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Missing Link: League Punishments of Team Executives

Michael A. McCann
University of New Hampshire School of Law, michael.mccann@law.unh.edu

MISSING LINK: LEAGUE PUNISHMENTS OF TEAM EXECUTIVES

MICHAEL A. MCCANN*

ABSTRACT

Is it lawful for a professional sports league to punish an executive of a team when that executive isn't employed by the league and, unlike a player, isn't a member of a union that collectively bargains with the league?

The answer to this question has long been presumed as "yes," despite the non-employing league lacking a contractual link to the executive—a third party—it fines, suspends, or even bans from employment with businesses owned by others.

This Article challenges that presumption. It does so by applying employment law, franchise law, and private association law to the unique relationship between sports leagues and their independently owned franchises. The Article balances the absence of a contractual relationship with league interests in fair play and orderly structure.

To date, this topic has been overlooked in legal scholarship. Yet it is timely given recent high-profile punishments of team executives in several of the major leagues.

* Director of the Sports and Entertainment Law Institute and Professor of Law, University of New Hampshire Franklin Pierce School of Law; Legal Analyst and Senior Writer, *Sportico*; On-Air Legal Analyst, NBA TV. The author would like to thank his colleagues for reviewing drafts and offering suggestions and Kara McCann and Willa McCann for their support and inspiration.

INTRODUCTION

Professional sports leagues in the United States routinely suspend, fine, or even bar executives of independently owned teams. Leagues undertake these actions despite lacking a contractual relationship with those whom they punish. This is a unique practice in the American workforce. While employers, often in accordance with workplace or collectively bargained policies, can take adverse actions against workers, third parties are normally without standing to affect such measures.

Sports leagues operate differently. As joint ventures, leagues are expected to maximize the collective interests of teams, even if doing so harms the interests of one team or, by extension, one person who works for a team. Such a framework has generally received support by courts, though usually in the context of agreements signed by players, owners, or teams. Team executives, in contrast, do not enter into those league-wide or team-to-team agreements. Their employment interests are also owed to employing teams rather than the league at-large.

This Article undertakes a "first of its kind" exploration into the idiosyncratic phenomenon of league punishments of team executives. It does so mainly through the lens of employment law, franchise law, and private association law, and by drawing attention to the distinct features of sports leagues. This Article concludes by attempting to resolve legally problematic tensions endemic in a non-employer punishing a third party for employment-related transgressions.

I. COMPETING APPLICATIONS OF FIDUCIARY DUTIES AND LEAGUE GOVERNANCE

When the National Basketball Association ("NBA") fined Philadelphia 76ers President of Basketball Operations Daryl Morey $50,000 in 2020 over an automated tweet, the league's explanation made sense within the context of rule administration.[1] The tweet, which Morey deleted within minutes of publication, praised the accomplishments of a player, Houston Rockets Star James Harden, whom the 76ers eyed in a trade.[2] The league's prohibition against tampering contemplates a strict liability scheme: any attempt, no matter how trivial and irrespective of intent, to solicit a person who is under contract with another team

1. *NBA fines Daryl Morey $50K for Violating Anti-tampering Rule*, NBA (Dec. 28, 2020, 2:20 PM), https://www.nba.com/news/nba-fines-daryl-morey-50k-for-violating-anti-tampering-rule (explaining that Morey had been fined).

2. Michael McCann, *Morey Tampering Fine for Automated Tweet Finds No Sympathy in NBA Rules*, SPORTICO (Dec. 28, 2020, 1:54 PM), https://www.sportico.com/law/analysis/2020/daryl-morey-james-harden-1234619205/.

is prohibited.[3] From that lens, even an unintended tweet extolling another team's player justified punishment.

Left undiscussed was the fiduciary relationship—or lack thereof—between the NBA and Morey. How could a sports league sanction a person who is neither employed by that league nor a member of any relevant bargaining unit? Unlike an NBA employee, who is paid by the NBA, an NBA player, who is employed by a team but represented by a union that negotiates working conditions with the league, or a team owner, who contractually assents to certain league authorities, Morey's employer is the 76ers. He is not a member of a union, and the NBA doesn't employ him.[4] His employment duties are captured in his 76ers' contract and the team's workplace policies—and they are owed to his employer, not third parties. The NBA can neither hire Morey as a 76ers employee nor fire him in that capacity.[5]

The Morey example is not unique to the NBA or to professional sports. In 2014, the NBA fined Toronto Raptors General Manager Masai Ujiri $25,000 for screaming "F--- Brooklyn" in front of Raptors fans before the team would play the Brooklyn Nets.[6] Not long earlier, the Women's National Basketball Association ("WNBA") fined Minnesota Lynx Cheryl Reeve for throwing her jacket at an assistant coach during a game.[7] A couple of years ago, Major League Baseball ("MLB") suspended former Houston Astros General Manager Jeff Luhnow for his role in the team's electronic sign-stealing scandal.[8] The Astros also fired Luhnow, who in turn sued the Astros for breach of contract.[9] Most recently, the National Hockey League ("NHL") suspended former Arizona Coyotes General Manager John Chayka through 2021.[10] Chayka's infraction

3. Constitution & By-laws, NBA, at 47, 50–51 (Sept. 2019), https://ak-static.cms.nba.com/wp-content/uploads/sites/4/2019/09/NBA-Constitution-By-Laws-September-2019-1.pdf [hereinafter NBA Constitution].

4. Collective Bargaining Agreement, NBA, at 339 (July 2017), https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf.

5. *See* NBA Constitution, *supra* note 3, at 46 (allowing teams to operate in accordance with their own business judgment in situations where a rule is not provided by the Constitution or its Bylaws).

6. Ben Golliver, *NBA Fines Raptors GM Masai Ujiri for Cursing Brooklyn*, SPORTS ILLUSTRATED (Apr. 21, 2014), https://www.si.com/nba/2014/04/21/masai-ujiri-warned-nba-fine-toronto-raptors-gm-brooklyn.

7. David Woods, *New Name on Jerseys*, INDIANAPOLIS STAR, Oct. 20, 2012, at C8.

8. Nathaniel Grow & Scott J. Shackelford, *The Sport of Cybersecurity: How Professional Leagues can Better Protect the Competitive Integrity of their Games*, 61 B.C. L. REV. 473, 507 (2020).

9. Michael McCann, *Luhnow Sues Astros to Keep Lid on Scandal*, SPORTICO (Nov. 10, 2020), https://www.sportico.com/law/analysis/2020/astros-gm-luhnow-sues-team-1234616376/.

10. Sean Leahy, *NHL Reportedly Suspends Ex-Coyotes GM John Chayka for Rest of Year*, NBC SPORTS (Jan. 25, 2021), https://nhl.nbcsports.com/2021/01/25/nhl-reportedly-suspends-ex-coyotes -gm-john-chayka-for-rest-of-year/.

was the manner in which he quit his job with the Coyotes.[11] NHL Commissioner Gary Bettman regarded Chyaka's behavior as "conduct detrimental to the league."[12] The suspension prohibits any NHL team from employing Chayka.[13]

The uniqueness of this punishment schema is apparent when comparing it to analogous workplace settings. Consider a university that disciplines a law school professor.[14] The professor reports to his or her law school dean, and the professor's duties and responsibilities are generally set and enforced by the law school rather than the university at large.[15] In that vein, the professor might be akin to a general manager of a team, rather than a league worker. That debatable resemblance breaks down upon closer review. Ordinarily, the professor's formal employer is the university or university system, not the law school.[16] The professor's capacity to advance in rank is also usually contingent on university provost and trustee support.[17] Alternatively, consider when the White House, on behalf of the President of the United States, directs or urges remedial measures against persons who work for federal agencies.[18] In a sense, the White House is functioning like a league, with agencies as teams. But when assessing the role of punishment, this parallel doesn't withstand scrutiny. For one, there are well-established legal limits to the President's ability to sanction or replace agency employees.[19] For another, the agency employee is not employed by a separate

11. *Id.*

12. *Id.*

13. *Id.*

14. *See, e.g.*, Leonora LaPeter & Gary Fineout, *New Allegation Brings Professor a Suspension*, TALLAHASSEE DEMOCRAT, June 12, 1998, at 1 (discussing Florida State's suspension of a law professor over alleged misconduct with a student and detailing how the university would investigate him).

15. *See, e.g.*, Memo. of Law in Support of Defendants' Motion to Dismiss the Complaint at 7–8, Fletcher v. Columbia Univ., No. 152759/2017 (N.Y. Sup. Ct. May 23, 2017) (explaining how law school administration establishes the professor's duties); *see also* Julianne Basinger et al., *Suspended Law Professor Loses Tenured Job*, CHRON. HIGHER ED., May 9, 2003, at A10 (discussing a law school covering teaching assignments of a professor who became unavailable).

16. *See* Memo. of Law in Support of Defendants' Motion to Dismiss the Complaint, *supra* note 15 at 2.

17. *See* Claire R. Rollor, *Narrowing the Gender Pay Gap by Providing Equal Opportunity: The Need for Tenured Female Professors in Higher STEM Institutions in an Effort to Recast Gender Norms*, 21.2 UCLA WOMEN'S L. J. 143, 151–52 (2014) (explaining how a professor's ability to gain tenure is normally contingent on approval by the provost and university trustees).

18. Erich Wagner, *White House Advisor Sought Legal Opinion to Allow Trump to Fire Anyone In Government*, GOVT. EXEC. (June 25, 2020), at https://www.govexec.com/management/2020/06/white-house-advisor-sought-legal-opinion-trump-can-fire-anyone-government/166445/.

19. Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1773–74 (2013) (distinguishing the President and agencies as entities and noting that the President's ability to take action against agency leaders and employees varies based on the classification of the position and type of agency).

ownership group, like a general manager of a team—the employee works for the federal government, just like the President himself or herself.[20]

Leagues' ability to sanction non-unionized employees of individual franchises stems from the contractual relationship between franchises and their employees. Employment contracts between teams and their executives contain language requiring executives to accept league discipline.[21] For instance, in the NBA, executives assent to Article 35A of the league constitution, a document that governs the legal relationship between franchises and the league.[22] Article 35A is expressed as governing teams' non-player employees.[23] Teams are obligated to "provide and require in every contract with any of its owners, officers, managers, coaches or other employees that they should be bound and governed by the Constitution."[24] Article 35A further allows the commissioner to impose a fine of up to $5 million and a suspension of a length of the commissioner's for any conduct the commissioner finds is "conduct prejudicial or detrimental to the Association."[25] The decision of the commissioner is also "final, binding, conclusive, and unappealable."[26]

MLB adopts a similarly dictatorial approach. Under Article VI of the league's constitution, all contracts between MLB clubs and their officers and employees "shall contain a clause by which the parties agree to submit themselves to the jurisdiction of the Commissioner, and to accept the Commissioner's decisions rendered in accordance with this Constitution."[27] Mindful of the possibility of attempts to contract around Article VI and other provisions, Article VII declares that the constitution "shall supersede any conflicting provisions of any other agreement, as amended, whether now existing or hereinafter entered into, to which any Major League Club is a party and any conflicting actions taken pursuant thereto."[28] MLB has used league rules

20. *See* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L. J. 1256, 1303 (discussing the origins of federalizing executive branch officials).

21. NBA Constitution, *supra* note 3, at 6.

22. *See* Riko Enters., Inc. v. Seattle Supersonics Corp., 357 F. Supp. 521, 524 (S.D.N.Y. 1973) ("The NBA constitution is a contract between the member teams of the NBA."); *see also* Desir v. Spano, 259 A.D.2d 749, 749 687 N.Y.S.2d 411, 411 (N.Y. App. Div. 1999) ("The constitution and by-laws of an unincorporated association express the terms of a contract which define the privileges secured and the duties assumed by those who have become members.").

23. *See* NBA Constitution, *supra* note 3, at 48 (noting "the provisions" shall apply to "employees, agents or representatives of a Member [franchise] or Owner").

24. *Id*.

25. *Id.* at 49.

26. *Id.* at 52.

27. *See* Major League Const., art. VI, § 3 (2005), https://ipmall.law.unh.edu/sites/default/files/hosted_resources/SportsEntLaw_Institute/League%20Constitutions%20&%20Bylaws/MLConsititutionJune2005Update.pdf [http://perma.cc/L2VA-6MU4] [hereinafter MLB Constitution].

28. *Id.* at art. VII.

to punish team employees.[29] Most famously, MLB expelled Cincinnati Reds manager Pete Rose from any relationship with the league or its teams as a penalty for alleged violations of an anti-betting rule.[30] The willingness of leagues to regulate teams' employees with whom they lack an employment or labor relationship exhibits selective timing. Leagues play only bounded roles in teams' hiring of executives.[31] There are no league-mandated eligibility requirements for coaches or general managers.[32] Likewise, the league doesn't participate in job interviews or hold veto power over teams' hiring choices.[33] One partial exception: ensuring a diverse applicant pool. For example, the NFL's "Rooney Rule" requires that teams interview minority candidates and, by dangling additional draft picks, rewards teams that draw from diverse applicant pools.[34] MLB utilizes a similar, albeit less commanding policy, dubbed the "Selig Rule."[35] It requires teams to "consider," though not interview, female or minority candidates for front office and on-field positions.[36] Still, teams' decisions on who to hire is ultimately up to those teams.

League officials also sometimes exhibit caution at the prospect of punishing team employees. After coaches and general managers criticized NHL referees in 1978, the NHL demurred on issuing reprimands.[37] The world's top hockey league reasoned that team owners are responsible for policing their own employees.[38] Until the last two decades, leagues also refrained from instituting rules that, under threat of penalty, compel teams to follow health protocols designed to mitigate the risk of neurological trauma.[39] Even in instances where

29. *See* Kendall Howell, *You Can Bet On It: The Legal Evolution of Sports Betting*, 11 HARV. J. SPORTS & ENT. L. 73, 75 (explaining the Pete Rose scandal and its aftermath).

30. *Id.* at 75–80.

31. Jeff Zillgitt, *NBA Nears Record with New Black Coaching Hires: 'The Last Few Weeks Have Been Really Cool'*, USA TODAY (updated July 29, 2021), https://www.usatoday.com/story/sports/nba/2021/07/28/seven-hires-nba-nears-record-number-black-coaches/5374290001/.

32. *Id.*

33. Jamillah Bowman Williams, *Accountability as a Debiasing Strategy: Testing the Effect of Racial Diversity in Employment Committees*, 103 IOWA L. REV. 1593, 1631 (2018) (explaining that "in the context of the NFL, for example, most head coach hiring decisions are made by some combination of the team's owner, presidents, vice presidents, and general managers.").

34. James Wagner, *Hailed as a Trailblazer, Ng Still Stands Alone*, N.Y. TIMES, Jan. 30, 2021, at B7.

35. Nathaniel Grow, *MLB Announces New Minority Hiring Initiative*, FANGRAPHS (Aug. 17, 2015), https://blogs.fangraphs.com/mlb-announces-new-minority-hiring-initiative/.

36. *Id.*

37. Parton Keese, *N.H.L. Focused on Boe*, N.Y. TIMES (June 13, 1978), https://www.nytimes.com/1978/06/13/archives/nhl-focuses-on-boe-some-progressbut-canadiens-trophy-leaders-too.html; James Christie, *Islander Debts Under Discussion at NHL Meetings*, GLOBE & MAIL, June 12, 1978 (Can.).

38. Christie, *supra* note 37.

39. Colin Fly, *APNewsBreak: NBA Mulling Formal Concussion Policy*, ASSOCIATED PRESS, Mar. 9, 2011.

leagues punish teams for failure to adhere to health protocols, those punishments are levied on the teams themselves, rather than the infringing employees.[40]

II. LEAGUES AS PRIVATE ASSOCIATION JOINT VENTURES

The relationship between leagues and teams' officials stems from the connection between leagues and their teams. Courts have regarded pro leagues where teams are independently owned as joint ventures.[41] These are associations "of two or more persons formed to carry out a single business enterprise for profit for which purpose they combine their property, money, efforts, skill, and/or knowledge."[42] Sports leagues operate at the collective behest of teams, whose owners elect the commissioner and can fire him or her.[43] At the same time, the commissioner enjoys sizable authority over teams and is bestowed with final say on matters impacting the league.[44] Indeed, laws governing private associations empower the commissioner and other league officials to act akin to a chief executive officer and corporate boards.[45] Courts usually accord such associations deference in decision-making and rule-making, so long as such activities are not arbitrary or fraudulent.[46] To illustrate, in *Atlanta National League Baseball Club, Inc. v. Kuhn*, a federal court ruled that while a league

40. Ken Belson, *N.F.L. Introduces New Rules to Back Concussion Protocol*, N.Y. TIMES, July 26, 2016, at B13.

41. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 520 Fed. Appx. 61 (3d Cir. 2013) (describing the NBA as a joint venture); Williams v. Nat'l Football League, 598 F.3d 932, 933 (8th Cir. 2009) (calling the NFL a joint venture). There are other types of pro sports leagues, including single entity leagues where the league owns all of the teams and directly employs players, coaches and other staff. *See generally*, Nathaniel Grow, *There's No "I" in "League": Professional Sports Leagues and the Single Entity Defense*, 105 MICH. L. REV. 183, 185–87, 189 (2006) (explaining there are other types of pro sports leagues, including single entity leagues where the league owns all the teams and directly employs players, coaches and other staff).

42. 46 AM. JUR. 2D *Joint Ventures* § 1 (2017).

43. Michael J. Willisch, *Protecting the "Owners" of Baseball: A Governance Structure to Maintain the Integrity of the Game and Guard the Principals' Money Investment*, 88 NW. U. L. REV. 1619, 1620–21 (1994); *see also* Hal McCoy, *Firing Vincent was Step by Owners Toward Strike*, ST. LOUIS POST-DISPATCH, Aug. 15, 1994, at 4C (discussing the "firing" of MLB commissioner Faye Vincent).

44. Charles O. Finley & Co., Inc. v. Kuhn, 569 F.2d 527, 532 (7th Cir. 1978) (explaining history of the commissioner in baseball and how the position enjoys authority outside of ownership groups and is designed to ensure control over the sport itself).

45. Marc Edelman, *Are Commissioner Suspensions Really Any Different from Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade*, 58 CATH. U. L. REV. 631, 634 (2009).

46. *See, e.g.*, Milwaukee Am. Ass'n v. Landis, 49 F.2d 298, 301–03 (N.D. Ill. 1931) (holding commissioner has substantial latitude to void a transaction between teams in order to protect the best interests of the league when such voidance is not arbitrary or fraudulent); *see also* Note, *Out of Bounds: Professional Sports Leagues and Domestic Violence*, 109 HARV. L. REV. 1048, 1060 (discussing the latitude courts generally afford commissioners).

commissioner could punish an owner for commenting on another team's pending free agents in violation of a tampering rule, stripping the owner's team of a first-round pick was arbitrary since it was not listed by relevant rules as a possible penalty.[47]

Courts have also thought of leagues as franchisors and teams as franchisees.[48] This label works on several levels. One is that leagues, like franchisors, establish rules and policies that each team (franchise) must follow in order to advance collective interests.[49] To that end, both leagues and typical franchisors, such as fast food and retail chains, require teams/franchisees to follow operations manuals.[50] These manuals are designed to ensure consistency in presentation and experience.[51] Such policies might, for instance, specify the number of towels and soft drinks home teams must provide visiting teams or the temperature at which a fast food restaurant's burgers are grilled.[52] Teams and franchises are similar in regard to individual ownerships that act as "part of the cooperative enterprise."[53]

Yet, there are crucial distinctions between pro leagues and franchisors. For example, while leagues feature salary caps that limit the dollar amounts teams can spend on players—including, in some leagues, maximum salaries[54]—franchisors typically reserve wage and salary decisions to individual franchises.[55] Teams also directly compete in myriad ways that are unique to the

47. 432 F. Supp. 1213, 1222–26 (N.D. Ga. 1977).

48. Am. Needle, Inc. v. New Orleans La. Saints, 385 F. Supp. 2d. 687, 696 (N.D. Ill. 2005); *see also* Cont'l Basketball Ass'n v. Ellenstein Enters., Inc., 640 N.E.2d 705, 706 (Ind. App. 1994) (describing the Continental Basketball Association as a franchisor that sells franchises or member clubs).

49. *Cont'l Basketball Ass'n*, 640 N.E.2d at 708.

50. Nicolas Saenz, *Sports Franchise Bankruptcy: A New Way For Team Owners To Escape League Control?*, 10 VA. SPORTS & ENT. L.J. 63, 70–73 (2010).

51. *See* Ferrer v. Jewelry Repair Enters., 310 So.3d 428, 429 (Fla. Dist. Ct. App. 2021). (noting that franchises value "uniform standardization of products and services" and the relationship with franchisees "contemplates regular and ongoing support from the franchisor").

52. Samuel J. Horovitz, *If You Ain't Cheating You Ain't Trying: "Spygate" and the Legal Implications of Trying Too Hard*, 17 TEX. INTELL. PROP. L.J. 305, 318 (2009); Doreen Hemlock, *Whopping Winners*, S. FLA. SUN-SENTINEL, May 5, 1998; James W. Denison, *Why It's Tough to have Hard-and-Fast Rules about Operations Manuals*, 30 FRANCHISE L.J. 239, 241 (2011).

53. Saenz, *supra* note 50, at 71.

54. Scott R. Rosner, *Conflicts of Interest and the Shifting Paradigm of Athlete Representation*, 11 UCLA ENT. L. REV. 193, 244 (2004); *see also* Richard A. Kaplan, *The NBA Luxury Tax Model: A Misguided Regulatory Scheme*, 104 COLUM. L. REV. 1615, 1626 (2004) (discussing the NBA's use of maximum salaries for rookies).

55. Kate Taylor, *McDonald's Is Raising Employees' Wages, But Only at Corporate Locations*, ENTREPRENEUR (Apr. 1, 2015), https://www.entrepreneur.com/article/244641; *see also* Ruben Alan Garcia, *Modern Accountability for a Modern Workplace: Reevaluating the National Labor Relations Board's Joint Employer Standard*, 84 GEO. WASH. L. REV. 741, 746–47 (discussing limited impact of McDonalds' raising wages).

sports industry and distinguishable from the typical franchisor-franchisee relationship. Most obviously, they battle on the field, court, and rink. Teams also contend in ancillary components of "in-game" competition, such as in drafting amateur players, signing players, and recruiting coaches and scouts.[56]

While teams compete, they also collaborate, sometimes out of necessity. They must agree on game rules and scheduling, or a competitive game between two teams would be impossible.[57] While not essential to the playing of organized games, teams' acceptance of league-wide economic restraints, such as agreed-upon deadlines and restrictions, help to create an orderly system for competition.[58] Likewise, teams prefer to assign certain authorities to a neutral party: the commissioner.[59] The role of the commissioner is thought to have begun in the late 19th century with the rise of the National League—considered the first "true" major professional league.[60] The league was initially run by a board, which eventually hired coal magnate William Hulbert to lead operations.[61] Hulbert would spark controversy, including by banning players for fixing games and even expelling a team, the Cincinnati Red Stockings, for playing games and serving beer on Sundays.[62] Over the next century other commissioners would adopt the role of the "final arbiter of disputes between leagues and clubs," with the goal of seeking remedies for conduct "detrimental to the best interests" of the league.[63] To that end, commissioners would receive

56. *See* Sullivan v. Nat'l Football League, 34 F.3d 1091, 1098 (1st Cir. 1994) ("it is well established that NFL clubs also compete with each other, both on and off the field, for things like fan support, players, coaches, ticket sales, local broadcast revenues, and the sale of team paraphernalia."); *see also*, Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1393 (9th Cir. 1984) (noting that teams in the same geographic market compete for fans).

57. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 202 (2010) (distinguishing that NFL teams "must cooperate in the production and scheduling of games"). While teams must conspire, they must also bargain numerous wage, hour, and other workplace rules with players' associations in order to gain protection of the non-statutory labor exemption. The exemption immunizes leagues from scrutiny of Section I of the Sherman Antitrust Act. *See* Gabe Feldman, *Collective Bargaining in Professional Sports*, *in* THE OXFORD HANDBOOK OF AMERICAN SPORTS LAW 209, 216–17 (Michael A. McCann ed., 2018).

58. *Am. Needle, Inc.*, 560 U.S. at 201 (explaining that individual teams share a common interest in the league operating as a profitable enterprise).

59. Nat'l Hockey League Players' Ass'n v. Bettman, No. 93 Civ. 5769 (KMW), 1994 WL 738835, at *14 (S.D.N.Y. Nov. 9, 1994) (discussing how team owners created position of the commissioner and responsibilities).

60. Jimmy Golen & Warren K. Zola, *The Evolution of the Power of the Commissioner in Professional Sports in* THE OXFORD HANDBOOK OF AMERICAN SPORTS LAW 19, 21 (Michael A. McCann ed., 2018).

61. *Id.*

62. *Id.* at 22.

63. Matthew B. Pachman, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409, 1415 (1990).

authorities guided by a "broad mandate to preserve fundamental aspects of fairness" of their leagues, including in regard to preventing cheating and untoward influences from gamblers.[64]

These authorities are normally captured in the league constitution, which is typically joined by bylaws.[65] All of the teams within a league sign this document and assent to be bound by its terms.[66] Leagues are obliged to act within the terms of the constitution when issuing punishments.[67] This was apparent early in the development of professional sports leagues. In 1919, a New York court issued an injunction against Bryon Johnson, president of MLB's American League, after the Boston Red Sox sued Johnson for acting outside the scope of his powers.[68] Johnson had suspended Red Sox Pitcher Carl Mays for desertion after Mays had left the ballpark in the middle of a game.[69] The Red Sox objected to the suspension and deemed it tantamount to a punishment of the club for which Johnson lacked the contractual authority to impose.[70] Johnson argued he acted within a general welfare/best interests of the game provision which gave him the authority to "to impose fines or penalties, in the way of suspension or otherwise, upon any manager or player who, in his opinion, has been guilty of conduct detrimental to the general welfare of the game."[71] The court sided with the Red Sox, reasoning that welfare of the game concerns on-field activities, not those off the field, and therefore Johnson acted beyond the scope of his position's authority.[72]

Although rare, teams have challenged their own leagues in court over the parameters of the relationship between franchisor and franchisee. In *Madison Square Garden v. National Hockey League*[73] the New York Rangers insisted that the NHL violated Section I of the Sherman Act by controlling the team's official website.[74] The Dallas Cowboys, which sued the NFL in a dispute over

64. Aaron S.J. Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, 119 YALE L.J. ONLINE 113, 123–24 (2010).

65. Robert Ambrose, Note, *The NFL Makes it Rain: Through Strict Enforcement of its Conduct Policy, the NFL Protects its Integrity, Wealth, and Popularity*, 34 WM. MITCHELL L. REV. 1069, 1091–92 (2008).

66. *See* Olson v. Major League Baseball, 447 F. Supp. 3d 159, 167 (S.D.N.Y. 2020) ("All of MLB's member Clubs have entered into an operating agreement, the Major League Constitution, pursuant to which all teams agree to be bound by all rules and regulations relating to games").

67. Am. League Baseball Club of N.Y. v. Johnson, 109 Misc. 138, 138 (N.Y. Sup. Ct. 1919).

68. *Id.* at 139–40, 152.

69. *Id.* at 141.

70. *Id.* at 143.

71. *Id.* at 144.

72. *Am. League Baseball Club of N.Y.*, 109 Misc. at 149.

73. Madison Square Garden, L.P. v Nat'l Hockey League, No. 07 CV 8455(LAP), 2008 WL 4547518, at *1 (S.D.N.Y. Oct. 10, 2008).

74. *Id.* The parties settled their dispute in March 2009. *See* Stipulation and Order of Dismissal, Madison Square Garden, L.P. v. Nat'l Hockey League, No. 07 CDCVCD 8455(LAP) (S.D.N.Y.

the sharing of merchandise revenue,[75] and the Oakland Raiders, which litigated against the NFL over the team's relocation plans,[76] are other noteworthy examples. To be clear, in none of those examples were team employees sanctioned or otherwise punished by the associated league.

Leagues have also stressed separation from their teams and their employees when doing so proves legally advantageous. In *Cortez v. National Basketball Ass'n*, the NBA successfully argued it was not the proper defendant in an Americans with Disabilities Act case.[77] A group of hearing-impaired individuals had sued the league and the San Antonio Spurs.[78] The plaintiffs sought an injunction that would have required the NBA to offer interpretative and captioning services at Alamodome, where the Spurs played their home games.[79] The NBA filed a motion to dismiss, maintaining it was neither the operator nor owner of the facility.[80] The plaintiffs protested, stressing that the production of NBA games leads the league to possess "profound control" over the venues where NBA games are played.[81] The federal district court ruled for the NBA, noting that while the NBA as a franchisor could be held liable as an operator of places of public accommodation (franchisees' arenas), the league's established control did not extend to arena decisions concerning interpretative and captioning services.[82]

Meanwhile, litigation brought by team employees over workplace disputes has typically involved the employee and team, rather than the employee and the league. In 2007, a jury awarded former New York Knicks Executive Anucha Browne Sanders $11.6 million for sex discrimination and retaliation claims brought against Madison Square Garden General Manager Isiah Thomas and Chairman James Dolan.[83] Her complaint made clear she reported to the team's

Mar. 23, 2009). Currently, the NHL controls websites of the individual teams. *See Privacy Policy*, NHL (updated Jan. 16, 2020), https://www.nhl.com/info/privacy-policy.

75. Dallas Cowboys Football Club, Ltd. v. Nat'l Football League Trust, No. 95 CIV. 9426, 1996 WL 601705, at *1 (S.D.N.Y. Oct. 18, 1996).

76. L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1384–85 (9th Cir. 1984), *cert. denied*, Nat'l Football League v. Oakland Raiders, Ltd., 469 U.S. 990 (1984).

77. Cortez v. Nat'l Basketball Ass'n, 960 F. Supp. 113, 118 (W.D. Tex. 1997).

78. *Id.* at 114.

79. *Id.*

80. *Id.*

81. *Id.* For instance, the NBA issued thirty-five pages of guidelines to teams on operation of their facilities. *Id.* at 115.

82. *Id.* at 115, 117.

83. Amy Tracy, Note, *Athletic Discipline for Non-Sport Player Misconduct: The Role of College Athletic Department and Professional League Discipline and the Legal System's Penalties and Remedies*, 9 VA. SPORTS & ENT. L.J. 254, 261 (2010); *see also* Browne Sanders v. Madison Square Garden, L.P., 101 Fair Empl. Prac. Cas. (BNA) 390 (S.D.N.Y. 2007).

president, Steve Mills, and was evaluated by the Knicks, not the NBA.[84] Still, Browne Sanders served as the Knicks' primary liaison to the NBA.[85] Moreover, despite the NBA contractually requiring teams adhere to a sexual harassment policy, the NBA declined to punish the Knicks—a move that could have furnished Browne Sanders with grounds to challenge the NBA.[86] She nonetheless demurred on alleging any liability or wrongdoing on the part of the league.[87]

Similarly, much of the litigation brought by NFL cheerleaders over alleged pay discrimination and hostile work environments has been directed against teams and their ownership groups, rather than the league itself.[88] The underlying logic is that teams, as opposed to the league, are responsible for the cheerleaders' pay, workplace conditions and protections, and duties under employee handbooks.[89] In *Jaclyn S. v. Buffalo Bills*, members of the Buffalo Jills—the Bills' cheerleading squad—sued the team alleging it failed to pay minimum wage as required by New York labor law.[90] The Bills maintained the cheerleaders were employed by a third party that provided cheerleading services to the Bills.[91] Analogous arguments were raised in *Lacy T. v. Oakland Raiders*.[92] There, former members of the Raiderettes alleged the team had failed to pay minimum wages, overtime compensation, reimbursement for business expenses, and meal and rest breaks.[93]

84. Complaint at 5, Browne Sanders v. Madison Square Garden, L.P., 101 Fair Empl. Prac. Cas. (BNA) 390 (S.D.N.Y. 2007) (No. 06 CV 00589MSG).

85. *Id.*

86. *See* Tracy, *supra* note 83, at 262 (explaining how the NBA declined to punish the Knicks or any of its employees).

87. Complaint, *supra* note 84, at 1.

88. *See, e.g.*, Prince v. Madison Square Garden, 427 F. Supp. 2d 372, 375–77 (S.D.N.Y. 2006) (cheerleader for the New York Rangers sued Madison Square Garden over alleged unwelcomed sexual advances and harassment); First Amended Class Action Complaint at 2, Brenneman v. Cincinnati Bengals, Inc., 2014 WL 548864 (S.D. Ohio 2014) (No. 1:14-cv-136); *see also* Heylee Bernstein, *Cheerleaders in the NFL: Employment Conditions and Legal Claims*, 10 HARV. J. OF SPORTS & ENT. L. 239, 240 (2019) (discussing cheerleader litigation brought against individual teams).

89. *See* Bernstein, *supra* note 88, at 252–54.

90. Jaclyn S. v. Buffalo Bills, Inc., No. 804088-2014, 2014 WL 3700677, at *1 (N.Y. Sup. Ct. July 1, 2014).

91. *Id.*

92. Lacy T. v. Oakland Raiders, No. A144707, 2016 WL 7217584, at *1 (Cal. Ct. App. Dec. 13, 2016).

93. *Id.* The class action would end in a $1.25 million settlement. *See For N.F.L. Cheerleaders, Rigid Rules Start to Grate*, N.Y. TIMES, Apr. 8, 2018, at SP4. Note that cheerleader litigation has not been limited to the NFL. In *Prince v. Madison Square Garden*, 427 F. Supp. 2d 372, 377 (S.D.N.Y. 2006), cheerleaders for the New York Rangers NHL club sued over hostile work environment. The case would settle out of court. *See* Susan Schultz Laluk & Sharon P. Stiller, *Employment Law*, 58 SYRACUSE L. REV. 955, 974 (2008).

There have been exceptions, with aggrieved team employees or would-be team employees suing the league. However, plaintiffs in those cases have pleaded conspiracies against leagues and teams, as opposed to individualized misconduct by the league. In *Kelsey K. v. NFL Enterprises*, a group of former NFL cheerleaders sued the league and its teams on the theory that they colluded to suppress wages for cheerleaders employed by teams.[94] United States District Judge William Alsup dismissed the lawsuit on grounds the complaint failed to allege facts "supporting a plausible inference that the defendants entered into any agreement or conspiracy to unlawfully restrain trade."[95] The NFL is also named as a defendant in *Caitlin Ferrari et al. v. National Football League & Buffalo Bills, Inc*.[96] In that ongoing case, former cheerleaders acknowledge the NFL is not their employer but assert "derivative claims of aiding and abetting" against the league for its influence on cheerleader salaries.[97] Meanwhile, in the context of disability law, former NBA Player Roy Tarpley sued the league and a team (the Dallas Mavericks) over his assertion that exclusion from the league on the basis of a lifetime ban constituted a violation of the Americans with Disabilities Act.[98] Tarpley, who played for the Mavericks until his banishment for violating league alcohol and drug policies, reached a settlement with the NBA and Mavericks before a federal court issued substantive rulings.[99]

III. LESSONS FROM FRANCHISE LITIGATION

The lack of relationship between franchisors and employees of franchisees has furnished a valuable defense to franchisors.[100] Such dynamic highlights how franchisors view franchise employees as outsiders—a stark contrast from how sports leagues regard franchise employees as within their scope of authority.

This framework was evidenced in *Patterson v. Domino's Pizza*.[101] There, the California Supreme Court refused to hold a franchisor liable for possible sexual harassment in the workplace of a franchisee.[102] An employee of a

94. Kelsey K. v. NFL Enterprises, LLC, 254 F. Supp. 3d 1140, 1142–43 (N.D. Cal. 2017).

95. *Id.* at 1148.

96. 153 A.D.3d 1589 (N.Y. App. Div. 2017).

97. Brief for Defendant-Appellant National Football League at 1, Ferrari v. Nat'l Football League, 153 A.D.3d 1589 (N.Y. App. Div. 2017) (No. 804125/2014).

98. Plaintiff's Original Complaint at 4, 6, Tarpley v. Nat'l Basketball Ass'n , No. 4:07-cv-03132 (S.D. Tex. Sept. 26, 2007); *see also* Michael A. McCann, *Do You Believe He Can Fly? Royce White and Reasonable Accommodations Under the Americans with Disabilities Act for NBA Players with Anxiety Disorder and Fear of Flying*, 41 PEPP. L. REV. 397, 419–22 (2014) (analyzing Tarpley's litigation).

99. *Former NBA Players Settles Disability Lawsuit*, TORONTO STAR (Mar. 17, 2009), https://www.thestar.com/sports/basketball/2009/03/16/former_nba_player_settles_disability_lawsuit.html.

100. Jay Hewitt, *Franchisor Direct Liability*, 30 FRANCHISE L.J. 35, 41 (2010).

101. 333 P.3d 723, 726 (Cal. 2014).

102. *Id.* at 743.

Domino's Pizza franchise sued Dominos, arguing it was vicariously liable for alleged sexual harassment by another employee of that same franchise.[103] Domino's stressed that the standards it imposes on franchisees pertain to selling its trademarked pizza and meeting customer expectations that they "received a similar experience each time they patronized any franchised store."[104] In terms of selection and management of franchises' employees, Dominos insisted it reserved those responsibilities to individual franchises.[105] The court was convinced, concluding that "[n]o reasonable inference could be drawn" to intuit Domino's retained control over the franchisee with respect to day-to-day aspects of the franchisee's workplace—including in terms of hiring, supervision, discipline, and firing.[106] Similarly, in *Nickola v. 7-Eleven, Inc.*, a franchisor persuaded a court that because it neither controlled hiring practices nor directed the relevant type of work, it ought to be severed from a litigation.[107] The case involved a 7-Eleven customer who was injured when an employee spilled hot coffee on the customer's head during an altercation with another customer regarding the coffee's preparation.[108] While the franchisor had provided operations training to franchisees, those franchisees weren't mandated to follow recommendations and could instead supervise employees as they saw fit.[109]

Although the lack of privity between franchisee employees and the franchisor can advantage the franchisor in litigation, that dynamic also creates administrative and enforcement hurdles for franchisors. As Professors Robert W. Emerson and Lawrence J. Trautman have written, a franchisor "monitoring a franchisee can become a complicated web of legal strands."[110] The franchisor can turn to the franchise agreement and explore potential contractual options, but in some instances the agreement doesn't contemplate applicable procedures or remedies.[111] Franchisors and franchisees might then pursue litigation,

103. *Id.* at 727.

104. *Id.*

105. *Id.* at 727–28; *see also* Andrew Elmore, *The Future of Fast Food Governance*, 165 U. PA. L. REV. ONLINE 73, 80 (2017) (discussing how franchises characterize their control of franchisees as consistent with quality control, rather than day-to-day operational management).

106. *Patterson*, 333 P.3d. at 742; *see also* Deepa Das Acevedo, *Invisible Bosses for Invisible Workers, or Why the Sharing Economy is Actually Minimally Disruptive*, 2017 U. CHI. LEGAL F. 35, 52 (2017) (explaining the legal significance of a franchisor possessing control over human resources and related practices).

107. Nickola v. 7-Eleven Inc., No. 03–13494, 2006 N.Y. Misc. LEXIS 4126, at *7 (N.Y. Sup. Ct. Oct. 2, 2006).

108. *Id.* at *2–3.

109. *Id.* at *4–5; *see also* Mobil Oil Corp. v. Bransford, 648 So. 2d 119, 120 (Fla. 1995) (holding Mobil Oil not liable after a customer sued over injuries sustained in an altercation with an employee of a franchisee).

110. Robert W. Emerson & Lawrence J. Trautman, *Lessons about Franchise Risk from Yum Brands and Schlotzsky's*, 24 LEWIS & CLARK L. REV. 997, 1008 (2020).

111. *Id.*

arbitration, or mediation.[112] For instance, in *Zeidler v. A&W Restaurants, Inc.*, an A&W franchisee sued the franchisor for breach. [113] The franchisee had closed in the wake of the franchisor warning the franchisee that it had failed to follow company health and sanitation standards.[114] The franchisee averred, unsuccessfully, that the franchisor's threats made it impracticable to run a profitable business.[115]

Outside of the sports context, the record is bereft of franchisors firing, suspending, or fining franchisee employees.[116] In fact, when franchisors attempt to impose such a sanction, they can run afoul of the law. In *Smith v. Ford Motor Company*, the franchisor was held liable for "wrongfully exert[ing] pressure" on the franchisee, a local car dealership, to disassociate itself from the dealership's president and general manager.[117] Ford Motors was found to have engaged in "wrongful, malicious and unlawful interference" in the employment relationship between the dealership and the employee.[118] Franchisors can also face litigation when they attempt to mediate employee-related disputes among franchisees. In *Pearse v. McDonald's*, a former manager of one McDonald's franchise who was recruited by a second sued McDonald's.[119] He persuaded a trial court that McDonald's had illegally interfered with his employment relationship.[120] McDonald's had warned the second franchisee that it was in violation of franchise agreement prohibition against poaching employees.[121] To restore compliance with its franchise agreement, the second franchisee fired the plaintiff.[122] On appeal, McDonald's prevailed.[123] The appellate court reasoned that McDonald's interests in maintaining a "unified operation of its system" and in preventing "impairment to its operating agreements" outweighed the plaintiff's interests "in being free from the interference of job changing between franchisees."[124] Still, the litigation highlighted the thorny landscape for franchisors to regulate franchisees' employment matters.[125]

112. *Id.*

113. 301 F.3d 572, 573 (7th Cir. 2002).

114. *Id.* at 573–74.

115. *Id.*

116. A thorough examination of case law, as well as conversations with franchise attorneys, yielded not one example of a franchisor taking direct against the employee of a franchise.

117. 221 S.E.2d 282, 284 (N.C. 1976).

118. *Id.*

119. 351 N.E.2d 788, 789 (Ohio Ct. App. 1975).

120. *Id.* at 789–90.

121. *Id.*

122. *Id.*

123. *Id.* at 793.

124. *Pearse*, 351 N.E.2d at 792.

125. *See* Andrele Brutus St. Val, *No-Hire Provisions in McDonald's Franchise Agreements, An Antitrust Violation or Evidence of Joint Employer?*, 23 EMPL. RTS. & EMPLOY. POL'Y J. 279,

That's not to say franchisors lack leverage or suasion over franchisees with respect to employees. In a standard franchise agreement, the franchisor possesses the right to terminate or suspend its relationship should a stipulated circumstance arise. For instance, a "threat or danger to public safety results from the construction, maintenance or operation of the franchised business" can accord the franchisor with an option to end the arrangement.[126] Likewise, a franchisee that "by act or omission, permits or commits tortious conduct or a violation of any applicable law, ordinance, rule or governmental regulation . . . constituting a felony, or constituting a misdemeanor, lesser criminal offense or a violation of law" can also see its agreement voided.[127] These clauses are occasionally invoked. In *Glenside West Corp. v. Exxon Co., U.S.A., Division of Exxon Corp.*,[128] the president of an Exxon franchisee was convicted of a crime in the aftermath of repeatedly beating a man with a pipe.[129] Exxon ended its relationship with the franchisee, a decision the court concluded was well within actions authorized by the franchise agreement.[130]

No matter how franchisor-franchisee law and accompanying case precedent are unpacked, they do not align with sports leagues directly disciplining employees of privately owned teams. Franchisors, outside of the sports league context, simply do not punish employees of franchisees. The distinctiveness of leagues in this context reflects their structure. Professor Stephen Ross explains that leagues possess a "unique interest in maintaining a significant degree of competitive balance among the teams within their venture."[131] To that end, courts have permitted leagues to restrict and sanction individual franchises to ensure fair play among them. For instance, in *United States v. National Football League*,[132] the court concluded that "it is both wise and essential that rules be passed to help the weaker clubs in their competition with the stronger ones and

318–19 (2019) (discussing how franchisors' liability as joint-employers may be impacted by degree to which a franchisee manager acts as an intermediary between the franchisor and franchisee).

126. Franchise agreement for a pizza chain (on file with author); *see also* Bryan Arbeit, *A Franchisor's FLSA Liability for its Franchisee's Workers: Why Operational Control over Employment Conditions should make a Franchisor a Joint Employer*, 32 HOFSTRA LAB. & EMP. L.J. 253, 274 (2015) (noting that franchisors routinely engage in inspections of franchisees to ensure compliance).

127. *See* sample franchise agreement on file with author, *supra* note 126.

128. 761 F. Supp. 1118 (D.N.J. 1991).

129. *Id.* at 1124.

130. *Id.* at 1134; *see also* Thomas J. Walsh III, *Supersizing the Definition of Employer under the National Labor Relations Act: Broadening the Joint-Employer Standard to include Franchisors and Franchisees*, 47 U. TOL. L. REV. 589, 634 (2018) (arguing "franchisors have significant direct and indirect effects on conditions of employment and have further potential to control other conditions of employment").

131. Stephen F. Ross, *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 CASE W. RES. L. REV. 133,134 (2001).

132. 116 F. Supp. 319 (E.D. Pa. 1953).

to keep the League in fairly even balance."[133] The league, the court reasoned, could prevent the telecasting of a team's games into the television markets of other teams when those teams are playing home games.[134] This same logic has been identified in rulings concerning other leagues. For instance, in *Philadelphia World Hockey Club. v. Philadelphia Hockey Club, Inc*.,[135] a court identified a "need for competitive balance within the league" as a justification for upholding contractual restraints in pro hockey.[136]

From that lens, punishments of team officials enable leagues to more effectively promote competitive balance: team officials are on notice that their actions are subject to league review and sanction. Given that team owners might lack the desire to punish their own employees for taking actions designed to advance their team's interests—even at the expense of failing to comply with league rules—the league reserving the right to punish is arguably defensible.[137] In the event a sanctioned executive challenged a league punishment in court on grounds of an absence of contractual privity, the league would likely insist its capacity to achieve competitive balance hinges on a capacity to discipline.

CONCLUSION

The ability of professional sports leagues to punish someone who neither works for the league nor is a member of a bargaining group or management association in contract with the league tests the limits of employment, franchise, and private association laws. From the standpoint of institutional design, leagues possess straight lines to players, owners, and teams, but only dotted ones to executives of those teams. Leagues attempt to diminish the risk of liability by requiring teams to incorporate language within employment contracts that indicates leagues have authority to punish. It remains to be seen if such language would withstand legal scrutiny given that the executive is not in contract with the league. A league, however, would possess a rational argument that its ability to meet essential objectives, including fair play and orderly structure, demands that commissioners can enforce rules against all persons associated with the league.

133. *Id.* at 323.

134. *Id.* at 326; *see also* Mackey v. Nat'l Football League, 543 F.2d 606, 621 (8th Cir. l976) (finding that the NFL enjoys "has a strong and unique interest in maintaining competitive balance among its teams.")

135. 351 F. Supp. 462 (E.D. Pa. 1972).

136. *Id.* at 486; *see also* Flood v. Kuhn, 407 U.S. 258, 282 (1972) (citing "unique characteristics and needs" of professional baseball while upholding a longstanding antitrust exemption).

137. *See* Jason Reid, *Will the NFL's Radical Plan to Increase Minority Hires Work?*, UNDEFEATED, May 16, 2020, at (explaining how "owners won't punish themselves" and therefore league and commissioner intervention can be needed to effect policy change).