

# The Waiting Game: Examining Labor Law and Reasons Why the WNBA Needs to Change Its Age/Education Policy

Jessica L. Hendrick

Follow this and additional works at: <http://scholarship.law.marquette.edu/sportslaw>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Labor and Employment Law Commons](#)

---

### Repository Citation

Jessica L. Hendrick, *The Waiting Game: Examining Labor Law and Reasons Why the WNBA Needs to Change Its Age/Education Policy*, 27 Marq. Sports L. Rev. 521 (2017)  
Available at: <http://scholarship.law.marquette.edu/sportslaw/vol27/iss2/12>

This Comment is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

# THE WAITING GAME: EXAMINING LABOR LAW AND REASONS WHY THE WNBA NEEDS TO CHANGE ITS AGE/EDUCATION POLICY

JESSICA L. HENDRICK\*

## I. INTRODUCTION

The 2015 Women's National Basketball Association (WNBA) draft started with an expected, but somewhat controversial, selection of Notre Dame University star junior guard, Jewell Loyd, as the number one overall pick.<sup>1</sup> The controversy stems from Loyd's decision to forgo her final year of eligibility and enter the draft early due to her age (twenty-two years old). Her coach, Muffet McGraw commented, "I think it's a really bad decision for women, especially to try to leave early. They're not making the money that the men make."<sup>2</sup> This kind of reception greatly differs from the men's side in which the first three picks of the 2015 National Basketball Association (NBA) draft were all freshmen (Karl-Anthony Towns, D'Angelo Russell, and Jahlil Okafor).<sup>3</sup> Why should a highly qualified female athlete have to wait four years or until the age of twenty-two to enter the WNBA draft while male athletes are often encouraged and occasionally expected to leave after only playing one year? The disparity in the reception towards Loyd's draft compared to D'Angelo Russell or Jahlil Okafor's draft illustrates the difference between how female college athletes are viewed compared to their male counterparts.

---

\* Jessica L. Hendrick is a J.D. Candidate at Marquette University Law School and the Articles & Research Editor of the *Marquette Sports Law Review*. She attended the University of Virginia and received a B.A. in History and in Women, Gender & Sexuality.

1. *Notre Dame's Jewell Loyd Declares for WNBA Draft*, USA TODAY (Apr. 9, 2015), <http://www.usatoday.com/story/sports/ncaaw/2015/04/08/ap-newsbreak-jewell-loyd-declares-for-wnba-draft/25494797/>.

2. Kate Fagan, *Why Jewell Loyd Leaving ND Early Is a Good Thing*, ESPN (Apr. 16, 2015), [http://espn.go.com/wnba/story/\\_/id/12699118/why-jewell-loyd-leaving-nd-early-good-thing](http://espn.go.com/wnba/story/_/id/12699118/why-jewell-loyd-leaving-nd-early-good-thing).

3. Eric Stephen, *NBA Draft 2015: Pick-by-Pick Results*, SBNATION (June 26, 2015), <http://www.sbnation.com/nba/2015/6/25/8847849/nba-draft-2015-results-pick-by-pick>.

This Comment will examine whether the WNBA's Age/Education Policy conflicts with labor law under the National Labor Relations Act (NLRA) and suggests the league should modify its policy to allow for a younger entry age or a less demanding education requirement. To begin analyzing these issues, Part II will detail the history of the WNBA and its connection to the NBA. Part III will explore collective bargaining agreements (CBAs) and Age/Education

Policies from the WNBA, the National Football League (NFL), and the NBA; and will discuss the litigation brought by players to contest the league's respective rules. Part IV will then consider labor law and the legal steps a female college basketball player would need to take to establish a legal claim against the WNBA. After considering the legal possibilities, Part V will explain why the WNBA should change its policy due to larger social implications and some of the potential positive effects of a new policy. Finally, Part VI will offer conclusive comments on the WNBA's Age/Education Policy and the hope that one day female athletes will receive equitable treatment.

## II. BACKGROUND OF THE WNBA

### A. *In the Beginning*

Although the WNBA is the most recognizable women's professional basketball league, it was not the first. In the 1970s two leagues appeared, the Ladies Professional Basketball Association and the Women's Professional Basketball League, but both failed by 1981.<sup>4</sup> In the early 1990s, a few small regional leagues appeared, but all had trouble drawing crowds.<sup>5</sup> The next national league formed in 1992 and was called the American Basketball League (ABL).<sup>6</sup> This league planned to have eight teams and a forty-game season running from October to February, but as it was on the verge of starting in

---

4. Marc Edelman & C. Keith Harrison, *Analyzing the WNBA's Mandatory Age/Education Policy from a Legal, Cultural, and Ethical Perspective: Women, Men and the Professional Sports Landscape*, 3 NW. J.L. & SOC. POL'Y 1, 4 (2008).

5. *Id.* at 5. These leagues included the Women's Sports Association Professional Basketball League (WSAPL), the Women's World Basketball Association (WWBA), and the Liberty Basketball Association (LBA). *Id.* These leagues thought staying regional would help lower costs; however, they all folded soon after forming. The LBA tried to draw crowds by lowering the hoops to allow players to dunk and having the players wear spandex uniforms, but to no avail. *See id.* (citing Ailene Voisin, *Women's League Planning Comeback*, ATLANTA J.-CONST., Apr. 2, 1993, at E13).

6. *Id.*

1995, the NBA announced it would sponsor its own separate women's league.<sup>7</sup>

In 1996, David Stern, the then NBA Commissioner, announced the start of the league right before the U.S. Women's Basketball team won the gold medal at the Atlanta Olympics.<sup>8</sup> During its inaugural season, the league had eight teams and attracted top players such as Sheryl Swoopes, Rebecca Lobo, and Lisa Leslie.<sup>9</sup> From the beginning, however, the WNBA had better standing than the ABL; and it was only a matter of time before the ABL folded in 1998, and subsequently filed for bankruptcy.<sup>10</sup> Even though the WNBA paid players less than the ABL, the athletes saw a brighter future with the WNBA due to its connections with the NBA.<sup>11</sup>

The NBA structured the WNBA in such a way that it could maintain longevity and keep costs low.<sup>12</sup> To help with this, the NBA created the WNBA as a single-entity completely owned by the NBA, with some NBA teams

choosing to operate individual WNBA teams.<sup>13</sup> To keep costs low, the NBA: Assigned players to the league (not to a team); excluded the option of free agency; kept salaries low (few players made six-figure salaries and some barely made over \$50,000); limited staff by using those who worked for NBA teams; used existing facilities owned by NBA teams; and used the pre-existing NBA marketing and branding strategies.<sup>14</sup> These low-cost strategies, along with the backing of the NBA, allowed for the WNBA to overcome the initial burdens that new professional leagues face.<sup>15</sup> However, it was not until 1998, after the WNBA had completed two seasons, did it establish a player's union (the Women's National Basketball Players Association (WNBPA)) and a CBA,<sup>16</sup> which seems odd since the NBA has had both since the 1950s.<sup>17</sup>

---

7. *Id.* at 5–6.

8. Jacquelyn L. Bridgeman, "We Got Next": *The Once and Future WNBA*, in LEGAL ISSUES IN AMERICAN BASKETBALL 219, 228–29 (Lewis Kurlantzick ed., 2011).

9. See *WNBA History/Timeline*, WNBA, [http://www.wnba.com/archive/wnba/about\\_us/wnba\\_history\\_timeline\\_2012\\_04\\_30.html](http://www.wnba.com/archive/wnba/about_us/wnba_history_timeline_2012_04_30.html) (last visited May 15, 2017).

10. Edelman & Harrison, *supra* note 4, at 8–9.

11. *Id.* at 7–9.

12. Bridgeman, *supra* note 8, at 229–30.

13. *Id.* at 230.

14. *Id.* at 230–31.

15. *Id.* at 232–33.

16. Edelman & Harrison, *supra* note 4, at 9–10. See generally *About the WNBPA*, WNBPA, <http://wnbpa.com/about/> (last visited May 15, 2017).

17. See *About & History*, NBPA, <http://nbpa.com/about/> (last visited May 15, 2017).

### B. *Turning Point*

For the first few years, the league appeared to handle the challenges of being a new professional league and benefitted from the connection with the NBA. But in 2002, the WNBA decided—and needed to—make a significant change. At this point in time, the league had completed its sixth season but faced

decreasing attendance and viewership.<sup>18</sup> Additionally, WNBA players started to fight against the CBA, their main demands included: Increase salaries since they made significantly less than their male counterparts; altering the terms relating to free agency; and raising the salary cap.<sup>19</sup> This led the NBA to restructure the WNBA to the mixed-mode format, which is the model used by the NBA, the NHL, the NFL, and MLB.<sup>20</sup> The structural change allowed for vast league changes, such as allowing the stronger teams to retain more of their profits, and removing the obligation of NBA teams to subsidize a women's team.<sup>21</sup> Additionally, the new model gave greater opportunity for new owners with legitimate interests to own a team, and gave teams the ability to change locations to areas like Connecticut and Tennessee that have stronger ties to women's college basketball.<sup>22</sup>

These changes, which were adopted in the 2003–2006 CBA, modestly increased the average player's salary, increased the salary cap, and altered the terms of free agency.<sup>23</sup> Since the 2003–2006 CBA, only slight alterations have been made to the CBA. The most recent CBA between the WNBA and the WNBPA was agreed upon in 2014 and lasts until 2021, with the main changes relating to improving salaries, increasing roster spots to twelve, and trying to balance players that travel to play overseas in the off-season.<sup>24</sup> Based on these recent changes, one can see how the WNBA is balancing the changing atmosphere of women's professional basketball by adjusting to the needs of the players (especially those who play year-round) while also ensuring the

---

18. See Bridgeman, *supra* note 8, at 233–34.

19. *Id.*

20. *Id.* at 234.

21. *Id.*

22. *Id.* at 234–35.

23. *Id.* at 235.

24. See Nate Parham, *WNBA's New Collective Bargaining Agreement Reflects Owners' Interest in Limiting Offseason Play in Foreign Leagues*, SWISH APPEAL (Mar. 10, 2014), <http://www.swishappeal.com/2014/3/10/5485828/wnba-collective-bargaining-agreement-time-off-bonus>. See generally WNBA COLLECTIVE BARGAINING AGREEMENT (2014), <http://wnbpa-uploads.s3.amazonaws.com/docs/WNBA%20CBA%202014-2021Final.pdf> [hereinafter WNBA CBA].

league's survival, which could indicate a willingness to update some rules to better maintain the league's reputation.

### III. LEAGUE CBAS AND THE AGE/EDUCATION POLICIES

The WNBA's CBA has a section titled "Player Eligibility and WNBA Draft,"<sup>25</sup> which details when a player can enter the draft. This policy states a player can enter the draft if she:

- (i) [W]ill be at least *twenty-two (22) years old* during the calendar year in which such Draft is held and she either has no remaining intercollegiate eligibility or renounces her remaining intercollegiate eligibility by written notice to the WNBA at least ten (10) days prior to such draft; (ii) *[H]as graduated from a four-year college or university* prior to such Draft, or "is to graduate" from such college or university within the three (3)-month period following such Draft and she either has no remaining intercollegiate eligibility or renounces her remaining intercollegiate eligibility by written notice to the WNBA at least ten (10) days prior to such Draft . . . .<sup>26</sup>

The section goes on to state that a player can be eligible for the draft if her college class is about to graduate or has graduated, and international players (who can be amateur or professional) can enter if they are born and reside outside the United States and are at least twenty years old.<sup>27</sup> The two main ways a player enters the WNBA Draft are graduating from college or being twenty-two years old. These requirements greatly differ from the male professional leagues. For example, the NBA requires a player to be at least nineteen years old, to have at least one NBA Season elapsed since the player graduated from high school, and to notify the NBA that he will be an "Early Entry" to the draft.<sup>28</sup> As for the NFL, its policy states that a player will be eligible for the draft only if three NFL seasons pass after the player's high

---

25. WNBA CBA, *supra* note 24, art. XIII, § 1(b)(i)–(ii).

26. *Id.*

27. *Id.* art. XIII, §§ 1(b)(iii), (d)–(e).

28. NBA COLLECTIVE BARGAINING AGREEMENT art. X, § 1(b)(i)–(ii)(F) (2017), <http://3c90sm37lsaecdwtr32v9qof.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf>.

school graduation.<sup>29</sup>

Although the WNBA's policy is inspiring, since most of the female college basketball players enter the draft after graduating, there is something unsettling with the notion that women are forced to continue education while men are not. Compared to the NBA and NFL policies, the WNBA's policy is more extensive and demanding of the athlete. A female college basketball player—upset over her inability to enter the WNBA prior to graduation—would only need to look towards the legal history of Age/Education Policies lawsuits against the NBA and the NFL to see how courts have decided cases challenging these policies.

#### A. *Evolution of Current Age/Education Policies*

Some may not know the extent of the history and development of CBAs, professional leagues, and Age/Education Policies. Versions of the policy range from an unspoken agreement among club owners to becoming formalized rules in a league's CBA.<sup>30</sup> The main reasons why there is so much resistance from college players regarding an Age/Education Policy are the increased possibility of getting injured while playing in college (especially a career-ending injury)<sup>31</sup> and the loss of possible future earnings upon entering the draft and the league.<sup>32</sup> These two motivating factors are the same for male and female college athletes, with the main difference being that men make more money and have less restrictive Age/Education rules to overcome. Much of this does relate to the history and longevity of the NFL and the NBA, which allowed their policies to evolve over time to a somewhat acceptable middle ground.

The NFL's Age/Education Policy (Age/Education Policy) started from a general agreement among club owners not to recruit players that had yet to

---

29. NFL COLLECTIVE BARGAINING AGREEMENT art. VI, § 2(b) (2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

30. See generally Marc Edelman & Joseph A. Wacker, *Collectively Bargained Age/Education Requirements: A Source of Antitrust Risk for Sports Club-Owners or Labor Risk for Players Unions?*, 115 PENN ST. L. REV. 341 (2010).

31. For example, former Virginia Commonwealth University (VCU) point guard, Briante Weber, suffered a season ending injury when he torn his ACL and MCL, causing him to miss the rest of his senior season and drastically impacted his ability to enter the 2015 draft healthy. See Brandon Di Perno, *Former VCU Guard, Briante Weber Fails Physical at Heat Camp*, HOT HOT HOOPS (Sept. 11, 2015), <http://www.hothoohoops.com/2015/9/11/9313205/former-vcu-guard-briante-webber-fails-physical-at-miami-heat-camp-nba-virginia-university>; see also N. Jeremi Duru, *Hoop Dreams Deferred: The WNBA, the NBA, and the Long-Standing Gender Inequity at the Game's Highest Level*, 2015 UTAH L. REV. 559, 577–80.

32. See Duru, *supra* note 31, at 577–85.

graduate from college.<sup>33</sup> But this unspoken policy was not always followed, and in 1926, the team owners ratified a bylaw that forbade them from enticing college players to play professionally.<sup>34</sup> At first the club-owners enforced the policy, but in 1935 this became the responsibility of the NFL Commissioner to enforce.<sup>35</sup> From 1926 to 1989, the Age/Education Policy did not change, but two commissioners—Pete Rozelle and Paul Tagliabue—each exercised their power and allowed one player to enter the league early.<sup>36</sup> The first player (Andy Livingston) was allowed to enter the league early because he impregnated his high school girlfriend and dropped out of school to support his family.<sup>37</sup> The other player, Barry Sanders, submitted a fourteen-page petition stating he had the requisite athletic ability (Sanders had just won the Heisman Trophy), he needed the money due to his family's economic status, and he was playing at a university facing sanctions, which would limit his television exposure.<sup>38</sup>

Because of these two exceptions, in 1990 there was a staggering forty petitions from college players requesting the NFL Commissioner (at the time Paul Tagliabue) give them some kind of exemption from the Age/Education Policy to enter the draft early.<sup>39</sup>

Out of concern for a possible antitrust lawsuit, Commissioner Tagliabue, along with the club owners, agreed to change the Age/Education Policy to allow college juniors to enter the draft.<sup>40</sup> Even with the policy changes, players still submitted requests to the NFL Commissioner for an exemption; for example, Maurice Claret, who in 2004 brought an antitrust lawsuit against the NFL.<sup>41</sup> Before 2006, the policy was not part of the CBA, but was a bylaw enforced by the NFL. One could interpret the absence of this policy in the NFL's CBA as an issue that players were not too concerned with, but worried the league, which was why the Commissioner was in charge of monitoring and enforcing it. Thus, one could conclude that current players are not concerned with or bothered by the policy—indicating they may not be actively trying to change the rule during negotiations—but the league is the one that is directing

---

33. See Edelman & Wacker, *supra* note 30, at 343–44.

34. *Id.* at 346.

35. *Id.* at 346–47.

36. *Id.* at 347.

37. *Id.*

38. *Id.*

39. *Id.* at 347–48.

40. *Id.* at 348.

41. *Id.* at 349–53.

the policy's direction and preventing any kind of change if the issue is ever discussed.

The NBA has a similar history when it comes to its Age/Education Policy. Its policy dates back to 1969, but some say the inception date was actually 1949.<sup>42</sup> Although it initially stated that players were not eligible unless they were four years out of high school, the rule changed due to a lawsuit brought by Spencer Haywood in 1971. After the case, the NBA altered its policy similar to that of the NFL's in which players could file a petition asking for early entry into the draft.<sup>43</sup> However, this policy did not last long, and in 1976, the NBA completely abandoned an Age/Education Policy.<sup>44</sup>

Due to the lack of an Age/Education Policy, the NBA allowed high school seniors and college players from any year to enter the draft.<sup>45</sup> It soon became commonplace for high school seniors and college freshmen to be picked early in the draft selections.<sup>46</sup> In 2005, the NBA and the National Basketball Player Association re-implemented an Age/Education Policy in the CBA, stating that a player can enter the draft if he is at least nineteen years old and has waited one NBA season since his high school graduation.<sup>47</sup> The 2011–2021 CBA still implements this one-year rule, meaning most players attend college for one year, commonly referred to as one-and-done, while a few players elect to go overseas for that one year to start making money. The major issue stemming from the NBA's policy is the impact it has on college basketball because it makes it more difficult for college teams to develop a program around a solid team since key players plan to leave after playing for only one year.<sup>48</sup>

As for the WNBA, the league has the same policy in place since its inception due to its close ties with the NBA,<sup>49</sup> and it was officially put in the 1999 CBA.<sup>50</sup> During this time, there were quality players that had graduated college and were readily available to play in the league, as proven by the U.S. Women's Team performance in the 1996 Atlanta Olympics. This arguably made

---

42. *Id.* at 354.

43. *Id.* at 355–56.

44. *Id.*

45. *Id.* at 356–57.

46. *Id.* at 357–58.

47. *See id.* at 359. *See also NBA Collective Bargaining Agreement Ratified and Signed*, NBA (July 30, 2005), [http://www.nba.com/news/CBA\\_050730.html](http://www.nba.com/news/CBA_050730.html).

48. *See* Dylan Hernandez, *College Basketball's So-Called One-and-Done Rule Needs Revisiting*, L.A. TIMES (Mar. 24, 2016), <http://www.latimes.com/sports/la-sp-college-one-and-done-hernandez-20160324-story.html>.

49. *See* Duru, *supra* note 31, at 575–76.

50. *Id.*

college players less attractive to professional teams since there were great, mature players readily available. Also, since the WNBA was such a new league, it was a huge risk for a college player to give up her education on what was a small chance of being drafted. There appears to be no concern with the effects of this rule on the WNBA, as shown by each CBA allowing for the rule to remain unchanged. It can be argued the Age/Education Policy is a hindrance to the development and growth of the WNBA and should be changed, either by a college player bringing a lawsuit or by a change made to the CBA by the WNBPA and the WNBA.

*B. Legal Precedent Relating to Age/Education Policies*

The two controlling areas of law related to the Age/Education Policy are antitrust law and labor law. Antitrust law and labor law are not mutually exclusive and courts have discussed the two in conjunction when faced with this policy. The overlap between these areas of law is the Clayton Act and Norris-LaGuardia Act.<sup>51</sup> Although the two are interrelated, male athletes have brought antitrust lawsuits about the Age/Education Policy against professional leagues since the 1970s.<sup>52</sup> The NFL and the NBA are the main professional leagues that appear to have a long, tumultuous history of dealing with disputes over such a policy. Most of the arguments used to combat an Age/Education Policy have been the same regardless of the sport or league. The players' main concerns are the possibility of getting injured and the desire to make money while at the early stages of their athletic careers, compared to the league and Players Association that are focused on creating a good, mature product.<sup>53</sup> These cases are influential in demonstrating how courts approach an Age/Education Policy claim.

The following cases mainly focus on an antitrust analysis in which a court applies either the per se analysis, the Rule of Reason analysis, or the quick-look Rule of Reason analysis (also known as the quick-look test). The kind of conduct in question influences which test a court uses. If the action is per se

---

51. Clayton Act, 15 U.S.C. § 17 (2016); Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, 113 (2016).

52. *See, e.g.*, Clarett v. NFL, 369 F.3d 124 (2d Cir. 2004); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976); Linseman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977); Denver Rockets v. All-Pro Mgmt. Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

53. *See* Nitin Sharma, *An Antitrust and Public Policy Analysis of the NBA's Age/Education Policy: At Least One Road Leads to Rome*, 7 RUTGERS J.L. & PUB. POL'Y 481, 485–86 (2010).

illegal, such as a group boycott or horizontal restraints on trade, a court will apply the per se test.<sup>54</sup> For the quick-look test, courts mainly consider if there are any reasonable procompetitive economic justifications for the restraint on trade, and if not, then the anticompetitive effects outweigh the procompetitive justifications, which is a violation of the Sherman Act.<sup>55</sup> The Rule of Reason analysis focuses on “whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary.”<sup>56</sup>

In order to exempt a CBA provision from antitrust laws, the subject matter must fall under the non-statutory labor exemption. This exemption precludes an antitrust challenge to the CBA, and in effect strengthens the ability of labor parties, such as Players Associations, to unionize and bargain over player wages and working conditions.<sup>57</sup> Thus, when a court is faced with a sports antitrust lawsuit questioning the validity of a CBA’s policy, the court will discuss labor law to determine if the policy in question is exempt.

One of the first cases that brought the issue of an Age/Education Policy to the forefront was *Denver Rockets v. All-Pro Management Inc.*, a 1971 case brought by Spencer Haywood.<sup>58</sup> At the time Haywood was trying to enter the league the NBA’s policy stated that a player had to be at least four years removed from high school to be eligible—at the time he was only two years removed.<sup>59</sup> Haywood had played at a community college, transferred to a university, and signed with the Denver Rockets of the American Basketball Association (ABA).<sup>60</sup> In an attempt to move to the NBA, Haywood tried to get out of his contract with the ABA, but the NBA’s eligibility rules precluded him from signing with the Seattle Supersonics since he was not four years removed from the time of his high school graduation.<sup>61</sup> Haywood brought his claim against the NBA’s policy, arguing that it violated section 1 of the Sherman Act; the court agreed and entered summary judgment in favor of Haywood.<sup>62</sup>

The court in *Denver Rockets* applied the per se analysis because a group boycott had previously been found to be a complex practice that outweighed

---

54. See Edelman & Harrison, *supra* note 4, at 12–13.

55. See *id.* at 13–14; see also Sharma, *supra* note 53, at 490.

56. *Mackey*, 543 F.2d at 620.

57. MATTHEW J. MITTEN, *SPORTS LAW IN THE UNITED STATES* 121 (2d ed. 2014).

58. *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971).

59. *Id.* at 1055.

60. *Id.* at 1052.

61. *Id.* at 1054.

62. *Id.* at 1066–67.

the benefits from that practice.<sup>63</sup> One of the main arguments the NBA used to justify its Age/Education Policy was the league's desire to give players an "opportunity to complete four years of college prior to beginning his professional basketball career."<sup>64</sup> The court recognized how "commendable this desire may be, [but the] court is not in a position to say that this consideration should override the objective of fostering economic competition which is embodied in the antitrust laws."<sup>65</sup> The result of this case forced the NBA to change its policy to one that allowed college students and high school seniors to enter the league.<sup>66</sup>

The next influential decision came from the Eighth Circuit in 1976. In *Mackey v. NFL*, a class action of former and present NFL players claimed the rule relating to a player's free agency, the Rozelle Rule, made teams hesitate when it came to signing free agents and it also reduced their salaries.<sup>67</sup> In the end, the Eighth Circuit held the rule violated antitrust law due to a lack of arm's-length bargaining over the policy.<sup>68</sup> In order to reach its decision, the court first considered labor law to determine if the Rozelle Rule fell under the non-statutory labor exemption,<sup>69</sup> and then looked to antitrust law to decide whether the rule violated the Sherman Act.<sup>70</sup>

The *Mackey* case is important because the Eighth Circuit, in analyzing the Rozelle Rule, set out three factors to consider if there are competing interests between labor law and antitrust law: (1) Whether the restrictions implemented by the labor policy affect "only the parties to the collective bargaining relationship;" (2) whether the subject-matter of the agreement is a "mandatory subject of collective bargaining;" and (3) whether the restrictions come from an agreement reached at "bona fide arm's-length bargaining."<sup>71</sup> *Mackey* met the first two prongs, but the Eighth Circuit found there was no bona fide bargaining in the NFL's 1968 and 1970 CBAs, and thus was not exempt from antitrust scrutiny.<sup>72</sup> This case set forth the three-part test that has been widely

---

63. *Id.* at 1063 (citing *N. Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958)).

64. *Id.* at 1066.

65. *Id.*

66. See Edelman & Wacker, *supra* note 30, at 354–55.

67. *Mackey v. NFL*, 543 F.2d 606, 609 (8th Cir. 1976).

68. *Id.* at 623.

69. *Id.* at 611.

70. *Id.* at 616.

71. *Id.* at 614. See Andrew M. Jones, *Hold the Mayo: An Analysis of the Validity of the NBA's Stern No Preps to Pros Rule and the Application of the Nonstatutory Exemption*, 26 LOY. L.A. ENT. L. REV. 475, 495 (2006).

72. See *Mackey*, 543 F.2d at 616.

used by courts in sports related cases to determine if the non-statutory labor exemption applies.<sup>73</sup>

A more recent decision relating to the Age/Education Policy comes from the Second Circuit in an opinion delivered by now Supreme Court Justice Sotomayor. In *Clarett v. NFL*, the court found the NFL's Age/Education Policy fell under the non-statutory labor exemption, making the rules a mandatory bargaining topic.<sup>74</sup> Maurice Clarett played for Ohio State University, but was forced to sit out his sophomore season, which increased his desire to enter the NFL Draft.<sup>75</sup> However, the NFL's Age/Education Policy stated a player could only enter the draft if three NFL seasons have passed since the player's high school graduation.<sup>76</sup> Similar to Haywood in *Denver Rockets*, Clarett claimed the rule violated section 1 of the Sherman Act.<sup>77</sup> To combat the argument, the NFL asserted "federal labor law favoring and governing the collective bargaining process precludes the application of the antitrust laws to its eligibility rules."<sup>78</sup>

The Second Circuit noted the Age/Education Policy falls under the non-statutory labor exemption, which protects the National Labor Relations Board's (NLRB) function and ensures the meaningful process of collective bargaining.<sup>79</sup> Clarett argued the NFL's Policy did not fall under the non-statutory labor exemption and that the court should follow the Eight Circuit's decision in *Mackey*.<sup>80</sup> But the Second Circuit did not find *Mackey* to be applicable or controlling in this case, and the court found the eligibility rule to be a mandatory bargaining subject.<sup>81</sup> It viewed the case as "a prospective employee's disagreement with the criteria, established by the employer and labor union, that he must meet in order to be considered for employment."<sup>82</sup> Thus, the Second Circuit reversed the district court's decision and found the Age/Education Policy fell under the non-statutory exemption therefore barring any antitrust claim.<sup>83</sup>

---

73. See Jones, *supra* note 71, at 496.

74. *Clarett v. NFL*, 369 F.3d 124, 139, 143 (2d Cir. 2004).

75. *Id.* at 125–26.

76. *Id.* at 126.

77. *Id.*

78. *Id.* at 130.

79. *Id.* at 131.

80. *Id.* at 133.

81. *Id.* at 133, 139.

82. *Id.* at 143.

83. *Id.*

These cases illustrate how complex and intertwined antitrust and labor law are when it comes to a league's Age/Education Policy in its CBA. A female athlete could bring the same antitrust claims against the WNBA when arguing its policy violates section 1 of the Sherman Act, and would most likely be denied in the same manner as the *Clarett* case. Depending on the circuit, especially whether it is the Second or the Eighth, one of the two tests, i.e., *Clarett* or *Mackey*, will be used to determine the validity of the claim, and the player will likely lose simply based upon precedent.

#### IV. LABOR LAW AND AGE/EDUCATION POLICY

Although a lawsuit claiming an antitrust violation will most likely not be successful for the players, there has yet to be a case brought solely under labor law that challenges a league's Age/Education Policy. Using labor law cases, there is some insight on how a court could approach and analyze a case brought by a female college basketball player against the WNBA.

##### A. Background on Labor Law

The Clayton Act and Norris-LaGuardia Act<sup>84</sup> note that labor unions are not restraints on trades and that certain activities are exempt from antitrust law.<sup>85</sup> Although these acts allow for statutory exemptions, the NLRA, which governs labor law and unions, is most relevant to issues relating to an Age/Education Policy.<sup>86</sup>

The governing source when it comes to labor laws and collective bargaining is the NLRA.<sup>87</sup> The NLRA was created in order to “protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses[,] and the U.S. economy.”<sup>88</sup> Section 7 of the NLRA lists the rights of employees to include the ability to: (1) “[F]orm, join, or assist labor organizations;” (2) “bargain collectively through representatives of their own choosing;” and (3) “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or

---

84. See discussion *supra* Section III.B.

85. See *Mackey v. NFL*, 543 F.2d 606, 611 (8th Cir. 1976).

86. *Id.* at 611–12.

87. National Labor Relations Act, 29 U.S.C. §§ 151–69 (2016). See Kevin W. Brooks, “Physically Ready to Compete”: Can Players’ Unions Bar Potential Draftees Based on Their Age?, 21 *SPORTS LAW. J.* 89, 93 (2014).

88. *National Labor Relations Act*, NLRB, <https://www.nlr.gov/resources/national-labor-relations-act> (last visited May 15, 2017).

protection.”<sup>89</sup> The second element is the one most relevant when it comes to questioning the Players Association and the league’s CBA. Other important NLRA sections that relate to labor unions include: Section 8, which details various forms of unfair labor practices, and section 9, which explains exclusive representation and how elections should be conducted.<sup>90</sup>

To begin an analysis of a female college basketball player’s possible labor law claim, the first step is to recognize the Second Circuit’s decision in *Clarett* that found the Age/Education Policy to be a mandatory bargaining subject and subject to the non-statutory labor exemption—making it exempt from antitrust scrutiny.<sup>91</sup> After understanding that antitrust law is not the proper avenue, the player would need to show the WNBPA breached its duty of fair representation under the NLRA. A player would bring the claim to the NLRB, and would have the ability to appeal the decision to a federal district court.

A labor union only consists of active members in the league, which means college athletes do not have their own representative in the WNBPA and are bound by the CBA.<sup>92</sup> One of the major points of contention in labor law relating to CBAs is whether prospective employees are represented by the union. The NLRA defines “employee” as “any employee” and proceeds to list who falls within the seemingly vague definition.<sup>93</sup> This is a very broad definition that courts have interpreted in different manners.

### B. Legal Discussion

One of the first influential cases in labor law was in 1944. In *Steele v. Louisville & Nashville R.R. Co.*,<sup>94</sup> the Supreme Court noted that those elected to act on behalf of other members have a duty to fairly represent all members.<sup>95</sup> The Supreme Court noted that “the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents.”<sup>96</sup> Additionally, the Supreme Court noted that a labor union has to perform its duty to all those it represents, and is required “to represent non-union or minority union members . .

---

89. 29 U.S.C. § 157.

90. *See id.* §§ 158–159.

91. *See Clarett v. NFL*, 369 F.3d 124, 139, 143 (2d Cir. 2004).

92. MITTEN, *supra* note 57, at 112.

93. 29 U.S.C. § 152(3).

94. 323 U.S. 192 (1944).

95. *Id.* at 202.

96. *Id.*

. without hostile discrimination, fairly, impartially, and in good faith.”<sup>97</sup> The downside of this case is that it specifically dealt only with the Railway Labor Act and did not apply to labor unions under the NLRA.<sup>98</sup> It was not until 1953 that the Supreme Court recognized that the unions under the NLRA owed a duty to fairly represent its members.<sup>99</sup>

In 1953, the Supreme Court in *Ford Motor Co. v. Huffman*<sup>100</sup> formally recognized the duty of fair representation under the NLRA. The Court held that the members in the labor organization represent the employees during negotiation and “is responsible to, and owes complete loyalty to, the interests of all whom it represents,”<sup>101</sup> but acknowledged that “differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees.”<sup>102</sup> This decision granted a “wide range of reasonableness” to the bargaining representative that is “subject always to complete good faith and honesty of purpose” while using his discretion.<sup>103</sup>

These two cases form the framework that subsequent labor law cases followed when considering the duty of fair representation. This duty is breached when the union’s conduct is “arbitrary, discriminatory, or in bad faith.”<sup>104</sup> Therefore, a female college basketball player that attacks the WNBA’s

Age/Education Policy would need to show the WNBPA, which is a union, breached its duty in representing prospective athletes.<sup>105</sup>

A key part of the analysis involves defining who belongs to the union. Some courts are more restrictive in defining who is an employee and what kind of interests they have in the collective bargaining process. In *Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, the Supreme Court held that retired employees fell outside the meaning of “employee,” and the union and employer did not have to collectively bargain

---

97. *Id.* at 204.

98. Brooks, *supra* note 87, at 92–93.

99. *Id.* at 94.

100. 345 U.S. 330 (1953).

101. *Id.* at 338.

102. *Id.*

103. *Id.* See also Brooks, *supra* note 87, at 95.

104. MITTEN, *supra* note 57, at 112 (quoting Peterson v. Kennedy, 771 F.2d 1244, 1253 (9th Cir. 1985)).

105. See Wood v. NBA, 809 F.2d 954, 959–60 (2d Cir. 1987); see also Edelman & Wacker, *supra* note 30, at 367–68.

in a way that benefited retired employees.<sup>106</sup> The significance of this case is to recognize the importance of being deemed an “employee” within the terms of CBA. If someone is not an employee, then the labor union would not have a duty of fair representation to that person, and thus that person’s concern would not be a priority during negotiations. If a female college basketball player did not fall within the meaning of “employee,” the WNBPA would not have to consider that player’s interest when negotiating the CBA.

To combat this opinion, a player could look to a 1965 Fifth Circuit decision in which prospective employees were represented by the labor union.<sup>107</sup> In *NLRB v. Houston Chapter, Associated General Contractors of America, Inc.*, the employers and the labor union discussed the process of hiring new employees, and one of the key factors considered was whether a person was a member or non-member in a labor union.<sup>108</sup> The Fifth Circuit noted that if membership in a union is not compulsory, then the union could not discriminate between members and non-members.<sup>109</sup> Essentially the union had to represent both current and prospective employees,<sup>110</sup> which would be beneficial to a female college basketball player bringing a claim against the WNBPA. The downfall in relation to a player’s claim is the Supreme Court’s decision in *Allied Chemical* is more legally persuasive than the Fifth’s Circuit decision, and would only be persuasive in any kind of legal proceeding.

In order to determine mandatory bargaining subjects, sections 8(a) and 8(d) of the NLRA need to be read in conjunction.<sup>111</sup> The Supreme Court said that in reading these two provisions together, the employer and the labor union are obligated to bargain in good faith regarding “wages, hours, and other terms and conditions of employment.”<sup>112</sup> Additionally, it is the agreement’s practical effort, not its form, that determines if the provision concerns a mandatory

---

106. *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 165 (1971).

107. *NLRB v. Houston Chapter, Associated Gen. Contractors of Am., Inc.*, 349 F.2d 449, 451–52 (5th Cir. 1965). See Edelman & Wacker, *supra* note 30, at 367–68.

108. *Houston Chapter, Associated Gen. Contractors of Am., Inc.*, 349 F.2d at 450–51.

109. *Id.* at 453.

110. See Edelman & Wacker, *supra* note 30, at 368.

111. See *NLRB v. Wooster Div.*, 356 U.S. 342, 348–49 (1958).

112. *Id.* at 349. See Jones, *supra* note 71, at 509.

subject.<sup>113</sup> Typically, when bringing an antitrust claim relating to labor law, the non-statutory labor exemption would apply, and if the policy falls under it, then it would imply an antitrust violation.<sup>114</sup> But if a player were to just bring a labor law claim, then it would seem frivolous to mention the non-statutory labor exemption since it applies mainly to antitrust law claims that relate to mandatory bargaining subjects.<sup>115</sup>

The next step in finding if the Age/Education Policy violates labor law is demonstrating whether the WNBPA breached its duty of fair representation. One of the ways in which to prove a breach of fair representation is to show that the bargaining process was somehow arbitrary.<sup>116</sup> An act is arbitrary “when it simply ignores a meritorious grievance or handles it in a perfunctory manner,” is “without rational basis,” or is “egregious, unfair[,] and unrelated to legitimate union interests.”<sup>117</sup> The main problem with claiming the WNBPA’s conduct is arbitrary is that it refers to a failure to follow rules or the process of the agreement, not the policy itself.<sup>118</sup>

Another way to prove the WNBPA breached its duty of fair representation is to claim it acted in a discriminatory manner. Similar to defining “employee,” determining whether a labor union acts in a discriminatory manner ranges from a narrow to a broad interpretation.<sup>119</sup> The narrow interpretation focuses on the class of employees being discriminated against, specifically if the employees belong to a constitutionally or statutorily protected group.<sup>120</sup> From a narrow view, a prospective player would have very little chance of success since college athletes are not a protected class.

As for the broad view, a female college basketball player may have greater success at bringing a claim by arguing the members in the Players Association want to preserve their position in the league and would do so to the detriment of younger, qualified players.<sup>121</sup> There are positive and negative factors that can sway a court to favoring either the athlete, or the league and the Players

---

113. Mackey v. NFL, 543 F.2d 606, 615 (8th Cir. 1976).

114. *Id.*

115. *See* Jones, *supra* note 71, at 509–10.

116. *See* Edelman & Wacker, *supra* note 30, at 370.

117. Peterson v. Kennedy, 771 F.2d 1244, 1254 (9th Cir. 1985).

118. *Id.* at 1253. *See* Edelman & Wacker, *supra* note 30, at 370.

119. Edelman & Wacker, *supra* note 30, at 371–72.

120. *Id.* at 374.

121. *Id.* at 373.

Association. A key factor would be that the WNBA is the only American women's professional basketball league, and preventing qualified players from entering the league early limits their opportunity to pursue their chosen career.<sup>122</sup> Some of the bigger, better paying international teams want the star WNBA players because the league is one of the best in the world and the U.S. produces quality players. Denying early entry of a standout college player could hurt her internationally and domestically. However, the player's age does not necessarily correlate to salary. Even though rookies are paid less than veteran players, many players get extra money through endorsements based on skill and attraction, not age. Claiming a breach of duty of fair representation due to discrimination under a broad view could be successful, but there are other factors that impact the court's decision that could outweigh this position.

The final option to prove the WNBPA breached its duty is to show that it acted in bad faith when it collectively bargained. This kind of breach is often illustrated by claiming the union was dishonest or had the desire to mislead players.<sup>123</sup> To prove this, a female college basketball player would need evidence of some kind of "backdoor deal" demonstrating the Players Association had bad intentions.<sup>124</sup> This would seem like the best option in trying to show a breach of the duty of fair representation. For example, a female college basketball player could argue the WNBPA financially favors the current players over the rookies and heavily limits the player selection pool because playing four years in college increases the probability of getting injured.<sup>125</sup> A player could also try to show that members of the WNBPA are protecting their interests by maintaining a smaller talent pool and ensuring a certain competitive level by only having older, mature players.<sup>126</sup> However,

---

122. *Id.* at 375 n.235.

123. *See generally id.* at 370; Brooks, *supra* note 87, at 119–20.

124. Edelman & Wacker, *supra* note 30, at 371.

125. *See* Brooks, *supra* note 87, at 119–20.

126. This is asserting that veteran players could be concerned about being replaced by younger players and their overall longevity in the league if younger players could replace them. Additionally, with not every available college player going to the WNBA, teams can maintain the same roster for a number of years thus enhancing team chemistry and the chances of winning the league championship. For example, the Los Angeles Sparks won the 2016 WNBA Championship, and the team only has two rookies and two players with one-year experience. *See Roster*, L.A. SPARKS, <http://sparks.wnba.com/roster/> (last visited May 15, 2017). Similarly, the Minnesota Lynx, the team that lost to the Sparks in 2016 Finals, has only one rookie. *See Roster*, MINN. LYNX, <http://lynx.wnba.com/roster/> (last visited May 15, 2017). Both teams have strong veteran foundations that have made them top contenders over the recent years.

this could be hard to prove because it is an understood part of labor unions that not all members will be completely satisfied with all the terms.<sup>127</sup>

A major hindrance to a claim against a league's Age/Education Policy is the fact that younger people are not protected under the Age Discrimination in Employment Act (ADEA).<sup>128</sup> A labor union can exclude younger members by favoring policies that benefit the older members.<sup>129</sup> This notion decreases the likelihood that a court, or the NLRB, would rule in favor of a female basketball player. As the Supreme Court noted in *Ford Motor Co.*, "[t]he complete satisfaction of all who are represented is hardly to be expected."<sup>130</sup> State law could seem to be a way to maneuver around a rule favoring older members over younger ones, but federal laws like the ADEA will preempt state laws, in addition to courts being more deferential to labor unions and the collective bargaining process.

What could make this issue more compelling and interesting is if the NLRB found student-athletes were employees. Members of the Northwestern University football team brought the issue of employment to the NLRB, and the board decided that "asserting jurisdiction in this case would not promote stability in labor relations."<sup>131</sup> Although it is unclear whether the Board may rehear this topic due to its volatile nature relating to two important areas of sports—college and professional—it would still be interesting to see what affect student-athlete unions would have on professional leagues and Players Associations. It would conceivably make collective bargaining efforts more difficult, but college players could feel better about their position if, or when, they enter the professional league.

Due to the lack of direct legal precedent, a female college basketball player would need to make a very persuasive argument as to why the WNBA's Age/Education Policy violates labor law. However, the odds would not be in the player's favor because "a union balances many collective and individual interests in deciding whether and to what extent it will pursue a particular grievance, [and] courts should 'accord substantial deference' to a union's

---

127. See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953); Brooks, *supra* note 87, at 120.

128. MITTEN, *supra* note 57, at 108 (explaining that the ADEA protects only to those who are 40 or older).

129. *Id.*

130. *Ford Motor Co.*, 345 U.S. at 338.

131. Nw. Univ. & Coll. Athletes Players Ass'n, 362 N.L.R.B. 167, \*5 (2015). See Tom Farrey, *NLRB Says Northwestern Players Cannot Unionize*, ESPN (Aug. 17, 2015), [http://espn.go.com/college-football/story/\\_/id/13455477/nlrbsays-northwestern-players-cannot-unionize](http://espn.go.com/college-football/story/_/id/13455477/nlrbsays-northwestern-players-cannot-unionize).

decisions regarding such matters.”<sup>132</sup> If a court is to give deference to the WNBA and has the ability to apply a strict definition of “employee,” along with the league arguing there has never been a problem with the Age/Education Policy, the prospective player’s labor law claim would be an up-hill battle. Overall, a player could bring the claim and make very persuasive arguments as to why the WNBA should be forced to change its policy; however, the outcome may not be surprising to the legal community.

#### V. COMMENTS ABOUT THE WNBA’S POLICY

The WNBA’s Age/Education Policy has been enforced since the league started and has been a part of its CBA since 1999.<sup>133</sup> Even though Jewell Loyd was not the first to leave college early (Candace Parker left Tennessee in 2008 with one year of eligibility remaining), it seems she received heavy criticism for doing so.<sup>134</sup> Women face the same concerns regarding the possibility of injury and salary as men, but the league views the positives—being female role models and maintaining competitive teams at the collegiate and professional levels—as key reasons for keeping the policy.<sup>135</sup>

A possible solution would be to allow female basketball players who complete their degrees in less than four years to enter the league. Many student-athletes enroll in summer classes to help relieve some of the academic pressures during season. Additionally, if a student-athlete enters college with more high-school credits and maintains a balanced load during the school year and summer, they could complete a degree in three years and could possibly be ready to enter the draft early. This would apply to a very small number of athletes and would require constant work, but it would still maintain and uphold the WNBA’s emphasis on academics.

Another reason why the WNBA should consider altering the rule is because many of the big-named veterans, like Sue Bird and Diana Taurasi, are getting older. Although this happens to every team and player, these big name players are even more important for the WNBA so it can continue to keep drawing fans’ attention and television viewership. Even though Maya Moore is one of the younger well-known players, there has yet to be any recent, outstanding players in the league. Arguments could be made that the Griner–Delle Donne–Diggins 2013 draft was the last draft that featured big-named

---

132. Peterson v. Kennedy, 771 F.2d 1244, 1253 (9th Cir. 1985).

133. See Duru, *supra* note 31, at 575–76.

134. See Fagan, *supra* note 2.

135. See Duru, *supra* note 31, at 586–89.

players, and that they are the future of the WNBA. But as the league loses major veterans, there needs to be younger players, such as Breanna Stewart, to draw crowds and to help teams build their franchises.

Yet the biggest concern for the WNBA is players going overseas during the off-season. This is best illustrated by Diana Taurasi's absence in the 2015 WNBA season.<sup>136</sup> Taurasi was a standout star when she played at the University of Connecticut, is an impact player for the Phoenix Mercury, and is a member of the U.S. National Women's Basketball team (as well as being a recognizable name). But, Taurasi decided to forgo playing the 2015 season because her Russian team (UMMC Yekaterinburh) could pay her almost triple her WNBA salary.<sup>137</sup> Many international leagues in China, Russia, and Europe can pay female basketball players more than the WNBA. Although there are the downsides of playing overseas, such as language barriers, being the only American on a team, and living for four months in a foreign country, the upside is the money and the gratitude shown by the locals for the player's skills.<sup>138</sup> Additionally, with the continuing disparity in salary between the WNBA and the NBA, there is less incentive for American women to play in the WNBA due to the risk of burning out and injuries.<sup>139</sup> Even though the bigger names will still play in the WNBA, the more important question is how long can the WNBA compete with international leagues who can offer better salaries and are willing to pay for players not to play in the WNBA?

Along the lines of international games, every four years professional athletes vie for a spot on the U.S. Olympic team. What seems important to note is the difference in the "star" value between the men's and women's teams. For the 2016 Rio Olympics, the men's team seemed sparse in big-name players and only had two players with prior Olympic experience,<sup>140</sup>

---

136. See Kate Fagan, *Diana Taurasi's Decision to Sit out Should Spark WNBA Salary Changes*, ESPN (Feb. 4, 2015), [http://espn.go.com/wnba/story/\\_id/12272036/diana-taurasi-decision-sit-spark-wnba-salary-changes](http://espn.go.com/wnba/story/_id/12272036/diana-taurasi-decision-sit-spark-wnba-salary-changes) [hereinafter Fagan, *Diana Taurasi*]; Kate Fagan, *Britney Griner & Diana Taurasi Opted to Play in Russia Both for Money and Escape from the Spotlight*, ESPN (May 5, 2016), [http://www.espn.com/espn/feature/story/\\_page/espnw-russia160505/brittney-griner-diana-taurasi-opted-play-russia-money-escape-spotlight](http://www.espn.com/espn/feature/story/_page/espnw-russia160505/brittney-griner-diana-taurasi-opted-play-russia-money-escape-spotlight) [hereinafter Fagan, *Britney Griner*].

137. See Fagan, *Diana Taurasi*, *supra* note 136.

138. See Seth Berkman, *Overseas, Lost in Transition*, N.Y. TIMES (Nov. 10, 2014), [http://www.nytimes.com/2014/11/11/sports/basketball/transition-game-wnba-players-battle-the-blues-in-first-season-abroad.html?\\_r=0](http://www.nytimes.com/2014/11/11/sports/basketball/transition-game-wnba-players-battle-the-blues-in-first-season-abroad.html?_r=0); Fagan, *Britney Griner*, *supra* note 136.

139. Fagan, *Diana Taurasi*, *supra* note 136.

140. *USA Basketball Announces 2016 U.S. Olympic Men's Basketball Team*, USA BASKETBALL (June 27, 2016), <http://www.usab.com/news-events/news/2016/06/2016-moly-team-announced.aspx>. See Victor Mather, *No Steph Curry. No LeBron James. It Won't Matter for U.S. Basketball in Rio*,

however, the women's team featured nine veterans.<sup>141</sup> This is not to say the men's team is less qualified, but it is striking when compared to the women's team. Both leagues have a bigger talent pool than most other countries, and many say because the men's season is longer, they need more rest. But consider the female players who play in the WNBA and overseas year-round, all while making less money than the men. Both male and female athletes put their bodies on the line, have possible financial losses if they are injured, and need the time to rest. This situation is identical for female college basketball players who have to wait four years to enter the WNBA while the male college basketball players only have to wait one year. One begins to question whether female athletes will ever be treated similar to male athletes or if this perpetual inequality between athletes based on their sex will continue.

## VI. CONCLUSION

The WNBA should be applauded for lasting twenty years. It has inspired many female athletes, and in some ways has broken the glass ceiling in athletics. But for all of the league's accomplishments, there still seems to be a huge disparity in treatment between male and female basketball players. Why is it less acceptable for male athletes to receive a degree and more encouraged for them to become professional athletes at an earlier age than female athletes? This Comment is critical of both sides, men not being encouraged academically and women not being encouraged athletically, but the larger focus is on why the WNBA is limiting its opportunities and future by not allowing younger players to enter the league. A prime example would be Breanna Stewart from the University of Connecticut. She has been one of the most talked about players in women's college basketball and just completed her first season in the WNBA. If she were a male, sports commentators would most likely have recognized her as a prime "one-and-done" player.

An athlete may not be able to bring successful claims under antitrust law or labor law, but this does not mean that the league and Players Association could not initiate the change. As noted in an article by Kate Fagan discussing the debate surrounding Jewell Loyd's draft, a surcharge of student-athletes to

---

N.Y. TIMES (June 27, 2016), [http://www.nytimes.com/2016/06/28/sports/olympics/usa-basketball-curry-lebron-james-kyrie-irving.html?\\_r=0](http://www.nytimes.com/2016/06/28/sports/olympics/usa-basketball-curry-lebron-james-kyrie-irving.html?_r=0).

141. *Experienced 12-Member U.S. Olympic Women's Basketball Team Announced*, USA BASKETBALL (Apr. 27, 2016), <http://www.usab.com/news-events/news/2016/04/2016-woly-team-named.aspx>.

the WNBA might be the wave of the future and could improve the WNBA.<sup>142</sup> With the recent change in women's college basketball moving from a period system to a quarter system, like that used in the WNBA, it is even easier for players to smoothly transition from the college level to the professional level. Additionally, the growing dispute over whether student-athletes should be paid during their time in college presents another component that will influence how female basketball players feel about the Age/Education Policy. If male athletes are the only ones to receive compensation, then women are placed at an even greater economic disadvantage, since men would receive more money than them at both the collegiate and professional levels.

Overall, the continual disparity in treatment and perception of female athletes will hold the WNBA back from growing. Allowing younger players into the league can add excitement to the game and could allow veterans an opportunity to rest while their teams still maintain their competitive edge. The Age/Education Policy is an exemplary example of how female athletes are still prompted to do the "right" thing by staying in school, compared to male athletes who are less inclined to receive a college education simply because society is more accepting of male athletes. Even though a female student-athlete more than likely would not be able to bring a successful labor lawsuit against the WNBA, it could strike a chord with the league to truly reevaluate how the rule affects the game and players. The WNBA's Age/Education Policy should be less restrictive and allow female players the same opportunity as their male counterparts to consider the viability of leaving college early and entering their respective professional leagues.

---

142. See Fagan, *supra* note 2.