Punt or Go For the Touchdown?

A Title VII Analysis of the National Football League's Hiring Practices for Head Coaches

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"The behavior of the NFL is important, because if Tagliabue and his 30 owners can peer down from their skyboxes and say, 'We can't find any,' it leaves no doubt what excuses and lies everyday African-Americans face in hiring and promotion."[1]

I. INTRODUCTION

The National Football League ("NFL") is one of the most popular sports leagues in the world. The league is an unincorporated association of thirty separately owned professional football teams, each operated through a distinct corporation or partnership.[2] Teams are located in major American cities such as Chicago, New York and San Francisco, but teams also exist in smaller markets such as Buffalo, New Orleans and Cincinnati.[3] The estimated price tag of an NFL franchise is believed to be anywhere from $300 to $400 million dollars.[4] In January 1998, the NFL became one of the largest corporate players in American business when it sold the rights to televise association-sponsored games to four networks for almost $18 billion.[5]

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[1] *See* Derrick Z. Jackson, *Why So Few African-American Coaches in the N.F.L.?* Feb. 1, 1998, Boston Globe at 23A.

[2] *See* Mackey v. National Football League, 543 F.2d 606, 610 (8th Cir. 1976). In Mackey, the court, describing the history of the NFL, wrote:

> The NFL, which began operating in 1920, is an unincorporated association comprised of member clubs which own and operate professional football teams. It presently enjoys a monopoly over major league professional football in the United States. The League performs various administrative functions, including organizing and scheduling games, and promulgating rules. A constitution and bylaws govern its activities and those of its members . . . . Throughout most of its history, the NFL's operations have been unilaterally controlled by the club owners.

Id.

[3] *See Tagliabue: Free Agency Threatens Small Markets*, USA TODAY, Aug. 5, 1992 at 13C.

[4] *See* Ann Imse, *Don't Let Broncos Go, Expert Warns Acquiring Another NFL Team More Costly Than New Stadium*, ROCKY MOUNTAIN NEWS, Feb. 6, 1998, at 4A. The owner of the Cleveland team, the latest expansion city in the NFL, will pay between $300 and $500 million to the league to own the franchise. Both the Carolina Panthers and Jacksonville Jaguars, the last teams brought in for expansion before Cleveland, each paid $200 million for their franchises. *See id.*

[5] *See* Howard Manly, *ABC Fills Up The NFL's TV Jackpot, Total Deal Worth $17.6B; NBC Won't Be A Part Of It,* BOSTON GLOBE, Jan. 14, 1998 at F1. The Fox Network will pay over $550 million per year to televise National Football Conference

Soon after, the NFL began preparation for its annual championship, the Super Bowl. The Super Bowl is carried, in some form or fashion, to over forty million households, providing yet another financial coup for the league and its owners.[6]

In what normally would have been a festive time for NFL owners and league officials, coaches and players became troubled when the question of race, with special regard to head coaching positions, was brought into the public spotlight.[7] Head coaching positions within the NFL are unique, namely, because there is no formal or standardized merit or seniority system through which hiring decisions are made.[8] Coaches are hired for expertise (for example, offenses or defenses),[9]

("NFC") games; the Columbia Broadcasting System will pay $500 million per year to televise American Football Conference ("AFC") games; ESPN will televise Sunday night and Thursday night games for $600 million per year; and the American Broadcasting Company will televise Monday night football games for $550 million per year. The contract is an eight year deal open to league negotiation in five years. *See id.*

[6] *See generally* William J. Donovan, *Money - Not Football - Is the Force Driving the Marketing Event that is the Super Bowl*, PROVIDENCE JOURNAL BULLETIN, Jan. 25, 1998, at A1.

[7] *See Tagliabue To Meet With Black Coaches*, THE NEWS AND OBSERVER (Raleigh, NC), Jan. 24, 1998, at C5. *See also* Milo F. Bryant, *Racism Only Word For Disparity*, THE FRESNO BEE, Jan. 23, 1998, at D1.

[8] The NFL has no institutionalized program for hiring of head coaches. Each individual team handles the hiring of head coaches and, accordingly, there is no timeline or set of standards.

[9] Chan Gailey, the new head coach of the Dallas Cowboys, was hired because of his experience and knowledge of offenses. *See generally* Tim Price, *Offense A Priority For Gailey, Expertise of New Coach Should Help Cowboys Move the Ball*, SAN ANTONIO EXPRESS-NEWS, Feb. 14, 1998, at 01C.

knowledge of the game (i.e. head coaching experience),[10] and their ability to communicate with players.[11]

The NFL's players are more than sixty percent African-American,[12] yet there are only three African-American head coaches and nine African-American coordinators.[13] In the week preceding Super Bowl XXXII, a wave of publicity brought the situation to the attention of the American public.[14] Most of the publicity centered around one African-American assistant coach, named Sherman Lewis.[15] Lewis, the offensive coordinator of the 1997 World Champion Green Bay Packers, has been passed over for a total of fourteen new head coaching positions from 1996 to 1998.[16] Yet, Lewis arguably should

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[10] One of the main criteria used by the New Orleans Saints in deciding to hire Mike Ditka as their new head coach was his proven experience as a head coach in the NFL. *See generally* Mike Strom, *'You Won't Be Embarrassed Watching These Guys Play' Ditka Vows Saints Will Rise*, NEW ORLEANS TIMES-PICAYUNE, Jan. 29, 1997, at A1.

[11] Bill Cowher, the head coach of the Pittsburgh Steelers, is known as a tenacious motivator for players. *See generally* Stephen Brunt, *Looks Like Another AFC Consolation Bowl*, GLOBE AND MAIL, Jan. 9, 1998, at S1.

[12] *See* Mike Freeman, *Black Coaches are Angry with NFL Over Hiring*, N.Y. TIMES, Jan. 20, 1998, at C1.

[13] *See* Ian O'Connor, *NFL in Need of Hire Learning* , N.Y. DAILY NEWS, Feb. 15, 1998, at 104. The three African-American head coaches in the National Football League are Tony Dungy of the Tampa Bay Buccaneers, Ray Rhodes of the Philadelphia Eagles, and Dennis Green of the Minnesota Vikings. The nine African-American coordinators are Sylvester Croom of the Detroit Lions, Ray Sherman of the Pittsburgh Steelers, Emmitt Thomas of the Philadelphia Eagles, Marvin Lewis of the Baltimore Ravens, Jim Skipper of the New York Giants, Sherman Lewis of the Green Bay Packers, Ted Cottrell of the Buffalo Bills, Jimmy Raye of the Kansas City Chiefs, Willie Shaw of the Oakland Raiders, and Kippy Brown of the Miami Dolphins. *See generally* Gene Frenette, *Searching For Equal Footing, Black Coaches Say Problem in NFL is Visibility, Not Ability*, FLA. TIMES-UNION, Dec. 16, 1997, at D1.

[14] *See generally* Bill Walsh, *Reaching Across the NFL's Color Line*, N.Y. TIMES, Jan. 23, 1998, at A1; *see also* Bob Kravitz, *NFL Hiring Practices Look Like Racism*, ROCKY MOUNTAIN NEWS, Jan. 21, 1998, at 3N.

[15] *See generally* Nick Cafardo, *Why Is There No Room For Lewis? He's Gifted, Successful and Overlooked*, BOSTON GLOBE, Jan. 22, 1998, at C1.

[16] *See id.* "Eleven jobs opened up last year, and maybe one black guy got an interview," said Lewis. *Id.* "Four more this year, and maybe one African-American [Art Shell, still under consideration in Oakland] will get interviewed." *Id.*

have been hired as a head coach years ago. His offensive expertise, knowledge of the game, ability to communicate and experience has never been questioned.[17] Lewis received much of the media attention surrounding the controversy because, by NFL coaching standards, he is considered to be a strong candidate for any head coaching position.[18] Many of his white counterparts who have been hired as head coaches have not enjoyed Lewis' success.[19] Lewis' plight was so disconcerting to other African-American assistant coaches that a group of black assistant coaches discussed, but never pursued, filing a class action suit against the NFL.[20] Such a claim against the NFL would most likely be a claim brought under Title VII of the Civil Rights Act of 1964,[21] which prohibits racial discrimination by any employer.[22] There are various legal theories under which African-American coaches could sue the NFL.[23] The most likely, though, are racial discrimination through disparate treatment or disparate impact.[24]

The Supreme Court of the United States, through prior case law, established a framework in which disparate treatment cases must be

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[17] *See generally* Don Pierson, *Black Coaches Want Answers On NFL Hiring*, CHICAGO TRIBUNE, Mar. 23, 1997, at 13.

> The three new coaches without NFL head coaching experience—Jim Fassel, Steve Mariucci and Kevin Gilbride—arrive with far less NFL assistant coaching experience than Green Bay offensive coordinator Sherman Lewis has. Mariucci was the Packers' quarterbacks coach under Lewis before working one year as head coach at Cal and making the jump to the San Francisco 49ers.

Id.

[18] *See id.*

[19] *See id.*

[20] *See* Jim Reeves, *Lewis Merits A Chance At Cowboys Job*, FORT WORTH STAR-TELEGRAM, Jan. 22, 1998, at 1.

[21] 42 U.S.C. § 2000(e)(2)(a). This section reads:

> 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 . . . .

Id.

[22] *See id.*

[23] This Comment is focusing only on Title VII actions.

[24] For a further discussion of disparate treatment, *see infra* part II.A; For a further discussion of disparate impact, *see infra* part II.B.

litigated.[25] The plaintiff must first establish by a preponderance of the evidence a prima facie case of racial discrimination.[26] If this is accomplished, the defendant must rebut the prima facie case by "producing evidence" that adverse employment actions were taken for a legitimate and nondiscriminatory reason.[27]

To posit a claim of disparate impact, an employee must show that a facially neutral employment practice has had a significant discriminatory impact. If such a showing is made, the employer must demonstrate why the employment practice has a manifest relationship to the employment in question. If the employer satisfies the requirement, the employee must establish that the employer was using the practice as mere pretext for discrimination or that another practice would serve the employer's legitimate interests without undesirable effects.[28]

This Comment argues that African-American assistant coaches have legitimate disparate treatment and disparate impact claims under Title VII of the Civil Rights Act of 1964 regarding the National Football League's hiring practices. Specifically, this Comment focuses on the hiring and promotion standards employed by member teams to fill head-coaching vacancies. Part I discusses the development of case law for disparate treatment under Title VII and applies the disparate treatment framework to the NFL's hiring practices for head coaches. Part II examines the evolution of case law with regard to disparate impact and examines those same hiring practices in light of the disparate impact test. This Comment concludes that such causes of action could be successful against the NFL.

II. EVOLUTION OF DISPARATE TREATMENT UNDER TITLE VII

The Supreme Court has ruled that in order to establish a case of disparate treatment, a plaintiff must show, by a preponderance of the evidence, a "prima facie" case of racial discrimination, thereby creating

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[25] *See infra* part I.

[26] *See* E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class, Title VII in Disparate Treatment Cases*, 30 CONN. L. REV. 441, 451 (1998).

[27] *See id.*

[28] *See id.* at 452.

a presumption the employer unlawfully discriminated against an employee.[29] Once established, a presumption of discrimination places upon the defendant the burden of producing an explanation to rebut the prima facie case.[30] After a plaintiff establishes a prima facie case of discrimination, a defendant must clearly set forth reasons for its actions which would support a finding that unlawful discrimination was not the cause of the challenged employment action.[31] The defendant can rebut the presumption by introducing evidence of legitimate, nondiscriminatory reasons for its actions.[32]

A. *Clarifying the Plaintiff's and Defendant's Burdens in Discriminatory Treatment Cases*

The foundation for establishing a prima facie case in Title VII discriminatory treatment cases was laid in *McDonnell Douglas v. Green*.[33] The case focused on a black civil rights activist, Green, who was discharged from his position as a mechanic at McDonnell Douglas. Green protested his discharge, arguing the firm's general hiring practices were racially discriminatory.[34] Three weeks after protesting his discharge, McDonnell Douglas advertised for mechanics, and Green applied for reinstatement McDonnell Douglas refused to rehire him.[35] Green filed an action with the Equal Employment Opportunity Commission, arguing violations of §§ 703 (a)(1) and 704(a) of the Civil Rights Act of 1964.[36] The Commission found

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[29] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[30] *See* Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981).

[31] *See id.* at 254-55.

[32] *See id.*

[33] *See McDonnell Douglas*, 411 U.S. at 792.

[34] *See id.* at 794. Respondent was laid off as part of a general reduction in McDonnell Douglas' workforce. Respondent engaged in illegal and disruptive behavior to protest his discharge ,and the general hiring practices of McDonnell Douglas. *Id.*

[35] *See id.* at 796. McDonnell Douglas rejected the petitioner's application because of his involvement in protests against the company. *Id.*

[36] Civil Rights Act of 1964 §703(a)(1), 42 U.S.C. § 2000 (e)(2)(a)(1)(1996)

> It shall be an unlawful employment practice for an employer . . . 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

reasonable cause to believe the McDonnell Douglas had violated § 704(a) by refusing to reinstate Green because of his civil rights activity.[37] The District Court, however, dismissed Green's claim of racial discrimination in McDonnell Douglas' hiring procedures and concluded that nothing in Title VII or § 704 protected Green's illegal activity.[38] The Eighth Circuit Court of Appeals agreed Green's protests were not protected under § 704(a), yet reversed the dismissal of his claim of racially discriminatory hiring practices.[39] The Supreme Court affirmed.[40] The Court posited a framework for establishing a prima facie case of racial discrimination. First, the plaintiff must belong to a racial minority. Second, the plaintiff must apply and be qualified for a job for which the employer is seeking applicants. Third, despite the plaintiff's qualifications, the plaintiff is rejected and after his rejection, the position remains open while the employer continues seeking applications from persons of the complainant's qualifications.[41] The Court further opined that the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.[42]

> employment, because of such individual's race, color, religion, sex, or national origin . . . .

Civil Rights Act of 1964 §703(a)(1), 42 U.S.C. § 2000 (e)(3)(a)(1996). "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this title . . . ."*Id.*

[37] *See McDonnell Douglas*, 411 U.S. at 797.

[38] *See id.* The District Court dismissed the racial discrimination in petitioner's hiring procedures because the Commission failed to make a determination of reasonable cause to believe a violation of Section 703(a)(1). The Court reasoned that nothing in Title VII or Section 704 protected "such activity as employed by the plaintiff in the 'stall in' and 'lock in' demonstrations." *Id.*

[39] *See id.* The Eighth Circuit held the prior determination by the Commission of reasonable cause was not a jurisdictional prerequisite for raising a claim under Section 703(a)(1) in federal court. The court ordered the case remanded under the respondent's 703(a)(1) claim. *See McDonnell Douglas*, 411 U.S. at 797.

[40] *See id.* at 792.

[41] *See id.* at 802.

[42] *See id.*

The Supreme Court further refined this principle in *Texas Department of Community Affairs v. Burdine*.[43] The Texas Department of Community Affairs ("TDCA") hired Burdine, a female, who possessed several years of relevant experience in her field of expertise.[44] Burdine was subsequently promoted and eventually assumed the duties of her supervisor.[45] Burdine's program was completely funded by the United States Department of Labor, which decided to terminate the program.[46] With the assistance of Burdine, TDCA officials persuaded the Labor Department to continue funding the program.[47] The TDCA decided to hire a male from another division of the agency as the supervisor of the program.[48] As part of the staff reorganization, Burdine was fired, despite her continued application for the supervisor position.[49] Burdine was eventually rehired by TDCA and reassigned, where she received the salary and responsibilities commensurate with what she would have received in the supervisory position for which she had been appointed supervisor of the program.[50] Burdine filed suit in United States District Court alleging that the failure to promote her and the decision to terminate her employment had been predicated on gender discrimination in violation of Title VII.[51] The court held neither decision was based upon gender discrimination.[52] The Court of Appeals for the Fifth

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[43] *See Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

[44] See *id.* at 250.

[45] *See id.* Her supervisor resigned in November, and the respondent was assigned the supervisor's duties. See *id.* Although she applied for the supervisor's position of Project Director, the position remained vacant for six months. See id.

[46] *See id.* The Department of Labor was seriously concerned about inefficiencies within the program, including bookkeeping problems and the lack of a supervisor. In February 1973, the Department of Labor notified the TDCA that it would terminate the program. *See id.*

[47] *See id.* The continuation of funding by the Labor Department was defendant upon the program's reformation, including the appointment of a permanent supervisor and a complete reorganization of the staff. *See id.*

[48] *See id.*

[49] *See id.* at 251.

[50] *See id.*

[51] *See id.*

Circuit reversed in part.[53] The Supreme Court vacated and remanded.[54] Justice Powell, delivering the majority opinion, reasoned that the burden of rebutting the presumption of discrimination is met by producing evidence explaining the employment decision, and the defendant does not have to persuade the court that it was motivated by the reasons proffered.[55]

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[52] *See id.* The court's decision was based upon the testimony of a TDCA official, who stated the employment decisions were based on the demands of the Labor Department, consultation among trusted advisors, and a nondiscriminatory evaluation of the qualifications of involved individuals. The court accepted this decision as rational. *See* id.

[53] *See id.* at 251.

> The court held that the District Court's "implicit evidentiary finding" that the male hired as Project Director was better qualified for that position than respondent was not clearly erroneous. Accordingly, the court affirmed the District Court's finding that respondent was not discriminated against when she was not promoted.
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> The Court of Appeals, however, reversed the District Court's finding that Fuller's testimony sufficiently had rebutted respondent's prima facie case of gender discrimination in the decision to terminate her employment at PSC. The court reaffirmed its previously announced views that the defendant in a Title VII case bears the burden of proving by a preponderance of the evidence the existence of legitimate nondiscriminatory reasons for the employment action and that the defendant also must prove by objective evidence that those hired or promoted were better qualified than the plaintiff. The court found that Fuller's testimony did not carry either of these evidentiary burdens. It, therefore, reversed the judgment of the District Court and remanded the case for computation of backpay.

Id.

[54] *See id.* at 249.

[55] *See id.* at 254. Justice Powell wrote,

> It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

Id. at 254-56.

The holdings in *McDonnell Douglas* and *Burdine* were tested and expanded in *St. Mary's Honor Center v. Hicks*.[56] In *Hicks*, Hicks, was employed by St. Mary's Honor Center, a halfway house operated by the Missouri Department of Corrections and Human Resources.[57] After various personnel changes and supervisory actions, Hicks was demoted and eventually discharged.[58] Hicks brought suit against St. Mary's in United States District Court, alleging violations of § 703(a)(1) of Title VII of the Civil Rights Act of 1964.[59] The District Court found for the petitioners and the Eighth Circuit Court of Appeals reversed and remanded.[60] The Supreme Court reversed, holding that a trier of fact's rejection of an employer's asserted legitimate, nondiscriminatory reasons for its challenged actions does not entitle an employee to judgment as a matter of law under the *McDonnell Douglas* scheme.[61]

B. *Proving Disparate Impact Cases Under Title VII*

The Supreme Court has established a three-prong test for proving a disparate-impact claim.[62] To establish a prima facie case, a plaintiff must first show that a facially neutral employment practice "had a

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[56] 509 U.S. 502 (1993).

[57] *See id.* at 504. Hicks, an African-American male, was hired as a correctional officer by the Center in August 1978, and was subsequently promoted to shift commander. *See id.*

[58] *See id.* An extensive investigation of St. Mary's resulted in supervisory changes. Two new supervisors were appointed to oversee Hicks. Before the personnel changes, Hicks had a satisfactory employment record, but soon became the object of repeated disciplinary actions. First he was suspended; then he received a letter of reprimand and was subsequently demoted; ultimately he was discharged for threatening one of his supervisors. *See id.* 504-05.

[59] *See supra* note 37.

[60] *See Hicks*, 509 U.S. at 505.

[61] *See id.* at 511.

> But the Court of Appeals' holding that rejection of the defendant's proffered reasons compels judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion."

Id.

[62] *See generally* Connecticut v. Teal, 102 S.Ct. 2525 (1982).

significantly discriminatory impact."[63] If a plaintiff makes the showing, an employer must demonstrate that "any given requirement [has] a manifest relationship to the employment in question," or face a finding of discrimination.[64] A plaintiff may still prevail after such a showing is made by an employer, if a plaintiff can in turn show that an employer was using the practice as a mere pretext for discrimination.[65]

The foundation for determining a prima facie case for disparate impact claims was laid in *Griggs v. Duke Power Company* ("Duke").[66] The controversy in the case centered around Duke's hiring and transfer policy which required that prospective employees have certain educational credentials or pass a standardized general intelligence test.[67] In 1955, Duke began requiring applicants to possess a high school education for any department except Labor, and for transfer from one department to any other department within the company.[68] In 1965, Duke abandoned its prejudicial policy of restricting blacks to the Labor Department, yet made completion of high school a prerequisite to transfer from the Labor Department to any other department.[69]In addition, Duke began requiring prospective employees in any department other than the Labor Department to pass two aptitude

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[63] *Id.* at 2530.

[64] *Id.* at 2538.

[65] *See id.*

[66] 401 U.S. 424 (1971).

[67] *See id.* at 425-26. One of those two requirements had to be met not only for employment, but to also transfer jobs within the company. The expanded issue was whether these requirements could stand when neither standard was shown to be significantly related to successful job performance, both requirements operate to disqualify Negroes at a substantially higher rate than white applicants and the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites. *See id.* at 426.

[68] *See id.* at 427. The transfer policy was specifically from the coal handling department to any of the other internal departments, which included operations, maintenance and labor. *See id.* at 424.

[69] *See id.* "From the time the high school requirement was instituted to the time of trial, however, white employees hired before the time of the high school education requirement continued to perform satisfactorily and achieve promotions in the 'operating' departments." *Id.*

tests.[70] "In September 1965 the Company began to permit incumbent employees who lacked a high school education to qualify for transfer from Labor or Coal Handling to an 'inside' job by passing two tests—the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Comprehension Test."[71] Black employees within the company brought a class action suit in United States District Court against Duke alleging the employment practices were violative of Title VII of the Civil Rights Act.[72] The District Court dismissed the complaint and the plaintiffs appealed.[73] The Court of Appeals affirmed in part and reversed in part.[74] The Supreme Court reversed.[75] Chief Justice Burger, writing for the majority, opined that use of the high school education requirement and standardized testing for employment purposes violated the Civil Rights Act because the employer was prohibited by provisions of the Act pertaining to employment opportunities from using educational credentials or standardized testing as a condition of employment in or for transfer to jobs,

> when (a) neither standard [was] shown to be significantly related to successful job performance; (b) both requirements operate[d] to disqualify Negroes at a substantially higher rate than white applicants;

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[70] *See id.* at 427-28. This new requirement was instituted, ironically, on July 2, 1965, the date Title VII became effective. A high school education alone allowed current employees to be eligible for transfer to the four departments in which blacks had been excluded if the person had been employed prior to the new requirement. *See id.* at 428.

[71] *Id.* Neither of the tests was used to determine any particular ability to perform the work required in the various departments of the company. *See id.*

[72] *See id.* at 426.

[73] *See id.* at 428. The District Court concluded that even though the respondent followed a racially discriminatory hiring policy prior to Title VII, the company had taken affirmative steps to correct such behavior. The District Court also concluded that Title VII was intended to only be prospective and therefore the impact of prior inequities was beyond the reach of corrective action authorized by Title VII. *See id.*

[74] *See id.* at 428-29. The Court of Appeals upheld the district court's finding of no violation against the employer because a there was no showing of a discriminatory purpose in the adoption of the diploma and test requirements. *See id.* The Court of Appeals reversed in part, "rejecting the holding that residual discrimination arising from prior [employment] practices was insulated from remedial action." *Id.*

[75] *See id.* at 436.

> and (c) the jobs in question formerly had been filled only by white employees as part of a long standing practice of giving preference to whites.[76]

The court expanded this framework in *Albermarle Paper Co. v. Moody*.[77] In *Albermarle*, the respondents, a certified class of black employees, brought a Title VII action against their employer, the Albermarle Paper Company, and the employees' union.[78] The respondents sought injunctive relief against "any policy, practice, custom or usage" by the company that was violative of Title VII of the Civil Rights Act of 1964.[79] The United States District Court found the respondent black employees had been locked into lower paying job classifications and ordered the petitioners to institute a plant wide seniority system.[80] The court, however, refused to order backpay in the case or enjoin the company's testing program.[81] The respondents appealed and the Court of Appeals for the Fourth Circuit reversed.[82]

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[76] *Id.* at 426.

[77] 422 U.S. 405 (1975).

[78] *See id.* The respondents were both present and former employees of the defendant. *See id.* at 408.

[79] *See id.* at 409. After discovery, the class added a class backpay demand. *See id.* The major "policy, practice, custom or usage" at issue were the seniority system of the plant, employee testing program, and backpay. Id.

[80] *See id.* at 424 (finding that the locked lower job classifications for the black employees was due to a reorganization pursuant to a new collective-bargaining agreement.).

[81] *See id.* at 410. The Court refused the backpay claim because the company's breach of title VII was not in bad faith and the class had delayed providing backpay until five years after the complaint was filed, prejudicing the company. *See id.* The Court further refused to enjoin the company's testing program, which the class claimed had a disproportionate adverse impact on blacks and was not related to job performance, because the tests had undergone validation studies and were proven to be job related. *See id.* at 411.

[82] *See id.* The Court of Appeals held an award of backpay could be requested after filing a complaint and that such an award could not be denied merely because the employer had not acted in bad faith. *See id.* at 412. As for the pre-employment tests, the Court held that the District Court erred because it approved a validation study done without job analysis, to allow Albemarle to require tests for 6 lines of progression where there has been no validation study at all, and to allow Albemarle to require a person to pass two tests for entrance into 7 lines of progression when only one of those tests was validated for that line of progression. *See id.*

The Supreme Court upheld the Fourth Circuit's decision and vacated the original judgment, remanding the case back to District Court.[83] Justice Stewart, writing for the majority, opined that the absence of bad faith is insufficient for denying backpay,[84] and that measured against the Equal Employment Opportunity Commission's guidelines and the Court's ruling in *Griggs*, the petitioner's testing program violated Title VII.[85]

The court completed the framework for prima facie cases of disparate impact in *Dothard v. Rawlinson*.[86] In *Dothard*, a female, Rawlinson, applied for a position as a prison guard and was rejected.[87]

In finding unlawful discrimination, backpay should be denied only for reasons that "would not frustrate the central statutory purposes manifested by Congress in enacting Title VII of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Id. at 405-06. The Court of Appeals further added that absence of bad faith is insufficient for denying backpay, and that measured against the Equal Employment Opportunity Commission's guidelines, the company's validation study was defective because of its "odd" results: there was no way of deducing what job performance criteria were being considered; the test focused on job groups near the top of various lines of progression; and it dealt with job-experienced white workers. *See id.* at 406.

[83] *See id.* at 407.

[84] *See id.* at 422.

> The District Court's stated grounds for denying backpay in this case must be tested against these standards. The first ground was that Albemarle's breach of Title VII had not been in "bad faith." This is not a sufficient reason for denying backpay. Where an employer has shown bad faith—by maintaining a practice which he knew to be illegal or of highly questionable legality—he can make no claims whatsoever on the Chancellor's conscience. But, under Title VII, the mere absence of bad faith simply opens the door to equity; it does not depress the scales in the employer's favor.

Id.

[85] *See id.* at 431-36. The Court found that, measured against Equal Employment Opportunity Commission's guidelines for employers seeking to determine through professional validation studies whether employment tests are job related, employer's validation study was "materially defective." *Id.* at 431.

[86] 433 U.S. 321 (1977).

[87] *See id.* at 323. The appellee applied for a prison guard position with the Alabama Board of Corrections, which was entitled "correctional counselor." *Id.* The applicant was rejected because she failed to meet the minimum 120-pound weight requirement of an Alabama statute, which also required a minimum height of 5 feet 2 inches. *See id.* at 323-24.

Rawlinson filed an action with the Equal Employment Opportunity Commission, received a right-to-sue letter and ultimately filed a class action suit in United States District Court against the Alabama Department of Corrections, claiming that an Alabama statute[88] outlining physical qualifications for prisons guards was violative of Title VII.[89] While the suit was pending, the appellant adopted a new regulation,[90] establishing gender criteria for assigning correctional counselors to "contact positions" within maximum-security institutions.[91] Rawlinson amended her class-action complaint, challenging the regulation as running afoul of Title VII and the Fourteenth Amendment.[92] A three-judge panel agreed with Rawlinson and granted relief to the class.[93] The Department of Corrections appealed to the Supreme Court.[94] The Court affirmed in part and reversed in part.[95] Justice Stewart, writing for the majority, stated that

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[88] ALA. CODE, § 373(109)(1973). In relevant part, the statute read:
(d) Physical qualifications. - The applicant shall be not less than five feet two inches nor more than six feet ten inches in height, shall weigh not less than 120 pounds nor more than 300 pounds and shall be certified by a licensed physician designated as satisfactory by the appointing authority as in good health and physically fit for the performance of his duties as a law-enforcement officer. The commission may for good cause shown permit variances from the physical qualifications prescribed in this subdivision.

Id.

[89] Dothard, 433 U.S. at 324.

[90] *See id.*

[91] *Id.* at 324. The court defined contact positions as "positions requiring continual close physical proximity to inmates of the institution." *Id.* at 325.

[92] *See id.*

[93] *See id.* at 321. The Court arrived at its decision based on national statistics comparing the height and weight of men and women and showing that the standard outlined in the Alabama statute would exclude over 40% of the female population and less than 1% of the male population. The court found that appellee had made out a prima facie case of unlawful sex discrimination, and the appellants had failed to rebut the claim. The court also found the challenged regulation invalid under Title VII because it was based on stereotyped characterizations of the sexes, and, rejected the appellants' bona-fide-occupational-qualification defense under § 703(e) of Title VII. With regard to that defense, the court ruled that "being male was not such a qualification for the job of correctional counselor in a 'contact' position in an Alabama male maximum-security penitentiary." *Id.*

[94] *See id.*

[95] *See id.* at 322.

Title VII prohibited application of Alabama's facially neutral height and weight statute. He based this decision upon: (a) the plaintiff established a prima facie case of unlawful sex discrimination upon showing the statutory requirements would exclude over forty-one percent of the nation's female population, while excluding less than one percent of the male population, and (b) the prima facie case was not rebutted on the ground that the statutory requirements were job-related, i.e. that the requirements were related to the strength essential to effective job performance as a prison guard, because no evidence was presented by the defendants to correlate the statutory requirements with the amount of strength thought to be essential.[96] The Court concluded, however, the regulation barring hiring female guards in "contact positions" at all male prisons fell within the purview of bona fide occupational qualification as defined in § 703(e) of Title VII.[97]

III. APPLYING THE DISPARATE TREATMENT TEST TO THE NFL'S HIRING PRACTICES

For a claim of disparate treatment against the NFL to be successful, there are a number of steps that must be followed. First, the plaintiffs must establish a prima facie case of discrimination.[98] The NFL would then be given an opportunity to respond and give legitimate, nondiscriminatory reasons for its failure to hire qualified African-Americans as head coaches.[99] Once the NFL meets such a burden, the plaintiffs would be given an opportunity to show that the stated reasons for the defendant's rejection were pretextual.[100]

A. *Is there a Prima Facie Case of Discrimination against the NFL?*

For purposes of this Comment, two African-American head coaching prospects, Emmitt Thomas, defensive coordinator of the

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[96] *See id.* at 329-32.

[97] *See id.* at 334.

[98] *See McDonnell Douglas*, 411 U.S. at 802.

[99] *See id.*

[100] *See id.*

Philadelphia Eagles and Sherman Lewis, offensive coordinator of the Green Bay Packers, will serve as examples of disparate treatment.

The first element of a prima facie case of disparate treatment consists of establishing that the applicants belong to a racial minority.[101] In the current case, both Mr. Thomas and Mr. Lewis are African-Americans. Therefore, the first element is easily satisfied.

The second element is whether the applicant applied for and was qualified for a job in which the employer was seeking applicants.[102] Mr. Thomas was formally considered for head coaching positions with the Detroit Lions,[103] New York Giants[104] and St. Louis Rams,[105] while the Dallas Cowboys considered Mr. Lewis for their head coaching vacancy.[106] Mr. Thomas was a player in the NFL, has been an NFL assistant coach for over fifteen years and has been a coordinator for three years.[107] Compared against others, who have become head coaches in the NFL, Mr. Thomas is more than qualified. Mr. Lewis has over 28 years of coaching experience including at the college level, has been an assistant coach with three Super Bowl winning teams, offensive coordinator for two other victorious Super Bowl teams.[108] When compared to others, who have become head coaches, Mr. Lewis is more than qualified.

As for the employer seeking applicants, the four teams were clearly looking to fill head-coaching vacancies. The Detroit Lions fired

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[101] *See id.*

[102] *See id.*

[103] *See* Eric T. Pate, *Lions' Search Begins with Two Assistants*, GRAND RAPIDS PRESS, Dec. 31, 1996, at C1.

[104] *See* Vinny DiTrani, *Eagles' Thomas Talks With Giants*, THE RECORD, Jan. 3, 1997, at S06.

[105] *See* Jim Thomas, *Shaw Meets With Thomas, Keeps Cards Close to Vest; But Rams Have Competition for Coaching Candidates*, ST. LOUIS POST-DISPATCH, Jan. 9, 1997, at 01D.

[106] *See* Rick Cantu, *Lewis Interviewed Again For Cowboys Job; Green Bay Offensive Coordinator Might Be Leading Contender*, AUSTIN AMERICAN-STATESMAN, Feb. 10, 1998, at C1.

[107] *See* Jim Thomas, *Eagles' Aide Emerges in NFL Coaching Hunt; Rams, Giants Among Those With Interest in Emmitt Thomas*, ST. LOUIS POST-DISPATCH, Jan. 1, 1997, at 01D.

[108] *See* Tom Pedulla, *Lewis' Job Outlook Irks Pack*, USA TODAY, Jan. 22, 1998, at 4C

Wayne Fontes and began an intensive interview process.[109] The New York Giants had recently fired Dan Reeves, created a short list of candidates and began the interviewing process.[110] The St. Louis Rams dismissed Rich Brooks, and actually began the search process before his formal dismissal.[111] Finally, the Dallas Cowboys, after the resignation of Barry Switzer, searched for five weeks, and interviewed four candidates for one of the most sought after head coaching positions in professional sports.[112]

The third element is that despite the applicant's qualifications, they are not selected.[113] The Detroit Lions hired Bobby Ross,[114] the New York Giants settled on Jim Fassel,[115] the St. Louis Rams coaxed Dick Vermeil out of retirement[116] and the Dallas Cowboys shocked the world by hiring a virtual unknown, Chan Gailey.[117]

The fourth and final element of establishing a prima facie case is that after the applicant's rejection the position remained open and the employer continued to seek applications from persons of the complainant's qualifications.[118] In the case of Mr. Thomas, it is unclear when the Detroit Lions interviewed him.[119] However, he interviewed after Jim Fassel for the New York job[120] and was formally interviewed before Dick Vermeil was brought in to coach the St. Louis Rams.[121] The situation in St. Louis seems to be the clearest fulfillment

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[109] *See* Associated Press, *Lions Hope Ross Continues Winning Ways in Detroit*, TULSA WORLD, Jan. 15, 1997, at B4.

[110] *See Names: Fassel First Up In Giants' Coach Search*, BOSTON GLOBE, Dec. 26, 1996, at C2.

[111] *See* R. B. Fallstrom, *Rams Finally Latch On To Dick Vermeil*, THE COLUMBIAN, Jan. 21, 1997, at D Section, p. 3.

[112] See Rick Cantu, Cowboys Hire Gailey as New Head Coach, New Dallas Coach a Steeler Alumnus, AUSTIN AMERICAN-STATESMAN, Feb. 13, 1998, at A1.

[113] *See McDonnell Douglas*, 411 U.S. at 802.

[114] *See* Associated Press, *supra* note 110.

[115] *See supra* note 111.

[116] *See* Fallstrom, *supra* note 112.

[117] *See* Cantu, *supra* note 113.

[118] *See McDonell Douglas*, 411 U.S. at 802.

[119] *See* Associated Press, *supra* note 110.

[120] *See* DiTrani, *supra* note 105.

[121] *See* Fallstrom, *supra* note 112.

of the fourth element. Mr. Thomas interviewed for the job before the eventual successful candidate was brought into the mix.[122] John Shaw, President of the St. Louis Rams, admits that after interviewing Thomas and other candidates he tried to talk Vermeil into accepting the head coaching job.[123]

Mr. Lewis interviewed third in a pool of four candidates for the Dallas job.[124] He interviewed before the successful candidate, Chan Gailey.[125] The job was offered to Terry Donahue, the first candidate, but he turned down the offer.[126] Gailey was not even interviewed until after the failure of Donahue to accept the position.[127] Therefore, in both Mr. Thomas' and Mr. Lewis' cases, the eventual successful candidates were not brought in to interview for the coaching vacancies until well after Mr. Thomas and Mr. Lewis had completed interviews.

Accordingly, using the examples of Mr. Thomas and Mr. Lewis, African-American assistant coaches satisfy all four elements and thus establish a prima facie case of disparate treatment.

B. *Can the NFL Rebut the Prima Facie Case?*

The next step in the process is for the NFL to articulate legitimate reasons as to why Mr. Thomas and Mr. Lewis were not hired for the positions in which they had expressed interest.[128] The following are possible rebuttal arguments that could be made by the NFL.

1. The National Football League Does Not Control the Hiring Policies of Each Individual Association Team

One argument that could be made by the NFL is that the League, as an entity does not control the hiring process for coaches. Paul Tagliabue, the Commissioner of the NFL, was once quoted as saying,

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[122] *See* Thomas, *supra* note 108.

[123] *See* Fallstrom, *supra* note 112.

[124] *See* Cantu, *supra* note 109.

[125] *See* Cantu, *supra* note 115.

[126] *See* Richard Justice, *Donahue Turns Down Offer from Cowboys, Returns Home*, PITTSBURGH POST-GAZETTE, Feb. 4, 1998, at C6.

[127] *See* Jean-Jacques Taylor, *Steelers' Gailey Arrives for Cowboys Interview*, DALLAS MORNING NEWS, Feb. 10, 1998, at 2B.

[128] *See McDonnell Douglas*, 411 U.S. at 802.

"It's not my job to hire players or coaches for teams but to assure fairness in the process."[129] The League takes no part in the hiring process, nor do they take part in who is considered for positions or have any veto power over who is ultimately selected.[130] Therefore, they would argue that the wrong entity is being sued, because the hiring policy of each team is set by the management structure of those individual teams.

2. The Candidates Lacked the Experience of Those Coaches Who Were Hired

A second argument most likely to be made by the NFL is that Mr. Thomas and Mr. Lewis lacked the experience of the coaches who were ultimately hired. Bobby Ross, who was hired to replace Wayne Fontes as head coach in Detroit, was a college head coach,[131] and had NFL head coaching experience.[132] Jim Fassel was a college coach, and an NFL assistant widely held to be an offensive genius.[133] Dick Vermeil followed the same path, as he was a college football head coach, then became a head coach in the NFL before being hired by the Rams.[134] Finally, Chan Gailey, the choice of Dallas Cowboys owner Jerry Jones, was a head college coach and an offensive coordinator in the NFL.[135] All of the candidates have at least one thing in common, the experience of being a head coach at least at the collegiate level. Neither Mr. Thomas nor Mr. Lewis have been head coaches in any capacity.

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[129] *Committees Might Discuss Hiring Practices*, SACRAMENTO BEE, Mar. 25, 1997, at D3.

[130] *See* Associated Press, *Ross Takes Control of Lions*, CHI. TRIB., Jan. 14, 1997, at 3.

[131] *See id.* While serving as head coach at Georgia Tech, Ross' team won a share of the national title.

[132] *See* Associated Press, *supra* note 110.

[133] *See* Mark Singelais, *Fassel Takes on Giant Task, N.Y. Hires Ex-Assistant as Coach*, TIMES UNION (Albany, NY), Jan. 16, 1997, at C1.

[134] *See* Clarence E. Hill, Jr., *Tired of Coasting: Terry Donahue Appears Ready to Leave Behind His Retirement in the California Splendor to Take Another Challenge*, FT. WORTH STAR-TELEGRAM, Feb. 3, 1998 at 3.

[135] *See* Cantu, *supra* note 113.

3. Coaching Decisions Are Based on More Than Resume Credentials

A third argument that may be made by the NFL is that coaching decisions are based on more than resume credentials. For instance, William Clay Ford, owner of the Detroit Lions, brought in Bobby Ross to head up the organization because of his "no-nonsense attitude."[136] Jim Fassel was hired presumably because of his relationship to the organization[137] and his experience with the team's starting quarterback.[138] Dick Vermeil was the choice of the Rams because he had "high energy" and is "smart."[139] Finally, the Cowboys chose Chan Gailey because of his energy level and his willingness to let the owner have significant control over player personnel and related matters.[140] There is a common thread of "intangibles," or things not necessarily reflected on a resume, that play an important part in these hiring decisions.

C. *The Coaches Have One Last Opportunity to Respond to the NFL's Reasoning*

The final element of a disparate treatment claim is that the plaintiff is given an opportunity to respond to the defendant's reasons for the

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[136] *See* Associated Press, *supra* note 110. "It was that conservative, no-nonsense attitude that endeared Ross to Lions owner William Clay Ford. It was a big reason why initial plans to interview a wide variety of prospects were scrapped." *Id.*

[137] *See* Singelais, *supra* note 136. Fassel spent two seasons with the Giants, the first as quarterbacks coach and the second as the offensive coordinator. *See id.*

[138] *See id.*

> Reeves' (Former Giants head coach Dan Reeves) relationship with Brown was strained, but Fassel said he thinks very highly of his 26-year-old quarterback. "Dave has struggled the last few years," Fassel said Wednesday at Giants Stadium. "Dave needs to get into a situation where he's sure of himself, where he's got confidence in himself, he's got confidence in who's calling the plays, confidence in a lot of things. I think Dave Brown is an excellent quarterback who's going to be a lot better than he is. Dave Brown is a guy I like. He's intelligent and he's competitive. And it's my job to bring it out of him."

Id.

[139] *See* Fallstrom, *supra* note 112.

[140] *See* Cantu, *supra* note 113.

applicants' rejection.[141] The perspective plaintiffs would likely have a powerful response to the NFL's reasoning.

1. The NFL Does Exert Some Responsibility Over The Hiring Process

One responsive argument the plaintiffs could make is the NFL does take some responsibility for the hiring process. First, in 1997, when the Commissioner met with the committee of African-American assistants about the failure to have any African-Americans hired in the eleven open head coaches positions, he assured the participants that it was his job to make sure a diverse pool of applicants were considered for positions and that the hiring process is fair.[142] Tagliabue also assured the assistants the issue would be revisited, most likely through League committees.[143]

The League can also influence where and when a coach will be hired. Two prime examples can be found with Minnesota Vikings Head Coach Dennis Green and Offensive Coordinator Brian Billick. Both men were courted by other teams and rules established by the NFL prohibited either man from leaving, with the Commissioner finally ruling on Mr. Billick's status.[144]

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[141] *See McDonnell Douglas*, 411 U.S. at 802.

[142] *See supra* note 130.

[143] *See id.*

[144] *See* Don Banks, *Raiders Eyeing Green, but . . .*, STAR TRIBUNE (Minneapolis, MN), Jan. 8, 1998, at 1C. An official with the Oakland Raiders, under direction from the team's owner Al Davis, called Roger Headrick, President of the Minnesota Vikings. The Oakland official inquired as to whether Mr. Green was under contract and also whether the team planned on firing Mr. Green. The Oakland official was told that Mr. Green was under contract. Had the Raiders hired Mr. Green just as a head coach and not with any additional duties, NFL regulations state that the Minnesota Vikings would have to be paid some form of compensation. *See id.*
See also Don Banks, *Billick, League Officials To Discuss Situation; Tuesday meeting scheduled with Commissioner's attorneys*, STAR TRIBUNE (Minneapolis, MN), Jan. 26, 1998, at 8C. Billick resigned as the Offensive Coordinator of the Minnesota Vikings with one year left on his contract to pursue a similar job with the Dallas Cowboys. Roger Headrick, President of the Minnesota Vikings, refused to accept the resignation of Mr. Billick and referred the matter to the league. The Commissioner

Further, three years ago, Bill Walsh, the former head coach of the San Francisco 49ers was asked by the League to put together a program to find ways of getting more African-Americans into NFL head-coaching positions, because of his long commitment to helping African-American coaches.[145] Obviously, based on the actions of the league and the words of the Commissioner, the NFL takes some responsibility for the hiring process of coaches within the NFL.

2. The Candidates Were as Qualified as the Coaches Who Were Hired

A second argument the perspective plaintiffs could make is the candidates were as experienced as those individuals who were hired. Starting with the coaches who were hired in the stead of Emmitt Thomas, Bobby Ross is arguably the most qualified. He won a national championship as a college coach, never had a losing season as the coach of the San Diego Chargers and took the Chargers to their first Super Bowl in 1995.[146] Jim Fassel was a college head coach, but was not successful.[147] Further, Fassel has only been coaching in the NFL since 1991, when he was first a quarterback coach with the New York Giants, and had failed to serve as coordinator for any team successful in winning a playoff game.[148] As for Dick Vermeil, he had not coached football in any form or fashion since 1982.[149] Vermeil had spent the last 15 years as a college football analyst for CBS and then ABC.[150] The game of football that he left 15 years ago is drastically different than what it is today.[151] Emmitt Thomas was arguably more

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felt Mr. Billick's situation was "clear cut" and that he could not accept another job in 1998. *See id.*

[145] *See* Glenn Dickey, *NFL Confronts Coaching Color Barrier*, S.F. CHRON., Mar. 24, 1997, at B3.

[146] *See* Associated Press, *supra* note 110.

[147] *See* Singelais, *supra* note 134. Fassel was the head coach at the University of Utah from 1985 until 1989, when he was fired. While there, he compiled a record of 25-33. *See id.*

[148] *See id.*

[149] *See* Fallstrom, *supra* note 112.

[150] *See id.*

[151] *See* Bill Lyon, *The Hold is Forever, Vermeil Couldn't Shake It,* ST. LOUIS POST-DISPATCH, Jan. 22, 1997, at 06B. The emergence of free agency, as well as the

qualified than Jim Fassel because he has more experience in the league as an assistant, and has served as the coordinator on a team that has won a playoff game. Thomas was a much better fit for the St. Louis job than Dick Vermeil because over the 15 years that Vermeil was retired from football, Thomas was gaining more and more experience in the League. Someone who has not been a part of the game is unlikely to be more qualified than a coach who has been actively involved in the game and developing his skills as the game has evolved. Therefore, Thomas is arguably more qualified than two of the three candidates who were ultimately hired.

Chan Gailey is also an interesting case study when his qualifications are stacked against those of Sherman Lewis. Gailey has five years of head coaching experience, but not in the NFL.[152] Gailey also has been an assistant on teams that have made it to four Super Bowls and has ten years of experience as an assistant in the NFL.[153] Lewis spent fourteen years as an assistant with Michigan State.[154] Lewis has been an assistant on three Super Bowl winning teams and was the offensive coordinator for the Green Bay Packers back-to-back Super Bowl teams.[155] Finally, Lewis has never coached on a losing team,[156] and he has fourteen years coaching experience in the NFL.[157] Accordingly, Lewis is arguably more qualified than Gailey to be a head coach in the NFL.

The facts indicate that the coaches have strong responses to all of the NFL's possible arguments. With such strong responses, it is safe to

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salary cap, have changed the structure of the game. Winning seasons by the expansion Carolina Panthers and Jacksonville Jaguars now place franchises in quick, must-win situations. Therefore, a coach does not have five years to make an organization a winner. *See id.*

[152] *See* Denne H. Freeman, *Cowboys Select Steelers' Assistant*, THE COMMERCIAL APPEAL (Memphis, TN), Feb. 13, 1998, at D1.

[153] *See id.*

[154] *See* Kirk Bohls, *NFL Owners, or Longhorns, Should Knock on Lewis' Door*, AUSTIN AMERICAN-STATESMAN, Nov. 21, 1997, at C1.

[155] *See id.*

[156] *See id.*

[157] *See* Jean-Jacques Taylor, *NFL, Tagliabue Have Opportunity To Avoid Replay*, DALLAS MORNING NEWS, Mar. 14, 1998, at 2B.

assume that other factors are at play in the League's failure to hire African-Americans as head coaches. The arguments made by the NFL can be viewed as a pretext for the discriminatory treatment of African-American assistant coaches. Accordingly, the perspective plaintiffs could make a showing of disparate treatment by the NFL.

IV. APPLYING THE DISPARATE IMPACT FRAMEWORK TO THE NFL'S HIRING PRACTICES

To make a claim of disparate impact, an employee must show that a facially neutral employment practice has had a significant discriminatory impact. If such a showing is made, the employer must demonstrate why the employment practice has a manifest relationship to the employment in question. If the employer satisfies the requirement, the employee must establish the employer was using the practice as mere pretext for discrimination, or that another practice would serve the employer's legitimate interests without yielding other undesirable effects.[158]

A. Is There A Prima Facie Case?

First, the perspective plaintiffs must establish a prima facie case of disparate impact.[159] In order to establish a prima face case, a plaintiff must prove "a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin."[160]

In the instant matter, the NFL clearly does not have a facially biased hiring policy. The hiring process usually[161] consists of the

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[158] *See supra* text accompanying notes 26-28.

[159] *See* 42 U.S.C. § 2000(e)(2)(k) (Supp. V 1993).

[160] *See id.*

> In order to make this showing, the plaintiff must prove that (1) a discrete employer selection practice (or if no discrete practice is severable from the selection process, the process itself) (2) disproportionately excludes people of the plaintiff's class. Whether the degree of disproportion is adequate to constitute "impact" is determined on a case-by-case basis.

Susan S. Grover, *The Business Necessity Defense In Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 394 n.31 (1996).

[161] *See supra* part III.A.

management creating a "short list" of candidates to fill the coaching vacancy.[162] Many times, the short list has the candidates ranked.[163] Candidates are then brought in for interviews if they are interested in the position.[164] After interviews, one of the candidates is chosen and offered the job.

The creation of a short list inadvertently leaves African-American assistants behind and is the most problematic aspect of the typical hiring process. The initial stage of the process is key because qualified individuals are at least given an opportunity to plead the case for their credentials and abilities. African-Americans are excluded in two different ways in the initial stage of the process.

First, these short lists are not inclusive of all the individuals who are qualified for head coaching positions. Professional head coaches are usually hired after serving as a head coach in college or a coordinator in the pros.[165] Of the fifteen coaching vacancies that opened over the past two years, only Emmitt Thomas and Sherman Lewis were even offered interviews.[166] Art Shell, the first African-American head coach in the modern NFL,[167] Jimmy Raye, the offensive coordinator of the Kansas City Chiefs,[168] and Ray Sherman, the new offensive coordinator of the Pittsburgh Steelers,[169] are all notables who were not included in any discussions for head coaching positions. Even though qualified based on the criteria set forward by most owners and general managers, they were nonetheless left out in the cold when it came time for the fourteen teams looking for head coaches to start the interview process.

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[162] *See* Pate, *supra* note 104.

[163] *See Fallstrom*, *supra* note 112; *see also Fassel First Up In Giants' Coach Search*, *supra* note 111.

[164] *See* DiTrani, *supra* note 105.

[165] See *Black Assistants Mull Lawsuit; NFL Hiring Practices, Snub of Packers' Lewis Fuel Controversy*, HOUSTON CHRONICLE, Jan. 21, 1998, at 3.

[166] *See supra* text accompanying notes 106-109.

[167] *See* Jarrett Bell, *Equal Opportunity: Black Coaches Seek Chances To Head NFL Teams*, USA TODAY, Mar. 20, 1997, at 03C.

[168] *See id.*

[169] *See id.*

Second, the short list candidates usually are acknowledged because of connections the perspective employer has with others throughout the sports world. A three-month study conducted by *Newsday* concluded that for many perspective hires, one of the main factors in the hiring decisions was that the successful candidates had developed connections with the decision-makers.[170] The study also found these decision-makers have been slow to reach a level of comfort in hiring minority coaches.[171] Bill Kuharich, General Manager of the New Orleans Saints and one of the pivotal individuals in hiring Mike Ditka as the head coach of the Saints, stated,

> [t]he way people get jobs is probably determined more by who you know than by talent and ability. You can slant statistics to meet your objective. But you've got to go back to the individual and trace the connection - who influenced the decision - and you can target why a guy got a job.[172]

This problem has manifested itself in such a way now that qualified candidates are excluded because of the strong reliance on social connections by owners and general managers.[173] Whether those social connections are influenced by race, the result is that disproportionately, African-Americans are not even given the opportunity to be considered for head coaching positions.

B. *The NFL's Rebuttal*

The NFL could argue that the management structure of each team has to work so closely with the head coach, it is imperative that whoever is hired as the head coach is able to communicate and work effectively with the authority structure. Two prime examples of this

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[170] *See* Greg Logan, *Race In Sports, NFL Coaches, Just Out Of Reach, Black Coaches, Shut Out Of 11 Head-Coaching Spots, Ask 'Why?'*, NEWSDAY, Jun. 1, 1997, at B04.

[171] *See id.*

[172] *Id.*

[173] *See* Dickey, *supra* note 146. "A league-wide meeting of NFL coaches and executives that would be primarily social, with dinners and other social gatherings. One of the primary problems for black coaches is that they are not well-known among white general managers, who tend to make their coaching choices from the men they know." *Id.*

can be seen with the Dallas Cowboys and the San Diego Chargers. Jerry Jones, owner of the Cowboys, hired Jimmy Johnson because they were college football teammates and friends.[174] After winning two Super Bowls, however, Johnson resigned his position as coach with the Cowboys because he and Jones could no longer continue to work together.[175] A second example is Bobby Ross, and his first stint in the NFL as a head coach. He, along with General Manager Bobby Beathard, effectively controlled the San Diego Chargers.[176] The two put together a team that went to the Super Bowl in 1995. Yet, Ross eventually quit because of Beathard's insistence on firing members of the coaching staff.[177]

These two situations exemplify how tense head coach-management relations can be. They prove that there is a need for harmony to exist within the authority structure of the team. Therefore, general managers and owners have to be able to hire individuals with whom they feel most comfortable. Hence, there is a job-related reason for using social connections to create a short list of candidates for head coaching vacancies.

C. There Are Other Practices That Would Serve The Employer's Legitimate Interests Without Undesirable Effects

The perspective plaintiffs would next have to establish that the employer is using the practice as mere pretext for discrimination, or

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[174] *See* Jonathan Rand, *Two Egos Too Many for Dallas*, KAN. CITY STAR, Mar. 30, 1994, at D1.

[175] *See id.* Jones allegedly made remarks about firing Johnson while in a bar. Jones also allegedly remarked that the team was successful because of him, not Johnson, and that any one of "300 coaches" could have lead the team to two Super Bowl victories. *See id.*

[176] *See* Bernie Wilson, *Beathard Beats Ross In Chargers Turf War*, FRESNO BEE, Jan. 4, 1997, at D6.

[177] *See id.* Beathard was displeased with the offensive coordinator, Ralph Friedgen and defensive coordinator Dave Adolph. Beathard was also upset at the way young players were being used by the staff. Ross is very loyal to his assistants and had fired only one in 20 years of coaching. *See id.*

that another practice would serve the employer's legitimate interests without undesirable effects.[178]

There are other practices that would serve the NFL's legitimate interests without undesirable effects. One is to create a standardized list of criteria for those who are interested in applying for head coaching positions. The list could include the experience the employer is looking for and give a background description of the organization, information about members of the management structure and information about the players and draft prospects. Once a comprehensive list is established, the League's owners could approve the document and make it available to all interested applicants. In the past, African-American assistants have complained they did not know what criteria were used to assess head-coach candidates.[179] This would directly address that concern. This way, applicants would have an idea of what the decision-makers are looking for in a coach, be given a chance to match their qualifications against the desired criteria and not feel slighted if they are not given the opportunity to interview. If it is not possible for the league to come to a consensus on such a document, each team, as it looks for a new coach, could publish such a list.

A second alternative is eliminating recruiting restrictions. Currently, another team cannot legally contact an assistant coach on a team in the playoffs or Super Bowl until the candidate's team is eliminated or the Super Bowl is concluded.[180] Successful coordinators such as Raye, Sherman and Lewis were all on successful teams that made it at least into the second round of the playoffs. These men were essentially eliminated from consideration for some head coaching jobs because owners and general managers wanted to make a decision on coaches before the Super Bowl.[181] This would allow successful coordinators to be included on the short lists for these coaching positions in which they are qualified and thereby increase their possibility of being hired.

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[178] *See supra* text accompanying notes 26-28.

[179] See Tom Silverstein, *Looking For A Chance: Failure of Pack's Lewis To Consideration Get For Head Coach Job Angers Black Coaches In The NFL*, ROCKY MOUNTAIN NEWS, Apr. 6, 1997, at 16C.

[180] *See* Logan, *supra* note 171.

[181] *See id.*

A third new practice that could be instituted that would serve the interests of the owners and general managers, yet give deserving African-American assistant coaches a shot at head coaching jobs is the creation of a seniority or merit system for assistant coaches. The owners and general mangers would then, voluntarily, start with the assistants at the top of the list when they formulate their short list for head coaches. This type of system rewards those assistants who have stayed in the league for many years and haven't been given their opportunity at the collegiate or pro level to be head coaches or even coordinators.

If the three options presented to the NFL on changing their hiring practices were accepted, African-Americans would have improved chances of success in attaining head coaching positions.

V. CONCLUSION

When disparate treatment and impact tests are applied to the hiring practices of the National Football League, it is apparent that African-American head-coach candidates would likely have a successful Title VII claim against the NFL. The disparate treatment test is satisfied because the perspective plaintiffs would be able to establish a prima facie case and show that the excuses given for not hiring African-American assistants for head coaching jobs are invalid. The disparate impact test would succeed because, although the hiring practices of the NFL are facially neutral, the practices disproportionately eliminate African-American assistant coaches from consideration. There are clearly other ways in which owners and general managers can hire quality candidates without excluding talented African-American assistants from consideration. Even if in the next round of head coach hirings, an African-American such as Emmitt Thomas or Sherman Lewis is hired as a head coach, it does not bring the issue to a conclusion. Qualified African-Americans need to be given as many opportunities to serve as head coaches as their white colleagues. African-Americans are important to the NFL's culture and tradition and should have an opportunity to not only run or catch a football, but also to make coaching and management decisions. It's fourth down and long and the league could choose to punt by ignoring the lack of

minority head-coaches or go for a touchdown by seriously addressing its discriminatory hiring practices.