifting.¹⁵⁴ Second, the trial judge, in this pre-*Barnes* case, would not set aside the jury's punitive damages award that may be issued in an ADA action when malice or reckless indifference is presented.¹⁵⁵ At trial, apparently the college's counsel attempted to establish that Meling was totally disabled—based on her submission of an application seeking government benefits—and thus could not do her job even with any reasonable accommodation; this position could result in the jurors concluding that the school terminated the professor for the reason she was so disabled as to be unable to do the essential functions of her job.¹⁵⁶ The court noted:

The vast majority of Meling's courses required no physical activity on her part, and even the courses that required demonstrations could be taught by using students to perform the required skills, a method that is preferred [in] some academic circles even where the instructor has no physical limitations. Indeed, without changing Meling's schedule at all for the Fall 1994 semester, Meling could readily have performed her job . . .

150. *Id.* at 273.

151. *Id.* at 272.

152. *Id.* at 270.

153. *Id.* at 276-77.

154. The regulations amplify that "major life activities" are "basic activities that the average person in the general population can perform with little or no difficulty." 29 C.F.R. 1630.2(i) (2006). The following items would be included: "sitting, standing, lifting, reaching . . . caring for oneself, performing manual tasks, walking, seeing, hearing speaking, breathing, learning and working." 3 F. Supp. 2d at 273 (citing 29 C.F.R. § 1630.2(i)).

155. See 29 U.S.C. § 794(a); *Barnes v. Gorman*, 536 U.S. 181 (2002); *Brown v. Unified Sch. Dist. No. 500*, 338 F. Supp. 2d 1229 (D. Kan. 2004), *on further consideration*, 368 F. Supp. 2d 1250 (D. Kan. 2005).

156. *Meling*, 3 F. Supp. 2d at 274.

had the college permitted her to teach with the assistance of a student demonstrator.¹⁵⁷

Thus, the court found that instituting reasonable accommodations via the use of a student demonstrator would comport with the statute, which the college failed to offer or provide the professor. No college representative ever contacted the professor about any possible accommodations. Third, the professor's receipt of disability benefits (through the Teachers Insurance Annuity Association (TIAA)) did not establish as a matter of law that she was unable to work¹⁵⁸ (which may have countenanced the employer's action). Finally, the court declined to order her reinstatement with tenure. The parties pursued no appeal to the Second Circuit Court of Appeals—not even a challenge by the college due to the punitive damages awarded against it. With the generous compensatory damages, and more significantly the awarding of punitive damages, which would no longer be sanctioned, the case captures the spirit of the federal laws designed to rebut disability discrimination.

Parenthetically, in *Schultz v. YMCA of the United States*,¹⁵⁹ the First Circuit Court of Appeals ruled that a deaf lifeguard who failed to meet the qualifications for certification would not be entitled to damages for emotional injuries he claimed pursuant to the Rehabilitation Act.¹⁶⁰ David Schultz was an accomplished swimmer, swim instructor, and lifeguard with certification by the American Red Cross.¹⁶¹ Schultz then sought certification by the YMCA, which was not required for his current position at a Massachusetts YMCA facility.¹⁶² The YMCA, a private religious organization, required that its lifeguards be able to hear noises and distress signals.¹⁶³ The plaintiff took the required certification course.¹⁶⁴ With the use of a hearing aid, an audiologist reported that Schultz could hear normal sounds. Based on the applicant's wearing a hearing aid, the instructor recommended the certification, which the

157. *Id.*

158. The lower court identified, "On February 12, 1997, the EEOC issued an Enforcement Guideline holding that an individual's statement for the purpose of obtaining disability benefits, that she is 'totally disabled' or 'unable to work' does not bar a claim under the ADA." *Meling v. St. Francis Coll.*, No. 95-CV-3739 JG, 1997 WL 1068681, *5 (E.D.N.Y. Apr. 1, 1997). The court found that "[t]he SSA do[es] not make any allowance for an individual's ability to work with reasonable accommodations." *Id.*

159. 139 F.3d 286 (1st Cir. 1998).

160. *Id.* at 290.

161. *Id.* at 287.

162. *Id.*

163. *Id.*

164. *Id.*

YMCA granted the plaintiff.¹⁶⁵ Subsequent to this, the course instructor noticed Schultz did not always wear his hearing aid, and so she asked that her name be removed from the plaintiff's certification, which led the YMCA to revoke the certification.¹⁶⁶ However, prior to the revocation, the plaintiff had resigned from his position as aquatics director and accepted a lower paid position at the facility, which he then resigned.¹⁶⁷ The plaintiff offered evidence that the ability to hear "contributes little, if anything, to the performance of life guarding functions."¹⁶⁸ The First Circuit concluded the YMCA's action was not prompted by malice or hostility such as to warrant the grant of damages for emotional distress to this individual.¹⁶⁹

The concept of reasonable accommodations is predicated on the ability of the disabled individual to perform the requisite essential duties the position requires. While the college professor in *Meling* was qualified, but required a reasonable accommodation, the *Schultz* case exemplifies that the individual, regardless of any disability, must still exhibit the minimum mandatory requirements for the specific position. It is especially critical in the education field for K-12 teachers and sometimes coaches to be appropriately licensed and certified in the states in which they seek to teach or coach. Coaches are increasingly charged with being able to prove, at a minimum, that they have cardio-pulmonary resuscitation (CPR) certification. And with automated external defibrillators (AEDs) becoming more common in the athletic arena, a review should be made to ascertain if coaches are certified to use the AEDs.¹⁷⁰ It is when the individual meets such requirements (with or without a reasonable accommodation) but still is not hired that the inquiry will be made—based on a specific factual determination—as to the reason the school hired an individual without any discernible disabilities over the disabled candidate, when both were equally qualified. The hiring situation poses a catch-22 problem where the employer is seeking an individual with

165. *Id.*

166. *Id.* at 288.

167. *Id.*

168. *Id.* at 289. One expert's report advanced "that drowning victims are almost never in a position to call for help." *Id.* It was not indicated whether being in the company of someone who could alert others, albeit that individual was not in a position to help the distressed swimmer, was significant—which could easily arise in a pool-based situation.

169. *Id.* at 290-91.

170. Recently, New York passed a statute, N.Y. EDUC. LAW § 917 (McKinney 2006) (on-site cardiac automated external defibrillator), which is also known as the "Louis Law," based on the student-athlete who died as a result of a ball hitting his chest during a boys' lacrosse game at a Long Island public high school. It requires the availability of AEDs at all extracurricular athletic events, regardless if the event takes place on or off public school property, along with a properly trained individual to operate the device.

experience, leaving the disabled individual at a possible disadvantage. Even though the teacher in *Zimmerman* had experience over the recent graduate, it still did not render his claim successful where he repeatedly sought a position at the local public school because the school could show legitimate, objective reasons for hiring the non-disabled individual.

ii. Coaches

The issue in *Maddox v. University of Tennessee*¹⁷¹ concerned whether the conduct of an athletic employee or his alleged disability was the overriding factor resulting in his termination.¹⁷² The men's assistant football coach alleged the university violated the ADA and Rehabilitation Act due to his alcoholism condition.¹⁷³ During February 1992, the plaintiff was offered a contract, terminable at will in accordance with a university manual.¹⁷⁴ In an employment application, Maddox did not indicate he had any health problems that would interfere with performing his job.¹⁷⁵ The application also inquired as to whether the applicant had ever been arrested, to which this individual responded he had not, which was not accurate, as there had been three prior arrests (two incidents involved driving while under the influence of alcohol).¹⁷⁶ On May 26, 1992, he was arrested for allegedly driving while intoxicated (DWI), reportedly at a high rate of speed.¹⁷⁷ The arrest resulted in negative publicity for the university.¹⁷⁸ After the arrest, Maddox then entered an alcohol rehabilitation program.¹⁷⁹ The university officially terminated the coach during June 1992 for his alleged criminal conduct and the bad publicity engendered.¹⁸⁰

The Sixth Circuit Court of Appeals summarized the opposing stances:

171. 62 F.3d 843 (6th Cir. 1995). In *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342 (D. Ariz. 1992), the district court granted an injunction "allowing a Little League baseball first-base coach, who used a wheelchair, to coach on the field at an All-Star game, despite an association rule to the contrary." Heckman, *Athletic Associations*, *supra* note 27, at 14 n.64. The Little League had indicated that the presence of the wheelchair constituted a threat to the safety of the participants. *See* 42 U.S.C. § 12182(b)(3). However, Anderson had coached for his team for approximately three years without incident. *Anderson*, 794 F. Supp. at 345.

172. *Maddox v. Univ. of Tenn.*, 62 F.3d 843, 844 (6th Cir. 1995).

173. *Id.* at 845.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

“The [university] says it fired him because of his conduct (drunk driving), rather than his disability (alcoholism). The plaintiff replies his conduct is caused by his disability, so a dismissal for the former is a dismissal for the latter.”¹⁸¹ The court emphasized the difference

[b]etween discharging someone for unacceptable misconduct and discharging someone because of the disability. As the district court noted, to hold otherwise, an employer would be forced to accommodate all behavior of an alcoholic which could in any way be related to the alcoholic’s use of intoxicating beverages; behavior that would be intolerable if engaged in by a sober employee or, for that matter, an intoxicated but non-alcoholic employee.¹⁸²

The coach’s responsibilities at the NCAA Division I university included: on-field coaching;

[r]ecruitment of high school football players; . . . serving as a positive role model for athletes on the university’s football team, . . . counseling players on various issues, including the use and abuse of alcohol and drugs, and . . . promoting a positive image as a representative of not only the football program but the university as well.¹⁸³

The Sixth Circuit Court found the university’s reasons for terminating the plaintiff did not constitute a pretext, but rather constituted a legitimate reason.¹⁸⁴ It also found that the plaintiff was not “otherwise qualified”¹⁸⁵ due to the fallout engendered to the university, reasoning, “The school falls out of favor with the public, and the reputation of the football program suffers. Likewise, to argue that football coaches today, with all the emphasis on the misuse of drugs and alcohol by athletes, are not ‘role models’ and ‘mentors’ simply ignores reality.”¹⁸⁶ The Sixth Circuit court concluded, “Employers subject to the Rehabilitation Act and ADA must be permitted to take appropriate action with respect to an employee on account of egregious or criminal conduct, regardless of whether the employee is disabled.”¹⁸⁷

181. *Id.* at 846.

182. *Id.* at 847 (presented in Heckman, *Athletic Associations*, *supra* note 27, at 14 n.64).

183. *Id.* at 845 n.1.

184. *Id.* at 848-49.

185. *Id.* at 848.

186. *Id.* at 848-49.

187. *Id.* at 848.

This case captures two principles involved with the area. First, the individual must be deemed “disabled.” Obviously certain disabilities will be ascertainable to the onlooker; whereas, other medical conditions will not. Then, the inquiry is whether the employer-school knew or should have known of the employee’s disability before the underlying action took place that led to the employer’s adverse action against this person. If the educational institution could not detect or did not know of the athletic department employee’s disability, then an essential element needed to satisfy a *prima facie* case will be lacking. Second, even assuming the employee can satisfy that he or she was appropriately “disabled,” this will not automatically condone purported bad behavior under the label that the individual is disabled. This goes back to the definition of *disability*, whereby certain conditions are not legally sufficient to be deemed statutorily “disabled.”¹⁸⁸ The *Maddox* case also showcases the importance of any underlying contract or employment agreement between the parties.

While certain conditions that are action-based—such as alcoholism or drug addition—are included in the definition of disability, nevertheless, as this case exemplifies, it does not provide a blanket tolerance of any activities undertaken by those individuals. This would require a fact-specific inquiry. For example, could a school legally fire a physical education teacher with Tourette Syndrome for voicing obscenities in the gymnasium? An episode of the *Oprah* television show featured a primary school teacher with this condition. He simply explained to his students that he had the condition and that as a result he may engage in this involuntary action. Therein, the teacher made known his medical condition.

iii. Officials

In the area of athletics, there is an expectation that those participating will be the fittest of the fit. The next two cases explore what happens when the officials do not visibly meet this criteria.

In *Jones v. Southeast Alabama Baseball Umpires Ass’n*,¹⁸⁹ an umpire, “[w]ho [used] a prosthesis due [to] a leg amputation, alleged a violation of the ADA against the Association in not assigning him to umpire solely high school varsity baseball games.”¹⁹⁰ Jones had notified the Association that he no longer wished to umpire at the junior varsity games and wanted to umpire

188. See *supra* notes 49-50.

189. 864 F. Supp. 1135 (M.D. Ala. 1994).

190. See Heckman, *Athletic Associations*, *supra* note 27, at 14 n.64.

solely at varsity baseball games.¹⁹¹ During 1992, the association rejected the request and informed Jones that based on the use of a “[p]rosthetic device, he did not have the mobility to umpire effectively on a regular basis at the more competitive varsity level.”¹⁹² The Alabama district court recognized that the ADA covers both an employer and employment agency.¹⁹³ While the association conceded it had twenty-five employees, exceeding the required fifteen employees, it argued that these employees did not exceed the minimum hiring length of at least twenty weeks as the high school baseball season lasts approximately thirteen to fourteen weeks.¹⁹⁴ Jones countered that the association also assigned the umpires to officiate at summer league baseball games, which run from April to August (approximately a five-month period).¹⁹⁵ The state trial court did not engage in the merits of the case and simply denied the association’s motion for summary judgment, stating, “It is unclear from the record whether the umpires procured by the Association for schools are employees of the Association or are procured to be employees of the schools; the Association would be an employment agency only if the latter is true.”¹⁹⁶

Merely because an individual uses a prosthesis device does not automatically equate with lack of mobility. Moreover, there is relatively minimal running around by officials in baseball games compared to other sports like football, basketball, soccer, lacrosse, and field hockey. Obviously, this case dealt with officiating interscholastic baseball games. Periodically, there is attention focused on the girth of Major League Baseball (MLB) umpires, purportedly for health reasons, who are presently required to have “reasonable body weight.”¹⁹⁷

The next case examines such a situation involving a college football

191. *Jones*, 864 F. Supp. at 1136.

192. *Id.*

193. *Id.* at 1137-38.

194. *Id.*

195. *Id.*

196. *Id.* at 1138.

197. See *How to Become MLB Umpires*, http://www.mlb.com/mlb/official_info/umpires/how_to_become.jsp (last visited Nov. 16, 2007); see also Dan Gelston, *Former Umpire Eric Gregg Dies After Stroke*, USA TODAY, June 5, 2006, available at <http://www.usatoday.com/sports/baseball/2-6-06-05>; Tom Haudricourt, *HGH Ignites New Fears; Grimsley Saga Sure to Fuel Criticism*, MILWAUKEE J. SENTINEL, June 11, 2006, at 7C, available at <http://www.findarticles.com/p/articles/mi-4196/is-20060611/ai-u16476533>; Bob Nightengale, *Thumbs up on Ejections Is a Message from Umps*, SPORTING NEWS, Mar. 17, 1997, at 32, available at <http://www.encyclopedia.com/doc/1g1-1922063> (concerning MLB umpire Eric Gregg, “who took time off last season to enter a weight-loss clinic after the death of fellow National League umpire John McSherry”).

referee. In *Clemons v. Big Ten Conference*, a college football referee for the NCAA Division I conference unsuccessfully claimed discrimination due to his obesity in violation of the ADA.¹⁹⁸ The Big Ten Conference, one of the most powerful NCAA Division I football conferences, revised the rating system for its football referees, modeling it on the National Football League's policy.¹⁹⁹ Referees received one-year contracts.²⁰⁰ The conference considered five criteria for their referees: "(1) appearance and physical condition; (2) position, coverage and movement; (3) consistency, common sense and judgment; (4) poise, decisiveness and game control; and (5) relationship with the coaches, players and others."²⁰¹ Between 1990 and 1992, the plaintiff's ratings increasingly plummeted as his weight increased to 270 pounds, at which time he received notices from the conference about his weight.²⁰² The following year, he was again assigned a poor rating, with his weight up to 280 pounds.²⁰³ He was then placed on probation.²⁰⁴ During April 1994, the conference renewed his contract for the 1994-1995 season.²⁰⁵ When Clemons reported for work in August, his weight reached an apex of 285 pounds.²⁰⁶ Two days later, the conference canceled his contract.²⁰⁷ Clemons argued that the conference manual had no reference to weight, although it did require referees to be in good physical condition.²⁰⁸

The Illinois district court noted, "Simply because the Big Ten did not employ height-weight charts does not make the physical condition requirement invalid."²⁰⁹ Additionally, the ADA regulations indicate that "except in rare circumstances, obesity is not considered a disabling impairment."²¹⁰ The court ultimately found that the plaintiff was not disabled as his ability to do other jobs was not impacted, and the ADA was not meant to cover exclusion from a single position of employment.²¹¹ The court found that

198. No. 96-C-0124, 1997 WL 89227 (N.D. Ill. Feb. 24, 1997).

199. *Id.* at *1.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at *2.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at *4.

209. *Id.*

210. *Id.* at *5 (citing 29 C.F.R. § 1630.2(j)(3)(i)).

211. *Id.*

Plaintiff has not provided any evidence that an official that cannot keep up with the athletes can nonetheless perform adequately. Plaintiff's evaluations demonstrate that he failed to keep himself in a physical condition that enabled him to keep up with the athletes and place himself in the proper position to make accurate calls.²¹²

The court seemed content that the plaintiff was not disabled; however, the court did not expound on whether it would have countenanced the factor contained in the first condition pertaining to "appearance." Clemons also claimed his termination was due to racial discrimination, which will be discussed in Part IV.

III. AGE DISCRIMINATION

A. Age Discrimination in Employment Act of 1967 (ADEA)

The ADEA²¹³ is a federal statute that prohibits employment discrimination on the basis of age, and includes individuals over the age of forty,²¹⁴ where the employer has at least twenty employees²¹⁵ and there is an interstate commerce basis. The statute's purpose is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."²¹⁶ The ADEA mandates:

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his

212. *Id.* at *4.

213. 29 U.S.C. §§ 621-634 (2000). For new implementing regulations, see 72 Fed. Reg. 36,873 (eff. July 6, 2007).

214. 29 U.S.C. § 631(a) ("The prohibitions in this chapter shall be limited to individuals who are at least forty years of age.").

215. *Id.* This is due to the ADEA's inclusion as part of the Fair Labor Standards Act.

216. *Id.* § 621(b).

status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.²¹⁷

Lawful practices may include "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business; or where the differentiation is based on reasonable factors other than age" or the laws of a foreign country, or where age is used in a valid seniority system or employee benefit plan, or where the discharge or discipline was for good cause.²¹⁸ On February 24, 2004, in *General Dynamics Land Systems, Inc. v. Cline*,²¹⁹ the Supreme Court held that there would be no ADEA violation where an employer favored an older employee over a younger employee, even though both were in the protected class of being forty years of age or older.²²⁰

In establishing a prima facie case, an individual can assert age discrimination based on direct evidence.²²¹ Another avenue used to establish civil rights violations, such as Title VII, is through use of a disparate impact claim, which alludes to situations where neutral or favorable policies nonetheless have a negative effect on the protected group.²²² However, it is

217. *Id.* § 623(a) (employer practices). *See generally* Jankovitz v. Des Moines Indep. Cmty. Sch. Dist., 421 F.3d 649 (8th Cir. 2005) (challenging the school district's employee retirement incentive plan). The Eighth Circuit stated, "Arbitrary age discrimination occurs when an employer denies or reduces benefits based solely on an employee's age." *Id.* at 654; *see also* Bowman v. Orleans Parish Sch. Bd., 141 Fed. Appx. 291 (5th Cir. 2005) (unpublished opinion) (concerning the unsuccessful claim of a female who challenged the School Board's failure to promote her to the position as school principal based on her age); Abrahamson v. Bd. of Educ., 374 F.3d 66 (2d Cir. 2004) (ruling the collective bargaining agreement applicable to teachers over age fifty-five violated the ADEA), *cert. denied*, 543 U.S. 984 (2004).

218. 29 U.S.C. § 623(f) (lawful practices).

219. 540 U.S. 581 (2004); *see also* Meling v. St. Francis Coll., 3 F. Supp. 2d 267 (E.D.N.Y. 1998) (discussed within).

220. *Cline*, 540 U.S. at 584.

221. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 613 (1993) (noting "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA").

222. In general, Title VII cases may be established through reliance on a discriminatory intent or a discriminatory impact. The former is demonstrated through disparate treatment. Disparate treatment can be proven either through direct or indirect evidence. *See infra* note 314 (concerning Title VII). In most cases, there is not direct evidence of the employer voicing its intent to purposely discriminate against an older individual. Instead, the plaintiff will rely on the indirect method. Indirect evidence is established through use of the *McDonnell Douglas* burden-shifting method. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This requires three major steps: (1) the plaintiff must prove that he or she is a member of the protected class, was qualified for the position, and an adverse action was taken by the employer toward the individual; (2) then the defendant must prove there was a legitimate business reason for not hiring the plaintiff or taking the unfavorable employment action toward this individual;

not clear whether the ADEA, a statute enacted three years after passage of Title VII, allowed for cases predicated upon disparate impact. During 2005, the Supreme Court ruled that while an employee could predicate an ADEA case on a disparate impact theory, it would be narrowly limited. The Court distinguished the statutory language found in Title VII, which allows for full use of a disparate impact theory,²²³ as opposed to the ADEA. The Court required that the plaintiff “‘isolat[e] and identify[] the *specific* employment practices that are allegedly responsible for any observed statistical disparities.’”²²⁴

The ADEA contains an anti-retaliation provision whereby an employer may not discriminate when “such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.”²²⁵ There is a pre-filing requirement.²²⁶ The individual would follow the Title VII provisions concerning statute of limitations aspects. The ADEA provides for both legal

and (3) finally, then the burden shifts back to the plaintiff to prove that the alleged reason was pretextual. *Id.* at 802-04. “Under the *McDonnell Douglas* scheme, the plaintiff bears the initial burden of establishing a prima facie case.” *Farrell v. Butler Univ.*, 421 F.3d 609, 613-14 (7th Cir. 2005) (investigating whether an adverse employment was undertaken by an educational employer and noting that in this circuit, the “denial of a raise qualifies as an adverse employment action . . . but that the denial of a bonus does not”) (internal citations omitted). In *Farrell*, the Seventh Circuit found that a “permanent increase in base salary strongly suggests that the award is a raise, not a bonus.” *Id.*

The latter legal basis is demonstrated through establishment of a disparate impact theory. 42 U.S.C. § 2000-e-2(k)(1)(A)-(C) (2000) (amending the original statute to allow for use of the disparate theory); *see also* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). “Under a disparate impact theory, an employer is held liable when a facially neutral employment practice disproportionately impacts members of a legally protected group.” *Farrell*, 421 F.3d at 616. The Seventh Circuit continued:

In order to advance a disparate impact claim, the plaintiff must first establish a prima facie case by proving by a preponderance of the evidence that the employment policy or practice had an adverse disparate impact on women on the basis of their gender. The plaintiff must first ‘isolate and identify ‘the specific employment practices that are allegedly responsible for any observed statistical disparities,’ and second demonstrate causation by offering ‘statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotion because of their membership in [the] protected group.

Id. (internal citations omitted).

223. *See* Heckman, *Forty Years of Sex Discrimination*, *supra* note 13, at 9-10.

224. *Smith v. Jackson*, Miss., 544 U.S. 228, 241 (2005) (emphasis added) (quoting *Watson v. Ft. Worth Bank and Trust*, 487 U.S. 977, 994 (1988)).

225. 29 U.S.C. § 623(d) (2000) (opposition to unlawful practices; participation in investigations, proceedings, or litigation).

226. *Id.* § 626(d).

and equitable relief, which may include back pay, front pay, and liquidated damages in cases of willful violation of the statute.²²⁷ The law directs:

In any action brought to enforce [the ADEA] the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes [of the statute], including without limitation judgments compelling employment, reinstatement, or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.²²⁸

During 2002, in *Kimel v. Florida Board of Regents*, the Supreme Court rendered its first post-*Seminole Tribe* decision addressing the application of an Eleventh Amendment defense in a case involving a major federal civil rights law.²²⁹ The plaintiffs included associate professors, faculty, and librarians at state universities.²³⁰

While the Court recognized that the statutory language of the ADEA “does contain a clear statement of Congress’ intent to abrogate the States’ immunity, . . . that abrogation exceeded Congress’ authority under § 5 of the Fourteenth Amendment.”²³¹ The Court emphasized that Congress could not use the Commerce Clause to shore up the ability of citizens to sue states or arms of the state based on this federal statute.²³² The Court noted that the Fourteenth Amendment could be used to surmount the earlier enacted

227. *Id.* § 626(b) (“[L]iquidated damages shall be payable only in cases of willful violations. . .”).

228. *Id.*

229. 528 U.S. 62 (2000) (finding that the ADEA does not allow lawsuits by state employee to be brought in the federal courts, despite the express language in the statute providing for such causes of action. The Court found such language violated Congress’ authority pursuant to Section 5 of the Fourteenth Amendment); *see also* *Kovacevich v. Kent State Univ.*, 224 F.3d 806 (6th Cir. 2000) (female professor alleged sex and age discrimination against the university. The appellate court held that the Eleventh Amendment insulated this state university against her ADEA claim); *Peterson v. Davidson County Cmty. Coll.*, 367 F. Supp. 2d 890, 893 (M.D.N.C. 2005) (finding Eleventh Amendment prevented an employee from bringing an ADEA claim against a North Carolina community college. The North Carolina district court stated, “Here, there is no state statute or constitutional provision demonstrating the state of North Carolina’s waiver of its immunity regarding the ADEA.”).

230. Heckman, *The Impact of the Eleventh Amendment*, *supra* note 17 (manuscript at 9-10) (discussing this case in detail) (referring to this consolidated case with employees from the University of Montevallo, Florida State University, and the Florida Department of Corrections).

231. *Kimel*, 528 U.S. at 67; *see also* Heckman, *The Impact of the Eleventh Amendment*, *supra* note 17 (manuscript at 9-10).

232. *Kimel*, 528 U.S. at 80 (“Today we adhere to our holding in *Seminole Tribe*: Congress’ powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals.”).

Eleventh Amendment;²³³ however, strings were attached. There are three tests the Court has utilized in Fourteenth Amendment equal protection cases. Cases predicated on age discrimination would be assigned to the “rational relationship” test. The Court concluded that the ADEA failed the proportionality and congruence test²³⁴ imposed by the Court in an earlier opinion, *City of Boerne v. Flores*.²³⁵ In examining purported discrimination assigned to “older persons,” the Court noted that they “have not been subjected to ‘a history of purposeful unequal treatment.’”²³⁶ Thus, the Court found the ADEA exceeded the constitutional constraints.

B. Intercollegiate Athletic Departments

i. Coaches or Athletic Directors

This is another area with a surprisingly low incidence of case law involving individuals engaged in athletic-related employment at schools. In *Moore v. University of Notre Dame*,²³⁷ the Indiana district court found that the defendant-private university violated the ADEA in terminating a sixty-four-year-old male assistant football coach from the storied football program.²³⁸ The court determined that the coach’s reinstatement was not an appropriate remedy, and it ordered the university to pay the former offensive lineman coach, who was fired in 1996, compensatory damages in the amount of \$75,577 and attorneys’ fees totaling \$394,865.²³⁹

In *Jacobs v. College of William and Mary*,²⁴⁰ the plaintiff, who had turned forty years of age when announcements were made for certain full-time appointments in the physical education department, claimed that the college failed to employ her in the new position of full-time varsity basketball coach due to her age.²⁴¹ She had been the former women’s basketball coach.²⁴² The

233. *Id.* (“Section 5 of the Fourteenth Amendment, however, does grant Congress the authority to abrogate the States’ sovereign immunity.”).

234. *Id.* at 82-83.

235. 521 U.S. 507 (1997).

236. Heckman, *The Impact of the Eleventh Amendment*, *supra* note 17 (manuscript at 10) (quoting *Kimel*, 528 U.S. at 83).

237. 22 F. Supp. 2d 896 (N.D. Ind. 1998); *Moore v. Univ. of Notre Dame*, 968 F. Supp. 1330 (N.D. Ind. 1997).

238. 22 F. Supp. 2d at 904.

239. *Id.* at 915.

240. 517 F. Supp. 791 (E.D. Va. 1980), *aff’d without opinion*, 661 F.2d 922 (4th Cir. 1980), *cert. denied*, 454 U.S. 1033 (1981).

241. 517 F. Supp. at 798.

court found no violation of the ADEA as the college listed a Masters in Physical Education as a requirement, which the plaintiff did not have, although she had at the time finished all the course work, but was waiting to complete her oral component of the program.²⁴³ In a certain irony, the female head of the search committee denied the allegation that she had asked the current captain of the women's basketball team the following question: "Wouldn't you all like a younger coach, someone like Mary Ann Stanley?"²⁴⁴ Nevertheless, the district court asserted that "[the] plaintiff has the burden to prove, not that age was a factor, but that 'age was the determining factor,' . . . and 'proof that it was a determining factor is . . . essential to recovery under the ADEA.'" ²⁴⁵ The court stated, "A mere reference to age is not sufficient to establish a right to recovery. It must have been a determining factor, and plaintiff must establish 'but for' the age, she would have been selected."²⁴⁶ The court concluded, "The evidence falls far short of meeting this standard. There is no dispute of any substantial fact and therefore no support for a verdict showing 'but for' age plaintiff would have been selected."²⁴⁷ This is reminiscent of the disability statute requirements that the plaintiff must meet the minimum requirements in order to go forward. It again demonstrates the significance of the job description and requirements for athletic employment positions.

Due to the unfavorable Court ruling in *Kimel*, educational athletic employees are turning to state laws for redress. In *Brady v. Curators of University of Missouri*,²⁴⁸ the head baseball coach at the University of Missouri-St. Louis contended a violation of the Missouri Human Rights Act²⁴⁹ based on age discrimination and retaliation, where his full-time position with benefits was reduced to a part-time position without benefits.²⁵⁰ This was after the coach had previously been reinstated as part of a settlement

242. *Id.*

243. *Id.* at 799-800.

244. *Id.* at 800. Marianne Stanley, an extremely successful women's basketball coach, would later become embroiled in her own sex discrimination claim concerning her termination as the head coach at the University of Southern California. See *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313 (9th Cir. 1994); *Stanley*, No. CV93-4708-JGD (C.D. Cal. Mar. 10, 1995) (granting defendants' motion for summary judgment in its entirety), *aff'd*, 178 F.3d 1069, (9th Cir. 1999), *cert. denied*, 528 U.S. 1022 (1999); see also Heckman, *Sex Discrimination in the Gym*, *supra* note 1, at 600-04 (discussing the *Stanley* case); Heckman, *The Glass Sneaker*, *supra* note 1, at 599-600 (same).

245. *Jacobs*, 517 F. Supp. at 800 (quoting *Loeb v. Textron, Inc.*, 606 F.2d 1003 (1st Cir. 1979)).

246. *Id.* at 801.

247. *Id.*

248. 213 S.W.3d 101 (Mo. App. E.D. 2006).

249. MISS. HUMAN RIGHTS ACT § 213.111 (2000).

250. 213 S.W.3d at 101.

agreement with the university after filing a claim with the EEOC.²⁵¹ James Brady had been the head coach since 1985, with a winning record every year and with eighty percent of his players graduating.²⁵² In May 2002, the university engaged in the somewhat common practice of placing certain sports in tiers, with baseball, softball, and volleyball placed in the less favorable tier two sports, while basketball and soccer were deemed tier one sports.²⁵³ During this period, the plaintiff argued that the university allowed the baseball field to deteriorate, such that the coach contended the school had to decline the NCAA's offer to conduct championship games there, despite the baseball team being the best team in Division II at that juncture, and that the school never moved the coach back to his original favorable office.²⁵⁴

The coach proffered that three younger athletic department employees had been treated better than him.²⁵⁵ The university had hired a male assistant men's basketball coach, who was younger, and only had half a year student coaching experience at a salary appreciably higher than coach Brady's reduced salary.²⁵⁶ Another younger athletic department employee, the compliance officer, was allowed to work less than full-time hours to care for his children while still classified as a full-time employee.²⁵⁷ The jury brought back a verdict in excess of \$1 million in favor of the coach, with \$225,000 for actual damages, \$750,000 for punitive damages against the university, \$200,000 punitive damages individually against the Chancellor for Administrative Affairs, and \$100,000 punitive damages individually against the female Athletic Director.²⁵⁸ The defendants challenged the issuance of punitive damages. First, the Missouri appellate court ruled that the state statute allowed for punitive damages,²⁵⁹ affirming the trial court's action. Second, the court affirmed that the sufficiency of evidence warranted the punitive damages.²⁶⁰

ii. Other Athletic Department Employees

The first two cases concern women doing administrative work in the

251. *Id.* at 105.

252. *Id.* at 104.

253. *Id.* at 105.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 108.

260. *Id.* at 109-10.

athletic departments employed by the University of Oklahoma. In *Beery v. University of Oklahoma Board of Regents*,²⁶¹ a forty-eight-year-old female administrative assistant to the athletic director alleged age discrimination when she was terminated.²⁶² Beery's duties included secretarial and administrative duties.²⁶³ She had worked for the former athletic director for over fifteen years, then for the interim athletic director for a few months and the new athletic director for about six months until her termination on March 19, 1997.²⁶⁴ During 1996, the new athletic director had hired a forty-year-old man to be his special assistant.²⁶⁵ The special assistant was being groomed to be an associate athletic director.²⁶⁶ He received a significantly higher salary than the plaintiff.²⁶⁷ The special assistant began assuming some of the plaintiff's higher-level duties, such as "supervising the clerical staff, assisting the Athletic Director in preparing the budget, and returning sensitive phone calls and letters."²⁶⁸ The athletic department then announced a reorganization, which resulted in the plaintiff's termination, and the subsequent hiring of the former basketball office assistant, a forty-eight-year-old female, to a new Secretary II position.²⁶⁹

The Tenth Circuit Court of Appeals, in this unpublished opinion, affirmed the lower court's grant of summary judgment dismissing the age discrimination claim.²⁷⁰ The court rejected the plaintiff's use of comparison with the new special assistant; rather, the court found that the plaintiff's responsibilities and duties were more comparable to the new Secretary II position, which was filled by another woman over forty years of age.²⁷¹ The court identified that the special assistant's higher salary was related to his budgetary and supervisory roles, finding that there was "no evidence that plaintiff ever held the position for which [the special assistant] was hired, or that she was qualified to do so."²⁷²

In *McEwen v. University of Oklahoma Board of Regents ex rel State of*

261. No. 98-6459, 2000 WL 27692 (10th Cir. Jan. 14, 2000).

262. *Id.* at *1.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at *3.

272. *Id.*

Oklahoma,²⁷³ the Tenth Circuit again affirmed the lower court's issuance of summary judgment in favor of the state university concerning another age discrimination lawsuit commenced by a fifty-three-year-old woman, who had worked twenty-two years in the university's athletic department and refused a transfer to the physical plant.²⁷⁴ She was terminated due to a reduction-in-force in the athletic department. The lower court had found that the university's reason for the adverse employment decision was credible.

In *Austin v. Cornell University*, two male employees, who held seasonal positions at the private university's golf course, alleged age discrimination.²⁷⁵ This New York district court found that the lawsuit could proceed against two named university employees as defendants, respectively, the head golf professional at the Robert Trent Jones Golf Course in Ithaca, New York, and the Associate Director of Athletics for Operations and Facilities.²⁷⁶ One of the plaintiffs, Austin, worked in the pro shop for a number of seasons and as a paid ranger for one season; McPeak worked as a volunteer ranger for a number of seasons and a paid ranger for the golf course for two seasons—as the golf course was not open during the winter months.²⁷⁷ Prior to the 1993 season, both Austin and McPeak were not rehired.²⁷⁸ At that time, Austin was seventy-three-years-old, and McPeak was sixty-seven-years-old.²⁷⁹ They were told the university's decision was predicated on a reorganization to use a "double wave" system, which involved golfers crossing over after respectively playing the first nine holes or the tenth through eighteenth holes, and a downsizing from twenty to about sixteen or seventeen positions.²⁸⁰ The opinion omitted any discussion as to why an exact count was not provided for the trial court's consideration. If the plaintiffs accounted for two of the positions, then who was the third, and if applicable, fourth individual who did not make the final cut? The defendants indicated that they had received complaints regarding the plaintiffs' job performances, but decided not to communicate this to the plaintiffs, purportedly to spare their feelings.²⁸¹ Cornell advertised for the position and hired four individuals: three were under

273. No. 99-6214, 2000 WL 783418 (10th Cir. June 20, 2000).

274. *Id.* at *1.

275. 891 F. Supp. 740 (N.D.N.Y. 1995) (denying the defendants' motion for summary judgment to dismiss the lawsuit).

276. *Id.* at 743.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 743-44.

281. *Id.* at 744.

forty years of age and one man was in his fifties.²⁸²

First, the New York district court identified that “[u]nlawful termination cannot occur where a party is not an employee at the time of the alleged discrimination,”²⁸³ and thus granted the university’s motion to dismiss.²⁸⁴ However, as to unlawful failure to rehire, the court noted that “the ‘fresh help’ and ‘timid’ comments reasonably can relate to age-based stereotypes regarding plaintiffs.”²⁸⁵ Additionally, since the plaintiffs were replaced with workers having no ranger experience, the court found this established a permissible inference of discrimination.²⁸⁶ The court underscored the university’s failure to criticize the plaintiffs’ performance during the prior season, which could “lead to the rational inference that their performance was satisfactory and that defendants’ current claim to the contrary is pretextual.”²⁸⁷ Merely providing a list of ranger duties to the plaintiffs was not satisfactory to place the plaintiffs on notice that their work performance was unsatisfactory.²⁸⁸ Finally, this district court would allow individuals, as opposed to the employer, to be held liable under the ADEA where the discriminatory acts were performed while exercising supervisory control over a plaintiff’s employment.²⁸⁹

This case points out that if the educational institution is going to engage in employee evaluations, then it behooves the school to communicate the outcome of such activity to the employee. With the subsequent Court decision in *Cline*, it would appear that substituting older employees with younger employees, who are also over forty-years of age, will be tolerated. Obviously, this raises the question as to whether the ADEA statute should be amended to provide jurisdiction not only for those over forty-years-old, but also those who fall into that category where they are replaced by anyone who is ten years younger than the current employee.

C. Interscholastic Athletic Departments

The following cases involve high school football coaches. In *Eggleston v. South Bend Community School Corp.*,²⁹⁰ a male high school teacher had earlier alleged age discrimination by the school district in being denied a

282. *Id.* at 744-45.

283. *Id.* at 746.

284. *Id.*

285. *Id.* at 748.

286. *Id.*

287. *Id.*

288. *Id.* at 748-49.

289. *Id.* at 750.

290. 858 F. Supp. 841 (N.D. Ind. 1994).

teaching position.²⁹¹ The parties entered into a settlement agreement, which contained a clause related to the teaching position, as well as to his position as an assistant football coach.²⁹² The athletic department provided the coach with a favorable written evaluation, indicating that “[d]iscipline was excellent. Covered all phases of coaching responsibilities. Outstanding scouting report for each week. Very pleased with his work.”²⁹³ However, the head football coach was not so enamored with this assistant coach.²⁹⁴ The plaintiff would successfully file three grievances.²⁹⁵ Then the plaintiff instituted this lawsuit alleging retaliation based on his removal as the assistant football coach. The court, in this pre-*Kimel* case, emphasized:

For more than twenty years, the federal courts have held that harassment violates the statutory prohibition against discrimination in the terms and conditions of employment. *The [Equal Employment Opportunity] Commission has held and continues to hold that an employer has a duty to maintain a working environment free of harassment based on race, color, religion, sex, national origin, age, or disability, and that the duty requires positive action where necessary to eliminate such practices or remedy their effects.*²⁹⁶

The Indiana district court indicated the ADEA allows for compensatory damages,²⁹⁷ but not punitive damages.²⁹⁸ It also found that the ADEA allows for a claim based on a hostile environment.²⁹⁹

On March 30, 2001, in *Puchalski v. School District of Springfield*,³⁰⁰ a Pennsylvania district court denied a motion for summary judgment filed by the plaintiff, a terminated male football coach, who contended that his termination was based on a violation of the ADEA and that he was defamed.³⁰¹ The

291. *Id.* at 843.

292. *Id.*

293. *Id.* at 848.

294. *Id.*

295. *Id.* at 848-49.

296. *Id.* at 848 (emphasis in original).

297. *Id.* at 855.

298. *Id.* at 856.

299. *Id.* at 846-47. This generally is found in Title VII sexual harassment hostile environment cases.

300. 161 F. Supp. 2d 395 (E.D. Pa. 2001); *see also* *Cameli v. O’Neal*, No. 95-C-1369, 1997 WL 351193 (N.D. Ill., June 23, 1997) (examining a coach’s lawsuit predicated on discrimination based on age and race) (discussed within).

301. *See also* *Henderson v. Anne Arundel County Bd. of Educ.*, 54 F. Supp. 2d 482 (D. Md.

plaintiff had been the head coach for ten years.³⁰² It was alleged that he directed a racial epithet at a football player during a game at another school. A school employee allegedly made the statement that they were looking for a “young coach who works in the [school] district.”³⁰³ The district did not renew the plaintiff’s contract.³⁰⁴ The decision was purportedly based on a number of reasons, including the alleged failure by the coach to allow players to practice without first obtaining required physical examination forms.³⁰⁵ Clearly, making certain that all athletes are physically able and medically cleared to participate is an aspect that all coaches must follow. Ultimately, the school district hired one of the plaintiff’s assistant coaches, who was then twenty-five-years-old.³⁰⁶ The court ruled the plaintiff failed to establish an unlawful pretext for the adverse employment action.³⁰⁷ The coach also alleged racial discrimination. The Pennsylvania district court rejected the coach’s claim that the athletic director made a racist remark concerning him that presented him in a false light in violation of a state law.³⁰⁸

IV. RACE DISCRIMINATION

A. Legal Predicates

i. Fourteenth Amendment

There are a number of provisions that may prohibit discrimination based upon an individual’s race. The Fourteenth Amendment to the Constitution

1999) (discussed within) (finding no ADEA violation in not hiring the former high school head football coach back to his former position. The court ruled that the school board articulated non-pretextual reasons for selecting another younger Caucasian man).

302. *Puchalski*, 161 F. Supp. 2d at 402.

303. *Id.*

304. *Id.* at 403.

305. *See, e.g.*, 8 N.Y. COMP. CODES R & REGS. tit. 8, § 135.4 (c)(7)(i)(i) (2006) (directing public schools “(i) to provide adequate health examination before participation in strenuous activity and periodically throughout the season as necessary, and to permit no pupil to participate in such activity without the approval of the school medical officer”). *See generally* N.Y. EDUC. LAW § 901 (medical inspection to be provided) (McKinney 2006); N.Y. EDUC. LAW § 903 (pupils to furnish health certificates) (McKinney 2006); N.Y. EDUC. LAW § 904 (examinations by medical inspection) (McKinney 2006); N.Y. EDUC. LAW § 905 (record of examinations: eye, ear, and scoliosis tests) (McKinney 2005); N.Y. EDUC. LAW § 906 (existence of contagious diseases, return after illness) (McKinney 2006); N.Y. EDUC. LAW § 912-a (urine analysis; drug detection) (McKinney 2006).

306. 161 F. Supp. 2d at 403.

307. *Id.* at 412.

308. *Id.* at 402.

ensures equal protection by states pursuant to the Equal Protection Clause.³⁰⁹ For fundamental rights or laws predicated on race, national origin, or alienage, the laws must pass the highest test, the strict scrutiny test. As the Fifth Circuit Court of Appeals stated:

In order to preserve these principles, the Supreme Court recently has required that any governmental action that expressly distinguishes between persons on the basis of race be held to the most exacting scrutiny . . . Furthermore, there is now absolutely no doubt that courts are to employ strict scrutiny when evaluating all racial classifications, including those characterized by their proponents as “benign” or “remedial.”³¹⁰

Lawsuits may be brought as §1983 actions,³¹¹ a procedural mechanism that allows the plaintiff to assert violations of constitutional protections and certain statutes in federal courts.³¹²

309. U.S. CONST. amend. XIV. The 2000 U.S. Census form contained the following definitions: “The term Black or African American refers to people having origins in any of the Black racial groups of Africa. It includes people who indicate their race as Black, African Am., or Negro, or provide written entries such as African American, Afro American, Kenyan, Jamaican, Caribbean-American, Nigerian, or Haitian;” and “[t]he term White refers to people having origins in any of the original peoples of Europe, the Middle East, or North Africa. It includes people who indicate their race as ‘White’ or report entries such as Irish, German, Italian, British, Iraqi, Near Easterner, Arab, or Polish.” Race, <http://www.answers.com/topic/race-united-states-census> (last visited Oct. 14, 2007).

310. See *Hopwood v. Tex.*, 78 F.3d 932, 940 (5th Cir. 1996), *on remand*, 999 F. Supp. 872 (W.D. Tex. 1998), *aff’d in part, rev’d in part*, 236 F.3d 256 (5th Cir. 2000), *reh’g and reh’d en banc denied*, 248 F.3d 1141 (table), *cert. denied*, 533 U.S. 929 (2001); Heckman, *Women & Athletics*, *supra* note 1, at 7 n.23 (identifying Supreme Court decisions designating the aforementioned as suspect classes subject to a strict scrutiny standard).

311. 42 U.S.C. § 1983 (2005).

312. For cases brought by student-athletes concerning the NCAA’s academic requirements alleging discrimination on the basis of race pursuant to the Fifth or Fourteenth Amendment to the Constitution or the various federal statutes, see *Cureton v. National Collegiate Athletic Ass’n*, 198 F.3d 107 (3d Cir. 1999), *on remand*, No. Civ. A. 97-131, 2000 WL 388722 (E.D. Pa. Apr. 14, 2000), *reconsideration denied*, No. Civ. A. 97-131, 2000 WL 623233 (E.D. Pa. May 15, 2000), *aff’d*, 252 F.3d 267 (3d Cir. 2001) (examining whether NCAA’s use of standardized tests (SAT scores) to determine academic eligibility constituted discrimination, on the basis of race pursuant to a Title VI disparate impact theory, against incoming freshmen African-American students); *Pryor v. National Collegiate Athletic Ass’n*, 153 F. Supp. 2d 710 (E.D. Pa. 2001) (finding the NCAA was a recipient of federal funds in this Title VI action that also contested the NCAA’s initial eligibility standards); *Hall v. National Collegiate Athletic Ass’n*, 985 F. Supp. 782 (N.D. Ill. 1997) (another Title VI action concerning NCAA’s core course requirements imposed to satisfy a student-athlete’s academic eligibility); see also Diane Heckman, *Tracking Challenges to NCAA’s Academic Eligibility Rules Based on Race and Disability*, 222 EDUC. L. REP. 1, Oct. 4, 2007 (discussing the *Cureton* and *Pryor* cases); Kenneth L. Shropshire, *Colorblind Propositions: Race, the SAT, and the National Collegiate Athletic Association*, 8 STAN. L. & POL’Y REV. 141 (1997).

For other matters involving student-athletes or schools, see *Colorado Seminary v. National*

ii. Title VII of the Civil Rights Act of 1964 (Title VII)

There are also a number of federal statutes that prohibit discrimination on the basis of race. First, Title VII prohibits employment discrimination based on race,³¹³ provided there are at least fifteen employees and the business has an interstate commerce connection. The pivotal language of Title VII states:

It shall be an unlawful employment practice for an employer –

(1) 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, because of such individual's race, color, religion,

Collegiate Athletic Ass'n, 570 F.2d 320 (10th Cir. 1978) (NCAA's placement of the member school on probation for failure to declare certain intercollegiate hockey players ineligible was not unconstitutional); *Butts v. National Collegiate Athletic Ass'n*, 751 F.2d 609 (3d Cir. 1984) (college basketball player brought action seeking preliminary injunction against enforcement of NCAA rule providing that athlete's participation in organized sport after twenty years of age and prior to college would count as one year of varsity competition in sport for purposes of four-year college eligibility limitation. The Third Circuit upheld the lower court's denial of the player's request seeking an injunction, even if the rule might have a racially disparate impact); *Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224 (5th Cir. 1968) (finding state high school athletic association which prevented schools with black student-athletes from being members violated the Constitution); *Davis v. Kent State University*, 928 F. Supp. 729 (N.D. Ohio 1996) (dismissing complaint filed by male African-American, who claimed loss of his athletic scholarship on the gymnastics team was motivated by his race in this Section 1983 action predicated on violation of the First, Fourth, Fifth and Fourteenth Amendments); *Kelley v. Metropolitan County Board of Nashville and Davidson County, Tennessee*, 293 F. Supp. 485 (M.D. Tenn. 1968) (concerning suspension of an "all Negro high school" for a year). See generally, Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615 (1995) (examining "the role of race in denying equality of opportunity to black participants involved in college sports"); Timothy Davis, *Racism in Athletics: Subtle Yet Persistent*, 21 U. ARK. LITTLE ROCK L. REV. 881 (1999) (follow-up article); Alfred Dennis Mathewson, *Emphasizing Torts in Claims of Discrimination Against Black Female Athletes*, 38 WASHBURN L.J. 817 (1999).

313. See also *Cox v. Nat'l Football League*, 29 F. Supp. 2d 463 (N.D. Ill. 1998) (unsuccessful Title VII retaliation claim brought by NFL player); *Scholz v. RDV Sports, Inc.*, 710 So. 2d 618 (Fla. Dist. Ct. App. 1998) (concluding that a terminated white assistant coach for the Orlando Magic, an NBA team, established a prima facie case of racial discrimination under Title VII concerning his allegation of wrongful discharge), *review denied*, 718 So. 2d 170 (Fla. 1998). The court noted, "Title VII extends protection against intentional racial discrimination to both minority and nonminority employees." *Id.* at 623. The court further articulated, "[I]t was not necessary for [the plaintiff] to prove that race was the sole reason for his termination. . . . Rather, he was only required to submit evidence indicating that race was a motivating factor in making the decision." *Id.* at 625. See generally Sean D. Johnson, *Wage Discrimination in the National Basketball Association: Is There Discrimination Based on Race?*, 6 VILL. SPORTS & ENT. L.J. 27 (1999); Earl Smith, *Race Matters in the National Basketball Association*, 9 MARQ. SPORTS L.J. 239 (1999); Michael Corey Dawson, Comment, *A Change Must Come: All Racial Barriers Precluding Minority Representation in Managerial Positions on Professional Sports Teams Must Be Eliminated*, 9 SETON HALL J. SPORT L. 551 (1999).

sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.³¹⁴

In order to establish a prima facie racial discrimination case, the following elements must be proven: "(1) membership in a protected class; (2) satisfactory job performance [where the individual is already employed]; (3) an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination."³¹⁵ A plaintiff may establish either a disparate treatment or disparate impact case. A disparate treatment case may be proven by either a direct or indirect method. Under the direct method, the individual must prove that the defendant was motivated by discriminatory animus, through either direct or circumstantial evidence.³¹⁶ Presently, there has been no Supreme Court ruling finding that this statute, upon which the ADEA was modeled, infringes on state sovereignty as found in the Eleventh Amendment. While this statute is activity based, the next one is based on a federal funding predicate.

iii. Title VI of the Civil Rights Act of 1964 (Title VI)

Title VI³¹⁷ prohibits discrimination on the basis of race, color, or national origin. It states, "No person in the United States shall, on the ground of race,

314. 42 U.S.C. § 2000e-(2)(a) (2000) (employer practices).

315. *Zhao v. State Univ. of N.Y.*, 472 F. Supp. 2d 289, 307 (E.D.N.Y. 2007) (citing *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 567 (2d Cir. 2000)). This court also noted,

Nor does it matter that the stereotyping involved positive attributes that could have initially favored a plaintiff at the time of hiring. If an employer has crossed the line into making employment decisions based on ethnic stereotyping rather than on the merits, one could easily see how a stereotype that may benefit an employee on one day could result in an adverse employment action on another day.

Id. at 310.

316. *Sun v. Bd. of Trs. of Univ. of Ill.*, 473 F.3d 799, 812 (7th Cir. 2007) (indicating that circumstantial evidence of intentional discrimination features "(1) suspicious timing, ambiguous oral or written statements, or behavior toward or comments directed at other employees in the protected group; (2) evidence, whether or not rigorously statistical, that similarly situated employees outside the protected class received systematically better treatment; and (3) evidence that the employee was qualified for the job in question but was passed over in favor of a person outside the protected class and the employer's reason is a pretext for discrimination), *cert. denied*, 127 S. Ct. 2941 (2007). The indirect method utilizes the *McDonnell Douglas* method. *Id.* at 814.

317. 42 U.S.C. § 2000d (effective July 2, 1964).

color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”³¹⁸ Thus, in order to trigger application of this statute, a prospective plaintiff must establish that the program or activity received federal funds. It would be applicable to any educational program or activity that is a recipient of federal funds. Unlike with Title VII, in *Alexander v. Sandoval*,³¹⁹ the Supreme Court determined that an individual could not enforce the disparate-impact Title VI regulations in a private action; individuals must establish intentional discrimination in order to obtain relief pursuant to Title VI. The Equalization Act also applies to Title VI.³²⁰ The Court has not entertained a case challenging the Eleventh Amendment entwinement over this statute’s application to potential public schools.

iv. Section 1981 Action

Another federal statute, 42 U.S.C. § 1981, is restricted to prohibiting racial discrimination in the making and enforcement of employment contracts, which also utilizes the burden-shifting analysis. The law provides the following:

(a) Statement of equal rights[:] All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens (b) ‘Make and enforce contracts’ defined[:] For purposes of this section, the term ‘make and enforce contracts’ includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. (c) Protection against impairment[:] The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.³²¹

The court in *Goins v. Hitchcock Independent School District*³²² stated:

318. *Id.*

319. 532 U.S. 275 (2001) (5-4 decision) (rejecting the plaintiff’s claim that Alabama violated Title VI by offering tests to obtain driver’s licenses only in the English language).

320. *See* 42 U.S.C. § 2000d-7.

321. *Id.* § 1981 (1991).

322. 191 F. Supp. 2d 860 (S.D. Tex. 2002), *aff’d*, 65 Fed. Appx. 508 (5th Cir. 2003) (unpublished opinion).

In order to sustain a claim under § 1981 against Individual Defendants, Plaintiff must show that (1) she belongs to a racial minority; (2) the Individual Defendants intended to discriminate against her on the basis of race; and (3) such discrimination involved an activity enumerated in the statute (i.e., the making and enforcing of a contract).³²³

Title VI, Title VII, and § 1981 actions require intentional discrimination.

B. Coaches

The period since the passage of Title VII also reflects the changing of all-white or predominantly Caucasian athletic teams and corresponding coaching squads,³²⁴ especially in the interscholastic and intercollegiate sports of football and men's basketball. A number of coaches, especially football coaches, have commenced lawsuits. The cases generally fall into two categories: (1) those commenced by African-American coaches alleging failure to be hired or retained,³²⁵ and (2) reverse discrimination suits, involving the termination of white coaches who were replaced by African-American coaches.³²⁶ Long-time coaches may also assert age discrimination claims. The issue of whether school districts could hire coaches of one race to match the race of the team's student-athletes would underlie a number of cases. The general scenario would feature the termination of the long-time white male coach, leaving open two possible legal grounds: an age discrimination claim, as well as a race discrimination claim. Female coaches have not asserted race-based challenges, where little progress has been made in their coaching men's football or men's basketball teams, regardless of their race.

Throughout these cases, attention should be paid to the identity (category) of the school employee making the offensive remarks and to how the courts

323. *Id.* at 869-70 (covering only race and alienage and not gender-based discrimination); *id.* at 870 n.9; *see also* *Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400, 402-03 (5th Cir. 2001) (detailing the elements required to support a *prima facie* case as had been articulated by the district court).

324. *See, e.g.*, the history of the men's basketball team at the University of Kentucky. Richard Lapchick, *A Reason to Celebrate Sports: Buck O'Neil*, ESPN.COM, Oct. 14, 2006, http://sports.espn.go.com/espn/columns/story?columnist=lapchick_richard&id=2621475.

325. *See, e.g.*, *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042 (5th Cir. 1996); *Harris v. Birmingham Bd. of Educ.*, 712 F.2d 1377 (11th Cir. 1983); *Cross v. Bd. of Educ. of Dollarway Ark. Sch. Dist.*, 395 F. Supp. 531 (E.D. Ark. 1975).

326. *See, e.g.*, *Cameli v. O'Neal*, No. 95-C-1369, 1997 WL 862988 (N.D. Ill. June 23, 1997); *Covington v. Beaumont Indep. Sch. Dist.*, 738 F. Supp. 1041 (E.D. Tex. 1990); *Frye v. Anne Arundel County Bd. of Educ.*, No. C-2000-67307-OC, 2002 WL 31995810 (Md. Cir. Ct. Nov. 21, 2002).

handled the discourse. The following case illustrates biases that may still impact individuals, even though the administrator's comment did not establish race discrimination. In *Auguster v. Vermilion Parish School Board*,³²⁷ the Fifth Circuit Court of Appeals found no § 1981 claim for racial discrimination concerning an African-American male teacher in a Louisiana school whose teaching contract was not renewed, where his position was filled by a white woman.³²⁸ A school administrator had reportedly told the plaintiff that he had a negative experience with past hiring of African-American coaches, "and if there was another problem, no matter what it was, that he would do his best to get rid of me, from day one."³²⁹ After being hired, this teacher was reprimanded for inappropriate use of corporal punishment and for showing an R-rated movie to his students.³³⁰ The court found: "Given the overwhelming evidence supporting the school board's legitimate justification, however, [the administrator's] comments can be viewed as no more than stray remarks, which are insufficient to survive summary judgment."³³¹

The cases are divided into two sections, dealing with hiring or termination concerns. The cases are chronologically presented; they all concern interscholastic or intercollegiate coaches with the exception of the *Clemons* case, which involved an official.

i. Hiring-Related Cases

While the 2007 National Football League Super Bowl game was historic for featuring for the first time two African-American coaches (Lovie Smith, coach of the Chicago Bears, and Tony Dungy, coach of the winning Indianapolis Colts),³³² the hiring of minority individuals to coach NCAA Division I teams has not made great progress despite forty years of civil rights legislation. A 2007 *New York Times* article reported that merely seven out of

327. No. 00-30736, 2001 WL 392261 (5th Cir. May 3, 2001).

328. *Id.* at *2.

329. *Id.* at *5.

330. *Id.* at *2.

331. *Id.* The Fifth Circuit stated,

The fact that [an administrator] had told [the plaintiff] that 'if there was another problem, no matter what it was, that he would do his best to get rid of [him]' is insignificant in comparison to the evidence of the [plaintiff's] unfitness as a teacher and thus is insufficient, on its own, to establish discrimination.

Id. at *6 (analyzing the elements pertaining to stray remarks).

332. See John Branch, *One Man's Journey: From the Flats to the Pinnacle, Savoring the Ride*, N.Y. TIMES, Jan. 28, 2007, § 8, at 1; Karen Crouse, *One Man's Lesson: A Gentle Touch Develops into a Winning One*, N.Y. TIMES, Jan. 28, 2007, § 8, at 1.

119 NCAA Division I-A programs were led by minority coaches, one less than in 1998.³³³ The article also informed that only two out of twenty head-coaching vacancies for the past season were filled by minority coaches.³³⁴

In *Harris v. Birmingham Board of Education*,³³⁵ the Eleventh Circuit Court of Appeals examined whether racial discrimination occurred in a case commenced by three African-American male coaches employed by an Alabama board of education. The plaintiffs alleged they were only assigned to coach football or basketball at historically all African-American schools in the area and were never promoted to the head coaching position at other schools.³³⁶ This Alabama school board operated under a desegregation order.³³⁷ The plaintiffs produced statistical evidence that “[o]nly once in a ten-year period (1970-1980), was a white head football coach replaced by an [African-American] head football coach and that occurred at a school which eventually became predominantly [African-American].”³³⁸ There was an informal system used for assigning head coaches, with no fixed criteria for the head coaching positions.³³⁹ The Eleventh Circuit found that as to one of the plaintiffs, “[t]he statistical evidence, the showing of only subjective hiring standards and the history of past racial discrimination was enough to compel a finding of employment discrimination.”³⁴⁰ The appellate court highlighted:

Title VII, Supreme Court precedent, and our holdings would be rendered a farce if a public employer, without notification of job opportunity procedures, without uniform criteria for determining qualifications, and with a totally subjective system of selection could rebut a prima facie case by a prospective employee of the protected class by showing that the employee never had the opportunity to learn of and apply for the job.³⁴¹

333. Selena Roberts, *College Booster Bias Is Delaying Minority Hiring*, N.Y. TIMES, Jan. 28, 2007, § 8, at 1, 6.

334. *Id.*

335. 712 F.2d 1377 (11th Cir. 1983); *see also* Cross v. Bd. of Educ. of Dollarway Ark. Sch. Dist., 395 F. Supp. 531 (E.D. Ark. 1975) (concerning another black high school football coach, who was demoted to a junior high school football coach, when the all-black high school became the junior high school and the older black students were placed in a predominantly white high school. He was passed over for consideration as the high school football coach, which the court found violated Title VII).

336. *Harris*, 712 F.2d at 1379.

337. *Id.* at 1381.

338. *Id.*

339. *Id.*

340. *Id.* at 1383.

341. *Id.* at 1384.

The court thus remanded the case back to the district court for further proceedings in light of its determination as to one of the coaches.³⁴²

Another teacher, with one Mexican and one African-American parent, unsuccessfully asserted a Title VII violation in *Lujan v. Franklin County Board of Education*, where a white applicant was chosen as the head high school football coach at a Tennessee school.³⁴³ Previously, Lujan had been the head football and boys' basketball coach at an all-black high school that closed.³⁴⁴ Then, the plaintiff was assigned to be the assistant football coach at his new school.³⁴⁵ The Tennessee district court found there were "plausible non-discriminatory reasons" for the school board's action.³⁴⁶ The Sixth Circuit affirmed the decision.³⁴⁷

In *Covington v. Beaumont Independent School District*,³⁴⁸ two football coaches, a male Caucasian and male Hispanic, at a Texas high school alleged racial discrimination in being reassigned from the varsity football team to the sophomore team.³⁴⁹ The school had assigned two male African-American coaches to coach the varsity football team based on the rationale that the majority of the team were African-American players.³⁵⁰ In this § 1983 action, the Texas district court held this violated the Equal Protection Clause of the Fourteenth Amendment.³⁵¹ In 1990, the court noted the school district's actions were not part of an affirmative action plan, nor was the reassignment undertaken to remedy identified past discrimination against black coaches.³⁵² The court rejected the school district's rationale that its reason was to further racial integration among its coaching staff in light of an old case charging the system was not integrated.³⁵³ The Texas district court ruled the coaches were entitled to \$1 each for the constitutional violation and \$5000 each for mental distress and anguish.³⁵⁴

On June 14, 1999, in *Henderson v. Anne Arundel County Board of*

342. *Id.*

343. 584 F. Supp. 279 (E.D. Tenn. 1984).

344. *Id.* at 280.

345. *Id.* at 280-81.

346. *Id.* at 282.

347. *Lujan v. Franklin County Bd. of Educ.*, 766 F.2d 917 (6th Cir. 1985).

348. 738 F. Supp. 1041 (E.D. Tex. 1990) (the coaches were still being paid according to the contracts to coach the varsity team).

349. *Id.* at 1042.

350. *Id.*

351. *Id.* at 1042-43.

352. *Id.* at 1043.

353. *Id.*

354. *Id.*

Education,³⁵⁵ the Maryland district court granted a board of education's motion for summary judgment dismissing the claims of race and age discrimination brought pursuant to Title VII, § 1981, and the ADEA by an African-American male who was not selected as the head varsity football coach at one of the high schools.³⁵⁶ The plaintiff had been the head coach at the high school for three years, compiling the following win-loss record: 1-9, 5-5, and 2-8.³⁵⁷ His contract was not renewed.³⁵⁸ A new coach who had a winning record came in for a few years.³⁵⁹ When he left, the plaintiff applied for the position, which went to a younger male Caucasian.³⁶⁰ The plaintiff apparently had a poor interview, which combined with his poor performance when he last had the position, were deemed legitimate reasons for hiring the other individual.³⁶¹ The court rejected the plaintiff's "spoliation" argument that members on the interview panel had destroyed their personal notes after the interviews occurred.³⁶² The plaintiff pointed out that the interview by the selection committee was conducted by Caucasians and based on subjective criteria.³⁶³ The court commented:

Although the Court recognizes that the vagaries of high school sports make it difficult for any coach to maintain a consistent winning record—given the shifting talent pool of players from year to year—nonetheless, Mr. Henderson's losing record when he had the head coach job, combined with his poor interview performance, certainly constituted a legitimate, non-discriminatory reason for his non-selection³⁶⁴

As to the argument that subjective elements were included, the court noted that "the selection of a football coach comes close to a tenure decision, in that subjective evaluations are highly important."³⁶⁵

355. 54 F. Supp. 2d 482 (D. Md. 1999).

356. *Id.* at 484.

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.* at 485. The court found, "These were minor records, personal to the interviewers, and it is certainly understandable that teachers serving on a panel to interview a football coach would see no reason to preserve records of this nature." *Id.* at 484.

363. *Id.*

364. *Id.*

365. *Id.*

In *Frye v. Anne Arundel County Board of Education*,³⁶⁶ the plaintiff alleged reverse race discrimination in not being selected as the head football coach at a Maryland high school, where the coach had held the position for two prior years when the school board announced it would solicit applications for the 1999-2000 academic year.³⁶⁷ Three candidates applied, including Frye, a Caucasian male.³⁶⁸ The position went to one of his assistant coaches, an African-American male.³⁶⁹ A five-person panel did the interviewing for the position.³⁷⁰ However, the school principal made the ultimate hiring decision, indicating that she did not hire the plaintiff due to his prior job performance allegedly consisting of profanity and negative remarks made by him to his players, along with lack of control of the team and his lack of self-control.³⁷¹ The coach had two winning seasons as head coach.³⁷² The Maryland state appellate court dismissed the assertion that one or more of the panel members thought it would be “nice” to have a black coach, and that there may have been discrepancies between the actual tallies of the selection committee members and what was transferred to the principal, since the selection panel did not make the ultimate decision.³⁷³ The plaintiff also alleged the new hiring was a sham, as it was announced in a newspaper article before the principal officially took over that position.³⁷⁴ The appellate court noted, “The Supreme Court has held that Title VII protects whites as well as minorities.”³⁷⁵ However, the court found the plaintiff did not establish his burden of essentially proving that the principal’s action was due to discriminatory racial animus, stating, “Even if [the principal] was wrong in her assessment, there is no evidence that she was dishonest or that she was motivated by racial reasons, nor does being wrong establish unlawful [discriminatory] conduct.”³⁷⁶ Thus, the Maryland appellate court granted the defendant’s motion for summary judgment.

The analysis addressed the role of the panel; however, it was not fully investigated, since the court relied on the principal making the ultimate

366. No. C-2000-67307 OC, 2002 WL 31995810 (Md. Cir. Ct. Nov. 21, 2002).

367. *Id.* at *1.

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.* at *2.

372. *Id.*

373. *Id.* at *3.

374. *Id.*

375. *Id.* at *1 (citing *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273 (1975)).

376. *Id.* at *4.

decision. This case poses four potential tracts of inquiry, especially for high schools hiring coaches. First, the criteria for selecting the coach should be identified at the commencement of the process, such as the following: (a) educational background (including minimum requirements: high school graduate, college graduate, other); (b) sports background (high school participation, collegiate, Olympic, professional, other); (c) coaching background (high school, college, Olympic, professional, other); (d) win-loss record; (e) coaching philosophy; (f) identification of the school's philosophy concerning the role of athletics; (g) graduation rates; (h) coach's control of past teams; (i) coach's record for technical fouls, etc.; (j) student-athlete violations; (k) health and safety concerns (number of athletes injured and severity of injuries); (l) temperament, which is one of those subjective aspects; and (m) other miscellaneous aspects. Second, educational institutions should make it clear who has the ultimate hiring decision and what the role of any panel or search committee is before the selection process begins: thus, is it merely to screen potential candidates with a final interview of the top two or three individuals by the actual school administrator who makes the ultimate decision, or does the panel have final authority? Why bother having a panel, purportedly comprised of school representatives conversant with the area, if the panel's recommendation is not followed? Third, the lax manner in which the panel reached its decision was glossed over—if tally sheets are utilized, then the chair of the selection committee should be charged with collecting, tallying, and storing them if making the ultimate decision or before their transmittal to the ultimate decision-maker. Fourth, the ultimate decision-maker's basis for making the selection should comport with the original criteria.

In *Seagrave v. Dean*,³⁷⁷ a Louisiana trial court awarded the white male former track coach at the Louisiana State University and Agricultural and Mechanical College (LSU) damages for lost wages and emotional distress for breach of a state law.³⁷⁸ Originally, the state university hired Seagrave as an assistant men's and women's track coach.³⁷⁹ Then the university promoted him to be the head coach for the women's team.³⁸⁰ When an opening occurred with the men's team during 1987, Seagrave applied for the position, which went to another male who had experience being the head coach of the men's program.³⁸¹ LSU told Seagrave that he did not have the proper experience.³⁸²

377. 908 So. 2d 41 (La. Ct. App. 2005).

378. *Id.* at 42.

379. *Id.* at 43.

380. *Id.*

381. *Id.*

During a 1989 out-of-state spring training program, the plaintiff informed the current men's track coach that he had engaged in an all-night counseling session with one of his female athletes at the residence where he was living during this interim period.³⁸³ Upon Seagrave's return, a meeting was held whereupon the administration asked the coach to resign; he refused.³⁸⁴ The university held a grievance hearing, even though the coach was deemed an at-will employee.³⁸⁵ LSU did not change the termination decision.³⁸⁶

In 1990, Seagrave commenced his lawsuit alleging a number of grounds, including that his termination was predicated upon racial discrimination, pursuant to a Louisiana state statute, based on his marriage to an African-American woman.³⁸⁷ In analyzing the requisite prima facie elements, the Louisiana appellate court reversed the favorable trial court decision.³⁸⁸ First, the appellate court determined the protected class was not African-Americans, "but rather is someone engaged in an interracial relationship."³⁸⁹ Seagrave was replaced as the women's track coach with an African-American woman, who was not engaged in an interracial relationship.³⁹⁰ Thus, the "jury could reasonably conclude that Seagrave established that he was replaced by someone outside of his protected class."³⁹¹ However, the inquiry did not end there.

Apparently, there was a comment by the athletic director that Seagrave would not be considered for the men's head coaching position "because he only had experience coaching women and because he was going to marry a black woman."³⁹² The Louisiana state appellate court stated:

In order for comments in the workplace to provide sufficient evidence of discrimination, they must be (1) related to the protected class of persons of which the plaintiff is a member; (2) proximate in time to the termination; (3) made by an individual with authority over the employment decision; and (4) related to

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.* at 43-44.

388. *Id.* at 42.

389. *Id.* at 46.

390. *Id.*

391. *Id.*

392. *Id.*

the employment decision at issue.³⁹³

The court found the plaintiff failed to establish all the criteria as the comment was allegedly made in 1987, approximately two years before the coach's ultimate termination.³⁹⁴ Thus, the appeals court found that the jury erred.³⁹⁵

During 2006, in *Banks v. Pocatello School District No. 25*,³⁹⁶ the Idaho district court refused to grant summary judgment to the school district based on a male African-American's Title VII claim that he was not hired as a head football coach based on racial discrimination and retaliation for filing an administrative grievance with the EEOC.

ii. Termination Cases

The Fifth Circuit Court of Appeals rejected claims asserted by a black, male assistant men's basketball coach based on violation of his First Amendment freedom of speech and association protections and § 1981 racial discrimination in *Wallace v. Texas Tech University*.³⁹⁷ The university reportedly warned the coach not to get too close to his players.³⁹⁸ It then refused to renew the coach's contract for allegedly advising some of his players that they were entitled to financial assistance during their fifth year of NCAA eligibility.³⁹⁹ The appellate court affirmed the grant of summary judgment.⁴⁰⁰ It noted that an allegation of a racial slur did not establish a violation of §1981, nor did the evidence support the plaintiff's claim that racist remarks had been made by the head coach or other individuals.⁴⁰¹ The Fifth Circuit also rejected the assertion of discrimination based on a difference in pay accorded the two assistant coaches, as the other coach had greater experience—thus providing an objective reason for the difference in compensation afforded him.⁴⁰²

The next case is instructive, where educational institutions can premise employment decisions based on the win-loss record of a coach, as it is a

393. *Id.*

394. *Id.* at 46-47.

395. *Id.* at 47.

396. No. CV-04-125-E-BLW, 2006 WL 1128214 (D. Idaho Apr. 25, 2006).

397. 80 F.3d 1042 (5th Cir. 1996).

398. *Id.* at 1046.

399. *Id.*

400. *Id.* at 1042.

401. *Id.* at 1048.

402. See Heckman, *Freedom of Speech*, *supra* note 3, at 39-40 (expounding on this case).

legitimate barometer to use in making employment decisions where written coaching contracts are non-existent or negligible, especially on the interscholastic level. In *Cameli v. O'Neal*,⁴⁰³ a Caucasian long-time Illinois high school varsity basketball coach unsuccessfully alleged race and age discrimination.⁴⁰⁴ The case reflects, depending on the parties' viewpoint, the interaction or interference by the administration into the fundamental role of a coach: (1) to make his own staffing decisions, provided they do not abridge any applicable laws, and (2) to make his own team-composition decisions in a sport where tryouts were held to ascertain the talent and ability of potential team members.⁴⁰⁵

A chronological timeline is featured. Initially, the head boys' basketball coach refused to hire a "Black" assistant coach to sit on the bench.⁴⁰⁶ The racial composition of the school or even the team members was not provided. The administration informed Cameli that he must have an African-American assistant "to increase the diversity of the coaching staff."⁴⁰⁷ The coach then indicated his displeasure with the African-American man hired to coach the sophomore team.⁴⁰⁸ The assistant principal then recommended that the plaintiff not be rehired as the varsity coach; however, the superintendent did not implement the recommendation.⁴⁰⁹

During the beginning of the 1992-1993 school year, a new principal came on board who indicated he would be a hands-on administrator.⁴¹⁰ At the end of the 1992-1993 school year, the coach indicated his intent to retire from teaching at the end of the following academic year (June 1994).⁴¹¹ The plaintiff was born during 1934 and thus would presumably be approximately sixty-years-old upon his retirement.⁴¹² Cameli met with the new principal, who informed him that he did not favor retired teachers continuing to

403. No. 95-C-1369, 1997 WL 351193 (N.D. Ill. June 23, 1997); see also *Jett v. Dallas Indep. Sch. Dist.*, 798 F.2d 748 (5th Cir. 1986) (concerning the involuntary transfer of a Caucasian football coach due to his alleged comments in a local newspaper, predicated on a First Amendment free speech violation), *aff'd in part, rev'd in part*, 491 U.S. 701 (1989), *on remand*, 7 F.3d 1241 (5th Cir. 1993).

404. *Cameli*, No. 95-C-1369, 1997 WL 351193, at *12.

405. See *id.* at *2-4, *15. This differs from where student-athletes can be members of the team provided that they show up for the team.

406. See generally *id.*

407. *Id.* at *1.

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.* at *2.

412. *Id.* at *1.

coach.⁴¹³ The court did not identify any Illinois statutes or regulations that formally embodied this stance, nor did it indicate whether the school district had policies that directed this stance—as opposed to a single administrator’s viewpoint. The principal informed the coach that he thought the sophomore coach could take over the plaintiff’s position.⁴¹⁴

At the end of the 1993 varsity basketball tryouts, the plaintiff wanted to cut two seniors from the team, based on other superior talent exhibited.⁴¹⁵ However, the principal instructed the coach that while the two seniors did not have to play, they were to be kept on the team.⁴¹⁶ During November 1993, one of these students then accused the coach of calling him a “bastard” during a practice, which was contested.⁴¹⁷ During December, the coach dismissed three students from the team.⁴¹⁸ The principal again intervened and overruled this determination.⁴¹⁹ The plaintiff claimed that his supervisors “told him repeatedly that he would be the last white coach” at the high school.⁴²⁰ The principal informed the coach of his displeasure with the coach being called for a technical foul during an away game against the school’s rival team.⁴²¹ The principal was not satisfied with the team’s performance that year.⁴²² The team lost in the final playoff game to a team that included “a 1996 Heisman Trophy finalist, two players who eventually went on to play NCAA Division I basketball, and Antoine Walker, who now plays professionally for the Boston Celtics.”⁴²³ The team finished with a win-loss record of 16-9, although it was 14-3 for the second half of the season.⁴²⁴

The plaintiff also claimed that the superintendent asked him, “Don’t you think you’re getting too old for this game?” and “Don’t you think you ought to surprise everyone by resigning?”⁴²⁵ During March 1994, the principal sent the plaintiff a letter indicating he would not be rehired as the coach, and the school hired the thirty-eight-year-old African-American boys’ sophomore basketball

413. *Id.* at *2.

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.* at *3.

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.* at *4.

423. *Id.* at *4 n.6.

424. *Id.* at *4.

425. *Id.*

coach for the position.⁴²⁶ The court did not indicate if the public high school did any advertising to solicit applications for the coaching position.

As to the ADEA claim, the Illinois district court stated, "A statement by an employer or its agents that reveals hostility to older workers may constitute direct evidence of discrimination."⁴²⁷ However, the court then highlighted, "The mere utterance of derogatory age-related comments, which are unconnected to the allegedly wrongful employment decision at issue, cannot give rise to an inference of age discrimination."⁴²⁸ Thus, the Illinois district court found no ADEA violation predicated upon its determination that the superintendent was not the individual who made the employment decision not to rehire the plaintiff, which was done by the principal, even though the superintendent reviewed or approved this decision—and the plaintiff proffered evidence that age-related comments were made by this individual.⁴²⁹ When the assistant principal advanced his decision to terminate the coach, the superintendent had authority to override that determination.⁴³⁰ The court also rejected the plaintiff's claim that the reasons for his discharge were pretextual.⁴³¹ Previously, when the former acting principal wanted to terminate the coach, it was the superintendent who did not implement the decision.⁴³² The power that each of these administrators held, which may not have been unilateral, as the court apparently relied upon, constituted dual power held by both the superintendent and the principal to affect employment decisions.⁴³³ The plaintiff pursued no appeal.

Second, the court rejected the plaintiff's claim that a hostile environment was created pursuant to Title VII based on race.⁴³⁴ The court found the evidence presented did not constitute an objectively hostile environment.⁴³⁵ The court also rejected a further motion by the school district to limit the amount of front pay potentially available to the plaintiff to compensate him for the amount of his coaching stipend for any years he could prove that he would have continued to coach.⁴³⁶

426. *Id.*

427. *Id.* at *5.

428. *Id.* at *6.

429. *Id.* at *11-12.

430. *Id.*

431. *Id.* at *9-11.

432. *Id.* at *8.

433. *Id.* at *12.

434. *Id.* at *13-14.

435. *Id.* at *13.

436. *Id.*

Thus, the court ruled that the school district would essentially be responsible for a breach of contract claim to pay the coach for any time that remained on the coach's contract with the school district. However, on the two big-ticket items, the court rejected the coach's ADEA and Title VII discrimination claims. The court sanctioned the school district's premature termination of the coach, where the court did not categorically conclude that the school district's actions were predicated on just cause.

During 1997, this same Illinois district court also rejected the ADEA and Title VII claims advanced in the next case involving an African-American man. In *Clemons v. Big Ten Conference*, this collegiate football referee claimed ADA disability discrimination due to obesity, previously discussed, as well as racial discrimination against the Big Ten Conference, a conference in the NCAA.⁴³⁷ There were no allegations of any race-related statements made by conference members to this plaintiff. The Illinois district court held that "[a] plaintiff may establish racial discrimination under Title VII or Section 1981 either by presenting direct evidence of discrimination or by following the burden-shifting method set out in *McDonnell Douglas Corp. v. Green*."⁴³⁸ Ultimately, the court issued summary judgment to the conference on both discrimination claims advanced.⁴³⁹

V. CONCLUSION

Despite the existence of a number of strong civil rights statutes aimed at prohibiting discrimination, aside from the issue of sex discrimination, there exists a paucity of cases involving athletic department employees at educational institutions predicated on age, disability, and race. The surprisingly minimal case law accounts for the lack of clear trends to extrapolate from the material. It does capture the restricted ability by these employees to avail themselves of these laws, with the Supreme Court's erecting Eleventh Amendment barriers to suing certain public educational institutions or narrowing whether plaintiffs can meet the jurisdictional criteria that they belong in the class subject to purported discrimination.

In the area of disability discrimination involving employment, despite the presence of three federal statutes, reliance is posited principally on the ADA. Any possible use of the fundamentals of the *Martin* decision to the issue of disability discrimination concerning athletic employment remains to be seen,

437. No. 96-C-0124, 1997 WL 89227 (N.D. Ill. Feb. 4, 1997).

438. *Id.* at *3; see also Heckman, *Forty Years of Sex Discrimination*, *supra* note 13, at 5 (elaborating on the burden-shifting method).

439. *Clemons*, No. 96-C-0124, 1997 WL 89227, at *6.

especially as concerns the pivotal area of providing a reasonable accommodation. The Supreme Court's broad reading of what constitutes a reasonable accommodation is a favorable result—and represents the only case that the Court has substantively addressed involving individuals involved with athletics pursuant to the federal civil rights laws examined herein. Additionally, the *Meling* lower court decision showcases the peril for educational institutions that do not consider ascertaining what the reasonable accommodation consists of in a particular situation, as evidenced by the appreciable punitive damages awarded in a pre-*Barnes* case.

On the converse side, the Supreme Court has substantially limited those deemed “disabled” and extricated state entities from being subject to the ADA's coverage for Title I employment-based cases based on the Eleventh Amendment. Whether public school athletic department employees can safely use Title II for adverse employment actions at public entities remains to be seen, as the *Martin* case dealt with an independent contractor who sought relief under Title III and the *Lane* case dealt specifically with access to the courts, pursuant to Title II, and not educational facilities. The Court in *Barnes* also took away the ability of disabled individuals to receive punitive damages. The bottom line is that the Rehnquist Court took the broad congressional mandate embodied within the ADA and has appreciably lessened it due to the result of the *Garrett* decision.

It is not known if the prevalence of older (male) coaches, especially on the professional level, including the National Basketball Association, the National Football League, and Major League Baseball, has had any impact on making it not out-of-the-ordinary to employ older coaches. As exemplified by the presence of Coach Joe Paterno at Penn State University (collegiate football) and Coach Bobby Knight at Texas Tech University (collegiate basketball), the pattern continues. During 2006, Coach John Cheney announced his retirement from Temple University (collegiate basketball). Numerous other male collegiate coaches could have been identified. Perhaps this societal acceptance accounts for the scarcity of cases by educational athletic department employees asserting age discrimination. On the judicial side, the Supreme Court's decision in *Kimel* restricting the ability of individuals to commence ADEA actions against state actors is also complicit with providing a barrier to athletic department employees at certain educational institutions from going forward with claims for monetary damages in federal courts. With race discrimination, this area was dominated by interscholastic football coaches challenging coaching decisions. It revealed not only the traditional cases, but a number of reverse discrimination claims. The bellwether issue in the area of federal discrimination laws remains the outcome of Eleventh Amendment challenges and any congressional response.

Many courts have dismissed the “stray” offensive comments uttered by school employees in the discrimination cases as not being indicative of a discriminatory intent when the coach is dismissed from coaching the interscholastic or intercollegiate team. A number of these cases are predicated on the coach’s poor win-loss record in that sport, which is put forth to be an objective barometer when making athletic department employment decisions. However, as every longtime coach knows, there will be times when the team will be victorious and other times when it will not be.⁴⁴⁰ Having an athlete of the caliber of Mia Hamm, Michael Jordan, or Joe Montana will significantly ensure the prospect of a winning season—but after the athlete’s graduation, unless there is another individual possessed with superior athletic talent, the previously great coach will look merely average at best. The overall caliber of the team pool is not put into the equation when win-loss records are examined. This is taking into account the ability to recruit such athletes, which is not present in public school interscholastic programs. Moreover, on the interscholastic level, the emphasis should be on the non-profit aspect of the endeavor and its educational-related purpose. The same argument could be advanced with intercollegiate athletic programs. The selection process, especially when it encompasses selection committees, should be reviewed for the employment of athletic department employees. Coaches should understand the parameters of their employment, not only where a written contract is entered into between the parties, but also where the relationship is based on a handshake. Educational administrators must be cognizant of these civil rights laws when making employment decisions and continue to keep track of the developing law.

440. See *Brady v. Curators of Univ. of Mo.*, 213 S.W.3d 101, 105 (Mo. App. E.D. 2006).

APPENDIX

FEDERAL CIVIL RIGHTS LAWS INVOLVING EDUCATIONAL ATHLETIC DEPARTMENT EMPLOYMENT

STATUTE	TITLE VII	EQUAL PAY ACT	TITLE IX	REHABILITATION ACT, SECTION 504	IDEA	ADA	ADEA	TITLE VI
Code Citation	42 U.S.C. § 2000e-17	29 U.S.C. § 206(d)	20 U.S.C. §§ 1681-1688 ²	29 U.S.C. § 794 ¹	20 U.S.C. §§ 1400-1500 ³	42 U.S.C. §§ 12101-12213	29 U.S.C. §§ 621-634	42 U.S.C. § 2000d
Type of Discrimination	race, sex, national origin, or religion	sex	sex	disability	disability	disability	age	race, color, or national origin
Prohibits Retaliation	yes 42 U.S.C. § 2000e-3(e)	yes 29 U.S.C. § 215(a)(3)	yes ⁴ 34 C.F.R. § 106.51	yes	yes	yes 42 U.S.C. § 12203	yes 29 U.S.C. § 623(d)	yes
Main Jurisdictional Requirement	15 or more employees	15 or more employees	recipient of federal funds & educational program	recipient of federal funds	recipient of federal funds for special ed programs	employment ⁵ of public entities, ⁶ and public accommodations ⁷	20 or more employees	recipient of federal funds
Statute of Limitations	180 days or 300 days (if file with state or local agency)	2 years (3 years if it is a willful violation)	borrowers state law	borrowers state law	identified depending if re: hearing or judicial action ⁸	Title I follows Title VII; Titles II and III borrow state law	follows Title VII	borrowers state law
Pre-filing Requirement with an Administrative Agency	yes	no	no	yes (employees)	yes (for students)	Title I: yes Title II: no Title III: possibly	yes	no

* N/A designates that the issue is not being presently addressed.

¹ For the implementing regulations, see 34 C.F.R. pt. 104 (2006)
² For the new implementing regulations, see 34 C.F.R. pt. 106 (2006) (revisions were made to 34 C.F.R. §§ 106.34, 106.35, 106.43)
³ For the new implementing regulations, see 34 C.F.R. pt. 300 & pt. 301 (2006).
⁴ See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).
⁵ See Title I, 42 U.S.C. §§ 12111-12117 (2000); 29 C.F.R. pt. 1630 (2006) (based on Title VII).
⁶ See Title II, 42 U.S.C. §§ 12131-12165 (2000); 28 C.F.R. pt. 35 (2006).
⁷ See Title III, 42 U.S.C. §§ 12181-12189 (2000); 28 C.F.R. pt. 36 (2006).
⁸ 20 U.S.C. § 1415(i)(3)(C) (2006); 34 C.F.R. §§ 300.507(a)(2), 300.516(b) (2006) (imposing “two years for [the] hearing stage and 90 days for [the] judicial stage unless specified in state law”); Perry A. Zirkel, *An Updated Comparison of the IDEA and Section 504/ADA*, 216 EDUC. L. REP. 1, 11 n.101 (Mar. 22, 2007). Prior to the 2004 changes to the IDEA, the federal courts borrowed from the state law.

STATUTE	TITLE VII	EQUAL PAY ACT	TITLE IX	REHABILITATION ACT, SECTION 504	IDEA	ADA	ADEA	TITLE VI
Statutory Abrogation of Eleventh Amendment Immunity	yes 42 U.S.C. § 2000e-3	yes 29 U.S.C. § 206(d)(1)	yes 42 U.S.C. § 2000d-7	yes 42 U.S.C. § 2000d-7	yes 42 U.S.C. § 1403	yes 42 U.S.C. § 12202	yes 29 U.S.C. § 626(b)	yes 42 U.S.C. § 2000d-7
Supreme Court Finding that Eleventh Amendment Immunity Prohibits Private Lawsuits Against States or Arms of the States	qualified - no ⁹ [N/A] ¹⁰	[N/A]	[N/A]	no ¹¹	[N/A] ¹²	Title I: yes ¹³ Title II: no ¹⁵ (state employers - public entities - state courthouses)	yes ¹⁴	[N/A]
Limitation on Amount of Monetary Damages	yes - sex (compensatory) ¹⁷	no	no	yes (employees) follows Title VII ¹⁸	controverted ¹⁶	Title I: yes (employees) follows Title VII Title III ¹⁹	follows Title VII	no

* N/A designates that the issue is not being presently addressed.

⁹ See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (this decision was rendered prior to the enactment of the Civil Rights Act of 1991). There has been no post-*Scimmole Tribe* Supreme Court decision rendered sanctioning the ability of citizens to sue states in federal courts pursuant to Title VII.

¹⁰ U.S. CONST. amend. XI. The Supreme Court has yet to rule on this issue involving the Equal Pay Act. For cases vacating the decisions and remanding for further consideration in light of *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (dealing with the ADEA), see *State University of New York, College at New Paltz v. Anderson*, 528 U.S. 1111 (2000), *vacating* 169 F.3d 117 (2d Cir. 1999) (ruling that the Equal Pay Act did allow for plaintiffs to sue public entities, without contravening the Eleventh Amendment), *on remand sub nom. Anderson v. State University of New York*, 107 F. Supp. 2d 158 (N.D.N.Y. 2000) (concluding the Equal Pay Act did abrogate Eleventh Amendment immunity for state entities), and *Illinois State University v. Varner*, 528 U.S. 1110 (2000), *vacating* 130 F.3d 706 (7th Cir. 1998) (claim by female tenure-track faculty alleging violation of Title VII and Equal Pay Act), *on remand*, 226 F.3d 927 (7th Cir. 2000) (ruling the Equal Pay Act did foreclose Eleventh Amendment immunity to protect the state university and the issue of whether Title VII also resulted in the same determination was waived on appeal), *cert denied*, 533 U.S. 902 (2001).

¹¹ The Supreme Court has not ruled on this issue. See *Lane v. Pena*, 518 U.S. 187 (1996) (finding citizens could not sue the federal government, here the U.S. Department of Transportation, for monetary relief pursuant to the Rehabilitation Act).

¹² See 34 C.F.R. § 300.177 (2006) (2004 revisions). The Supreme Court has not ruled on this issue.

¹³ See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

¹⁴ See *Kimel*, 528 U.S. 62.

¹⁵ See *Tenn. v. Lane*, 541 U.S. 509 (2004) (5-4) (determining disabled citizens could sue states for access to the state judicial system). However, this was a narrow decision tailored to the judicial access provided by this public entity, rather than a full-fledged sanctioning of the abrogation of state sovereign immunity when Title II is asserted.

¹⁶ There is no explicit statutory language conferring monetary damages. The general position is that the IDEA does not provide for compensatory damages. See *Hamilton v. Bd. of Sch. Comm'rs of Mobile County, Ala.*, 993 F. Supp. 884 (S.D. Ala. 1996). However, it is not unanimous. See *Zinkel, supra* note 8, at 12 n.116. There is also a lack of consistency concerning the awarding of punitive damages. *Id.*

¹⁷ When Title VII sex discrimination is successfully asserted then a tier system is applied with the more employees an employer hires, the greater the amount of compensatory damages that may be awarded with a maximum of \$300,000. However, this restriction is not applied when suspect classes are involved, such as with race discrimination. Punitive damages are permitted. 42 U.S.C. § 1981a(3) (1991); see also *Kolstad v. Am. Dental Ass'n*, 527 U.S. 326 (1999).

¹⁸ Compensatory damages are allowed. *But see Barnes v. Gorman*, 536 U.S. 181 (2002) (disallowing punitive damages).

¹⁹ Monetary damages are not available for Title III claims pertaining to public accommodations. See 28 C.F.R. § 36.501 (2006); see, e.g., *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524 (3d Cir. 2007); *Cole v. Nat'l Collegiate Athletic Ass'n*, 120 F. Supp. 2d 1060 (N.D. Ga. 2000).

MUHAMMAD ALI: THE GREATEST IN COURT

ANDRES F. QUINTANA*

- I. INTRODUCTION
- II. THE RISE AND FALL OF THE GREATEST WORLD HEAVYWEIGHT CHAMPION
 - A. *Ali's Fight with Sonny Liston Marks the Advent of His Boxing-Related Lawsuits*
 - B. *Ali Commences His Legal Fight for Conscientious Objector Classification*
 - i. "I ain't got no quarrel with the Viet Cong": Ali's Anti-Vietnam Position Draws Public Ire
 - ii. Ali Spars with Federal and Administrative Tribunals over His Classification
 - C. *Ali Continues His Assault on Boxing Heavyweight Contenders*
 - D. *Ali Fights Conscription on Grounds of Under-representation*
 - E. *Ali Sentenced for Refusing Induction*
 - F. *Ali Becomes Involved in Leading Foreign Intelligence Surveillance Case*
 - G. *Ali Battles New York State Boxing Athletic Commission over Boxing License*
 - H. *Physical Education Teachers or Professors*
 - I. *Ali Prevails in the U.S. Supreme Court as a Conscientious Objector*
- III. THE RETURN AND RETIREMENT OF THE WORLD HEAVYWEIGHT CHAMPION

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- A. *The Legal Fallout from the "Rumble"*
- B. *Ali's Post-fight Jeers Prompt Lawsuit*
- C. *Ali Champions the Right of Publicity Protection*
- D. *Ali's Fight with Leon Spinks Incites Antitrust Lawsuit*
- E. *The End of a Legendary Career*

IV. CONCLUSION

Every knee must bend, every head must bow,
every tongue must testify, thou art The Greatest
of all time.¹

I. INTRODUCTION

Muhammad Ali is considered one of sport's most popular, if not controversial, icons of the twentieth century.² In the sports world, perhaps only soccer's fabled Pele or basketball's renowned Michael Jordan can legitimately challenge Ali's indissoluble recognition and universal appeal.³ Known simply by the self-proclaimed moniker "The Greatest"⁴ to boxing aficionados and fans worldwide, Ali was a charismatic and exuberant champion with an intoxicating and flamboyant personality. Ali's extraordinary boxing skills are irrefutable. As an amateur, Ali had a phenomenal boxing record of 100 victories in 108 bouts by the age of eighteen and had won six Kentucky Golden Gloves titles, two National Amateur Athletic Union championships, two National Golden Glove crowns, and an

1. THE QUOTABLE ESPN 228 (Shelly Youngblut, ed. 1998) (quoting boxing promoter Don King in reference to Muhammad Ali).

2. See *America's Greatest: Four Athletes Who Transcend Sports in the 20th Century*, SAN DIEGO UNION-TRIB., Jan. 14, 1999, at D7 (naming Muhammad Ali, Jackie Robinson, Babe Ruth, and Michael Jordan); Vicki Michaelis, *Top 10 Sports Heroes of the Past 100 Years*, DENVER POST, Jan. 17, 1999, at C10 (ranking Muhammad Ali number one).

3. See Stephen Brunt, *Jordan Joins Ali, Pele as Men Who Rose Above Their Sports*, GLOBE & MAIL (Toronto), Jan. 14, 1999, at S2 (naming Muhammad Ali, Michael Jordan, and Pele as the three athletes in the twentieth century "who have become part of the worldwide mass consciousness"); Hubert B. Herring, *A Benchmark for Generation X Golf*, N.Y. TIMES, Nov. 14, 1999, at 2 (naming Muhammad Ali along with Babe Ruth, Billie Jean King, and Pele as "sports figures who don't just define their sports, they change their sports").

4. MUHAMMAD ALI WITH RICHARD DURHAM, *THE GREATEST: MY OWN STORY* 415 (1975) ("I already told them. And I already told you. Didn't you hear me? I said I was The Greatest.").

Olympic gold medal in the light heavyweight division.⁵ His remarkable amateur success carried over to a much acclaimed and well-documented professional boxing career. At his prime, Ali showcased all the indispensable attributes of a superlative pugilist: quick hands, remarkable reflexes, nimble footwork, a potent jab,⁶ and an uncanny ability to withstand his opponents' punches. By the time Ali retired from boxing in 1981, he had captured the professional heavyweight championship an unprecedented three times and compiled an impressive 56-5 career record with thirty-seven knock-outs and nineteen successful title defenses.⁷ Deservingly, Ali was inducted into the International Boxing and United States Olympic Halls of Fame and is recognized by pundits and the general public alike as one of the greatest heavyweight champions of all time.⁸ In 1994, Ali was honored as "Athlete of the Century" by *Sports Illustrated* magazine.⁹

Ali's path to immortality, however, was rocky. At the commencement of his professional boxing career, Ali was more maligned than he was adored.¹⁰ He had developed a vivid, profane gift for hectoring and mentally browbeating his opponents before fights with a myriad of antics and tactics in and out of the boxing ring.¹¹ As a formidable, poetry-spouting bully, Ali escalated taunting and smack-talking to unprecedented heights to strategically keep his opponents psychologically off balance. His aphorisms, rhymes, and pre-fight jeers at some of the sport's best known boxers—Joe Frazier, George Foreman,

5. "Fighters in the [light heavyweight] category must weigh between 165 [pounds] and 178 [pounds] if amateurs, and between 160 [pounds] and 178 [pounds] if professional." THE DICTIONARY OF SPORTS: THE COMPLETE GUIDE FOR TV VIEWERS, SPECTATORS AND PLAYERS 187 (Gerry Cox ed., 1999).

6. In boxing parlance, a "jab" is a "short sharp punch," used frequently to divert an opponent's attention before another, presumably more potent punch is thrown. THE MAMMOTH BOOK OF WORLD SPORTS 92 (Noam Friedlander ed., Carroll & Graf Publishers 1999)(1975); see THE DICTIONARY OF SPORTS: THE COMPLETE GUIDE FOR TV VIEWERS, SPECTATORS AND PLAYERS, *supra* note 5, at 187. Other types of punches include "the hook" (a heavy blow, usually to the head) and "the uppercut" (which is delivered from below and aimed at the lower part of the face or at the body). THE MAMMOTH BOOK OF WORLD SPORTS at 92.

7. Cyber Boxing Zone, Muhammad Ali, <http://www.cyberboxingzone.com/boxing/alirec.htm> (last visited Sept. 27, 2007).

8. Ali was inducted into the International Boxing Hall of Fame in 1990. International Boxing Hall of Fame, Enshrines: Muhammad Ali, <http://www.ibhof.com/ali.htm> (last visited Sept. 27, 2007). Ali was inducted into the Olympic Boxing Hall of Fame in 1983. U.S. Olympic Hall of Fame, <http://www.hickoksports.com/history/olymphof.shtml> (last visited Sept. 27, 2007).

9. Barry Dick, *The Greatest – Muhammad Ali*, COURIER-MAIL (Brisbane, Austl.), Nov. 26, 2005, at 64, available at <http://www.news.com.au/couriermail/story/0,23739,17365233—10389,00.html>.

10. See Stephen Brunt, *For Shining Moment, World Stands Still for Ali*, GLOBE & MAIL (Toronto), July 20, 1996, at E2.

11. BERT BLEWETT, THE A-Z OF WORLD BOXING: AN AUTHORITATIVE AND ENTERTAINING COMPENDIUM OF THE FIGHT GAME FROM ITS ORIGINS TO THE PRESENT DAY 13 (1996).

Charles “Sonny” Liston, Floyd Patterson—are considered classics. Consequently, the media and much of the general public considered the young, upstart Ali an arrogant, unapologetic braggart who irritated many with his orotund talk. Indeed, Ali’s braggadocio alone motivated the general public to flock to his bouts expecting, if not yearning for, his opponent to slam his mouth shut with a fistful of knuckles.¹² As Ali recounted: “Every time I stepped into the ring, at least half the audience was so anxious to see me slaughtered, they would cheer and scream and stomp for every punch an opponent hit me with. So much so that they became hysterical when I frustrated those dreams and hopes.”¹³

Whether marveled or not, Ali was the embodiment of the consummate entertainer, the marquee protagonist in a night of riveting theater. Ali aptly self-promoted and knew how to enlist the news media as an integral part of his competitive strategy.

Ali’s achievements extend beyond his well-known boxing prowess and records. He literally transcended the sport of boxing and dominated other public landscapes: political activism, civil rights, religious freedom, and humanitarian projects.¹⁴ Although dozens of books have been written and various movies produced about Ali, Ali’s significant contribution to American law either as a party litigant or through the legal action stemming from his many fights has not been systematically discussed.

In order to shed additional light on Ali’s remarkable life, this article briefly recounts Ali’s many feats both in the boxing ring and the courts. Part II of this article chronicles the rise of the upstart and mouthy Ali and his heavyweight championship fight debut against the ferocious Sonny Liston in the bout that “shocked the world.”¹⁵ The fight’s legal fallout marked the advent of Ali’s many boxing-related lawsuits throughout his career. Part II will also focus on Ali’s conversion to Islam, his refusal to be inducted into the armed forces, and consequently, the revocation of his boxing license. The article then navigates through Ali’s protracted legal fight in the various federal and administrative tribunals over his conscientious objector status and

12. AUDREY EDWARDS, MUHAMMAD ALI, THE PEOPLE’S CHAMP 12, 17 (1977) (“His boasting alone drew records to his fights.”); Patrick Smith, *Down for the Count, But Still the Greatest*, THE AGE (Melbourne, Austl.), July 22, 1996, at 2. “He became a performer, hustling people with a calculated sales pitch designed to shock his public yet still make them turn out for the fights.” EDWARDS, *supra* at 12.

13. ALI WITH DURHAM, *supra* note 4, at 133.

14. See Michael Oriard, *College Athletics as a Vehicle for Social Reform*, 22 J.C. & U.L. 77, 84 (1995). Ali has further lent his name to a number of causes including the Muhammad Ali Parkinson’s Research Center and the Muhammad Ali Boxing Reform Act of 1998, S. 2238, 105th Cong. (1998).

15. International Boxing Hall of Fame, *supra* note 8.

involvement in a leading foreign surveillance intelligence case. Along this difficult path, Ali's legal battle resulted in several published and important cases, culminating in the landmark U.S. Supreme Court decision in *Clay v. United States*.¹⁶ Part II of the article also analyzes Ali's legal struggle with the state boxing commissions to renew his boxing license.

Fresh from his victories before the Supreme Court and state boxing commission, Part III of the article focuses on the highly anticipated return of the heavyweight champion to the familiar boxing ring. The article recounts his epic fights with the sport's best known boxers—Joe Frazier in “The Fight of the Century” and the “Thrilla in Manila,” and George Forman in the “The Rumble in the Jungle”—as well as the legal aftermath stemming from these bouts. Part III also analyzes Ali's legal championing of the common law right of publicity protection in the well-known *Playgirl Magazine* case¹⁷ and his collateral impact in the fields of copyright and antitrust law. Finally, Part III reflects upon Ali's final bouts and the twilight of his legendary career.

II. THE RISE AND FALL OF THE GREATEST WORLD HEAVYWEIGHT CHAMPION

Muhammad Ali was born Cassius Marcellus Clay, Jr., named after a prominent nineteenth century abolitionist, on January 17, 1942, in Louisville, Kentucky.¹⁸ Ali began his boxing career as a skinny, 112-pound twelve-year-old under the tutelage of Joe Elsbey Martin, a white Louisville policeman.¹⁹ Surprisingly, Ali did not naturally gravitate towards boxing, but instead serendipitously discovered the sport that would ultimately define him.²⁰ The tale of Ali's unexpected convergence with boxing is so often retold as to be a fundamental part of his legend.²¹ In October 1954, at age twelve, Ali and a friend rode their bicycles to a local recreational auditorium, which was hosting a bazaar.²² When the two boys left to return home, Ali discovered that his bicycle had vanished.²³ In his frantic search for a policeman who could help recover his bicycle, Ali wandered into the auditorium's basement gym where Martin ran a boxing training program.²⁴ Immediately, Ali was hooked.²⁵ As

16. *Clay v. United States (Clay III)*, 403 U.S. 698 (1971).

17. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

18. JOHN COTTRELL, *MUHAMMAD ALI, WHO ONCE WAS CASSIUS CLAY* 9 (1967).

19. ALI WITH DURHAM, *supra* note 4, at 45.

20. *Id.*

21. *See id.*

22. *Id.*

23. *Id.*

24. *Id.*

he recollected:

[T]he sights and sounds and the smell of the boxing gym excited me so much that I almost forgot about the bike.

There were about ten boxers in the gym, some hitting the speed bag, some in the ring, sparring, some jumping rope. I stood there, smelling the sweat and rubbing alcohol, and a feeling of awe came over me.²⁶

Six weeks later the young Ali won a three-minute, three-round split decision in his debut match.²⁷ The rest, as the saying goes, is history.

Ali first came to public attention after he won the gold medal in the light heavyweight division in the 1960 Summer Olympic Games in Rome, Italy.²⁸ Ali's decisive Olympic victory—considered the apex of the amateur boxing world—enabled him to garner the invaluable notoriety he needed to launch his meteoric ascent towards the professional heavyweight title.²⁹ On the heels of the Olympic Games, Ali made his professional debut on October 29, 1960, by defeating Tunney Hunsaker.³⁰ The fight was significant because, as Ali stated, of “all the publicity and all the shouting I'd done, the sports world would be watching every blow I threw.”³¹ Between 1960 and 1963, Ali defeated nineteen consecutive opponents, including several contenders.³² The 1963 bout against Brit Henry Cooper, the one-time British, European, and Commonwealth heavyweight champion, was particularly noteworthy because Cooper had knocked Ali down in the fourth round with his trademark left

25. *Id.*

26. *Id.*

27. “To all intents and purposes, Cassius was born at the age of 12, the day he entered the gym and started fighting.” ALI WITH DURHAM, *supra* note 4, at 46.

28. The championship bout was fought on September 5, 1960. RUMMEL, *supra* note 18, at 31-32. Ali's opponent was Zbigniew Pietrzyskowski of Poland, the European champion and gold medal favorite. *Id.* at 31. Judges awarded Ali a unanimous decision. *Id.* at 32.

29. Ali v. Connally, 266 F. Supp. 345, 349 (S.D. Tex. 1967) (Ali's “subsequent entry into the ranks of professional pugilism was followed by immediate, continuous and remarkable success”).

30. Cyber Boxing Zone, *supra* note 7.

31. ALI WITH DURHAM, *supra* note 4, at 80.

32. The nineteen fighters defeated by Muhammad Ali were, in chronological order: Herb Slier (December 27, 1960); Tony Esperti (January 17, 1961); Jim Robinson (February 7, 1961); Donnie Fleeman (February 21, 1961); Lamar Clark (April 19, 1961); Duke Sadedong (June 26, 1961); Alonzo Johnson (July 22, 1961); Alex Miteff (October 7, 1961); Willi Besmanoff (November 29, 1961); Sonny Banks (February 19, 1962); Don Warner (March 28, 1962); George Logan (April 23, 1962); Billy Daniels (May 19, 1962); Alejandro Lavorante (July 20, 1962); Archie Moore (November 15, 1962); Charlie Powell (January 24, 1963); Doug Jones (March 13, 1963); and Henry Cooper (June 18, 1963). Cyber Boxing Zone, *supra* note 7.

hook, “Enry’s ‘Ammer.”³³ The bell rang before Cooper could complete a knockout, and, according to the legend, Ali was so dazed that his trainer, Angelo Dundee, cut his glove.³⁴ Another glove had to be fetched, giving Ali time to recover from the knockdown and ultimately prevail over Cooper.³⁵

Outside the ring at this time, America was in the midst of the turbulent 1960s, an era of significant political, cultural, and social cataclysm driven by a motley of lively and controversial causes and characters. It was then that Ali the professional boxer would become, perhaps unexpectedly, Ali the lightning rod for a society struggling to deal with a myriad of social, political, and cultural issues. Ali, then still Cassius, began to develop a budding interest in the Nation of Islam, an organization the general public at the time considered to be subversive and militant.³⁶

*A. Ali’s Fight with Sonny Liston Marks the Advent of His Boxing Related
Lawsuits*

Ali’s professional and personal life would be suddenly and permanently transformed in 1964. In that year, Charles “Sonny” Liston was the fearsome world heavyweight boxing champion.³⁷ Ali did the unthinkable and daringly challenged the seemingly invincible and ferocious Liston for the world heavyweight boxing title. Even though Ali was not the primary heavyweight title contender, his continuous taunts at Liston induced the heavyweight champion to choose Ali as an opponent.³⁸ “Ain’t I pretty?,” Ali would cry. “Ain’t that big old bear Liston ugly?”³⁹ Like many of Ali’s historical bouts to come, the Ali-Liston fight was promoted with a catchy nickname: “The Greatest Grudge Fight in History.”⁴⁰ On February 25, 1964, a significant underdog, Ali indeed “Shocked the World” by defeating Liston after six rounds.⁴¹ Liston surrendered the title when he refused to answer the bell for round seven, opting instead to retire on his stool, having lost round six under a

33. *Henry Cooper*, <http://www.answers.com/topic/henry-cooper-boxer> (last visited Sept. 26, 2007).

34. James Slater, *Clay v. Cooper: The Final Word on the Torn Glove Story*, EASTSIDEBOXING.COM, Mar. 17, 2006, <http://www.eastsideboxing.com/news.php?p=6346&more=1>.

35. *Henry Cooper*, *supra* note 33.

36. EDWARDS, *supra* note 12, at 62.

37. *Cyber Boxing Zone*, *supra* note 7.

38. ALI WITH DURHAM, *supra* note 4, at 112.

39. JOHN D. MCCALLUM, *THE WORLD HEAVYWEIGHT BOXING CHAMPIONSHIP: A HISTORY* 322 (1974).

40. ALI WITH DURHAM, *supra* note 4, at 113.

41. <http://www.answers.com/topic/henry-cooper-boxer> Boxing Hall of Fame, *supra* note 8.

flurry of Ali's hefty punches, and claiming an injured shoulder.⁴²

Despite Ali's excessive pre-fight ballyhooing and self-promotion, the bout itself was indifferently covered by the news media and poorly attended. Perhaps this was because the fight was perceived as a considerable mismatch.⁴³ Indeed, the case of *Inter-Continental Promotions, Inc. v. MacDonald* stemmed from the fight's lackluster attendance.⁴⁴ Inter-Continental Promotions, which "owned both fighters," sued the fight's promoter, William MacDonald, and his surety for breach of contract.⁴⁵ Under the express terms of their contract, MacDonald agreed to pay Inter-Continental, "upon completion of the boxing contest," \$625,000 for the live gate receipts.⁴⁶ Since only "a small crowd" attended the fight, the gate receipts amounted to a mere \$225,000.⁴⁷ MacDonald paid Inter-Continental that amount and the latter sued for the outstanding balance.⁴⁸ In federal district court, MacDonald averred that his contract with Inter-Continental was illegal on its face since Florida law made promoting a prizefight illegal.⁴⁹ Specifically, MacDonald relied upon a Florida statute that made it a felony "to voluntarily engage in" or "to render aid" in "any pugilistic exhibition, fight or encounter . . . [for] which any admission fee is charged,"⁵⁰ except "boxing exhibitions held by and under the auspices of" a designated or specifically approved organization.⁵¹ The district court agreed with MacDonald, and Inter-Continental appealed; the U.S. Court of Appeals for the Fifth Circuit reversed.⁵² After consideration of the Florida statute and legislative history,

42. According to Muhammad Ali's account of the fight's final rounds:

In the sixth, I went out and Liston was a changed man. He'd thrown his best stuff and he hadn't been able to do his damage. I felt his breathing. He was tired and I was still strong, and he knew he had no protection against my lefts or rights. When the bell rang for the start of the seventh round, he stayed in his corner. He sat limp on the stool, staring blankly across at us. Angelo and Bundini were screaming at me: "You The Champion! You The Champion!" I leaped into their arms. The long campaign was over. I had come into my own. I had fulfilled my prediction.

ALI WITH DURHAM, *supra* note 4, at 119.

43. Liston was an 8-1 betting favorite over Ali. Dave Kindred, *It Was 25 Years Ago: No Small Feat of Clay*, ATLANTA J.-CONST., Feb. 26, 1989, at E4.

44. 367 F.2d 293, 294 (5th Cir. 1966).

45. *Id.*

46. *Id.* at 295.

47. *Id.* at 294.

48. *Id.*

49. *Id.*

50. *Id.* at 295 (citing to FLA. STAT. ANN. §§ 548.01-.02 (West 1971)(repealed 1984)).

51. *Id.*

52. *Id.* at 303.

the Fifth Circuit held that a “prizefight” came within the scope of the generic terms “pugilistic exhibition” and “boxing exhibition.”⁵³ Moreover, the court noted that while the statute requires only that the bout “be held by and under the auspices” of one of the designated or approved organizations, it does not require that the group be a signatory to every contract that relates to the fight.⁵⁴ The absence of any mention of a designated or approved group in the contract between Inter-Continental and MacDonald was not inconsistent with the allegation that an approved group ultimately sponsored the bout.⁵⁵ The court found that because Inter-Continental completely performed its part of the bargain, the “potential injustice is far greater than if neither side had performed and one of the parties were seeking to compel the other to do so.”⁵⁶

B. Ali Commences His Legal Fight for Conscientious Objector Classification

The day after the Liston fight, Ali again “shocked the world” when he appeared at a press conference and formally announced that he accepted the teachings of Islam and changed his name to Cassius X.⁵⁷ A couple weeks later he changed his name to Muhammad Ali. Ali’s announcement purportedly prompted then FBI Director J. Edgar Hoover to inquire about the champ’s draft status.⁵⁸ Furthermore, Ali’s religious conversion to the Nation of Islam struck a disconcerting chord with the general public and made him anathema to white Christian America.⁵⁹

Ali would not return to the boxing ring for almost sixteen months. On May 25, 1965, Ali defeated Liston again in a lackluster rematch bout.⁶⁰ This time Ali needed less than one round to dispose of Liston with the now alleged and infamous “phantom punch.”⁶¹ “I’m the king of the world,” Ali vigorously

53. *Id.* at 292.

54. *Id.* at 302.

55. *Id.*

56. *Id.* at 303.

57. ALI WITH DURHAM, *supra* note 4, at 178. When asked the significance of the letter “X,” Ali replied that as members of the Nation of Islam, “we rejected the names handed to us by our former slave masters and X took the place of our real but unknown black names.” *Id.* at 128.

58. HOWARD BINGHAM & MAX WALLACE, *MUHAMMAD ALI’S GREATEST FIGHT: CASSIUS CLAY VS. THE UNITED STATES OF AMERICA* 96 (2000).

59. Brunt, *supra* note 3 (stating Ali’s religious conversion “turned a man whom the press had characterized as harmless and clown-like into an apparently dangerous character”).

60. See Robert Fachel, *Sports Fanfare: Boxing*, WASH. POST, Aug. 8, 1995, at E2; Shirley Povich, *Joe Walcott: Many Names, Endurance Most of All*, WASH. POST, Mar. 6, 1994, at D3.

61. Fachel, *supra* note 60; Povich, *supra* note 60; see also Earl Gustkey, *19 Years Later Liston Death Remains Mystery to His Friends*, L.A. TIMES, Feb. 22, 1989, at 1 (opining that Ali’s first round knock-out punch “didn’t look strong enough to break an egg”).

proclaimed after the fight, now with added validity.⁶² Ali went on to defeat Floyd Patterson on November 22, 1965.⁶³

i. “I ain’t got no quarrel with the Viet Cong”⁶⁴: Ali’s Anti-Vietnam Position Draws Public Ire

Synonymous with the tumult of the 1960s was America’s controversial involvement in the Vietnam War. The outspoken Ali opposed conscription and became entangled in a protracted legal brawl that would culminate in the landmark U.S. Supreme Court conscientious objector case of *Clay v. United States*.⁶⁵ That decision is considered one of the most important legal events of that era.⁶⁶ Ali’s legal fight would “highlight a fundamental question in the Supreme Court—whether a citizen has a constitutional right by liberty of conscience to refuse to serve in a particular war as opposed to war in the abstract.”⁶⁷ This fight began on February 17, 1966, when Ali was classified 1-A⁶⁸ by a selective service board in Louisville, Kentucky.⁶⁹ When journalists asked Ali about his reaction to his classification, Ali uttered his infamous poem about the Vietnam War. As Ali recalled later:

Of all the poems I wrote, all the words I spoke, all the slogans I shouted . . . of all the controversies that aroused people against me or for me, none would have the effect on my life or change the climate around me like the “poem” I read on a TV hookup one warm February afternoon in Miami, 1966.⁷⁰

Keep asking me, no matter how long,

On the war in Viet Nam, I sing this song
I ain’t got no quarrel with the Viet Cong . . .⁷¹

62. Muhammad Ali Quote, <http://www.saidwhat.co.uk/quote650.html> (last visited Sept. 26, 2007).

63. Cyber Boxing Zone, *supra* note 7.

64. ALI WITH DURHAM, *supra* note 4, at 124.

65. *Clay v. United States (Clay III)*, 403 U.S. 698 (1971).

66. See Mark Conrad, *Major Legal Events of the Century: 1961-1972*, N.Y.L.J., Aug. 13, 1999, at 5.

67. JOHN COTTRELL, *MUHAMMAD ALI, WHO ONCE WAS CASSIUS CLAY* 339 (1967).

68. A “1-A” classification signified the eligibility for unrestricted military service. *Clay III*, 403 U.S. at 699.

69. *Clay v. United States (Clay I)*, 397 F.2d 901, 905 (5th Cir. 1968).

70. ALI WITH DURHAM, *supra* note 4, at 123.

71. *Id.* at 124.

A reporter was asking me if I would accept the draft. The children were looking at my face and I was looking at theirs. I shook my head and repeated the remark I had already made to them. Some of the reporters rushed off to file their reports. They had enough. Others kept asking, "How does it feel about to be drafted?"⁷²

Ali's public remarks caused a national uproar and evoked death threats against him.⁷³ Numerous legal and administrative proceedings ensued. On February 28, 1966, Ali applied for draft exemption as a conscientious objector because of his religious convictions, informing the local selective service board that as a minister in the Nation of Islam, "to bear arms or kill is against my religion. And I conscientiously object to any combat military service that involves the participation in any war in which the lives of human beings are being taken."⁷⁴

The local selective service board denied Ali's conscientious objector claim and he appealed to the Kentucky Appeal Board.⁷⁵

ii. Ali Spars with Federal and Administrative Tribunals over His Classification

On May 6, 1966, the Kentucky Selective Service Appeal Board reviewed Ali's file *de novo* and concluded that he was not entitled to conscientious objector classification.⁷⁶ Ali's file was subsequently referred to the U.S. Department of Justice for an advisory recommendation as permitted by then-applicable Selective Service regulations.⁷⁷ In turn, the Justice Department subsequently requested an investigation by the FBI and a special hearing "on the character and good faith" of Ali's conscientious objections.⁷⁸

As Ali's investigation proceeded, he continued to box and defended his world heavyweight title against various foreign, but highly ranked, opponents. These bouts took place on his opponents' home turfs and outside the United States. On March 29, 1966, Ali won a unanimous decision over tough George

72. *Id.* at 138.

73. Tom Callahan, *Direct From the Stands, the Bad Seed*, WASH. POST, May 2, 1993, at D3; Bob St. John, *Ali's Long Shadow Extends from First Meeting to Today*, DALLAS MORNING NEWS, July 29, 1997, at 13A (reporting that Ali's refusal to be inducted made him "a national outlaw").

74. ALI WITH DURHAM, *supra* note 4, 160.

75. *Clay v. United States (Clay I)*, 397 F.2d 901, 905 (5th Cir. 1968).

76. *Id.*

77. *Id.*

78. *Id.* at 918.

Chualo, the then-reigning Canadian Heavyweight Champion, in Toronto, Canada.⁷⁹ A few months later Ali went to England and knocked out Henry Cooper (who had knocked him down in their initial 1963 match) for a second time.⁸⁰ Ali then knocked out "British Bulldog" Brian London, also in England, on August 6, 1966.⁸¹

Back home, Ali continued his sparring match with the Kentucky Selective Service Appeals Board. On August 23, 1966, Ali petitioned the Selective Service for an exemption from conscription as a minister of the Lost Found Nation of Islam.⁸² That same day, a special hearing was held in Louisville, Kentucky, before former federal circuit judge Lawrence Grauman.⁸³ On the basis of the record, the hearing officer concluded to the Justice Department that Ali stated his views "in a convincing manner, answered all questions forthrightly," and was "sincere in his objection on religious grounds to participation in war in any form."⁸⁴ The hearing officer recommended that Ali's conscientious objector claim be sustained.⁸⁵

Notwithstanding this recommendation, the Justice Department advised the Kentucky Appeal Board that Ali's request for conscientious objector classification should be denied.⁸⁶ The Justice Department concluded that Ali's objections to participation in war insofar as they were based upon the teachings of the Nation of Islam "rest on grounds which are primarily political and racial. These constitute objections to only certain types of war in certain circumstances, rather than a general scruple against participation in war in any form."⁸⁷ The Justice Department asserted that "only a general scruple against participation in war in any form can support a claim for conscientious objector" classification.⁸⁸ The Justice Department also noted that Ali "had not consistently manifested his conscientious objector claim and had not shown overt manifestations sufficient to establish his subjective belief where his claim was not asserted until [conscription] became imminent."⁸⁹ On January 10, 1967, without a statement of reasons, the Kentucky Appeal Board denied

79. *Cyber Boxing Zone*, *supra* note 7.

80. *Id.*

81. *Id.*

82. *Clay I*, 397 F.2d at 906.

83. *Clay v. United States (Clay III)*, 403 U.S. 698, 699-700, 699 n.2 (1971); *Clay I*, 397 F.2d at 918; *MCCALLUM*, *supra* note 39, at 324.

84. *Clay I*, 397 F.2d at 918.

85. *Id.*

86. *Id.* at 918-19; *MCCALLUM*, *supra* note 39, at 324.

87. *Clay I*, 397 F.2d at 919; *MCCALLUM*, *supra* note 39, at 324.

88. *Clay I*, 397 F.2d at 919.

89. *Id.*

Ali's conscientious objector claim.⁹⁰

C. Ali Continues His Assault on Boxing Heavyweight Contenders

Meanwhile, in the boxing ring, Ali continued his assault on heavyweight contenders, conquering two more challengers: German Karl Mildenberger and Cleveland Williams.⁹¹ Ali was next scheduled to fight Ernie Terrell.⁹² The Ali-Terrell bout gained controversy and was publicized as a vicious "grudge fight" when, during the pre-fight hoopla, Terrell refused to acknowledge Ali by his Muslim name and repeatedly referred to Ali by his "slave name," Cassius Clay.⁹³ This rebuff so incensed Ali that the champ pledged to punish Terrell in the ring for this perceived impudence.⁹⁴ "I'm going to whip him and talk to him and insult him and humiliate him," Ali promised.⁹⁵ On February 6, 1967, Ali's prognostication came to fruition. For fifteen rounds, Ali continually bombarded the overmatched Terrell with combinations of devastating punches.⁹⁶ According to ringside spectators, Ali kept taunting Terrell throughout the fight shouting, "What's my name? What's my name?"⁹⁷ As John Cottrell described the infamous eighth round in 1967:

At this point the champion started to shout. He told [Terrell] to stand up and fight; then he landed a thundering right to the jaw. "What's my name?" he asked. No answer. He slashed the silent Terrell with a left-right combination and asked again, "What's my name?" Still no reply. Between rounds, cornermen have been known to slap dazed boxers and ask that question to test their awareness. [Ali] used the same method to taunt his opponent, punctuating each tongue-lashing with a tattoo of punishing punches. With one eye almost shut, the other starting to close, Terrell was being subjected to ruthless, calculated torture.⁹⁸

Even though the fight went the distance, Ali delivered a horrible beating

90. *Clay v. United States (Clay III)*, 403 U.S. 698, 700 (1971).

91. *Cyber Boxing Zone*, *supra* note 7.

92. *Id.*

93. COTTRELL, *supra* note 67, at 307-09.

94. *Id.* at 309.

95. *Id.*

96. *Id.* at 313-17.

97. *Id.* at 314.

98. *Id.* at 314-15.

on Terrell and won thirteen of fifteen rounds.⁹⁹

On February 24, 1967, the National Directory of Selective Service appealed Ali's 1-A classification to the National Selective Service Appeal Board.¹⁰⁰ Ali's appeal was again denied.¹⁰¹ Back in the ring, Ali fought Zora Folley in New York City's Madison Square Garden on March 22, 1967.¹⁰² The match was Ali's seventh heavyweight title defense in less than one calendar year and his ninth since dethroning Liston.¹⁰³ After pounding Folley for the first six rounds, Ali knocked him out the seventh round to retain his heavyweight boxing title.¹⁰⁴ Most significantly, the fight would mark Ali's last night in a ring for three and a half years, while numerous federal district and appellate courts and boxing commissions became embroiled with Ali's pending induction and his controversial recalcitrance.

D. Ali Fights Conscription on Grounds of Under-representation

Two days after the Folley fight, on March 24, 1967, Ali requested a transfer of induction location from Louisville, Kentucky, to Houston, Texas, which was granted.¹⁰⁵ Ali then challenged induction on the ground that pervasive under-representation of African-Americans in the composition of local selective service draft boards was forbidden race discrimination and thus deprived local boards of lawful authority to induct any African-American registrant.¹⁰⁶ On March 29, 1967, the U.S. District Court for the Western District of Kentucky considered Ali's motion for declaratory judgment with respect to the constitutionality of the Universal Military Training and Service Act provision pertaining to selective service boards.¹⁰⁷ Specifically, Ali argued the provision was unconstitutional on its face and as applied because of "systematic exclusion" of African-Americans from membership on local boards and appeal boards in Kentucky.¹⁰⁸ The Court concluded that the issues

99. *Id.* at 316-17.

100. *Clay v. United States (Clay I)*, 397 F.2d 901, 906 (5th Cir. 1968); *Ali v. Breathitt*, 268 F. Supp. 63, 65 (W.D. Ky. 1967), *stay denied, sub nom.*, *Ali v. Gordon*, 386 U.S. 1002 (1967). The National Selective Service Appeal Board is comprised of three civilian members who are appointed by the President of the United States. *Clay I*, 397 F.2d at 909. The Universal Military Training and Service Act vests the board with the duties and functions of the President. *Id.*

101. *Clay I*, 397 F.2d at 906.

102. *Cyber Boxing Zone*, *supra* note 7.

103. *Id.*

104. *Id.*

105. *Clay I*, 397 F.2d at 906; *Breathitt*, 268 F. Supp. at 65.

106. *Clay I*, 397 F.2d at 906; *Breathitt*, 268 F. Supp. at 64.

107. *Breathitt*, 268 F. Supp. at 64-65.

108. *Id.* at 64.

raised in Ali's complaint did not present a "substantial constitutional question" appropriate for judicial review "unless and until [Ali] presents himself at an Induction Station and either submits to induction or refuses to submit to induction."¹⁰⁹ Ali filed a similar complaint in the U.S. District Court for the Southern District of Texas, asserting substantially the same legal contentions as those presented in his Kentucky suit.¹¹⁰

On April 28, 1967, Ali reported for but declined to submit to induction into the United States Armed Forces.¹¹¹ The champ's refusal instantly made him a politically significant figure at a time when American opinion against the Vietnam War and compulsory system of military service was ever-increasing.¹¹² On May 1, 1967, the U.S. District Court for the Southern District of Texas denied Ali's petition for injunctive relief.¹¹³ Judge Allen Hannay held that a registrant who has not received and acted on an order of induction cannot get injunctive relief because he cannot show "irreparable injury."¹¹⁴ Thus, Ali's legal remedy could only arise after the final step toward military induction, and should Ali refuse this final step, his remedy would lie in whatever defense he claims in the criminal prosecution.¹¹⁵ Judge Hannay also said that a second remedy available to Ali was that of *habeas corpus* in the event Ali took the final step toward military induction while claiming that his induction was illegal, unconstitutional, and void.¹¹⁶

The state boxing commissions that licensed professional boxers, however, did not wait for the legal process to take its course. Before Ali had been arrested or charged, let alone convicted, the New York State Athletic Commission suspended his boxing license and withdrew its recognition of him as the World Heavyweight Champion.¹¹⁷ Soon thereafter, all other jurisdictions in the United States followed in New York's footsteps.¹¹⁸ Ali's refusal to accept conscription was clear, and he knew the consequences: "I'm

109. *Id.* at 65.

110. *Clay I*, 397 F.2d at 908.

111. *Id.*; *Breathitt*, 268 F. Supp. at 65.

112. COTTRELL, *supra* note 67, at 339.

113. *Clay I*, 397 F.2d at 908.

114. *Breathitt*, 268 F. Supp. at 65.

115. *Ali v. Connally*, 266 F. Supp. 345, 347 (S.D. Tex. 1967).

116. *Id.*

117. THOMAS HAUSER, *MUHAMMAD ALI: HIS LIFE AND TIMES* 172 (1991). "One hour after Ali refused induction—before he'd been charged with any crime, let alone convicted—the New York State Athletic Commission suspended his boxing license and withdrew recognition of him as champion." *Id.*; see also ALI WITH DURHAM, *supra* note 4, at 175; COTTRELL, *supra* note 67, at 339.

118. More than thirty state boxing commissions reportedly had refused to grant Ali a license to fight. See HAUSER, *supra* note 117, at 172.

giving up my title, my wealth, maybe my future. Many great men have been tested for their religious belief. If I pass this test, I'll come out stronger than ever."¹¹⁹

E. Ali Sentenced for Refusing Induction

After refusing induction, Ali filed another complaint in the U.S. District Court for the Southern District of Texas, on April 29, 1967, seeking similar injunctive relief.¹²⁰ This complaint was likewise denied on May 1, 1967, for the same reasons enunciated previously by Judge Hannay.¹²¹ The district court also held that Ali's "subsequent refusal of induction did not suffice to create a remedy for injunctive relief."¹²² Seven days later a federal grand jury indicted Ali for draft evasion under 50 U.S.C. App. § 462.¹²³ Ali's petition to the U.S. Court of Appeals for the Fifth Circuit to restrain the impending trial was denied on May 15, 1967.¹²⁴ On June 20, 1967, at the height of Ali's professional boxing career, a jury in the U.S. District Court for the Southern District of Texas returned a verdict of guilty against Ali on the charge of violating the Universal Military Training and Service Act because of his refusal to be inducted.¹²⁵ Judge Joe Ingraham sentenced Ali to a term of five years imprisonment and a fine of \$10,000.¹²⁶ The U.S. Court of Appeals for the Fifth Circuit affirmed Ali's conviction and Ali petitioned the U.S. Supreme Court for *certiorari*.¹²⁷

F. Ali Becomes Involved in Leading Foreign Intelligence Surveillance Case

As an additional weave to these already entangled administrative and court proceedings, Ali's conviction also set the scene for another important legal development taking shape at that time: the judicial review of the reasonableness of warrantless foreign intelligence surveillances. While Ali's petition to the U.S. Supreme Court was pending, the United States government

119. COTTRELL, *supra* note 67, at 336.

120. *Clay v. United States (Clay I)*, 397 F.2d 901, 908 (5th Cir. 1968).

121. *Id.*

122. *Id.*

123. *Id.* at 906.

124. *Id.* at 908.

125. *Id.* at 906-07.

126. *Id.* at 907.

127. *Id.* Similar arguments were rejected by the Fifth Circuit in other cases. *See, e.g.,* *Giordano v. United States*, 394 U.S. 310 (1969); *Sellers v. McNamara*, 398 F.2d 893 (5th Cir. 1968), *cert. denied sub nom., Sellers v. Laird*, 395 U.S. 950 (1969) (Justice Douglas, joined by Chief Justice Warren and Justice Marshall, dissenting).

revealed that five telephone conversations involving Ali had been electronically “‘overheard’ on FBI wiretaps targeted against persons other than Ali.”¹²⁸ Around this time, an exception to the warrant clause for foreign intelligence gathering was being judicially developed.¹²⁹ While the U.S. Supreme Court had never directly considered such an exception, several lower federal courts had addressed this issue.¹³⁰ Ali was involved in one of the first appellate decisions on this point.¹³¹

Prompted by the United States government’s disclosure and Ali’s further submissions, the U.S. Supreme Court vacated the conviction on March 24, 1969, and remanded the case for a determination of whether Ali’s conviction had been tainted by the information obtained as a result of the unlawful electronic surveillance.¹³² On July 14, 1969, Judge Ingraham conducted an *in camera* review of the FBI’s surveillance logs and ordered disclosure to Ali of the records relating to four of the intercepted conversations.¹³³ The district court did not require disclosure of the fifth conversation, however, holding it to be the product of “a lawful surveillance by the FBI pursuant to the Attorney General’s authorization of a wiretap for the purpose of gathering foreign intelligence.”¹³⁴ The district court held that the wiretaps did not indicate that the information obtained by the FBI agents had tainted the government’s evidence against Ali.¹³⁵ Accordingly, the court reimposed Ali’s five-year prison sentence and fine.¹³⁶

Ali again appealed to the U.S. Court of Appeals for the Fifth Circuit challenging the government’s withholding of certain electronic surveillances.¹³⁷ According to the United States, the surveillances were conducted “for the purpose of gathering foreign intelligence” and had no

128. William F. Brown & Americo R. Cinquegrana, *Warrantless Physical Searches for Foreign Intelligence Purposes: Executive Order 12,333 and the Fourth Amendment*, 35 CATH. U. L. REV. 97, 109 (1985).

129. *Id.*

130. *Id.*

131. See *United States v. Clay (Clay I)*, 430 F.2d 165, 166 (5th Cir. 1970); Brown & Cinquegrana, *supra* note 128, at 109; David Hardin, Note, *The Fuss Over Two Small Words: The Unconstitutionality of the USA Patriot Act Amendments to FISA Under the Fourth Amendment*, 71 GEO. WASH. L. REV. 291, 297 (2003).

132. *Giordano*, 394 U.S. 310 (per curiam), *vacating and remanding United States v. Clay (Clay I)*, 397 F.2d 901 (5th Cir. 1968).

133. *Clay II*, 430 F.2d at 166.

134. *Id.*

135. *Id.* at 166-67.

136. *Id.*

137. *Id.* at 170.

bearing on the criminal prosecution at hand.¹³⁸ Relying on the inherent powers of the President as Commander-in-Chief to justify the constitutionality of the wiretap, the Fifth Circuit recognized the overriding need to obtain foreign intelligence information to protect national security.¹³⁹ The court relied on the government's claim that the wiretap was installed "for the purpose of gathering foreign intelligence information," stating that "[it] would be 'intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.'"¹⁴⁰ Despite the court's assertion that it balanced the rights of the defendant with the national interest, the court omitted any discussion of the Fourth Amendment.¹⁴¹ The court determined that Ali's rights were sufficiently protected by the *in camera* examination of the surveillance and, thus, any further judicial inquiry was improper.¹⁴² The court's opinion left unscathed the President's unrestricted power in conducting warrantless surveillances on the grounds of national security.¹⁴³ Consequently, the Fifth Circuit once again upheld Ali's conviction.¹⁴⁴ Ali again petitioned the U.S. Supreme Court for *certiorari*.

G. Ali Battles New York State Boxing Athletic Commission over Boxing License

While federal courts continued to weigh-in on Ali's conviction and draft status, Ali applied for renewal of his license to box in New York on September 22, 1969.¹⁴⁵ The New York State Athletic Commission (Commission) unanimously denied his application on October 14, 1969, due to his "refusal to enter the service and [his felony] conviction in violation of Federal law [being] regarded by [the] Commission to be detrimental to the best interests of boxing, or to the public interest, convenience or necessity."¹⁴⁶ Ali filed a complaint in

138. *Id.* at 171; Hardin, *supra* note 131, at 298.

139. *Clay II*, 430 F.2d at 171; Hardin, *supra* note 131, at 297-98.

140. *Clay II*, 430 F.2d at 171 (quoting *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)); *see also* Hardin, *supra* note 131, at 298.

141. *Clay II*, 430 F.2d at 171; Hardin, *supra* note 131, at 298.

142. *See Clay II*, 430 F.2d at 171; Hardin, *supra* note 131, at 298.

143. In *United States v. Enten*, 388 F. Supp. 97 (D.D.C. 1971), the court relied on the holding of *Clay* to determine the issue of "[w]hether the Attorney General's authorization of a wiretap for the purpose of gathering foreign intelligence information violates the Fourth Amendment." *Id.* at 98. The court did "not believe the judiciary should question the decision of the executive department that such surveillances are reasonable and necessary to the protection of the national interest." *Id.*

144. *Clay II*, 430 F.2d at 168-72.

145. *Ali v. Div. of State Athletic Comm'n of N.Y.*, 308 F. Supp. 11, 14 (S.D.N.Y. 1969).

146. *Id.*

the U.S. District Court for the Southern District of New York charging that the Commission's action in denying him a boxing license because of his conviction for refusal to serve in the U.S. Armed Forces violated his First and Fourteenth Amendments rights and constituted cruel and unusual punishment in violation of the Eight Amendment.¹⁴⁷ Judge Frankel dismissed Ali's complaint on December 24, 1969, explaining that the Commission possessed a statutory right to deny, suspend, or revoke a boxing license because of an applicant's prior felony conviction.¹⁴⁸ The court also held that Ali's claims based on freedom of religion and cruel and unusual punishment were meritless.¹⁴⁹ In footnote three of his decision, Judge Frankel noted that Ali broadly claimed arbitrary discrimination in violation of his rights under the Equal Protection Clause without asserting "some semblance of content for the conclusory allegations."¹⁵⁰ "Out of what may [have been] excessive caution," however, Judge Frankel granted leave "to replead the broad allegation so that [Ali] may attempt, if he responsibly deems it possible, to supply some concrete and specific content for his charge."¹⁵¹

On January 27, 1970, Ali amended his complaint to charge the Commission with "arbitrarily, capriciously and invidiously" refusing to renew Ali's boxing license in violation of his right to equal protection of the laws guaranteed by the Fourteenth Amendment.¹⁵² Judge Mansfield, now presiding, concurred with Judge Frankel's opinion that the Commission had discretion to deny a boxing license to an applicant because of his conviction of a felony or military offense.¹⁵³ The question before the district court was whether the Commission could exercise its broad powers to regulate boxing in such a way as to deny to an applicant the equal protection of the state's laws, which is guaranteed to him by the Fourteenth Amendment.¹⁵⁴ Ali was able to demonstrate at least 244 instances in recent years where the Commission granted, renewed, or reinstated boxing licenses to applicants who had been convicted of one or more felonies, misdemeanors, or military offenses

147. *Id.* at 15, 18-19.

148. *Id.* at 17.

149. *Id.* at 18 ("The argument that [the Commission's] refusal of a license for [Ali] to fight impedes on [Ali's] freedom of religion is not interesting or intelligible enough for long discussion Plaintiff [Ali] also invokes the Eight Amendment, arguing that the license denial inflicts 'cruel and unusual punishment.' Again, a short answer seems enough.")

150. *Id.* at 15 n.3.

151. *Id.*

152. *Ali v. Div. of State Athletic Comm'n of N.Y.*, 316 F. Supp. 1246, 1248 (S.D.N.Y. 1970).

153. *Id.* at 1249.

154. *Id.*

involving moral turpitude.¹⁵⁵ “Some 94 felons thus licensed include persons convicted for such anti-social activities as second degree murder, burglary, armed robbery, extortion, grand larceny, rape, sodomy, aggravated assault and battery, embezzlement, arson, and receiving stolen property.”¹⁵⁶ Under these circumstances, Judge Mansfield concluded that the “deliberate and arbitrary discrimination or inequality in the exercise of [the Commission’s] regulatory power, not based upon differences that are reasonably related to the lawful purposes of such regulation,” constituted a violation of the Equal Protection Clause of the Fourteenth Amendment.¹⁵⁷ The Commission did not appeal the ruling. Ali had finally won his bout with the Commission.

By summer 1970, American public opinion was turning increasingly against the Vietnam War. The largest-ever anti-war demonstration had taken place in Washington, D.C., and polls showed for the first time that a majority of Americans disapproved of the United States’ participation in the Vietnam War.¹⁵⁸ Amid this mounting criticism, Ali’s stand seemed less controversial and treasonous.¹⁵⁹ For others, Ali’s position remained largely divisive.¹⁶⁰ Consequently, Ali “faced the fact that not a promoter in America could get a fight for [him] legally.”¹⁶¹

H. Ali’s Dramatic Return to Boxing Ring

Having won his legal bout against the Commission, and with his conviction still on appeal before the U.S. Supreme Court, Ali announced on September 11, 1970, that he had signed to fight Jerry Quarry.¹⁶² Quarry was

155. For instance, Sonny Liston. *Id.*

156. *Id.*

157. *Id.* at 1250. “In short, the exercise of state power by a state agency in the issuance or refusal of licenses to engage in a regulated activity should not represent the exercise of mere personal whim, caprice or prejudice on the part of such agency. It should, and constitutionally must, have some rational basis.” *Id.* (internal citations omitted). “Defendants have offered no evidence tending to refute or rebut the overwhelming and undisputed proof of arbitrary, capricious, and unfounded discrimination furnished by plaintiff.” *Id.* at 1252.

158. BINGHAM & WALLACE, *supra* note 58, at 213.

159. *Id.*

160. *Id.*

161. ALI WITH DURHAM, *supra* note 4, at 250.

162. During his suspension, Ali spoke at various college campuses and articulated his beliefs on the Vietnam War:

I’m expected to go overseas to help free people in South Vietnam, and at the same time my people here are being brutalized and mistreated, and this is really the same thing that’s happening over in Vietnam. So I’m going to fight it legally, and if I lose, I’m just going to jail. Whatever the punishment, whatever the persecution is for standing up for my [Muslim] beliefs, even if it means facing machine-gun fire

the “perennial mainstay in the heavyweight division throughout the ‘60’s and ‘70’s” and considered the dominant “White Hope” of the era.¹⁶³ The fight would take place on October 26, 1970, in Atlanta, Georgia, which had no state boxing commission.¹⁶⁴ However, due to Ali’s continued unpopularity in many parts of the country, the Ali-Quarry match proved very difficult to organize in that state.¹⁶⁵ Georgia state Senator LeRoy Johnson, the first African-American to be elected to a political office in the southeast and the first African-American elected to Georgia’s Senate since Reconstruction, had been instrumental in bringing the Ali-Quarry fight to Georgia.¹⁶⁶ Governor Lester Maddox, a segregationist and staunch conservative, opposed the fight proclaiming, “We shouldn’t let him fight for money if he didn’t fight for his country.”¹⁶⁷ Maddox urged the public to boycott the fight.¹⁶⁸ Indeed, Maddox had asked then Attorney General Arthur Bolton to search for legal grounds to stop the fight.¹⁶⁹ Bolton had found none, so, on fight day, Maddox called for “A Day of Mourning.”¹⁷⁰ Over 600 members of the news media attended the fight, and an estimated 100 million viewers worldwide reportedly watched on closed-circuit television.¹⁷¹

The fight was significant for two reasons. First, it signaled Ali’s much anticipated return to the boxing ring after three and a half years of forced exile. As Ali summarized the importance of the fight:

People are coming from Pakistan and China. . . . From Philadelphia, from Detroit, from Watts. Satellites are flying around the sky just to take this fight to Africa and Asia and Russia. Millions and millions of people, watching and waiting—

that day, I’ll face it before denouncing . . . the religion of Islam.

Hauser, *supra* note 117, at 187.

163. Jim Amato, *Jerry Quarry*, <http://www.saddoboxing.com/boxing-article/Jerry-Quarry.html> (last visited Sept. 27, 2007).

164. Roy McHugh, *Roy McHugh Remembers Ali*, PITT. POST-GAZETTE, June 2, 1998, at E2.

165. Ali reportedly canceled an appearance on the popular *Tonight Show* with host Johnny Carson because the fight promoters feared national attention might provoke a backlash against the fight. ALI WITH DURHAM, *supra* note 4, at 286.

166. MCCALLUM, *supra* note 39, at 334; Gary Pomerantz, *The One-Ring Circus Atlanta Can’t Forget*, ATLANTA J.-CONST., Oct. 21, 1990, at F1; *Black History Month Historical African-American Portraits: Capitol Collection*, http://www.sos.state.ga.us/black_history/Portraits.htm (last visited Sept. 27, 2007).

167. Pomerantz, *supra* note 166.

168. ALI WITH DURHAM, *supra* note 4, at 310.

169. *Id.* at 310.

170. Pomerantz, *supra* note 166.

171. *Id.*

just to see me jump around a ring. . . . I'd better win . . . because as much hell as I catch when I'm winning, I hate to think of what would happen if I lost.¹⁷²

The fight was also significant because the manner in which Ali beat Quarry showed the world that he was again a major force in boxing.¹⁷³ For three rounds, Ali was in complete command, peppering Quarry with stinging left jabs and jolting him with left hooks and right combinations.¹⁷⁴ As Ali left the ring, he spotted broadcast journalist Howard Cosell of ABC at the television microphone and said, "Do you still think I'm all washed up?"¹⁷⁵

Ali went on to defeat Oscar "Ringo" Bonavena on December 7, 1970, setting up the classic confrontation between Ali and Joe "Smokin' Joe" Frazier.¹⁷⁶ Ali was back in the ring, but with his prolonged inactivity between March 1967 and October 1970, Frazier was essentially made heavyweight champion.¹⁷⁷ According to Ali: "They say Frazier is the technical champ, but technical stuff doesn't mean much in the country any more. People are rebelling, fighting, demanding what's right. No old man on a boxing commission can tell them Frazier's the champ now. But I'm ready to get on with fighting him."¹⁷⁸

On March 8, 1971, Ali and Frazier fought for the boxing heavyweight title in what is still called "The Fight of the Century." "The Fight" is considered one of the most famous, widely discussed, eagerly anticipated, and comprehensively covered bouts of all time since it featured two skilled, undefeated fighters, both of whom had reasonable claims to the heavyweight boxing crown.¹⁷⁹ Setting the scene, Ali offered one of his classic poems:

Joe's gonna come out smokin'
But I ain't gonna be jokin'
I'll be pickin' and pokin'
Pouring water on his smokin'
This might shock and amaze ya

172. MCCALLUM, *supra* note 39, at 337.

173. *Id.*

174. *Id.*

175. *Id.* at 338.

176. Cyber Boxing Zone, *supra* note 7.

177. MCCALLUM, *supra* note 39, at 339.

178. *Id.*

179. *The Fight of the Century*, <http://www.ibhof.com/ibhfhvy1.htm> (last visited Sept. 28, 2007).

But I'm gonna destroy Joe Frazier¹⁸⁰

The fight lived up to the hype, and Frazier floored Ali with a hard left hook in the fifteenth and final round and won a unanimous decision.¹⁸¹ This marked Ali's first professional defeat.¹⁸² After the fight, both men went to the hospital, and Frazier spent the next three weeks there recovering from Ali's blows.¹⁸³

I. Ali Prevails in the U.S. Supreme Court as a Conscientious Objector

Back in the legal arena, on June 21, 1971, three months after his defeat by Frazier, Ali's sentence was overturned by the U.S. Supreme Court in *Clay v. United States*.¹⁸⁴ *Clay* compendiously set forth the standards that a draft registrant must satisfy in order to qualify for conscientious objector classification.¹⁸⁵ According to *Clay*, registrants must establish that: (a) they are conscientiously opposed to war in any form;¹⁸⁶ (b) their objection is based on religious, moral, or ethical beliefs;¹⁸⁷ and (c) their objection is sincere.¹⁸⁸ In *Clay*, the federal government conceded, and the U.S. Supreme Court agreed, that the Justice Department's conclusion that Ali's beliefs were neither based upon "religious training and belief" nor sincerely held were erroneous as a matter of law.¹⁸⁹ The government argued, however, that a "basis in fact" existed for finding that Ali was "not opposed to 'war in any form' but [was] only selectively opposed to certain wars."¹⁹⁰ Indeed, Ali asserted that he was

180. BINGHAM & WALLACE, *supra* note 58, at 233.

181. See Chris Gay, *Trouble in the Ring: A Noble Sport Is Bloodied by Scandal and Farce; Can It Fight Back?*, WALL ST. J., Nov. 12, 1999, at W17.

182. The case of *Barrett v. Coulet*, 263 So. 2d 764 (Miss. 1972), involved the Ali-Frazier match. There, the complainant Barrett purchased a ticket to a closed circuit telecast of a boxing match between Ali and Frazier and sought to maintain a class action for himself and others similarly situated. *Id.* at 764. Barrett's chancery suit was for breach of contract and breach of implied warranty based upon a charge that part of the program was not shown and other parts were of poor quality. *Id.* at 764-65. On appeal, the class action was not allowed even though each claim involved grew out of one factual situation common to each member of the potential class. *Id.* at 765. There, each claim related to one occurrence (a telecast), which transpired on a single date. *Id.* at 764-65.

183. BINGHAM & WALLACE, *supra* note 58, at 234.

184. 403 U.S. 698 (1971); *Unites States v. Clay (Clay IV)*, 446 F.2d 1406 (5th Cir. 1971).

185. *Clay III*, 403 U.S. at 700.

186. *Id.* (citing *Gillette v. United States*, 401 U.S. 437 (1971)).

187. *Id.* (citing *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970)).

188. *Id.* (citing *Witmer v. United States*, 348 U.S. 375 (1955)).

189. *Id.* at 702.

190. *Id.* at 701.

morally opposed to engaging in a war prosecuted by “non believers” based on his allegiance to the Holy Qur’an.¹⁹¹

The *Clay* Court determined that, even if the government’s position was correct, Ali’s conviction required reversal for other reasons. There existed three possible reasons for denying Ali’s conscientious objection claim, two of which were concededly invalid; since neither the local selective service board nor the Kentucky Appeal Board identified a sound basis for denying Ali’s conscientious objection claim, the Court said it was impossible to determine upon which of the three grounds the boards relied.¹⁹² Under such circumstances, where the administrative determination might have been the product of a factual finding that was legally insufficient to support the classification, the entire proceedings must be invalidated.¹⁹³ In other words, *Clay* signified that draft boards must state, albeit briefly, the reasons for an adverse decision in every case in which a conscientious objector claim is presented.¹⁹⁴ *Clay* addressed the more fundamental legal question of how the courts must respond when confronted with positive evidence that board action was tainted by misapplication of the law.¹⁹⁵ In such a context of likely official misfeasance, the *Clay* Court deemed analysis of the sufficiency of a prima facie showing was unnecessary and inappropriate.¹⁹⁶

After the Court’s decision was released, a swarm of reporters anxiously waited for Ali’s reaction to the news.¹⁹⁷ One reporter asked Ali “whether he would take legal action to recover damages” from those who had pushed him out of boxing during the previous three years.¹⁹⁸ Ali responded, “No. They only did what they thought was right at the time. I did what I thought was right. That was all. I can’t condemn them for doing what they think was

191. The notion of the “jihad,” or holy war, was discussed by Justice Douglas in his concurring opinion. See *id.* 705-10 (Douglas, J., concurring).

192. *Id.* at 703.

193. *Id.* at 704.

194. *United States v. Reese*, 331 F. Supp. 1088, 1091 (N.D. Ga. 1971).

195. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 137-38 (1979).

196. According to Bob Woodward and Scott Armstrong’s book, *The Brethren: Inside the Supreme Court*, the United States Supreme Court originally voted five to three against Ali. *Id.* at 137. Thurgood Marshall had been Solicitor General earlier in the case and recused himself. *Id.* Justice Harlan, a member of the majority, sequestered himself with background materials about the Muslims and after studying them, changed his vote. *Id.* He now thought that the government had misled the Selective Service and the courts by insisting that Ali’s religious beliefs were not authentically anti-war. *Id.* at 137-38.

197. BINGHAM & WALLACE, *supra* note 58, at 248.

198. *Id.*

right.”¹⁹⁹

III. THE RETURN AND RETIREMENT OF THE WORLD HEAVYWEIGHT CHAMPION

For Ali, 1974 was a remarkable year in the boxing ring. First, Ali erased the memory of his defeat by Frazier when the two fought again on January 28, 1974.²⁰⁰ Although Frazier was no longer the heavyweight champion at the time, the fight is still considered a classic. This time Ali defeated Frazier in the twelfth round.²⁰¹ On October 30, 1974, Ali regained the heavyweight crown much the way he initially captured the title against Liston, by knocking out another apparently menacing and indomitable prizefighter, the previously unbeaten heavyweight champion George Foreman.²⁰² Forman was a large, brooding, hard-hitting, young, ex-Olympic heavyweight champion who previously demolished Frazier, knocking him out in the second round of their championship fight.²⁰³ According to the pundits, Foreman was indestructible.²⁰⁴ Ali and Foreman would share equally a \$10 million purse.²⁰⁵ By all accounts, “Ali was being tempted to suffer the humiliating blows from Foreman which would blast him out of boxing forever.”²⁰⁶ Ali, however, never thought about losing the fight and poetically dubbed the legendary²⁰⁷ fight held in Kinsasha, Zaire (now the Democratic Republic of the Congo), as “The Rumble in the Jungle.”²⁰⁸ With the boisterous crowd chanting “Ali – boom-aye-yay” (“Ali will kill him”), Ali employed the now famous “Rope-A-Dope” strategy to tire Foreman out before knocking him out

199. *Id.* at 249.

200. Cyber Boxing Zone, *supra* note 7.

201. *Id.*

202. *Id.*; HARRY CARPENTER, BOXING, A PICTORIAL HISTORY 153 (1975); Will Joyner, “Kings” Had a Long Walk to the Throne, DALLAS MORNING NEWS, Mar. 8, 1997, at 5C; James Verniere, *Movies: Ali’s Royalty Transcends His Sport*, BOSTON HERALD, Feb. 28, 1997, at S3.

203. CARPENTER, *supra* note 202, at 153.

204. *Id.*; Joyner, *supra* note 202.

205. CARPENTER, *supra* note 202, at 153.

206. *Id.*

207. See Joyner, *supra* note 202 (“legendary 1974 ‘Rumble in the Jungle’” bout); Rochelle Riley, *Ali Promotes Both “Healing” and Healing on Book Tour*, COURIER J. (Louisville, Kent.), Feb. 27, 1997 (“legendary 1974 ‘Rumble in the Jungle’ fight”); James Verniere, *supra* note 202 (“legendary ‘Rumble in the Jungle’”).

208. See Anthony Violanti, *A Tale of Two Boxers*, BUFFALO NEWS, Apr. 10, 1997, at C1 (referring to the fight as “a battle for freedom, racial equality and honor by America’s foremost black athlete”). *When We Were Kings* is an award winning documentary that chronicles the famous “Rumble in the Jungle” fight.

in the eighth round.²⁰⁹ According to the strategy, Ali would cover and lean against the ropes, allowing Foreman to connect with a steady rain of body punches for the first seven rounds (all the while Ali would verbally taunt Foreman that he had no power).²¹⁰ After Foreman punched himself out, both mentally and physically, he became a sitting duck for Ali. In the eighth round, Ali finally came off the ropes and landed a quick succession of punches, including a stiff right that sent Foreman to the canvas where he was counted out seconds before the end of the round. Ali had regained more than just another boxing title; he had won the affinity of the general public. Even then-President Gerald Ford invited the redeemed champion to the White House in what was considered a sign of reconciliation after the Vietnam War ordeal.²¹¹

A. The Legal Fallout from the "Rumble"

From a legal prospective, the Ali-Foreman "Rumble" generated a number of legal actions, most notably *Monster Communications, Inc. v. Turner Broadcasting Systems Inc.*²¹² *Monster Communications* involved a copyright dispute over documentary film footage of the "Rumble."²¹³ There, the plaintiff produced an award-winning, eighty-four-minute film, *When We Were Kings (Kings)* for theatrical release, which essentially recants the story of the "Rumble."²¹⁴ The defendant, Turner Network Television, produced a ninety-four-minute documentary film entitled *Ali—The Whole Story (Story)* for television about Ali's life.²¹⁵ The defendant incorporated between forty-one seconds and two minutes (nine to fourteen film clips) of the same Zaire fight footage.²¹⁶ Plaintiff brought a copyright infringement action against the defendant on the ground that *Story* contained some of the same historic film clips that were previously incorporated in *Kings*.²¹⁷ The defendant argued that this was fair use and the district court agreed.²¹⁸ First, the court indicated that fair uses of images captured from historically significant events may be far

209. Mike Littwin, *Gast Goes the Distance with Ali Documentary*, BALT. SUN, Mar. 11, 1997, at 1D (referring to the "famous 1974 Rumble in the Jungle" as Muhammad Ali's "gloriously incongruous rope-a-dope victory over George Foreman").

210. Joyner, *supra* note 202; Littwin, *supra* note 209.

211. BINGHAM & WALLACE, *supra* note 58, at 252.

212. 935 F. Supp. 490 (S.D.N.Y. 1996).

213. *Id.* at 491.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 493.

broader than uses of other types of visual images.²¹⁹ Moreover, analyzing the footage quantitatively, the court stated that the infringing film clips constituted no more than two percent of the film.²²⁰ The court also found that the allegedly infringing film clips are not the focus of the defendant's film.²²¹ The two films are quite different: one focuses on the fight in Zaire; the other is the story of Ali's whole life.²²² Finally, the court found that disallowing the use of such film clips might make it impossible for subsequent biographers to tell Ali's story through film, which would defeat the entire purpose of the fair use concept of copyright law.²²³

B. Ali's Post-fight Jeers Prompt Lawsuit

Back in the ring, Ali fought Chuck "The Bayonne Bleeder" Wepner on March 24, 1975, in his next title defense.²²⁴ Although he lost, Wepner became just the fourth fighter ever to knock Ali down.²²⁵ The bout (and Wepner) purportedly served as the inspiration for the Rocky Balboa character in Sylvester Stallone's *Rocky*.²²⁶ Consequently, Wepner would later earn the nickname "The Real Rocky."²²⁷ Further, the Ali-Wepner bout served as the backdrop for a lawsuit between Ali and a television producer in connection with a suit brought by the fight's referee against Ali. In *American Broadcasting Co. v. Ali*, the television producer American Broadcasting Company (ABC) brought action against Ali seeking to set aside a labor arbitration award in favor of Ali that required ABC to reimburse him for fees and costs incurred by Ali in his successful defense of a libel action.²²⁸ Not surprisingly, Ali's mouth was the source of this action. Four days after the Ali-Wepner bout, broadcast journalist Howard Cosell of ABC conducted a

219. *Id.* at 494.

220. *Id.* at 495.

221. *Id.*

222. *Id.*

223. *Id.* at 494. Other published cases stemming from the "Rumble" include *Hutchinson v. Brotman-Sherman Theatres*, 419 N.E.2d 530 (Ill. App. Ct. 1981), in which the assignee of exclusive telecast rights for the "Rumble" brought suit against defendant exhibitors for breach of their agreement. Also, in *South Shore Amusements, Inc. v. Supersport Auto Racing Ass'n*, 483 N.E.2d 337 (Ill. App. Ct. 1985), the plaintiff brought a breach of contract suit relating to a lease of building to show the closed circuit telecast of the "Rumble."

224. Cyber Boxing Zone, *supra* note 7.

225. See Chuck Wepner Biography, <http://www.autographedtoyou.com/Chuck%20-Wepner-biography.htm> (last visited on Sept. 29, 2007).

226. *Id.*

227. *Id.*

228. *Am. Broad. Co. v. Ali*, 489 F. Supp. 123 (S.D.N.Y. 1980).

videotape interview of Ali.²²⁹ Ali was a paid commentator on an ABC show.²³⁰ The Ali-Wepner bout was controversial, and Ali was critical of the performance by the fight's referee, Anthony Perez.²³¹ Ali and Perez "had exchanged derogatory remarks after the contest concerning each other's performance and alleged professional lapses of the other."²³² Cosell "vigorously and provocatively" pursued this subject matter in the taped Ali interview.²³³ Specifically, Cosell invited Ali to "express yourself as volubly as usual if you will" and "continued to prod Ali until the voluble Ali came forth with the comment that precipitated the defamation lawsuit."²³⁴ Cosell further pursued "Ali with questions whether Ali was 'finished with you [sic] tirade' and whether Ali was 'embarrassed' by his showing against Wepner."²³⁵

ABC's broadcast of the interview precipitated a libel action by referee Perez against ABC in state court.²³⁶ "Ten days later Perez commenced a libel action in [federal court] against Ali focused on the broadcast" and demanded damages.²³⁷ "Ali thereupon asserted a third party complaint against ABC in the federal action, claiming indemnity as well as contribution from ABC."²³⁸ Ali prevailed on the federal libel suit and claimed "he was entitled to reimbursement from ABC for the fees and costs incurred by him in his successful defense of the libel action."²³⁹ Ali further demanded an arbitration of his claim against ABC under a collective bargaining contract between ABC and the labor organization, the American Federation of Television and Radio Artists (AFTRA).²⁴⁰ After a "lengthy and sharply contested" arbitration, an arbitration panel awarded Ali \$193,352.²⁴¹ ABC then sought to set aside Ali's arbitration award.²⁴² In rejecting ABC's claim and confirming Ali's award, the court in *American Broadcasting Co.* found essentially that ABC had failed to edit the controversial videotape interview despite the authority and

229. *Id.* at 124.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 127.

235. *Id.*

236. *Id.* at 124.

237. *Id.*

238. *Id.*

239. *Id.* at 125.

240. *Id.*

241. *Id.*

242. *Id.*

opportunity to do so.²⁴³

Following the Wepner fight in 1975 and through the beginning of 1978, Ali successfully defended his heavyweight title nine times, defeating Ron Lyle (May 16, 1975), Joe Bugner (June 30, 1975), Joe Frazier (October 1, 1975), Jean Pierre Coopman (February 20, 1976), Jimmy Young (April 30, 1976), Richard Dunn (May 24, 1976), Ken Norton (September 28, 1976), Alfredo Evangelista (May 16, 1977), and Earnie Shavers (September 29, 1977).²⁴⁴ Most notable of these fights was Ali's stirring fourteenth round knock-out of Frazier in the epic "Thrilla in Manila."²⁴⁵

C. *Ali Champions the Right of Publicity Protection*

In January of 1978, Ali again went to court in one of the first cases to recognize a right of publicity protection, and additionally, to apply this right to an athlete.²⁴⁶ That year, Ali sued *Playgirl Magazine* over the magazine's unauthorized commercial use of a drawing that evoked his identity.²⁴⁷ Specifically, *Playgirl Magazine* had allegedly published an impressionistic caricature of a nude African-American man seated on a stool in the corner of a boxing ring with both hands taped and outstretched resting on the ropes on either side.²⁴⁸ Ali sought a preliminary injunction and damages for a common law right of publicity infringement as well as for a violation of New York's privacy law.²⁴⁹ Ali claimed injury to his public reputation and the economic consequences thereof.²⁵⁰ He further argued that he had expended great time and effort throughout his career to establish a "commercially valuable proprietary interest in his likeness and reputation."²⁵¹

The court examined the facts to determine if a preliminary injunction was

243. *Id.* at 128.

244. *Cyber Boxing Zone*, *supra* note 7.

245. The seminal satellite broadcast of the "Thrilla in Manila" boxing match between Ali and Frazier in 1975 by Home Box Office (HBO) launched the idea of satellite television service to the American public. Jeffrey P. Cowan Jr., *The Taxation of Space, Ocean, and Communications Income Under the Proposed Treasury Regulations*, 55 *TAX LAW.* 133, 134-35 (2001).

246. *See* *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978). "The right of publicity is the right of every person, celebrity, and non-celebrity alike, to control and benefit from the commercial use of his or her identity." Donna L. Candido, *The Right of Publicity: An Overview*, in 476 *PRACTICING LAW INSTITUTE, ANNUAL ADVANCED SEMINAR ON TRADEMARK LAW* 181, 185 (1997).

247. *Playgirl*, 447 F. Supp. 723 (S.D.N.Y. 1978).

248. *Id.* at 726.

249. *Id.*

250. *Id.* at 729.

251. *Id.*

appropriate.²⁵² When examining the success of Ali's claim on its merits, the court found that although the caricature was captioned "Mystery Man,"²⁵³ the striking resemblance to Ali was evident and accompanied with a "verse which refers to the figure as 'the Greatest.'"²⁵⁴ Relying on the pecuniary value of Ali's "public reputation or 'persona'"²⁵⁵ and that the interest underlying "the right of publicity is the 'straightforward one of preventing unjust enrichment by the theft of good will,'" the court held Ali had met the criteria for making out a common law right of publicity claim in New York.²⁵⁶ The district court specifically held that the drawing was not newsworthy, but rather a "dramatization, an illustration falling somewhere between representational art and cartoon, and is accompanied by a plainly fictional and allegedly libelous [sic] bit of doggerel."²⁵⁷

The defendants in *Playgirl* argued that the statutory right of privacy does not extend to protect Ali, as he is an "athlete . . . who chooses to bring himself to public notice, who chooses, indeed . . . to rather stridently seek out publicity."²⁵⁸ The court rejected this argument and stated that

such a contention 'confuses the fact that projection into the public arena may make for newsworthiness of one's activities, and all the hazards of publicity thus entailed, with the quite different and independent right to have one's personality, even if newsworthy, free from commercial exploitation at the hands of another'²⁵⁹

The district court ultimately found the establishment of a "likelihood that [Ali would] prevail on his claim that his right of publicity [had] been violated by the publication of the offensive portrait."²⁶⁰ The court even imposed the harsh remedy of an injunction against any further distribution of the *Playgirl*

252. *Id.* at 726. According to the court, in order to determine whether a preliminary injunction was necessary, Ali needed to clearly show "either (1) probable success on the merits *and* possible irreparable injury; *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward" Ali's favor. *Id.*

253. *Id.* at 727.

254. *Id.* "The Greatest" was a moniker that both the plaintiff and the press often used when referring to Ali, the former heavyweight boxing champion of the world. *Id.*

255. *Id.* at 728.

256. *Id.* at 728-29 (quoting *Zacchini v. Scripps Howard Broad. Co.*, 433 U.S. 562, 576 (1977)).

257. *Id.* at 727.

258. *Id.*

259. *Id.* (quoting *Booth v. Curtis Publ'g Co.*, 223 N.Y.S.2d 737, 745 (N.Y. App. Div. 1962)).

260. *Id.* at 728.

issue.²⁶¹ In condemning an arguably creative part of the body of a magazine, as opposed to an advertisement, the court broadened the scope of infringing “commercial” uses to apply to works which are merely commercially sponsored or contain paid advertising.²⁶² This case further expanded the notion of identity that included physical characteristics to identify a person.

D. Ali’s Fight with Leon Spinks Incites Antitrust Lawsuit

Although Muhammad Ali was in the twilight of his boxing career, he was still the heavyweight champion. In early 1978, Ali was preparing to defend his heavyweight title against 1974 Olympic gold medalist Leon Spinks.²⁶³ On February 15, 1978, appearing in just his eighth professional bout, Spinks upset Ali in fifteen rounds to win the heavyweight title.²⁶⁴ An Ali-Spinks rematch was scheduled for September 15, 1978, in New Orleans, Louisiana, which Ali won by unanimous fifteen-round decision.²⁶⁵ Within weeks before the second bout, the State of Alabama filed an antitrust case concerning the fight on behalf of Alabama residents to obtain injunctive relief to prevent and restrain violations of Section 1 of the Sherman Act.²⁶⁶ The complaint alleged that the defendants, American Broadcasting Companies, Inc. (ABC), Top Rank, Inc. (Top Rank), and Louisiana Sports, Inc. (LSI), had “by written contracts agreed to restrict the live telecast coverage by a ‘blackout’ (non-telecast) of a 200-mile radius (400-mile diameter) area around New Orleans, Louisiana,” the site of the Ali-Spinks fight.²⁶⁷ Alabama alleged that the blackout restriction was an unlawful agreement in restraint of trade.²⁶⁸ Subsequently, other states and entities moved to intervene in the case.²⁶⁹

The facts of the case are simple and straightforward. Top Rank, the promoter of the Ali-Spinks match, had sold to LSI its right to receive the live gate proceeds of the Ali-Spinks bout for \$3 million.²⁷⁰ Subsequently, Top Rank assigned to ABC its right to the live telecast of the match for \$5.15

261. *Id.* at 732.

262. *Id.* at 728-29.

263. See *Cyber Boxing Zone*, *supra* note 7.

264. *Id.*

265. Muhammad Ali, <http://www.hickoksports.com/biograph/alimuham.shtml> (last visited Sept. 29, 2007).

266. *State ex rel. Baxley v. Am. Broad. Co.*, 1978 WL 1423 (S.D. Ala. Sept. 13, 1978).

267. *Id.* at *1.

268. *Id.*

269. *Id.*

270. *Id.*

million.²⁷¹ The agreement between ABC and Top Rank provided that ABC would not telecast the fight in the state of Louisiana or within a 200-mile radius of the city of New Orleans unless the live gate was sold out.²⁷² LSI was granted closed circuit TV rights.²⁷³ “This ‘blackout’ provision [was] the seed of [this] controversy.”²⁷⁴ The court first addressed whether the State of Alabama had made out a case for preliminary injunctive relief to enjoin the fight for proceeding as planned.²⁷⁵ The State argued that the blackout of a 200-mile radius of New Orleans was arbitrary and unreasonable and suggested a 75-mile radius.²⁷⁶ However, the court found that the State of Alabama failed to prove a substantial likelihood of success on the merits since the State provided insufficient evidence regarding differences in comparable population density or other factors that could affect the reasonableness of a 75-mile blackout radius area.²⁷⁷ Furthermore, the court found that the possible harm to defendants outweighed the possible threat to the plaintiff since LSI had incurred out-of-pocket costs totaling \$4.1 million or more and its revenues from ticket sales were about \$3.5 million.²⁷⁸ Thus, a court order lifting the blackout would probably cause LSI substantial economic loss.²⁷⁹

E. The End of a Legendary Career

Far past his prime and lacking the once fatal mix of butterfly and bee, Ali fought twice more and lost. In 1980, he was defeated by Larry Holmes, a former sparring partner and the then-World Heavyweight Champion.²⁸⁰ Despite the apparent finality of his loss to Holmes and his increasingly suspect medical condition, Ali would fight one more time. On December 11, 1981,

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.* at *1-2.

276. *Id.* at *2-3.

277. *Id.*

278. *Id.* at *4.

279. *Id.*

280. Mark Giles, *They Really Shouldn't Have Done It*, TIMES (London), Oct. 14, 2005, at 103. The case of *Sunshine Promotions, Inc. v. Ridlen*, 483 N.E.2d 761 (Ind. Ct. App. 1985), involved the Ali-Holmes fight in part. There, Sunshine, a promoter of closed circuit telecasts of boxing matches (including the Ali-Holmes fight), brought an action for the refund of a gross receipts tax imposed on ticket sales for telecasts since such a tax was not imposed on subscription cable providers. *Id.* at 764. The court rejected Sunshine's claim, finding that an Indiana state statute imposing such a tax on the gross receipts of a closed circuit promoter did not deny the promoter's equal protection. *Id.* at 765-67.

Ali lost a ten-round unanimous decision to future heavyweight champion Trevor Berbick in what was billed as "The Drama in the Bahamas."²⁸¹ Following this loss, Ali retired in 1981.²⁸² Ali was later diagnosed with Parkinson's Syndrome, following which his motor functions began a slow decline.²⁸³ "I feel fine," Ali insisted. "I'm older and fatter, but we all change."²⁸⁴

In 1996, Ali carried the torch and ignited the Olympic flame during the opening ceremonies in Atlanta, Georgia.²⁸⁵ His appearance at the Games moved an international audience.

IV. CONCLUSION

Muhammad Ali continues to be one of the most recognized and admired figures in the world because of his tremendous determination, accomplishment, and perseverance against daunting odds.²⁸⁶ Ali was not just a sports symbol; he personified the racial and political climate of his generation. Whether calculated or not, Ali also directly and indirectly accomplished many feats in court that remain legal precedent in assorted areas of the American law. In the federal law context, Ali's struggle for conscientious objector status resulted in a landmark U.S. Supreme Court ruling, which set forth the standards that a draft registrant must satisfy in order to qualify for conscientious objector classification. Further, Ali's involvement in a leading case on warrantless foreign intelligence surveillance forced the federal appellate courts to consider the President's Constitutional powers in conducting warrantless surveillances on the grounds of national security. His legendary bouts not only spawned a copyright infringement lawsuit, which addressed the fair uses of images captured from historically significant events, but another suit that delved into television "blackout" rules and antitrust law. Ali's contribution to state common law was equally significant. Specifically, Ali went to court in one of the first cases to successfully recognize a right of publicity protection, and additionally, to apply this right to an athlete. Ali would also compel courts to consider liability issues concerning libel under a labor collective bargaining contract. Indeed, Ali was, and continues to be, *The*

281. Dick Heller, *Ali Was "Greatest" No More*, WASH. TIMES, Dec. 12, 2005, at C13; Cyber Boxing Zone, *supra* note 7.

282. Muhammad Ali, *supra* note 265.

283. Muhammad Ali Biography, <http://novaonline.nvcc.edu/eli/evans/his135/events/ali98.htm> (last visited on Sept. 29, 2007).

284. *Id.*

285. *Id.*

286. BINGHAM & WALLACE, *supra* note 58, at 256-59.

Greatest in court.

TECHNICAL FOUL: DAVID STERN'S EXCESSIVE USE OF RULE-MAKING AUTHORITY

BRENT D. SHOWALTER*

I. INTRODUCTION

In the past two seasons,¹ National Basketball Association (NBA) Commissioner David Stern has used some of his expansive authority in implementing a variety of rules designed to clean up the games, the players, and the image of the NBA. These rules include instituting a dress code for players² and various uniform requirements, using a new synthetic basketball, prohibiting players from attending certain nightclubs, and introducing a “point of emphasis” that players will be called for technical fouls for excessive complaining. Stern has implemented such rules under the auspices of the amount of authority he has been given in the Collective Bargaining Agreement (CBA) between the league and the National Basketball Players Association (NBPA) and in the NBA Constitution. However, the NBPA has begun to express its disagreement with Stern’s free flow of new rules and, in the future, may take action against these or other newly formulated rules.

This article will examine the scope of authority that David Stern and commissioners of other professional sports leagues have to formulate and implement player conduct rules similar to those Stern has recently instituted. In examining Stern’s authority, this article will discuss: (1) the history of the

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1. The NBA seasons of 2005-2006 and 2006-2007.
2. The dress code was discussed by the NBA and the National Basketball Players’ Association (NBPA), and supposedly agreed upon, during collective bargaining negotiations in the summer of 2005. See Mike Wise, *Opinions on the NBA’s Dress Code are Far from Uniform*, WASH. POST, Oct. 23, 2005, at A01, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/10/22/AR2005102201386_pf.html. However, since the dress code was not included in the final version of that collective bargaining agreement, it will be analyzed as if the NBPA did not consent to its institution.

professional sports league commissioner, including cases challenging a commissioner's authority, and the history of the NBA commissioner, (2) recent rules established by David Stern, (3) CBA provisions of the National Football League (NFL), Major League Baseball (MLB), National Hockey League (NHL), and NBA governing the creation of new rules, (4) whether player conduct rules must be collectively bargained between the league and the players' union under the National Labor Relations Act (NLRA), and (5) Stern's authority to institute new player conduct rules in light of the NBA CBA and the NLRA.

II. PROFESSIONAL SPORTS LEAGUE COMMISSIONER

Since the inception of the professional sports league commissioner position, the office has enjoyed a considerable amount of power over the league and its players. A commissioner is unique in the amount of authority he has been given, but the truly distinctive aspect of the position is that he makes many decisions based on his sole discretion and "represents an almost autonomous authority within the internal structure of the league, uncontrolled by its principal owners."³ A commissioner receives his authority to make decisions through the league's CBA, constitution, and bylaws,⁴ but these documents can also limit his authority.

A. History

The expansive authority possessed by professional sports league commissioners began when Judge Kenesaw Mountain Landis was elected as the first commissioner of a professional sports league in 1921.⁵ Judge Landis was elected as commissioner of MLB after the infamous Chicago Black Sox scandal,⁶ when the club owners decided that a one-person commissionership was necessary to "assure that public interests would first be served" and disgorge "existing evils" from baseball.⁷ To ensure that Landis was able to accomplish these goals, under the Major League Baseball Agreement he was given the power to "investigate, either upon complaint or upon his own

3. Gregor Lentze, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach From a Corporate Perspective*, 6 MARQ. SPORTS L.J. 65, 72 (1995).

4. MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 437 (2005).

5. *The Commissionership: A Historical Perspective*, MLB.COM, http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com (last visited Oct. 24, 2007).

6. In the Black Sox scandal, eight Chicago White Sox players allegedly took payments from bettors to lose a game in the 1919 World Series. *Id.*

7. *Id.*

initiative, an act, transaction or practice, charged, alleged or suspected to be detrimental to the best interest of the national game of baseball, (and to determine and take) any remedial, preventive or punitive action (he deemed appropriate).”⁸ While this gave him considerable power, his power was magnified because the agreement also provided that his “decisions w[ere] final and could not be challenged by the clubs in court.”⁹

This expansive power first given to Landis has continued to this day in MLB, and commissioners of the other professional sports leagues enjoy similar authority. In MLB, the commissioner still has the authority to investigate and punish actions, by a fine or suspension, that are not in the best interests of baseball.¹⁰ In the NFL, the commissioner can fine, suspend, or terminate the contract of a player whose conduct is deemed “to be detrimental to the League or professional football.”¹¹ The commissioner of the NHL can expel, suspend, fine, or a combination thereof “any official or a Member Club or player or employee” for any act or conduct “whether during or outside the playing season [that] has been dishonorable, prejudicial to or against the welfare of the League or the game of hockey.”¹² The NBA commissioner’s authority includes the ability to discipline a player whose conduct at or during a game is “prejudicial to or against the best interests of the Association or the game of basketball” with a fine or suspension¹³ and to fine or suspend “any Player who, in his opinion, shall have been guilty of conduct prejudicial . . . or detrimental to the [NBA].”¹⁴

B. Cases Challenging Commissioners’ Authority

The scope of a commissioner’s authority, mainly his authority to act in the best interests of the league or discipline a player for his conduct, has been judicially challenged, although courts generally provide deference to a commissioner’s decisions except where the commissioner acted beyond the scope of his authority or in bad faith.¹⁵

8. *Id.*

9. *Id.*

10. MAJOR LEAGUE BASEBALL, MAJOR LEAGUE CONSTITUTION art. II, § 3 (2006), available at <http://www.businessofbaseball.com/docs/MLConstitutionJune2005Update.pdf>.

11. NAT’L FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS ASSOCIATION Appendix C ¶ 15 (2006) [hereinafter NAT’L FOOTBALL LEAGUE CBA]; see also NAT’L FOOTBALL LEAGUE, CONSTITUTION AND BYLAWS OF THE NFL art. 8.13(A) (rev. 1999).

12. NAT’L HOCKEY LEAGUE, NHL BYLAWS § 17.3(a) (1990).

13. NAT’L BASKETBALL ASS’N, NBA CONSTITUTION art. XXXV(d) (1989).

14. *Id.* art. XXXV(e).

15. MITTEN ET AL., *supra* note 4, at 437.

A commissioner's decisions made under the "best interests" of the game clause have been upheld for disapproving player trades¹⁶ and for suspending a Chief Executive Officer (CEO) of a club for one year due to his tampering with the exclusive negotiating rights of a free agent and his former club¹⁷ because the clause provides the commissioner with broad authority and discretion.¹⁸

However, even when acting under the "best interests" clause, a commissioner's authority is not unfettered. In the tampering case mentioned above, the commissioner also took away a draft choice from the club as a penalty.¹⁹ The court found that the commissioner did not have the authority to take away the draft choice because it was a penalty that the commissioner did not have the authority to impose for this type of conduct.²⁰ This was similar to *Riko Enterprises, Inc. v. Seattle Supersonics Corp.*,²¹ where the court found that the NBA commissioner did not have the authority to deny a team a draft choice; only the NBA's board of directors had this power pursuant to the NBA's constitution.²² Similarly, a commissioner's assignment of a club to a different division under his "best interests" authority was invalid.²³ Although the best interests clause gave the commissioner broad authority, since the dispute was already governed by the constitution, the commissioner could not use his authority in contradiction of the constitution.²⁴

III. COMMISSIONERSHIP OF THE NBA

The NBA has had only four commissioners²⁵ since 1946, with each individual making his own distinct mark on the league.²⁶ These four commissioners, Maurice Podoloff, Walter Kennedy, Larry O'Brien, and David Stern,²⁷ all had a different impact on the NBA, possibly due to their use or

16. *Charles O. Finley & Co., v. Kuhn*, 569 F.2d 527, 531 (7th Cir. 1978).

17. *Atlanta Nat'l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213, 1223 (N.D. Ga. 1977).

18. *Id.* at 1219-22; *Kuhn*, 569 F.2d at 534.

19. *Kuhn*, 432 F. Supp. at 1216-17.

20. *Id.* at 1223.

21. *Riko Enters. v. Seattle Supersonics Corp.*, 357 F. Supp. 521 (S.D.N.Y. 1973).

22. *Id.* at 525.

23. *Chi. Nat'l League Ball Club, Inc. v. Vincent*, 1992 WL 179208 (N.D. Ill. 1992), *vacated*, *reprinted in* MITTEN ET AL., *supra* note 4, at 448.

24. *Id.*

25. Until 1967 the position was referred to as NBA President instead of NBA Commissioner. Mike Monroe, *The Commissioners*, NBA.COM, <http://www.nba.com/history/commissioners.html> (last visited Jan. 24, 2007). The NBA has had four presidents/commissioners. *See id.*

26. *Id.*

27. *Id.*

nonuse of authority. Recently, current NBA Commissioner David Stern has drawn attention to his use of authority by instituting a variety of player conduct rules.

A. NBA Commissioners

Maurice Podoloff became the first league commissioner²⁸ in 1946 when the NBA was known as the Basketball Association of America (BAA).²⁹ Unlike MLB Commissioner Kenesaw Mountain Landis, who had enjoyed expansive authority for over two decades, Podoloff had limited authority, yet he left his mark by successfully merging the BAA and the National Basketball League to create the NBA.³⁰ Podoloff led the NBA until 1963 when Walter Kennedy took over the position.³¹ Kennedy served as commissioner³² in 1964 when the NBPA was formed, and in 1971, the commissionership received expansive authority, similar to that of the MLB commissioner, when “the owners gave [Kennedy] far-reaching authority to run the league, making him perhaps the most powerful administrative figure in American pro sports at that time.”³³

Kennedy was succeeded as commissioner in 1975 by Larry O’Brien, whose accomplishments included a merger with the American Basketball Association and a landmark CBA in 1983.³⁴ In 1984, current commissioner David Stern took over the position. “Under Stern’s guidance the NBA has enjoyed its period of greatest growth and taken basketball to the forefront of the global sports scene.”³⁵ To accomplish this, Stern created the free agency system, presided over the CBA that brought the salary cap and revenue sharing to the NBA, developed NBA Properties and NBA Entertainment to market the NBA, and moved the NBA into new technological outlets.³⁶ He also expanded the league to thirty teams,³⁷ and under his watch, the average player

28. Podoloff’s official title was NBA President. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Kennedy’s title was changed from President to Commissioner in 1967. *Id.*

33. *Id.*

34. *Id.* The 1983 CBA was landmark because it established the first salary cap in professional sports, a revenue guarantee for players, and a substance abuse program. Dan T. Rosenbaum & Andy Stein, *Re-Negotiating the NBA Collective Bargaining Agreement*, Sept. 24, 2003, <http://www.uncg.edu/bae/people/rosenbaum/NBA/cba1.pdf>.

35. Monroe, *supra* note 25.

36. *Id.* Stern served as NBA Executive Vice President during the 1983 CBA negotiations that resulted in the salary cap and revenue guarantee. *Id.*

37. *See* Team Index, <http://www.nba.com/teams> (last visited Nov. 16, 2007).

salary rose from \$275,000 in 1983³⁸ to \$5.215 million in 2006.³⁹

B. David Stern's Player Conduct Rules

While Stern has grown the NBA into a successful, worldwide enterprise, his tenure has not been without controversy. During the past two seasons, Stern has instituted a variety of player conduct rules with the purpose of changing the NBA's image. These new rules include a player dress code, a new basketball, various uniform rules, technical fouls for excessive complaining, and a possible ban on certain nightclubs.

Stern instituted the player dress code⁴⁰ at the beginning of the 2005-2006 season⁴¹ to soften the NBA's hip-hop image and increase the league's appeal to its fans.⁴² The dress code requires players who are "engaged in team or league business" to dress in business casual attire.⁴³ Business casual attire is defined as a dress shirt or sweater with dress or khaki pants or dress jeans and appropriate shoes.⁴⁴ Players are not allowed to wear sneakers or sandals,⁴⁵ sleeveless shirts, shorts, jerseys, t-shirts, chains or pendants over clothing, sunglasses, or headphones.⁴⁶

The second major rule change was the institution of a new basketball for the 2006-2007 season.⁴⁷ The basketball was synthetic leather with a slightly different two-piece panel layout that was used in all NBA games.⁴⁸ The new basketball was a significant change due to the panel layout and the synthetic leather, and it was the first change in the NBA basketball in thirty-five years and only the second change in sixty years.⁴⁹ While the NBA claimed that the

38. Nat'l Basketball Ass'n Players Ass'n, *NBPA History*, <http://nbpa.com/history.php> (last visited Feb. 23, 2007).

39. Plunkett Research, Ltd., *Sports Industry Overview*, <http://www.plunkettresearch.com/Industries/Sports/SportsStatistics/tabid/273/Default.aspx> (last visited Apr. 13, 2007).

40. *NBA Player Dress Code*, NBA.COM, http://www.nba.com/news/player_dress_code_051017.html (last visited Jan. 23, 2006).

41. *Proposed Dress Code Doesn't Suit Some NBA Players*, ESPN.COM, Oct. 5, 2005, <http://sports.espn.go.com/nba/news/story?id=2181671>.

42. Wise, *supra* note 2.

43. *NBA Player Dress Code*, *supra* note 40, § 1.

44. *Id.*

45. *Id.*

46. *Id.* § 3. A player can wear headphones in the locker room and on the team bus and plane. *Id.*

47. *NBA Introduces New Game Ball*, NBA.COM, June 28, 2006, http://www.nba.com/news/blackbox_060628.html. The old basketball was leather and was comprised of the traditional eight panels. *See id.*

48. *Id.*

49. *Id.*

ball improved shooting, scoring, and turnovers,⁵⁰ players complained that the ball stuck to their hands, did not bounce like the old ball,⁵¹ and cut their fingers.⁵² Due to these adverse effects, and because neither the NBPA nor the players were consulted before introduction of the ball, the NBPA filed an unfair labor practice charge⁵³ claiming that the ball adversely affected working conditions⁵⁴ and, therefore, could not be unilaterally implemented by Stern. Before the unfair labor practice charge could be litigated, and after less than a half season of use, the NBA pulled the new basketball and reverted back to the old leather basketball.⁵⁵

Also instituted for the 2006-2007 season were uniform rules and a point of emphasis.⁵⁶ The new uniform rules for the season are that players “can wear one 4-inch wristband on each wrist[, which] cannot be worn on the bicep, . . . headbands can be no wider than 2 inches, [and players] can no longer [wear] tights or long compression socks.”⁵⁷ Other uniform rules that are more strictly enforced and subject players to discipline for the season are that “players must keep their uniform shirts tucked into their pants” while they are on the court⁵⁸ and are prohibited from wearing rubber bands.⁵⁹ Additionally, the rule that “[p]layers, coaches and trainers are to stand and line up in a dignified posture along the sidelines or on the foul line during the playing of the National Anthem”⁶⁰ has been increasingly enforced as “players chewing gum and shifting as they stood in line [during the National Anthem] . . . ha[s] been outlawed.”⁶¹ In addition to these uniform rules, Stern also introduced a major

50. *NBA to Switch to Leather Ball on Jan. 1*, NBA.COM, Dec. 11, 2006, http://www.nba.com/news/ball_061211.html.

51. Michael S. Schmidt, *N.B.A. to Take up Complaints with Ball Manufacturer*, N.Y. TIMES, Dec. 5, 2006, available at <http://www.nytimes.com/2006/12/05/sports/basketball/06ball.html?ex=1172379600&en=026de53ab131da43&ei=5070>.

52. Brian Hanley, *Iverson Not the Answer for Bulls*, CHI. SUN-TIMES, Dec. 12, 2006, available at <http://www.suntimes.com/sports/basketball/bulls/168800,CST-SPT-bullnt12.article>.

53. Schmidt, *supra* note 51.

54. Mitch Lawrence, *Players Crying Foul*, N.Y. DAILY NEWS, Nov. 16, 2006, available at http://www.nydailynews.com/sports/2006/11/16/2006-11-16_players_crying_foul_nbas_new_ball_not_th.html.

55. *NBA to Switch to Leather Ball on Jan. 1*, *supra* note 50.

56. Oscar Dixon, *Stern Wants On-Court Decorum to be Uniform*, USA TODAY, Oct. 26, 2006, available at http://www.usatoday.com/sports/basketball/nba/2006-10-26-uniformity_x.htm?POE=SPOISVA.

57. *Id.*

58. NAT'L BASKETBALL ASS'N, OFFICIAL RULES OF THE NBA, available at http://www.nba.com/analysis/rules_h.html?nav=ArticleList (last visited Mar. 19, 2007).

59. Lawrence, *supra* note 54.

60. NAT'L BASKETBALL ASS'N, *supra* note 58.

61. Lawrence, *supra* note 54.

point of emphasis for the season in a new rule that “[p]layers will be called for technical[] [fouls] for excessive complaining.”⁶²

Finally, in January 2007, the NBA required its security forces to promulgate a list of nightclubs in all NBA cities that players should not visit.⁶³ Once such locations are identified, “the league will send a directive to teams mandating that players avoid those spots or be subject to a substantial fine.”⁶⁴

Like the directive of the nightclub ban, these player conduct rules have been seen as Stern’s directives and have raised controversy among the players, NBPA, media, and fans. The controversial nature of the rules has raised questions regarding Stern’s authority under the NBA CBA to institute such rules.

IV. PROFESSIONAL SPORTS LEAGUES’ PROVISIONS GOVERNING RULE CHANGES

David Stern and other professional sports league commissioners have broad authority under the “best interests” clause of a league’s CBA; however, a commissioner’s authority to institute new player conduct rules is limited under a league’s CBA, and he cannot unilaterally expand his power beyond that given to him.⁶⁵

A. Professional Sports Leagues’ CBA Provisions

Provisions in professional sports leagues’ CBAs governing the institution of new rules during the current term of the CBA vary significantly. One of the CBAs addresses only playing rules, while two cover most of the league’s rules and regulations, and another allows *carte blanche* institution of certain rules. The specificity and scope of these CBA provisions has an impact on the league’s commissioner’s authority to institute new player conduct rules.

i. NBA

The NBA commissioner has the broadest authority of the professional sports leagues, as the NBA CBA does not require the commissioner to get consent from the NBPA prior to enacting rules.⁶⁶ The NBA “is entitled to

62. Dixon, *supra* note 56.

63. Mitch Lawrence, *Indy’s Change of Pace*, N.Y. DAILY NEWS, Jan. 21, 2007, at 63. This mandate was in the wake of the murder of NFL player Darrent Williams at a Denver, Colorado, nightclub. *Id.*

64. *Id.*

65. See *infra* Part II.B.

66. See NAT’L BASKETBALL ASS’N, NBA COLLECTIVE BARGAINING AGREEMENT, art. VI § 12 (2005).

promulgate and enforce reasonable rules governing the conduct of players on the playing court” and must only give notice and consult with the NBPA prior to putting the rule into effect.⁶⁷ “Conduct on the playing court’ [means] conduct in any area within an arena (including, but not limited to, locker rooms, vomitories, loading docks, and other back-of-house and underground areas, including those used by television production and other vehicles) at, during or in connection with an NBA . . . game.”⁶⁸ This includes “conduct engaged in by a player within an arena from the time the player arrives at the arena for an NBA game until the time the player has left the premises of the arena following the conclusion of such game.”⁶⁹ In regards to playing rules, the NBPA has a vote on the NBA Competition Committee, which recommends playing rules to the NBA’s board of directors for final approval.⁷⁰

ii. NFL

While the NBA’s CBA allows unregulated institution of certain rules, the NFL’s CBA only governs playing rule changes, and it limits the commissioner’s authority by requiring the NFL to give the National Football League Players Association (NFLPA) notice of all proposed changes.⁷¹ “If the NFLPA believes that the adoption of a playing rule change would adversely affect player safety,” it can call a meeting to discuss the rule change, and if it is unsatisfied with the outcome of the meeting, then it can “request an advisory decision by one of the arbitrators.”⁷² However, “[t]he arbitrator’s decision [is] advisory only, not final and binding.”⁷³ Therefore, once the arbitrator has made his decision, the NFL can implement the proposed playing rule change, even to the disagreement of the NFLPA.⁷⁴

iii. MLB

Unlike the NFL provision, MLB’s CBA provision governs playing rules, major league rules, and any other rules or regulations, limiting the

67. *Id.*

68. *Id.* art. XXXI § 8(c).

69. *Id.*

70. *Id.* art. XXIX § 4(a).

71. NAT’L FOOTBALL LEAGUE CBA, *supra* note 11, art. XIII § 1(c).

72. *Id.*

73. *Id.*

74. *See id.*

commissioner's authority to institute any type of rule.⁷⁵ If any playing or scoring rule change is proposed by MLB, it must give notice to the MLB Players Association (MLBPA).⁷⁶ The MLB and MLBPA must negotiate over the proposed rule change if the change would "significantly affect terms and conditions of employment."⁷⁷ If no agreement can be made on the rule change, the rule will "not be put into effect until the completion of the next complete succeeding season . . . following the date the change was proposed."⁷⁸

If the rule change involves "any Major League Rule, or other rule or regulation," MLB must give notice to the MLBPA and must negotiate the proposed change.⁷⁹ However, MLB's obligation to negotiate with the MLBPA applies only to changes of existing rules or regulations that would change a player benefit or rules that would "impose an obligation upon the Players which had not previously existed."⁸⁰

iv. NHL

Unlike the NBA commissioner's broad rule-making authority, the NHL commissioner's authority is the most restricted of the professional sports leagues' commissioners. The NHL's CBA provisions govern the amendment or modification of any league rule or playing rule,⁸¹ and any rule change by the NHL must be provided to the NHL Players' Association (NHLPA).⁸² If a proposed league rule or playing rule would "affect terms or conditions of employment of any Player" then the NHLPA must consent to the rule, which it cannot unreasonably withhold.⁸³ Additionally, the NHL must send the NHLPA the current league rules, and "[n]o Player shall be bound by any provision of a League Rule that has not been furnished to the NHLPA."⁸⁴

75. MAJOR LEAGUE BASEBALL, 2003-2006 BASIC AGREEMENT art. XVIII (2002).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. NAT'L HOCKEY LEAGUE, COLLECTIVE BARGAINING AGREEMENT BETWEEN NHL AND NHL PLAYERS' ASSOCIATION art. 30.3 (2005).

82. *Id.* (governing league rules); *Id.* art. 30.2 (governing playing rules).

83. *Id.* art. 30.3.

84. *Id.* art. 30.1.

B. Commissioner's Authority to Institute Player Conduct Rules Under the CBA

To institute new player conduct rules, a commissioner must have the authority under the CBA provisions. If he is not given the explicit authority in the CBA, he may still be able to unilaterally implement such rules without the consent of the players' union under certain conditions.⁸⁵ Each of the four professional sports leagues' CBAs have significantly different provisions governing the institution of new rules, and therefore, the authority of each commissioner to institute player conduct rules, such as those created by the NBA, also varies significantly. The authority of each league's commissioner to institute new player conduct rules will be analyzed based on the rules instituted by David Stern.

i. NBA

The NBA's CBA provides Commissioner Stern with the most rule-making authority of the professional sports league commissioners. The CBA gives Stern broad authority to institute rules "governing the conduct of players on the playing court."⁸⁶ Conduct on the playing court "mean[s] conduct in any area within an arena . . . from the time the player arrives . . . until the time the player [leaves]."⁸⁷ While this gives Stern considerable authority, he still should not be able to ban players from attending certain nightclubs or institute the new basketball. The prohibition on players attending nightclubs does not govern the conduct of players while they are within an arena; likewise, the new basketball should not be considered "conduct of players." Similarly, the dress code cannot be implemented by Stern, as its scope is too broad. The dress code would be within the scope of the clause if it regulated players' attire only when they were in an arena. However, the dress code requires "[b]usiness Casual attire whenever [players] are engaged in team or league business."⁸⁸ This requires certain attire even when players are outside an arena, which falls outside the scope of the CBA. Finally, the uniform rules and technical fouls for excessive complaining would be within the scope of the provision as they regulate the conduct of players on the playing court.

85. Rules could be implemented by the commissioner if they do not relate to "wages, hours, and other terms and conditions of employment. . . ." Nat'l Labor Relations Act, 29 U.S.C. § 158(d) (1994). See *infra* Part V for a complete discussion.

86. NAT'L BASKETBALL ASS'N, *supra* note 66, art. VI § 12.

87. *Id.* art. XXXI § 8(c).

88. *NBA Player Dress Code*, *supra* note 40.

ii. NFL

Unlike Stern's broad authority, the NFL's CBA governs only changes to playing rules, which limits the commissioner's authority to implement new rules.⁸⁹ The NFL commissioner must give notice of playing rule changes to the NFLPA and may have to discuss the changes with them, but he can ultimately institute these playing rules without the NFLPA's consent. He cannot, however, institute other types of rules.

Playing rules are rules that govern the administration of the game itself,⁹⁰ such as the descriptions of the playing field, duties of the officials, penalties that may be assessed, timing, and other rules governing how the game is to be played.⁹¹ The majority of the rules instituted by the NBA—the dress code, the nightclub ban, the new ball, and the uniform rules—would likely not be considered playing rules, and thus, would not be permissible under the NFL CBA.

The dress code and nightclub ban are not playing rules as they govern conduct outside of the game. A new ball and uniform rules would also not be considered playing rules. While both could be considered rules governing the administration of the game, because the NFL's current playing rules do not address the design of the ball nor uniform requirements,⁹² the NFL, and likely an arbitrator or judge, would not consider them playing rules. Only one rule, the penalty for excessive complaining, would be considered a playing rule because it involves administration of the game and is a penalty similar to those found in the NFL rulebook.⁹³

iii. MLB

MLB's CBA is much broader than the NFL's CBA. Not only does it govern playing rules, but it also governs most other rules and regulations of the league.⁹⁴ Under the MLB CBA, the commissioner would only have the authority to unilaterally implement playing rules, as other rules and regulations

89. NAT'L FOOTBALL LEAGUE CBA, *supra* note 11, art. XIII § 1(c).

90. *See* MAJOR LEAGUE BASEBALL, OFFICIAL RULES (2006), available at http://mlb.mlb.com/mlb/official_info/official_rules/foreword.jsp. "This code of rules is written to govern the playing of baseball games." *Id.*

91. *See id.*; NAT'L FOOTBALL LEAGUE, DIGEST OF RULES, available at <http://www.nfl.com/rulebook/digestofrules> (last visited Mar. 19, 2007).

92. *Id.* These rules include a section on the ball; however, it sets forth the number of balls needed for a game and the administration of ball use. *Id.* It does not include rules governing the ball itself.

93. *See id.*

94. MAJOR LEAGUE BASEBALL, *supra* note 75, art. XVIII.

must be negotiated with the MLBPA.⁹⁵ Similar to the NFL, the penalty for excessive complaining would be considered a playing rule, while the dress code and nightclub ban would not be playing rules. However, contrary to the NFL, a new ball and uniform rules should be considered playing rules because they concern the playing of the game and are currently included in the MLB rulebook.⁹⁶

Under the MLB CBA, any other rule changes, if they altered a player benefit or introduced a new obligation on a player, could not be instituted by the commissioner, as they must be negotiated with the MLBPA.⁹⁷ Under these criteria, the commissioner could not institute the dress code or the ban on certain nightclubs, as they would impose new obligations on a player that had not previously existed under the CBA.

iv. NHL

Contrary to Stern's broad authority, the NHL's CBA significantly limits the commissioner's rule-making authority. The CBA provisions govern playing and league rules and do not allow the commissioner to institute any rule that "affect[s] terms or conditions of employment of any Player," without the consent of the NHLPA.⁹⁸ This limitation effectively provides the commissioner with no significant rule-making authority because, under the NLRA, the league must collectively bargain with the NHLPA over "wages, hours, and other terms and conditions of employment."⁹⁹

V. NATIONAL LABOR RELATIONS ACT

Even where a commissioner does not have authority under the CBA to institute a certain player conduct rule, he may still unilaterally implement the rule if it does not affect the players' "wages, hours, and other terms and conditions of employment."¹⁰⁰

The NLRA governs employer-employee relations,¹⁰¹ and it gives employees the right to form labor organizations to collectively bargain with

95. *Id.* Playing rules must be negotiated with the MLBPA but if the two parties cannot reach an agreement, the rule can be instituted by MLB the following year. *Id.*

96. See MAJOR LEAGUE BASEBALL, OFFICIAL RULES §§ 1.09, 1.11 (2006), available at http://mlb.mlb.com/mlb/downloads/y2007/01_objectives_of_the_game.pdf.

97. MAJOR LEAGUE BASEBALL, *supra* note 75, art. XVIII.

98. NAT'L HOCKEY LEAUGE, *supra* note 81, art. 30.3.

99. Nat'l Labor Relations Act, 29 U.S.C. § 158(d) (1994).

100. *Id.*

101. *Id.* §§ 151–169.

their employers.¹⁰² Because players in professional sports leagues have formed unions to collectively bargain with their respective leagues, the NLRA governs the bargaining relationship between the two parties. In the collective bargaining relationship, “to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment.”¹⁰³

“[W]ages, hours, and other terms and conditions of employment”¹⁰⁴ are considered mandatory subjects of collective bargaining that must, at the insistence of either party, be bargained for between the employer and the union.¹⁰⁵ Those subjects not comprising one of these areas are permissive subjects that need not be bargained over.¹⁰⁶ Failure or refusal by a party to negotiate with regards to a mandatory subject, such as an employer unilaterally implementing a mandatory subject, constitutes a violation of the duty to collectively bargain and is an unfair labor practice.¹⁰⁷

However, what constitutes a mandatory subject of bargaining is sometimes not clear. “[G]eneral[ly], ‘only issues that settle an aspect of the relationship between the employer and employees’ are mandatory subjects of bargaining. An issue arising from outside the bargaining unit may be a mandatory subject . . . if it ‘vital[ly] affects’ the terms and conditions of employment within the bargaining unit.”¹⁰⁸ Even if a decision by an employer has an adverse effect on employees, if the decision is one about “the scope or direction of an enterprise,” it will not be considered a mandatory subject.¹⁰⁹ If the subject is not a mandatory one, then it is considered permissive and may be implemented by the employer without being presented to the union, regardless of whether the subject was included in the CBA.¹¹⁰

102. *Id.* § 157; Brent Showalter, Comment, *Steroid Testing Policies in Professional Sports: Regulated by Congress or the Responsibility of the Leagues?*, 17 MARQ. SPORTS L. REV. 651, 654 (2007).

103. Nat'l Labor Relations Act § 158(d).

104. *Id.*

105. *Id.*

106. John Vukelj, *Post No Bills: Can the NBA Prohibit Its Players from Wearing Tattoo Advertisements?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 507, 542 (2005).

107. *See* NLRB v. Katz, 369 U.S. 736, 743 (1962).

108. *Pall Corp. v. NLRB*, 275 F.3d 116, 119-20 (D.C. Cir. 2002) (quoting *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178-79 (1971)).

109. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 673 (1981).

110. Mark M. Rabuano, Comment, *An Examination of Drug-Testing as a Mandatory Subject of Collective Bargaining in Major League Baseball*, 4 U. PA. J. LAB. & EMP. L. 439, 446-47 (2002).

A. Employer Rules as a Mandatory Subject of Collective Bargaining

Whether a rule instituted by an employer is a mandatory subject of collective bargaining, especially on the grounds that the rule affects “other terms and conditions of employment,”¹¹¹ is often unclear because the NLRA does not specifically define these terms. Generally, instituting new rules that could result in employee discipline, such as rules on absenteeism and tardiness,¹¹² or procedural and safety rules¹¹³ affect the terms and conditions of employment, and thus, must be bargained over.

In *Murphy Diesel Co. v. NLRB*,¹¹⁴ the employer unilaterally modified and implemented rules on absenteeism and tardiness.¹¹⁵ The employer refused to bargain over the rules¹¹⁶ because the CBA between the employer and the union contained a clause stating that “all management functions are reserved to the Company,” and the CBA did not address the rules in question.¹¹⁷ The employer also claimed that the rules were not new because they were merely a clarification of its previous rules.¹¹⁸ The court found that these rules were conditions of employment, and thus, mandatory subjects of bargaining.¹¹⁹ They were more than a clarification of existing rules, and the clause in the CBA did not give the employer authority to institute the rules.¹²⁰ The CBA “ma[de] no reference to rules on absence or tardiness. Any waiver of the Union’s right to bargain about conditions of employment must be ‘clear and unmistakable.’”¹²¹

Similarly, new plant rules issued by Miller Brewing in *NLRB v. Miller Brewing Co.*¹²² were considered conditions of employment and thus subject to bargaining.¹²³ Although the booklet of plant rules issued by Miller Brewing mainly contained rules that were already known and in force, which did not need to be bargained over, it did contain at least two new rules that required

111. Nat’l Labor Relations Act, 29 U.S.C. § 158(d) (1994).

112. *Murphy Diesel Co. v. NLRB*, 454 F.2d 303, 304 (7th Cir. 1971).

113. *See NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969).

114. 454 F.2d 303 (7th Cir. 1971).

115. *Id.* at 304.

116. *Id.* at 306.

117. *Id.* at 304 (quoting CBA).

118. *Id.* at 306.

119. *Id.* at 307.

120. *Id.* Clarification of existing rules usually need not be bargained over. *See id.* at 306-07.

121. *Id.* (quoting *Gen. Elec. Co. v. NLRB*, 414 F.2d 918, 923 (4th Cir. 1969)).

122. *NLRB v. Miller Brewing Co.*, 408 F.2d 12 (9th Cir. 1969)

123. *Id.* at 15.

bargaining.¹²⁴ Furthermore, even though the union had not previously objected to the unilateral implementation of plant rules, such a waiver did not bar the union from challenging future rules.¹²⁵ “Each time the bargainable incident occurs—each time new rules are issued—Union has the election of requesting negotiations or not. An opportunity once rejected does not result in a permanent ‘close-out’”¹²⁶

B. Equipment as a Mandatory Subject of Collective Bargaining

In addition to new rules, equipment or machinery may also be considered to affect the conditions of employment. In *National Football League Management Council*,¹²⁷ the NFLPA demanded that the NFL Management Council collectively bargain over future installations of artificial turf at NFL stadiums.¹²⁸ When the management council declined, claiming that it was not required to bargain on that subject, the NFLPA filed suit alleging that installation of artificial turf was a mandatory subject of collective bargaining.¹²⁹ The National Labor Relations Board found that artificial turf was a mandatory subject, and therefore, the management council “was obligated to meet and confer with the Union on this matter.”¹³⁰

C. Commissioner’s Authority to Institute Player Conduct Rules under the NLRA

A commissioner would have the authority to institute rules such as a dress code, a new ball, a nightclub ban, uniform rules, and a penalty for excessive complaining only if he was given the authority in the league’s CBA or if the rule was a permissive subject of collective bargaining. Of these rules, only the uniform rules and the penalty for excessive complaining would likely be considered permissive. The remaining rules would be considered conditions of employment, and therefore, would be mandatory subjects that must be collectively bargained.

The institution of a new ball, similar to the artificial turf in *National Football League Management Council*, is a mandatory subject of collective bargaining. Although the court did not explain the reasoning behind its

124. *Id.* at 15-16.

125. *Id.* at 15.

126. *Id.*

127. NFL Mgmt. Council, 203 N.L.R.B. 958 (1973).

128. *Id.*

129. *Id.* at 958-59.

130. *Id.* at 959.

decision that artificial turf was a mandatory subject, installing turf would likely affect the conditions of employment because it is fundamental to the players performing their jobs and could affect their health and safety. Similarly, a new ball is such an integral part of players' jobs that changing the ball would affect their working conditions, such as the new basketball instituted by the NBA did, cutting the players' fingers and affecting their shooting and dribbling.

The nightclub ban and dress code are also mandatory subjects that must be bargained for because they affect a player's terms and conditions of employment. The nightclub ban affects the terms and conditions of a player's employment because a player is not allowed to visit those banned nightclubs without the risk of getting penalized with a substantial fine.¹³¹ This new rule infringes into the players' personal lives outside of their employment as professional athletes and subjects them to discipline if they violate the rule, materially altering their conditions of employment. Similarly, the dress code also affects conditions of employment. Before the dress code, players could wear any attire of their choosing.¹³² The dress code changed this by requiring the players to wear business casual attire to, from, and inside the arena, thereby substantially altering a condition under which the players were employed.

The uniform rules and the penalty for excessive complaining could follow similar logic as that of the dress code in that they alter a condition of employment; however, both rules are likely permissive subjects of bargaining. First, both rules could be considered clarifications of existing rules, as opposed to new rules, and therefore are not mandatory subjects. The rule on excessive complaining is a clarification of the rule that officials are permitted to assess technical fouls "at any time."¹³³ The uniform rules could be a clarification of the existing uniform rules, including the rule that players must be uniformly dressed.¹³⁴ Some of these uniform rules, such as players keeping their uniforms tucked in and standing in line during the National Anthem, are not new rules at all, but are existing rules that are being more strictly enforced. Additionally, the uniform rules that are new, such as those regulating headbands, wristbands, and compression shorts, even if they are not considered clarifications, do not affect the conditions of a player's employment, as they are very small and have no affect on a player performing his job functions.

131. Lawrence, *supra* note 63.

132. Players' attire was subject to individual team rules.

133. NAT'L BASKETBALL ASS'N, *supra* note 58, Rule No. 12A § V(a).

134. *Id.*

VI. DAVID STERN'S RULE-MAKING AUTHORITY

Under the NBA CBA, David Stern has the authority to establish rules governing the conduct of players while they are on the playing court.¹³⁵ Under this authority, Stern can likely institute the uniform rules and assess technical fouls for excessive complaining.¹³⁶ He cannot, however, institute the new basketball, the nightclub ban, or the dress code because these rules either govern players' conduct outside the playing court or do not involve the conduct of players.

For Stern to be able to institute these three rules that fall outside the scope of his authority under the CBA, they must be considered permissive subjects of collective bargaining. If the rule changes are deemed mandatory subjects, then Stern can institute them only if the NBPA consents to their institution. Similar to his authority under the CBA, Stern would have the authority to unilaterally implement the uniform rules and assess technical fouls for excessive complaining, as they are likely permissive subjects of bargaining.¹³⁷ The new basketball, nightclub ban, and dress code, however, would likely be considered mandatory subjects of collective bargaining, and therefore, Stern does not have the authority to institute them without the consent of the NBPA.

The NBPA could bring, and would likely be successful on, unfair labor practice charges against Stern because he has not bargained over the rules, choosing instead to unilaterally implement them. Even though the NBPA may have not have formally objected to these rules, under *Murphy*, it has not waived its rights to bargain over them unless it gave clear and unmistakable consent.¹³⁸ Furthermore, even though the NBPA has not objected to the unilateral implementation of these rules or previous rules, it can still require collective bargaining over these or future rules because "[e]ach time the bargainable incident occurs—each time new rules are issued—Union has the election of requesting negotiations or not."¹³⁹

VII. CONCLUSION

NBA Commissioner David Stern does have expansive authority, which has been given to him under the CBA and the NBA's Constitution. Recently, he has seemingly tested the limits of his authority through implementing a variety of player conduct rules in an effort to improve the league's image.

135. NAT'L BASKETBALL ASS'N, *supra* note 66, art. VI § 12.

136. *See infra* Part IV.B.4.

137. *See infra* Part V.C.

138. *Murphy Diesel Co. v. NLRB*, 454 F.2d 303, 307 (7th Cir. 1971).

139. *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969).

Stern's intentions in instituting such rules may or may not be laudable, but he has continued the barrage of rules, much to the disagreement of the NBPA. On the other hand, the NBPA has been hesitant to take any action against these rules due to the possible bad publicity of multi-million dollar athletes complaining about having to dress in business casual attire or use a different basketball, the expense in pursuing claims, and the questionable outcomes.

While Stern may not have the authority to institute some of the rules under the CBA's provision giving him the power to institute rules governing players' on-court conduct, and some of the rules may be considered mandatory subjects of collective bargaining, his actions could have a more serious effect than the issue of whether he does or does not have the authority to undertake such actions. That effect could be felt in 2011 when the current CBA expires¹⁴⁰ and the NBPA insists on taking away some of the commissioner's rule-making authority. It is possible that from now until 2011 Stern will not institute any new, attention-getting rules and the NBPA will forget about his recent actions. However, it is equally as possible that he will continue to implement player conduct rules to the disagreement of the NBPA and it will not forget about his use of authority. "[A] league commissioner does not have unfettered independence or authority. . . . [A]t times, he or she must walk a tightrope to avoid undermining or losing his or her authority."¹⁴¹ David Stern is walking a tightrope with his player conduct rules and is in danger of losing his authority.

140. NAT'L BASKETBALL ASS'N, *supra* note 66, art. XXXIX § 1. The current CBA runs through June 30, 2011, and the NBA has a one-year option to extend it through June 30, 2012. *Id.* art. XXXIX §§ 1-2.

141. MITTEN ET AL., *supra* note 4, at 437.

COMMENT

DISBARRING JERRY MAGUIRE: HOW BROADLY DEFINING “UNAUTHORIZED PRACTICE OF LAW” COULD TAKE THE “LAWYER” OUT OF “LAWYER-AGENT” DESPITE THE CURRENT STATE OF ATHLETE AGENT LEGISLATION

I. INTRODUCTION

In 1995, moviegoers watched as fictional agent Jerry Maguire waltzed out of his plush window office at Sports Management International to represent athletes independently.¹ However, from the time Jerry Maguire was representing “The Great Rod Tidwell”² until now, the agent industry has become one of enormous change. Industry giants such as IMG, Octagon, and SFX, among others, once unfamiliar to the sports world, have used their purchasing power to buy the businesses of boutique agencies,³ building an arsenal of athletes and leverage that has made it difficult for smaller firms to compete.⁴ At the same time, agents have begun to specialize, usually representing players in only one sport and often players at only one position.⁵ Perhaps most significantly, instances of unscrupulous and incompetent

1. See Cameron Crowe, *Jerry Maguire Movie Script* (2006), available at <http://www.godamongdirectors.com/scripts/jerrymaguire.txt>.

2. Rod Tidwell became Jerry Maguire’s only client following Jerry’s termination from Sports Management International by rival agent Bob Sugar, played by comedian and sports persona Jay Mohr. See *id.*

3. KENNETH L. SHROPSHIRE & TIMOTHY DAVIS, *THE BUSINESS OF SPORTS AGENTS* 38 (2003). An example of one such acquisition was the purchase of David Falk’s Falk Associates Management Enterprises (FAME). *Id.* at 39. Falk, Michael Jordan’s long-time agent, sold his practice to SFX for \$82.9 million, including \$38.75 million up front and \$15 million in bonuses per year for five years if FAME met certain cash flow requirements. Richard Sandomir, *Sale of Agency Opens New Doors for Falk and Clients*, N.Y. TIMES, May 6, 1998, at C6.

4. See SHROPSHIRE & DAVIS, *supra* note 3, at 45-46.

5. See Peter Keating, *Crash Landing*, ESPN THE MAGAZINE, Apr. 1, 2002, available at <http://espn.go.com/magazine/vol15no07steinberg.html>.

conduct by agents, including one involving hip-hop mogul Percy “Master P” Miller,⁶ have finally led Congress to draft, and George W. Bush to sign, the first piece of federal legislation regulating agent conduct.⁷ This legislation, the Sports Agent Responsibility and Trust Act (SPARTA), was signed in 2004.⁸

Today, while Jerry Maguire would no doubt find it difficult to compete independently, his biggest competitor may not be specialty-agents or even large umbrella corporations with 300-plus clients; his biggest competitor may be himself. Some may recall that Jerry Maguire was a lawyer, not just an agent.⁹ While SPARTA imposes penalties on agents who do not follow the rules,¹⁰ it is the lawyer-agents who still remain at a large competitive disadvantage with their non-lawyer counterparts.¹¹ Specifically, attorney-agents are still held to a higher standard of care for negligence claims and governed by an unforgiving code of professional conduct, the violation of which could lead to disbarment.¹² Also, and often overlooked, attorney-agents may be precluded from recovering for services rendered in a state where they are not licensed if they are determined to have engaged in the “unauthorized practice of law,”¹³ a phrase that courts have defined broadly.¹⁴

This comment will address how, despite being a highly regulated industry, the business of sports agents exists in competitive imbalance. Because courts have held that attorneys are always attorneys even when acting as agents,¹⁵ and because they have broadly defined the “unauthorized practice of law” to

6. Mark's Sportslaw News, *Williams Quits No Limit Sports: Fallout Over Controversial Contract Leads Saints' RB to Steinberg*, Mar. 27, 2000, <http://www.sportslawnews.com/archive/Articles%202000/WilliamsSteinberg.htm>. Leland Hardy, an agent with No Limit Sports, created by Master P, negotiated an incentive-loaded contract for then New Orleans Saints' running back Ricky Williams, which included mostly bonus money and little guaranteed salary. *Id.*

7. *See Sports Agent Responsibility and Trust Act: Hearing on H.R. 361 Before the Subcomm. on Commercial and Admin. Law of the Comm. on the Judiciary H.R.*, 108th Cong. 29 (2003) (statement of Scott Boras), available at http://commdocs.house.gov/committees/judiciary/hju87094.000/hju87094_0.HTM.

8. Melissa Steedle Bogad, Note, *Maybe Jerry Maguire Should Have Stuck with Law School: How the Sports Agent Responsibility and Trust Act Implements Lawyer-Like Rules for Sports Agents*, 27 CARDOZO L. REV. 1889, 1904 (2006).

9. *See* Crowe, *supra* note 1.

10. Sports Agent Responsibility and Trust Act, 15 U.S.C. § 7804 (2006).

11. Tamara L. Barner, Note, *Show Me the . . . Ethics?: The Implications of the Model Rules of Ethics on Attorneys in the Sports Industry*, 16 GEO. J. LEGAL ETHICS 519, 523-24 (2003).

12. *Id.* at 521-22.

13. *See* David A. Gerregano, Annotation, *What Constitutes “Unauthorized Practice of Law” by Out-of-State Counsel*, 83 A.L.R.5th 497 (2000).

14. *In re* Peterson, 163 B.R. 665, 672 (Bankr. D. Conn. 1994).

15. *In re* Pappas, 768 P.2d 1161, 1167 (Ariz. 1988) (citing *In re* Dwight, 573 P.2d 481 (1997)).

include many of the services athletes expect from agents,¹⁶ attorney-agents risk losing everything, from their hard-earned money to their licenses. Prior to addressing the substantive issue, however, this comment will briefly explore the existing structure of the athlete agent industry and then evaluate the current state of agent regulation from all sources, both public and private. Finally, suggestions for bridging the competitive gap between lawyer and non-lawyer-agents will be presented.

II. THE ATHLETE-AGENT BUSINESS: EVOLUTION AND THE CURRENT STATE OF THE LAW GOVERNING AGENTS

As professional sports transitioned from chump-change in the mid-1900s to big business in the late 1970s and early 1980s, agents became commonplace,¹⁷ forcing changes to the landscape of sports, not all of which were good.¹⁸ Despite legislation from multiple entities—state, federal, and private—attempting to control rogue agents and their unscrupulous behavior, not all problems have been solved.¹⁹ The current state of the law governing lawyer conduct creates a competitive disparity between lawyer-agents and their non-attorney counterparts. Therefore, despite a melting pot of regulations governing agent conduct, qualified and ethical attorneys may still find it difficult, if not impossible, to enter the profession without putting their licenses, reputations, and money up for grabs.

A. Defining “Agent,” a Tumultuous Task

The term “sports agent” has varying definitions and meanings depending on the context and depending on the source defining the term.²⁰ The National Collegiate Athletic Association (NCAA) defines an athlete agent as “[a]ny person who represents any individual in the marketing of his or her athletics ability.”²¹ Meanwhile, federal and state legislatures have adopted their own definitions.²² SPARTA’s drafters defined “agent” as an individual who

16. See *Birbrower, Montalbano, Condon, & Frank, P.C. v. Super. Ct. of Santa Clara County*, 949 P.2d 1, 12-13 (Cal. 1998).

17. See SHROPSHIRE & DAVIS, *supra* note 3, at 10-11.

18. See *id.* at 99-100.

19. See Mark’s Sportslaw News, *supra* note 6.

20. ROBERT H. RUXIN, AN ATHLETE’S GUIDE TO AGENTS 10 (4th ed. 2004).

21. NAT’L COLLEGIATE ATHLETIC ASS’N, 2005-06 NCAA DIVISION I MANUAL art. 12.3.1.2(a), available at http://www.ncaa.org/library/membership/division_i_manual/2005-06/2005-06_d1_manual.pdf.

22. Compare 15 U.S.C. § 7801 (Supp. 2004) with WIS. STAT. § 440.99 (2005-2006).

“recruits or solicits a student athlete to enter into an agency contract.”²³ Wisconsin has adopted the same definition but adds that an agent can be anyone “who represents to the public that the individual is an athlete agent.”²⁴ It is clear that the definition of “sports agent” is varied.

Regardless of the definition used, today’s sports agent performs a variety of tasks for his or her athletes that extend beyond simply negotiating the athlete’s playing contract with a team.²⁵ The modern-day agent not only manages and negotiates playing contracts, but also determines his athletes’ market value, uses that value to his players’ advantage by securing and sustaining endorsement revenue for the players off the field, secures personal appearances for the players, acts as a speaking agent for the players when dealing with the media, and counsels his rookie clients on pre-draft planning and preparation, including scheduling workouts, creating media kits and marketing collateral, and generally easing the players’ concerns as draft day approaches.²⁶ More and more, agents are performing these and other services for their athletes well into retirement.²⁷

In addition, savvy businessmen and lawyers have begun to dominate the profession by offering specialty services beyond those offered by traditional agents.²⁸ Today’s agents often have graduate degrees in business, usually finance and economics, or law degrees, and sometimes both.²⁹ Financial planners and Certified Public Accountants (CPAs) who moonlight as sports agents can offer their athletes traditional services in addition to financial and investment planning, tax planning, and money management advice.³⁰ Also, many lawyer-agents offer legal expertise to their athlete clients in addition to traditional agent functions.³¹ It used to be that anyone could represent an athlete, but now, with complex collective bargaining agreements and contract dynamics, lawyers and businessmen are commonplace.

23. 15 U.S.C. § 7801(2).

24. WIS. STAT. § 440.99(2) (2005-2006).

25. RUXIN, *supra* note 20, at 10.

26. *Id.*

27. Walter T. Champion, Jr., *Attorneys Qua Sports Agents: An Ethical Conundrum*, 7 MARQ. SPORTS L.J. 349, 351-52 (1996).

28. Timothy Davis, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences*, 42 WILLAMETTE L. REV. 781, 791-92 (2006).

29. *See id.* The National Football League Players Association (NFLPA) currently requires agents wishing to become certified to possess both an undergraduate degree and either a master’s or law degree from an accredited university. *Salary Cap and Agent Administration Department: Agent Certification*, NFLPA.ORG, <http://www.nflpa.org/RulesAndRegs/AgentCertification.aspx> (last visited Sept. 25, 2007).

30. *See* Champion, *supra* note 27, at 351-52.

31. *See* SHROPSHIRE & DAVIS, *supra* note 3, at 22.

B. The Athlete Agent Business, an Industry of Change

Agents are not new to the sports scene and have been representing athletes since the early 1900s.³² In 1920, sports agent Charles “Cash and Carry” Pyle³³ negotiated a \$100,000, eight-game contract for “Red” Grange of the Chicago Bears.³⁴ The contract was representative of what agents could accomplish for their athletes and is considered one of the first contracts negotiated by an agent.³⁵ However, not until the late 1970s did agents really begin to dominate professional sports, and the contract negotiated by Pyle for Grange was only a foreshadowing of things to come.³⁶

The boom of agents truly began in the late 1970s and early 1980s and can be directly attributed to a number of factors responsible for reshaping the economic landscape of professional sports.³⁷ Interleague competition increased as rival professional leagues formed and forced their competitors to spend more to keep players.³⁸ In addition, revenue-grossing television contracts and the cultivation of additional revenue streams put more money in the hands of owners, while the bargaining power of player unions was simultaneously getting stronger.³⁹ At the same time, successful challenges by players against the reserve and option clauses in their contracts led to the advent of free agency where players could bid their services on the open market.⁴⁰ Finally, the birth of salary arbitration in professional baseball created an additional catalyst for increased compensation to players in that sport.⁴¹ Almost instantly, it seemed, sports had become big business.

As a result, player salaries skyrocketed throughout professional sports,

32. MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION* 671 (2005).

33. Besides athlete contracts, Pyle also represented Grange in endorsement opportunities and even movie appearances. *Id.*

34. RUXIN, *supra* note 20, at 5.

35. *Id.*

36. MITTEN ET AL., *supra* note 32, at 671.

37. *Id.*

38. The World Football League (WFL) was formed in 1973 and folded two years later. NFL History, NFL.COM, <http://www.nfl.com/history/chronology/1971-1980> (last visited Sept. 25, 2007). During its tenure, however, the WFL lured and signed several NFL star veterans to astronomical salaries. SHROPSHIRE & DAVIS, *supra* note 3, at 11. The United States Football League and the American Basketball Association were additional rival leagues that effectively competed with the NFL and National Basketball Association (NBA) respectively. *Id.*

39. SHROPSHIRE & DAVIS, *supra* note 3, at 12.

40. *Id.* at 10-11. For example, in *Mackey v. NFL* players challenged the “Rozelle Rule,” which required a team wishing to sign a player formerly under contract to provide compensation to the player’s former team. 543 F.2d 606, 609 (8th Cir. 1976). The rule was successfully overturned on antitrust grounds. *Id.* at 623.

41. RUXIN, *supra* note 20, at 6.

and the playing field was ripe for the entry of agents.⁴² For example, the average salary in the National Basketball Association (NBA) rose from \$20,000 in 1967 to \$90,000 in 1972.⁴³ Salaries in the National Football League (NFL) closely followed suit with averages escalating from \$90,000 to \$190,000 between 1982 and 1985,⁴⁴ while average salaries in the National Hockey League (NHL) and Major League Baseball (MLB) each jumped 150% from 1987-1992.⁴⁵ Today's player salaries have reached seemingly insurmountable heights with 2003-2004 average salaries reaching \$4.9 million, \$1.83 million, and \$1.33 million in the NBA, NHL, and NFL, respectively.⁴⁶ A recent example of the acute escalation of player salaries is the \$252 million, ten-year deal negotiated for baseball player Alex Rodriguez by super agent Scott Boras.⁴⁷ Escalating player salaries like the one exemplified by the Rodriguez contract, and the high commissions these contracts promise to the agents negotiating them, have attracted numerous agents to the profession while heightening competition.⁴⁸

Adding fuel to the already competitive fire is the fact that large corporations, once unfamiliar to the sports industry, began using their buying power to purchase smaller, boutique agencies.⁴⁹ Octagon, IMG, and SFX Sports are well-known examples of companies who began using their capital to buy up the businesses of respected agents beginning in 1995,⁵⁰ including those representing athletes in the four major professional sports, as well as those representing Olympians, tennis players, golfers, extreme and action sports competitors, and others.⁵¹ The result has been some of the most powerful agents in their respective sports joining forces under one roof.⁵²

42. See Stacey M. Nahrwold, *Are Professional Athletes Better Served by a Lawyer-Representative Than an Agent?* *Ask Grant Hill*, 9 SETON HALL J. SPORT L. 431, 431-32 (1999).

43. Roger G. Noll, *The Economics of Sports Leagues*, in *LAW OF PROFESSIONAL AND AMATEUR SPORTS* 19-1, 19-26 (Gary Uberstine ed., 2002).

44. *Id.* at 19-27.

45. RUXIN, *supra* note 20, at 7.

46. *Major League Salaries*, BASEBALL-ALMANAC.COM, http://www.baseball-almanac.com/charts/salary/major_league_salaries.shtml (last visited Apr. 11, 2007).

47. *The \$252 Million Man: Rodriguez Rose from Humble Beginnings to be the Highest-Paid Baseball Player in History*, CNN.COM, <http://www.cnn.com/CNN/Programs/people/shows/rodriguez/profile.html#top> (last visited Apr. 11, 2007).

48. Nahrwold, *supra* note 42, at 431-32.

49. See SHROPSHIRE & DAVIS, *supra* note 3, at 33.

50. Posting of Rick Karcher, Director, Center for Law and Sports, Florida Coastal School of Law, <http://sports-law.blogspot.com/2006/08/hollywood-talent-firm-consolidates.html> (Aug. 23, 2006).

51. See IMG - Sports, <http://www.imgworld.com/sports/> (last visited Apr. 11, 2007).

52. See SHROPSHIRE & DAVIS, *supra* note 3, at 35-36.

These powerhouse agencies have become attractive to athletes as one-stop shops offering everything from contract negotiations, marketing management, legal and financial planning services, and post-career opportunities.⁵³

In 2006, a momentous power shift occurred when Creative Artists Agency (CAA), a talent-marketing firm in California, entered the fray, purchasing the businesses of some of the agents originally owned by these three companies.⁵⁴ The move caused some of the most prominent agents in the business to shift allegiance to CAA and leave their former employers.⁵⁵ The purchasing that has occurred by CAA and others has put a large percentage of available athletes in the hands of a few dominant entities, forcing smaller agents to fight for the leftovers.⁵⁶ These umbrella corporations and the variety of services they offer clients have made it difficult, if not impossible, for many smaller agents to compete.⁵⁷

As the number of agents continues to grow and the number of athletes remains relatively stagnant,⁵⁸ competition between agents has grown fierce, spawning unscrupulous conduct by agents motivated by greed.⁵⁹ Probably the most notorious problem agent is “Tank” Black, a former coach turned agent who coaxed many college athletes into premature representation agreements, forcing many of them to forfeit their remaining eligibility and turn pro.⁶⁰ Adding insult to injury was the fact that Black lost some \$12 million of his clients’ money to poor investment schemes.⁶¹ Bad boy agents Norby Walters and Lloyd Bloom went one step further, allegedly offering drugs and prostitutes to potential recruits.⁶² The duo even threatened to break the legs of

53. *See id.* at 29.

54. Karcher, *supra* note 50.

55. *Id.* CAA purchased the rights to former SFX football agent Ben Dogra as well as the practice of former IMG agent Tom Condon, who has represented some of the biggest names in the NFL. *Id.* The firm also purchased the rights to prominent MLB and NHL agents, amassing a combined client roster of 140 athletes across the four major professional sports, currently the most of any agency. *Id.*

56. SHROPSHIRE & DAVIS, *supra* note 3, at 29.

57. *Id.* at 29. IMG has even developed its own training facility, “IMG Academies,” offering its athlete clients and amateur prospects the chance to train and rehabilitate at a state-of-the-art training facility located in Florida. IMG Academies, IMG Headquarters, <http://www.imgacademies.com/hq/default.sps?itype=7959> (last visited Apr. 11, 2007).

58. MITTEN ET AL., *supra* note 32, at 692.

59. Nahrwold, *supra* note 42, at 434-35.

60. Mike Fish, *A Black Eye: Headed to Prison, Black Should be a Lesson to Agents*, SPORTS ILLUSTRATED, May 7, 2002, http://sportsillustrated.cnn.com/inside_game/mike_fish/news/2002/05/07/tank_black/.

61. *Id.*

62. *See* David Lawrence Dunn, Note, *Regulation of Sports Agents: Since at First It Hasn't Succeeded Try Federal Legislation*, 39 HASTINGS L.J. 1031, 1032 (1988).

one of their athlete prospects if the athlete refused to pay back loan money.⁶³ Perhaps not as popular, but equally devious, was agent Richard Sorkin, who lost much of his clients' money to bad stock market decisions and compulsive gambling.⁶⁴

This hyper-competitive and often unscrupulous agent behavior, although deplorable, is not surprising given the increase in athlete salaries and the relative stability in the number of athletes coming out of college. The result has been a gorge of legislation from federal and state legislatures, as well as the NCAA and league players associations attempting to rid the industry of problem agents.

C. Tightening the Reins: Legislation Abounds as Everyone Takes a Crack at Agents

Misconduct by agents has led to a cornucopia of regulatory doctrines from multiple sources all aimed at controlling agent conduct.⁶⁵ While intensive regulation has to some extent solved the challenges presented by problem agents like Tank Black, it has also resulted in some problems of its own, not the least of which is inconsistency.⁶⁶ Also, despite progressive legislation such as SPARTA, the agent industry still exists in competitive disparity where attorney-agents struggle to compete with their non-attorney counterparts.⁶⁷

Regulation of agents by private associations such as the NCAA and the individual players unions is well intentioned, but cannot alone control problem agents. Specifically, NCAA bylaws prohibit athletes from reaching a representation agreement with an agent or from receiving gifts from an agent prior to the expiration of the athlete's college eligibility.⁶⁸ However, because the NCAA lacks the jurisdiction to regulate agents, any punishment for violating these rules falls on the athletes or their university.⁶⁹ In addition, while professional players unions have instituted regulations governing agent

63. John Gorman, *Bears' Douglass: Agent Said He'd Break My Legs*, CHI. TRIB., Mar. 16, 1989, at Sec. 4(1).

64. Paul L. Montgomery, *The Spectacular Rise and Ignoble Fall of Richard Sorkin, Pros' Agent*, N.Y. TIMES, Oct. 9, 1977, at S1.

65. See Eric Willenbacher, Note, *Regulating Sports Agents: Why Current Federal and State Efforts Do Not Deter the Unscrupulous Athlete-Agent and How a National Licensing System May Cure the Problem*, 78 ST. JOHN'S L. REV. 1225, 1226 (2004).

66. See *id.* at 1243-45.

67. See *id.* at 1244-46.

68. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 21, art. 12.3.

69. Diane Sudia & Rob Remis, *Athlete Agent Legislation in the New Millennium: State Statutes and the Uniform Athlete Agents Act*, 11 SETON HALL J. SPORT L. 263, 268-69 (2001).

conduct,⁷⁰ the enforceability and effect of these rules is questionable because sanctions against agents are rarely levied.⁷¹

As a result of the ineffectiveness of private organizations in regulating agent conduct, individual states began regulating agents internally.⁷² While agents are subject to the same state laws and criminal codes as other state citizens, most states have drafted agent-specific statutes as well.⁷³ Some state registration statutes require agents to pay a fee to the state, post a surety bond, or even pass a competency exam before they are allowed to recruit athletes.⁷⁴ Other state regulations prohibit agents from engaging in certain types of conduct when soliciting athletes, the violation of which can subject them to criminal and civil penalties.⁷⁵ The result of states creating agent legislation unique to their own jurisdiction was an inconsistency in the law applied to agents.⁷⁶

70. See NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, NFLPA REGULATIONS GOVERNING CONTRACT ADVISORS (Mar. 2006), available at <http://www.nflpa.org/RulesAndRegs/AgentRegulations.aspx>. The NFLPA forbids contract advisors from offering anything of value to potential players or their families when recruiting those players. *Id.* § 3(B)(2)-(3). Agents are also prohibited from providing false or misleading information to athletes while recruiting. *Id.* § 3(B)(4).

71. See Barner, *supra* note 11, at 532. For example, while the NFLPA receives hundreds of complaints against player agents every year, the union filed only fifty-five individual disciplinary proceedings against agents between 1996 and 2003, twenty-two of which pertained to the agent failing his or her mandatory certification exam. Mark Doman, *Attorneys as Athlete-Agents: Reconciling the ABA Rules of Professional Conduct with the Practice of Athlete Representation*, 5 TEX. REV. ENT. & SPORTS L. 37, 47 (2003) (citing Interview with Mark Levin, Director of Salary Cap & Agent Administration Division, NFLPA, in Wash., D.C. (Apr. 8, 2003)). Therefore, only thirty-three of those proceedings dealt with serious agent misconduct. *Id.* at 48. The NFLPA's inability to punish misbehaving agents does not stem from a lack of resources, but rather from its inability to obtain evidentiary proof that the agent engaged in the alleged misconduct in the first place. *Id.* However, despite its lack of enforceability, the NFLPA still maintains the strictest agent regulations of the four major professional sports unions. Posting of Rick Karcher, Director of the Center for Law and Sports, Florida Coastal School of Law, <http://sports-law.blogspot.com/2006/11/another-agent-suing-nflpa-over-due.html> (Nov. 22, 2006).

72. See MITTEN ET AL., *supra* note 32, at 719.

73. See *id.*

74. Sudia & Remis, *supra* note 69, at 275.

75. CAL. BUS. & PROF. CODE §§ 18897.8-.97 (2006) (making it a misdemeanor to violate any provision of the state code governing agents and allowing any person harmed by the agent's conduct to recover punitive damages from the agent).

76. UNIFORM ATHLETE AGENTS ACT (2000), available at <http://www.law.upenn.edu/bll/ulc/uaaa/aaa1130.htm>. Prior to the adoption of the UAAA, twenty-eight states had adopted some form of legislation regulating athlete agents; however, inconsistencies across the board made the statutes hard to follow. *Id.* Specifically, only two-thirds of existing state regulations required agents to register with the state before representing athletes, and even those states had varied registration terms, ranging from one year in thirteen states, two years in four states, and for indefinite terms in two states. *Id.* Also, substantial differences in registration procedures as well as record maintenance, reporting, renewal, notice, warning, and security requirements created confusion among agents trying to follow

In 2000, in an attempt to reduce confusion and create parity among state agent regulations, Congress enacted a piece of model legislation called the Uniform Athlete Agents Act (UAAA).⁷⁷ The UAAA is not binding on the states and can be adopted by the states at their discretion to either take the place of or supplement existing state agent laws.⁷⁸ The UAAA standardizes agent reporting, registration, and record keeping requirements for agents in states that choose to adopt it, and it also includes a list of punishable misconduct for agents recruiting college athletes.⁷⁹ The UAAA also allows for criminal penalties against violating agents⁸⁰ and for the recovery of civil damages by the educational institution against the agent and student athlete.⁸¹ As of July 2007, thirty-six states had adopted the UAAA.⁸²

Congress passed SPARTA in 2004,⁸³ creating the first piece of federal legislation aimed at regulating agents.⁸⁴ Essentially, SPARTA compensates for the NCAA's lack of jurisdiction over agents by making it unlawful for agents to recruit student athletes by offering them anything of value or by feeding them misleading information.⁸⁵ However, SPARTA does not make the recruiting of college athletes illegal, it only requires that the athlete consent in writing to being represented by the agent and that the agent notify the athlete that consenting may render him or her ineligible.⁸⁶ Therefore, SPARTA does not completely safeguard college athletes from unknowingly losing their eligibility.⁸⁷

However, SPARTA is a valuable piece of legislation despite the UAAA and other state agent regulations. Specifically, SPARTA affords private parties recourse against agents in federal district courts, even in states that currently do not have agent legislation on the books.⁸⁸ Also, unlike the

the rules. *Id.* The Act's drafters expounded on the headaches such inconsistency must have caused rule-abiding agents, stating, "Conscientious agents operating in more than a single State must have nightmares caused by the lack of uniformity in the existing [state] statutes." *Id.*

77. *Id.*

78. See Uniform Athlete Agents Act (UAAA) History and Status, NCAA.ORG, <http://www1.ncaa.org/membership/enforcement/agents/uaaa/history.html> (last visited Apr. 11, 2007).

79. UNIFORM ATHLETE AGENTS ACT § 14 (2000).

80. *Id.* § 15.

81. *Id.* § 16(a).

82. See Uniform Athlete Agents Act (UAAA) History and Status, *supra* note 78.

83. Bogad, *supra* note 8.

84. See *id.* at 1914-15.

85. SPARTA, 15 U.S.C. § 7802(a) (2006).

86. *Id.* § 7802(b)(3).

87. See *id.*

88. See Willenbacher, *supra* note 65, at 1242.

UAAA, SPARTA allows both states and educational institutions to bring actions for damages, thereby compounding the potential blow to the misbehaving agent's pocketbook.⁸⁹ Finally, SPARTA treats a violation of its provisions as an unfair or deceptive trade practice punishable by the Federal Trade Commission (FTC) under the FTC Act, 15 U.S.C. § 57a(a)(1)(B).⁹⁰ In this way, SPARTA also imposes federal criminal penalties on misbehaving agents.⁹¹ Therefore, SPARTA was a valuable addition to existing agent legislation.

In addition to private regulatory provisions and state and federal laws governing traditional agents, attorney-agents are also governed by a set of model ethical rules that dictate acceptable behavior.⁹² The Model Rules of Professional Conduct (MRPC) was drafted by the American Bar Association (ABA) as a uniform code of conduct governing attorney behavior.⁹³ The MRPC has been adopted with minor revisions and modifications by most states.⁹⁴ Violations of the model rules in states that have adopted them have resulted in attorneys being fined, suspended from practicing law, and even disbarred.⁹⁵

It has long been thought that because the model rules impose restrictions on attorney behavior, some of which is considered business as usual for sports agents, the rules limit the ability of attorneys to effectively compete with non-attorney-agents.⁹⁶ For example, Model Rule 1.5 prevents attorneys from charging excessive fees.⁹⁷ Because agents are paid a percentage rate of the athlete's total compensation, as athlete salaries climb, the agent's fee increases.⁹⁸ Given the escalating salaries of professional athletes, a three to five percent commission, the industry norm for professional sports, of even a marginal salary could be considered excessive compared to what lawyers would normally make if they performed the same services at an hourly rate.⁹⁹ Similarly, under Rule 7.3, attorneys are not allowed to solicit business from

89. 15 U.S.C. §§ 7804-7805 (Supp. 2004).

90. *Id.* § 7803(a).

91. *Id.*

92. *See Bogad, supra* note 8, at 1907.

93. *Id.*

94. *Id.*

95. *See Barner, supra* note 11, at 523-24.

96. *See Nahrwold, supra* note 42, at 440-41.

97. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2007).

98. *See Barner, supra* note 11, at 524.

99. *See id.* at 524-25.

prospective clients when doing so for their own pecuniary gain.¹⁰⁰ This prevents attorneys from aggressively recruiting athletes about to turn pro,¹⁰¹ an activity most consider to be a staple function of successful agents, vital to their success.¹⁰² Also, Model Rules 1.4 and 8.4, which rightfully subject attorneys to punishment for fraudulently misrepresenting themselves to clients, do not hold weight for non-attorney-agents.¹⁰³ Therefore, non-attorney-agents have fewer restrictions on what they may say when selling themselves to college athletes.¹⁰⁴

Lastly, attorney-agents are subject to heightened expectations of competency under Model Rule 1.1 not demanded of non-attorney-agents.¹⁰⁵ While the competency requirement is a valuable protection for athletes, attorney-agents are required to exercise extreme caution learning the tools of the trade,¹⁰⁶ investing many more labor-intensive hours strictly scrutinizing league collective bargaining agreements, player contracts, and learning the economics of the relevant sport than their non-attorney counterparts are required to invest. Attorneys who fail to complete this due diligence are engaging in malpractice, which may be evidence of the attorney's negligence in a court of law.¹⁰⁷ Therefore, the Model Rules are often viewed as significantly handicapping attorney-agents.¹⁰⁸

Despite this disparity, some claim that SPARTA bridges the gap between attorney and non-attorney-agents by imposing federal restrictions on agents that mimic the MRPC.¹⁰⁹ One argument goes that because SPARTA requires

100. MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2007).

101. *See id.* (declaring it unethical for lawyers to solicit business from prospective clients either in person, by telephone or through real-time electronic communication).

102. Russell Hubbard, *Out of Bounds - In the Battle for Pro Prospects, Some Sports Agents Break the Rules*, BIRMINGHAM NEWS, Dec. 21, 2003, available at <http://www.profilesports.com/news/outofbounds.html>.

103. Bogad, *supra* note 8, at 1909.

104. While the NFLPA does prohibit its agents from fraudulently misrepresenting themselves to athletes in their recruiting efforts, only statements that contain "materially false or misleading information" are punishable. NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, *supra* note 70, § 3(B)(4). On the other hand, the Model Rules of Professional Conduct uses broader language, making punishable the use of any communication "involving dishonesty, fraud, deceit or misrepresentation." MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2007). Therefore, attorney-agents are culpable for a larger scope of conduct than non-attorney-agents, and, given the inability of the NFLPA to gather evidence against most misbehaving agents, will likely be held accountable more readily than non-attorneys who are not subject to scrutiny by the bar.

105. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2007).

106. *See id.*

107. *See* MODEL RULES OF PROF'L CONDUCT, Preamble and Scope [20] (2007).

108. *See* Barner, *supra* note 11, at 524-25.

109. Bogad, *supra* note 8, at 1908-09.

disclosure to student athletes while preventing agents from wooing athletes with false or misleading information, SPARTA effectively mimics Model Rules 1.4 and 8.4 for non-attorney-agents.¹¹⁰ Also, proponents allege that because SPARTA encourages states to adopt the UAAA,¹¹¹ it will eventually result in all states mandating background checks and competency evaluations prior to licensing agents.¹¹²

However, even if SPARTA imposes standards for all agents similar to the provisions of the MRPC, competitive disparity still exists between attorney and non-attorney-agents. Specifically, because courts have held that lawyers are lawyers twenty-four seven, even when they are performing non-attorney activities,¹¹³ attorneys are subject to a body of common law precedent governing their conduct even when acting in other professional capacities, not all of which is favorable.¹¹⁴ For example, lawyers are held to a higher standard of care than lay persons in the event they are sued for negligence.¹¹⁵ Also, while a violation of the MRPC does not itself give rise to a cause of action for negligence against an attorney, conduct that violates a provision of the MRPC can be used as evidence that an attorney was negligent.¹¹⁶ These and other issues affecting attorneys have made life difficult for attorneys wishing to branch out into other industries.¹¹⁷

A competitive disparity between lawyer and non-lawyer-agents that has been almost universally undervalued is how broadly courts have defined what constitutes the unauthorized practice of law. Namely, because attorneys are always attorneys, even when they are acting as agents, attorney-agents are not safe from court precedent broadly defining the unauthorized practice of law to include activities performed by lawyers that are typical of everyday agents.¹¹⁸ The next section will discuss how attorney-agents may be in danger of losing not only their money and their reputations, but also their licenses if they perform typical agent functions in a state where they are not licensed.

110. *Id.*

111. 15 U.S.C. §§ 7804-7805 (Supp. 2004).

112. *See Bogad, supra* note 8, at 1910.

113. *In re Pappas*, 768 P.2d 1161, 1166 (Ariz. 1988).

114. *See id.*

115. *See generally* 57A AM. JUR. 2D *Negligence* § 177 (2006). *See also Meyer v. Wagner*, 709 N.E.2d 784, 791 (Mass. 1999) (holding that the standard of care in determining whether an attorney was negligent should be based on whether he exercised the degree or skill expected of a qualified attorney).

116. MODEL RULES OF PROF'L CONDUCT, Preamble and Scope [20] (2007).

117. *See Barner, supra* note 11, at 523.

118. *See Birbrower, Montalbano, Condon, & Frank, P.C. v. Super. Ct. of Santa Clara County*, 949 P.2d 1, 12-13 (Cal. 1998).

III. DESPITE THE CURRENT STATE OF AGENT REGULATION, LAWYER-AGENTS ARE STILL AT A COMPETITIVE DISADVANTAGE COMPARED TO THEIR NON-LAWYER COUNTERPARTS

Despite SPARTA and other progressive reshaping of the athlete agent industry by state and federal legislatures, the agent business still presents a competitive disadvantage to lawyer-agents. Because courts have determined that lawyers are always lawyers even when acting in the capacity of some other profession, attorney-agents could find themselves at the receiving end of litigation, facing suspensions, fines, potential disbarment, and even the non-fulfillment of contractual obligations by athletes who allege that their attorney-agent engaged in the unauthorized practice of law.

A. The "Two-Hat" Theory: Attorneys Are Always Attorneys

Kenneth Shropshire and Timothy Davis, professors of business and law respectively and experts on the agent industry, have stated that "[a]ttorney status carries with it assumptions made by the public as to the training, competence, ethics, and accountability of attorneys."¹¹⁹ Indeed, one of the selling points that attorney-agents can offer their clients is the fact that they are attorneys.¹²⁰ Therefore, with the best interests of the public at heart, courts have held that attorneys cannot shed their role as attorneys regardless of what activity or type of professional employment they are undertaking, even when that activity or type of employment is outside the practice of law.¹²¹

In fact, the strong weight of authority has held that an attorney can never wear multiple hats and is an attorney twenty-four hours a day, seven days a week.¹²² For example, the court in *In re Pappas*¹²³ found that an attorney, who was also a certified public accountant (CPA), was guilty of violating a number of provisions in the state code of ethics governing attorney conduct after he botched a business deal involving some of his clients.¹²⁴ Although the

119. SHROPSHIRE & DAVIS, *supra* note 3, at 93.

120. *Id.*

121. See Doman, *supra* note 71, at 42-43.

122. See *In re Dwight*, 573 P.2d 481, 484 (Ariz. 1977) (holding that an attorney acting in his capacity as an investment advisor was subject to ethical rules governing attorneys). The court held that "[a]s long as a lawyer is engaged in the practice of law, he is bound by the ethical requirements of that profession, and he may not defend his actions by contending that he was engaged in some other kind of professional activity." *Id.*; see also *Kelly v. State Bar of Cal.*, 808 P.2d 808, 812 (Cal. 1991) (holding that an attorney who helped a client purchase an airplane was an attorney even in that capacity).

123. *In re Pappas*, 768 P.2d 1161 (Ariz. 1988).

124. *Id.* at 1168-69.

attorney was acting as a financial advisor to the clients at the time and had never represented them legally, the court refused to distinguish between the defendant's role as an attorney and his role as a CPA.¹²⁵ The court reasoned:

The duties of a lawyer who also holds other professional licenses cannot be circumscribed by the fine distinctions that we might draw between the nature of the services performed under a particular license. How is one to tell whether, in advising [his clients] about the tax consequences of the condemnation settlement, respondent acted as an accountant or a lawyer? . . . More importantly, how is any client to know when a lawyer *cum* accountant *cum* investment adviser removes one hat and puts on another?¹²⁶

Several courts have specifically ruled that attorney-agents were acting as attorneys in their role in representing professional athletes.¹²⁷ In *Cuyahoga County Bar Ass'n v. Glenn*,¹²⁸ the Supreme Court of Ohio held that an attorney-agent had violated a state ethics code governing attorney conduct by coaxing some \$20,000 from his client's team, the Chicago Bears, without his client's consent.¹²⁹ The court subsequently suspended the lawyer from the practice of law for one year and ordered that he repay the money in full, plus interest.¹³⁰ In *In re Horak*,¹³¹ the court held that an attorney who was representing the government of St. Vincent in its bid for the 1988 Olympic Games was operating in the capacity of a lawyer and not a sports agent, and was therefore subject to disciplinary proceedings for violating regulations governing the misappropriation of client funds.¹³² The court subsequently disbarred the attorney.¹³³

Some have argued wrongly that the decision in *Wright v. Bonds*¹³⁴ can be used as precedent to show that some courts have held attorneys to be sports agents and not attorneys.¹³⁵ In *Wright*, Barry Bonds' ex-agent sued Bonds for

125. *Id.* at 1166.

126. *Id.*

127. See SHROPSHIRE & DAVIS, *supra* note 3, at 92-93; see also Bogad, *supra* note 8, at 1900.

128. *Cuyahoga County Bar Ass'n v. Glenn*, 649 N.E.2d 1213 (Ohio 1995).

129. *Id.* at 1214-15.

130. *Id.*

131. *In re Horak*, 224 A.D.2d 47 (N.Y. App. Div. 1996).

132. *Id.* at 52.

133. *Id.* at 53.

134. *Wright v. Bonds*, No. 96-55586, 1997 U.S. App. LEXIS 16811, at *2 (9th Cir. July 3, 1997).

135. Barner, *supra* note 11, at 523.

breach of contract when Bonds defected to another sports management firm.¹³⁶ Bonds countered that the agreement between him and Wright should be null and void because Wright had never registered with the Major League Baseball Players Union.¹³⁷ The court held that Wright should be held to the standards of an agent even though he was an attorney.¹³⁸ The court reasoned that Wright was not acting as a lawyer and was instead acting as an agent, as evidenced by his sending of correspondence using his agency stationary rather than that of his law firm and the fact that the contract between him and his client specifically excluded legal work.¹³⁹

However, the holding in *Wright* likely will not disrupt the commonly held belief that attorneys are always attorneys even when acting as agents. While the court in *Wright* distinguished between attorneys acting as agents and those acting as attorneys, the court was simply interpreting a California statute that allowed attorneys to perform legal work for athletes without having to register with the state's Labor Commissioner, a requirement for athlete agents.¹⁴⁰ In that regard, it was not directly on point with cases specifically deciding the issue of whether attorneys are always attorneys.¹⁴¹ Also, the multi-hat theory expressed in *In re Pappas* suggests just how far the courts will stretch the notion that attorneys are always attorneys.¹⁴² There is nothing to suggest that an attorney who decides to be a sports agent will be treated any differently.

Therefore, courts will most likely hold that attorneys are attorneys even when acting as sports agents and cannot shed their attorney hat and the often burdensome body of law that governs them simply by acting in the capacity of another profession. Since lawyers are not free from the law governing lawyer conduct even as sports agents, one concern is that attorney-agents may be engaging in the unauthorized practice of law by performing typical sports agent duties in states where they are not licensed and exposing themselves to potential liability because of it.

B. Unauthorized Practice of Law

MRPC 5.5 states that "[a] lawyer may practice law only in a jurisdiction in

136. See *Wright*, 1997 U.S. App. LEXIS 16811, at *2.

137. See *id.*

138. See *id.*

139. See *id.*

140. See *id.*

141. Compare *id.* with *In re Horak*, 224 A.D.2d 47 (N.Y. App. Div. 1996) and *Cuyahoga County Bar Ass'n v. Glenn*, 649 N.E.2d 1213 (Ohio 1995).

142. *In re Pappas*, 768 P.2d 1161, 1166 (Ariz. 1988).

which the lawyer is authorized to practice.”¹⁴³ Most courts have agreed, holding that an attorney who practices law in a state where he is not licensed engages in the unauthorized practice of law in that state,¹⁴⁴ with the phrase “unauthorized practice of law” being one that is defined broadly by courts to include even the transactional and negotiation activities¹⁴⁵ viewed as traditional practices of modern-day sports agents.¹⁴⁶

Although many have called for reform in this area to loosen the restraints on a lawyer’s ability to practice extraterritorially,¹⁴⁷ the modern trend in the law strictly limits a lawyer’s ability to do so.¹⁴⁸ Most courts agree that an attorney who is not licensed to practice law in a state cannot recover for legal services performed in that state and may also be subject to additional penalties at the court’s discretion.¹⁴⁹ Therefore, given the fact that lawyers are always lawyers, even when they are acting as sports agents, attorneys wishing to become agents should be concerned about the unsettled nature of court precedent defining what is and is not the unauthorized practice of law.

Further broadening the competitive gap between attorney and non-attorney-agents is the fact that non-attorney-agents will likely not be held to the same standard as their attorney counterparts by courts determining if the agent has committed the unauthorized practice of law.¹⁵⁰ Specifically, courts have been hesitant to uphold allegations that lay persons have engaged in the unauthorized practice of law, and therefore, non-attorney-agents are not likely engaging in the unauthorized practice of law by performing their duties as agents.¹⁵¹

In addition, the majority of courts have broadly construed the unauthorized practice of law as extending beyond representation by a lawyer

143. MODEL RULES OF PROF’L CONDUCT R. 5.5, Comment [1] (2007).

144. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (2000) (stating that the unauthorized practice of law concerns any extraterritorial practice by a lawyer outside of the state in which he is licensed, unless that representation is ancillary to a representation of a client within the state he is licensed and unless the lawyer also obtains permission from the foreign state).

145. See *Birbrower, Montalbano, Condon, & Frank, P.C. v. Super. Ct. of Santa Clara County*, 949 P.2d 1, 12-13 (Cal. 1998).

146. Job Profiles, <http://www.jobprofiles.org/artspointsagent.htm> (last visited Apr. 11, 2007).

147. Carol A. Needham, *Negotiating Multi-State Transactions: Reflections on Prohibiting the Unauthorized Practice of Law*, 12 ST. LOUIS U. PUB. L. REV. 113, 133 (1993).

148. See *In re Application of Jackman*, 761 A.2d 1103, 1109 (N.J. 2000) (emphasizing the decision reached by the court in *Birbrower*, 949 P.2d 1 (Cal. 1998)).

149. C.D. Sumner, Annotation, *Right of Attorney Admitted in One State to Recover Compensation for Services Rendered in Another State Where He Was Not Admitted to the Bar*, 11 A.L.R.3d 907, §2 (2006).

150. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4, Cmt. c (2006).

151. See *id.*

in court to also include transactional practice.¹⁵² In *Birbrower, Montalbano, Condon, & Frank, P.C. v. Superior Court*,¹⁵³ the court held that a group of New York attorneys were engaged in the unauthorized practice of law when they counseled a California client on strategy leading up to an arbitration proceeding over the terms of a contract.¹⁵⁴ The court held that both representing the client in arbitration and the attorneys' advice to the client not to settle constituted the unauthorized practice of law.¹⁵⁵ The New Jersey Supreme Court affirmed the holding in *Birbrower*.¹⁵⁶ The court held that "[o]ne is engaged in the practice of law whenever legal knowledge, training, skill, and ability are required."¹⁵⁷ Both courts refused to allow the attorneys to recover for their services.¹⁵⁸

Courts have interpreted the phrase "unauthorized practice of law" as including activities by a lawyer in a state where he is not licensed even when the lawyer does not physically enter the state.¹⁵⁹ The *Birbrower* court held that even though the New York attorneys conducted a portion of their work from their New York offices, they were precluded from recovering to the extent that their services affected a California client.¹⁶⁰ The court opined that while "[p]hysical presence [in the state] is one factor [it] may consider in deciding whether the unlicensed lawyer has [engaged in the unauthorized practice of law] . . . it is by no means exclusive."¹⁶¹ The court overturned a California appeals court, which only a year prior held that a Colorado lawyer could recover fees for the portion of services rendered from his licensed state.¹⁶²

While there are no cases specifically interpreting whether an attorney-agent engaged in the unauthorized practice of law, the precedent discussed suggests that the everyday practices of attorney-agents may not be protected

152. See *Jackman*, 761 A.2d at 1109.

153. *Birbrower*, 949 P.2d at 1.

154. See *id.* at 12-13.

155. See *id.*

156. *Jackman*, 761 A.2d at 1106 (holding that an unlicensed associate handling merger and acquisition transactions had engaged in the unauthorized practice of law).

157. *Id.*; see also *In re Peterson*, 163 B.R. 665, 674-76 (Conn. 1994) (holding that a bankruptcy attorney who was not licensed in the state of Connecticut could not recover for services, some of which included basic negotiation).

158. Compare *Birbrower*, 949 P.2d at 13 with *Jackman*, 761 A.2d at 1109-10.

159. *Birbrower*, 949 P.2d at 6.

160. *Id.*

161. *Id.* at 5.

162. *Estate of Condon*, 76 Cal. Rptr. 2d 922, 928 (Cal. Ct. App. 1998) (holding that physical presence of the attorney in the non-licensed state was necessary to bar recovery).

from scrutiny. Specifically, the broad construction of unauthorized practice of law by *Birbrower* and others to include out-of-court activities like negotiation and dispute resolution techniques should be troubling to lawyer-agents because these services are typical, everyday agent activities.¹⁶³ Also, while negotiation is a staple function of athlete agents in all sports, arbitration advocacy is an additional function performed by Major League Baseball agents,¹⁶⁴ and therefore, should create additional concern for lawyer-agents representing players in that sport. Therefore, the inseparable fusion of dispute resolution techniques and professional sports, combined with the suggestion in *Birbrower* that dispute resolution constitutes the practice of law, should concern lawyer-agents who are not licensed to practice law in jurisdictions where they are negotiating and arbitrating on behalf of their athletes.

Even attorney-agents conducting business from their home offices in the state where they are licensed may not be protected.¹⁶⁵ The holding in *Birbrower* suggests that attorney-agents may be engaged in the unauthorized practice of law even when conducting business by phone, fax, or otherwise within the state in which they are licensed because physical presence in the non-licensed state is not required.¹⁶⁶ Therefore, it is at best unclear whether this problem can be avoided by setting up a home office in the state where the attorney is licensed and conducting business from that state by electronic means.

Some may argue, however, that all of this is irrelevant and that athletes do not go looking to poach attorney-agents for free services, entering into agreements with them only to later opt out of their promises and stop payment through an unauthorized-practice-of-law claim. However, disagreements between athletes and their agents over money do occur,¹⁶⁷ and when they do, it is not unrealistic to assume that the athlete would use any and all available resources to prevent payment to that agent, including a claim that the agent engaged in the unauthorized practice of law. Therefore, there should be at least some concern among attorney-agents that their status as attorneys could

163. See RUXIN, *supra* note 20, at 9-10.

164. See ROGER I. ABRAMS, THE MONEY PITCH: BASEBALL FREE AGENCY AND SALARY ARBITRATION 151 (2000).

165. See *Birbrower*, 949 P.2d at 5-6.

166. See *id.*

167. See *Zinn v. Parrish*, 644 F.2d 360 (7th Cir. 1981). Leo Zinn was a prominent sports agent in the 1970s who negotiated a series of contracts with the Cincinnati Bengals for his client Lemar Parrish. *Id.* at 361. Before Zinn could collect for his services, Parrish terminated the relationship and refused payment. *Id.* at 362; see also *Detroit Lions, Inc. v. Argovitz*, 580 F. Supp. 542, 547-49 (E.D. Mich. 1984) (holding that an athlete-plaintiff was correct in asserting that his agent had a conflict of interest, thereby entitling the athlete to damages).

lead to problems down the road.

However, the state of the industry suggests that many lawyer-agents are not concerned,¹⁶⁸ and many in the industry even boast of the special niche services that their multifunctional law firm can offer clients, from contract negotiation to tax and estate planning.¹⁶⁹ A court only needs to look at the web sites of these law firms as evidence that what is truly being offered is a bundle of legal services, not simply the work of a typical sports agent.¹⁷⁰ But even if these law firms could show that the services they perform are typical of sports agents and not limited to attorneys, the holding in *Birbrower* and other cases suggests that even attorneys performing agent services may very well be engaged in the unauthorized practice of law.

In the age of multi-state negotiations for athletes who are sponsored by multiple companies and who may play for various teams throughout their careers, many of which may not be located in the state where the attorney-agent is licensed, becoming an agent is risky business for attorneys wishing to keep their licenses and their money. Also, given the dog-eat-dog nature of the agent industry, where conflicts over athletes are just part of a day's work, it is a very real possibility that a rival agent will encourage an athlete to allege his attorney-agent engaged in the unauthorized practice of law, thus voiding any contractual obligations owed to that attorney by the athlete. The unauthorized practice of law defense is therefore a very real concern.

IV. BRIDGING THE COMPETITIVE GAP BETWEEN LAWYER AND NON-LAWYER-AGENTS: A BIRD'S-EYE VIEW

The hyper-competitive and often unethical state of the agent industry has already caused some lawyers to leave the profession, despite their qualifications.¹⁷¹ Len Elmore, ESPN basketball analyst and lawyer with LeBoeuf, Lamb, Greene, & MacRae in New York,¹⁷² summarized his experience as an agent as follows:

In all candor what chased me from the [agent] industry was the shrinking revenue caused by wage scaling and my unwillingness to pay a young kid to become my client. I simply did not desire,

168. See Lynch, Gilardi, & Grummer, *Sports Law and Athlete Representation*, http://www.lgglaw.com/pa_sports.html (last visited Sept. 24, 2007); see also Williams & Connolly, LLP, Sports, http://www.wc.com/practice.cfm?practice_id=130 (last visited Sept. 24, 2007).

169. See Williams & Connolly, *supra* note 168.

170. *Id.*

171. See SHROPSHIRE & DAVIS, *supra* note 3, at 60.

172. LeBoeuf, Lamb, Greene, & MacRae Lawyer Directory, <http://www.llgm.com/leonardelmore/> (last visited Sept. 24, 2007).

nor could I afford, to 'stoop to conquer.' Betrayal by client family members . . . also had negative impact. Thus, I was left with a harsh business reality. It was time to fold them and move on.¹⁷³

Elmore's distaste for the industry highlights a greater concern than the industry's cost-to-value proposition. If attorneys are already discouraged by their inability to compete for athletes, the restrictive nature of the law governing lawyers could only add a further disincentive to qualified attorneys wishing to enter the profession. And there is little doubt that the agent industry, despite the progressive efforts by the NCAA, Congress, and the states would benefit greatly from well-trained, competent lawyers qualified to represent athletes.¹⁷⁴ The Ricky Williams fiasco and other incidents of incompetence by agents make this apparent.¹⁷⁵ Ironically, however, ethical attorneys may currently be the only attorneys discouraged by their professional ethos from entering the agent industry.

While the current state of the law governing lawyers may seem ominous to ethical attorneys concerned about their licenses and reputations, that law is not without the ability to change. The most practical solution that would seemingly bridge the competitive gap between lawyer and non-lawyer-agents would be a top-down approach, beginning internally with the ABA and trickling down to individual state bars, to rethink and modify the policy surrounding MRPC 5.5 and other rules as they relate to an attorney's participation in other professions. Doing so likely provides the best chance of bridging the competitive gap between attorney and non-attorney-agents.

Modifying the policy surrounding the law governing lawyers likely does not require much, if any, restructuring of the MRPC or the restatements. The solution may be as simple as amending ABA policy through an addendum letter or through some other written amendment sent individually to each state bar association, combined with an ongoing dialogue with those associations and with local and federal judges. The goal would be to have all states, as well as state and federal courts, begin to modify their existing policies to the extent that lawyers engaged in other professions, while still governed by the

173. SHROPSHIRE & DAVIS, *supra* note 3, at 60 (quoting Len Elmore, *Turn Out the Lights, Agents' Party Is Over*, SPORTS BUS. J., July 9, 2001, at 54).

174. See Bob George, *Poston Brothers Becoming NFL Laughingstock*, Mar. 28, 2004, http://www.patsfans.com/bob/display_story.php?story_id=2418.

175. *NFLPA Suspends Agent Poston for Two Years*, NFL.COM, July 28, 2006, <http://sports.espn.go.com/nfl/news/story?id=2530936>. In 2006, NFL Agent Carl Poston was suspended for two years by the NFLPA for leaving \$6.5 million in bonus money on the table when negotiating LaVar Arrington's contract with the Washington Redskins. *Id.* Arrington was forced to buy his way out of the deal, an expenditure of \$4.4 million. *Id.*

MRPC, should be able to engage in conduct that is reasonably expected of practitioners in those professions without the fear of reprimand.

Absent some modification to the existing structure of the law governing lawyers, ethical attorneys wishing to become sports agents, and those already in the business, may find it increasingly difficult to compete with their non-attorney counterparts on a level playing field. The unfortunate consequence will be the disenfranchisement of lawyers wishing to enter the profession—lawyers who would otherwise bring polished contract negotiating skills and zealous advocacy to the bargaining table.

V. CONCLUSION

Jerry Maguire would no doubt find being a present-day attorney-agent difficult if not impossible, and unfortunately, may be forced to leave the profession, contract expertise and spotless personal ethics in tow. While SPARTA takes a recognized step towards regulating agent conduct in recruiting college athletes, it only marginally closes the gap between attorney and non-attorney-agents. The looming threat of being disbarred or otherwise sanctioned for violating any one of numerous Model Rules applied to attorneys as agents may itself prove effective in keeping ethical, hard-working attorneys out of the business. Combined with the broad interpretation courts have applied to the unauthorized practice of law, these forces may be enough to discourage some of the best and brightest contract negotiators, namely lawyers, from ever becoming agents in the first place.

However, the purpose of this article was not to paint an ominous picture of the athlete agent business or to prevent otherwise qualified attorneys from trying their hand in the industry. The reality is that lawyers become agents all the time, and some of the best agents in the field are lawyers. Rather, the idea was to raise what is a very real concern affecting attorney-agents so that attorneys wishing to become agents can take precautions to protect their money, to protect their good names, and most importantly, to protect their licenses.

It is very possible that the day may soon arrive when the law governing lawyers begins to modernize, allowing attorneys to wear two hats instead of one. Given the increasingly demanding agent certification requirements being implemented by professional sports leagues and their unions, and given the need for good lawyers in the industry, it may only be a matter of time before the courts take a more modern, less restrictive look at what it means to be an attorney, allowing lawyers to branch out into other professions without the fear that just being a lawyer will place them at a competitive disadvantage. Until then, the Jerry Maguires of the world should not be altogether

discouraged from entering the business, but should at least take a more guarded approach to representing athletes.

Jeremy J. Geisel

INDEX

SPORTS LAW IN LAW REVIEWS AND JOURNALS

AMATEUR SPORTS

Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415 (2007).

Marc J. Dobberstein, Comment, *"Give Me the Ball, Coach": A Scouting Report on the Liability of High Schools and Coaches for Injuries to High School Pitchers' Arms*, 14 SPORTS LAW. J. 49 (2007).

Richard J. Hunter, Jr. & Paula Alexander Becker, *Is it Time to Revisit the Doctrine of "State Action" in the Context of Intercollegiate and Interscholastic Sports?*, 14 VILL. SPORTS & ENT. L.J. 191 (2007).

Michael Loesevitz, *Random Drug Testing in Public Schools*, 36 J.L. & EDUC. 453 (2007).

Sarah McCarthy, Comment, *The Legal and Social Implications of the NCAA's "Pregnancy Exception"—Does the NCAA Discriminate Against Male Student-Athletes?*, 14 VILL. SPORTS & ENT. L.J. 327 (2007).

Barbara Osborne, *"No Drinking, No Drugs, No Lesbians": Sexual Orientation Discrimination in Intercollegiate Athletics*, 17 MARQ. SPORTS L. REV. 481 (2007).

Josephine R. Potuto, *Academic Misconduct, Athletics Academic Support Services, and the NCAA*, 95 KY. L.J. 447 (2006-2007).

Ronnie Wade Robertson, Comment, *Tilting at Windmills: The Relationship Between Men's Non-Revenue Sports and Women's Sports*, 76 MISS. L.J. 297 (2006).

Mike Rogers & Rory Ryan, *Navigating the Bylaw Maze in NCAA Major-Infractions Cases*, 37 SETON HALL L. REV. 749 (2007).

Megan Ryther, Comment, *Swimming Upstream: Men's Olympic Swimming Sinks While Title IX Swims*, 17 MARQ. SPORTS L. REV. 679 (2007).

Nicholas W. Schieffelin, Note, *Maintaining Educational and Athletic Integrity: How Will Schools Combat Performance-Enhancing Drug Use?*, 40 SUFFOLK U. L. REV. 959 (2007).

Frank P. Tiscione, Comment, *College Athletics and Workers' Compensation: Why the Courts Get it Wrong in Denying Student-Athletes*

Workers' Compensation Benefits When They Get Injured, 14 SPORTS LAW. J. 137 (2007).

Claire Williams, *Sexual Orientation Harassment and Discrimination: Legal Protection for Student-Athletes*, 17 J. LEGAL ASPECTS OF SPORT 253 (2007).

ANTITRUST LAW

Meri J. Van Blarcom-Gupko, *Should NASCAR Be Allowed to Choose the Tracks at Which Its Series' Races Are Run?*, 16 SETON HALL J. SPORTS & ENT. L. 193 (2006).

Christian Dennie, *From Clarett to Mayo: The Antitrust Labor Exemption Argument Continues*, 8 TEX. REV. ENT. & SPORTS L. 63 (2007).

Brion Doherty, Comment, *NFL Stadiums and Antitrust: Yesterday, Today and Tomorrow*, 4 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 39 (2007).

John A. Fortunato & Jef Richards, *Reconciling Sports Sponsorship Exclusivity with Antitrust Law*, 8 TEX. REV. ENT. & SPORTS L. 33 (2007).

Brett Gibbs, Note, *Antitrust and Sports League Franchise Relocation: Bringing Raiders I into the Modern Era of Antitrust Law*, 29 HASTINGS COMM. & ENT. L.J. 217 (2007).

Jonathan B. Goldberg, Comment, *No Tying in Football? Re-Examining the Sale of NFL Tickets*, 14 SPORTS LAW. J. 1 (2007).

Bartlett H. McGuire, *Age Restrictions in Women's Professional Tennis: A Case Study of Procompetitive Restraints of Trade*, 1 J. INT'L MEDIA & ENT. L. 199 (2007).

Salil K. Mehra & T. Joel Zuercher, *Striking Out "Competitive Balance" in Sports, Antitrust, and Intellectual Property*, 21 BERKELEY TECH. L.J. 1499 (2006).

Jude D. Schmit, Comment, *A Fresh Set of Downs? Why Recent Modifications to the Bowl Championship Series Still Draw a Flag Under the Sherman Act*, 14 SPORTS LAW. J. 219 (2007).

CONSTITUTIONAL LAW

Eoin Carolan, *The New WADA Code and the Search for a Policy Justification for Anti-Doping Rules*, 16 SETON HALL J. SPORTS & ENT. L. 1 (2006).

Peter Charlish & Rob Heywood, *Anti-Doping Inconsistencies Snare American Star*, 8 TEX. REV. ENT. & SPORTS L. 79 (2007).

Hector Del Cid, *Winning at All Costs: Can Major League Baseball's New Drug Policy Deter Kids from Steroids and Maintain the Integrity of the*

Game?, 14 SPORTS LAW. J. 169 (2007).

Jared L. Downs, Note, *Johnston v. Tampa Bay Sports Authority: Does the NFL's Pat-Down Policy Constitute an Illegal Use of the Hands?*, 34 N. KY. L. REV. 95 (2007).

Paul Greene, Note, *United States Anti-Doping Agency v. Montgomery: Paving a New Path to Conviction in Olympic Doping Cases*, 59 ME. L. REV. 149 (2007).

Joshua Peck, Note, *Last Resort: The Threat of Federal Steroid Legislation—Is the Proposed Legislation Constitutional?*, 75 FORDHAM L. REV. 1777 (2006).

Dean Krishna, Comment, *DNA Testing for Eddy Curry? Creating a New Constitutional Protection*, 9 U. PA. J. CONST. L. 1105 (2007).

Paul C. McCaffrey, Note, *Playing Fair: Why the United States Anti-Doping Agency's Performance-Enhanced Adjudications Should Be Treated as State Action*, 22 WASH. U. J.L. & POL'Y 645 (2006).

Susan K. Menge, *Should Players Have to Pass to Play?: A Legal Analysis of Implementing Genetic Testing in the National Basketball Association*, 17 MARQ. SPORTS L. REV. 459 (2007).

James Potter, Comment, *The NCAA as State Actor: Tarkanian, Brentwood, and DueProcess*, 155 U. PA. L. REV. 1269 (2007).

Joseph M. Saka, Comment, *Back to the Game: How Congress Can Help Sports Leagues Shift the Focus from Steroids to Sports*, 23 J. CONTEMP. HEALTH L. & POL'Y 341 (2007).

Brent D. Showalter, Comment, *Steroid Testing Policies in Professional Sports: Regulated by Congress or the Responsibility of the Leagues?*, 17 MARQ. SPORTS L. REV. 651 (2007).

Kelley Tiffany, *Cheering Speech at State University Athletic Events: How Do You Regulate Bad Spectator Sportsmanship?*, 14 SPORTS LAW. J. 111 (2007).

Paul D. Trumble, Comment, *"Knicker" and Dime Issues: An Unexplored Loophole in New York's Genetic Discrimination Statute and the Viability of Genetic Testing in the Sports Employment Context*, 70 ALB. L. REV. 771 (2007).

CRIMINAL LAW

Christo Lassiter, *Lex Sportiva: Thoughts Towards a Criminal Law of Competitive Contact Sport*, 22 ST. JOHN'S J. LEGAL. COMMENT. 35 (2007).

GENDER ISSUES

Elisa M. Butler, Note, *Civil Rights—No Hitting Back: Schools Have to Play by the Title IX Rules*; Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005), 7 WYO. L. REV. 577 (2007).

Julie A. Davies & Lisa M. Bohon, *Re-imagining Public Enforcement of Title IX*, 2007 BYU EDUC. & L.J. 25 (2007).

Deanna DeFrancesco, Comment, *Jennings v. University of North Carolina at Chapel Hill: Title IX, Intercollegiate Athletics, and Sexual Harassment*, 15 J.L. & POL'Y 1271 (2007).

Brittany Ducker, *Overcoming the Hurdles: Title IX and Equal Educational Attainment for Pregnant and Parenting Students*, 36 J.L. & EDUC. 445 (2007).

Suzanne E. Eckes, *Title IX and High School Opportunities: Issues of Equity on and in the Court*, 21 WIS. WOMEN'S L.J. 175 (2006).

Sarah K. Fields, *Intramural and Club Sports: The Impact of Title IX*, 33 J.C. & U.L. 521 (2007).

Blake J. Furman, Note, *Gender Equality in High School Sports: Why There Is a Contact Sports Exemption to Title IX, Eliminating It, and a Proposal for the Future*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1169 (2007).

Jane Hefferan, Note, *Changing Seasons, Changing Times: The Validity of Nontraditional Sports Seasons Under Title IX and the Equal Protection Clause*, 9 VAND. J. ENT. & TECH. L. 861 (2007).

Lyndsay N. Huot, *Eighth Annual Review of Gender and Sexuality Law: Education Law Chapter: Athletics and Title IX of the 1972 Education Amendments*, 8 GEO. J. GENDER & L. 417 (2007).

Haley K. Olsen-Acre, Comment, *The Use of Drug Testing to Police Sex and Gender in the Olympic Games*, 13 MICH. J. GENDER & L. 207 (2007).

Sarah M. Riley, Note, *Title IX Prohibits Retaliation Against Plaintiff Who Complains of Sex Discrimination, Even if Plaintiff Is Not Recipient of Original Discriminatory Treatment*: Jackson v. Birmingham Board of Education, 44 DUQ. L. REV. 745 (2006).

Yael Lee Aura Shy, Comment, *"Like Any Other Girl": Male-to-Female Transsexuals and Professional Sports*, 14 SPORTS LAW. J. 95 (2007).

INTELLECTUAL PROPERTY LAW

Patrick R. Byrd, Comment, *It's All Fun and Games Until Someone Gets Hurt: The Effectiveness of Proposed Video-Game Legislation on Reducing Violence in Children*, 44 HOUS. L. REV. 401 (2007).

Robert T. Ferguson Jr., Comment, *Extreme Makeover: Redefining*

Athletes' Identities in a Fantasy World, 14 VILL. SPORTS & ENT. L.J. 287 (2007).

Jonathan Gonzalez, *Trademark Goodwill, Brand Devaluation, and the Neo-Political Correctness of College Athletics: Did Marquette's Recent Identity Crisis Cost Them Thousands or Even Millions of Dollars in Brand Value?*, 14 SPORTS LAW. J. 195 (2007).

Gabriel Grossman, Comment, *Switch Hitting: How C.B.C. v. MLB Advanced Media Redefined the Right of Privacy*, 14 UCLA ENT. L. REV. 285 (2007).

Ryan T. Holte, Comment, *The Freedom to Imagine Fantasy Sports: Applying New Ideas in Copyright Law to Professional Athletes' Right of Publicity*, 54 J. COPYRIGHT SOC'Y U.S.A. 771 (2007).

Dana Howells, Note, *Log Me in to the Old Ballgame: C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, LP*, 22 BERKELEY TECH. L.J. 477 (2007).

Allan M. Johnson, Comment, *The Right of Publicity Gets Left Out in C.B.C. Distribution & Marketing v. Major League Baseball Advanced Media, LP*, 14 SPORTS LAW. J. 71 (2007).

Richard T. Karcher, *The Use of Players' Identities in Fantasy Sports Leagues: Developing Workable Standards for Right of Publicity Claims*, 111 PENN ST. L. REV. 557 (2007).

Matt Maher, Note, *You've Got Messages: Modern Technology Recruiting Through Text-Messaging and the Intrusiveness of Facebook*, 8 TEX. REV. ENT. & SPORTS L. 125 (2007).

Steve McKelvey & John Grady, *Missouri Court Fashions New "Twist" on Athletes' Right of Publicity*, 24 ENT. & SPORTS LAW. 1(4) (2006).

John D. McMillen, et al., *Control of University Sponsored Sporting Events—The Conflict Between Sport Artist's Freedom of Expression and University Owned Trademarks*, 17 J. LEGAL ASPECTS OF SPORT 141 (2007).

Daniel Mead, Note, *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.: Why Major League Baseball Struck Out and Won't Have Better Luck in Its Next Trip to the Plate*, 8 MINN. J.L. SCI. & TECH. 715 (2007).

Brandon T. Moonier, Comment, *The Legal Game Behind Fantasy Sports: Copyright Protection and the Right of Publicity in Professional Performance Statistics*, 26 ST. LOUIS U. PUB. L. REV. 129 (2007).

Mark S. Nagel & Daniel A. Rascher, *Washington "Redskins"—Disparaging Term or Valuable Tradition?: Legal and Economic Issues Concerning Harjo v. Pro-Football, Inc.*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 789 (2007).

Gary P. Quiming, Comment, *Playing by the Rules of Intellectual Property: Fantasy Baseball's Fight to Use Major League Baseball Players' Names and Statistics*, 29 U. HAW. L. REV. 301 (2006).

Jason Shane, Note, *Who Owns a Home Run? The Battle of the Use of Player Performance Statistics by Fantasy Sports Websites*, 29 HASTINGS COMM. & ENT. L.J. 241 (2007).

INTERNATIONAL SPORTS LAW

Sarah Clover, *Confused Signals: Satellite Broadcasting and Premiership Football*, 18 ENT. L. REV. 126 (2007).

Kristin Jo Custer, Note, *From Mice to Men: Genetic Doping in International Sports*, 30 HASTINGS INT'L & COMP. L. REV. 181 (2007).

Andrew Goldstone, Note, *Obstruction of Justice: The Arbitration Process for Anti-Doping Violations During the Olympic Games*, 7 CARDOZO J. CONFLICT RESOL. 361 (2006).

Bashar H. Malkawi, *Broadcasting the 2006 World Cup: The Right of Arab Fans Versus ART Exclusivity*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 591 (2007).

Anthony S. Marinac, *Dworkin on the Half-Forward Flank: The Jurisprudence of AFL's Spirit of the Laws*, 17 MARQ. SPORTS L. REV. 503 (2007).

Andrew Norris, *Sporting Chance: Has Sport Sponsorship Ambushed the Law?*, 156 NEW L.J. 1465(2) (2006).

Helen Padley, *London 2012: Five Years, Nine Months, and Counting*, 28 EUROPEAN INT. PROP. REV. 586 (2006).

David W. Penn, Note, *From Bosman to Simutenkov: The Application of Non-Discrimination Principles to Non-EU Nationals in European Sports*, 30 SUFFOLK TRANSNAT'L L. REV. 203 (2006).

Oscar N. Pinkas, Comment, *The Wisdom of Major League Baseball: Why Free Agency Does Not Spell Doom for European Football*, 16 SETON HALL J. SPORTS & ENT. L. 257 (2006).

Thomas M. Schiera, Note, *Balancing Act: Will the European Commission Allow European Football to Reestablish the Competitive Balance that It Helped Destroy?*, 32 BROOKLYN J. INT'L L. 709 (2007).

Bruce Sprague, *Taxation of Professional Athletes: Cross-Border Perspectives*, 54 CANADIAN TAX J. 477 (2007).

Ross Thomas, *The Form for Selection: Selection to Represent One's Country Is Beginning to Give Rise to Legal Issues in a Surprising Number of Cases*, 51 J.L. SOC. SCOTLAND 45(1) (2006).

Jessica N. Trotter, Comment, *Rooting for the "Home Team": How Major League Baseball and Latin America Can Better Provide for the "Safe"-ty of Their Players*, 13 SW. J.L. & TRADE AM. 445 (2007).

LABOR LAW

Roger I. Abrams, *Blackmun's List*, 6 VA. SPORTS & ENT. L.J. 181 (2007).

Jon Berkon, Comment, *A Giant Whiff: Why the New CBA Fails Baseball's Smartest Small Market Franchises*, 4 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 9 (2007).

Thomas Brophy, *Icing the Competition: The Nonstatutory Labor Exemption and the Conspiracy Between the NHL and OHL in NHLPA v. Plymouth Whalers Hockey Club*, 14 VILL. SPORTS & ENT. L.J. 1 (2007).

Robert Forbes, Note, *Call on the Field Reversed: How the NFL Players Association Won Big on Salary Forfeiture at the Bargaining Table*, 6 VA. SPORTS & ENT. L.J. 333 (2007).

William B. Gould IV, *Globalization in Collective Bargaining, Baseball, and Matsuzaka: Labor and Antitrust Law on the Diamond*, 28 COMP. LAB. L. & POL'Y J. 283 (2007).

Hannah Gordon, Comment, *In the Replay Booth: Looking at Appeals of Arbitration Decisions in Sports Through Miami Dolphins v. Williams*, 12 HARV. NEGOT. L. REV. 503 (2007).

Jonathan Kotler, Comment, *Parallel Unionism in Professional Hockey: Redefining the Nonstatutory Labor Exemption to the Antitrust Laws*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843 (2007).

Bram Maravent & Ben Tario, *Leveling the Playing Field: Can Title VII Work to Increase Minority Coaching Hires in NCAA Athletics?*, 81-OCT. FLA. B.J. 44 (2007).

Abraham Spira, *Almost Three Decades Later, Is Mackey Still Viable?*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 805 (2007).

Vittorio Vella, Comment, *Swing and a Foul Tip: What Major League Baseball Needs to Do to Keep Its Small Market Franchises Alive at the Arbitration Plate*, 16 SETON HALL J. SPORTS & ENT. L. 317 (2006).

TAX LAW

Kara Fratto, *The Taxation of Professional U.S. Athletes in Both the United States and Canada*, 14 SPORTS LAW. J. 29 (2007).

TORT LAW

Michael S. Carroll, et al., *Recreational User Statutes and Landowner Immunity: A Comparison Study of State Legislation*, 17 J. LEGAL ASPECTS OF SPORT 163 (2007).

Matthew G. Cole, Comment, *No Blood No Foul: The Standard of Care in Texas Owed by Participants to One Another in Athletic Contests*, 59 BAYLOR L. REV. 435 (2007).

Mary Virginia Moore Johnson & Beth A. Easter, *Legal Liability for Cheerleading Injuries: Implications for Universities and Coaches*, 17 J. LEGAL ASPECTS OF SPORT 213 (2007).

MISCELLANEOUS

Vanessa Bovo, Comment, *Keeping the Public in the Public Use Requirement: Acquisition of Land by Eminent Domain for New Sports Stadiums Should Require More than Hypothetical Jobs and Tax Revenues to Meet the Public Use Requirement*, 16 SETON HALL J. SPORTS & ENT. L. 289 (2006).

Anthony J. Dreyer & Mitchell P. Schwartz, *Whose Game Is It Anyway: Sport Teams' Right to Restrict (and Control) Ticket Resale*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 753 (2007).

Greg Egan, Comment, *Sustained Yield: How the Dynamics of Subsistence and Sport Hunting Have Affected Enforcement and Disposition of Game Violations and Wounded Alaskan Culture*, 28 HAMLINE J. PUB. L. & POL'Y 609 (2007).

Brad M. Gallagher, *The Disappearance of the Great American Indian Athlete*, 24 ENT. & SPORTS LAW. 1(11) (2006).

Parker B. Parker, Jr., *Take Me out to the Metaphor*, 5 PIERCE L. REV. 313 (2007).

Kirk Pasich & Vered Yakovee, *Legal Aspects of Big Sports Event Management: Risk-Management Insurance Coverage for Business Interruption and Event Cancellation*, 24 ENT. & SPORTS LAW. 1(6) (2007).

R. Robin McDonald, *A Red Flag for AT&T: The Telecom May Have to Drop out of the NASCAR Sponsorship Race*, 14 CORP. COUNS. 23(1) (2007).

NATIONAL SPORTS LAW INSTITUTE, *Survey: Entertainment Law in the State of Wisconsin*, 17 MARQ. SPORTS L. REV. 519 (2007).

Megan Ryther, *2006 Annual Survey: Recent Developments in Sports Law*, 17 MARQ. SPORTS L. REV. 585 (2007).

Scott B. Shapiro, Comment, *Who Decides: Institutional Choice in Determining a Performance Enhancing Drug Policy for the NFL*, 7 WYO. L.

REV. 183 (2007).

S. Christopher Szczerban, *Tackling Instant Replay: A Proposal to Protect the Competitive Judgments of Sports Officials*, 6 Va. Sports & Ent. L.J. 277 (2007).

Sharianne Walker & Michael Enz, *The Impact of Professional Sports on the Local Economy*, 29 W. NEW. ENG. L. REV. 149 (2006).

Ron D. Cadwalader

