

The Advancement of Minority Coaches in Professional Athletics

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Change and diversity are two words that have gained prominence in mainstream America’s vernacular since the recent election of our nation’s first African-American president. Unfortunately, collegiate and professional athletics—arenas very often viewed as trailblazers in the field of diversity—still face many issues

related to the hiring and retention of minority coaches.¹

The disproportionate representation of minority head coaches is most evident in college football. For instance, among the 119 NCAA football programs, there are only four African-American coaches.² A recent example of a collegiate coaching hire that evokes talk of discrimination is the hiring of Gene Chizik as the head coach of football at Auburn University.³ What was notable in the hiring of Chizik, who had previously compiled a losing record of 5–19 for two seasons at Iowa State, was the fact that a highly qualified African-American candidate, Turner Gill, was also interviewed for the position but did not receive an offer. Gill took over as head coach at the University at Buffalo three years ago and succeeded in turning around one of the country’s worst football programs by guiding Buffalo to a winning record—its first Metro Atlantic Conference championship and its first bowl bid in 50 years.⁴

Auburn’s passing over of Gill evoked an emotional response in some quarters. NBA Hall of Famer Charles Barkley, a notable Auburn alumnus, has been

quoted as saying that “race was the No. 1 factor . . . you can say it’s not about race, but you can’t compare the two résumés and say [Chizik] deserved the job. Out of all the coaches they interviewed, Chizik probably had the worst résumé.” Barkley also stated: “I told him you can’t not take the job because of racism. [Turner] was worried about being nothing more than a token interview. [Turner] was concerned about having a white wife. It’s just very disappointing to me.”⁵

The Auburn controversy has focused a spotlight on the issue of minority hiring within collegiate sports. Now the choice is up to the NCAA whether it will choose to remedy this situation on its own prerogative or whether it will be forced to do so by the courts.

Self-Regulation and Non-Litigious Means

Collegiate and professional sports have often mirrored each other both on and off the field. For example, NCAA Division I-A football and the NFL often adopt the ideas, policies, and on-field rules of each other’s respective organizations. Instant replay is one example of an on-field policy that was initially adopted by the NFL in 1986⁶ (and fully implemented in 1997)⁷ that the NCAA then also later adopted in 2006.⁸

One rule that has not been implemented by the NCAA, but that exists in the NFL, is the Rooney Rule, enacted in 2002.⁹ The Rooney Rule was named after the owner of the Pittsburgh Steelers, Dan Rooney, who chaired the NFL Committee on Workplace Diversity and helped formulate a policy that any NFL club seeking to hire a head coach must interview one or more minority applicants for the vacant position.¹⁰ The fact that today, approximately one-fourth of all NFL teams have minority head coaches, can arguably be attributed directly to the NFL’s implementation of the Rooney Rule. Conversely, in collegiate athletics, which lacks a

functional counterpart to the Rooney Rule, approximately only four percent of NCAA football programs have African-American coaches.¹¹

As a result of the apparent disparity in minority hiring between the NCAA and NFL, it has been argued that the NCAA should also adopt its own version of the Rooney Rule. Furthermore, if the NCAA or its member institutions could not be persuaded to enact such a rule on their own accord, litigation through Title VII has been discussed as an avenue of implementing such a policy change.¹² It must be noted that the NCAA has stated publicly it does not believe it can implement a collegiate version of the Rooney Rule because, even though it is a governing body, it cannot instruct its members how to hire.¹³ At a hearing before the House Subcommittee on Commerce, Trade, and Consumer Protection in 2007, Myles Brand, president of the NCAA, stated that

[j]ust as no central authority dictates to American higher education who among all educators and administrators they ought to interview or hire, the colleges and universities will not cede to the NCAA the authority to dictate who to interview or hire in athletics. This is not a challenge that can be managed through Association action in the same way we have done with academic reform. 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.¹⁴

When specifically asked about the implementation of the Rooney Rule, Brand stated that he believed “[s]uch a rule will not work for higher education as a whole, nor can a specific sport be singled out to operate apart from the institution.”¹⁵ More tellingly, Brand indicated that he believes such a rule is not

necessary.¹⁶ Although Mr. Brand cited his work with the Black Coaches Association (BCA) in helping them design the Minority Hiring Report Card that grades and publicizes the results of interview and hiring efforts in Division I,¹⁷ it is clear that little progress has been made to date.

Directly suing a university may not only bring more attention to the issue of minority hiring than just the Minority Hiring Report Card, but may also spur the NCAA or its member universities to enact its own type of Rooney Rule to avoid negative publicity and further litigation.

Accelerating Minority Hiring Through Litigation

Title VII Litigation

Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin.¹⁸ Specifically, Title VII states:

(a) Employer practices

It shall be an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.¹⁹

If an organization wanted to initiate a lawsuit on behalf of minority coaches against an institution based upon a violation of Title VII, a number of requirements must first be met. The organization would have to: (1) establish that it has standing to bring a lawsuit on behalf of the coach (plaintiff);²⁰ (2) if applicable, achieve certification as "class"; (3) establish that plaintiff is a member of a protected group/class; (4) prove that plaintiff was qualified for the position; (5) demonstrate that plaintiff suffered

an adverse employment action; and (6) prove that the adverse employment action occurred under circumstances that give rise to an inference of discrimination.²¹

In the context of federal court litigation, standing is the basic legal requirement that determines whether an individual or class of individuals is a "proper party to request an adjudication of a particular issue."²² Specifically, the courts have stated that to establish standing, a party must prove

(1) that the plaintiffs have suffered an injury in fact—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.²³

The racial bias must originate from a decision-maker, and race must have had a role in the employer's decision-making process and a determinative influence on the hiring decision.

Courts have held that "[o]nly someone who claims he has been, or is likely to be, harmed by [an] ongoing discriminatory practice has an adequate stake in the litigation to satisfy the "case or controversy" requirement of Article III.²⁴ "If [a] named plaintiff lacks standing to sue, he cannot prosecute the pattern or practice claim, and unless an employee who has been, or is likely to be, harmed by the discriminatory practice is substituted as the named plaintiff, the claim fails."²⁵

If an organization wanted to bring a lawsuit on behalf of minority coaches who were denied interview opportunities or otherwise denied coaching positions, it would also have to seek class certification. In order to establish a "class" of litigants, the law requires that there exist numerosity, commonality, typicality, and that adequacy are satisfied so that relief is appropriate for the class as a whole.²⁶ A class of minority coaches could fulfill the requirement for class certification, since there are a number of qualified minority coaching candidates and the basis of their claim could fall under the rubric of discrimination and Title VII. However, the difficulty would be in establishing a class of minority coaches that faced commonality of circumstances with regard to the alleged hiring practices of a university.

The next set of elements—(1) that plaintiff is a member of a protected class; (2) that plaintiff was qualified for the position; and (3) that plaintiff suffered an adverse employment action—would not be difficult to establish. First, race is a protected class. Therefore, an African-American coach who was denied a head coaching position will fall under the definition of a protected class.²⁷ Second, a minority coach can often cite his prior coaching experience to prove that he was qualified for the head coaching position at issue. Finally, failing to be hired will suffice as an "adverse employment action."

The thorniest issue to be resolved for both educational institutions and any coach who believes that he was discriminated against is the issue of proving such discrimination. In a Title VII action, the plaintiff has the burden of establishing the case of racial discrimination.²⁸

The Supreme Court has cited two methods of analysis under a Title VII lawsuit: (1) the pre-text analysis;²⁹ and (2) the mixed-motive method.³⁰ Under a pre-text analysis, plaintiff carries the initial burden of establishing a prima facie case of racial discrimination. In *McDonnell Douglas Corp. v. Green*, the Supreme Court set forth a model for resolving claims of intentional discrimination where there is no direct evidence of discriminatory intent. The Court stated that plaintiff could establish a prima facie case of racial discrimination by

showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.³¹

The Court added that “[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” Plaintiff must then establish that the reason offered by the employer was merely a pretext for an employer’s discriminatory hiring practices.³²

According to the Court, one method of establishing that an employer’s reason was merely pretext for its racially discriminatory decision would be to establish that “whites engaging in similar illegal activity were retained or hired by petitioner.”³³ The Court also added that other relevant evidence in establishing pretext could include facts that an employer had followed a discriminatory policy toward minority employees. Finally, the Court stated that “statistics as to [an employer’s] employment policy and practice may be helpful to a determination of whether [an employer’s] refusal to rehire [plaintiff] in this case conformed to a general pattern of discrimination against blacks.”³⁴

“Under the mixed-motive method, a plaintiff must present sufficient evidence, direct or circumstantial, that, despite the existence of legitimate, nondiscriminatory reasons for the adverse employment action, an illegal factor (i.e., race) was a motivating factor in that decision.”³⁵ A party does not have to establish that race was the only motivating factor, only that race did play a motivating part.³⁶ In addition, the racial bias must originate from a decision-maker, and race must have had a role in the employer’s decision-making process and a determinative influence on the hiring decision.³⁷ However, it must be noted that standing alone, a deviation from an institution’s policy does not establish discriminatory intent.³⁸

Conclusion

When all of the legal tests and factors are viewed together, it becomes clear that the burden for a party or an individual attempting to bring litigation against the NCAA or an educational institution regarding the disparity in minority coaching hires is steep, and a potential plaintiff faces significant evidentiary challenges. An organization would have to find a minority coach that was clearly discriminated against by an educational institution and then attempt to find some direct or circumstantial evidence of discriminatory intent. In addition, statistical imbalances, although very real and prevalent, may not prove to be decisive in proving a case of minority hiring discrimination.

Unlike professional sports leagues, such as the NFL, the government could not force the NCAA to pass regulations by threatening to withdraw an entity’s anti-trust exemption. Additionally, the NCAA does not even have the authority to tell its members how they should hire. However, similar to the NFL, the threat of litigation and the related negative publicity could spur universities to self-regulate by instituting their own version of the Rooney Rule. ■

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Endnotes

1. <http://sports.espn.go.com/ncf/news/story?id=3780386>
2. <http://sports.espn.go.com/ncf/news/story?id=3770769>
3. <http://auburntigers.cstv.com/sports/m-footbl/spec-rel/121308aab.html>
4. <http://sports.espn.go.com/ncf/news/story?id=3770769>
5. *Id.*
6. www.nfl.com/history/chronology/1981-1990
7. www.nfl.com/history/chronology/1991-2000

8. www.ncaa.org/wps/ncaa?ContentID=4802
9. www.nfl.info/nflmedia/News/2002News/NFLDiversityProgram.htm
10. *Id.*
11. <http://sports.espn.go.com/ncf/news/story?id=3780386>
12. *Id.*
13. *Id.*
14. www.ncaa.org/wps/ncaa?ContentID=3303
15. *Id.*
16. *Id.*
17. *Id.*
18. www.eeoc.gov/policy/vii.html
19. 42 U.S.C.A. § 2000e-2
20. *Bennett v. Spear*, 520 U.S. 154 (1997); *Murray v. U.S. Bank Trust Nat. Ass’n*, 365 F.3d 1284 (11th Cir. 2004). *See also* *Hall v. Alabama Ass’n of School Boards*, 326 F.3d 1157 (11th Cir. 2003) and *Cotter v. City of Boston*, 323 F.3d 160 (1st Cir. 2003).
21. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).
22. *Flast v. Cohen*, 392 U.S. 83 (1968) states “The ‘gist of the question of standing’ is whether the party seeking relief has ‘alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions’” (citing *Baker v. Carr*, 369 U.S. 186 (1962)). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.
23. *Bennett v. Spear*, 520 U.S. 154, 167 (1997) citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).
24. *Flast v. Cohen*, 392 U.S. 83, 99–101 (1968) (internal citation omitted).
25. *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955 (11th Cir. 2008).
26. *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, FN 20 955 (11th Cir. 2008); and *Fed.R.Civ.P. 23(a)*, which states that “One or more members of a class may sue or be sued as representative parties on behalf of all only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

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way to bridge divides and create coalitions for change. Additionally, diversity groups could judge and work with their local mock trial and moot court teams both at the high school and college levels. This form of outreach is yet another way to be involved in the community in a positive way.

While affinity group meetings are important, different groups could consider periodic joint meetings to increase dialogue and understanding. Small steps such as this could go a long way to moving beyond the issues that divide us. If one affinity group hosts an event—whether it is within the firm or the community—other groups could show their support by attending. Groups could co-sponsor speakers, events, and social outings. Attorneys should follow the lead of law student diversity groups that often pair together to sponsor events on campus. Much of the outreach that occurs between diversity groups at the law-school level gets lost once graduating students start practicing law.

Often, a platform of many diversity groups is to increase outreach within the community, and by joining forces with different groups, great strides can be made in volunteer efforts that impact the larger community. Diversity groups could work together on important community service projects or pro bono work. Service projects within the community serve the valuable purpose of helping the community and also provide

an opportunity for coalition building between different diversity groups. A community service project sponsored by affinity groups could also be opened up to everyone as a mechanism to encourage greater involvement.

Finally, building bridges between different diversity groups also provides the opportunity for mentoring relationships. Especially at firms where diversity may be lacking, a diverse attorney may find a mentor in another group that he or she may not have been exposed to otherwise. Mentoring is important to all attorneys, and coalition building increases the opportunity for mentoring relationships to form. This idea applies to diversity groups in the community outside law firms. Networking and mentoring across groups within and outside the firm can be a valuable way to find mentors that you may not find within the firm.

Ultimately, the more coalitions that can be built and the more understanding that is gained between and within diversity groups, the more likely change is to occur. Once coalitions between diversity groups are solidified, the process of reaching out beyond diversity groups must begin. Non-diverse attorneys have a significant role to play in diversity initiatives because they are in the majority. Building upon relationships forged by diversity coalitions is the first step to building longer and wider bridges between all different groups. By fostering coalitions, diversity groups can also reach out to

non-diverse attorneys to increase dialogue and work together to try to reach diversity goals. ■

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Endnotes

1. Virginia G. Essandoh, *The Legal Intel- ligencer*, Oct. 23, 2008, www.law.com/jsp/nlj/ PubArticleNLJ.jsp?id=1202425493943.
2. *Id.*
3. Eric V. Hall, *Know the Risks Before Developing an Affinity for Affinity Groups*, 6/1/2007, www.rothgerber.com/showarticle. asp?Show=872.
4. The terms affinity group and diversity group are used interchangeably.
5. Victor R. Romero, *Rethinking Minor- ity Coalition Building: Valuing Self-Sacrifice, Stewardship and Anti-Subordination*, 50 VILL. L. REV. 823, 823 (2005).
6. Mari J. Matsuda, *Besides My Sister, Facing the Enemy Out of Coalition*, 43 STAN L. REV. 1183, 1888 (1990–1991).
7. *Id.* at 1990.
8. *Id.* at 1191.
9. Trina Grillo and Stephanie M. Wild- man, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism*, 1991 DUKE L.J. 397, 404.
10. *Id.* at 404.
11. *Id.*
12. www.urbandebate.org/quickfacts. shtml.
13. *Id.*

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(4) the representative parties will fairly and adequately protect the interests of the class.”

27. *Johnson v. St. Luke's Hosp.*, 2007 WL 3119845 (E.D.Pa., Oct. 23, 2007). *See generally* Title VII.

28. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

29. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Ward v. City of North Myrtle*

Beach, 457 F.Supp.2d 625 (D.S.C. 2006).

30. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *See also Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (4th Cir. 2004).

31. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973)

32. *Id.*

33. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973) citing *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970); *Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co.*

34. *Id.*

35. *Ward v. City of North Myrtle Beach*, 457 F.Supp.2d 625 (D.S.C. 2006) citing *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

36. *Id.*

37. *See generally Ward v. City of North Myrtle Beach*, 457 F.Supp.2d 625 (D.S.C. 2006) citing *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004).

38. *Mitchell v. USBI Co.*, 186 F.3d 1352, 1355–56 (11th Cir. 1999).