*NFL’s Employment Law*

Jess McGuire

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Professor Lasher

The National Football League (NFL), is a specialized market creating entertainment for the masses. Employing just under seventeen hundred athletes, the competition to play in the league is extremely stiff. Players must dedicate their lives to perfecting their trade and risk their health to play in the league. The lack of competition and specialized skills required to play in the league has created an environment where the NFL has the upper hand for its treatment of players. In the last three years, this has been exemplified by Colin Kaepernick, and the NFL protests that have followed. The protest has highlighted that the NFL does not protect employees’ rights.

The Sherman Antitrust Act of 1890 prohibits and criminalizes monopolization of interstate commerce that is achieved by holding back competition through anticompetitive conduct. This law prevents monopolies from forming in an attempt to control the market and determine prices. As long as competition is present, it allows for the best deal for consumers.

Major League Baseball (MLB) is the only professional sports organization to be exempt from antitrust laws. In 1922, what was then known as the National League of Professional Baseball began to buy competing teams in nearby cities after the Federal League folded. In this instance, the Federal League Baltimore team was not bought or compensated, so the owners sued for attempting to monopolize baseball. Initially in trial court, the defendants were found liable but appeals to the appellate and Supreme Court ruled unanimously that the National Baseball League was exempt from antitrust laws. In *Federal Baseball Club vs. National League* the Supreme Court ruled that, “the business exhibition of baseball was a purely state affair” (259 U.S. 200). This meant that the Sherman Act, which regulates interstate commerce, does not have jurisdiction over baseball. The ruling stated, “The business of providing public baseball games for profit between clubs of professional baseball players in a league and between clubs of rival leagues, although necessarily involving the constantly repeated traveling of the players from one state to another, provided for, controlled, and disciplined by the organizations employing them, is not interstate commerce” (259 U.S. 200). This case has returned to the Supreme Court in 1953 and 1972 when understanding of interstate commerce had expanded. Nonetheless, the court ruled in favor of the National League each time clarifying that this antitrust exemption was only for baseball, not for sports in general.

In 1972 the Supreme Court had the opportunity to overturn the previous decision in *Flood vs. Kuhn.* Curt Flood was the star of the St. Louis Cardinals with a family and business ventures established in the city when management traded him away to play for the Philadelphia Phillies. Flood had no interest in being traded or playing for the racist mayor of Philadelphia and found it unfair that he could be bought or traded like property of the MLB. He first appealed the trade with the commissioner of baseball, Bowie Kuhn, claiming, “After twelve years in the Major Leagues, I do not feel I am a piece of property to be bought and sold irrespective of my wishes."After Kuhn sided with the Cardinals, Flood sued the Commission in a case that would he would eventually lose at the Supreme Court. Justices William Douglas and Thurgood Marshall dissented recognizing that baseball had grown into a, “big business packaged with beer, with broadcasting, and with other industries” and stating that, “Baseball should be covered by the antitrust laws beginning with this case and henceforth, unless Congress decides otherwise.” (407 US 258). In the decision, Justice Harry Blackmun admitted that the decision from *Federal Baseball* was precedent because of *stare decisis*. He also admitted that the interpretation of the commerce clause had expanded since that decision and stated that baseball had become just as much an interstate commerce as other sports that the Court had denied the same antitrust exemptions to (407 US 258). Despite all the reasons pointing towards holding the MLB to antitrust laws, they still are exempt from these laws. There is speculation that baseball being so deeply rooted into American culture has allowed for it to face more lenient rulings in order for baseball to have an edge over other sports. While the MLB has been exempt for the last sixty years, it is agreed by experts that they voluntarily abide by the Sherman Act. By doing so the MLB hopes to avoid drawing the attention of Congress and risk a revocation of its exemption (Grow). *Major League Baseball Properties Inc. v. Salvino* *Inc*. where Salvino sold plush bears that used logos of certain baseball clubs resulted in the MLB Properties filing a claim for infringement of trademark, breach of contract, and unfair competition. Salvino then filed a counterclaim alleging antitrust and unfair competition. The MLBP attempted to settle all counterclaims but what unable to settle the counterclaim against the antitrust violation to the Sherman Act (542 F.3d 290). This claim then went to the district court where Salvino provided very little evidence proving that the licensing permit allowed the MLBP to fix prices and limit output. In the end, the MLBP won and maintained their antitrust exemption. Therefore, indirectly, the MLB is still governed by antitrust laws.

During World War II, the NFL was hurt by the demands necessary to fight. With athletes leaving the league to serve their country, the number of full roster teams were limited. Teams were forced to merge together to keep the league from disbanding. Following the war, when the NFL was just getting back on its feet, was when the All-American Football Conference (AAFC) emerged. Arch Ward, a *Chicago Tribune* sports writer founded the league. The AAFC was significantly wealthier than the NFL and featured ample media coverage given Ward’s history at the *Chicago Tribune* (“NFL”)*.* The creation of the league following the end of the war meant that there was a surplus of talent coming back from fighting overseas. These players now had a choice as to what league they wanted to play for, giving the power back to the individual.

The US Supreme Court ruled in 1957 that the NFL was subject to antitrust laws. This ruling came from the case *Radovich vs. NFL*. Bill Radovich signed with the Detroit Lions after no other team expressed interest. He played with them for four seasons, making the All-Pro list before leaving to serve in the Navy during World War II. After he returned, Radovich asked for a trade to the Los Angeles Rams or to be paid more. His father, who lived just outside of LA, had fallen ill and Radovich wanted to go take care of him or be able to afford help to tend to him. The owner of the Lions, Fred Madel Jr., refused a trade and promised to blacklist him for five seasons if he left the NFL to play for another league. When Radovich’s contract expired he signed with an NFL competitor, the AAFC. After playing two seasons, a minor league football team in the Pacific Coast League (PCL) with affiliations to the NFL, extended an offer to Radovich to play for the San Francisco Clippers. After learning of Madel’s blacklisting of Radovich due to his stint in the AAFC, the Clippers rescinded their offer (352 US 445).

Radovich sued the NFL saying they, “…conspired to monopolize and control professional football in violation of the Sherman Act” (352 US 445). He alleged that the Sherman Act was being violated due to the anticompetitive practice of blacklisting, The suit states “…the conspiracy was to destroy a competitive league [AAFC] by boycotting it and its players; that each team uses a standard player contract which prohibits a player from signing with another club without the consent of the club holding his contract; that these contracts are enforced by agreement of the clubs to blacklist any player violating them and to visit severe penalties on recalcitrant member clubs…” (352 US 445). The court held that the ruling from *Federal Baseball Club vs. National League* would not set a precedent for this case and is only applicable to professional baseball. The court ruled in favor of Radovich due to the high volume of interstate business. This is due to the broadcasting of games through the radio and television throughout the entire country which forced the Sherman Act to be enforced. The NFL paid $35,000 in damages to Radovich.

Since this case, the NFL has merged with the AAFC, giving the league teams such as the Cleveland Browns and the San Francisco 49ers. In fact, the NFL has merged with another competitor in the American Football League (AFL) substantially decreasing the competition the NFL faces. The AFL was formed when Lamar Hunt, son of a Texas oiler, wanted to buy the Chicago Cardinals in 1959 and move them west (“NFL”). At the time the NFL was predominately set in the east with certain cities having multiple teams. The NFL was not interested in expansion, so Hunt decided to create a competing league to rival the NFL. In 1960 the AFL had eight franchises established across the country, but the biggest difference between the two leagues was the inclusion of African American stars in the AFL (“NFL”). The NFL was more of a whitewashed league ignoring these up and coming stars. This allowed for the AFL to have a large pool of talent to sign. The major advantages that the AFL had over the NFL was money. The owners had lots of it, and understood that losses were unavoidable while the league was being established. This lead to the AFL landing big names which further decreased the size of the NFL talent pool. Therefore, the NFL approached the AFL and proposed a merger. In 1970 the two leagues would merge to form one league, with two conferences within the NFL (“NFL”). The history from the AFL would now become that of the NFL. This merger would expand the NFL past the eastern territory and removed the competition when it comes to landing big name talent. To date, the NFL’s competition is the Canadian Football League (CFL) and the United States based Indoor Football League (IFL) which is known for having lesser talent undesirable to the NFL and lower wages.

In 1920 the National Football League Players Association (NFLPA) was founded as a player union. It was established to provide players with formal representation to negotiate compensation and the terms of a collective bargaining agreement (Jones). Its job today is to represent players concerning wages, hours, and working conditions while negotiating retirement and insurance benefits and to help assist in charitable and community organizations. The NFLPA is meant to protect the athletes from being taken advantage of in any aspect by the NFL.

Lack of competition puts consumers and employees at a disadvantage. Professional sports are such a specialized skill that is not applicable to any other career that these men have limited opportunities to move to other fields. Given that the NFL has very little competition if you have the skills and want to play professional football, this takes the power out of the player’s hands when it comes to work issues. The National Labor Relations Act (NLRA) also referred to as the Wagner Act guarantees basic rights of private sector employees to organize trade unions, engage in collective bargaining for better working conditions, and take collective action with the right to strike if necessary (Trotter). The NFL has their own Collective Bargaining Agreement (CBA) where the NFLPA and the team owners negotiate on distribution of revenue, health and safety standards, and benefits such as medical and pensions. Since its founding, the CBA has negotiated on seven different occasions to reach an agreement.

Most recently, in 2011, the NFL suffered the longest lockout in the history of the league. This lockout was due to the commissioner of the league, Roger Goodell demanding cutbacks in players’ salaries. The Player’s Association rejected this notion demanding to see the financial records of the league to understand why it would be necessary to cut their salaries. It was during this lockout that the players voted to end the CBA’s status as a labor union on March 1, 2011 unless an agreement was reached. The CBA expired, removing the NFL’s labor union which would make the lockout illegal by the players. After court-ordered mediation between the NFLPA and the owners, the league came to an agreement that redistributed the league revenues while establishing salary caps for the players. This agreement was contingent on the NFLPA re-establishing as a union and creating a new CBA. The new CBA featured improvements in regards to health, safety, and financia lmatters. An increase in players’ benefits, contact practices were limited, and an increase up to 1.5 million dollars in guaranteed salaries for injured players were all featured in this new CBA (Brandt).

The reinstatement of the CBA brings us to the NFL’s most current debacle and that is with Colin Kaepernick. Kaepernick was the quarterback for the San Francisco 49ers for five seasons where he took the team to the NFC Championship game in his first season as a starter. However, Kaepernick is better known for his activism. Before the start of a nationally televised game in 2016, Kaepernick was seen seated during the national anthem. When asked about this after the game he cited his behavior as a protest for racial injustice. The reaction was mixed. Other players sat, knelt, and raised fists in support of Kaepernick and racial injustices in society until nearly every team had some sort of protest during the anthem. Some fans were outraged at his refusal to stand for the anthem and that led to another protest of the league where viewers would leave the games or just not tune in all together. Vice President Mike Pence left an Indianapolis Colts’ game immediately following the national anthem after witnessing the protest. All of this publicity resulted in a decline in ratings, loss of sponsors, and a decrease in profit for the league (Beaton). So when Kaepernick became a free agent after the 2016 season, following his newly created social movement, no team would sign him despite his accolades.

Kaepernick’s protest impacted the league even though he is no longer a part of it. Throughout the entire 2017 season the protests continued drawing national media coverage and drawing mixed responses. Kaepernick became a household name as his jersey sales climbed. However, this does not benefit Kaepernick individually, as he does not own the rights to his jersey sales (Brandt). The NFL owners obviously were not pleased with the protests as they were hurting their bottom lines, so they attempted to set policies in place to keep the players in line during the anthem. All of this back and forth eventually led to the NFLPA and the owners meeting to discuss how to rectify this situation. What was agreed upon was a hundred-million-dollar donation to charities the players would choose that would help fight injustices toward minorities.

There have been countless debates on the legality of the protests. Legislation is in place to protect workers from discrimination, but in a powerful organization with little competition, how can the employee be protected? Spectators including the President have weighed in saying that all protestors should be fired referring to them as, “sons of bitches.” The Dallas Cowboys owner, Jerry Jones, stated that any protesters would be benched for that game (Football). Title VII of the Civil Rights Act states that an employer cannot discriminate in hiring, firing, promotion opportunities and other employment decisions based on; race: color, religion, national origin, or gender. The National Labor Relations Act provides protections to employees involved in concerted activities to prevent unfair treatment in the workforce which should be extended to the NFL players wishing to peacefully protest**.** By preventing players from protesting, the League infringes on their rights spelled out in the previous legislation in the following ways.

The first law in place is the Constitution. The very first amendment protects the right of freedom of speech and association. Interpreted as freedom of speech, there is no legal way to enforce having the players stand for the anthem. In fact, the Supreme Court has already handled a case dealing with standing for a flag salute during the Pledge of Allegiance. In *West Virginia State Board of Education vs. Barnette* (1943) children of Jehovah’s Witnesses were expelled from school for refusing to salute the flag during the Pledge (319 U.S. 624). The Supreme Court found a Constitutional violation based on freedom of religion and speech in the case, which would set a precedent if the NFL protestors were to seek legal remedies. Overall, the First Amendment protects only where the government is the employer. However, the private company employees may be protected in many states whose laws prohibit private-sector employers from retaliation for legal off-duty activities. Some states have statutes that protect the rights outlined in the First Amendment, making it applicable to all private sector employees (McDonald). The NFL has historically filed as a 501 (c)(6) non-profit, which provides tax-exemptions for “business leagues, chambers of commerce, real estate boards, boards of trade, and professional football leagues” (Gregory).[[1]](#footnote-1) While the NFL is a private company, because of its tax exemptions the league must respect the rights spelled out in the Constitution.

Title VII protects employees from discrimination on five protected categories; race, color, national origin, religion, and gender. It also protects workers from retaliation when opposing what they feel is discrimination in any of the five protected categories. In this instance, the protestors are standing up for racial inequality which has resulted in the majority of protestors being minorities. While not all protestors are black, these protests are racially charged which is protected under Title VII. The protests have forced many minorities to act in opposition to employment discrimination which means that if any of them were to be fired that it would be deemed as retaliation and considered illegal.

Finally, the National Labor Relations Act is in place to protect employees who engage in, “concerted activity for mutual aid and protections” (Jones). This statement protects union activity as well as political advocacy and issues that affect the lives of the employees. Many protesters today kneel in unison with their teammates who have protested and received backlash. In this instance, for those who have joined the protest to support their teammates, they would be protected under concerted activity. Additionally, the anthem protest is considered part of the job as NFL contracts state that the job is more than just what happens on the field (Jones). Therefore, if racial inequality impacts the players’ lives off the field then they have every right to take action on the field.

These laws have laid out the fact that NFL players are not allowed to be fired due to their decision to protest. This however, has not stopped owners from discriminating against protesters. Free agents Colin Kaepernick and his former teammate Eric Reid, who was the first player to join Kaepernick in the protests, remain unsigned despite their experience and excellence taking the 49ers to the NFC championship game.[[2]](#footnote-2) Many players have spoken out, saying that the two men deserve to play in the NFL. This begs the question, are Kaepernick and Reid being blacklisted by the NFL for starting these protests?

Kaepernick seems to think so. In the October 2017 season he filed a grievance against the NFL claiming that he was being blacklisted from the league due to his protests. His lawyer gathered nearly 100,000 documents citing collusion. He cited correspondence from Dallas, Baltimore, and Tennessee, who were all teams that signed a quarterback midseason with statistically lesser experiences in the league to Kaepernick’s (Belson). These teams have contacted Kaepernick but never extended him an offer to come workout with their teams. The arbitrator, Stephen Burbank, who was appointed by the league and the NFLPA had to review the evidence produced by Kaepernick’s lawyer and determined there was enough information to proceed to a full hearing. Now lawyers will be able to question team owners and league officials in a trial-like format. If Kaepernick is to win the arbitration he stands to earn double what he might have earned if he was playing for the NFL which could be around twenty-four million dollars (Belson).

Phillip Maltin, partner at Raines Feldman LLP, said that the number one reason that the NFL cannot discipline or terminate a player for refusing to stand during the national anthem is because the league publicly stated they would not do so last year. In 2016 Brian McCarthy, a hired spokesperson for the NFL stated that, “Players are encouraged but not required to stand during the playing of the National Anthem.” To go on now and punish players who do not stand would almost certainly guarantee that the NFL would lose an arbitration case. Claiming that the previous statement was a policy upon which players then relied would be enough to win in an arbitration case (McDonald).

The NFL is attempting to combat these protests by implementing new policies. This new policy requires all players and personnel “stand and show respect for the flag and anthem.” All members have an option of opting out of the ceremony and remaining in the locker room during the anthem. Any player or team that is found violating the new policy will be fined by the league and each team can create additional harsher punishments if they wish. The rule which is composed of six principles also gives the commissioner the right “to impose appropriate discipline on league personnel who do not stand and show respect for the flag and anthem” (Seifert). In contrast the MLB and NBA have much simpler rules regarding protocol during the national anthem. The MLB does not have any documented rules on the issue and allows players to honor the flag however they see fit. They have only had one protestor since Kaepernick has started this movement.[[3]](#footnote-3) The NBA policy states that, “players, coaches, and trainers must line up in a dignified position along the sideline or foul line” (Seifert). The NBA has no mention of discipline in its policy and have avoided any protests.

In the most recent development, Kaepernick has made the headlines once again, this time for his groundbreaking deal with the massive sports company, Nike. Kaepernick was sponsored by Nike back when he was a quarterback for the 49ers, but with the recent attention drawn by his activism Nike signed him to a new deal that could reportedly be worth millions of dollars per year. In early September Nike revealed a black and white picture of Kaepernick with the words “Believe in something. Even if it means sacrificing everything” written across the center. He was also featured in the center of the latest of Nike’s “Just Do It” campaign that featured athletes such as Serena Williams and Odell Beckham Jr.. Like mostly everything Kaepernick has been involved with in the last few years, Nike received a mixed response. Videos from protestors splashed the Internet of burning Nike products as their stock price fell three percent. However, from the social media movement that followed the newest advertisement, Nike received media exposure equivalent to $43 million. This deal is interesting because Nike is the official sponsor of the NFL providing them game jerseys and other apparel for each team every Sunday from now up to 2028 (Calfas). Because Kaepernick is not an active player with no contractual obligation to the NFL, Nike did not need permission to use him as the face of their new advertisement despite his pending lawsuit with the NFL.

With Kaepernick’s jersey being the only athlete not on a roster to break the top fifty sales in 2017, Nike plans to capitalize on this market with proceeds going towards Kaepernick’s nonprofit. Sales from a line of merchandise in accordance with Kaepernick's advertisement will be donated to his *Know Your Rights* campaign. This campaign works to fight oppression through education and social activism. Youth are taught how to interact with law enforcement as well self motivation. Additionally, he made a Million Dollar Pledge where he donated one million dollars of his own money to different organizations that fight injustices (Kaepernick).

As far as Kaepernick’s pending hearing, what lies ahead for him is unknown. There is a possibility that the NFL may decide to settle this case and prevent any further negative press being shed on their top executives and the league as a whole. If this does not happen, the arbitration is expected to happen by the end of the year. This could easily be delayed as the NFL uses third parties to collect evidence. Kaepernick’s main goal has always been and continues to be fair treatment from the league based on his performance. He wishes to compete on the highest level of the sport that he was once considered a top five quarterback in the league. Kaepernick’s fight against social injustices will continue whether his career is resurrected or he never plays football again, which either way will alter the future of the league.

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U.S. Const. am. 1.

*W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

1. The NFL’s league office is classified as a nonprofit. The individual teams throughout the organization are not considered nonprofits and are expected to pay taxes. The league office is the administrative and organizational arm of the NFL and does things like write the rules of the game, hire referees, run the college draft, negotiate the collective bargaining agreement with the players, conduct player safety research, and run youth football programs. [↑](#footnote-ref-1)
2. As of September 28th Reid was signed to play for the Carolina Panthers. In his first week on the team he wore a #IMWITHKAP shirt showing support for his old quarterback and knelt before his first game back against the New York Giants. [↑](#footnote-ref-2)
3. Bruce Maxwell of the Oakland Athletics knelt before a game in September 2017 citing support of Kaepernick. In the following weeks concluding the season Maxwell was refused service in an Alabama diner. The server allegedly stated his support for Trump before denying service to Maxwell and the rest of his party. Maxwell was given a different server after complaining to management. [↑](#footnote-ref-3)