

**TITLE VII AS AN ADDITIONAL LEGAL
REDRESS FOR SEX INEQUITY IN
INTERCOLLEGIATE ATHLETICS**

*Rachel M. Whitlock**

Introduction 100

I. The Objective of Title VII..... 103

II. The Elements of a Title VII Claim 104

 A. The Member of a Protected Class Element 104

 B. The Employer–Employee Relationship Element .. 104

 1. The Economic Realities Test 107

 a. The Continuing Relationship Factor 107

 b. The Integration Factor 108

 c. The Investment in Facilities Factor 108

 d. The Right to Control Factor 108

 i. Control and Direction Exhibited During Training
 Camp and Pre–Season Workouts..... 109

 ii. Control and Direction Exhibited During Athletic
 Season and Post–Season 109

 iii. Control and Direction Exhibited During Off–Season
 and Summer Term..... 109

 iv. Control and Direction Exhibited During Activities
 Outside the Athletic Purview..... 110

* J.D. Candidate, The University of Mississippi School of Law, 2016; B.A., Baylor University, 2012.

e.	The Risk Factor.....	110
2.	The Hybrid Test.....	111
a.	The Economic Realities Factor.....	111
b.	The Method of Payment Factor.....	112
c.	The Type of Occupation Factor	113
d.	The Skill Factor	113
e.	The Termination Factor	113
C.	The Discrimination Element.....	114
1.	The Direct Evidence Model	115
a.	General Participation	115
b.	Operating Expenses.....	116
i.	Team Travel.....	117
ii.	Equipment, Uniforms, and Supplies	117
iii.	Fundraising	117
iv.	Game Expenses.....	117
v.	Medical Expenses	118
vi.	Membership Dues.....	118
vii.	Facilities Maintenance and Rental	118
c.	Practice and Game Facilities	118
d.	Publicity	119
e.	Recruiting and Scholarships	119
2.	The Disparate Treatment Model	119
a.	The Prima Facie Case Element	120
b.	The Legitimate, Nondiscriminatory Reason Element	121

c. The Pretext for Discrimination Element.....	121
3. A Further Analysis of the Application of the Direct Evidence Model and the Disparate Treatment Model in the Intercollegiate Athletics Context	122
III. The Remedies Available Under Title VII	123
Cconclusion	123

INTRODUCTION

Renowned American educator, playwright, and poet Robert L. Frost once wrote, “I took the [road] less traveled by, [a]nd that has made all the difference.”¹ In January of 2014, former Northwestern University (Northwestern) grant-in-aid male athlete T. Kain Colter followed the words of Frost almost a century later and took the road less traveled by filing a petition² with the National Labor Relations Board (NLRB) to have the College Athletes Players Association recognized as the union representative for football players at Northwestern.³ He asserted in the petition that grant-in-aid male athletes who participate in football at Northwestern are “employees within the meaning of the National Labor Relations Act⁴ (NLRA) and, therefore, are entitled to choose whether or not to be represented for the

¹ ROBERT FROST, *The Road Not Taken*, in MOUNTAIN INTERVAL 1, 9 (1916).

² The petition was filed with the assistance of both College Athletes Players Association president Ramogi Huma and United Steelworkers president Leo W. Gerard. See Ben Strauss, *In a First, Northwestern Players Seek Unionization*, N.Y. TIMES (Jan. 28, 2014), <http://www.nytimes.com/2014/01/29/sports/ncaafootball/northwestern-players-take-steps-to-form-a-union.html>.

³ See *id.*

⁴ The National Labor Relations Act (NLRA) is codified in Sections 151 through 169 under Title 29 of the United States Code. For almost eighty years, the NLRA “has served as the cornerstone of U.S. labor policy.” Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 87 (2006). It is usually the starting and ending point for inquiry as to whether an individual is an employee because many statutes that govern the employment relationship “among . . . employers and employees are modeled after the NLRA and usually draw their meaning from the interpretations given [to it] by the [National Labor Relations Board] and the federal courts.” *Id.* at 88.

purposes of collective-bargaining.”⁵ In March of 2014, NLRB Regional Director Peter S. Ohr affirmed Colter’s assertion by declaring in a twenty-four page decision that grant-in-aid male athletes who participate in football at Northwestern are employees under Section 2(3) of the NLRA.⁶

Shortly thereafter, Northwestern officials appealed Ohr’s decision to the NLRB five-member committee located in Washington, D.C..⁷ In August of 2015, the committee dismissed Colter’s petition, effectively denying his assertion.⁸ Although the committee declined to uphold Ohr’s decision, many insist that, in general, grant-in-aid male athletes who participate in football and basketball at National Collegiate Athletic Association⁹ (NCAA) Division I Football Bowl Division (FBS) member institutions should be classified as employees.¹⁰ If these athletes are classified as employees, however, then there are potential implications affecting their female counterparts under Title IX of the Education Amendments of 1972 (Title IX).¹¹

For over forty years, Title IX has been “the law most frequently utilized to remedy sex [inequity] in . . . intercollegiate

⁵ *Nw. Univ. & Coll. Athletes Players Ass’n*, Case 13-RC-121359 1, 2 (2014), available at www.nlr.gov/case/13-RC-121359.

⁶ *See id.*

⁷ *See* Ben Strauss & Steve Eder, *Labor Board to Review Northwestern Football Case*, N.Y. TIMES (Apr. 24, 2014), http://www.nytimes.com/2014/04/25/sports/ncaa-football/labor-board-to-review-northwestern-football-case.html?_r=0.

⁸ *See* Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players’ Union Bid*, N.Y. TIMES (Aug. 17, 2015), http://www.nytimes.com/2015/08/18/sports/ncaafotball/nlr-says-northwestern-football-players-cannot-unionize.html?_r=0.

⁹ The National Collegiate Athletic Association (NCAA) was founded in 1906 and is the predominant governing organization of intercollegiate athletics. *See* Maureen A. Weston, *Gamechanger: NCAA Student-Athlete Name & Likeness Licensing Litigation and the Future of College Sports*, 3.1 MISS. SPORTS L. REV. 77, 83–84 (2013). The NCAA is subdivided into three divisions, which consists of approximately 1,200 member institutions. *See id.* Generally, “each year, the NCAA oversees more than 430,000 [male and female] athletes as they compete in twenty-three sports.” *Id.* at 83.

¹⁰ *See* McCormick & McCormick, *supra* note 4, at 79; *see also* Justin C. Vine, Note, *Leveling the Playing Field: Student Athletes Are Employees of Their University*, 12 CARDOZO PUB. L. POL’Y & ETHICS J. 235 (2013).

¹¹ In 2002, Title IX of the Education Amendments of 1972 “was renamed the Patsy T. Mink Equal Opportunity in Education Act in honor of the Hawaiian congresswoman who was instrumental in its passage.” MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 773 (3d ed. 2013). For clarity, however, this Note will not use the new name.

athletics.”¹² It provides, in pertinent part, that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”¹³ According to case law, “Title IX was passed with two objectives in mind: (1) to avoid the use of federal resources to support discriminatory practices; and (2) to provide individual citizens effective protection against those practices.”¹⁴

Title IX has improved intercollegiate athletics by effectively increasing participation opportunities for female athletes and eliminating a portion of the existing sex inequity. It has not, however, fully remedied sex inequity present in intercollegiate athletics. Therefore, Title IX should not be the only remedial option available to grant-in-aid female athletes in the quest for sex equity in intercollegiate athletics. If the relationship between a NCAA Division I FBS member institution and a grant-in-aid female athlete is that of employer and employee, as it should be, then protection under Title VII of the Civil Rights Act of 1964 (Title VII) becomes available. A grant-in-aid female athlete who does not receive the same privileges of employment as her male counterparts—particularly those who participate in football and basketball—should be entitled to seek additional legal redress under Title VII because the current remedial option for relief granted under Title IX has proven inadequate in completely eliminating sex inequity present in intercollegiate athletics.

This Note focuses on illustrating the viability of Title VII in the intercollegiate athletics context as an additional legal redress alongside Title IX. Part I discusses the objective of Title VII. Part II examines the three required elements a grant-in-aid female athlete must fulfill in order to file and sustain a claim under Title VII. And lastly, Part III analyzes the remedies available under Title VII.

¹² *Id.* at 794.

¹³ 20 U.S.C. § 1681 (2015).

¹⁴ *Cohen v. Brown Univ.*, 101 F.3d 155, 165 (1st Cir. 1996) (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979)).

I. THE OBJECTIVE OF TITLE VII

Title VII provides, in pertinent part, that:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his [or her] employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his [or her] status as an employee, because of such individual's race, color, religion, sex, or national origin.”¹⁵

Under Title VII, “it is illegal for an employer to discriminate in any area of employment, ‘including hiring, firing, promotion, layoff, compensation, benefits, job assignments, training, . . . or any other terms of employment.’”¹⁶ As the Court stated in *Griggs v. Duke Power Co.*¹⁷:

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities . . . [through] the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.¹⁸

¹⁵ 42 U.S.C. § 2000e-2(a) (2015).

¹⁶ Kristi L. Schoepfer, *Title VII: An Alternative Remedy for Gender Inequity in Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 107, 117 (2000).

¹⁷ 401 U.S. 424 (1971).

¹⁸ *Id.* at 429-31.

In other words, the congressional intent of Title VII was “to offer comprehensive protections and, in short, eliminate discrimination in the workplace.”¹⁹

II. THE ELEMENTS OF A TITLE VII CLAIM

In order for a grant-in-aid female athlete to file and sustain a claim under Title VII against her institution, she must illustrate that she fulfills the three requirements of a Title VII claim: (1) the member of a protected class element; (2) the employer-employee relationship element; and (3) the discrimination element.²⁰

A. *The Member of a Protected Class Element*

An individual filing a claim under Title VII must be a member of a class protected under the statute.²¹ The classes that receive protection under Title VII include race, color, religion, sex, and national origin.²²

A grant-in-aid female athlete filing a claim under Title VII against her institution would be able to fulfill this element, as she would qualify as a member of the protected class of sex.

B. *The Employer-Employee Relationship Element*

An individual filing a claim under Title VII must be an employee of an employer covered under the statute.²³ The employers covered under Title VII include “[a]ll private employers, state and local governments, and educational institutions that employ fifteen or more individuals”²⁴

A grant-in-aid female athlete’s institution would be covered as an employer under Title VII. She, however, is not accorded the status of employee, but is identified solely as a “student-athlete.” For over sixty years, the NCAA has used the term “student-athlete” to describe the male and female athletes who participate in intercollegiate athletics at the organization’s member

¹⁹ Schoepfer, *supra* note 16.

²⁰ See 42 U.S.C. § 2000e (2015).

²¹ See Schoepfer, *supra* note 16.

²² See *id.*

²³ See *id.*

²⁴ *Id.*

institutions.²⁵ The NCAA “invented the now ubiquitous watchword ‘student–athlete’”²⁶ in direct response to two separate state court rulings in Colorado and California.²⁷ In *Univ. of Denver v. Nemeth*,²⁸ the Colorado Supreme Court upheld the state Industrial Commission’s decision that University of Denver grant–in–aid male athlete Ernest E. Nemeth was an employee within the meaning of the Colorado workers’ compensation statute.²⁹ As a result, Nemeth was entitled to receive workers’ compensation from the University of Denver for the injury he sustained while playing football on the university’s grounds.³⁰ Ten years later, in *Van Horn v. Indus. Acc. Comm’n*,³¹ the California Court of Appeals recognized California State Polytechnic College grant–in–aid male athlete Edward G. Van Horn as an employee.³² The court’s decision overturned the state Industrial Accident Commission’s ruling and granted workers’ compensation benefits to Van Horn’s widow and their minor, dependent children after he was killed in a plane crash while returning to California from a game in Ohio with his teammates.³³

As a consequence to these two state court rulings, the NCAA became faced with the unexpected and unwanted threat of other state industrial commissions and courts possibly recognizing additional intercollegiate athletes as employees of their institutions. In his book entitled *Unsportsmanlike Conduct: Exploiting College Athletes*, former NCAA Executive Director Walter F. Byers recounts that in order “[to address that threat, w]e crafted the term *student–athlete*, and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for

²⁵ See McCormick & McCormick, *supra* note 4, at 83.

²⁶ Nicholas Fram & T. Ward Frampton, Note, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFF. L. REV. 1003, 1014–15 (2012).

²⁷ See *id.*

²⁸ 127 Colo. 385, 257 P.2d 423 (1953).

²⁹ See *id.* at 399, 257 P.2d at 430.

³⁰ See *id.* at 398–99, 257 P.2d at 429–30.

³¹ 219 Cal. App. 2d 457 (Ct. App. 1963).

³² See *id.* at 464–68.

³³ See *id.*

such words as players and athletes. . . .”³⁴ The term “student-athlete” was adopted and mandated “purposely to buttress the notion that [grant-in-aid male and female athletes] should be considered students rather than employees.”³⁵ It was also “meant to conjure the nobility of amateurism³⁶ and the precedence of scholarship over athletic endeavor”³⁷ while obfuscating the actual nature of the relationship between a grant-in-aid athlete and his or her institution, which is that of employee and employer.

In order to obtain relief under Title VII, a grant-in-aid female athlete must establish that she is not only a student but also an employee. The term “employee” is ambiguously defined under Title VII as “an individual employed by an employer.”³⁸ Accordingly, a grant-in-aid female athlete should use either the economic realities test³⁹ or the hybrid test⁴⁰ to establish that she is

³⁴ McCormick & McCormick, *supra* note 4, at 84 (quoting WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69 (1995)).

³⁵ *Id.*

³⁶ Amateurism is a NCAA principle that has been accepted as an embodiment of “the Athenian concept of a complete education derived from fostering full growth of both mind and body.” *Gaines v. NCAA*, 746 F. Supp. 738, 744 (M.D. Tenn. 1990). It is “the proclaimed foundation of intercollegiate [athletics].” *Weston*, *supra* note 9, at 79. The basic purpose of this principle is to “retain a clear line of demarcation between intercollegiate athletics and professional sports.” THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2015–16 NCAA DIVISION I MANUAL Article 1.3.1 (2015), available at <http://www.ncaapublications.com/productdownloads/D116.pdf> [hereinafter NCAA DIVISION I MANUAL]. The NCAA maintains that its principle of amateurism is essential to attracting fans, to creating competitive balance in college sports, and to promoting a complementary relationship between academics and athletics. See Michael McCann, *Ed O'Bannon v. the NCAA: A Complete Analysis Before the Trial*, SPORTS ILLUSTRATED (June 5, 2014), <http://www.si.com/college-football/2014/06/05/ed-obannon-ncaa-trial-primer>.

³⁷ Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

³⁸ 42 U.S.C. § 2000e(f) (2015).

³⁹ Besides its application under Title VII of the Civil Rights Act of 1964 (Title VII), the economic realities test has been applied by courts under the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Fair Labor Standards Act. See Charles J. Muhl, *What is an Employee? The Answer Depends on the Federal Law*, MONTHLY LAB. REV. 3, 6 (2002), available at <http://www.bls.gov/opub/mlr/2002/01/art1full.pdf>.

⁴⁰ Besides its application under Title VII, the hybrid test has been applied by courts under the Age Discrimination in Employment Act and the Americans with Disabilities Act. See *id.*

an employee under Title VII. Courts generally apply these two tests in order to determine whether an individual qualifies as an employee under the statute.⁴¹

1. The Economic Realities Test

The economic realities test, while similar to the common-law test,⁴² is used to determine the existence of an employment relationship based on whether an individual is “economically dependent on [an employer] for continued employment.”⁴³ This test examines the nature of the employment relationship, relying on the standard that employees typically “hold a single job and rely on that one employer for continued employment and for their primary source of income.”⁴⁴ Courts use the following factors to determine whether an individual qualifies as an employee under this test.⁴⁵

a. The Continuing Relationship Factor

An individual is an employee under the continuing relationship factor if he or she “has a permanent or extended relationship with the [employer].”⁴⁶

A grant-in-aid female athlete is an employee under this factor because she has an extended relationship, usually four to five years, with her institution, the employer.

⁴¹ *See id.*

⁴² The common-law test has been applied by courts under the Employment Retirement and Income Security Act, the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, the Immigration Reform and Control Act, and the NLRA. *See id.* This test, also known as the right-to-control test, was “developed on the basis of the traditional legal concept of agency.” *Id.* at 5. Under this test, an individual is an employee if his or her “work process and work product are controlled by the employer.” *Id.* at 6. This is “determined by evaluating [the] totality of the circumstances and specific factors.” *Id.* The specific factors include ten factors that are used to determine whether an individual qualifies as an employee, “with no one factor dispositive, but with the determination centering on who has the right to control the work process.” *Id.* at 5.

⁴³ *Id.* at 6.

⁴⁴ *Id.* at 7.

⁴⁵ *See id.* at 8.

⁴⁶ *Id.*

b. The Integration Factor

An individual is an employee under the integration factor if he or she “provides services that are a part of the employer’s regular business.”⁴⁷

A grant-in-aid female athlete is an employee under this factor because she provides services that are a part of her institution’s million-dollar generating business known as college sports. Her services provide her institution with “measurable and tangible benefits . . . sufficient to establish an employer–employee relationship”⁴⁸ between her and her institution. These benefits include: (1) ticket sales; (2) apparel sales; (3) games and tournaments; and (4) television advertisements and contracts.

c. The Investment in Facilities Factor

An individual is an employee under the investment in facilities factor if he or she has “no investment in the work facilities [or] equipment.”⁴⁹

A grant-in-aid female athlete is an employee under this factor because she has no investment in the facilities or equipment at her institution. Specifically, she performs her responsibilities in facilities with equipment provided by her institution. Her institution provides to her access to practice and game facilities as well as practice and game equipment, which includes uniforms, shoes, accessories, and other items necessary to compete or to otherwise represent the institution.

d. The Right to Control Factor

An individual is an employee under the right to control factor if the employer controls and directs the material details of his or her work.⁵⁰

A grant-in-aid female athlete is an employee under this factor because her institution controls and directs the material details of her work. This control and direction is executed through the coaching staff that works for the athletic department at her

⁴⁷ *Id.*

⁴⁸ *Cheatham v. Workers’ Comp. Appeals Bd.*, 49 Cal. Comp. Cases 54, 61 (1984).

⁴⁹ Muhl, *supra* note 39, at 8.

⁵⁰ *See id.* at 7.

institution. The coaching staff displays this control and direction through the enforcement of rules, regulations, and policies set forth in handbooks established by the athletic department, institution, athletic conference, and NCAA. This control and direction is exhibited during: (1) training camp and pre-season workouts; (2) the athletic season and post-season; (3) off-season and the summer term; and (4) activities outside the athletic purview.

*i. Control and Direction Exhibited During Training Camp and
Pre-Season Workouts*

This control and direction is exhibited during training camp and pre-season workouts through the requirement that a grant-in-aid female athlete comply with the daily itineraries prepared, provided, and enforced by the coaching staff. These itineraries “set forth, hour by hour, what [athletic] related activities [she will] engage in from [morning until night]”⁵¹ These itineraries also include “the location, duration, [and] manner in which [she will] carry out [her] duties”⁵²

*ii. Control and Direction Exhibited During Athletic Season and
Post-Season*

This control and direction is exhibited during the athletic season and post-season through the requirement that a grant-in-aid female athlete comply with the times and scheduling of practices, weightlifting sessions, film sessions, study halls, and games. She must also comply with formations, strategies, and diets.

*iii. Control and Direction Exhibited During Off-Season and
Summer Term*

This control and direction is exhibited during the off-season and the summer term through the requirement that a grant-in-aid female athlete continue to comply with diets as well as the

⁵¹ *Nw. Univ.*, Case 13-RC-121359 at 15.

⁵² *Id.*

times and scheduling of practices, weightlifting sessions, film sessions, and study halls.

iv. Control and Direction Exhibited During Activities Outside the Athletic Purview

This control and direction is exhibited during activities outside the athletic purview in a variety of ways. For example, some NCAA Division I FBS member institutions require that a grant-in-aid female athlete's housing be dictated by the institution through the requirement that she: (1) live on campus for a set amount of years; and/or (2) submit a lease for approval before she can make her own living arrangements.⁵³ Additionally, some NCAA Division I FBS member institutions require that a grant-in-aid female athlete obtain permission from the coaching staff before she is able to apply for or acquire any form of outside employment in an attempt to "monitor whether [she] is receiving any sort of additional compensation or benefit. . . ."⁵⁴ Among other things, a grant-in-aid female athlete "must also abide by a social media policy, which restricts what [she] can post on the internet, including Twitter, Facebook, and Instagram . . . [and give no] media interviews unless [she is] directed to participate in interviews that are arranged"⁵⁵

e. The Risk Factor

An individual is an employee under the risk factor if he or she "does not have the opportunity to make a profit or incur a loss."⁵⁶

A grant-in-aid female athlete is an employee under this factor because she "does not have the opportunity to make a profit or incur a loss."⁵⁷ Instead, this opportunity solely belongs to the employer, her institution. This is evidenced by: (1) the million-dollar contracts NCAA Division I FBS member institutions have with media outlets and advertising companies; and (2) the amount

⁵³ *See id.* at 4.

⁵⁴ *Id.*

⁵⁵ *Id.* at 5.

⁵⁶ Muhl, *supra* note 39, at 8.

⁵⁷ *Id.*

of revenue generated each year from the labor of grant-in-aid male and female athletes.

2. The Hybrid Test

Most courts accept the view that “the totality of the circumstances⁵⁸ surrounding the relationship between [the employee] and [the] employer . . . should be examined to determine whether [an individual] is an employee”⁵⁹ under the hybrid test. This test is used to determine the existence of an employment relationship under the evaluation of “both common-law and economic reality test factors, with a focus on who has the right to control the means and manner of [an employee]’s performance.”⁶⁰ The first four factors of the hybrid test—continuing relationship, integration, tools and materials (i.e., investment in facilities), and right to control—are the same as those under the above-mentioned economic realities test. These factors, therefore, will not be duplicated under the hybrid test in order to prevent superfluous repetition. In addition to these factors, courts generally also consider the following factors.

a. The Economic Realities Factor

An individual is an employee under the economic realities factor if he or she is economically dependent on the employer, to whom he or she is providing services, for his or her continued employment.⁶¹

A grant-in-aid female athlete is an employee under this factor because she is economically dependent on her institution, to whom she is providing services, for her continued employment. She is restricted by rules, regulations, and policies set forth in handbooks established by the athletic department, institution, athletic conference, and NCAA from applying for or obtaining certain types of outside employment in order to supplement the

⁵⁸ The totality of the circumstances includes “all the conditions under which [an individual] is working.” *Id.* at 5.

⁵⁹ *Id.* at 9.

⁶⁰ *Id.* at 6.

⁶¹ *See id.* at 7.

athletic scholarship provided to her by her institution.⁶² She may accept a limited amount of gifts from family members,⁶³ but is fully prohibited “from accepting cash, loans, or gifts from non-family [individuals].”⁶⁴ Ultimately, these restrictions leave her “economically dependent upon [the] athletic scholarship”⁶⁵ provided to her by her institution for her continued employment in exchange for her services.

b. The Method of Payment Factor

An individual is an employee under the method of payment factor if he or she is “paid by the hour, or [if] other computation based on time worked is used to determine pay.”⁶⁶

A grant-in-aid female athlete is an employee under this factor because she receives compensation in the form of an athletic scholarship on a yearly basis from her institution in consideration for her services.⁶⁷ The athletic scholarship she receives provides “certain items of compensation which are measurable in money, including room and board, tuition, books,”⁶⁸ . . . “required institutional fees, . . . medical and life insurance, and . . . [a stipend] up to \$2,000 for miscellaneous expenses.”⁶⁹ The worth of these items, however, vary depending on the institution. In 2012, the median value of an athletic scholarship at a NCAA Division I FBS member institution was \$26,000 at an in-state public institution, \$39,000 at an out-of-state public institution, and \$52,000 at a private institution.⁷⁰ Although athletic scholarships vary depending on the institution, it is clear that an athletic

⁶² See Vine, *supra* note 10, at 255.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Muhl, *supra* note 39, at 7.

⁶⁷ See *Coleman v. W. Mich. Univ.*, 125 Mich. App. 35 (1983) (holding that a grant-in-aid athletic scholarship constituted wages).

⁶⁸ *Id.* at 39.

⁶⁹ Fram & Frampton, *supra* note 26, at 1021.

⁷⁰ See THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT: REVENUES & EXPENSES FOR 2004–12 1, 18 (2013), *available at* <http://www.ncaapublications.com/productdownloads/2012RevExp.pdf> [hereinafter NCAA DIVISION I REPORT].

scholarship constitutes compensation to a grant-in-aid female athlete by her institution in exchange for her services.

c. The Type of Occupation Factor

An individual is an employee under the type of occupation factor if his or her work is completed under the direction or supervision of the employer.⁷¹

A grant-in-aid female athlete is an employee under this factor because her work is completed under the direction or supervision of her institution through the coaching staff, which works for the institution's athletic department. The coaching staff oversees her work during: (1) training camp; (2) pre-season workouts; (3) practices; (4) weightlifting sessions; and (5) regular season and tournament games.

d. The Skill Factor

An individual is an employee under the skill factor if he or she possesses "the skill required in the particular occupation."⁷²

A grant-in-aid female athlete is an employee under this factor because she possesses the skills required in her sport that enables her to participate and compete in intercollegiate athletics at her institution. Her skills are highly specialized, which her institution seeks in exchange for an athletic scholarship in order to obtain division, conference, and national titles.

e. The Termination Factor

An individual is an employee under the termination factor if he or she or the employer can terminate the employment relationship, with or without notice and explanation.⁷³

A grant-in-aid female athlete is an employee under this factor because she or her institution may terminate the relationship, with or without notice and explanation. Specifically, she or "[t]he head coach, with consultation with the athletic

⁷¹ See *Diggs v. Harris Hosp.-Methodist, Inc.*, 847 F.2d 270, 272 (5th Cir. 1988).

⁷² *Id.*

⁷³ See *id.* at 273.

department, can immediately reduce or cancel [her athletic] scholarship for a variety of reasons.”⁷⁴ Bylaw 15.3.4.2 of the NCAA Manual expressly provides a grant-in-aid female athlete and the head coach with this authority. The Bylaw states, in pertinent part, that:

Institutional financial aid based in any degree on athletic ability may be reduced or canceled during the period of the award if the recipient:

- (a) Renders himself or herself ineligible for intercollegiate competition;
- (b) Fraudulently misrepresents any information on an application, letter of intent, or financial aid agreement (see Bylaw 15.3.4.2.3);
- (c) Engages in serious misconduct warranting substantial disciplinary penalty (see Bylaw 15.3.4.2.4); or
- (d) Voluntarily (on his or her own initiative) withdraws from a sport at any time for personal reasons⁷⁵

In addition, the head coach may terminate the relationship if a grant-in-aid female athlete “engages in any activity that either results in a declaration of ineligibility, or is considered misconduct in the eyes of [her] institution.”⁷⁶

C. The Discrimination Element

An individual filing a claim under Title VII must prove that the employer committed an action against him or her that constitutes one of the two types of discrimination recognized under the statute. The two types of discrimination recognized under Title VII are: (1) disparate treatment, which is “intentional discrimination based upon an individual’s race, color, religion, sex, or national origin;”⁷⁷ and (2) disparate impact, which is

⁷⁴ *Nw. Univ.*, Case 13–RC–121359 at 15.

⁷⁵ NCAA DIVISION I MANUAL, *supra* note 36, at Bylaw 15.3.4.2.

⁷⁶ Schoepfer, *supra* note 16, at 126.

⁷⁷ *Id.* at 127.

“discrimination caused by a neutral employment policy that has a disproportionate impact on a class of protected persons.”⁷⁸

A grant-in-aid female athlete filing a claim under Title VII would be able to fulfill this element if she would be able to demonstrate that her institution has committed an action against her that constitutes disparate treatment or disparate impact. She would likely be asserting that the discrimination she has experienced was intentional not a disproportionate impact. Therefore, she would be asserting that the type of discrimination she has experienced is disparate treatment not disparate impact.

In order to establish a disparate treatment claim under Title VII, a grant-in-aid female athlete would have to employ either the direct evidence model or the disparate treatment model.⁷⁹ These models “are simply different evidentiary paths by which to resolve the ultimate issue of . . . discriminatory intent [by the employer].”⁸⁰ As such, both of these models would be available to a grant-in-aid female athlete if she were able to provide the necessary support. Both the direct evidence model and the disparate treatment model will subsequently be applied in the intercollegiate athletics context in order to demonstrate the compatibility between a grant-in-aid female athlete discrimination claim and the use of Title VII.

1. The Direct Evidence Model

A grant-in-aid female athlete may bring her claim under Title VII using the direct evidence model. Under this model, the existence of disparate treatment against her by her institution is best evidenced through the examination of the following five key components of an athletic program.

a. General Participation

During the 1970s, female athletes “accounted for less than 20%” of [the] athletes at [NCAA] member institutions⁸¹ In

⁷⁸ *Id.*

⁷⁹ *See id.*

⁸⁰ *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 707 (6th Cir. 1985).

⁸¹ Schoepfer, *supra* note 16, at 108–09.

contrast, during this same time period, male athletes were provided with numerous opportunities. For example, in 1973, approximately 165,000 males were participating in intercollegiate athletics at NCAA member institutions, “accounting for more than 90% of participation.”⁸² Since the 1970s, the passage of Title IX has generally increased the participation opportunities for female athletes in intercollegiate athletics. Their male counterparts, however, continue to have substantially more opportunities. During the 2011–12 academic year, “of the 453,347 NCAA [athletes] who competed in NCAA intercollegiate athletics . . . , 195,657 (43.2%) of them were [females] and 257,690 (56.8%) were [males].”⁸³ Specifically, in 2012, the median number of participating grant-in-aid female athletes in athletic programs at NCAA Division I FBS member institutions was 284 while the median number for their male counterparts was 331.⁸⁴

Moreover, the existence of disparity between male and female participation rates is further evidenced in the development among NCAA Division I FBS member institutions to eliminate male athletic opportunities in non-revenue sports, rather than increasing participation opportunities for female athletes.⁸⁵ This disparity “is likely to continue because the court held in *Kelley v. [Bd. of Tr. of] Univ. of Ill.*⁸⁶ that using this strategy was a legally appropriate”⁸⁷ means to ensure comparability between male and female athlete participation rates.

b. Operating Expenses

According to the NCAA Division I Intercollegiate Athletics Programs Report on Revenues and Expenses for 2004–12, operating expenses include: (1) team travel; (2) equipment, uniforms, and supplies; (3) fundraising; (4) game expenses; (5) medical expenses; (6) membership dues; and (7) facilities maintenance and rental.⁸⁸

⁸² *Id.* at 109.

⁸³ MITTEN ET AL., *supra* note 11, at 775.

⁸⁴ See NCAA DIVISION I REPORT, *supra* note 70, at 31.

⁸⁵ See Schoepher, *supra* note 16, at 112.

⁸⁶ 832 F. Supp. 237 (C.D. Ill. 1993).

⁸⁷ Schoepher, *supra* note 16, at 112..

⁸⁸ See NCAA DIVISION I REPORT, *supra* note 70, at 31–32.

i. Team Travel

The median amount spent in 2012 on team travel for grant-in-aid female athletes at NCAA Division I FBS member public and private institutions was \$1,194,000 and \$1,234,000, respectively.⁸⁹ In contrast, the median amount spent for their male counterparts was \$2,320,000 and \$2,394,000, respectively.⁹⁰

ii. Equipment, Uniforms, and Supplies

The median amount spent in 2012 on equipment, uniforms, and supplies for grant-in-aid female athletes at NCAA Division I FBS member public and private institutions was \$266,000 and \$355,000, respectively.⁹¹ In contrast, the median amount spent for their male counterparts was \$724,000 and \$792,000, respectively.⁹²

iii. Fundraising

The median amount spent in 2012 on fundraising for grant-in-aid female athletes at NCAA Division I FBS member public and private institutions was \$13,000 and \$27,000, respectively.⁹³ In contrast, the median amount spent for their male counterparts was \$59,000 and \$200,000, respectively.⁹⁴

iv. Game Expenses

The median amount spent in 2012 on game expenses for grant-in-aid female athletes at NCAA Division I FBS member public and private institutions was \$270,000 and \$260,000, respectively.⁹⁵ In contrast, the median amount spent for their male counterparts was \$1,159,000 and \$1,290,000, respectively.⁹⁶

⁸⁹ *See id.* at 31.

⁹⁰ *See id.*

⁹¹ *See id.*

⁹² *See id.*

⁹³ *See id.*

⁹⁴ *See id.*

⁹⁵ *See id.*

⁹⁶ *See id.*

v. Medical Expenses

The median amount spent in 2012 on medical expenses for grant-in-aid female athletes at NCAA Division I FBS member public and private institutions was \$2,000 and \$0, respectively.⁹⁷ In contrast, the median amount spent on their male counterparts was \$7,000 and \$2,000, respectively.⁹⁸

vi. Membership Dues

The median amount spent in 2012 on membership dues for grant-in-aid female athletes at NCAA Division I FBS member public and private institutions was \$7,000 and \$16,000, respectively.⁹⁹ In contrast, the median amount spent on their male counterparts was \$9,000 and \$15,000, respectively.¹⁰⁰

vii. Facilities Maintenance and Rental

The median amount spent in 2012 on facilities maintenance and rental for grant-in-aid female athletes at NCAA Division I FBS member public and private institutions was \$73,000 and \$168,000, respectively.¹⁰¹ In contrast, the median amount spent on their male counterparts was \$381,000 and \$337,000, respectively.¹⁰²

c. Practice and Game Facilities

Traditionally, grant-in-aid male athletes—particularly those who participate in football and basketball—receive “more and better time [in] the practice and game [facilities].”¹⁰³ This practice is often justified through arguments that the male athletic events “receive significantly more spectators, and produce more revenue, than do [female] athletic events.”¹⁰⁴

⁹⁷ *See id.*

⁹⁸ *See id.*

⁹⁹ *See id.*

¹⁰⁰ *See id.*

¹⁰¹ *See id.* at 32.

¹⁰² *See id.*

¹⁰³ Felice Duffy, *Twenty-Seven Years Post Title IX: Why Gender Equity in College Athletics Does Not Exist*, 19 QUINNIPIAC L. REV. 67, 97 (2000).

¹⁰⁴ Schoepfer, *supra* note 16, at 115.

d. Publicity

The disparity in publicity between grant-in-aid female athletes and their male counterparts—particularly those who participate in football and basketball—is common.¹⁰⁵ This practice is often justified through arguments similar to those presented in the practice and game facilities context. One such argument is that female athletic events “do not generate public interest, and therefore, it is an inefficient use of resources to allocate funding and personnel to cover [the] events.”¹⁰⁶

e. Recruiting and Scholarships

As noted by the NCAA in its Division I Intercollegiate Athletics Programs Report on Revenues and Expenses for 2004–12, the median amount spent in 2012 on recruiting for grant-in-aid female athletes at NCAA Division I FBS member public and private institutions was \$267,000 and \$269,000, respectively.¹⁰⁷ In contrast, the median amount spent for their male counterparts was \$553,000 and \$634,000, respectively.¹⁰⁸

In relation to scholarships, the median amount spent in 2012 for grant-in-aid female athletes at NCAA Division I FBS member public and private institutions was \$3,002,000 and \$5,478,000, respectively.¹⁰⁹ In contrast, the amount spent for their male counterparts was \$4,086,000 and \$7,730,000, respectively.¹¹⁰

2. The Disparate Treatment Model

If a grant-in-aid female athlete does not bring her claim under Title VII using the direct evidence model in response to the disparate treatment against her by her institution, then she may bring her claim using the disparate treatment model.^{111, 112} The

¹⁰⁵ See Duffy, *supra* note 103, at 98.

¹⁰⁶ Schoepfer, *supra* note 16, at 116.

¹⁰⁷ See NCAA DIVISION I REPORT, *supra* note 70, at 31.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

¹¹¹ The usage of the disparate treatment model usually occurs when there is a lack of direct evidence, but the presence of circumstantial evidence of intentional discrimination. See Schoepfer, *supra* note 16, at 128.

disparate treatment model, which was “first set forth in *McDonnell Douglas Corp. v. Green*¹¹³ and most clearly articulated in *Tex. Dep’t of Cmty. Affairs v. Burdine*,”^{114, 115} utilizes an analysis entitled “the burden shifting analysis” that requires the fulfillment of all elements of a three-part test: (1) the prima facie case element; (2) the legitimate, nondiscriminatory reason element; and (3) the pretext for discrimination element.¹¹⁶

a. The Prima Facie Case Element

First, an individual seeking relief from disparate treatment by his or her employer must offer proof that a prima facie case of discrimination exists.¹¹⁷ To establish a prima facie case, the individual would have to illustrate that: “(1) [he or] she belongs to a protected class; (2) [he or] she performed [his or] her job satisfactorily; (3) [he or] she suffered an adverse employment action; and (4) [his or] her employer treated similarly-situated . . . employees more favorably.”¹¹⁸

A grant-in-aid female athlete seeking relief from disparate treatment by her institution must be able to offer proof that a prima facie case of discrimination exists. First, she would illustrate that she is a member of the protected class of sex. Second, she would illustrate that she has performed her athletic duties satisfactorily through presenting evidence that she obtained and maintained her athletic scholarship. Lastly, she should illustrate that she has suffered effects of an adverse employment action by her institution and that her male counterparts are treated more favorably by her institution through presenting evidence of her institution’s unequal disbursement of benefits between herself and her male counterparts under its athletic program.

¹¹² *See id.*

¹¹³ 411 U.S. 792, 801–02 (1973).

¹¹⁴ 450 U.S. 248, 252–53 (1981).

¹¹⁵ Schoepfer, *supra* note 16, at 128.

¹¹⁶ *See id.*

¹¹⁷ *See id.*

¹¹⁸ *Davis v. McCormick*, 898 F. Supp. 1275, 1286 (D. Ill. 1995).

b. The Legitimate, Nondiscriminatory Reason Element

Second, the employer of an individual seeking relief from disparate treatment through filing a claim under Title VII must offer “a legitimate, nondiscriminatory reason for the disparate treatment.”¹¹⁹ If the employer offers a reason that has its “basis in anything not prohibited by Title VII, [t]he reason will be considered nondiscriminatory.”¹²⁰

It is difficult to anticipate every counterargument a NCAA Division I FBS member institution may offer as a legitimate, nondiscriminatory reason in response to the disparate treatment alleged by a grant-in-aid female athlete under a Title VII claim. It is likely, however, that either budget constraints or the lack of interest in female athletics would be offered as a reason.

c. The Pretext for Discrimination Element

Lastly, an individual seeking relief from disparate treatment through filing a claim under Title VII against his or her employer would have to “demonstrate that the reason offered by [his or her employer] is actually pretext for discrimination.”¹²¹ The individual can establish this element by proving: (1) his or her employer’s explanation has no basis in fact; (2) his or her employer’s explanation was not the real reason; or (3) “that the stated reason is insufficient to warrant the disparate treatment.”¹²²

A grant-in-aid female athlete seeking relief from disparate treatment through filing a claim under Title VII against her institution would have to “demonstrate that the reason offered by [her institution] is actually pretext for discrimination.”¹²³ Her ability to establish this element would depend on the reason given by her institution. A general response she may assert against her institution’s reason, however, is that she is denied the same privileges of employment enjoyed by her male counterparts because she and other grant-in-aid female athletes do not

¹¹⁹ Schoepfer, *supra* note 16, at 129.

¹²⁰ *Id.*

¹²¹ *Id.* at 128.

¹²² *Id.* at 129.

¹²³ *Id.* at 128.

generate as much money nor bring as much national recognition to the institution as their male counterparts. If a grant-in-aid female athlete were able to establish this element, then she would be able to satisfy her evidentiary burden and show that discriminatory practices at her institution resulted in disparate treatment.

3. A Further Analysis of the Application of the Direct Evidence Model and the Disparate Treatment Model in the Intercollegiate Athletics Context

An application of both the direct evidence model and the disparate treatment model to intercollegiate athletics illustrates that a grant-in-aid female athlete subjected to disparate treatment by her institution should be able to succeed with a Title VII claim and be afforded the available remedies. Through the evaluation of the five components of an athletic program under the direct evidence model and the three elements of the disparate treatment model, it is obvious that despite some of the changes that have been facilitated by the application of Title IX—particularly an increase in participation opportunities for female athletes—sex inequity is still present. Although many advances and improvements have been made in the past forty years, female athletes “are still struggling to enforce the intent of Title IX, and proportionality at most [NCAA Division I FBS member institutions] is still a dream.”¹²⁴ Former Advocacy Director for the Women’s Sports Foundation Kathryn M. Reith “believes that the quest for [sex equity] has become somewhat stagnant.”¹²⁵ Reith has stated that “the process has stalled,” and that “we are sort of stuck at [a] level of discrimination that [NCAA Division I FBS member institutions] are comfortable with.”¹²⁶ A possible way to revitalize the quest for sex equity within intercollegiate athletics is to use Title VII as a new avenue in order to effectuate change.

¹²⁴ *Id.* at 116.

¹²⁵ *Id.*

¹²⁶ *Id.*

III. THE REMEDIES AVAILABLE UNDER TITLE VII

If there is a finding that a NCAA Division I FBS member institution has discriminated against a grant-in-aid female athlete under Title VII, the available remedies include “hiring, reinstatement, reasonable accommodation, promotion, back pay, front pay, or other actions that will make the wronged individual whole.”¹²⁷ The majority of these remedies are inapplicable to the employer-employee relationship between a NCAA Division I FBS member institution and a grant-in-aid female athlete. The likely remedies that would be awarded by a court are: (1) reasonable accommodation; and (2) other actions that will make the grant-in-aid female athlete feel whole. Both the former and the latter would allow the court to use broadly its discretion to offer as a remedial award to a grant-in-aid female athlete an order to compel her institution to eliminate the disparate treatment of female athletes, including but not limited to restructuring budgetary allocations. The benefit from this type of award is two-fold. First, this type of award would balance the resources made available to both a grant-in-aid female athlete and her male counterparts, particularly those who participate in football and basketball. Second, this type of award would act to deter further sex inequity promoted by institutions in their athletic program practices.

This possible remedy, along with any other remedial options the court may come up with, would possibly not differ greatly from those offered under Title IX. However, Title VII should be offered as additional legal redress alongside Title IX in an attempt to assist with the current sex inequity in intercollegiate athletics. The use of Title IX to effectuate change in intercollegiate athletics has become stagnant. Title VII could be used as a catalyst to re-ignite the quest for sex equity in intercollegiate athletics.

CONCLUSION

A grant-in-aid female athlete should be able to fulfill all of the three required elements to establish a claim under Title VII

¹²⁷ *Id.* at 132.

against her institution. If she were successful in sustaining a claim under Title VII against her institution, then this would bring with it the acceptance of the idea that Title VII is a viable remedial option in addition to Title IX. This would convey extreme implications for the NCAA, its member institutions, and the future of intercollegiate athletics.¹²⁸ This should not, however, deter the use of Title VII in the intercollegiate athletics context. Grant-in-aid female athletes should be allowed access to Title VII in addition to Title IX as a remedial option to any sex inequity that they experience in intercollegiate athletics. In her article entitled *Title VII: An Alternative Remedy for Gender Inequity in Intercollegiate Athletics*, Associate Professor Kristi L. Schoepfer states that:

Title VII has the potential to remedy many of the [sex] inequities that are present in [intercollegiate] athletics. When Title IX was initially introduced, it too presented many potential ramifications for educational institutions, but it has, in many regards, helped female athletes in their quest for [sex] equality. If applied correctly, Title VII has the potential to be just as successful, if not more so, than Title IX, and effectively eliminate [sex] inequity in [intercollegiate athletics].¹²⁹

Grant-in-aid female athlete should be entitled to seek relief under Title VII in order to be given the protection they need and deserve. It is time for a reform that will offer greater protection to grant-in-aid female athletes who participate in intercollegiate athletics at NCAA Division I FBS member institutions. The type of reformation that will be demanded if the use of Title VII is allowed in addition to the use of Title IX as it relates to sex inequity in intercollegiate athletics will present challenges, but they are not insurmountable. There is no question that female athletes have more opportunities and athletic privileges than they did almost forty years ago when Title IX was first passed. This, however, should not serve as a barrier to a continued quest for sex

¹²⁸ As employees under Title VII, grant-in-aid female athletes would be entitled to multiple rights provided by both federal and state laws that govern the employer-employee relationship.

¹²⁹ Schoepfer, *supra* note 16, at 134.

equity in intercollegiate athletics. Grant-in-aid female athletes are still subject to disparate treatment by their institutions. Title VII has never been applied in the intercollegiate athletics context before, but it could provide a new avenue to effectuate change in the pursuit of sex equity for grant-in-aid female athletes and be effective in balancing the benefits received by them and their male counterparts, particularly those who participate in football and basketball. Title VII as an additional legal redress to sex inequity in intercollegiate athletics may accomplish what Title IX was intended to do, yet has often failed to do: create sex equity in intercollegiate athletics among NCAA Division I FBS member institutions. As stated by Robert Frost, taking the road less traveled may make all the difference.¹³⁰ All the difference may be made if Title VII is applied in the intercollegiate athletics context toward sex inequity.

¹³⁰ See FROST, *supra* note 1.