CHAPTER

6

Discrimination Issues

LEARNING OBJECTIVES

By the end of the chapter, the reader will be able to:

1. Identify potential areas of discrimination in sports
2. Explain the potential use of Title VII to prevent discriminatory practice in sport
3. Discuss gender equity in sport, and the use of both Title VII and Title IX to remedy gender discrimination
4. Identify emerging legal protections for transgendered athletes
5. Give examples of the application of the ADEA in sport
6. Identify the ways in which the ADA has been used to remedy and prevent discrimination based on disability in sport
7. Identify generally religious discrimination issues in sport

RELATED CASES

Case 6.1 Class v. Towson University, 806 F.3d 236 (2015)

Case 6.2 Pambianchi v. Arkansas Tech University, 95 F. Supp. 3d 1101 (2015)

Introduction

Throughout the history of sports, equality has been a topic of much discussion and debate. Discrimination based on race, gender, religion, age, and disability are at the forefront of the sports world today, as they have been for the last century. The unequal treatment of women, racial and religious minorities, and disabled persons in the sports world has been addressed by the court system and legislation in recent years. As such, this chapter focuses on the laws prohibiting discrimination and those who have challenged or used the laws in an attempt to combat discrimination based on gender, race, disability, religion, or age. Specifically, the chapter will address Title VII of the Civil Rights Act of 1964 (Title VII), Title IX, the Age Discrimination in Employment Act of 1967 (ADEA), the Americans with Disabilities Act (ADA), as well as how various laws, including Title VII, are used to combat religious discrimination.

Title VII

Title VII of the Civil Rights Act of 1964 prohibits job discrimination against employees and applicants on the basis of race, color, natural origin, religion, and sex; these five categories are called the *protected classes*. A protected class has been defined as a class of persons with identifiable characteristics who historically have been victimized by discriminatory treatment for certain purposes; these characteristics include race, color, national origin, religion and sex (Cross and Miller, 2008). Specifically, 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.
>
> (42 U.S.C.A. § 2000e-2(a)1.)

Each of the protected classes is a broad category that prevent discrimination in many circumstances. Race, while not specifically defined in Title VII, encompasses ancestry, physical characteristics, race linked illness, cultural characteristics (such as grooming practices), perception, or association. Discrimination based on color includes complexation, skin tone or shade or pigmentation. There is certainly overlap between race based and color based discrimination, however, there are exclusive protected classes (EEOC Compliance Manual, 2006). National origin discrimination includes treating applicants or employees unfavorably because they are from a certain part of the world or particular country, because of accent or ethnicity, or because they possess certain ethnic traits. Specifically, equal employment opportunity cannot be denied based on birthplace, ancestry, culture, linguistic characteristics or accents (EEOC Facts, 2015). Title VII does provide a definition for religious discrimination: specifically, religion includes "all aspects of religious observance and practice as well as belief" (42 U.S.C. § 2000e (j)). Further, religion includes "not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others" (*Thomas v. Review Bd. of the Indiana Employment*

Sec. Div., 1981). Lastly, sex based discrimination includes treating someone unfavorably because of his or her sex, gender identity (including transgender status) or because sexual orientation (as of July 2015). Further, pregnancy and childbirth are also protected (EEOC Enforcement Guidance, 2015).

Title VII applies to employers who have 15 or more employees, labor unions that operate hiring halls, employment agencies, and state and local governments. It has been referred to as "the single most important piece of legislation that has helped to shape and define employment rights in this country" (Bennett-Alexander and Pincus, 1995). The Civil Rights Act of 1991 amended Title VII in many respects, including giving plaintiffs the right to seek compensatory and punitive damages in intentional discrimination cases.

The *Equal Employment Opportunity Commission* (EEOC) is the federal agency that enforces the federal laws prohibiting discrimination and it also provides oversight of all federal and equal employment opportunity regulations, practices, and policies. An individual alleging discrimination under Title VII must file a claim with the EEOC before he or she can bring a lawsuit against his or her employer. The EEOC can investigate the allegations and make an attempt to settle the case between the parties. If no settlement is reached, the EEOC has the authority to file a lawsuit against the employer on the employee's behalf. If the EEOC decides not to bring a lawsuit or decides not to investigate the case, the individual asserting discrimination may file a lawsuit on his or her own initiative against the employer.

Title VII covers both intentional and unintentional discrimination. Intentional discrimination by an employer is commonly referred to as *disparate treatment discrimination* (*Jackson v. University of New Haven*, 2002). Disparate treatment is the most common form of discrimination claim and can be difficult to prove. A typical disparate treatment case could involve an individual's claim that an employer treated him or her less favorably based on membership in a protected class. For an individual to prove a prima facie case of disparate treatment discrimination as either an applicant or an employee, the plaintiff must show the following: (1) he or she is a member of a protected class, (2) he or she applied for or was qualified for the position, (3) he or she suffered an adverse employment decision, and (4) the position remained open and the employer continued to seek applicants or he or she was treated less favorably than other similarly situated employees (*McDonnell Douglas Corp. v. Green*, 1973). Once the plaintiff has established a prima facie case, he or she has met the initial burden of proof. The burden of going forward then shifts to the employer, who must provide a legitimate, nondiscriminatory reason for the employment decision (Cross and Miller, 2008). If the employer meets this burden, then the plaintiff must prove that this stated reason was merely pretext for discrimination. Proving pretext requires the plaintiff to demonstrate that the defendant's reason for taking the adverse employment action is false or a cover up for the employer's discriminatory intent.

Discrimination can also take the form of *disparate impact discrimination*, which occurs when an employer adopts a practice or policy that seems neutral on its face but is shown to have an adverse impact on a protected class. In these types of cases a plaintiff alleges that an employment practice by the defendant "in fact falls more harshly on one group than another and cannot be justified by business necessity" (*International Brotherhood of Teamsters v. U.S.*, 1977). If a person can prove disparate impact discrimination, then it is not necessary to prove intent (*Griggs v. Duke Power*, 1971). Examples of practices that may be subject to a disparate impact challenge include written tests, height and weight requirements, and subjective procedures, such as interviews. Many disparate impact cases are brought as class actions. Most often, proving this form of discrimination

involves statistical proof about the employer's practices. The EEOC has promulgated quantitative guidelines to determine if employee selection and promotion rules have a disproportionate impact. These guidelines state that if the observed promotion or selection rate for any group is less than four fifths of the rate for the group with the highest rate, then disproportionate impact will be assumed (29 C.F.R. § 1607.4(d)).

Even if a plaintiff successfully proves his or her burden in a Title VII claim, an employer can assert several defenses to an employment discrimination action. The first defense for the employer is to assert that discrimination did not take place or that the plaintiff has failed to meet the burden of proof. The employer can also attempt to justify discrimination on the basis of business necessity, a *bona fide occupational qualification* (BFOQ), or a seniority system.

The business necessity defense can be a viable defense to disparate impact discrimination if the employer can show that the discriminatory practice is "job-related" (*Griggs v. Duke Power,* 1971). Additionally, sex, national origin, or religious discrimination may be permissible if the employer can show that the discrimination was based on a BFOQ. A BFOQ is "a qualification that is reasonably necessary to the normal operation or essence of an employer's businesses" (*Frank v. United Airlines, Inc.*, 2000) However, race and color based discrimination can never be considered a BFOQ. The BFOQ clause has been narrowly construed by courts, and the burden rests on the employer in asserting such a defense (*Grant v. General Motors*, 1990). An employer may also defend a discrimination case on the basis of a fair seniority system. Differences in employment conditions that result from such a system are permissible as long as there is no intent to discriminate.

Specific applications of Title VII to sport can be found for each of the five protected classes; however, only race and sex will be discussed below. Religious discrimination will be discussed in a later section and include both Title VII and other legal doctrines.

Discrimination Based on Race

Allegations of racial discrimination in employment settings are common, and sport industry employers are not an exception. Plaintiffs can seek to remedy racial discrimination using a myriad of different legal theories, such as the Fourteenth Amendment of the U.S. Constitution, the Civil Rights Act of 1866 (42 U.S.C. § 1981), the Civil Rights Act of 1871 (42 U.S.C. § 1983), state statutes and constitutions, and local legislation. Focus in this section will be given to Title VII (as amended by the Civil Rights Act of 1991 (42 U.S.C. § 2000e)).

In *Moran v. Selig* (2006), a group of Caucasian and Latino ballplayers sued Major League Baseball (MLB), claiming racial discrimination under Title VII. At issue in the case was MLB's exclusion of these players from medical and supplemental income plans devised for former Negro League players. Many African-American ballplayers played in the Negro Leagues before the color barrier in baseball was broken by Jackie Robinson. In 1993, MLB created a plan that provided medical coverage to former Negro League players. In 1997, it adopted a supplemental income plan that provided an annual payment of $10,000 to eligible players (Gould, 2011). Individuals who had played in the Negro Leagues prior to 1948, were eligible for such payments. These two plans are referred to collectively as the "Negro League Plans." To successfully prove a Title VII claim for race based discrimination, the plaintiffs needed to demonstrate membership in a protected class, being qualified for their jobs, being subject to an adverse employment decision or action, and receiving less favorable treatment than similarly situated employees outside the protected class. The court held that the plaintiffs satisfied the first two criteria, but that not being eligible for the Negro League Plans was not an adverse employment decision, and

that the plaintiffs were not similarly situated to the employees with whom the plaintiffs chose to equate themselves because the plaintiffs never played in the Negro Leagues.

More recently, Louisiana State University was sued by its former head women's tennis coach, Anthony Minnis, an African-American. The plaintiff, who was the first African-American coach hired by LSU in any sport, alleged that his firing in 2012 (after 21 years at the university) was due in part to racial harassment. Specifically, Minnis alleged that he was subject to race based harassment and discrimination throughout his long tenure as head coach. Further, Minnis alleged *disparate compensation*, given that his replacement, a Caucasian female with no prior collegiate head coaching experience was given a contract with an annual salary $25,000 more than what Minnis had received (*Minnis v. Board of Supervisors*, 2014).

After analyzing his Title VII discriminatory discharge and disparate compensation claims, the court found in favor of LSU. With regard to the discriminatory discharge claim, Minnis was required to prove the four part plaintiff's burden discussed earlier. There was no question that Minnis was a member of a protected class, qualified for the position, and subject to an adverse employment action. However, the court found that Minnis failed to demonstrate that he was treated less favorably than other similarly situated employees. Minnis was compared to the head men's tennis coach, Jeff Brown, a white male, and it was determined that Brown and Minnis were treated differently because Brown had a superior win-loss record. Further, the court held that even if Minnis had established his case, the claim still would have failed because he was unable to rebut the non-discriminatory reasons that LSU advanced for the terminating Minnis: (1) his failure to meet established goals, (2) his losing record, and (3) morale issues (*Minnis v. Board of Supervisors*, 2014).

Minnis also failed on the disparate compensation claim. To succeed, Minnis needed to show that his circumstances were nearly identical to those of a better paid employee who was not a member of the protected class (*Taylor v. United Parcel Service, Inc*., 2008). When analyzing whether Minnis was paid less than white employees for substantially the same job responsibilities, the court found that none of the other head coaches, including Minnis's replacement, were proper comparisons, and that Minnis was unable to rebut LSU's legitimate, non-discriminatory reasons for the disparity in pay. Specifically, LSU asserted that: (1) Minnis's competitive record did not justify merit increases, (2) Minnis's salary was set by comparing his performance to that of SEC women's tennis coaches, and (3) Minnis's salary was calculated based on the market for the position at the time of hiring. (*Minnis v. Board of Supervisors,* 2014).

Discrimination Based on Sex

Title VII also prohibits discrimination based on sex, which as noted includes sexual orientation (as of July 2015), gender identity, pregnancy, and childbirth. To establish a prima facie case of sex discrimination under Title VII, a plaintiff must prove that he or she (1) was a member of a protected class; (2) was qualified for the position; (3) was discharged or otherwise subjected to an adverse employment action; and (4) others (similarly situated but not of the protected class) were treated more favorably (*Peirick v. Indiana University-Purdue University Indianapolis Athletics Dept.*, 2005).

In *Perdue v. City University of New York* (1998) Molly Perdue, the former women's basketball coach and women's sports administrator at Brooklyn College, filed a Title VII intentional sex discrimination claim against Brooklyn College, in addition to claims filed under the Equal Pay Act (29 U.S.C. § 206(d)) and Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.). Perdue alleged that she was subject to a lesser salary, worse employment conditions, and demeaning job responsibilities, in contrast to her male

coach counterparts. Specifically, as evidence of sex discrimination, Perdue cited that she received less than half the average salary of her two male counterparts (although she did work that was comparable), had to clean the gym for her games, had to launder her team uniforms, had a significantly smaller office, had worse game times and practice times, had fewer assistant coaches who worked only part-time as opposed to the full-time assistant coaches for the men's team, and had no team locker room, and an overall smaller budget. The federal jury returned a verdict and damage award in favor of Perdue, which was upheld by appellate courts.

There can also be cases of *reverse sex discrimination* as well. For instance, in *Medcalf v. Trustees of University of Pennsylvania* (2003), a male assistant crew coach alleged he had been the subject of reverse discrimination when the university would not allow him to apply to be the head coach of the women's crew team. A federal jury returned a verdict in his favor, and a federal appellate court affirmed the verdict when the University of Pennsylvania appealed.

In a more recent reverse discrimination case, *Mollaghan v. Varnell* (2012), two male soccer coaches sued the University of Southern Mississippi, senior somen's administrator Sonya Varnell and athletic director Richard Giannini, alleging sex discrimination, in addition to other claims (a third coach also filed a sexual harassment claim). Specifically, the coaches claimed that the administrators stated they preferred women to coach women's teams, and that the administrators had engaged in conduct that undermined the coaches' ability to coach the women's team, including taking over scholarship decisions and traveling with the team, with the intent to diminish the coaches' authority, giving cause for replacement with female coaches. After over ten years of trials and subsequent appeals, the Mississippi Supreme Court held in favor of the university on all claims, including the gender discrimination claim. Specifically, the court reasoned that there was insufficient evidence to demonstrate that either coach was discharged based on gender. Neither coach had actually been discharged (one failed to have his contract renewed and one accepted another position before his contract expired) and neither was replaced with a female coach.

Sexual Harassment

Title VII also protects employees against sexual harassment in the workplace. *Sexual harassment* consists of unwelcomed sexual advances, requests for sexual favors, and other physical and verbal conduct of a sexual nature when the conduct affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment (EEOC Enforcement Guidance, 1990). There are two types of sexual harassment: *quid pro quo* harassment, and *hostile work environment* sexual harassment. When a tangible negative employment action results from a refusal to submit to a supervisor's sexual demands, quid pro quo sexual harassment exists. Where, however, a claim targets a supervisor's 'severe and pervasive' sexually demeaning behavior rather than a fulfilled threat, the claim is properly characterized as a hostile work environment sexual harassment (*Alwine v. Buzas*, 2004).

For a plaintiff to establish a claim for quid pro quo sexual harassment, he or she must prove that (1) the employee belongs to a protected group, (2) the employee was subject to unwelcome sexual harassment, (3) the harassment complained of was based on sex, (4) the employee's reaction to the harassment complained of affected a tangible employment action, and (5) the harasser was the employee's supervisor (*Burlington Industries, Inc. v. Ellerth*, 1998).

To establish a claim for hostile work environment sexual harassment, the plaintiff must prove that (1) the employee was a member of a protected group, (2) the employee was subject to unwelcome

harassment that was sufficiently severe or pervasive to create a hostile work environment, (3) the harassment complained of was based on the employee's sex, (4) the harassment resulted in a tangible employment action, and (5) the harasser was the employee's supervisor, although a hostile environment can arise from someone other than the employee's supervisor (*Jew v. University of Iowa*, 1990). Although the phrase "hostile work environment" is not specifically mentioned in Title VII, a viable cause of action still exists under the statute (*Clarke v. Bank of Commerce*, 2007).

There have been many sexual harassment lawsuits involving athletes, coaches, school administrators, and others who are involved in sport or recreation; several of the cases already discussed in this chapter also included sexual harassment claims. Most prominent is *Faragher v. City of Boca Raton* (1998), in which a city lifeguard filed a Title VII sexual harassment claim after resigning from her job as a lifeguard, a position she held for five years. Beth Ann Faragher claimed that throughout her employment, two of her immediate supervisors subjected her to sexual remarks, uninvited offensive touching, and vulgar speech, creating a sexually hostile work environment. The city did have a sexual harassment policy, however it was never discussed with the lifeguards. Further, Faragher never reported any of the alleged conduct to managers above her supervisors. The district court held that the criteria for hostile work environment (as listed above) were met; specifically, they found the supervisors conduct sufficiently severe or pervasive to create a hostile work environment. Also, the court held that because the supervisors were acting within the scope of their job responsibility when they created the hostile work environment, the city of Boca Raton was liable under the theory of *respondeat superior*. On appeal, the 11th Circuit Court affirmed the hostile work environment, but reversed the ruling regarding liability to the city. The United States Supreme Court granted certiorari and reinstated the ruling of the district court finding that a hostile work environment did exist, and that because the city failed to disseminate its sexual harassment policy or keep track of supervisor conduct, the city was in fact liable. This case is important not only for the precedent regarding hostile work environment sexual harassment claims under Title VII, but also for the precedent regarding vicarious liability of the employer for supervisor misconduct.

Title IX

Historically, women have been discriminated against in sports and have not been provided with the same opportunities for participation as men. A vast disparity has existed between men's and women's sports in the provision of participation opportunities, training facilities, adequate equipment, coaching staff, trainers, playing fields, recruitment for the sport, and adequate funding. Opportunities for girls at the interscholastic level were curtailed because of an overall attitude that girls could not play or had no desire to participate in sports at the same competitive level as boys. Female amateur athletes have also experienced much discrimination and harassment, which has limited their opportunities in athletics over a long period of time. Fortunately, this has begun to change. Girls and women are now participating in sports at the interscholastic and intercollegiate levels in record numbers, which are still increasing. More females are now participating in what were once all-male sports. Girls now participate on boys' high school football, baseball, and even wrestling teams. The gap in opportunities between boys and girls has begun to shrink because of laws such as Title IX, as well as attitude changes in our society about the role of girls and women and their ability to participate and compete in the sports world. Further, more women are coaching at the collegiate level, and some strides are being made by women in athletic administration as well. Many of the archaic notions about women

participating in sports have been discarded as women achieve greatness and notoriety in both amateur and professional sports.

History and Overview of Title IX

Prior to 1970 there had been very few legal challenges addressing sex discrimination in athletics. In the early 1970s, women began using the Fourteenth Amendment for sex discrimination claims. But in 1972, Title IX was passed, federal legislation that gave women the statutory remedy needed to address problems dealing with sex discrimination; its purpose was to eliminate discrimination in federally funded activities. The statute states in part, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" (20 U.S.C. § 1681 (a)). While Title IX was not originally intended specifically as a remedy for gender inequity in athletics, the passage and implementation of Title IX has done more to advance women's rights in sports than any other piece of legislation.

The Department of Health, Education, and Welfare (HEW) was given the task of implementing Title IX. Approximately three years after Title IX was passed, regulatory guidance became effective (45 C.F.R. Part 86). The Office of Civil Rights (OCR) under the Department of Education is responsible for enforcing Title IX. The OCR's job is to ensure that universities that receive federal funds are in compliance with the requirements of Title IX. However, determining the scope of the federal fund requirement presented challenges in the early history of the legislation. *Grove City College v. Bell* (1984), was a landmark case in which the court ruled that only programs that received *direct* financial assistance were subject to Title IX. However, the holding of *Grove City* was not the intent of Congress when it passed Title IX, so the Civil Rights Restoration Act of 1987 was subsequently passed, which further clarified the applicability of Title IX to athletes. Based on the broader interpretation of federal funding included in the Civil Rights Restoration Act, almost all colleges, universities, secondary, and elementary school districts are covered under Title IX. The Civil Rights Restoration Act further supported congressional intent to protect against sex discrimination in institutions receiving federal funds by indicating that a "program" or "activity" includes the entire range of programs in a federally funded institution, not just specifically funded programs as set forth in *Grove City College*.

The OCR also has a compliance review program for selected recipients. During the review process the OCR is able to identify and resolve sex discrimination issues that may not have been addressed through the compliance process. Many universities and colleges have established guidelines for the development of a Title IX action plan, and many will provide their gender equity plan if requested. Universities and colleges have committees that work directly with athletes in addressing issues of gender equity. Some even will invite OCR representatives or Title IX consultants to visit the campus and assist them in the evaluation and development of policies intended to ensure gender equity.

Compliance with Title IX is further broken down into three areas: effective accommodation (participation opportunities), financial assistance, and equality in other program areas. Title IX plaintiffs have filed claims against university, interscholastic, and recreational athletic programs in all three areas; as such, each will be discussed.

Effective Accommodation

Equal provision of participation opportunities, or *effective accommodation*, is most often evaluated using a three-prong test established in 1979 by the Department of Civil Rights. The test was later clarified in 1996 and again in 2005. A school can

comply with Title IX by meeting the requirements of any one of the three prongs (*Pederson v. La. State University*, 2000). Specifically, the test indicates that a school will be compliant:

1. Where intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollment (the *substantial proportionality* prong); or
2. Where the members of one sex have been and are underrepresented among intercollegiate athletics, where the institution can show a *history and continuing practice* of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex (the history of continuing expansion prong); or
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as cited above, where it can be demonstrated that the interests and abilities of the members of the sex have been fully and effectively accommodated by the present program (the full and effective accommodation prong).

Each of the prongs is intended to offer a way for an educational institution (or other recipient of federal funds) to demonstrate that they are providing playing opportunities in an equitable manner. The first prong, substantial proportionality, is widely sought after because if an institution is substantially proportionate, it is also Title IX compliant. In simple terms, if an institution has an overall enrollment of 48% females and 52% males, the athletic participation opportunities must be substantially proportionate to those percentages. However, given the vast demographic diversity of educational institutions, substantial proportionality is not possible in many educational institutions; thus, history and continuing expansion or effective accommodation can also be used by institutions to demonstrate Title IX compliance. History and continuing expansion evaluates whether an institution has continuously expanded participation opportunities (or has plans to do so) to meet the interest and abilities of the underrepresented sex (most often women). Full and effective accommodation considers whether participation opportunities offered are meeting the full needs of all interested participants at an institution.

The necessity of institutions to be compliant regarding effective accommodation has had a major effect on colleges and universities. Many have made substantial changes within their athletic programs to ensure compliance with this provision of Title IX. In 2006, for example, James Madison University (JMU) voted to dismantle ten athletic teams to achieve substantial proportionality. Seven men's varsity teams (outdoor and indoor track, cross country, archery, gymnastics, swimming, and wrestling) and three women's varsity teams (archery, fencing, and gymnastics) were discontinued to comply with Title IX. JMU had been out of compliance with federal law because women made up 61% of enrolled students, whereas female athletic participation was only 50%. With the new plan in place, female athletic participation was predicted to increase to 61% (JMU Enacts Proportionality Plan, 2006).

James Madison University made the staggering cuts to its athletic program in 2006 to avoid liability for Title IX non-compliance. Given that as early as ten years prior, universities were being found liable for Title IX violations, JMU made what it thought was a prudent decision. Specifically, *Cohen v. Brown University* (1996), Title IX was used successfully by the plaintiffs to obtain remedy for gender inequity.

Cohen v. Brown (1996) may be the most significant case ever decided under Title IX. After

the Ivy League university announced that it was going to eliminate two women's sports, but stated that the teams could still qualify as unfunded club sports, the university was sued for failure to comply with Title IX's requirement of effective accommodation. The court analyzed all three prongs of the effective accommodation test, and found that under the first prong, Brown was not substantially proportionate. The Brown student body was 52% male and 47% female, however 63% of its student-athletes were male. For the second prong analysis, the court found that because Brown had not added a women's sport team since 1977 (14 years prior to the lawsuit filing), there could be no history or continuing practice of effective accommodation. Lastly, the court also found Brown did not fully and effectively accommodate the interests of the underrepresented sex because they were cutting women's sports teams. Given that none of the three prongs could be used to demonstrate Title IX compliance, the district court held that Brown was in violation of Title IX, and ordered the women's teams restored, with funding. On appeal, The Court of Appeals for the First Circuit ruled against Brown again, stating that the university was not in compliance with Title IX and that a university must fully and effectively accommodate the interests of women students to ensure Title IX compliance.

As a result of litigation and feared litigation, many athletic administrators began to cut men's sports teams as a way to become compliant (using the substantial proportionality prong). As such, men began to file lawsuits under Title IX, citing a form of reverse discrimination under the law. In *Kelly v. Board of Trustees of the University of Illinois* (1994), the court ruled that the university did not violate Title IX when it eliminated the men's swimming team and not the women's. The university cited budget constraints along with the need for compliance with Title IX and the gender equity policy of the Big Ten Conference. The court found that Illinois could do away with men's programs without violating Title IX because men's interests are permanently met when substantial proportionalities exist. Men's participation in athletics at the University of Illinois was at 76.6%, which was more than substantially proportional to their enrollment (56%).

After numerous cases like *Kelly v. Board of Trustees of the University of Illinois* (1994), the fairness of having to cut certain sports programs to comply with Title IX came under debate (Klinker, 2003). In a July 2003 memo, Assistant Secretary of Civil Rights Gerald Reynolds wrote regarding the compliance of intercollegiate athletics with Title IX, "OCR hereby clarifies that nothing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX, and that the elimination of teams is a disfavored practice." However, courts continued to hold that eliminating men's sports to achieve substantial proportionality was a legally permissible practice under Title IX.

One other distinction that has been made in Title IX case law regarding participation is that of contact and non-contact sports. Women will usually be allowed to participate on men's teams if the sport is deemed a non-contact sport and no women's team is available. If there is no team for one sex in a particular sport, and the excluded sex has had a history of limited opportunity, then the excluded sex must be allowed to try out for the existing team. If women have the opportunity to compete, then courts are usually less willing to allow them to participate on men's teams. The HEW regulations under Title IX allow athletic departments that receive federal funding to establish separate teams if the sport is deemed a contact sport or is based on competitive skill (45 C.F.R. § 86.41(b)).

In *Mercer v. Duke University* (1999), Heather Mercer, a placekicker, sued the university under Title IX for discriminating against her on the basis of sex when denying her an equal opportunity to earn a roster spot on the Duke football team. Prior to enrolling at Duke, Mercer was an all-state

high school kicker. After arriving at Duke in the fall of 1994, Mercer tried out for the Duke Football team as a walk-on kicker. Although Mercer did not initially make the team, she did serve as a manager during the 1994 season. She also regularly attended fall practices and participated in conditioning drills the following spring.

In April 1995, Mercer was selected to participate in an intra-squad scrimmage by team seniors. In that game, Mercer kicked the winning 28-yard field goal. Shortly after the game, Duke Football coaches told both the news media and Mercer that she had made the team. Mercer did not play in any games during the 1995 season, however, she again attended practices in the fall and spring. Further, Mercer was officially listed on the team roster filed with the National Collegiate Athletic Association (NCAA).

Mercer alleged that during the latter period of her tenure "on the team," she was the subject of discriminatory treatment. Specifically, she claimed that the coach "did not permit her to attend summer camp, refused to allow her to dress for games or sit on the sidelines during games, and gave her fewer opportunities to participate in practices than other walk-on kickers" (p. 2). In addition, Mercer claimed that the coach made many offensive comments to her, asking why she "did not prefer to participate in beauty pageants rather than football, and suggesting that she sit in the stands with her boyfriend rather than on the sidelines" (p. 2).

Just prior to the start of the 1996 season, the coach informed Mercer that he was dropping her from the team. Mercer alleged that this decision was based on of her sex because the coach "allowed other, less qualified walk-on kickers to remain on the team" (p. 3). When Mercer attempted to participate in spring drills, she was asked to leave because the drills were only for members of the team.

In the lawsuit, the university argued that a correct reading and interpretation of Title IX does not include coverage of contact sports, and that because football is a contact sport, the school wasn't required to allow the plaintiff to try out for the team. However, the court found that once the plaintiff was allowed to try out and actually made a member of the team (per the coaches own admission), she should not have been discriminated against on the basis of sex. The trial court awarded her $1 in compensatory damages and $2 million in punitive damages, finding that Duke had engaged in intentional discrimination. However, the punitive damages award was vacated by the Fourth Circuit Court of Appeals. Mercer was awarded $1 in compensatory damages, and on subsequent appeal, the plaintiff was awarded $349,243 in attorneys' fees.

Financial Assistance and Other Benefits

Aside from equality regarding participation opportunities, Title IX also requires equitable allocation of financial assistance; male and female student-athletes must receive athletics scholarship dollars proportional to their participation. Further, equal treatment of male and female student-athletes is necessary regarding the provision of (a) equipment and supplies; (b) scheduling of games and practice times; (c) travel and daily allowance/per diem; (d) access to tutoring; (e) coaching; (f) locker rooms, practice and competitive facilities; (g) medical and training facilities and services; (h) housing and dining facilities and services; (i) publicity and promotions; (j) support services; and (k) recruitment of student-athletes (20 U.S.C. § 106.41 (c)). The Equity Athletics Disclosure Act (EADA), passed in 1994, requires public disclosure of financial records relating to athletic expenditures by universities and colleges. The Department of Education is required to report to Congress on gender equity in college athletics; it relies on information received through the EADA in making that report. The university

or college must list all participants in athletics, the operating expenses for men's and women's programs, the number of scholarships awarded, the revenue received, coaches' salaries, and recruiting expenses. This statute allows the NCAA and the public to closely monitor gender equity issues and graduation rates for student athletes.

Although the EADA provides for reporting and monitoring of expenditures, alleged violations of Title IX still exist. Specifically, there have been numerous cases alleging that the distribution of benefits and services amongst athletic teams violates Title IX. In *Daniels v. School Bd. of Brevard County, Fla.* (1997), disparity existed between the high school programs for girls' softball and boys' baseball. Specifically, the female plaintiffs claimed that the boys baseball field had an electronic scoreboard while the girls softball field had no scoreboard at all; the boys had a batting cage while the girls did not; the bleachers at the girls softball field were in worse condition and allowed for fewer spectators than those at the baseball field; the baseball team had promotional signage on the school grounds, while the softball team did not; there were no available restrooms at the softball field, while restrooms were part of the baseball facility; concessions and a press box were available at the baseball field while the softball field contained neither amenity; maintenance of the baseball field was more routine, leaving the baseball field in better condition that the softball field; and the baseball field was lighted for nighttime play while the softball field was not. The initial court found that the school board was in violation of Title IX, and that the inequities posed a risk that the plaintiffs would suffer an irreparable threat of injury from the inequalities, namely the daily perception within the student body, faculty and community that girls are not as important as boys. The court afforded the school board an opportunity to submit a remedial plan to the court; however, the plan proposed that to achieve equity, the boys baseball facility would be modified or restricted. The school board contended that funding did not exist to improve the girls softball facility, thus the solution was to dismantle the boys baseball field. The court made clear that this approach was not within the spirit of the law, and ordered the school board to make several improvements to the girls' softball field, including the installation of lighting, promotional signage and restrooms.

The *Daniels* case presents one of the most glaring examples of unequal provision of benefits. While not all cases present such clear violations of Title IX, many cases have been filed challenging the equitable provision of access and services across all categories listed above. A reading of this case law indicates that Title IX requires male and female athletes to receive equitable benefits; however, male and female athletes do not need to receive the exact same benefits. Title IX has been interpreted by the courts to allow for variations in the benefits based on legitimate and justifiable discrepancies for non-gender related differences in sports, such as the differing costs of equipment or event management expenditures (NCAA Title IX, 2015).

Finally, discussion of a lawsuit filed against Quinnipiac University in 2009, and settled in 2013, demonstrates the overall breadth of issues that are covered by Title IX, and the changes this legislation is capable of producing. Specifically, in 2009, five volleyball players filed a lawsuit against Quinnipiac University after the school announced its intent to eliminate the women's volleyball team. The lawsuit claimed that Quinnipiac violated Title IX with regard to participation opportunities and equitable provision of benefit. Between 2010 and 2013, the plaintiff athletes won multiple decisions against the school in both the United States District Court of Connecticut and the United States Court of Appeals in the Second Circuit. After subsequent appeals, the two sides settled the case, and Quinnipiac agreed to make many sweeping changes regarding both participation opportunities and provision of benefits. Regarding

participation opportunities, Quinnipiac agreed to maintain all women's sports teams including volleyball, and continue its expansion by offering women's rugby, golf, and an enlarged track program. Regarding benefits, Quinnipiac agreed to increase scholarship allocation to female teams, spend $5 million dollars renovating and improving facilities for female teams, spend $450,000 on coaching salary increases, and provide greater access to academic support staff and training/conditioning staff, and allocate an additional $175,000 per year for three years to general improvements of the women's sport program (Court Approves Settlement, 2013).

Transgender Discrimination

An emerging area in sport law is transgender equality. Athletic participation by transgendered athletes is rising, due in part to the increasing visibility of transgendered athletes in multiple sports. Specifically, successful athletes Renee Richards (tennis), Jaiyah Saelua (soccer), Mianne Bagger (golf), and Kye Allums (basketball) are all transgendered (Mahoney, Dodds, & Polasek, 2015). As discussed, discrimination against transgendered individuals in the employment setting is actionable under Title VII. However, there are additional legal standards emerging at the state level aimed to protect transgendered individuals from discrimination (beyond the employee-employer relationship).

In 2013, California passed the School Success and Opportunity Act (California Education Code § 220). The law was intended to allow students to "remain consistent with their gender choice throughout the school day" including allowing transgendered students to participate on sports teams based on their gender identities (Mahoney et al., 2015). Specifically, the law states that students should be allowed to participate in sex-segregated activities, such as restroom use and athletic teams, based on their gender identity and not the gender listed on their school record (California Education Code, § 221.5). Additionally, as of 2014, high school athletic associations in several states have rules that allow students to participate on athletic teams based on gender identity (California, Colorado, Connecticut, Florida, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, , and Wyoming). While these athletic association policies are certainly not law, they do demonstrate a transition toward inclusion of transgendered athletes.

Age Discrimination in Employment Act (ADEA)

The Age Discrimination in Employment Act (ADEA) of 1967 protects individuals who are 40 years of age or older from employment discrimination based on age. The ADEA's protections apply to both employees and job applicants. Under the ADEA, it is unlawful to discriminate against a person because of his or her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.

The courts have interpreted the ADEA to permit employers to favor older workers based on age, even when doing so adversely affects a younger worker who is 40 or older. The ADEA applies to employers with 20 or more employees, including state and local governments, employment agencies, labor organizations, as well as the federal government. In order to establish a prima facie case of age discrimination, a plaintiff must prove the following four elements: (1) he or she suffered an adverse employment decision; (2) he or she was at least 40 years old at that time; (3) he or she was performing his or her job duties, or capable of performing job duties, at a level that met the

employer's legitimate expectations; and (4) he or she was treated more harshly than other similarly situated younger employees (*Alba v. Merrill Lynch and Co.*, 2006). Similar to Title VII, employers may assert defenses such as business necessity or BFOQ to the lawsuit and demonstrate that age was not a determining factor in any adverse employment decision made by the employer.

In *Moore v. University of Notre Dame* (1998), the court was called on to determine the damages that should be awarded to the plaintiff under the ADEA after a jury found in favor of the plaintiff on his claim for age discrimination. Joe Moore was the offensive line coach at the University of Notre Dame from 1988 to 1996. In December of 1996, Moore was terminated; he claimed that he was fired because he was "too old." By contrast, Notre Dame claimed that Moore had intimidated, abused, and made offensive remarks to players. In his lawsuit, Moore alleged that the reasons given for his firing were pretext for discrimination and that, in fact, he was discriminated against due to his age. Based on evidence that the head coach considered Moore's age to be a strong factor in the firing decision, a jury agreed with Moore and awarded him back pay in the amount of $42,935.28. Additionally, the jury determined that Notre Dame's violation of ADEA was willful; thus, Moore was awarded additional liquidated damages in the amount of $42,935.28.

By contrast, the plaintiff in *Raineri v. Highland Falls-Fort Montgomery School District* (2002) did not win his ADEA claim. Raineri was the high school boys varsity basketball coach from 1996-2000; when he was terminated, the school hired a coach ten years younger than him (Raineri was 53, the new coach was 43) with less coaching experience. The court granted summary judgment for the school district, citing lack of evidence of any age discrimination. Although the replacement employee was significantly younger, age was not found to be a factor in the employment decision; rather, Raineri was fired for reasons related to team success.

Americans with Disabilities Act (ADA)

The Americans with Disabilities Act (ADA) of 1990 was passed into law to prohibit discrimination against individuals with a disability. The precursor to the ADA was the Rehabilitation Act of 1973, which prohibited discrimination because of disability by federal government contractors and by those who receive federal financial assistance. Many disabled athletes asserted Section 504 of the Rehabilitation Act to establish their right to participate in collegiate athletics. However, the ADA is more extensive than the Rehabilitation Act. According to the ADA, "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities" (42 U.S.C. § 12101(a)(5)). The ADA is designed to remedy that situation.

The ADA is divided into four major sections: Title I–Employment, Title II–Public Services, Title III–Public Accommodations and Services by Private Entities, and Title IV–Telecommunications and Common Carriers; Title I and Title III are the most commonly applied to sport and recreation. Each section contains its own specific definitions and applications, however, the definition of a disabled individual remains constant. Specifically, the ADA's definition of disability reads, in part, "disability means, with respect to an individual . . . (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment" (42 U.S.C. § 12103 (3)). Disabilities have been defined under the ADA to

include blindness, alcoholism, morbid obesity, muscular dystrophy, and being HIV positive.

In 2008, the ADA was amended to further clarify who is covered by the law's protections. The "ADA Amendments Act of 2008" revises the definition of "disability" to more broadly encompass impairments that substantially limit a major life activity. The amended language also states that mitigating measures, including assistive devices, auxiliary aids, accommodations, medical therapies and supplies (other than eyeglasses and contact lenses) have no bearing in determining whether a disability qualifies under the law. Changes also clarify coverage of impairments that are episodic or in remission that substantially limit a major life activity when active, such as epilepsy or post-traumatic stress disorder.

As noted, Title I covers discrimination in an employment setting. 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 year" (42 U.S.C. § 12111(5)(a)). Further, the ADA defines a "*qualified individual with a disability*" as an individual with a disability who, with or without reasonable accommodations, can perform the essential functions of the employment that such individual holds or desires (42 U.S.C. § 12131(2)). An employer is not required to hire a disabled person who is not capable of performing the duties of the job; however, the ADA does require the employer to make a *reasonable accommodation* for the disabled individual. According to the ADA, a reasonable accommodation may include (but not be limited to) making existing facilities accessible, job restructuring, reassignment, modified work schedules, acquisition of assistive devices, or appropriate modification of training materials or policies (42 U.S.C. § 12111(9)). An employer is not required to make an accommodation for an individual if that accommodation would impose undue hardship on the operation of the employer's business. An undue hardship is defined as an action requiring significant difficulty or expense when considered in light of the nature and cost of the accommodation and the overall financial resources of the employer (42 U.S.C. § 12111(10)(a)).

Title III of the ADA requires owners and operators of *places of public accommodation* to allow disabled individuals to participate equally in the goods, services, and accommodations provided by the establishment. Specifically, disabled individuals must have "full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation by any person who owns, leases or operates a place of public accommodation" (42 U.S.C. § 12182 (a)). Title III specifically includes 12 categories of places of public accommodation; including over five million private establishments, such as restaurants, hotels, convention centers, retail stores, hospitals, museums, parks, zoos, private schools, health spas, gymnasiums, golf courses, and bowling alleys (to name a few). However, entities controlled by religious organizations, including places of worship, are not covered; nor are private clubs, except to the extent that the facilities of the private club are made available to customers or patrons as of a place of public accommodation (Title III Highlights, n.d.). Owners and operators of public accommodations are required under Title III to make reasonable accommodations for disabled patrons, assuming those accommodations don't fundamentally alter the nature of the goods or service provided; as with Title I, owner operators of public accommodations must make reasonable modifications in their policies to enable this goal to be achieved.

In *Anderson v. Little League Baseball, Inc.* (1992), a wheelchair-bound Little League coach, Lawrence Anderson, wanted to continue as an on-field base coach, a position he successfully held for three years. However, just prior to the 1991 post-season, Little League adopted a policy banning wheelchair-bound individuals from

coaching from anywhere other than the dugout. Specifically, Little League argued that this policy was necessary to ensure the health and safety of the players. Anderson, however, contended that the policy was created specifically to keep him from coaching, and that the policy was in violation of the ADA. Anderson asserted that as a wheelchair-bound individual, he was significantly limited in the major life function of walking, and thus disabled under the ADA. Further, he asserted that a Title III public accommodation includes Little League Baseball and its games and that defendants are subject to the provisions of the Americans with Disabilities Act because they own, lease (or lease to), or operate a place of public accommodation within the meaning of the ADA. Little League argued that while the ADA does require equal access to participation and enjoyment of activities, it does not require owner/operators of public accommodations to provide modifications that create a direct threat to the health and safety of other participants. The court discussed the issue of whether a wheelchair-bound coach in the first or third base coaches' box was a direct threat to the safety of the players, and concluded there was insufficient evidence to support this claim. Specifically, the court found that the blanket policy restricting on-field coaching by wheelchair-bound participants was a violation of the ADA because public accommodation owner/operators are required to make a case-by-case assessment of whether a direct threat to other participant health and safety exists.

Many Title III cases in sport law focus on participation; however, the law requires full and effective enjoyment, which does not always mean as a participant. An emerging application of Title III in sport focuses on spectators, not participants. Aside from spectator access issues that impact sport facilities, there is a recent history of case law that focuses on whether the live in-game experience is equal for all attendees. In *Feldman v. Pro Football Inc.* (2011), the United States Court of Appeals for the Fourth Circuit upheld a grant of summary judgment in favor of two Washington Redskins fans who challenged the adequacy of captioning as an auxiliary aid; the fans alleged that in-game entertainment features were inaccessible to them as deaf patrons, thus their ability to fully and effectively enjoy the experience was compromised, a violation of Title III of the ADA. Prior to the lawsuit, the Redskins provided little to no captioning on stadium video boards, opting instead to offer handheld captioning devices. After the plaintiff's filed suit, the Redskins significantly increased captioning to include a "considerable amount of game information and other announcements."

Specifically, the Redskins used stadium video boards to (1) caption public service announcements, including pregame information; (2) make announcements detailing each play; (3) provide referee penalty explanations; (4) make in-game entertainment announcements; (5) advertise; and (6) make end-of-the-game announcements, and announcements regarding the final score and information regarding the next home game. This captioning was provided in the seating bowl, and in the stadium concourse areas. Additionally, the Redskins captioned the emergency evacuation video on the stadium video board. While this captioning was a significant improvement over the Redskins' past practice, the plaintiffs contested the failure to caption additional aural programming, including lyrics to songs played for entertainment and a radio program that was broadcast in the concourse areas separate from the public address system broadcast was a violation of Title III of the ADA.

The court determined that Title III of the ADA required the defendants to provide equal enjoyment of aural information, including music with lyrics. As a result, the lower court's grant of summary judgment to the plaintiffs was withheld. This case is one example of several cases that have been filed regarding stadium captioning, and

compliance with the ADA. Many lawsuits are filed under Title III, however, if the facility in question is government owned/operated, the same claim would be filed under Title II.

Last but certainly not least, the preeminent ADA case in sport and recreation, which included both Title I and Title III (when filed) is *PGA Tour, Inc. v. Martin* (2001). Casey Martin has a rare medical disorder, a degenerative muscle condition that results in severe pain when he walks for extended periods of time. Martin entered the Professional Golfers' Association's (PGA's) qualifying tournament to earn his PGA tour card, and was allowed to use a cart for the first two rounds. In the third round, carts were not permitted, and Martin petitioned the PGA to allow him to use a cart in both that third qualifying round and in subsequent PGA sanctioned activities. Martin asserted that making the cart allowable was a reasonable accommodation for his disability under the ADA. The PGA denied his request, stating it would fundamentally alter the game of golf. Martin then requested injunctive relief from the court, and was granted an injunction, which allowed him to use a cart in the third qualifying round. However, after Martin earned his tour card, the PGA restricted his cart use again, and Martin filed an ADA lawsuit. Specifically, Martin claimed that as a PGA employee, he was entitled to reasonable accommodation under Title I, and that as a participant he was entitled to reasonable accommodation under Title III because by definition, a golf course is a place of public accommodation. The Title I claim did not survive because the court determined that Martin was not in fact an employee of the PGA; however, the Title III claim survived and was ultimately decided by the United States Supreme Court.

Before the Supreme Court rendered a final decision, both the district and appellate courts found in favor of Casey Martin; however, the PGA made two specific arguments in attempting to win its case. First, the PGA claimed that it was not subject to Title III because during a golf tournament, the area of the golf course used by the tournament players is roped off and restricted, therefore it does not qualify as a place of public accommodation. The court disagreed, noting that even if an owner/operator selectively decides to restrict access, the facility as a whole is still a place of public accommodation. Next, and more significant, the PGA argued that allowing a tour player to use a cart would fundamentally alter the sport of golf because the walking rule was essential to the game. While the PGA presented support for its arguments from many former golfers and industry experts, none of the courts were persuaded. The Supreme Court upheld the findings of the lower courts and ruled that allowing Martin to use a cart during PGA events increased his access, as required by the ADA, but did not fundamentally alter the game of golf.

Religious Discrimination

As noted at the beginning of the chapter, religion is a protected class under Title VII; religious discrimination in the workplace is remedied using this law. Specifically, employers must reasonably accommodate the religious practices of employees, unless the employer can demonstrate doing such would cause an undue hardship. Further, employers cannot intentionally discriminate against employers based on religion. In *Johnson v. National Football League* (1999), the plaintiff, a converted Muslim, contended that the National Football League (NFL), among others, discriminated against him because of his race and religion. In particular, J. Edwards Johnson asserted that the NFL violated his rights under Title VII by refusing to "employ" him as a football player in the NFL.

Johnson, an African-American, played offensive tackle as well as defensive lineman for the University of Miami for five years. While in

school, Johnson converted to Islam as a religion and became a Muslim. Johnson published two articles about race and religion in the university newspaper; his coaches did not respond well to the articles, and a controversy ensued. Johnson claims that this controversy, along with a mistaken media report regarding his draft status, prevented NFL teams from drafting him. He specifically alleged that the league and certain NFL teams "blackballed" him because of his religion and the controversy at the University of Miami.

J. Edwards Johnson eventually filed a charge of discrimination with the EEOC. The EEOC did not address the charge on the merits, but issued Johnson a right-to-sue letter in 1999. The NFL moved to dismiss the lawsuit, but did not succeed; the court found that Johnson sufficiently alleged a claim of discrimination. However, Johnson later filed a voluntary motion to dismiss the case, as the parties likely settled.

Additionally, the NCAA clashed with a member institution regarding religious discrimination. In 1992, the NCAA proposed Rule 9.2 as an attempt to do away with religious displays by players such as kneeling, removing their helmets, and crossing themselves in the end zone following a score. In 1995, Liberty University, its football coach, and four of its players filed a lawsuit against the NCAA (School Sues over Game Prayer, 1995). The lawsuit alleged that banning players from kneeling constituted religious discrimination, and violated the 1964 Civil Rights Act. However, the plaintiff dismissed the lawsuit after the NCAA stated that students were still permitted to pray under the rules.

There are many other areas where religion and sport intersect; specifically student athletes often challenge freedom of religion using the First Amendment of the United States Constitution. Freedom of religion guaranteed by the Constitution is discussed in Chapter 12.

Conclusion

The state and federal legislation discussed in this chapter aim to provide a remedy for the inequalities that are present at all levels of sport. Barriers still exist based on race, gender, religion, sexual orientation, age, and disability, but progress has been made in each of these areas as unequal treatment has been addressed by the court system and legislation in recent years. There is an established body of common law precedent in each of these areas, and guiding principles have been established regarding what conduct constitutes discrimination: sport managers and athletic administrators must be mindful of conduct that is potentially discriminatory so it can be avoided. Thoughtful consideration of policies and practices is essential to avoid discrimination and ensure compliance with the law.

Discussion Questions

Title VII

1. Mary Johnson has loved hockey all of her life. She has been a hockey referee in many semi-professional leagues for the past seven years. She has received outstanding performance reviews for her work as a referee in the leagues she has worked. She now desires to be a referee in the Instructional Hockey League (IHL). She has filed an application for employment but the league has a rule that it does not allow women referees due to safety concerns for players

DISCUSSION QUESTIONS (CONTINUED)

and referees alike. Ms. Johnson is 5 feet 2 inches and weighs 105 pounds. Johnson filed a lawsuit against the IHL based on discrimination seeking employment with the league. What defenses does the league have against the lawsuit? How would a court rule in this case?

2. Sex discrimination under Title VII has only recently been interpreted by the courts to include sexual orientation and gender identity. Discuss the potential impact of this expanded interpretation on athletic programs.
3. What racial issues do you believe are facing sports today? Do you believe Title VII has resulted in progress regarding racial discrimination in sports?
4. Does Title VII require that all sport organizations be accessible by both genders? In *Graves v. Women's Professional Rodeo Association, Inc*. (1990), a male barrel racer sued the Women's Professional Rodeo Association (WPRA) alleging that it denied him membership on the basis of his gender in violation of Title VII of the Civil Rights Act of 1964. The court found against Graves and discussed the following relating to the concept of BFOQ:

> Although WPRA raised no defense beyond its failure to qualify as an "employer" under Title VII, we note that under the bona fide occupational qualification (BFOQ) exception the organization probably would not have to admit males even if it had the requisite fifteen employees. The legislative history offers as an example of legitimate discrimination under the BFOQ exception to the proscriptions of Title VII "a professional baseball team for male players" 110 Cong.Rec. 7213 (1964). Presumably, being female would similarly constitute a BFOQ for competing in women's professional rodeo, in the same way that being female would constitute a BFOQ for competing in women's professional tennis or for membership in the Ladies' Professional Golf Association. In short, we do not believe that Title VII mandates the admission of men as competitors in women's professional sports.

Title IX

1. Consider what Title IX requires regarding provision of benefits and services; what are some of the practical challenges in this area? How do athletic administrators balance the benefits and services provided to revenue and non-revenue sports, assuming there is a gender difference?
2. Mary Williams was an outstanding placekicker for her high school football team. She wants to try out for her college football team but is not allowed to do so. The university cites federal law that states that educational institutions are allowed to maintain separate teams in contact sports. Mary argues that because she is a placekicker only, a non-contact position, she should therefore be allowed to try out. Is she correct? Does the school have to let her try out for the team? Should rules be different for placekickers as opposed to other players?
3. You have recently been named Title IX coordinator for a Division I athletic program. The athletic director has asked you to draft a two-page summary outlining a Title IX compliance

(*continues*)

DISCUSSION QUESTIONS (CONTINUED)

plan. Draft a short memorandum highlighting the significant portions of a Title IX plan that will withstand scrutiny. What information do you need to draft such a plan? What will be your major concerns and the focus and goals of the plan?

ADEA

1. Wilson Miller was an eight-time Pro-Bowl quarterback. At age 43 he still is able to play quarterback in the NFL. He is signed by the Denver Broncos to a contract and participates in the training camp. He is competing for the third-team quarterback position with Rusty Johnson, a 22-year-old rookie. Miller is cut from the team at the end of the camp in favor of Johnson. Miller was told by the head coach that although he had more experience reading defenses the owner wanted to go with the "new kid." He was also told by the head coach that Johnson had less propensity to get injured than Miller because of Miller's age. The assistant coach told Miller that the owner told the head coach to keep the rookie over Miller because the Broncos have a very young fan base and the head coach wanted to "make his roster as young as possible," in order to attract more fans to the game. Miller files an age discrimination case against the Broncos. The Broncos admit that both quarterbacks are of the same level of skill and both fill the team's offensive scheme. The Broncos argue that keeping Johnson over Miller was a business necessity because more fans will buy season tickets as a result of Johnson's presence on the team. Johnson's hometown is Denver, Colorado, and he played his college football for the University of Colorado. Can Miller prevail in his age discrimination lawsuit? Is the business necessity defense a valid defense to an age discrimination case?
2. Do you agree with the law in setting 40 as the age at which discrimination can occur under the ADEA?

ADA

1. Cynthia Jones is an outstanding basketball player for the Women's Maryland Wheelchair Scholastic League. She believes she could also play and compete in a non-wheelchair league with footed players. She makes a request of her local city league that she be allowed to participate in a footed league. The league turns her down, citing safety concerns. She has told the league she will only compete outside the three-point line on the court and never go inside of that line. Does the league have a right to refuse her request? What reasonable accommodations could be made for her? See *Kuketz v. MDC Fitness Corp.*, 13 Mass. L. Rptr. 511 (Mass. Super. Ct. 2001).
2. In *PGA v. Martin*, the court found that walking is not an essential part of the game of golf. Do you agree? How far do PGA golfers walk during a PGA event?
3. What reasonable accommodations could be made for Jim Abbott, former California Angels pitcher? Abbott was born without a right hand but overcame his disability by becoming the collegiate player of the year at the University of Michigan and even tossed a no-hitter with the

DISCUSSION QUESTIONS (CONTINUED)

New York Yankees in 1993. Abbott pitched ten years in the major leagues. Could he argue he was entitled to a "special fielder" as a reasonable accommodation due to his disability?

Sexual Harassment

1. You have just been named the new athletic director at your alma mater. You are concerned about some statements that have been made to women trainers for the football team. It has been brought to your attention that student-athletes have made sexually explicit remarks to women trainers at practice and during games. You have scheduled a meeting with the university's general counsel about your concerns. What policies or procedures would you put into place to prevent sexual harassment from occurring in the future? Would you provide sexual harassment training to all student-athletes and staff? If so, what would the training consist of? Could the university be held liable for sexual harassment of a university employee by student-athletes?

KEY TERMS

Bona fide occupational qualification
Disparate compensation
Disparate impact discrimination
Disparate treatment discrimination
Effective accommodation
Equal Employment Opportunity Commission
History and continuing practice
Hostile work environment
Places of public accommodation
Protected classes
Qualified individual with a disability
Quid pro quo
Reasonable accommodation
Respondeat superior
Reverse sex discrimination
Sexual harassment
Substantial proportionality

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