

AN EXAMINATION OF THE VIABILITY OF TITLE VII AS A MECHANISM TO
COMPEL RACIAL DIVERSITY AMONG THE COMPOSITION OF HEAD
COACHES AT NCAA FOOTBALL BOWL SUBDIVISION INSTITUTIONS

A Record of Study

by

LANCE CARLOS HATFIELD

Submitted to the Office of Graduate Studies of
Texas A&M University
in partial fulfillment of the requirements for the degree of

DOCTOR OF EDUCATION

August 2008

Major Subject: Physical Education

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ABSTRACT

An Examination of the Viability of Title VII as a Mechanism to
Compel Racial Diversity Among the Composition of Head Coaches
at NCAA Football Bowl Subdivision Institutions. (August 2008)

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The purpose of this study was to examine the legal strategy of utilizing Title VII of the Civil Rights Act of 1964 to compel change to the racial composition of head coaches at NCAA Football Bowl Subdivision institutions. To accomplish this, the researcher examined the guidelines for bringing a Title VII case, researched statutory requirements and case law precedents, and compiled and analyzed the outcomes of prior employment discrimination cases. In addition, the researcher investigated the proposition that Title VII could do for minority football coaches what Title IX did in athletics for girls and women.

Investigation of Title VII procedural guidelines revealed that plaintiffs are disadvantaged when pursuing a claim. This is due in part to the fact that plaintiffs must exhaust administrative remedies prior to filing a complaint with a court. As a result, the Title VII remedy requires a protracted process. In addition, review of salient sport and non-sport cases revealed that courts are highly deferential to employers when evaluating the employers' proffered hiring criteria.

Analysis of prior Title VII case outcomes revealed a significant disparity in plaintiff and defendant success rates. During 1998-2006, plaintiffs succeeded in opposing motions for summary judgment only 1.84% of the time in U.S. District Courts. Plaintiffs were more successful if they were able to get their cases heard by a court. Plaintiffs prevailed in 37.9% of jury trials and in 26.7% of bench trials.

It was also determined that Title VII is unlikely to provide results similar to Title IX. This is asserted for two main reasons. First, unlike Title IX, Title VII complaints cannot be filed directly in a court without exhausting administrative remedies. Second, because standing is not an issue in filing a Title IX complaint with the Office for Civil Rights, the investigation of an institution can commence upon the filing of a complaint by an interested party. Thus, a coach or administrator does not have to be directly involved.

It was concluded that for these and other reasons, it is unlikely that Title VII litigation can affect change. Minority coach advocates should instead try less adversarial approaches.

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I. INTRODUCTION

“White players, beyond the playing field, can expect to become coaches, athletics directors and college presidents. Blacks have no life beyond the playing field.”¹ This was Rev. Jesse Jackson’s response to the University of Alabama’s decision to hire Mike Shula rather than Sylvester Croom as head football coach in May 2003.² To Jackson and many observers the only logical explanation for Shula’s hiring over Croom was the fact that Shula is White and Croom is Black. Certainly, it was argued, the decision was not predicated upon the respective credentials of the two candidates.³

During this period of time, it seemed as if the pressures of America’s – and the South’s in particular – past history of race relations would explode over the issue of the lack of minority head coaches in major college football. Many perceived Alabama’s hiring of Shula as the perpetuation of a system that continually overlooks and disadvantages racial minorities; and, in light of the University of Alabama’s place in civil rights history, was demonstrative of the non-Reconstructed South. Rev. Jackson

This record of study follows the style of the *Journal of Legal Aspects of Sport*.

¹ Associated Press, *Jackson Takes Alabama to Task*, USA TODAY, May 9, 2003, available at http://www.usatoday.com/sports/college/football/sec/2003-05-09-jackson-alabama_x.htm (last visited July 7, 2007).

² Both Shula and Croom are alumni of the Alabama program. At the time, Shula was an assistant coach with the Miami Dolphins and Croom was an assistant coach with the Green Bay Packers.

³ Shula had spent 15 years as an NFL assistant coach and had no college coaching experience. On the other hand, Croom not only had 16 years of NFL coaching experience, but was an assistant coach at Alabama for 10 years, five of which were under Paul “Bear” Bryant. Croom was also an All-American player for the Crimson Tide in 1974. See Statement of Reverend Jesse Jackson, *The Lack of Diversity in Leadership Positions in NCAA Collegiate Sports*, Hearing before the House Subcommittee on Commerce, Trade, and Consumer Protection, Feb. 28, 2007, at 13, available at <http://bulk.resource.org/gpo.gov/hearings/110h/35220.pdf> (last visited Dec. 21, 2007) (quoting Rev. Jesse Jackson “Coach Croom grew up in Tuscaloosa, hometown boy, All-American, University of Alabama, hometown, played under Bear Bryant, can’t get better than that in Alabama, but when the deal went down, they went with Shula, who had almost zilch resume.”).

expressed this broad perspective when he stated that only “[t]he unfinished business in the South will make this country whole.”⁴

Croom would not have to wait long before his next opportunity to become a head coach. Mississippi State University head coach, Jackie Sherrill, retired amidst controversy following the 2003 season.⁵ Mississippi State then chose Croom as the new head coach.⁶ With one decision history was made. Croom became the first Black head football coach both at Mississippi State and in the venerated Southeastern Conference.⁷ Much like the previous spring when he was overlooked by Alabama, many observers commented not only on the sport-related significance of Croom’s hiring, but on the extant socio-political ramifications as well. Some remarked that it was most appropriate that this hiring take place in the state of Mississippi. William Ferris of the Center for the Study of the American South stated, “This (Croom’s hiring) registers at the top of the scale in terms of fundamental change in the American South...Having a Black head

⁴ Dave Bryan, *Jackson Calls for Probe into Alabama Hiring Practices*, USA TODAY, May 14, 2003, available at http://www.usatoday.com/sports/college/football/sec/2003-05-14-jackson-hiring-alabama_x.htm (last visited Dec. 20, 2007).

⁵ See Mississippi State University Press Release, *Sherrill Retirement Press Conference*, Oct. 20, 2003, available at http://www.mstateathletics.com/ViewArticle.dbml?&DB_OEM_ID=16800&ATCLID=930380&SPID=10997&SPSID=90889 (last visited Oct. 30, 2007) (announcing Jackie Sherrill’s intent to retire following the conclusion of the 2003 season. Sherrill’s final team ended the season with the program’s biggest margin of loss against rival Ole Miss, 33-0. The team finished the year 2-10, 1-7.)

⁶ Mississippi State University Press Release, *Croom Named Mississippi State Head Football Coach*, Dec. 1, 2003, available at http://www.mstateathletics.com/ViewArticle.dbml?&DB_OEM_ID=16800&ATCLID=930549&SPID=10997&SPSID=90889 (last visited Oct. 30, 2007).

⁷ Steve Weiberg, *Croom Takes Miss. State Job; SEC’s First Black Football Coach*, USA TODAY, Dec. 1, 2003, available at http://www.usatoday.com/sports/college/football/sec/2003-12-01-croom-msu_x.htm (last visited July 2, 2007).

coach at Mississippi State University is in many ways *the final nail in the coffin* of the kind of segregation for which the state and the region have been known for so long...”⁸

While it is difficult to assess any short-term socio-political advancement related or attributable to Croom’s appointment at Mississippi State, there has been some momentum in the wake of his hiring germane to the growth of the number of minority head coaches. During the time period of 2003-2006, racial minorities accounted for one of every three football coaching candidates interviewed at major college programs.⁹ Fifteen percent of coaching vacancies were filled with racial minorities.¹⁰ Going into the 2007 season, there were a total of eight racial minority head coaches at NCAA Football Bowl Subdivision schools. These included six African-Americans and two Hispanics.¹¹ Of these six African-American head coaches, three were hired during the 2006 calendar year.¹² For each of these three coaches, their respective current coaching positions are their first head coaching appointments.¹³

The purpose of this study is to examine the legal strategy of utilizing Title VII of the Civil Rights Act of 1964 to compel change to the racial composition of head coaches

⁸ Kelly Whiteside, *Croom’s Hiring Cheered Beyond Football*, USA TODAY, Dec. 1, 2003, available at http://www.usatoday.com/sports/college/football/sec/2003-12-01-croom-cheers_x.htm (last visited July 2, 2007) (emphasis added).

⁹ Brad Wolverton, *More Minority Candidates are Interviewed for Football-Coaching Jobs, but Few Get Hired, Report Says*, CHRON. HIGHER EDUC., Sept. 21, 2006, available at <http://chronicle.com/daily/2006/09/2006092103n.htm> (last visited July 27, 2007).

¹⁰ *Id.*

¹¹ The African-American head coaches were: Turner Gill of Buffalo, Ron Prince of Kansas State, Randy Shannon of Miami (FL), Tyrone Willingham of Washington, Karl Dorrell of UCLA, and Sylvester Croom of Mississippi State. The Hispanic coaches were Rich Rodriguez of West Virginia and Mario Cristobal of Florida International.

¹² These were Prince, Shannon, and Gill.

¹³ Turner Gill Biography, available at <http://www.ubathletics.buffalo.edu/football/coaches/gill.shtml> (last visited Dec. 21, 2007); Ron Prince Biography, available at http://www.kstatesports.com/ViewArticle.dbm?SPSID=3070&SPID=212&DB_OEM_ID=400&ATCLID=220015&Q_SEASON=2007 (last visited Dec. 21, 2007); Randy Shannon Biography, available at http://hurricanesports.cstv.com/sports/m-footbl/mtt/shannon_randy00.html (last visited Dec. 21, 2007).

at NCAA Football Bowl Subdivision institutions. To accomplish this, the researcher will examine the guidelines for bringing a Title VII case, research statutory requirements and case law precedents, and will compile and analyze the outcomes of prior employment discrimination cases. In addition, the researcher will investigate the proposition that Title VII can do for minority football coaches what Title IX did in athletics for girls and women.

A. Recent Developments Involving Minority Coaches at the FBS Level

Since the recent conclusion of the 2007 regular season, the Football Bowl Subdivision has seen some significant coaching changes. Among these include Rich Rodriguez's move from West Virginia University to become the head coach at the University of Michigan,¹⁴ the hiring of two new minority head coaches, and the termination of one minority head coach. The two recently hired minority head coaches are Kevin Sumlin at the University of Houston¹⁵ and Ken Niumatalolo at the United States Naval Academy.¹⁶ Niumatalolo was promoted to head coach after spending the previous six seasons at Navy as assistant head coach and offensive line coach.¹⁷ He is also believed to be the first NCAA head coach of Polynesian heritage.¹⁸ Sumlin goes to Houston after spending the previous five seasons on Bob Stoops's staff at the University

¹⁴ University of Michigan Press Release, *Michigan Hires Rodriguez as New Head Football Coach*, Dec. 17, 2007, available at <http://mgoblue.com/football/article.aspx?id=103268> (last visited Dec. 20, 2007).

¹⁵ University of Houston Press Release, *Kevin Sumlin Named 11th Football Head Coach on Friday*, Dec. 14, 2007, available at <http://uhcougars.cstv.com/sports/m-footbl/spec-rel/121407aee.html> (last visited Dec. 16, 2007).

¹⁶ United States Naval Academy Press Release, *Ken Niumatalolo Named Head Football Coach at the Naval Academy*, Dec. 8, 2007, available at <http://navysports.cstv.com/sports/m-footbl/spec-rel/120807aab.html> (last visited Dec. 8, 2007).

¹⁷ *Id.*

¹⁸ *Id.*

of Oklahoma.¹⁹ During his tenure at Oklahoma, Sumlin served in the roles of co-offensive coordinator, special teams coordinator, and position coach for wide receivers and tight ends.²⁰ Sumlin is the first African-American head coach at Houston as well as the first African-American head coach to be hired at a Football Bowl Subdivision institution in the state of Texas.²¹ Neither Niumatalolo²² nor Sumlin²³ have previous head coaching experience at any level.

In addition to the events that have advanced opportunities for minorities in coaching, there have been some recent transactions that can be construed as being a step backward. One such transaction was the termination of Karl Dorrell at UCLA.²⁴ His firing came two days after the Bruins lost to intra-city rival Southern Cal and one day after accepting a bid to play Brigham Young University in the Pioneer Las Vegas Bowl.²⁵ Dorrell's overall record for five years with UCLA was 35-27.²⁶ The 2007 season was expected to be a good year for the team as evidenced by their pre-season top 25 ranking in most polls.²⁷ However, unexpected losses to, among others, Utah and Notre Dame along with yet another loss to Southern Cal was enough for UCLA athletic

¹⁹ Univ. of Houston, *supra* note 15.

²⁰ *Id.*

²¹ *Id.* Former African-American University of North Texas coach, Matt Simon, was hired by UNT when the football team competed at the I-AA level. He was the head coach when the program transitioned to the Division I-A level.

²² U.S. Naval Academy, *supra* note 16.

²³ Univ. of Houston, *supra* note 15.

²⁴ UCLA Press Release, *Karl Dorrell Released as UCLA Head Football Coach*, Dec. 3, 2007, available at <http://uclabruins.cstv.com/sports/m-footbl/spec-rel/120307aaa.html> (last visited Dec. 14, 2007).

²⁵ Associated Press, *Karl Dorrell Fired as Football Coach at UCLA*, available at <http://msn.foxsports.com/cfb/story/7522024> (last visited Dec. 4, 2007).

²⁶ UCLA, *supra* note 24.

²⁷ Associated Press, *supra* note 25.

director Dan Guerrero to make the decision to take the program in a new direction.²⁸ During Dorrell's head coaching stint at ULCA, the Bruins managed only one victory against arch-rival Southern Cal.²⁹

The eminent demise of Dorrell's tenure was not without some controversy. During an interview with *Los Angeles Times* reporter, Kurt Streeter, Dorrell was asked about some of the criticisms he had received and the role of race.³⁰ Dorrell's response, as quoted by Streeter, was, "I don't feel like I've gotten a fair shake...Let me put it this way, [i]n every opportunity that I've had in my coaching career, it was never in my mind that I was dealing with a level playing field. I've had to do more to accomplish what I've accomplished."³¹ These comments started a firestorm of responses accusing Dorrell of playing the race card.³² This controversy prompted Dorrell to issue a statement of clarification on the UCLA website three days after the *Los Angeles Times* story.³³ In this release Dorrell noted, "My comments regarding race issues were expressed in a general sense and clearly not as an indictment about my experience at UCLA."³⁴

²⁸ *Id.*

²⁹ Chris Dufresne, *Dorrell Got a Fair Chance, and That's Not Just a Minority Opinion*, L. A. TIMES, Dec. 4, 2007, available at <http://www.latimes.com/sports/la-sp-dufresne4dec04,1,6329385.column?page=2&cset=true&ctrack=1> (last visited Dec. 8, 2007).

³⁰ Kurt Streeter, *Keep Karl! And Keep Me Posted*, L. A. TIMES, Nov. 18, 2007, available at <http://www.latimes.com/sports/la-sp-streeter18nov18,1,5315593.print.column?coll=la-headlines-sports&ctrack=8&cset=true> (last visited Nov. 26, 2007).

³¹ *Id.*

³² For example, see *UCLA Coach Karl Dorrell Throws In the Race Card*, http://community.foxsports.com/blogs/Lisa%20H/2007/11/19/UCLA_Coach_Karl_Dorrell_throws_in_the_race_card (Nov. 19, 2007, 7:54 p.m. EST).

³³ See UCLA Press Release, *Statement From UCLA Head Football Coach Karl Dorrell*, Nov. 21, 2007, available at <http://uclabruins.cstv.com/sports/m-footbl/spec-rel/112107aab.html> (last visited Nov. 27, 2007).

³⁴ *Id.*

Floyd Keith, executive director of the Black Coaches and Administrators (BCA)³⁵ had the following comment in response to Dorrell's termination, "I'm sad for Karl. It's unfortunate he had so many injuries this year. I wish they would have given him another year."³⁶ Commenting on the prospective search for Dorrell's replacement, Keith said, "I think Dan (UCLA A.D. Guerrero) will have a process. I will be disappointed if that's not the case."³⁷

The firing of Karl Dorrell, while on its face appears to be a step back for minorities, can have a silver lining. The conduct of Dorrell and others who advocate for more minority head coaches can have an impact on future opportunities. Dorrell was keenly aware of this potential, and it may have served as the major rationale behind his clarification statement.³⁸ If every criticism and termination decision of a minority coach is countered with allegations of discrimination predicated upon race, then athletic directors, presidents and boosters may be less likely to support minority candidates.³⁹ Mr. Streeter, an African-American, believes that the animus unleashed upon Karl Dorrell by the UCLA fanbase is largely predicated upon the fact that Mr. Dorrell is African-

³⁵ The BCA had previously been known as the Black Coaches Association. The organization changed its name in July 2007 to the Black Coaches and Administrators to "better reflect the needs of the changing demographics of the organization." See Erika P. Thompson, *Black Coaches Association Announces Name Change*, July 6, 2007, available at <http://bcasports.cstv.com/genrel/072007aaa.html> (last visited Dec. 20, 2007).

³⁶ Dufresne, *supra* note 29.

³⁷ *Id.*

³⁸ UCLA, *supra* note 33.

³⁹ See Jeffrey L. Seglin, *The Right Thing: When Fear of Firing Deters Hiring*, N. Y. TIMES, Apr. 18, 1999 available at <http://query.nytimes.com/gst/fullpage.html?res=9A02EED6153BF93BA25757C0A96F958260> (last visited July 27, 2007) (noting that "Over the last few years, several people have spoken to me about their reluctance to hire people whose race, color, creed, or national origin – or age, disability or sex – put them in protected classes under anti-discrimination law. The reasoning goes this way: You have to be absolutely sure that someone in a protected class is the best possible candidate, because people in these categories *can make your life miserable with litigation if you ever have to dismiss them.*") (emphasis added).

American.⁴⁰ However, before there was DumpDorrell.com there was FireRonZook.com.⁴¹ In addition, commentators are still scratching their heads over the University of Southern Mississippi's decision to force the resignation of head coach Jeff Bower, a Caucasian. After all, Bower has coached his teams to ten bowls in the last eleven years,⁴² recently completed his fourteenth consecutive winning season,⁴³ won four Conference USA titles,⁴⁴ was named Conference USA Coach of the Decade in 2004,⁴⁵ and has one of the best graduation rates in the country at 81%.⁴⁶ Fans sometimes have unrealistic expectations and administrators make questionable decisions. Perhaps UCLA should be happy with six victories a year; however, having their in-town rival and fellow PAC-10 Conference member (i.e., Southern Cal) annually compete for the national championship tended to elevate UCLA supporters' expectations; thus, Southern Cal's success only exacerbated the deficiencies in Dorrell and UCLA's performance.⁴⁷

⁴⁰ See Streeter, *supra* note 30 (quoting Streeter "I'm convinced that race plays a role in what some of you critics are saying. To think otherwise would be plain foolish. Some of you don't know what to make of a coach who does not fit into your convenient stereotypes.").

⁴¹ See Joedy McCreary, *Fire-the-Coach Websites a Big Business*, USA TODAY, Aug., 30, 2006, available at http://www.usatoday.com/tech/webguide/2006-08-30-anti-coach-websites_x.htm (last visited May 25, 2008). The article discusses the sale of domain names targeted toward disgruntled sports fans. The article highlights the site Redshirted.com which has purchased and is reselling numerous "fire-the-coach" domain names. All of the domain names of FBS-level coaches noted as being sold on the website are White coaches. Among the coach domain names sold are Urban Meyer (Florida), Dan Hawkins (Colorado), Ralph Friedgen (Maryland), Al Groh (Virginia), and Kirk Ferentz (Iowa). See Redshirted.com, available at <http://www.redshirted.com/roster.html>.

⁴² Associated Press, *Bower Resigns as Southern Miss Coach After 14th Winning Season*, November 26, 2007, ESPN.COM, available at <http://sports.espn.go.com/ncf/news/story?id=3128077> (last visited Nov. 26, 2007).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See 2007 NCAA DIVISION I FEDERAL GRADUATION RATE DATA, UNIVERSITY OF SOUTHERN MISSISSIPPI, available at http://web1.ncaa.org/app_data/inst2007/664.pdf (last visited Dec. 2, 2007) (noting that the USM Graduation Success Rate (GSR) among Black players is 81%, 100% among Hispanics and 82% among White players.).

⁴⁷ See Kurt Streeter, *Race Issue Can't, and Shouldn't, Be Avoided*, L. A. TIMES, Nov. 30, 2007, available at <http://www.latimes.com/sports/la-sp-streeter30nov30,1,4220777.column?coll=la-headlines-sports> (last

The coaching business is a challenging one. Floyd Keith, responding to questions about Dorrell, concurred, “It’s (coaching) a tough profession. We understand that there are casualties. It’s just the landscape of coaching. When people get involved in it, this is one of the hazards in it. Normally, you get around five to six years, then, if nothing’s happening, you start looking at it.”⁴⁸ Some of Rev. Jackson’s recent comments have imbued the success of African-Americans in coaching with a sense of normalcy.⁴⁹ On the other side, failure and criticism are also a part of the coaching game and extreme sensitivity of any kind will not well suit people - regardless of their background. There is no excuse for comments or actions that are discriminatory; however, Football Bowl Subdivision coaches are in the spotlight, and for better or worse their every move will be critiqued and challenged.

Two other recent coaching changes served as the impetus for some strongly-worded concerns from advocates of expanding opportunities for minorities in head coaching positions – particularly the BCA. The first involved Texas A&M University in the wake of Dennis Franchione’s ignominious departure from College Station. Franchione stepped down as head coach within minutes after the Aggies defeated Texas in their annual day-after-Thanksgiving matchup.⁵⁰ Three days later Aggie athletic director Bill Byrne introduced Houston Texans’ assistant coach, Mike Sherman, as the

visited Dec. 2, 2007) (quoting Streeter “Over several seasons, Dorrell has won about six out of ten games. So did his predecessors. He’s doing what football coaches do at UCLA.”).

⁴⁸ See Dufresne, *supra* note 29.

⁴⁹ See White, *infra* p. 13 and note 63 (quoting Rev. Jackson “When African-American coaches do well, we’re delighted. Only the ignorant are surprised.”).

⁵⁰ Texas A&M Press Release, *Fran Steps Down as A&M Coach*, Nov. 23, 2007, available at <http://www.aggieathletics.com/pressRelease.php?SID=MFB&PRID=13656> (last visited Dec. 14, 2007).

new head coach.⁵¹ Floyd Keith was quick to criticize Byrne for his sense of urgency in replacing Francione. “I’m disappointed in him (Byrne) because it’s not like he doesn’t know. It’s just a blatant disregard for...doing it the right way. I hope student-athletes and other coaches and people of color take notice of that.”⁵² Of course, given Bill Byrne’s sense of urgency in replacing former head men’s basketball coach Billy Gillispie when he departed for the University of Kentucky in the spring of 2007, no one should have been surprised with Byrne’s actions when he had to replace the head football coach.⁵³

The other coaching change that prompted pejorative comments from the BCA, among others, was Ole Miss’s decision to hire former University of Arkansas head coach Houston Nutt. Ole Miss athletic director Pete Boone announced on November 24 that the university would not be retaining Ed Orgeron as the head football coach.⁵⁴ Three days later, the university announced that it would hold a press conference the following day to introduce Nutt as the next head football coach at Ole Miss.⁵⁵ This announcement

⁵¹ Texas A&M Press Release, *Sherman Named Head Coach at Texas A&M*, Nov. 26, 2007, available at <http://www.aggieathletics.com/pressRelease.php?SID=MFB&PRID=13662> (last visited Nov. 26, 2007); See also, Chris Duncan, *Ex-Packers Boss Sherman Named Coach at Texas A&M*, USA TODAY, Nov. 26, 2007, available at http://www.usatoday.com/sports/college/football/big12/2007-11-26-aandm-sherman_N.htm (last visited Nov. 26, 2007).

⁵² Jack Carey & Steve Weiberg, *Texas A&M Draws Criticism for Interviewing Only Sherman*, USA TODAY, Nov. 26, 2007, available at http://www.usatoday.com/sports/college/football/big12/2007-11-26-bca-aggies_N.htm?csp=34 (last visited Nov. 26, 2007).

⁵³ See *infra* p. 103 and note 392.

⁵⁴ University of Mississippi Press Release, *Ed Orgeron Not Returning as Ole Miss Head Football Coach*, Nov. 24, 2007, available at http://www.olemisssports.com/ViewArticle.dbml?SPSID=12792&SPID=12792&SPID=737&DB_OEM_ID=2600&ATCLID=1325877 (last visited Nov. 28, 2007).

⁵⁵ University of Mississippi Press Release, *Ole Miss Announces Wednesday Press Conference to Introduce Houston Nutt*, Nov. 27, 2007, available at http://www.olemisssports.com/ViewArticle.dbml?SPSID=12792&SPID=737&DB_OEM_ID=2600&ATCLID=1327212 (last visited Nov. 28, 2007).

came just hours after Nutt had refused a salary increase and contract extension from the University of Arkansas.⁵⁶

In response to the hiring of Nutt, the BCA's Keith, said "I'm as disappointed (with Ole Miss) as I was with the situation at Texas A&M. There's not much difference. It just concerns me that this practice seems to continue and we're not seemingly getting any closer to a diverse or an inclusive search for football...There's some great talent out there. Take time to talk to them, that's all."⁵⁷ Ole Miss's Boone offered the following as mitigation in his decision not to work with the BCA to develop a more inclusive hiring process, "I think it's important to have a person like Houston Nutt, a proven success...This time we have to get it right, so when that (Nutt's availability) came about we had to move very fast."⁵⁸

Boone's comments strike at the very problem facing minority candidates for head coaching positions. That is their overall lack of notoriety among decision makers and near absence of brand equity that athletic programs and their fans demand. These comments also call into question a search conducted in light of any prospective "Rooney Rule" equivalent at the college level.⁵⁹ That is to say that Ole Miss knew that it had its

⁵⁶ Associated Press, *Ole Miss Hires Former Arkansas Coach Houston Nutt*, Nov. 27, 2007, available at <http://msn.foxsports.com/cfb/story/7494364> (last visited Nov. 27, 2007).

⁵⁷ Associated Press, *BCA Chief Disappointed Ole Miss, Texas A&M Did Not Interview Black Candidates*, Nov. 30, 2007, available at <http://bcasports.cstv.com/genrel/120207aaa.html> (last visited Nov. 30, 2007).

⁵⁸ *Id.*

⁵⁹ The NFL's Rooney Rule requires that for every head coaching position, the respective teams are required to interview at least one racial minority for the position. Failure to follow the rule can result in fines levied by the NFL Commissioner. For more information about the history and mechanics of the Rooney Rule consult, Bram A. Maravent, *Is the Rooney Rule Affirmative Action? Analyzing the NFL's Mandate to Its Clubs Regarding Coaching and Front Office Hires*, 13 SPORTS LAW J. 233 (2006); See also, Associated Press, *Millen Fined for Not Interviewing Minority Candidates*, ESPN.COM, July 25, 2003, available at <http://espn.go.com/nfl/news/2003/0725/1585560.html> (last visited July 27, 2007). Dr. Richard Lapchick has previously referred to this college equivalent as the "Eddie Robinson Rule". See Harrison,

man in Nutt; therefore, any other interviews as part of a search would in essence be window dressing to fulfill the letter of any extant regulations requiring or recommending the interviewing of at least one minority candidate.⁶⁰

It should be noted that most of the criticism levied against Texas A&M and Ole Miss is not in regard to whom they hired as head coaches. Rather, it was the methodology utilized by the respective institutions to fill their openings. “That’s what we’re fighting against,” Keith said recently.⁶¹ “We’ve never fought against the hire, we’ve fought against the process.”⁶²

While the previous discussion has demonstrated that some progress has been made to advance the representation of racial minorities in head coaching, much more still needs to be done to insure that qualified minorities receive serious consideration for these premier positions. Of course, concern over the issue is not limited to the members and leadership of the BCA.

During recent testimony before Congress on the issue of the lack of racial minorities in leadership positions in intercollegiate athletics, it was suggested, among

infra p. 16 and note 83, at vii-viii (Dr. Lapchick writing in the Foreward “We have called on the NCAA and President Myles Brand to adopt an “Eddie Robinson Rule,” a college version of the NFL’s Rooney Rule mandating that people of color be interviewed for all head coaching positions with sanctions for those who do not.”).

⁶⁰ This concern is analogous to the critique the NFL’s Rooney Rule has received both conceptually and in an actual hiring scenario. *See* Michael Smith, *System’s Flawed, but Better Than Before*, ESPN.COM, Dec. 21, 2004, available at <http://sports.espn.go.com/nfl/columns/story?id=1950744> (last visited July 26, 2007) (detailing the Miami Dolphins’ compliance with the letter but not the spirit of the Rooney Rule when hiring Nick Saban. It was well known that Saban was the Dolphins coach of choice. However, the Dolphins also interviewed Art Shell in what the Pollard Alliance characterized as both a “sham” and “mockery”. Shell’s response to the controversy was, “If you have ever been a head coach, you want the chance to do that again. I can’t be concerned with what they’re doing with Nick Saban. If you have an opportunity to get in front of a team and tell them about yourself, you need to do it.”). *See also*, Maravent, *supra* note 59 at 234-235.

⁶¹ *See* Dufresne, *supra* note 29.

⁶² *Id.*

other things, that Title VII actions against colleges and universities might be utilized as a strategy to increase minority representation.⁶³ Other interested parties would like to see more aggressiveness from Indianapolis. Although it is the individual schools that make the hiring decisions⁶⁴, many argue that the governing body of major college sports, the National Collegiate Athletic Association (NCAA) headquartered in Indianapolis, should exert more influence and make use of its sanctioning power to compel its membership to provide equal access opportunities for minority coaching candidates.⁶⁵ Others have even suggested some type of federal legislation that would be the operational equivalent to the National Football League's (NFL) Rooney Rule.⁶⁶

On the final day of Black History Month in 2007 and in the shadow of Super Bowl XLI which, for the first time in NFL history, pitted two African-American head coaches against each other⁶⁷, the U.S. House Subcommittee on Commerce, Trade and

⁶³ Joseph White, *Lack of Black College Football Coaches Lamented at Hearing*, USA TODAY, Feb. 28, 2007, available at http://www.usatoday.com/sports/college/football/2007-02-28-775348188_x.htm?loc=interstitialskip (last visited Dec. 20, 2007) (quoting Dr. Richard Lapchick of the Institute for Diversity and Ethics in Sport, "One of the things we're thinking about is Title VII lawsuits.").

⁶⁴ See Carla Peay, *The Issue of Lack of Diversity in College Sports Reaches the Halls of Congress*, BLACK ATHLETE SPORTS NETWORK, Mar. 5, 2007, available at http://www.Blackathlete.net/artman2/publish/CollegeSports_24/The_Issue_Of_Lack_Of_Diversity_In_College_Sports_R_3004.shtml (last visited July 2, 2007); See also Prepared Statement of Myles Brand, NCAA President Before the Subcommittee on Commerce, Trade and Consumer Protection, Feb. 28, 2007, available at http://energycommerce.house.gov/cmte_mtgs/110-ctcp_hrg.022807.Brand-testimony.pdf (last visited July 27, 2007).

⁶⁵ See Rev. Jackson, *supra* note 3 (quoting Rev. Jackson, "Now some progress has been made, Mr. Chairman, based on Dr. Brand's leadership of raising the academic standards to assure more graduation take [sic] place, and there is a penalty if you don't have a certain graduation rate, but there is no penalty if you don't have Black coaches, Latino coaches. There must be something that makes it a mandate to at least consider and to have some good reason why resume A that is superior goes beneath resume B, which may not hardly exist. This thing is profoundly cultural.").

⁶⁶ See Peay, *supra* note 64 (quoting former Arkansas basketball coach Nolan Richardson "It's [diversification of the search process] got to become law because it's affecting our younger generation. When a young Black kid looks to the sideline and sees no one who looks like him, why should he even think about pursuing coaching as a career?").

⁶⁷ Jarett Bell, *Coaches Chasing Super Bowl – and History*, USA TODAY, Jan. 17, 2007, available at http://www.usatoday.com/sports/football/nfl/2007-01-16-dungy-lovie_x.htm (last visited Dec. 14, 2007).

Consumer Protection held a hearing to discuss the issue of the lack of minority representation among intercollegiate athletic administrators and coaches.⁶⁸ The hearing was titled “The Lack of Diversity in Leadership Positions in NCAA Collegiate Sports.” Among those providing testimony were Rev. Jackson, Dr. Myles Brand, Dr. Richard Lapchick, Floyd Keith, and former University of Arkansas men’s basketball head coach Nolan Richardson.⁶⁹

Dr. Brand’s testimony began with background information about the size and scope of operations of the NCAA.⁷⁰ According to Dr. Brand, the NCAA has nearly 1,300 members. This number includes colleges, universities, athletic conferences, and related organizations.⁷¹ The association conducts 89 championships in 23 sports in which more than 45,000 student-athletes compete for the title of National Collegiate Champion.⁷² Dr. Brand also proffered the estimate that more than 380,000 student-athletes were competing during the 2006-2007 academic year.⁷³ Some of the more interesting testimony germane to the association’s scope of operations was the reinforcement of the NCAA as a voluntary association, and one in which “[t]he authority for all rules, policies and procedures rests with the *member institutions* and *not* the national office.”⁷⁴ Dr. Brand also noted that the “NCAA’s primary purpose is to regulate and promote intercollegiate athletics in a manner that fully integrates athletics programs

⁶⁸ The hearing took place in the Rayburn House Office Building on February 28, 2007. Public record documents related to the hearing can be accessed at: http://energycommerce.house.gov/cmte_mtgs/110-ctcp_hrg.022807.Diversity_in_Leadership_NCAA.shtml.

⁶⁹ *Id.*

⁷⁰ *See generally*, Prepared Statement of Myles Brand, *supra* note 64.

⁷¹ *Id.* at 1.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* (emphasis added).

with the academic mission of higher education and student-athletes with the student body.”⁷⁵

Responding to those who have called upon the NCAA to have a more hands-on approach to insure that minorities are getting a fair opportunity in being considered for head coaching positions, Dr. Brand remarked without equivocation that the national office does not have such discretion. He stated, “Part of my frustration with this issue is the lack of direct control the NCAA has over the matter. The Association cannot make the hires, and it cannot mandate who is interviewed...The universities and colleges retain their autonomy and authority in the case of hiring and in the case of expenditures, and they will not cede it to the NCAA or any other national organization.”⁷⁶ Taking this part of Dr. Brand’s testimony *in toto*, it should be reasonably inferred that the more appropriate targets for pressure to compel more inclusive search processes would be the presidents, chancellors and athletic directors of the respective institutions rather than the NCAA’s national office.⁷⁷

At the Division I level, the NCAA has two designations for its members with football programs.⁷⁸ Those institutions with programs participating at the highest level of competition are members of the Football Bowl Subdivision (i.e., I-FBS, hereinafter

⁷⁵ *Id.*

⁷⁶ *Id.* at 5-6.

⁷⁷ The NCAA generally refers to institutional presidents and chancellors as Chief Executive Officers (CEOs). These officials are also identified as having ultimate accountability for institutional control. *See* 2007-2008 NCAA DIVISION I MANUAL, BYLAW 2.1.1 (noting in relevant part “The institution’s president or chancellor is responsible for the administration of *all aspects* of the athletics program, including approval of the budget and audit of all expenditures.”) (emphasis added).

⁷⁸ *See* NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, COMPOSITION & SPORT SPONSORSHIP OF THE NCAA, available at http://www.ncaa.org/wps/portal!/ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLN4j3CQXJgFjGpvqRqCKOAcAFj_zcVH1v_QD9gtzQiHJHRUUAc0tpTA!!/delta/base64xml/L3dJdyEvUUD3QndNQSEvNEIVRS82XzBfTFU!?CONTENT_URL=http://www1.ncaa.org/membership/membership_svcs/membership_breakdown.html (last visited Dec. 20, 2007).

“FBS”), formerly known as Division I-A.⁷⁹ These include, among others, institutions that are members of the so-called “Big Six” conferences.⁸⁰ The second level of competition within Division I is the Football Championship Subdivision (i.e., I-FCS, hereinafter “FCS”), formerly known as Division I-AA.⁸¹ Other Division I institutions that do not have football programs or do not compete in football at the top two levels are designated as “Division I”, formerly known as Division I-AAA.⁸² At the current time, the FBS has 119 members⁸³ of which, as of this writing, a total of nine, or 7.5%, have minority head football coaches.

B. Access Challenges Facing Minority Coaches

A major obstacle for minority coaches that has already been alluded to is their ability to become part of the coaching pipeline.⁸⁴ Because those seeking to fill head

⁷⁹ Memorandum from David Berst, Vice President for Division I, Dennis Poppe, Managing Director of Baseball and Football, and Damani Leech, Director of Baseball and Football to Division I Conference Commissioners, Aug. 16, 2006 (on file with the author).

⁸⁰ These are the Atlantic Coast Conference (ACC), Big East Conference, Big Ten Conference, Big XII Conference, PAC-10 Conference, and the Southeastern Conference (SEC).

⁸¹ Berst, *supra* note 79.

⁸² NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 78.

⁸³ *Id.* However, the Institute for Diversity and Ethics in Sport at the University of Central Florida notes that there are 120 institutions at the FBS level. See INST. FOR DIVERSITY AND ETHICS IN SPORT, UNIV. OF CENTRAL FLORIDA, THE BUCK STOPS HERE: ASSESSING DIVERSITY AMONG CAMPUS AND CONFERENCE LEADERS FOR DIVISION IA SCHOOLS IN 2007-08 (Oct. 24, 2007) at 1 (noting “This study examines the race and gender of conference commissioners and campus leaders including college and university presidents, athletics directors, and faculty athletics representatives for all 120 Division IA institutions.”)

⁸⁴ Being a part of a network and the coaching/hiring trees of respective coaches has become a more salient aspect of the discussion. For example, much has been made of the network of coaches established in the NFL by Bill Walsh. See Tom Weir, *Bill Walsh’s ‘Genius’ Changed Face of Football*, USA TODAY, July 30, 2007, available at http://www.usatoday.com/sports/football/nfl/2007-07-30-bill-walsh-obit_N.htm (last visited July 27, 2007) (noting that of the current head coaches in the NFL, all but ten could trace their coaching “lineage” back to Bill Walsh); See also, Walter C. Farrell, Jr., *Walsh Network Produces Diversity As Well As Success*, N. Y. TIMES, Aug. 3, 2003, § 8 at 11 (arguing that “natural networks” of coaches can produce diversity as well as artificial networks compelled by regulations such as the Rooney Rule); C. Keith Harrison, *The Big Game in Sport Management and Higher Education: The Hiring Practices of Division IA and IAA Head Football Coaches*, BCA HRC #4, 2006-2007 (2007) at 1 (exhibiting the Tony Dungy hiring tree that includes current NFL head coaches Lovie Smith, Herman Edwards, and Mike Tomlin).

coaching positions are more than likely White (e.g., athletic directors and presidents),⁸⁵ they are going to be more likely to consider a familiar and pre-established pool of candidates, which is also more likely to be White.⁸⁶ This system, commonly referred to as the “good ‘ol boy” network”, has worked to the disadvantage of minorities since the inception of intercollegiate athletics.⁸⁷

The reform efforts of organizations such as the BCA and the NCAA’s Men’s Coaches Academy are aimed at breaking down the aforementioned “good ‘ol boy” network by putting the names of prospective minority candidates in front of college presidents and athletic directors. The importance of candidates getting face-to-face with decision makers and presenting themselves as viable choices cannot be overstated. Turner Gill, current head coach at the University at Buffalo, credits his current coaching position with prior unsuccessful interviews for head coaching positions at the universities of Missouri and Nebraska.⁸⁸ Because of Gill’s interview performance and Buffalo athletics director Warde Manuel’s knowledge of Gill’s interviews, Gill received a legitimate opportunity for the head coaching appointment. Remarking on how important interviewing is, Gill stated, “I got a chance. People need to hear who you are,

⁸⁵ See generally, BUCK STOPS HERE, *supra* note 83.

⁸⁶ Alan Hughes and Mark W. Wright, *Black Men Can’t Coach? While the NCAA Considers Changing its Game Plan, Many Black Football Head Coaching Candidates Remain on the Bench*, BLACK ENTERPRISE, July 2003 at 66; See also, Olin Buchanan, *Black Coaches Confident in Progress*, RIVALS.COM, June 10, 2007, available at <http://collegefootball.rivals.com/content.asp?cid=679445> (last visited June 28, 2007).

⁸⁷ Hughes & Wright, *supra* note 86. See also, Kenneth L. Shropshire, *Merit, ‘Ol Boy Networks, and the Black-Bottomed Pyramid*, 47 HASTINGS L. J. 455 (1996) (discussing that minorities are underrepresented across leadership positions in the sport industry and that affirmative action programs are a possible solution to correct this underrepresentation.).

⁸⁸ See Jay Weiner, *Just Looking for a Chance: Black Coaches Look to Break CFB Coaching Barrier*, ST.COM, October 26, 2007, available at http://sportsillustrated.cnn.com/2007/writers/the_bonus/10/17/Black.coaches/index.html (last visited Dec. 21, 2007).

what you are and what you have to offer. It's just getting an opportunity to interview that's so important.”⁸⁹

The hiring process in intercollegiate football is frequently compared to that of the NFL. In examining the primary differences between the two, Keith has said, “In the NFL you might have to convince two people – the general manager and the owner. In colleges [sic] there is the athletic director, the president, the search committee, the Board of Regents and significant others.”⁹⁰ In mentioning significant others, Keith is obviously referring to what some see as the most significant obstacle to overcome for minorities – boosters. Although not necessarily making decisions predicated upon discriminatory criteria, boosters do have their preferences when it comes to whom they desire to be the next head coach at their respective institutions. This idea of the booster obstacle received the full support of Howard University head coach Carey Bailey when he said, “The reality is most decisions are not made by the athletic directors or the presidents. There are three or four guys in the back of some restaurant that are calling the shots.”⁹¹

In addition to being compared to the NFL in regard to minority coaching opportunities, intercollegiate football also gets compared to intercollegiate basketball. The reticence of athletic directors and presidents to provide equivalent head coaching opportunities in football as they have done for basketball has been pointed out and questioned. Dr. Richard Lapchick of the Institute for Diversity and Ethics in Sport has noted that, “There seems to be a culture in college football [not] to think outside the box

⁸⁹ *Id.*

⁹⁰ *See* Buchanan, *supra* note 86.

⁹¹ *Id.*

and take some risks like college basketball did.”⁹² During his testimony before the House subcommittee, Keith provided some statistics on the differences between minority coaches in college football and basketball.⁹³ During the 2006-2007 academic term, 25.2% of men’s basketball teams at the Division I level had an African-American head coach.⁹⁴ During the same period, African-Americans accounted for 5.8% of head coaches in the Football Bowl Subdivision.⁹⁵ Similarly, African-Americans held only 5.8% of Football Championship Subdivision head coaching positions.⁹⁶

Why the difference between football and basketball? Dr. Lapchick has stated that one of the reasons is tied to the alumni/booster issue.⁹⁷ Some advocates and researchers have suggested that a minority head coach might not be able to placate this constituent group; therefore, a minority coach’s ability to generate much needed revenues and infrastructure improvements via requisite donor support might be limited. Of course, many athletic directors and presidents might not think implementing “outside the box” strategies in regard to their football programs is prudent. Mere cursory examination of the financial statements will reveal that football programs, not basketball, at many FBS institutions are “cash cows”, and athletic directors rely on the revenues generated by

⁹² See Hughes & Wright, *supra* note 86 at 66.

⁹³ See Prepared Statement of Floyd A. Keith, Executive Director of the Black Coaches and Administrators before the House Subcommittee on Commerce, Trade and Consumer Protection, Feb. 28, 2007 at 2, available at http://energycommerce.house.gov/cmte_mtgs/110-ctcp_hrg.022807.Keith-testimony.pdf (last visited July 27, 2007). See also, Debby Stroman, *ACC Quietly Sets Example of Diversity*, 10 STREET & SMITH’S SPORTS BUS. J. 28, Feb. 11-17, 2008 (noting that in the Atlantic Coast Conference (ACC), eight of the twelve men’s basketball programs have African-American head coaches.).

⁹⁴ Keith, *supra* note 93 at 2. This percentage excludes coaches at historically Black colleges and universities (HBCUs).

⁹⁵ *Id.* This percentage excludes coaches at historically Black colleges and universities (HBCUs).

⁹⁶ *Id.* This percentage excludes coaches at historically Black colleges and universities (HBCUs). The statement utilized the football designations of I-A and I-AA.

⁹⁷ See Hughes & Wright, *supra* note 86 at 66.

football to help fund their other programs.⁹⁸ When head coaching vacancies occur, it is incumbent upon athletic directors and presidents to fill these positions as soon as possible so that the programs can mitigate their risk in the all important recruiting wars for talent that will lead to victories, and, ostensibly, more revenues.⁹⁹

Aside from keeping the donations flowing is the need to generate ticket sales and stimulate ancillary revenue streams. A coach's brand equity is a significant consideration when hiring head coaches at this level. Evidence of this can be seen with the University of Alabama's decision to hire Nick Saban in the spring of 2007. While Alabama could have made a bold decision to hire a qualified minority coach, especially given the publicity and controversy over their previous hire of Mike Shula, it is doubtful that that particular coach would have generated equivalent levels of excitement about the program that became manifest when over 92,000 fans attended the spring intra-squad scrimmage in April 2007.¹⁰⁰

⁹⁸ This is not to say that basketball does not generate considerable revenues for some schools. However, most schools in the FBS rely on football as their primary source of revenue. In a recent ranking of the top twenty-five revenue generating basketball programs, only one non-Big Six conference school (i.e., Marquette at #18 with \$10.79 M in basketball revenues) was listed. The top school, the University of Louisville, generated approximately \$21.5 M in basketball revenue in 2005-2006. See Michael Smith, *Banking on Hoops: Inside the Money-Making Machine Known as University of Kentucky Basketball*, 9 STREET & SMITH'S SPORTS BUS. J., Feb. 26-Mar. 4, 2007 at 17-23.

⁹⁹ For example, see Paul Gattis, *Search Has Recruits in Lurch*, HUNTSVILLE TIMES, Dec. 15, 2006 at 1E (reporting that the University of Alabama's protracted search for a head coach after terminating Mike Shula led to the change in commitment of prospective student-athlete Jermaine McKenzie. McKenzie changed his commitment from Alabama to the University of Miami (FL)). See also, Jim Masilak, *Recruits Waver on Commitment: Coaching Change Has Some Worried*, COMMERCIALAPPEAL.COM, Nov. 29, 2007, available at <http://www.commercialappeal.com/news/2007/nov/29/recruits-waver-on-commitment/> (last visited Dec. 22, 2007) (quoting South Panola High School coach Lance Pogue regarding the speed with which Ole Miss filled its head coaching position and its effect on Ole Miss's recruits' verbal commitments "They moved on the new coach so fast that nobody had a chance to come in and talk to them and get them pointed in another direction.").

¹⁰⁰ Associated Press, *Alabama Spring Game Attracts More Than 90,000*, USA TODAY, Apr. 21, 2007, available at http://www.usatoday.com/sports/college/football/sec/2007-04-21-alabama-springgame_n.htm?loc=interstitialskip (last visited July 27, 2007).

As CEOs of the athletic department, athletic directors are by nature risk-averse.¹⁰¹ Because minority candidates are less likely to have the level of reputation and history of success as head coaches compared to Whites, their candidacy is at a distinct disadvantage – especially at “Big Six” institutions. The idea of intercollegiate sport as business cannot be seen as an anomaly in the discussion of the lack of minority head coaches at FBS-level institutions. As long as the stakes of success remain at their current levels, most decision makers’ (i.e., *de jure* and *de facto*) knee-jerk reactions will be to seek out and support only those familiar candidates with established credentials rather than individuals possessing primarily the potential for success.

C. Title VII – The Oft-Quoted Strategy

How can the system be changed to provide equal access for minorities? Of course, the term “system” is used loosely since cursory examination of the various processes utilized by FBS institutions to fill head coaching vacancies reveals a lack of monolithic hiring standards – or even qualifications. Seemingly, the only consistency is the lack of serious consideration of minority candidates. There is no debate that an issue exists. However, what is debatable is the most appropriate and efficient route to affect change. Are there best practices available? Previous testimony has alleged that at the current level of growth it will take at least eighty years to reach a percentage of African-

¹⁰¹ This proclivity of athletic directors was discussed by Dr. Myles Brand during his testimony before Congress. In fact, this tendency was one of the obstacles he named as being necessary to overcome if minorities were to start achieving equitable opportunities in coaching. (“First we have to mitigate the risk-averse nature of those who make football coaching hires. Like it or not, the pressure to be successful in college football – given the contribution it makes financially for other sports and other student athletes, given the visibility it brings to a campus from multi-million-viewer television audiences, given the complexity of football operations – raises the stakes for those who make hiring decisions or recommendations in the sport. It is viewed as “safer” to hire a proven coach even though such practice closes the door on talented assistants and coordinators, including those who are minorities.”). *See* Prepared Statement of Myles Brand, *supra* note 64 at 9.

American head coaches in major college football equivalent to the overall population of African-Americans in the United States.¹⁰²

One of the more cited strategies to compel increased representation of minorities among the head coach population of FBS institutions has been the proposed use of Title VII. Perhaps this has been because of the changes that took place in the NFL soon after attorneys Johnnie Cochran and Cyrus Mehri threatened litigation to achieve similar ends at that level of competition.¹⁰³ It has also been said that Title VII might bring about equivalent results for racial minorities in coaching as Title IX did for sport participation opportunities for girls and women.¹⁰⁴ Because the BCA, among others, has been very vocal about using Title VII of the Civil Rights Act of 1964,¹⁰⁵ it is appropriate to examine the viability of this strategy to bring about broad sweeping change.¹⁰⁶

¹⁰² See Testimony of Myles Brand, *The Lack of Diversity in Leadership Positions in NCAA Collegiate Sports*, Hearing before the House Subcommittee on Commerce, Trade, and Consumer Protection, February 28, 2007, at 17-18, available at <http://bulk.resource.org/gpo.gov/hearings/110h/35220.pdf> (quoting Dr. Brand “Sadly, if the pace of progress remains the same, it will be more than 80 years before we reach a percentage that even approximated the number of African-Americans in the general population. As I have said on more occasions than I can count, this is not only unacceptable, it is unconscionably wrong.”).

¹⁰³ See White, *supra* note 63 (noting that “[I]t was the threat of a lawsuit from Johnnie Cochran and Cyrus Mehri several years ago that prompted the NFL to institute the Rooney Rule.”).

¹⁰⁴ See Weiberg, *infra* p. 22 and note 106 (“What Title IX has done for women in all sports, activists are hoping Title VII will do for Black coaches in major-college football.”); See also, Keith, *supra* note 93 at 9.

¹⁰⁵ CIVIL RIGHTS ACT OF 1964, codified as §§ 701-718, 42 U.S.C. §§ 2000e - 2000e-17 (2000).

¹⁰⁶ Steven Weiberg, *Black Coaches Association Will Use Title VII as a Tool in Encouraging Diversity in NCAA*, USA TODAY, Sept. 5, 2006, available at http://www.usatoday.com/sports/college/football/2006-09-05-title7-ncaa_x.htm (last visited Sept. 7, 2006) (quoting Cyrus Mehri “It (Title VII) can be a catalyst for change.”); See generally, Keith, *supra* note 93 at 9-11.; Prepared Statement of Dr. Richard Lapchick before the House Subcommittee on Commerce, Trade and Consumer Protection, Feb. 28, 2007, at 7, available at http://energycommerce.house.gov/cmte_mtgs/110-ctcp_hrg.022807.Lapchick-testimony.pdf (last visited Dec. 21, 2007) (noting under ‘Suggested Solutions’ that Title VII actions should be considered “where appropriate”.); Associated Press, *BCA Will Consider Legal Action Under Civil Rights Legislation*, ESPN.COM, Oct. 9, 2007, available at <http://sports.espn.go.com/nfl/news/story?id=3055685> (last visited Oct. 9, 2007) (quoting Keith “We’ve brought that (Title VII) up and it will be considered on a case-by-case basis.”); White, *supra* note 63 (quoting Fitz Hill, president of Arkansas Baptist College “Title VII, Title IX, something has to mandate that we move forward with a game plan to ensure equity for all coaches.”).

Section II of this paper will discuss the guidelines of Title VII, the requirements to bring a suit under the auspices of Title VII, the various legal theories utilized in a legal action and the remedies available to plaintiffs under the statute. Section III will present the requirements to establish a legal argument that racial minorities are underrepresented as head coaches in major college football. In addition, this section will discuss recent Title VII cases involving coaches as well as a legal strategy to utilize in cases where head coaching positions are not posted. Section IV will assess the viability of Title VII to bring about change by presenting statistics related to Title VII case outcomes. It will also be determined whether the conceptual analogy between Title VII and Title IX can extend to the efficacy of litigation. Finally, Section V will proffer non-litigation strategies that could increase the number of minority head coaches in major college football; and, suggestions for future research will be presented.

II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964: THEORIES AND MECHANICS

The Civil Rights Act of 1964 has been the subject of copious scholarly publications. The Act, *in toto*, has been deemed by numerous scholars and other commentators to be the most important piece of civil rights legislation enacted in the history of the United States.¹⁰⁷ Not only was this act passed amidst much social discord, it was also the root of much discord within the halls of Congress.¹⁰⁸ In an anticipated move, Southern senators led a filibuster of the proposed legislation that lasted for fifty-seven days.¹⁰⁹ The last senator to speak as part of the filibuster was Robert C. Byrd of West Virginia. His speech, focusing on why cloture should not be invoked to end the filibuster, was 800 pages long and lasted over fourteen hours.¹¹⁰ Of course, the Southerners were outnumbered in their desire to maintain the social status quo. Eventually these senators lost ownership of the forum for debate. Due to the perseverance of many legislators, most notably Democratic Whip Hubert Humphrey of

¹⁰⁷ See DAVID B. FILVAROFF & RAYMOND E. WOLFINGER, *The Origin and Enactment of the Civil Rights Act of 1964*, LEGACIES OF THE 1964 CIVIL RIGHTS ACT (2000) (Benard Grofman ed.) at 9 (noting that “The Civil Rights Act of 1964 was the greatest legislative achievement of the civil rights movement. Enacted amid extraordinary public attention, it is arguably the most important domestic legislation of the postwar era.”); See also, N. Jeremi Duru, *Fielding a Team for the Fans: The Societal Consequences and Title VII Implications of Race-Considered Roster Construction in Professional Sport*, 84 WASH. U. LAW REV. 375, 379 (2006) (noting that “The Civil Rights Act of 1964...is widely recognized as the most significant civil rights legislation enacted in our nation’s history.”).

¹⁰⁸ For more information about the social environment and the congressional dynamics associated with the passage of the Civil Rights Act of 1964, consult the following resources: CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985); Nicole L. Guéron, *An Idea Whose Time Has Come: A Comparative Procedural History of the Civil Rights Acts of 1960, 1964, and 1991*, 104 YALE L. J. 1201 (1995); Emmanuel O. Iheukwumere & Philip C. Aka, *Title VII, Affirmative Action, and the March Toward Color-Blind Jurisprudence*, 11 TEMP. POL. & CIV. RTS. L. REV. 1 (2001); Grofman, *supra* note 107.

¹⁰⁹ See *Civil Rights Filibuster Ended* available at http://www.senate.gov/artandhistory/history/minute/Civil_Rights_Filibuster_Ended.htm (last visited Dec. 28, 2007).

¹¹⁰ WHALEN & WHALEN, *supra* note 108 at 195, 197.

Minnesota, the Civil Rights Act, President Johnson's first component of the Great Society program, was signed into law on July 2, 1964.¹¹¹

A. Title VII's Provisions and Reach

Among the Act's eleven articles, two are heralded as its most significant achievements. These respective articles were also the most at-risk for compromise during the Act's procedural journey.¹¹² These are Title II, which proscribes discrimination in places of public accommodation,¹¹³ and Title VII, which proscribes discrimination in employment.¹¹⁴ This paper will focus on the latter title.

Scholars have noted that employment discrimination law is almost entirely statutory.¹¹⁵ However, it should not be inferred from this fact that the courts have not had a significant role in shaping this area of law. Congress often relies on the courts to provide shape and parameters to their enacted legislation.¹¹⁶ Title VII certainly follows

¹¹¹ *Id.* at 228.

¹¹² WHALEN & WHALEN, *supra* note 108, at 142 (noting "There was no telling how long the Southerners would keep the talkathon going. But the administration feared they would make somebody pay before they turned it off. The price could either be Title II (Public Accommodations) or Title VII (Equal Employment).").

¹¹³ § 201(a) notes in pertinent part: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, and privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground or race, color, religion, or national origin." The subsequent section lists numerous places of public accommodation including places of lodging, restaurants, and sports arenas and stadiums.

¹¹⁴ 42 U.S.C. 2000e-2 (§ 703 (a)(1)) of the Act notes that "It shall be an unlawful employment practice for an employer - to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

¹¹⁵ *See, e.g.*, GEORGE RUTHERGLEN, *EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE* (2nd ed. 2007) at 10 (noting "Because employment discrimination is primarily statutory, Congress always has the final say over how far the principle against discrimination should be extended in the workplace.").

¹¹⁶ For example, *see* FILVAROFF & WOLFINGER, *supra* note 107, at 9 (noting that "At the federal level, advances (related to employment in protections against discrimination employment and access to public accommodations) had been limited largely to the judicial arena."). *See also*, RUTHERGLEN, *supra* note 115, at 10-13 (discussing how Congress did not define "discrimination" under the meaning of the Act; thus, the courts have had their biggest interpretive role in this area). Sometimes the courts adopt either too broad or

this congressional proclivity. However, the statute, as enacted and amended, is not entirely amorphous.

For example, Title VII is clear on what organizations are subject to the requirements of the statute. An employer under the meaning of the title is “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year...”¹¹⁷ This definition includes private employers, state and local governments, labor organizations, and the federal government.¹¹⁸

The federal definition of an employer under the Act’s proscriptions is limited to only those with fifteen or more employees¹¹⁹ and covers only discrimination predicated upon race, color, religion, sex, and national origin.¹²⁰ Many states have enacted similar protections; and, in some instances, these state statutes are more rigorous than the federal equivalent. For example, a number of states enforce anti-discrimination laws against employers that have as few as one employee.¹²¹ Other states’ definitions of an employer are triggered by specific types of discrimination. For example, Georgia law defines an

too narrow guidelines when interpreting congressional intent and Congress will enact legislation to clarify its desires. An example of this is when Congress passed the Civil rights Act of 1991 in large part to overturn elements of the U.S. Supreme Court’s holding in the Title VII case of *Wards Cove Packing Co. v. Atonio*. See *infra* p. 39 and note 174.

¹¹⁷ 42 U.S.C. § 2000e (§701 (b)) (2000).

¹¹⁸ See *Hazelwood School District v. United States*, 433 U.S. 299, 309 (1976) (the holding of the Court noting that “Racial discrimination by public employers was not made illegal under Title VII until March 24, 1972.” This date was the effective date of the Equal Employment Opportunity Act of 1972, P.L. 88-352, which made significant amendments to the Civil Rights Act of 1964. Among the amendments was the addition of the phrase “governments, governmental agencies, political subdivisions” after the word “individuals” in § 701(a) of Title VII thus bringing public bodies under the jurisdiction of the statute.).

¹¹⁹ 42 U.S.C. § 2000e (§701 (b)) (2000).

¹²⁰ 42 U.S.C. § 2000e-2 (§ 703) (a)(1) (2000).

¹²¹ See, e.g., COLO. REV. STAT. § 24-34-401(3) (2005); HAW. REV. STAT. § 378-1 (1993 & Supp. 2006), MICH. COMP. LAWS § 37.1201(b) (LexisNexis 2007), and WIS. STAT. ANN. § 111.32(6)(a) (2004).

“employer” as a person or entity having fifteen or more employees for the purposes of enforcement of disability-related discrimination legislation.¹²² Meanwhile the law requires that an employer have only ten or more employees to enforce gender-related discrimination legislation.¹²³

In addition to a more rigorous definition of what constitutes an employer under the meaning of their respective employment anti-discrimination laws, many states have expanded the scope of protections to include areas of prospective employment discrimination not addressed in Title VII. For example, some states protect prospective and current employees from discrimination predicated upon, among other things, sexual orientation,¹²⁴ smoking,¹²⁵ lawful use of any product when not at work,¹²⁶ and political activities and affiliations.¹²⁷ On the other end of the spectrum, some states provide protections equivalent to the federal statute or, otherwise, have no state-level equivalent.¹²⁸

¹²² See GA. CODE ANN. § 34-6A-2(2) (2007) (noting that “Employer means a person or governmental unit or officer in this state having in his, her, or its employ 15 or more individuals or any person acting as an agent of the employer.”) (quotations omitted).

¹²³ See GA. CODE ANN. § 34-5-2(4) (2007) (noting that “Employer means any person employing ten or more employees and acting directly or indirectly in the interest of an employer in relation to an employee. The term employer, as used in this chapter, means an employer who is engaged in intrastate commerce.”) (quotations omitted).

¹²⁴ See, e.g., CAL. GOV'T. CODE § 12920 (West, WESTLAW through 2006 Reg. Sess., ch. 198); HAW. REV. STAT. § 378-2 (1) (2002); N.M. STAT. ANN. § 28-1-7(A) (Michie 2008).

¹²⁵ See, e.g., KY. REV. STAT. ANN. § 344.040(1) (LexisNexis 2005); N.J. STAT. ANN. 34: 6B-1(1) (West 2005); OKLA. STAT. ANN. tit. 40, § 500(1)-(2) (West 2005); and W.VA. CODE § 21-3-19(a) (LexisNexis 2005).

¹²⁶ See, e.g., NEV. REV. STAT. ANN. § 613.333(1)(b) (LexisNexis 2005); N.Y. LAB. LAW § 201-d(2)(b) (Consol. 2005); and N.C. GEN. STAT. § 95-28.2(b) (LexisNexis 2005).

¹²⁷ See, e.g., CAL. LAB. CODE § 1101(b) (Deering 2004) ; N.Y. LAB. LAW § 201-d(2)(a) (Consol. 2005).

¹²⁸ For example, Mississippi has no equivalent employment anti-discrimination laws with the exception of proscribing employment discrimination predicated upon military status. See MISS. CODE ANN. § 33-1-15 (West 2007).

B. Theories of Discrimination Under Title VII

Since 1998, there have been over 96,000 Title VII cases terminated in the United States Federal District Courts.¹²⁹ When Title VII cases are argued, the theories of discrimination presented are usually one of two types, disparate treatment or disparate impact.¹³⁰ Procedural rules do not preclude a plaintiff from bringing an action predicated upon both theories of discrimination.¹³¹ However, a review of cases will demonstrate that most actions will argue one or the other.

There are a couple of important differences between the two theories that should be noted. First, disparate treatment cases differ from disparate impact cases in that the former cause of action concentrates on the alleged discriminatory actions of an employer against an individual. Disparate impact cases focus on the effects of employer actions, policies and procedures on protected classes.¹³² Second, disparate treatment cases allege

¹²⁹ Raw data comes from the Administrative Office of U.S. Courts accessible through the Inter-University Consortium for Political and Social Research housed at the University of Michigan. It was in 1998 that the Administrative Office began to delineate between the employment discrimination statutes by identifying both the title and section in the datasets. Further analysis results will be presented in Section IV. *See infra* pp. 91-95.

¹³⁰ *See Keith, supra* note 93, at 10 (noting that “There are two main components of Title VII claims: disparate-treatment and disparate impact.”). In addition to these two theories is a third theory which is commonly referred to as class or systematic disparate treatment. While cases following this cause of action were prevalent during Title VII’s early years, they are now much less pervasive. *See RUTHERGLEN, supra* note 115, at 57 (noting that “These cases were common in the years after Title VII first became effective, but they are now rare. Class claims today focus more on the effects of an employer’s decisionmaking [sic] process and less on the process itself...The tendency in group litigation is towards group theories of liability, with evidence of the effects of employment practices upon different groups and the justification, if any, that can be offered for practices with such different effects.”). An examination of recent cases making use of this theory finds that this theory is most often used to attack an employer’s affirmative action policies (i.e., reverse discrimination). Given the nature of the employment of major college head football coaches and the limitations of this theory, it will not be discussed further in this paper.

¹³¹ *See, e.g., Jackson v. Univ. of New Haven*, 228 F. Supp. 2d. 156, 158-159 (D. Conn. 2002) (noting that “Jackson appears to base his complaint on both the “disparate treatment” and “disparate impact” theories of recovery in that he alleges both the challenged qualifications had a discriminatory effect upon African-Americans (disparate impact) and that the defendants intentionally discriminated against him based upon his race (disparate treatment).”).

¹³² *See supra* note 110 and accompanying text for protected classes.

that discrimination on the part of the employer is intentional. Evidence of discrimination can either be direct or predicated upon circumstantial or inferential materials. On the other hand, disparate impact does not necessarily allege discriminatory intent. It merely alleges that some facially neutral employer practice or policy acts to disadvantage members of one or more Title VII protected classes.¹³³ In the next two sections salient case law for each theory will be discussed along with the requisite tests for substantiating a discrimination claim as well as the respective evidentiary burdens of the plaintiffs and defendants.

1. Disparate Treatment Theory

Most discrimination claims under Title VII allege intentional discrimination on the part of an employer defendant toward an individual.¹³⁴ The leading case in Title VII cases alleging disparate treatment is *McDonnell Douglas Corporation v. Green*.¹³⁵ It was in *McDonnell Douglas* that the U.S. Supreme Court established the burden shifting framework that is very familiar to those with even a modicum of exposure to Title VII employment discrimination jurisprudence.

In *McDonnell Douglas*, the respondent, a Black male, was laid off as part of a general workforce reduction by the McDonnell Douglas Corporation. Respondent believed the decision was motivated by racial animus and that the general hiring practices of McDonnell Douglas were racially discriminatory. As part of protests against the employer, respondent, who was active in the civil rights movement, participated in

¹³³ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1970).

¹³⁴ RUTHERGLEN, *supra* note 115, at 31.

¹³⁵ 411 U.S. 792 (1972). See RUTHERGLEN, *supra* note 115 at 36 (asserting that “No decision in employment discrimination law has been cited more frequently than *McDonnell Douglas Corp. v. Green*.”).

an illegal stall-in blocking the access roads to the McDonnell Douglas plant during the morning shift change. Petitioner was arrested for his participation. In addition, a lock-in was conducted in which doors to the building were chained and padlocked. Related to the respondent's culpability in the incident, the Court noted that "[t]hough respondent apparently knew beforehand of the "lock-in," the full extent of his involvement remains uncertain."¹³⁶

Three weeks subsequent to the lock-in, McDonnell Douglas advertised to the general public its need for mechanics, which was respondent's occupation and former position with the employer. Respondent applied and was rejected. McDonnell Douglas noted that its rejection of respondent was due to his participation in both the stall and lock-ins. Respondent filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that McDonnell Douglas refused to rehire him due to his race and civil rights activities. Respondent was later provided a right-to-sue letter by the EEOC and filed suit in federal court. The District Court found for the defendant in the case noting that the reason the defendant was not rehired was entirely predicated upon his participation in illegal demonstrations. The Eighth Circuit provided two opinions in this case; however, the Circuit's attempts of establishing rules of evidentiary burdens were unsuccessful.¹³⁷ Because "Title VII tolerates no racial discrimination, subtle or otherwise", the Court granted certiorari to ensure that discrimination plaintiffs would

¹³⁶ 411 U.S. 792, 795 (1972).

¹³⁷ *Id.* at 801 (the Court writing "The two opinions of the Court of Appeals and the several opinions of the three judges of that court attempted, with a notable lack of harmony, to state the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case.") (footnote omitted).

have the opportunity to advance arguments that rebuttals to a prima facie case were in fact pretext for discrimination.

Although there were other issues to be handled by the Court related to the Eighth Circuit's holdings, the Court noted that "[t]he critical issue before us concerns the order and allocation of proof in a private, non-class action challenging employment discrimination."¹³⁸ The Court then developed the familiar three-step burden-shifting analysis. The first step requires the plaintiff in a Title VII action to establish a prima facie case of racial (or other protected class) discrimination. There are four prongs required for the plaintiff to meet this burden. First, the plaintiff must demonstrate that he or she belongs to a protected class.¹³⁹ Second, the plaintiff must establish that he or she

¹³⁸ *Id.* at 800.

¹³⁹ *Id.* at 802. The exact words of the Court were "This [establishing a prima facie case] may be done by showing i) that he belongs to a racial minority..." Some scholars have noted that this prong makes establishing reverse discrimination cases under Title VII extremely difficult. See RUTHERGLEN, *supra* note 115, at 42 (noting that "The limited scope of *McDonnell Douglas* is apparent from the way in which the elements of the plaintiff's prima facie case are defined. The first element, membership in a minority group, simply does not apply to claims of reverse discrimination."). Some courts give deference to the plain language of the statute; thus when applying the *McDonnell Douglas* test, they evaluate the actions of an employer generically and do not delineate between segments within the protected classifications. See, e.g., *Iadimarco v. Runyon*, 190 F.3d 151, 161 (3rd Cir. 1999). The Third Circuit writing that "all that should be required to establish a prima facie case in the context of "reverse discrimination" is for the plaintiff to present sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon a *trait* that is protected under Title VII." (emphasis added). See also, *Medcalf v. Trustees of the Univ of Penn*, 71 Fed. Appx. 924, 933 (3rd Cir. 2003), where a male applicant for a rowing head coaching position was successful in a reverse gender discrimination case. The Third Circuit's holding also upheld the district court's punitive damage award to the plaintiff. However, in *Arceneaux v. Vanderbilt Univ.*, 25 Fed. Appx. 345 (6th Cir. 2001), a reverse gender discrimination case brought by the head coach of the men's and women's cross country teams, the district court found against the plaintiff because, among other things, he could not meet the requirement of demonstrating that he was a member of a protected class. The Sixth Circuit noted that "[t]he district court held that although an implied cause of action for employment discrimination under Title IX, and is not preempted by Title VII, Arceneaux nevertheless failed to make out a prima facie case of discrimination because he failed to establish that he was a member of a protected class." *Id.* at 346. Although the Sixth Circuit's holding upheld the district court's ruling because Arceneaux failed to meet the requirements of *McDonnell Douglas*' fourth prong and did not pronounce an opinion on the district court's finding on the first prong, Judge Batchelder's concurrence does address this issue. She wrote, "I concur in the result reached by the majority, although I think that Arceneaux has failed to satisfy the first prong as well as the last prong of the *McDonnell Douglas* test." *Id.* at 349. In addition, a number of courts have upheld the notion of Whites

applied for the position and that he or she was qualified for the position for which the employer was seeking to fill. Third, that despite the plaintiff's qualifications, he or she was rejected (i.e., received an adverse employment decision). Finally, after his or her rejection, the position remained open and the employer continued to seek to fill the position with applicants possessing plaintiff's qualifications. The Court established the prima facie prongs as general guidelines, thus allowing for some flexibility predicated upon the fact patterns of respective cases.¹⁴⁰ Although some scholars do not view establishing a prima facie case as being too high of a hedge wall,¹⁴¹ a review of case statistics for Title VII plaintiff win rates in pre-trial motions leads to a different inference.¹⁴²

Should the plaintiff carry the burden of establishing a prima facie case of discrimination, the burden will then shift to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."¹⁴³ This burden represents the second step in the three-step Title VII analysis. The burden carried by the defendant at

being members of a protected class under the discrimination-by-association theory. In the recent case of *Holcomb v. Iona Coll.*, No. 06-3815-cv (2nd Cir. 2008), the Second Circuit overturned a district court's granting of summary judgment in a case involving a terminated White basketball coach who sued Iona College under Title VII. In this case, the plaintiff alleged that he was discriminated against and ultimately fired because his wife is Black. In addressing this issue the Second Circuit's holding noted that "where an employee is subjected to adverse action because an employer disapproves of an interracial association, the employee suffers discrimination because of the employee's own race. All the district judges in this circuit to consider the question, including the district court in this case, have reached that conclusion... The Fifth, Sixth, and Eleventh Circuits agree." (emphasis in original) *Id.* at 17.

¹⁴⁰ *McDonnell Douglas*, 411 U.S. at 802 n. 13 (noting that "The facts necessarily will vary in Title VII cases, and the specification of prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations."). For example, predicated upon the fact pattern in *Arceneaux*, the Sixth Circuit interpreted the fourth prong to mean "that a comparable non-protected person was treated better." *Arceneaux*, 25 Fed. Appx. at 347.

¹⁴¹ For example, see Bram Maravent and Ben Tario, *Leveling the Playing Field: Can Title VII Work to Increase Minority Coaching Hires in NCAA Athletes*, 81 FLA. BAR J. 44, 46 (2007) (asserting that "The plaintiff's burden to prove a prima facie case is not very difficult.").

¹⁴² See *infra* p. 91-95.

¹⁴³ *McDonnell Douglas*, 411 U.S. 792, 802 (1972).

this level is light because “[t]his burden is one of production, not persuasion; it can involve no credibility assessment.”¹⁴⁴ That is to say the Court cannot make a *sua sponte* determination of the credibility of the employer’s rationale. This determination is reserved for the plaintiff in the next step of the analysis.

The final step in the analysis is for the plaintiff to prove that the defendant’s non-discriminatory reason(s) are merely pretext for prohibited discrimination.¹⁴⁵ The evidence required to survive this level of analysis goes beyond merely establishing that the employer’s proffered reason(s) are false. As the Court has written, the “ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.”¹⁴⁶ The Court held in *Reeves v. Sanderson Plumbing Products, Inc.* that disbelief of the employer’s reasons for the adverse employment action does not automatically require that the fact finder find for the plaintiff.¹⁴⁷ Thus, to prevail, a plaintiff must not only establish a prima facie case and discredit the employer’s proffered reasons, he or she must also provide sufficient probative evidence of pretext so that a reasonable fact finder could infer that a prohibited discriminatory rationale more likely than not motivated the

¹⁴⁴ *Reeves v. Sanderson Plumbing Prod.*, 530 U.S. 133, 142 (2000) (quoting *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 509 (1993)).

¹⁴⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1972). Having established the burden shifting framework, the Court vacated the Eighth Circuit’s holdings and remanded the case back to district court to be reconsidered consistent with the Court’s decision.

¹⁴⁶ *Reeves*, 530 U.S. at 153.

¹⁴⁷ *Id.* at 146 (finding that “There [*St. Mary’s Honor Center v. Hicks*] we held that the factfinders’ rejection of the legitimate nondiscriminatory reason for its action does not *compel* judgment for the plaintiff. The ultimate question is whether the employer intentionally discriminated, and proof that the employer’s proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff’s proffered reason...is correct. In other words, it is not enough...to *disbelieve* the employer; the factfinder must *believe* the plaintiff’s explanation of intentional discrimination.”) (emphasis in original) (internal quotation marks omitted).

employer in making the adverse employment decision. That is to say the plaintiff's evidence must meet the preponderance of the evidence standard.

A discussion of disparate treatment would not be complete without further clarification of the burdens placed upon the plaintiff and defendant respectively. The basic burden allocation and presentation order of evidence in a Title VII case have been enumerated above. As noted in regard to the burden placed upon the defendant at the second level of analysis, the defendant need only provide some legitimate, non-discriminatory rationale for its adverse employment decision. The defendant's burden is one of production. On the other hand, the plaintiff's burden is more rigorous. The Court provided clarification of the requisite burdens in the case of *Texas Department of Community Affairs v. Burdine*.¹⁴⁸

In this case, the U.S. Supreme Court considered whether or not the Fifth Circuit was correct when it held that: a) when a plaintiff successfully establishes a prima facie case of discrimination, "the burden shifts to the defendant to *persuade* the court by a *preponderance of the evidence* that legitimate, nondiscriminatory reasons for the challenged employment action existed"; and b) that the defendant must also present objective evidence to establish that those hired were in fact better qualified than the plaintiff.¹⁴⁹

¹⁴⁸ 450 U.S. 248 (1980). This case involved an allegation of gender discrimination proscribed by Title VII. It was brought by a female who was terminated by the defendant employer. The District Court held that the employer's rationale for terminating the plaintiff (i.e., that the plaintiff, along with two other employees did not work well together, thus adversely affecting work efficiency) was sufficient for meeting its burden under *McDonnell Douglas*. The Fifth Circuit reversed in part requiring elevated defendant burdens inconsistent with *McDonnell Douglas*. *Id.* at 251-252.

¹⁴⁹ *Id.* at 250 (emphasis added).

In its *Burdine* holding, the Court noted that “[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff *remains at all times with the plaintiff.*”¹⁵⁰ At each stage of the analysis, the plaintiff must meet the preponderance of the evidence standard. The burden on the defendant “is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant *need not persuade the court* that it was actually motivated by the proffered reasons.”¹⁵¹ Therefore, the burden of persuasion remains at all times with the plaintiff while the burden of production remains at all times with the defendant. Although the *de jure* burden on the defendant might be lighter, *de facto* circumstances probably place both sides on more equal footing.¹⁵²

The Court also held in *Burdine* that the Fifth Circuit was in error by “requiring the defendant to prove by objective evidence that the person hired or promoted was more qualified than the plaintiff.”¹⁵³ The Court noted without equivocation that Title VII does not require preferential treatment be given to racial minorities and women in the employment decisions.¹⁵⁴ Employers, the Court wrote, have the “discretion to choose

¹⁵⁰ *Id.* at 248 (emphasis added).

¹⁵¹ *Id.* at 254 (emphasis added).

¹⁵² See RUTHERGLEN, *supra* note 115, at 36 (“Legal doctrine does not require employers to offer good reasons for their decisions, but the practicalities of litigation often compel them to do so.”).

¹⁵³ *Burdine*, 450 U.S. at 258.

¹⁵⁴ *Id.* at 259 (the Court writing “Title VII, however, does not demand that that an employer give preferential treatment to minorities or women.”).

among equally qualified candidates, provided the decision is not based upon unlawful criteria.”¹⁵⁵

2. *Disparate Impact Theory*

It has already been noted that most Title VII causes of action are brought by aggrieved individuals.¹⁵⁶ One of the limitations of the disparate treatment theory is that for it to be utilized effectively, a plaintiff must allege the employer intentionally discriminated against him or her. How was a court to deal with a fact pattern that does not allege intentional discrimination on the part of an employer but alleges a discriminatory effect that impacts a class of individuals? Certainly Congress did not leave this kind of gaping hole in its legislative intent when passing Title VII. Indeed, for certain discrimination causes of action, relief is unavailable under a charge of unintentional discrimination.¹⁵⁷ The U.S. Supreme Court’s opinion in *Griggs v. Duke Power Company*¹⁵⁸ would provide a mechanism by which to bring an action to demonstrate discriminatory effect upon protected classes.¹⁵⁹

¹⁵⁵ *Id.* The Court’s holding vacated the Fifth Circuit’s decision. Thus, the case was remanded for further proceedings.

¹⁵⁶ See RUTHERGLEN, *supra* note 130.

¹⁵⁷ For example, the U.S. Supreme Court held in *General Bldg. Contractors Ass’n v. Pennsylvania*, 458 U.S. 375, 391 (1982) that “We conclude, therefore, that § 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination.” See also, *Alexander v. Sandoval et al.*, 532 U.S. 275, 281 (2001) (noting that “What we said in *Alexander v. Choate*, 469 U.S. 287, 293 (1985), is true today: Title VI itself directly reach[es] only instances of intentional discrimination.”) (internal quotations and footnote omitted).

¹⁵⁸ 401 U.S. 424 (1970).

¹⁵⁹ Justice Powell’s dissent in *Teal v. Connecticut*, 457 U.S. 440 (1981) discusses the tension of using group effects to protect individual rights in Title VII cases. He wrote “It is true that the aim of Title VII is to protect individuals, not groups. But in advancing this commendable objective, Title VII jurisprudence has recognized two distinct models of proof. In one set of cases – those involving direct proof of discriminatory intent – the plaintiff seeks to establish direct, intentional discrimination against him... In disparate-impact cases, by contrast, the plaintiff seeks to carry his burden of proof by way of *inference* – by showing that an employer’s selection process results in the rejection of a disproportionate number of members of a protected group to which he belongs... But this method of proof – which actually *defines*

As previously mentioned, disparate impact cases do not necessarily allege intentional discrimination. These cases do allege that an employer's facially neutral employment practices and procedures operate to disadvantage large numbers of protected groups under Title VII.¹⁶⁰ In *Griggs*, the Court developed the disparate impact theory to address the respondent's use of intelligence tests or possession of a high school diploma as a condition for employment and advancement.

The Court held that Title VII legislation is dichotomous in its approach to prevent and remedy employment discrimination. First, the intent of employer practices must be considered. Second, the effects of employer practices must be considered.¹⁶¹ In addition, the *Griggs* holding noted that practices which operate to exclude protected classes cannot withstand judicial scrutiny unless the practice is significantly related to job performance.¹⁶² This finding, as the Court wrote, does not preclude the administration of instruments and other tests or requirements. However, any gate keeping policies or procedures that have the effect of excluding protected classes must be closely aligned with the activities of the position being sought.¹⁶³

disparate-impact theory under Title VII – invites the plaintiff to prove discrimination by reference to the group rather than to the allegedly affected individual.” *Id.* at 458-459 (emphasis in original) (footnote omitted).

¹⁶⁰ As the Court noted in *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 & n.15 (1976), disparate treatment “involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.”

¹⁶¹ *Griggs*, 401 U.S. at 432 (noting “But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.”) (emphasis in original).

¹⁶² *Id.* at 431 (holding that “The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”).

¹⁶³ *Id.* at 424-425 (holding that “The Act does not preclude the use of testing or measuring procedures, but it does proscribe giving them controlling force unless they are demonstrably a reasonable measure of job

In creating a workable system of jurisprudence under the disparate impact theory established in *Griggs*, the U.S. Supreme Court developed a three-step litigation structure similar to a *McDonnell Douglas* action in their next major Title VII disparate impact holding. This was the case of *Albemarle Paper Company v. Moody*.¹⁶⁴ The first step was for the plaintiff to establish a prima facie showing of impact.¹⁶⁵ Should the plaintiff meet this burden, then the defendant will have to demonstrate that its employment policies and procedures that give rise to a disparate impact are job-related and business necessities. Finally, should the defendant successfully carry the requisite evidentiary burden, the plaintiff – much like the third step in *McDonnell Douglas* – can proffer a surrebuttal of pretext.¹⁶⁶

The next major case, which refined the framework established in *Albemarle*, was *Wards Cove Packing Company, Inc. v. Atonio*.¹⁶⁷ The lead petitioner in this case was a salmon cannery that operated only on a seasonal basis in Alaska although it did have

performance.”). The Court’s holding reversed, in part, the opinion of the Fourth Circuit finding for the defendant employer.

¹⁶⁴ 422 U.S. 405 (1974). This case called into question the employer’s requirement that employees desiring advancement have a high school diploma and receive acceptable scores on two general ability tests. Plaintiffs alleged that these requirements were instituted to exclude Blacks from higher level positions within the company.

¹⁶⁵ *Id.* at 425 (the Court writing “This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, i.e., has shown that the tests in question select applicant for hire or promotion in a racial pattern significantly different from that of the pool of applicants.”).

¹⁶⁶ *Id.* The Court writing “If an employer does then meet the burden of proving that its tests are job related, it remains open to the complaining party to show that other tests or selection devices, without similarly undesirable effect, would also serve the employer’s legitimate interest in efficient and trustworthy workmanship. Such a showing would be evidence that the employer was using its tests merely as a pretext for discrimination.” (internal quotations omitted). *See also*, *Dothard v. Rawlinson*, 433 U.S. 321-322 (1976) (holding that “To establish a prima facie case of employment discrimination, a plaintiff need only show that the facially neutral standards in question...select applicants for hire in a significantly discriminatory pattern, and here the showing of the disproportionate impact of the height and weight standards on women based upon national statistics, rather than on comparative statistics of actual applicants, sufficed to make out a prima facie case.”).

¹⁶⁷ 490 U.S. 642 (1988).

year round offices in Seattle and Astoria, Oregon. Most of the unskilled positions were filled with non-White workers that were primarily of either Native Alaskan or Filipino decent.¹⁶⁸ Employees of the cannery filed suit alleging disparate impact in both the hiring and promotion standards of the petitioner-employer.

The Supreme Court's holding in *Wards Cove* reversed the Ninth Circuit's finding for the plaintiffs. The Court's rationale for reversing the Ninth Circuit is important because it modified the *Griggs/Albemarle* framework in four significant ways. First, the Court noted that plaintiffs need to prove that a particular employer practice caused a disparate impact.¹⁶⁹ This, therefore, rendered inappropriate any "bottom line" statistical analyses to infer disparate impact as a result of an employer's practices.¹⁷⁰ Second, the *Wards Cove* case scaled back the requirement that defendants demonstrate that their practices were both job related and a business necessity. The Court noted that defendants must provide only a "business justification for his employment practice."¹⁷¹

The third way in which *Wards Cove* altered the prior standards, and was the most significant alteration, was requiring only that a defendant produce evidence that its employment practices were justified under its business justification assertion. This is

¹⁶⁸ *Id.* at 642.

¹⁶⁹ *Id.* at 656-657. "Our disparate-impact cases have always focused on the impact of *particular* hiring practices on employment opportunities for minorities. Just as an employer cannot escape liability under Title VII by demonstrating that...his work force is racially balanced...a Title VII plaintiff does not make out a case of disparate impact simply by showing that...there is racial *imbalance* in the work force." (emphasis in original) (internal quotations omitted).

¹⁷⁰ *Id.* at 657. The Court noted "As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's prima facie case in a disparate-impact suit under Title VII."

¹⁷¹ *Id.* at 659. The earlier "necessity" standard was too high of a benchmark. The Court noted "[A]t the justification stage of such a disparate-impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate goals of the employer...[T]here is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet..." (internal citations omitted).

analogous to the burden defendants have in a *McDonnell Douglas* action; they have the burden of production, not persuasion.¹⁷² Finally, *Wards Cove* altered the *Albemarle* pretext surrebuttal concept to be a presentation of alternative practices that the employer should adopt or the employer would be at risk of having their proffered justifications being viewed as pretext.¹⁷³

The *Wards Cove* holding was imbued with scaling back employment civil rights rather than advancing them. Due in large part to the Supreme Court's holding in *Wards Cove*, Congress enacted the Civil Rights Act of 1991.¹⁷⁴ This Act made significant changes to Title VII primarily by adding a new § 703(k).¹⁷⁵ Among other things, the Act clarified the burdens on both the plaintiff and defendant. Section 104(m) of the Act defines “demonstrates” as meeting the burdens of both production and persuasion; thereby overruling *Wards Cove* on the issue of the defendant's level of evidence related to their business justification. The defendant must also “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity...”¹⁷⁶ Congress also codified pre-*Wards Cove* holdings with respect to the

¹⁷² *Id.* The majority wrote “In this phase, the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff.”

¹⁷³ *Id.* at 660-661. Justice White, writing for the majority, noted “If respondents, having established a prima facie case, come forward with alternatives to petitioner's hiring practices that reduce the racially disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for nondiscriminatory reasons. Of course, any alternative practices which respondents offer up in this respect must be equally effective as petitioner's chosen hiring procedures in achieving petitioner's legitimate employment goals.”

¹⁷⁴ Pub. L. No. 102-166.

¹⁷⁵ Codified as 42 U.S.C. § 2000e-2(k) (2000).

¹⁷⁶ 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

terminology of “business necessity” and “job related”¹⁷⁷ in addition to the concept of alternative employment practices.¹⁷⁸

C. Bringing a Case of Employment Discrimination

Before an individual initiates an action under the auspices of Title VII, the prospective plaintiff should realize the process is lengthy and has a number of steps. It can take considerable time before the plaintiff will have the opportunity to have their case considered by a jury. The current process of filing and arbitrating an employment discrimination action under Title VII serves a number of purposes. Among these includes the encouragement for settlement rather than opting for protracted and costly legal proceedings. In addition, it has been argued that the ability of prevailing plaintiffs to collect attorney’s fees has led to increased filings; however, this is a very important benefit for plaintiffs and is in line with the civil rights nature of the statute.¹⁷⁹ Without the provision of attorney’s fees, many injured plaintiffs possibly would not be able to retain counsel. This benefit is especially important when considering that many plaintiffs in Title VII actions are *pro se* at a number of points in the litigation process.¹⁸⁰

There are three distinct procedural stages for a charge of employment discrimination filed under Title VII. It should be noted, however, that the law provides

¹⁷⁷ Section 3(2) notes that a purpose of the Act is “to codify the concepts of “business necessity” and “job related” enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).”

¹⁷⁸ 42 U.S.C. § 2000e-2(k)(1)(C) (2000) (noting that “The demonstration referred to by subparagraph (A)(ii) shall be in accordance with law as it existed on June 4, 1989, with respect to the concept of “alternative employment practice.””).

¹⁷⁹ See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

¹⁸⁰ See *Clermont & Schwab*, *infra* p. 95 and note 368, at 434 (finding that approximately 19% of plaintiffs in Title VII actions in U.S. District Courts from 1998-2001 were *pro se*). See also, RUTHERGLEN, *supra* note 115, at 161. Rutherglen’s assertion leads to an inference that many Title VII plaintiffs are *pro se* at the earlier stages of an action when he noted that at the EEOC stage of a Title VII case many plaintiffs “may well be acting without the assistance of counsel.”

for a case of employment discrimination to be brought against an employer by the EEOC, the Attorney General or a private individual.¹⁸¹

The first stage of a filing a Title VII claim is by registering a complaint with a state or local agency with jurisdiction over employment discrimination questions.¹⁸² Plaintiffs must exhaust state and local remedies before formally filing a complaint with the EEOC.¹⁸³ In fact, a plaintiff cannot file a complaint with the EEOC until at least sixty days after state and local proceedings have commenced or at the conclusion of those proceedings if they terminate earlier than sixty days.¹⁸⁴

The second stage is filing the complaint with the EEOC after state and local administrative remedies fail. The statute of limitations for filing a complaint will vary predicated upon the existence of a state or local agency with anti-discrimination legislation enforcement responsibilities. Should a plaintiff live in a jurisdiction without such an agency, he or she would have 180 days from the date of the alleged discriminatory conduct to file a charge.¹⁸⁵ If a plaintiff lives in a jurisdiction with a state or local enforcement agency, he or she would have either 300 days subsequent to the

¹⁸¹ 42 U.S.C. § 2000e-5(f)(1) (2000) (noting that the “Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision...the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action...[i]f a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge...the Commission has not filed an action under this section or the Attorney General has not filed a civil action...”).

¹⁸² 42 U.S.C. § 2000e-5(c) (2000). *See Oscar Mayer & Co. et al. v. Evans*, 441 U.S. 750, 765-766 (1979) (holding that “That Commission [Iowa State Civil Rights Commission] must be given an opportunity to entertain respondent’s grievance before his federal litigation can continue...[R]espondent must pursue his state remedy.”).

¹⁸³ 42 U.S.C. § 2000e-5(c) (2000).

¹⁸⁴ *Id.*

¹⁸⁵ 42 U.S.C. § 2000e-5(e)(1) (2000).

employer’s alleged discriminatory conduct to file a charge, or to file “within thirty days after receiving notice that the State or local agency has terminated the proceedings...whichever is earlier.”¹⁸⁶

Once a charge has been filed with the EEOC, the agency will begin to investigate to determine whether reasonable cause exists for sanctions against an employer.¹⁸⁷ As part of its investigation, the agency will consider the findings of the state and/or local administrative proceedings, if applicable. Under the law, the EEOC must provide “substantial weight to the final findings and orders made by the State or local authorities in proceedings commenced under State or local law...”¹⁸⁸ According to statistics for the fiscal years of 1997-2007, the agency made a determination that approximately 73% of race-based filings under Title VII had exhibited no reasonable cause.¹⁸⁹ Should the EEOC investigation team determine that a charge has reasonable cause (i.e., the Commission investigators “believe that the charge is true”), the Commission’s agents will then “endeavor to eliminate any such alleged unlawful employment practice by

¹⁸⁶ *Id.* In the recent holding in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S., slip op. (2007), the Supreme Court provided additional clarification on the statute of limitations to file a charge with the EEOC. This case involved a Title VII disparate treatment in pay case. The plaintiff argued that she could file charges with the EEOC several years after alleged discriminatory pay decisions (e.g., denial of pay raises) were made because of the continuing negative effects these prior decisions had on her current pay. The Court held that the plaintiff’s allegations were time barred per the promulgated statute of limitations to file an EEOC charge. Further, the Court held that in Title VII disparate pay cases, the requisite filing time is triggered when each alleged discriminatory decision is made and communicated to the employee.

¹⁸⁷ 42 U.S.C. § 2000e-5(b) (2000). However, an EEOC finding of no reasonable cause does not preclude a subsequent court action. *See McDonnell Douglas*, 411 U.S. 792, 799 (1972) (noting that “a Commission ‘no reasonable cause’ finding does not bar a lawsuit in the case.”) (quoting *Robinson v. Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971) at 800.).

¹⁸⁸ 42 U.S.C. § 2000e-5(b) (2000).

¹⁸⁹ From the table *Race-Based Charges, FY1997 – FY2007*, available at <http://www.eeoc.gov/stats/race.html> (last visited Mar. 28, 2008). Race-based charges lead all EEOC filings under Title VII’s protected categories for the fiscal years designated with 315,315 filings received. Sex-based charges are second with 268,737 filings. During the fiscal years 1997-2007, the EEOC made a no reasonable cause determination in 63% of sex-based cases. *See Sex-Based Charges FY 1997 – FY 2007*, available at <http://www.eeoc.gov/stats/sex.html> (last visited Mar. 28, 2008).

informal methods of conference, conciliation, and persuasion.”¹⁹⁰ If those methods fail and, after 180 days, the EEOC or the Attorney General fail to file a civil suit against the employer, the aggrieved person or persons can intervene and take the complaint to the third and final stage of a Title VII action.¹⁹¹

The final stage is for the plaintiff to file a complaint in either a jurisdictional state or local court or federal district court.¹⁹² Following conciliation failure by the EEOC, the agency will present the plaintiff with a right-to-sue letter. Upon receipt of this letter, the plaintiff must file suit within ninety days.¹⁹³ Although plaintiffs do have a choice in venue, most plaintiffs’ choose to file a complaint in the federal courts. This is due to the level of deference courts must provide to the findings in both administrative and state level court proceedings. It is a settled matter of case law that the findings of administrative agencies have no preclusive effect on court proceedings.¹⁹⁴ However, federal courts have to be deferential to the holdings of state courts. Thus, these state level court proceedings could potentially have *res judicata* effect on any subsequent federal hearing.

¹⁹⁰ 42 U.S.C. § 2000e-5(b) (2000).

¹⁹¹ See *supra* note 181 and accompanying text.

¹⁹² See *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1989). At issue in this case was whether or not a plaintiff was required to file a Title VII suit in a federal court. In its holding authored by Justice Stevens, the Court noted that “To give federal courts exclusive jurisdiction over a federal cause of action, Congress must, in an exercise of its powers under the Supremacy Clause, affirmatively divest state courts of their presumptively concurrent jurisdiction... Title VII contains no language that expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction.”

¹⁹³ 42 U.S.C. § 2000e-5(f)(1) (2000).

¹⁹⁴ See *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 111 (1990). In this case the Court noted that federal courts are not bound by the holdings of state and local agencies. If courts were required to give a high level of deference or were bound to administrative proceedings, then any subsequent federal hearing would be “strictly *pro forma* if state administrative findings were given preclusive effect.” See also, *McDonnell Douglas*, 411 U.S. 792, 799 (1972) (noting that “court actions under Title VII are *de novo* proceedings...” (quoting *Robinson v. Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971) at 800.).

In addition to choice of venue in which to file their complaint, plaintiffs can also request a jury trial.¹⁹⁵

D. Remedies Available Under Title VII

Before deciding to bring suit, it is prudent for a plaintiff and his or her attorney to make a reasonable judgment of not only the potential for success in an action, but the rewards that could come with a prevailing verdict. Under Title VII, prevailing plaintiffs have access to three types of remedies. These include equitable remedies, damages and attorney's fees.

The goal of equitable relief under Title VII is to “make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to secure complete justice.”¹⁹⁶ Some examples of equitable relief under Title VII include injunction against discriminatory employment practices, reinstatement of terminated employees, back pay, and grants of seniority.¹⁹⁷

¹⁹⁵ This option was brought about with Congress' passage of the Civil Rights Act of 1991. Prior to this, all court proceedings under Title VII were bench trials. In addition, if compensatory or punitive damages are being sought in an action, any party can request a jury trial. *See* 42 U.S.C. § 1981a (2000).

¹⁹⁶ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1974) (internal quotations omitted).

¹⁹⁷ 42 U.S.C. § 2000e-5(g)(1) (2000). For a discussion on the remedy of grants of competitive seniority and the concept of front pay, consult *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) and its progeny. In a Title VII case alleging sex discrimination, the U.S. District Court for Northern Mississippi awarded the plaintiff the position of Athletic Director at Lee High School in Columbus, MS as well as back pay. The case originated out of the plaintiff's rejection for the position of Athletic Director because the school district had conflated the positions of head football coach and athletic director. Because the plaintiff was not qualified to serve as head football coach, she was automatically rejected for the athletic director position. The court's holding noted that “Plaintiff is entitled to appropriate equitable relief, including placement into the Athletic Director's position and an award of back pay for those earnings she was denied as a result of the defendant's actions in violation of Title VII.” *Wynn v. Columbus Mun. Separate Sch. Dist.*, 692 F. Supp. 672, 686 (N.D. Miss. 1988).

Along with the provision of, among other things, jury trials, the Civil Rights Act of 1991 provides the opportunity for Title VII prevailing plaintiffs to be awarded damages.¹⁹⁸ However, there are a few constraints on the awarding of damages under Title VII. Some of the more salient to this paper include the following. First, damages can only be assessed against defendants in disparate treatment cases.¹⁹⁹ Second, punitive damages can only be awarded if the defendant in the case is a private employer.²⁰⁰ Finally, damages assessed for “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded” are limited and predicated upon the size of the employer.²⁰¹

Finally, the prevailing plaintiff is entitled to attorney’s fees.²⁰² To be inferred from the statutory language, prevailing defendants should be able to collect attorney’s fees as well. However, the U.S. Supreme Court in *Christiansburg Garment Company v. EEOC* gave a very narrow definition to that inference.²⁰³ The Court noted that prevailing defendants could receive an award of attorney’s fees at the court’s discretion if the court

¹⁹⁸ 42 U.S.C. § 1981a(a)(1) (2000).

¹⁹⁹ *Id.*

²⁰⁰ 42 U.S.C. § 1981a(b)(1) (2000) (noting that for a plaintiff to receive an award, he or she must demonstrate “that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”). For further discussion on meeting this standard within the context of a case involving a prevailing intercollegiate coach, consult *supra* note 138 and accompanying text.

²⁰¹ 42 U.S.C. § 1981a(b)(3) *et seq.* (2000). For employers with 15-100 employees, the maximum award is \$50,000. For employers with 101-200 employees, the maximum award is \$100,000. For employers with 201-500 employees, the maximum award is \$200,000. For employers with more than 500 employees, the maximum award is \$300,000.

²⁰² 42 U.S.C. § 2000e-5(k) (2000) (noting that “In any action or proceeding under this subchapter, the court, in its discretion, may allow the prevailing party other than the Commission or the United States, a reasonable attorney’s fee (*including expert fees*) as part of the costs...” (emphasis in original)).

²⁰³ *Christiansburg Garment Co.*, 434 U.S. 412 (1978).

found that the plaintiff's action "was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."²⁰⁴

With the foundation of Title VII jurisprudence established in the preceding sections, it is now necessary to examine Title VII actions involving coaches and the hiring process. The next section will also proffer a litigation strategy that could maximize the utility of Title VII jurisprudence in an attempt to effect change among the racial composition of head coaches at NCAA FBS member institutions.

²⁰⁴ *Id.* at 421.

III. TITLE VII AND THE HIRING OF COACHES: UNDERREPRESENTATION, LEADING CASES AND POTENTIAL LITIGATION STRATEGY

In examining the issue of underrepresentation of African-Americans in head coaching positions, the *raison d' être* of the inquiry is to ascertain whether or not the cause of this alleged underrepresentation is the result of discrimination. In simplest terms, by asserting that this is the case is to say that African Americans are not as represented as Whites are in the profession because they are in fact Black. Therefore, we must infer that for various reasons this immutable characteristic is anathema to decision makers – *de jure* and/or *de facto*. While this assumption is *a priori* for many advocates and researchers, this assumption is worth investigating further by reviewing actual court cases.²⁰⁵ As will be established later, this review demonstrates that most published cases involving coaches and discrimination are predicated upon sex discrimination not race discrimination. In addition, most published cases involve current employees rather than those seeking new employment. It has been previously established that, compared to the past, more minorities are being interviewed for coaching positions.²⁰⁶ In addition, there has been some, although minimal, progress in the hiring of racial minorities for these

²⁰⁵ See, e.g., George B. Cunningham, Jennifer E. Bruening & Thomas Straub, *The Underrepresentation of African-Americans in NCAA Division I-A Head Coaching Positions*, 20 J. SPORT MGMT., 387, 390 (2006) (noting that “[I]t is likely that discrimination is contributing to the underrepresentation of African-American head coaches, such that African-Americans face substantial barriers in achieving head coaching positions.”). Due to overt comments of minority advocates such as Floyd Keith and Rev. Jackson as well as the couching of potential solutions in discrimination statutes, it can thus be inferred that these individuals and their respective organizations assume discrimination rather than the presence of other salient subjective hiring criteria.

²⁰⁶ See Wolverton, *supra* note 9; See also, Brand, *supra* note 102 at 15 (Dr. Brand stating “As a result of public disclosure [via the BCA Hiring Report Card], more than 30 percent of all candidates interviewed for head coaching positions over the last 3 years have been minorities.”).

coaching appointments.²⁰⁷ However, recent research and events have put forward the notion that minorities who are hired tend to receive more support from their institutions than do their non-minority counterparts.

One of the more important analyses of head coaching performance predicated upon race was Janice Madden's report published in 2002.²⁰⁸ The statistics of this report served as bulwark support for the subsequent Cochran and Mehri Report²⁰⁹ which eventually led to the development of the NFL's Rooney Rule.²¹⁰ One finding of the Madden Report, which examined the hiring, performance and termination of head coaches in the NFL, was that African-American coaches were "significantly more likely to be fired" than Whites when considering regular-season team performance, team quality and coaching tenure.²¹¹ In addition, Madden noted that discrimination is the most likely cause for adverse employment decisions affecting African-American head coaches in the NFL.²¹² Subsequent research led to a different conclusion when examining the experiences of college head football coaches.

²⁰⁷ Brand, *supra* note 102 at 15 (stating "Even more striking is that 76 percent of all the openings over the last three years have had at least one minority candidate interviewed and in more than three out of every four vacancies, a person of color was interviewed but only nine of the 81 openings in all of Division I have been filled with a minority candidate.").

²⁰⁸ Another version of the report was later published in an academic journal. See Janice Fanning Madden, *Differences in the Success of NFL Coaches by Race, 1990-2002: Evidence of Last Hire, First Fire*, 5 J. SPORTS ECON. 6 (2004) [hereinafter the "Madden Report"].

²⁰⁹ Johnnie L. Cochran, Jr., & Cyrus Mehri, *Black Coaches in the NFL: Superior Performance, Inferior Opportunities* (2002), available at http://web2.customwebexpress.com/meska/UserFiles/File/Report_-_Superior_Performance_Inferior_Opportunities.pdf (last visited Dec. 14, 2007).

²¹⁰ See Maravent, *supra* note 59.

²¹¹ Madden (2004), *supra* note 208, at 15.

²¹² *Id.* at 16 (noting that "These findings are consistent with racial discrimination against African-American coaches...Because attendance is less an issue for football than other sports, it appears that management or employer discrimination is the more likely source of racial discrimination against African-American coaches.").

Mixon and Treviño utilized econometric analyses to examine the effect of race on the termination of head coaches at NCAA FBS-level institutions.²¹³ Their study demonstrated that minority coaches, *ceteris paribus*, were almost ten percent less likely to be terminated compared to their White counterparts.²¹⁴ The authors note that minority head coaches might also receive additional institutional supports not provided to White coaches.²¹⁵

Some of these possible extra benefits and supports have come to light in recent seasons. For example, when Sylvester Croom was named head coach at Mississippi State University in 2003, he inherited a program under NCAA investigation. Some of the eventual sanctions levied against the program included postseason appearance restrictions and elimination of a number of scholarships.²¹⁶ In order to mitigate the negative effect of these sanctions on his new head coach, Mississippi State athletic director Larry Templeton stated that Croom's contract would be for the state maximum four years plus one year for each year the program was under NCAA probation.²¹⁷ It is

²¹³ Franklin G. Mixon, Jr., & Len J. Treviño, *How Race Affects Dismissals of College Football Coaches*, 25 J. LABOR RSCH 645 (2004). The study examined head coach performance for the 1990-2000 seasons.

²¹⁴ *Id.* at 653 (noting that “The estimated probability difference taken from RACE in this unrestricted model is -0.096, suggesting that Black coaches, on average, face a dismissal probability that is 9.6 percentage points lower than that faced by their nonBlack counterparts; this difference is significant at the 0.097 level.”).

²¹⁵ *Id.* “This finding provides evidence that race plays a significant role in the dismissal/retention process and that Black head coaches may be the beneficiaries of favorable treatment relative to their nonBlack counterparts by university administrators.”

²¹⁶ Associated Press, *Mississippi State Extends Croom's Contract*, USA TODAY, Dec. 18, 2005, available at http://www.usatoday.com/sports/college/football/sec/2005-12-18-croom_x.htm (last visited July 7, 2007).

²¹⁷ *Id.* See also, MISS. CODE ANN. § 37-101-15(f) (2003) (noting that “The board shall have authority to elect the heads of the various institutions of higher learning and to contract with all deans, professors, and other members of the teaching staff, and all administrative employees of said institutions for a term not exceeding four (4) years.”).

unknown how many, if any, coaches have been able to take over a program on or under threat of probation with such a level of support from their respective administrators.

Another example of unique administrative support for a minority head coach involves Florida International University (FIU). It was recently revealed that FIU head football coach Mario Cristobal has a provision in his contract that the university will admit his recruited student-athletes as long as these prospects receive qualifier certification from the NCAA Eligibility Center.²¹⁸ This, of course, means that the university will admit certified prospective football student-athletes even if they do not meet the university's admissions guidelines. A situation related to separate admissions standards for prospective football student-athletes recently made headlines when the University of South Carolina refused admission to two of Steve Spurrier's signed recruits during the 2007 pre-season.²¹⁹ Spurrier even threatened to resign if policies were not changed to accommodate his recruiting.²²⁰ While the administration stated it was willing to provide some leeway with the admissions policy for prospective student-

²¹⁸ Jodi Upton, *Unique Clause Addresses Admissions*, USA TODAY, Dec. 5, 2007, available at http://www.usatoday.com/sports/college/football/2007-12-05-fiu-admissions_N.htm?POE=click-refer (last visited Dec. 5, 2007). The NCAA's initial eligibility requirements focus on a high school prospective student-athlete's academic preparation for college-level work. Prospective student-athletes must achieve a certain grade point average (GPA) in prescribed college prep courses (core courses) as well as achieve a corresponding minimum score on either the ACT or SAT. Prospective student-athletes who do not have enough core courses or do not possess the requisite core course GPA and standardized test score will be deemed "non-qualifiers" by the NCAA Eligibility Center. As non-qualifiers, these prospective student-athletes cannot, among other things, participate with the team in practices or games nor receive athletics-related financial aid. The NCAA's academic requirements govern only athletic participation and many member schools have more rigorous standards for the admission and the retention of students. For more information on the NCAA's initial eligibility and academic progression requirements, consult the NCAA's website at <http://www.ncaa.org>.

²¹⁹ Associated Press, *Spurrier Blasts South Carolina Admissions for Denying Two Recruits*, ESPN.COM, Aug. 6, 2007, available at <http://sports.espn.go.com/nca/news/story?id=2962823> (last visited Apr. 19, 2008). The student-athletes denied admission met NCAA initial eligibility standards but did not meet the University of South Carolina's more rigorous admissions standards.

²²⁰ *Id.* Spurrier stated that if the policies were not changed then he would "have to go somewhere else."

athletes at the University of South Carolina, to date a reformed policy has not been made a provision within Spurrier's contract, nor should it be inferred that Spurrier will or would receive the wide berth accorded to Cristobal.²²¹

It is important to note that, given the previous discussion, Mixon and Treviño's findings as well as the benefits provided Croom and Cristobal do not address discrimination in the hiring process. Rather, the previous discussion has been to speculate that, once hired, intercollegiate coaching minorities might receive additional consideration to help ensure their success. Therefore, minority coaches at the FBS-level could be more insulated from dismissal than their White counterparts, thus supporting Mixon and Treviño's findings.²²²

A. Underrepresentation and the Relevant Labor Pool

When discussing the topic of African-Americans occupying head coaching positions in intercollegiate athletics, the discussion will not get far without the term "underrepresented" being used. In fact, it is unlikely that any discussion related to minorities and their presence in many professions or at certain levels of institutions of higher learning will proceed without this terminology or some variant being used within the first few sentences. What exactly does underrepresentation mean? There exists a dichotomy of contexts related to defining this term. In one context underrepresentation is very easy to define and establish indicator thresholds. In the other context, advocates must be circumspect in their definitions because these definitions and their operational

²²¹ ESPN.com News Service, *South Carolina Willing to Work with Spurrier, To a Point*, ESPN.COM, Aug. 7, 2007, available at <http://sports.espn.go.com/nfl/news/story?id=2964254> (last visited Apr. 19, 2008).

²²² It is interesting to note that Mixon & Treviño's article does speculate that then-Notre Dame head coach Tyrone Willingham might be the beneficiary of special treatment. Soon after their article was published Notre Dame terminated Willingham after the conclusion of the 2004 season.

parameters can be analogous to the proverbial house of cards. Being too aggressive or rigid in the definition can easily bring down the house.

The first context is the social context. Advocates, researchers and the general public can define underrepresentation in any way they choose. The most pervasive definition germane to the number of minority head coaches, as evidenced by the literature, media sound bites and Congressional testimony, has grounded the meaning of this term in the racial comparison between the number of coaches versus the number of participants.²²³ Therefore, it is argued that an appropriate representation of the races among head coaches should more closely mirror racial participation rates. Using the most recent published figures this would mean fifty-six FBS-level head coaches should be African-American and fifty-five should be White, non-Hispanic.²²⁴

While social researchers and advocates, among others, can publish papers and make comments before Congress asserting, with impunity, that minorities are

²²³ Cf. Cunningham et al., *supra* note 205, at 388 (noting that “The data clearly show that, when considering the proportion of players who are African-American, African-Americans are underrepresented in the coaching ranks.”); George B. Cunningham & Michael Sagas, *Access Discrimination in Intercollegiate Athletics*, 29 J. SPORT SOCIAL ISSUES 148, 150 (2005) (“These figures are even more telling when we consider that racial minorities constitute 28.6% of all participants in men’s athletics and 23.0% of all participants in women’s athletics... Thus, when compared to the population of potential coaches [student-athletes], we see that racial minorities are underrepresented in the coaching ranks.”); Brand, *supra* note 99 at 14-15 (stating “In my very first public speech as NCAA president more than 4 years ago, I said that one of the most egregious instances of lack of access was the low number of African-American head football coaches in Division I-A or the Bowl Championship Division, as it is now called... In Division I-A, 2.4 percent [excluding HBCUs] are head coaches where 55 percent of student-athletes are minorities.”).

²²⁴ These are based upon Division I-A participation rates for 2005-06 as reported in the 1999-00-2005-06 NCAA STUDENT-ATHLETE RACE AND ETHNICITY REPORT, *available at* http://www.ncaapublications.com/Uploads/PDF/2005-06_race_ethnicity_reportf05055c6-deb3-45de-ab1c-cbeeb4c19584.pdf (last visited Feb. 12, 2008). Participation rates, in percentages, for Black, Non-Hispanic and White, Non-Hispanic were 46.9% and 45.9% respectively. *Id.* at 37. To date, there have not been any serious demands for the head coaching numbers to approach these percentages. As previously noted, most advocates are pleased with the current representation of minorities as head coaches in Division I basketball. According to the NCAA’s report, participation rates for this sport among men in 2005-06 were 58.9% and 29.9% for Blacks and Whites respectively. *Id.* Meanwhile, approximately twenty-five percent of head coaches were Black. *See* Keith, *supra* note 93, at 2.

underrepresented as head coaches relative to the racial composition of sport participants, when the issue enters the legal context a different definition of underrepresentation must be utilized. In fact, the U.S. Supreme Court has characterized the previous social comparison as “irrelevant” for the purposes of deciding Title VII cases.²²⁵ While there is redeeming value to the social context definition of underrepresentation, in light of the requisite legal guidelines to establish the same claim that particular definition has no utility.

How, then, do the courts define underrepresentation? It is a well settled matter of case law that the only appropriate comparison for the purposes of establishing underrepresentation in Title VII litigation is to examine the racial composition of those holding the desired positions versus the racial composition of the qualified labor pool.²²⁶ This type of analysis is the cornerstone of class claims of discrimination (i.e., disparate impact cases).²²⁷ Some courts have held that such statistics, however, are not salient when presenting a case predicated upon a disparate treatment cause of action.²²⁸

²²⁵ See generally, *Hazelwood School District v. United States*, 433 U.S. 299 (1976).

²²⁶ In *Hazelwood*, the Court noted that “[T]he Court of Appeals rejected the trial court’s analysis of the statistical data as resting on an irrelevant comparison of Negro teachers to Negro pupils in Hazelwood. The proper comparison, in the appellate court’s view, was one between Negro teachers in Hazelwood and Negro teachers in the relevant labor market area.” *Id.* at 304-305. In assessing the appropriateness of the lower court’s comparative requirements, the Court’s holding noted that “There can be no doubt, in light of the *Teamsters* case, that the District Court’s comparison of Hazelwood’s teacher work force to its student population fundamentally misconceived the role of statistics in employment discrimination cases. The Court of Appeals was correct in the view that a proper comparison was between the racial composition of the qualified public school teacher population in the relevant labor market.” *Id.* at 308 (footnote omitted).

²²⁷ *Wards Cove Packing Co., Inc. v. Atonio* 490 U.S. 642, 650 (1988) (noting that “It is such a comparison – between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs – that generally forms the proper basis for the initial inquiry in a disparate-impact case.”).

²²⁸ For example, the Maryland District Court addressed the use of statistical data in the disparate treatment case of *Van Slyke v. Northrup Grumman*, 115 F. Supp. 2d 587, 597 (D. Md. 2000). The court noted that “As this court found in a recent failure to promote case, statistical evidence has little if any relevance in an individual disparate treatment action.” (citing *Bostron v. Apfel*, 104 F. Supp. 2d 548 (D. Md. 2000)) (internal quotations omitted).

Therefore, under employment discrimination law, we cannot imbue African-Americans as being underrepresented among head coaches nor can we infer they are being discriminated against simply because their numbers do not reflect the participation rates of African-Americans in FBS-level football.²²⁹

With the legal definition now established, the logical next question is, what is the threshold for determining underrepresentation in the legal context? It is in this area of litigation where plaintiffs, among others, need to tread lightly. Whereas in the social context it might be appropriate to say there *should be* racial proportionality between head coaches and student-athletes, thus being loosely analogous to one prong of Title IX compliance, in the legal context this is tantamount to establishing a racial quota which is repugnant to constitutional protections.²³⁰ For an interesting examination of just how tenuous the relationship is between the normative prescriptions of racial representation and legal doctrine, it is recommended that interested parties listen to the oral arguments in the landmark University of Michigan affirmative actions cases.²³¹ During the

²²⁹ See *Carter v. Ball*, 33 F.3d 450, 456 (4th Cir. 1994) (holding that “The mere absence of minority employees in upper-level positions does not suffice to prove a *prima facie* case of discrimination without a comparison to the relevant labor pool.”).

²³⁰ Of the three prongs to establish institutional compliance with Title IX, the proportionality prong is imbued with being the most difficult to implement. This prong requires that athletic participation opportunities (as well as funding) for male and female students be provided in numbers substantially proportionate to an institution’s undergraduate student enrollment. Some argue that compliance utilizing this prong leads to the elimination of men’s teams. For example, James Madison University (JMU) recently enacted a proportionality strategy to comply with Title IX. As part of this strategy, seven varsity men’s teams and three varsity women’s teams were eliminated. At the time of the announced strategy, JMU’s student enrollment was 61% female and 39% male. It should be noted that to be consider compliant with Title IX, institutions need to establish that they are meeting the standards of only one of the three prongs. See James Madison University Press Release, *JMU Enacts Proportionality Plan to Comply with Title IX*, Sept. 26, 2006, available at <http://www.jmu.edu/jmuweb/general/news/general7490.shtml> (last visited May 26, 2008).

²³¹ These cases are *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003). The oral argument files are available through the Oyez Project and can be accessed via the internet at <http://www.oyez.org/>.

arguments of both cases, counselors for the University of Michigan were extremely careful in their explanations and responses not to tie the controversial concept of “critical mass” to a number or percentage.²³² Their testimony when trying to give definite shape to the concept of critical mass while avoiding quota-establishing language was reminiscent of Justice Potter Stewart’s concurrence in *Jacobellis v. Ohio*.²³³ When he could not find the words to adequately define what constituted hard-core pornography, Justice Stewart famously wrote “[I] know it when I see it...”²³⁴

Enforcing employment representation of the respective races in proportion to their participation rates or general population numbers would be harmful to society.²³⁵ Indeed the Supreme Court has not only found against this type of normative prescription,

²³² For example, in the *Gratz* case John Payton, lead counsel for the University of Michigan, asserted that targeted minorities (i.e., African-Americans, Native Americans and Hispanics) were underrepresented in Michigan’s undergraduate applicant pool. Chief Justice Rehnquist responded by asking Mr. Payton how he ascertained that these groups were underrepresented. He then stated to Mr. Payton that “When you say underrepresented, it sounds like something almost mathematical, that you’re saying, we only have a certain percentage of...and we should have this percentage. Well, what is this percentage?” To which Mr. Payton replied “It’s actually not a percentage at all and it really is driven by the educational benefits that we want from our diverse student body. If we had in our applicant pool sufficient numbers of minority students...” Chief Justice Rehnquist interrupted and asked Mr. Payton to define what he meant by a “sufficient number”. To which Mr. Payton replied “A sufficient number so that when we made our selections, we were achieving the critical mass of students that we need for the benefits I described. That is not a fixed precise number at all, as you’ve heard. [T]hat’s simply not the nature of the critical mass. But when you’re trying to figure out whether or not in your applicant pool you have sufficient numbers so that the normal operation of our process would yield a critical mass that’s underrepresented. We are underrepresented with respect to Hispanics, with respect to African-Americans and with respect to Native Americans.”

²³³ 378 U.S. 184 (1963).

²³⁴ *Id.* at 197.

²³⁵ Section 703(j) of Title VII is explicit in noting that Title VII does not require that employers “grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group...” Nor does the Act require that an employer’s workforce reflect the “total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.” However, the Supreme Court has noted that comparisons along protected characteristics between a workforce and the qualified labor pool can be probative because “absent explanation, it is ordinarily expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which the employees are hired.” *See Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 & n.20 (1976).

they have also established through the study of statutory legislative histories that this ethos is in fact contrary to the will of Congress as well.²³⁶

How can it be determined, within the legal context, what the head coaching landscape should look like? This is a challenge without the ability to utilize quantifiable criteria. In addition, the concept of underrepresentation is a macro perspective. As such, what is the role of each individual institution in developing a solution? After all, each institution has only one head football coaching position that is infrequently available. Should the NCAA exert its sanctioning power to place a heavy hand on the hiring processes of the respective member institutions? If the concern now is access to the interview process - which, as previously noted, has become more inclusive - is the next step “forcing” institutions to hire along racial lines should the desired number of minority coaches not be selected? Only policy development and (possible) resulting litigation on these questions will yield more definitive answers.

While the courts are clear about the proper comparison to be made to establish underrepresentation for the purposes of Title VII cases, what is less clear is identifying the probative qualified labor pool.²³⁷ In fact, failure to establish a proper pool is probably the most prevalent element that has proven fatal to a number of Title VII disparate

²³⁶ *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 652 (1988) (noting that “The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII.”). *See also*, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1974) (noting that a proportionality system would force employers to “engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII.”).

²³⁷ *See Duru*, *supra* note 107, at 403 n. 195 (asserting that “What constitutes the relevant labor market for purposes of disparate treatment statistical analysis is certain to engender significant debate among parties to an employment discrimination case.”).

impact cases in the sport context.²³⁸ Based upon the Supreme Court’s decisions, there are two prongs to determine who should be included in the qualified labor pool in any cause of action.

The first prong is based upon the respective qualifications of prospective pool members. Supreme Court jurisprudence delineates jobs as being skilled and low or unskilled.²³⁹ For jobs classified as low or unskilled positions, the U.S. Supreme Court has found that it can be appropriate to use general population numbers.²⁴⁰ For jobs requiring special skills or certifications, the Court has found general population

²³⁸ See, e.g., *Jackson v. Univ. of New Haven*, 228 F. Supp.2d 156, 164-166 (D. Conn. 2002). In this case, the plaintiff offered two pieces of statistical evidence to support his claim that the defendant’s requirement that applicants for the head football coaching position have previous intercollegiate coaching experience constituted a disparate impact against African-Americans. His first piece of evidence was comparing the racial composition of the pool of applicants versus those selected by the defendant to interview. He noted that of the applicants only 10% of Whites did not possess the requisite prior college coaching experience while 50% of Black applicants did not possess this experience. He also proffered an article published in the *Sports Business Journal* that simply cited the number of African-American coaches in college football. The court characterized these pieces of evidence as insufficient to establish a proper comparison for proving discrimination. See also, *Wynn v. Columbus Mun. Separate Sch. Dist.*, 692 F. Supp. 672, 683 (N.D. Miss. 1988) (noting that the plaintiff made improper comparisons to establish her discrimination claims. The court’s holding noted that the “plaintiff has chosen an improper pool of applicants from whom to draw her statistics. The fact that very few women across the State of Mississippi are selected to serve as Athletic Director bears only a tenuous relationship at best, if any relationship at all, to the issue of whether Columbus Schools discriminates in its selection of Athletic Directors...The court is of the opinion that the only proper group for consideration in the case at bar are those female coaches in the Columbus Schools who have applied for and been denied the position of Athletic Director because of their lack of qualifications for the job of Head Football Coach.”).

²³⁹ For example, the Court in *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1976) noted that the skills it took to perform the jobs at issue (i.e., driving a truck) were widely diffused. However, in *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1976), the Court noted that the qualifications for the at-issue jobs (i.e., public school teacher) were more concentrated. Therefore, predicated upon the requisite skill levels, each Court noted it was appropriate to consider separate labor pools in their decisions.

²⁴⁰ See *Hazelwood*, 433 U.S. at 308 n. 13 (noting that “In *Teamsters*, the comparison between the percentage of Negroes on the employer’s work force and the percentage in the general areawide population was highly probative, because the job skill there involved – the ability to drive a truck – is one that many persons possess or can fairly readily acquire.”).

comparisons are inappropriate; therefore, the comparative population is much more narrow.²⁴¹

Related to the issue at bar, a major problem exists because there are no established monolithic qualifications for prospective head coaches. While some commentators assume that previous extensive offensive or defensive coordinator experience is required, there are a number of examples of individuals being hired from the ranks of position coach to head coach, or who were hired with very limited coordinator experience.²⁴² Also, should all coaches in the NFL be considered as a part of the labor pool? What about minor league and semi-pro football coaches?²⁴³ What about

²⁴¹ *Id.* (noting that “When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.”).

²⁴² Many people outraged about Shula’s hiring over Croom based their charge of racism against Alabama in the respective credentials of the two candidates. While Croom did possess ten additional years of collegiate coaching experience (1976-1986) that Shula did not possess (during the 1976 season, Croom was a graduate assistant), their NFL coaching careers were almost identical in tenure, including their offensive coordinator positions. Shula was offensive coordinator for the Tampa Bay Buccaneers from 1996-1999 and Croom was offensive coordinator for the Detroit Lions 1997-2000. *See* Mike Shula Biography available at <http://www.jaguars.com/team/coach.aspx?id=2696> (last visited Feb. 25, 2008). *See also*, Sylvester Croom Biography available at http://www.mstateathletics.com/ViewArticle.dbml?SPSID=90894&SPID=10997&DB_OEM_ID=16800&ATCLID=931622&Q_SEASON=2007 (last visited Feb. 25, 2008). In the NFL, one of the most recent minority head coaches hired is Mike Tomlin by the Pittsburgh Steelers. Prior to being named head coach in January 2007, Tomlin had twelve years of coaching experience equally divided between college and the NFL. He spent all of those years as a position coach with the exception of 2006, the season before he was hired as the Steeler head coach, in which he was the defensive coordinator for the Minnesota Vikings. Of the current NCAA FBS head coaches going into the 2008 season, all but two served as a coordinator or assistant head coach sometime prior to their head coach appointment. In addition, of the current head coaches, only one has filled his staff with two minority coordinators (i.e., Turner Gill, University at Buffalo). Gill’s staff lists only one coordinator position and one assistant head coach position. Both of these are occupied by African-Americans. Five of the remaining eight staffs do not have at least one minority coordinator. Sylvester Croom’s staff does not list a coordinator position; however, he does have an assistant head coach who is African-American. The staff information was obtained via each institution’s athletic website and was accurate as of April 15, 2008.

²⁴³ The plaintiff in *Jackson* was a minor league coach. His disparate impact claim failed due to his improper labor pool statistics. *See Jackson v. Univ. of New Haven*, 228 F. Supp.2d 156, 166 (D. Conn. 2002).

high school coaches?²⁴⁴ Finally, should all college coaches across the various divisions in the NCAA be considered; and, what about coaches of National Association of Intercollegiate Athletics (NAIA) member programs? Indeed, this is a very difficult challenge, especially when considering the level of deference a court will give each institution's requirements for application.²⁴⁵ Therefore, establishing the probative labor pool for the purposes of the qualifications prong will depend on two specific things. First, the pool will depend on the respective requirements of the head coaching position promulgated via the institution's position advertisement. Second, should a plaintiff feel the hiring criteria are too exclusive predicated upon race, the plaintiff must convince the court that the requirements are unreasonable and work to exclude racial minorities.

The second required prong to establish a qualified labor pool necessitates the use of proper geographic parameters from which the pool will be developed. In *International Brotherhood of Teamsters v. United States*, the Court allowed the use of general population statistics in the cities where the employer's respective trucking terminals were located.²⁴⁶ These geographical areas were appropriate, the Court held, because the jobs were of low skill and the employer utilized the residents of the respective cities to populate its driving force.

²⁴⁴ See Gerry Faust Biography available at http://und.cstv.com/sports/m-footbl/mtt/faust_gerry00.html (last visited Feb. 25, 2008). Gerry Faust coached Notre Dame from 1981-1985. Prior to his appointment at Notre Dame, Faust spent eighteen seasons (1963-1980) as head coach at Cincinnati's Moeller High School. A more recent appointment of a high school head coach to head football coach at a FBS institution came on December 26, 2006 when the University of North Texas hired Southlake Carroll High School's (Denton, TX) Todd Dodge. See Todd Dodge, *infra* p. 104 and note 393.

²⁴⁵ For example, in *Jackson*, the plaintiff argued that the defendant's requirement of prior college coaching experience served as a disparate impact against African-Americans. The court disagreed. *Jackson*, 228 F. Supp. 2d at 165-166. The court also noted that it would not be "appropriate for this Court to mandate that the defendants equate Jackson's experience in coaching minor league football with college coaching experience." *Id.* at 161.

²⁴⁶ 431 U.S. 324, 337-343 (1976).

In *Hazelwood School District v. United States*, the geographical pool was much more at issue. The Hazelwood School District is located in the greater St. Louis metropolitan area. Using Hazelwood's proposed labor market, their 1.8% of certified African-American teachers would be compared to an area where 5.7% of certified public school teachers were African-American.²⁴⁷ The United States argued that the more appropriate comparison should include the areas composing both the city of St. Louis and St. Louis County. When that comparison is made, Hazelwood School District's representation would be compared to an area where a total of 15.4% of certified teachers were African-American.²⁴⁸ With this increased disparity it would be more likely to give rise to the inference that Hazelwood School District intentionally discriminated against African-Americans in its hiring of certified teachers.

Working in concert with the qualification prong, jobs that are unskilled or low skilled will typically have limited geographic reach.²⁴⁹ Conversely, those jobs requiring high skill levels will, potentially, have a much more broad geographic labor pool to consider. Is the position of head football coach at a FBS-level institution a high-skill position? Most would argue yes. However, an assessment of the skill level will also be predicated upon the promulgated requirements of the position's advertisement.²⁵⁰

²⁴⁷ 433 U.S. 299, 308 (1976).

²⁴⁸ *Id.* at 310 (noting that "What the hiring figures prove obviously depends upon the figures to which they are compared. The Court of Appeals accepted the Government's argument that the relevant labor market area of St. Louis County and the city of St. Louis, in which, according to the 1970 census 15.4% of all teachers were Negro.").

²⁴⁹ *See, e.g.*, *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 302 (7th Cir. 1991) (noting that "Low-paying, unskilled jobs are more likely to be filled by those living closer to the site of the job..." quoting *Mister v. IL Central Gulf Railroad*, 832 F.2d 1427, 1432 (7th Cir. 1987)).

²⁵⁰ A discrimination case involving a college coach (reverse sex discrimination) that demonstrates the importance of hiring personnel in light of a public position announcement is the *Medcalf* case. In this case the court found that the University of Pennsylvania's salient hiring criteria proffered in their courtroom

Depending on these requirements and the location of the institution, the geographic pool could be confined to a large metropolitan area rather than requiring a regional or nationwide search. It should be noted, however, that in an action courts will give deference to the employer's hiring criteria and will construct the appropriate geographical labor pool predicated upon these criteria. While the respective hiring criteria for both qualifications and the resultant geographical search area are not unassailable, if the courts ascertain that these criteria are reasonable and uniformly enforced, it will be difficult for a plaintiff to overcome this finding in a cause of action without other compelling evidence to give rise to an inference of discrimination.

While there are few cases on point to reference, there are a number of recently published cases involving racial discrimination in the hiring of coaches that can be consulted for guidance. This paper will now examine some of the leading cases before proffering a potential strategy to maximize the prospect for success in using Title VII litigation to affect change.

B. Leading Title VII Cases Involving Racial Discrimination and Hiring of Coaches

It has already been demonstrated that there are a number of challenges within the procedural process that work against plaintiffs in Title VII cases. This shall be further reinforced in Section IV. Getting a claim into court can be a serious drain on a plaintiff's patience, physical and emotional health, and his or her financial resources. However, the biggest challenge is not getting a case to court. The biggest challenge is getting the case before a jury.

testimony differed significantly from the advertisement that was posted for a women's rowing coach. *See generally, Medcalf*, 71 Fed. Appx. 924 (3rd Cir. 2003).

Once a case proceeds to court (i.e., after the plaintiff receives a right-to-sue letter from the EEOC), the discovery process, utilizing, among other things, depositions and interrogatories, will begin on both sides so the parties can ascertain facts related to the case. After examination of the facts, most defendants' attorneys will move for a Rule 56(c) motion for summary judgment.²⁵¹ For a summary judgment motion to prevail, the moving side must establish that the "pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."²⁵² In its interpretation of Rule 56(c), the Supreme Court has held that "summary judgment will not lie if the dispute is about a material fact that is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party."²⁵³ When a court evaluates the evidence in response to a motion for summary judgment, all "inferences to be drawn from the underlying facts...must be viewed in the light most favorable to the party

²⁵¹ See FED. R. CIV. P. RULE 56(c). A Rule 56(c) motion is different than a Rule 12(b)(6) motion for dismissal. A Rule 12(b)(6) motion is granted without benefit of the discovery process. For more information of the mechanics of Rule 12(b)(6) and its interplay with Rule 8(a)(2)'s requirement of notice pleading within the context of a Title VII case consult *Swierkiewicz v. Sorema, N.A.* 534 U.S. 506 (2002). In this case, the Supreme Court overturned a ruling from the Second Circuit upholding the notion that the *McDonnell Douglas* elements of establishing a prima facie case was an appropriate standard to for making judgment on the merits of a plaintiff's case at the complaint stage. In a unanimous decision authored by Justice Thomas, the Court held that the Second Circuit's heightened pleading standard "conflicts with Federal Rules of Civil Procedure 8(a)(2), which provides that a complaint must include only a short and plain statement of the claim showing the pleader is entitled to relief. Such a statement must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." (internal quotations omitted). The Court clarified that the *McDonnell Douglas* prima facie standard was established so that the plaintiff's circumstantial case could survive motion for summary judgment and get to a jury. *Id.* at 510-512.

²⁵² FED. R. CIV. P. RULE 56(c).

²⁵³ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). See also, *Matsushita Elec. Indust. Co. v. Zenith*, 475 U.S. 574 (1986) (finding that if the evidence is insufficient to compel the trier of fact to find for the non-moving party, then summary judgment is appropriate.).

opposing the motion.”²⁵⁴ In addition, the Court has established that at the summary judgment stage “the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”²⁵⁵ It is at this stage of the litigation the plaintiff must present his or her evidence to establish a prima facie case of discrimination, thus, beginning the *McDonnell Douglas* burden shifting framework discussed in Section II.²⁵⁶

A review of the case law will reveal that most published Title VII-related holdings are either lower court opinions to grant summary judgment or are appeals requesting an appellate court to overturn a summary judgment order. As will be detailed later, plaintiffs in Title VII cases prevail on pre-trial motions, most of which are motions for summary judgment, less than two percent of the time.²⁵⁷ Therefore, the most serious hurdle for plaintiffs to overcome is to survive a motion for summary judgment. Examination of Title VII cases with coach plaintiffs demonstrates that these cases follow the above pre-trial success trend and are rarely an exception to the statistics.

Below are some of the more recent cases that have alleged racial discrimination in not hiring African-Americans for either college or high school level coaching positions. In addition, two other germane cases are presented because the holdings in

²⁵⁴ *Matsushita*, 475 U.S. at 587 (quoting *United States v. Diebold*, 369 U.S. 654, 655 (1962)).

²⁵⁵ *Liberty Lobby*, 477 U.S. at 249. The Court provided further clarification of the judge’s responsibility when considering a motion for summary judgment. The majority wrote “If the defendant in a run-of-the-mill civil case moves for a summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” *Id.* at 252.

²⁵⁶ See *supra* text accompanying notes 135-145.

²⁵⁷ See *infra* p. 94 and note 365.

these respective cases do further define the obstacles prospective plaintiffs face when pursuing Title VII claims.

*1. Jackson v. University of New Haven*²⁵⁸

The most recent Title VII case closest to being on point with this paper is the *Jackson* case. In this case the plaintiff, James C. Jackson, brought suit after he did not receive the opportunity to interview for the football head coaching position at the University of New Haven, a Division II member of the NCAA. The university posted the position's availability on the university and NCAA's websites.²⁵⁹ The advertisement for the position noted the following requirements: a bachelors degree, master's preferred; successful collegiate coaching experience; recruiting and game coaching experience; and knowledge of NCAA rules and regulations.²⁶⁰ In response to the advertisement, thirty-six applications were received from which the university selected six applicants to interview.²⁶¹ The plaintiff was not among those selected and all selected interviewees were Caucasian.²⁶² Jackson, in turn, filed suit under Title VII alleging both disparate treatment and disparate impact discrimination.²⁶³ Prior to commencement of the trial, the defendant in the action moved for summary judgment which the District Court for the District of Connecticut considered.

²⁵⁸ 228 F. Supp.2d 156 (D. Conn. 2002).

²⁵⁹ *Id.* at 157.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 157-158.

²⁶² *Id.* at 158.

²⁶³ *Id.* at 158-159.

Jackson's arguments centered on the university's promulgated requirement that all applicants should have college coaching experience.²⁶⁴ While all selected interviewees possessed this experience, Jackson did not. His argument on this point was that "the requirement of previous collegiate coaching experience was not necessary to ensure familiarity with NCAA rules and regulations and that it served to exclude otherwise qualified minority applicants, such as himself."²⁶⁵ Although Jackson had extensive success as a minor-league football head coach, the university held prior college coaching experience as an essential requirement; therefore, Jackson was not qualified for the position according to the university.

In addressing Jackson's allegation of disparate treatment, the court noted that the granting of summary judgment was appropriate on this cause of action because Jackson failed to make a prima facie case of discrimination. This was due to Jackson's failure to establish the second prong of *McDonnell Douglas* (i.e., that he was qualified for the position) in light of the university's posted requirements.²⁶⁶ Thus, a key lesson from this case is the level of deference given by the court to the hiring criteria of the employer.²⁶⁷

²⁶⁴ *Id.* at 158 (observing that "At the heart of this dispute lies the "collegiate coaching experience" requirement.").

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 160-161 (noting that "There is an obvious and significant nexus between the defendants' need to select a head coach well-versed in NCAA regulations and the requirement that candidates have actual experience in college coaching. Thus, Jackson has failed to make out a prima facie case of disparate treatment in that he has failed to demonstrate that he was qualified for the position of head coach. As Jackson has failed to meet his burden, this Court grants summary judgment as to his disparate treatment claim...").

²⁶⁷ *Id.* at 161 (quoting *Thornley v. Penton Publishing*, 104 F.3d 26, 29 (2nd Cir. 1997)). The court wrote that "As we understand this element, being qualified refers to the criteria the *employer* has specified for the position." (emphasis added) (quotations omitted). In addition the court noted that "broad deference should be afforded to employers in selecting hiring criteria: Absent a showing by the plaintiff that the employer's demands were made in bad faith...an employer...is not compelled to submit the reasonableness of its employment criteria to the assessment of either judge or jury." *Jackson* F. Supp.2d at 161 (quotations omitted).

Jackson also used the previous college coaching experience requirement as the basis for his disparate impact claim.²⁶⁸ For reasons discussed previously, the court found Jackson's arguments in support of this allegation insufficient to establish a causal link between the requirement of the university and its alleged adverse impact on African-Americans.²⁶⁹

2. *Banks v. Pocatello School District No. 25*²⁷⁰

In *Banks*, the plaintiff, an African-American, brought twelve causes of action against the Pocatello (Idaho) School District as a result of being rejected for six head coaching positions and one assistant coaching position at two district high schools.²⁷¹ These causes of action included allegations of sex discrimination, race discrimination and retaliation for filing discrimination claims.²⁷² The opinion in this case addressed Pocatello School District's motion for summary judgment.²⁷³ Of import to this paper are the causes of action predicated upon race discrimination for which Banks sought relief under Title VII.

In considering Bank's allegation of race discrimination because he was not hired for the assistant coaching position, the court noted that since the school hired an African-American, Banks would be unable to provide evidence that would give rise to an

²⁶⁸ *Id.* at 164 (noting that "Here, Jackson alleges that the defendants' facially neutral hiring criteria [requiring prior college coaching experience], had a discriminatory impact on African-Americans. Specifically, Jackson asserts that because African-Americans have historically been under-represented in the ranks of NCAA coaches this requirement disproportionately excludes African-Americans from consideration.").

²⁶⁹ *See supra* note 238 and accompanying text (holding that Jackson failed to establish a probative labor pool for the court to determine the impact of the previous college coaching requirement on African-Americans.).

²⁷⁰ 429 F. Supp.2d 1197 (D. Idaho 2006).

²⁷¹ *Id.* at 1198-1199.

²⁷² *Id.* at 1199.

²⁷³ *Id.* at 1198.

inference of racial discrimination.²⁷⁴ Therefore, the court granted summary judgment on that particular cause of action. The court reached a different conclusion on the causes of action related to his pursuit of the six head coaching positions.

In each instance where Banks applied and was rejected for a head coaching position, the school district hired a White applicant. In some instances, Banks's credentials could be construed as somewhat "better" than those hired - at least predicated upon tenure of previous coaching positions.²⁷⁵ The court determined that Banks established a prima facie case of discrimination. The burden then shifted to the school district to demonstrate legitimate, nondiscriminatory reasons for not hiring Banks. The school district's proffered reason was that Banks rated lower on his interview evaluations compared to the successful applicants. These evaluations were taken of all coaching candidates by members of the various search committees. In providing this rebuttal, the court found that the school district met its burden.²⁷⁶

The burden then shifted back to Banks to demonstrate that the district's proffered reason is "not worthy of credence because it is internally inconsistent or otherwise not believable"; therefore, the proffered reason was merely pretext for discrimination.²⁷⁷ In attempting to meet this burden, Banks put forward two pieces of evidence. First, Banks argued that his qualifications were superior to those hired. The court found this argument

²⁷⁴ *Id.* at 1201 (holding that "[B]ecause the district hired an applicant who was African-American in this instance, even clearly superior qualifications would not raise an inference that race motivated the hiring decision.").

²⁷⁵ *Id.* The court wrote that Banks "had many years of experience coaching girls' basketball and boys football in the district, possibly more than any of the selected applicants." (internal citation omitted).

²⁷⁶ *Id.* at 1202 (holding that "the district's proffered reason for not hiring Banks is legitimate and nondiscriminatory.").

²⁷⁷ *Id.*

to be unpersuasive, especially considering Banks did not have prior head coaching experience while those hired did.²⁷⁸

Second, Banks argued that the various selection committees' assertion that he did not possess good communication skills and the organizational skills necessary to be a head coach was inconsistent with previous evaluations of his work. Banks offered as evidence his prior teaching evaluations. Two administrative members of the various search committees who specifically noted Banks's lack of communication and organizational skills as reasons for not hiring him as a head coach performed a majority of Banks's evaluations.²⁷⁹ In these evaluations, the court noted that Banks received remarks commending his competencies in the disputed areas within the teaching context.²⁸⁰ The district court found this argument compelling; thus, refused summary judgment on the causes of action related to Banks's denial in six prior attempts to become a head coach within the school district.²⁸¹

3. *Amie v. El Paso Independent School District*²⁸²

In *Amie*, the defendant school district successfully argued for summary judgment involving the non-hiring of an African-American basketball head coaching candidate. The plaintiff served as a teacher and coach in the district from 1984-1997 with his head

²⁷⁸ *Id.* "Banks has not explained why his years of assistant coaching experience made him more qualified for a head coach position than applicants with head coach experience...Banks's qualifications may have been somewhat better. However, because they were not *clearly* superior, they cannot satisfy Banks's burden." (emphasis in original).

²⁷⁹ *Id.* at 1203.

²⁸⁰ *Id.* at 1204. The court also noted that although "the district may be right that the skills required in the classroom are not identical to the skills required in the sports arena, the district has not pointed to evidence currently in the record that justifies summary judgment based on that argument."

²⁸¹ *Id.* "Coupled with Banks's circumstantial evidence that the district selected a White applicant over him for each position, Banks's positive teacher evaluations could allow a reasonable trier of fact to infer that the deposed administrators harbored a discriminatory motive against Banks."

²⁸² *Amie v. El Paso Indep. School Dist.*, 2007 U.S. Dist., LEXIS 39749 (W.D. Tex. 2007).

coaching tenure covering 1989-1997. During his nine year tenure as a head coach, his teams achieved a high level of success.²⁸³ The plaintiff was relieved of his coaching duties in 1997; however, he remained a teacher within the district.²⁸⁴ As a result of not being hired for other coaching positions he applied for between 1997 and 2001, the plaintiff filed a Title VII lawsuit in 2001 against the district alleging racial discrimination.²⁸⁵ That lawsuit was eventually settled in 2003.²⁸⁶

Because the plaintiff settled with the defendants out of court in 2003, those previous causes of actions were not implicated in the instant case. The current cause of action developed as a result of the plaintiff not being selected as head coach at the district's Bowie High School in 2005. Instead of hiring the plaintiff, the selection committee hired a Hispanic, Peter Morales, who possessed no prior head coaching experience. The court determined that the plaintiff had met his burden of establishing a prima facie case of discrimination. Under the *McDonnell Douglas* framework, the school district was then required to articulate a legitimate and nondiscriminatory reason for not hiring the plaintiff.²⁸⁷ Because of the special circumstances of the school in question, the selection committee noted that Morales was better qualified for the position.²⁸⁸ The court

²⁸³ *Id.* at 2. Amie's teams had garnered three bi-district championships, two district championships and achieved top ten ranking in the State of Texas.

²⁸⁴ *Id.* In addition, the plaintiff did not hold a coaching position in any capacity within the district since 1997. *Id.* at 2-3. The reasons for the district's relieving of the plaintiff of his coaching duties were not disclosed in the opinion and were not presented as germane to the decisions made to not hire the plaintiff for subsequent coaching appointments.

²⁸⁵ *Id.* at 3.

²⁸⁶ *Id.* The district and the plaintiff entered into a Release of All Claims and Settlement Agreement.

²⁸⁷ *Id.* at 13. The court noted "[h]aving found that Plaintiff has met his initial burden, the burden of production shifts to EPISD to articulate a legitimate, nondiscriminatory reason for not promoting Plaintiff."

²⁸⁸ *Id.* at 3-4. The committee was not only concerned about prospective basketball success. It noted that Bowie High School students were underperforming in reading and math and the school had a high dropout

found this explanation to meet the defendant's burden of production.²⁸⁹ It was now the plaintiff's burden to demonstrate that the defendant's explanation was not the true reason for his not being hired.²⁹⁰

In his attempt to establish pretext, the plaintiff focused exclusively on his tenure of coaching experience versus the lack of head coaching experience of Morales. The court found this argument unpersuasive for the purposes of establishing pretext to quash a motion for summary judgment.²⁹¹ As a result, summary judgment was granted. The holding of the district court was subsequently affirmed in a decision issued by the Fifth Circuit Court of Appeals.²⁹²

The holding of the district court in *Amie* is particularly salient to this paper. In *Amie*, the court gave extensive deference to the non-coaching aspects of the position. The position of head football coach at NCAA FBS institutions are, much like the position at issue in *Amie*, multidimensional. Therefore, prospective plaintiffs who would seek to predicate their cause of action wholly upon their previous coaching experience versus that of their competitors should take this caveat into consideration before

and pregnancy rate. Therefore, they wanted to have the candidate who could best affect change in the classroom as well as on the court.

²⁸⁹ *Id.* at 13-14. "The court finds that EPISD has articulated a legitimate, non-discriminatory reason for its action."

²⁹⁰ *Id.* at 14. "Thus, the inference of discrimination necessarily drops out and the burden shifts to the Plaintiff to show pretext."

²⁹¹ *Id.* at 16-18 (the court holding that "[P]laintiff has not created an issue of fact as to whether EPISD's proffered reason is untrue. Plaintiff merely asserts that he was the "most qualified" candidate, ostensibly because [he] had more coaching experience than Morales...The fact that Morales had no previous head coaching experience before being hired also falls short of pretext. Plaintiff focuses on the number of years of basketball coaching experience he had, *implying that coaching experience was the only (or most important) factor in the hiring.*") (emphasis added).

²⁹² *See Amie v. El Paso Independent School District*, 253 Fed. Appx. 447, 2007 U.S. App. LEXIS 26210 (5th Cir. 2007). It should be noted that the holding in the appellate case is *per curiam*. Therefore, its precedential value is governed by 5th CIR. R. 47.5.4.

proceeding in an action. Institutions at the FBS level will hire based upon criteria that are more extensive, and more subjective, than previous experience alone. The three prior cases should have reinforced the fact that hiring decisions are multidimensional. The courts are aware of this subjectivity and provide employers broad discretion for determining which particular candidates are best fits for both the positions and within the respective organizations.

Although the next two Title VII cases are not firmly on point with this paper, they do have value because the holdings in these cases can affect litigation strategy. One case involves the dismissal of an African-American basketball head coach from a NCAA Division I program. The other is a reverse discrimination case involving a White male applicant for a coaching position with a women's college rowing team.

4. *Richardson v. Sugg*²⁹³

It would be hard to find someone to argue against the assertion that Nolan Richardson was a successful basketball coach. However, the 2001-2002 campaign was a disappointing season for the coach at the University of Arkansas.²⁹⁴ In the wake of a late-season loss to the University of Kentucky, Richardson made several comments that the University of Arkansas could pay him and he would leave his position.²⁹⁵ Five days after his initial comments, university chancellor, John White, and athletic director, Frank Broyles, both White, notified Richardson that he could retire as head basketball coach or

²⁹³ 448 F.3d 1046 (8th Cir. 2006).

²⁹⁴ *Id.* at 1051. The team finished the 2001-2002 season with a 14-15 record.

²⁹⁵ *Id.*

he would be fired.²⁹⁶ Richardson refused to retire and White notified Richardson the next day that he was terminated effective immediately.²⁹⁷ Richardson, after EEOC conciliation failed, brought suit in federal district court which granted the defendants' motion for summary judgment.²⁹⁸ Richardson then appealed to the Eighth Circuit for reversal of the district court's holding.

Among the allegations Richardson levied against the University of Arkansas was a mixed-motive case of racial discrimination under Title VII.²⁹⁹ Richardson proffered statements by Broyles at a sport banquet held in February 2000 as evidence of racial discrimination.³⁰⁰ The day of the banquet a sports reporter, Wally Hall, published a column detailing an exchange he had with Richardson in which Richardson referred to

²⁹⁶ *Id.* at 1052 (noting that “Richardson was offered the buyout under his contract, amounting to \$500,000 annually for six years, as well as full retiree benefits.”).

²⁹⁷ *Id.* “Richardson refused to retire and told the two they would have to fire him. The next day, March 1, 2002, White dispatched a letter to Richardson stating that, given White’s decision that new leadership was needed for the basketball team, and since Richardson had declined to retire, he was terminated effective immediately.”

²⁹⁸ *See Richardson v. Sugg*, 325 F. Supp.2d 919 (E.D. Ark. 2004).

²⁹⁹ 448 F.3d at 1057. A mixed-motive cause of action alleges that discriminatory criteria were used in addition to legitimate criteria in making an employment decision. The leading case on mixed-motive analysis is *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In addition, *Price Waterhouse* is considered to be the leading case for actions alleging direct evidence of discrimination. Although the opinion in *Price Waterhouse* was a plurality opinion, there was one issue that all justices were in agreement on. That is when an employer demonstrates it would have made the same employment decision absent consideration of the discriminatory criteria, there is no liability under Title VII. Congress, in effect, overturned the *Price Waterhouse* holding in part by adding subsection (m) to § 703 of Title VII. This subsection notes, in pertinent part, that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” Congress, while reversing the Court on the liability and causation aspects of the *Price Waterhouse* holding, did adopt the Court’s findings on the establishment of the affirmative defense and burden of proof related to causation on the part of the defendant. The Court provided further clarification of *Price Waterhouse* in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). In this case, the Court held that direct evidence of discrimination is not necessary to trigger a mixed-motive analysis/jury instruction. This finding has led to extensive disarray in the Circuits because of the implication the *Desert Palace* holding has on the *McDonnell Douglas/Burdine* analysis. This is especially so in those Circuits that apply the *Price Waterhouse* analysis at the liability stage rather than at the remedy stage.

³⁰⁰ *Id.*

Hall as a “redneck”.³⁰¹ In addition, Hall wrote that Richardson referred to Arkansas fans as “redneck SOB’s”.³⁰² That evening at the banquet, Broyles asked a different sports reporter, Clay Henry, if he would write an article in effect equating the offensiveness of someone using the word “redneck” with someone using the word “nigger”.³⁰³ Henry refused and later told Richardson about his conversation with Broyles.³⁰⁴

Richardson argued that Broyles’s comment was direct evidence of racial animus. The Eighth Circuit, agreeing with the district court, held that this did not constitute direct evidence of racial discrimination. The court offered two facts in support of its finding. First, there was a two year time period between the statement made by Broyles and the adverse employment decision against Richardson.³⁰⁵ Second, the court noted there was substantial evidence presented in the district court proceeding (e.g., communication between Broyles and Richardson as well as public comments of positive affirmation on behalf of each party) demonstrating that Broyles and Richardson had an amicable relationship in the wake of Broyles’s comment at the banquet. Thus, when considering these pieces of evidence, the court noted Richardson was unable to establish a causal link between Broyles’s comment in February 2000 and the decision to terminate his

³⁰¹ *Id.* Richardson had contacted Hall to take issue with some negative comments the reporter had written about Richardson’s son.

³⁰² *Id.*

³⁰³ *Id.* “The night of February 18, Broyles attended a sports banquet and sat next to members of the media. Broyles asked Clay Henry, a sports columnist, if he would write a column equating Richardson’s calling White people “rednecks” with a White person calling Richardson a “nigger”.”

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 1058.

employment in March 2002.³⁰⁶ Therefore, the Eighth Circuit affirmed summary judgment on Richardson’s racial discrimination allegation.³⁰⁷

Another salient aspect of the Eighth Circuit’s holding was finding that the president of the university, B. Alan Sugg, and Chancellor White were not “cat’s paws,” merely surrogate decision makers for the purposes of advancing Broyles’s alleged racial animus toward Richardson.³⁰⁸

5. *Medcalf v. Board of Trustees of the University of Pennsylvania*³⁰⁹

Similar to the *Richardson* case, *Medcalf* had a fact pattern including alleged discriminatory comments made by administrative personnel as well as an investigation to ascertain who the salient employment decision makers were. This case is unusual because it is an appeal of a jury verdict rather than a plaintiff appealing a lower court’s granting of summary judgment for a defendant. It is also unusual because the verdict below was in favor of the plaintiff. In this case the Third Circuit upheld the district court’s holding and the jury’s award of punitive damages to the plaintiff.

The plaintiff, Andrew Medcalf, a White male, applied for the posted position of women’s rowing coach at the University of Pennsylvania (Penn). Medcalf was already

³⁰⁶ *Id.* at 1059 (noting that “[T]he time-span between the comments and Richardson’s firing required Richardson to establish a causal link. Because the statements and the adverse employment decision were not close in time, [plaintiff] must establish a causal link between the comments and his termination.”) (quoting *Simmons v. Oce-USA, Inc.*, 174 F.3d 913 (8th Cir. 1999) at 916.) (internal quotations omitted).

³⁰⁷ The Eighth Circuit’s opinion upheld the entire holding of the U.S. District Court in this case.

³⁰⁸ 448 F.3d at 1059-1060 (holding that “In this case, any claims that Broyles used White and/or Sugg as a “cat’s paw” to advance any animus he might have held fails. Richardson’s contract provided for independent review by Sugg of any decision to fire Richardson, which review was amply undertaken, and Sugg’s own impression of Richardson’s comments at the press conference provided an independent basis for his decision to approve Richardson’s termination. As such, Sugg, who had the final say on Richardson’s termination, was not used as a “cat’s paw” to carry out someone else’s discriminatory motive.”).

³⁰⁹ 71 Fed. Appx. 924 (3rd Cir. 2003).

an assistant rowing coach at Penn working with the men's heavyweight crew.³¹⁰ Penn posted the women's position in numerous rowing magazines and Medcalf applied along with twenty-four other individuals, including the eventual successful applicant, Barbara Kirch.³¹¹ Penn's athletic director, Steve Bilsky, had placed senior associate athletic director Carolyn Femovich in charge of the hiring process, although it would be ultimately Bilsky who made the hiring decision.³¹²

In order to get a stronger pool of applicants, Femovich published a second posting to solicit additional applications for the women's position. "Ultimately, fifty-four candidates applied for the position – thirty four men and twenty women."³¹³ Femovich granted interviews to four women and no men.³¹⁴ Kirch was named coach and Medcalf sought relief under Title VII alleging reverse sex discrimination.

When evaluating the evidence, the Third Circuit heavily scrutinized Femovich's position postings that were published in the numerous rowing magazines.³¹⁵ The postings provided a summary of coaching responsibilities and duties. These included: "[M]anages, directs, and coaches Women's Crew. Responsible for the recruiting,

³¹⁰ *Id.* at 926.

³¹¹ *Id.*

³¹² *Id.* Bilsky testified that he told Femovich to administer the search "as she saw fit". Among the duties Femovich performed was writing the advertisements for the position that were to become highly probative in the district court proceedings as well as in the Third Circuit's consideration of the case.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at 928. In addition, the advertisement had a section titled "ACTUAL DUTIES" which listed the following: "Directs and coaches Women's Crew, instructs team members in rowing techniques, trains novices and advanced rowers in rowing tanks and on the water. Makes Boat Selection for both Varsity and Junior Varsity." This case should put administrators on notice to be more circumspect when writing the position postings for coaching and other positions. In a recent advertisement for Duke University's head football coaching position, the posting noted that even though prior college football coaching experience was required, it would consider "an equivalent combination of relevant education and/or experience." See Associated Press, *Calling All Applicants: Head Coaching Job Possibility Just a Click Away*, ESPN.COM, Dec. 12, 2007, available at <http://sports.espn.go.com/ncf/news/story?id=3152458> (last visited Dec. 14, 2007).

training, and counseling of student-athletes. Communicates with the Director of Rowing to coordinate the maintenance and use of facilities and equipment. Receives general supervision, and reports to the Head Coach of Men's and Women's Rowing."³¹⁶ The court then juxtaposed the substantive content of the postings with the trial testimony of Penn's various representatives, including Femovich and Bilsky (collectively, "Penn"). The court noted that Penn's testimony in support of imbuing Kirch as the superior candidate to Medcalf was founded upon administrative duties rather than coaching duties.³¹⁷ The court found this suspect because none of the hiring criteria regarded by Penn as essential at trial was found in the respective position announcements.³¹⁸ Also, in response to the superior administrative skills argument given by Penn, the court noted that with the exception of Kirch, Medcalf's experience, taken *in toto*, was far superior to the other women who were granted interviews.³¹⁹

The other essential issues reviewed by the Third Circuit were related to discriminatory comments Femovich made during the search and her influence on the

³¹⁶ *Medcalf*, 71 Fed. Appx. at 928.

³¹⁷ *Id.* at 929 (noting that "Yet at trial, Penn focused almost exclusively on the administrative side of coaching, contending that it selected Kirch over Medcalf based upon her relative superiority in areas such as: (1) knowledge of NCAA and Ivy League rules, (2) recruiting, (3) fundraising, (4) administering budgets, and (5) knowledge of Ivy League student financial aid requirements and constraints. The jury may have regarded this emphasis on administrative capabilities as suspect in light of the fact that there was strong evidence that Medcalf was a superior technical coach to Kirch and the other women who were granted interviews. Penn conceded that the evidence... supports the argument that he was a better on-the-water coach, but asserted that this was *not important* when compared to the other hiring criteria it evaluated.") (internal quotations omitted) (emphasis added).

³¹⁸ *Id.* (noting that "Penn's sudden de-emphasis of the value of coaching skills is at the least a "weakness" which tends to indicate that Penn's proffered reasons were not credible. Given the emphasis on actual coaching ability in the Position Announcement, the jury could easily have concluded that Penn *later altered its coaching priorities to make possible the hiring of Kirch.*") (emphasis added).

³¹⁹ *Id.* at 930. "[A]pplying the largely administrative hiring criteria Penn focused on at trial, Medcalf was far more qualified for the position than the other women, besides Kirch, who at least received interviews... In conclusion, the jury rationally could have concluded that Medcalf was more qualified than the other candidates who received interviews, and that Penn's failure to grant him an interview was based upon his gender."

selection of the successful candidate. Femovich noted a number of times during the search process that it was her desire to hire a female for the coaching position.³²⁰ In addition, it was alleged by Penn's counsel that Medcalf had "circumvented the hiring process" when Medcalf submitted a resume directly to Bilsky. Femovich's later testimony acknowledged that Medcalf had in fact applied through the proper channels and Medcalf's direct communication with Bilsky came only in response to Medcalf's inability to schedule a meeting with Femovich to discuss the coaching position.³²¹ The court also noted that some of the women granted interviews had never submitted their resumes to Femovich for consideration.³²²

In order to mitigate the damaging evidence against Femovich, Penn argued that Bilsky was the sole decision maker; therefore, Femovich's discriminatory comments should be construed as "stray remarks."³²³ The court did not find this argument worthy of credence. Previous testimony established that Bilsky gave Femovich a wide berth in conducting the search process.³²⁴ In addition, evidence was in the record that among Femovich's responsibilities during the search process was to review resumes, perform reference checks, select who was to be interviewed and develop itineraries for the interviewees.³²⁵ Femovich also participated in the interviews of candidates.³²⁶ The court

³²⁰ *Id.* at 931. Evidence on this point was also presented through the testimony of Penn student-athletes.

³²¹ *Id.* n.2.

³²² *Id.*

³²³ Penn relied on *Ezold v. Wolf et al.*, 983 F.2d 509, 547 (3rd Cir. 1992) (the *Wolf* court holding that "If we were to hold that several stray remarks by a nondecisionmaker over a period of five years, while inappropriate, were sufficient to prove that Wolf's associate evaluation and partnership admission process were so infected with discriminatory bias that such bias more likely motivated Wolf's promotion decision than its articulated legitimate reason, we would spill across the limits of Title VII.").

³²⁴ Bilsky, *supra* note 312.

³²⁵ *Medcalf*, 71 Fed. Appx. at 931.

³²⁶ *Id.*

thus established that Femovich was a decision maker; therefore, the stray remark theory was not applicable.³²⁷

Also of interest in this case was the award of punitive damages to the plaintiff. It has been previously established that punitive damages under Title VII can only be awarded against private employers such as the University of Pennsylvania.³²⁸ Penn argued that it could not be held responsible under the vicarious liability doctrine for the actions of Femovich because it made “good faith efforts to comply with Title VII.”³²⁹ Since the district court did not provide jury instructions to consider Penn’s good faith efforts, and since those instructions were not being appealed, the Third Circuit held that “Penn has waived any argument that its good faith efforts to comply with Title VII preclude the imposition of vicarious liability for Carolyn Femovich’s actions.”³³⁰ Based upon this finding, the court noted that the awarding of punitive damages was appropriate; thus, the holding of the district court was affirmed.³³¹

C. Potential Litigation Strategy

It is very difficult for Title VII plaintiffs to prevail in a court proceeding regardless of the type of alleged discrimination.³³² Therefore, the threat to resort to Title

³²⁷ *Id.* at 931-932 (noting that “The record contains substantial evidence that Femovich was intimately involved in the [interview] process...such that the jury could properly infer that she was a decisionmaker...Based on this evidence, a reasonable fact finder could have concluded that discriminatory animus more likely than not was a motivating factor in Penn’s decision not to interview Medcalf and consider him for the position.”).

³²⁸ *See supra* note 200 and accompanying text.

³²⁹ *Medcalf*, 71 Fed. Appx. at 933.

³³⁰ *Id.*

³³¹ *Id.* (holding that “Based on the charge the jury was given, the evidence is sufficient to support the award of punitive damages.”).

³³² *See* Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?* 61 LA. L.REV. 555, 557 (2001) (writing that “There is it seems a general consensus that employment discrimination cases are too easy to file, and all too easy to win...But this picture is grossly distorted, and while there are large

VII litigation to racially diversify head coaches in major college football rings hollow. As will be further demonstrated in Section IV, plaintiffs are more likely to achieve success through the court of public opinion rather than a court of law. However, there are some fact patterns that could serve the greater purposes of using Title VII to racially diversify head coaches without requiring a victory in court to be effective.

Prior to discussing a prospective litigation strategy, a counterintuitive notion must be advanced. In the motion picture *Legally Blonde*, a law professor asks Reese Witherspoon's character if she would rather represent a client who "committed a crime *malum prohibitum* or *malum in se*."³³³ A similar question could be asked here. Should a plaintiff wish to have direct evidence of discrimination or would they rather have a circumstantial case? On the surface, this might be a simple question to answer; however, one must juxtapose the overall goals of litigation with the issue at hand. If prevailing against an institution is the only goal, then direct evidence might be more desirable. However, consider the *Medcalf* case previously discussed. The plaintiff was able to present direct evidence of discriminatory animus and won. What is the logical administrative follow-up response for Penn in the wake of this case? Certainly an administrator should make sure that in future searches personnel are not as careless as

numbers of employment discrimination suits – and I have suggested that such claims are generally too easy to file with the Equal Employment Opportunity Commission – these suits are far too difficult, rather than easy, to win.”) (footnote omitted).

³³³ LEGALLY BLONDE (Metro Goldwyn Mayer 2001). See *State v. James S. Trent*, 259 P. 893, 898 (1927) (noting that “ An offense *malum in se* is one which is naturally evil, as adjudged by sense of civilized community; but an act *malum prohibitum* is wrong only because made so by statute.”) (quotation marks omitted). While representing a client who committed a crime *malum in se* might be undesirable because of the nature of the client's crime, the attorney in such a case will probably have more room to argue mitigation than in a *malum prohibitum* case. In a *malum prohibitum* case, the central issue is whether or not the defendant committed the statutory infraction. In a *malum in se* case, a defendant can be found guilty of committing an act; however, he or she can proffer defenses (e.g., self-defense, being under the influence, etc.) that can either lessen the penalty or be entirely exculpatory.

Femovich was. It is more likely, then, that a losing defendant would respond to only the overt behaviors found by the court to be discriminatory. It does not necessarily mean that any discriminatory processes would be changed. This is especially so considering that in cases involving direct evidence of discrimination, an attorney can easily overlook some of the more latent discriminatory evidence because of their excitement of representing a plaintiff in a supposed “slam dunk” case.

In order to utilize Title VII for broad sweeping change, such as that proposed by the BCA, it might be better if a plaintiff brought a case predicated upon circumstantial evidence. This type of case could compel a deeper examination of, among other things, processes, attitudes and organizational culture that serve as the tools for the perpetuation of discriminatory employment practices. The *interpretation* of linkages of sometimes subtle pieces of evidence is what is required to effect the type change envisioned by Keith and Rev. Jackson among others.

A litigation strategy that utilizes Title VII in responding to recent fact patterns that have emerged involving FBS-level institutions is set forth below. While this strategy is not guaranteed to bring victory in a court action, hopefully the strategy will serve as notice to university administrators that changes in the hiring processes of elite-level head coaches must be made.

1. Head Coaching Position Not Posted

Recall the earlier hiring case studies of Texas A&M and Ole Miss in the wake of their respective 2007 seasons.³³⁴ Both athletic directors appointed new head coaches

³³⁴ See *supra* text accompanying notes 50-62.

within days of their football teams' last regular season contests. There was no search committee formed, no position announcement and no national search. Rather, it appears that A&M's Byrne and Ole Miss's Boone made quick, unilateral decisions to hire the coaches of their choice.³³⁵ Did Byrne and Boone create liability under Title VII for their respective institutions by handling their hiring decisions in the manner that they did? While there was an outcry from enraged advocates about the how these hirings were handled, there was no threat of litigation in these respective incidents. However, these incidents did once again bring the threat of litigation to the forefront. It is asserted here that both Texas A&M and Ole Miss case studies represented a perfect opportunity to affect change utilizing Title VII.

If the head coaching positions were not posted and if there were no formal hiring processes, how could plaintiffs have standing to challenge Byrne and Boone's hiring decisions to allege racial discrimination? How could such plaintiffs overcome a motion for summary judgment in light of the second prong of the *McDonnell Douglas prima facie* requirement? The leading case on this point is *Carmichael v. Birmingham Saw Works*.³³⁶ In *Carmichael*, the Eleventh Circuit wrote that a plaintiff need not demonstrate that he or she applied for a job in circumstances in which the employer did not post a

³³⁵ During an open presentation made by the author on the campus of Mississippi State University on Feb. 15, 2008, Mississippi State Associate Athletic Director Greg Byrne, the son of Bill Byrne, asserted that Bill Byrne had made the decision almost three months prior to announcing Mike Sherman as head coach that Byrne would pursue Sherman to replace Dennis Franchione. It was further asserted that Byrne considered a number of other coaches; however, interviews were not conducted. In an interesting side note, Greg Byrne was announced as Mississippi State's new athletic director six days after the author's presentation. For the announcement of Greg Byrne's appointment as athletic director, see Mississippi State University Press Release, *Byrne Named MSU's Athletic Director*, n.d., available at http://www.mstateathletics.com/ViewArticle.dbml?DB_OEM_ID=16800&ATCLID=1394328 (last visited Feb. 21, 2008).

³³⁶ 738 F.2d 1126 (11th Cir. 1984).

position announcement or had no formal hiring procedures.³³⁷ The opinion in *Carmichael* has been cited by most Circuits, including the Fifth Circuit which includes the States of Texas and Mississippi.³³⁸ The Third Circuit explained the rationale behind this allowance when it wrote that the “relaxation of the application element of the prima facie case is especially appropriate when the hiring process itself, rather than just the decision-making behind the process, is implicated in the discrimination claim or is otherwise suspect.”³³⁹

In allowing for non-applicants to establish a prima facie case of discrimination, the courts have not given carte blanche to prospective plaintiffs. To have standing, plaintiffs still must be qualified for the position and they must establish that it was reasonable for the employer to know that they were interested in being considered for the position.³⁴⁰ Therefore, it is incumbent for organizations such as the BCA and the

³³⁷ *Id.* at 1133 (noting that “[W]hen an employer uses such informal methods, it has a duty to consider all those who might reasonably be interested, as well as those who have learned of the job opening and expressed an interest.”).

³³⁸ *See, e.g.,* *Everett v. State of MS et al.*, 106 Fed. Appx. 264, 266 (5th Cir. 2004) (noting that “In the past, we have held that, where an employer does not publish a vacancy or create a formal application process, a plaintiff need not prove that she applied for the position in order to make out a prima facie case of discrimination”).

³³⁹ *See* *E.E.O.C. v. Metal Service Co.*, 892 F.2d 341, 349 (3rd Cir. 1990). In addition, the court wrote that “Such an informal hiring process, in conjunction with an all White workforce, is itself strong circumstantial evidence of discrimination.” *Id.* at 350; *See also, Harris v. Birmingham Bd. of Educ.*, 712 F.2d 1377, 1383 (11th Cir. 1983) (the court holding that even though the plaintiff did not formally apply for the coaching position in question, the failure of the district to post vacancies and to institute formal hiring procedures did not preclude the plaintiff from making a prima facie case of discrimination); *See also, Wright et al. v. Stern et al.*, 450 F. Supp.2d 335, 369 (S.D.N.Y. 2006) (holding that “These practices – failing to post, failing to interview, the interview procedures used by [New York City Department of] Parks... - are not discriminatory on their face, for they apply regardless of an employee’s race. As these subjective practices were employed, however, plaintiffs allege – and a reasonable jury could conclude based on the statistical and other evidence – that class members were disparately impacted.”).

³⁴⁰ *Metal Service Co.*, 892 F.2d at 348 (“Courts have generally held that the failure to formally apply for a job opening will not bar a Title VII plaintiff from establishing a prima facie claim of discriminatory hiring, as long as the plaintiff made every reasonable attempt to convey his interest in the job to the employer.”); *See also, Oaks v. Ameripath, Inc.*, 2007 U.S. Dist. LEXIS 76061 (S.D. Tex 2007) (the plaintiff was able to make a prima facie case of racial discrimination despite her not filing a formal application for a promotion.

NCAA to encourage racial minorities to make contact with university presidents and athletic directors to notify these administrators of their interest in prospective coaching opportunities. Most head coaching positions at the FBS level do not become available overnight. Dennis Franchione was on or close to being on the proverbial hot seat before the 2007 season even began.³⁴¹ Why was Bill Byrne not being notified of prospective candidate interest earlier in the season? This is especially so in the wake of the booster newsletter scandal exposed in October 2007 that all but sealed Franchione's fate in Aggieland.³⁴² Perhaps specific interest was conveyed; however, there has not been any public acknowledgement of that fact to date.

The requisite relaying of interest prong raises an interesting question that, unfortunately, will probably take future litigation to settle. Does the BCA and NCAA's practice of notification to institutions of prospective head coaching candidates create

The court held that Plaintiff's comments on her annual review about her desire to move up in the organization were sufficient to make the employer reasonably aware of her interest.); *See also*, Jones v. Flagship Int'l., 793 F.2d 714, 724 (5th Cir. 1986) (holding that "Where the plaintiff claims discrimination in promotion on the basis that jobs for which she was qualified were never posted or otherwise opened for formal applications, she must establish that the company had some reason or duty to consider her for the post.").

³⁴¹ Mark Schlabach, *Bowden, Doba on the Coaching Hot Seat Entering 2007*, ESPN.COM, Aug. 9, 2007, available at http://sports.espn.go.com/nfl/preview07/columns/story?columnist=schlabach_mark&id=2967204 (last visited Feb. 12, 2008) (Schlabach gave Franchione a "warm" temperature rating versus the other ratings of "hot" and "mild"); *See also*, Olin Buchanan, *Coaching Seats are Heating Up for Some*, RIVALS.COM, Aug. 27, 2007, available at <http://collegefootball.rivals.com/content.asp?CID=705847> (last visited Feb. 12, 2008) (noting Franchione was not firmly on the hot seat going into the season, but was one of five head coaches that were on the edge of the hot seat depending on their teams' performance.). Another school, North Carolina State University, received permission from the institution's administration to not post the head football coaching position in the wake of their termination of Chuck Amato. The athletic department received this permission because of the publicity surrounding Amato's termination. *See* Associated Press, *supra* note 315.

³⁴² Associated Press, *Franchione Admonished for Secretive Newsletter: Texas A&M Officials also Report Possible Violations to NCAA*, Oct. 11, 2007, available at <http://nbcports.msnbc.com/id/21248941/> (last visited Feb. 11, 2008).

sufficient notice for a listed individual to have standing in a Title VII cause of action?³⁴³ For example, the NCAA maintains a database of the participants in its annual Men's and Expert Football Coaches Academies and publicizes its annual classes to member institutions through direct mail and via the association's website.³⁴⁴ In fact, the home page for the academies overtly requests "Please call on one or more of our participants if you are in need of a head football coach!"³⁴⁵ If an academy participant allows his name, likeness and/or other ancillary professional information to be used to publicize his participation in the academy, does this mean that a university president and athletic director should reasonably assume that the named individual is interested in their head coaching position under *Carmichael* and its progeny? Since the focus of the training received at these academies is to prepare minorities for head coaching positions, it is reasonable that their participation alone is indicative of their interest to become a head coach. Therefore, it is also reasonable that notice of an individual's participation in the respective NCAA academies could constitute notice under *Carmichael*, thus, assist a plaintiff in making his prima facie case of discrimination in a case similar to the fact patterns presented by Texas A&M and Ole Miss.

This strategy is not presented as an approach to win in a Title VII case. However, it could help overcome a motion for summary judgment. The crux of the strategy is to

³⁴³ For more information on the BCA's methodology of notification, see Keith, *supra* note 93 at 4 (noting that "[F]or the Division I head coaching openings in Division I football and women's basketball; and for Division I athletic director searches, both a general and specific candidate list is provided directly to the institutional athletic director and president via the Hiring Report Card package sent once an opening is verified.").

³⁴⁴ For a more detailed description of the Academies, see *infra* pp. 102-103.

³⁴⁵ The website address is http://www1.ncaa.org/membership/ed_outreach/prof_development/m_coach_academy/index.html.

present a creative cause of action that can be utilized to affect change. If enough plaintiffs brought suit predicated upon the above strategy, it is reasonable to assume that, in the future, athletic directors would open up the search process and would not run behind-the-scene or “cloak and dagger-type” hiring processes.³⁴⁶ Again, the more secretive the hiring process, the more likely an inference of discrimination can be made.³⁴⁷

In light of the above strategy, a best practices recommendation is that prospective minority candidates should make direct contact with both an institution’s president and athletic director to notify these administrators of their interest in a potential head coaching opportunity. In addition, prospective candidates should request that they be notified when the head coaching position formally becomes available. These proactive steps should be sufficient to create legal standing for a Title VII complaint. Aside from establishing liability, these steps can also promote a search process that is more formal and open, thus increasing the opportunity for consideration of qualified minorities.

³⁴⁶ See Tom Witosky, *Coaching Hires More Costly, Hush-Hush*, DESMOINESREGISTER.COM, Dec. 6, 2007, available at <http://www.desmoinesregister.com> (last visited Dec. 10, 2007) (The article notes how much more secretive major college coach hiring processes have become and how the press and fans are utilizing technology such as flight tracking software to try and ascertain prospective coaching candidates. It was also reported that the Des Moines Register had filed an Iowa public records request for the telephone records of Iowa State athletic director Jamie Pollard to see who Pollard was contacting about the ISU head football coaching position.). In a related story shared at an open presentation, Greg Byrne noted that while at the University of Kentucky he was on the search committee that hired current coach Rich Brooks. During the search process, Byrne stated that the committee interviewed Grambling coach Doug Williams and that he took Williams back to the airport after Williams’ interview. On the way back to campus, Byrne heard a radio broadcast that announced that Williams was going to be the next head football coach at the University of Kentucky. A fan had spotted Byrne dropping Williams off at the airport, made the assumption, and called the radio station (comments made by Greg Byrne, Feb. 15, 2008).

³⁴⁷ See generally, *EEOC v. Metal Service Co.*, 892 F.2d 341 (3rd Cir. 1990).

In the next section an assessment of Title VII's viability to affect change will be presented. The most compelling information will be a compilation of case statistics of Title VII cases that demonstrates plaintiff success rates.

IV. CAN TITLE VII AFFECT CHANGE

“History has proven that in order for any significant progress to be made in eradicating a social injustice, legal action has been the catalyst for change.”³⁴⁸ These words prepared by the BCA’s Keith speak of a history that, unfortunately, has relied on our society’s deference for the rule of law to bring about significant social change. This history has salience in the sport context as well. It was previously mentioned that the threat of Title VII litigation by attorneys Johnnie Cochran and Cyrus Mehri helped bring about the NFL’s Rooney Rule.³⁴⁹ Perhaps the almost immediate success of Cochran and Mehri created some level of hubris among minority advocates when it came to demanding increased racial diversity among the college coaching ranks. However, in light of the numerous threats of litigation, progress at the collegiate level has not matched the pace of progress at the professional level.

Intercollegiate athletics are, in many ways, not comparable to professional sports. Although numerous commentators characterize intercollegiate athletics as being a business, they exist in only a pseudo-business reality that is quite *sui generis*. Professional sports, however, do exist in a much more real business world. Thus, professional sports are administered and react differently to environmental threats on the team and league level than do intercollegiate athletic departments and the NCAA. Professional owners and general managers must be more concerned about their brands and ability to generate revenues. While intercollegiate athletic directors do face similar concerns, the mere existence of the organization is not at stake as in professional sports.

³⁴⁸ Keith, *supra* note 93, at 4.

³⁴⁹ White, *supra* note 103.

Remember, major league baseball is no longer played in Montreal. Also, recall the respective fates of the Women's United Soccer Association and the XFL. However, football is still being played at Kent State University and has never been under serious threat not to be played due to team performance or athletic department profitability.³⁵⁰ While many athletic directors are quick to say they are concerned with runaway athletic budgets, few do anything about it.³⁵¹ In addition, university presidents do little to facilitate the ethos of self-sustained operations among their athletic administrators by continuing to provide copious amounts of institutional support to keep the machine running. If a professional sport franchise was managed the way a typical intercollegiate athletics department is managed, it would be out of business in a very short time.

Those operating professional sport teams will, therefore, be more sensitive to threats of litigation because of the fact that these teams exist in a more true market system, and one in which organized labor is involved. Intercollegiate athletic departments, despite NCAA and institutional restraints placed on their ability to generate certain revenues, do have a potential resource not available to professional teams - boosters.³⁵² By virtue of the parent institution's non-profit status, college athletic

³⁵⁰ According to the calculation of winning percentages of current NCAA FBS members and using data from 1920-2007, Kent State ranked 108th with a winning percentage of 39% across 88 seasons. See Stassen.com College Football Information available at <http://football.stassen.com> (last visited April 30, 2008).

³⁵¹ See Gary Brown, *Same Song, Different Verse: Expenses Outpacing Revenue*, 1 NCAA CHAMPION 14 (Spring 2008). The article reports that during the 2006 fiscal year, only nineteen FBS athletic departments generated revenues in excess of expenses. For the three fiscal years of 2004-2006, only sixteen FBS schools managed to accomplish this feat. The article also notes that while the median net revenue for the nineteen schools in 2006 was \$4.3 M, the median net revenue loss for the other member schools was \$8.9 M.

³⁵² It is conceded, however, that there are mechanisms such as league revenue sharing on the professional level that are analogous to shared revenues and institutional support in intercollegiate sport. For example, NBA owners recently voted to increase shared revenue distributions from \$30 M to \$49 M in order to

departments provide an incentive for booster financial support not available to professional teams.³⁵³ Booster support has been used, among other things, to build and improve facilities, purchase equipment, provide athletic grants-in-aid to student-athletes and buy out coaching contracts.³⁵⁴ Of course, this financial support is rarely provided out of pure altruism.³⁵⁵ This leverage has already been commented on as it relates to the topic of this paper.³⁵⁶ Professional sport organizations are beholden to monied interests as well; however, those with the leverage at this level are typically the agents and athletes.

Not only do the operations of intercollegiate athletic departments represent a challenge to the effectiveness of Title VII to affect change, the most alarming fact is the reality of litigation outcomes in employment discrimination cases. In this section, case

further narrow the revenue gap between high and low performing franchises. *See* John Lombardo, *NBA Increases Shared Revenue by 63 Percent*, 11 STREET & SMITH'S SPORTS BUS. J., Apr. 28-May 4, 2008, at 1. One of the constraints the NCAA places on member institutions related to generating revenue is the inability to directly profit from the likenesses of current student-athletes. For example, universities cannot sell jerseys with the names of current student-athletes on them. *See generally*, 2007-2008 NCAA DIVISION I MANUAL, BYLAW 12 AMATEURISM.

³⁵³ Consult I.R.C. § 6115 (2008) for regulations on the extent to which donations to intercollegiate athletic programs are tax deductible.

³⁵⁴ For example, Boone Pickens's gift of \$165 million, the largest in the history of college athletics, will be used mostly to improve the athletic facilities at Oklahoma State University. *See* Steve Weiberg, *Tycoon's \$165M Gift to Oklahoma State Raises Both Hopes and Questions*, USA TODAY, Aug. 15, 2006, available at http://www.usatoday.com/sports/college/2006-08-15-pickens-oklahoma-state-donation_x.htm (last visited Feb. 12, 2008). *See also*, Mark Alesia, *IU Buyouts Add Up: Since 2000, \$4M Has Been Paid to Former Coaches and Sports Administrators at the College*, INDIANAPOLIS STAR, Feb. 24, 2008, available at <http://www.indystar.com> (last visited Mar. 6, 2008) (noting that an anonymous donor paid \$550,000 of then-head men's basketball coach Kelvin Sampson's \$750,000 contract buyout. Sampson was found to have continued violating NCAA recruiting rules after coming to Indiana University from the University of Oklahoma. Although Sampson's contract did have a fire-for-cause provision, the university decided to pay Sampson to ward off any potential wrongful termination litigation.). It is reasonable to infer that should a Rooney Rule equivalent ever be made applicable on the intercollegiate level, some institutions could be relatively immune to any fines due to their respective booster support unless there was some type of proscription of what monies could be utilized to pay assessed fines.

³⁵⁵ Weiberg, *supra* note 354. Weiberg alludes to this when he asked the question "What sort of influence in OSU athletics does that [Pickens's donation] buy Pickens?"

³⁵⁶ *See* Buchanan, *supra* note 86.

statistics as well as a cursory comparison between Title IX and Title VII will be presented. In short, it should be demonstrated that any hope for Title VII to compel racial diversity among elite-level head football coaches is probably misplaced.

A. Case Statistics in Federal Employment Discrimination Actions

Floyd Keith was quoted in a recent interview stating that winning a Title VII court case was a “50-50 proposition.”³⁵⁷ While it may be commendable for Keith to have such an optimistic outlook on prospective litigation, the actuality of winning a Title VII case is much more difficult than Keith seems to understand. Since previous performance is a good predictor of future performance, this paper’s assessment of the viability of Title VII to affect change is predicated in large part on the past performance of plaintiffs in Title VII cases and employment discrimination cases generally. The raw data utilized in this analysis was compiled by the Administrative Office of the U. S. Courts. The stated purpose of this collection of data is to “provide an official public record of the business of the federal courts.” The data collected comes from cases in all federal district courts and 12 federal appellate courts and includes both civil and criminal cases. In addition, the information collected comes from two points in the life of a case: when a case is filed and when a case is terminated. The yearly data files for both the U.S. district courts and federal appellate courts were downloaded from the Institute for Social Research’s Inter-University Consortium for Political and Social Research (ICPSR) at the University of Michigan.³⁵⁸

³⁵⁷ Maravent & Tario, *supra* note 141, at 46 (quoting Keith “This is a 50-50 proposition as to winning or losing a Title VII case.”).

³⁵⁸ The ICPSR can be accessed via the internet at <http://www.icpsr.umich.edu/>. The following databases were downloaded in ASCII format then converted to SPSS files for analysis. Federal Court Cases:

There are a few limitations on the use of this database. First, the database provides information only on federal court actions; thus, it does not include local or state case information. This does not seem to be a major concern because anecdotally we can infer that most Title VII cases would be filed in federal court rather than a state or local court due to the precedential value state and local holdings would have on any subsequent federal proceedings.³⁵⁹ Second, the Administrative Office for U.S. Courts did not start delineating between the various employment discrimination statutes until 1998. Therefore, we have only a limited picture of Title VII-specific trend data in litigation. However, this later information does come subsequent to the last major change to Title VII (i.e., the Civil Rights Act of 1991). Finally, although we can delineate between the various statutes giving rise to discrimination cases since 1998, we cannot readily ascertain what type of discrimination is alleged (e.g., race, sex, etc.).³⁶⁰ Despite these drawbacks, among others, the Administrative Office database is construed to be fairly

Integrated Data Base, 2006, ICPSR 4685 (2007); Federal Court Cases: Integrated Data Base, 2005, ICPSR 4382 (2006); Federal Court Cases: Integrated Data Base, 2004, ICPSR 4348 (2006); Federal Court Cases: Integrated Data Base, 2003, ICPSR 4026 (2005); Federal Court Cases: Integrated Data Base, 2002, ICPSR 4059 (2005); Federal Court Cases: Integrated Data Base, 2001, ICPSR 3415 (2005); Federal Court Cases: Integrated Data Base, 1970-2000, ICPSR 8429 (2005). Each dataset includes a description of the data, separate data files for district court civil and criminal terminations and appellate court civil and criminal terminations, pending case data and codebooks for each data file. Because the Administrative Office of U.S. Courts did not begin providing the section numbers of the discrimination statutes until 1998, only data for 1998-2000 were utilized from the ICPSR 8429 data base file. In addition, only the civil termination files for both district and appellate courts were used in this study. Title VII district court cases were identified in the data files using the following codes: NOS (Nature of Suit) = 442 (Civil Rights Jobs), TITL = 42, and SECTION = 2000. *See infra* p. 94 and note 367 for information on the selection of appellate court cases.

³⁵⁹ *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1990).

³⁶⁰ For additional commentary on the efficacy of the database consult Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Empirical Analysis*, 78 NOTRE DAME L. REV. 1455 (2003).

accurate in its holistic presentation of previous employment discrimination litigation in the federal courts.³⁶¹

Aggregation of case outcomes revealed that from 1998 through 2006, 96,266 Title VII cases were terminated in U.S. district courts. Two other employment discrimination statutes that focus on race (i.e., § 1981 and § 1983) had 7,115 and 12,590 district court terminations during the same time period.³⁶² When factoring in the other primary employment discrimination causes of action, Title VII cases comprised approximately seventy percent of all employment discrimination cases terminated.³⁶³

Examining plaintiff success rates in Title VII, § 1981 and § 1983 cases will demonstrate how far off the mark Keith was in his prognostications for a victory in court. Across these three causes of action, plaintiffs prevailed only 11.3% of the time in district courts during the 1998-2006 time period.³⁶⁴ When these cases are broken down by plaintiff prevailing rates predicated upon disposition type, an even grimmer picture

³⁶¹ Clermont & Schwab, *infra* p. 95 and note 368, at 431.

³⁶² 42 U.S.C. § 1981 (2007). Section 1981 proscribes racial discrimination in contracts. *See also*, 42 U.S.C. § 1983 (2007). Section 1983 does not provide for additional civil rights; however, it does provide for remedies against state actors. Along with § 1981 and 42 U.S.C. § 1985 (2007) (providing a remedy against conspiracies to deprive people of their civil rights), these statutes are referred to generally as the “Reconstruction Statutes.” Section 1981 cases were identified in the data files using the following codes: NOS (Nature of Suit) = 442 (Civil Rights Jobs), TITL = 42, and SECTION = 1981. Section 1981 cases were identified in the data files using the following codes: NOS (Nature of Suit) = 442 (Civil Rights Jobs), TITL = 42, and SECTION = 1983.

³⁶³ These include the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (2000); the Americans with Disabilities Act (ADA), 42 U.S.C. § 1210 (2007); and, the Family Medical Leave Act (FMLA), 29 U.S.C. § 2601 (2007).

³⁶⁴ Title VII plaintiffs prevailed in 11.3% of cases (total cases meeting selection criteria = 21,119, plaintiffs prevailed in 2,395 cases), § 1981 plaintiffs prevailed in 10.5% of cases (total cases meeting selection criteria = 1,560, plaintiffs prevailed in 164 cases), and § 1983 plaintiffs prevailed in 11.3% of cases (total cases meeting selection criteria = 3,225, plaintiffs prevailed in 363 cases). Overall, the district courts found for the plaintiffs under these three statutes 2,922 times versus 22,982 times for the defendants. Only those cases with final judgments (regardless of disposition method) for either the plaintiff or the defendant were used. These numbers represent the total number of dispositions for these respective causes of action in the years designated. Those cases finding for the plaintiff were coded under the variable JUDGMENT as “1”. Those cases finding for the defendant were coded under the variable JUDGMENT as “2”.

emerges. Examining Title VII cases alone, plaintiffs prevailed against pre-trial motions only 1.84% of the time.³⁶⁵ It is at this stage of litigation that the defendants make a motion for summary judgment. This analysis demonstrates the difficulty plaintiffs have in overcoming this motion. However, should plaintiffs survive a motion for summary judgment, their chances for success do improve. In actions disposed through jury trials, plaintiffs prevailed 37.9% of the time while plaintiffs prevailed 26.7% of the time in bench trials.³⁶⁶

Despite the small glimmer of hope in the wake of either a jury or bench trial, successful plaintiffs must then face the appeals process. As the statistics will tell, whatever gains plaintiffs received in the district courts will usually be overturned in the appellate courts. Analysis of appellate court data demonstrated that in 1998-2006 lower court employment discrimination holdings, including those granting pre-trial motions, were affirmed 90.6% of the time.³⁶⁷ Given the extremely low success rates of plaintiffs at the district court level, it can be inferred that plaintiffs do not have much more success at the appellate level. A previous study by Clermont and Schwab traced plaintiffs from the district courts through the appellate courts and their findings support the inference

³⁶⁵ The cases used to compile this information were those that were decided either for the plaintiff or defendant (i.e., JUDGMENT code = 1 (plaintiff) or 2 (defendant)). This information uses only three of the possible twenty-one case disposition codes. Those cases identified as “Motion Before Trial” were coded as “6” under the variable DISP. Plaintiffs prevailed in only 278 of 15,127 cases meeting the above criteria.

³⁶⁶ The cases used to compile this information were those that were decided either for the plaintiff or defendant (i.e., JUDGMENT code = 1 (plaintiff) or 2 (defendant)). Jury verdicts were coded as “7” and bench trials were coded as “9” under the DISP variable. Plaintiffs prevailed in 1,031 of 2,721 jury trials and 143 of 536 cases meeting the above criteria.

³⁶⁷ The Administrative Office for U.S. Courts does not delineate between titles and sections for appellate cases in the database, nor is there a code designating the prevailing party in the lower proceeding. The cases represented here are all cases coded as 442 – Civil Rights Jobs under the variable NOS (Nature of Suit). Only those appellate cases that upheld (Code = 1 Affirmed) or reversed (Code = 2 Reversed) the lower courts’ holdings are used here. There were a total of 14,931 cases meeting the above criteria. Lower court holdings were affirmed in 13,521 of those cases while the lower court was reversed in 1,410 cases.

made here.³⁶⁸ In looking across all employment discrimination cases from 1988-2000, Clermont and Schwab found that when the plaintiff prevailed at the pre-trial stage, the lower courts' decisions were overturned 54% of the time.³⁶⁹ When the defendant prevailed below at the pre-trial stage, appellate courts reversed only 11% of those decisions.³⁷⁰ In appellate actions considering plaintiff trial victories in the district courts, appellate courts overturned these decisions 42% of the time.³⁷¹ However, appellate courts reversed the district courts only 8% of the time when defendants prevailed below.³⁷² These disparities led Clermont and Schwab to conclude that the federal appellate courts were “anti-plaintiff.”³⁷³

B. Is Title VII Comparable to Title IX?

Advocates of Title VII litigation will invariably compare their strategy with that of women and their use of Title IX.³⁷⁴ Title IX precludes discrimination predicated upon sex in programs supported by federal funds.³⁷⁵ While Title VII and Title IX are civil rights statutes and can provide remedies for discrimination in employment, the

³⁶⁸ Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL L. STUD. 429 (2004).

³⁶⁹ *Id.* at 450.

³⁷⁰ *Id.*

³⁷¹ *Id.* This percentage includes both jury and bench trials. The appellate courts reversed the lower courts in 195 of 456 identified cases meeting Clermont & Schwab's criteria.

³⁷² *Id.* The appellate courts reversed the lower courts in only 776 of 7,667 identified cases meeting Clermont & Schwab's criteria.

³⁷³ *Id.* at 451 (noting “In short, we think we have unearthed a troublesome *anti-plaintiff effect* in federal appellate courts.”) (emphasis in original).

³⁷⁴ Keith, *supra* note 93, at 4 (stating “Just as Title IX has opened doors for NCAA Women's athletics, we believe that the use of Title VII may be necessary to drive this issue to the forefront.”). *See also*, White, *supra* note 63 (writing that “[I]t's time to make Title VII do for Black coaches what Title IX did for women's sports.”).

³⁷⁵ 20 U.S.C. § 1681 *et seq.* (2006). Title IX of the Educational Amendments of 1972 says in pertinent part “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...”

pragmatic similarities end there. The fact is that Title IX is much more conducive to activist litigation than Title VII. cursory comparison of the procedural guidelines alone should demonstrate the advantage Title IX plaintiffs have over Title VII plaintiffs.

The process for filing a Title VII claim was presented in Section II. The period of time between filing a claim with a state or local EEOC office and getting the case before a judge or jury can be considerable. As a result, a plaintiff's momentum can be lost due to the process. Filing a claim under Title IX is much simpler if not for any other reason than a plaintiff can file a lawsuit immediately without having to exhaust administrative remedies.

Carpenter and Acosta detail three independent ways in which Title IX can be enforced against colleges and universities.³⁷⁶ First, guidelines stipulate that all institutions should have a Title IX complaint process as well as an identified person with oversight responsibility for such claims.³⁷⁷ Second, plaintiffs can file a complaint directly with the Office for Civil Rights (OCR) within 180 days of the alleged discriminatory act.³⁷⁸ The authors note that it has been found that the average time between the initiation of a complaint to the OCR's letter of finding or resolution is 206 days.³⁷⁹ Finally, plaintiffs can file an immediate lawsuit with a jurisdictional court.³⁸⁰ It

³⁷⁶ LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, TITLE IX (2005).

³⁷⁷ *Id.* at 21-22.

³⁷⁸ *Id.* at 22-24.

³⁷⁹ *Id.* at 22 (noting that "The average time from the initiation of an OCR complaint to the dissemination of a letter of findings or letter of resolution is 206 days according to one study, but often cases involving athletics take even longer because of their multifaceted nature.") (internal citations omitted).

³⁸⁰ *Id.* at 24-26.

is possible for a plaintiff to contemporaneously file complaints in both a court and with the OCR.³⁸¹

Carpenter and Acosta also note something of significance about the Title IX complaint process that has salience here. In comparing the pros and cons of filing a complaint with the OCR versus filing a lawsuit, the authors note that when filing an OCR complaint, a coach does not have to be directly involved.³⁸² This provides two advantages. First, it can mitigate the potential for retaliation against a coach or administrator. Second, the investigatory nature of the Title IX claim will potentially be more comprehensive in the administrative action. In a lawsuit, the focus is on finding specific facts that relate to the alleged injury received by a plaintiff. Ancillary information related to the discriminatory conduct of the defendant may be discovered. However, such information may not be probative predicated upon the rules of evidence and the respective jurist's interpretation of those rules. Rules of evidence in administrative actions are, typically, much more liberal.

³⁸¹ *Id.* at 23.

³⁸² *Id.* (discussing that “[B]ecause an OCR complaint does not require the complainant to have legal standing, a person more insulated from retaliation can sign the complaint. A parent, community member, or even a professional organization can file the complaint. The institution may suspect the identity of the motivating force behind the complaint but will never be certain.”) (internal citation omitted). It is important to note that the OCR and EEOC are not equivalent agencies in the comparison either. To file a Title VII complaint with the EEOC, the individual filing the complaint must have legal standing. The author has firsthand experience in a scenario demonstrating the ability of a professional organization to file a Title IX complaint against an institution. In June of 1997, the National Women’s Law Center (NWLC) filed complaints with the OCR against schools it considered to be the most out of compliance with Title IX. Corresponding with the 25th anniversary of Title IX, the NWLC chose the top 25 non-compliant institutions. The author was in athletic administration at one of the institutions subject to a complaint filing and ended up being one of the primary administrators working to resolve compliance issues. See Amy Shipley, *Title IX Complaints Filed Against 25 Universities*, WASH. POST, June 3, 1997 at D.01.

Another important distinction between Title IX and Title VII is their respective friendliness toward class claims. It has already been noted that although class claims were prevalent soon after Title VII's passage, they are less frequent today.³⁸³ Title IX is much more conducive to the filing of class claims.³⁸⁴ It is through class claims that demonstrate a pervasive discriminatory pattern against protected classes that holistic change comes about. It is also important to note that Title IX claims are usually predicated upon very overt differences in treatment; and, these differences in treatment usually affect a large number of people over a significant period of time. A Title VII case within the context of this paper is, typically, going to be based upon circumstantial evidence that will ask a court or jury to connect the dots to find an inference of discrimination. In addition, whereas a Title IX claim will involve looking at a university's actions that adversely affect, potentially, a few hundred women at one institution on an on-going basis, a Title VII claim of discrimination in the hiring of a head football coach will involve alleged injury to one person for a position that can go many years without having to be filled.

Based upon the information presented in this paper, it is unlikely that Title VII can compel racial diversification of head coaches at NCAA FBS institutions. Title VII is simply not a statute that can be used in the manner that the BCA and other advocates envision. Because of the nature of the matter, it is much more difficult for a single

³⁸³ See RUTHERGLEN, *supra* note 115.

³⁸⁴ See Cathryn L. Claussen, *Title IX and Employment Discrimination in Coaching Intercollegiate Athletics*, 12 U. MIAMI ENT. & SPORTS L. REV. 149, 150 (1995) (noting that "First, regarding the diminished percentage of female coaches in women's athletics, Title VII would not help because it only provides *individual redress* for victims of discrimination. Title IX, however, takes a program-wide look at availability of coaches, and assumes a significant disparity in number of coaches to be a factor in whether male and female athletes are being coached equally.") (emphasis added).

successful Title VII case against one institution to instigate change across numerous institutions like Title IX has done. Athletic director and athletic department success at many FBS institutions are largely based upon the success of their respective football programs. This could be a major reason why racial minority football coaches have not received head coaching opportunities equivalent to those of men's basketball. Athletic directors and presidents tend to be much more circumspect and perhaps more influenced by boosters, alumni and the brand equity of respective head coaching candidates when it comes to making the hiring decision for the football program versus other athletic programs. It is in the athletic directors' and presidents' best interests to be so careful. However, it is going to take more than the threat of Title VII litigation to make these individuals see that consideration of racial minorities is in their, and their respective football programs', best interests as well.

V. CONCLUSION

Predicated upon minority participation rates, there is no doubt that African-Americans are underrepresented among the ranks of head football coaches at FBS institutions. However, as previously explained, this comparison has no utility in a legal proceeding. In addition, because of the volunteer nature of the NCAA, there is little that can be done by the Association to compel member schools to adopt a Rooney-type rule. Consequently, pursuing legal redress through the EEOC and the courts via the filing of Title VII actions is an option. This option does, however, come with a major caveat. As demonstrated by the outcomes in such litigation, adherents of this strategy should be encouraged to affect change through other means. What, then, are some other possible solutions?

As noted earlier in this paper, some level of information asymmetry might be associated with the search process. Institutional presidents and athletic directors, who do most of the hiring, might not have the network or knowledge of who the top up-and-coming minority coaches are despite the best efforts of the NCAA and the BCA to keep them informed. In the case of the BCA, it has already been established that they do not readily communicate with university personnel until an opening is confirmed.³⁸⁵ In the case of Texas A&M, it was shared during a general presentation session that Bill Byrne had decided who he was going to pursue approximately three months prior to Dennis Franchione's resignation.³⁸⁶ For those who truly seek it, there are sources of information available to institutions looking to fill coaching vacancies. The BCA is an organization

³⁸⁵ See *supra* note 343 and accompanying text.

³⁸⁶ See *supra* note 335 and accompanying text.

that is available and desires to be consulted when institutions are developing their applicant pools. However, the potential drawbacks associated with utilizing the BCA and other similar organizations can be significant. First, utilization of outside groups, particularly ones with agendas, be these agendas perceived or actual, can mitigate the control the institution and its representatives have over the decision making process.³⁸⁷ Outside consultants might not be as sensitive to the broad-base constituencies and dynamics of the respective athletic departments; therefore, they might make hiring recommendations entirely consistent with the agenda they came in with.³⁸⁸ Thus, these groups might be as pre-disposed toward certain candidates as the institutions might be.

Second, university presidents and athletic directors might fear the potential negative publicity they and their programs might receive if they do not choose the candidate that the outside consulting group endorsed. Choosing the best person for the job is a process of balancing numerous criteria and is always going to be a subjective determination. By using a group such as the BCA, universities and their search

³⁸⁷ For more information regarding the BCA's normative prescription for how to run a search process, consult Floyd Keith's prepared statement before Congress. Among the criteria for an institution to receive an "A" grade from the BCA includes 30% of the hiring committee to be minority, 30% of interviews to be granted to minority candidates (qualifications of candidates not addressed), and a minimum search length in excess of two weeks. Keith, *supra* note 93, at 6.

³⁸⁸ This is not to say that it is within the purview of hiring personnel to not choose a minority candidate because they do not feel that a minority would not be accepted by an institution's fan base. Customer preferences have never been allowed to establish a bona fide occupational qualification (BFOQ) in the sex or gender context. It is firmly established legal doctrine that racial criteria can never be used to support a proffered BFOQ. *See Diaz v. Pam Am World Airways*, 442 F.2d 385, 388 (5th Cir. 1971) (citing that stated customer preferences for female flight attendants is not sufficient to establish a BFOQ. Thus, this evidence was not exculpatory in an action challenging Pan Am's female-only flight attendant hiring patterns. Among the requirements for establishing a sex-related BFOQ, the Fifth Circuit noted that "the essence of the business operation would [have to] be undermined by not hiring members of one sex exclusively.") (emphasis omitted).

committees might be pressured to give overriding consideration to a candidate's race thereby handicapping their ability to define and choose the best person for the job.

Another opportunity for institutions to narrow the information gap is to utilize the resources of the NCAA via the Men's Coaches Academy and the Expert Football Coaches Academy. The Men's Coaches Academy, which began in 2003, "addresses the critical shortage of ethnic minorities in head coaching positions in college football, primarily at the Division I-A level."³⁸⁹ The topics discussed during the three day conference include: communication skills, fiscal responsibilities, program building, compliance, and academic related issues.³⁹⁰ It is hoped that the minority assistant coaches who participate in the respective academies will be better prepared to present themselves as viable candidates for head coaching vacancies. Of course, the other aspiration is that athletic directors and presidents will take notice of the participants and place their names in a database of prospective candidates for future head coaching opportunities.³⁹¹ It is this author's assertion, however, that participants in the academies must be more assertive in conveying their interest in prospective head coaching positions. Through the unofficial grapevine, many coaches are aware of potential openings far in advance of public notice. Therefore, it is incumbent upon prospective candidates to relay their interest soon after becoming aware of potential openings if not for any other reason than to create legal standing in a prospective Title VII suit. It is a better aspiration for such notice, however, that the individual expressing interest will

³⁸⁹ *NCAA Invites 30 to Men's Coaches Academy*, available at <http://www.ncaasports.com/story/10230789> (last visited June 20, 2007).

³⁹⁰ *Id.*

³⁹¹ *See supra* note 345 and accompanying text.

receive consideration should an opening actually develop or that his name will be passed along to those presidents and athletic director who are seeking to hire head coaches.

By making use of outside consulting groups and the NCAA's Men's Coaches and Expert Football Coaches Academies, the extant information asymmetry does not have to hinder the development of adequate pools of qualified minority applicants. However, utilization of these resources may lead to protracted searches which, as previously discussed, are not something universities are inclined to do - especially when searching for head coaches of revenue sport teams.³⁹²

There is another strategy that might be considered, and it is one that can address some of the concerns related to hiring minority head coaches. Rather than pushing for FBS member schools to hire more minority head coaches, perhaps the emphasis should be on placing qualified minorities in head coaching positions at the Football Championship Subdivision (FCS) level. Again, one of the areas of concern in hiring minorities at top-level programs is their lack of head coaching experience and brand equity. Most administrators operate under the assumption that past head coaching success is an indicator of future head coaching success. This philosophy was evident when the University of North Texas, a FBS member of the Sunbelt Conference, recently

³⁹² A great example of the sense of urgency in hiring occurred in the spring of 2007. On Thursday, March 22, head Kentucky basketball coach, Tubby Smith announced he was leaving UK to coach at Minnesota. Kentucky subsequently asked for and received permission to talk to Texas A&M head coach Billy Gillispie on Thursday, April 5. They announced Gillispie as the new head coach the following day. Texas A&M athletic director, Bill Byrne then announced Wichita State's Mark Turgeon as the Aggies' new coach on Tuesday, April 10. See Andy Katz, *Smith Leaving Kentucky to Coach Minnesota*, ESPN.COM, Mar. 23, 2007, available at <http://sports.espn.go.com/ncb/news/story?id=2808406> (last visited July 12, 2007); Pat Forde, *Wildcats to Introduce Gillispie on Friday*, ESPN.COM, Apr. 6, 2007, available at <http://sports.espn.go.com/ncb/news/story?id=2827764> (last visited July 12, 2007); Texas A&M University Press Release, *Turgeon Named Texas A&M Men's Basketball Coach*, Apr. 10, 2007, available at <http://aggieathletics.com> (last visited Apr. 14, 2007).

hired Todd Dodge from Southlake Carroll High School in Denton, Texas, to become the university's sixteenth head football coach.³⁹³ While at Southlake Carroll and competing at the 5A level, Dodge accumulated a record of 79-1 and won four state championships.³⁹⁴ In addition to his Southlake Carroll and other high school coaching experiences, Dodge served as offensive coordinator at North Texas for the 1992 and 1993 seasons.³⁹⁵

Perhaps the paradigm of achieving success at the FCS level then moving on to the FBS level is Ohio State University's Jim Tressel. Prior to his arrival in Columbus in 2001, Tressel spent fifteen years at perennial FCS power Youngstown State University. While at Youngstown State, Tressel accumulated a record of 135-57-2, made 10 playoff appearances, and participated in the national championship game six times, winning four.³⁹⁶ Tressel's success has continued during his seven seasons at Ohio State. His record going into the 2008 season is 73-16.³⁹⁷ His Ohio State teams have gone to seven bowls - five of them BCS including three national championship games - won four Big Ten Conference titles and one national championship.³⁹⁸

The more exclusive the organization, the more protectionist members of that organization will be. Although FCS member schools are not considered top-level

³⁹³ Todd Dodge Biography, available at http://www.meangreensports.com/ViewArticle.dbml?SPSID=9051&SPID=562&DB_OEM_ID=1800&ATCLID=723249&Q_SEASON=2007 (last visited June 20, 2007).

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ 2006 YOUNGSTOWN STATE UNIV. FOOTBALL MEDIA AND RECRUITING GUIDE, *Jim Tressel's Lasting Legacy*, at 88.

³⁹⁷ Jim Tressel Biography available at http://www.ohiostatebuckeyes.com/ViewArticle.dbml?SPSID=87743&SPID=10408&DB_OEM_ID=17300&atclid=1059367 (last visited May 20, 2008). See also, BCS National Championship Game Post Game Notes, Jan. 8, 2008, available at http://www.ohiostatebuckeyes.com/ViewArticle.dbml?SPSID=87745&SPID=10408&DB_OEM_ID=17300&ATCLID=1364787 (last visited Feb. 12, 2008).

³⁹⁸ *Id.*

programs, as we have seen in the cases of Todd Dodge and Jim Tressel, it is hard to argue with success. Although Dodge and Tressel are White, their experiences should disprove any notion that positions at the FCS level, or lower, preclude the chance to make it to the elite level of coaching.

If the only thing minority head coach advocates care about is placing individuals in the highest paying jobs, then the idea of what is “right” becomes a little less clear. If, however, the true fight is for opportunity then that must be the overarching objective and efforts must be focused on all levels of intercollegiate football and not just the level that has the highest exposure and remuneration. Sport films capture the imagination because, in the end, the underdog overcomes the highest obstacles to defeat the team with the most affluence and privilege. That is the substance of the American dream and the American spirit. This not to say that some highly talented people have been overlooked and to accept a position at the lower levels of competition would not be the best use of their talent. However, FCS institutions and student-athletes need talented coaches too. Affecting change to ingrained systems such as hiring processes that disadvantage minorities requires a holistic perspective. If the objective is to provide more of a presence of minority head coaches in football, then it might require the martyrdom of some very qualified individuals. One need only look to the intercollegiate athletic gender equity movement and the history of the Association of Intercollegiate Athletics

for Women (AIAW) to see that sacrifices will have to be made and will continually have to be made.³⁹⁹

Whether or not FCS member schools would be more welcoming of minority candidates compared to FBS member schools is yet to be determined. However, from the standpoint of litigation, it might be easier to take on a smaller institution with a more limited budget rather than a flagship state university with much higher levels of resources and a full staff of attorneys. In addition, if a candidate were to in effect litigate his way to a head coaching appointment, the level of pressure and scrutiny that individual would face at a major university might mitigate or even preclude his ability to be successful.

Change did not happen overnight in the pursuit of equality for women in intercollegiate athletics. Change occurred as a result of Title IX after plaintiffs, both female coaches as well as female athletes, filed suits to demand equality under the statute's provisions. As commented on earlier, the analogy between Title IX and Title VII must be considered circumspectly. Despite the "Dear Colleague" letters that tend to obfuscate standards for compliance, Title IX's boundaries represent much brighter lines than those of Title VII.

However, an increase in African-American coaches at FBS schools might be realized through the utilization of legal remedies such as Title VII. It is hoped the information given herein has provided a much more realistic perspective on the use of

³⁹⁹ CARPENTER & ACOSTA, *supra* note 376, at 175 (writing that prior to the passage of Title IX over 90% of women's programs were coached and administered by females. By 2004, only 44.1% of women's teams had a female head coach. Also in 2004 women held only 41% of all administrative positions in athletics departments in which there were women's team participating in intercollegiate competition.).

Title VII as some type of statutory savior. This is especially so given the special parameters for litigation that Keith has placed on bringing a case. Much like his overconfidence for winning a Title VII action, Keith's hope for the perfect plaintiff seems to be somewhat out of touch with reality.⁴⁰⁰ Whoever the plaintiff is, it is conceded that the individual could be risking his coaching career by filing a Title VII complaint.⁴⁰¹

Those preferring this path should realize that, as demonstrated by the history of Title IX, litigation is rarely an expedient solution. Given the sense of urgency promulgated through the statements of individuals like Dr. Myles Brand, Rev. Jesse Jackson, and Dr. Richard Lapchick, protracted litigation in this instance would seem to be an unacceptable alternative. It appears that fear of litigation rather than actual litigation is the currency of change for many advocates. However, the threats of litigation to date have gone largely unheeded by most FBS athletic administrators.

⁴⁰⁰ See Maravent & Tario, *supra* note 141, at 46 (quoting Keith "It [the plaintiff coach] can't be just anybody; it has to be a marquee name.").

⁴⁰¹ *Id.* (quoting Keith "It's going to take a Curt Flood [type of person]."). Curt Flood challenged Major League Baseball's reserve clause in a battle that ended up going to the U.S. Supreme Court in *Flood v. Kuhn*, 407 U.S. 258 (1972). Although Flood lost the court battle, he is generally credited with bringing about free agency in professional sports. However, his activism came with a price. His major league baseball career ended soon after beginning his legal actions challenging the reserve clause. Of course, many prospective Title VII plaintiffs fear retaliation not only by a single employer, but by the profession. See LANCE C. HATFIELD, *Potential Lawsuit Lurks in Liberty U. Athletic Dept.*, 7 LEGAL ISSUES COLLEGIATE ATHLETICS 3 (2004) (discussing a terminated college volleyball coach who was considering filing a Title VII complaint alleging sex discrimination. The coach stated that "When you are looking for a job, you are afraid of any stigma that might attach immediately and long-term as a result of filing a complaint of gender discrimination. As a parent and someone who wants to continue in the profession, you have to make sure that you make the right decisions."). Fears of retaliation are not unfounded. One of the causes of action in the *Banks* case was for retaliation. The court noted evidence that one member of a head coach selection committee provided Banks with the lowest scores possible on the selection criteria. In a section of the evaluation reserved for comments, the member wrote "Law suit v. own school!!" *Banks v. Pocatello Sch. Dist. No. 25*, 429 F. Supp.2d 1197, 1205 (D. Idaho 2006).

Finally, is a collegiate equivalent to the NFL's Rooney Rule the answer? While advocates have made statements to that effect, it is reasonable to infer that many commentators will view the rule just as suspect on the college level as they do on the professional level. Many will probably view the interviews of racial minorities as simply following the rules to avoid any extant penalties.⁴⁰² In fact, this criticism was leveled against the University of Alabama when the university hired Mike Shula rather than Sylvester Croom. It is important to note that Alabama did formally interview both Shula and Croom. It was only when Shula was chosen over Croom that Alabama's interview process was criticized.⁴⁰³ In addition, there is the potential that many prospective head coaching minority candidates will not interview if they perceive that the institution is merely going through the motions. In a recent communication exchange with Dr. Dennis Phillips, professor and Faculty Athletics Representative (FAR) at the University of Southern Mississippi, it was shared that this type of challenge was faced when Southern Miss was trying to build its applicant pool for head football coach after Jeff Bower's resignation. Dr. Phillips noted the hiring committee tried to interview a particular minority who was under the misguided impression that Southern Miss had already made a decision on who they wanted as head coach. Despite the committee's protestations to contrary, the individual told the committee that he would not interview.⁴⁰⁴ The university

⁴⁰² Consider the rhetoric surrounding the Miami Dolphins' interview of Art Shell in 2004 when it was fairly well known that the organization wanted LSU's Nick Saban all along. See Michael Smith, *supra* note 60.

⁴⁰³ John Zenor, *Alabama Finally Unveils Shula as Home-Grown Hope*, USA TODAY, May 9, 2003, available at http://www.usatoday.com/sports/college/football/sec/2003-05-09-shula_x.htm. Rev. Jesse Jackson is quoted referring to Alabama's interview process as "smoke and mirrors".

⁴⁰⁴ E-mail from Dr. Dennis R. Phillips, Associate Professor of Sport Management at the University of Southern Mississippi, to author (December 8, 2007, 10:41 a.m., EDT) (on file with author). Dr. Phillips

later hired Larry Fedora, who is White, and came to Southern Miss after spending three seasons as an offensive coordinator at Oklahoma State.⁴⁰⁵

There appears to be a developing trend in intercollegiate and professional sports that has implications for the Rooney Rule and any prospective intercollegiate equivalent. This trend is the appointment of head coaching designates or “head coaches in waiting”. A number of teams are appointing head coaches in advance of a current head coach’s departure. This has happened twice recently in the NFL. Former Atlanta Falcons head coach and current Seattle Seahawk assistant head coach, Jim Mora, was recently named head coach-designate by the Seattle Seahawks and will take over after Mike Holmgren’s departure in 2009.⁴⁰⁶ In addition, Indianapolis Colts assistant coach Jim Caldwell has been appointed head coach-designate to take current head coach Tony Dungy’s place upon Dungy’s retirement – whenever that takes place.⁴⁰⁷ Teams in the NFL can avoid the formal hiring process and penalties in appointing head coach-designates because the Rooney Rule allows exceptions for teams that promote from within their organization. Some see this provision as a loophole and a way in which to circumvent the system to

also noted that “[T]hat type of attitude [choosing not to interview because of a feeling that the school has established who it wants] – or the perception that they are token interviewees – is also not what the BCA is looking for I don’t think.” See also, Bob Hohler, *Rooney Rule Cited for its Effectiveness*, BOSTON GLOBE, Sept. 21, 2006, available at http://www.boston.com/sports/colleges/football/articles/2006/09/21/rooney_rule_cited_for_its_effectiveness/ (last visited Feb. 12, 2008) (noting that not all Black coaches think a Rooney Rule on the college level is a good idea. Quoting Mel Mills, head coach at Becker College “If they have to make a school bring somebody in for an interview, is that coach truly getting a fair shake?”). But see, Weiner, *supra* note 88 (discussing how important prior failed interviews were for Turner Gill to receive serious consideration for the head coaching position at the University at Buffalo.).

⁴⁰⁵ University of Southern Mississippi Press Release, *Southern Miss Hires Larry Fedora as 18th Head Football Coach*, Dec. 12, 2007, available at <http://southernmiss.cstv.com/sports/m-footbl/spec-rel/121207aai.html> (last visited Dec. 12, 2007).

⁴⁰⁶ Danny O’Neil, *Mora Named Seahawks Head Coach for 2009*, SEATTLE TIMES, Feb. 6, 2008, available at http://seattletimes.nwsource.com/html/seahawks/2004166684_hawk060.html (last visited May 1, 2008).

⁴⁰⁷ Michael Marot, *Quiet Caldwell Hopes to Make Smooth Transition With Colts*, USA TODAY, Jan. 22, 2008, available at http://www.usatoday.com/sports/football/2008-01-22-2505609814_x.htm (last visited May 1, 2008).

further disadvantage minority coaching candidates.⁴⁰⁸ In light of this claim, it should be noted that the above beneficiary coaches are Caucasian and African-American respectively.

The designation of a future head coach is not limited to the NFL. It occurs on the intercollegiate level as well. Two recent examples involved basketball coaches who were appointed successors to their respective legendary coaching fathers. Sean Sutton succeeded his father as head basketball coach at Oklahoma State University in 2006⁴⁰⁹ and Texas Tech University officially designated Bob Knight's son, Pat, as the next head coach of the Red Raiders' basketball team in 2005.⁴¹⁰ Texas Tech University also recently announced the appointment of Dan Spencer as head coach-designate for the baseball team. Spencer is expected to assume his new position after the retirement of current head coach Larry Hays following the 2009 season.⁴¹¹ In addition, there have been two recent appointments of head coach designates at major college football programs. First, Florida State University offensive coordinator Jimbo Fisher was

⁴⁰⁸ Ian O'Connor, 'Coach in Waiting' Loophole is New Color Barrier, FOXSPORTS.COM, Feb. 13, 2008, available at <http://msn.foxsports.com/nfl/story/7792444> (last visited May 1, 2008).

⁴⁰⁹ Sean Sutton Biography, Oklahoma State University, available at http://www.okstate.com/ViewArticle.dbml?DB_OEM_ID=200&ATCLID=6635&Q_SEASON=2007 (last visited May 1, 2008). Sutton resigned his position after the 2007-2008 season. See Oklahoma State University Press Release, *Sean Sutton and Mike Holder Reach Mutual Agreement About Future of OSU Basketball*, Apr. 1, 2008, available at http://www.okstate.com/ViewArticle.dbml?&DB_OEM_ID=200&ATCLID=1430759&SPID=145&SPSID=1463 (last visited Apr. 4, 2008).

⁴¹⁰ Associated Press, *Pat Knight Will Follow Father as Coach of Texas Tech*, USA TODAY, Oct. 1, 2005, available at http://www.usatoday.com/sports/college/mensbasketball/big12/2005-10-01-ttech-knight-son_x.htm (last visited May 1, 2008). Pat Knight officially took over the program following his father's mid-season resignation in February 2008. See Pete Thamel & Thayer Evans, *Bob Knight Resigns as Coach of Texas Tech*, N. Y. TIMES, Feb. 5, 2008, available at <http://www.nytimes.com/2008/02/05/sports/ncaabasketball/05knight.html?em&ex=1202360400&en=e41bbb305631b605&ei=5087%0A> (last visited Feb. 14, 2008).

⁴¹¹ Texas Tech University Press Release, *Spencer Named Head Coach Designate of Texas Tech Baseball*, April 29, 2008, available at <http://texastech.cstv.com/sports/m-basebl/spec-rel/042908aaa.html> (last visited May 1, 2008).

announced as successor to Bobby Bowden.⁴¹² Second, current University of Kentucky offensive coordinator Joker Phillips was announced as the Wildcat's future head coach after current coach Rich Brooks retires following the 2011 season.⁴¹³ Similar to the NFL examples, the above football head coach designates are Caucasian and African-American respectively.

If this trend continues to grow, will minority coaches be at a further disadvantage? Another interesting aspect of this trend from the standpoint of litigation is the implications this type of hiring process has on the standard for establishing standing to bring a Title VII suit. If this process is firmly rooted in the notion of inter-organization upward mobility and is uniformly enforced it would seem that the only individuals with standing to bring suit would be those minority coaches already on staff. Would this then require a shift in advocacy focus from hiring minority head coaches to hiring more minority coordinators and position coaches? Would any future collegiate Rooney-type rule close this alleged loophole, thus, require every head coach opening to be filled through a formal search process? Of course, these questions, among others, can only be addressed with time.

Some other potential solutions that could lead to additional research on the issue of minority representation among head football coaches include the following. First, one could establish the legal relationship of separate university athletic associations and

⁴¹² Florida State University Press Release, *Florida State University Announces Succession Plan for Football Program*, Dec. 10, 2007, available at <http://seminoles.cstv.com/sports/m-footbl/spec-rel/121007aad.html> (last visited May 1, 2008).

⁴¹³ University of Kentucky Press Release, *Phillips Designated as UK's Future Head Coach*, Jan. 18, 2008, available at http://www.ukathletics.com/index.php?s=&url_channel_id=39&url_article_id=21368&change_well_id=2 (last visited May 1, 2008).

official booster organizations to the respective institutions.⁴¹⁴ If truly separate, one could potentially utilize the joint liability/integrated enterprises doctrine for governmental sub-units to establish liability of the parent university in a Title VII action.⁴¹⁵ This strategy could lead to increased university oversight of the separate athletic association's hiring procedures and ensure compliance with university affirmative action employment policies and procedures.

Second, if boosters are as powerful as alleged, perhaps there should be increased emphasis on encouraging minority student-athletes and minority university students to become more involved in the *de facto* power structure behind intercollegiate athletics. Of course, this strategy involves not only developing an ethos of giving back among minority student-athletes who go to the professional level,⁴¹⁶ but this also involves developing and reinforcing this behavior among minorities in the general student population as well.⁴¹⁷

⁴¹⁴ For example, the athletic department at University of Central Florida notes in its job advertisements that the individuals hired will be employees of the University of Central Florida Athletics Association, Inc. (UCFAA), "which is a separate entity from the University of Central Florida".

⁴¹⁵ See *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1335 (11th Cir. 1999) (holding that "the single employer aggregation test adapted from cases involving the NLRB, in which the employers are always private entities, is not applicable to those Title VII cases in which the employers are state and local entities.").

⁴¹⁶ See Julie O'Neil & Marisa Schenke, *An Examination of Factors Impacting Athlete Alumni Donations to Their Alma Mater: A Case Study of a U.S. University*, 12 INT. J. NONPROFIT VOLUNT. SECT. MARK. 59, 61 (2007) (reporting research that demonstrates that athlete alumni since the 1980s give less than their non-athlete alumni counterparts. This includes former student-athletes that play professional sports.).

⁴¹⁷ Research is mixed on the general findings of differences between Whites and Blacks in nonprofit giving. Some studies have found that Whites are more likely to donate than Blacks. However, some studies have found that when controlling for certain variables (e.g., education), the differences between the races disappear. See, e.g., Patrick M. Rooney, Debra J. Mesch, William Chin, & Kathryn S. Steinberg, *The Effects of Race, Gender, and Survey Methodologies on Giving in the U.S.* 86 ECON. LETTERS 173, 179 (2005) (concluding that "We find that differences between minorities and Whites were insignificant in both the overall sample and the Singles Only subsample. These results support other research that has found racial differences in giving and volunteering tend to go away after controlling for other variables.") (internal citation omitted).

Finally, scholarly research should be conducted to ascertain why prospective and current minority student-athletes are not more vocal on the subject. If minority athletes began to change their verbal commitments, request that they be released from their NLI's and requested transfer to other schools based on their respective institution's hiring practices, it is reasonable to speculate that progress would be made at a much quicker pace than any litigation strategy.⁴¹⁸

Short of formalizing the professional progression path required to become a head coach, perhaps Title VII litigation can be a strategy to affect change. However, this paper has demonstrated the limitations of such a strategy and that alternative methods to encourage racial diversity should be pursued. It is unlikely that the BCA's aspiration for a one-shot landmark case that will bring about radical change will ever come to fruition. Looking at the history of Title IX should provide some semblance of the uphill battle Title VII advocates will have to fight. Despite all of Title IX's success, the statute continues to be breached and the courts continue to have Title IX cases on the docket.⁴¹⁹ The U.S. Supreme Court issued its last major opinion on Title IX as recently as 2005 in the *Jackson v. Birmingham Board of Education* case.⁴²⁰

Advocates of using Title VII to compel change must convince injured individuals to file suit and file suit often. Statutory remedies have utility inasmuch as individuals are

⁴¹⁸ For an interesting discussion on the topic of contemporary Black athletes and socio-political activism, consult Shaun Powell, *Souled Out? How Blacks are Winning and Losing in Sports* (2008). Related to the topic of this paper, Powell notes that "Regarding the lack of blacks in management and other positions of power, black athletes either don't care enough, would rather not discuss it, or simply give the subject a quick nod without dwelling too long." *Id.* at 27.

⁴¹⁹ See Laura Smith, *Talking Title IX*, 18 *ATHLETIC MGMT.* 30 (2006) (highlighting several Title IX violations and related court cases at both the interscholastic and intercollegiate levels. Given the general trend in case filings, it appears that advocates are now targeting disparities on the interscholastic level.).

⁴²⁰ 544 U.S. 167 (2005) (holding that Title IX does allow for suits alleging retaliation against individuals who report unlawful sex discrimination).

willing to use them. At the current time it appears as if the BCA, among others, are content with talking about litigation rather than actually using litigation. Regardless of the BCA or alleged injured individuals' willingness to utilize the courts to achieve their desired ends, the thought that the best and only method to increase opportunities for minorities in coaching is via the courts or legislative fiat is a thought that should chill the conscious of our society.

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