EDUCATIONAL ATHLETIC EMPLOYMENT AND CIVIL RIGHTS: EXAMINING DISCRIMINATION BASED ON DISABILITY, AGE, AND RACE

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I. INTRODUCTION

Athletic departments have always been unique fiefdoms within educational institutions. This concerns not only the physical aspects, as they are usually situated in a separate domain apart from the main area that houses the typical classrooms, are the only departments that historically have operated overwhelmingly segregated programs for male and female student-athletes, and were given a legal patina, which sanctioned this status quo. The 1960s

1. See Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2000) [hereinafter Title IX] (prohibiting discrimination on the basis of sex in educational programs and activities that receive federal funds); see also the implementing regulations, 34 C.F.R. § 106.34 (2006) (recently revised regulation; however, its inception in 1975 broadly allowed for single-sex physical education classes) (there has been no case law since Title IX’s passage in 1972 challenging this regulation’s application to physical education classes); 34 C.F.R. § 106.41(b) (2006) (allowing
and early 1970s ushered in a cornucopia of federal statutes aimed at eradicating discrimination based on an individual's civil rights due to the person's race, religion, national origin, sex, disability, and age. This includes the following statutes highlighted in this exposition: Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 (Title VII) (race, sex, national origin, and religion); the Individuals with Disabilities in Education Act (IDEA) (disability); Rehabilitation Act of 1973.

2. See infra note 6.
3. Id. For claims based on religion, see 42 U.S.C. § 2000e-2(c) (2000) (businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion). See also U.S. CONST. amend. 1; Nedra Rhone, Ruling Says LI Teacher Bias Victim; EEOC: Coach Denied Posts Because He Isn't Italian, NEWSDAY (N.Y.), Jan. 25, 2002, at A4 (EEOC ruled a Jewish physical education teacher was denied a high school coaching position at a Long Island public high school due to his religion). For cases involving a religion basis, see generally Diane Heckman, Educational Athletics and Freedom of Speech, 177 EDUC. L. REP. 15, 15 n.2 (2003) [hereinafter Heckman, Freedom of Speech] (listing cases involving freedom of religion and academic athletic employment) (the commentary provides an exposition of the First Amendment's freedom of speech protection involving athletic employees working at educational institutions); Diane Heckman, One Nation Under God: Freedom of Religion in Schools and Extracurricular Athletic Events in the Opening Years of the New Millennium, 28 WHITTIER L. REV. 537 (2006) [hereinafter Heckman, One Nation Under God].


5. See 20 U.S.C. §§ 1681-1688; 34 C.F.R. § 106.34; 34 C.F.R. § 106.41(b)-(c); Heckman, Women & Athletics, supra note 1; Heckman, Sex Discrimination in the Gym, supra note 1; Heckman, Scoreboard, supra note 1; Heckman, The Glass Sneaker, supra note 1.

6. The most significant civil rights statute is Title VII, 42 U.S.C. § 2000e (2000), which governs the elimination of discrimination in employment based on an individual's sex, race, national origin, and religion.

(Rehabilitation Act) (disability); Americans with Disabilities Act of 1990 (ADA) (disability); the Age Discrimination in Employment Act of 1967 (ADEA) (age); and Title VI of the Civil Rights Act of 1964 (Title VI) (race). All of these federal statutes would potentially target educational institutions.

This survey article profiles athletic employment at educational institutions and its interaction with federal statutory civil rights laws prohibiting discrimination based on disability, age, and race. The exposition highlights the significant elements of the applicable statutory laws and excavates the case law rendered by the judiciary within the last forty years, with an emphasis on recent decisions. While there has been an abundance of cases challenging the elimination of societal and institutional sex discrimination involving athletic endeavors, there has been minimal case law addressing the other areas of discrimination concerning athletic directors, coaches, physical education teachers, officials, and other athletic department support staff. Nonetheless, educational institutions and athletic departments must be cognizant of the panoply of federal statutes protecting individual citizens from discrimination by others, which may include other individuals, governmental or public entities, or private entities. Each statute has its own jurisdictional requisites, which must be reviewed. A review should also be made to ascertain whether there is any comparable state legislation.

The major issue in the formation of our country was determining the power of the central federal government versus the sovereignty of the individual states. The concept of federalism, recognizing this dual distribution

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12. See Weaver v. Ohio State University, No. C2-96-1199, 1997 WL 1159680 (S.D. Ohio June 4, 1997), where the Ohio district court stated:

   It is noteworthy that two of the pre-existing federal laws which prohibited discrimination in employment were amended by § 906 of Pub. L. 92-318, the same statute which contained the operative and enforcement provisions of Title IX (§§ 1681 and 1682). These amendments to the Equal Employment Opportunities Act, Title VII . . . and the Equal Pay Act, . . . brought employees of educational institutions engaged in educational activities within their coverage and prohibited discrimination on the basis of sex.

   Id. at *6.

13. This article is a companion piece to one investigating sex discrimination. See Diane Heckman, No Girls Allowed: Excavating Forty Years of Sex Discrimination Involving Educational Athletic Employment, 18 SETON HALL J. SPORT L. (forthcoming 2008) [hereinafter Heckman, Forty Years of Sex Discrimination].

14. Id.
15. See id. at 4-7.
16. Id. at 3 n.8.
of power, is present in the United States Constitution in a number of provisions, including the Eleventh Amendment.\textsuperscript{17} The biggest land mine for all the federal civil rights statutes is whether the express or implied statutory ability of a citizen to commence a lawsuit in a federal court against a state entity runs afoul of the Eleventh Amendment. Thus, the most significant inquiry today becomes the operation of the Eleventh Amendment, which would preclude citizens of a particular state from being able to sue a state or an "arm of the state,"\textsuperscript{18} in a federal court for monetary damages based on the governing federal statutes. For the first time in sixty years, during 1996, the Supreme Court in \textit{United States v. Lopez}\textsuperscript{19} ruled that a congressional statute aimed at protecting the nation's youth attending schools, specifically by regulating the possession of firearms near schools, was unconstitutional as not having met the interstate commerce connection upon which the statute was based.\textsuperscript{20} This followed with the Rehnquist Court emasculating a number of other federal statutes by determining that they violated the Eleventh Amendment by trampling on the sovereign immunity of states, starting with \textit{Seminole Tribe of Florida v. Florida}.\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{17} U.S. CONST. amend. XI, which states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." This amendment has been held applicable to citizens attempting to sue the state in which they reside. See Williams v. Dist. Bd. of Trs. of Edison, 421 F.3d 1190, 1192 (11th Cir. 2005) (stating, "The Eleventh Amendment bars federal courts from entertaining suits against states . . . . Although the text of the Eleventh Amendment does not appear to bar federal suits against a state by its own citizens, the Supreme Court long ago held that the Amendment bars these suits.") (citing Hans v. Louisiana, 134 U.S. 1 (1890)); Diane Heckman, \textit{The Impact of the Eleventh Amendment on the Civil Rights of Disabled Educational Employees, Students and Student-Athletes}, EDUC. L. REP. (forthcoming 2008) (manuscript at 2, on file with author) [hereinafter Heckman, \textit{The Impact of the Eleventh Amendment}].

\item \textsuperscript{18} Unlike the Fourteenth Amendment, which applies to state entities and private entities engaged in state action, the Eleventh Amendment pertains to a narrower subset containing states and "arms of the state." U.S. CONST. amend. XIV. See Williams, 421 F.3d at 1192, wherein the Eleventh Circuit identified four elements to determine if an arm of the state is involved, stating: "(1) how the state defines the entity; (2) what degree of control the state maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgment against the entity." In Williams, the court determined that the defendant-Florida community college was an arm of the state. Id.; see also Heckman, \textit{The Impact of the Eleventh Amendment}, supra note 17, (manuscript at 8). See generally Diane Heckman, \textit{Fourteenth Amendment Procedural Due Process Governing Interscholastic Athletics}, 5 VA. SPORTS & ENT. L.J. 1, 4-5 (2005) (addressing whether the defendant is a proper party defendant for Fourteenth Amendment purposes).


\item \textsuperscript{20} Id. at 567.

\item \textsuperscript{21} 517 U.S. 44 (1996) (Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1)(C) (1996); see infra text accompanying notes 79, 109-14, 124-29 (ADA related); text infra text accompanying notes
Oversight of the civil rights statutes can be triggered by the entities' receipt of federal funds, such as with Title VI, Title IX, and the Rehabilitation Act, or due to some specific activity that the defendant engaged in, such as with Title VII and the ADEA, which apply to the employees of certain employers provided the business has an interstate commerce connection; the IDEA, which covers certain providers of specific educational services for the disabled; and the ADA, which can apply to a multitude of entities. The Civil Rights Remedies Equalization Act (Equalization Act)\(^2\) applies to a number of civil rights laws that require receipt of federal funds, including the Rehabilitation Act and Title VI. It states:


(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.\(^3\)

Since the nation’s educational system is permeated by public educational institutions on the K-12 and post-secondary levels, the Eleventh Amendment can operate as a fatal knockout punch for those employed there, including the athletic department personnel, seeking remediation for violation of their federal civil rights.

Part II introduces legislation governing the prohibition of discrimination based on disability. Part III showcases the interaction between athletic employment and age discrimination. Part IV transmits the statutory law and case law barring discrimination based on an individual’s race. The accompanying appendix profiles the salient aspects of the federal civil rights statutes.

229-36 (ADEA related).
23. Id. (Equalization Act).
II. DISABILITY DISCRIMINATION

Whether the increase in the number of disabled athletes nationally\(^2\) coincides with the increase in the number of disabled physical education teachers, coaches, officials, and other athletic department personnel remains an open question due to confidentiality concerns.\(^2\) It is still unusual to have a physically disabled physical education teacher or coach on the K-12 or college level unless that individual subsequently becomes disabled after being employed.\(^2\) Presently, there are three federal laws that may have an impact on preventing discrimination involving disabled employees of athletic departments in educational institutions: the Rehabilitation Act, the IDEA, and the ADA.\(^2\) For these statutes:

first, examine the jurisdictional requirements, including what constitutes ‘disabled’ under the particular statute involved and what is the needed basis to trigger the statute’s application over a particular [school or] athletic association; second, determine what procedural requirements are imposed, including whether an administrative complaint must first be filed with an executive agency before commencing a federal lawsuit; and third, examine what constitutes a \textit{prima facie} case.\(^2\)

While all three federal statutes have references to disabled employees, in general, the ADA is the primary statute for positing disability discrimination in employment. The three statutes are individually reviewed based on their chronological enactment as law.

\textbf{A. Individuals with Disabilities Education Act (IDEA)}

The IDEA,\(^2\) a synthesis of two earlier statutes (one originally enacted in


\(^2\) See Viv Bernstein, \textit{Still Games to Coach, Players to Teach, Miles to Go}, N.Y. TIMES, Mar. 2, 2006, at D6 (successful women’s basketball coach at North Carolina State University who is battling cancer).

\(^2\) See Diane Heckman, \textit{Athletic Associations and Disabled Student-Athletes in the 1990's}, 143 EDUC. L. REP. 1 (2000) [hereinafter Heckman, \textit{Athletic Associations}] [for a detailed exposition of the three statutes and resultant case law].

\(^2\) Id. at 3.

1970), 30 is aimed at supporting special education to allow disabled students the right to receive a free appropriate public education31 (FAPE) "[t]hat emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living," among other goals.32 The IDEA became effective on October 30, 1990.33 On June 4, 1997, President William J. Clinton signed the IDEA Amendments of 1997 into law. During 2004, further revisions were made during the George W. Bush administration to fund and extend the IDEA legislation.34 The offering of physical education instruction is included, and the 1997 amendments now refer to extracurricular activities, which include opportunities to participate in interscholastic athletics.35 While this statute is primarily directed toward students, embedded within the IDEA is one provision directed toward employment. Section 1405 of the statute deals with the "[e]mployment of individuals with disabilities" and states, "The Secretary shall ensure that each recipient of assistance under this chapter makes positive efforts to employ and advance in employment qualified individuals with

31. Free appropriate public education (FAPE) is defined to mean

[s]pecial education and related services that – (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(8); see also 34 C.F.R. § 300.121 (2006) ("Each State must have on file with the Secretary information that shows that, subject to 34 C.F.R. § 300.122, the State has in effect a policy that ensures that all children with disabilities aged 3 through 21 residing in the State have the right to FAPE, including children with disabilities who have been suspended or expelled from school.").

33. Id. § 1403(c).
34. Pub. L. 108-446, 118 Stat. 2803 (Dec. 3, 2004) (known as the "Individuals with Disabilities Education Improvement Act of 2004"); see also Susan G. Clark, Judicial Review and the Admission of "Additional Evidence" Under the IDEA: An Unusual Mixture of Discretion and Deference, 201 EDUC. L. REP. 823 (2005); Ronald D. Wenkart, An Essay. Unfunded Federal Mandates: The No Child Left Behind Act and the Individuals with Disabilities Education Act, 202 EDUC. L. REP. 461, 462 (2005) (The "IDEA was envisioned as a federal-state partnership in which Congress would provide 40 percent of the cost and the states would pay 60 percent. Twice Congress has chastised itself for its failure to keep its promise, once in a 1994 statute and once in a 1999 resolution, but it has never increased funding to the 40 percent level.").
disabilities in programs assisted under this chapter.” However, there is no case law under the IDEA investigation claims by athletic department employees. Parenthetically, there is a provision pertaining to the IDEA expressly abrogating Eleventh Amendment immunity, albeit the Supreme Court has not addressed whether this provision, along with a proper Fourteenth Amendment nexus, would withstand such an attack by K-12 public schools.

B. Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act)

The Rehabilitation Act was enacted in 1973. This statute prohibits discrimination based upon disability and is applicable to educational programs and activities if they are recipients of federal funds. It directs:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

As one court opined, “The purpose of the Rehabilitation Act ‘is to prevent old-fashioned and unfounded prejudices against disabled persons from interfering with those individuals’ rights to enjoy the same privileges and duties afforded to all United States citizens.’”

In order to establish a prima facie employment case under the Rehabilitation Act, an individual must prove the following elements: (1) the activity or program received federal funding; (2) the plaintiff is “disabled” within the meaning of the statute; (3) the defendant discriminated against the

37. Id. § 1403 (2000).
38. See Heckman, The Impact of the Eleventh Amendment, supra note 17 (manuscript at 11). The IDEA is not applicable to post-secondary education as would be offered by colleges and universities.
40. Id. § 705(20) (2000).
41. Id. § 794(a) (promulgation of rules and regulations) (emphasis added). The terms “program” and “activity” are defined at 29 U.S.C. § 794(b).
plaintiff in an employment decision based on the individual’s disability; and
(4) the plaintiff is “otherwise qualified” to be employed or receive
employment benefits, or that the individual may be “otherwise qualified” via
“reasonable accommodations.”

First, it is imperative to establish that the defendant is a recipient of federal funds. This statute is not restricted to just “educational” programs and activities. The Rehabilitation Act can cover kindergarten through college (K–graduate school) in both private and public schools, provided that the educational institution program or activity is a recipient of federal funds, which is examined on an individual basis.

Second, an individual must establish that he or she meets the statutory definition of being disabled. The term “disabled” is now used in place of “handicapped,” although not all statutory language has been updated. The Rehabilitation Act defines a “handicapped” individual, which is the same definition utilized by the ADA. The word “disability,” as applicable to employees, is defined to mean “any individual who—(i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and (ii) can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to subchapter I, III, or VI of this chapter.” This element requires satisfaction of three prongs. Initially, a plaintiff must establish that he or she has a physical or mental impairment. The statute expressly provides that certain conditions, such as alcoholism, are not covered when employment is involved. Additionally, this law allows for the exclusion of employment of

43. See Heckman, Athletic Associations, supra note 27, at 8 (citations of underlying cases omitted) (revising the factors from the student or student-athlete viewpoint to the employee viewpoint).
46. The regulation states: “(1) Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.” 34 C.F.R. § 104.3(j)(i) (2006) (emphasis added).
47. See infra text accompanying note 69.
49. See 29 U.S.C. § 705(20)(C)(v), which states,

For purposes of sections 793 and 794 of this title as such sections relate to employment, the term, ‘individual with a disability’ does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.
individuals with certain diseases or infections, stating:

For purposes of sections 793 and 794 of this title, as such sections relate to employment, such term, ['individual with a disability'] does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.\(^{50}\)

Simply having a certain disability will not suffice; the individual must also establish that the particular impairment interferes with a major life activity,\(^{51}\) which has been defined explicitly to include "working."\(^{52}\) And finally, the individual must prove that prior to the adverse employment action taken by the defendant employer or potential employer, the educational institution knew of the individual’s condition (essentially implicating that the defendant was actively placed on notice) or the individual was regarded as having a disabling condition (essentially attributing a constructive notice).\(^{53}\) Vocational rehabilitation services may also come into play for disabled individuals.

Third, the plaintiff must establish that an adverse action taken by the educational institution against the disabled individual was due to that individual’s disability and not due to other legally-sanctioned, legitimate business reasons. Finally, the plaintiff must then establish that he or she was qualified for the position or would have been "otherwise qualified." A qualified handicapped person means "(1) with respect to employment, a handicapped person who, with reasonable accommodation, can perform the

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\(^{50}\) Id. (emphasis added).

\(^{51}\) Id. § 705(20)(D). An individual would not be deemed disabled or impaired due to the following conditions: homosexuality, bisexuality, transvestitism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairment, or other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current illegal use of drugs. Id. § 705(20)(E)–(F).

\(^{52}\) "Major life activities" is defined to mean "functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 34 C.F.R. § 104.3(j)(2)(ii) (2006). The list is not exclusive.

\(^{53}\) Id.

essential functions of the job in question." 54

Some critical procedural and jurisdictional aspects are discussed for the various statutes. First, the Rehabilitation Act imposes no administrative filing requirement for an aggrieved individual. Second, the Rehabilitation Act contains no explicit statute of limitations. Generally, courts tend to borrow the limitations period from the applicable state statute of limitations for personal injury actions; however, for employment-related matters, reference to the Americans with Disabilities Act would be required. 55 Third, generally, compensatory damages are permissible, presumably like Title IX. 56 However, punitive damages are not allowed. 57 Fourth, the jurisdictional reach over governmental entities is explored. In Lane v. Pena (Pena), 58 the Supreme Court determined that the Rehabilitation Act infringed upon the federal government’s authority in dismissing a disabled cadet attending the Merchant Marine Academy, which was overseen by the U.S. Department of Transportation. 59 The opinion foreclosed the ability of the plaintiff to seek monetary damages from the federal government pursuant to the Rehabilitation Act. 60 The Supreme Court has not ruled on whether the Eleventh Amendment impinges upon the states’ sovereign immunity. 61


56. Both statutes are devoid of any explicit statutory language concerning allowing monetary damages for aggrieved individuals. See Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992) (allowing monetary damages in a Title IX action when intentional discrimination is proven); see also K.M. ex rel. D.G. v. Hyde Park Cent. Sch. Dist., 381 F. Supp. 2d 343, 358 (S.D.N.Y. 2005) (ruling that “[a] plaintiff may recover money damages under the ADA or Section 504 by showing a statutory violation resulted from ‘deliberate indifference’ to those rights secured the disabled by those statutes”); Ali v. City of Clearwater, 807 F. Supp. 701, 705 (M.D. Fla. 1992) (stating, “Furthermore, the Franklin Court’s reliance on Guardians and Darrone make it clear that Section 504 should be interpreted similarly to Title IX; that is, in cases of intentional discrimination, damages are not limited to those equitable in nature”); Tanberg v. Weld County Sheriff, 787 F. Supp. 970 (D. Colo. 1992) (allowing for compensatory damages, citing Title IX and Franklin).


59. Id. Lower courts had held federal prisons educational programs were not subject to Title IX despite their obvious federal funding.

60. Id. at 199-200.

61. See Equalization Act, 42 U.S.C. § 2000d-7(a)(1) (2000) (eff. Oct. 21, 1986) (explicitly applicable to the Rehabilitation Act). For lower court cases addressing Eleventh Amendment considerations, see Miller v. Texas Tech University Health Sciences Center, 421 F.3d 342 (5th Cir. 2005) (finding that state agencies were not insulated by the Eleventh Amendment, where state agencies accepted federal funds and thus they could be subject to lawsuits in federal courts pursuant
The first Supreme Court review of a Rehabilitation Act educational employment case occurred during 1987, with the Court sanctioning the statute’s basic purpose. In *School Board of Nassau County, Florida v. Arline*, a female teacher was dismissed from her elementary school teaching position after suffering a third relapse from tuberculosis. First, the Court examined whether an individual with tuberculosis, a contagious disease, was a “handicapped individual” within the meaning of the Rehabilitation Act, and secondly, whether the individual was “otherwise qualified” to teach with such condition. The Supreme Court found that she was a “handicapped individual” within the meaning of the Act. The Court stated:

Arline’s contagiousness and her physical impairment each resulted from the same underlying condition, tuberculosis. It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.

Furthermore, the Court advanced, “Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of [Section] 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others.” Finally, since the record demonstrated insufficient evidence to determine if the plaintiff was “otherwise qualified,” the case was remanded on this issue. This Court decision would provide the backdrop for subsequent cases pertaining to all educational employees, including athletic department employees.

Since passage of the ADA, the Rehabilitation Act underscores [t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title 1 of the Americans with Disabilities Act of 1990 and the provisions of section 501 through 504, and 510, of the Americans with


63. *Id.* at 282.
64. *Id.* at 284.
Disabilities Act of 1990, as such sections relate to employment.\footnote{See id. § 705(20)(A).}

This accounts for the decrease in Rehabilitation Act cases for public school and university athletic department employees, although it has not been totally usurped for those employed in the sports field.\footnote{See infra text accompanying notes 159-69 (concerning Schultz v. YMCA of the United States, 139 F.3d 286 (1st Cir. 1998), and community-related athletic employment); see also infra text accompanying note 127 (regarding the Supreme Court’s decision in Garrett finding the Eleventh Amendment protected public universities deemed “arms of the state” from being sued for monetary damages via Title I of the ADA).}

C. Americans with Disabilities Act of 1990 (ADA)

President George H.W. Bush signed the ADA\footnote{See Heckman, Athletic Associations, supra note 27, at 12 (referring to Pub. L. 101-336, § 1, 104 Stat. 327 (1990) (codified as amended in 42 U.S.C. §§ 12101-12213)); see also 42 U.S.C. § 12117(a) (incorporating by reference Title VII procedures into ADA Title I actions. 42 U.S.C. § 2000e-5(e)(1)). The Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(e) (2000), also pertains to this civil rights statute.} into law on July 26, 1990, although it was not effective until July 26, 1992. This statute is rather remarkable, as unlike the Rehabilitation Act, where the educational program or activity must receive federal funds, the ADA may involve private entities and private individuals, including the private owners and operators of places of public accommodations, as defined within the statute. The ADA and the Rehabilitation Act focus on whether the defendant has provided a reasonable accommodation to an individual on the basis of a known disability. The ADA, like the Rehabilitation Act, defines “disability” as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”\footnote{42 U.S.C. § 12102(2). In Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1082 (10th Cir. 1997), the Tenth Circuit Court stated: Similarly, it would be illegal for an employer to discriminate against a qualified employee because that employee had a family member or a friend who had a disability, if the employer knew about the relationship or association, knew that the friend or family member has a disability, and acted on that basis. Thus, if an employee had a spouse with a disability, and the employer took an adverse action against the employee based on the spouse’s disability, this would then constitute discrimination. Id. at 1082. The court also noted “that the protection afforded to non-disabled employees who have an association with a disabled person differs in one significant respect from that afforded to disabled employees. This difference is the application of the ADA’s ‘reasonable accommodation’ requirements.” Id. at 1083.} The term “major life activities” is defined as:

\footnote{Id. at 1082. The court also noted “that the protection afforded to non-disabled employees who have an association with a disabled person differs in one significant respect from that afforded to disabled employees. This difference is the application of the ADA’s ‘reasonable accommodation’ requirements.” Id. at 1083.}
functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." The term "substantially limits" means:

(i) unable to perform a major life activity that the average person in the general population can perform; or (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.

This comprehensive legislation, unlike other statutes, is divided into different areas depending on either the nature of the activity or the entity involved: Title I oversees employment relationships, Title II covers public entities, and Title III addresses public accommodations. This cobbled together of somewhat disparate areas into one statutory scheme provides for lack of uniformity.

The ADA prohibits retaliation against individuals who raise the specter that an employer may be engaging in this type of discrimination. On the procedural front, an aggrieved individual seeking relief for employment pursuant to Title I (employment) claims must first file an administrative complaint and exhaust administrative remedies; whereas, an individual pursuing remedies under Title II (public entities) or Title III (those providing

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70. 29 C.F.R. § 1630.2(i) (2006); see also Hanig v. Yorktown Cent. Sch. Dist., 384 F. Supp. 2d 710, 715 (S.D.N.Y. 2005) (noting that the EEOC found that a public high school guidance counselor was not deemed disabled due to her dyslexia and dysgraphia, which the plaintiff indicated interfered with her writing skills, an integral part of her having to send written letters of recommendation on behalf of her students to colleges and universities).

71. Id. at § 1630.2(j)(1); see, e.g., Meling v. St. Francis Coll., 3 F. Supp. 2d 267 (E.D.N.Y. 1998) (discussed within).

72. 42 U.S.C. § 12203(a) (applying when an individual has "opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing"). The Eighth Circuit Court in Amir v. St. Louis University, 184 F.3d 1017, 1025 (8th Cir. 1999), stated, "In order to establish a prima facie case of retaliation, a plaintiff must show (1) that he engaged in a statutorily protective activity, (2) that an adverse action was taken against him, and (3) a causal connection between the adverse action and the protected activity." See also Treglia v. Town of Manlius, 313 F.3d 713, 719 (2d Cir. 2002) (identifying the prima facie elements, including another element that the employer was aware of the employee's protected activity); Hanig v. Yorktown Cent. Sch. Dist., 384 F. Supp. 2d 710, 725 (S.D.N.Y. 2005) (finding that a claim for ADA retaliation cannot succeed where the plaintiff was no longer employed by the public school district).

73. See Smith v. Park County Sch. Dist. No. 6, No. 99-8023, 1999 WL 1136762, *1 (10th Cir. Dec. 13, 1999) (concerning the failure of the plaintiff to exhaust the administrative remedies with respect to his ADA claim, by not filing a charge within 300 days of the alleged violation).
public accommodations) apparently may proceed straight to court, although there is some case law requiring that the entity must be placed on notice prior to filing a lawsuit pursuant to Title III. For Title I (employment-related), the individual must file an administrative complaint with the EEOC within 180 days (as with Title VII actions), since the ADA mandates compliance with the administrative procedures of Title VII. For Title II (public entities), there is no express statute of limitations, so federal courts borrow the comparable state statute of limitations, generally based on the limitations period used for personal injury actions. The Civil Rights Act of 1991, applicable to Title VII lawsuits, also covers Title I (employment) of the ADA, and allows the awarding of compensatory damages, depending on the number of employees within an establishment, with a maximum award of $300,000, as well as the right to a jury trial. Punitive damages are not permitted for Title I cases. For a Title II (public entities) claim, the individual would need to prove intentional discrimination to obtain monetary damages. However, in a case commenced by a student-athlete, a Georgia district court ruled that monetary damages were unavailable when involving public accommodations covered under Title III, although injunctive relief is permitted. Since the new millennium, the Supreme Court has ruled on ADA cases involving the Eleventh Amendment as it concerns Title I (employment) and Title II (public entities), which are discussed within. The specific titles will be reviewed in reverse order: Title

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74. 42 U.S.C. § 2000e-5(e)(1) (requiring an individual to file an administrative complaint with the EEOC, or if permissible by state law, allowing a dual filing with the state agency, which must be done within 180 days of the offending action. The time limit may be extended to 300 days); see also Heckman, Forty Years of Sex Discrimination, supra note 13, at 11.


76. See id. § 1981a(b)(3)(D).


78. See Cole v. Nat’l Collegiate Athletic Ass’n, 120 F. Supp. 2d 1060 (N.D. Ga. 2000) (concerning a claim that the NCAA’s academic eligibility rules violated the ADA; the court granted the NCAA’s motion to dismiss the action).

79. See 42 U.S.C. § 12202 (state immunity):

   A State shall not be immune under the [E]leventh [A]mendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of [the requirements of] this chapter . . . . [R]emedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

See infra text accompanying note 127 concerning the decision in Garrett (where there was no mention of this specific statutory provision in the opinion); see also Erickson v. Bd. of Governors State Colls. & Univs. for N.E. Ill. Univs., 207 F.3d 945 (7th Cir. 2000) (ruling that Title I does not abrogate Eleventh Amendment immunity), cert. denied sub nom. United States v. Bd. of Govs. of
III, Title II, and then Title I.

i. Title III: Public Accommodations

1. Generally

Title III prohibits disability discrimination by private entities providing public accommodations.\(^8\) It does not apply to public entities. It mandates that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by \textit{any person} who owns, leases (or leases to), or operates a place of public accommodation."\(^8\) The Title III component "defines a 'public accommodation' as 'a private entity . . . which affects commerce through the operation of a concert hall, stadium, or other place of exhibition or entertainment, a nursery, elementary, secondary, . . . school, or other place of education, or a gymnasium . . . or other place of exercise or recreation.'"\(^8\) Thus, the statute expressly applies to an assortment of sporting venues.

The ADA instructs that reasonable modifications are required. "Discrimination" has been defined to include:

\begin{quote}
\text{a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, \textit{unless} the entity can demonstrate that making such modifications \textit{would fundamentally alter the nature} of such goods, services, facilities, privileges, advantages, or accommodations.}\(^8\)
\end{quote}

Thus, reasonable accommodations are required unless it can be demonstrated that such modifications would fundamentally alter the nature of the accommodations.\(^8\) Additionally, entities may exclude disabled

\begin{footnotesize}
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\item 42 U.S.C. § 12182(a) (emphasis added).
\item See Heckman, \textit{Athletic Associations, supra} note 27, at 13 (citing 42 U.S.C. § 12181(7)) (identifying twelve categories) (emphasis added).
\item See Wong v. Regents of Univ. of Cal., 192 F.3d 807, 818 (9th Cir. 1999) (ruling that an academic institution must make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability pursuant to both the
\end{itemize}
\end{footnotesize}
individuals who pose a significant risk to the health or safety of other individuals. It states, "Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others." The statute elaborates, "The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." The next case addressing public accommodations received national attention and showcased the David versus Goliath aspect of the disabled athlete battling against the governing sports entity in a very visible and accessible fact pattern.

2. PGA Tour, Inc. v. Martin

During 2001, in *PGA Tour, Inc. v. Martin*, for the first time the Supreme Court examined a case pertaining to any disabled individual involved with athletics under any of the federal disability statutes. Although the professional golfer was an independent contractor rather than an employee of the PGA Tour, the case holding may be pertinent for other ADA cases involving athletic department employees. Casey Martin, "a golfer with a circulatory

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Rehabilitation Act and the ADA; however, neither statute requires the school to make a fundamental or substantial modification to its programs or standards).

85. 42 U.S.C. § 12182(b)(3).
86. Id.
87. 532 U.S. 661 (2001) (finding that allowing a disabled professional golfer to use a golf cart during professional tour events constituted a reasonable accommodation). Both the district court and Ninth Circuit Court allowed Martin to use the golf cart. Martin v. PGA Tour, Inc., 994 F. Supp. 1242 (D. Or. 1998) (granting the golfer an injunction allowing him to use the golf cart, whereupon the PGA Tour appealed the decision), aff'd, 204 F.3d 994 (9th Cir. 2000), aff'd, 532 U.S. 661 (2001). See generally Alison M. Barnes, *The Americans with Disabilities Act and the Aging Athlete After Casey Martin*, 12 MARQ. SPORTS L. REV. 67 (2001). However, the Seventh Circuit Court, in another case, rendered pre-*Martin*, prohibited a golfer with a hip condition from using a cart in other golf events. See Olinger v. U.S. Golf Ass'n, 55 F. Supp. 926 (N.D. Ind. 1999), aff'd, 205 F.3d 1001 (7th Cir. 2000), cert. granted, judgment vacated, 532 U.S. 1064 (2001), on remand, No. 99-2580, 2001 WL 1029125 (7th Cir. Sept. 4, 2001) (referring the case back to the district court in light of the *Martin* decision); see also Leiken v. Squaw Valley Ski Corp., No. Civ. S-93-505, 1994 WL 494298 (E.D. Cal. 1994) (agreeing to consolidate an individual action with a class action, commenced pursuant to Title III of the ADA, commenced by individuals challenging the ski resort policy forbidding persons with wheelchairs from using cable cars). In *Akiyama v. U.S. Judo Inc.*, 181 F. Supp. 2d 1179, 1184 (W.D. Wash. 2002), in a case analyzing whether individuals that were required to bow to others violated their freedom of religion, the Washington district court, commenting on the landmark decision in *Martin*, stated, "The Supreme Court has also made clear that there is no 'rules of competition' exception to the anti-discrimination laws; such rules are not immune from judicial review and may be subjected to the appropriate tests for identifying 'discrimination.'"
problem that would clearly be exacerbated if forced to walk the course, sought to use a golf cart during a Professional Golf Association (PGA) Tour event, pursuant to the ADA." The PGA claimed that walking was part of the game and barred Martin's use of a golf cart during professional tour events. Both the National Collegiate Athletic Association (NCAA) and the PGA Senior Tour allowed the use of carts for its golfers. There was no question that Martin was disabled or that the Tour's action was predicated solely on the disability of Martin. Simply put, with the use of a cart, Martin could participate, and without it, he would be unable to participate.

The Magistrate judge found that the ability to plan and execute golf shots was an inherent, essential part of the game of golf, as opposed to the ability to walk distances, which the Magistrate found to be incidental to the game. When given his requested accommodation, Martin was able to perform his chosen work, and thus, the Magistrate ordered the PGA to allow the golfer to use a golf cart. The Ninth Circuit Court of Appeals affirmed the district court's decision granting an injunction, directing that the PGA Tour could not prevent Martin from using a cart during PGA tournament events.

On appeal to the Supreme Court, the two contested issues were whether the PGA Tour, Inc., clearly a private entity, engaged in actions under the ADA's definition of public accommodation, contained in Title III, and secondly, whether allowing a disabled golfer to use a cart in professional competitions constituted a reasonable accommodation. In another divided decision, the Supreme Court issued an affirmative response to the first

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88. See Heckman, Athletic Associations, supra note 27, at 15 n.66.
89. Martin, 532 U.S. at 670-71.
90. Id. at 667-68.
91. Id. at 690.
92. Id.
94. Martin, 532 U.S. at 664-65.
95. Id. at 661. Justice Scalia wrote a dissent, joined in by Justice Thomas, claiming that the majority was wrong on both counts of whether the PGA came under the definition of a public accommodation and secondly, whether allowing use of the cart did constitute a fundamental alteration. The dissent opined,

The statute, of course, provides no basis for this individualized analysis that is the Court's last step on a long and misguided journey. The statute seeks to assure that a disabled person's disability will not deny him equal access to (among other things) competitive sporting events—not that his disability will not deny him an equal chance to win competitive sporting events.

Id. at 703 (Scalia, J., dissenting) (emphasis in original). Justice Scalia, who also criticized the opinion for opening the area to a floodgate of litigation, wrote, "The Court guarantees that future
The Tour held events at courses that were deemed public. The private golf courses were open to the public, who were allowed to attend and be a part of the gallery. Additionally, the Q (qualification) school was open to the public, provided the individual paid $3000 and submitted two letters of reference.

The Court then tackled the second issue. As indicated, the ADA regulations require a public entity to “make reasonable accommodations in policies . . . when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service.” Did allowing Martin to use the cart constitute a reasonable accommodation or would it result in a fundamental alteration to the game of golf? The Court explored what were the essential versus incidental elements of this sport. It stated:

The use of carts is not inconsistent with the fundamental character of golf, the essence of which has always been shot-making. The walking rule contained in [the PGA Tour’s] hard cards is neither an essential attribute of the game itself nor an indispensable feature of tournament golf . . . Further, the factual basis of petitioner’s argument—that the walking rule is “outcome affecting” because fatigue may adversely affect performance—is undermined by the District Court’s finding that the fatigue from walking during a tournament cannot be deemed significant.

Thus, the Court concluded walking was not deemed fundamental to the essence of this particular sport, but rather, it was an incidental aspect of the game of golf.

Additionally, the Court required that the entity involved must conduct an individualized inquiry. The Court stated, “Even if petitioner’s factual predicate is accepted, its legal position is fatally flawed because [the PGA Tour’s] refusal to consider Martin’s personal circumstances in deciding whether to accommodate his disability runs counter to the ADA’s requirement

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cases of this sort will have to be decided on the basis of individualized factual findings. Which means that future cases of this sort will be numerous, and a rich source of lucrative litigation.” Id. at 702. This prognostication has not materialized.

96. Id. at 677.
97. Id.
98. Id. at 665.
100. Martin, 532 U.S. at 663.
that an *individualized inquiry* be conducted." Then, the Court concluded
the use of the cart by this disabled individual would not result in a
fundamental alteration. Martin's use of the golf cart did not provide him
with any unfair advantage. The Court upheld that herein it would be a
reasonable accommodation to allow a professional golfer with a disability to
use a golf cart. The Court's expansive discourse on what constitutes a
reasonable accommodation should serve disabled athletic department
employees seeking relief under the ADA under both Title I and Title II.

ii. Title II: Public Entities

Title II is modeled on the Rehabilitation Act and governs public
entities. The array of public entities entails any department, agency, special
purpose district, or other instrumentality of a state or local government.
Thus, it is clear that all state colleges and universities and public schools
would be included. Title II imparts: "Subject to the provisions of this
subchapter, no qualified individual with a disability shall, by reason of such
disability, be excluded from participation in or be denied the benefits of the
services, programs, or activities of a public entity, or be subjected to
discrimination by any such entity." Title II defines a qualified individual
with a disability as "an individual, . . . who, with or without reasonable
modifications to rules, policies, or practices . . . or the provision of auxiliary
aids and services, meets the *essential . . . requirements* for the . . . participation
in programs or activities provided by a public entity." On May 17, 2004, in *Tennessee v. Lane* (*Lane*), the Rehnquist Court, in
a divided opinion, determined that state entities would not be insulated by the

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101. *Id.* (emphasis added); *see* Dennin v. Interscholastic Conn. Athletic Conf., Inc., 913 F. Supp. 663 (D. Conn.) (pre-Martin case, requiring an individualized analysis by the state athletic association, concerning a disabled interscholastic swimmer with Downs Syndrome), *judgment vacated*, 94 F.3d 96 (2d Cir. 1996).
102. 532 U.S. at 690.
103. *Id.*
104. *Id.*
106. 42 U.S.C. § 12131(1); *see also* Transp. Workers Union of Am. v. N.Y. City Transit Auth., 342 F. Supp. 2d 160 (S.D.N.Y. 2004) (holding the plaintiffs could use Title II of the ADA to assert an employment disability-based claim, thus the union could assert both Title I and Title II against the municipal department).
107. 42 U.S.C. § 12132.
108. *Id.* § 12131(2) (emphasis added).
Eleventh Amendment in a case concerning access by disabled individuals to Tennessee state courthouses. Disabled individuals, who used wheelchairs, were not afforded accommodations, such as elevators, to reach the upper floors of the Tennessee state court buildings and were left to literally crawl up the steps if no one was available to carry them up the staircases. It should be stressed that this was not a unanimous decision with Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas filing a dissent. Aside from the specific decision rendered for these plaintiffs, the issue arises as to whether this holding should be narrowly confined only for access to state courthouses or expansively applied to all state entities covered under Title II. Justice Stevens, writing for the majority, recognized the underlying problem, stating, "[N]othing in our case law requires us to consider Title II, with its wide variety of applications as an undifferentiated whole." Thus, the Court resisted giving a blanket approval to all Title II premised actions, which will engender future litigation to flesh out the boundaries of the state sovereignty. Although, the Court did recognize that Title II was enacted to address pervasive discrimination "in such critical areas as... education."

iii. Title I: Employment

Title I covers the area of employment and requires the employment of at least fifteen employees for a business that involves interstate commerce. The potential employee or employees must be able to "perform the essential functions of the employment position" with or without a reasonable accommodation. The statute requires that a reasonable accommodation be made by the employer for the disabled employee, provided it does not constitute an undue hardship. The term "reasonable accommodation" as defined in the ADA

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110. Id.
111. Id. at 513-14.
112. Id.
113. Id. at 528. However, it should be stressed that the Supreme Court recognized that Congress documented "[a] pattern of unequal treatment in the administration of a wide range of public services, programs and activities, including the penal system, public education, and voting." Id. at 524.
115. 42 U.S.C. §§ 12111-12117. Religious entities are provided an exemption. Id. § 12113(c); see also 29 C.F.R. §§ 1630.1-16 (2006) (implementing regulations).
116. 42 U.S.C. § 12111(5)(A) ("The term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person.").
117. Id. § 12111(8).
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may include (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.\(^{(1)}\)

The term “undue hardship” takes into account financial considerations and the level of difficulty in attempting to provide such accommodation.\(^{(2)}\) As indicated, the term “working” constitutes a major life activity.\(^{(3)}\) The regulations provide further amplification of the term “working,” identifying:

The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.\(^{(4)}\)

In order to establish a prima facie ADA Title I employment case, the following must be established:

(1) [The plaintiff] is an individual with a disability according to the statute; (2) [the plaintiff] is “otherwise qualified” to perform the job requirements, with or without [a] reasonable accommodation; (3) [the plaintiff has] suffered an adverse employment decision; (4) [t]he employer knew or had reason to know of [the plaintiff's] disability; and (5) [t]he position remained open after the adverse employment decision or the disabled individual was replaced.\(^{(5)}\)

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\(^{(1)}\) Id. § 12111(9).
\(^{(2)}\) Id. § 12111(10) (noting four enumerated factors that may be considered when considering whether the action would constitute an undue hardship); see also id. § 12111(10)(b) (i)-(iv).
\(^{(3)}\) 29 C.F.R. § 1630.2(i) (2006) (defined as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working”). The Tenth Circuit Court held “communicating” was not a major life activity. Pack v. Kmart Corp., 166 F.3d 1300, 1305 (10th Cir. 1999).
\(^{(4)}\) 29 C.F.R. § 1630.2(j)(3)(i) (emphasis added).
\(^{(5)}\) See Swanson v. Univ. of Cincinnati, 268 F.3d 307, 314 (6th Cir. 2001) (concerning a former surgical resident); see also Macy v. Hopkins County Sch. Bd. of Educ., 484 F.3d 357, 363 (6th Cir. 2007). Another court stated,
Here, the job description and responsibilities would be a critical aspect, especially in hiring and termination cases.

iv. Current Considerations

First, recent Supreme Court decisions have made it more difficult for potential plaintiffs to qualify that they meet the disability criteria necessary to proceed with their disability claims. The Supreme Court found that if individuals with certain conditions were able to take certain medicine or use certain devices or aides, then they would not in fact be deemed disabled. This action has appreciably lessened the pool of individuals who have disabling conditions but are not now deemed de jure “disabled” for ADA application.

Second, while this statute broadened the categories of potential defendants, and the ADA statutory scheme covers states and arms of the state, the Supreme Court dramatically curtailed the applicability of the ADA to certain educational employers as potential defendants. The Court ruled on a Title I claim in *Board of Trustees of the University of Alabama v. Garrett*, which involved a consolidated case, including the university’s termination of the plaintiff, a registered female nurse, who had been undergoing treatment for breast cancer. On February 21, 2001, the Supreme Court, in a split

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Sanzo v. Uniondale Union Free Sch. Dist., 381 F. Supp. 2d 113, 117 (E.D.N.Y. 2005). The Sanzo court also found that “incidents of misconduct and incompetence only further provide legitimate nondiscriminatory reasons for [a school employee’s] termination.” Id. at 118. The court also noted, “Similarly, New York courts use the same McDonnell Douglas framework to analyze cases of employment discrimination under the [New York Human Rights Law, found at N.Y. EXEC. LAW §§ 290-301 (McKinney 2006)].” Id. at 118.


decision, concluded that the Eleventh Amendment would preclude application
of Title I of the ADA to arms of the state, which would by extension include
this public state university, as it impugns the sovereignty of states, when
claimants were seeking monetary relief for such disability discrimination in
employment. Here, the ADA has a specific provision abrogating Eleventh
Amendment immunity toward the state. Nevertheless, the Court, in a 5-4
decision authored by Chief Justice Rehnquist, ruled that the ADA exceeded
Congress's § 5 authority of the Fourteenth Amendment (since the Fourteenth
Amendment was enacted subsequent to the passage of the Eleventh
Amendment). Essentially, to pass judicial muster, a federal statute allowing
a citizen to sue a state or arm of a state must have a proper Fourteenth
Amendment § 5 nexus. In reviewing the three-tier analysis the Court uses for
equal protection purposes pursuant to the Fourteenth Amendment, disability is
not placed either within the first strict scrutiny analysis reserved for
fundamental rights or suspect classes (race, national origin, or alienage), or
even second intermediate test analysis (sex and birth legitimacy), but
according to the Court is relegated to the third rational relationship test.
Thus, the Court stated that the Constitution bars only "irrational"
discrimination and that it would be "entirely rational and therefore
constitutional for a state employer to conserve scarce financial resources by
hiring employees who are able to use existing facilities."

While Garrett involved a state university, whether other state universities
and local public school districts also come under the umbrella of "arms of the
state" now becomes a critical element. The Garrett decision has effectively
negated Title I's application for employees working or seeking to work at state
tentities. Query, whether this decision would also apply to Title II and Title III
of the ADA when it involves state entities, such as public schools, other state
institutions, and public state parks. Three years later, in Tennessee v. Lane,
the Court found that individuals could sue states that did not provide access to

125. 531 U.S. at 360.
126. See supra note 79.
127. U.S. CONST. amend. XIV, which states in principal part:
No State shall make or enforce any law which shall abridge the privileges or
immunities of citizens of the United States; nor shall any State deprive any person
of life, liberty, or property, without due process of law; nor deny to any person
within its jurisdiction the equal protection of the laws.

See Garrett, 531 U.S. at 356 (pertaining to the Fourteenth Amendment).
128. See Heckman, One Nation Under God, supra note 3, at 540 n.10.
3 (quoting Chief Justice William H. Rehnquist).
130. See Heckman, Forty Years of Sex Discrimination, supra note 13, at 4.
the state judicial systems pursuant to Title II of the ADA.\textsuperscript{131} Disabled employees are now utilizing Title II to sue state entities in order to circumvent the judicial roadblock caused by the Garrett decision. Whether this legal strategy will prove successful remains to be seen. Surprisingly, only a handful of cases have been commenced involving athletic department employees since the ADA's effective date.

\textit{D. Athletic Employment}

i. Physical Education Teachers or Professors

Due to confidentiality factors,\textsuperscript{132} it is unknown how many disabled individuals are hired as physical education teachers or interscholastic and intercollegiate coaches. While individuals who subsequently become disabled may be protected by the federal statutes, it is remarkable that more cases have not been instituted within the last forty years by disabled individuals confronted with the inability to obtain employment or being subjected to an adverse action during their employment concerning athletic endeavors at schools. Two cases are profiled involving educational institutions: the first case concerns a disabled individual seeking to become a physical education teacher who sought relief under a state statute, and the second case involves a physical education professor who was terminated after she became disabled and who asserted a violation of the ADA. A third case regarding a disabled individual, who worked for a private employer and sought relief under the Rehabilitation Act, is also profiled due to its instruction in this area.

The next case exemplifies the problems faced by disabled individuals seeking employment in the athletics field. In \textit{Zimmerman v. Minot Public School District, No. 1},\textsuperscript{133} the North Dakota Supreme Court found no violation of a state human rights law,\textsuperscript{134} which prohibited discrimination based on disability, when a local school district did not hire a hearing-impaired applicant for the opening as a middle school physical education teacher.\textsuperscript{135} Zimmerman annually filed applications with the school district regardless of

\begin{itemize}
  \item \textsuperscript{131} 541 U.S. 509 (2004); \textit{see also supra} text accompanying note 99.
  \item \textsuperscript{132} \textit{See supra} note 25 (concerning HIPAA medical privacy law); \textit{see also} Family Educational Rights and Privacy Act, 20 U.S.C. § 1232 (2000) (providing confidentiality as to certain school records, including medical records).
  \item \textsuperscript{133} 574 N.W.2d 797 (N.D. 1998).
  \item \textsuperscript{134} \textit{N.D. HUMAN RIGHTS ACT, N.D. CENT. CODE} § 14-02.4 (2007).
  \item \textsuperscript{135} 574 N.W.2d at 798.
\end{itemize}
whether any vacancies existed. When an opening occurred, the school
district interviewed nine applicants. The plaintiff had been providing
physical education instruction for a number of years at a school for the deaf
and had graduated with an education major and a physical education minor
and a lower grade-point-average (2.50) than the applicant chosen. The
plaintiff expressed interest in coaching two sports not available at this
particular school, while the individual hired indicated an interest in coaching
the four sports offered. The applicant who was hired had no teaching
experience, but had student-taught at the middle school with excellent
recommendations; he graduated with a major in physical education and a
higher grade-point-average (3.70) than the plaintiff. The trial court
concluded the school district had advanced legitimate non-discriminatory
reasons for its decision. The appellate court affirmed the lower court’s
determination, finding the trial court had not committed any error therein, and
thus sanctioned the school district’s hiring action.

In Meling v. St. Francis College, a terminated professor of physical
education sued alleging her termination from this small New York Catholic
college violated the ADA. In 1993, Meling had been injured in an
automobile accident. As a result, she received a medical leave of absence
for the fall 1993 and spring 1994 semesters. The professor applied for
disability for the following fall 1994 semester, whereupon the private college
informed the professor that she could only receive a one-year medical leave.
Her physician informed the college that she could return to work for “light
duty only.” She sought to resume teaching, but wanted certain
modifications and assistance—essentially, she was seeking a “reasonable
accommodation.” During this period, the professor had also filed for
governmental disability benefits, whereupon a claimant would identify

136. Id.
137. Id.
138. Id.
139. Id.
140. Id.
141. Id. at 799.
142. Id. at 800.
144. Id. at 267.
145. Id. at 270.
146. Id.
147. Id.
148. Id.
149. Id.
whether he or she was partially or completely disabled, as benefits were contingent upon such classification after proving eligibility. Meling apparently had indicated that she was totally disabled. The college subsequently discharged Meling from her position.

At the conclusion of the trial, a New York federal jury awarded Meling $225,000 in compensatory damages and $150,000 in punitive damages, and it ordered her reinstatement to the faculty. The defendant-college moved to prevent entry of the favorable award as a final judgment while the plaintiff cross-moved, seeking her reinstatement with tenure. First, the Eastern District Court of New York aligned itself with the jury determination that the plaintiff was disabled pursuant to the ADA, based on the limitation of her abilities of walking, standing, sitting, reaching, and lifting. Second, the trial judge, in this pre-Barnes case, would not set aside the jury’s punitive damages award that may be issued in an ADA action when malice or reckless indifference is presented. At trial, apparently the college’s counsel attempted to establish that Meling was totally disabled—based on her submission of an application seeking government benefits—and thus could not do her job even with any reasonable accommodation; this position could result in the jurors concluding that the school terminated the professor for the reason she was so disabled as to be unable to do the essential functions of her job.

The court noted:

The vast majority of Meling’s courses required no physical activity on her part, and even the courses that required demonstrations could be taught by using students to perform the required skills, a method that is preferred in some academic circles even where the instructor has no physical limitations. Indeed, without changing Meling’s schedule at all for the Fall 1994 semester, Meling could readily have performed her job . . .
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had the college permitted her to teach with the assistance of a student demonstrator.\textsuperscript{157}

Thus, the court found that instituting reasonable accommodations via the use of a student demonstrator would comport with the statute, which the college failed to offer or provide the professor. No college representative ever contacted the professor about any possible accommodations. Third, the professor’s receipt of disability benefits (through the Teachers Insurance Annuity Association (TIAA)) did not establish as a matter of law that she was unable to work\textsuperscript{158} (which may have countenanced the employer’s action). Finally, the court declined to order her reinstatement with tenure. The parties pursued no appeal to the Second Circuit Court of Appeals—not even a challenge by the college due to the punitive damages awarded against it. With the generous compensatory damages, and more significantly the awarding of punitive damages, which would no longer be sanctioned, the case captures the spirit of the federal laws designed to rebut disability discrimination.

Parenthetically, in Schultz v. YMCA of the United States,\textsuperscript{159} the First Circuit Court of Appeals ruled that a deaf lifeguard who failed to meet the qualifications for certification would not be entitled to damages for emotional injuries he claimed pursuant to the Rehabilitation Act.\textsuperscript{160} David Schultz was an accomplished swimmer, swim instructor, and lifeguard with certification by the American Red Cross.\textsuperscript{161} Schultz then sought certification by the YMCA, which was not required for his current position at a Massachusetts YMCA facility.\textsuperscript{162} The YMCA, a private religious organization, required that its lifeguards be able to hear noises and distress signals.\textsuperscript{163} The plaintiff took the required certification course.\textsuperscript{164} With the use of a hearing aid, an audiologist reported that Schultz could hear normal sounds. Based on the applicant’s wearing a hearing aid, the instructor recommended the certification, which the

\begin{footnotesize}
\begin{enumerate}
\item[157.] \textit{Id.}
\item[158.] The lower court identified, “On February 12, 1997, the EEOC issued an Enforcement Guideline holding that an individual’s statement for the purpose of obtaining disability benefits, that she is ‘totally disabled’ or ‘unable to work’ does not bar a claim under the ADA.” Meling v. St. Francis Coll, No. 95-CV-3739 JG, 1997 WL 1068681, *5 (E.D.N.Y. Apr. 1, 1997). The court found that “[t]he SSA do[es] not make any allowance for an individual’s ability to work with reasonable accommodations.” \textit{Id.}
\item[159.] 139 F.3d 286 (1st Cir. 1998).
\item[160.] \textit{Id.} at 290.
\item[161.] \textit{Id.} at 287.
\item[162.] \textit{Id.}
\item[163.] \textit{Id.}
\item[164.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
YMCA granted the plaintiff. Subsequent to this, the course instructor noticed Schultz did not always wear his hearing aid, and so she asked that her name be removed from the plaintiff's certification, which led the YMCA to revoke the certification. However, prior to the revocation, the plaintiff had resigned from his position as aquatics director and accepted a lower paid position at the facility, which he then resigned. The plaintiff offered evidence that the ability to hear "contributes little, if anything, to the performance of life guarding functions." The First Circuit concluded the YMCA's action was not prompted by malice or hostility such as to warrant the grant of damages for emotional distress to this individual.

The concept of reasonable accommodations is predicated on the ability of the disabled individual to perform the requisite essential duties the position requires. While the college professor in Meling was qualified, but required a reasonable accommodation, the Schultz case exemplifies that the individual, regardless of any disability, must still exhibit the minimum mandatory requirements for the specific position. It is especially critical in the education field for K-12 teachers and sometimes coaches to be appropriately licensed and certified in the states in which they seek to teach or coach. Coaches are increasingly charged with being able to prove, at a minimum, that they have cardio-pulmonary resuscitation (CPR) certification. And with automated external defibrillators (AEDs) becoming more common in the athletic arena, a review should be made to ascertain if coaches are certified to use the AEDs. It is when the individual meets such requirements (with or without a reasonable accommodation) but still is not hired that the inquiry will be made—based on a specific factual determination—as to the reason the school hired an individual without any discernible disabilities over the disabled candidate, when both were equally qualified. The hiring situation poses a catch-22 problem where the employer is seeking an individual with

165. Id.
166. Id. at 288.
167. Id.
168. Id. at 289. One expert’s report advanced "that drowning victims are almost never in a position to call for help." Id. It was not indicated whether being in the company of someone who could alert others, albeit that individual was not in a position to help the distressed swimmer, was significant—which could easily arise in a pool-based situation.
169. Id. at 290-91.
170. Recently, New York passed a statute, N.Y. EDUC. LAW § 917 (McKinney 2006) (on-site cardiac automated external defibrillator), which is also known as the "Louis Law," based on the student-athlete who died as a result of a ball hitting his chest during a boys' lacrosse game at a Long Island public high school. It requires the availability of AEDs at all extracurricular athletic events, regardless if the event takes place on or off public school property, along with a properly trained individual to operate the device.
experience, leaving the disabled individual at a possible disadvantage. Even though the teacher in Zimmerman had experience over the recent graduate, it still did not render his claim successful where he repeatedly sought a position at the local public school because the school could show legitimate, objective reasons for hiring the non-disabled individual.

ii. Coaches

The issue in Maddox v. University of Tennessee\(^{171}\) concerned whether the conduct of an athletic employee or his alleged disability was the overriding factor resulting in his termination.\(^{172}\) The men’s assistant football coach alleged the university violated the ADA and Rehabilitation Act due to his alcoholism condition.\(^{173}\) During February 1992, the plaintiff was offered a contract, terminable at will in accordance with a university manual.\(^{174}\) In an employment application, Maddox did not indicate he had any health problems that would interfere with performing his job.\(^{175}\) The application also inquired as to whether the applicant had ever been arrested, to which this individual responded he had not, which was not accurate, as there had been three prior arrests (two incidents involved driving while under the influence of alcohol).\(^{176}\) On May 26, 1992, he was arrested for allegedly driving while intoxicated (DWI), reportedly at a high rate of speed.\(^{177}\) The arrest resulted in negative publicity for the university.\(^{178}\) After the arrest, Maddox then entered an alcohol rehabilitation program.\(^{179}\) The university officially terminated the coach during June 1992 for his alleged criminal conduct and the bad publicity engendered.\(^{180}\)

The Sixth Circuit Court of Appeals summarized the opposing stances:

171. 62 F.3d 843 (6th Cir. 1995). In Anderson v. Little League Baseball, Inc., 794 F. Supp. 342 (D. Ariz. 1992), the district court granted an injunction “allowing a Little League baseball first-base coach, who used a wheelchair, to coach on the field at an All-Star game, despite an association rule to the contrary.” Heckman, Athletic Associations, supra note 27, at 14 n.64. The Little League had indicated that the presence of the wheelchair constituted a threat to the safety of the participants. See 42 U.S.C. § 12182(b)(3). However, Anderson had coached for his team for approximately three years without incident. Anderson, 794 F. Supp. at 345.
172. Maddox v. Univ. of Tenn., 62 F.3d 843, 844 (6th Cir. 1995).
173. Id. at 845.
174. Id.
175. Id.
176. Id.
177. Id.
178. Id.
179. Id.
180. Id.
“The [university] says it fired him because of his conduct (drunk driving), rather than his disability (alcoholism). The plaintiff replies his conduct is caused by his disability, so a dismissal for the former is a dismissal for the latter.”

The court emphasized the difference between discharging someone for unacceptable misconduct and discharging someone because of the disability. As the district court noted, to hold otherwise, an employer would be forced to accommodate all behavior of an alcoholic which could in any way be related to the alcoholic’s use of intoxicating beverages; behavior that would be intolerable if engaged in by a sober employee or, for that matter, an intoxicated but non-alcoholic employee.

The coach’s responsibilities at the NCAA Division I university included: on-field coaching,

[r]ecruitment of high school football players; . . . serving as a positive role model for athletes on the university’s football team, . . . counseling players on various issues, including the use and abuse of alcohol and drugs, and . . . promoting a positive image as a representative of not only the football program but the university as well.

The Sixth Circuit Court found the university’s reasons for terminating the plaintiff did not constitute a pretext, but rather constituted a legitimate reason. It also found that the plaintiff was not “otherwise qualified” due to the fallout engendered to the university, reasoning, “The school falls out of favor with the public, and the reputation of the football program suffers. Likewise, to argue that football coaches today, with all the emphasis on the misuse of drugs and alcohol by athletes, are not ‘role models’ and ‘mentors’ simply ignores reality.” The Sixth Circuit court concluded, “Employers subject to the Rehabilitation Act and ADA must be permitted to take appropriate action with respect to an employee on account of egregious or criminal conduct, regardless of whether the employee is disabled.”

181. Id. at 846.
182. Id. at 847 (presented in Heckman, Athletic Associations, supra note 27, at 14 n.64).
183. Id. at 845 n.1.
184. Id. at 848-49.
185. Id. at 848.
186. Id. at 848-49.
187. Id. at 848.
This case captures two principles involved with the area. First, the individual must be deemed "disabled." Obviously certain disabilities will be ascertainable to the onlooker; whereas, other medical conditions will not. Then, the inquiry is whether the employer-school knew or should have known of the employee's disability before the underlying action took place that led to the employer's adverse action against this person. If the educational institution could not detect or did not know of the athletic department employee's disability, then an essential element needed to satisfy a prima facie case will be lacking. Second, even assuming the employee can satisfy that he or she was appropriately "disabled," this will not automatically condone purported bad behavior under the label that the individual is disabled. This goes back to the definition of disability, whereby certain conditions are not legally sufficient to be deemed statutorily "disabled." The Maddox case also showcases the importance of any underlying contract or employment agreement between the parties.

While certain conditions that are action-based—such as alcoholism or drug addiction—are included in the definition of disability, nevertheless, as this case exemplifies, it does not provide a blanket tolerance of any activities undertaken by those individuals. This would require a fact-specific inquiry. For example, could a school legally fire a physical education teacher with Tourette Syndrome for voicing obscenities in the gymnasium? An episode of the Oprah television show featured a primary school teacher with this condition. He simply explained to his students that he had the condition and that as a result he may engage in this involuntary action. Therein, the teacher made known his medical condition.

iii. Officials

In the area of athletics, there is an expectation that those participating will be the fittest of the fit. The next two cases explore what happens when the officials do not visibly meet this criteria.

In Jones v. Southeast Alabama Baseball Umpires Ass'n, an umpire, "[w]ho [used] a prosthesis due [to] a leg amputation, alleged a violation of the ADA against the Association in not assigning him to umpire solely high school varsity baseball games." Jones had notified the Association that he no longer wished to umpire at the junior varsity games and wanted to umpire

188. See supra notes 49-50.
190. See Heckman, Athletic Associations, supra note 27, at 14 n.64.
solely at varsity baseball games. During 1992, the association rejected the request and informed Jones that based on the use of a "[p]rosthetic device, he did not have the mobility to umpire effectively on a regular basis at the more competitive varsity level." The Alabama district court recognized that the ADA covers both an employer and employment agency. While the association conceded it had twenty-five employees, exceeding the required fifteen employees, it argued that these employees did not exceed the minimum hiring length of at least twenty weeks as the high school baseball season lasts approximately thirteen to fourteen weeks. Jones countered that the association also assigned the umpires to officiate at summer league baseball games, which run from April to August (approximately a five-month period). The state trial court did not engage in the merits of the case and simply denied the association’s motion for summary judgment, stating, "It is unclear from the record whether the umpires procured by the Association for schools are employees of the Association or are procured to be employees of the schools; the Association would be an employment agency only if the latter is true."

Merely because an individual uses a prosthesis device does not automatically equate with lack of mobility. Moreover, there is relatively minimal running around by officials in baseball games compared to other sports like football, basketball, soccer, lacrosse, and field hockey. Obviously, this case dealt with officiating interscholastic baseball games. Periodically, there is attention focused on the girth of Major League Baseball (MLB) umpires, purportedly for health reasons, who are presently required to have "reasonable body weight."

The next case examines such a situation involving a college football

192. Id.
193. Id. at 1137-38.
194. Id.
195. Id.
196. Id. at 1138.
referee. In Clemons v. Big Ten Conference, a college football referee for the NCAA Division I conference unsuccessfully claimed discrimination due to his obesity in violation of the ADA. The Big Ten Conference, one of the most powerful NCAA Division I football conferences, revised the rating system for its football referees, modeling it on the National Football League’s policy. Referees received one-year contracts. The conference considered five criteria for their referees: “(1) appearance and physical condition; (2) position, coverage and movement; (3) consistency, common sense and judgment; (4) poise, decisiveness and game control; and (5) relationship with the coaches, players and others.” Between 1990 and 1992, the plaintiff’s ratings increasingly plummeted as his weight increased to 270 pounds, at which time he received notices from the conference about his weight. The following year, he was again assigned a poor rating, with his weight up to 280 pounds. He was then placed on probation. During April 1994, the conference renewed his contract for the 1994-1995 season. When Clemons reported for work in August, his weight reached an apex of 285 pounds. Two days later, the conference canceled his contract. Clemons argued that the conference manual had no reference to weight, although it did require referees to be in good physical condition.

The Illinois district court noted, “Simply because the Big Ten did not employ height-weight charts does not make the physical condition requirement invalid.” Additionally, the ADA regulations indicate that “except in rare circumstances, obesity is not considered a disabling impairment.” The court ultimately found that the plaintiff was not disabled as his ability to do other jobs was not impacted, and the ADA was not meant to cover exclusion from a single position of employment.

199. Id. at *1.
200. Id.
201. Id.
202. Id.
203. Id. at *2.
204. Id.
205. Id.
206. Id.
207. Id.
208. Id. at *4.
209. Id.
210. Id. at *5 (citing 29 C.F.R. § 1630.2(j)(3)(i)).
211. Id.
Plaintiff has not provided any evidence that an official that cannot keep up with the athletes can nonetheless perform adequately. Plaintiff’s evaluations demonstrate that he failed to keep himself in a physical condition that enabled him to keep up with the athletes and place himself in the proper position to make accurate calls.\textsuperscript{212}

The court seemed content that the plaintiff was not disabled; however, the court did not expound on whether it would have countenanced the factor contained in the first condition pertaining to “appearance.” Clemons also claimed his termination was due to racial discrimination, which will be discussed in Part IV.

III. AGE DISCRIMINATION

A. Age Discrimination in Employment Act of 1967 (ADEA)

The ADEA\textsuperscript{213} is a federal statute that prohibits employment discrimination on the basis of age, and includes individuals over the age of forty,\textsuperscript{214} where the employer has at least twenty employees\textsuperscript{215} and there is an interstate commerce basis. The statute’s purpose is “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.”\textsuperscript{216} The ADEA mandates:

It shall be unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his

\textsuperscript{212} Id. at *4.
\textsuperscript{214} 29 U.S.C. § 631(a) (“The prohibitions in this chapter shall be limited to individuals who are at least forty years of age.”).
\textsuperscript{215} Id. This is due to the ADEA’s inclusion as part of the Fair Labor Standards Act.
\textsuperscript{216} Id. § 621(b).
status as an employee, because of such individual’s age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.217

Lawful practices may include “a bona fide occupational qualification reasonably necessary to the normal operation of the particular business; or where the differentiation is based on reasonable factors other than age” or the laws of a foreign country, or where age is used in a valid seniority system or employee benefit plan, or where the discharge or discipline was for good cause.218 On February 24, 2004, in General Dynamics Land Systems, Inc. v. Cline,219 the Supreme Court held that there would be no ADEA violation where an employer favored an older employee over a younger employee, even though both were in the protected class of being forty years of age or older.220

In establishing a prima facie case, an individual can assert age discrimination based on direct evidence.221 Another avenue used to establish civil rights violations, such as Title VII, is through use of a disparate impact claim, which alludes to situations where neutral or favorable policies nonetheless have a negative effect on the protected group.222 However, it is

217. Id. § 623(a) (employer practices). See generally Jankovitz v. Des Moines Indep. Cmty. Sch. Dist., 421 F.3d 649 (8th Cir. 2005) (challenging the school district’s employee retirement incentive plan). The Eighth Circuit stated, “Arbitrary age discrimination occurs when an employer denies or reduces benefits based solely on an employee’s age.” Id. at 654; see also Bowman v. Orleans Parish Sch. Bd., 141 Fed. Appx. 291 (5th Cir. 2005) (unpublished opinion) (concerning the unsuccessful claim of a female who challenged the School Board’s failure to promote her to the position as school principal based on her age); Abrahamson v. Bd. of Educ., 374 F.3d 66 (2d Cir. 2004) (ruling the collective bargaining agreement applicable to teachers over age fifty-five violated the ADEA), cert. denied, 543 U.S. 984 (2004).


220. Cline, 540 U.S. at 584.


222. In general, Title VII cases may be established through reliance on a discriminatory intent or a discriminatory impact. The former is demonstrated through disparate treatment. Disparate treatment can be proven either through direct or indirect evidence. See infra note 314 (concerning Title VII). In most cases, there is not direct evidence of the employer voicing its intent to purposely discriminate against an older individual. Instead, the plaintiff will rely on the indirect method. Indirect evidence is established through use of the McDonnell Douglas burden-shifting method. Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This requires three major steps: (1) the plaintiff must prove that he or she is a member of the protected class, was qualified for the position, and an adverse action was taken by the employer toward the individual; (2) then the defendant must prove there was a legitimate business reason for not hiring the plaintiff or taking the unfavorable employment action toward this individual;
not clear whether the ADEA, a statute enacted three years after passage of Title VII, allowed for cases predicated upon disparate impact. During 2005, the Supreme Court ruled that while an employee could predicate an ADEA case on a disparate impact theory, it would be narrowly limited. The Court distinguished the statutory language found in Title VII, which allows for full use of a disparate impact theory, as opposed to the ADEA. The Court required that the plaintiff “‘isolate[e] and identify[] the specific employment practices that are allegedly responsible for any observed statistical disparities.’”224

The ADEA contains an anti-retaliation provision whereby an employer may not discriminate when “such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.”225 There is a pre-filing requirement.226 The individual would follow the Title VII provisions concerning statute of limitations aspects. The ADEA provides for both legal

and (3) finally, then the burden shifts back to the plaintiff to prove that the alleged reason was pretextual. Id. at 802-04. “Under the McDonnell Douglas scheme, the plaintiff bears the initial burden of establishing a prima facie case.” Farrell v. Butler Univ., 421 F.3d 609, 613-14 (7th Cir. 2005) (investigating whether an adverse employment was undertaken by an educational employer and noting that in this circuit, the “denial of a raise qualifies as an adverse employment action . . . but that the denial of a bonus does not”) (internal citations omitted). In Farrell, the Seventh Circuit found that a “permanent increase in base salary strongly suggests that the award is a raise, not a bonus.” Id.


In order to advance a disparate impact claim, the plaintiff must first establish a prima facie case by proving by a preponderance of the evidence that the employment policy or practice had an adverse disparate impact on women on the basis of their gender. The plaintiff must first ‘isolate and identify the specific employment practices that are allegedly responsible for any observed statistical disparities,’ and second demonstrate causation by offering ‘statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotion because of their membership in [the] protected group.’

Id. (internal citations omitted).

223. See Heckman, Forty Years of Sex Discrimination, supra note 13, at 9-10.


226. Id. § 626(d).
and equitable relief, which may include back pay, front pay, and liquidated damages in cases of willful violation of the statute.\textsuperscript{227} The law directs:

In any action brought to enforce [the ADEA] the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes [of the statute], including without limitation judgments compelling employment, reinstatement, or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.\textsuperscript{228}

During 2002, in \textit{Kimel v. Florida Board of Regents}, the Supreme Court rendered its first post-\textit{Seminole Tribe} decision addressing the application of an Eleventh Amendment defense in a case involving a major federal civil rights law.\textsuperscript{229} The plaintiffs included associate professors, faculty, and librarians at state universities.\textsuperscript{230}

While the Court recognized that the statutory language of the ADEA "does contain a clear statement of Congress’ intent to abrogate the States’ immunity, . . . that abrogation exceeded Congress’ authority under § 5 of the Fourteenth Amendment."\textsuperscript{231} The Court emphasized that Congress could not use the Commerce Clause to shore up the ability of citizens to sue states or arms of the state based on this federal statute.\textsuperscript{232} The Court noted that the Fourteenth Amendment could be used to surmount the earlier enacted

\textsuperscript{227} Id. § 626(b) ("[L]iquidated damages shall be payable only in cases of willful violations. . . .")

\textsuperscript{228} Id.

\textsuperscript{229} 528 U.S. 62 (2000) (finding that the ADEA does not allow lawsuits by state employee to be brought in the federal courts, despite the express language in the statute providing for such causes of action. The Court found such language violated Congress’ authority pursuant to Section 5 of the Fourteenth Amendment); see also Kovacevich v. Kent State Univ., 224 F.3d 806 (6th Cir. 2000) (female professor alleged sex and age discrimination against the university. The appellate court held that the Eleventh Amendment insulated this state university against her ADEA claim); Peterson v. Davidson County Cmty. Coll., 367 F. Supp. 2d 890, 893 (M.D.N.C. 2005) (finding Eleventh Amendment prevented an employee from bringing an ADEA claim against a North Carolina community college. The North Carolina district court stated, “Here, there is no state statute or constitutional provision demonstrating the state of North Carolina’s waiver of its immunity regarding the ADEA.”).

\textsuperscript{230} Heckman, \textit{The Impact of the Eleventh Amendment}, supra note 17 (manuscript at 9-10) (discussing this case in detail) (referring to this consolidated case with employees from the University of Montevallo, Florida State University, and the Florida Department of Corrections).

\textsuperscript{231} \textit{Kimel}, 528 U.S. at 67; see also Heckman, \textit{The Impact of the Eleventh Amendment}, supra note 17 (manuscript at 9-10).

\textsuperscript{232} \textit{Kimel}, 528 U.S. at 80 ("Today we adhere to our holding in \textit{Seminole Tribe}: Congress’ powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals.").
Eleventh Amendment; however, strings were attached. There are three tests the Court has utilized in Fourteenth Amendment equal protection cases. Cases predicated on age discrimination would be assigned to the “rational relationship” test. The Court concluded that the ADEA failed the proportionality and congruence test imposed by the Court in an earlier opinion, City of Boerne v. Flores. In examining purported discrimination assigned to “older persons,” the Court noted that they “have not been subjected to ‘a history of purposeful unequal treatment.’” Thus, the Court found the ADEA exceeded the constitutional constraints.

B. Intercollegiate Athletic Departments

i. Coaches or Athletic Directors

This is another area with a surprisingly low incidence of case law involving individuals engaged in athletic-related employment at schools. In Moore v. University of Notre Dame, the Indiana district court found that the defendant-private university violated the ADEA in terminating a sixty-four-year-old male assistant football coach from the storied football program. The court determined that the coach’s reinstatement was not an appropriate remedy, and it ordered the university to pay the former offensive lineman coach, who was fired in 1996, compensatory damages in the amount of $75,577 and attorneys’ fees totaling $394,865.

In Jacobs v. College of William and Mary, the plaintiff, who had turned forty years of age when announcements were made for certain full-time appointments in the physical education department, claimed that the college failed to employ her in the new position of full-time varsity basketball coach due to her age. She had been the former women’s basketball coach.

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233. Id. ("Section 5 of the Fourteenth Amendment, however, does grant Congress the authority to abrogate the States' sovereign immunity.").

234. Id. at 82-83.


236. Heckman, The Impact of the Eleventh Amendment, supra note 17 (manuscript at 10) (quoting Kimel, 528 U.S. at 83).


238. 22 F. Supp. 2d at 904.

239. Id. at 915.


241. 517 F. Supp. at 798.
court found no violation of the ADEA as the college listed a Masters in Physical Education as a requirement, which the plaintiff did not have, although she had at the time finished all the course work, but was waiting to complete her oral component of the program.\textsuperscript{243} In a certain irony, the female head of the search committee denied the allegation that she had asked the current captain of the women's basketball team the following question: "Wouldn't you all like a younger coach, someone like Mary Ann Stanley?"\textsuperscript{244} Nevertheless, the district court asserted that "[the] plaintiff has the burden to prove, not that age was a factor, but that 'age was the determining factor,' . . . and 'proof that it was a determining factor is . . . essential to recovery under the ADEA.'"\textsuperscript{245} The court stated, "A mere reference to age is not sufficient to establish a right to recovery. It must have been a determining factor, and plaintiff must establish 'but for' the age, she would have been selected."\textsuperscript{246} The court concluded, "The evidence falls far short of meeting this standard. There is no dispute of any substantial fact and therefore no support for a verdict showing 'but for' age plaintiff would have been selected."\textsuperscript{247} This is reminiscent of the disability statute requirements that the plaintiff must meet the minimum requirements in order to go forward. It again demonstrates the significance of the job description and requirements for athletic employment positions.

Due to the unfavorable Court ruling in \textit{Kimel}, educational athletic employees are turning to state laws for redress. In \textit{Brady v. Curators of University of Missouri},\textsuperscript{248} the head baseball coach at the University of Missouri-St. Louis contended a violation of the Missouri Human Rights Act\textsuperscript{249} based on age discrimination and retaliation, where his full-time position with benefits was reduced to a part-time position without benefits.\textsuperscript{250} This was after the coach had previously been reinstated as part of a settlement.
agreement with the university after filing a claim with the EEOC.\textsuperscript{251} James Brady had been the head coach since 1985, with a winning record every year and with eighty percent of his players graduating.\textsuperscript{252} In May 2002, the university engaged in the somewhat common practice of placing certain sports in tiers, with baseball, softball, and volleyball placed in the less favorable tier two sports, while basketball and soccer were deemed tier one sports.\textsuperscript{253} During this period, the plaintiff argued that the university allowed the baseball field to deteriorate, such that the coach contended the school had to decline the NCAA’s offer to conduct championship games there, despite the baseball team being the best team in Division II at that juncture, and that the school never moved the coach back to his original favorable office.\textsuperscript{254}

The coach proffered that three younger athletic department employees had been treated better than him.\textsuperscript{255} The university had hired a male assistant men’s basketball coach, who was younger, and only had half a year student coaching experience at a salary appreciably higher than coach Brady’s reduced salary.\textsuperscript{256} Another younger athletic department employee, the compliance officer, was allowed to work less than full-time hours to care for his children while still classified as a full-time employee.\textsuperscript{257} The jury brought back a verdict in excess of $1 million in favor of the coach, with $225,000 for actual damages, $750,000 for punitive damages against the university, $200,000 punitive damages individually against the Chancellor for Administrative Affairs, and $100,000 punitive damages individually against the female Athletic Director.\textsuperscript{258} The defendants challenged the issuance of punitive damages. First, the Missouri appellate court ruled that the state statute allowed for punitive damages,\textsuperscript{259} affirming the trial court’s action. Second, the court affirmed that the sufficiency of evidence warranted the punitive damages.\textsuperscript{260}

\section*{ii. Other Athletic Department Employees}

The first two cases concern women doing administrative work in the
athletic departments employed by the University of Oklahoma. In *Beery v. University of Oklahoma Board of Regents*, a forty-eight-year-old female administrative assistant to the athletic director alleged age discrimination when she was terminated. Beery’s duties included secretarial and administrative duties. She had worked for the former athletic director for over fifteen years, then for the interim athletic director for a few months and the new athletic director for about six months until her termination on March 19, 1997. During 1996, the new athletic director had hired a forty-year-old man to be his special assistant. The special assistant was being groomed to be an associate athletic director. He received a significantly higher salary than the plaintiff. The special assistant began assuming some of the plaintiff’s higher-level duties, such as “supervising the clerical staff, assisting the Athletic Director in preparing the budget, and returning sensitive phone calls and letters.” The athletic department then announced a reorganization, which resulted in the plaintiff’s termination, and the subsequent hiring of the former basketball office assistant, a forty-eight-year-old female, to a new Secretary II position.

The Tenth Circuit Court of Appeals, in this unpublished opinion, affirmed the lower court’s grant of summary judgment dismissing the age discrimination claim. The court rejected the plaintiff’s use of comparison with the new special assistant; rather, the court found that the plaintiff’s responsibilities and duties were more comparable to the new Secretary II position, which was filled by another woman over forty years of age. The court identified that the special assistant’s higher salary was related to his budgetary and supervisory roles, finding that there was “no evidence that plaintiff ever held the position for which [the special assistant] was hired, or that she was qualified to do so.”

In *McEwen v. University of Oklahoma Board of Regents ex rel State of*
Oklahoma, the Tenth Circuit again affirmed the lower court's issuance of summary judgment in favor of the state university concerning another age discrimination lawsuit commenced by a fifty-three-year-old woman, who had worked twenty-two years in the university's athletic department and refused a transfer to the physical plant. She was terminated due to a reduction-in-force in the athletic department. The lower court had found that the university's reason for the adverse employment decision was credible.

In Austin v. Cornell University, two male employees, who held seasonal positions at the private university's golf course, alleged age discrimination. This New York district court found that the lawsuit could proceed against two named university employees as defendants, respectively, the head golf professional at the Robert Trent Jones Golf Course in Ithaca, New York, and the Associate Director of Athletics for Operations and Facilities. One of the plaintiffs, Austin, worked in the pro shop for a number of seasons and as a paid ranger for one season; McPeak worked as a volunteer ranger for a number of seasons and a paid ranger for the golf course for two seasons—as the golf course was not open during the winter months. Prior to the 1993 season, both Austin and McPeak were not rehired. At that time, Austin was seventy-three-years-old, and McPeak was sixty-seven-years-old. They were told the university's decision was predicated on a reorganization to use a "double wave" system, which involved golfers crossing over after respectively playing the first nine holes or the tenth through eighteenth holes, and a downsizing from twenty to about sixteen or seventeen positions. The opinion omitted any discussion as to why an exact count was not provided for the trial court's consideration. If the plaintiffs accounted for two of the positions, then who was the third, and if applicable, fourth individual who did not make the final cut? The defendants indicated that they had received complaints regarding the plaintiffs' job performances, but decided not to communicate this to the plaintiffs, purportedly to spare their feelings. Cornell advertised for the position and hired four individuals: three were under

274. Id. at *1.
275. 891 F. Supp. 740 (N.D.N.Y. 1995) (denying the defendants' motion for summary judgment to dismiss the lawsuit).
276. Id. at 743.
277. Id.
278. Id.
279. Id.
280. Id. at 743-44.
281. Id. at 744.
forty years of age and one man was in his fifties.\textsuperscript{282}

First, the New York district court identified that "[u]nlawful termination cannot occur where a party is not an employee at the time of the alleged discrimination,"\textsuperscript{283} and thus granted the university’s motion to dismiss.\textsuperscript{284} However, as to unlawful failure to rehire, the court noted that "the ‘fresh help’ and ‘timid’ comments reasonably can relate to age-based stereotypes regarding plaintiffs."\textsuperscript{285} Additionally, since the plaintiffs were replaced with workers having no ranger experience, the court found this established a permissible inference of discrimination.\textsuperscript{286} The court underscored the university’s failure to criticize the plaintiffs’ performance during the prior season, which could "lead to the rational inference that their performance was satisfactory and that defendants’ current claim to the contrary is pretextual."\textsuperscript{287} Merely providing a list of ranger duties to the plaintiffs was not satisfactory to place the plaintiffs on notice that their work performance was unsatisfactory.\textsuperscript{288} Finally, this district court would allow individuals, as opposed to the employer, to be held liable under the ADEA where the discriminatory acts were performed while exercising supervisory control over a plaintiff’s employment.\textsuperscript{289}

This case points out that if the educational institution is going to engage in employee evaluations, then it behooves the school to communicate the outcome of such activity to the employee. With the subsequent Court decision in \textit{Cline}, it would appear that substituting older employees with younger employees, who are also over forty-years of age, will be tolerated. Obviously, this raises the question as to whether the ADEA statute should be amended to provide jurisdiction not only for those over forty-years-old, but also those who fall into that category where they are replaced by anyone who is ten years younger than the current employee.

\textit{C. Interscholastic Athletic Departments}

The following cases involve high school football coaches. In \textit{Eggleston v. South Bend Community School Corp.},\textsuperscript{290} a male high school teacher had earlier alleged age discrimination by the school district in being denied a

\begin{footnotesize}
\begin{itemize}
\item 282. \textit{Id.} at 744-45.
\item 283. \textit{Id.} at 746.
\item 284. \textit{Id.}
\item 285. \textit{Id.} at 748.
\item 286. \textit{Id.}
\item 287. \textit{Id.}
\item 288. \textit{Id.} at 748-49.
\item 289. \textit{Id.} at 750.
\item 290. 858 F. Supp. 841 (N.D. Ind. 1994).
\end{itemize}
\end{footnotesize}
teaching position. The parties entered into a settlement agreement, which contained a clause related to the teaching position, as well as to his position as an assistant football coach. The athletic department provided the coach with a favorable written evaluation, indicating that "[d]iscipline was excellent. Covered all phases of coaching responsibilities. Outstanding scouting report for each week. Very pleased with his work." However, the head football coach was not so enamored with this assistant coach. The plaintiff would successfully file three grievances. Then the plaintiff instituted this lawsuit alleging retaliation based on his removal as the assistant football coach. The court, in this pre-Kimel case, emphasized:

For more than twenty years, the federal courts have held that harassment violates the statutory prohibition against discrimination in the terms and conditions of employment. The [Equal Employment Opportunity] Commission has held and continues to hold that an employer has a duty to maintain a working environment free of harassment based on race, color, religion, sex, national origin, age, or disability, and that the duty requires positive action where necessary to eliminate such practices or remedy their effects.

The Indiana district court indicated the ADEA allows for compensatory damages, but not punitive damages. It also found that the ADEA allows for a claim based on a hostile environment. On March 30, 2001, in Puchalski v. School District of Springfield, a Pennsylvania district court denied a motion for summary judgment filed by the plaintiff, a terminated male football coach, who contended that his termination was based on a violation of the ADEA and that he was defamed. The

291. Id. at 843.
292. Id.
293. Id. at 848.
294. Id.
295. Id. at 848-49.
296. Id. at 848 (emphasis in original).
297. Id. at 855.
298. Id. at 856.
299. Id. at 846-47. This generally is found in Title VII sexual harassment hostile environment cases.
301. See also Henderson v. Anne Arundel County Bd. of Educ., 54 F. Supp. 2d 482 (D. Md.
plaintiff had been the head coach for ten years.\textsuperscript{302} It was alleged that he directed a racial epithet at a football player during a game at another school. A school employee allegedly made the statement that they were looking for a “young coach who works in the [school] district.”\textsuperscript{303} The district did not renew the plaintiff’s contract.\textsuperscript{304} The decision was purportedly based on a number of reasons, including the alleged failure by the coach to allow players to practice without first obtaining required physical examination forms.\textsuperscript{305} Clearly, making certain that all athletes are physically able and medically cleared to participate is an aspect that all coaches must follow. Ultimately, the school district hired one of the plaintiff’s assistant coaches, who was then twenty-five-years-old.\textsuperscript{306} The court ruled the plaintiff failed to establish an unlawful pretext for the adverse employment action.\textsuperscript{307} The coach also alleged racial discrimination. The Pennsylvania district court rejected the coach’s claim that the athletic director made a racist remark concerning him that presented him in a false light in violation of a state law.\textsuperscript{308}

IV. RACE DISCRIMINATION

A. Legal Predicates

i. Fourteenth Amendment

There are a number of provisions that may prohibit discrimination based upon an individual’s race. The Fourteenth Amendment to the Constitution (1999) (discussed within) (finding no ADEA violation in not hiring the former high school head football coach back to his former position. The court ruled that the school board articulated non-pretextural reasons for selecting another younger Caucasian man).

303. Id.
304. Id. at 403.
305. See, e.g., 8 N.Y. COMP. CODES R & REGS. tit. 8, § 135.4 (c)(7)(i)(i) (2006) (directing public schools “(i) to provide adequate health examination before participation in strenuous activity and periodically throughout the season as necessary, and to permit no pupil to participate in such activity without the approval of the school medical officer”). See generally N.Y. EDUC. LAW § 901 (medical inspection to be provided) (McKinney 2006); N.Y. EDUC. LAW § 903 (pupils to furnish health certificates) (McKinney 2006); N.Y. EDUC. LAW § 904 (examinations by medical inspection) (McKinney 2006); N.Y. EDUC. LAW § 905 (record of examinations: eye, ear, and scoliosis tests) (McKinney 2005); N.Y. EDUC. LAW § 906 (existence of contagious diseases, return after illness) (McKinney 2006); N.Y. EDUC. LAW § 912-a (urine analysis; drug detection) (McKinney 2006).
306. 161 F. Supp. 2d at 403.
307. Id. at 412.
308 Id. at 402.
ensures equal protection by states pursuant to the Equal Protection Clause.\textsuperscript{309} For fundamental rights or laws predicated on race, national origin, or alienage, the laws must pass the highest test, the strict scrutiny test. As the Fifth Circuit Court of Appeals stated:

In order to preserve these principles, the Supreme Court recently has required that any governmental action that expressly distinguishes between persons on the basis of race be held to the most exacting scrutiny \ldots Furthermore, there is now absolutely no doubt that courts are to employ strict scrutiny when evaluating all racial classifications, including those characterized by their proponents as "benign" or "remedial."\textsuperscript{310}

Lawsuits may be brought as §1983 actions,\textsuperscript{311} a procedural mechanism that allows the plaintiff to assert violations of constitutional protections and certain statutes in federal courts.\textsuperscript{312}

\textsuperscript{309} U.S. CONST. amend. XIV. The 2000 U.S. Census form contained the following definitions: "The term Black or African American refers to people having origins in any of the Black racial groups of Africa. It includes people who indicate their race as Black, African Am., or Negro, or provide written entries such as African American, Afro American, Kenyan, Jamaican, Caribbean-American, Nigerian, or Haitian;" and "[t]he term White refers to people having origins in any of the original peoples of Europe, the Middle East, or North Africa. It includes people who indicate their race as 'White' or report entries such as Irish, German, Italian, British, Iraqi, Near Easterner, Arab, or Polish." Race, http://www.answers.com/topic/race-united-states-census (last visited Oct. 14, 2007).

\textsuperscript{310} See Hopwood v. Tex., 78 F.3d 932, 940 (5th Cir. 1996), on remand, 999 F. Supp. 872 (W.D. Tex. 1998), aff'd in part, rev'd in part, 236 F.3d 256 (5th Cir. 2000), reh'g and reh'd en banc denied, 248 F.3d 1141 (table), cert. denied, 533 U.S. 929 (2001); Heckman, Women & Athletics, supra note 1, at 7 n.23 (identifying Supreme Court decisions designating the aforementioned as suspect classes subject to a strict scrutiny standard).


\textsuperscript{312} For cases brought by student-athletes concerning the NCAA's academic requirements alleging discrimination on the basis of race pursuant to the Fifth or Fourteenth Amendment to the Constitution or the various federal statutes, see Cureton v. National Collegiate Athletic Ass'n, 198 F.3d 107 (3d Cir. 1999), on remand, No. Civ. A. 97-131, 2000 WL 388722 (E.D. Pa. Apr. 14, 2000), reconsideration denied, No. Civ. A. 97-131, 2000 WL 623233 (E.D. Pa. May 15, 2000), aff'd, 252 F.3d 267 (3d Cir. 2001) (examining whether NCAA's use of standardized tests (SAT scores) to determine academic eligibility constituted discrimination, on the basis of race pursuant to a Title VI disparate impact theory, against incoming freshmen African-American students); Pryor v. National Collegiate Athletic Ass'n, 153 F. Supp. 2d 710 (E.D. Pa. 2001) (finding the NCAA was a recipient of federal funds in this Title VI action that also contested the NCAA's initial eligibility standards); Hall v. National Collegiate Athletic Ass'n, 985 F. Supp. 782 (N.D. Ill. 1997) (another Title VI action concerning NCAA's core course requirements imposed to satisfy a student-athlete's academic eligibility); see also Diane Heckman, Tracking Challenges to NCAA's Academic Eligibility Rules Based on Race and Disability, 222 EDUC. L. REP. 1, Oct. 4, 2007 (discussing the Cureton and Pryor cases); Kenneth L. Shropshire, Colorblind Propositions: Race, the SAT, and the National Collegiate Athletic Association, 8 STAN. L. & POL'Y REV. 141 (1997).

For other matters involving student-athletes or schools, see Colorado Seminary v. National
There are also a number of federal statutes that prohibit discrimination on the basis of race. First, Title VII prohibits employment discrimination based on race, provided there are at least fifteen employees and the business has an interstate commerce connection. The pivotal language of Title VII states:

> 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.314

In order to establish a prima facie racial discrimination case, the following elements must be proven: “(1) membership in a protected class; (2) satisfactory job performance [where the individual is already employed]; (3) an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination.”315 A plaintiff may establish either a disparate treatment or disparate impact case. A disparate treatment case may be proven by either a direct or indirect method. Under the direct method, the individual must prove that the defendant was motivated by discriminatory animus, through either direct or circumstantial evidence.316 Presently, there has been no Supreme Court ruling finding that this statute, upon which the ADEA was modeled, infringes on state sovereignty as found in the Eleventh Amendment. While this statute is activity based, the next one is based on a federal funding predicate.

iii. Title VI of the Civil Rights Act of 1964 (Title VI)

Title VI317 prohibits discrimination on the basis of race, color, or national origin. It states, “No person in the United States shall, on the ground of race,

315. Zhao v. State Univ. of N.Y., 472 F. Supp. 2d 289, 307 (E.D.N.Y. 2007) (citing Cruz v. Coach Stores, Inc., 202 F.3d 560, 567 (2d Cir. 2000)). This court also noted, Nor does it matter that the stereotyping involved positive attributes that could have initially favored a plaintiff at the time of hiring. If an employer has crossed the line into making employment decisions based on ethnic stereotyping rather than on the merits, one could easily see how a stereotype that may benefit an employee on one day could result in an adverse employment action on another day.

Id. at 310.
316. Sun v. Bd. of Trs. of Univ. of Ill., 473 F.3d 799, 812 (7th Cir. 2007) (indicating that circumstantial evidence of intentional discrimination features “(1) suspicious timing, ambiguous oral or written statements, or behavior toward or comments directed at other employees in the protected group; (2) evidence, whether or not rigorously statistical, that similarly situated employees outside the protected class received systematically better treatment; and (3) evidence that the employee was qualified for the job in question but was passed over in favor of a person outside the protected class and the employer’s reason is a pretext for discrimination), cert. denied, 127 S. Ct. 2941 (2007). The indirect method utilizes the McDonnell Douglas method. Id. at 814.
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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." Thus, in order to trigger application of this statute, a prospective plaintiff must establish that the program or activity received federal funds. It would be applicable to any educational program or activity that is a recipient of federal funds. Unlike with Title VII, in Alexander v. Sandoval, the Supreme Court determined that an individual could not enforce the disparate-impact Title VI regulations in a private action; individuals must establish intentional discrimination in order to obtain relief pursuant to Title VI. The Equalization Act also applies to Title VI. The Court has not entertained a case challenging the Eleventh Amendment entwinement over this statute’s application to potential public schools.

iv. Section 1981 Action

Another federal statute, 42 U.S.C. § 1981, is restricted to prohibiting racial discrimination in the making and enforcement of employment contracts, which also utilizes the burden-shifting analysis. The law provides the following:

(a) Statement of equal rights: 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, . . . 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 . . . (b) ‘Make and enforce contracts’ defined: For purposes of this section, the term ‘make and enforce contracts’ includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. (c) Protection against impairment: The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

The court in Goins v. Hitchcock Independent School District stated:

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318. Id.

319. 532 U.S. 275 (2001) (5-4 decision) (rejecting the plaintiff’s claim that Alabama violated Title VI by offering tests to obtain driver’s licenses only in the English language).


In order to sustain a claim under §1981 against Individual Defendants, Plaintiff must show that (1) she belongs to a racial minority; (2) the Individual Defendants intended to discriminate against her on the basis of race; and (3) such discrimination involved an activity enumerated in the statute (i.e., the making and enforcing of a contract).\(^\text{323}\)

Title VI, Title VII, and §1981 actions require intentional discrimination.

### B. Coaches

The period since the passage of Title VII also reflects the changing of all-white or predominantly Caucasian athletic teams and corresponding coaching squads,\(^\text{324}\) especially in the interscholastic and intercollegiate sports of football and men’s basketball. A number of coaches, especially football coaches, have commenced lawsuits. The cases generally fall into two categories: (1) those commenced by African-American coaches alleging failure to be hired or retained,\(^\text{325}\) and (2) reverse discrimination suits, involving the termination of white coaches who were replaced by African-American coaches.\(^\text{326}\) Long-time coaches may also assert age discrimination claims. The issue of whether school districts could hire coaches of one race to match the race of the team’s student-athletes would underlie a number of cases. The general scenario would feature the termination of the long-time white male coach, leaving open two possible legal grounds: an age discrimination claim, as well as a race discrimination claim. Female coaches have not asserted race-based challenges, where little progress has been made in their coaching men’s football or men’s basketball teams, regardless of their race.

Throughout these cases, attention should be paid to the identity (category) of the school employee making the offensive remarks and to how the courts

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323. *Id.* at 869-70 (covering only race and alienage and not gender-based discrimination); *id.* at 870 n.9; see also Auguster v. Vermilion Parish Sch. Bd., 249 F.3d 400, 402-03 (5th Cir. 2001) (detailing the elements required to support a prima facie case as had been articulated by the district court).


handled the discourse. The following case illustrates biases that may still impact individuals, even though the administrator’s comment did not establish race discrimination. In Auguster v. Vermilion Parish School Board, the Fifth Circuit Court of Appeals found no § 1981 claim for racial discrimination concerning an African-American male teacher in a Louisiana school whose teaching contract was not renewed, where his position was filled by a white woman. A school administrator had reportedly told the plaintiff that he had a negative experience with past hiring of African-American coaches, “and if there was another problem, no matter what it was, that he would do his best to get rid of me, from day one.” After being hired, this teacher was reprimanded for inappropriate use of corporal punishment and for showing an R-rated movie to his students. The court found: “Given the overwhelming evidence supporting the school board’s legitimate justification, however, [the administrator’s] comments can be viewed as no more than stray remarks, which are insufficient to survive summary judgment.”

The cases are divided into two sections, dealing with hiring or termination concerns. The cases are chronologically presented; they all concern interscholastic or intercollegiate coaches with the exception of the Clemons case, which involved an official.

i. Hiring-Related Cases

While the 2007 National Football League Super Bowl game was historic for featuring for the first time two African-American coaches (Lovie Smith, coach of the Chicago Bears, and Tony Dungy, coach of the winning Indianapolis Colts), the hiring of minority individuals to coach NCAA Division I teams has not made great progress despite forty years of civil rights legislation. A 2007 New York Times article reported that merely seven out of

327. No. 00-30736, 2001 WL 392261 (5th Cir. May 3, 2001).
328. Id. at *2.
329. Id. at *5.
330. Id. at *2.
331. Id. The Fifth Circuit stated,

The fact that [an administrator] had told [the plaintiff] that ‘if there was another problem, no matter what it was, that he would do his best to get rid of [him]’ is insignificant in comparison to the evidence of the [plaintiff’s] unfitness as a teacher and thus is insufficient, on its own, to establish discrimination.

Id. at *6 (analyzing the elements pertaining to stray remarks).
119 NCAA Division I-A programs were led by minority coaches, one less than in 1998.\textsuperscript{333} The article also informed that only two out of twenty head-coaching vacancies for the past season were filled by minority coaches.\textsuperscript{334}

In \textit{Harris v. Birmingham Board of Education},\textsuperscript{335} the Eleventh Circuit Court of Appeals examined whether racial discrimination occurred in a case commenced by three African-American male coaches employed by an Alabama board of education. The plaintiffs alleged they were only assigned to coach football or basketball at historically all African-American schools in the area and were never promoted to the head coaching position at other schools.\textsuperscript{336} This Alabama school board operated under a desegregation order.\textsuperscript{337} The plaintiffs produced statistical evidence that "[o]nly once in a ten-year period (1970-1980), was a white head football coach replaced by an [African-American] head football coach and that occurred at a school which eventually became predominantly [African-American]."\textsuperscript{338} There was an informal system used for assigning head coaches, with no fixed criteria for the head coaching positions.\textsuperscript{339} The Eleventh Circuit found that as to one of the plaintiffs, "[t]he statistical evidence, the showing of only subjective hiring standards and the history of past racial discrimination was enough to compel a finding of employment discrimination."\textsuperscript{340} The appellate court highlighted:

\begin{quote}
Title VII, Supreme Court precedent, and our holdings would be rendered a farce if a public employer, without notification of job opportunity procedures, without uniform criteria for determining qualifications, and with a totally subjective system of selection could rebut a prima facie case by a prospective employee of the protected class by showing that the employee never had the opportunity to learn of and apply for the job.\textsuperscript{341}
\end{quote}


\textsuperscript{334} \textit{Id.}

\textsuperscript{335} 712 F.2d 1377 (11th Cir. 1983); \textit{see also} Cross \textit{v. Bd. of Educ. of Dollarway Ark. Sch. Dist.}, 395 F. Supp. 531 (E.D. Ark. 1975) (concerning another black high school football coach, who was demoted to a junior high school football coach, when the all-black high school became the junior high school and the older black students were placed in a predominantly white high school. He was passed over for consideration as the high school football coach, which the court found violated Title VII).

\textsuperscript{336} \textit{Harris}, 712 F.2d at 1379.

\textsuperscript{337} \textit{Id.} at 1381.

\textsuperscript{338} \textit{Id.}

\textsuperscript{339} \textit{Id.}

\textsuperscript{340} \textit{Id.} at 1383.

\textsuperscript{341} \textit{Id.} at 1384.
The court thus remanded the case back to the district court for further proceedings in light of its determination as to one of the coaches.\footnote{342} Another teacher, with one Mexican and one African-American parent, unsuccessfully asserted a Title VII violation in \textit{Lujan v. Franklin County Board of Education}, where a white applicant was chosen as the head high school football coach at a Tennessee school.\footnote{343} Previously, Lujan had been the head football and boys’ basketball coach at an all-black high school that closed.\footnote{344} Then, the plaintiff was assigned to be the assistant football coach at his new school.\footnote{345} The Tennessee district court found there were “plausible non-discriminatory reasons” for the school board’s action.\footnote{346} The Sixth Circuit affirmed the decision.\footnote{347}

In \textit{Covington v. Beaumont Independent School District},\footnote{348} two football coaches, a male Caucasian and male Hispanic, at a Texas high school alleged racial discrimination in being reassigned from the varsity football team to the sophomore team.\footnote{349} The school had assigned two male African-American coaches to coach the varsity football team based on the rationale that the majority of the team were African-American players.\footnote{350} In this § 1983 action, the Texas district court held this violated the Equal Protection Clause of the Fourteenth Amendment.\footnote{351} In 1990, the court noted the school district’s actions were not part of an affirmative action plan, nor was the reassignment undertaken to remedy identified past discrimination against black coaches.\footnote{352} The court rejected the school district’s rationale that its reason was to further racial integration among its coaching staff in light of an old case charging the system was not integrated.\footnote{353} The Texas district court ruled the coaches were entitled to $1 each for the constitutional violation and $5000 each for mental distress and anguish.\footnote{354}

On June 14, 1999, in \textit{Henderson v. Anne Arundel County Board of Education}.\footnote{342} \textit{Id.} \footnote{343} 584 F. Supp. 279 (E.D. Tenn. 1984). \footnote{344} \textit{Id.} at 280. \footnote{345} \textit{Id.} at 280-81. \footnote{346} \textit{Id.} at 282. \footnote{347} \textit{Lujan v. Franklin County Bd. of Educ.}, 766 F.2d 917 (6th Cir. 1985). \footnote{348} 738 F. Supp. 1041 (E.D. Tex. 1990) (the coaches were still being paid according to the contracts to coach the varsity team). \footnote{349} \textit{Id.} at 1042. \footnote{350} \textit{Id.} \footnote{351} \textit{Id.} at 1042-43. \footnote{352} \textit{Id.} at 1043. \footnote{353} \textit{Id.} \footnote{354} \textit{Id.}
the Maryland district court granted a board of education’s motion for summary judgment dismissing the claims of race and age discrimination brought pursuant to Title VII, § 1981, and the ADEA by an African-American male who was not selected as the head varsity football coach at one of the high schools. The plaintiff had been the head coach at the high school for three years, compiling the following win-loss record: 1-9, 5-5, and 2-8. His contract was not renewed. A new coach who had a winning record came in for a few years. When he left, the plaintiff applied for the position, which went to a younger male Caucasian. The plaintiff apparently had a poor interview, which combined with his poor performance when he last had the position, were deemed legitimate reasons for hiring the other individual. The court rejected the plaintiff’s “spoliation” argument that members on the interview panel had destroyed their personal notes after the interviews occurred. The plaintiff pointed out that the interview by the selection committee was conducted by Caucasians and based on subjective criteria. The court commented:

Although the Court recognizes that the vagaries of high school sports make it difficult for any coach to maintain a consistent winning record—given the shifting talent pool of players from year to year—nonetheless, Mr. Henderson’s losing record when he had the head coach job, combined with his poor interview performance, certainly constituted a legitimate, non-discriminatory reason for his non-selection . . .

As to the argument that subjective elements were included, the court noted that “the selection of a football coach comes close to a tenure decision, in that subjective evaluations are highly important.”
In *Frye v. Anne Arundel County Board of Education*, the plaintiff alleged reverse race discrimination in not being selected as the head football coach at a Maryland high school, where the coach had held the position for two prior years when the school board announced it would solicit applications for the 1999-2000 academic year. Three candidates applied, including Frye, a Caucasian male. The position went to one of his assistant coaches, an African-American male. A five-person panel did the interviewing for the position. However, the school principal made the ultimate hiring decision, indicating that she did not hire the plaintiff due to his prior job performance allegedly consisting of profanity and negative remarks made by him to his players, along with lack of control of the team and his lack of self-control. The coach had two winning seasons as head coach. The Maryland state appellate court dismissed the assertion that one or more of the panel members thought it would be “nice” to have a black coach, and that there may have been discrepancies between the actual tallies of the selection committee members and what was transferred to the principal, since the selection panel did not make the ultimate decision. The plaintiff also alleged the new hiring was a sham, as it was announced in a newspaper article before the principal officially took over that position. The appellate court noted, “The Supreme Court has held that Title VII protects whites as well as minorities.” However, the court found the plaintiff did not establish his burden of essentially proving that the principal’s action was due to discriminatory racial animus, stating, “Even if [the principal] was wrong in her assessment, there is no evidence that she was dishonest or that she was motivated by racial reasons, nor does being wrong establish unlawful [discriminatory] conduct.” Thus, the Maryland appellate court granted the defendant’s motion for summary judgment.

The analysis addressed the role of the panel; however, it was not fully investigated, since the court relied on the principal making the ultimate
decision. This case poses four potential tracts of inquiry, especially for high schools hiring coaches. First, the criteria for selecting the coach should be identified at the commencement of the process, such as the following: (a) educational background (including minimum requirements: high school graduate, college graduate, other); (b) sports background (high school participation, collegiate, Olympic, professional, other); (c) coaching background (high school, college, Olympic, professional, other); (d) win-loss record; (e) coaching philosophy; (f) identification of the school’s philosophy concerning the role of athletics; (g) graduation rates; (h) coach’s control of past teams; (i) coach’s record for technical fouls, etc.; (j) student-athlete violations; (k) health and safety concerns (number of athletes injured and severity of injuries); (l) temperament, which is one of those subjective aspects; and (m) other miscellaneous aspects. Second, educational institutions should make it clear who has the ultimate hiring decision and what the role of any panel or search committee is before the selection process begins: thus, is it merely to screen potential candidates with a final interview of the top two or three individuals by the actual school administrator who makes the ultimate decision, or does the panel have final authority? Why bother having a panel, purportedly comprised of school representatives conversant with the area, if the panel’s recommendation is not followed? Third, the lax manner in which the panel reached its decision was glossed over—if tally sheets are utilized, then the chair of the selection committee should be charged with collecting, tallying, and storing them if making the ultimate decision or before their transmittal to the ultimate decision-maker. Fourth, the ultimate decision-maker’s basis for making the selection should comport with the original criteria.

In Seagrave v. Dean,377 a Louisiana trial court awarded the white male former track coach at the Louisiana State University and Agricultural and Mechanical College (LSU) damages for lost wages and emotional distress for breach of a state law.378 Originally, the state university hired Seagrave as an assistant men’s and women’s track coach.379 Then the university promoted him to be the head coach for the women’s team.380 When an opening occurred with the men’s team during 1987, Seagrave applied for the position, which went to another male who had experience being the head coach of the men’s program.381 LSU told Seagrave that he did not have the proper experience.382

378. Id. at 42.
379. Id. at 43.
380. Id.
381. Id.
During a 1989 out-of-state spring training program, the plaintiff informed the current men's track coach that he had engaged in an all-night counseling session with one of his female athletes at the residence where he was living during this interim period. Upon Seagrave’s return, a meeting was held whereupon the administration asked the coach to resign; he refused. The university held a grievance hearing, even though the coach was deemed an at-will employee. LSU did not change the termination decision.

In 1990, Seagrave commenced his lawsuit alleging a number of grounds, including that his termination was predicated upon racial discrimination, pursuant to a Louisiana state statute, based on his marriage to an African-American woman. In analyzing the requisite prima facie elements, the Louisiana appellate court reversed the favorable trial court decision. First, the appellate court determined the protected class was not African-Americans, “but rather is someone engaged in an interracial relationship.” Seagrave was replaced as the women’s track coach with an African-American woman, who was not engaged in an interracial relationship. Thus, the “jury could reasonably conclude that Seagrave established that he was replaced by someone outside of his protected class.” However, the inquiry did not end there.

Apparently, there was a comment by the athletic director that Seagrave would not be considered for the men’s head coaching position “because he only had experience coaching women and because he was going to marry a black woman.” The Louisiana state appellate court stated:

In order for comments in the workplace to provide sufficient evidence of discrimination, they must be (1) related to the protected class of persons of which the plaintiff is a member; (2) proximate in time to the termination; (3) made by an individual with authority over the employment decision; and (4) related to

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382. Id.
383. Id.
384. Id.
385. Id.
386. Id.
387. Id. at 43-44.
388. Id. at 42.
389. Id. at 46.
390. Id.
391. Id.
392. Id.
the employment decision at issue. The court found the plaintiff failed to establish all the criteria as the comment was allegedly made in 1987, approximately two years before the coach's ultimate termination. Thus, the appeals court found that the jury erred. During 2006, in *Banks v. Pocatello School District No. 25*, the Idaho district court refused to grant summary judgment to the school district based on a male African-American's Title VII claim that he was not hired as a head football coach based on racial discrimination and retaliation for filing an administrative grievance with the EEOC.

**ii. Termination Cases**

The Fifth Circuit Court of Appeals rejected claims asserted by a black, male assistant men's basketball coach based on violation of his First Amendment freedom of speech and association protections and § 1981 racial discrimination in *Wallace v. Texas Tech University*. The university reportedly warned the coach not to get too close to his players. It then refused to renew the coach’s contract for allegedly advising some of his players that they were entitled to financial assistance during their fifth year of NCAA eligibility. The appellate court affirmed the grant of summary judgment. It noted that an allegation of a racial slur did not establish a violation of §1981, nor did the evidence support the plaintiff's claim that racist remarks had been made by the head coach or other individuals. The Fifth Circuit also rejected the assertion of discrimination based on a difference in pay accorded the two assistant coaches, as the other coach had greater experience—thus providing an objective reason for the difference in compensation afforded him.

The next case is instructive, where educational institutions can premise employment decisions based on the win-loss record of a coach, as it is a

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393. *Id.*
394. *Id.* at 46-47.
395. *Id.* at 47.
397. 80 F.3d 1042 (5th Cir. 1996).
398. *Id.* at 1046.
399. *Id.*
400. *Id.* at 1042.
401. *Id.* at 1048.
legitimate barometer to use in making employment decisions where written coaching contracts are non-existent or negligible, especially on the interscholastic level. In *Cameli v. O’Neal*, a Caucasian long-time Illinois high school varsity basketball coach unsuccessfully alleged race and age discrimination. The case reflects, depending on the parties’ viewpoint, the interaction or interference by the administration into the fundamental role of a coach: (1) to make his own staffing decisions, provided they do not abridge any applicable laws, and (2) to make his own team-composition decisions in a sport where tryouts were held to ascertain the talent and ability of potential team members.

A chronological timeline is featured. Initially, the head boys’ basketball coach refused to hire a “Black” assistant coach to sit on the bench. The racial composition of the school or even the team members was not provided. The administration informed Cameli that he must have an African-American assistant “to increase the diversity of the coaching staff.” The coach then indicated his displeasure with the African-American man hired to coach the sophomore team. The assistant principal then recommended that the plaintiff not be rehired as the varsity coach; however, the superintendent did not implement the recommendation.

During the beginning of the 1992-1993 school year, a new principal came on board who indicated he would be a hands-on administrator. At the end of the 1992-1993 school year, the coach indicated his intent to retire from teaching at the end of the following academic year (June 1994). The plaintiff was born during 1934 and thus would presumably be approximately sixty-years-old upon his retirement. Cameli met with the new principal, who informed him that he did not favor retired teachers continuing to

403. *No. 95-C-1369, 1997 WL 351193 (N.D. Ill. June 23, 1997); see also Jett v. Dallas Indep. Sch. Dist., 798 F.2d 748 (5th Cir. 1986) (concerning the involuntary transfer of a Caucasian football coach due to his alleged comments in a local newspaper, predicated on a First Amendment free speech violation), aff’d in part, rev’d in part, 491 U.S. 701 (1989), on remand, 7 F.3d 1241 (5th Cir. 1993).


405. *See id.* at *2-4, *15. This differs from where student-athletes can be members of the team provided that they show up for the team.

406. *See generally id.*

407. *Id.* at *1.

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.* at *2.

412. *Id.* at *1.*
coach. The court did not identify any Illinois statutes or regulations that formally embodied this stance, nor did it indicate whether the school district had policies that directed this stance—as opposed to a single administrator’s viewpoint. The principal informed the coach that he thought the sophomore coach could take over the plaintiff’s position.414

At the end of the 1993 varsity basketball tryouts, the plaintiff wanted to cut two seniors from the team, based on other superior talent exhibited.415 However, the principal instructed the coach that while the two seniors did not have to play, they were to be kept on the team.416 During November 1993, one of these students then accused the coach of calling him a “bastard” during a practice, which was contested.417 During December, the coach dismissed three students from the team.418 The principal again intervened and overruled this determination.419 The plaintiff claimed that his supervisors “told him repeatedly that he would be the last white coach” at the high school.420 The principal informed the coach of his displeasure with the coach being called for a technical foul during an away game against the school’s rival team.421 The principal was not satisfied with the team’s performance that year.422 The team lost in the final playoff game to a team that included “a 1996 Heisman Trophy finalist, two players who eventually went on to play NCAA Division I basketball, and Antoine Walker, who now plays professionally for the Boston Celtics.”423 The team finished with a win-loss record of 16-9, although it was 14-3 for the second half of the season.424

The plaintiff also claimed that the superintendent asked him, “Don’t you think you’re getting too old for this game?” and “Don’t you think you ought to surprise everyone by resigning?”425 During March 1994, the principal sent the plaintiff a letter indicating he would not be rehired as the coach, and the school hired the thirty-eight-year-old African-American boys’ sophomore basketball

413. Id. at *2.
414. Id.
415. Id.
416. Id.
417. Id.
418. Id. at *3.
419. Id.
420. Id.
421. Id.
422. Id. at *4.
423. Id. at *4 n.6.
424. Id. at *4.
425. Id.
coach for the position.\textsuperscript{426} The court did not indicate if the public high school did any advertising to solicit applications for the coaching position.

As to the ADEA claim, the Illinois district court stated, “A statement by an employer or its agents that reveals hostility to older workers may constitute direct evidence of discrimination.”\textsuperscript{427} However, the court then highlighted, “The mere utterance of derogatory age-related comments, which are unconnected to the allegedly wrongful employment decision at issue, cannot give rise to an inference of age discrimination.”\textsuperscript{428} Thus, the Illinois district court found no ADEA violation predicated upon its determination that the superintendent was not the individual who made the employment decision not to rehire the plaintiff, which was done by the principal, even though the superintendent reviewed or approved this decision—and the plaintiff proffered evidence that age-related comments were made by this individual.\textsuperscript{429} When the assistant principal advanced his decision to terminate the coach, the superintendent had authority to override that determination.\textsuperscript{430} The court also rejected the plaintiff’s claim that the reasons for his discharge were pretextual.\textsuperscript{431} Previously, when the former acting principal wanted to terminate the coach, it was the superintendent who did not implement the decision.\textsuperscript{432} The power that each of these administrators held, which may not have been unilateral, as the court apparently relied upon, constituted dual power held by both the superintendent and the principal to affect employment decisions.\textsuperscript{433} The plaintiff pursued no appeal.

Second, the court rejected the plaintiff’s claim that a hostile environment was created pursuant to Title VII based on race.\textsuperscript{434} The court found the evidence presented did not constitute an objectively hostile environment.\textsuperscript{435} The court also rejected a further motion by the school district to limit the amount of front pay potentially available to the plaintiff to compensate him for the amount of his coaching stipend for any years he could prove that he would have continued to coach.\textsuperscript{436}
Thus, the court ruled that the school district would essentially be responsible for a breach of contract claim to pay the coach for any time that remained on the coach’s contract with the school district. However, on the two big-ticket items, the court rejected the coach’s ADEA and Title VII discrimination claims. The court sanctioned the school district’s premature termination of the coach, where the court did not categorically conclude that the school district’s actions were predicated on just cause.

During 1997, this same Illinois district court also rejected the ADEA and Title VII claims advanced in the next case involving an African-American man. In Clemons v. Big Ten Conference, this collegiate football referee claimed ADA disability discrimination due to obesity, previously discussed, as well as racial discrimination against the Big Ten Conference, a conference in the NCAA.437 There were no allegations of any race-related statements made by conference members to this plaintiff. The Illinois district court held that “[a] plaintiff may establish racial discrimination under Title VII or Section 1981 either by presenting direct evidence of discrimination or by following the burden-shifting method set out in McDonnell Douglas Corp. v. Green.”438 Ultimately, the court issued summary judgment to the conference on both discrimination claims advanced.439

V. CONCLUSION

Despite the existence of a number of strong civil rights statutes aimed at prohibiting discrimination, aside from the issue of sex discrimination, there exists a paucity of cases involving athletic department employees at educational institutions predicated on age, disability, and race. The surprisingly minimal case law accounts for the lack of clear trends to extrapolate from the material. It does capture the restricted ability by these employees to avail themselves of these laws, with the Supreme Court’s erecting Eleventh Amendment barriers to suing certain public educational institutions or narrowing whether plaintiffs can meet the jurisdictional criteria that they belong in the class subject to purported discrimination.

In the area of disability discrimination involving employment, despite the presence of three federal statutes, reliance is posited principally on the ADA. Any possible use of the fundamentals of the Martin decision to the issue of disability discrimination concerning athletic employment remains to be seen,

438. Id. at *3; see also Heckman, Forty Years of Sex Discrimination, supra note 13, at 5 (elaborating on the burden-shifting method).
especially as concerns the pivotal area of providing a reasonable accommodation. The Supreme Court’s broad reading of what constitutes a reasonable accommodation is a favorable result—and represents the only case that the Court has substantively addressed involving individuals involved with athletics pursuant to the federal civil rights laws examined herein. Additionally, the Meling lower court decision showcases the peril for educational institutions that do not consider ascertaining what the reasonable accommodation consists of in a particular situation, as evidenced by the appreciable punitive damages awarded in a pre-Barnes case.

On the converse side, the Supreme Court has substantially limited those deemed “disabled” and extricated state entities from being subject to the ADA’s coverage for Title I employment-based cases based on the Eleventh Amendment. Whether public school athletic department employees can safely use Title II for adverse employment actions at public entities remains to be seen, as the Martin case dealt with an independent contractor who sought relief under Title III and the Lane case dealt specifically with access to the courts, pursuant to Title II, and not educational facilities. The Court in Barnes also took away the ability of disabled individuals to receive punitive damages. The bottom line is that the Rehnquist Court took the broad congressional mandate embodied within the ADA and has appreciably lessened it due to the result of the Garrett decision.

It is not known if the prevalence of older (male) coaches, especially on the professional level, including the National Basketball Association, the National Football League, and Major League Baseball, has had any impact on making it not out-of-the-ordinary to employ older coaches. As exemplified by the presence of Coach Joe Paterno at Penn State University (collegiate football) and Coach Bobby Knight at Texas Tech University (collegiate basketball), the pattern continues. During 2006, Coach John Cheney announced his retirement from Temple University (collegiate basketball). Numerous other male collegiate coaches could have been identified. Perhaps this societal acceptance accounts for the scarcity of cases by educational athletic department employees asserting age discrimination. On the judicial side, the Supreme Court’s decision in Kimel restricting the ability of individuals to commence ADEA actions against state actors is also complicit with providing a barrier to athletic department employees at certain educational institutions from going forward with claims for monetary damages in federal courts. With race discrimination, this area was dominated by interscholastic football coaches challenging coaching decisions. It revealed not only the traditional cases, but a number of reverse discrimination claims. The bellwether issue in the area of federal discrimination laws remains the outcome of Eleventh Amendment challenges and any congressional response.
Many courts have dismissed the “stray” offensive comments uttered by school employees in the discrimination cases as not being indicative of a discriminatory intent when the coach is dismissed from coaching the interscholastic or intercollegiate team. A number of these cases are predicated on the coach’s poor win-loss record in that sport, which is put forth to be an objective barometer when making athletic department employment decisions. However, as every longtime coach knows, there will be times when the team will be victorious and other times when it will not be.\textsuperscript{440} Having an athlete of the caliber of Mia Hamm, Michael Jordan, or Joe Montana will significantly ensure the prospect of a winning season—but after the athlete’s graduation, unless there is another individual possessed with superior athletic talent, the previously great coach will look merely average at best. The overall caliber of the team pool is not put into the equation when win-loss records are examined. This is taking into account the ability to recruit such athletes, which is not present in public school interscholastic programs. Moreover, on the interscholastic level, the emphasis should be on the non-profit aspect of the endeavor and its educational-related purpose. The same argument could be advanced with intercollegiate athletic programs. The selection process, especially when it encompasses selection committees, should be reviewed for the employment of athletic department employees. Coaches should understand the parameters of their employment, not only where a written contract is entered into between the parties, but also where the relationship is based on a handshake. Educational administrators must be cognizant of these civil rights laws when making employment decisions and continue to keep track of the developing law.

\textsuperscript{440} See Brady v. Curators of Univ. of Mo., 213 S.W.3d 101, 105 (Mo. App. E.D. 2006).
APPENDIX
### Federal Civil Rights Laws Involving Educational Athletic Department Employment

**STATUTE**
- Title VII
- Equal Pay Act
- Title IX
- Rehabilitation Act, Section 504
- IDEA
- ADA
- ADEA
- Title VI

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<td>15 or more employees</td>
<td>recipient of federal funds &amp; educational program</td>
<td>recipient of federal funds</td>
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<td>employment; public entities; public accommodations</td>
<td>20 or more employees</td>
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<td>180 days or 300 days (if filed with state or local agency)</td>
<td>2 years (3 years if it is a willful violation)</td>
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<td>identified depending on: Title I; Title II and III borrow state law</td>
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<td>no</td>
<td>yes (employees)</td>
<td>yes (for students)</td>
<td>Title I: yes</td>
<td>Title II: no</td>
<td>Title III: possibly</td>
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* N/A designates that the issue is not being presently addressed.

1. For the implementing regulations, see 34 C.F.R. pt. 104 (2006).
2. For the implementing regulations, see 34 C.F.R. pt. 106 (2006) (revisions were made to 34 C.F.R. §§ 106.34, 106.35, 106.43).
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<th>TITLE IX</th>
<th>REHABILITATION ACT, SECTION 504</th>
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<td>§ 206(d)(1)</td>
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<td>§ 12202</td>
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<td>no</td>
<td>no</td>
<td>yes (employees) follows Title VII‡‖</td>
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* N/A designates that the issue is not being presently addressed.

† See Fitzpatrick v. Bitker, 427 U.S. 445 (1976) (this decision was rendered prior to the enactment of the Civil Rights Act of 1991). There has been no post-Scamnole Tribe Supreme Court decision rendered sanctioning the ability of citizens to sue states in federal courts pursuant to Title VII.

‡ U.S. Const. amend XI. The Supreme Court has yet to rule on this issue involving the Equal Pay Act. For cases vacating the decisions and remanding for further consideration in light of Kovel v. Florida Board of Regents, 528 U.S. 62 (2000) (dealing with the ADEA), see State University of New York, College at New Paltz v. Anderson, 528 U.S. 1114 (2000), vacating 169 F.3d 117 (2d Cir. 1999) (ruling that the Equal Pay Act did allow for plaintiffs to sue public entities, not contravening the Eleventh Amendment), on remand sub nom. Anderson v. State University of New York, 107 F. Supp. 2d 158 (N.D.N.Y. 2000) (concluding the Equal Pay Act did abrogate Eleventh Amendment immunity for state entities), and Illinois State University v. Varner, 528 U.S. 1110 (2000), vacating 150 F.3d 706 (7th Cir 1998) (claim by female tenure-track faculty alleging violation of Title VII and Equal Pay Act), on remand, 226 F.3d 927 (7th Cir 2000) (ruling the Equal Pay Act did foreclose Eleventh Amendment immunity to protect the state university and the issue of whether Title VII also resulted in the same determination was waved on appeal), cert denied, 533 U.S. 902 (2001).

‖ The Supreme Court has not ruled on this issue. See Lane v. Pena, 518 U.S. 187 (1996) (finding citizens could not sue the federal government, here the U.S. Department of Transportation, for monetary relief pursuant to the Rehabilitation Act).


‖‖ See Kemel, 528 U.S. 62.

†† See Tenn. v. Lane, 541 U.S. 509 (2004) (5-4) (determining disabled citizens could sue states for access to the state judicial system). However, this was a narrow decision tailored to the judicial access provided by this public entity, rather than a full-fledged sanctioning of the abrogation of state sovereign immunity when Title II is asserted.

‡‡‡ There is no explicit statutory language conferring monetary damages. The general position is that the IDEA does not provide for compensatory damages. See Hamilton v. Bd. of Sch. Comm’rs of Mobile County, Ala., 983 F. Supp. 884 (S.D. Ala. 1996). However, it is not unanimous. See Zirkel, supra note 8, at 12 n.116. There is also a lack of consistency concerning the awarding of punitive damages. Id.

§§§ When Title VII sex discrimination is successfully asserted then a tier system is applied with the more employees an employer hires, the greater the amount of compensatory damages that may be awarded with a maximum of $300,000. However, this restriction is not applied when suspect classes are involved, such as with race discrimination. Punitive damages are permitted. 42 U.S.C. § 1981a(a)(1) (1991); see also Kostad v. Am. Dental Ass’n, 527 U.S. 526 (1999).


‖‖‖‖ Monetary damages are not available for Title III claims pertaining to public accommodations. See 28 C.F.R. § 36 501 (2006); see, e.g., Bowers v. Nat’l Collegiate Athletic Ass’n, 475 F.3d 524 (3d Cir. 2007); Cole v. Nat’l Collegiate Athletic Ass’n, 120 F. Supp. 2d 1160 (N.D. Ga. 2000).