

**REVERSE SLAM DUNK: MAKING THE CASE
THAT THE NATIONAL BASKETBALL
ASSOCIATION’S MINIMUM AGE
REQUIREMENT VIOLATES STATE
DISCRIMINATION LAWS**

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I just look at it as, [the NBA] took away the choice that you have, forcing you to go to college, when sometimes college isn’t for everybody. I think about the fact that I can go enlist in the Army and die at the age of 18, but I can’t play in the NBA. That means that they take basketball more seriously than a person’s life. – Bill Walker¹

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1. Luke Winn, *Q&A with . . . Kansas State’s Bill Walker*, Post to *College Hoops Blog*, SI.COM (Jan. 29, 2008, 9:01:00 AM), http://sportsillustrated.cnn.com/si_blogs/basketball/ncaa/2008/01/q-with-kansas-states-bill-walker.html.

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INTRODUCTION

Bill Walker has been called a “victim” of the National Basketball Association’s (NBA) minimum age rule.² In 2007, he was ineligible to be drafted by any NBA team due to 2005 NBA Collective Bargaining Agreement (CBA) requirements.³ Predicted to be one of the first sixteen players selected, had he come to the NBA straight from high school, Walker would have signed a guaranteed contract for millions of dollars had he met the NBA CBA qualifications.⁴ Instead, he attended Kansas State University, played college basketball, and suffered a serious knee injury.⁵ No one knows how successful he could have been in the NBA had he been allowed to play, but, at the very least, having to wait to enter the draft cost him millions of dollars.

The eligibility requirements under the NBA CBA state that American students wishing to enter the NBA Draft must be at least nineteen years of age and one year removed from

2. *Id.*; see also That Big 12 Guy, *Bill Walker: Draft Casualty or Legend in the Making?*, BLEACHER REP. (June 18, 2009), <http://bleacherreport.com/articles/30524-bill-walker-draft-casualty-or-legend-in-the-making>.

3. See Andy Katz, *Walker’s Season Comes to an End with Ruptured ACL*, ESPN (Jan. 9, 2007, 4:27 AM), <http://sports.espn.go.com/ncb/news/story?id=2724691>.

4. *Id.*

5. *Id.*

high school.⁶ Since the NBA Draft is the only vehicle through which a player can contract with an NBA team,⁷ the rule facially discriminates against eighteen-year-old prospective players who are barred from playing in the NBA because of their age.⁸

This Comment discusses the potential of bringing a reverse age discrimination claim against the NBA based on the facially discriminatory rule contained in the NBA CBA. As this Comment will demonstrate, a prospective player would have no federal claim against the NBA, but he could make a strong case that the NBA rule violates certain state age discrimination laws.

Part I provides background regarding the rule. The section first discusses the language of the NBA CBA age requirement, and then it explores the interests of the four groups most affected by it: the NBA, the National Collegiate Athletic Association (NCAA), current NBA players and prospective players. Part II focuses on whether federal or state law protects an eighteen-year-old prospective player and whether the same law would provide the basis for a claim for reverse discrimination. Part III analyzes whether section 301 of the Labor Management Relations Act (LMRA) would preempt a state law claim for reverse age discrimination. Part IV considers a possible NBA affirmative defense that age is a bona fide occupational qualification. Finally, in light of the discussion in the earlier parts, Part V will analyze the viability of a claim made by a prospective player.

I. BACKGROUND

The NBA is an unincorporated association of professional basketball teams, with twenty-nine teams in the United States (U.S.) and one in Canada.⁹ The NBA promotes, organizes, and regulates professional basketball in the U.S. and Canada; players enter into contracts with the member

6. See NBA COLLECTIVE BARGAINING AGREEMENT, art. X, § 1 at 225 (2005), <http://www.nbpa.org/cba/2005> [hereinafter NBA CBA].

7. *Id.*

8. As will be discussed in the following background section, players must also meet other requirements that are analytically distinct from age. This Comment, however, will only focus on the facially discriminatory portion of the rule.

9. See *Team Index*, NBA.COM, <http://www.nba.com/teams/> (last visited Feb. 19, 2010) (listing all of the NBA teams).

teams, not the NBA.¹⁰

Much like other unionized industries, the NBA conducts a collective bargaining process with the National Basketball Players Association (NBPA) to negotiate standard terms of employment.¹¹ NBA players are thus bound to the terms of the CBA negotiated on their behalf by NBPA leaders. This agreement has downstream implications that affect more than just current NBA players.

On July 30, 2005, the NBA and the NBPA approved a new six-year CBA.¹² The agreement runs through the 2011 NBA season, with the NBA holding a one-year renewal option.¹³ A very divisive issue concerns the provisions contained under Article X of the NBA CBA. Article X increased the minimum playing age to nineteen and required that, prior to entering the draft, one NBA season must have elapsed following the year the player graduated or should have graduated from high school.¹⁴

While potential players have much to lose because of the rule, it provides some benefits to the NCAA, the NBA as whole, as well as current NBA players. The following subsections will discuss the rule itself and how it affects interests of the NBA, the NCAA, and potential players.

A. *The Rule*

To play professional basketball in the NBA, a player must sign a contract with one of the thirty NBA franchises. Someone cannot, however, just apply for a job as an NBA

10. See NBA CBA, *supra* note 6, at art. II, § 1, at 15 (“The Player Contract to be entered into by each player and the Team by which he is employed . . .”).

11. Jordan Michael Rossen, Note, *The NBA’s Age Minimum and Its Effect on High School Phenoms*, 8 VA. SPORTS & ENT. L.J. 173, 182 (2008).

12. See NBA CBA, *supra* note 6, at art. XLIII, § 3 at 424–25; see also *NBA Collective Bargaining Agreement Ratified and Signed*, NBA.COM (July 30, 2005, 1:16 AM), http://www.nba.com/news/CBA_050730.html [hereinafter *NBA CBA Ratified & Signed*].

13. NBA CBA, *supra* note 6, at art. XXXIX, § 2, at 421.

14. *Id.* at art. X, § 1(b) (“A player shall be eligible for selection in the first NBA Draft with respect to which he has satisfied all applicable requirements of section 1(b)(i) below and one of the requirements of section 1(b)(ii) below: (i) The player (A) is or will be at least 19 years of age during the calendar year in which the Draft is held, and (B) with respect to a player who is not an international player (defined below), at least one (1) NBA Season has elapsed since the player’s graduation from high school (or, if the player did not graduate from high school, since the graduation of the class with which the player would have graduated had he graduated from high school . . .”).

player with any team; instead, he must follow the specific process laid out in the NBA CBA.¹⁵ The NBA CBA specifically states, “[n]o player may sign a contract or play in the NBA unless he has been eligible for selection in at least (1) NBA Draft.”¹⁶ As for eligibility, Article X, section 1(b)(i) requires:

The player (A) is or will be at least 19 years of age during the calendar year in which the draft is held, and (B) with respect to a player who is not an international player [], at least one (1) NBA Season has elapsed since the player’s graduation from high school (or, if the player did not graduate from high school, since the graduation of the class with which the player would have graduated from high school)¹⁷

A potential player must also meet one of the seven requirements under Article X, section (1)(b)(ii).¹⁸ Therefore,

15. *See id.* at art. X.

16. *Id.* at art. X, § 1(a).

17. *Id.* at art. X, § 1(b)(i).

18. The NBA CBA provides:

(A) The player has graduated from a four-year college or university in the United States (or is to graduate in the calendar year in which the Draft is held) and has no remaining intercollegiate basketball eligibility; or

(B) The player is attending or previously attended a four-year college or university in the United States, his original class in such college or university has graduated (or is to graduate in the calendar year in which the Draft is held), and he has no remaining intercollegiate basketball eligibility; or

(C) The player has graduated from high school in the United States, did not enroll in a four-year college or university in the United States, and four calendar years have elapsed since such player’s high school graduation; or

(D) The player did not graduate from high school in the United States, and four calendar years have elapsed since the graduation of the class with which the player would have graduated had he graduated from high school; or

(E) The player has signed a player contract with a “professional basketball team not in the NBA” (defined below) that is located anywhere in the world, and has rendered services under such contract prior to the Draft; or

(F) The player has expressed his desire to be selected in the Draft in a writing received by the NBA at least sixty (60) days prior to such Draft (an “Early Entry” player); or

(G) If the player is an “international player” (defined below), and notwithstanding anything contained in subsections (A) through (F) above:

(1) The player is or will be twenty-two (22) years of age during the calendar year of the Draft; or

(2) The player has signed a player contract with a “professional basketball team not in the NBA” (defined below) that is located in the United States, and has rendered services under such contract prior to the Draft; or

(3) The player has expressed his desire to be selected in the Draft in a writing received by the NBA at least sixty (60) days prior to such Draft (an “Early Entry” player).

Id. at art. X, § 1(b)(ii)(A)–(G).

any potential player who is eighteen years old the year in which the NBA Draft is held, or has not taken a year off from high school in that year, is ineligible for the NBA Draft and foreclosed from playing for any team in the NBA.

If a potential player meets the NBA Draft qualifications and has filed the proper paperwork with the league, he may be drafted by any of the teams in the league.¹⁹ The NBA Draft consists of two rounds in which each team is given a pick in each round.²⁰ The draft order is based on each team's performance during the previous season.²¹ Once a team picks a player, the player must only negotiate or sign a contract with that organization.²² The negotiating process is more or less a formality because the NBA CBA also includes a "rookie scale" which is used to determine how much a pick can be paid.²³ The difference in salary between those drafted in the first round and those drafted in the second round is significant.²⁴ Besides making less money, contracts for those selected in the second round are also not guaranteed.²⁵ This is because first round picks are automatically guaranteed their salary based upon the rookie scale, while a player taken in the second round does not "draw a salary unless he earns a regular-season roster spot."²⁶ Thus, an ineligible eighteen-year-old who would have been drafted in the first round, but could not enter the draft, will lose millions of dollars because of the rookie scale.

B. An Analysis of the NBA's Stated Reasons for the Rule

On July 30, 2005, the NBA placed a picture on its website showing three men smiling blissfully above the caption "Six-

19. See NBA CBA, *supra* note 6, at art. X, § 3.

20. *Id.* at art. X, § 3(a).

21. *Id.* at art. X, § 3.

22. See *id.* at art. X, § 4.

23. See, e.g., 2009–10 NBA Rookie Scale, NAT'L BASKETBALL PLAYER'S ASS'N, [http://www.nbpa.org/sites/default/files/EXHIBIT B.pdf](http://www.nbpa.org/sites/default/files/EXHIBIT_B.pdf) (last visited Feb. 19, 2010).

24. See Ray Fittipaldo, 2009 Draft Pitt Stars Tumble, PITTSBURGH POST-GAZETTE, June 26, 2009, at D1 (second round picks get a minimum salary contract and only if they make the team).

25. *Id.*

26. David Glenn, NBA Salary Scale Drives Many Decisions, Post to David Glenn's ACC Journal, WRAL.COM (May 28, 2008), <http://www.wral.com/sports/blogpost/2953499/>.

Year CBA Ratified and Signed.”²⁷ The three men in the picture, NBPA Executive Director Billy Hunter, NBPA President Michael Curry, and NBA Commissioner David Stern,²⁸ had just signed the 2005 NBA CBA.²⁹ As in all negotiations, both the NBA and NBPA came to the table in 2005 with goals they hoped to obtain. The NBA’s interests related to four categories: (1) the reputation of the league and the game; (2) the quality of basketball played; (3) the maintenance of competitive balance between the teams; and (4) economic concerns.³⁰ At least according to the NBA, the minimum age requirement implicates each of these interests.³¹

The NBA’s official position was that it did not pursue the minimum age requirement for economic reasons.³² Yet based on what NBA officials said in the media, it appears that the age requirement was actually very much tied in with the NBA’s economic concerns. For example, during a press conference on June 12, 2005, Stern said:

[B]ut I think 130 some odd players came out this year, announced themselves eligible for the [sixty draft spots]. Those are just underclassman and high school seniors for the [sixty] spots in the draft. Anything that would begin to cut down on that would be good for business.³³

Despite these numbers, which include players over nineteen, only eleven high school students actually entered the 2005 NBA Draft.³⁴

In his early discussions with the media on the topic, Stern was always very short, usually insisting he just believes that eighteen-year-olds should not play in the league.³⁵ Other

27. See *Six-Year CBA Ratified and Signed*, NBA.COM, http://www.nba.com/news/cba_2005.html (last visited Feb. 19, 2010).

28. *Id.*

29. See *NBA CBA Ratified & Signed*, *supra* note 12.

30. David Stern, Comm’r, Nat’l Basketball Ass’n, Remarks at NBA Finals Media Availability Press Conference (June 12, 2005) (transcript available at http://www.nba.com/finals2005/djs_050612.html).

31. See *id.*

32. See *NBA CBA Ratified & Signed*, *supra* note 12.

33. David Stern, *supra* note 30.

34. See *NBA Draft Early Entry List 2010*, INSIDEHOOPS.COM (June 15, 2010), <http://www.insidehoops.com/nba-draft-early-entry.shtml>.

35. See David Stern, *supra* note 30 (“I just don’t believe we should be in a position whereas a business matter, our teams are making judgments upon 18 year olds playing against other 18 year olds . . .”); see also David Stern, Comm’n, Nat’l Basketball Ass’n,

NBA executives, however, have made it appear that the age requirement is needed to protect team owners and general managers from themselves, also known as, “making informed hiring decisions.”³⁶ The worry is that a team becomes enamored with a high school player and invests millions of dollars in him only to see that player fail to live up to expectations.³⁷

Interestingly, despite these concerns, recent experience shows that teams are more likely to choose poorly in selecting older players entering the draft than those who come straight from high school.³⁸ In fact, the data suggests that owners and general managers do a better job scouting and analyzing younger players than their older counterparts.³⁹

There is also the argument that the age requirement will protect the quality of basketball played, and help maintain competitive balance among the teams.⁴⁰ The idea is that players coming straight from high school do not have the necessary, refined skills needed to play in the NBA, taking the roster spot of someone more able to contribute to the team.⁴¹ By taking a year to play in another environment, players are better prepared to play in the NBA.⁴²

Evidence again, however, does not support this claim.⁴³ For example, of the players on the 2010 All-NBA First Team, which purports to identify the best five players in the league, three of the selections came to the NBA straight out of high school.⁴⁴ Looking at the past years, this appears to be the norm. Three of five selections in 2009 were players who went

Conference Call with the Media (April 12, 2004) [hereinafter Conference Call with the Media] (transcript available at <http://www.insidehoops.com/stern-interview-041104.shtml>) (“I just don’t think it is a good idea to have them in the league.”).

36. See *NBA Defends Age Minimum to Congress*, USA TODAY (July 20, 2009, 5:27 PM), http://www.usatoday.com/sports/basketball/nba/2009-07-20-congress-age-rule_N.htm (In a letter to Congress, NBA President Joel Litvin argued that “The policy helps teams make informed hiring decisions”).

37. See Sam Farmer, *Early Risers*, L.A. TIMES, June 26, 2001, Sports, at D1.

38. See Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113, 160 (2004).

39. See *id.* at 182–88.

40. *Id.* at 183; see also Rossen, *supra* note 11, at 175.

41. McCann, *supra* note 38, at 183.

42. *Id.*

43. See generally *id.*

44. See *Best on Offense (Durant), Defense (Howard) Pace All-NBA Team*, NBA.COM (May 6, 2010, 2:02 PM), <http://www.nba.com/2010/news/05/06/all.nba/>.

straight to the NBA from high school.⁴⁵ In 2008, it was four out of five.⁴⁶ And from 2002–2007, in every year but one, at least two out of five selections entered the league from high school.⁴⁷

Another concern is that high school players are not mature enough to adjust to the NBA lifestyle.⁴⁸ According to NBA President Joel Litvin, the rule “increases the chances that incoming players will have the requisite ability, experience, maturity and life skills.”⁴⁹ The NBA has not, as of yet, provided any evidence to support this claim beyond a feeling of paternalism.⁵⁰ Contrary to Litvin’s claims, almost all of the players drafted out of high school are widely perceived as “good citizens.”⁵¹ In fact, many of the players coming straight from high school have been praised for their community work.⁵²

Finally, Stern has given the impression that he believes the rule is necessary to keep children from believing that the NBA is the next logical step for them.⁵³ In a press conference, he admitted that his “views about having an age limitation don’t go to whether I think players can make it or contribute in this league.”⁵⁴ Instead, his worry is that allowing players into the NBA straight out of high school gives a false impression to young children who look up to the NBA players.⁵⁵ As he said:

45. See *James a Unanimous Pick for All-NBA First Team*, NBA.COM (May 13, 2009, 1:45 PM), <http://www.nba.com/2009/news/05/12/allnba.team.release/>.

46. See *All-NBA Teams*, NBA.COM, http://www.nba.com/history/awards_allnba.html (last visited May 13, 2010).

47. *Id.*

48. See Rossen, *supra* note 11, at 174.

49. *NBA Defends Age Minimum to Congress*, *supra* note 36.

50. See McCann, *supra* note 38, at 178–88.

51. *Id.* at 179.

52. *Id.*

53. See David Stern, Comm’n, Nat’l Basketball Ass’n, Remarks at All Star Media Availability With Commissioner David Stern (Feb. 14, 2004) (transcript available at http://www.nba.com/allstar2004/djs_040214.html).

54. *Id.*; see also Conference Call with the Media, *supra* note 35 (“I have never said that the [eighteen-]year-olds can’t play in the league. I just said that I don’t think it’s a good idea for us to have them in the league. And I never said that they shouldn’t come into the league because they should go to college. Because I am not sure that college is necessarily for everyone. What I have said is that I don’t think that we should be setting an example for kids to be planning the rest of their lives around basketball, because it’s not a very good thing to do.”).

55. *Id.*

[I]t would be a good thing to somehow use ourselves to focus attention on the fact that a youngster who thinks he's coming to the NBA is . . . much more likely to be a rocket scientist or a brain surgeon than an NBA player . . . [s]o I don't mean to cast any aspersions on either the maturity or the basketball capacity of [nineteen]-year-olds. I just think it would be a good idea as a league if we were not associated with the prospect of pulling kids who are now [ten] years old, bouncing the ball and telling their parents they are going to be the next LeBron James, because everyone in this room knows they are not, and they will be left with virtually nothing.⁵⁶

This comment seems to imply that Stern does not want to make any real statements about whether nineteen-year-olds are mature enough to play in the NBA. He instead hides behind the idea that making a an eighteen year old wait one year before entering the league somehow stops children from believing they will be the next LeBron James.

One only need to look at the available statistical evidence to see that eighteen-year-olds are properly prepared and mature enough to play in the NBA.⁵⁷ By providing vague answers and lawyer speak, however, the NBA has sidestepped these statistics and has avoided showing any genuine evidence to support its justifications for the age requirement. It appears, instead, that the age requirement is nothing more than a way to provide teams the opportunity to watch the players play more games and make better decisions about which players to hire.⁵⁸

C. The Interests and Influence of Colleges and Universities

While colleges and universities do not technically have a formal interest in the NBA CBA, the NCAA is an important constituency with a powerful voice. Having draft ineligible players available to play for college basketball programs has a

56. *Id.*

57. *See supra* notes 38–52 and accompanying text.

58. *Mike and Mike in the Morning: David Stern Interview* (ESPN radio broadcast Feb. 9, 2010) (“The rule is good for the NBA because they get to see the players against more elite competition.”); *see also* Marlen Garcia, *One-and-Done Players Leave Behind a Mess For Colleges* USA TODAY (June 5, 2009, 9:06 PM), http://www.usatoday.com/sports/college/mensbasketball/2009-06-05-freshmen-cover_N.htm (“This is not about the NCAA . . . This is not an enforcement of some social program. This is a business decision by the NBA. We like to see our players in competition after high school.”).

number of rewards for the NCAA.⁵⁹ There are huge costs, however, and the NCAA, along with colleges and universities may, at some point begin to see the NBA age requirement as doing more bad than good.

The prominent issue surrounding the NCAA is the creation of the “one and done” player, someone who goes to college for one year, plays basketball, and leaves for the NBA. The rule has come under scrutiny because of a feeling that the phenomenon reduces the term “student athlete” to a joke.⁶⁰ As long-time college basketball announcer Dick Vitale said:

[One and done] is unfair to an athlete who has to go to school for one year when he has no desire to be in the classroom. College is supposed to be for those who want an education, for those who want to be there. It is time to end this mockery. If these kids want to make themselves available for the NBA, then so be it. If the NBA sees fit to draft them, so be it.⁶¹

Ohio State University faculty representative John Bruno is also frustrated with the rule because he does not feel that the player is going to “take full advantage of this opportunity,” and admitted “it’s almost better if they didn’t enroll at all.”⁶²

These concerns about the rule’s effect on the ideal of scholar athletes are a function of the minimal education requirements for these players.⁶³ In order to be eligible to play basketball during the spring term, a freshman is only

59. See *infra* notes 74–78 and accompanying text.

60. *Mike and Mike in the Morning: Dick Vitale Interview* (ESPN radio broadcast Feb. 9, 2010); see also Andrea Adelson, *NBA’s One-and-Done Rule Has to Go*, ORLANDO SENTINEL (June 14, 2009), <http://www2.ljworld.com/news/2009/jun/14/nbas-one-and-done-rule-has-go/?sports> (Orlando Magic head coach Stan Van Gundy was quoted as saying “Kids should be going to college if at least part of what they want to do is get an education. The way it’s set up on these one-and-done. . . . To me, it’s a sham.”); Aran Smith, *Jeff Capel Interview*, NBADRAFT.NET (Sept. 30, 2008, 4:28 PM), <http://www.nbadraft.net/capelinterview.htm> (Coach Jeff Capel feels the rule makes a mockery of college basketball); *Coach K Rails Against One-and-Done Rule in College Hoops*, Post to *The Dan Patrick Show*, SI.COM (June 11, 2009), <http://sportsillustrated.cnn.com/danpatrick/blog/67082/index.html> (“A school can’t be an extended stay hotel.”).

61. See *Would Amateur Reform and a Return to Frosh Ineligibility Help?*, MONEY PLAYERS (Aug. 24, 2009, 9:39 PM), <http://www.moneyplayersblog.com/blog/2009/08/froshineligible.html>.

62. See Andy Katz, *One-and-Dones Have Low Academic Requirements Too*, ESPN (May 13, 2008), http://sports.espn.go.com/ncb/columns/story?columnist=katz_andy&id=3393470.

63. *Id.*

required to complete six semester hours during the fall term.⁶⁴ Therefore, nothing stops a player from taking six credits in the fall semester, doing just enough to pass the classes, and then skipping classes entirely in the spring.⁶⁵

Colleges and universities are also finding out the hard way that “one and done” players can leave a scar on their programs well after they have gone on to the riches of the NBA.⁶⁶ For example, Ohio State University lost two men’s basketball scholarships because it did not meet the NCAA Academic Progress Rate (“APR”) requirements.⁶⁷ To avoid NCAA penalties, schools must have an APR over a four-year period of 925, which equates to a graduation rate of approximately sixty percent.⁶⁸ Ohio State University had a score of 911, placing it between the twentieth and thirtieth percentiles.⁶⁹ The school’s low scores could be traced to two players leaving after their freshman seasons.⁷⁰ There are other examples as well. On January 4, 2010, the University of Southern California forfeited victories amid allegations that the head coach of the basketball team provided cash to a player in 2008.⁷¹ Also, in 2007, news reports indicated that a University of Memphis player had someone else take his

64. *Id.*

65. *Id.*; see also *Mike and Mike in the Morning: Dick Vitale Interview*, *supra* note 60.

66. See Steve Wieberg & Marien Garcia, *Amid One-and-Done Issues, Trouble Shadows College Hoops*, USA TODAY (June 24, 2009, 3:23 PM), http://www.usatoday.com/sports/college/mensbasketball/2009-06-23-ncaa-basketball-troubles_N.htm.

67. See Bill Rabinowitz, *Ohio State Loses Two Scholarships – Men’s Basketball Program Takes a Hit When APR Score Fails to Meet Standards*, COLUMBUS DISPATCH (May 7, 2009, 3:17 AM), http://dispatch.com/live/content/sports/stories/2009/05/07/osu_apr_5-7.ART_ART_05-07-09_C1_9PDPK0K.html?sid=101 (teams must have an APR over 925). The NCAA maintains a website that posts the Academic Progress Rate (“APR”) of each member school, along with the list of schools that have been penalized. See *NCAA Academic Reform*, NCAA, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/media+and+events/press+room/current+issues/academic+reform (last visited Jan. 12, 2011). The rating is based on a combination of eligibility, retention and graduation of each scholarship player. See *id.* Teams can lose scholarships based on how their APR scores in reference to the benchmark set by the NCAA. *Id.*

68. Rabinowitz, *supra* note 67.

69. *Id.*

70. *Id.*

71. See David Wharton & Baxter Holmes, *USC Will Forfeit Victories, Money; The School Acts Before the NCAA Does in the Case Against Former Basketball Star Mayo.*, L.A. TIMES, Jan. 04, 2010, at A1.

college entrance exams.⁷² The University of Connecticut is also under investigation for alleged recruiting violations, claiming that an agent guided a recruit to the school and paid his expenses.⁷³

Despite these negatives, the NCAA derives much value from having these players play for colleges and universities. For one, there is the multi-billion dollar contract with CBS to televise the NCAA's annual basketball tournament.⁷⁴ With the top players coming to college, instead of going straight to the NBA, there is more incentive for CBS to eventually renew the contract.⁷⁵ Further, the individual schools and athletic departments also benefit.⁷⁶ Schools/programs receive a portion of the television revenue based on the number of times a team makes the NCAA tournament and the number of wins it has each year in the tournament.⁷⁷ Therefore, having better players can increase the amount of money schools receive from the NCAA.

Schools are willing to give up scholarships due to players leaving early because the better players ultimately increase the money the school receives from the NCAA. Also, the NCAA is willing to look the other way because "one and done" players will help maintain the television contracts. Thus, the NBA gets an opportunity to scout the players for free while they are playing for their college teams, the NCAA is able to command hundreds of millions of dollar for the right to televise games featuring premier players that otherwise would have jumped to the NBA from high school, and the colleges and universities get an increased share of these huge television deals, as well as endorsements from apparel companies.

Players do not receive any of that money, or at least, they are not supposed to receive any of that money beyond

72. Andy Katz, *Memphis Works to Resolve Disputes*, ESPN (May 29, 2009, 2:01 AM), <http://sports.espn.go.com/ncb/news/story?id=4213427>.

73. Andy Katz, *Source: NCAA to Probe UCONN*, ESPN (Mar. 27, 2009, 2:04 AM), <http://sports.espn.go.com/ncb/news/story?id=4017697>.

74. Thomas O'Toole, *NCAA Reaches 14-Year Deal with CBS/Turner for Men's Basketball Tournament, Which Expands to 68 Teams for Now*, USA TODAY (April 22, 2010, 1:50 PM), <http://content.usatoday.com/communities/campusrivalry/post/2010/04/ncaa-reaches-14-year-deal-with-cbsturner/1>.

75. *Id.*

76. *Id.*

77. *Id.*

scholarships.⁷⁸ The players help keep college basketball relevant in the sports world while passing on the NBA even though this “service” of going to school may not be in their best financial interests. The question for the NCAA, however, is becoming whether or not the money is worth the effort. The television deals will likely be there whether or not these players are playing or not. As the “one and done” player becomes the norm, the black mark that these players leave on college programs may force the NCAA to think about whether or not this “deal” is in its best interest.

D. Current Players

Another important group are the current players in the NBA, more specifically, older players who may only have a few years left in the league. Grant Hill, an NBA veteran, has been quoted as saying, “I always thought that it was the purpose of the union to protect its members, not potential members . . . I think if anyone gets left out, it’s the older players, guys who put equity into this league, card-carrying members paying their dues to the union. I would hope they would be protected.”⁷⁹ Essentially, Hill is implying that the increased age requirement would protect older players. The question becomes how?

Whether or not eighteen-year-olds are part of an NBA draft, the same amount of picks will take place. Therefore, regardless of an age requirement, veterans will have to beat out certain young, or rookie players for a spot on the team. The age requirement, therefore, protects these older players by keeping talented eighteen-year-old players out of the league for an extra year. That, however, is the very definition

78. Under section 12.1.2 of the 2009-201 NCAA Division I manual, “an individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport; (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation . . . ; (d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations.” NCAA ACADEMIC & MEMBERSHIP AFFAIRS STAFF, 2009–10 NCAA DIVISION I MANUAL, § 12.1.2 (2009), http://www.utm.edu/departments/athletics/2009-10_d1_manual.pdf.

79. Liz Robbins, *Age Limit: One Player’s Path Is Another Player’s Roadblock*, N.Y. TIMES, Mar. 27, 2005, <http://www.nytimes.com/2005/03/27/sports/basketball/27hoops.html?scp=1&sq=&st=nyt>.

of age discrimination in the workplace; not hiring someone in favor of someone else based on age.

E. The Prospective Players

The stated mission of the NBPA is “to ensure that the rights of NBA players are protected and that every conceivable measure is taken to assist players in maximizing their opportunities and achieving their goals, both on and off the court.”⁸⁰ The mission statement itself is part of the uphill battle facing prospective players. The NBPA is there to “ensure the rights of *NBA players*.”⁸¹ This key point arose during negotiations with the NBA, because just two months before the 2005 NBA CBA ratification, NBPA director Billy Hunter was quoted as stating, “I’m strongly philosophically opposed to [a minimum age], and I can’t understand why people think one is needed”⁸² At the same time, however, he also said, “I’m flexible on anything if it makes economic sense and improves the overall conditions for my constituents.”⁸³ Only the men at the negotiating table know which conditions were improved in exchange for the age requirement. What is known, however, is that the negotiating team representing the players is made up of NBA players in the league and does not include a single party representing the interests of prospective players.⁸⁴ Thus, the players most affected by the rule effectively have no voice.

These prospective players have the most at stake because the rule can affect these players both physically and economically.⁸⁵ They put their potential careers at risk by playing (in colleges, overseas, or elsewhere) without the safety of a guaranteed NBA contract. Bill Walker, discussed above, is a prime example of how this rule can derail a player’s career.⁸⁶ Walker was ineligible for the 2007 NBA Draft

80. *About the NBPA*, NAT’L BASKETBALL PLAYER’S ASS’N, <http://www.nbpa.org/about-us> (last visited Feb. 15, 2010).

81. *Id.* (emphasis added).

82. Chris Sheridan, *Hunter Still Opposed to Raising NBA Age Limit*, USA TODAY (May 12, 2005, 11:00 PM), http://www.usatoday.com/sports/basketball/nba/2005-05-12-hunter-age-limit_x.htm.

83. *Id.*

84. *See What We Do*, NAT’L BASKETBALL PLAYER’S ASS’N, <http://www.nbpa.org/what-we-do> (last visited Feb. 19, 2010).

85. *See* Rossen, *supra* note 11, at 179.

86. *See supra* notes 2–5 and accompanying text.

because, even though he was nineteen years old, the league considered him part of the 2007 high school class.⁸⁷ Therefore, he did not meet the one year removed qualification.⁸⁸ Thus, Walker spent the following season playing basketball for Kansas State University.⁸⁹ Yet, instead of impressing NBA scouts and allowing them to watch him against elite competition, as Stern would like, Walker ruptured his ACL during the team's sixth game and did not play the rest of the season.⁹⁰ Nonetheless, the injury did not deter Walker, as he recovered and was then drafted in the second round of the 2008 NBA Draft by the Boston Celtics.⁹¹ He likely would have been a first round draft pick, perhaps a lottery pick, had he been allowed to enter the draft directly out of high school.⁹² Instead, he went to college and suffered an injury that severely hurt his draft status.⁹³ Walker may still have gotten injured if he had played in the NBA instead of college, but as a first round draft pick, he would have had been guaranteed millions of dollars.

Another player who put his potential career in jeopardy while playing in college was Demar Derozan. Derozan was considered a "can't miss" basketball prospect after high school.⁹⁴ His mother suffers from lupus, a disease that causes her immune system to attack other parts of her body.⁹⁵ Had Derozan been allowed to enter the draft out of high school, he would have been able to provide the care that his mother needed to treat the disease.⁹⁶ Instead, while he had to play

87. Rossen, *supra* note 11, at 181–82.

88. *Id.*

89. *See id.*; see also Michael McCann, *The Legal and Social Policy Implications of Bill Walker's Knee Injury*, SPORTS L. BLOG (Jan. 12, 2007, 12:12:00 AM), <http://sports-law.blogspot.com/2007/01/legal-and-social-policy-implications.html>.

90. *See* Katz, *supra* note 3.

91. *See Bill Walker – Biography*, BILLWALKER.ORG, <http://www.billwalker.org> (last visited Feb. 19, 2010).

92. *See* Katz, *supra* note 3.

93. *Id.*

94. *See* Kenneth Miller, *Exploring Their European Options*, L.A. SENTINEL, June 26, 2008, at B1.

95. *What Is Lupus*, MED. NEWS TODAY, <http://www.medicalnewstoday.com/info/lupus/whatislupus.php> (last visited May 18, 2010); *What is Lupus*, LUPUS FOUND. AM., http://www.lupus.org/webmodules/webarticlesnet/templates/new_learnunderstanding.aspx?articleid=2232&zoneid=523 (last visited May 18, 2010).

96. *See* Tom Ziller, *NBA Age Limit Isn't Fair, Doesn't Work*, NBA FANHOUSE (July 22, 2009, 9:00AM) <http://nba.fanhouse.com/2009/07/22/nba-age-limit-isnt-fair-doesnt-work/>.

one year in college, his mother suffered.⁹⁷

II. DO AFFECTED PLAYERS HAVE VIABLE REVERSE AGE DISCRIMINATION CLAIMS AGAINST THE NBA?

Reverse discrimination occurs when a minority group is given preferential treatment over the majority group.⁹⁸ In the typical age discrimination cases, older workers alleged discrimination in favor of younger workers.⁹⁹ “Reverse age discrimination,” refers to situations in which there is discrimination against younger workers in favor of older ones.¹⁰⁰ A claim for reverse age discrimination starts with the location of an age discrimination law that covers the prospective players. While the age requirement is facially discriminatory, in order to challenge the rule, eighteen-year-olds need to be part of the class protected by antidiscrimination statutes.

A. *Federal Law: Age Discrimination in Employment Act*

Enacted in 1967, the Age Discrimination in Employment Act (ADEA) was the congressional response to the growing number of employees adversely affected by age-based stereotypes.¹⁰¹ Beginning in 1964, former Secretary of Labor, Willard Wirtz conducted a study to determine the effects of arbitrary age discrimination on employment decisions.¹⁰² The study found that older workers had been stereotyped as less productive than their younger counterparts; Secretary Wirtz recommended legislation to eliminate the arbitrary age discrimination affecting these workers.¹⁰³ Therefore, in enacting the ADEA, Congress expressed its purpose to “prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems

97. *Id.*

98. See Elena Minkin, Note, *Flourishing Forties Against Flaming Fifties: Is Reverse Age Discrimination Actionable Under the Age Discrimination in Employment Act*, 48 ST. LOUIS L.J. 225, 226 (2003).

99. *Id.* at 226–27.

100. *Id.*

101. See D. Aaron Lacy, *Second National People of Color Legal Scholarship Conference: You Are Not Quite as Old as You Think: Making the Case for Reverse Age Discrimination Under the ADEA*, 26 BERKELEY J. EMP. & LAB. L. 363, 367 (2005).

102. *Id.* at 366.

103. *Id.* at 367.

arising from the impact of age on employment.”¹⁰⁴ To this end, ADEA section 623(a) makes it unlawful for an employer to fail or refuse to hire an individual on the basis of age.¹⁰⁵ It is only unlawful, however, for an employer to fail or refuse individuals who meet the ADEA’s age requirements.¹⁰⁶ Originally, the ADEA protected only those between the ages of forty and sixty-five, but the age sixty-five upper limit was removed in 1986 out of a concern about the effects of mandatory retirement clauses.¹⁰⁷ Therefore, the ADEA makes it unlawful for an employer to fail or refuse to hire any individual over forty on the basis of age.¹⁰⁸

The stated purpose of the ADEA is to “promote employment of older persons based on their ability rather than age”¹⁰⁹ At the time it was passed, forty was chosen as the minimum age threshold based on testimony indicating forty to be the age at which age discrimination in employment becomes evident.¹¹⁰ There is some indication that Congress may intend to protect younger workers because young people are also affected by age discrimination.¹¹¹ For example, the Age Discrimination Act, passed in 1975, prohibits age discrimination in federal programs, but does not set a minimum age requirement.¹¹² Furthermore, Congress has suggested “the young are often subject to discrimination and, therefore, warrant protection as well.”¹¹³ The Supreme Court,

104. 29 U.S.C. § 621(b) (2006).

105. *Id.* § 623(a) (“It shall be unlawful for an employer: (1) to fail or refuse to hire . . . 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; [or] (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age . . .”).

106. Lacy, *supra* note 101, at 368–69.

107. *See id.* at 368–69; *see also* Age in Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 342 (1986).

108. 29 U.S.C. § 631(a) (2006).

109. *See* § 621(b).

110. Minkin, *supra* note 98, at 231–32. (quoting H.R. Rep. No. 90-805, at 6).

111. Jeffrey P. Fuhrman, Comment, *Can Discrimination Law Affect the Imposition of a Minimum Age Requirement for Employment in the National Basketball Association?*, 3 U. PA. J. LAB. & EMP. L. 585, 599 (2001).

112. *Id.*; *see also* 42 U.S.C. §§ 6101–07 (2006).

113. Fuhrman, *supra* note 111, at 599; *see also* 121 CONG. REC. 9212 (daily ed. Apr. 8, 1975) (Statement of Rep. John Brademas) (“Its provisions are broad and it is the intent of the committee that it apply to age discrimination at all age levels, from the youngest to the oldest.”).

however, in *General Dynamics Land Systems, Inc. v. Cline*, denied the possibility of reverse age discrimination claims under the ADEA.¹¹⁴

Even with a discriminated younger player shut out from bringing a claim in federal court, the ADEA does not preempt state age discrimination laws.¹¹⁵ Section 633 of the ADEA defines the Federal-State relationship, maintaining that the ADEA has no effect on “any agency of any [s]tate performing like functions with regard to discriminatory employment

114. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004). The plaintiffs in *Cline* were union employees who challenged a provision between General Dynamics and the United Auto Workers union. *Id.* at 584. The retirement provision at issue only applied to those employees retiring subsequent to the agreement who were under fifty years old. *Id.* The plaintiffs consisted of individuals in the forty to forty-nine year old class, who are protected by the ADEA, but denied the promise of retirement health benefits because they are under the age of fifty. *Id.* The Equal Employment Opportunity Commission (EEOC) agreed with the plaintiffs that the agreement violated the ADEA and asked the two parties to informally settle. *Id.* at 585. When no agreement could be reached, the plaintiffs brought the action in federal court. *Id.* The district court denied relief under the ADEA, but the Sixth Circuit reversed, holding that the prohibition against age discrimination intended by Congress is “so clear on its face that if Congress had meant to limit its coverage to protect only the older worker against the younger, it would have said so.” *Id.* (citing *Cline v. Gen. Dynamics Land Sys.*, 296 F.3d 466, 472 (6th Cir. 2002)). In reversing the Sixth Circuit’s ruling and refusing to give deference to EEOC, the Supreme Court ruled that even those in the protected class over forty could not bring a viable claim for reverse age discrimination because the introductory provisions of the ADEA and its legislative history make clear that the ADEA was created “to protect a relatively older worker from discrimination that works to the advantage of the relatively young.” *Id.* at 589–91 (“The findings stress the impediments suffered by ‘older workers’ The statutory objects were ‘to promote employment of older persons based on their ability rather than age’”); see also *id.* at 600 (“[W]e neither defer nor settle on any degree of deference because the commission is clearly wrong.”); Paul L. Arrington, *Not Always Protected: Reverse Age Discrimination and the Supreme Court’s Decision in General Dynamics Land Systems, Inc. v. Cline*, 73 UMKC L. REV. 543, 570 (2005). Summarizing the ADEA’s legislative history the Court found:

The record thus reflects the common facts that an individual’s chances to find and keep a job get worse over time; as between any two people, the younger is in the stronger position, the older more apt to be tagged with demeaning stereotype. Not surprisingly, from the voluminous records of the hearings, we have found . . . nothing suggesting that any workers were registering complaints about discrimination in favor of their seniors. . . .

Cline, 540 U.S. at 589. Accord Arrington, *supra*, at 560. Additionally, the Court found that Congress had been silent on the issue of reverse age discrimination claims despite judicial interpretations holding that the ADEA does not provide for these claims. *Id.* at 582. Therefore, the court found that if Congress wanted to protect younger workers, “it would not likely have ignored everyone under [forty].” *Id.*

115. See *Hulme v. Barrett*, 449 N.W.2d 629, 631 (Iowa 1989) (“[T]he federal Act does not preempt state age discrimination laws”).

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practices on account of age.”¹¹⁶ Therefore, prospective players could still have a viable claim if a state protects eighteen-year-olds.

B. State Law

While federal law does not protect prospective eighteen year-old players claiming age discrimination, certain states do provide potential protection. The following table shows the age discrimination protection currently provided by state laws:

116. 29 U.S.C. § 633 (2006).

Table 1
(States with NBA Basketball Teams are bolded)

| <i>States which protect ages 18 and older¹¹⁷</i> | <i>States with no specific minimum age¹¹⁸</i> | <i>States which protect ages 40 and older¹¹⁹</i> | |
|---|--|---|---------------------|
| Iowa | Alaska | Alabama | Ohio |
| Minnesota | Colorado | Arizona | Oklahoma |
| New Jersey | Connecticut | Arkansas | Pennsylvania |
| New York | District of Columbia | California | Rhode Island |
| Oregon | Florida | Delaware | South Carolina |
| Vermont | Hawaii | Georgia | Tennessee |
| | Maine | Idaho | Texas |
| | | Illinois | Utah |

117. IOWA CODE § 216.6(3) (2010); MINN. STAT. § 362A.03 (2010); New Jersey Law Against Discrimination, N.J. STAT. ANN. § 10:5-12 (West 2010); N.Y. EXEC. LAW § 296(3-a)(a) (Consol. 2010); OR. REV. STAT. § 659A.030(1)(a) (2010); Vermont Fair Employment Practices Act, VT. STAT. ANN. tit. 21, § 495(c) (2010).

118. ALASKA STAT. § 18.80.220 (2010); COLO. REV. STAT. § 24-34-402 (2010); CONN. GEN. STAT. § 46a-60 (2010); District of Columbia Human Rights Act of 1977, D.C. CODE § 2-1402.11 (2010); FLA. STAT. § 760.10 (2010); HAW. REV. STAT. § 378-2 (2010); Maine Human Rights Act, ME. REV. STAT. tit. 5, § 4572 (2010); MD. CODE ANN., STATE GOV'T § 20-606 (West 2010); Elliot-Larson Civil Rights Act, MICH. COMP. LAWS § 37.2202 (2010); MISS. CODE ANN. § 25-9-149 (West 2010); MONT. CODE ANN. § 49-2-303 (2010); N.H. REV. STAT. ANN. § 354-A:7 (2010); N.M. STAT. ANN. § 28-1-7 (2010); N.C. GEN. STAT. ANN. § 75B-2(4) (West 2010).

119. ALA. CODE § 25-1-21 (2010); ARIZ. REV. STAT. ANN. § 41-1465 (2010); ARK. CODE ANN. § 21-3-202 (West 2010); California Fair Employment and Housing Act, CAL. GOV'T CODE § 12941 (West 2010); DEL. CODE ANN. tit. 19, § 710(1) (2010); Georgia Fair Employment Practices Act, GA. CODE ANN. § 34-1-2 (West 2010); IDAHO CODE ANN. § 67-5901(9) (West 2010); Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/1-103(A) (2010); IND. CODE § 22-9-2-1 (2010); Kansas Acts Against Discrimination Act of 1953, KAN. STAT. ANN. § 44-1112(a) (2010); KY. REV. STAT. ANN. § 344.040 (West 2010); LA. REV. STAT. ANN. § 23:311 (2010); MASS. GEN. LAWS ch. 151B, § 1(8) (2010); MO. REV. STAT. § 213.010 (1), (5) (2010); Nebraska Fair Employment Practices Act, NEB. REV. STAT. § 48-1003(1) (2010); NEV. REV. STAT. § 613.330 (2010); North Dakota Human Rights Act, N.D. CENT. CODE § 14-02.4-02(1), (6) (2010); OHIO REV. CODE ANN. § 4112.14(A) (LexisNexis 2010); OKLA. STAT. tit. 25, § 1301 (2010); Pennsylvania Human Relations Act, 43 PA. CONS. STAT. § 954(h) (2010); R.I. GEN. LAWS § 28-5-6(1) (2010); South Carolina Human Affairs Law, S.C. CODE ANN. § 1-13-30(c) (2010); Tennessee Human Rights Act, TENN. CODE ANN. § 4-21-101 (3), (8)(b) (2010); TEX. LAB. CODE ANN. § 21.054(b) (West 2010); UTAH CODE ANN. § 34A-5-106(1)(a)(i)(E) (LexisNexis 2010); Virginia Human Rights Act, VA. CODE ANN. § 2.2-2639(B) (2010); WASH. REV. CODE ANN. § 49.60.180(1) (LexisNexis 2010); West Virginia Human Rights Act, W. VA. CODE § 5-11-3(h), (k) (2010); WIS. STAT. § 111.33(1) (2010); WYO. STAT. ANN. § 27-9-105(a)(i), (b) (2010).

| | | |
|-----------------------|----------------------|---------------|
| Maryland | Indiana | Virginia |
| Michigan | Kansas | Washington |
| Mississippi | Kentucky | West Virginia |
| Montana | Louisiana | Wisconsin |
| New Hampshire | Massachusetts | Wyoming |
| New Mexico | Missouri | |
| North Carolina | Nebraska | |
| | Nevada | |
| | North Dakota | |

As the chart suggests, a number of states with NBA teams protect those eighteen and older; however, although the prospective player would fall within the protected class in each of these jurisdictions, only some have recognized a claim for reverse age discrimination. The three states that have decided cases in this area and allow such a claim are New Jersey, Oregon and Michigan.

In New Jersey, all residents, regardless of age, have a right to obtain employment free from age discrimination.¹²⁰ The relevant New Jersey statute is the Law Against Discrimination (LAD).¹²¹ The practice of age discrimination is made illegal in section 10:5-12: “It shall be unlawful employment practice or, as the case may be, an unlawful discrimination for an employer, because of . . . age . . . to refuse to hire or employ or to bar . . . unless justified by lawful considerations other than age, from employment”¹²²

The seminal case in which the Supreme Court of New Jersey applied this statute to a reverse discrimination claim is *Bergen Commercial Bank v. Sisler*.¹²³ *Sisler* involved a twenty-five-year-old employee claiming wrongful discharge after being replaced by an older employee.¹²⁴ *Sisler* had been hired to be vice president of the Bergen Commercial Bank without revealing his age to his new employer.¹²⁵ His hiring had occurred after several meetings in which the Bank actively recruited *Sisler* in an attempt to hire him away from his former employer.¹²⁶ Only during a lunch meeting shortly

120. N.J. STAT. ANN. § 10:5-4 (West 2010).

121. *Id.*

122. *Id.* § 10:5-12(a).

123. *See generally* *Bergen Commercial Bank v. Sisler*, 723 A.2d 944 (N.J. 1999).

124. *Id.* at 947–48.

125. *Id.* at 948.

126. *Id.* at 947–48.

before he started working for the bank was he asked about his age.¹²⁷ Upon learning he was twenty-five, the bank's chairman and co-founder asked Sisler not to tell anyone his age because it "would be embarrassing to [the chairman] if other people in the bank found out how old [Sisler] was and what he had been hired for."¹²⁸ Eight days after he started working at the bank, Sisler was called in for a meeting at which time the bank asked him to take a lesser position in the company.¹²⁹ Sisler refused to take a demotion and was terminated five months later, replaced by a thirty-one-year-old.¹³⁰ The bank argued that Sisler was unable to make a claim of age discrimination because the LAD protected only employees who were denied hiring or fired because the company chose a younger applicant instead.¹³¹

The New Jersey Supreme Court disagreed. Justice Stein wrote the opinion for a unanimous court holding that the LAD language was "broad enough" to allow the employee to bring a claim of reverse age discrimination.¹³² While courts normally rely on the ADEA in interpreting its own state statute, the *Sisler* court felt the significant differences in language, including the lack of an express age limitation, "preclude[d] wholesale reliance on federal law in deciding whether younger workers are within the ambit of the [ADEA]'s protection."¹³³ Therefore, the court conducted its own independent research into the purpose of the LAD.¹³⁴ The court could not find any legislative intent supporting a finding that younger workers were unprotected.¹³⁵ Also, the court relied on a separate part of the LAD explicitly mentioning the act should not be read to require the hiring of any person under the age of eighteen.¹³⁶ Justice Stein pointed out that it would be "superfluous" to include exceptions for residents under the age of eighteen if the act itself did not protect workers over the age of eighteen.¹³⁷

127. *Id.*

128. *Id.*

129. *Sisler*, 723 A.2d at 947–48.

130. *Id.*

131. *Id.* at 949.

132. *Id.* at 957.

133. *Id.*

134. *Id.* at 957–58.

135. *Sisler*, 723 A.2d at 957.

136. *Id.*

137. *Id.*

Additionally, the justices looked at other anti-discrimination statutes and found the inclusion of age limitations and ceilings.¹³⁸ This language, the court felt, showed that the legislature was fully aware of the option to protect specific age groups under the LAD.¹³⁹ The court even gave an example, holding that it would be fully consistent with the underlying purpose behind the LAD to protect a “twenty-three-year-old schoolteacher who, despite her outstanding performance in the classroom, was discharged by a local school board because they believed she was too young to teach.”¹⁴⁰

Thus, the *Sisler* court found a broad and liberal reading of the LAD protects the underlying purpose of anti-discrimination laws: “discourag[ing] the use of categories in employment decisions which ignore the individual characteristics of particular applicants.”¹⁴¹

This interpretation mirrors that of the Oregon Supreme Court, which allowed a reverse age discrimination claim, awarding damages to a beautician who claimed she was denied a job because the employer thought she was too young.¹⁴² There, the Commissioner of Labor found an employer violated the Oregon Employment Discrimination Statute (“OEDS”).¹⁴³ Under the OEDS, it is unlawful for an employer to refuse to hire individuals eighteen and older because of their age.¹⁴⁴

Following the lead of *Sisler* and *Ogden*, the Michigan Court of Appeals allowed a reverse age discrimination claim in the 2000 case *Zanni v. Medaphis Physician Services*

138. *Id.* at 958.

139. *Id.* at 957–58. The New Jersey Employment in Public Service Law is limited to an age protected class of persons over forty. *Id.* Also, the LAD itself has an age ceiling added in 1985 excluding workers over the age of 70 from protection. *Id.*

140. *Sisler*, 723 A.2d at 958.

141. *Id.*

142. *See generally* *Ogden v. Bureau of Labor*, 699 P.2d 189 (Or. 1985).

143. *Id.* at 190.

144. OR. REV. STAT. § 659A.030 (2010). Interestingly, Rebecca Miller, the scorned beautician, was actually a resident of Washington. *See* *Ogden v. Bureau of Labor*, 68 Or. App. 235, 240 (Or. Ct. App. 1984). On the first appeal, the employer argued that the statute only protected “inhabitants of the state” and was restricted only to Oregon residents. *Id.* The court found, however, the text of the public policy statement behind the statute ensures an employee is protected, regardless of residency, as long as the discrimination took place in Oregon. *Id.* This holding is significant for the potential player residing outside of Oregon to be able to bring a claim based on Oregon Law.

*Corp.*¹⁴⁵ In *Zanni*, an employee alleged that she had been fired from her position of account executive and a less qualified older employee was hired in her place.¹⁴⁶ Prior to termination, the thirty-one-year-old employee had been told her “voice sounded too young on the phone . . . and clients wanted an older account executive.”¹⁴⁷ The employer’s response maintained that a claim under Michigan’s Elliot-Larson Civil Rights Act (“ELCRA”) did not exist for age discrimination based on an employee’s youth.¹⁴⁸ Overruling prior case law, the court refused to rely on the ADEA in deciding whether ELCRA allowed reverse discrimination claims. Judge Cavanagh’s opinion for the court found that the purpose of ELCRA was to “eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases,”¹⁴⁹ and that it is possible for younger workers to be subjected to the same stereotypes about their abilities.¹⁵⁰ Younger workers, the court found, were “unfairly viewed as immature and unreliable, without regard for individual merits.”¹⁵¹ The one caveat Judge Cavanagh added, however, was: “[o]f course, employers are still free to discriminate among workers on the basis of factors, such as experience and education, that are often correlated with age.”¹⁵²

While these three states appear to protect prospective players, a player wishing to enter the NBA draft will not know in advance which team will actually draft him.¹⁵³ This brings up the issue of defining exactly who the employer is, and against whom the player would bring his claim. According to the NBA CBA, each player signs a contract with his respective team.¹⁵⁴ It would appear, therefore, that the teams are the employers of the players and that the teams themselves cannot violate discrimination laws.

145. *Zanni v. Medaphis Physician Servs. Corp.*, 612 N.W.2d 845 (Mich. Ct. App. 2000).

146. *Id.* at 846.

147. *Id.*

148. *Id.*

149. *Id.* at 847.

150. *Id.* at 848.

151. *Zanni*, 612 N.W.2d at 848.

152. *Id.* at 848 n.1. (citing *Plieth v. St. Raymond Church*, 210 Mich. App 568, 573 (Mich. Ct. App. 1995)).

153. See discussion *infra* Part I (discussing the NBA Draft and how a prospective player signs a contract to play in the NBA).

154. See NBA CBA, *supra* note 6, at art. II, § 1, at 15.

C. State Law Claim Against the NBA

The *Williams v. National Football League* case,¹⁵⁵ also known as the StarCaps case, addressed the issue of whether a sports league or its teams are the players' employer. In *Williams*, players from the National Football League's (NFL's) Minnesota Vikings brought state employment law claims directly against the NFL as their employer.¹⁵⁶ Chief Judge Loken, in his dissent from denial of rehearing, discussed whether the NFL could even be sued as an employer.¹⁵⁷ According to Judge Loken, "one defense to these claims is that the NFL is not an 'employer' subject to the statutory duties and remedies."¹⁵⁸ The same question will be raised here: is the NBA an employer subject to state anti-discrimination law?

As Chief Judge Loken realized, determining whether the NBA or the actual team is the employer is necessarily "complex."¹⁵⁹ Finding an answer would require:

[A]nalysis of the [CBA] between the NFL and the NFLPA, the NFL Constitution and Bylaws, and the Standard Player Contract between the players and the Vikings. Thus, the defense requires a sophisticated understanding of the collectively bargained relationships—the "law of the shop" as the Supreme Court has called it—not mere reference to the bare terms of the CBA.¹⁶⁰

This issue, however, may not be as "complex" as it seems. A player cannot enter the NBA or sign a contract with a team unless he enters the NBA draft.¹⁶¹ The NBA CBA determines the player's salary depending on where he is picked in the draft.¹⁶² The NBA CBA also determines other rules the player must follow while playing in the NBA.¹⁶³

A player is therefore subject to both the rules of the NBA and whatever rules his particular team institutes. The teams do not individually or collectively create the NBA CBA;

155. See generally *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009).

156. See generally *Williams v. Nat'l Football League*, 598 F.3d 932 (8th Cir. 2009).

157. See *id.* at 933 (Loken, C.J., dissenting from denial of rehearing en banc).

158. *Id.*

159. *Id.*

160. *Id.*

161. See NBA CBA, *supra* note 6, at art. X, § 1(a).

162. *Id.* at art. VIII.

163. See generally *id.*

instead the NBA CBA is agreed upon by the NBA (acting for the owners) and the current players (represented by the NBPA).¹⁶⁴ More likely than not, each team's contract with the NBA has language to the effect that the teams accept whatever agreements the league deems necessary to enter. This should not, however, provide the teams and the NBA with a way to circumvent state discrimination law. Just because the NBA is essentially acting as a proxy for the teams, it should not be shielded from the underlying issues. If a player cannot sign a contract with the Portland Trailblazers, the Detroit Pistons, or New Jersey Nets because he is not old enough for the NBA draft, the NBA should not be allowed to hide behind the fact that the player's contract is with the individual team. This is sure to be a key issue if a claim is brought.¹⁶⁵

III. LABOR MANAGEMENT RELATIONS ACT SECTION 301 PREEMPTION

A. *Section 301 Generally*

Another issue encountered is whether a state law claim based on the NBA CBA is pre-empted by section 301 of the LMRA,¹⁶⁶ which applies to controversies concerning CBAs.¹⁶⁷ As part of the 1930's New Deal legislation, Congress passed

164. *See generally id.*

165. There does not appear to be a direct answer to this issue whether or not the NBA as a whole can be sued or whether the aggrieved player must institute a claim against the individual teams. This was somewhat addressed towards the end of the opinion in *Brown v. Pro Football, Inc.*, 518 U.S. 231, 248-49 (1996). There, Justice Breyer writes that the sports leagues are "more like a single bargaining employer" because while teams may enter into contracts with individual players, the "clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival." *Id.* This idea was "irrelevant" to the *Brown* question whether or not federal laws shield a sports league CBA from antitrust claim. *Id.* at 234, 249. In the context of age discrimination, this idea becomes very relevant. As Justice Breyer alluded, teams in a professional sports league must work together to ensure that the league is viable. Because *Brown* is an opinion about a sports league, it is likely a court will find that the NBA teams are working together as one single employer. Therefore, without delving into this issue too much, a claim against the NBA should be viable.

166. 29 U.S.C. § 185 (2006).

167. *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 372 (1990); *see also Williams v. Nat'l Football League*, 582 F.3d 863, 873 (8th Cir. 2009) ("Section 301 applies to '[s]uits for violation of contracts between an employer and a labor organization,' [] or, in other words, suits for breaches of CBAs.").

the National Labor Relations Act (NLRA), also known as the Wagner Act, which provides workers with the right to organize and join labor unions and to bargain collectively through representatives they chose.¹⁶⁸ Congress found, however, that there was an imbalance of power under the NLRA in favor of labor.¹⁶⁹ Therefore, in 1947, Congress passed the LMRA to correct this imbalance.¹⁷⁰

The LMRA section 301 was designed to provide federal courts with the jurisdictional and substantive power to not only resolve labor disputes arising under a CBA, but to create federal substantive law to resolve those disputes.¹⁷¹ To this end, the Supreme Court has authorized federal preemption of state substantive law by holding that any state law cause of action for a CBA violation is “entirely displaced by federal law under [section] 301.”¹⁷² At first, section 301 only pre-empted contract claims; however, cases have extended its use to other claims, including state law tort claims.¹⁷³

In the case of a prospective high school entrant, the NBA will undoubtedly seek removal to federal court and thus a determination based upon section 301. This is simply due to the fact that there is already federal law in the NBA’s favor.¹⁷⁴ In federal court, the NBA can argue that the court has the power to determine the substantive law used. Using the ADEA will further the goals of having the CBA governed by only one law; however, the eighteen-year-old player being shut out from the NBA draft has not signed the NBA CBA and is not a party to the agreement. The NBA is likely to argue that the NBPA negotiates on behalf of current, former, and future players. Nevertheless, the high school athletes

168. See National Labor Relations Act, 29 U.S.C. § 157 (2006).

169. *Rawson*, 495 at 372.

170. *Id.*

171. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 450–51 (1957).

172. *Rawson*, 495 U.S. at 368.

173. See *id.* at 369; see also *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210–11 (1985) (The court extended section 301 beyond breach of contract claims into the tort arena when it preempted a state tort suit for a bad-faith failure to pay an employee’s disability benefits. In extending preemption beyond the contract arena, Justice Blackmun wrote: “questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law.” Justice Blackmun later added that when state law determines the meaning of a CBA term or phrase, parties become uncertain of what was agreed upon and reaching an agreement becomes more complicated).

174. See 29 U.S.C. § 623(a) (2006).

hoping to be drafted by an NBA team have no voice and are not actually represented by anyone during the collective bargaining process. Therefore, they should not be considered parties to the CBA. Being labeled a non-party is significant. As stated by both the Sixth Circuit and the Southern District of Ohio, section 301 “creates federal jurisdiction only over parties to the contract being sued on.”¹⁷⁵ Consequently, section 301 should not preempt any state law civil rights claim because a high school player is not a person subject to or bound by the terms of the NBA CBA.

Even if section 301 does apply to the non-signatory high school player, a state law age discrimination claim should not be preempted. If courts were to allow preemption were allowed, federal courts would be free to create federal substantive law in this area. Of course, there is already federal law for age discrimination as discussed above, namely the ADEA. Allowing a creation of federal law under these circumstances would not be consistent with section 301’s purpose.

The Supreme Court stated that when resolving preemption issues in this area, the key determinations are “the need for uniformity in the interpretation of labor contracts,” and “the critical role of arbitration in industrial relations.”¹⁷⁶ Uniformly interpreting labor contracts and ensuring arbitration’s role, however, are not reasons to allow discrimination.

Nonetheless, the test that the Supreme Court has adopted to determine if state law is preempted was articulated in *Local 174 Teamsters v. Lucas Flour Co.*¹⁷⁷ A state law claim

175. *Martin Marietta Energy Sys. v. Indus. Comm’n*, 843 F. Supp. 1206, 1213 (S.D. Ohio 1994) (quoting *Metropolitan Detroit Bricklayers Dist. Council v. J.E. Hoetger & Co.*, 672 F.2d 580, 583 (6th Cir. 1982)).

176. Rebecca H. White, *Section 301’s Preemption of State Law Claims: A Model for Analysis*, 41 ALA. L. REV. 377, 385–86 (1989).

177. *See Local 174 Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103–04 (1962) (“The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. Indeed, the existence of possibly conflicting legal concepts might

will be preempted if the claim is “substantially dependent upon analysis” of the CBA terms.¹⁷⁸ The reasoning behind this method is to make certain that CBAs are interpreted uniformly and to help encourage peaceful and consistent outcomes in labor-management disagreements.¹⁷⁹ Allowing individual contract terms to have different meanings depending on whether they were looked at under state or federal law would frustrate CBA negotiations.¹⁸⁰ Also, claims based on state law could be inconsistent because the state-law principles used to analyze CBAs may differ from state to state.¹⁸¹ Employers and labor unions would therefore have to take into account all of the differences among the states when bargaining over terms. This would frustrate the desired uniformity and create situations where one employee may have a state law breach of contract claim against an employer, but her fellow employee, under the same circumstances, would not have a claim because she works for the company in a state with different contract law.

B. Section 301 and Sports: StarCaps

The Eighth Circuit addressed section 301’s application to a sports league CBA in *Williams v. National Football League*.¹⁸² *Williams* involved five NFL players who tested positive for bumetanide,¹⁸³ a banned substance, in violation of the NFL’s drug policy.¹⁸⁴ All of the players were suspended for four games without pay for the violations.¹⁸⁵ Two of the suspended players were members of the Minnesota Vikings who initiated

substantially impede the parties’ willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.”).

178. *Lueck*, 471 U.S. at 220; see also *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968).

179. *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 404 (1988).

180. See *Lucas Flour Co.*, 369 U.S. at 103.

181. See *Williams v. Nat’l Football League*, 582 F.3d 863, 874 (8th Cir. 2009) (quoting *Lingle*, 486 U.S. at 406).

182. *Id.* at 863. StarCaps is a dietary supplement distributed by Balanced Health Products and at the heart of the drug testing surrounding the case. *Id.* at 869.

183. See *Bumetanide Definition*, MEDLINE PLUS, <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a684051.html> (last visited Feb. 19, 2010) (“Bumetanide, a ‘water pill,’ is used to reduce the swelling and fluid retention caused by various medical problems, including heart or liver disease. It also is used to treat high blood pressure. It causes the kidneys to get rid of unneeded water and salt from the body into the urine.”).

184. See *Williams*, 582 F.3d at 869.

185. *Id.* at 870.

a suit claiming numerous violations of Minnesota state law.¹⁸⁶ The Eighth Circuit applied a two-step approach to “determine if the claims were sufficiently ‘independent’ to survive [s]ection 301 preemption.”¹⁸⁷ First, the court looked to see if the state law claims were “based on a provision of the CBA.”¹⁸⁸ If a CBA provision created the right in which the claim was based, section 301 preemption would be appropriate.¹⁸⁹ Second, the court determined whether the state law claim required interpretation of the CBA.¹⁹⁰ Applying this principle, the court determined that section 301 preempted the player’s common law claims, but not the two statutory claims.¹⁹¹

One of the statutory claims was based on Minnesota’s Drug and Alcohol Testing in the Workplace Act (DATWA), which imposes certain requirements on employers for drug and alcohol testing policies.¹⁹² The crux of the plaintiff’s argument was that the NFL’s failure to use a certified laboratory¹⁹³ and the discipline imposed on the players did not comply with DATWA.¹⁹⁴ The NFL countered with three arguments based on the CBA, however, they were all rejected because the NFL could not show that the court had to interpret the CBA to decide the DATWA claim.¹⁹⁵

186. *Id.* at 872.

187. *Id.* at 874.

188. *Id.*

189. *Id.*

190. *Williams*, 582 F.3d at 874.

191. *Id.* at 873.

192. MINN. STAT. § 181.955(1) (2010). The DATWA provides the criteria a laboratory must meet in order to administer the drug test for an employer. *Id.* § 181.953 subdiv. 1. Also, the DATWA specifies the discipline an employer may levy against an employee for a positive test. § 181.953 subdiv. 10(a), 10(b)(1)–(2). Finally, under the DATWA, an employer must give its employee the right to explain any positive results and the employee may not be disciplined on the basis of an initial positive test. § 181.953 subdiv. 6(b), 6(c).

193. *See Williams* 582 F.3d at 875 n.9.

194. *Id.* at 875.

195. *Id.* at 876. The NFL first argued that any liability under DATWA requires the court to interpret the CBA to determine whether the NFL drug policy provides equivalent or greater protection than DATWA. *Id.* at 875. The court held that there was “no need to consult the Policy in order to resolve the Players’ DATWA claim.” *Id.* at 876. Instead, the court would only need to compare the drug testing procedures actually undertaken with what DATWA requires. *Id.* The court based this holding on *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261 (1994), which held that “purely factual questions’ about an employee’s conduct or an employer’s conduct and motives do not ‘requir[e] a court to interpret any term of an [CBA].” *See id.* Next, the NFL asserted that the court would need to interpret the CBA and Policy to verify that the NFL is an employer for the purposes of DATWA. *Id.* The court rejected this argument

The second statutory claim was based on Minnesota's Consumable Products Act (CPA).¹⁹⁶ The CPA protects employees from being disciplined or discharged for using "lawful consumable products . . . off the premises of the employer during nonworking hours."¹⁹⁷ The NFL's argument for section 301 pre-emption centered on a CPA exception that allows employers to restrict use of lawful consumable products if they "relate[d] to a bona fide occupational requirement and [are] reasonably related to employment activities or responsibilities of a particular employee or group of employees."¹⁹⁸ The NFL maintained that in order to determine if the CPA was violated, the court would have to interpret the NFL drug policy to determine what "off the premises of the employer" and "during nonworking hours" meant.¹⁹⁹ The court rejected this argument as it found that while these terms were found in the statute, there was no need for it to interpret what was meant because the terms were not part of the agreement.²⁰⁰ The court also rejected the NFL's argument that the players had "waived their rights under the CPA because their bargaining representative, the Union, agreed to the drug testing procedures and discipline provided for by the [p]olicy."²⁰¹ Because the CPA creates

and found that the "crucial inquiry is whether resolution of a state-law claim *depends upon the meaning* of a [CBA]." *Id.* at 877 (emphasis added) (quoting *Miner v. Local 373*, 513 F.3d 854, 865 (8th Cir. 2008)). Applying that standard, the court found that no specific provision of the CBA needed to be interpreted. *See id.* ("None of these references require interpretation, only mere consultation, which is insufficient to warrant preemption of an otherwise independent state law claim."). Also, the players' contracts themselves would most likely be dispositive, and those contracts were not part of the CBA. *Id.* Finally, the NFL contended that a ruling in the players' favor would make its uniform drug enforcement policy impossible to implement. *Id.*

196. MINN. STAT. § 181.938 (2006).

197. § 181.938(2) ("[L]awful consumable products' means products whose use or enjoyment is lawful and which are consumed during use or enjoyment, and includes food, alcoholic or nonalcoholic beverages, and tobacco.").

198. § 181.938 (3)(a)(1); *see also Williams*, 582 F.3d at 878.

199. *See Williams*, 582 F.3d at 878. The NFL gave three distinct reasons: (1) whether the Policy's ban on bumetanide violates the CPA requires interpretation of the Policy in order to determine whether the ban is a bona fide occupational requirement or necessary to avoid a conflict of interest, (2) the CPA only applies to the use of substances "off the premises of the employer" and "during nonworking hours" such that a court would have to analyze the CBA and the Policy in order to determine whether the CPA applies here, and (3) the Players waived their rights under the CPA when the Union, their bargaining agent, became a party to the Policy. *Id.* at 878–80.

200. *Id.* at 879.

201. *Id.* at 880.

rights completely independent of the NFL's CBA, the rights cannot be waived or altered by union agreement.²⁰²

The players also brought several common law claims against the NFL.²⁰³ Some of the claims were based on the players claiming that the NFL had a duty to "disclose to the players that StarCaps contained bumetanide."²⁰⁴ They argued further that this duty arises from Minnesota law relating to the fiduciary relationship.²⁰⁵ Finding against this argument, the court held that these common law claims were preempted because the court would have to examine the parties' expectations under the CBA.²⁰⁶ As to common law misrepresentation claims, the court held that they would be preempted as well because "whether the players can show that they reasonably relied on the lack of a warning that StarCaps contained bumetanide cannot be ascertained apart from the terms of the [p]olicy."²⁰⁷ The players would only know which ingredients they should have been warned about by looking at the actual drug policy.²⁰⁸ Finally, any emotional distress claim was preempted because whether the NFL's nondisclosure was outrageous enough to warrant the claim required an evaluation of what the parties had agreed their relationship would be under the drug policy.²⁰⁹

An aggrieved NBA player should have the same protections provided for in *Williams*. Section 301 should not, therefore preempt any state law age discrimination claims brought against the NBA. As will be shown, similar results have occurred in non-sports contexts.²¹⁰ Unless the court must interpret actual language, the claim will not be preempted.²¹¹ It is crystal clear that no interpretation is needed in this context, if you are eighteen, you cannot enter the NBA draft.

202. *Id.*

203. *Id.* at 880–81. ("[B]reach of fiduciary duty, aiding and abetting a breach of fiduciary duty, violations of public policy, fraud, constructive fraud, negligent misrepresentation, negligence, gross negligence, intentional infliction of emotional distress, and vicarious liability.").

204. *Id.* at 881.

205. *Williams*, 582 F.3d at 881.

206. *Id.*

207. *Id.* at 882.

208. *Id.* at 881 n.14.

209. *Id.* at 882.

210. *See infra* Part V.B.

211. *Id.*

IV. THE NBA'S AFFIRMATIVE DEFENSE: IS THERE A BONA FIDE OCCUPATIONAL QUALIFICATION?

It is clear that the age requirement is a facially discriminatory policy that constitutes systemic disparate treatment. Once the claim makes it into court, the NBA may be able to admit to their discriminatory practice, but claim an affirmative defense. Because claims in state courts routinely follow the test used when deciding ADEA claims, the NBA will be entitled to an affirmative defense that the age requirement is a bona fide occupational qualification (BFOQ).²¹² It is not unlawful for the employer or a labor organization to make employment decisions based on age “where age is a [BFOQ] reasonably necessary to the normal operation of the particular business.”²¹³

The Supreme Court discussed the use of a BFOQ defense in *Western Airlines v. Criswell*.²¹⁴ In this case, the Court described the defense as an “extremely narrow exception to the general prohibition of age discrimination contained in the ADEA.”²¹⁵ The Court adopted the Fifth Circuit’s two-step inquiry to determine if age is a BFOQ and thus reasonably necessary for the conduct of business.²¹⁶ The first step requires the employer to show the age qualification is

212. See 29 U.S.C. § 623 (2006). See generally *Yanowitz v. L’Oreal USA, Inc.*, 116 P.3d 1123 (Cal. 2005) (holding that test used for an adverse employment claim was whether the action “materially affects the terms, conditions or privileges of employment”); *Fl. State Univ. v. Sondel*, 685 So. 2d 923 (Fla. 1996) (following controlling federal case law that asks first whether there is a legitimate non-discriminatory reason for the policy); *Nunmer v. Mich. Dep’t of Treasury*, 533 N.W.2d 250 (Mich. 1995) (stating that the Michigan Civil Rights Commission has concurrent jurisdiction with the circuit courts); *Bergen Commercial Bank v. Sisler*, 157 N.J. 188 (N.J. 1999) (following federal standards to ensure consistency in discrimination laws); *Civil Serv. Bd. v. Bureau of Labor & Indus.*, 692 P.2d 569 (Or. 1983) (upholding the commissioner’s use of federal law to determine whether rule was a BFOQ).

213. § 623(f)(1).

214. See generally *W. Airlines v. Criswell*, 472 U.S. 400 (1985) (*Criswell* involved an airline rule in which flight engineers were required to retire at age sixty. The airline claimed that the rule was necessary for safety reasons; the same reasons pilots were also required to retire at age sixty. The Court found that flight engineers and pilots did not have the same impact on safety because they could not command the plane and the engineer’s required qualifications were not as stringent. Therefore, the Court held that the airline did not show that the rule was reasonably necessary to the operation of its business).

215. *Id.* at 412 (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977)).

216. See *id.* at 416–17.

“reasonably necessary’ to the company’s central objective.”²¹⁷ If the employer meets its burden under prong one, the second part of the test requires an explanation as to why age needed to be used as a proxy for the job’s qualifications.²¹⁸

A. Reasonably Necessary to the Company’s Central Objective

To show the age requirement was reasonably necessary requires more than simple reasonableness.²¹⁹ An employer cannot use the age requirement only because it is convenient or to its advantage.²²⁰ The Supreme Court explained that the job requirement could not be “so peripheral to the central mission of the employer’s business.”²²¹ Other courts have specified that an employer must show that the fundamental nature of its business operations necessitates the age qualification.²²² To prove this, the employer must provide

217. Eric A. Fox, Note, *An Examination of Mandatory Retirement Provisions for Police Officers*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 101, 108 (2000).

218. *Id.*

219. *Id.*

220. *Id.*

221. See *Int’l Union v. Johnson Controls*, 499 U.S. 187, 216 n.4 (1991). (“An example of a “peripheral” job qualification was in *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, *cert. denied*, 404 U.S. 950 (1971). There, the Fifth Circuit held that being female was not a BFOQ for the job of flight attendant, despite a determination by the trial court that women were better able than men to perform the “nonmechanical” functions of the job, such as attending to the passengers’ psychological needs. The court concluded that such nonmechanical functions were merely “tangential” to the normal operation of the airline’s business, noting “no one has suggested that having male stewards will so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another” (quoting *Diaz*, 442 F.2d at 388).

222. See *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976) (upholding the district court’s finding that bus company policy of refusing to hire individuals over the age of forty, as a driver, was a BFOQ because the company’s business was to ensure passengers safe arrival and applicants over the age of forty are less able to perform job safely); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974) (reversed the district court and held that bus company’s policy of refusing to hire individuals over thirty-five, as a driver, did not violate the ADEA because policy was not arbitrary, but supported by objective evidence of diminished driving capacity); *Criswell v. W. Air Lines, Inc.*, 514 F. Supp. 384 (C.D. Cal 1981) (finding that an airline’s mandatory retirement at age sixty violated the ADEA because the policy was not necessary to the safe operation of the airline’s business); *Murnane v. Am. Airlines, Inc.*, 482 F. Supp. 135 (D.D.C. 1979); *Poteet v. Palestine*, 620 S.W.2d 181 (Tex. App. 1981) (agreeing with Airline that only hiring pilots under the age of forty was necessary to enhance the safety of its passengers)..

objective evidence.²²³ The following two cases reveal how this test is very fact intensive.

In *EEOC v. City of East Providence*, the First Circuit upheld a finding that a police department's age sixty retirement rule did not violate the ADEA.²²⁴ The Police Department argued that age was a BFOQ relating to a need for a certain level of fitness.²²⁵ The department brought forth evidence that showed all of a police officer's duties required certain physical and emotional strength and stamina.²²⁶ There were also facts that showed the department did not evaluate fitness levels of officers under sixty, but the court held that the "physical strength and stamina and the ability to withstand stress are [job qualifications] reasonably necessary to the operation of the [East Providence] police department."²²⁷

Contrary to this, the Sixth Circuit, in *EEOC v. Tennessee Wildlife Resources Agency* found a mandatory retirement age of fifty-five for all wildlife officers was not reasonably necessary to the essence of the business.²²⁸ The court held this even though wildlife officers engaged in law enforcement while regularly working long physically strenuous hours.²²⁹

B. Age as a Proxy

The second half of the test to determine if age is a BFOQ reasonably necessary to conduct business can be satisfied in one of two ways: (a) there is a substantial basis supporting the belief that all, or substantially all, applicants not meeting the age requirement would not be able to safely or efficiently

223. See *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982) (remanding for further fact finding to provide for objective evidence that airline policy which directed pilots be automatically retired at age sixty was necessary for the safety of third party passengers); *EEOC v. St. Paul*, 500 F. Supp. 1135 (D. Minn. 1980) (concluding that the defendant could not show objective evidence to prove that certain firefighters possessed traits that would preclude safe and efficient job performance); *Beck v. Manheim*, 505 F. Supp. 923 (E.D. Pa. 1981) (holding that medical testimony describing the aging process as evidence showed policeman over the age of sixty were less able to meet the job's physical requirements).

224. *EEOC v. City of E. Providence*, 798 F.2d 524, 531 (1st Cir. 1986).

225. *Id.* at 530.

226. *Id.*

227. *Id.* at 529–30.

228. See generally *EEOC v. Tennessee Wildlife Resources Agency*, 859 F.2d 24 (6th Cir. 1988).

229. *Id.* at 24–26.

perform the job duties, or (b) it is “impossible or highly impractical” to ensure the employee will have the necessary qualifications through an individualized assessment into each applicant’s capabilities.²³⁰

The Eighth Circuit addressed this part of the test in *Houghton v. McDonnell Douglas Corp.*²³¹ *Houghton* involved a fifty-two-year-old test pilot who was removed from his position because of age.²³² The court held the company had to bring forth evidence supporting a factual basis under which it determined “substantially all of the older pilots are unable to perform the duties of test pilot safely and efficiently or that some older pilots possess traits precluding safe and efficient job performance unascertainable other than through knowledge of the pilot’s age.”²³³ The company, however, could provide only general evidence.²³⁴ There was nothing to support a claim that the test pilots were unable to perform their duties, justifying the “arbitrary age limit” imposed by the company.²³⁵ Instead the court found medical technology could predict whether a test pilot had a disabling physical condition.²³⁶ The court also relied on statistical research that showed accident rates of test pilots actually decreased with age.²³⁷ For a reverse age discrimination claim against the NBA, the potential player could come forward with statistics showing that, percentage-wise, high school players are more likely to play and play at a high level in the NBA.

Finding age was a BFOQ, the District of Columbia Court of Appeals upheld an American Airlines policy in which flight officers over a certain age would not be hired.²³⁸ The court upheld the requirement because American Airlines showed that when older pilots are hired, they become captain at an older age and then only spend a few years as a captain before

230. See Fox, *supra* note 217, at 110.

231. See generally *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir. 1977).

232. *Id.* at 564 (“Houghton claims he was ‘constructively discharged.’ However, a constructive discharge generally takes place when an employer makes working conditions so intolerable that the employee is forced to quit.”).

233. *Id.* (citing *Weeks v. S. Bell Telephone & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969)).

234. *Id.*

235. *Id.*

236. *Id.*

237. *Houghton*, 553 F.2d at 563.

238. See generally *Murnane v. Am. Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981).

retirement.²³⁹ The Federal Aviation Administration required retirement at age sixty; therefore, when the pilot becomes a captain, American Airlines could not maximize the experience of its captains.²⁴⁰

V. DISCUSSION

A prospective player's case should be a slam-dunk. Assuming that a court would hold that the NBA is an employer, a prospective player from New Jersey, Michigan, or Oregon should bring a claim in state court against both the NBA and the team in that state for violation of the state's age discrimination law. All three states allow actions against an employer based on reverse age discrimination, and getting around the three major issues, reverse age discrimination, section 301 preemption, and BFOQ, should not be difficult.

A. Reverse Age Discrimination

Proving the underlying reverse age discrimination should be the easiest hurdle to overcome because the age requirement is facially discriminatory. The *Sisler*, *Ogden* and *Zanni* courts all protected younger workers who were either fired or not hired because the employer felt the workers were too young for the job.²⁴¹ Just like in *Zanni*, it appears the NBA is seeking to keep these younger players out of the league because of maturity levels.²⁴² If the purpose of these statutes is truly to "eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases,"²⁴³ then the prospective player must be protected just like any other younger worker. It appears that Bill Walker may have been denied entry into the NBA draft because of his age.²⁴⁴ While it is too late for Walker, it is not too late for other prospective high school athletes who are the targets of facially discriminated because of their age.

239. *Id.* at 101.

240. *Id.*

241. See *supra* notes 123–137, 142–152 and accompanying text.

242. See discussion *supra* Part II.B.

243. *Zanni v. Medaphis Physician Servs. Corp.*, 612 N.W.2d 858 (Mich. Ct. App. 1999). Accord discussion *supra* Part II.B.

244. See discussion *supra* Part II.B.

B. Section 301 Should Not Preempt State Law Age Discrimination Claims

In addition to being able to prove the rule does facially discriminate, the prospective player should be able to show that LMRA section 301 does not preempt the state law claim. Congress's hope for uniformity in this realm should not allow the existence of a CBA to ensure preemption of certain state law claims, especially discrimination.

In *Wrobbel v. Asplundh Construction Corp.*, a case from the Eastern District of Michigan, stated as much when it did not allow a defendant construction company's use of section 301 to preempt a claim of discrimination on the basis of sex.²⁴⁵ *Wrobbel* involved a female electrician alleging that a construction company and her union violated Michigan's Elliot-Larson Civil Rights Act when the union failed to refer her to the construction company and the company failed to hire her.²⁴⁶ Denying section 301 preemption, the *Wrobbel* court cited the Supreme Court's decision in *Lingle v. Norge Division of Magic Chef, Inc.*, for the proposition that "not every dispute relating to the terms of collective bargaining agreements is subject to [section] 301 preemption."²⁴⁷ Further, the court quoted the *Lingle* Court's statement that:

[Section] 301 pre-emption . . . says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements

Even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for [section] 301 pre-emption purposes.²⁴⁸

Applying this, the Eastern District of Michigan held that "state anti-discrimination laws are not preempted under section 301" because those state laws are representative of the "independent' claims" discussed in *Lingle*.²⁴⁹ The court

245. *Wrobbel v. Asplundh Constr. Corp.*, 549 F. Supp. 2d 868, 872 (E.D. Mich. 2008).

246. *Id.* at 869–70.

247. *Id.* at 873 (citing *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399 (1988)).

248. *Id.* (quoting *Lingle*, 486 U.S. at 409–10).

249. *Id.* (quoting *Lingle*, 486 U.S. at 407 n.7).

also cited *Tisdale, v. United Association of Journeymen & Apprentices of Plumbing & Pipefitting Industry, Local 704*, where the Sixth Circuit reversed a district court's order granting removal of the plaintiffs' state race discrimination claim and remanded the case with instructions that the case be returned to state court for adjudication.²⁵⁰ In *Tisdale*, the court stated:

[W]e do not believe that the instant case is within the area which Congress meant to occupy in the Taft-Hartley [Labor Management Relations] Act. This is not fundamentally a *labor* case involving negotiated contractual terms, which is what [section] 301 addresses. This is a *discrimination* case involving non-negotiable rights guaranteed by the State of Michigan.

In fact, if any federal law were applicable here it would be not the Taft-Hartley Act but Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, which forbids racial and other discrimination by employers and labor organizations. Title VII specifically does not preempt state civil rights actions. 42 U.S.C. § 2000e-7. It should be self-evident that if Congress did not preempt state civil rights actions by operation of federal civil rights law it could not have meant to do so through federal labor law. As the Supreme Court has stated, "it would be inconsistent with congressional intent under [[section] 301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract."²⁵¹

In addition to these cases, the Ninth Circuit, in *Chimiel v. Beverly Wilshire Hotel, Co.*, held that section 301 does not preempt anti-discrimination statutes because "California's age discrimination law is a nonnegotiable right and applies to both unionized and nonunionized workers."²⁵² Furthermore, the court had previously held that "antidiscrimination statutes were not preempted by section 301 because the right is defined and enforced under state law without reference to the terms of [CBA]."²⁵³ Therefore, even a provision in a CBA must still conform to anti-discrimination statutes.

The rulings in *Wrobbel*, *Tisdale* and *Chimiel* align with the

250. *Wrobbel*, 549 F. Supp. 2d at 873 (citing *Tisdale, v. United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus., Local 704*, 25 F.3d 1308, 1308 (6th Cir. 1994)).

251. *Tisdale*, 25 F.3d at 1312 (quoting *Allis-Chalmers v. Lueck*, 471 U.S. 202, 212 (1985)).

252. *Chimiel v. Beverly Wilshire Hotel, Co.*, 873 F.2d 1238, 1286 (9th Cir. 1989).

253. *Id.* (citing *Ackerman v. W. Elect. Co., Inc.*, 860 F.2d 1514, 1517-18 (9th Cir. 1988)).

Supreme Court's findings in *Allis-Chalmers Corp. v. Lueck*.²⁵⁴ In *Allis-Chalmers*, Justice Blackmun discussed the need to determine whether the claim would create a situation in which the actual meaning of specific contract phrases or terms are being determined by state law.²⁵⁵ This determination is important because the specific contract terms or phrases should be taken as they are written and not defined by the courts or defined or analyzed in reference to state law.²⁵⁶ The Court was careful to point out, however, that "not every dispute concerning employment, or tangentially involving a provision of a [CBA], is preempted by [section] 301 or other provisions of the federal labor law."²⁵⁷ It was not the goal of Congress, the Court found, to replace inconsistent state regulations with the terms of the agreement.²⁵⁸ If the terms of the CBA controlled in all inconsistency situations, unions and employers could contract for terms that would otherwise be illegal under state law.²⁵⁹ The Court also found that although preemption under section 301 would be extended beyond contract claims, it would be inconsistent with Congress's intent to "preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract."²⁶⁰

Therefore, both the Sixth and Ninth Circuits have held that section 301 does not preempt discrimination claims because it is the type of claim that is independent of any contract claim that may arise out of the CBA.²⁶¹ Furthermore, as the *Williams* decision has shown, claims surrounding a sports league's CBA undergo the same analysis as any other CBA.²⁶² In *Williams*, both the DATWA and CPA claims surrounded rights completely independent from the CBA and the court, therefore, determined that those claims could not be preempted under section 301.²⁶³ That would be the case

254. *Allis-Chalmers*, 471 U.S. 202.

255. *Id.* at 211.

256. *Id.*

257. *Id.*

258. *Id.* at 211–12.

259. *Id.* at 212.

260. *Allis-Chalmers*, 471 U.S. at 212.

261. See *Tisdale, v. United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus., Local 704*, 25 F.3d 1308, 1312 (6th Cir. 1994); *Chimiel*, 873 F.2d at 1286 (ninth circuit).

262. See discussion *supra* Part III.B.

263. See discussion *supra* Part III.B.

here as well. The discrimination claim is completely independent from the CBA.

An example of a claim arising out of the NBA CBA is one having to deal with providing medical information. NBA CBA Article XXII contains certain provisions governing the procedure for providing medical treatment and releasing medical information.²⁶⁴ Suppose a player has a claim against the NBA because certain medical information about him was released that should not have been pursuant to the Article. If this claim is brought under state law it will be removed to federal court because it is preempted under section 301. The underlying claim requires the court to interpret the actual language of the NBA CBA discussing medical information. A claim for reverse age discrimination requires no such interpretation. It is clear what the age requirement states; you cannot enter the NBA if you are eighteen. Any attempt by the NBA, therefore, to remove the case to federal court in hopes that the court will apply the ADEA, should be thwarted.

C. Bona Fide Occupational Qualification

The NBA also does not have a valid BFOQ defense to the reverse age discrimination claim. First, the age requirement is not reasonably necessary to the NBA's central objective. Of course, the NBA will argue that this is similar to the facts of *City of East Providence* case in which the court held that the retirement rule did not violate the ADEA because it was tied to a need for certain levels of mental and physical fitness.²⁶⁵ The reality is that the NBA's age rule is not tied to levels of mental or physical fitness. There is simply no evidence to prove that these prospective players will not have the mental or physical capacity to play in the NBA. David Stern's general statements that he does not want young children to grow up thinking the NBA is a viable life path is not an objective this rule can be tied to.²⁶⁶ Also, as stated above, President Joel Litvin, has said that the age requirement "increases the chances that incoming players will have the

264. See NBA CBA, *supra* note 6, at art. XXII.

265. EEOC v. City of E. Providence, 798 F.2d 524, 528-29 (1st Cir. 1986).

266. See discussion *supra* Part I.B.

requisite ability, experience, maturity and life skills.”²⁶⁷ There is just no evidence available to support either of these claims.

Second, even if the NBA can satisfy the first prong, it is unlikely the league would be able to show why age needs to be used as a proxy under these circumstances. Not only is there a lack of specific evidence to support this argument, the evidence that is available shows that there is no reason for age to be used as a proxy. Statistics show that players who entered the league at age eighteen are just as likely, if not more likely, to become stars.²⁶⁸ For example, LeBron James and Kobe Bryant are arguably the two best players in the NBA,²⁶⁹ yet both players entered the NBA Draft directly after high school at age eighteen.

If the NBA had evidence that eighteen-year-old players did not play as well as other players in the league or that there was a high percentage of eighteen-year-olds getting in trouble while playing in the NBA, perhaps there would be a BFOQ. Absent this evidence, the NBA has nothing to support its argument and a BFOQ defense must be denied.

CONCLUSION

Any way the NBA tries to spin it, the minimum age requirement is a facially discriminatory rule. It discriminates against eighteen-year-olds in favor of older players. While the NBA reaps the benefits of being able to see these players in action one more year, the prospective player puts himself at risk of injury, with the possibility that at any moment his dream of playing in the NBA could vanish. Therefore, an eighteen-year-old somewhere may be able to bring suit.

The ADEA provides no help for the teen, as it only protects those forty and older. Regardless, the Supreme Court has decided that it will not allow reverse age discrimination claims under the ADEA. State law does provide some avenues for recovery. Oregon may be the best route for a player’s claim because one does not have to be a resident in Oregon to bring a claim of reverse age discrimination.²⁷⁰ It is

267. *NBA Defends Age Minimum to Congress*, *supra* note 36. *See supra* Part I.B.

268. *See supra* Part I.B.

269. *See West: LeBron Has Chance to Be Greatest*, ESPN (May 19, 2009), <http://sports.espn.go.com/nba/news/story?id=4178437>.

270. *See Ogden v. Bureau of Labor*, 68 Or. App. 235, 240 (Or. Ct. App. 1984).

unclear, on the other hand, whether New Jersey or Michigan would allow such a claim to be brought by an out-of-state resident.

Once in court, the NBA is likely to argue that the claim is preempted both by federal labor law and section 301 of the LMRA. As this Comment has shown, however, these claims are unlikely to pass muster. The ADEA specifically says that it will not preempt state law in this area. In addition, section 301 of the LMRA requires that the court interpret the CBA for the claim to be preempted.²⁷¹ Here, interpretation of the CBA is not needed. If the player is not nineteen, he cannot be hired to play basketball in the NBA. Especially if this claim is brought in the Eighth Circuit, section 301 should not be of issue. If the court holds that a drug policy does not preempt a state drug policy act, then certainly a claim for age discrimination under state law is not preempted. This would also be in line with the Supreme Court decisions holding that employers and labor unions cannot contract for illegal terms in a CBA.

Having most likely lost on preemption grounds, the NBA may be forced to plead an affirmative defense and argue that age is a BFOQ. This is the one area where the NBA may actually have a good argument. The argument should fail, however, because there is overwhelming evidence that shows eighteen-year-olds are able to play in the NBA and in fact play well. Also, the NBA may have stuck its foot in its mouth already with NBA Commissioner Stern claiming that the rule has nothing to do with whether or not a player is able to play in the NBA. Stern was quick to point out that the requirements are put in place to ensure that children do not look at the NBA as the end all of their lives and that they are more likely to become brain surgeons or rocket scientists than NBA players.²⁷² There may be a fair amount of truth to that statement, but that does not excuse the fact that this rule is facially discriminatory.

Therefore, a prospective player bringing a claim of state law reverse age discrimination should feel very confident about winning this case. If the player can find a state court that allows a claim for reverse age discrimination, the NBA better watch out; this case is a slam-dunk.

271. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

272. *See* David Stern, *supra* note 53.