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JOHN ROCKER AND EMPLOYEE DISCIPLINE FOR SPEECH*

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John Rocker's statements in a *Sports Illustrated* interview, Commissioner of Baseball Bud Selig's suspension and fine of the Atlanta Braves' pitcher for those comments, and the arbitral disposition of Rocker's grievance in the wake of that discipline raise vexing issues about the reach of the Commissioner's disciplinary authority. More generally, the case also points to the little-noticed but significant question of how Rocker would have fared under various state statutes designed to limit private employer interference with employee speech interests.

In a December 27, 1999 *Sports Illustrated* article, Rocker offered opinions belittling New York City, welfare mothers, homosexuals, foreigners, and other minority groups.[1] He also called an overweight black teammate "a fat monkey." After speaking with Rocker, Commissioner Selig, citing "the best interests of baseball," condemned the pitcher's behavior, noting that Rocker had dishonored the Braves and Major League Baseball, and imposed the sanction of a seventy-three day suspension, including all of spring training, and a $ 20,000.00 fine.[2] (Selig also ordered the player to undergo sensitivity training.) Rocker, through his union representatives, objected to the imposition and severity of this punishment, and the Major League Baseball Players Association (MLBPA) immediately filed a grievance, claiming that the discipline was "without just cause."[3]

The Commissioner's authority is significantly circumscribed by the just cause provision of the collective bargaining agreement with the players' union.[4] Accordingly, an aggrieved player, such as Rocker, can have an independent arbitrator ultimately determine "whether there has been

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1. Jeff Pearlman, *At Full Blast, Shooting Outrageously from the Lip, Braves Closer John Rocker Bangs Away at His Favorite Targets: The Mets, their Fans, their City, and Just About Everybody in It,* SPORTS ILLUSTRATED, Dec. 27, 1999, at 60.

2. Ross Newman, *Now, Baseball Has Spoken; Commissioner Suspends Rocker Until May 1 and Fines Him $20,000 for Racial and Ethnic Comments,* L.A. TIMES, Feb. 1, 2000, at D1.

3. Murray Chass, *Baseball; Rocker Permitted to Attend Camp, to Selig's Dismay,* N.Y. TIMES, Mar. 2, 2000, at D1.

4. BASIC AGREEMENT BETWEEN THE AMERICAN LEAGUE OF PROFESSIONAL BASEBALL CLUBS AND THE NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS AND MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, art. XI (B), (E) (1997).

just cause for the penalty imposed."[5] And, indeed, the arbitrator who reviewed Selig's discipline found that it was excessive and consequently reduced the suspension to the first fourteen days of the regular season.[6] He further concluded that, under the Major League Agreement, the Commissioner is not empowered to levy a fine of more than $500 in this disciplinary setting.[7] (The arbitrator let stand the sensitivity training requirement.)

The protection afforded by the just cause limitation, which is designed to curb arbitrary employer action, is particularly consequential in the setting of professional sports because the employment effect of a Commissioner's ruling, due to its industry-wide character, is more sweeping than an act of management discipline in a more conventional industry. For example, imagine an experienced Travelers employee who is well paid, but has limited competence outside insurance. Fortunately for him, market forces tend to limit the potential for abusive treatment by his employer, and they provide him with options if he is maltreated. Employment opportunities at other insurance companies affect Travelers' handling of the employee, and they offer comparable job possibilities if Travelers dismisses him. This market constraint, though, does not operate in professional sports because a Commissioner suspension amounts to a ban on hiring by all employers in the industry.

The just cause assessment involves two related central questions. First, what sort of behavior warrants discipline; i.e., is the conduct legitimately a concern of the employer? Second, what form and level of sanction are apt; i.e., is the discipline excessive? Rocker's case presented both issues.

In his comments, Rocker did not denigrate his employer. He did not criticize the operations of the Braves or of the league. He did not disparage his employer's product. Nor did he question the competence of supervisory employees (e.g., umpires). Indeed, the only mention, by Rocker, of a member of the baseball universe was a reference to a black teammate as "a fat monkey," without specific identification of the individual. In short, his conduct squarely presents the question of the limit of Commissioner authority to regulate players' off-field behavior. That regulation is problematic as it affects the personal liberty and privacy of players, and, therefore, the answer to the question plainly demands great caution.

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5. *Id.* at art. XII (A) (1997).
6. Chass, *supra* note 3, at D1.
7. *Id.*

The response that arbitrators have given to this difficult question is to insist on a demonstrable connection between the conduct and harm to the employer's business interests. It is in the identification of exactly what behavior counts and the level of proof of harm required that arbitral law implicitly, and critically, defines and values an employee's liberty interest and weights it against management prerogatives.

The discipline situation probably easiest to justify is when the "misconduct" away from the workplace bears on the employee's competence or trustworthiness, casting doubt on his ability to continue to perform his job adequately and thereby interfering with the employer's ability to operate the business successfully. An example would be the discharge of a plant guard who has been convicted of armed robbery or an employee who regularly ingests drugs shortly before coming on duty. Another, more precarious, grounding of discipline, and the one Rocker's case highlights, disapproves of off-duty employee behavior, which tarnishes the reputation of the company or its products.

This reputational defense is more plausible when an entertainment product with high public visibility is involved;[8] this image justification was at the center of the Commissioner's brief for his action. Indeed, that line of argument has elicited sympathy from arbitrators passing on challenges to Commissioner discipline for off-field drug activity.[9] In addition, and if the Braves had been able to offer objective proof of serious economic harm, such as cancellation of season tickets, no easy task, his case would have been strengthened. Moreover, in recent years the National Hockey League (NHL) has disciplined players for voicing racial slurs, with suspensions ranging from one to three games;[10] these instances of verbal abuse occurred on ice, so the justification for league action (e.g., the threat of game disruption), is easier to accept.

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8. In this respect, compare the case of off-duty bigoted remarks by an assembly line worker in a widget factory. The Uniform Player's Contract, § 7(b)(1), provides that a baseball club may terminate a player if he "shall. . .fail, refuse, or neglect to conform his personal conduct to the standards of good citizenship and good sportsmanship. . . ."

9. For example, in 1983 four members of the Kansas City Royals - Vida Blue, Willie Wilson, Jerry Martin, and Willie Aikens - were arrested and convicted of cocaine possession. Commissioner Bowie Kuhn suspended each player for one year. After a grievance hearing before arbitrator Richard I. Bloch, the suspensions of Wilson, Martin, and, later, Aikens were commuted. In a number of these cases, though, while the arbitrator accepted the premise that player use of drugs is a matter of legitimate concern regarding "the best interests of baseball," he found the sanction imposed disproportionate to the offense and, accordingly, reduced it.

10. K.C. Johnson, *When Words Collide: NHL Addresses Bigotry; Allegations of Racial Slurs Prompt League Into Action,* CHI. TRIB., May 2, 1999, at C7.

The arbitrator's validation of Selig's authority to act, but reduction of the penalty imposed, was not surprising in light of the precedents. The importance of spring training for a pitcher's career and the fact that the suspension ordered was greater than that prescribed for some drug users undoubtedly contributed to the judgment of excessiveness. The severity of the penalty for comments in a magazine might have appeared particularly out of line in an industry setting where employees are expected to speak regularly with the press. While the substantial decrease in the sanction was a major accomplishment for the union, it had grounds for disappointment as well as it had argued that just cause for any discipline was lacking. Indeed, the decision can be viewed as precedent for the proposition that Commissioner disciplinary authority extends beyond drugs and on-field incidents.

Of course, recognition of the existence of Commissioner authority does not necessarily mean its invocation in these circumstances was wise. Indeed, Selig might well have been better served by a decision to condemn Rocker's venomous remarks, underline that Rocker spoke for himself alone and not as a representative of Major League Baseball, acknowledge the value of personal liberty though it may, on occasion, be abused, and avoid the likely considerable future difficulties of fashioning consistent disciplinary responses in other speech cases.[11]

I. THE RELEVANCE (OR IRRELEVANCE) OF FEDERAL CIVIL RIGHTS LAWS: DISCRIMINATION IN EMPLOYMENT AND PUBLIC ACCOMMODATIONS

Attorney Lewis Steel has suggested that Rocker's behavior implicates federal civil rights legislation and that the discipline of the player

11. Important "extra-legal" sanctions in the clubhouse would still have operated. Following the *Sports Illustrated* interview, Rocker was shunned by his teammates. In spring training and early in the season, his teammates largely wanted nothing to do with him. It took almost an entire season for him to shed his status as a pariah in the Braves' clubhouse.

Noteworthy, by contrast, was the treatment by NBA Commissioner David Stern of the controversy surrounding an Alan Iverson gangsta rap recording featuring vile, misogynistic, gay-bashing lyrics accompanied by the background sound of gunfire, a CD which produced a stream of negative publicity. Stern termed the lyrics "coarse, offensive, antisocial and repugnant" and the recording "a disservice to [Iverson], the Philadelphia 76ers, his teammates and perhaps all NBA players." However, citing his belief that the NBA should not be in the business of regulating artistic expression, Stern determined not to discipline Iverson, imposing neither fine nor suspension. A meeting between the Commissioner and the player, though, did produce a promise by Iverson to edit out some of the most offensive lyrics from the final version before the compact disc's release. Stephen A. Smith, *After Meeting with David Stern, Maybe Allen Iverson Situation Can Return to Normal*, PHILA. INQUIRER, Oct. 15, 2000, at A1.

was a legitimate response to the dictates of these laws.[12] More particularly, he contends that the Braves were obliged to discipline Rocker in order to preclude team liability for employment discrimination on the basis of race, i.e., the creation of a hostile working environment (Title VII of the 1964 Civil Rights Act) and discrimination in the enjoyment of the services and facilities of a place of public accommodation, i.e., discrimination against potential customers on the basis of race or color (Title II of the 1964 Civil Rights Act). While Steel's suggestions are distinctive, their validity is dubious at best.

It is true that federal law imposes liability on employers for the boorish conduct of employees in the workplace that has made life miserable for other employees. More precisely, an employer is responsible for workplace harassment by co-workers if the employer knew, or should have known, of the harassment and failed to take corrective action.[13] In light of this threat of liability, employers are sensibly alert to move aggressively to restrain and monitor employee conduct that might provide the foundation for hostile environment claims by other employees.

However, even accepting that comments not fairly attributable to the employer and uttered far from the workplace are material, under accepted judicial standards, a failure to impose stiff discipline on Rocker would not have created a significant risk of liability for the Braves. The bulk of Rocker's offensive comments in the Sports Illustrated interview expressed severe distaste for non-English speaking foreigners. He made only one remark about a fellow employee, referring to a black teammate as a "fat monkey."

Yet to constitute a Title VII violation based on race, an employee must face a workplace permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment as judged by a reasonable person.[14] Rocker's conduct, however distasteful it may have been to teammates, hardly produced such a harassing condition. In determining whether conduct is actionable, courts have generally looked to four factors: the frequency of the discriminatory conduct, its severity, whether it is physically threatening

12. Lewis M. Steel, *Where Rocker's Rights End*, N.Y. TIMES, Feb. 12, 2000, at A15. If Steel is correct, then state civil rights laws may also have bearing.

13. 42 U.S.C. § 1981 (1994); Frank S. Ravitch, *Hostile Work Environment and the Objective Reasonabless Conundrum; Deriving a Workable Framework from Tort Law for Addressing Knowing Harassment of Hypersensitive Employees*, 36 B.C. L. REV. 257, 262-63 (1995); 29 C.F.R. § 1604.11(d) (2000).

14. 42 U.S.C. § 1981 (1994).

or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance.[15] Rocker's behavior was neither pervasive, nor severe, nor physically threatening. It can not even be characterized as an episodic pattern of antipathy based on race. And a conclusion that Rocker's conduct, assessed objectively, intimidated his teammates and interfered with their play is untenable. Rocker's comments to a magazine writer simply do not approach the extreme, persistent, and unwelcome forms of speech federal judges have treated as subject to regulation.

Moreover, the Braves could have taken prompt and effective action - and thereby legally protected itself - without imposing on Rocker the kind of severe sanctions that Commissioner Selig did. Thus, for example, they might have counseled Rocker about the sensitivity of the matter, admonished him that such conduct would not be tolerated, and warned him of the disciplinary consequences of another such incident.

Admittedly, hostile workplace law is somewhat mushy. The relevant factors are nonexhaustive and unweighted; "severe," "pervasive," and "abusive" are imprecise terms. The contours of the violation are vague. Also, it is the totality of circumstances that determines whether incidents collectively amount to a harassing environment.[16] Accordingly, since the employer's focus is on the cumulative behavior of all employees, it will be inclined to restrain any comment that might advance a hostile environment, even when the comment by itself does not generate the environment. The resulting uncertainty and concern for the aggregate picture might well lead a prudent employer, anxious to avoid litigation, to act preventively and to "oversuppress" employee speech by restricting any statement that might contribute to a hostile environment. Employers, after all, have no general interest in preserving employee speech interests unrelated to efficiency.

Yet, even if we assume that rational, cautious employers will engage in some degree of overregulation of employee speech, no need existed for the Braves to severely discipline Rocker. The aggregation problem was not present in the Rocker case and his behavior was not sufficiently egregious to be either actionable or worrisome. I am not suggesting that the Braves should not have responded in some fashion, but a failure to seriously discipline him would not have grounded a credible claim of

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15. Harris v. Forklift Sys., 510 U.S. 17, 23 (1993).

16. Tam B. Tran, *Title VII Hostile Work Environment: A Different Perspective*, 9 J. CONTEMP. LEGAL ISSUES 357, 363-64 (1998); 29 C.F.R. § 1604.11(b) (2000); Perry v. Ethan Allen, Inc., 115 F.3d 143 (2d Cir. 1997).

racial employment discrimination due to the creation of an objectively hostile work environment.

Mr. Steel's Title II contention is similarly unpersuasive. First, it is quite a stretch to read Rocker's comments as designed to drive black (and other minority) customers from the Braves' stadium. Also, it is clear that Rocker is speaking personally in the interview and not on behalf of the Braves or Major League Baseball. So, it can hardly be said that the Braves have denied, or intend to deny, the full and equal enjoyment of its facilities because of racial discrimination. Moreover, and in any case, the Braves, again, can respond effectively and protect the team from liability without imposing severe discipline on Rocker. To counter any potential perception of discrimination, the team could disavow Rocker's insensitive remarks, make it clear that he is not speaking for it, declare its own contrary values, and publicize that all patrons, no matter their color, are sought and welcome at Turner Field and will be admitted and served without differentiation.

Under the Civil Rights Act, an employer is not obliged to change the beliefs of employees. The focus is on behavior. Thus, the Braves, like any other employer, need not dismiss all Ku Klux Klan members. Indeed, any other reading of the statute would swallow up the interest in freedom of association.

II. STATE STATUTES

A weighty, and unexamined, issue is the treatment of Rocker's behavior under state legislation enacted to limit employer interference with employee speech interests. A few states, for example, Massachusetts, afford a degree of such protection under their Civil Rights Acts.[17] But the most explicit provision, one specifically addressed to the employer-employee relationship, exists in Connecticut. That law - rare in the United States - shields employees from retaliatory action grounded in the employee's exercise of enumerated constitutionally protected rights, including freedom of speech. It states:

> Any employer . . . who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer,

17. MASS. GEN. LAWS ANN. ch. 12, § 11 (West 1996).

> shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages.[18]

Could the Braves discipline Rocker without liability if this provision applied? A proper reading of the statute yields a negative answer.

Since any discipline would be on account of Rocker's exercise of his free speech "right,"[19] the central interpretive issue is the meaning to be given to the qualifications of the proviso. Did Rocker's activity substantially or materially interfere with his job performance or his working relationship with the team?

Does Rocker's colloquy interfere with his job performance? Clearly not if that job is defined as being a relief pitcher. His ability to retire opposing batters is not adversely affected by the views he expressed. However, baseball players do commit themselves contractually to conform their personal conduct to standards of good citizenship and good sportsmanship. And Rocker's job performance might be seen to include a measure of respect for teammates in a small group, cooperative endeavor. But these constructions run into serious empirical and conceptual difficulties in Rocker's case. First, in his interview Rocker barely mentions and does not criticize the Braves. Indeed, his only mention of a member of the organization was a reference to a teammate as a "fat monkey." As previously noted, his comments hardly qualify as "fighting words," much less the creation of a hostile work environment. And, there have been no disruptive responses by teammates to the article. In addition, to recognize the vague references to good citizenship in the Uniform Player's Contract as effective limits on employee protection would be to gut the thrust of the statute, which is designed to prevent the

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18. CONN. GEN. STAT. ANN. § 31-51q (West 1999).

19. While there has been some judicial disagreement about whether the law reaches workplace expression, there is no doubt that off-site speech such as Rocker's is within its parameters. Moreover, while, in some cases, the factual issue of causation has proved troublesome for complaining employees, the causal link between Rocker's comments and his discipline is patent. The Connecticut Supreme Court has interpreted the statute to protect only an employee speaking as a citizen on matters of "public concern." Thus, it does not protect one who speaks on a matter only of personal interest, such as the terms and conditions of his employment and an employer is, therefore, free to discipline an employee for making comments critical of the employer's practices or expressing grievances about the circumstances of his employment. Rocker, in his interview, quite clearly was not speaking out in his capacity as an employee to express grievances about his employment situation but rather, as a citizen, was addressing a matter of public concern-i.e., his belief and the belief held by others that New York City is home to large numbers of unsavory and repugnant groups of people.

crude use of economic power to quash speech distasteful to the owner but not deleterious to the company.

Similarly, it is difficult to see how Rocker's comments could substantially interfere with his working relationship with his employer. Rocker did not, after all, publicly criticize or demean the Braves or Major League Baseball. Nor, quite clearly, are his remarks part of a private personnel dispute with the employer. While he may have lost the respect of his employer as a person, his working relationship with the Braves as an athlete is unlikely to be affected by his comments. Finally, while the rooting of discipline in reputational harm to the employer is plausible, to accept hostility to views publicly expressed by an employee as warrant for discipline is to subvert the basic purpose of the statute.[20]

III. PREEMPTION OF STATE LEGISLATION?

Though the Connecticut statute, if applicable, would protect Rocker, its application to an employee covered by a collective bargaining agreement with a "just cause" provision raises a difficult preemption question.

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20. The statute undoubtedly imposes a cost on the Braves, who are placed in a difficult position. Indeed, most employers, including Connecticut employers, would likely be surprised to learn of this restriction on their disciplinary authority, as the state has generally offered little protection for speech by private employees in the United States. But the decision to limit employer control over its workforce so that it is not exercised in a way so as to inhibit speech on controversial issues is understandable. For the workplace, where people spend much of their day, is an important locus of public discourse. Much employee speech is not work-related but rather is devoted to conversation about public matters, sports, politics and the issues of the day. (In fact, the uses of political speech by employees as evidence to support an employment discrimination claim under federal or state law raises serious constitutional questions under the first amendment.) Indeed, if recognition of the value of free speech rests implicitly on an agreement that we will live in a society with people whose views we dislike, why should working with them be a major problem? The Connecticut statute expresses disagreement with existing employment law which gives employers too much authority to control employees' speech on every subject, not just on matters of race and sex.

Yet the statute might be better constructed if it took account of values strongly held and expressed by the employer, central values which conflict with an employee's stated views. A business's interest in expressive association may be undercut by the forced acceptance of an employee who advocates or epitomizes a position inconsistent with that adopted and advocated by the organization. For example, a law firm strongly and outspokenly committed to equal opportunity encounters an employee who speaks publicly in favor of discrimination. However, recognition of such an exception should require a specific, announced position by the employer, and one which goes beyond its interest in maximizing profits. The Braves' contractual call for "good citizenship" would be inadequate as a foundation for exclusion of an employee. Rather, vindication of an interest in expressive association should require the identification of a clear position to be advocated over time in an unequivocal way.

This exception bears some resemblance to the exemptions, rooted in part in a concern for intimate association, in fair housing and fair employment laws for businesses with a small number of employees and for small owner-occupied housing units.

Is the state legislation preempted by federal labor law, in particular, by section 301 of the Labor Relations Management Act (LRMA)?

A confident answer is not possible, as much is in doubt in the preemption area. The preemption claim argues, in essence, that union and employer have negotiated a collective bargaining agreement under the aegis of the federal labor law regime. That agreement includes a "just cause" provision, which addresses the limits of employer authority to discipline on account of employee speech; and arbitration decisions interpreting that phrase constitute the law of the shop. Accordingly, the Connecticut statute must yield in service to the goal of a unified federal body of labor-contract law. This argument surely has force [is tenable]. Yet, the Supreme Court's most recent pronouncements about section 301 preemption[21] indicate that even though the state court action and the arbitration grievance would adjudicate the same facts, federal law does not preempt if the state action, implementing the provision of minimum substantive guarantees to individual workers, does not require interpretation of the collective bargaining agreement.[22] Under that test, the Connecticut statute would seem to survive.

Of course, the answer to the preemption question is unlikely to be a very consequential one in the Rocker setting. That is, the relevant evidence and standards of decision would be similar under both the "just cause" clause and the Connecticut statute.

21. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988).
22. *Id.* at 413.