GLASS CEILING EMPLOYMENT AND RACIAL DISCRIMINATION IN HIRING FOR THE HEAD COACHING POSITION IN THE NATIONAL FOOTBALL LEAGUE

Racism, both conscious and unconscious, continues to interfere with the concept of merit-based hiring practices throughout the United States. Discriminatory hiring practices in the National Football League can be seen as a microcosm of society. This paper will focus on the existing hiring practices in the National Football League to demonstrate that a system of institutionalized discrimination exists, thus promoting a race-based system of hiring and firing, as opposed to a meritocracy.

First, I will analyze the potential claims for race discrimination under a disparate treatment analysis, addressing both individual and systemic claims. The foundation for individual disparate treatment litigation was developed in *McDonnell Douglas Corp. v. Green*,[1] and has subsequently been refined in *Texas Dept. of Cmty. Affairs v. Burdine*,[2] *Desert Palace, Inc. v. Costa*[3] and other cases.[4] Then I will address the viability of a systemic disparate treatment claim as defined in *Hazelwood School Dist v. United States*,[5] and *Int'l Brotherhood of Teamsters v. United States*.[6]

I. INTRODUCTION

In the United States there is a strong prohibition of status discrimination. As Paul Brest stated, the antidiscrimination principle

1. 411 U.S. 792, 802 (1973).
2. 450 U.S. 248, 258 (1981).
3. 539 U.S. 90 (2003).
4. These cases include St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993), Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 113 (2000), and Price Waterhouse v. Hopkins, 480 U.S. 228 (1989).
5. 433 U.S. 299 (1977).
6. 431 U.S. 324 (1977).

disfavors decisions and types of conduct, especially in the employment context, that are race dependent.[7] Race dependent decisions, overt racial classifications or covert choices, and race based conduct are especially offensive when a member of a minority group is affected.[8] Part of the rationale for the antidiscrimination principle is to prevent the harmful results that occur when minorities are unable to secure a desired job—as is the case in the NFL when applicants are competing for head coaching positions.[9] Brest suggests that race-based decisions can be additionally harmful because these choices inflict psychic injury on the victims since the adverse employment action is based upon immutable personal traits.[10] The decision also inflicts material injury because qualified candidates are denied job opportunities.[11]

In July of 2003, the president of the Detroit Lions football organization, Matt Millen, was fined $200,000 for failing to interview any minority candidates for the position of head coach before he hired Steve Mariucci, a white candidate.[12] In fact, Mariucci was the only candidate considered for the position.[13] The Lions claimed they offered interviews to five minority candidates, yet it appears the candidates rejected the offer for the interview, claiming they knew the job was "inevitabl[y]"[14] going to Mariucci.[15] The Commissioner of the National Football League, Paul Tagliabue, enforced the fine, making it the first penalty assessed under the NFL's new diversity program.[16] The genesis of this event and the significance of the fine may not be

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7. Paul Brest, *Forward: In Defense of the Antidiscrimination Principle*, 90 HAR. L. REV. 1, 6-11 (1976).
8. *Id.* at 6.
9. *Id.*
10. *Id.*
11. Brest, *supra* note 7, at 6. Specifically, Brest states, "the individual acts of discrimination combine into a systematic and grossly inequitable frustration of opportunity." *Id.* at 10.
12. Jay Nordlinger, *Of the Rooney Rule, Classically Black, and other distinctively American Outrages* (September 9, 2003), *available at* http://www.nationalreview.com/impromptus090203.asp.
13. Associated Press, *NFL fines Lions' Millen $200,000* (July 25, 2003), *available at* http://stacks.msnbc.com/news/9944213.asp?0s1=-11.
14. Walter Cronkite, *Lions' Millen Fined $200K for Not Interviewing Minority* (July 25, 2003), *available at* http://www.ryanmcbain.com/forums.showthread.php?t=136.
15. *See id.*
16. Associated Press, *supra* note 13.

readily apparent, and thus a brief history of hiring practices in the National Football League is necessary.

The National Football League was created in 1920.[17] Within the past eighty-three years, more than four hundred coaches have been hired; yet only *six* have been African American.[18] Currently, there are thirty-two football teams in the League, all of which have white owners.[19] Of the thirty-two head coaching positions, only three positions are held by African-Americans.[20] The three African-American coaches are Herman Edwards of the New York Jets, Tony Dungy of the Indianapolis Colts, and Marvin Lewis of the Cincinnati Bengals.[21] The hiring practices in the NFL have been characterized as "disturbing"[22] and the firing practices have been rated similarly.[23] Every year highly qualified African-American candidates are denied the opportunity to compete for these positions.[24]

There are three predominant reasons for the discriminatory hiring practices in the NFL.[25] First, the power to hire a head coach has been vested in the owner of the franchise.[26] As noted, the fundamental lack of diversity from the standpoint of who owns the teams creates a barrier to minority advancement whether or not the racism is conscious. As Jonnie Cochran and Cyrus Mehri suggest, "It is not always a case of overt or conscious racism; more often, it is about people being most comfortable with those who are most familiar to them."[27]

Second, as of 2002, team owners were under no obligation to interview a set number of diverse candidates.[28] Oftentimes, the individual franchise will "predetermine[]" a replacement before the head coaching position is officially opened to applicants. [29] Minority

17. Jonnie L. Cochran, Jr. and Cyrus Mehri, *Black Coaches in the National Football League: Superior Performance, Inferior Opportunities* (September 30, 2002), page 1, *available at* http://www.findjustice.com.
18. *Id.*
19. *Id.* at 13.
20. Cronkite, *supra* note 14.
21. *Id.*
22. Cochran, *supra* note 17, at 8.
23. *Id.*
24. *Id.*
25. *Id.* at 13.
26. Cochran, *supra* note 17, at 13.
27. *Id.*
28. *Id.*
29. *Id.*

applicants, understanding that this is the practice, are naturally discouraged from applying.[30] Other minority applicants who do attempt to acquire the position often hit a "glass ceiling" and find that they cannot advance in the profession as easily as their white counterparts.[31]

Recently, the minority executives and coaches in the National Football League have organized to form the Fritz Pollard Alliance, named after the leagues first African-American football coach.[32] Together, minorities in the NFL have lobbied for increasing the number of employment opportunities available, and increasing the visibility of minority coaches in the front office positions.[33] Change in the League has come slowly, but finally in December of 2002, the League owners agreed, *in principal*, that any team attempting to fill a head coaching vacancy must first interview at least one minority applicant.[34] This rule is informally known as the "Rooney Rule" named after Art Rooney, the chairman of the Workplace Diversity Committee and the owner of the Pittsburgh Steelers football organization.[35] Under the Rooney Rule, if an NFL team does not interview any minority candidates, then that organization could be fined up to $500,000.[36] The only exception to the Rooney Rule occurs when a team promotes one of its existing assistant coaches, and consequently does not have to interview any minority candidates.[37]

The third reason for discriminatory hiring practices in the NFL is linked to the "anti-tampering" policy.[38] This policy prevents owners from interviewing for the head coach position any candidates that are currently assistant coaches for other teams that are still in post-season play.[39] Cochran and Mehri analogize this policy to similar "pretextual" explanations found in the employment discrimination field.[40] A

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30. Cronkite, *supra* note 14.
31. Cochran, *supra* note 17, at 13.
32. Cronkite, *supra* note 14.
33. *Id.*
34. *NFL clubs to promote diversity program* (December 20, 2002), *available at* http://www.nfl.com.news/story/6046016.
35. *Id.*
36. Associated Press, *supra* note 13.
37. Nordlinger, *supra* note 12.
38. Cochran, *supra* note 17, at 13.
39. *Id.*
40. *Id.* at 14.

pretextual explanation is a false reason advanced to hide the actual motive.[41] Specifically, while 70% of the players in the National Football League are African American, only 28% of the assistant coaches and coordinators are black.[42] This anti-tampering policy is pre-textual because of its haphazard application in the National Football League. For example, the policy was the cited reason why qualified candidates such as Marvin Lewis and Sherman Lewis had not been interviewed for head coaching positions.[43] However, this policy was bypassed when a white assistant coach, Kevin Gilbride of the San Diego Chargers, was hired as a head coach while his team was still in post-season play.[44] Cochran and Mehri suggest that the NFL's anti-tampering policy would not pass a rigorous analysis.[45] However, in December of 2002, the Committee on Workplace Diversity suggested an amendment to the anti-tampering policy.[46] Recently, the NFL accepted a Committee modification to the anti-tampering policy by stating that assistant coaches for playoff teams could be interviewed for head coaching positions.[47]

II. INSTITUTIONALIZED DISCRIMINATION

A. Generally

It is important to understand how individuals are influenced by organizational structures before antidiscrimination reform can take place.[48] First, the concept of institutionalized discrimination must be defined. As Professor Tristin Green noted, there are many bureaucratic organizations where discrimination exists, but this discrimination is not

41. Black's Law Dictionary 1206 (7th ed. 2000).
42. Cochran, *supra* note 17, at 1. *See also* Don Pierson, *Database key for hiring black NFL coaches* (November 1, 2002), *available at* http://newblackvoices.com/technology/bv021101blackcoaches,0,4638152.story?coll=bv-technology-headlines (stating that 154 of the 547, or 28%, of the assistant coaches in the National Football League are African-American).
43. *Id.* at 13.
44. *Id.* at 14.
45. *Id.*
46. *NFL clubs to promote diversity program*, *supra* note 34.
47. *Id.*
48. Tristin Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 659-60 (2003).

readily apparent through widespread policies or overt plans.[49] Rather, discrimination today is "institutionalized" and discrete, and is interwoven into the very fabric of the workplace.[50]

As Green states, "larger organizational decision-making structures, workplace cultures, and informal, institutionalized practices become equally important" when we try to solve the problem of workplace discrimination.[51] There are several factors that create unequal treatment in the employment arena. For example, application methods, the personnel designated to make the decisions, the heterogeneous composition of the group, and the environment will all contribute to racial discrimination.[52] Oftentimes, a blind adherence to historical hiring practices within an organization without question will facilitate, albeit arguably unintentionally, a perpetual cycle of discrimination.

B. In the context of the National Football League

The lack of diversity among decision makers, the absence of diversity in the final candidate choices, and the anti-tampering policy facilitate and perpetuate a cycle of racial employment discrimination in the National Football League. The owners of individual teams in the NFL are all white, and because these owners will hire candidates for the head coach position they may be acting on discriminatory preferences, on either a conscious or unconscious level. These decisions are influenced by the NFL culture and the structure of the hiring system.

While the number of minority players in the NFL continues to grow, the number of African-American coaches has remained static.

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49. Tristin Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R. L. REV. 1, 92 (2003).

50. *Id.* at 91. Thus, Professor Green accurately states:

[W]e have seen a shift in the ways in which discrimination operates in the workplace. As traditional social norms permitting overt racism and segregation give way to a modern norm of egalitarianism, and as well-defined, hierarchical, bureaucratic structures delineating clear paths for advancement within institutions give way to a globalized workplace of flexible governance and movement between institutions, discrimination often operates in the workplace today less as a blanket policy or discrete, identifiable decision to exclude than as a perpetual tug on opportunity and advancement. *Id.*

51. Green, *supra* note 48, at 660.

52. *Id.* at 670.

Specifically, in the NFL at the player level 30% of the athletes are white whereas 70% are black.[53] However, the statistics change dramatically at the assistant coach and coordinator position, where 72% of the participants are white, and only 28% are African-American.[54] The disparity in the head coaching position is exceptionally highlighted because 94% of head coaches are white whereas only 6% of head coaches are African-American.[55] Thus, it is notably "rare" for an African-American football player to later transcend the ranks and become a coach in the NFL.[56]

Two prime examples of race-based discrimination in the NFL institution can be seen in the careers of Art Shell and Sherman Lewis. The breakdown of racial barriers did not begin in the 1950's or even the 1960's. Rather, the erosion of racial prejudice in the National Football League began in 1989 when Art Shell began his career with the Los Angeles Raiders.[57] Despite Shell's success and the success of the five other African-Americans that had opportunities to coach, many feel that minorities are the "last hired and first fired" in the NFL despite having successful records.[58] In fact, Shell has not received another job offer since leaving the Raiders in 1994.[59]

Sherman Lewis has been an offensive coordinator for ten of his fourteen years in the coaching field of the NFL.[60] In addition, Lewis had also earned four Super Bowl Rings, one of which was with the Green Bay Packers in 1997.[61] Yet, when the Packers needed a new head coach, Lewis was not even interviewed for the position.[62] Lewis' career has been described as "frustrating" despite the fact that he has repeatedly proven himself to be one of the greatest coaches of our time.[63]

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53. Cochran, *supra* note 17, at 1.
54. *Id.*
55. *Id.*
56. Michael Steinberger, *Black coaches find the barriers remain in US Sport,* Financial Times, October 7, 2003.
57. *Id.*
58. Cochran, *supra* note 17, at 11.
59. Steinberger, *supra* note 56.
60. Cochran, *supra* note 17, at 8.
61. *Id.*
62. *Id.* at C-14.
63. Steinberger, *supra* note 56.

Often, members of an institutional organization are unaware that decisions are made with racial and gender biases. Bill Walsh, a Hall of Fame football coach, once stated that the hiring process for a head coach is, "a very fraternal thing. You end up calling friends, and the typical coach hasn't been exposed to many black coaches."[64] The "ol' boy" network mentality is a vicious cycle that is difficult to break. Nevertheless, recognition events have already taken place in the NFL, especially with the threat of a lawsuit by Cochran and Mehri, which has sparked reform and change.[65]

C. In the context of other sports franchises

Professional football is not the only sports franchise that has been plagued with problems of race-dominated control that produce discriminatory results, such as hiring practices. In *Diversity, Racism, and Professional Sports Franchise Ownership: Change Must Come From Within*, Kenneth Shropshire noted, "[o]ne possible path for decreasing actual or perceived racism against African Americans in any business setting is to increase African American ownership."[66] Clearly, the professional sports business is a useful model for studying society's problems with race.

In a recent survey, 97% of Major League Baseball coaches were white.[67] In all of professional sports franchises, minorities occupy less than 5% of the crucial management positions and less than 3% of team ownership.[68] It is worthwhile to compare the number of minority

64. Kenneth L. Shropshire, *Merit, Ol' Boy Networks, and the Black-Bottomed Pyramid*, 47 HASTINGS L.J. 455, 461-62 (1996) (quoting Claire Smith, *Too Few Changes Since Campanis*, N.Y. Times, Aug. 16, 1992, at pages 1, 2).

65. Cochran, *supra* note 17, at 15. Specifically, Cochran and Mehri proposed a Fair Competition Resolution that would empower the NFL commissioner to give teams better draft choices when they have diverse front offices. *Id.* In addition, Cochran and Mehri suggested that the final candidate selections for a head coaching position must be diverse. *Id.* In response to these proposals, the NFL created the Workplace Diversity Committee. Nordlinger, *supra* note 12. Also, the league has imposed the Rooney Rule, which states that each team must interview one minority applicant for the head coaching position. *Id.*

66. Kenneth L. Shropshire, *Diversity, Racism, and Professional Sports Franchise Ownership: Change Must Come From Within*, 67 U. COLO L. REV. 47, 47-48 (1996).

67. *Id.* at 50-51.

68. *Id.*

participants in professional sports: almost 80% of the players in the National Basketball Association are African-American,[69] almost 70% of the players in the National Football League are African-American,[70] and almost 20% of the players in Major League Baseball are African-American.[71] Based on these statistics, it has been hypothesized that the low number of minority owners and managers is due to discrimination rather than a lack of knowledge or experience.[72] Thus, the current employment structure in the sports industry is often analogized to a "black-bottomed pyramid" where African-American athletes comprise many of the participants of a sport, but are rarely seen in head coaching or corporate positions.[73]

Major League Baseball has faced extreme criticism for the lack of minority employees in both the front office and executive positions in the organization. In addition to the coaching problems, MLB also adds another unique race factor—the decline of African-American participation. Interestingly, the number of African-American players in the organization is dwindling, whereas Latino and Caribbean representation is skyrocketing.[74] The increase of minority participation in coaching and front office positions would only help the sports franchises. First, it would add the social value of a diverse environment.[75] Second, it would benefit the sports franchise financially because minorities in the ownership or front office positions would undoubtedly increase the fan base to include more minorities and generate revenue for the industry as a whole.[76]

The National Basketball Association fares better than both the National Football League and Major League Baseball combined. At one point during the 2002 season, thirteen of the twenty-nine professional basketball teams had black head coaches. This rise in African-American visibility in the front office is sharp and dramatic.[77] The reasons why the NBA has achieved such great success in

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69. *Id.* at 51.
70. Cochran, *supra* note 17, at 1.
71. Shropshire, *supra* note 66, at 51.
72. *Id.* at 50-51.
73. Shropshire, *supra* note 64, at 456-57.
74. Steinberger, *supra* note 56.
75. Shropshire, *supra* note 66, at 53-54.
76. *Id.*
77. Steinberger, *supra* note 56.

incorporating minority candidates in head coaching positions is a meritorious discussion, yet it is outside the scope of this paper.

Diversity in sports franchises will bring about empowerment, and aside from legal solutions, insular organizational change is fundamental to breaking through "glass ceiling" barriers for minority advancement. A minority owner hiring for a head coach position, for example, is more likely to recognize the rewards of minority participation in front office positions than white owners.[78] While discrimination in ownership is not specifically prohibited by Title VII, discrimination by the ownership does fall under the basic substantive standard enumerated in § 703 (a).[79] Specifically, that section states that failure or the refusal to hire individuals because of race or to limit employees or applicants for employment in any way that would deprive a person of employment opportunities because of race is prohibited.[80] Thus, because the owner is in the position to hire, fire and adversely affect an employee or applicant for employment, that team owner may be held liable under Title VII of the Civil Rights Act of 1964 for race based discrimination.

Moreover, discrimination in ownership may also be a violation of 42 U.S.C.A. §1981, which has been used to promote racial equality since the post-Civil War Reconstruction Era. Specifically, the failure of the owners to "make and enforce contracts" with African-American candidates could be a violation of the law.[81] Once a valid model for

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78. Shropshire, *supra* note 66, at 58.

79. 42 U.S.C. § 2000e-2(a).

80. Section 703(a) of the Civil Rights Act of 1964 states:
It shall be 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, sex, or national origin; or 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. 42 U.S.C. §2000e-2(a).

81. 42 U.S.C.A. § 1981 (1994) states:
(a) 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, give evidence, 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, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
(b) For purposes of this section, the term "make and enforce contracts"

dealing with employment discrimination in the sports industry is established, other facets of society may be able to rely on appropriate methods to pursue a legal claim and facilitate institutional change.[82]

III. LEGAL OUTLETS FOR EMPLOYMENT DISCRIMINATION CLAIMS SURROUNDING THE HEAD COACH POSITION IN THE NATIONAL FOOTBALL LEAGUE

This section addresses the types of claim a potential plaintiff could bring under Title VII of the Civil Rights Act of 1964, and the various legal theories that can be advanced in the claim for employment discrimination. Initially, I will analyze the potential claims for race discrimination under a disparate treatment analysis, first addressing the validity of a claim for individual disparate treatment analysis, as defined in *McDonnell Douglas Corp. v. Green.*[83] Second, I will analyze the likelihood of success for a systemic disparate treatment analysis, as defined in *Hazelwood School Dist v. United States*[84] and subsequent cases.

A. Title VII of the Civil Rights Act of 1964

Today, when an African-American applicant is unlawfully turned away from a head coaching position, one remedy would be to bring either an individual or a class action lawsuit against the National Football League under Title VII of the Civil Rights Act of 1964.[85] The

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includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privilege, terms, and conditions of the contractual relationship.
(c)The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

82. Shropshire, *supra* note 64, at 456-57.
83. 411 U.S. 792 (1973).
84. 433 U.S. 299 (1977).
85. Section 703(a) of the Civil Rights Act of 1964 provides:

It shall be an unlawful employment practice for an employer- (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, 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. 42 U.S.C. § 2000e-2(a) (emphasis added).

Act prohibits racial discrimination against employees *or applicants* for employment.[86] Thus, a minority applicant could sue the employer, the NFL,[87] alleging racial discrimination because of the presence of disparate treatment, both individual and systemic.[88]

Specifically, a minority applicant might be able to argue that a joint employment relationship exists between the NFL organization and the specific team. The notion of joint employment extends the scope of employment law to other groups and organizations that may not "technically" be the employer of the affected employee or applicant, but receive substantial benefits from the employee's services. This theory will be discussed in depth in the systemic disparate treatment analysis section of this paper.

1. Individual Disparate Treatment Analysis

To sustain a disparate treatment claim, the plaintiff must prove a prima facie case of racial discrimination, established by a preponderance of the evidence.[89] Once this standard is met, the burden shifts to the defendant to rebut the plaintiff's claims by demonstrating that the employment issue in question was made for a "legitimate"[90] and racially neutral purpose.[91] The framework for the plaintiff's and the defendant's respective burdens in a Title VII discriminatory treatment case was established in *McDonnell Douglas v. Green*.[92]

In *McDonnell Douglas*, Green was terminated from his employment as a mechanic for McDonnell Douglas because Green was a civil rights activist.[93] Green argued that McDonnell Douglas violated

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86. *See* Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

87. A claim may be able to succeed against the National Football League because of the paternalistic relationship that now exists where the Commissioner of the league, Paul Tagliabue, can enforce monetary fines on individual teams for failing to interview minority applicants. Associated Press, *supra* note 13.

88. Jim Moye, *Punt or Go for the Touchdown? A Title VII Analysis of the National Football League's Hiring Practices for Head Coaches*, 6 UCLA ENT. L. REV. 105, 109 (1998).

89. *Id.* at 110.

90. *Id.*

91. Moye, *supra* note 88, at 110.

92. *See* McDonnell Douglas v. Green, 411 U.S. 792 (1973). *McDonnell Douglas* is one of the leading pretext or single-motive cases in individual disparate treatment analysis. *Id.*

93. *See id.* at 797.

sections 703(a)(1) and 704(a) of the Civil Rights Act of 1964 by enforcing racially discriminatory hiring practices.[94] In response, the Supreme Court developed a methodology for establishing a prima facie case of race discrimination in employment settings. First, the plaintiff must belong to a racial minority class.[95] Second, the plaintiff must be qualified for the position that the employer is seeking to fill.[96] Third, the plaintiff must be rejected for the position.[97] Fourth, after the rejection of the applicant, the employer must continue to look for a candidate that has similar qualities as the plaintiff.[98] With a prima facie case established, the defendant must come forward with a nondiscriminatory reason for its action.[99] The plaintiff then has a chance to prove that defendant's reason was a pretext for discrimination.[100]

In subsequent years, the Court has further developed the methodology for Title VII actions. In *Texas Department of Community Affairs v. Burdine*, the plaintiff was a female employee who was qualified for a supervisory position.[101] Despite her repeated applications for the position, the Department hired a male and later fired Burdine.[102] After the plaintiff protested, Burdine was rehired at a supervisor's salary, but did not have the title or recognition as a supervisor.[103] When plaintiff filed a Title VII action, the Court held that an employer could rebut the plaintiff's presumption of discrimination by thoroughly explaining the reasons behind the employment decision without responding directly to the allegations by the plaintiff.[104]

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94. *See id.*
95. *See id.* at 802.
96. *McDonnell Douglas,* 411 U.S. at 802.
97. *Id.*
98. *Id.* Also, in St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993), the Court held that the *McDonnell Douglas* burden shifting approach is the correct and proper method to allocate the burden of production in cases alleging discriminatory treatment.
99. *McDonnell Douglas,* 411 U.S. at 802-803.
100. *Id.* at 804-805.
101. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 250 (1981).
102. *Id.* at 250-51.
103. *See id.* at 251.
104. *See id.* at 254. Thus, in *Burdine,* the Court clarified the second and third steps in the *McDonnell Douglas* framework. *See id.* at 254-56. In step two,

In the context of the National Football League, there are a number of potential African-American coaches who could hypothetically pursue Title VII action against NFL teams. For example, in addition to Sherman Lewis as mentioned earlier, Emmitt Thomas and Marvin Lewis could present valid legal claims, and both have applied for head coaching positions. Thomas has been a defensive assistant for over two decades, and in that time he has earned two Super Bowl Rings for the Washington Redskins.[105] However, Thomas has rarely been offered the opportunity to interview for the position as head coach.[106] Marvin Lewis helped to create one of the strongest defensive teams in the history of football.[107] Yet, in 2000, Marvin Lewis was only offered one interview, with the Buffalo Bills, for the head coach position.[108] However, the Bills indicated that they did not have a real interest in hiring Marvin Lewis.[109]

While Sherman Lewis, Marvin Lewis and Emmitt Thomas are all likely candidates to be potential plaintiffs in Title VII actions, this paper will not trace the hypothetical likelihood of one specific coach to sustain a Title VII claim. Rather, this paper will create a roadmap for future candidates to pursue a legal action, and will then assess the effects a Title VII action might have on the National Football League.

First, a prospective coach will have to establish a prima facie case of discrimination. The first element is the requirement to be part of a racial minority.[110] This element would be satisfied on the basis of the applicant's immutable racial characteristics, so there is little reason

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there is a transfer of the burden of production. *See id.* at 254. This transfer creates a backdoor for the plaintiff to prove discrimination, without having to prove intent. *See id.* at 254. In the prima facie case, the defendant is forced to rebut, and as such the defendant is the party that has to define a non-discriminatory reason for the termination. *See id.* at 254-56. Because of this burden shifting, the plaintiff has an easier time identifying the claim and as such, it is easier for the plaintiff to prove intent. *See id.* at 256. Also, in the third step, the plaintiff can prove by a preponderance of the evidence that there is a pretext, then the issue of discriminatory intent merges with the requirement to prove pretext. *See id.* Thus, the plaintiff can prevail by directly demonstrating discrimination or indirectly proving the reason the defendant articulated in step two. *See id.*

105. Cochran, *supra* note 17, at 8.
106. *Id.* at 9.
107. *Id.*
108. *Id.*
109. Cochran, *supra* note 17, at 9.
110. *See McDonnell Douglas*, 411 U.S. at 802.

to discuss this requirement. Next, the plaintiff must prove that he was qualified for the position as head coach.[111] A candidate could point to prior coaching experience, for example the plaintiff could emphasize experience working as an assistant coach or coordinator. College level coaching experience and playing experience would also prove to be invaluable. In addition, the quality of the NFL teams previously coached would play a factor in determining applicants' qualifications. An applicant with repeated previous Super Bowl wins would be highly qualified for the position of head coach. At the prima facie stage, however, the plaintiff need merely show he met the minimum, announced qualifications.[112] The issues surrounding qualifications become more intense when the defendant asserts that it did not hire the plaintiff because it hired a candidate with better qualifications.

The third step would be to show that the applicant was passed over despite his or her qualifications.[113] Specifically, Marvin Lewis has been an NFL assistant defensive coach since 1992.[114] From 1992 until 1995, Lewis helped produce four Pro Bowl linebackers for the Pittsburgh Steelers.[115] From 1996 until 2000, Lewis was instrumental with the Ravens 2000 Superbowl win.[116] However, after the 2000 season ended only one team, the Buffalo Bills, interviewed Lewis.[117] Yet, the Bills did not seem to seriously consider hiring Lewis because he never met the Bills owner, and was never given a tour of the team's facilities.[118]

Also, Sherman Lewis has a distinguished career; he has spent nineteen seasons as an assistant coach in the NFL.[119] Under Sherman Lewis' leadership the teams he has coached have gone to the playoffs 15 times, clinched 11 division championships, won five NFC Championships, and won a total of four Superbowls.[120] Finally, Emmitt Thomas has been associated with the NFL for 35 years.[121]

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111. *See id.*
112. *See id.*
113. *See id.*
114. Cochran, *supra* note 17, at C-11.
115. *Id.*
116. *Id.*
117. *Id.*
118. Cochran, *supra* note 17, at C-11 - C-12.
119. *Id.* at C-13.
120. *Id.* at C-14.
121. *Id.* at C-15.

First, Thomas spent nine years with the Redskins, where many of his players were chosen to compete in the ProBowl, the team won two NFC Championships after having gone to the playoffs five times, and won two Superbowl titles.[122] In 1995, Thomas was promoted to defensive coordinator with the Philadelphia Eagles, and was consistently ranked one of the best defensive teams in the League.[123] After 1998 Thomas has spent time working as a defensive coordinator for the Green Bay Packers and the Minnesota Vikings where he has had similar success, but despite his achievements he has *never* been offered a head coaching position.[124]

The last step required by the plaintiff in establishing a prima facie case of case of racial discrimination under Title VII is to show that after the applicant was rejected from receiving the position, the position remained open and that the employer continued to take applications for the head coaching position.[125] Even if a plaintiff does establish these requirements, the NFL would have a chance to rebut the argument by asserting a non-discriminatory reason for its decision not to hire the plaintiff.[126] The NFL team could make three obvious arguments: first, the team hired the most qualified candidate; second, the minority candidate was not experienced enough for the head coach position; and third, that a coach's personality was taken into account when the hiring decision was made. These decisions consequently affect inter-organizational relationships.[127] These arguments, while facially legitimate, may be tainted.[128]

Currently, Jonnie Cochran and Cyrus Mehri have compiled and statistically analyzed hiring and firing statistics of black coaches in the NFL.[129] Cochran and Mehri have examined the first year season

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122. Cochran, *supra* note 17, at C-15.
123. *Id.*
124. *Id.*
125. Moye, *supra* note 88, at 123.
126. *See Burdine*, 450 U.S. at 254.
127. Moye, *supra* note 88, at 124-27.
128. In addition, if the plaintiff can prove that discrimination proves a motivating part of an adverse employment decision, then the plaintiff wins the case, and the defendant-potential employer can only reduce damages with affirmative defenses. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that there is a "same decision defense" in which a defendant can avoid liability if the employer can demonstrate that they would have made the same decision based upon the non-discriminatory reason alone).
129. Cochran, *supra* note 17, at 1-4.

records of all coaches in the NFL, the overall season records, the final year season records of coaches who were terminated, and the season records for all NFL teams who had African-American coaches.[130] The results have indicated that African-American coaches in the NFL have consistently outperformed their white counterparts and have been involuntarily terminated more than less successful white head coaches.[131]

For example, the average wins per full season for coaches by race from 1986 – 2001 indicate that African-American coaches average more wins, 9.1 wins, than their white counterparts who only average 8 wins.[132] Specifically, during the first season with a team the African-American coach will yield 9.5 average wins, whereas the white coach will only yield 6.8 wins.[133] In the last season before termination, white coaches average 5.5 wins, whereas African-American coaches average 6.8 wins.[134]

Also, the disproportion of coaches in the playoffs from 1986 – 2001 is dramatic. On average, African-American coaches have gone to the playoffs 67% of all seasons, compared to white coaches, who comprise the majority, who have only gone to the playoffs 39% of the time.[135] During the first season of coaching, white coaches only go to the playoffs 20% of the time, compared to African-American coaches who advance 60% of the time.[136] Also, in the final season before termination white coaches attend the playoffs at a rate of 8%, compared to African American coaches who have a 20% attendance rate despite their small numbers overall.[137]

In addition, a strong argument exists that African-American coaches enhance the performance of teams while they are present, and the skills that they have taught transcend even after they have left the team or have been fired.[138] Specifically, between 1986 and 2001 teams that were coached only by a white coach average only 7.4 wins per full

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130. *See id.*
131. *Id.* at 2-3.
132. *Id.* at 3.
133. Cochran, *supra* note 17, at 3.
134. *Id.*
135. *Id.* at 4.
136. *Id.*
137. Cochran, *supra* note 17, at 4.
138. *See id.* at 5.

season.[139] However, under a black coach the number of average wins increases to 9.1 average wins per season, and remains high even after a white coach regains the head coaching position at 8.9 average wins per season.[140]

While each case would be decided on its facts, there is certainly a substantial amount of available data to support a finding that defendant's assertion that the candidate it selected was more qualified that the plaintiff was unworthy of credence and was, therefore, a pretext for discrimination.[141] If the defendant asserts the anti-tampering policy that has been in place in the NFL, that could also be found to be a pretext since it has traditionally kept African-American assistant coaches from being interviewed. This reason may be false, and is only meant to hide the real motive for the racial discrimination. Therefore, the employer's advanced reason was not worthy of credence and consequently, the fact finder should draw the inference of discrimination.

Imbedded in these ideas is the notion that employment discrimination is implicit in the NFL organization by the mere fact that most owners of teams are white males.[142] Cochran and Mehri have proven that despite the fact that many qualified minority applicants have repeatedly attempted to break through the "glass ceiling" preventing advancement in the NFL, head coaching positions are still awarded to less experienced white applicants.[143]

Previously, the NFL could have rebutted the plaintiff's prima facie case of Title VII employment discrimination by pointing out that the NFL does not control the hiring decisions of the individual teams in the organization.[144] Typically, decisions to hire a head coach are made

139. *Id.*
140. *Id.*
141. *See* Reeves v. Sanderson Plumbing Products Inc., 530 U.S. 133, 148 (2000) (holding that there was proof of a prima facie case, that defendant's reason lacked credence, and therefore there was sufficient evidence to support a finding of discrimination).
142. Also, it should be noted that in *Reeves,* that if the plaintiff can establish a prima facie case of discriminatory treatment, and provide enough evidence to prove that the employer's asserted reason for the discrimination was in fact false, the trier of fact is allowed to conclude that the employer discriminated against the plaintiff. *Reeves,* 530 U.S. at 148.
143. Cochran, *supra* note 17, at 8-12.
144. Moye, *supra* note 88, at 124-25.

by the owners of the particular football team.[145] However, since the advent of the Rooney Rule in 2002, the power to supervise head coaching decisions has been vested in the Commissioner of the NFL.[146] In addition, NFL teams are incorporating the recommendations of the NFL Committee on Workplace Diversity, which was appointed by Paul Tagliabue on October 31, 2002.[147] The Committee is comprised of four owners of NFL teams,[148] and is assisted by NFL club executives.[149] Together the Committee has created the Rooney Rule, changed the former anti-tampering policy in the NFL, and have complied a detailed information book describing prospective head coaching candidates. Finally, the Committee is implementing a training program that places the most qualified candidates in the front office positions.[150]

Thus, because of the recent advancements in the NFL in regard to hiring practices, it seems less likely that the NFL could successfully rebut a plaintiff-applicant's prima facie case of discrimination because the NFL is actively taking responsibility for the hiring practices and enforcing fines when egregious offenses of the Rooney Rule are occurring, and for when teams are circumventing the recommendations of the Committee on Workplace Diversity.[151] Even if the defendant-

145. *Id.*

146. Associated Press, *supra* note 13.

147. *NFL clubs to promote diversity program*, *supra* note 34.

148. *Id.* The owners of NFL teams who also participate on the Diversity Committee include Dan Rooney owner of the Pittsburgh Steelers, Arthur Blank owner of the Atlanta Falcons, Stan Kroenke owner of the St. Louis Rams, and Pat Bowlen owner of the Denver Broncos. *Id.*

149. *Id.* The participating executives include Ray Anderson of the Atlanta Falcons, Terry Bradway of the New York Jet's, Bill Polan of the Indianapolis Colts, and Rich McKay of the Tampa Bay Buccaneers. *Id.*

150. *Id.*

151. *See* Associated Press, *supra* note 13. The plaintiff's claim would be likely to survive even with the modifications to the *McDonnell Douglas* burden shifting analysis created by the Court in Hazen Paper Co. v. Biggins, 507 U.S. 604, 612 (1993). In *Hazen Paper* the Court upheld the *McDonnell Douglas* framework as applied in a claim under the Age Discrimination in Employment Act ("ADEA"), but that the employer did not have to prove the legitimacy of the decision to take an adverse employment action. *Id.* Thus, even though *Hazen Paper* removed the need for the defendant to demonstrate that the decision was "legitimate," in the context of employment discrimination in the NFL, all the applicant for the head coach position must show was that the reason for the adverse employment action was a pretext, and that there was in fact a pretext for discriminating against the applicant. *Id.*

NFL does rebut the plaintiff's evidence, the plaintiff will have another chance to respond to the NFL's reasoning.[152] In addition, after the Supreme Court's recent decision in *Desert Palace Inc. v. Costa,*[153] the evidentiary burden placed upon the plaintiff is not as strict as it has been applied previously.

Specifically in *Desert Palace Inc. v. Costa*, Petitioner Desert Palace employed Catharina Costa as a warehouse worker.[154] As the only woman on the job and in the Union, she was denied privileges, harassed by male co-workers and was involved in a physical altercation with a male co-worker.[155] Respondent Costa filed a lawsuit in Federal District Court alleging sex discrimination and sexual harassment under Title VII.[156] At trial the Petitioner employer claimed that Respondent did not assert direct evidence at trial.[157] Eventually, the issue regarding whether or not a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under a Title VII claim was settled by the Supreme Court.[158] In *Desert Place* the Court was given their first opportunity to apply the effect of the Civil Rights Act of 1991 to mixed motive cases.[159]

Specifically, the Court held that § 2000e—2(m) states that a plaintiff only needs to demonstrate that an employer was using inappropriate considerations when making employment decisions.[160] Thus, there is no requirement of a heightened showing through direct evidence.[161] Also the Court stated that circumstantial evidence is enough, and is sometimes more persuasive and satisfying, in a Title VII case.[162] Thus, this decision changes the application of the *Price Waterhouse* case, which other courts have held to require direct evidence of discrimination before a mixed-motive instruction could be given to the jury.[163]

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152. Moye, *supra* note 88, at 126-27.
153. 539 U.S. 90 (2003).
154. *Id.* at 92.
155. *Id.*
156. *Id.*
157. *Costa,* 539 U.S. at 92.
158. *Id.* at 90.
159. *Id.* at 93.
160. *Id.* at 94.
161. *Costa,* 539 U.S. at 94.
162. *Id.*
163. *Id.* at 91. Specifically, other courts have relied on Justice O'Connor's

Therefore, a candidate of racial discrimination by an NFL team does not have to demonstrate direct evidence of discrimination to assert his Title VII claim. Future claims against NFL teams have a greater likelihood of success because a heightened showing of direct evidence is not required. Alternatively, if an individual disparate treatment theory is unsuccessful, the plaintiff could attempt to prove a systemic disparate treatment claim.

2. Systemic Disparate Treatment

A systemic disparate treatment claim is one way a plaintiff can challenge the hiring practices of employer in a broad sense. A systemic disparate treatment claim was first developed in 1977 in *International Brotherhood of Teamsters v. United States*.[164] In *Teamsters* the use of a seniority system in a union-negotiated collective bargaining agreement was held to be valid under Title VII.[165] The employer had been engaged in racial discrimination against African-Americans and Spanish-surnamed people, and favored hiring white persons.[166] Specifically, Congress did not intend to outlaw the use of such lists, and consequently destroy vested seniority rights in employees, because an employer had engaged in racial discrimination before the passage of Title VII.[167]

In *Teamsters*, the Court noted that the use of statistics has served and will continue to serve an important role when proving the existence of discrimination in the future.[168] Specifically, statistical proof can be used to establish a prima facie case of racial discrimination in jury cases and in employment discrimination.[169] While statistics can be rebutted, their use depends heavily on the facts and circumstances of the case.[170] Thus, under *Teamsters* the *effect* of

concurrence in *Price Waterhouse* to hold that direct evidence is required to establish liability under § 2000e-2(m). *See, e.g.*, Mohr v. Dustrol, Inc., 306 F.3d 636 (8th Cir. 2002), Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572 (1st Cir. 1999), Trotter v. Board of Trustees of Univ. of Ala., 91 F.3d 1449 (11th Cir. 1996), and Fuller v. Phillips, 67 F.3d 1137 (4th Cir. 1995).

164. 431 U.S. 324 (1977).
165. *Id.* at 334-35.
166. *Id.*
167. *Id.* at 375.
168. *Teamsters*, 431 U.S. at 339.
169. *Id.*
170. *Id.* at 340.

an employer's practices can establish a pattern of an underlying intent to discriminate under Title VII.[171]

The framework for a systematic disparate treatment claim was enhanced in *Hazelwood School District v. United States*.[172] Generally, in a systematic disparate treatment claim, the pattern and practice of discrimination is the focus of the analysis. In *Hazelwood*, the United States Attorney General filed an action against Hazelwood School district alleging racial discrimination—specifically, that the school was involved in the "pattern and practice"[173] of discriminating against African-American applicants for teaching positions within the school.[174] Specifically, the Attorney General is authorized under 42 U.S.C. § 2000e-6(a) to bring a lawsuit against any person or group of persons who engage in a pattern of employment behavior that suggests that members of racial classifications are being denied the full exercise of their rights.[175]

The Attorney General relied on the history of racially discriminatory practices before 1972, the current statistics, the highly subjective hiring standards of the school, and ***fifty-five*** specific instances of alleged discrimination.[176] In the 1971-1972 school year the school had 3,127 applicants for 234 teaching vacancies.[177] In the 1972-1973 school year the school had 2,373 applications for 282 vacancies.[178] A large number of the applicants who were not hired were African-American.[179] While Hazelwood did hire an African-American teacher in 1969, the numbers of black teachers grew notably slowly. In 1970, only 6 of 957 teachers were black; in 1972, only 16 of

171. *Id.* at 359. Specifically, the Court in *Hazelwood* stated, "Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood*, 433 U.S. 299, 307-08 (1977).

172. 433 U.S. 299 (1977).

173. *Id.* at 301.

174. *Id.* at 301.

175. *Id.*

176. *Hazelwood*, 433 U.S. at 303. *See also* Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 437-38 (1986) (finding that the trial court properly admitted statistical evidence to demonstrate the victim-petitioner's claim of systematic discrimination).

177. *Hazelwood*, 433 U.S. at 303.

178. *Id.*

179. *Id.*

1,107 teachers were black; in 1973, only 22 of 1,231 teachers were black.[180]

When the Supreme Court interpreted the use of statistics in the *Hazelwood* case, the Court relied on *Teamsters*, and stated that the burden is on the government to show by a preponderance of the evidence that race based discrimination was the employer's motive or standard operating procedure.[181] The Court started its analysis with a probability assumption: over time nondiscriminatory hiring practices will result in a work force that tends to represent the racial and ethnic composition of the pool from which workers are chosen.[182] Evidence of a gross and longstanding disparity between the labor pool and the workforce is significant despite the fact that § 703(j) makes it clear that Title VII imposes no requirement that the workforce of one employer must match the racial background of the general population.[183]

In using these statistical techniques there is an important threshold question of what the proper workforce is, as was the case in *Hazelwood*.[184] While it is usually the employees of one employer, it is possible to claim that the NFL as a whole is the appropriate workforce. Thus, a minority applicant might be able to argue that a joint employment relationship exists between the NFL organization and the specific team, especially now that the Commissioner of the NFL, Paul Tagliabue, has been given the power to assess fines on the NFL for failing to interview minority candidates.[185] The notion of joint employment extends the scope of employment law to other groups and organizations that may not "technically" be the employer of the affected employee or applicant, but receive substantial benefits from the employee's services.[186]

In *Liu v. Donna Karen International, Inc.*, Chinese immigrant workers were employed in a clothing factory owned by Jen Chu Apparel Incorporated.[187] Most of the clothing made at the Jen Chu

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180. *Id.*
181. *Hazelwood*, 433 U.S. at 307.
182. *Id.*
183. *Id.*
184. *Id.* at 308.
185. *See* Associated Press, *supra* note 13.
186. *See generally*, Liu v. Donna Karen International, Inc., 2000 U.S. Dist. LEXIS 18847 (S.D.N.Y. January 2, 2001).
187. 2000 U.S. Dist. LEXIS 18847, at *2 (S.D.N.Y. January 2, 2001).

Apparel warehouse was for Donna Karen International, Incorporated.[188] While the court interpreted joint employment in the context of the FLSA, and examined the economic reality presented by the facts of the case, a court reviewing the potential claim against the NFL could look at the same factors and expand this principle to Title VII of the Civil Rights Act of 1964.

When Commissioner Paul Tagliabue assessed the first penalty against the Detroit Lions under the new diversity program, a link between the individual team's decision and the NFL organization was created. Similarly, in *Liu* the existence of facts establishing that employment by one group was not completely disassociated from employment by the other group was a factor that led to the existence of joint employment.[189] The court in *Liu* focused on a number of factors, the *Carter* test,[190] to determine the scope of entanglement between employers. The factors include who has the power to hire and fire, who supervised the employee's work, who determined the method of payment, and who monitored the employment records.[191]

Specifically, in the context of Title VII actions a similar argument can be made for the existence of a joint employment relationship with the NFL organization as a whole and the individual teams. When parties are attempting to consolidate entities in a Title VII action, the Act is read liberally, and the consolidation of employers is consistent with the remedial purposes of the Act.[192] Specifically, the factors that should be applied to determine who is an "employer" under the Act can be found in § 2000e (b) of the Act which echoes the standards promulgated by the National Labor Relations Board.[193] The

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188. *Id.* at *3.

189. *Id.* at *4-*5.

190. *Id.* at *5-*6. The *Carter* test was first developed in Carter v. Dutchess Community College, 735 F.2d 8 (2d Cir. 1984).

191. *Liu,* 2000 U.S. Dist. LEXIS 18847, at *5-*6.

192. Baker v. Stuart Broad. Co., 560 F.2d 389, 391 (8th Cir. 1997). *See also* Wilson v. Brinker International, Inc., 248 F.Supp. 2d 856, 861 (D. Minn. 2003) (where the court held that the plaintiff submitted sufficient evidence to support a finding that a joint employment relationship existed between the defendants in a Title VII gender discrimination case).

193. Specifically, § 2000e (b) states:

The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United

four factors are interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control.[194]

In *Scheidecker v. Arvig Enterprises, Inc.*, the court considered the relevance of a single employer or joint employer analysis in a case for gender discrimination under Title VII, the Minnesota Human Rights Act, the Family and Medical Leave Act, and the Minnesota Parenting Leave Act.[195] A single employer relationship is defined where there are two entities that are normally separate are really an integrated enterprise, so that there is a single employer for all litigation purposes.[196] In contrast, a joint employment relationship does not involve a single integrated enterprise, but instead a joint employer assumes that there are separate entities in existence but those entities have decided to operate particular features of their employer-employee relationships jointly.[197]

Upon applying the four factors for a joint employment relationship, the court held that while no single factor is controlling, because one employer supplied services to the other the interrelation of operations prong of the test was satisfied.[198] Second, common management was defined by having members of the board of directors in common between both entities.[199] Third, the centralized control of labor relations prong was satisfied by the overlap between departments, and the shared responsibilities when making hiring decisions.[200] Fourth, common ownership was present among all of the defendants.[201]

States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers. 42 U.S.C. §2000e (b).

194. *Baker*, 560 F.2d at 392.

195. Scheidecker v. Arvig Enterprises, Inc., 122 F. Supp. 2d 1031, 1035 (D. Minn. 2000).

196. NLRB v. Browning-Ferris Indus. of Pennsylvania, Inc., 691 F.2d 1117, 1122 (3rd Cir. 1982).

197. *Id.*

198. *Scheidecker*, 122 F.Supp. 2d at 1038.

199. *Id.*

200. *Id.* at 1039. *See also* Trevino v. Celanese Corp., 701 F.2d 397, 404 (5th Cir. 1983) (implying that the third prong of the analysis is the most

In the context of the NFL, the organization itself has now decided to take an active role in monitoring who is hired and interviewed for head coaching positions. While the league is not monitoring the day-to-day activities, they may be exerting enough control in the initial hiring aspect to create liability if African-American candidates are discriminated against. The interrelation of operations prong of the analysis may be satisfied because of the creation of the Committee on Workplace Diversity by Paul Tagliabue on October 31, 2002.[202] The individual teams are adhering to the principles set forth by the Committee, and the individual NFL teams are incorporating the recommendations of the Committee into their employment practices.[203]

In addition, the common management prong of the test may be satisfied because Paul Tagliabue is enforcing fines on individual NFL teams for breaking the Committee's policies as demonstrated by the $200,000 fine to the Detroit Lions in July of 2003.[204] While Paul Tagliabue is not in actual control of each team, he does have the power to supervise the hiring procedures of each team, and levy fines with the sanction of the NFL as a whole. Third, the centralized control of the labor relations prong of the analysis may be satisfied by Paul Tagliabue's increased role in the organization, and his creation of the Committee is comprised of four owners of NFL teams,[205] and is assisted by NFL club executives.[206] Because all of the members of the Committee are current NFL team owners and NFL team executives, and because the Committee decisions are being enforced in principal, the group may be considered a centralized point of labor relations in the NFL organization.[207] Specifically, the Committee has created the

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significant).

201. *Id.*

202. *NFL clubs to promote diversity program, supra* note 34.

203. *Id.*

204. Associated Press, *supra* note 13.

205. The owners of NFL teams who also participate on the Diversity Committee include Dan Rooney owner of the Pittsburgh Steelers, Arthur Blank owner of the Atlanta Falcons, Stan Kroenke owner of the St. Louis Rams, and Pat Bowlen owner of the Denver Broncos. *NFL clubs to promote diversity program, supra* note 34.

206. The participating executives include Ray Anderson of the Atlanta Falcons, Terry Bradway of the New York Jet's, Bill Polan of the Indianapolis Colts, and Rich McKay of the Tampa Bay Buccaneers. *NFL clubs to promote diversity program, supra* note 34.

207. *NFL clubs to promote diversity program, supra* note 34.

Rooney Rule, changed the former anti-tampering policy in the NFL, and have complied a detailed information book describing prospective head coach candidates.[208] Finally, the Committee is implementing a training program that places the most qualified candidates in the front office positions.[209] Fourth, while the common ownership prong of the analysis may be weak, because the Commissioner of the league and the Committee are excessively entangled with the supervision of the hiring process, these entities may in a sense be considered "common owners"[210] under the test for joint employment.

In addition, the application of statistical analysis to discrimination litigation is useful. Generally, it is believed that the absence of discriminatory hiring practices will produce a work-force that more or less represents the ethnic composition of the population as a whole.[211] In 2000, there were 9 openings for head coaching positions, yet zero African-American coaches were hired.[212] The total number of head coaches in the league at the time was thirty-one, yet only two were black.[213] In 2001, there were six openings for the head coaching position.[214] One black coach was hired, Herman Edwards, took the position with the New York Jets.[215] However the total number of head coaching positions was thirty-two, and the total number of black coaches was only three.[216] In 2002, there were seven openings.[217] Only one black coach was hired, Tony Dungy, who accepted a position with the Indianapolis Colts.[218] However, the total number of coaches in the NFL was thirty-two, but there were only two black coaches overall when Dungy was hired.[219]

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208. *Id.*
209. *Id.*
210. *Scheidecker*, 122 F.Supp. 2d at 1038.
211. Michael J. Zimmer ET AL, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION (5th ed. 2000).
212. Cochran, *supra* note 17, at E-1.
213. *Id.*
214. *Id.* at E-2.
215. *Id.* at E-3.
216. Cochran, *supra* note 17, at E-2.
217. *Id.* at E-3.
218. *Id.* at E-4.
219. *Id.* at E-3. As of September 5, 2002 there are three African-American head coaches. *Id.* at D-1.

A potential pool of African-American candidates for the head coaching position can be comprised of current major head coaches, former head coaches and professional assistants in the NFL.[220] As of September 5, 2002 there are three black head coaches, five former black head coaches, and nine professional assistant coaches.[221] Also, the potential pool of coaches could be comprised of active and former college head coaches and professional assistants.[222] As of August 30, 2002 there were six current mid-major head coaches, eleven former head coaches, nine professional assistants and twenty two college assistants who all possessed significant coaching experience that would allow them to be qualified candidates for an NFL head coaching position.[223]

Because the Court did not find an evidentiary problem with the submission of the Attorney General's evidence in *Hazelwood*, and only found that the lower court erred because it refused to allow the school district the opportunity to rebut the evidence, in a potential claim against the NFL this statistical evidence would be persuasive and useful in promoting a systematic disparate impact claim. Also, as the *Hazelwood* case instructs, the defendant-employer must be allowed to rebut the plaintiff's evidence with their own evidence or the decision risks being remanded to the trial court by an appellate court.[224]

An employment pool in a case of racial discrimination against the NFL could consist of current NFL assistant coaches, current college Division I coaches, and current NFL players. In the context of the *Hazelwood* decision, each employment pool could be considered a "qualified" pool because the proper racial comparison is between the racial composition of the NFL head coaching staff, and the racial composition of the qualified head coaching pools in the labor market.[225] Assistant coaches, college coaches and NFL players are all equipped with the fundamental knowledge and playing experience necessary to coach a football team from the head coaching standpoint. The Supreme Court in *Hazelwood* only disapproved of the use of statistics when the lower court relied on statistics comparing the number of African-

220. Cochran, *supra* note 17, at D-1.
221. *Id.*
222. *Id.*
223. *Id.* at D-2–D-3.
224. *Hazelwood*, 433 U.S. at 310-13.
225. *Id.* at 308-09.

American teachers to the number of African-American students in the population.[226] As the *Hazelwood* Court pointed out, this comparison is irrelevant, and the essential focus was between the composition of the teaching staff in the school and the qualified labor market.[227]

The application of statistical analysis to discrimination in the National Football League would aid litigation, and bolster a potential plaintiff's case against the league and the individual team. Using binomial distribution starts with the statement of the Null hypothesis.[228] Binomial distribution is a statistical method used to decide whether to reject the Null hypothesis. If it can no longer be said that the employers does not discriminate, then it is possible to draw the legal inference that the employers did discriminate.[229] Binominal distribution compares the number of minority coaches in the NFL, the "O", with the total number of NFL coaches, the "N", in light of the probability –the "P"—of how many are expected, given their representation in the qualified labor pool from which NFL coaches can be expected to be chosen.[230] The formula, $Z = (O-NP) / \quad (NP (1-P))$, is a method of deciding whether to reject the Null hypothesis stated in terms of numbers of standard deviation.[231] If the number of standard deviations is greater than two, then the Null hypothesis is rejected and there is discrimination in the workforce.[232]

In the context of the NFL, the percentage of current coaches as the employment pool will set the standard to be expected in the workforce. Then if the number of deviations from the standard is greater than two, then the Null hypothesis—the assumption that there is no discrimination in the workforce—is rejected.[233] Currently, there are three black head coaches, and thirty-two total head coaches in the NFL. In the formula: the "O", the observed number of African-American

226. *Id.* at 304-05.
227. *Id.* at 308-09. *See also Teamsters*, 431 U.S. at 337-38 (where the Court looked at the racial composition of the line drivers employed in the company, and the racial composition of other workers employed at the company to determine if there was system wide discrimination).
228. Zimmer, *supra* note 211, at 253.
229. *Id.*
230. *Id.* at 260.
231. *Id.*
232. Zimmer, *supra* note 211, at 259.
233. *Id.* at 259. The equation to determine the number of standard deviations is $Z = O - NP / \sqrt{(NP (1-P))}$. *Id.* at 260.

head coaches in the NFL is three, and the "N", the total number of coaches in the NFL is 32. Thus, 9.375% of the current head-coaching workforce is African-American.[234]

In addition, only 28% of assistant coaches are African-American.[235] Thus, when these statistics are applied to determine the number of standard deviations, the number of NFL assistants compared to the number of NFL head coaches, and the number of players in the NFL compared to the number of head coaches, the results indicate a high number of deviations from the standard. Specifically, $Z = O\text{-}NP$ / $(NP(1\text{-}P)) = 3\text{-}(32 * .28)$ / $(32 * .28)(1\text{-}.28) = \text{-}2.07626$.[236] Therefore, the chance that the discrimination in the league is due to mere chance is rejected. In fact, it is highly unlikely that the consistent discrimination against African-American candidates for the head coaching position is mere chance. Therefore, when looking at assistant coaches as a qualified employment pool, the Null hypothesis is rejected and there is discrimination in the workforce.

Also, as of December 1, 2003, the present number of Division I college head coaches who are black is five, out of a total of one hundred and seventeen college football programs.[237] Therefore, the percentage of African-American head coaches in Division I football is 4.273%.[238] Similarly, when these statistics are applied to determine the

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234. In this equation and the following equations, Z will equal the number of standard deviations. O will be 3, which is the current number of black coaches in the NFL. N is 32, the total number of coaches in the NFL. Here, P is the percentage of the employment pool for current head coaches that are black (9.375%). Therefore, $Z = O\text{-}NP / (\sqrt{}(NP(1\text{-}P)) = 3 - (32 * 0.09375) / \sqrt{}(32 * 0.09375)(1 - 0.09375) = 0$.

235. Cochran, *supra* note 17, at 1.

236. The number of standard deviations from the norm for black assistant coaches in the NFL is: $Z = O\text{-}NP / (\sqrt{}(NP(1\text{-}P)) = 3 - (32 * .28) / \sqrt{}(32 * .28)(1 - .28) = -5.96 / \sqrt{8.24} = -5.96 / 2.87054 = -2.07626$.

237. *Croom accepts Mississippi State post, makes SEC history* (December 1, 2003), *available at* http://cbs.sportsline.com/collegefootball/story/6883397. Specifically, in December of 2003, Sylvester Croom became the first African-American head coach in the Southeastern Conference. *Id.* During the 2003 season, there were only four other African-American head coaches out of one hundred and seventeen Division 1-A football schools. *Id.* Regarding the hiring policies at the college level, Jesse Jackson commented that while Croom's hiring is a positive step to foster the hiring of minorities, the SEC is still slow to hire minorities in the athletic director and university president positions. *Id.*

238. *Id.* There are 5 black head coaches currently in Division I football. *Id.* There are 117 total football programs. $5/117 = .04273 * 100\% = 4.273\%$.

number of standard deviations, the number of African-American head coaches at the college level compared to the number of NFL head coaches, and the number of players in the NFL compared to the number of head coaches, the results indicate deviation from the standard, but that deviation falls slightly short of two, which would be needed to show discrimination in the employment pool.

Specifically, Z = O-NP / (NP (1-P)) = 3-(32 * .04273) / (32*.04273)(1-.04273) = 1.42703.[239] Consequently, the likelihood that the discrimination in the league is due to mere chance is not rejected. Therefore, in when looking at Division I African-American coaches as a qualified employment pool, the Null hypothesis is not rejected and there is the chance that there is no discrimination present in the workforce. For the Null hypothesis to be rejected, the number of standard deviations, "Z", must be two or greater. In this case, the numbers fall slightly short of indicating discrimination in this employment pool.

Finally, seventy percent of the players in the NFL are African-American.[240] After applying the formula to determine the number of standard deviations, the number of African-American players in the NFL, compared to the number of NFL head coaches, and the number of players in the NFL compared to the number of head coaches, the results indicate a high number of deviations from the standard.[241] Specifically, Z = O-NP / (NP (1-P)) = 3-(32 * .70) / (32*.70)(1-.70) = -13.66342.[242] Therefore, the chance that the discrimination in the league is due to mere chance is rejected once again. In fact, it is even more unlikely that the consistent discrimination against African-American candidates for the head coaching position is mere chance. Therefore, when looking at NFL players as a qualified employment

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239. The number of standard deviations from the norm for black college coaches in Division I is: Z = O-NP / (√ (NP (1-P)) = 3 - (32 * .04273) / √ (32 * .04273) (1 - .04273) = 1.63264 / √ (1.36736 * .95727) = 1.63264 / 1.14408 = 1.42703.

240. Cochran, *supra* note 17, at 1.

241. The number of standard deviations from the norm for black players in the NFL is: Z = O-NP / (√(NP (1-P)) = 3 - (32 * .70) / √ (32 * .70) (1 - .70) = -7.48370.

242. The number of standard deviations from the norm for black assistant coaches in the NFL is: Z = O-NP / (√(NP (1-P)) = 3 – (32 * .70) / √ (32 * .70) (1 - .70) = -19.4 / √ (22.4 * 3) = 19.4 / 1.41985 = -13.66342.

pool, the Null hypothesis is rejected and there is discrimination in the workforce.

In the context of the National Football League, Cochran and Mehri have examined the first year season records of all coaches in the NFL, the overall season records, the final year season records of coaches who were terminated, and the season records for all NFL teams who had African-American coaches.[243] African-American coaches in the NFL average 1.1 more wins on average per season than their white counterparts.[244] African-American coaches send their teams to the playoffs 67% of the time, which is 28% higher than white coaches.[245] In their first season coaching, African-American coaches win 2.7 more times on average, and in their final season they win an average of 1.3 more games than similarly terminated white coaches.[246] These results have led Dr. Janice Madden,[247] a Professor of Sociology at the University of Pennsylvania, to conclude that African-American coaches are consistently outperforming their white counterparts.[248] Specifically, Madden states,

> [This] data [is] consistent with blacks having to be better coaches than the whites in order to get a job as a head coach in the NFL. The small number of black coaches is likely not to be just a pipeline problem. The black coach candidates in the pipeline seem to be held to a higher standard in the [NFL].[249]

Cochran and Mehri have clearly demonstrated that the statistical results of their study indicate that African-American coaches in the NFL have consistently outperformed their white counterparts,[250] and have been involuntarily terminated more than less successful white head coaches.[251]

243. Cochran, *supra* note 17, at 1-4.
244. *Id.* at ii.
245. *Id.*
246. *Id.*
247. Cochran, *supra* note 17, at B-4. Dr. Madden focuses her research on the effects of race and gender in employment decisions. *Id.*
248. *Id.* at 6.
249. *Id.*
250. *Id.* at 1-4.
251. Cochran, *supra* note 17, at 1-4.

IV. CONCLUSION

It has yet to be seen if the responses to the racially discriminatory hiring practices in the National Football league will remedy the larger problem of race discrimination, or if the modifications made through the Committee on Workplace Diversity are simply cosmetic changes. Even though the NFL has only agreed to adopt these changes *in practice,* this decision is a good first step. The problem of institutionalized discrimination must be addressed and the league itself must be constantly assessed and re-evaluated to combat the problem of employment discrimination. However, there is always an obvious fear that NFL owners and teams will not takes the changes suggested by the Diversity Committee seriously. In the future, it may just be considered a cost of doing business to accept a $200,000 or $500,000 fine for failing to interview a minority coach because white owners may still want to hire the white candidate despite the negative press and current sensitivity to employment discrimination in the NFL.

The coaching decisions will still be made by white owners who utilize the "short list" to make interview selections.[252] The "short list," by its very nature, will overlook highly qualified candidates. Thus, a team owner or team managers wishing, consciously or subconsciously, to overlook a black candidate could hide behind the principle that many other qualified applicants of all races were left off of the "short list."[253] Also, the list making process is highly connected with the comfort-factor described earlier: oftentimes white owners will look to hire white candidates simply because they are unfamiliar with and have little exposure to minority candidates.[254] The Rooney Rule will start to chip away at the absence of minorities in the interview round for the position, but many minority candidates feel that the mandatory interview is just part of a "dog-and-pony" show aimed at interviewing a minority applicant to satisfy the rule and that the team has no real intention of hiring the candidate.[255]

Thus, the practices of the NFL and the individual owners continue to severely inhibit a minority applicant from breaking through the "glass ceiling" in the NFL to achieve a high level of success in a

252. Moye, *supra* note 88, at 130-32.
253. *Id.*
254. Cochran, *supra* note 17, at 13.
255. Associated Press, *supra* note 13.

head coaching position. In sum, Title VII can be an effective tool to advance an employment discrimination claim against the NFL under a discriminatory treatment theory, both individual and systemic.

However, some academics have claimed that Title VII lawsuits have arguable effects in an institutionalized discrimination setting. In *Targeting Workplace Context: Title VII as a Tool for Institutional Reform* Professor Tristin Green specifically examines the effect of Title VII lawsuits as a method for change with employment and workplace discrimination.[256] Green suggests the most effective way to correct discriminatory practices is to first recognize larger patterns of employment discrimination, and determine why the structure of the organization creates discrimination.[257] Most importantly Green points out that, "implementation of meaningful organizational change will require intensive self-assessment and commitment to reform, in many cases commitment that must sustained over a long period of time."[258]

Thus, the best way to prevent employment discrimination in the National Football League would be to continue identifying, addressing, and restructuring the barriers that exist in the NFL's hiring practices. The Diversity Committee has begun to take affirmative measures for change, but these steps do not solve the problem, instead they should be viewed as a first step in modifying the racially discriminatory institution present in the NFL.

A bypassed candidate may have alternative forms of dispute resolution to aid their suit, if litigation is not the most viable avenue. Arbitration is an alternative that would allow the parties to come to an amicable resolution outside of the court room. In the meantime, the NFL should focus on the four types of affirmative action routes that can be pursued in the sports industry. First, there should be a focused and serious effort to recruit members of the minority communities into the front office and executive level positions.[259] Second, diversity training should be, if it is not already, a requirement in all aspects of the National Football League.[260] Third, the employment practices which

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256. Green, *supra* note 48, at 660-62.
257. *Id.* at 668-69.
258. *Id.* at 672.
259. Shropshire, *supra* note 64, at 465-66.
260. *Id.*

lead to employment discrimination in the institution should be modified and restructured.[261] Finally, there should be preferential hiring and promotion of persons who are part of a minority group.[262]

Erin Scanga[*]

261. *Id.*
262. *Id.*

* *Juris Doctorate* Candidate, Seton Hall University School of Law, anticipated degree conferred May 2005. Bachelor of Arts, African and African-American Studies, University of Chicago, 2001.