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THE BCA AND THE NCAA: HOW TITLE VII MAY LEVEL THE PLAYING FIELD IN THE COLLEGIATE COACHING RANKS

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I. INTRODUCTION

In January 2007, only 5% of the 119 head coaches in Division I-A college football teams were minorities.¹ This number is startling in light of the fact that in National Collegiate Athletic Association (NCAA) football teams 55% of the student-athletes are from minority groups.² Even the president of the NCAA, Myles Brand, has stated that this organization has had a “dismal record of hiring people of color into head coaching positions, especially in the sport of football.”³ The disparity between the numbers of coaches and players has prompted an action brought by the Black Coaches & Administrators (BCA). The BCA is a group of minority coaches and assistant coaches who focus on improving employment opportunities for minority

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¹ Press Release, NCAA, NCAA to Host First Future Coaches Academy for Prospective Head Football Coaches (Jan. 3, 2007), available at http://www2.ncaa.org/portal/media_and_events/press_room/2007/january/20070103_future_coaches_academy_rls.html [hereinafter NCAA Press Release 1].

² *The Lack of Diversity in Leadership Positions in NCAA Collegiate Sports: Hearings Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. On Energy and Commerce*, 110th Cong. (2007) (testimony of Myles Brand), available at http://energycommerce.house.gov/cmte_mtgs/110-ctcp_hrg.022807.Brand-testimony.pdf [hereinafter Brand Testimony]; see also Richard Lapchick, *Power at the Top: How NCAA Division I-A diversity figures reflect top administration*, Sept. 11, 2006, <http://www.ncasports.org/articles.htm>.

³ Brand Testimony, *supra* note 2.

coaches in all sports.⁴ The BCA uses its power and influence to initiate changes in the hiring practices of the NCAA and its member institutions by encouraging aggrieved coaches to file complaints against the NCAA and its member schools.⁵ These complaints allege that the hiring practices of the NCAA and its member institutions violate Title VII of the Civil Rights Act of 1964.⁶

Title VII of the Civil Rights Act prohibits employment practices that have the effect of discriminating on the basis of race, religion, sex, or national origin.⁷ There are two possible ways by which a coach could prove a Title VII violation.⁸ First, the coach can show that the school has demonstrated a discriminatory and deliberate bias against a class protected by Title VII.⁹ This action is also known as a Title VII “disparate treatment” complaint.¹⁰ Second, the coach can lodge a Title VII “disparate-impact” complaint, which “involve[s] employment practices that are facially neutral in their treatment of different groups but [] in fact fall more harshly on one group than another.”¹¹ The BCA believes that in Title VII lies the solution to the minority coaching problem.

⁴ BCASports.org, *About the Black Coaches Association*, <http://www.bcasports.org/MiContent.aspx?pn=AboutBCA> (last visited Apr. 5, 2007) [hereinafter *About BCA*].

⁵ *The Lack of Diversity in Leadership Positions in NCAA Collegiate Sports: Hearings Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. On Energy and Commerce*, 110th Cong. (2007) (testimony of Richard Lapchick), available at http://energycommerce.house.gov/cmte_mtgs/110-ctcp_hrg.022807.Lapchick-testimony.pdf [hereinafter Lapchick Testimony].

⁶ *Id.*; see also 42 U.S.C. § 1981 (1968), which states in relevant part:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

⁷ 29 C.F.R. § 1606.2 (2007) (Title VII of the Civil Rights Act of 1964, as amended, protects individuals against employment discrimination on the basis of race, color, religion, sex or national origin. The title VII principles of disparate treatment and adverse impact equally apply to national origin discrimination. These Guidelines apply to all entities covered by title VII (collectively referred to as “employer”).).

⁸ *Id.*

⁹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) (In Title VII Congress sought to remove the “artificial, arbitrary, and unnecessary barriers to employment when [those] barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”).

¹⁰ *Id.*

¹¹ *Int’l Bd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

II. PURPOSE STATEMENT

This note will examine the feasibility of bringing a Title VII action against the NCAA by the minority coaches and the prerequisites to sustain such an action. The note attempts to address the question: “What constitutes proof of discrimination in hiring?” In particular, this note will analyze the constitutional basis for Title VII, as given by the Supreme Court, and explore the tests for determining whether Title VII has been violated. Furthermore, the note will present the history of the Title VII cases along with the relevant legal rules that apply to the NCAA and its member institutions. Based upon these rules, the NCAA Division I-A hiring practices will be analyzed. The most relevant factors for this analysis include the numbers of minority players, assistant coaches, coaches, and athletic directors at NCAA Division I-A football schools as well as the standard hiring practices adopted by the athletic directors in these schools. This information will be used to determine if the NCAA or its member institutions have violated Title VII in their hiring practice and if litigation would be the best method of resolving the issue and improving the employment prospects for minority applicants.

In addition, other solutions will be offered and evaluated; for example, instituting mandates that institutions interview a certain number of minority candidates, as the National Football League (NFL) has implemented under the program most commonly known as the “Rooney Rule.” This rule requires “that people of color be interviewed for all head coaching positions.”¹² Finally, this note will discuss the reasons why each side may or may not want to pursue litigation in this matter.

III. FACTS

Since the passage of the Civil Rights Act of 1964,¹³ great strides have been made in the pursuit of equal rights for all people, regardless of race. Hiring practices in many fields have changed to more fairly represent an increasingly diverse population. This has not been the case,

¹² C. Keith Harrison, *Scoring the Hire: A Hiring Report Card and Social network Analysis for the NCAA Division I-A and I-AA Football Head Coaching Positions in American Higher Education*, at v (Sept. 21, 2006), available at <http://graphics.fansonly.com/schools/bca/graphics/hrc/HRCfootball-06.pdf> [hereinafter Harrison, *BCA Report Card*].

¹³ 42 U.S.C.S. § 1981 (1968).

however, in the Division I-A college football coaching ranks. Of the “414 coaching vacancies in Division I-A [football] since 1982, only 21 blacks have been hired.”¹⁴

As of the beginning of the 2006 NCAA football season, only six out of the 119 head coaches of NCAA Division I-A football teams were minorities.¹⁵ They were the University of Miami’s Randy Shannon, University of Washington’s Tyrone Willingham, Mississippi State University’s Sylvester Croom, University of California at Los Angeles’s Karl Dorrell, Kansas State University’s Ron Prince, and University of Buffalo’s Turner Gill,¹⁶ among whom only Tyrone Willingham of the University of Washington had served as a head coach for more than four years.¹⁷ Of all of the Division I, II and III football playing member institutions combined, only 14 hired minority head coaches.¹⁸

However, in other sports where a majority of the athletes are of color, minority coaches have fared much better. For example, twenty-three percent of current college basketball coaches are minorities.¹⁹ In Division I college basketball, there are more than eighty African-American head coaches.²⁰ Although this percentage does not correlate with the higher number of minority players in the sport, it is an encouraging number which has increased substantially in recent years.²¹

A. The BCA’s Activities and the Hiring Report Card

The BCA has recently been active in bringing the issue related to the college football coach hiring practice to light. For example, in light of the very low numbers of minority head coaches in Division I-A football, the BCA has created a “Hiring Report Card” (HRC) to evaluate

¹⁴ *BCA Grades for Minority Hiring Improve* ASSOCIATED PRESS, Sept. 21, 2006, available at <http://sports.espn.go.com/espn/print?id=2597084&type=story>.

¹⁵ Michael Wallace, *Dungy Proud of Two Black Coaches in Super Bowl*, MIAMI HERALD, Jan. 23, 2007, available at http://superbowlgame.blogspot.com/2007_01_23_archive.html.

¹⁶ *Id.* See also *NCAA hosts Future Coaches Academy* NCAASPORTS.COM Jan. 3, 2007), available at <http://www.ncaasports.com/story/9905659>.

¹⁷ Add Seymour Jr., *The Diversity Lessons the NCAA Can Learn From the NFL*, Feb. 1, 2007, available at Diverse Online, http://www.diverseeducation.com/artman/publish/article_6952.shtml.

¹⁸ Brand Testimony, *supra* note 2, at 36 (The NCAA’s calculation excludes coaches from Historically Black Colleges and Universities where a majority of the coaches are minorities.).

¹⁹ Mike Fish, *Colorado, Others Barely Make the Minority Grade*, ESPN.com, Feb. 10, 2006, available at <http://sports.espn.go.com/espn/blackhistory/news/story?id=2325630>.

²⁰ Brand Testimony, *supra* note 2.

²¹ *Id.*

the hiring practices of the NCAA and its member institutions.²² The HRC surveys the schools that have hired a new coach and assigns grades from A through F based on the inclusiveness and fairness of the school's hiring process.²³ Because of this "public disclosure," the number of minority candidates that have been interviewed for head coaching positions in the last three years has increased. Minorities now comprise more than 30% of the total number of candidates interviewed.²⁴ Unfortunately, the report has not sufficiently changed the hiring practices of Division I-A football programs, as evidenced by the continued low number of minority coaches actually hired.

Because of the ineffectiveness of the HRC, the BCA is considering pursuing legal actions against the offending institutions, claiming Title VII violations.²⁵ The BCA hopes that "Title VII. . . [can] do for black coaches what Title IX did for women's sports."²⁶ Richard Lapchick, chair of the DeVos Sports Business Management Program and Director of the Institute for Diversity and Ethics in Sport at the University of Central Florida, expects lawsuits to be filed within the near future unless progress is made.²⁷ In his words, all that is required to jumpstart more fairness in the hiring practice is a "right case, one backed by a discriminated coach willing to take a stand."²⁸ Roger Clegg, president and general counsel of the Virginia-based Center for Equal Opportunity, agrees and he stated:

What you would have to do is pick out a particular college and say, all right . . . they've never hired an African American as a head coach. There've been plenty of African American individuals who have applied, and their qualifications are better than (those of) the people who were actually hired.²⁹

²² Press Release, Black Coaches Association, Black Coaches Association (BCA) releases the 3rd Hiring Report Card for Football Coaches (Sept. 19, 2006), *available at* <http://www.bcasports.org/MiContent.aspx?pn=NewsListings&sss=1&xid=1064>.

²³ *Id.*

²⁴ Brand Testimony, *supra* note 2.

²⁵ Lapchick Testimony, *supra* note 5.

²⁶ American Council on Education, *House Subcommittee conducts Hearing on Diversity in College Coaching Ranks* (Mar. 2, 2007), <http://www.acenet.edu/AM/Template.cfm?Section=HENA&TEMPLATE=/CM/HTMLDisplay.cfm&CONTENTID=20683>.

²⁷ Lapchick Testimony, *supra* note 5.

²⁸ American Council on Education, *supra* note 26.

²⁹ Steve Wieberg, *Black Coaches Association will use Title VII as tool in encouraging diversity in NCAA*, USA TODAY, Sept. 5, 2006, http://www.usatoday.com/sports/college/football/2006-09-05-title7-ncaa_x.htm

He went on to say that there is small likelihood of finding any tangible proof of deliberate discrimination, such as a memo stating that the school didn't hire the minority coach because he was a minority.³⁰ More subtle evidence will be needed to prove a Title VII violation. It will be an uphill legal battle unless pressure mounts and the NCAA adopts a self-imposed action like the NFL instituted with the Rooney Rule.

B. The Facts Behind the NFL's Rooney Rule

As stated earlier, even with the Hiring Report Card in place, the hiring rate of minority head coaches in NCAA Division 1-A football is abysmal. This is in stark contrast to the NFL's recent increase in the number of minority head coaches. At the beginning of the 2006 NFL season, there were seven African-American head coaches among the NFL's 32 teams and two of them made it to the Superbowl.³¹ Many people attribute the growth and success of minority coaches in the NFL to the league's active efforts to increase diversity among its head coaching ranks. One of the early proponents of increasing the number of minority coaches in the NFL was attorney Johnnie Cochran.³² In association with fellow attorney Cyrus Mehri, Cochran authored a report in September of 2002 that detailed the disparity between the number of professional African-American football players and the number of African-American head coaches.³³ This report, entitled "Black Coaches in the NFL: Superior Performance, Inferior Opportunities," shed light on the issue and caught the attention of the NFL.³⁴ Cochran and Mehri threatened to sue the NFL for discrimination unless something was done to remedy the blatant disparity.³⁵ In December 2002, through its Committee on Workplace Diversity, the NFL quickly responded by implementing an ambitious program to increase diversity in the head coaching ranks.³⁶ This program promoted the goal of racial diversity by requiring teams seeking to hire a head coach to

³⁰ *Id.*

³¹ Lapchick Testimony, *supra* note 5.

³² Johnnie L. Cochran, Jr. & Cyrus Mehri, *Black Coaches in the NFL: Superior Performance, Inferior Opportunities 1 (2002)*, [www.findjustice.com/files/Report - Superior Performance Inferior Opportunities.pdf](http://www.findjustice.com/files/Report_-_Superior_Performance_Inferior_Opportunities.pdf).

³³ *Id.*

³⁴ *Id.*

³⁵ See generally Richard E. Lapchick, *History Making Black History Month: Can Colleges do as Well?* (Feb. 2007), http://www.bus.ucf.edu/sport/cgi-bin/site/sitew.cgi?page=/news/articles/article_35.htm.

³⁶ Press Release, NFL, NFL Clubs to Implement Comprehensive Program to Promote Diversity in Hiring (Dec. 20, 2002), available at <http://www.nfl.com/news/story/6046016>.

interview one or more minority applicants for the position.³⁷ The program, coined “The Rooney Rule,” was named after Dan Rooney, the owner of the Pittsburgh Steelers and chair of the NFL Committee on Workplace Diversity.³⁸ This program has been credited with helping to add more minority coaches to the NFL’s head coaching ranks.³⁹ The Rooney Rule provides the teams with detailed guidelines that they must adhere to in order to be in compliance with the rule.⁴⁰ They include: (1) creating a detailed job description for their head coaching position; (2) issuing a hiring timeline; (3) keeping records on who was contacted for the position; and (4) keeping records on the outcome of that contact.⁴¹ The NFL can fine the teams that do not adhere to these hiring rules.⁴² The first notable fine for a violation of the rules was given to the Detroit Lions in 2003 when the team hired Coach Steve Mariucci without conducting a search that adhered to the spirit of the rule.⁴³ This fine helped solidify the enforcement power of the NFL on this issue and put teeth into the Rooney Rule. Since that time, several African-American head coaches have been hired throughout the NFL.⁴⁴ “[T]he NFL’s progress is directly traceable to the concerted push the league has made in the last decade since its passage of the Rooney Rule on minority hiring.”⁴⁵

C. The NCAA’s Reaction to the NFL’s Rooney Rule

Myles Brand, president of the NCAA, contested the applicability of the Rooney Rule to college sports.⁴⁶ He asserted that a Rooney Rule type program would not work for higher education, but he did not give any specific reasons.⁴⁷ He went on to say that the NCAA’s system of utilizing the BCA’s Hiring Report Card is better,⁴⁸ based on the premise that schools would

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Press Release, NFL, NFL Issues Interviewing Guidelines (Dec. 9, 2003)[hereinafter Rooney Guidelines], available at <http://www.nfl.com/news/story/6908387>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Johnette Howard, *Time to Get Schooled on College Hiring* (Jan. 24, 2007), available at <http://www.chiefshuddle.com/forums/index.php?showtopic=36244>. (“The Detroit Lions were fined \$200,000 when general manager Matt Millen ignored the league’s directives and hired Steve Mariucci.”).

⁴⁴ Seymour, *supra* note 17.

⁴⁵ Howard, *supra* note 43.

⁴⁶ Brand Testimony, *supra* note 2.

⁴⁷ *Id.*

⁴⁸ *Id.*

improve the inclusiveness of their hiring processes in order to avoid getting a bad grade on the HRC.⁴⁹ Mr. Brand states that “[t]he BCA’s Minority Hiring Report Card has proven to be the operational equivalent of the NFL’s Rooney Rule.”⁵⁰ He further states:

[The Hiring Report Card] is a . . . powerful and comprehensive tool because it evaluates not only whether a minority was interviewed, but the diversity of the search committee, communication with the BCA and others who can make minority recommendations, the duration of the process to avoid 48-hour searches and hires, and adherence to institutional affirmative action policies.⁵¹

The Hiring Report Card works because grading the hiring process of each school sheds light on exclusionary hiring practices.⁵² Now the goal must be to tackle the problem of why the schools are not hiring minorities even with the report card in place.

IV. REASONS FOR THE LACK OF MINORITY COACHES IN COLLEGE FOOTBALL

At a recent congressional hearing on this issue, Myles Brand gave three reasons as to why there are so few minority head coaches and why schools haven’t done more to hire minorities.⁵³ First and most prominently, the NCAA lacks control over colleges and universities when it comes to hiring.⁵⁴ Unlike the influence the NCAA has in promoting academic standards in collegiate sports, the NCAA does not have the same authority to make interviewing or hiring decisions.⁵⁵ The NCAA is just a regulatory body utilized by the member colleges and universities to promote intercollegiate athletics.⁵⁶ It is comprised of approximately “1300 colleges, universities, athletics conferences and related organizations,” for which it conducts over 80 championships with over 380,000 student athletes participating.⁵⁷ The “authority for all rules, policies and procedures rests with the member institutions” and not with the NCAA.⁵⁸ Second, as Brand stated, institutions have a “risk-adverse” nature when it comes to making football coach

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

hiring decisions,⁵⁹ because there is tremendous pressure to succeed in college football due to the large amounts of money it generates.⁶⁰ Tolerance for mistakes is minimal, and the required skill set is so specialized that schools tend to follow the practice of hiring a “proven coach” instead of looking at promising assistant coaches.⁶¹ Brand recently stated that:

[A] head football coach – even more so than a head basketball coach – must not only understand the complexities of the game, but they must hire and manage a staff of two dozen or more, organize the development of more than a hundred student athletes into various skill units, recruit in competition with dozens of other top teams for the best available talent, appeal to alumni and donors for both athletics and campus-wide development, and often be a spokesperson for the university. And they must win!⁶²

By consistently reshuffling coaches, athletic administrators can say to their fan base that they hired someone they believed had the required skill set to succeed, because they coached well and won at another institution. Third, as Brand stated, the NCAA must “improve the informal networks so that minority coaches are front-of-mind options for hiring decisions.”⁶³ This sentiment was echoed in an article by Mike Fish, entitled *Colorado, Others Barely Make the Minority Grade*,⁶⁴ in which Fish expressed the need for minority candidates to get in front of the athletic directors before the hiring process begins in order to be considered for available positions.⁶⁵

Another reason for the lack of minority coaches, only alluded to by Brand in his testimony, is the lack of diversity on the coaching search committees and in the athletic directors’ office. The 2006 BCA Hiring Report stated that only 34 of 134 coaching search committee members nationwide -- or 1.3 per school -- were minorities.⁶⁶

Additionally, the perception of a lack of qualified candidates persists. For example, Tim Weiser, former Athletic Director for Kansas State University, stated that whenever the school had coaching vacancies, he did not interview any minority candidates because there were no

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Fish, *supra* note 19.

⁶⁵ *Id.*

⁶⁶ Harrison, *supra* note 12.

candidates that fit the school's criteria.⁶⁷ He did not consider utilizing a hiring committee like other universities because "[s]earch committees don't get fired, but athletic directors do."⁶⁸ This perception is prevalent among university athletic directors because they are putting their futures "in the hands of a group of people that might not know the details or what [the athletic director's] job requires."⁶⁹ Therefore, when athletic directors like Wieser make hiring decisions, the trend is for them to protect their jobs by hiring proven coaches.

One solution to the problem may be to focus on increasing the number of minority athletic directors. There are currently only eleven African-American and three Latino athletic directors in Division I athletics.⁷⁰ Increasing the number of minority athletic directors may increase the likelihood of interviewing minority candidates. However, this solution still does not relieve the external pressures athletic director face when making hiring decisions.

V. BACKGROUND

A. The Current NCAA Landscape

An analysis of the typical head coach hiring process is necessary to understand why athletic directors and search committees are not hiring more minority coaches. The NCAA hiring process usually consists of the directors or committees creating a "short list" of candidates to fill a coaching position.⁷¹ Candidates on the "short list" are usually placed there because of the personal connections the prospective employer has with others throughout the sports world.⁷² The short list stage of the process is important because qualified individuals on the list are at least given an opportunity to plead the case for their credentials and abilities.⁷³ The most problematic aspect of the typical hiring process is that the "short lists" often do not include minority candidates.⁷⁴ A three-month study conducted by Newsday concluded that many of the

⁶⁷ Fish, *supra* note 19.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Brand Testimony, *supra* note 2.

⁷¹ Jim Moye, Comment, *Punt or Go For the Touchdown? A Title VII Analysis of The National Football League's Hiring Practices for Head Coaches*, 6 UCLA ENT. L. REV. 105, 132 (1998).

⁷² *Id.*

⁷³ *Id.* at 131.

⁷⁴ *Id.*

successful candidates had developed connections with the decision-makers.⁷⁵ The study also found that these decision-makers “have been slow to reach a level of comfort” in hiring minority coaches.⁷⁶

Consequently, if the decision makers are not comfortable with hiring or even interviewing minority coaches, and these coaches are not making onto the short list of candidates, then there is very little chance of a minority coach being hired.

B. Title VII of the Civil Rights Act: Background

What can be done? One option is to consider a Title VII action against the NCAA or the member universities. A thorough understanding of Title VII of the Civil Rights Act of 1964 is required in order to determine the viability of such an action. Title VII prohibits discrimination in employment on the basis of race, national origin, sex, or religion.⁷⁷ It states in relevant part that “[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex or national origin.”⁷⁸ The Act covers all private employers, state and local governments, and public and private educational institutions that employ fifteen or more individuals.⁷⁹

Title VII protects against both discriminatory treatment of protected groups and seemingly fair practices that have a discriminatory impact on those groups.⁸⁰ Disparate treatment cases focus on whether an individual was treated in a discriminatory manner, whereas disparate-impact cases focus on discrimination against a protected group as a whole.⁸¹ Disparate treatment claims can be differentiated from disparate-impact claims by analyzing whether an employer treats some people less favorably than others because of race (disparate treatment), or

⁷⁵ Greg Logan, *Race In Sports, NFL Coaches, Just Out Of Reach, Black Coaches, Shut Out Of 11 Head-Coaching Spots, Ask "Why?"*, NEWSDAY, June 1, 1997, at B04.

⁷⁶ *Id.*

⁷⁷ *See generally* Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1994).

⁷⁸ *Id.*

⁷⁹ *See* § 701(b), 42 U.S.C. § 2000e(b) (1994). Employers must employ 15 or more employees for more than 19 weeks in the current or preceding calendar year in order for Title VII to apply. *See id.*

⁸⁰ *See* *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

⁸¹ *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

whether the employer's practices weigh more heavily and harshly on one race than others without a business necessity justification.⁸²

C. Title VII – Disparate Treatment Background & Analysis

Through prior case law, the Supreme Court established a framework by which disparate treatment cases must be litigated. To establish a case for disparate treatment racial discrimination, “a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern.”⁸³ A plaintiff must prove that discrimination was the motivating factor for not hiring or promoting an applicant even if the reasons given by the defendants for their acts were unreliable.⁸⁴

This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.⁸⁵

The burden of proof is always on the plaintiff to prove the intentional discrimination.⁸⁶ Once that is proven, the defendant employer has the burden of showing a “legitimate, nondiscriminatory reason for the employee's rejection.”⁸⁷ If the defendant employer shows a nondiscriminatory reason, then the plaintiff has the burden of persuasion to show that the reasons are not valid and are just a pretext for discrimination.⁸⁸ This is the plaintiff's “burden of persuasion.”⁸⁹ If the plaintiff meets the burden of persuasion then a court must grant judgment for the plaintiff as a matter of law.⁹⁰ The remedy for the aggrieved plaintiff could include an injunction against the violating employer, forcing it to discontinue the discriminatory practice, and could also include fines for non-compliance.⁹¹

The Supreme Court has decided several cases that govern the examination of disparate treatment actions. In *McDonnell Douglas Corp. v. Green*, the Court ruled that when an employer shows a legitimate and nondiscriminatory reason for not hiring an employee, that employee must be given an opportunity to show that the employer's reason was just a “pretext” for discrimination.⁹² In this case, Green was laid off from McDonnell Douglas.⁹³ While

⁸² *Id.*

⁸³ *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977).

⁸⁴ *Jiminez v. Mary Washington College*, 57 F.3d 369, 377-78 (4th Cir. 1995).

unemployed, Green participated in illegal activities against McDonnell Douglas in an attempt to damage its business,⁹⁴ which McDonnell Douglas gave as one of the reasons for not rehiring Green when it started adding new employees.⁹⁵

The Court stated that “[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in [] deliberate, unlawful activity against it.”⁹⁶ Green contended that he was engaged in “civil rights activities” and the true reason for his not being rehired was racial discrimination.⁹⁷ Under Title VII, the plaintiff/employee carries the burden of proof to show a prima facie case of discrimination.⁹⁸ If the employee carries his burden, then the burden shifts to the employer to show a nondiscriminatory reason for failing to hire the employee.⁹⁹

In this case, McDonnell Douglas’ reason for not rehiring Green was considered “subjective” but it did qualify as a valid reason.¹⁰⁰ The burden then shifted back to Green to prove that the reason was pretextual.¹⁰¹ Since Green was not permitted to rebut the defendant’s claim in the lower court, the Court remanded the case for further proceedings.¹⁰² The Court stated that a valid rebuttal could include evidence that other white employees were rehired after participating in similar activities and only minorities were excluded from opportunity.¹⁰³ This case shows that in employment discrimination cases, plaintiffs must be allowed to rebut the evidence proffered by the defense to show that it was a pretext for discrimination.¹⁰⁴

⁸⁵ McDonnell Douglas, v. Green, 411 U.S. 792, 802 (1973).

⁸⁶ Texas Dep’t of Cmty Affairs v. Burdine, 450 U.S. 248, 255 (1981).

⁸⁷ *McDonnell Douglas*, 411 U.S. at 802.

⁸⁸ *Id.* at 804.

⁸⁹ *Texas Dep’t of Cmty Affairs*, 450 U.S. at 253.

⁹⁰ St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993).

⁹¹ See Regents of Univ. of CA v. Bakke, 438 U.S. 265 (1978).

⁹² 411 U.S. at 803.

⁹³ *Id.*

⁹⁴ *Id.* at 794.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 801.

⁹⁸ *Id.* at 802.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 803-04.

¹⁰¹ *Id.* at 807.

¹⁰² *Id.*

¹⁰³ See *id.*

¹⁰⁴ *Id.*

In *Texas Department of Community Affairs v. Burdine*, a female employee claimed that the Texas Department of Community Affairs violated Title VII when it did not promote her and ultimately terminated her because of her gender.¹⁰⁵ The district court held it was not discrimination because the Department proved that her termination was based on her lack of qualifications and her inability to work well with other employees.¹⁰⁶ The court of appeals affirmed the district court's decision that it was not discrimination, but found that the Department did not meet the burden of production in rebutting the plaintiffs' prima facie case.¹⁰⁷ The appeals court stated that the Department must prove by "a preponderance of the evidence" the nondiscriminatory reasons for her non-promotion and termination as well as prove that those that were hired and promoted were better qualified for the position.¹⁰⁸ The Supreme Court vacated and remanded the case because the defendant's reasons did meet the requirements for rebutting the plaintiff's allegations.¹⁰⁹ The Court stated that defendants only have a "burden of explaining" the nondiscriminatory reasons for their actions.¹¹⁰ There is no need to prove the reasons by a preponderance of evidence or to demonstrate that the hired party was more qualified.¹¹¹ The "employer's burden is satisfied if he simply 'explains what he has done' or '[produces] evidence of legitimate nondiscriminatory reasons.'"¹¹²

Any NCAA member school that is sued for a Title VII violation may rely on these decisions to support its reasoning as to why a potentially stronger minority candidate was not hired for a coaching position. These cases open up more options for a member institution to justify its hiring practice. For example, a school could argue that a candidate wasn't hired because he did not have a history of recruiting the best players in the country or he was not known for spurring alumni giving. Based on these factors, what would seem like a potentially discriminatory hiring decision could be justified by some arbitrary reasons that in fact have little to do with how well the candidate would perform on the job. Because the majority of Division I-A schools have never had a minority head coach, they can use the pretext that a minority coach

¹⁰⁵ 450 U.S. 248, 251 (1981).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 252.

¹⁰⁹ *Id.* at 259-60.

¹¹⁰ *Id.* at 260.

¹¹¹ *Id.* at 259-60.

¹¹² *Id.* at 256 (quoting *Board of Trustees v. Sweeney*, 439 U.S. 24, 25 (1978)).

lacks Division I-A recruiting experience. Furthermore, if a school hires an alumnus who is not a minority, rather than a minority candidate, the school may be successful in arguing that it hired the candidate because of his past affiliation with the school. These arbitrary reasons for not hiring a qualified minority coach may be insufficient to rebut a claim of discrimination brought by a minority candidate unless the latter could provide some clear and definite proof that the proffered reason was pretextual.

Ash v. Tyson Foods, Inc. is a recent case where the statements made by management seemed to support the minority employees' claim of racial animus in promotion decisions.¹¹³ In *Ash*, two black male employees alleged that Tyson Foods, the employer, violated Title VII and 42 U.S.C. § 1981 when denying them promotions.¹¹⁴ The plaintiffs claimed that the reasons given by the employer for not promoting them were just a pretext for discrimination.¹¹⁵ The plaintiffs showed evidence that their manager referred to one of them as "boy" and applied different qualification standards not required by the company policy.¹¹⁶ The promotion qualifications included a college degree and outside experience.¹¹⁷ The Eleventh Circuit Court of Appeals ruled that use of the word "boy" could never by itself constitute a racial slur if it is used in the absence of special qualifiers or modifiers.¹¹⁸ The court also found that in order for an employer's conduct to be considered a pretext for racial discrimination it would need to "jump off the page and slap you in the face," which the evidence has failed to do.¹¹⁹

The Supreme Court vacated and remanded this ruling based on the premise that "[a]lthough it is true the disputed word [boy] will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign."¹²⁰ The Court listed five non-exclusive factors which may indicate whether use of a particular word is evidence of racial animus.¹²¹ These include: (1) context; (2) inflection; (3) tone of voice; (4) local custom; and (5)

¹¹³ *See*, 546 U.S. 454 (2006).

¹¹⁴ *Id.* at 455.

¹¹⁵ *Ash v. Tyson Foods, Inc.*, 129 Fed. Appx. 529, 531 (11th Cir. 2005).

¹¹⁶ *Id.*

¹¹⁷ *See id.* at 534.

¹¹⁸ *See Ash*, 546 U.S. at 456.

¹¹⁹ *See id.* at 456-57.

¹²⁰ *Id.* at 456, 458.

¹²¹ *Id.*

historical usage.¹²² The Court also found the Court of Appeals' standard for inferring the existence of pretextual evidence to be imprecise and unhelpful.¹²³ Granting judgment as a matter of law against the employee was incorrect because the employee presented sufficient evidence, i.e., the manager's act of interviewing him after hiring a white male, to show that the manager's stated reasons for denying his promotion were pretextual.¹²⁴

However, upon remand the court of appeals still found that the use of the word "boy" in this context was not sufficient to show that the employer's stated reasons for not promoting the employees were racial discrimination.¹²⁵ The Court of Appeals also found that the employees did not show significant differences between their qualifications and the qualifications of the chosen candidates.¹²⁶ The differences were not "of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question."¹²⁷

Ash clarifies the kind of evidence required to win a Title VII action. First, a prospective minority coach would need to prove that he had clearly superior qualifications over the chosen candidate. This evidence would not need to "slap you in the face," but it would need to stand out to the point where any reasonable athletic director or hiring committee would not have made the same selection.¹²⁸ The plaintiff coach would probably need clear verbal or written evidence showing racial animus in the hiring decision. The court in *Ash* did not elaborate on the type of words or evidence required. In the correct context, use of the words "Boy," "Ann," "Blew," "Buffie," "Coconut," "Colored," "Gable," "Rastus," or even "Teapot" would all be considered racial slurs.¹²⁹ Recently the words "articulate and bright and clean and . . . nice-looking" were considered by some in the public to have racially negative undertones when used to describe a minority Presidential candidate.¹³⁰ Here, as in most situations, context is important. Given that

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Ash*, 129 Fed. Appx. at 533-534.

¹²⁷ *Id.* (citing *Cooper v. Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004)).

¹²⁸ *Id.*

¹²⁹ Ethnic Slurs – List - http://en.wikipedia.org/wiki/List_of_ethnic_slurs (last visited Apr. 5, 2007).

¹³⁰ Xuan Thai and Ted Barrett, *Biden's description of Obama draws scrutiny* (Feb. 9, 2007), <http://www.cnn.com/2007/POLITICS/01/31/biden.obama/index.html> (2008 Presidential Candidate Joe Biden commented on fellow candidate Barack Obama, who is African-American. Many considered his

Ash is a fairly recent decision, it should be a good indicator of how the current Supreme Court would ultimately rule in a similar case brought up by the BCA.

D. Title VII - Disparate-Impact Background and Analysis

In addition to the disparate treatment cases that have come before the Supreme Court, the Court has also adjudicated many disparate-impact claims. In disparate-impact cases, a complainant must prove that some employment practices, which facially do not seem to be, actually are.¹³¹ Employment practices that appear to be subjective or discretionary can be analyzed using the disparate-impact approach to determine if they are in fact discriminatory.¹³² The goal of the disparate-impact test for Title VII violations is “the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”¹³³ To establish a prima facie case under disparate-impact analysis, a plaintiff must first show that a facially neutral employment practice had a significantly discriminatory impact.¹³⁴ If the plaintiff meets this initial burden of proof, then the employer must demonstrate that the practice has a genuine relationship to the employment in question.¹³⁵ Once a legitimate, nondiscriminatory reason is advanced, the plaintiff then has the burden of proving that the reason advanced is a pretext for discrimination.¹³⁶ If the employer is able to show this relationship, then the plaintiff must show that the practice is just a pretext for discrimination and that another practice would serve the employer's legitimate interests without undesirable effects.¹³⁷ Just as in disparate treatment analysis, the remedy for a disparate-impact violation of Title VII could include an injunction against the violating employer as well as fines for non-compliance.¹³⁸

If the plaintiff relies on employment statistics as a proof of discrimination, then he or she must also identify specific employment practices allegedly responsible for observed statistical

comment a veiled slur suggesting that minorities are not normally articulate, clean, bright and nice-looking.).

¹³¹ *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 986 (1988).

¹³² *Id.*, at 992.

¹³³ *Griggs*, 401 U.S. at 431.

¹³⁴ *Id.*

¹³⁵ *Id.*, at 432.

¹³⁶ *McDonnell Douglas*, 411 U.S. at 804.

¹³⁷ *Id.* at 805.

¹³⁸ *See Bakke*, 438 U.S. 265.

disparities and prove causation.¹³⁹ An employer may impeach the reliability of statistical evidence in support of a disparate-impact claim by showing that the data was obtained from incomplete data sets or based on inadequate statistical techniques.¹⁴⁰ Statistics have been useful in proving employment discrimination.¹⁴¹ However, their usefulness depends on the surrounding facts and circumstances.¹⁴² A significant disparity between the composition of the work force and the composition of management may be important in analyzing whether there is a Title VII violation.¹⁴³ Other factors, such as a small sample size and “evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants, would also be relevant.”¹⁴⁴ This is important because the statistical evidence leans in favor of an aggrieved minority coach in this situation.

One notable disparate-impact case is *Griggs v. Duke Power Co.*, in which a class action lawsuit was filed against the employer Duke Power Company alleging that its employment practices violated Title VII of the Civil Rights Act of 1964.¹⁴⁵ Duke Power required that applicants have a high school education or pass a standardized general intelligence test as a condition of employment.¹⁴⁶ The Supreme Court ruled that Title VII prohibited these types of requirements as conditions for employment when those conditions were not “significantly related to successful job performance.”¹⁴⁷ The Court held that an individual did not need to show that an employer had discriminatory intent against them when the employment procedures or testing mechanisms worked as built-in obstacles for minority groups and were not related to determining employee capabilities.¹⁴⁸

In *Connecticut v. Teal*, black employees of a Connecticut state agency failed a written examination used to determine which employees were eligible for promotion.¹⁴⁹ The plaintiffs argued that the test was a non-job related written examination and required the employees to

¹³⁹ *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 995 (1988).

¹⁴⁰ *Id.* at 996.

¹⁴¹ *Int'l Bhd. of Teamsters*, 431 U.S. at 339.

¹⁴² *Id.* at 340.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ 401 U.S. 424, 425 (1971).

¹⁴⁶ *Id.* at 425-26.

¹⁴⁷ *Id.* at 426.

¹⁴⁸ *Id.* at 432.

¹⁴⁹ 457 U.S. 440, 440 (1982).

achieve a passing score in order to be considered for promotion.¹⁵⁰ Black candidates had a pass rate on the exam of fifty-four percent while white candidates had a pass rate of eighty percent.¹⁵¹ Only those candidates that passed the test would be eligible for promotion.¹⁵² Once those candidates were identified, the state used additional criteria to determine which candidates were promoted from the group of passing candidates.¹⁵³ Although a higher percentage of blacks failed the written test, they were actually promoted at higher rates than white employees from the group of passing candidates.¹⁵⁴ Some of the black employees that failed the test sued in district court alleging that use of the written examination as a requirement for promotional consideration had a disparate-impact on black candidates in violation of Title VII.¹⁵⁵

In defense, the State argued that because the "bottom-line" percentage of candidates promoted was higher for black candidates than for whites, it could not be held liable under Title VII's disparate-impact doctrine.¹⁵⁶ The Supreme Court rejected the State's argument and held that a "nondiscriminatory 'bottom line' is no answer, under the terms of Title VII, to respondents' prima facie claim of employment discrimination."¹⁵⁷ The Court essentially stated that an employer could not avoid the illegality of a non-job-related hiring requirement that had caused a disparate-impact on a protected group by compensating for the disparity at a later stage so that the final numbers would not support a claim of discrimination.¹⁵⁸ "Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired."¹⁵⁹ The Court went on further to say that the "[r]equirements and tests that have a discriminatory impact are merely some of the more subtle, but also the more pervasive, of the practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."¹⁶⁰

¹⁵⁰ *Id.* at 444.

¹⁵¹ *Id.* at 443.

¹⁵² *Id.* at 443-444.

¹⁵³ *Id.* at 444.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 456.

¹⁵⁸ *Id.* at 452.

¹⁵⁹ *Id.* at 455.

¹⁶⁰ *Id.* at 456 (citing *McDonnell Douglas*, 411 U.S. at 800) (internal citations omitted).

In *Griggs* and *Teal*,² arbitrary non-job related criteria for promotion and hiring were held to be susceptible to Title VII action. In applying these two cases to an action against the NCAA member institutions, there would need to be some kind of test or requirement that stood as a barrier for minorities getting hired as head football coaches. However, coaching candidates are not usually given aptitude tests to determine their suitability for head coaching positions. Decisions are made based on criteria such as coaching history and experience instead of aptitude and intelligence. This is understandable because although coaching requires a certain degree of intelligence, it also requires a great ability to coordinate, communicate and negotiate. Coordinating the activities of a large coaching staff with the activities of the student athletes is very important when it comes to making the most efficient use of time. Communicating play calls and strategy as well as expressing to the members of a team what is expected of them are integral to the success of any head coach. Finally, negotiating with prospective players and their parents is very important because no head coach can be successful without skilled players. Neither the BCA nor the NCAA would refer to any tests the coaches were given as the reason why the minority coaching candidate was not hired. This pitfall is just too easy to avoid and explain away when it comes to coaching decisions.

In *EEOC v. Consolidated Service Systems*, a Korean-owned cleaning service hired employees primarily through word-of-mouth recruiting.¹⁶¹ The result was that 81% of the new employees were Korean, though they comprised less than 1% of the workforce in the county.¹⁶² The court looked at the question of whether “circumstantial evidence compels an inference of intentional discrimination” or disparate-impact.¹⁶³ The court ruled that “word of mouth recruiting does not compel an inference of intentional discrimination.”¹⁶⁴ The employer had no duty to inform the entire labor pool of job openings and they did not perform any intentional acts of discrimination.¹⁶⁵ Also, “word of mouth recruitment” is not considered an “employment practice” in the Seventh Circuit, thus the disparate-impact claim had to be dropped.¹⁶⁶ In jurisdictions that consider word of mouth hiring as an employment practice, one must balance

¹⁶¹ 989 F.2d 233, 234 (7th Cir. 1994).

¹⁶² *Id.* at 235.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 236.

¹⁶⁵ *Id.* at 237.

¹⁶⁶ *Id.* at 236.

the advantages of the practice against the possible discriminatory effect when the employer's workforce is already skewed along racial or other disfavored lines.¹⁶⁷ "In considering claims of disparate-impact under section 703 (a) (2)" of Title VII, the Supreme Court "focus[es] on [the] employment and promotion requirements that create[d] a discriminatory bar to opportunities."¹⁶⁸ If that bar is proven to be non-discriminatory, there is no requirement to focus on the number of "overall [] minority . . . applicants actually hired or promoted."¹⁶⁹

Consolidated Service Systems bodes well for the NCAA member institutions because the case seems to enable athletic directors to hire not from a list of qualified candidates offered by the BCA but from their individual circle of candidates. Athletic directors can gather a list of available candidates by "word of mouth" and make the decision to hire a new coach before announcing that the current coach is leaving. This type of unadvertised coaching vacancy makes it very hard for minority candidates to put their hats into the coaching ring. In most cases, they are not aware of the vacancies until after decisions have been made in filling the positions. This goes to the core of the BCA's issue with the NCAA member institutions. The BCA believes that unless athletic directors are forced to interview minority candidates, they will not have any incentive to do so. The current "word-of-mouth" interview and hiring system is probably the reason that there are only six minority head coaches currently in the NCAA Division I-A football teams.¹⁷⁰

E. Applying the Disparate Treatment Test to the Member Institutions

For a claim of disparate treatment against a Division I-A member university to be successful, the following elements must be proven. First, a prima facie case of disparate treatment discrimination must be shown. This is done by showing that the facially neutral standards utilized by the university to select applicants for hire have "a significantly discriminatory pattern."¹⁷¹ The member university would then need to rebut the claim by giving reasons why its particular hiring practices have a "manifest relationship to the employment in

¹⁶⁷ *Id.*

¹⁶⁸ *Teal*, 457 U.S. at 450.

¹⁶⁹ *Id.*

¹⁷⁰ See NCAA Press Release 1, *supra* note 1.

¹⁷¹ *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977).

question.”¹⁷² If the university meets this burden, then the plaintiff coach must show that the reasons given were not valid and were just a pretext for discrimination.¹⁷³

For example, suppose a minority coach filed a case against Blackacre University for employment discrimination under the disparate treatment analysis of Title VII of the Civil Rights Act. The minority coach would need to show that he applied and was qualified for a head coaching job with the university. Then the coach must show that despite his qualifications, he was denied employment by the university and the university continued to seek out other applicants with similar or lesser qualifications. If the university hires someone of similar or lesser qualifications, who is not a minority, then he may have a case for disparate treatment against the university. The coach would need to prove that the university did not hire him because he was a minority. This may be a hard burden to prove because most schools do not have a set of coaching standards and the decisions to hire coaches are oftentimes based on subjective evaluations made by the athletic directors or the hiring committees.

Unless there was proof that the athletic directors or the hiring committee deliberately discriminated against the minority coach, it would be difficult to pass the first hurdle of the disparate treatment test. If the coach does produce proof that he was not hired because of his race, then the university would need to produce evidence that the criteria it used for hiring the coach was based on non-discriminatory factors. Again, these factors may include prior affiliation to the university, coaching experience in a particular offensive or defensive system, or even a history of recruiting talented student athletes. As long as the university could offer a sufficient reason for why it did not hire the minority coach, the burden would shift back to the coach to prove that the reason was just a pretext for discrimination. Without specific information showing conclusively that a university did not hire a candidate because of race, given the subjective criteria used to hire college coaches today, it would be very difficult to show that the reasons listed were not valid. The coach could rebut the university’s claim if he could produce such evidence as a witness to the decision making process who could state the discriminatory reason for not hiring the minority coach. If this evidence is available, then the coach may have a case. Because the selection process is not open and the selection criterion is not public knowledge, proving a disparate-impact violation would be difficult.

¹⁷² Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

¹⁷³ See *id.*

VI. CURRENT NCAA INITIATIVES TO IMPROVE DIVERSITY

The NCAA and the BCA are currently working on several solutions to this diversity in coaching problem. Since 2003, the NCAA has implemented several initiatives to increase the number of minority candidates and coaches.¹⁷⁴ In conjunction with the NFL, the BCA and the American Football Coaches Association, (AFCA) the NCAA created the “Coaches’ Academy.”¹⁷⁵ “The Coaches Academy is an NCAA initiative created to address the critical shortage of ethnic minorities in head coaching positions in the sport of football.”¹⁷⁶ One of the programs, called the “Future Coaches Academy,” works with inexperienced coaching candidates “who have a desire to enter the college football coaching profession.”¹⁷⁷ In 2007, there were 31 participants selected to attend the Academy with hopes to become future NCAA head coaches.¹⁷⁸ In addition to this program, the NCAA is currently hosting several “Coaches’; Academy” programs as a part of its greater Advanced Coaching Initiative.¹⁷⁹ The NCAA states the objectives of the Academy as follows:

- (1) To increase the understanding and application of skills necessary to secure head coaching positions;
- (2) to increase the understanding and awareness of competencies necessary for success in head coaching at the intercollegiate level;
- (3) to motivate assistant coaches and coordinators to pursue careers as head coaches at the Division I-A level;
- (4) to introduce ethnic minority and women coaches to senior-level coaches and administrators through a mentoring program;
- (5) to raise public awareness of the existing talent pool of ethnic minority and women coaches; and
- (6) to promote the coaching profession to student-athletes, graduate assistants and others.¹⁸⁰

The NCAA Coaches Academy has three levels: Expert, Advanced and Executive.¹⁸¹ The Expert Coaching Program was created for minority football coaches with at least six years of

¹⁷⁴ Press Release, NCAA, NCAA Selects 12 Participants for Expert Coaching Program to be held in Indianapolis, June 1-3 (May 21, 2004), *available at* <http://www.ncaa.org/releases/miscellaneous/2004/2004052101ms.htm> [hereinafter NCAA Press Release 2]; *see also* Brand Testimony, *supra* note 2.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ NCAA Press Release 1, *supra* note 1.

¹⁷⁸ *Id.*

¹⁷⁹ NCAA Press Release 2, *supra* note 174.

¹⁸⁰ Press Release, NCAA, NCAA Coaches Academy: Assisting Diverse Leaders with Achieving coaching Excellence (2003), *available at* <http://www1.ncaa.org/membership/governance/assoc-wide/moic/2003/s5b.htm> [hereinafter NCAA Press Release 3].

¹⁸¹ NCAA Press Release 2, *supra* note 174.

coaching experience and has the goal of teaching and reinforcing “various aspects of securing, managing and excelling in NCAA head coaching positions at the Division I-A level; and to provide participants with an experience that emphasizes the importance of skill enhancement, networking and exposure to key stakeholders in intercollegiate athletics.”¹⁸² The Advanced Coaching Program is for football coaches with at least four years of experience, and the Executive Coaching Program is for football coaches with at least eight years of experience.¹⁸³ These programs directly tackle the issues between the BCA and the NCAA and are hosted by NCAA athletics administrators, head football coaches and business leaders.¹⁸⁴ Getting to know these people is critical for a prospective coach trying to enter the coaching arena.

These programs teach the candidates the skills needed to succeed as well as the skills needed to handle the numerous “off-the-field concerns” that affect every head football coach. The NCAA believes the coaches graduating from the programs today will be the head coaches of NCAA football teams in the future. In fact, some academy graduates have already started working for Division I-A football programs, and the NCAA hopes this trend will continue.¹⁸⁵ Kansas State University’s Ron Prince, Columbia University’s Norries Wilson, and St. Peters College’s Chris Taylor are a few examples of academy graduates.¹⁸⁶

Additionally, in 2005, the NCAA created the “Office of Diversity and Inclusion.”¹⁸⁷ Charlotte Westerhaus was hired as vice-president of the program.¹⁸⁸ Her mandate was to help member institutions and the national office to increase their diversity makeup.¹⁸⁹ Through efforts such as these, the number of African-Americans on the NCAA’s administrative staff has increased from forty-six to sixty-four in the last five years.¹⁹⁰

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ NCAA Press Release 1, *supra* note 1.

¹⁸⁶ Brand Testimony, *supra* note 2.

¹⁸⁷ Press Release, NCAA, Charlotte Westerhaus Named NCAA Vice-President for Diversity and Inclusion (May 18, 2005), *available at* http://www2.ncaa.org/portal/media_and_events/press_room/2005/may/20050518_vp_odi_release.html.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See Brand Testimony, *supra* note 2.

VII. OUTSIDE PROPOSALS TO INCREASE DIVERSITY

There are several solutions being offered that may foster change. Some believe in a collegiate version of the Rooney Rule, which diversified the interview pool for the NFL.¹⁹¹ Attorney Cyrus Mehri states that scholarships should be withheld from institutions that do not implement a diversity program or do a better job in diversifying their hires.¹⁹² Still others offer less rule-based solutions. The Executive Director of the BCA, Floyd Keith, has stated that one solution would involve student-athletes not attending institutions that do not have a diverse coaching staff.¹⁹³ “When student-athletes of color start making decisions to play where it is most likely that they have a fair and equitable opportunity to eventually coach and become an administrator, we will then, and only then, start to see a difference in the hiring process.”¹⁹⁴

VIII. CONSEQUENCES

A. Legal Ramifications

Tulane law professor Joel Friedman, an expert in employment discrimination law, is not convinced that there will be anything to gain from litigation.¹⁹⁵ Current labor law may not have much application to the world of sports.¹⁹⁶ The NCAA and its member schools can provide a myriad of excuses explaining why their searches exclude minority candidates. If the search is done during prime recruiting season or right before the season, the athletic director can say he “did it in three days by calling up [his] friends and maybe that had a disproportionate exclusionary effect on blacks, but it was necessary under the circumstances.”¹⁹⁷ It would be up to the court to decide whether the given reasons are valid. Based on the case law in this area, it is unlikely that a court will second-guess athletic directors’ hiring decisions. Congressional action is necessary and may be on the horizon. On February 28, 2007 the U.S. House of Representatives Energy and Commerce Subcommittee on Commerce, Trade and Consumer

¹⁹¹ *Id.*

¹⁹² Seymour, *supra* note 17.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Wieberg, *supra* note 29.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

Protection held a hearing on the issue, signifying that this issue has attracted the attention of lawmakers.¹⁹⁸

B. Coaching Ramifications

There are far-reaching ramifications if colleges and universities continue to ignore qualified minority candidates. Exceptional minority football coaches that feel they cannot get a head coaching position at a Division I-A college may opt to take positions in the NFL,¹⁹⁹ such as former University of California at Los Angeles (UCLA) assistant coach, Jon Embree, who took a position in the NFL with the Chiefs instead of waiting for seemingly non-existent head coaching opportunities in Division I-A college football.²⁰⁰ In addition, several other minority assistant coaches from Division I-A football programs are defecting to the NFL, including Eric Bieniemy and Curtis Johnson, two highly regarded college assistant coaches.²⁰¹ Jon Embree stated that the reason for the increased movement of minority college coaches to NFL programs is because “there seem to be more opportunities available in the NFL to minority coaches.”²⁰² Finally, an NFL assistant coaching position enhances the likelihood of a coach getting a top college job. “Dorrell, Willingham and Croom all worked as NFL assistants before they got their first college head coaching jobs.”²⁰³ Floyd Keith, the executive director of the BCA, stated that “[i]t’s encouraging to see the NFL successes, but it doesn’t take the collegiate people off the hook.”²⁰⁴

IX. CONCLUSION

On pure legal terms, suing under a Title VII action may not prove to be a success. A Title VII claim may fail on the basis of the disparate-impact or disparate treatment test. The disparate-impact test would likely fail because the NCAA member schools have not instituted a standard hiring practice that discriminates against a single minority group. Individual schools and athletic directors have their own standards for determining whom to interview and whom to hire. Without smoking gun evidence to show that an individual school’s standard hiring practice

¹⁹⁸ See Brand Testimony, *supra* note 2.

¹⁹⁹ See Fish, *supra* note 19.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

has deliberately discriminated against minority coaching candidates, the BCA would not have a prima facie case against the school. Under the disparate treatment test, the BCA would have a difficult time proving that the stated reasons given by a school for hiring a non-minority candidate are not legitimate. Since most new hires have some kind of familiarity or relationship with the person doing the hiring, many minority candidates are thereby excluded.

A solution outside the realm of litigation needs to be devised. Both sides have obvious reasons to resolve their issues outside of court. A protracted lawsuit will have a negative impact on the NCAA, resulting in lower television viewership and attendance at games. Additionally, sponsors are likely to distance themselves from the NCAA or any member institution accused of racially discriminatory hiring practices.

The BCA may not want to take this case to court because of the likelihood of dismissal. Even if it won a case in district court, with the current makeup of the Supreme Court, it is unlikely to win in such a high profile case involving the subtleties of racial discrimination. Also, the BCA would not want to appear unreasonable or disinterested in negotiating a fair solution with the NCAA member schools. This controversy might paint the BCA as an irrational and uncompromising organization. On the other hand, the goal of the BCA (if it decides to pursue litigation) may not be to win a Title VII claim against the NCAA member schools but to bring enough attention to the issue to force action by the schools, as has occurred with the NFL in the implementation of the Rooney Rule. If the NCAA member schools are unwilling to compromise, BCA will have a valid reason to move forward with litigation. In the end, what is needed is productive dialogue between both sides. Hopefully, the current implementation of the NCAA Coaching Academies and Congressional action on the issue will facilitate progress and fairness.