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WHERE TO TURN? THE LACK OF ANTI-DISCRIMINATORY HIRING POLICIES TO PROTECT MINORITY COACHES IN COLLEGIATE ATHLETICS

MADELINE R. FARRELL*

INTRODUCTION

Without a national anti-discriminatory hiring policy instituted by the National Collegiate Athletic Association (NCAA), coaches of color are left with little to no alternative to challenge the lack of diversity in hiring of coaches and front-office staff within collegiate athletics. Often, candidates of color are overlooked for positions they are well qualified for or threatened with the potential loss of their career by filing a Title VII claim against a university's hiring practice.¹ This leaves minority candidates with limited options in advancing their careers as head coaches or front-office staff due to the potential backlash they may face in challenging customary hiring practices within collegiate athletics.²

This comment will begin with the history and background of the racial composition of coaches and front-office staff in collegiate athletics for Football

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¹ Timothy Davis, *America's Race-Based Caste Structure: Its Impact in College and Professional Sports*, 9 TEX. A&M L. REV. 599, 620 (2022).

² *Id.* at 601.

Bowl Subdivision (FBS) football and Division I men's basketball. By using statistical data to demonstrate minority coaches' disparities in gaining access to leadership positions, the issue of racial inequity in collegiate athletic hiring practices becomes glaringly obvious, particularly given the large number of players of color who make up FBS football and Division I men's basketball.³

Second, this comment will compare the lack of institutionally issued policies and regulations at the intercollegiate level to the efforts the National Football League (NFL)⁴ and the National Basketball Association (NBA)⁵ have taken to increase racial diversity in hiring, as well as legislation passed in the state of Oregon, the first to pass a state law addressing collegiate hiring practices.⁶ The substantive efforts of the NFL, NBA, and Oregon's state law have increased minority coaches' access to leadership positions; however, there is still much room for improvement.⁷

Third, this comment will examine the potential legal action minority candidates, particularly coaches, may pursue against NCAA member schools. This will include an overview of 42 U.S.C.A. § 1981,⁸ 42 U.S.C.A. § 2000d (Title VI),⁹ and 42 U.S.C.A. § 2000e (Title VII) claims,¹⁰ the limits these legal remedies may provide, and will use case law to demonstrate the constraints minority coaches face.

Lastly, this comment will offer suggestions that the NCAA could implement to address unconscious bias in the collegiate hiring process and increase racial diversity in front-office staff and head coaching positions. Following in the footsteps of professional leagues and statewide initiatives, the NCAA and its member schools should adopt and implement the "Russell Rule," named after the late Hall of Famer, 11-time NBA champion and activist, Bill Russell,¹¹ which requires at least one qualified minority candidate to be

³ *Id.* at 613-14.

⁴ Ron S. Hochbaum, "And It Only Took the 307 Years": Ruminations on Legal and Non-Legal Approaches to Diversifying Head Coaching College Football, 17 VILL. SPORTS & ENT. L.J. 161, 174 (2010).

⁵ Davis, *supra* note 1, at 621.

⁶ Hochbaum, *supra* note 4, at 224-25.

⁷ Michael J. Nichols, *Time for Hail Mary? With Bleak Prospects of Being Aided by a College Version of the NFL's Rooney Rule, Should Minority Coaches Turn their Attention to Title VII Litigation?*, 8 VA. SPORTS & ENT. L.J. 147, 156-57 (2008).

⁸ 42 U.S.C.A. § 1981 (West 20204, Westlaw through Pub. L. No. 118-39).

⁹ 42 U.S.C.A. § 2000d (West 2024, Westlaw through Pub. L. No. 118-39).

¹⁰ 42 U.S.C.A. § 2000e-2 (West 2024, Westlaw through Pub. L. No. 118-64).

¹¹ Davis, *supra* note 1, at 621.

interviewed for head coaching and administrative positions.¹² A policy like the Russell Rule would help increase the number of minority coaches and front-office staff hires at the collegiate level.¹³ Adopting a national standard regarding intercollegiate hiring practices would allow minority coaches to hold NCAA member schools accountable by challenging hiring policies that do not conform with the Russell Rule, without fear of losing out on positions they are well qualified for or potentially losing their career altogether.¹⁴

I. HISTORY OF NCAA DIVERSITY INITIATIVES

After the Black Lives Matter movement in the summer of 2020, the call for racial and social justice in society, including sports, garnered global attention and demonstrated the continued need to recognize, address, and dismantle institutionalized racism.¹⁵ In response to the global call for change, professional leagues like the NBA pledged \$300 million and the NFL pledged \$250 million to initiatives committed to achieving greater social and racial justice.¹⁶ However, these initiatives often fall short of “adequately address[ing] the persistent and structural racial inequities in professional and intercollegiate sports.¹⁷ Race-related barriers continue to limit opportunities afforded to minority coaches to ascend in their careers.¹⁸ Those in positions of power, including college presidents, athletic directors, coaches, and team owners, have the ability to change oppressive structures but have continually chosen not to, even in the face of glaring statistics showing the inequalities in employment and hiring on college campuses.¹⁹

The Institute for Diversity and Ethics in Sport (TIDES) publishes a yearly report that examines racial and gender disparities in sports. TIDES Racial and Gender Report Card is published to indicate “areas of improvement, stagnation and regression” in the racial and gender makeup of professional and

¹² Adam Rittenberg, *No Action from NCAA Committee on Pair of Minority Hiring Policies*, ESPN (Nov. 13, 2020, 6:47 PM), https://www.espn.com/college-sports/story/_/id/30312570/no-action-ncaa-committee-pair-minority-hiring-policies.

¹³ See Davis, *supra* note 1, at 621.

¹⁴ See Hochbaum, *supra* note 4, at 176.

¹⁵ Richard E. Lapchick, *The 2021 Racial and Gender Report Card: College Sport*, THE INST. FOR DIVERSITY & ETHICS IN SPORT, 3 (2021), https://www.tidesport.org/_files/ugd/403016_14f7be7c35154a668addb71b75b7e14f.pdf.

¹⁶ Davis, *supra* note 1, at 601.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 602.

intercollegiate employment.²⁰ In 2021, college sports received a “C+” on the report card for hiring practices, lagging behind professional sports.²¹ Within collegiate coaching positions, white people held 85.3% of all head coaching positions for Division I schools.²² At the NCAA national office, the percentage of people of color holding positions such as executive vice president, senior vice president, and vice president has actually decreased since 2020.²³ Black or African Americans held only 12.2% of athletic director positions at Division I schools.²⁴ Additionally, white people predominantly hold other positions of power on campus, including university chancellors, presidents, head athletic trainers, and faculty athletic representatives.²⁵

The NCAA is well aware of the systemic problems that contribute to the lack of diversity in the front-office and coaching staff at the collegiate level.²⁶ The NCAA has taken steps, albeit meaningless, to address race-based inequities in hiring diverse candidates. In 2016, the NCAA adopted a “Pledge and Commitment to Promoting Diversity” however, this pledge has done little to change hiring outcomes.²⁷ The NCAA inclusion initiatives include developing a culture that “recognizes and values diversity’s role in organizational excellence” by creating the Board of Governors Committee to promote cultural diversity and equity, the Minority Opportunities and Interests Committee, and various NCAA professional development and education workshops and forums.²⁸ While these initiatives and committees constitute a good-faith effort, they do little to enact actual change.

Unlike professional sports, in which the various leagues are subject to regulation, hiring of college coaches has been unregulated because colleges and universities have not agreed to such regulation.²⁹ In order for the NCAA to have control over the hiring process, all member schools would need to draft and pass legislation. This means all 372 Division I members and conferences would require their institution to introduce legislation to which all schools in the

²⁰ Lapchick, *supra* note 15, at 7.

²¹ *Id.* at 1.

²² *Id.* at 11.

²³ *Id.* at 9.

²⁴ *Id.* at 12.

²⁵ Davis, *supra* note 1, at 611.

²⁶ See Rittenberg, *supra* note 12.

²⁷ Davis, *supra* note 1, at 612.

²⁸ Lapchick, *supra* note 15, at 40–47.

²⁹ Hochbaum, *supra* note 4, at 164.

conference would have to agree to.³⁰ This was proven possible when the Western Coast Conference (WCC) adopted the Russell Rule in 2020.³¹

While the most effective policy change may come from individual state legislation, as this comment will address, the NCAA could use its influence and power to create rules and regulations that extend to each member school, as has been shown to be achieved through other NCAA regulations. Like other successful national policies enforced by the NCAA, an NCAA national policy like the Russell Rule that regulates member schools' hiring policies may also prove to be successful in increasing racial diversity in collegiate athletic hires. State legislation and NCAA policies could be further strengthened through those in positions of power on campus to promote increased diversity and inclusion efforts, as well as having more people of color hold positions of power at the collegiate level.

II. NFL, NBA & THE STATE OF OREGON DIVERSITY HIRING INITIATIVES

To address racial disparities in hiring, the NFL adopted the Rooney Rule (Rule) in 2003, which requires franchises to interview at least two candidates of color for open head coaching positions.³² The Rule, named after then-chairman of the NFL's Workplace Diversity Committee and owner of the Pittsburgh Steelers, Dan Rooney, focused on the low number of minority head coaches in the NFL.³³ The Rule has since been expanded to apply to general manager positions and other front-office positions as well.³⁴ Further expanding diversity efforts, following the 2022 Spring League Meeting, the Rule now also requires NFL teams to conduct outside interviews with a minority and/or female candidate for quarterback coaching positions.³⁵ This expansion aims to help increase the number of minority coaches "in the pipeline," as many head coaches began their careers in a quarterback coaching position.³⁶

Similarly, the NBA made efforts to increase the racial diversity of head coaches through the Coaches Equality Initiative (Initiative), a partnership

³⁰ Adam Rittenberg, *Oregon Law on Hiring Minority College Coaches Works, So Why Isn't It Used Everywhere?*, ANDSCAPE (Jan. 9, 2020), <https://andscape.com/features/oregon-law-on-hiring-minority-college-coaches-works-so-why-isnt-it-used-elsewhere/>.

³¹ *The Russell Rule*, WEST COAST CONFERENCE (Aug. 3, 2020, 5:55 AM), <https://wccsports.com/news/2020/8/2/general-russell-rule-diversity-hiring-commitment.aspx>.

³² Davis, *supra* note 1, at 621.

³³ *The Rooney Rule*, NFL FOOTBALL OPERATIONS, <https://operations.nfl.com/inside-football-ops/inclusion/the-rooney-rule/> (last visited Feb. 29, 2023).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*; Davis, *supra* note 1, at 611.

between the NBA and the NBA Coaches Association.³⁷ The Initiative identifies and develops coaching talent to increase the number of “highly skilled” NBA coaches and “level the playing field for development and advancement of all qualified coaching candidates.”³⁸ This includes collaborative programs that seek to increase the number of coaches in the potential candidate pool through workshops that develop coaching skills, institute unconscious bias training for NBA employees, and encourage collaboration among NBA teams and with outside groups to enhance diversity and promote best practices.³⁹

In 2010, Oregon was the first state to pass its own Rooney Rule, establishing a state law that requires state schools to interview at least one minority candidate for all head coach and athletic director position openings.⁴⁰ This law has been successful in increasing diverse hires, including the University of Oregon’s (UO) two football coaches, Willie Taggart and Mario Cristobal, UO’s track and field coach Robert Johnson, and Portland State and Western Oregon’s athletic departments, led by Val Cleary and Curtis Campbell.⁴¹ However, while state regulation demonstrates positive changes, advocates of the Oregon Rooney Rule’s lobbying efforts took herculean determination to get the state law passed, potentially making it difficult to push similar laws in other states.⁴²

III. ANALYSIS

The NCAA has not implemented a nationwide policy to increase diversity in hiring due to limitations on imposing such regulations as a result of state law. However, the NCAA has various rules and regulations that control other aspects of collegiate athletics, such as academic eligibility, banned substances, and until recently, a student-athletes’ ability to profit from their name, image, and likeness (NIL).⁴³ Not only does the NCAA regulate student-athletes, but the NCAA also regulates college coaches through recruiting rules, scholarship limits, and permissible coaching activities.⁴⁴ These regulations on student-athletes and coaches demonstrate that a nationwide policy, such as the Russell

³⁷ Davis, *supra* note 1, at 610.

³⁸ *Id.*

³⁹ *Id.* at 621.

⁴⁰ Rittenberg, *supra* note 12.

⁴¹ Rittenberg, *supra* note 30.

⁴² *Id.*

⁴³ See *NCAA Division I Manual*, NCAA (Aug. 1, 2022), <https://www.ncaapublications.com/productdownloads/D123.pdf>.

⁴⁴ *Id.*

Rule, could be implemented and the NCAA could enforce the rule, extending to all NCAA member schools across the country.

A. NCAA's Refusal to Implement Nationwide Policy Change

The NCAA's Committee to Promote Cultural Diversity and Equity (CPCDE) has discussed the Oregon Rooney Rule and its applicability to NCAA member schools. However, the CPCDE declined to recommend a policy to the NCAA Board of Governors.⁴⁵ Because the NCAA is a voluntary association with public and private members subject to different state laws, the NCAA has stated that it "cannot mandate the individual hiring practices of colleges and universities" and asserts that employment decisions must be made on campus at the individual level.⁴⁶ However, there have repeatedly been calls to reform the hiring process, particularly for college football head coaches, which the NCAA continues to ignore.⁴⁷

The NCAA was not ruled a state actor in *National Collegiate Athletic Association v. Tarkanian*; therefore, there are limited federal protections minority coaches have against the NCAA's lack of action.⁴⁸ The NFL's Rooney Rule originated as a result of pressure by civil rights attorneys, Johnnie Cochran and Cyrus Mehri, who demonstrated through statistical analyses that black coaches in the NFL were being held to a higher standard and therefore threatened to sue the NFL and its teams if the league did not take measures to correct the disparity.⁴⁹ Additionally, the Rooney Rule has teeth in that the NFL has the power to sanction a team's general manager and the team itself if it does not follow the Rule.⁵⁰ As no NCAA regulation currently stands, coupled with no federal law being applied to the NCAA, the threat of a lawsuit is not great, but not impossible.

However, the Rooney Rule is not a cure-all to the issue of racial diversity in hiring. If the NCAA were to implement a similar policy, it would also likely face criticism. Opponents of the Rooney Rule have labeled it "unfair, inefficient, flawed, subterfuge, and reverse discrimination."⁵¹ The ways in which the Rule has been avoided by NFL teams, as demonstrated in the Brian Flores class-action complaint against the NFL and the thirty-two NFL teams, show that

⁴⁵ Rittenberg, *supra* note 12.

⁴⁶ *Id.*

⁴⁷ Hochbaum, *supra* note 4, at 162.

⁴⁸ *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 196 (1988).

⁴⁹ Hochbaum, *supra* note 4, at 174.

⁵⁰ *Id.* at 176.

⁵¹ *Id.* at 183–84.

league regulations will not solve all of the issues.⁵² Nevertheless, league regulations do offer protections and legal remedies to front-office and coaching staff impacted by systemically oppressive employment policies.⁵³

While the NCAA points to its lack of regulatory authority over its member schools as the reason it has yet to implement an anti-discriminatory hiring policy, the NCAA is a “major power in formulating rule changes and in setting and policing the procedures” under which member schools operate their programs.⁵⁴ In fact, the NCAA plays a fundamental role in regulating the conduct of its member schools, their employees, supporters like boosters and fan conduct, as well as student-athletes.⁵⁵ Regulations include transfer rules, controlling the use of member schools’ intellectual property, including school colors and logos, limitations to booster donations, and until recently, student-athlete NIL rights.⁵⁶ It is clear the NCAA is not incapable of regulating its member schools and the conduct that occurs on college campuses across the country. Instead, it is the excuse of institutional autonomy the NCAA hides behind to avoid responsibility for an issue it helps perpetuate.⁵⁷

B. Federal Legal Protections

In order to challenge discriminatory hiring practices at the intercollegiate level, as there is no NCAA institutional policy, a coach’s legal recourse falls under state or federal employment law protections. Under federal law, no person may be discriminated against based on race. As the Civil Rights Act of 1964 states,

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.⁵⁸

⁵² Flores v. Nat’l Football League, 2022 WL 3098388 (2022).

⁵³ See Hochbaum, *supra* note 4, at 176.

⁵⁴ *Id.* at 180.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ § 1981 (Westlaw).

Additionally, under 42 U.S.C.A. § 2000d (Title VI), “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁵⁹ However, most employment claims are brought under 42 U.S.C.A. § 2000e (Title VII). Title VII bans discrimination in federally assisted programs, making most, if not all, public and private universities fall within this category by way of financial aid to students, or through research grants awarded to the institution.⁶⁰ The purpose of Title VII is to “remov[e] ... artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or impermissible classification.”⁶¹

Under the unlawful employment practices section within the Civil Rights Act of 1964:

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.⁶²

To avoid discriminatory hiring practices, the anti-discriminatory recruiting, hiring, and advancement requirements of the Equal Employment Opportunity Commission (EEOC) encourage employers to apply job requirements consistently and uniformly to all applicants.⁶³ Potentially unlawful practices leading to employment discrimination claims include soliciting applications from sources where all or most of the potential candidates are of the same race or color or requiring applicants to have a specific educational background that is not important to the job performance.⁶⁴

⁵⁹ § 2000d (Westlaw).

⁶⁰ Nichols, *supra* note 7, at 163.

⁶¹ Hochbaum, *supra* note 4, at 187.

⁶² § 2000e-2 (Westlaw).

⁶³ Nichols, *supra* note 7, at 164–65.

⁶⁴ *Id.* at 165.

However, even if the job requirements are applied consistently, applicants come from different areas, and educational backgrounds are applicable and necessary for the job, discriminatory employment practices still persist. This is exemplified through pacts like the “unspoken gentlemen’s agreement,” which demonstrates the “reshuffling effect” that occurs when white coaches are rehired by other teams, rather than the experienced candidates of color being selected.⁶⁵

In *Jackson v. University of New Haven*, Jackson, an African American coach, brought a § 1981, Title VII, and Title VI action against the University of New Haven (UNH) and the athletic director.⁶⁶ UNH’s job posting required that candidates have prior college coaching experience.⁶⁷ While Jackson had no college coaching experience, he had been a professional minor league football coach, had earned several accolades and honors as a coach, and was inducted into the minor league football Hall of Fame.⁶⁸ UNH received thirty-six applicants for the position, in which the Search Committee interviewed six – all of whom had college coaching experience and all of whom were white.⁶⁹ Jackson asserted his Title VII claim, stating that the requirement of previous coaching experience at the collegiate level was not necessary for the job requirement of familiarity with NCAA rules and regulations.⁷⁰ Jackson stated this resulted in disparate treatment due to his race and disparate impact on minority coaches as a group, which functioned to exclude qualified minority coaches from the pool of potential candidates.⁷¹

C. Disparate Treatment

Disparate treatment within employment occurs when an employer treats some individuals less favorably than others due to their race, color, religion, sex, or national origin.⁷² Under systemic disparate treatment, a coach must prove that they were among a class of individuals that were treated differently from another class.⁷³ The burden-shifting framework for a disparate treatment claim was

⁶⁵ Davis, *supra* note 1, at 617.

⁶⁶ *Jackson v. Univ. of New Haven*, 228 F. Supp. 2d 156, 157 (D. Conn. 2002).

⁶⁷ *Id.* at 158.

⁶⁸ *Id.*

⁶⁹ *Id.* at 157-58.

⁷⁰ *Id.* at 158.

⁷¹ *Id.* at 158-59.

⁷² Hochbaum, *supra* note 4, at 187.

⁷³ *Id.* at 188.

established in *McDonnell Douglas v. Green*⁷⁴ and *Texas Department of Community Affairs v. Burdine*.⁷⁵ Under this framework, a plaintiff alleging disparate treatment based on race must first establish a prima facie case of discrimination.⁷⁶ In order to establish a prima facie case of discrimination, the plaintiff must show that (1) they are a member of a protected class; (2) they meet the qualification for the employment; (3) show an adverse employment decision; and (4) show circumstances that give rise to an inference of discrimination.⁷⁷ The court held in *Jackson* that he did not meet the second prong of the prima facie test because while he had prior coaching experience, the job description explicitly required collegiate coaching experience, and that the subjective determination that he would be qualified for the position was not enough to carry Jackson's burden making out a prima facie case.⁷⁸

While *Jackson* is one of the few cases where a coach brought a Title VII claim against a university, the case demonstrates one of the issues coaches of color may face when bringing a Title VII claim; the issue of determining what "qualified candidate" means. In *Jackson*, the court defined being "qualified" as referring to the criteria the employer has specified for the position.⁷⁹ However, many differ in their opinions on which coaching candidates should be considered qualified.⁸⁰ While neither party disagreed on the qualifications for the head coaching position, if Jackson had established a prima facie case of discrimination, the burden would have shifted to UNH to offer a non-discriminatory reason for its decision. UNH argued that Jackson was not qualified because he failed to meet the qualification of having prior collegiate coaching experience.⁸¹

The numbers show that the opportunity for coaches of color to gain meaningful college coaching experience is limited due to the predominance of white people holding positions of power in collegiate athletics and are, therefore, the drafters of what "qualified" means.⁸² Those in positions of power within collegiate athletics are overwhelmingly white, and while it may not be that the dominance of white males in leadership positions in sports that is the

⁷⁴ *McDonnell Douglas Corp. v. Green*, 93 S. Ct. 1817, 1824 (1973).

⁷⁵ *Tex. Dept. of Cmty. Aff. v. Burdine*, 101 S. Ct. 1089, 1094 (1981).

⁷⁶ *Jackson v. Univ. of New Haven*, 228 F. Supp. 2d at 160.

⁷⁷ *Id.*

⁷⁸ *Id.* at 161.

⁷⁹ *Id.*

⁸⁰ Hochbaum, *supra* note 4, at 195.

⁸¹ *Jackson v. Univ. of New Haven*, 228 F. Supp. 2d at 161.

⁸² *See Davis, supra* note 1, at 611.

result of “overt racism,” it is a consequence of the systemic racism that influences the idea of who is “qualified” and fit to be a leader, and who is not.⁸³

While it is possible to make a prima facie case of disparate treatment based solely on statistics, to do so, a plaintiff “must present a ‘significant’ pattern of discrimination unexplainable on grounds other than race.”⁸⁴ Jackson was unable to prove that the reason for denying him an opportunity to be interviewed for the head coaching position was based solely on race.⁸⁵ However, Jackson as an individual black male coach, was impacted by the limitations black coaches face when attempting to advance their careers due to systemic barriers held in place by traditional power structures.

The argument that Jackson needed NCAA coaching experience to be “well-versed in NCAA regulations,” while ignoring his vast experience in coaching football at the professional level, discredits the experiences and skills he gained in the professional coaching world.⁸⁶ While broad deference is given to employers in drafting hiring criteria, practices such as these must be critically examined, particularly what party is drafting the criteria, as this can be used to maintain traditional power structures.⁸⁷ The court held that the prior college coaching experience requirement in *Jackson* appeared reasonable on its face;⁸⁸ however, requirements such as these must be viewed through a much more critical lens.

Statistics can be used as strong evidence to prove a party’s case. For example, in the 2019-2020 season, 82% of Division I head football coaches were white males who also dominated offensive and defensive coordinator roles as well, often positions used as “springboards” to become a head football coach.⁸⁹ Courts may be cautious to rely solely on statistics to determine if there is a prima facie case of racial discrimination because the usefulness of statistics depends on surrounding facts and circumstances.⁹⁰ To prove a prima facie disparate treatment claim, “the plaintiff must prove that the decision-maker chose [their] course of action at least in part because of its adverse effects on an identifiable group of employees”, which is typically achieved “through a

⁸³ *Id.* at 614.

⁸⁴ *Davis v. D.C.*, 925 F.3d 1240, 1255 (D.C. Cir. 2019).

⁸⁵ *Jackson v. Univ. of New Haven*, 228 F. Supp. 2d at 161.

⁸⁶ *Id.* at 158.

⁸⁷ *Id.* at 161.

⁸⁸ *Id.* at 162.

⁸⁹ *Davis*, *supra* note 1, at 612.

⁹⁰ *Int’l Bhd. of Teamsters v. United States*, 97 S. Ct. 1843, 1856–57 (1977).

combination of statistics and anecdotes.”⁹¹ Therefore, coaches would need to prove that they were “not the only one negatively impacted by the university’s or the NCAA’s policies - through the use of statistical information and/or statistical experts.”⁹² While statistics may have slight variations, they should be a serious factor considered by the courts when examining university hiring requirements by looking at more than what a qualification says on its face and critically examining the reason for which the qualification exists.

Even when a minority coach is qualified, they may still face discrimination by their employer. In *Minnis v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*, Minnis was employed as the head coach for the women’s tennis team for twenty-one years.⁹³ Despite Minnis’ numerous accolades, NCAA Tournament appearances, and All-American level players, during his tenure as the head coach, the team’s winning record did not reflect this same level of success.⁹⁴ Ultimately, Minnis was terminated from his position due to the overall poor team record.⁹⁵

In Minnis’ employment discrimination action, he alleged that his replacement, “a white female with ‘far less experience’ [was] being paid substantially more than he was paid” during his time with the university.⁹⁶ While Minnis could show he was qualified for the position, as evidenced by the fact that he held the position for over two decades, was named Southwest Regional Women’s Tennis Coach of the Year five times, and named Southeastern Conference (SEC) Coach of the Year once, the university did not recognize these achievements as being qualified enough.⁹⁷ The court held for the university, stating that “Title VII does not set forth ‘a general civility code for the American workplace.’”⁹⁸

As *Jackson* and *Minnis* demonstrate, even with the use of federal protections, the burden of proving discriminatory hiring and employment practices on the plaintiff is incredibly high. Additionally, outside of federal and state protections, there is little a coach can do to challenge collegiate employment policies. Even if coaches assert a claim, there is the continuous

⁹¹ Nichols, *supra* note 7, at 166.

⁹² *Id.*

⁹³ *Minnis v. Bd. of Supervisors of La. State Univ.*, 55 F. Supp. 3d 864, 870 (M.D. La. 2014).

⁹⁴ *Id.*

⁹⁵ *Id.* at 872, 883.

⁹⁶ *Id.* at 872.

⁹⁷ *See generally id.*

⁹⁸ *Id.* at 876.

threat of the consequences of challenging such practices and the potential of ostracizing themselves from future career opportunities in sports.

D. Disparate Impact

Disparate impact in employment claims requires that a plaintiff show that a facially neutral policy can be shown to have an adverse impact on a protected group.⁹⁹ Proving disparate impact differs from disparate treatment in that no discriminatory intent is required to be proven under this claim.¹⁰⁰ To prove a disparate impact claim, the “plaintiff must (1) identify a policy or practice, (2) demonstrate that a disparity exists, and (3) establish a causal relationship between the two.”¹⁰¹ Jackson asserted that UNH’s facially neutral hiring criteria of having prior college coaching experience had a discriminatory impact on black coaches because black coaches have been historically underrepresented in collegiate coaching positions and, thus, disproportionately excluded from consideration.¹⁰²

Statistics help to draw attention to the underrepresentation of black head coaches: however, “[d]etermining the parameters of the applicant pool is important in ... employment discrimination case[s].”¹⁰³ Jackson offered statistics “suggesting a causal link between the prior experience requirement and its impact on African-Americans, by comparing the pool of applicants to those who were ultimately selected for interviews.”¹⁰⁴ However, the limited sample size of the total applicants for UNH’s posting was too small to show statistically significant results.¹⁰⁵ The Court held that the relevant comparisons are the ones that show the difference “between the percentage of minority employees and the percentage of potential minority applicants in the qualified labor pool.”¹⁰⁶ Therefore, Jackson failed to meet his burden in proving a disparate impact claim.¹⁰⁷

The Court also noted that “[t]he 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 (emphasis

⁹⁹ *Jackson*, 228 F. Supp. 2d at 162.

¹⁰⁰ Nichols, *supra* note 7, at 167.

¹⁰¹ *Jackson*, 228 F. Supp. 2d at 164.

¹⁰² *Id.*

¹⁰³ Hochbaum, *supra* note 4, at 194.

¹⁰⁴ *Jackson*, 228 F. Supp. 2d at 165.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 166.

¹⁰⁷ *Id.*

removed).”¹⁰⁸ However, actions such as the “social network theory” demonstrate that when job opportunities arise, one often hires an employee through network ties.¹⁰⁹ This “social network theory” often excludes minority candidates because there is a substantial lack of diversity among those in leadership making hiring decisions.¹¹⁰ Hence, the question becomes, how does a minority coach challenge an institutionalized practice that perpetually excludes those who look like them from leadership positions?

IV. PROPOSED SOLUTION

It is clear there must be alternative ways in which a coach can find legal relief. There must be an avenue for minority coaching and front office-staff candidates at the collegiate level to challenge hiring practices. Critics of the NCAA’s lack of response to addressing this issue have called for the NCAA to adopt the Oregon Rooney Rule or the Russell Rule model for member schools, as “[i]t is time for the NCAA to fulfill the broken promises and move their words to action to promote cultural diversity and equity.”¹¹¹

Many are looking to the NCAA to create internal guidance for member schools to implement a policy that encourages and enforces inclusive hiring and employment practices to increase the number of minority candidates in head coaching and front-office staff roles. For many years, leaders within collegiate athletics have stressed the need for diverse hiring policies and initiatives.¹¹² In 2008, the Athletic Directors’ Association issued guidelines for hiring head coaches that required athletic directors at Division I-A schools to interview at least one minority candidate while seeking to fill a head coaching vacancy.¹¹³ Unfortunately, this proposal did little to enact change, as the guidelines were seen merely as suggestions rather than a policy because there were no penalties for noncompliance.¹¹⁴ Congressional action also has been suggested as a solution, including giving financial incentives to institutions for hiring minority coaches, removing university boosters from the hiring process, as well as instituting a “college version” of the Rooney Rule.¹¹⁵

¹⁰⁸ *Id.*

¹⁰⁹ Hochbaum, *supra* note 4, at 165.

¹¹⁰ *Id.* at 165-66.

¹¹¹ Rittenberg, *supra* note 12.

¹¹² *See* Davis, *supra* note 1, at 612.

¹¹³ Hochbaum, *supra* note 4, at 181-82.

¹¹⁴ *Id.* at 182-83.

¹¹⁵ Nichols, *supra* note 7.

The “Russell Rule” has been suggested as an option for the NCAA to enforce across member schools.¹¹⁶ Paralleling the Rooney Rule, the Russell Rule requires member schools to include a candidate of a traditionally underrepresented group within the pool of candidates for leadership and front-office positions such as athletic director, head and full-time assistant coaches, and senior administrators within the athletic department.¹¹⁷ The Russell Rule has been adopted by the WCC, which requires all member institutions to submit a hiring report to the WCC Presidents’ Council, including evidence of their efforts to comply with the Russell Rule.¹¹⁸ Gloria Nevarez, the WCC Commissioner, described the adoption of the Russell Rule as a “not just a ‘guideline’ or a ‘best practice’” but a rule in which the WCC President Council monitors compliance with the conference organization.¹¹⁹ While the WCC’s implementation of the Russell Rule is still in its early stages and lacks teeth or prescribed penalties, there are discussions of penalties ranging from private warnings to public reprimand.¹²⁰

In addition to the Russell Rule, initiatives that would aid in creating more equity in hiring include “[universities] providing ... athletes of color [more] leadership opportunities within and outside of athletics to ensure they receive the [same] mentoring” that white athletes often receive, posturing them for professional positions in sports after their career as a student-athlete.¹²¹ Additionally, certified programs on unconscious bias, equity, and inclusion for those in leadership positions within athletics could help address the racial inequities in hiring as well as actively engaging in recruiting candidates of color.¹²² Diverse teams led by diverse coaches lead to more opportunities for everyone. As the University of San Diego President James T. Harris stated, “it just makes for a better learning environment when you have people that have all these different backgrounds . . . we really are serious about diversifying and changing the faces of our athletic departments.”¹²³

¹¹⁶ Davis, *supra* note 1, at 621.

¹¹⁷ *Id.*

¹¹⁸ *The Russell Rule*, W. COAST CONF. (Aug. 8, 2020), <https://wccsports.com/news/2020/8/2/general-russell-rule-diversity-hiring-commitment.aspx>.

¹¹⁹ Karen Weaver, *For West Coast Conference, ‘Russell Rule’ Shows Early Promise in Diversifying Athletic Departments*, FORBES (June 19, 2022, 11:45 AM), <https://www.forbes.com/sites/karenweaver/2022/06/19/for-west-coast-conferencerussell-rule-shows-early-promise-in-diversifying-athletic-departments/?sh=13e9eddf3fc7>.

¹²⁰ *Id.*

¹²¹ Davis, *supra* note 1, at 621–22.

¹²² *Id.* at 622.

¹²³ Weaver, *supra* note 119.

The hope is that other NCAA member schools and conferences adopt a similar approach as the WCC has in increasing diversity in coaching and front-office staff hires. Additionally, the NCAA could apply a similar multi-pronged approach initiated by the NBA, including collaborative programming among the national office and college coaches, training to understand unconscious bias, and collaboration across universities to promote best practices.¹²⁴ It is also necessary for athletes of color, companies, and other supporters to advocate for greater inclusion and equity in leadership on college campuses and continue to apply pressure to enact social change.¹²⁵

CONCLUSION

Sports have a profound influence on society, including intercollegiate athletics. As professional athletes, coaches, and league organizations continue to address social and racial inequities, so too have college campuses, including collegiate athletics. The only way in which traditional, oppressive structures change is through questioning, challenging, and changing the status quo. There must be a more accessible and equitable legal recourse for minority college coaches and front-office staff to take in confronting the institutionalized racism that influences employment and hiring practices on campus.

It is possible that a Title VII lawsuit could succeed in “opening the door” for more candidates of color to fill head coaching and front-office positions.¹²⁶ However, without the NCAA or Congress imposing a nationwide rule or regulation on campus, it is not probable that minority candidates will be successful due to the high burden and the real fear of being ostracized from future career opportunities.¹²⁷ The NFL’s Rooney Rule, the NBA Coaches Equality Initiative, the State of Oregon’s adoption of the Rooney Rule, and the WCC’s adoption of the Russell Rule have shown promising success not only in increasing the number of candidates of color being considered for the leadership positions, but also successfully filling these positions. The blueprint for addressing racial inequities in hiring in sports is out there; it is time to use this blueprint at the collegiate level.

¹²⁴ Davis, *supra* note 1, at 621.

¹²⁵ *Id.* at 622.

¹²⁶ Nichols, *supra* note 7, at 172.

¹²⁷ Hochbaum, *supra* note 4, at 202.