2006

The ADEA and Sports Law

Adam Epstein, *Central Michigan University*

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Central Michigan University

INTRODUCTION

The purpose of this article is to provide insight into age issues in sports law and its relationship to the Age Discrimination in Employment Act of 1967 (ADEA), a federal law that will undoubtedly become more important in this context. There are a few published decisions involving the ADEA in the sports setting. However, there are some cases involving claims by coaches, support staff and administrators who allege they were terminated unlawfully based upon age discrimination.

This article explores age discrimination in sport as possibly covered by the ADEA. Part I presents a comprehensive overview of the ADEA including defenses to a claim of age discrimination. Part II offers relevant cases with regard to the ADEA and its evolution including the few cases that are specifically applicable in the sport environment. Finally, Part III addresses considerations for the future of the relationship between the ADEA and the sports industry.

While the ADEA is relevant and must be considered in the context of employment in the sports setting involving coaches, administrators, supervisors and others, it is highly unlikely that a plaintiff-professional athlete would be successful in claiming age discrimination under the ADEA for termination of personal services as a professional athlete. There are numerous defenses available to an organization which would likely shield an employer from liability, and the ADEA was not enacted to deal with the unique nature of the professional sports contract.

PART I. OVERVIEW AND HISTORY OF THE ADEA

The ADEA (29 U.S.C. §§ 621-34, 2005) applies only to employers with twenty or more employees. It also includes federal, state and local governments, employment agencies and labor organizations. The ADEA defines an employer as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year" (29 U.S.C.

§630 (b), 2005). A person is defined as "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons" (29 U.S.C. §630 (a), 2005). The ADEA defines employee as "any individual employed by an employer" (29 U.S.C. §631(f), 2005). The term employee must be distinguished, of course, from an independent contractor or volunteer, neither of which are considered employment relationships under the law and yet might be found in a variety of sport management settings such as event and race management (*Smith v. Berks Community Television,* 1987, p. 795-796).

The ADEA makes it "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age" (29 U.S.C. §623(a)(1), 2005). The ADEA does not prevent an employer from asking a job applicant's age or date of birth although this could be evidence in a trial that might demonstrate that one was treated differently because of his or her age. A plaintiff proves discrimination through direct evidence by establishing proof of an existing policy which itself constitutes discrimination. In all other cases, the plaintiff seeks to prove discrimination through circumstantial evidence. (*Danville v. Regional Lab Corp.*, 2002).

In the sports context, then, the first determinant for ADEA applicability is whether or not the individual athlete, coach, referee, or other individual, was classified as an employee in an organization having at least twenty employees. An athlete sponsored by a product manufacturer such as Nike to endorse their products would not normally be considered an employee and the ADEA would be inapplicable. Student-athletes are not considered employees and the ADEA is not applicable in this context either (*Rensing v. Indiana State Univ. Bd. of Trustees*, 1983; *Coleman v. Western Michigan Univ.*, 1983; *Waldrep v. Texas Employers Ins. Assoc.*, 2000). However, the ADEA would otherwise apply in the sports context generally involving employees such as coaches and administrators.

ADEA Enforcement

The Equal Employment Opportunity Commission (EEOC) is the federal agency charged by Congress with responsibility for enforcing employment laws including the ADEA (29 U.S.C. §628, 2005). Its regulations are found in the Code of Federal Regulations (29 C.F.R. §1625, 2005). Before bringing a lawsuit under the ADEA, a plaintiff must exhaust his or her administrative remedies by filing a charge of discrimination with the EEOC within 180 days

of the alleged discriminatory incident (42 U.S.C. §§2000e-5(e)(1), 2005). The ADEA does not make employers liable for stupid or even wicked business decisions (*Norton v. Sam's Club*, 1998). Instead, it makes them liable for discrimination and for firing people on account of their age (*Norton*, 1998).

Remedies

A federal district court is authorized to afford relief such as reinstatement, back pay, injunctive relief, declaratory judgment, and attorney's fees (29 U.S.C. §216(b), 2005). In the case of a willful violation of the Act, the ADEA authorizes an award of liquidated damages equal to the back pay award (29 U.S.C. §626(b), 2005). The ADEA also gives federal courts the discretion to grant such legal or equitable relief as may be appropriate to effectuate the purposes of the ADEA. However, it is clear that most age discrimination claims were and are handled administratively or resolved out of court leaving no published decision to refer to (EEOC, 2006).

Defenses

The statute provides a first defense when it states that "it shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age . . . ." (29 U.S.C.§623(f)(1), 2005). This "reasonable factors other than age" (RFOA) provision insures that employers may use neutral criteria other than age even if the employment action has a disparate and adverse impact on older workers (*Equal Employment Opportunity Comm'n v. Wyoming,* 1983). The role of the RFOA provision is to afford employers an independent "safe harbor" from liability and has given employers an advantage in disparate impact claims as long as the reasons for termination were legitimate and nondiscriminatory and can be articulated as such (*McDonnell Douglas Corp. v. Green,* 1973). Reliance on an unreasonable non-age factor might indicate that the employer's explanation is, in fact, no more than a pretext (an excuse or red herring) for intentional discrimination (*Hazen Paper v. Biggins*, 1993; *Reaves v. Mills*, 1995; Luce, 2004).

A. Bona Fide Occupational Qualification

Similar to Title VII (42 U.S.C. §§2000e, et seq., 2005), the ADEA provides an affirmative defense to liability where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. This phrase is commonly referred to as a BFOQ.

The Supreme Court has outlined the test for what constitutes a BFOQ (*Western Air Lines, Inc. v. Criswell*, 1985). In most cases dealing with mandatory age requirements for jobs involving public safety (such as police officers and firefighters), the employer asserts as an affirmative defense that the age limitation is a BFOQ. However, the BFOQ exception is extremely narrow and many employers do not meet the BFOQ standard. Further, much has been written about state and local, as opposed to federal police and firefighting agencies who have instituted and then subsequently disbanded rigid, mandatory retirement programs for their officers as long as the more experienced employee can still meet certain minimum physical fitness standards (*Massachusetts Bd. of Retirement v. Murgia*, 1976; Luce, 2004). A BFOQ could be used as a legitimate defense to an ADEA claim initiated by a professional athlete especially if their athletic skills have deteriorated in terms of speed, strength, quickness, agility or other objective measure of physical skill.

B. Reduction in Force

When an employee is discharged in connection with a reduction in work force (RIF), when a plaintiff is not replaced by any other employee, the employer will likely have a legitimate defense to a claim under the ADEA (Kohrman & Hayes, 2001). An employer's decision to implement a RIF does not necessarily violate the ADEA as courts are not willing to substitute their business judgment for that of an employer, also known as the *Aronson* Standard (*Aronson v. Lewis*, 1984; Vineyard, 2004). For example, instead of establishing that the covered employee was replaced by a substantially younger worker, the plaintiff-employee who is discharged as part of a RIF must present additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons (*Barnes v. GenCorp., Inc.*, 1990, p. 1465). In any RIF case, in addition to showing that he or she is within the protected group, has been adversely affected, and was qualified to assume another position at the time of discharge, the plaintiff must also show that the employer intended to discriminate on the basis of age in reaching its decision to discharge the employee (Luce, 2004).

In professional sports, it is routine (and expected) to have more players (i.e., employees) in pre-season camps as part of the screening process before establishing the final roster. The professional athlete knows going in that the employment relationship might be terminated prior to the start of the regular season (or even during the season) for a myriad of reasons other than age

alone. Unlike most other occupations, the professional athlete competes for a position on the team where there are only a limited number of slots in an environment that might be a subject of collective bargaining. This is very different than in most other employment relationships That is, there is an expectation that there might be a termination of the employment relationship during an athletic tryout. This differs remarkably from the traditional rank-and-file hiring process in which, either no employment relationship is established at all during the initial selection process of being hired as an employee, or, in some cases, a probationary period is given to employees with the expectation that they will ultimately be employed permanently.

C. Seniority Systems

A bona fide seniority system which is not a subterfuge used to evade the purposes of the ADEA is also acceptable as a defense (29 U.S.C. §623(i)(2), 2005). Length of service must be the primary criteria although the system may be qualified by merit factors as well. Lesser rights or favors in treatment to those with longer service might be found to be a subterfuge used to evade the purposes of the ADEA (29 C.F.R. part 1625.8(b), 2005; Luce, 2004).

Seniority systems, *per se*, are not part of the process of the formation of a professional athletic team. Jobs are on the line on a season-by-season and team-by-team basis and it is unlikely that a seniority system would be relevant in the professional athlete context. On the other hand, in a sport organization such as a collegiate athletic department or the front office of a professional athletic team, established seniority systems certainly could be a defense to a claim of discrimination.

D. Business Necessity Defense

The business necessity defense allows employers to defend any action by proving they considered neutral criteria, unrelated to age, which are job-related and consistent with business necessity (Luce, 2004). The RFOA defense will likely overlap with the business necessity defense in a RIF situation. Terminated employees in RIF cases often allege "disparate impact" in violation of the ADEA (Luce). Employers who might terminate employees out of the necessity of business survival (i.e., avoiding bankruptcy) will likely have a strong defense even if their decision affects older covered employees disproportionately.

For example, it was acceptable in one case for an employer who was facing a changing marketplace after the utility industry was deregulated to restructure its business for survival (*Adams v. Florida Power Corp.*, 2001).

Similarly, in another case, the employer was faced with a drastic reduction in the volume of work and it was forced to close plants and terminate employees (*Mullin v. Raytheon*, 1999). The plaintiffs claimed that their employer (Raytheon) violated the ADEA by demoting or terminating employees based on high salary. The court held that the drastic downturn in business and subsequent termination of employees represented a legitimate business necessity defense (*Mullin*, 1999, p.11).

E. Business Judgment Rule

Organizations that have boards of directors recognize that sometimes the decisions made do not, in hindsight, represent the best decisions. For example, making decisions that affect the direction of a company, such as termination of a model or brand of product, or the decision to pursue new geographical or demographic markets, might ultimately prove unsuccessful. Directors should not be held personally liable if the decisions that were made were done so on an informed basis, in good faith and in the best interests of the company (*Sinclair Oil Corp. v. Levien*, 1971). This principle is also known as the "business judgment rule" and it protects directors so that they may take some risk without fear of being held liable for every decision that they make (*Aronson v. Lewis*, 1984). Obviously, decisions that might end employment for those over the age of forty years could be impacted by board of directors' decisions. Thus, the business judgment rule could be a legitimate defense related to reduction in work force, layoffs, termination of employment and so on affecting those over age forty. However, courts may consider piercing this corporate veil in the event that the directors did not act on an informed basis or did not address key issues (*In Re Abbott Laboratories Derivative Litigation*, 2003).

F. Exemptions

The ADEA does not apply to a few federal laws. For example, mandatory retirement programs of airline pilots who reach age sixty are not protected by the ADEA (14 C.F.R. §121.383(c), 2006), as are air traffic controllers (5 U.S.C. §8335, 2006), federal firefighters, and law enforcement officers (29 U.S.C. §623(j), 2005), all in the name of public safety (*Western Airlines Inc. v. Criswell*, 1985). Some states have mandatory retirement ages for specific professions. For example, state judges in Michigan must retire at age seventy (Brasier, 2005). No mandatory retirement applies to university and college employees over the age of forty (regardless of tenure), though some state universities may still attempt to find legal loopholes for asking college deans

and other individuals in senior administrative positions to step down (29 U.S.C. §631(d), 2005; Jaschik, 2006).

Still, if an employee has become physically or mentally unable to perform their responsibilities then mandatory retirement could be allowed without violating the ADEA (likely under the BFOQ defense), and colleges and universities may continue retiring employees through the proper use of voluntary retirement practices including employee retirement incentive programs (ERIPs) also known as voluntary retirement (Van Sistine & Meredith, 2001). In reality, many employees will likely voluntarily decide to retire anyway and the ERIPs provide additional incentive. ERIPs are usually a one-time lump sum payment to induce an older worker to retire voluntarily and became common after the statutory elimination of mandatory retirement under the ADEA (29 U.S.C. §631(d), 2005). These programs are often beneficial to older workers (and lucrative) and beneficial in the short run to encourage an employee to retire (Van Sistine & Meredith, 2001).

State labor and employment law considerations

It is also very important to note that there are numerous states with ADEA-like statutes. Some states take the position that age discrimination should not be limited just to those over forty. For example, the state of Michigan in 1976 enacted the Elliott-Larsen Civil Rights Act. Located at M.C.L. 37.2101 et seq., this act provides that equal opportunity in employment shall be implemented without discrimination because of "religion, race, color, national origin, age, sex, height, weight, familial status, or marital status." (M.C.L. 37.2102, 2005). The ADEA does not preempt state age discrimination laws and states can, in fact, expand the coverage of the ADEA. Similarly, states cannot usurp this federal law (29 U.S.C. §633(a), 2005). Thus, sports law practitioners and others should be aware of their particular state laws that might come into play in addition to the federal ADEA when a claim is made.

PART II: ADEA AND CASE LAW

A thorough understanding of the ADEA is important for anyone involved in an ADEA claim and, of course, for those interested in preventing one from occurring. In this Part, the major non-sports law and sports law related cases are addressed. It is important to understand that this separate analysis does not imply that there are different rules.

Non-Sports Law Decisions

The following cases represent the court's development and interpretation of the. These cases represent only a fraction of the cases which involve the ADEA, but exploring them should provide an historical foundation for the evolution of age discrimination claims. The cases are addressed in chronological order.

Griggs v. Duke Power Co.

In *Griggs v. Duke Power Co.* (1971), for the first time the Supreme Court recognized disparate impact claims under Title VII of the 1964 Civil Rights Act. *Griggs* noted that the high school diploma requirement, which was unrelated to job performance, had an unfair impact on African-Americans who had received fewer educational opportunities in segregated schools (*Griggs v. Duke Power Co.*, 1971, p. 431). *Griggs* suggested (but did not explicitly state) that a disparate impact theory should be cognizable under Title VII of the Civil Rights Act. After the decision in *Griggs*, however, the federal circuit courts of appeal were inconsistent as to whether it was clear (based upon *Griggs*) whether a very similar statute such as the ADEA actually authorized recovery under the disparate impact theory based upon age as well as the employment-related protections of Title VII.

Following the *Griggs* decision, there was much needed guidance as to how to interpret and apply Title VII and similar federal statutes, such as the ADEA, but the Supreme Court refused to grant certiorari on this particular issue until 2001 (*Adams v. Florida Power Corp.*, 2001; Franck, 2003). The federal circuits were so disjointed and lacking in guidance on how to interpret Title VII (and the ADEA) under a disparate impact theory that the Second, Eight and Ninth Circuits post-*Griggs* allowed a disparate impact theory, the First, Third, Sixth, Seventh and Tenth Circuits did not, while the Fourth, Fifth and D.C. Circuits did not even address this issue at all (*Adams v. Florida Power Corp.*, 2001). The following cases continued to shape the scope of Title VII ultimately assisting the courts in interpreting the ADEA.

McDonnell Douglas Corp. v. Green

Plaintiffs who produce only circumstantial evidence of employment discrimination may sue but must negotiate the burden-shifting analysis as set forth in *McDonnell Douglas Corp. v. Green* (1973). This case involved Title VII and racial discrimination not age discrimination, but subsequent decisions have held that a plaintiff in an ADEA claim (just as in a Title VII employment

law case) must prove by a preponderance of the evidence that the non-discriminatory explanation offered by the employer was not the employer's actual reason, but rather a pretext for discrimination. (*Reeves v. Sanderson Plumbing Prods., Inc.*, 2000; Mitchell, 2001). *McDonnell Douglas* established that the burden of proof immediately shifts to the defendant once the plaintiff-employee has established a *prima facie* case of age discrimination. To establish a *prima facie* case, the plaintiff must show (1) he is a member of a protected class, (2) he met the legitimate expectations of his employer, (3) he suffered an adverse employment action, and (4) similarly situated employees who were not members of the protected class received different treatment (*McDonnell Douglas Corp. v. Green,* 1973, p.802). The defendant must then provide the legitimate, nondiscriminatory reasons for its employment action.

Under the *McDonnell Douglas* framework, a plaintiff may then survive dismissal of the case (i.e., summary judgment) by submitting evidence from which a fact finder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action (*McDonnell Douglas Corp. v. Green*, 1973, p.800). By analogy, it has been interpreted that the same procedure holds true for ADEA claims (*Reeves v. Sanderson Plumbing Prods., Inc.*, 2000). The plaintiff must show that: (1) at the time of the adverse employment action, the employee was a member of the class protected by the ADEA (that is at least 40 years of age); (2) the employee was otherwise qualified for the position in which he or she was employed; (3) the employee suffered an adverse employment decision; and (4) in the case of a demotion or discharge, the employee was replaced by a younger employee (*Reeves*, 2000, p. 142). If the defendant can then demonstrate a legitimate, non-discriminatory reason for the employer's action, the presumption of discrimination vanishes and bounces back to the plaintiff who must then bear the burden of persuasion on the issue of discrimination (*Pope v. ESA Servs., Inc.*, 2005, p.1007).

Hazen Paper Co. v. Biggins

In *Hazen Paper Co. v. Biggins* (1993), the Supreme Court of the United States held that an employee's allegation that he was discharged shortly before his pension would have vested did not state a cause of action under the ADEA (p. 351). The motivating factor was not the employee's age, but rather his years of service, a factor that the ADEA did not prohibit an employer from considering when terminating an employee. The Court noted that disparate-treatment captured the essence of what Congress sought to prohibit in the

ADEA, but the Court was careful to explain that it was not deciding whether a disparate impact theory of liability is available under the ADEA (*Hazen Paper Co. v. Biggins*, 1993, p. 610). Unfortunately, *Hazen Paper* perpetuated the confusion among the federal circuits as well (Mitchell, 2001; Franck, 2003).

O'Connor v. Consolidated Coin Caterers Corp.

Having left the issue of whether "disparate impact" is a cognizable legal theory under the ADEA open in *Hazen Paper*, the Supreme Court in *O'Connor v. Consolidated Coin Caterers Corporation* (1996) continued to attempt to clarify the application of the ADEA in the employment context. In this case, a dismissed 56 year old employee was replaced by a 40 year old employee. The Court held that an employee alleging illegal employment termination on the basis of age does not have to show that he or she was replaced by someone under the age of 40 (*O'Connor v. Consolidated Coin Caterers Corp.*, 1996, p. 312). The Court said that because the ADEA prohibits discrimination against employees because of their age, the fact that one person in the protected class loses out to another person in the protected class was irrelevant (*O'Connor*, 1996, p. 312). The Supreme Court opined that the ADEA bars discrimination because of age not because one is in the protected age group. Further, defendants must continue to utilize the burden-shifting arrangement of *McDonnell Douglas* (*O'Connor*, p. 311-12).

General Dynamics Land Systems, Inc. v. Cline

In *General Dynamics Land Systems, Inc. v. Cline* (2004), the Supreme Court ruled that a claim of "reverse age discrimination" was invalid under the ADEA. The Court said that it granted certiorari to resolve the continued conflict among the federal circuits as to the application and interpretation of the ADEA (*General Dynamics Land Systems, Inc. v. Cline*, 2004, p. 585). In this case, the Court held that an employer did not violate the ADEA when it instituted a program that provided retiree health care benefits only to workers over 50 years of age but denied participation in that program to workers between ages 40 and 49 (*General Dynamics Land Systems, Inc.*, 2004, p. 584). Stating, "The enemy of 40 is 30, not 50," the Court still did not resolve the issue of the disparate impact theory under the ADEA or whether or not a reverse age discrimination claim might be able to be brought under state laws (*General Dynamics Land Systems, Inc.*, p. 588).

Smith v. City of Jackson

Finally, on March 29, 2004, the U.S. Supreme Court once and for all agreed to decide whether or not the ADEA recognizes disparate impact claims in which plaintiffs argued that neutral policies affected those older than 40 disproportionally even if there was not discriminatory intent. In *Smith v. City of Jackson* (2005), officers of the Jackson, Mississippi Police Department alleged that they were adversely affected by the department's implementation of a new performance pay plan that granted substantially larger salary increases to recently hired officers. The Supreme Court noted that except for the substitution of "age" for "race, color, religion, sex, or national origin," the language of ADEA §4(a)(2) and Title VII §703(a)(2) is identical yet narrower in scope (*Smith v. City of* Jackson, 2005, p. 233). The Supreme Court held in an unanimous decision that the ADEA does authorize recovery in disparate impact cases comparable to *Griggs v. Duke Power Co.* (1971) even though in this instance the claimants failed to set forth a valid claim (*Smith,* 2005, p.232).

The issue of whether the ADEA recognized disparate impact claims has been ambiguous at best until *Smith* (2005) which was decided over thirty years after *Griggs* (1971). The Supreme Court's refusal to directly address this issue and other ADEA concerns created mass confusion among the federal circuits over time. Still, the Court made clear that parties involved in an ADEA claim subject themselves to the burden-shifting analysis of *McDonnell Douglas Corporation* (1973). In addition, an employee alleging illegal employment termination on the basis of age does not have to show that he or she was replaced by someone under the age of 40 (*O'Connor*, 1996). And finally, the Supreme Court held that reverse age discrimination claims are not valid under the ADEA (*General Dynamics Land Systems, Inc.*, 2004).

Sports Law Decisions

There have been very few published sports law decisions involving the ADEA. This does not mean that the sports industry has not addressed the ADEA. The few sports-related decisions that do exist, however, come in a wide variety of contexts including college coaches, college academic coordinators, NFL referees, security guards and administrative assistants who have claimed that they were terminated because of their age.

Moore v. The University of Notre Dame

In *Moore v. The Univ. of Notre Dame* (1997), assistant football coach Joe Moore was fired after he brought an action against Notre Dame under the ADEA. An offensive line coach from 1988-1996, Moore also sued "The Blue and Gold" for the tort of defamation, reporting that head coach Bob Davie said that Moore could only coach a few more years due to his age. While the defamation claim was dismissed, the court allowed the ADEA claim to proceed (*Moore v. The Univ. of Notre Dame*, 1998).

Moore filed charges with the EEOC which issued a right to sue letter on February 24, 1997. While the official reason for firing was that Moore had intimidated, abused and made offensive remarks to players, Moore was also accused of not measuring up to Notre Dame standards. The case was ordered to a settlement conference but that ended unsuccessfully. Then, after a trial on July 9, 1998, a jury awarded Moore back pay of $42,935.28 and liquidated damages of $42,935.28 (because the jury felt Notre Dame's conduct was willful) (*Moore v. The University of Notre Dame,* 1998, p. 903). Post-trial motions from Moore demanded reinstatement or five-years of front pay as well, but the court felt that reinstatement was not the preferred remedy in this case (*Moore,* 1998, p. 903). Therefore, he was awarded $75,577.68 in front pay which was based upon his new job salary minus what he would have made at Notre Dame (*Moore,* p. 908).

Dreith v. National Football League

Ben P. Dreith sued the NFL alleging violations of the ADEA *Dreith v. National Football League* (1991). Dreith had worked as a referee for the NFL and had officiated many post-season playoff games. In 1998, the NFL informed Dreith that he would not be able to officiate any of that year's playoff games (*Dreith v. National Football League*, 1991, p. 834). After being demoted to line judge, he filed a complaint that was transferred to the EEOC alleging that he had been demoted because of his age. Thereafter, the NFL informed Dreith that it was not renewing his contract.

The EEOC determined that the NFL's policy to scrutinize its officials' on-field performance after they reached age 60 violated the ADEA (*Dreith v. National Football League*, 1991, p. 834). After the EEOC made this determination (and after the NFL told Dreith his contract would not be renewed), Dreith filed a second EEOC complaint alleging retaliation (*Dreith*, 1991, p. 834-837). The District Court for the District of Colorado ultimately interpreted the ADEA to allow Dreith's several claims of age discrimination and outrageous conduct to continue jointly (*Dreith*, p. 837). Ultimately, the

court held that given the employee's allegations that the employer had assigned the employee to a position with which he was unfamiliar in order to humiliate him during nationally televised games, reasonable jurors could have differed on whether the employer's conduct was outrageous (p. 839). The parties and their counsel were ordered to meet in a good faith attempt to settle the case and apparently they did for a six figure sum in 1993 (Ben Dreith, n.d.).

Street v. North Carolina State University

In September 1991, Jutta Street began working as an Academic Coordinator in North Carolina State University's (NCSU) Academic Support Program for Student Athletes (ASPSA). Street had personality conflicts with the interim director of the ASPSA but was still retained in her position. In 1995, the new director of the ASPSA, in spite of documented concerns with Street's work and attitude, gave her a raise. Continued poor performance, combined with complaints about Street's attitude led to a her dismissal. Though she was replaced by younger males she could not establish a *prima facie* case of age or sex discrimination because she could not show that her performance met her employer's legitimate expectations (*Street v. North Carolina State University*, 1999, p.7). Eight NCSU football players under Street's academic supervision were suspended for poor scholastic performance the fall term before Street was fired. The court in *Street v. North Carolina State Univ.* (1999) dismissed her claim as NCSU was able to show legitimate non-discriminatory reasons for dismissing her (p. 7). Street had to show that these reasons were pretextual, but she could not meet this burden (*Street*, p. 8).

Beery v. Univ. of Oklahoma Board of Regents

Sharon Beery began her employment at the University of Oklahoma on September 5, 1967, as a Clerk-Typist I. She was promoted eventually to the position of Administrative Assistant to the Athletic Director, performing this job first for Athletic Director Duncan until May 1996, then for an interim director until September 1996, and finally for Athletic Director Owens until her termination on March 19, 1997. She was 48 years old when discharged, and was earning a salary of $39,000. On December 16, 1996, 40-year-old Bob King began working as a Special Assistant to the Athletic Director at a salary of $69,500. His initial responsibilities included assisting in preparing and balancing the athletic department's budget and getting familiar with the department's operations. In July 1997, King was promoted to Senior Associate Athletic Director. King and Owens allegedly became dissatisfied with

plaintiff's work and King recommended that she be terminated. On March 19, 1997, Owens issued a press release announcing the reorganization of the athletic department. Beery was terminated as part of this reorganization (*Beery v. Univ. of Oklahoma Board of Regents*, 2000, p. 3).

On March 28, the University posted an opening for a Secretary II in the athletic director's office. On July 1, 1997, 48-year-old Pam Kelleher was transferred from the basketball office to become the Administrative Coordinator to the Athletic Director, performing many of Beery's former duties. Kelleher's salary was determined according to the same pay scale as Beery. Beery sued the University, alleging she was terminated based on her age in violation of the ADEA. Beery's evidence showed she performed numerous secretarial and administrative functions for the Athletic Director ranging from answering the phone, typing correspondence, and opening and distributing the mail, to assisting in preparing the budget, assisting in office personnel decisions, and serving as host during home football games. In all, twenty-four different duties were specified. Although Beery claimed she was replaced by a 40-year old man, the duties assumed by the 40-year old man were related more to his budgetary and supervisory roles and there was no evidence that she ever held position for which 40-year old man was hired or that she was qualified to do so (*Beery v. Univ. of Oklahoma Board of Regents*, 2000, p. 10). Therefore, the district court for the Western District of Oklahoma granted the University's motion for summary judgment on her ADEA claim. The Tenth Circuit Court of Appeals then affirmed the decision to dismiss the claim because Beery did not raise a genuine issue as to whether she was replaced by a younger individual (*Beery*, 2000, p. 2).

Peterson v. National Football League

In *Peterson v. National Football League* (1999), plaintiff Jack Peterson was a former Regional Security Representative for the NFL who was terminated in May of 1996. He claimed that the NFL failed to consider him for four newly created security positions on account of his age in violation of the ADEA and New York Executive Law § 296 (*Peterson v. National Football League*, 1999, p. 1). The court held that the NFL stated legitimate, non-discriminatory reasons for restructuring (*Peterson*, 1999, p. 15-16).

Peterson was 66 years old at the time. The only evidence suggesting a discriminatory motive behind the decision to restructure the department was testimony concerning a stray remark that was made at a department meeting held in early March 1996, but that remark alone did not negate the legitimate reasons for the restructuring (*Peterson v. National Football League*, 1999, p.

16). In sum, of the individuals hired for new specialist positions, two were 58 years old and one was 30 years old. Peterson did not show a triable of fact as to whether age played a motivating role, or contributed to, the filling of the positions (*Peterson*, 1999, p. 21-22).

Shreve v. Cornell University

In *Shreve v. Cornell University* (1988), James Shreve alleged that the failure of Cornell to hire him as its head football coach, retain him as an assistant coach, or appoint him as Assistant Director of Admissions, was predicated upon his age. Robert Blackman announced in November 1982 that he was retiring from his position as head football coach at Cornell. Shreve was 56 years old at the time and had been an assistant football coach at Cornell for six years under Blackman. Upon Coach Blackman's retirement, Cornell's assistant football coaches were notified that their appointments would terminate at the end of their terms and Blackman's replacement would have the opportunity to select his own staff. Cornell's athletic director, Michael Slive, reviewed the credentials of over seventy applicants for the head coaching spot, including Shreve. The position was formally offered to Maxie Baughan, then the defensive coordinator for the Detroit Lions of the NFL and he accepted. Baughan did not extend an offer to Shreve because he had concluded that plaintiff had a reputation as a "poor" football coach. Baughan did extend offers to four of the assistant coaches who served under Blackman at Cornell, and three of those coaches accepted Baughan's offer. In the end, Cornell offered non-discriminatory reasons for the three employment actions that were challenged. The court concluded that the Shreve's age was not a determining factor in the university's employment decisions (*Shreve v. Cornell University*, 1988, p. 19). There was evidence in the record supporting the conclusion that the other coach had superior coaching credentials and engaging personality won him the coaching position, irrespective of the individual's age (*Shreve*, 1988, p. 21).

Summary

There are very few sports law cases involving the ADEA. As mentioned earlier, most cases involving the ADEA settle or are resolved administratively (EEOC, 2006). The sports law cases that have been addressed here involved coaches, administrators, support staff and even referees. Certainly, references to age during the course of employment should be avoided as exemplified in *Moore v. The University of Notre Dame* (1997). On the other hand, there are numerous defenses to ADEA claims and the ability to provide legitimate and

non-discriminatory reasons for termination appears to have given employers the upper-hand. Sports law practitioners need to be cognizant of the major cases, both sports law related and not.

PART III: ADEA AND THE FUTURE

The national discourse of age and its relation to sports law has never been more prominent though consideration of the ADEA seems to have been lost in the shuffle. Much of the attention involving age and sports law in recent years has focused on Maurice Clarett's unsuccessful attempt to overturn the NFL minimum age policy or the NBA's inclusion of age minimums in its CBA (*Clarett v. NFL*, 2004b). The prowess of the contemporary professional athlete competing well into their forties has launched age-related discussion and potential legal concerns for the athlete at the more experienced end of the age spectrum invoking consideration of the ADEA. Ray Brown (age 43) of the Washington Redskins football team, Chris Chelios (44) of the Detroit Red Wings hockey club, Julio Franco (47) of the Atlanta Braves baseball organization, and tennis professional John McEnroe (47) represent only a few of the many professional athletes in 2006 continuing to compete successfully well into their forties in professional sports (Solomon, 2006). As such, it is inevitable that someday a disgruntled professional athlete will pursue a claim under the ADEA for an employment related termination alleging age discrimination though such a claim would likely be unsuccessful based upon the ADEA as currently written.

Unfortunately, there is very little legal precedent involving ADEA claims in the sports law context likely due to cases settling out of court involving EEOC mediated settlements (EEOC, 2006). The ADEA certainly would apply to any interscholastic, intercollegiate and professional coach, administrator, and others considered covered employees. However, sports law practitioners and others must also consider whether ancillary employees such as medical staff, trainers, and even equipment managers might claim that their dismissal was not due to poor performance or a change in management, but a claim based upon age discrimination.

If a professional athlete is released from their employment contract, could the coach, general manager or owner be found liable for age discrimination under the ADEA even if the player's skills remained exceptional? This is highly unlikely as the employment relationship as a professional athlete is very different from other professions. For example, courts should consider that the professional athletic contract is often transient, as athletes (and their agents) frequently shop their services to other teams or leagues in other cities or even,

in some cases, other countries. Courts should also consider that the bulk of the performance of the professional athlete's cotnract is seasonal, during the sport's playing season, and not year-round. As such, athletes often live temporarily in the cities in which they are a member of the professional team. The athlete, then, often has established only limited roots within that community and mainly seasonal relationships with that employer, which is much different than most employment relationships. Further, many hiring (or firing) decisions for professional athletes are based upon factors other than pure athletic talent or skills alone. These factors include considerations involving team chemistry, trading the athlete to another team for different players, dismissing the athlete for violations of team or league rules and, of course, issues related to financial stability or expense. All of this and more represents the unique nature of the professional sports employment environment for athletes. This is much different than the traditional employment context wherein the ADEA applies.

CONCLUSION

Those involved in any employment relationship in the sports setting, from athletic administration and supervision, to coaching, to hiring and termination, must certainly address age issues involving the ADEA. However, the ADEA would almost certainly be ineffective for claims by professional athletes over the age of forty who allege that the termination of their employment as a skilled professional athlete violates the ADEA. Unlike the *Moore* case, more often than not there will only be circumstantial evidence of age discrimination as educated employers would not normally expressly state "age" as a reason for employment termination in correspondence or in conversation. However, it is certainly possible that this could occur.

There are numerous defenses to claims of age discrimination. One might be the reasonable factors other than age (RFOA) defense. In the case of the professional athlete, this could mean employment termination based upon objective means of measuring athletic skill such as speed, strength and stamina. An additional defense might be the reduction in workforce (RIF) defense in which an employer makes important employment decisions based upon financial decisions. Finally, other defenses might include the bona fide occupational qualification (BFOQ), the business necessity defense and the business judgment rule. These defenses are not mutually exclusive and could certainly overlap in terms of providing an employer-defendant with legitimate, non-discriminatory reasons for employment termination.

Still, the ADEA remains essentially uncharted territory in sports law. Professional athletes' jobs are reviewed annually, weekly and in many cases daily. This special employment relationship which is based upon the unique talents, abilities and skills of athletes (and under public scrutiny on a daily basis) is remarkably different than the traditional employment context considered when the ADEA was enacted. The objective, subjective and financial decisions that must be made in the professional sports context involving athletes should not be considered by the courts in the same manner as a rank-and-file employee. Only time will tell how the EEOC and courts address this situation involving the plaintiff-professional athlete.

ABOUT THE AUTHOR

ADAM EPSTEIN is an Associate Professor of Finance and Law at Central Michigan University. He has published numerous articles and several texts in the areas of sports and business law. He may be reached at sportslawprof@aol.com.

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