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# Do you Believe He Can Fly? Royce White and Reasonable Accommodations Under the Americans with Disabilities Act for NBA Players with Anxiety Disorder and Fear of Flying

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# Do You Believe He Can Fly? Royce White and Reasonable Accommodations Under the Americans with Disabilities Act for NBA Players with Anxiety Disorder and Fear of Flying

Michael A. McCann\*

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*“Every mental illness has triggers, those triggers are like allergies. If you[‘re] allergic to sand, you probably don’t play a lot of volleyball[.]”*  
- Royce White, September 24, 2012<sup>1</sup>

I. ROYCE WHITE, THE NBA DRAFT, AND LIFE AND FLIGHTS AS AN NBA PLAYER

In June 2012, it was widely expected that Iowa State forward Royce White would be drafted in the first round of the 2012 NBA draft.<sup>2</sup> There was much to like about the twenty-one-year-old red-shirt sophomore. White was the only Division I basketball player in 2011–2012 to lead his team in points, rebounds,

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1. Royce White, @Highway\_30, TWITTER (Sept. 24, 2012, 5:38 PM), [https://twitter.com/Highway\\_30/status/250393914366910465](https://twitter.com/Highway_30/status/250393914366910465).

2. See Jonathan Givony, *Y! Sports/DraftExpress 2012 NBA Mock Draft No.1: Updated*, YAHOO! SPORTS (June 28, 2012, 6:57 PM), <http://sports.yahoo.com/news/y-sports-draftexpress-2012-nba-mock-draft-no-200300177--nba.html>; (reporting that the Boston Celtics, with the twenty-first and twenty-second picks, had serious interest in White); Gary Washburn, *Still Flashing a Hot Hand, Riley Put It All Together*, BOSTON GLOBE (June 24, 2012), [http://www.boston.com/sports/basketball/articles/2012/06/24/still\\_flashing\\_a\\_hot\\_hand\\_riley\\_put\\_it\\_all\\_together/](http://www.boston.com/sports/basketball/articles/2012/06/24/still_flashing_a_hot_hand_riley_put_it_all_together/) (noting that Celtics may have made a pre-draft promise to White that if he was available at twenty-one, they would pick him).

assists, steals, and blocked shots.<sup>3</sup> Scouts were fascinated by White's unique blend of point guard and power forward skills.<sup>4</sup> Based purely on talent, he probably would have been a top ten—possibly even top five—pick in the sixty-selection annual draft.<sup>5</sup> It would have been a meaningful achievement in his basketball career. NBA teams select the employment rights of players through the draft and players can only sign with the team that drafts them.<sup>6</sup> Players selected in the first round (picks one to thirty) receive guaranteed two-year contracts (with team options for a third and fourth year), while players selected in the second round (picks thirty-one to sixty) typically receive non-guaranteed contracts for the league minimum.<sup>7</sup>

Talent, however, is not the only consideration for draft status. Unfortunately for White, "other issues" downgraded his projected draft status and in turn cost him a considerable amount of money.<sup>8</sup> The difference between being a top ten pick and one picked later in the first round is far more than a matter of pride. The NBA employs a fixed rookie wage scale where salaries are steeply slotted based on when a player is drafted.<sup>9</sup> The player picked tenth in the 2012 NBA draft, for instance, was slotted to receive a contract worth \$4.6 million guaranteed over the next two years; the player selected twentieth was slotted to obtain \$2.8 million guaranteed over that time, or about sixty percent of what the player taken tenth will earn.<sup>10</sup> If White had fallen to the second round, he would have been poised to sign for the league minimum for rookie players, \$473,604.<sup>11</sup>

3. Pablo S. Torre, *The Mystery Pick Is Royce White*, SPORTS ILLUSTRATED, July 2, 2012, at 10, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1200858/1/index.htm>.

4. *Id.*

5. Nick Menta, *Royce White Will Fly, but That Isn't Really the Issue*, CSNPHILLY.COM (July 7, 2013, 10:00 AM), <http://www.csnphilly.com/basketball-philadelphia-sixers/royce-white-will-fly-isnt-really-issue>.

6. See Glenn M. Wong et al., *Going Pro in Sports: Providing Guidance to Student-Athletes in a Complicated Legal & Regulatory Environment*, 28 CARDOZO ARTS & ENT. L.J. 553, 563–64 (2011) (explaining how players drafted in the NBA and NFL drafts can only play with the team that drafts them for at least one year, depending on how many years they have left in college).

7. See *2012–13 NBA Rookie Salary Scale*, HOOPSWORLD, <http://www.hoopsworld.com/2012-13-rookie-salary-scale> (last visited Oct. 21, 2013). For a complete and definitive discussion on the NBA salary structure, see Larry Coon, *Larry Coon's NBA Salary Cap FAQ*, CBFAQ.COM (September 7, 2013), <http://www.cbfaq.com/salarycap.htm>.

8. See Menta, *supra* note 5.

9. See *2012–13 NBA Rookie Salary Scale*, *supra* note 7.

10. See *id.*

11. See *NBA Minimum Salaries*, HOOPSWORLD, <http://www.hoopsworld.com/nba-minimum-salaries> (last visited Oct. 21, 2013).

To be sure, no matter when White was drafted, he was almost assuredly set to become “wealthy” by any objective metric. According to the United States Census Bureau, median household income in the United States is \$49,445, and lower for those who—like White—are under age thirty or without college degrees.<sup>12</sup> Even more telling, the annual median wage in the United States is \$26,364.<sup>13</sup> On the other hand, the average NBA career lasts just four to five years, and many players struggle in the transition from a high-paying NBA career to alternative, lasting employment.<sup>14</sup> NBA players, like many pro athletes, tend to earn a great deal of money but only over a short window of time relative to the typical American who works on average forty-four years and generally has steadier earning power.<sup>15</sup>

Fortunately for White, his fall ended when the Houston Rockets selected him with the sixteenth pick.<sup>16</sup> Shortly thereafter, the team signed him to a contract worth a guaranteed \$3.5 million over the next two years.<sup>17</sup> While White will thus receive a sizable amount of money, it is significantly less than what he would have received had his draft status not been clouded by “other issues.” Moreover, as explained below, those same issues have already impaired his NBA career. So what are these issues?

First, there are questions about White’s character and law-abidingness. These stem primarily from a shoplifting incident in 2009 that led him to plead guilty to theft and disorderly conduct.<sup>18</sup> To White’s credit, he has avoided trouble in recent years and seems to have matured.<sup>19</sup> It does not appear White’s draft position was impacted much, if at all, by his past run-ins with the law.

12. *Income, Poverty and Health Insurance Coverage in the United States: 2010*, U.S. CENSUS BUREAU (Sept. 13, 2011), [http://www.census.gov/newsroom/releases/archives/income\\_wealth/cb11-157.html](http://www.census.gov/newsroom/releases/archives/income_wealth/cb11-157.html).

13. Jillian Berman, *U.S. Median Annual Wage Falls to \$26,364 As Pessimism Reaches 10-Year High*, HUFFINGTON POST (Jan. 23, 2012), [http://www.huffingtonpost.com/2011/10/20/us-incomes-falling-as-optimism-reaches-10-year-low\\_n\\_1022118.html](http://www.huffingtonpost.com/2011/10/20/us-incomes-falling-as-optimism-reaches-10-year-low_n_1022118.html).

14. See Ariel Sandler, *NBA Players Must Accept an Unfair Deal or Miss Out on an Entire Basketball Season*, BUS. INSIDER (Nov. 7, 2011, 7:07 PM), <http://www.businessinsider.com/nba-lockout-deal-2011-11> (noting that “[t]he average NBA career lasts between four and five years”).

15. SUSAN FEITELBERG, *THE NET WORTH WORKOUT 2* (2006) (“The average U.S. citizen works 44 years, then retires with a \$46,000 net worth, excluding home equity.” (footnote omitted)).

16. See Menta, *supra* note 5.

17. See *Houston Rockets Team Salary*, HOOPSWORLD, <http://www.hoopsworld.com/houston-rockets-team-salary/> (last visited Oct. 21, 2013).

18. See Jerry Zgoda, *The Many Shades of Royce White*, STARTRIB., June 24, 2012, at 1C, available at [www.startribune.com/sports/wolves/160135455.html](http://www.startribune.com/sports/wolves/160135455.html).

19. See Torre, *supra* note 3.

The second concern appears more salient and is also more interesting from a legal perspective. White suffers from generalized anxiety disorder (“GAD”) and obsessive compulsive disorder (“OCD”).<sup>20</sup> At their core, both disorders describe vulnerability to unfounded and, in some cases, debilitating worries.<sup>21</sup> More specifically, GAD refers to “persistent, excessive, and unrealistic worries about everyday”<sup>22</sup> occurrences, while OCD leads to ritualistic behaviors and routines as ways to mollify anxiety.<sup>23</sup> Approximately sixteen percent of Americans suffer from these and related anxiety disorders.<sup>24</sup>

Complications from anxiety disorders emerge in many forms, including through demonstrably physical symptoms such as episodic sleeplessness and panic attacks, and through situational-specific phobias, including fear of heights, escalators, or dental procedures.<sup>25</sup> These situational occurrences are often referred to as “triggers.”<sup>26</sup> Triggers are circumstances which stimulate unusual anxiety and related conditions.<sup>27</sup> Relatively common triggers include profuse sweating, chest pains, and shortness of breath.<sup>28</sup> Triggers vary by individuals, at least one of whom can excel at playing basketball in front of thousands of people—including screaming fans and caustic hecklers—but suffers panic attacks while at airports and on airplanes.<sup>29</sup>

White encounters several complications of anxiety disorder—with a severe fear of flying being the most problematic for an NBA career.<sup>30</sup> Outside of

20. *See id.*

21. *Understanding the Facts of Anxiety Disorders and Depression Is the First Step*. ADAA, <http://www.adaa.org/understanding-anxiety> (last visited Oct. 18, 2013).

22. *Generalized Anxiety Disorder (GAD)*, ADAA, <https://www.adaa.org/print/understanding-anxiety/generalized-anxiety-disorder-gad> (last visited Oct. 18, 2013).

23. *Obsessive-Compulsive Disorder (OCD)*, ADAA, <http://www.adaa.org/print/understanding-anxiety/obsessive-compulsive-disorder-ocd> (last visited Oct. 18, 2013).

24. Jennifer Jolly-Ryan, *The Last Taboo: Breaking Law Students with Mental Illnesses and Disabilities Out of the Stigma Straitjacket*, 79 UMKC L. REV. 123, 132–33 (2010).

25. GERIATRIC MENTAL HEALTH FOUND., ANXIETY AND OLDER ADULTS (2009), available at <http://www.gmhfonline.org/gmhf/consumer/factsheets/anxietybrochure.pdf>.

26. John C. Allen, *Cognitive Behavioural Therapy: An Effective Treatment for Bipolar Disorder*, MENTAL HEALTH (Nov. 29, 2009), <http://goarticles.com/article/Cognitive-Behavioural-Therapy-An-Effective-Treatment-for-Bipolar-Disorder/5427520/>.

27. GERIATRIC MENTAL HEALTH FOUND., *supra* note 25.

28. *Id.*

29. Jill Martin Wrenn, *NBA Rookie Royce White Battles Anxiety Disorder and Fear of Flying*, CNN (Oct. 9, 2012, 5:03 PM), <http://www.cnn.com/2012/10/09/living/royce-white-anxiety/index.html>.

30. *Id.*; see also David Aldridge, *White, Rockets Working Together to Overcome His Mental Illness*, NBA (Oct. 9, 2012, 1:12 AM), [http://www.nba.com/2012/news/features/david\\_aldrIDGE/10/08/morning-tip-rooting-for-rockets-royce-white/index.html](http://www.nba.com/2012/news/features/david_aldrIDGE/10/08/morning-tip-rooting-for-rockets-royce-white/index.html) (interviewing White about his anxiety).

telling *NBA.com*'s David Aldridge that he is taking a form of Prozac and seeing doctors, and telling *USA Today*'s Jeff Zillgitt he has tried Benadryl and Xanax without success, White's treatments have not been made public.<sup>31</sup> Anxiety disorder, however, is frequently treated by psychological counseling.<sup>32</sup> Anti-anxiety medication is sometimes also prescribed (though these medicines usually must be taken for a prolonged period of time to be efficacious and they are often accompanied by unwanted side effects—e.g., weight gain, insomnia, fatigue—especially when taken with other medicines).<sup>33</sup> Some persons afflicted with anxiety disorder have also turned to hypnosis and “[e]xposure-therapy programs” where persons, who fear flying, for instance, are exposed to flying incrementally.<sup>34</sup> Whichever treatments White has pursued, they have not resolved his anxiety disorder and fear of flying.<sup>35</sup>

White has plenty of company in his fear of flights. As many as forty percent of Americans have a fear of flying, which is sometimes called aviophobia.<sup>36</sup> The American Psychological Association estimates that between ten and twenty-five percent of Americans suffer from aviophobia, some with severe afflictions.<sup>37</sup> While this particular fear could emerge for numerous

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about panic attacks).

31. See Aldridge, *supra* note 30; Jeff Zillgitt, *Royce White Battles for Mental Health—His and Others*, USA TODAY (Feb. 11, 2013, 4:29 PM), <http://www.usatoday.com/story/sports/nba/2013/02/08/royce-white-houston-rockets-anxiety-disorder/1890421/>.

32. *Generalized Anxiety Disorder: Treatment and Drugs*, MAYO CLINIC (Sept. 8, 2011), <http://www.mayoclinic.com/health/generalized-anxiety-disorder/DS00502/DSECTION=treatments-and-drugs>.

33. Martin N. Seif, *How Can I Overcome My Fear of Flying?*, ADAA, <http://www.adaa.org/living-with-anxiety/ask-and-learn/ask-expert/how-can-i-overcome-my-fear-of-flying> (last visited Oct. 21, 2013).

34. See Tim Murphy, *For Fear of Flying, Therapy Takes to the Skies*, N.Y. TIMES, July 24, 2007, at F6, available at [http://www.nytimes.com/2007/07/24/health/psychology/24fear.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2007/07/24/health/psychology/24fear.html?pagewanted=all&_r=0) (noting that “[s]everal studies have found up to 40 percent of people have some” fear of flying); see also Shawn P. Cahill & Edna B. Foa, *PTSD: Treatment Efficacy and Future Directions*, PSYCHIATRIC TIMES (Mar. 1, 2007), <http://www.psychiatrictimes.com/articles/ptsd-treatment-efficacy-and-future-directions/page/0/3> (“Exposure therapy is a set of treatment procedures designed to help individuals confront feared but safe thoughts, situations, objects, people, places, or activities that elicit anxiety or are otherwise avoided because they are perceived as dangerous by patients.”).

35. See Aldridge, *supra* note 30.

36. See Katie Johnston Chase, *Fright Cancellation*, BOSTON GLOBE (June 26, 2009), at Business 5.

37. Barbara Olasov Rothbaum et al., *A Controlled Study of Virtual Reality Exposure Therapy for the Fear of Flying*, 68 J. OF CONSULTING & CLINICAL PSYCHOL. 1020, 1020 (2000); see Shahreen Abedin, *Seeing Crash Reports Can Worsen Flying Phobia*, CNN (Feb. 13, 2009), [http://articles.cnn.com/2009-02-13/health/flying.phobia.crashes\\_1\\_crash-plane-phobia?\\_s=PM:HEA](http://articles.cnn.com/2009-02-13/health/flying.phobia.crashes_1_crash-plane-phobia?_s=PM:HEA)

reasons, typical ones include having a negative flight experience, fearing crashes, and fearing terrorism.<sup>38</sup> Claustrophobia, acrophobia (fear of heights), and mysophobia (fear of germs) are less obvious causes.<sup>39</sup> Thirty-five million American adults—about nine percent of the United States population—categorically refuse to fly.<sup>40</sup>

White is also not alone in pursuing a career as a professional athlete while afflicted with an anxiety disorder. Some have excelled in spite of their condition. Consider Los Angeles Dodgers pitcher Zack Greinke who is one of the best pitchers in baseball.<sup>41</sup> He suffers from social anxiety disorder.<sup>42</sup> Greinke's disorder is similar to GAD, but is brought on by extreme worries about being scrutinized rather than by—as with GAD—generalized worries or concerns about situations unrelated to evaluation (e.g., flying on planes, ascending to heights).<sup>43</sup> Greinke, thirty years old, has managed his social anxiety disorder to the point where he has earned \$40 million in his big league career and is about to earn much more: in December 2012, he signed a guaranteed six-year, \$147 million contract with the Dodgers.<sup>44</sup>

LTH. *But see* Murphy, *supra* note 34.

38. See Patricia Pearson, *Things to Fear and Loathe*, N.Y. TIMES (Mar. 3, 2012), at 6, available at [http://opinionator.blogs.nytimes.com/2012/03/03/things-to-fear-and-loathe/?\\_r=0](http://opinionator.blogs.nytimes.com/2012/03/03/things-to-fear-and-loathe/?_r=0).

39. *Id.*

40. See *Fear of Flight—Why People Have the Fear of Flying & Afraid to Fly*, E-MEDICAL GUILD, <http://www.emedicalguild.com/fear-of-flight-why-people-have-the-fear-of-flying-afraid-to-fly/> (last visited Oct. 21, 2013).

41. See Chris Stephens, *Clayton Kershaw-Zack Greinke Is Now MLB's Best Pitching Duo*, BLEACHER REP. (Aug. 22, 2013), <http://bleacherreport.com/articles/1747438-clayton-kershaw-zack-greinke-is-now-mlbs-best-pitching-duo>.

42. See Joe Posnanski, *Zack Greinke Is in Total Control*, SI.COM (May 4, 2009), available at [http://sportsillustrated.cnn.com/2009/writers/joe\\_posnanski/04/28/zack\\_greinke/index.html](http://sportsillustrated.cnn.com/2009/writers/joe_posnanski/04/28/zack_greinke/index.html) (detailing Greinke's condition); see also Ann Cannon, *Ann Cannon: Let Mentally Ill Know They're Not Alone*, SALT LAKE TRIB. (Sept. 2, 2011), <http://www.sltrib.com/sltrib/news/52507909-78/mental-nami-illness-alone.html.csp> (discussing Greinke effectively treating his anxiety disorder through therapy and anti-depressants). In December 2012, Greinke signed a six-year, \$147 million contract with the Dodgers. See Joe Lemire, *Dodgers Win Greinke Sweepstakes*, SI.COM (Dec. 9, 2012), [http://sportsillustrated.cnn.com/2012/writers/joe\\_lemire/12/08/dodgers-greinke/index.html](http://sportsillustrated.cnn.com/2012/writers/joe_lemire/12/08/dodgers-greinke/index.html).

43. *Differences Between Social Anxiety and Panic Disorder*, SOCIAL ANXIETY INST., <http://www.socialanxietyinstitute.org/diff.html> (discussing social anxiety disorder and distinguishing it from other anxiety disorders) (last visited Oct. 21, 2013). Of all the major professional sports leagues, Major League Baseball appears to have encountered the most instances of players with anxiety disorders and related conditions. See Pablo S. Torre, *A Light in the Darkness*, Sports Illustrated, June 21, 2010, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1170866/index.htm>. It has also developed effective strategies for promoting counseling. *Id.*

44. See Lemire, *supra* note 42; see also, *Zack Greinke Player Page*, BASEBALL REFERENCE, <http://www.baseball-reference.com/players/g/greinza01.shtml> (last visited Oct. 21, 2013) (indicating



Severe fear of flying, by contrast, appears to be a much more limiting, or at least less treatable, condition for athletes. Jackie Jensen, a right fielder for the Boston Red Sox and the 1958 American League Most Valuable Player, prematurely ended his career because he found flying too frightening.<sup>45</sup> Professional boxer Andrew Golota, who won a bronze medal in the 1988 Olympic Games in Seoul and fought four times for the world heavyweight title, is thought to have suffered professionally because of his fear of flying.<sup>46</sup> Several notable coaches, including the legendary John Madden as well as former NBA coach Doug Moe, have also acknowledged a debilitating form of this fear.<sup>47</sup>

Despite White's anxiety over flying, he usually showed a willingness to fly for road games while in college.<sup>48</sup> In the 2011–2012 season, he flew to Italy, as part of a team tour, and on all but three of Iowa State's road trips.<sup>49</sup> When he did not fly, his grandfather drove him.<sup>50</sup> White did not miss a game because of his fear of flying.<sup>51</sup>

But playing in the NBA requires more flights and much more time in the air. NBA players, who play roughly three times as many games as college basketball players, fly regularly from October to May.<sup>52</sup> While the number of

Greinke's past earnings).

45. See Donald H. Stone, *The Game of Pleasant Diversion: Can We Level the Playing Field for the Disabled Athlete and Maintain the National Pastime, in the Aftermath of PGA Tour, Inc. v. Martin: An Empirical Study of the Disabled Athlete*, 79 ST. JOHN'S L. REV. 377, 387–88 (2005); see also, Jack O'Connell, *Not Always an Easy Transition*, COURANT, Feb. 1, 2004, at E10, available at [http://articles.courant.com/2004-02-01/sports/0402010809\\_1\\_baseball-purists-super-bowl-drew-henson](http://articles.courant.com/2004-02-01/sports/0402010809_1_baseball-purists-super-bowl-drew-henson) (providing additional detail).

46. Bernard Fernandez, *Mental Mistakes Keeping Golota from Boxing Heights*, PITTSBURGH POST-GAZETTE, Oct. 21, 2000, at D1, available at <http://search.proquest.com.lib.pepperdine.edu/docview/391291823/1407CB906B6136F1D85/2?accountid=13159>.

47. See Mary Billard, *Driving; a Rush Play for Madden: Coast to Coast in 50 Hours*, N.Y. TIMES, Oct. 18, 2002, at F1, available at <http://www.nytimes.com/2002/10/18/travel/driving-a-rush-play-for-madden-coast-to-coast-in-50-hours.html> (discussing John Madden); Joanne Davidson, *Local Stars Shine at Premiere*, DENVER POST, July 25, 1997, at E.04, available at <http://search.proquest.com.lib.pepperdine.edu/docview/410548909/1407CBCD558C68B2C8/1?accountid=13159> (discussing Doug Moe).

48. Scott Howard-Cooper, *Fear of Flying Could Ground Player's Chances for First Round*, NBA (Apr. 10, 2012, 10:27 AM), [http://www.nba.com/2012/news/features/scott\\_howard\\_cooper/04/10/royce-white/index.html](http://www.nba.com/2012/news/features/scott_howard_cooper/04/10/royce-white/index.html).

49. *Id.*

50. *Id.*

51. See Torre, *supra* note 3.

52. Stephen French, *Mile High Clubbin': What Really Happens on NBA Team Flights*, BLEACHER REP. (Mar. 4, 2013), <http://bleacherreport.com/articles/1553117-mile-high-clubbin-what-really-happens-on-nba-team-flights> ("NBA teams play 41 road games per season, which equates to a couple hundred hours of airtime with the same group of people.").

flights vary based on a team's schedule and where a team plays, the typical player flew about sixty times during the 2012–2013 NBA season.<sup>53</sup> For its part, the Rockets fly more often than most NBA teams, with ninety-eight flights during the 2012–2013 NBA season.<sup>54</sup> Some of those flights were cross-country, others into Canada. Some NBA players are even required to fly to Europe to participate in exhibition games.<sup>55</sup> It is difficult to envision a full-time NBA career for a person who is unable or unwilling to fly on airplanes.

## II. ROYCE WHITE'S NBA CAREER: DELAYED, WITH NO TAKEOFF IN SIGHT

Initially, White seemed capable of traveling by plane to advance his NBA career. A couple of weeks after the 2012 NBA Draft, White accompanied his new teammates by flight to Las Vegas to play for the Rockets' summer league team.<sup>56</sup> The summer league is mainly for rookie players to become acclimated to the NBA style of play and for free agent players to impress their way onto an NBA roster—established NBA players usually do not participate.<sup>57</sup> While the quality of play and talent in summer leagues is demonstrably less than that found in a regular season—or even preseason—NBA game, it is still a helpful barometer for a player transitioning from the college game to the pros.<sup>58</sup>

For White, the summer league was also an opportunity to prove wrong the teams that passed on him. At the time, he insisted teams had undervalued him in part because they misunderstood general anxiety disorder.<sup>59</sup> He thought they regarded it, and its complications, as problems of attitude—and, by implication,

53. This is based on my conversations with several NBA personnel. See also Randy Peterson, *Royce White: 'Hell, No' I Won't Make 100 NBA Flights*, USA TODAY (July 10, 2013, 9:51 PM), <http://www.usatoday.com/story/sports/nba/2013/07/10/royce-white-philadelphia-76ers-anxiety/2507525/> (explaining that the Rockets could make up to 100 flights during the upcoming season).

54. See Zillgitt, *supra* note 31.

55. See Wysy, *Celtics Coming to a City Near (and Far from) You*, SB NATION (June 25, 2012, 3:05 PM), <http://www.celticsblog.com/2012/6/25/3116586/celtics-coming-to-a-city-near-and-far-from-you>.

56. Chris Duncan, *Top Rookie with Anxiety Issue Joins Rockets' Camp*, BIG STORY (Oct. 8, 2012), <http://bigstory.ap.org/article/top-rookie-anxiety-issue-joins-rockets-camp>.

57. Zach Lowe, *Youngsters Shining at Summer League*, SI.COM (July 19, 2012, 11:14 AM), <http://sportsillustrated.cnn.com/basketball/nba/blogs/nba-point-forward/2012/07/19/summer-league-rookie-impressions/>.

58. *Id.*

59. Gary Washburn, *Revamped 76ers Hope to Keep up with Pack*, BOSTON GLOBE, July 22, 2012, at C3, available at <http://www.bostonglobe.com/sports/2012/07/22/revamped-philadelphia-ers-try-keep-with-heavyweights/tmrcPI0FVsiT99mLhUXmN/story.html>.

borne through personal choice rather than compelled by brain chemistry.<sup>60</sup> Many who suffer from mental illness have argued the same core point about social biases about mental illness and the presumed “choice” they make to suffer.<sup>61</sup>

White’s performance on and off the court in the summer league made the Rockets look smart. On the court, White earned very positive reviews for his play and particular praise for his rebounding skills and so-called “mean streak.”<sup>62</sup> Off the court, White encountered no troubles and seemed accessible and friendly. A month later, he flew to New York City to attend the NBA’s rookie orientation program.<sup>63</sup> These promising early returns suggested that White’s fear of flying and anxiety issues would not derail his NBA career.

Circumstances changed dramatically, however, at the start of the Rockets’ training camp in October. White informed team officials that he needed assurances that he could travel by bus—at his own expense—for large portions of the team’s schedule.<sup>64</sup> So adamant about this request, White refused to show up for work until the Rockets agreed to his demand.<sup>65</sup> White made this ultimatum after consultation with his physician who, according to White, recommended that he avoid triggers of his anxiety disorder.<sup>66</sup> One of White’s major triggers is flying on planes.<sup>67</sup> It is unclear why White was able to fly by plane for the summer league and rookie orientation program but could not do the same for most regular season games.

60. *Id.*

61. See Katherine B. O’Keefe, *Protecting the Homeless Under Vulnerable Victim Sentencing Guidelines: An Alternative to Inclusion in Hate Crime Laws*, 52 WM. & MARY L. REV. 301, 314–15 (2010); see also KENT GREENFIELD, *THE MYTH OF CHOICE: PERSONAL RESPONSIBILITY IN A WORLD OF LIMITS* (2011) (analyzing how false presumptions of choice impact public policy and law); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004) (discussing the general tendency of humans to see their own situation and biological and social constraints on decision-making, but failing to see how other persons’ choices are similarly constrained).

62. Washburn, *supra* note 59.

63. See Duncan, *supra* note 56.

64. Jonathan Feigen, *White, Rockets Reach agreement; He’ll Rejoin Team Monday*, HOUS. CHRON. (Oct. 4, 2012, 11:13 PM), <http://blog.chron.com/ultimaterockets/2012/10/royce-white-finds-a-way-to-travel-without-anxiety/>.

65. Myron Medcalf, *Royce White Wants to Travel by Bus*, ESPN (Oct. 4, 2012), [http://espn.go.com/nba/story/\\_/fid/8459655/royce-white-absent-houston-rockets-cites-mental-health](http://espn.go.com/nba/story/_/fid/8459655/royce-white-absent-houston-rockets-cites-mental-health).

66. Myron Medcalf, *For Royce White, It’s a Matter of Trust*, ESPN (Oct. 5, 2012), [http://espn.go.com/nba/story/\\_/fid/8462144/nba-houston-rockets-royce-white-bus-request-matter-trust](http://espn.go.com/nba/story/_/fid/8462144/nba-houston-rockets-royce-white-bus-request-matter-trust).

67. Feigen, *supra* note 64.

After a week—during which White became the first rookie in the NBA’s sixty-seven-year history to hold out of training camp over travel conditions—the Rockets agreed that he could travel by bus for most games.<sup>68</sup> The team even offered to put the assurance in writing.<sup>69</sup> As explained below, however, the uniform player contract prohibits most types of amendments absent approval by the league and players’ association.<sup>70</sup> Although not in writing, the “good faith agreement” between the team and himself satisfied White, who returned to training camp.<sup>71</sup>

Losing a week of camp would hurt any rookie’s development, and White was no exception. Unable to catch up, White played sparingly for the Rockets in its four preseason games and he struggled in his limited time.<sup>72</sup> To be fair, White was far from alone among rookies in failing to instantly succeed against older, stronger, and more polished NBA players. A number of players drafted before him were also predictably outmatched.<sup>73</sup> Still, White failed to show the Rockets that he was ready to contribute at the start of the 2012–2013 NBA season and should not have had a realistic expectation of playing time.

As of this writing, White has yet to appear in a regular season NBA game. The Rockets did not play him in its first four games and then informed him and two other rookies (Scott Machado, who also had not played, and Donatas Motiejunas, who had played five minutes in one game) that they would soon be assigned to the Rockets’ minor league team, the Rio Grande Valley (Texas) Vipers of the NBA’s Developmental League.<sup>74</sup> An assignment in the “D League” would provide these rookies with playing time that they would not receive on the Rockets, one of the NBA’s more talented teams.<sup>75</sup> Importantly,

68. *Id.*

69. *Id.*

70. *See infra* Part III.B.1.

71. Ben Golliver, *White Calls out Rockets for ‘Inconsistent’ Support of His Health*, SI.COM (Nov. 13, 2012), <http://nba.si.com/2012/11/13/royce-white-rockets-anxiety-disorder/>.

72. In twelve minutes per game, White averaged just two points, two rebounds and shot a meager twenty-seven percent from the field. *See, NBA Stats*, REALGM BASKETBALL, [http://basketball.realgm.com/player/Royce-White/NBA/2542/2014/By\\_Split/Per\\_Game/Recent\\_Games/Preseason](http://basketball.realgm.com/player/Royce-White/NBA/2542/2014/By_Split/Per_Game/Recent_Games/Preseason) (last visited Oct. 20, 2013).

73. For example, Jeremy Lamb, drafted by Houston with the twelfth pick, averaged seventeen minutes and six points, shooting a mediocre thirty-eight percent from the field. *NBA Stats*, REALGM BASKETBALL, [http://basketball.realgm.com/player/Jeremy-Lamb/NBA/22394/2014/By\\_Split/Per\\_Game/Recent\\_Games/Preseason](http://basketball.realgm.com/player/Jeremy-Lamb/NBA/22394/2014/By_Split/Per_Game/Recent_Games/Preseason) (last visited Oct. 20, 2013).

74. Jonathan Feigen, *Rockets Seek Answers As White Goes Missing*, HOUS. CHRON. (Nov. 13, 2012, 2:10 PM), <http://blog.chron.com/ultimaterockets/2012/11/royce-white-absent-from-practice-sent-to-d-league-team-with-machado-motiejunas/>.

75. Jake Lapin, *Grading Every Position Heading into Houston Rockets Training Camp*,

they would still be paid their NBA salaries while on the Vipers.<sup>76</sup> While undoubtedly disappointing news, the three rookies could commiserate with several other teams' rookies (including the Boston Celtics' Fab Melo, who like White was a 2012 first round pick).<sup>77</sup> Strictly in terms of travel, the assignment to the Vipers would have benefited White. The Vipers' schedule calls for most of its games to be played regionally and mostly within driving distance (the Vipers' first ten games are being played in Hidalgo, Texas; Tulsa, Oklahoma; Reno, Nevada; and Bakersfield, California).<sup>78</sup>

White did not take the news well. In response, he skipped practice and refused to report to any team activities, including practice.<sup>79</sup> The Rockets suspended him without pay for refusal to report.<sup>80</sup> For the next two months, while White remained away from his employment, he argued—mainly through Twitter—that the Rockets were punishing him for his mental health issues and that a neutral physician should determine if he plays.<sup>81</sup> He also asserted the team strategically shared misinformation with the media about his condition.<sup>82</sup> For instance, on November 14, 2012 he tweeted, “I’m not saying anything inappropriate or anything thats [sic] wasn’t said or OMITTED by the organization, they have their media, this is mine.”<sup>83</sup>

On January 23, 2013, White and the Rockets reached a mental health protocol that ensured a neutral mental health expert would have input in White’s employment with the Rockets.<sup>84</sup> White then reported to the Vipers and would

BLEACHER REP. (Sept. 22, 2013), <http://bleacherreport.com/articles/1783248-grading-every-position-heading-into-houston-rockets-training-camp>.

76. *NBA D-League FAQs*, NBA D-LEAGUE, [http://www.nba.com/dleague/santacruz/dleague\\_faqs.html](http://www.nba.com/dleague/santacruz/dleague_faqs.html) (last visited Oct. 21, 2013).

77. Kevin Scheitrum, *The Dev Report: Week Three*, NBA D-LEAGUE (Nov. 19, 2012), [http://www.nba.com/dleague/news/the\\_dev\\_report\\_2012\\_11\\_19.html](http://www.nba.com/dleague/news/the_dev_report_2012_11_19.html).

78. *Vipers 2012–13 Schedule*, NBA D-LEAGUE, <http://www.nba.com/dleague/riograndevalley/schedule/> (last visited Oct. 21, 2013).

79. Jonathan Feigen, *Rockets Fining White Each Day He Stays Away*, HOUS. CHRON. (Nov. 14 2012, 9:59 AM), <http://blog.chron.com/ultimaterockets/2012/11/lack-of-playing-time-one-of-issues-in-royce-white-conflict-with-rockets/>.

80. Dan Favale, *Royce White’s Twitter Explosion Hurts Him More Than It Hurts Rockets*, BLEACHER REP. (Nov. 16, 2012), <http://bleacherreport.com/articles/1411872-royce-whites-twitter-explosion-hurts-him-more-than-its-hurts-rockets>.

81. Ben Golliver, *Report: Royce White, Rockets Close to Agreement on Mental Health Treatment*, SI.COM (Jan. 23, 2013), <http://nba.si.com/2013/01/23/royce-white-rockets-agreement-return/>.

82. See Feigen, *supra* note 79.

83. Royce White, @Highway\_30, TWITTER (Nov. 14, 2012, 3:09 PM), [https://twitter.com/Highway\\_30/status/268853199081984000](https://twitter.com/Highway_30/status/268853199081984000).

84. See Golliver, *supra* note 81.

play for about two months.<sup>85</sup> During this time, White played in fourteen games and played reasonably well, averaging ten points (on forty-three percent shooting from the field) and six rebounds in twenty-five minutes per game.<sup>86</sup> As a Viper, White traveled by car to games (including a sixty-eight-hour round trip by RV for two games on March 1 and 2, 2013 in Hidalgo, Texas and Santa Cruz, California).<sup>87</sup> White then left the Vipers in the middle of March 2013, telling media the “hectic” playoff schedule would not be compatible with his mental health.<sup>88</sup> He also asserted he reached this conclusion with the advice of a physician.<sup>89</sup> He then returned to the Vipers in late March 2013, only to leave and then return again.<sup>90</sup> He played in four more games, his last on April 6.<sup>91</sup> Despite playing his best basketball of the season, White did not play in the Vipers’ remaining six regular season games or in the team’s playoff games.<sup>92</sup>

In July 2013, the Rockets traded White to the Philadelphia 76ers.<sup>93</sup> The move marked a new beginning for White, whom 76ers general manager Sam Hinkie described as “wildly talented.”<sup>94</sup> Geographically, the 76ers were a good fit. Three of the 76ers’ four Atlantic Division rivals (Knicks, Nets and Celtics) play within reasonable drives from Philadelphia and most of the 76ers’ fourteen

85. *Royce White Player Profile*, REALGM, <http://basketball.realgm.com/player/Royce-White/Summary/2542> (last visited Oct. 21, 2013).

86. *NBA Development League: Royce White Playerfile*, NBA D-LEAGUE, [http://www.nba.com/dleague/playerfile/royce\\_white/index.html?nav=page](http://www.nba.com/dleague/playerfile/royce_white/index.html?nav=page) (last visited Oct. 21, 2013).

87. Jesse Dorsey, *Royce White Makes 68-Hour Roundtrip RV Ride for 2 D-League Games*, BLEACHER REP. (Mar. 4, 2013), <http://bleacherreport.com/articles/1552492-royce-white-makes-68-hour-roundtrip-rv-ride-for-one-d-league-game>.

88. Jonathan Feigen, *Royce White Returns to D-League, but Does Not Plan to Stay for Long*, HOUS. CHRON. (Mar. 27, 2013, 11:56 AM), <http://blog.chron.com/ultimaterockets/2013/03/royce-white-returns-to-d-league-but-does-not-plan-to-stay-for-long/>.

89. *Id.*

90. Jonathan Feigen, *Royce White to Return to D-League, Vipers*, HOUS. CHRON. (Mar. 25, 2013, 1:49 PM), <http://blog.chron.com/ultimaterockets/2013/03/royce-white-to-return-to-d-league-vipers/>.

91. Jonathan Feigen, *Ohlbrecht Sent to Vipers; White to Sit Out D-League Playoffs*, HOUS. CHRON. (April 9, 2013, 12:51 PM), <http://blog.chron.com/ultimaterockets/2013/04/ohlbrecht-sent-to-vipers-white-to-sit-out-d-league-playoffs/>.

92. See Michael Rand, *How Much Will Skipping D-League Playoffs Hurt Royce White?*, STARTRIB. (May 1, 2013, 2:39 PM), <http://www.startribune.com/sports/blogs/205648111.html>.

93. Ben Golliver, *Reports: Rockets Agree to Trade Royce White to Sixers*, SI.COM (July 6, 2013), <http://nba.si.com/2013/07/06/royce-white-trade-houston-rockets-philadelphia-sixers/>.

94. Jason Wolf, *Royce White Ready for Second Chance*, USA TODAY (Oct. 11, 2013), <http://www.usatoday.com/story/sports/nba/76ers/2013/10/10/royce-white-philadelphia-76ers-nba-preseason/2963337/>.

Eastern Conference rivals play within lengthy, but plausible drives. While he would still need to fly for games out west, White would be able to drive to more of his team's games as a 76er than he could as a Rocket.

The 76ers also seemed like a positive match for White because they projected to be one of the worst teams in the 2013-14 NBA season.<sup>95</sup> As a 76er, White was poised to compete for regular minutes—a far cry from playing for the talented Rockets. With regular minutes, White could develop a routine that helped his mental state.

White's career with the 76ers never took off. He did not accompany the team on a preseason trip to Spain in early October 2013, a decision that he and team officials described as mutual.<sup>96</sup> He later played in five preseason games and received significant playing time—19 minutes per game—but struggled with his shooting, frequently turned the ball over and averaged only five points per game.<sup>97</sup> The Rockets released White before the start of the regular season, thereby denying him the chance of playing in his first regular season NBA game.<sup>98</sup> White's contract is guaranteed, meaning he will be paid \$1.7 million during the 2013-14 season.<sup>99</sup> As of this publication, however, White has not signed with another professional basketball team. He insists that air travel is not, and has never been, an obstacle to an NBA career. On December 3, 2013, White tweeted, "I've always said I was willing to fly."<sup>100</sup>

White's frequent use of Twitter (@Highway\_30) has played an important role in how he explains his health challenges and their impact on his employment. He uses Twitter to directly communicate with the public about his disorder and basketball career.<sup>101</sup> White has over 445,000 followers—more followers than any other player drafted before White in the 2012 NBA Draft, save for Anthony Davis, the number one overall pick<sup>102</sup>—and the number of his

95. In October 2013, *Grantland's* Zach Lowe went so far to say of the 76ers, "This is barely an NBA team." Zach Lowe, *The King's Court*, GRANTLAND (Oct. 8, 2013), [http://www.grantland.com/story/\\_/id/9790038/ranking-nba-tiers-power-2013-14-season](http://www.grantland.com/story/_/id/9790038/ranking-nba-tiers-power-2013-14-season).

96. *Id.*

97. *Royce White Player Profile*, REAL GM, <http://www1.realgm.com/player/Royce-White/Summary/2542> (last visited, Dec. 7, 2013).

98. Ben Golliver, *Reports: Sixers Released Royce White*, SI.COM (Oct. 24, 2013), <http://nba.si.com/2013/10/24/royce-white-released-cut-waived-philadelphia-76ers/>. As White's contract is guaranteed, he will still be paid \$1.7 million by the 76ers during the 2013-14 season. *Id.*

99. *Id.*

100. Royce White, @Highway\_30, TWITTER (Dec. 3, 2013), [https://twitter.com/Highway\\_30/status/407951803737591808](https://twitter.com/Highway_30/status/407951803737591808).

101. Royce White, @Highway\_30, TWITTER (Nov. 15, 2012), [https://twitter.com/Highway\\_30/](https://twitter.com/Highway_30/).

102. Research by author on June 1, 2013, surveying the Twitter accounts of the following players: Anthony Davis, Michael Kidd-Gilchrist, Bradley Beal, Dion Waiters, Thomas Robinson,

tweets can exceed sixty on any given day.<sup>103</sup> He also frequently responds to, or re-tweets, tweets from his followers who say they too suffer from anxiety disorder.<sup>104</sup> White, in fact, has become something of a Twitter champion for anxiety disorder awareness and how the disorder disrupts careers and everyday life.<sup>105</sup> He has even developed a Twitter hashtag—#anxietytroopers—for those afflicted with anxiety disorder to communicate, commiserate, and organize.<sup>106</sup>

To his credit, White is also remarkably responsive and thick-skinned on Twitter. He routinely responds, politely, to criticisms from those who contend he has embellished his illness. White has also engaged this author on Twitter, including comments responding to an earlier draft of this article that White downloaded from SSRN. In his tweets to this author, White maintains that mental health protocols are essential for him to play in the NBA.<sup>107</sup>

### III. ROYCE WHITE'S ANXIETY DISORDER AND THE AMERICANS WITH DISABILITIES ACT

Should White resume his NBA career, he may request from his team substantial accommodations as a condition of employment. The following analysis considers how White could seek such accommodations, and the same framework would likely be true for future NBA players with GAD or OCD.

The easiest way for White (or a similar player) to receive accommodations would be for White's team to voluntarily provide them. Should the team not do so, White and his agent would likely seek formal assistance from the National Basketball Players' Association ("NBPA"). The NBPA is White's exclusive representative and the entity with which the NBA must negotiate the terms and conditions of all players' employment.<sup>108</sup> Those terms are detailed in their collective bargaining agreement ("CBA").<sup>109</sup>

Damian Lillard, Harrison Barnes, Terrence Ross, Andre Drummond, Austin Rivers, Meyers Leonard, Jeremy Lamb, Kendall Marshall, John Henson, and Maurice Harkless.

103. See, e.g., Royce White, @Highway\_30, TWITTER (Nov. 15, 2012), [https://twitter.com/Highway\\_30/](https://twitter.com/Highway_30/). For example, on November 15, 2012, White tweeted sixty-seven times. *Id.* In many cases, they were re-tweets of other tweets. *Id.*

104. See Royce White, @Highway\_30, TWITTER (Sept. 28, 2013), <https://twitter.com/MayhemTheTruth/status/384008609685725184>.

105. *Id.*

106. See Royce White, @Highway\_30, TWITTER (Sept. 7, 2012, 11:24 AM), <https://twitter.com/search?q=%23AnxietyTroopers&src=hash&f=realtime>.

107. See Royce White, @Highway\_30, TWITTER (Mar. 25, 2012, 10:27 AM), [https://twitter.com/Highway\\_30/status/316239914045935617](https://twitter.com/Highway_30/status/316239914045935617); see also *infra* Part III.B.1.

108. See generally Wood v. NBA, 809 F.2d 954, 959 (2d Cir. 1987).

109. NBA, *CBA 101: Highlights of the Collective Bargaining Agreement Between the National*



White, however, would not be obligated to seek representation from the NBPA in this particular matter. Although a minority of federal circuits have found that a union member's claims under the ADA must be brought through grievance procedures contained in the CBA,<sup>110</sup> the United States Court of Appeals for the Fifth Circuit (where White would bring any lawsuit) has not. The Supreme Court of the United States, moreover, made clear in *Wright v. Universal Maritime Service Corporation* that federal courts are preferable to arbitration for ADA claims.<sup>111</sup>

Still, it is traditional for NBA players to seek assistance from the NBPA in employment disputes.<sup>112</sup> Assuming White did so, the NBPA and NBA would attempt to negotiate accommodations acceptable to both sides and in accordance with their CBA.<sup>113</sup>

If the NBPA and NBA could still not identify reasonable accommodations, White might seek recourse through the legal process. Specifically, he could file a charge of discrimination with the United States Equal Employment Opportunity Commission ("EEOC") against the team and NBA. The EEOC would likely try to mediate a resolution of the dispute.<sup>114</sup> If mediation fails, White would be poised to file a civil lawsuit against both the team and NBA.<sup>115</sup>

The idea of a player suing his team and league should not arouse disbelief. To be sure, professional athletes have traditionally eschewed the legal process to

*Basketball Associations (NBA) and the National Basketball Players Association (NBPA)* (Aug. 2010), available at [www.nba.com/element/mp3/2.0/sect/podcastmp3/PDF/CBA101.pdf](http://www.nba.com/element/mp3/2.0/sect/podcastmp3/PDF/CBA101.pdf). The NBA and NBPA agreed to a new CBA in 2011. See generally NBA, *CBA 101: Highlights of the 2011 Collective Bargaining Agreement Between the National Basketball Associations (NBA) and the National Basketball Players Association (NBPA)* (Sept. 2012), available at [http://www.nba.com/media/CBA101\\_9.12.pdf](http://www.nba.com/media/CBA101_9.12.pdf). At the time this Article was written, the new CBA had not yet been made public, and changes in terms between the CBAs do not materially influence this Article's analysis.

110. See Daniel B. Moar, *Arbitrating Hate: Why Binding Arbitration of Discrimination Claims Is Appropriate for Union Members*, 10 DUQ. BUS. L.J. 47, 54 (2008) (discussing the Fourth Circuit); see also Jacob E. Tyler, *Mandatory Arbitration of Discrimination Claims Under Collective Bargaining Agreements: The Effect of Wright*, 4 HARV. NEGOT. L. REV. 253, 253 (1999) (Most federal circuits do not permit the requirement that employees first seek ADA claims through collectively-bargained arbitration provision.).

111. 525 U.S. 70, 78–79 (1998); see also David L. Gregory & Edward McNamara, *Mandatory Labor Arbitration of Statutory Claims, and the Future of Fair Employment: 14 Penn Plaza v. Pyett*, 19 CORNELL J. L. & PUB. POL'Y 429, 436 (2010) (discussing the Court's opinion).

112. *What We Do*, NBPA, <http://www.nbpa.org/what-we-do> (last visited Oct. 21, 2013).

113. *Id.*

114. The EEOC tries to mediate disputes before litigation is commenced. See *Questions and Answers for Parties to Mediation: Mediation and the Americans with Disabilities Act (ADA)*, EEOC, <http://www.eeoc.gov/eeoc/mediation/ada-parties.cfm> (last visited Oct. 21, 2013).

115. See *infra* Part III.B.2 (discussing EEOC process and its relationship to White).

remedy their disputes with teams and leagues.<sup>116</sup> But we are now in a more litigious era of professional athletics. This is best illustrated in *Vilma v. Goodell*<sup>117</sup> and in other potential litigation concerning “Bounty Gate.”<sup>118</sup> *In re NFL Players’ Concussion Injury Litigation*, which features thousands of retired NFL players suing the NFL over long-term neurological harm purportedly caused by playing in the NFL, is similarly illustrative.<sup>119</sup>

Potentially advantaging White in a legal dispute with the team and NBA would be an important interplay between federal labor law and disability law: a CBA cannot “contract around” the Americans with Disabilities Act (“ADA”).<sup>120</sup> Indeed, while collective bargaining largely insulates professional sports leagues from federal antitrust scrutiny, it offers no such exemption from the ADA.<sup>121</sup> White, in other words, has not lost ADA protections merely because he is a member of a players’ association and is otherwise bound by a CBA.

But does the ADA actually protect White in this matter? And if so, how? These general questions demand more specific ones. Namely, is White’s anxiety disorder and resulting fear of flying a disability under the law? Does the team have a legal obligation to accommodate him? Must they allow him to travel by automobile to all games played within driving distance? Must they also allow him to skip games played too far away? Even though he would not be “injured” or “suspended” in a conventional sense, would White be entitled to his full salary if he only plays, say, sixty-five games of a team’s eighty-two-game schedule? Would White and the NBA be best off if he played

116. See, e.g., *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) (golfer with leg disability sued PGA Tour alleging its rule banning golf carts violated the ADA).

117. 917 F. Supp. 2d 591 (E.D. La. 2013); see also, Michael McCann, *Why Vilma v. Goodell Is Much More Than Just a Defamation Lawsuit*, SI.COM (May 17, 2012), [http://sportsillustrated.cnn.com/2012/writers/michael\\_mccann/05/17/vilma.goodell.suit/index.html](http://sportsillustrated.cnn.com/2012/writers/michael_mccann/05/17/vilma.goodell.suit/index.html) (discussing the litigation and “Bounty Gate” scandal).

118. See Brett Martel, *NFL Denies Witness Retractions in Bounty Probe*, WASH. TIMES (June 21, 2012), <http://www.washingtontimes.com/news/2012/jun/21/nfl-denies-witness-retractions-in-bounty-probe/?page=all#pagebreak> (outlining potential for additional lawsuits related to Bounty Gate against NFL commissioner Roger Goodell and the NFL).

119. Master Administrative Class Action Complaint for Medical Monitoring, *In re NFL Players’ Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. Pa. June 7, 2012). For more information on the retired players’ litigation, see generally Paul D. Anderson, *NFL CONCUSSION LITIG.*, <http://nflconcussionlitigation.com/> (last visited Oct. 21, 2013).

120. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50 (1974) (finding CBA language cannot preclude an employee from filing a statutory discrimination claim in court).

121. See Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 742 (2010) (discussing labor exemption from Section 1 of the Sherman Act through collective bargaining).

professionally in a country where all games can be played within driving distance? These and related matters will be considered below.

### A. *The ADA, Anxiety Disorders and Fear of Flying*

The ADA is a federal law that, among other things, protects those with disabilities from employer discrimination.<sup>122</sup> Disabilities must be lasting and diagnosable; they must also substantially limit a “major life activity,” which refers to a day-to-day activity that the average person easily performs.<sup>123</sup> Walking, breathing, bathing and working are all major life activities.<sup>124</sup> If an employee’s disability and impact on a major life activity result in ADA protection, he or she is normally considered a “qualified employee.”<sup>125</sup> An employer must make “reasonable” accommodations to the work environment for a qualified employee to perform the essential functions of the employment.<sup>126</sup>

Case law is unfavorable for plaintiffs, who bring ADA claims arising from anxiety disorders, as courts often dismiss these claims for failure to prove a verifiable disability or for failure to show the disability sufficiently impaired the plaintiff.<sup>127</sup> The litigation record, however, is extremely limited, as anxiety disorders only comprise 2.7% of claims brought under the ADA.<sup>128</sup> Courts have

122. 42 U.S.C. §§ 12101–12213 (2012). For a thorough discussion of the ADA, see Jamie L. Ireland & Richard Bales, *Title II of the Americans with Disabilities Act of 1990 and Its Prohibition of Employment Discrimination*, 28 N. ILL. U. L. REV. 183 (2008).

123. See Stephen F. Befort, *Let’s Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the “Regarded As” Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993, 1016 (2010) (citations omitted).

124. *Id.* (citations omitted).

125. 42 U.S.C. § 12112(b)(5)(A) (2012).

126. *Id.*; see also Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. app. § 1630.2 (2012) (noting that workplace environment changes must ensure that “equal employment opportunities” are provided to the qualified employee).

127. Wendy F. Hensel & Gregory Todd Jones, *Bridging the Physical-Mental Gap: An Empirical Look at the Impact of Mental Illness Stigma on ADA Outcomes*, 73 TENN. L. REV. 47, 61 (2005); see, e.g., *Williams v. N.Y. State Dep’t of Labor*, No. 98 Civ. 3816(RMB), 2000 WL 33175735, at \* 9 (S.D.N.Y. May 25, 2000) (dismissing GAD as an insufficient impairment for the ADA). On the other hand, some courts have proven receptive to and courts have recognized other anxiety and stress-related disorders as disabilities. See John M. Casey, *From Agoraphobia to Xenophobia: Phobias and Other Anxiety Disorders Under the Americans with Disabilities Act*, 17 U. PUGET SOUND L. REV. 381, 390–97 (1994).

128. James Concannon, *Mind Matters: Mental Disability and the History and Future of the Americans with Disabilities Act*, 36 LAW & PSYCHOL. REV. 89, 106 (2012).

also consistently rejected ADA claims arising under OCD—usually because of a perceived failure to limit a major life activity.<sup>129</sup>

Anxiety-related ADA claims are especially difficult in the context of sports. For instance, in *Tatum v. NCAA*, a freshman basketball player deemed academically ineligible to play could not persuade a court that he suffered from a disability—even though a licensed psychologist had diagnosed him with GAD and test-taking phobia.<sup>130</sup> The court reasoned that a lack of motivation and habitual under-achievement probably better accounted for his test-taking difficulties.<sup>131</sup> Skepticism of mental health claims brought by athletes is arguably consistent with dispositional expectations of athletes—namely that they should not “make excuses.”<sup>132</sup>

Several courts have held that flying does not qualify as a major life activity—mainly because it arises infrequently.<sup>133</sup> But those cases did not involve flying as a common occurrence in one’s employment.<sup>134</sup> The Americans with Disabilities Act Amendments Act of 1998 (“ADAAA”), moreover, expressly notes that major life activities include operation of “major bodily functions,” a term defined to include respiratory functions.<sup>135</sup> Given that air travel causes White (and others) anxiousness and severe breathing problems, it

129. See, e.g., *Humphrey v. Mem’l Hosps. Ass’n*, 239 F.3d 1128, 1135 (9th Cir. 2001) (rejecting OCD as an ADA-qualified disability); *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1255 (10th Cir. 2001) (concluding OCD is not a disability under the ADA); see also Michelle Parikh, Note, *Burning the Candle at Both Ends, and There Is Nothing Left for Proof: The Americans with Disabilities Act’s Disservice to Persons with Mental Illness*, 89 CORNELL L. REV. 721, 745–50 (2004) (illustrating instances of employees with OCD unable to convince a court they have suffered a legal harm).

130. *Tatum v. NCAA*, 992 F. Supp. 1114, 1114, 1122–23 (E.D. Mo. 1998).

131. *Id.* at 1122–23; see also Maureen A. Weston, *Academic Standards or Discriminatory Hoops? Learning-Disabled Student-Athletes and the NCAA Initial Academic Eligibility Requirements*, 66 TENN. L. REV. 1049, 1082–83 (1999) (discussing the *Tatum* opinion and difficulties for NCAA in dealing with anxiety disorder in relationship to eligibility).

132. See Clete Samson, Comment, *No Time Like the Present: Why Recent Events Should Spur Congress to Enact a Sports Violence Act*, 37 ARIZ. ST. L.J. 949, 965–69 (2005) (describing unwritten athletes’ “code of conduct” to not file lawsuits for injuries as reflecting expectations for their toughness and resiliency).

133. See, e.g., *Bliss v. Nationwide Mut. Ins. Co.*, 2010 U.S. Dist. LEXIS 49028, at \*11–12 (W.D. Tex. Feb. 25, 2010) (“[A]n argument can be made that a phobia such as fear of flying is a temporary limitation which does not rise to the level of a disability.” (citations omitted)); *Cannizzaro v. Neiman Marcus, Inc.*, 979 F. Supp. 465, 476 (N.D. Tex. 1997) (holding that flying is not a major life activity for purposes of the ADA).

134. See generally sources cited *supra* note 133.

135. ADA Amendments Act of 2008, 42 U.S.C. § 12102(2)(B) (2012).

would seem that the ADAAA may protect him. Businesses have also acknowledged fear of flying as a likely disability under the ADA.<sup>136</sup>

### *B. Job Description: Essential Functions of an NBA Player*

The ADA only requires employers to enable qualified employees to perform the essential functions of their job.<sup>137</sup> Although “essential functions” are not defined by the ADA, its implementing regulations identify several guideposts. They include any description of functions contained in contracts and collective bargaining agreements, level of expertise required to perform a particular function, and whether the job exists to perform that function.<sup>138</sup> Whether air travel is an essential job duty for being an NBA player is crucial; if it is not, then a team would not have an obligation to make White reasonable accommodations under the ADA.

#### 1. Uniform Player Contract, Collective Bargaining Agreement, and NBA Scheduling

A primary approach to uncovering the essential functions of NBA employment is through the Uniform Player Contract (“Contract”), which, per the CBA, every player must sign in order to be eligible for employment.<sup>139</sup> With few exceptions (salary, off-season conduct), the seventeen-page contract cannot be modified.<sup>140</sup> The Contract stipulates that the team employs the player as a “skilled basketball player;”<sup>141</sup> the player represents he has “extraordinary and unique skill and ability as a basketball player;”<sup>142</sup> the player agrees to render

136. See, e.g., Terri M. Solomon & Katherine E. Bierma Pregel, *Fear of Flying? Addressing Employees' Concerns Regarding the Threat of Terrorism to Business Travel*, LITTLER (Aug. 23, 2006), <http://www.littler.com/publication-press/publication/fear-flying-addressing-employees-concerns-regarding-threat-terrorism-b> (“In some instances, including where an employee suffers from a stress-related disability involving the fear of flying, employers may in fact be required by the Americans With Disabilities Act (ADA) or corresponding state laws to consider an employee’s reasonable request for accommodation, such as telecommuting or participating in meetings via teleconference.”).

137. See *supra* note 126 and accompanying text.

138. See ADA Regulations, 29 C.F.R. § 1630.2(n)(2) (2012).

139. 2005 Collective Bargaining Agreement art. II, § 1 (stating that a player contract must be a Uniform Player Contract).

140. 2005 Collective Bargaining Agreement art. II, § 2(a) (“Except as provided in [several other CBA sections] . . . no amendments to the form of Uniform Player Contract . . . shall be permitted.”).

141. 2005 Collective Bargaining Agreement Ex. A, § 1.

142. 2005 Collective Bargaining Agreement Ex. A, § 9.

services both for games scheduled<sup>143</sup> and for team or league promotional and civic activities;<sup>144</sup> the player agrees to give his “best services;”<sup>145</sup> unless the result of playing basketball, the player can be suspended for failing to keep himself in “good physical condition;”<sup>146</sup> and the player must provide the team “prompt notice” of any health condition that will affect his ability to render services.<sup>147</sup> The team can terminate a player’s contract if he fails to keep himself in “first class physical condition” and fails to show “competitive ability” to play NBA basketball.<sup>148</sup> Other than reference to the team paying for a player’s travel expenses, the Contract does not directly address travel.<sup>149</sup>

The Contract makes clear that a player assents to competitively and skillfully playing scheduled games.<sup>150</sup> In addition to preseason and potential postseason games, eighty-two regular season games are scheduled over a seven-month period and are played in twenty-two states and one Canadian province (with the farthest distance between venues—Portland, Oregon and Miami, Florida—2700 miles).<sup>151</sup> Therefore, an essential function of NBA player employment is clearly playing with a high level of talent and effort in games that are located in venues far apart.

White’s anxiety problems do not interfere with his ability to play in these games or in the partaking of other, non-travel team activities (e.g., practice, meetings).<sup>152</sup> His situation is therefore distinguishable from that of pro golfer Casey Martin, who suffers from a serious leg condition known as Klippel Trenaunay Weber syndrome.<sup>153</sup> In 1997, Martin sued the PGA, which refused to exempt him from a competition rule prohibiting golfers from using carts.<sup>154</sup> Four years later, the Supreme Court of the United States sided with Martin that

143. 2005 Collective Bargaining Agreement Ex. A, § 2.

144. 2005 Collective Bargaining Agreement Ex. A, § 13(d).

145. 2005 Collective Bargaining Agreement Ex. A, § 5(b).

146. 2005 Collective Bargaining Agreement Ex. A, § 7(b).

147. 2005 Collective Bargaining Agreement Ex. A, § 7(d).

148. 2005 Collective Bargaining Agreement Ex. A, § 16(a).

149. 2005 Collective Bargaining Agreement Ex. A, § 4.

150. 2005 Collective Bargaining Agreement Ex. A, § 2.

151. See *Calculate Distance Between NBA Teams*, SPORTS MAP WORLD, <http://www.sportmapworld.com/map/basketball/north-america/nba/> (last visited Oct. 23, 2013).

152. See *supra* note 29.

153. See Paul M. Anderson, *A Cart That Accommodates: Using Case Law to Understand the ADA, Sports, and Casey Martin*, 1 VA. SPORTS & ENT. L.J. 211, 238 (2002) (describing how Martin’s condition not only causes him pain when walking, but also increases his chances for blood-clots and hemorrhaging by walking).

154. See *generally* PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).

it was a reasonable accommodation under the ADA for him to use a cart.<sup>155</sup> White, in contrast, does not need an accommodation to perform the essential function of playing basketball. His limitation is, quite literally, getting to work and back home. Given the NBA's schedule, it would appear that a corollary function of White's employment as an NBA player is travel. If correct, White could argue that he deserves an accommodation for travel.

This would be a problematic conclusion for White and his NBA team, however, because the NBA schedule effectively necessitates air travel for some scheduled games. For instance, the Rockets played the Portland Trailblazers in Portland, Oregon (Rose Garden Arena) on Friday, April 5, 2013 at 9 PM (PST).<sup>156</sup> Considering that the average NBA game takes two and half hours, and players then shower and have postgame meetings for another hour; Rockets players could not leave the Rose Garden until around 12:30 AM (PST).<sup>157</sup> Their next game was later that same day—Saturday, April 6, 2013—in Denver, Colorado (Pepsi Center) where they took on the Denver Rockets at 9 PM (ET).<sup>158</sup> At 12:30 AM (PST), they had about 20.5 hours to get to the Pepsi Center. If they were packed and ready to go at 12:30 AM, it is conceivable they could make it before tip-off. The drive would take them between 18 and 19 hours.<sup>159</sup> They would have had to sleep on the bus, however, and even a modest traffic delay could have caused them to miss the game and forfeit. Also, teams normally arrive at their arenas at least three or four hours before tip-off for pregame meetings and sessions with trainers.<sup>160</sup> In other words, for all practical purposes, the Rockets *had to fly* to meet their scheduling obligations on April 5 and 6.

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155. *Id.* at 690. In a surprising turn of events, Martin (now a golf coach at the University of Oregon) has qualified for the 2012 U.S. Open. See Michael Bamberger, *This Time Around, Few Would Deny Casey Martin a Ride at the Open*, GOLF.COM (June 11, 2012), <http://www.golf.com/tour-and-news/casey-martin-play-us-open-cart-14-years-after-legal-battles>.

156. See *Rockets Schedule & Results*, NBA.COM, <http://www.nba.com/rockets/schedule> (last visited Oct. 23, 2013).

157. See John Tanasychuk, *For Fans, It's Heat and Eat*, SUNSENTINEL, Apr. 23, 2005, [http://articles.sun-sentinel.com/2005-04-23/news/0504230138\\_1\\_bubba-gump-restaurant-heat-game](http://articles.sun-sentinel.com/2005-04-23/news/0504230138_1_bubba-gump-restaurant-heat-game) (noting average playing time of NBA games is two hours and fifteen minutes; there is also a fifteen-minute halftime).

158. *Rockets at Nuggets*, NBA, <http://www.nba.com/games/20130406/HOUDEN/gameinfo.html> (last visited Oct. 23, 2013).

159. See *Driving Directions from Rose Garden, Portland, OR to the Pepsi Center, Chopper Circle, Denver, CO*, GOOGLE MAPS, *available at*, <http://tinyurl.com/d5sut8c> (last visited Oct. 23, 2013).

160. Tim Roye, *Life on the Road*, NBA.COM, [http://www.nba.com/warriors/news/Life\\_On\\_The\\_Road.html](http://www.nba.com/warriors/news/Life_On_The_Road.html) (last visited Oct. 23, 2013).

## 2. Case Law Involving NBA Players and Essential Job Functions: Roy Tarpley and Cuttino Mobley

Although the NBA has existed since 1946,<sup>161</sup> there is sparse evidence of the league encountering legal disputes over the essential job functions of NBA players. Two disputes, however, shed some light.

In 2006, forty-two-year-old Roy Tarpley—twice banned from the NBA (1991 and 1995) for violating league alcohol and drug policies—filed a charge of discrimination against the NBA with the Equal Employment Opportunity Commission (“EEOC”).<sup>162</sup> The filing of an EEOC charge is a required step before a person can sue under the ADA for certain types of discrimination.<sup>163</sup> Even though the NBA had no obligation under the CBA to provide him a third chance, Tarpley claimed the league was acting in a “clearly discriminatory and cruel” way when it denied his request in 2003.<sup>164</sup> Through drug tests and witness testimonials, Tarpley insisted he could show he had not abused for several years.<sup>165</sup> Boosting Tarpley’s argument was the ADA’s protection of alcoholics and drug addicts from discrimination, provided they are not currently abusing substances.<sup>166</sup> He also benefited from the fact that a CBA cannot “contract around” the ADA.<sup>167</sup> Indeed, while collective bargaining largely insulates professional sports leagues from federal antitrust scrutiny, it offers no such exemption from the ADA.<sup>168</sup>

161. Sam Goldaper, *The First Game*, NBA, [http://www.nba.com/history/firstgame\\_feature.html](http://www.nba.com/history/firstgame_feature.html) (last visited Oct. 23, 2013).

162. EEOC Charge No. 460-2006-04831, July 20, 2006 (on file with author). For additional information and analysis of Roy Tarpley’s legal dispute with the NBA, see Michael McCann, *Roy Tarpley, Addiction, and the American with Disabilities Act*, SPORTS L. BLOG (Aug. 3, 2007), <http://sports-law.blogspot.com/2007/08/roy-tarpley-addiction-and-american-with.html>; Robin L. Muir, *Drunk or Disabled? The Legal and Social Consequences of Roy Tarpley’s Discrimination Claim Against the NBA*, 15 VILL. SPORTS & ENT. L.J. 333 (2008).

163. 42 U.S.C. § 12117(a) (2012); see also Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213 (2003) (discussing relationship between ADA litigation and the EEOC).

164. See EEOC Charge, *supra* note 162.

165. *Id.*

166. See *Questions and Answers: Employment*, ADA.GOV (Dec. 29, 2005), <http://www.ada.gov/employtm.htm>.

167. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59–60 (1974) (holding the CBA language cannot preclude an employee from filing a statutory discrimination claim in court).

168. See Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 740–42 (2010) (discussing labor exemption from Section 1 of the Sherman Act through collective bargaining).



Finding reasonable cause that the NBA violated Tarpley's rights under the ADA, the EEOC granted Tarpley a right to sue letter.<sup>169</sup> Although a right to sue letter is not required for filing a lawsuit, it places the claimant in an advantaged position, particularly in settlement talks.<sup>170</sup> In *Tarpley v. NBA*, Tarpley argued before a federal court in Texas that the NBA and Mavericks' refusal to reinstate him in 2003 was unlawful and he was owed \$6.5 million in damages.<sup>171</sup>

Before any substantive rulings, the NBA and Mavericks agreed to pay Tarpley an undisclosed amount of money to drop his lawsuit.<sup>172</sup> The settlement drew rebuke from those who believed the law should not have protected Tarpley. One outraged headline read "*Roy Tarpley Steals Even More Mavericks' Money*," while its accompanying story lamented, "*His only disability was a lack of will power to say no.*"<sup>173</sup> Had the parties gone to trial, the essential functions of NBA player employment—and Tarpley's ability to perform them—would have emerged as key issues. Early court filings and associated commentary suggest that Tarpley would have argued that essential functions included not only the ability to play NBA basketball, but also the capability of being a role model.<sup>174</sup>

Tarpley would have struggled to prove that he was qualified to perform the function of playing in the NBA. By 2003, Tarpley had not played in the NBA for eight years or organized basketball for three years, and while he enjoyed considerable success playing in Europe from 1995 to 2000, he did so against inferior talent.<sup>175</sup> There is also no record of an NBA player missing eight seasons and then returning to the league. Tarpley, moreover, was thirty-eight years old when he applied for reinstatement.<sup>176</sup> At that time, the average age of

169. See EEOC Charge, *supra* note 162.

170. Robert A. Kearney, *Who's "In Charge" at the EEOC?*, 50 DRAKE L. REV. 1, 24–26 (2001).

171. *Tarpley v. NBA*, No. 4:07-cv-03132 (S.D. Tex. Sept. 26, 2007); see also Muir, *supra* note 162, at 333 (detailing damages).

172. *Tarpley Settles Lawsuit*, TORONTO STAR, MAR. 17, 2009, at Sports 8, available at [http://www.thestar.com/sports/basketball/2009/03/17/tarpley\\_settles\\_lawsuit\\_against\\_mavericks\\_nba.html](http://www.thestar.com/sports/basketball/2009/03/17/tarpley_settles_lawsuit_against_mavericks_nba.html).

173. Richie Whitt, *Roy Tarpley Steals Even More Mavericks' Money*, DALLAS OBSERVER BLOGS (Mar. 17, 2009, 9:30 AM), [http://blogs.dallasobserver.com/sportatorium/2009/03/roy\\_tarpley\\_steals\\_even\\_more\\_m.php](http://blogs.dallasobserver.com/sportatorium/2009/03/roy_tarpley_steals_even_more_m.php); see also, Walter Olson, *April 4 Roundup*, OVERLAWYERED (Apr. 4, 2009), <http://overlawyered.com/2009/04/april-4-roundup-2/> ("The wages of addiction: former basketball star Roy Tarpley settles his \$6.5 million ADA lawsuit against NBA and Dallas Mavericks.").

174. See Muir, *supra* note 162, at 357–59.

175. See McCann, *supra* note 162.

176. Harlan Schreiber, *The Roy Tarpley Saga*, HOOPS ANALYST (Aug. 26, 2009), <http://hoopsanalyst.com/blog/?p=55>.

an NBA player was twenty-seven, and Tarpley would have become the second oldest player in the league.<sup>177</sup> He also had history of serious knee problems and—though he played well in minor league basketball in 2006—he was often injured.<sup>178</sup> To be sure, Tarpley was an impressive NBA player in the late 1980s and early 1990s, but a decade in time for an NBA player is almost akin to fifty years for a typical worker.<sup>179</sup> From an objective point of view, therefore, it seemed unlikely that a non-discriminated Tarpley could have performed the essential functions of the job.

Tarpley may have achieved more success in arguing that he would have been a role model as an NBA player.<sup>180</sup> After all, he appeared to have beaten his substance abuse problems and his apparent victory could have provided hope to NBA fans suffering from addiction. To claim “role modeling” is an essential function of NBA employment, Tarpley could have cited the contractual obligation of players to participate in promotional and civic activities.<sup>181</sup> Moreover, though Charles Barkley famously quipped that he was not a role model, it is undeniable that athletes’ conduct serves as life lessons for many Americans.<sup>182</sup> Perhaps Tarpley could have also highlighted how NBA teams have signed players known more for their leadership and camaraderie skills than their basketball skills. The Chicago Bulls signing forward Brian Scalabrine for the 2011–2012 season (in which he played in only twenty-eight games and averaged one point per game) as a “chemistry guy” is one such example.<sup>183</sup> Still, it seems unlikely that an NBA team would sign a player unqualified to play merely because he inspires some members of the public.

Nonetheless, the EEOC found probable cause for discrimination, and the NBA and Mavericks agreed to pay Tarpley rather than take their chances in court.<sup>184</sup> Perhaps the idea of Tarpley arguing he would have been an inspiration

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177. See Muir, *supra* note 162, at 358.

178. See McCann, *supra* note 162.

179. Cf. Dave Berri, *Why the NBA Players Keep Losing to the Owners*, FREAKONOMICS (Dec. 6, 2011, 10:32 AM), <http://freakonomics.com/2011/12/06/why-the-nba-players-keep-losing-to-the-owners/> (explaining that NBA players are generally past their peak by age twenty-seven).

180. See Muir *supra* note 162, at 358–59 (discussing whether Tarpley was a role model).

181. See *infra* Part III(B)(1).

182. See Geoffrey Rapp, *Blue Sky Steroids*, 99 J. CRIM. L. & CRIMINOLOGY 599, 608 (2009).

183. See Steve Aschburner, *Break up the Bulls? Chicago Brass Had Better Think Twice*, NBA (Mar. 8, 2012, 12:53 PM), [http://www.nba.com/2012/news/features/steve\\_aschburner/03/08/noah-vs-howard/index.html](http://www.nba.com/2012/news/features/steve_aschburner/03/08/noah-vs-howard/index.html); see also *NBA Stats: Brian Scalabrine*, NBA, [http://www.nba.com/playerfile/brian\\_scalabrine/](http://www.nba.com/playerfile/brian_scalabrine/) (last visited Oct. 23, 2013) (listing Scalabrine’s statistics from the 2011–2012 season).

184. See EEOC Charge, *supra* note 162.

to others with drug and alcohol issues was worrisome enough for the defendants to settle.

Although not an ADA decision, the essential job functions of NBA player employment also arose in *Mobley v. Madison Square Garden LP*.<sup>185</sup> In *Mobley*, a ten-year NBA veteran player used New York disabilities law to contend that the New York Knicks—a team to which he had just been traded—had discriminated against him because he suffered from the heart condition hypertrophic cardiomyopathy.<sup>186</sup> This condition was blamed for the deaths of two notable basketball players: Boston Celtic star Reggie Lewis and Loyola Marymount University star Hank Gathers.<sup>187</sup>

According to *Mobley*, the Knicks forced him to retire after they would not allow him to play with the condition or with his proposed accommodation of an implanted heart defibrillator that would shock him back to life if necessary.<sup>188</sup> In *Mobley's* view, the Knicks were motivated not by *Mobley's* ailment—which was known about by NBA teams for nearly a decade and which had never caused *Mobley* problems—but by the salary cap relief that would be obtained if he retired for medical reasons.<sup>189</sup> Nonetheless, United States District Judge Deborah Batts dismissed *Mobley's* claim in June 2012.<sup>190</sup> She reasoned that *Mobley's* condition rendered it reasonable for the Knicks to conclude he could not perform the essential functions of playing in the NBA and that his proposed heart defibrillator likely posed an undue burden to the Knicks.<sup>191</sup>

*Tarpley* and *Mobley* are instructive for White should he seek protection from the ADA. These cases confirm the language of the uniform player contract that playing with a high level of talent and skill are paramount functions of NBA employment. *Tarpley*, however, also suggests that role modeling may be an additional essential function of an NBA player's employment. Given White's Twitter following, it seems plausible for him to argue his playing in the NBA

185. No. 11 Civ. 8290(DAB), 2012 WL 2339270, (S.D.N.Y. June 14, 2012).

186. *Id.* at \*1–2.

187. Andrew E. Rice, Article, *Eddy Curry and the Case for Genetic Privacy in Professional Sports*, 6 VA. SPORTS & ENT. L.J. 1, 3 (2006).

188. *Mobley*, 2012 WL 2339270, at \*2.

189. *Id.* (“Plaintiff contends that the Knicks disqualified him intentionally in order to save money and avoid paying the NBA’s ‘luxury tax’ (imposed on teams when their total payroll exceeds a certain threshold called the ‘salary cap’). Because the salary of a player who cannot play for medical [sic] reasons does not count against the team’s salary cap, *Mobley* alleges that the Knicks saved approximately \$19 million through insurance payments and avoided luxury tax when the team deemed him medically unfit to play.” (citations omitted)).

190. *Id.* at \*4.

191. *Id.*

would inspire other sufferers of anxiety disorder; though an NBA team could respond by noting White has achieved his Twitter following without playing in the NBA. For its part, *Mobley* suggests that a serious health concern associated with playing in the NBA can empower a team to end its employment with the player.

### 3. Case Law Involving Travel As Essential Function of Employment

The question of whether “getting to work” constitutes an essential function of employment has arisen in ADA litigation, in part because hundreds of millions of Americans have traveled to work since the ADA’s passage in 1990.<sup>192</sup> The precedent is clear: although punctuality in arriving at work is considered an essential function of one’s job, the means of getting to work are normally viewed as a private matter and not an employer’s responsibility.<sup>193</sup>

For instance, in *Gronne v. Apple Bank for Savings*, the United States Court of Appeals for the Second Circuit determined that an employer was not obligated to pay the cab fare to and from work of an employee who could not drive due to severe chronic fatigue syndrome.<sup>194</sup> Although the Second Circuit noted the possibility that “in narrow circumstances” an employer may have to provide an employee with transportation assistance to and from a job, those circumstances were clearly not present in that case.<sup>195</sup> There, the employer had offered to pay half of the employee’s cab fare on days when the employee’s “friends or family members could not drive her.”<sup>196</sup> The Second Circuit reasoned such an offer was either unnecessary for satisfying the ADA or in excess of the ADA’s requirements.<sup>197</sup>

Courts’ hesitation to recognize transportation to work as a protectable interest under the ADA is consistent with EEOC interpretation. In 1995, the EEOC acknowledged a spatial distinction in work environment between “work” and “transportation” for purposes of the ADA:

An employer is required to provide reasonable accommodations that eliminate barriers in the work environment, not ones that eliminate

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192. For an extensive discussion of “getting to work” ADA litigation, see Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59, 80–90 (2008).

193. *Id.* at 82–85.

194. 1 Fed. App’x 64, 66–67 (2d Cir. 2001).

195. *Id.* at 67.

196. *Id.* at 66.

197. *Id.* at 67.

barriers outside of the work environment. For example, an employer would not be required to provide transportation to work as a reasonable accommodation for an employee whose disability makes it difficult or impossible to use public or private means of transportation, unless the employer provides such transportation for employees without disabilities.<sup>198</sup>

On the other hand, the congressional record preceding passage of the ADA suggests a more expansive view of workplace than delineated by the EEOC. As acknowledged by the Second Circuit in *Lyons v. Legal Aid Society*, “Congress envisioned that employer assistance with transportation to get the employee to and from the job might be covered.”<sup>199</sup> This intent, however, has failed to be applied in ADA cases involving transportation to and from work.

The difficulty employees face in proving an employer obligation to provide transportation is heightened by the fact that certain employees must show up for work in order to obtain ADA protection.<sup>200</sup> Courts have repeatedly held that employees, who must be at work to perform their job functions, are not qualified individuals with disabilities if they cannot make it to work.<sup>201</sup> To illustrate, consider *Tyndall v. National Education Centers Inc.*, where a teacher, who suffered from Lupus, sued the school, which fired her for poor attendance.<sup>202</sup> The school had made reasonable accommodations to her in the forms of extended sick leave, flexibility with coming to work late/leaving early, and allowance for numerous breaks during the day.<sup>203</sup> After the school fired her for missing more than forty days in a seven-month stretch, the teacher claimed she was discriminated against because of her Lupus condition.<sup>204</sup> The United States Court of Appeals for the Fourth Circuit rejected her claim, reasoning that a teacher who is unable to teach is not qualified to teach.<sup>205</sup>

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198. Informal Guidance Letter from Elizabeth M. Thornton, Deputy Legal Counsel, EEOC (May 4, 1995).

199. 68 F.3d 1512, 1516 (2nd Cir. 1995). This case concerned whether an employer had to provide an employee parking as a reasonable accommodation. *See id.*

200. *See* Anthony H. Green, Note, *Reemployment Rights Under the Uniform Services Employment and Reemployment Act (USERRA): Who's Bearing the Cost?*, 37 IND. L. REV. 213, 231–32 (2003).

201. *Accord* Nowak v. St. Rita High Sch., 142 F.3d 999 (7th Cir. 1998).

202. 31 F.3d 209, 211–12 (4th Cir. 1994).

203. *Id.* at 211.

204. *Id.* at 213.

205. *Id.* at 213–14.

Case law would seem to suggest a dim outlook for White to argue that transportation to and from games warrants ADA consideration. Upon further inspection, however, White's workplace transportation arrangement as an NBA player is quite distinct from that encountered by the vast majority of United States workers. The difference may have legal significance.

Consider White's employment with the Rockets. White could have attended all home Rockets games because he lived within driving distance to the Toyota Center in downtown Houston. He could also have attended some road games by car—including most games played against the New Orleans Hornets, Dallas Mavericks, San Antonio Spurs, Oklahoma City Thunder, and possibly the Memphis Grizzlies. When White had to fly to attend "work"—i.e., Rockets games played in other parts of the country or Canada—he would have done so with his teammates, coaches, and team officials.<sup>206</sup> Like other NBA franchises, the Rockets travel as a team when flying.<sup>207</sup> Their air travel includes meetings and discussions, among other employment activities. The Rockets' air travel, in other words, is arguably an extension of the workplace, rather than a means of transportation to the workplace.

NBA policy appears to corroborate the view of team travel as an extension of the workplace. The NBA requires that its players adhere to a "business casual" dress policy whenever engaged in team or league business.<sup>208</sup> The dress code extends to team travel—meaning beyond the arenas where they play and practice, and into the airports and planes used for transportation.<sup>209</sup>

Whether a court would consider team travel an extension of the workplace is another matter. The Rockets would likely have argued such an interpretation was not consistent with two decades of case law. The team would probably have also emphasized that White was paid to perform in NBA games; his ability to get to games was merely a means to execute his employment.

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206. *Houston Rockets Player Royce White to Take a Private Bus to Games Rather Than the Team Plane Because of His Fear of Flying*, MAILONLINE (Oct. 5, 2012, 6:18 PM), <http://www.dailymail.co.uk/news/article-2213632/Houston-Rockets-star-Royce-White-scared-fly-teammates-demands-private-bus.html>.

207. *Id.*

208. *NBA Player Dress Code*, NBA (Oct. 20, 2005, 6:42 PM), [http://www.nba.com/news/player\\_dress\\_code\\_051017.html](http://www.nba.com/news/player_dress_code_051017.html).

209. *Id.*; see also Michael A. McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. PA. J. LAB. & EMP. L. 819, 827 (2006).

### C. Reasonable Accommodations for an NBA Player Who Cannot Fly

If White could show that he is disabled for purposes of the ADA and that air travel is an essential function of NBA player employment, the next step in the analysis would be determining reasonable accommodations. It is important to stress that an NBA team would not necessarily be obligated to offer White an accommodation.<sup>210</sup> If the only workable accommodation is one that would pose an undue burden on White's team, it would be deemed an unreasonable accommodation.<sup>211</sup> While there is no bright-line distinction between a reasonable and unreasonable accommodation, the latter normally imposes a high cost on employers and substantially disrupts the employer's business practice.<sup>212</sup> Courts have consistently declared unreasonable any accommodation that would compel changes to essential job duties.<sup>213</sup> As discussed below, determining reasonable accommodations for White presents significant problems.

#### 1. A Team Cannot Change Its Schedule—And the NBA Probably Cannot Either

In an ideal world, White would only have to play home games or games located nearby. One means of providing accommodation would be for the schedule of White's NBA team to change accordingly.

A team, however, has no ability to modify its eighty-two-game regular season schedule. Every team's schedule is determined by the league in accordance with league policies and CBA protections for players.<sup>214</sup> The league sets the date, time, and location for the 1230 games played each season by the

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210. See generally Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. 889, 892–93 (2000) (defining unreasonable accommodations as “modifications in work settings and processes that go further than what the ADA currently requires, modifications that impose some ‘due hardship’ on employers” (footnote omitted)).

211. See *id.*

212. John D. Ranseen & Gregory S. Parks, *Test Accommodations for Postsecondary Students: The Quandary Resulting from the ADA's Disability Definition*, 11 PSYCHOL. PUB. POL'Y & L. 83, 90 (2005); see also Seth D. Harris, *Re-Thinking the Economics of Discrimination: U.S. Airways v. Barnett, the ADA, and the Application of Internal Labor Market Theory*, 89 IOWA L. REV. 123, 126 (2003) (discussing how an accommodation can be declared unreasonable if it undermines “efficiency-enhancing” practices).

213. Victoria White, Comment, *Employment Disability Discrimination in Louisiana: How to Better Protect the Disabled Employee*, 52 LOY. L. REV. 917, 923–24 (2006) (citing *Frank v. Am. Freight Sys., Inc.*, 398 N.W.2d 797, 803 (Iowa 1987)).

214. Mike Zarren, *Inside the Front Office: October 20—Making the Schedule*, NBA.COM (Oct. 20, 2013), [http://www.nba.com/celtics/inside\\_front\\_office/zarren102008-trades.html](http://www.nba.com/celtics/inside_front_office/zarren102008-trades.html).

thirty teams.<sup>215</sup> In setting teams' schedules, the league tries to treat every team equally to the extent possible.<sup>216</sup> For instance, by rule each team plays two home games and two away games against each other team in its division, each team plays three or four games against other teams in its conference, and each team plays one home game and one away game against each other team in the opposing conference.<sup>217</sup> There are myriad other policies—including a prohibition of scheduling games on three consecutive nights, prohibition of scheduling games on days when players have traveled across two time zones, and restrictions on the number of games played on holidays.<sup>218</sup> Availability of arenas (many of which are shared with NHL teams and host concerts as well as other sporting events) is also considered.<sup>219</sup> A team, in other words, cannot unilaterally modify its schedule so that it accommodates White's anxiety disorder and fear of flying.

Expecting the NBA to modify the schedule to accommodate one of the league's 450 players also seems unreasonable. The complexity of scheduling would make such a request extremely burdensome. Even assuming such a request is technically feasible; honoring it might undermine fairness and player protections. For instance, if White's team is able to play more home games than other teams, it would give them a significant advantage.<sup>220</sup> The same would be true if White's team received an easier travel schedule.<sup>221</sup> Plus, what would happen if White's team traded him to another team? Would his new team's schedule be changed and his old team's schedule revert to normal?

## 2. A Team Can Reasonably Accommodate White by Letting Him Travel by Automobile for Some Road Trips

The Rockets, as discussed earlier, were comfortable with White traveling by car for some of the team's road games.<sup>222</sup> This was part of the good faith

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215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. See Oliver Entine & Dylan S. Small, *The Role of Rest in the NBA Home-Court Advantage* (Nov. 30, 2007) (unpublished project for Department of Statistics, University of Pennsylvania), available at [http://www-stat.wharton.upenn.edu/~dsmall/nba\\_rest\\_submitted.pdf](http://www-stat.wharton.upenn.edu/~dsmall/nba_rest_submitted.pdf) (acknowledging that a significant home-court advantage exists in the NBA).

221. *Id.*

222. See *supra* Part II.



agreement reached by White and the Rockets in October 2012.<sup>223</sup> In January 2013, the Rockets also agreed to input from a neutral mental health expert in determining whether White can play in a particular game.<sup>224</sup> The Rockets would have also been accepting of White arriving later for pre-game activities and leaving post-game activities earlier—provided, of course, he was available for at least the entire game.

These concessions by the Rockets may sound modest, but in practice they were quite substantial. The team undoubtedly recognized that such accommodations would have carried steep player developmental “costs” for a player in whom it had heavily invested. As a rookie traveling alone, White might not have gained valuable insight from conversations with coaches and teammates, or develop camaraderie with them. He might also have missed meetings and practices; though if meetings were conducted while in transit, a technology-based solution might have allowed White to take part in some of them.

### 3. Skipping Road Trips Would Not Be a Reasonable Accommodation

Unless injured, suspended, or assigned to the D-League, White as an NBA player would be contractually obligated to play all eighty-two regular season games, along with four to six pre-season games, and up to twenty-eight postseason games.<sup>225</sup> No NBA player signs a standard contract to play in “some games”—meaning White would be expected to play in all road games, including those in far-away locales. Plus, consider how a part-time arrangement would frustrate White’s coach. A coach might struggle to find a consistent role for White if he was only an occasional player—as in, he’s only “occasionally” at work. White’s teammates, particularly those whose playing time would vary by his availability, would also be impacted by White’s absence and presence.<sup>226</sup> White, put differently, would become a player with diminished utility. In that regard, a part-time player would probably constitute an undue hardship for White’s NBA team.

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223. See *supra* note 71 and accompanying text.

224. See *supra* note 84 and accompanying text.

225. See *supra* note 143 and accompanying text.

226. See Sean Rollins, *Royce White Is Lost Cause for Houston Rockets*, RANTSPO RTS (Jan. 30, 2013, 9:33 PM), <http://www.rantsports.com/nba/2013/01/30/royce-white-is-lost-cause-for-houston-rockets/> (explaining that Royce White’s struggles could disrupt the team’s chemistry and its performance on the court).

On the other hand, professional leagues have carved out exceptions for players to miss road games.<sup>227</sup> This has been true for NBA players recovering from injury.<sup>228</sup> Gilbert Arenas, returning from a knee injury in 2009, was allowed a flexible schedule; whereby, he would play in all home games but only some road games.<sup>229</sup> White, however, insists that he should not be classified as “injured.” On November 10, 2012 he tweeted, “For the record, I’m not injured . . . Not even a little bit. #Truth.”<sup>230</sup>

Perhaps a better analogy can be drawn from other circumstances that have led to part-time play arrangements. In 2011, the Central Hockey League allowed Rapid City Rush forward, Brett Nylander, a second lieutenant in the United States Air Force, to play only home games because his military service limited travel.<sup>231</sup> It would be unusual for Air Force duty and fear of flying to both somehow justify missing games, but perhaps that would provide an instructive example for a court.

#### 4. Modify the Collective Bargaining Agreement to Include Better Protections for Mental Health

White insists that the absence of a mental health protocol in the NBA’s CBA might constitute a violation of law. In his assessment, a reasonable accommodation for him and others with mental health issues would be for the league and players’ association to adopt a set of procedural safeguards.<sup>232</sup> These safeguards would dictate the circumstances for when a player could be considered able or unable to play due to mental health.<sup>233</sup> They would also vest binding decision-making authority in an independent medical doctor whose expertise is in mental health.<sup>234</sup> By empowering a third-party, neutral

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227. See, e.g., Anthony L. Cuaycong, *Courtside*, BUSINESS WORLD, Mar. 26, 2009, at S2/4, available at <http://www.gmanetwork.com/news/story/154310/sports/opinion/courtside-arenas>; Joe Paisley, *Former Falcon Gets Surprise Chance to Play Pro Hockey*, GAZETTE (Nov. 21, 2011, 12:00 AM), <http://www.gazette.com/articles/falcon-128937-nylander-ferras.html>.

228. See Cuaycong, *supra* note 227.

229. *Id.*

230. Royce White, @Highway\_30, TWITTER (Nov. 10, 2012, 7:38 PM), [https://twitter.com/Highway\\_30/status/267471361256067073](https://twitter.com/Highway_30/status/267471361256067073).

231. See Paisley, *supra* note 227.

232. See Royce White, @Highway\_30, TWITTER (Mar. 25, 2013, 10:27 AM), [https://twitter.com/Highway\\_30/status/316239914045935617](https://twitter.com/Highway_30/status/316239914045935617) (“When protocol isn’t present, protocol is definitely a ‘reasonable accommodation’.”).

233. Proposed Mental Health Protocol from Royce White to Houston Rockets (Jan. 2013) (on file with author).

234. *Id.*

physician—and, by implication, a physician not paid by the team or at least not paid more by the team than by the player or players' association—a mental health protocol would constitute a major shift in team-player relations. This is true not only in the NBA, but in professional sports generally—pro teams have historically employed their own physicians and that arrangement has been acceptable to players.<sup>235</sup>

It is unlikely that the NBA—or any league—would cede final say to an independent physician over a team physician.<sup>236</sup> Teams value control over who plays in games, and to relinquish that power to a third-party would signify a major concession of authority.<sup>237</sup> The NBA would probably also maintain that such a fundamental change would not constitute a reasonable accommodation, because it would significantly alter the relationship between players and teams.

That said, there are worrisome aspects of teams paying a physician's salary—especially in regards to the treatment of a player with mental health issues—that warrant future examination. Most obviously, the physician is paid by the team but has a doctor-patient relationship with the player; and in some circumstances, the team and player may have disparate short-term and long-term health goals.<sup>238</sup> There is also an ethical argument that players with unique health risks warrant greater protection.<sup>239</sup> This is perhaps most true of a player with mental health challenges—as team physicians usually specialize in orthopedics or family medicine, but not mental health.<sup>240</sup>

Compounding the concern, although CBAs between leagues and players' associations contain detailed procedures for health matters, these procedures are arguably undeveloped in terms of mental health matters.<sup>241</sup> Considering the increasing rates of persons diagnosed with mental illness in the United States,

235. See generally Dennis Durao, Note, *An Endangered Species: Professional Sports Team Physicians*, 15 QUINNIPIAC HEALTH L.J. 33 (2011).

236. See Michael McCann, *Beltran's Surgery Raises Questions*, SI.com (Jan. 16, 2010, 1:51 AM), [http://sportsillustrated.cnn.com/2010/writers/michael\\_mccann/01/16/mets.beltran/index.html](http://sportsillustrated.cnn.com/2010/writers/michael_mccann/01/16/mets.beltran/index.html) (detailing a disagreement between the Mets and outfielder Carlos Beltran over appropriate medical treatment of his knee).

237. See *id.*

238. See, e.g., *id.*; see also Michael A. McCann, *Message Deleted? Resolving Physician-Patient E-Mail Through Contract Law*, 5 YALE J.L. & TECH. 103, 107–15 (2002) (discussing the foundational elements of a physician-patient relationship).

239. See generally Matthew J. Mitten, *Enhanced Risk of Harm to One's Self As a Justification for Exclusion from Athletics*, 8 MARQ. SPORTS L. REV. 189 (1998).

240. See Durao, *supra* note 235, at 36.

241. See *Current Collective Bargaining Agreements in the Major Pro Sports Leagues*. PIERCE LAW IP MALL, [http://www.ipmall.info/hosted\\_resources/SportsEntLaw\\_Institute/UNHSportsEntLaw\\_Institute.asp](http://www.ipmall.info/hosted_resources/SportsEntLaw_Institute/UNHSportsEntLaw_Institute.asp) (last visited Oct. 23, 2013) (comparing and examining CBAs).

and the likelihood that more and more pro athletes will be recognized as suffering from mental health problems, leagues and players associations should expend more time developing mental health practices.<sup>242</sup> Although the latest CBA will not expire until at least 2017,<sup>243</sup> the NBA and NBPA continue to negotiate policies on important matters—including the eligibility restriction for the NBA draft and testing for Human Growth Hormone—and presumably could add mental health protocols to their to-do list.<sup>244</sup>

##### 5. Severing an NBA Contract, Compensating a Team, and Allowing a Player to Play in Another Country

White recently tweeted, “If you[re] allergic to sand, you probably don’t play a lot of volleyball.”<sup>245</sup> A corollary of such logic may be, “if you’re unable to fly, you probably don’t play a lot of NBA basketball.” Unless White is able to effectively treat his fear of flying, it will be difficult for him to play in the NBA. The league, in the twenty-first century, is simply not designed for players who cannot fly. The NBA map is also not going to shrink anytime soon. Just the opposite, in fact; the city of Seattle (which previously hosted the Sonics franchise) is rumored to be next in line for an NBA team.<sup>246</sup> As the above legal analysis shows, moreover, White is unlikely to succeed in an ADA claim against an NBA team or NBA.

If the optimal outcome of White returning to the NBA is not possible, the next best would be for him to play in another league.<sup>247</sup> White is surely a talented basketball player, and he possesses an impressive work ethic.<sup>248</sup> Although he may not be ticketed for NBA stardom, it would be a poor use of

242. See Katti Gray, *Are We Over-Diagnosing Mental Illness?*, CNN (March 18, 2013, 9:03 AM), <http://www.cnn.com/2013/03/16/health/mental-illness-overdiagnosis> (evaluating sharp increases in diagnoses of mental illness in recent years).

243. See *NBA Collective Bargaining Agreement*, PIERCE LAW (Dec. 8, 2011), at 377, [http://www.ipmall.info/hosted\\_resources/SportsEntLaw\\_Institute/2011NBA\\_NBPA\\_CBA\(final%20version\).pdf](http://www.ipmall.info/hosted_resources/SportsEntLaw_Institute/2011NBA_NBPA_CBA(final%20version).pdf).

244. See Henry Abbott, *Sources: NBA Nears HGH Agreement*, ESPN (Mar. 8, 2013, 5:07 PM), [http://espn.go.com/nba/story/\\_/id/9031485/nba-nears-agreement-nbpa-test-high-sources-say](http://espn.go.com/nba/story/_/id/9031485/nba-nears-agreement-nbpa-test-high-sources-say).

245. See *supra* text accompanying note 1.

246. Adrian Wojnarowski, *David Stern’s Final Act As NBA Commissioner: The Myth of David Stern*, YAHOO! SPORTS (Oct. 26, 2012, 1:32 AM), <http://sports.yahoo.com/news/nba—david-stern-s-final-act—promote-the-myth-of-david-stern-25321709.html>.

247. See, e.g., Ethan Grant, *Undrafted NBA Free Agents 2013: Prospects Who Must Consider Overseas Options*, BLEACHER REP. (June 28, 2013), <http://bleacherreport.com/articles/1688405-undrafted-nba-free-agents-2013-prospects-who-must-consider-overseas-options>.

248. See, e.g., Torre *supra* note 3.

human resources for White not to play professional basketball. After all, he is among a tiny slice of the world's population good enough to earn money playing basketball.<sup>249</sup> A timely resolution is also warranted, considering that basketball is a young person's game and White is "already" twenty-two years old—the average age of those who have recently finished their NBA careers is a little under twenty-eight years old.<sup>250</sup> Put another way, every day White misses playing pro basketball may be akin to most Americans not working for weeks in their chosen careers.

The NBA is not the only professional basketball league in which White could earn a substantial income. Some of these "other" leagues also play all or almost all of their games within driving distance. Take the Israeli Basketball Super League, also known as Ligat Winner Sal (Ligat).<sup>251</sup> The league has twelve teams located throughout Israel.<sup>252</sup> The teams furthest apart—the Maccabi Haifa Basketball Club and Hapoel Eilat—are separated by a mere four hours of driving.<sup>253</sup> Most of the teams are located within an hour drive of each other.<sup>254</sup>

To be sure, salaries in Ligat are considerably less than those in the NBA—where the median salary is \$2.3 million and average salary is \$5.2 million.<sup>255</sup> But they are still lucrative. Ligat teams sign players to nine-month contracts with salaries usually ranging from \$80,000 to \$200,000.<sup>256</sup> A number of one-

249. See Tony Manfred, *Here Are the Odds That Your Kid Becomes a Professional Athlete (Hint: They're Small)*, BUS. INSIDER (Feb. 10, 2012), <http://www.businessinsider.com/odds-college-athletes-become-professionals-2012-2?op=1> (explaining that only 1.2% of men's college basketball players play professionally in the United States).

250. See weILG, *Average NBA Career Length for Players—Details*, WEAK SIDE AWARENESS (Nov. 22, 2011), <http://weaksidawareness.wordpress.com/2011/11/22/average-nba-career-length-for-players-details/>.

251. See *The A-Z of Israel*, NEWSTATSMAN (Jan. 17, 2013), [http://www.newstatesman.com/world-affairs/world-affairs/2013/01/z-israel?page=0,11&quicktabs\\_most\\_read=0](http://www.newstatesman.com/world-affairs/world-affairs/2013/01/z-israel?page=0,11&quicktabs_most_read=0).

252. *Standings—2013–14 Season*, BASKET, [http://www.basket.co.il/StatsPage\\_table.asp?lang=en](http://www.basket.co.il/StatsPage_table.asp?lang=en) (last visited Oct. 23, 2013).

253. See Driving Directions from Haifa, Israel to Eilat, Israel, GOOGLE MAPS, available at <http://tinyurl.com/dx5pug4>.

254. See generally *Standings—2013–14 Season*, *supra* note 252 (listing the teams' locations).

255. For median NBA salary, see Joe Garofoli, *Vendors at Arena Pay Price for Lockout*, S.F. CHRON., Dec. 17, 2011, at A1, available at <http://www.sfgate.com/politics/joegarofoli/article/Oracle-Arena-vendors-paying-price-for-NBA-lockout-2411078.php>. For average NBA salary, see Steve Aschburner, *NBA's "Average" Salary—\$5.15M—a Trendy, Touchy Subject*, NBA (Aug. 19, 2011, 11:03 AM), [http://www.nba.com/2011/news/features/steve\\_aschburner/08/19/average-salary/index.html](http://www.nba.com/2011/news/features/steve_aschburner/08/19/average-salary/index.html).

256. Bob Clark, *Money, Visibility Await in Israel: Dunigan Might Join a Long Line of Americans*

time NBA players have signed six-figure contracts to play in Israel including Will Bynum, Anthony Parker, and Carlos Arroyo.<sup>257</sup> I interviewed Chris Brown, an NBA agent at Orpheus Sports and Entertainment in Boston, to assess White's likely market value in Israel. Brown, who has placed United States basketball players with teams in Europe and Asia, predicts White could expect to earn at least \$250,000 and perhaps as much as \$500,000 on a nine-month contract in Ligat.<sup>258</sup>

A salary of \$500,000 to \$1 million over two Ligat seasons would surely be a far cry from the \$3.5 million White is contracted to earn over the next two NBA seasons.<sup>259</sup> But it would still reflect a great deal of income to play in a league where White's fear of flying would not prevent a career—as it does in the NBA.<sup>260</sup> Especially given the gravitas he shows on Twitter, White—as a success story in Israel or elsewhere—might also be able to make-up some of his “lost earnings” through endorsement income and motivational speaking.

Getting White to Israel would take more than a two-week cruise over the Atlantic Ocean. White would obviously have to consent to playing there. He would, thus, have to be comfortable with leaving his family and friends for at least nine-months. He would also have to adjust to living in a different, unfamiliar culture—albeit one where English is spoken. Israel also has periodic security issues with neighboring countries, and at least one United States basketball player, Jeremy Tyler (who was seventeen years old at the time), struggled to adjust to playing and living there.<sup>261</sup> Then again, White's team—having invested significantly in him—would likely try to make his transition as comfortable as possible. Teams in other countries have often gone to great lengths to help young United States players transition into a new life and career

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in the Middle East, REG.-GUARD, Sept. 2, 2010, at C3, available at <http://projects.registerguard.com/csp/cms/sites/web/sports/25247133-41/israel-dunigan-team-basketball-nba.csp>.

257. See Dana Caldwell, *Pro Basketball: Former FGCU Star Sherwood Brown Signs with Israeli Team*, NAPLES DAILY NEWS (July 17, 2013, 6:04 PM), <http://www.naplesnews.com/news/2013/jul/17/pro-basketball-former-fgcu-star-sherwood-brown-sig/?print=1>.

258. Interview with Chris Brown, NBA Agent, Orpheus Sports and Entertainment (Dec. 10, 2012) (on file with author).

259. See *supra* note 17 and accompanying text.

260. See generally *supra* notes 156–60 and accompanying text.

261. See, e.g., Henry Abbott, *Big in Japan: Jeremy Tyler*, ESPN (Nov. 8, 2010, 12:37 PM), [http://espn.go.com/blog/truhoop/post/\\_id/21320/big-in-japan-jeremy-tyler](http://espn.go.com/blog/truhoop/post/_id/21320/big-in-japan-jeremy-tyler); Jordan Conn, *After Disastrous Decision to Leave High School Early, Tyler Eyes NBA*, SI.COM (June 20, 2011, 2:40 PM), [http://sportsillustrated.cnn.com/2011/writers/the\\_bonus/06/20/jeremy.tyler/index.html](http://sportsillustrated.cnn.com/2011/writers/the_bonus/06/20/jeremy.tyler/index.html).

abroad. The experience of a then eighteen-year-old Brandon Jennings moving to Rome to play for Lottomatica Virtus Roma is especially illustrative.<sup>262</sup>

White is currently a free agent and could sign with a team abroad. If he instead signs with an NBA team and then later seeks to play abroad, his NBA team, the NBA, and NBPA would also have to agree to White being relieved of his employment obligations to play for that NBA team. One possible arrangement could be for White to play “on loan” in a driving-friendly league—like Ligat—where he could develop his game against other pro players. Perhaps White would eventually overcome his fear of flying while there, too. An NBA team could preserve its NBA rights in White during this time, and hope that White can eventually return to the NBA.

Alternatively, White could sever contractual ties with his NBA team and the NBA and pursue a career elsewhere. This could only occur with all parties agreeing. Per rule of the International Basketball Federation (“FIBA”)—of which the NBA and most pro leagues are members—White would be ineligible to play elsewhere if under contract with an NBA team.<sup>263</sup>

Considering that White has been unable to secure employment with another NBA team since his release by the 76ers, it seems unlikely that an NBA team would fight to keep him. Then again, given the increasing rates of persons diagnosed with mental illness, it is plausible that a future NBA player with GAD or OCD would be in such a position.<sup>264</sup> In that vein, a team might expect compensation to relinquish the rights to a contracted player. The team, moreover, can fine or suspend a player under contract until he reports for work; thus diminishing its financial incentive to release him.

An NBA team’s incentive to release such a player would be similar to that for the NBA: the player could sue his team and NBA. But as explored in this Article, such a lawsuit is unlikely to prevail. Then again—and especially as *Tarpley v. NBA* reveals—the ADA can be applied in unexpected ways. Plus, even successful defense litigation can be costly and time-consuming. NBA and team officials, for example, might have to testify in depositions and be expected to comply with invasive discovery requests.

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262. See Chris Broussard, *Exchange Student: The First American to Go Prep to Pro by Way of Europe, Brandon Jennings Is Getting Quite an Education Overseas*, ESPN (May 19, 2009), <http://sports.espn.go.com/espnmag/story?id=3715746> (noting, among other points, that Virtus Roma provided Jennings, his mom, and brother a three-bedroom apartment in Rome, and the team also helped place his brother in a United States school).

263. See Chris Broussard, *PRO BASKETBALL: Bickering Over the European Exchange Rate*, N.Y. TIMES, Sept. 14, 2003, at 8–5, available at <http://www.nytimes.com/2003/09/14/sports/pro-basketball-bickering-over-the-european-exchange-rate.html?pagewanted=all&src=pm>.

264. See Gray, *supra* note 242.

To the extent either the NBA or an NBA team would object to a player leaving the league, the player's team would have the greatest incentive to block a departure. After-all, his team may have invested significant resources in developing his skills. His team may also want to keep him as an asset for a trade. If a dispute between the team and NBA emerges, the NBA might mollify the team's objection by offering compensation. Under the NBA's Constitution, which governs the relationship between franchises and the league, NBA commissioner Adam Silver has considerable authority—particularly in matters outside player-team or player-league disputes, which are more under the purview of the CBA.<sup>265</sup> This broad ability of the commissioner is sometimes referred to as the commissioner's "best interests of the league" power.<sup>266</sup>

Silver's predecessor, David Stern, used this authority to take away draft picks and reassign them. In 1999, Stern took away three first-round picks from the Minnesota Timberwolves after the team was caught secretly paying forward Joe Smith side money.<sup>267</sup> The three impacted drafts—2001, 2002, and 2004—each had one less first-round pick than the number of NBA teams.<sup>268</sup> More recently, Stern ordered the Oklahoma City Thunder to send a 2013 second round pick to the Celtics because, in a trade involving Jeff Green, the Thunder had failed to share medical information about Green.<sup>269</sup> Stern's decisions, which were not formally contested, suggest the commissioner possesses the legal authority to alter draft picks and number of picks.

It is worth noting, however, that when a previous NBA commissioner tried to manipulate a team's first round draft pick, a court rejected it as outside the scope of the commissioner's powers.<sup>270</sup> In *Riko Enterprises, Inc. v. Seattle Supersonics Corp.*, the court found that NBA commissioner Walter Kennedy lacked the authority to transfer the pick of one team to another as a form of

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265. See 2005 Collective Bargaining Agreement Ex. A (incorporating by reference Article 35 of League Constitution, which is not publicly available in its entirety). The Constitution is assented to by all teams and governs the relationship between teams and the league. *Id.*

266. See Matthew J. Parlow, *Professional Sports League Commissioners' Authority and Collective Bargaining*, 11 TEX. REV. ENT. & SPORTS L. 179, 192 (2010).

267. Mitchell T. Engler, *The Untaxed King of South Beach: LeBron James and the NBA Salary Cap*, 48 SAN DIEGO L. REV. 601, 619–20 (2011).

268. See *NBA Punishes Timberwolves for Secret Deal with Smith*, NBA (Oct. 25, 2000, 12:00 AM), [http://www.nba.com/news/smith\\_wolves\\_001025.html](http://www.nba.com/news/smith_wolves_001025.html).

269. Adrian Wojnarowski, *Thunder Forced to Give Up Draft Pick to Celtics as Compensation for Jeff Green's Health Issues*, YAHOO SPORTS (June 26, 2012), <http://sports.yahoo.com/news/nba--thunder-forced-to-give-up-draft-pick-to-celtics-as-compensation-for-jeff-green-s-health-issues.html>.

270. See generally *Riko Enters., Inc. v. Seattle Supersonics Corp.*, 357 F. Supp. 521 (S.D.N.Y. 1973).



punishment.<sup>271</sup> In *Riko*, Kennedy transferred the Sonics' first round pick in the 1973 NBA draft to the Philadelphia 76ers because the 76ers had tried to sign a player from another league (the American Basketball Association) whose exclusive NBA rights Kennedy had assigned to the Sonics.<sup>272</sup> Kennedy reasoned that the Sonics had breached the "principle of fair play" language in the constitution.<sup>273</sup> The court rejected Kennedy's transfer of draft picks as outside of his league constitutional powers.<sup>274</sup> It is unclear whether the Timberwolves or Thunder would have prevailed in similar suits against Stern. Now-a-days, franchise agreements between NBA teams and the NBA contain waiver of recourse language that would make it difficult for an NBA team to sue the league.<sup>275</sup>

If Stern has the power to take draft picks away, it would seem plausible, if not probable, that he also has the power to add picks. If correct, then in exchange for a team severing ties with a player, Stern could compensate that team with a draft pick. Then again, some teams—especially those whose draft slot would be subsequently lowered—would likely object to such an arrangement. After all, the team knowingly took a chance in acquiring the player.<sup>276</sup> If the NBA establishes a precedent of compensating teams for failed acquisitions, other teams may expect "re-takes," too.

Lastly, the NBPA—White's union—would have to consent to the voiding of a player contract. The union has a fiduciary duty to pursue the best interests of its membership.<sup>277</sup> One central tenet of this duty is the protection of guaranteed contracts in the NBA.<sup>278</sup> The NBPA has relentlessly fought for guaranteed contracts to remain guaranteed. For instance, it challenged an attempt by the Celtics in 2004 to void the contract of Vin Baker—who had clearly failed to keep himself in adequate condition due to problems with

271. *Id.* at 525; see also Parlow, *supra* note 266 at 192–93 (providing an in-depth analysis of the *Riko Enterprises* case).

272. *Riko Enters., Inc.*, 357 F. Supp. at 522.

273. *Id.* at 523.

274. *Id.* at 525.

275. David Aldridge, *Sacramento Caps Unprecedented Rally by Keeping Kings*, NBA.COM (May 15, 2013), <http://www.nba.com/2013/news/05/15/sacramento-keeping-kings-david-aldrige/>.

276. See Torre, *supra* note 3.

277. *The National Basketball Players Association: Official Media Kit*, NBPA, <http://www.nbpa.org/sites/default/files/users/sean.brandveen/Media%20Kit.pdf> (last visited Oct. 23, 2013).

278. See Bill Simmons, *If I Ruled the (NBA) World*, GRANTLAND (July 8, 2011), [http://www.grantland.com/story/\\_/id/6749669/if-ruled-nba-world](http://www.grantland.com/story/_/id/6749669/if-ruled-nba-world).

alcohol.<sup>279</sup> The NBPA helped Baker keep \$16 million of the remaining \$35 million on his contract.<sup>280</sup>

Although the circumstance of White consenting to the voiding of his contract would be different from the Celtics trying to void Baker's contract, the NBPA would probably still raise concerns. For one, it would likely question the logic of a player walking away from an NBA contract to pursue a less lucrative deal abroad. This question could lead to a formal objection by the NBPA. Indeed, merely because a player seeks a "worse-off" position financially does not mean a players' association will assent to it. For example, when Alex Rodriguez (then of the Texas Rangers) welcomed a trade to the Boston Red Sox in 2003, the Major League Baseball Players' Association rejected it.<sup>281</sup> The reason? Rodriguez was willing to "give back" a small portion of his \$270 million contract to facilitate the trade.<sup>282</sup> Players associations are worried about the potential precedent of a player relinquishing guaranteed salary to help a team.<sup>283</sup> The same could be true of a player and team negotiating an early termination of a contract that guarantees the player salary.

On the other hand, the NBPA may be more moved by the seemingly unfixable dilemma posed by White's disorder or a similar one afflicting another NBA player. Does White being away from organized basketball serve any purpose? Does it advance his development? The reality is that, unless treatment succeeds in mitigating his fear of flying, White is unlikely to have an NBA career and he will probably become more frustrated the longer he is away from the game. If he cannot pursue a career in the NBA, any union that is entrusted with looking out for his best interests should let him pursue a basketball career elsewhere.

279. See Michael McCann, *Structure of Plea Key for Arenas*, SI.COM (Jan. 15, 2010, 4:26 PM), [http://sportsillustrated.cnn.com/2010/writers/michael\\_mccann/01/14/arenas.felony/index.html](http://sportsillustrated.cnn.com/2010/writers/michael_mccann/01/14/arenas.felony/index.html); Shira Springer, *Baker's Pact Terminated; Union Irked*, BOSTON GLOBE, Feb. 19, 2004, at C1, available at [http://www.boston.com/sports/basketball/celtics/articles/2004/02/19/bakers\\_pact\\_terminated\\_union\\_irked/](http://www.boston.com/sports/basketball/celtics/articles/2004/02/19/bakers_pact_terminated_union_irked/) (quoting NBPA spokesman: "'With regard to the termination of a guaranteed contract, it doesn't matter if it's Vin Baker or any other player' . . . . 'The Players Association will contest this as aggressively and vigorously as possible. We expect to prevail as we have in other termination cases like this, such as those involving Latrell Sprewell and Nate Huffman.'").

280. McCann, *supra* note 279.

281. William B. Gould IV, *Labor Issues in Professional Sports: Reflections on Baseball, Labor, and Antitrust Law*, 15 STAN. L. & POL'Y REV. 61, 93-95 (2004).

282. *Id.*

283. See *A-Rod Stands by Union's Stance*, ESPN (Dec. 18, 2003), <http://sports.espn.go.com/mlb/news/story?id=1688755> (explaining players association's stance that one player's desire to give up guaranteed salary may hurt other players in the future).

## IV. CONCLUSION

The employment dispute between Royce White and the Houston Rockets had no culprit and there was no one to blame for it. White undoubtedly wanted to prosper in a basketball career and the Rockets undoubtedly wanted to develop a talented young player. There were two insurmountable obstacles: White's general anxiety disorder prevented him from pursuing an NBA career, and the Rockets are members of a league that needs its players to fly and be in good mental health.<sup>284</sup> Neither of these obstacles—absent unreasonable, if not outright implausible, accommodations—was resolvable. Indeed, the Rockets lacked the capacity to supply a significantly “more reasonable” accommodation than they have already offered in the good faith deal. It would also have been quixotic for the NBA to change its scheduling system to accommodate one player—especially when doing so would violate the league's CBA with players and its constitution. While the NBA and NBPA should explore more developed protocols for players with mental health issues, it is unlikely the law commands them to do so.

White could have pursued legal recourse through the ADA, first through the EEOC and then through the courts. As explained in this Article, however, the ADA does not work well for White's potential claims. Although Roy Tarpley enjoyed success in using the ADA against the NBA, White's ailments may not be protected in the context of transportation to and from work. Even if they are protected, the ADA is not designed to force employers to change their core business model and essential job functions to accommodate employees. Litigation is also costly, time-consuming, distracting, and might interfere with White's basketball development.

Instead of turning to the courts, White would probably be better off identifying new treatments for his anxiety disorder and fear of flying so that they no longer impair his NBA career. If that fails, White would be better served playing in a professional basketball league where all of the games are within driving distance. This Article explored the Israel Super Basketball League as one such possibility, but there would be others. If White could succeed as a player, he would not only achieve his dream of a pro basketball career, he might also become a legendary trailblazer for pro athletes and others afflicted with anxiety disorders and related phobias—call them #victorytroopers.

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284. Cf. Wrenn, *supra* note 29 (presenting the tension between White's anxiety and the Rockets' need to fly to many of its scheduled games).





