

Kaepernick Can Kick It!: Employment Discrimination, Political Activism, and Speech in the NFL

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“There is never time in the future in which we will work out our salvation. The challenge is in the moment, the time is always now.”

—James Baldwin, *Nobody Knows My Name*¹

INTRODUCTION

Anti-discrimination laws do not offer enough protection against employment discrimination. Colin Kaepernick has yet to be hired by hired by an NFL team following his anti-police brutality protests during the national anthem,² despite being a qualified NFL quarterback.³ Kaepernick’s protest has caused widespread controversy; as a result, Kaepernick has experienced backlash from the public, NFL officials, NFL players, and elected officials.⁴

In a time when speech and political views face a constant threat of being suppressed, it is important to provide increased protections when private employees, like Kaepernick, engage in political speech, and face backlash as a result of such speech.⁵ The interpretation of the law should be expanded to consider the various ways in which racial discrimination can manifest in the workplace.⁶ The law should also provide increased

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1. JAMES BALDWIN, *NOBODY KNOWS MY NAME* 126 (Vintage International 1993) (1961).

2. See generally *infra* notes 10, 80.

3. See generally *infra* note 69 (explaining that Kaepernick is qualified because generally other quarterbacks who are “as good as Kaepernick” are signed to a team, that doubts about Kaepernick’s skill level do not appear to adequately justify Kaepernick’s continued free agency, and that data and trends suggest that people are “right to be suspicious” that other factors are likely the reason Kaepernick remains unsigned).

4. See generally *infra* notes 27, 29, 54, 61.

5. See *infra* note 54 and accompanying text.

6. See generally Suzanne B. Goldberg, *Discrimination by Comparison*, 120 *Yale L.J.* 728, 732-43 (2011); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-05 (1973) (providing an example of racial discrimination in the workplace that was found to be protected by law and outlining the burden shifting requirements one must meet to garner protection under Title VII); *Hagan v. City of New York*, 39 F. Supp. 3d 481 (S.D.N.Y. 2014) (providing another example of racial discrimination in the workplace and the requirements the plaintiff had to meet to prove she experienced racial discrimination); see *infra* note 274 and accompanying text (demonstrating how respectability is not

protections for employee participation in political activities, such as protesting. Furthermore, for individuals like Kaepernick who seek to express their views on public matters, the law leaves private employees vastly unprotected.⁷ Therefore, there is a need for political speech related laws to safeguard private employees.

First, this Note provides in-depth background information regarding Colin Kaepernick, his anti-police brutality protest, and his continued NFL free agency. Then, this Note examines Title VII of the Civil Rights Act of 1964, New York Executive Law §296, New York Labor Law 201-d, the NFL Collective Bargaining Agreement, as well as First Amendment speech protections to provide an overview of the applicable law regarding Kaepernick's predicament.⁸ Subsequently, this Note analyzes the viability of claims Kaepernick could present under these laws, and whether they would provide him any remedy. Finally, this Note discusses what can be done to improve these laws and to provide greater protections for individuals like Kaepernick, who face backlash as a result of their decisions to decry matters of public concern, such as racism, through protesting and political activism.

I. HISTORY

A. *The Evolution of Kaepernick's Protest*

The inception of Colin Kaepernick's protest went unrecognized.⁹ On

sufficient enough to counteract the pervasiveness of racism in the United States, and also that even when Black people attain some sort of upward mobility, such as through education, racism continues to impact their lives and leads to disparities in outcomes between Black people and white people from similar backgrounds).

7. See generally *Hagan*, 39 F. Supp. 3d at 505–06 (2014) (citing *Pickering v. Bd. Of Educ. Of Twp. High Sch. Dist. 205, Will. Cnty.*, 391 U.S. 563, 568 (1968); *Garcetti v. Ceballos*, 547 U.S. 410, 418–19 (2006)) (defining what constitutes speech on a matter of public concern and demonstrating the limited yet special protections that exist specifically for government employees).

8. See generally 42 U.S.C. § 2000e-2(a)(1)–(2) (2012); N.Y. EXEC. LAW § 291 (McKinney, Westlaw through L.2018, chapters 1 to 271); N.Y. LAB. LAW § 201-d(2)(a)–(c) (McKinney, Westlaw through L.2018, chapters 1 to 271); NFL CBA (2011) art. 1.

9. Colin Kaepernick is an NFL player who had been playing with the San Francisco 49ers since he was drafted into the NFL in 2011. See *Colin Kaepernick Stats*, ESPN, http://www.espn.com/nfl/player/stats/_id/14001/colin-kaepernick (last visited Oct. 20, 2016). Colin Kaepernick was born to a Black father and white mother, but was adopted by a white Wisconsin

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August 14, 2016, Colin Kaepernick, a San Francisco 49ers player, sat on the bench as the national anthem played at the start of a 49ers' preseason game.¹⁰ This first action did not draw any attention.¹¹ Kaepernick sat again during the anthem on August 20, 2016, and once more his protest went unnoticed.¹² Finally, on August 26, 2016, Kaepernick sat another time during the national anthem.¹³ A photo of Kaepernick sitting during the anthem was put on social media by a journalist.¹⁴ This time, following the game, the media questioned Kaepernick about his actions.¹⁵ Kaepernick explained, that he was protesting police brutality and the oppression of "[B]lack people and people of color."¹⁶ To highlight the seriousness of the issues, Kaepernick emphasized, "To me, this is bigger than football and it would be selfish on my part to look the other way. There are bodies in the street and police officers getting paid leave and getting away with murder."¹⁷ In response to Kaepernick's actions, several statements were released by the San Francisco 49ers' leadership and the NFL. The 49ers expressed that, "In respecting such American principles as freedom of religion and freedom of expression, we recognize the right of an individual to choose and participate, or not, in our celebration of the national anthem."¹⁸ Additionally, Chip Kelly, the coach for the San Francisco 49ers at the time, said that Colin Kaepernick's decision to protest is "his right as a citizen" and that "it's not my right to tell him not to do something."¹⁹ The NFL explained, "Players are encouraged but not required to stand

couple when he was a child. See Esther Lee, *Colin Kaepernick Details Racial Struggle from His Childhood*, US WEEKLY (Oct. 8, 2015), <https://www.usmagazine.com/celebrity-news/news/colin-kaepernick-details-childhood-racial-struggle-2015810/>. Growing up with white parents, Kaepernick was confronted by racial differences at a very young age. *Id.*

10. Mark Sandritter, *A Timeline of Colin Kaepernick's National Anthem Protest and the Athletes Who Joined Him*, SB NATION, <https://www.sbnation.com/2016/9/11/12869726/colin-kaepernick-national-anthem-protest-seahawks-brandon-marshall-nfl> (last updated Sept. 25, 2017).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. Steve Wyche, *Colin Kaepernick Explains Why He Sat During National Anthem*, NFL, <http://www.nfl.com/news/story/0ap3000000691077/article/colin-kaepernick-explains-protest-of-national-anthem> (last updated Aug. 28, 2016).

19. *Id.*

during the playing of the national anthem.”²⁰ While there were many opinions about Kaepernick’s national anthem sit-in, Kaepernick clarified that he was not “looking for approval,” and he recognized that his protest would not likely be well received by everyone.²¹ Assured of his convictions for protesting police brutality and racial injustice, Colin Kaepernick declared, “If they take football away, my endorsements from me, I know that I stood up for what is right.”²²

On August 28, 2016, Kaepernick expounded on his reasons for protesting.²³ Kaepernick told the media that he would “continue to stand with the people that are being oppressed.”²⁴ He then stated that, “When there’s significant change and I feel that flag represents what it’s supposed to represent, and this country is representing people the way that it’s supposed to, I’ll stand.”²⁵ Although Kaepernick has not mentioned it himself, commentators have emphasized the significance of the symbolism of Colin Kaepernick’s protest and his choice to protest during the national anthem. Unbeknownst to many, “The Star-Spangled Banner,” is steeped in anti-Black racism.²⁶

20. *Id.* In contrast to the NFL, the NBA’s official rulebook explicitly mandates that players stand for the national anthem. See Tim Cato, *The NBA Actually Has a Rule Against Kneeling for the National Anthem*, SB NATION, <https://www.sbnation.com/2017/9/25/16358070/national-anthem-protest-kneel-kneel-rule> (last updated Sept. 29, 2017).

21. Wyche, *supra* note 18.

22. *Id.*

23. Sandritter, *supra* note 10.

24. *Id.*

25. *See id.*

26. See Jason Johnson, *Star-Spangled Bigotry: The Hidden Racist History of the National Anthem*, THE ROOT (July 4, 2016, 5:52 AM), <http://www.theroot.com/star-spangled-bigotry-the-hidden-racist-history-of-the-1790855893>. The United States’ national anthem has additional stanzas that typically are not sung. *Id.* Nevertheless, a portion of the third stanza states:

And where is that band who so vauntingly swore,
That the havoc of war and the battle’s confusion
A home and a Country should leave us no more?
Their blood has wash’d out their foul footsteps’ pollution.
No refuge could save the hireling and slave
From the terror of flight or the gloom of the grave,
And the star-spangled banner in triumph doth wave
O’er the land of the free and the home of the brave.

Id. To provide further context for these lyrics, it is important to understand the background of the song’s author, Francis Scott Key. *Id.* Francis Soctt Key was an aristocratic city prosecutor who owned enslaved persons, was an anti-abolitionist, and believed Black people should be sent back to Africa. *See id.* See also Norman Gelb, *Francis Scott Key, the Reluctant Patriot*, SMITHSONIAN MAGAZINE

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Immediately, Kaepernick experienced widespread public backlash. Current and former NFL players felt that Kaepernick was being disrespectful, while others conveyed agreeance with the reasons behind Kaepernick's protest but not his method. Several NFL executives anonymously conveyed that Kaepernick was a "traitor" and that they would never sign Kaepernick.²⁷ These executives approximated that "90 to 95 percent of the NFL front offices felt the same way."²⁸ Kaepernick also received a host of racial slurs and death threats on social media.²⁹ Others burnt Kaepernick's jersey.³⁰

On September 1, 2016, Colin Kaepernick's protest against police brutality and racial injustice evolved in three key ways.³¹ First, on September 1, 2016, after a meeting earlier that day with ex-NFL player Nate Boyer, who was previously a Green Beret, Kaepernick knelt instead of sitting on the bench as a result of his conversation with Boyer.³² During

(Sept. 2004), <https://www.smithsonianmag.com/history/francis-scott-key-the-reluctant-patriot-180937178/>; Christopher Wilson, *Where's the Debate on Francis Scott Key's Slave-Holding Legacy?*, SMITHSONIAN.COM (July 1, 2016), <https://www.smithsonianmag.com/smithsonian-institution/wheres-debate-francis-scott-keys-slave-holding-legacy-180959550/>. Key wrote "The Star-Spangled Banner" in response to the battle of Fort McHenry, which America lost despite the British suffering many casualties. See Johnson, *supra*. The third stanza of the song specifically references enslaved people who were fighting for the British army. *Id.*

27. Stefan Bondy, *Anonymous NFL GMs Call Colin Kaepernick a "Traitor," Say They'd Never Sign Him*, N.Y. DAILY NEWS (Aug. 31, 2016), <http://www.nydailynews.com/sports/football/anonymous-nfl-gms-call-colin-kaepernick-traitor-article-1.2773498>.

28. *Id.* One of the executives even called Kaepernick "the most hated player since Rae Carruth." *Id.* Carruth is an ex-football player who was convicted of "plotting to murder his pregnant girlfriend in 1999." *Id.*

29. See Shaun King, *Dear White America, Which Form of Protest Do You Prefer?*, N.Y. DAILY NEWS (Sept. 2, 2016), <http://www.nydailynews.com/news/national/king-dear-white-america-form-protest-prefer-article-1.2775698>. There is a long-standing history of policing and suppressing Black protest; generally, the United States public seems to find no form of Black protest acceptable. See *id.* See generally Judd Legum, *The Long History of Civil Rights Protests Making White People Uncomfortable*, THINK PROGRESS (Sept. 25, 2017, 8:30 AM), <https://thinkprogress.org/criticisms-nfl-protests-civil-rights-7288ae50f843/>. See Marissa Martinelli, *Trevor Noah Wants to Know: Is There Any Kind of Black Protest Republicans Won't Find a Way to Criticize?*, SLATE (Sept. 26, 2017, 12:31 PM), http://www.slate.com/blogs/browbeat/2017/09/26/trevor_noah_on_republican_criticism_of_protests_by_stevie_wonder_the_nfl.html.

30. See generally Matthew Allen, *Burning Jerseys: The Distant Cousin of Lynching*, THE ROOT (Oct. 1, 2017, 10:00 AM), <https://www.theroot.com/burning-jerseys-the-distant-cousin-of-lynching-1819019964> (explaining the significance of burning Black sports players' jerseys).

31. See Sandritter, *supra* note 10.

32. *Id.*; Nick Schwartz, *Nate Boyer Speaks Out on Colin Kaepernick*, USA TODAY (Sept. 7, 2018),

their meeting, Boyer and Kaepernick contemplated how to “keep the focus” on the issues behind the protest while not “tak[ing] away from the military,” which resulted in Kaepernick’s decision to kneel.³³ Second, Kaepernick’s teammate, Eric Reid, joined Kaepernick in kneeling.³⁴ Third, Jeremy Lane, from the Seattle Seahawks, became the first person outside of the San Francisco 49ers team to make a demonstration during the national anthem.³⁵ Lane protested by sitting on the Seahawks’ team bench as the anthem played.³⁶ As “God Bless America” played Kaepernick stood and applauded.³⁷ Despite Kaepernick’s attempt to modify his protest and show respect for military members, he and Reid received loud boos from spectators.³⁸ Upon the conclusion of the September 1st preseason game, Kaepernick announced that he would donate one million dollars to a number of organizations that aid marginalized peoples and deal with race-related issues.³⁹

Gradually, more individuals began to join Kaepernick’s protest.⁴⁰ The

<https://www.usatoday.com/story/sports/ftw/2018/09/07/former-green-beret-nate-boyer-on-colin-kaepernick-its-ok-to-be-different/111290108/>. Nate Boyer penned an open letter to Kaepernick expressing his feelings about Kaepernick’s choice to sit during the national anthem. Will Brinson, *Here’s How Nate Boyer Got Colin Kaepernick to Go from Sitting to Kneeling*, CBS SPORTS (Sept. 27, 2016), <https://www.cbssports.com/nfl/news/heres-how-nate-boyer-got-colin-kaepernick-to-go-from-sitting-to-kneeling/>; Marissa Payne, *Ex-Green Beret Who Wrote Letter to Colin Kaepernick Suggests Former QB Sit Down with Trump*, WASH. POST (Oct. 13, 2017), <https://www.washingtonpost.com/news/early-lead/wp/2017/10/13/ex-green-beret-who-wrote-letter-to-colin-kaepernick-suggests-former-qb-sit-down-with-trump/>. The letter prompted Kaepernick and Boyer to schedule a meeting with each other during which they discussed ways that Kaepernick could protest police brutality while not being disrespectful to the military. Sandritter, *supra* note 10. *See also* Brinson, *supra*. Upon the conclusion of their meeting, Kaepernick and Boyer decided that the best way for Kaepernick to achieve these goals was to kneel instead of sit during the anthem. Brinson, *supra*.

33. Sandritter, *supra* note 10.

34. *Id.*

35. *Id.*

36. *Id.* Jeremy Lane explained after the game, “I wasn’t trying to say anything. Just standing behind Kaepernick.” *Id.* Lane stated that he planned to keep sitting during the anthem until he believed “justice was served.” *Id.*

37. Josh Peter, *Colin Kaepernick: I’m Not Anti-American, Will Donate \$1 Million*, USA TODAY SPORTS (Sept. 2, 2016), <https://www.usatoday.com/story/sports/nfl/49ers/2016/09/01/colin-kaepernick-national-anthem-protest-police-socks/89743344/>.

38. Sean Wagner-McGough, *Colin Kaepernick to Donate \$1 Million to Charities that Aid Communities in Need*, CBS SPORTS (Sept. 2, 2016), <https://www.cbssports.com/nfl/news/colin-kaepernick-says-hell-donate-1-million-to-charities-that-help-communities-in-need/>.

39. Sandritter, *supra* note 10.

40. *See id.* On September 4, Megan Rapinoe, a professional women’s soccer player for the Seattle Reign, knelt during the national anthem specifically in support of Colin Kaepernick and his efforts to

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protest expanded beyond professional sports as college and high school sports teams, cheerleaders, and band members began kneeling during the anthem.⁴¹

Following the conclusion of the 2016 season, on March 3, 2017, the stakes of Kaepernick's protest were raised when he opted out of his contract with the San Francisco 49ers and became a free agent.⁴² A free agent is "a player who is not under contract and is free to negotiate and sign a Player Contract with any NFL Club, without Draft Choice Compensation or any Right of First Refusal."⁴³ Before becoming a free agent, Kaepernick made it clear that he intended to stand for the national anthem again the following football season if he were signed to a team.⁴⁴ Despite his free agency, Colin Kaepernick continued to decry police brutality.

During the course of Kaepernick's protest, on August 22, 2017, at the beginning of the 2017 preseason, Cleveland Browns' player Seth DeValve knelt in a prayer circle along with Isaiah Crowell, Duke Johnson, Jabrill Peppers, Christian Kirksey, Jamie Collins, Kenny Britt, Ricardo Louis, and Jamar Taylor.⁴⁵ Following this display, DeValve became the first

bringing attention to racial injustice. *Id.* As the movement grew, players used a variety of demonstrations to make a statement. *Id.* On September 11, 2016, four Miami Dolphins players knelt during the anthem. *Id.* Contrastingly, that same day, the entire Seattle Seahawks team linked arms during the national anthem, but no one knelt. *Id.* Similarly, for their September 11th game, the Kansas Chiefs also linked arms, and Chiefs' player, Marcus Peters, raised his fist. *Id.* Like, Peters, New England Patriots players, Martellus Bennett and Devin McCourty, raised their fists as well, but they did so after the anthem finished playing. *Id.*

41. *Id.* One of the earliest non-professional sports teams to demonstrate during the national anthem was Garfield High School's football team in Seattle Washington. *Id.* On September 16, 2016, the high school's football players and coaches all knelt. *Id.* A few players from the opposing team, the West Seattle Wild Cats, also knelt as well. *Id.* The Garfield football team's protest was explicitly in opposition to racial injustice in the United States. *Id.* On September 17, 2016, at the AT&T Nation's Football Classic, Howard University's cheerleaders knelt during the national anthem, while the Howard football players raised their fists. *Id.*

42. Harry Lyles, Jr., *Colin Kaepernick is Still an NFL Free Agent. These are the Rumored Reasons Why*, SB NATION, <https://www.sbnation.com/2017/5/9/15590404/colin-kaepernick-reasons-he-isnt-signed-nfl-protest> (last updated June 12, 2017).

43. NFL CBA (2011) art. 1.

44. *Kaepernick Opts Out of Contract, Becomes Free Agent*, ESPN (Mar. 3, 2017), http://www.espn.com/nfl/story/_/id/18818589/colin-kaepernick-opts-contract-becomes-free-agent.

45. See Scott Patsko, *Was the Browns' Prayer Circle During the National Anthem Respectful*, CLEVELAND.COM (Aug. 22, 2017), https://www.cleveland.com/browns/index.ssf/2017/08/was_the_browns_prayer_circle_d.html; Conor Orr, *Seth DeValve Took a Knee in Support of His Teammates*, NFL: AROUND THE NFL (Aug. 22, 2017), <http://www.nfl.com/news/story/0ap3000000833215/article/seth-devalve-took-a-knee-in->

white NFL player to make a demonstration during the anthem.⁴⁶ DeValve's demonstration came a week after Michael Bennett, a defensive end for the Seattle Seahawks, urged white NFL players to partake in the anti-police brutality protests in order to "change the whole conversation."⁴⁷

Although Kaepernick has received a great deal of criticism of his protest, he has also garnered significant public support. Shortly after the start of Kaepernick's protest, his jersey became the best-selling jersey in the NFL.⁴⁸ As Kaepernick remained an unsigned free agent, the social media campaign #BlackOutNFL was organized.⁴⁹ The campaign called for a complete boycott of the NFL, along with other actions, to influence the NFL to alter their treatment of Kaepernick and to help Kaepernick get signed to a team. In conjunction with #BlackOutNFL, Kaepernick supporters protested outside of the NFL Headquarters in Manhattan, NY, to oppose the NFL's treatment of Kaepernick.⁵⁰

Support for Kaepernick's protest against police brutality and racial injustice continued to reverberate in other professional sports as Bruce Maxwell, a baseball player for the Oakland Athletics, and NHL player, J.T. Brown of the Tampa Bay Lightning became the first players in their respective sports to participate in the national anthem demonstrations.⁵¹

support-of-his-teammates.

46. Scott Davis, *Browns Tight End Became the First White NFL Player to Kneel During the National Anthem*, BUS. INSIDER (Aug. 22, 2017, 9:44 AM), <http://www.businessinsider.com/browns-seth-devalve-kneel-during-national-anthem-2017-8>.

47. Mark Lelinwalla, *White Browns' Player Seth DeValve Knelt During the Anthem and Explains He "Will Be Raising Children that Don't Look Like Me,"* BET (Aug. 22, 2017), <https://www.bet.com/news/sports/2017/08/22/browns--seth-devalve-explains-kneeling-during-anthem.html>.

48. See Darren Heitner, *Colin Kaepernick Tops Jersey Sales in NFL*, FORBES (Sept. 7, 2016, 7:54 AM), <https://www.forbes.com/sites/darrenheitner/2016/09/07/colin-kaepernick-tops-jersey-sales-in-nfl/#60ded9ad47aad>.

49. See Angela Helm, *Will "BlackOut" Be the Movement to Shut Down the NFL?*, THE ROOT (Aug. 19, 2017, 12:52 PM), <http://www.theroot.com/will-blackout-be-the-movement-to-shut-down-the-nfl-1798053097>.

50. See generally *Colin Kaepernick Supporters Hold Rally Outside NFL Headquarters*, THE GUARDIAN (Aug. 24, 2017) [hereinafter *Supporters Hold Rally*], <https://www.theguardian.com/sport/2017/aug/24/colin-kaepernick-supporters-hold-rally-outside-nfl-headquarters>.

51. See *Athletics' Bruce Maxwell First MLB Player to Kneel During National Anthem*, ESPN (Sept. 24, 2017) [hereinafter *Bruce Maxwell*], http://www.espn.com/mlb/story/_/id/20796662/oakland-athletics-catcher-bruce-maxwell-kneels-national-anthem; Anne Branigin, *Black NHL Player Receives*

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Maxwell chose to kneel during the anthem, whereas Brown raised a fist.⁵² Similar to Kaepernick, Brown received a number of racially offensive comments along with death threats via social media following his act during the national anthem.⁵³

While the conversation on Kaepernick's anti-police brutality protest was initially driven by the public, various sports entities, and media, political figures, such as Donald Trump, later weighed in on Kaepernick's movement. First, in reference to NFL players who have demonstrated during the anthem, Donald Trump exclaimed, "Wouldn't you love to see one of these NFL owners, when someone disrespects our flag, to say, 'Get that son of a bitch off the field right now. Out! He's fired. He's fired!'"⁵⁴ Donald Trump then took to Twitter on September 24, 2017, and encouraged an NFL boycott to prompt the proper NFL authorities to "fire or suspend" players who protested during the anthem.⁵⁵ Subsequently, Donald Trump's comments led to a crucial shift in the NFL national anthem protests.

Two days following Trump's remarks, on September 24, 2017, NFL Teams made a variety of demonstrations to show their opposition to Trumps' comments.⁵⁶ The NFL-wide demonstrations that occurred are considered the "largest single-day athlete protest in American sports

Death Threats After Raising Fist During National Anthem, THE ROOT (Oct. 9, 2017, 9:31 AM), <https://www.theroot.com/black-nhl-player-receives-death-threats-after-raising-f-1819277551>.

52. Bruce Maxwell, *supra* note 51. Branigin, *supra* note 51.

53. See Branigin, *supra* note 51.

54. Bryan Armen Graham, *Donald Trump Blasts NFL Anthem Protesters: "Get that Son of a Bitch Off the Field,"* THE GUARDIAN (Sept. 23, 2017), <https://www.theguardian.com/sport/2017/sep/22/donald-trump-nfl-national-anthem-protests>.

In response to Trump's disparagement of NFL demonstrators, Kaepernick's adopted mother, Teresa Kaepernick, responded via Twitter, "Guess that makes me a proud bitch!" Michelle R. Martinelli, *Colin Kaepernick's Mom Fires Back at Donald Trump's Criticism of National Anthem Protests*, USA TODAY (Sept. 23, 2017), <http://ftw.usatoday.com/2017/09/colin-kaepernick-donald-trump-national-anthem-protest-fired-teresa-kaepernick-mom-proud-response/amp>. Contrastingly, Kaepernick's biological mother does not fully support his protest, and publicly "scolded" Kaepernick on social media. See Martenzie Johnson, *Colin Kaepernick's Parents Break Silence: "We Absolutely Do Support Him,"* ESPN (Dec. 10, 2016), http://www.espn.com/nfl/story/_/id/18247113/colin-kaepernick-parents-break-silence-speak-support-criticized-quarterback.

55. See Zeba Blay, *What It Really Means When Black People Who Protest Are Called "Ungrateful,"* HUFFPOST, https://www.huffingtonpost.com/entry/the-double-standards-of-black-people-in-protest_us_59c90d74e4b01cc57ff3cc50 (last updated Sept. 25, 2017).

56. Ryan Wilson, *NFL Anthem Protests Tracker: Beast Mode Calls Out Donald Trump, Boos Greet Players*, CBS SPORTS (Oct. 4, 2017), <https://www.cbssports.com/nfl/news/nfl-anthem-protests-tracker-beast-mode-calls-out-donald-trump-boos-greet-players/>.

history.”⁵⁷ The NFL and many NFL teams issued statements highlighting the importance of unity and upholding certain American values.⁵⁸ Other teams and their officials linked arms, knelt, or remained in the locker room during the anthem.⁵⁹ Nevertheless, these displays were in direct response to Donald Trump’s comments and were not about ending police brutality and the oppression of Black people and people of color within the United States.⁶⁰

The following month, at a meeting between select NFL franchise owners, players, and union leaders, while discussing the national anthem protests, Bob McNair, the Houston Texans’ franchise owner, said, “We can’t have the inmates running the prison.”⁶¹ This comment is particularly offensive given the majority of players in the NFL are Black, all but two

57. Louis Moore, *The NFL Has Officially Whitewashed Colin Kaepernick’s Protest*, VOX: FIRST PERSON (Sept. 28, 2017, 1:00 PM), <https://www.vox.com/first-person/2017/9/28/16379618/nfl-take-a-knee-protest-colin-kaepernick>.

58. See generally Tim Webber, *How Every NFL Team Responded to Trump’s National Anthem Protest Comments*, NPR (Sept. 25, 2017, 5:46 PM), <https://www.npr.org/2017/09/25/553539767/how-every-nfl-team-responded-to-trump-s-national-anthem-protest-comments>. See also Elliot C. McLaughlin & Darran Simon, *These Are the NFL Players Protesting Today Amid Trump Criticism*, CNN, <http://www.cnn.com/2017/09/24/us/nfl-trump-take-knee-protests/index.html> (last updated Sept. 25, 2017); Tyler Lauetta, *NFL Players and Teams Around the League Defiantly Reacted to Trump’s Comments by Protesting During the National Anthem*, BUS. INSIDER (Sept. 25, 2017, 9:41 PM), <http://www.businessinsider.com/nfl-teams-protest-trump-2017-9/#dallas-cowboys-1>.

59. Webber, *supra* note 58.

60. See Moore, *supra* note 57. These teams and officials’ efforts to denounce Donald Trump’s comments ultimately co-opted Colin Kaepernick’s protest. *Id.* See generally Jozen Cummings, *How the NFL Turned Colin Kaepernick’s Protest Into #AllLivesMatter*, THE ROOT: VERY SMART BROTHAS (Sept. 25, 2017, 2:11 PM), <https://verysmartbrothas.theroot.com/how-the-nfl-turned-colin-kaepernicks-protest-into-all-1818721572>; Jamil Smith, *How the NFL Watered Down Colin Kaepernick’s Protest*, WASH. POST (Sept. 26, 2017), <https://www.washingtonpost.com/news/posteverything/wp/2017/09/26/how-the-nfl-watered-down-colin-kaepernicks-protest/>. Kaepernick’s activism has been downplayed and overlooked in other ways as well. On September 25, 2017, Sports Illustrated unveiled the cover for their new issue entitled, “A Nation Divided Sports United.” Monique Judge, *Colin Kaepernick, Sports Illustrated and How Media Complicity Is Erasing His Movement*, THE ROOT (Sept. 27, 2017, 5:44 PM), <http://www.theroot.com/colin-kaepernick-sports-illustrated-and-how-media-comp-1818861875>. The cover depicts professional athletes from a variety of sports, coaches, and other sports figures linking arms and it is Sports Illustrated’s response to Donald Trump’s national anthem protest remarks. *Id.* Kaepernick was left off of the cover. *Id.*

61. See Seth Wickersham & Don Van Natta, Jr., *Gaffes, TV Ratings Concerns Dominated as NFL, Players Forged Anthem Peace*, ESPN (Oct. 27, 2017), http://www.espn.com/espn/otl/story/_/id/21170410/gaffes-tv-ratings-concerns-dominated-nfl-players-forged-anthem-peace-league-meetings.

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NFL franchise owners are white, and Black people are incarcerated at higher rates than white people.⁶² About a week later, McNair's comments surfaced in the public sphere.⁶³ Subsequently, many Texans players kneeled during the anthem at their next football game in opposition to McNair's comments.⁶⁴ Additionally, at the same meeting, NFL officials expressed concerns over Donald Trump's statements on the national anthem protests, and the influence such statements have.⁶⁵ Specifically, the franchise owners were afraid of "losing sponsors or fans because of the protests."⁶⁶

B. *Kaepernick Remains an Unsigned Free Agent*

Despite the NFL-wide anti-Trump protests during the anthem, and calls for unity by NFL executives, Colin Kaepernick, as of the 2019 off-season, remains unsigned.⁶⁷ Halfway through the 2018 NFL season, 50 quarterbacks were signed to NFL teams since Colin Kaepernick began his free agency.⁶⁸ Throughout Kaepernick's free agency, many sports analyzers examined Kaepernick's qualifications and found that

62. Ahiza Garcia, *These Are the Only Two Owners of Color in the NFL*, CNN: MONEY (May 18, 2018), <https://money.cnn.com/2018/05/18/news/nfl-nba-mlb-owners-diversity/index.html>; Michael Gertz, *NFL Census 2016*, PROFOOTBALLLOGIC (Apr. 19, 2017), <http://www.profootballlogic.com/articles/nfl-census-2016/>; RICHARD LAPCHICK & SAAHIL MARFATIA, UNIV. CENT. FLA., *THE 2017 RACIAL AND GENDER REPORT CARD: NATIONAL FOOTBALL LEAGUE 26* (2017),

<http://nebula.wsimg.com/63112e771048708d1b4213b554c6cd76?AccessKeyId=DAC3A56D8FB782449D2A&disposition=0&alloworigin=1>; H.A. Goodman, *70 Percent of NFL Players Are Black Men. Colin Kaepernick Should be Praised, Not Condemned*, HUFFPOST, https://www.huffingtonpost.com/entry/70-of-nfl-players-are-black-men-colin-kaepernick_us_57c7b12be4b07addc4114047 (last updated Oct. 23, 2017); NAACP, CRIMINAL JUSTICE FACT SHEET, <https://www.naacp.org/criminal-justice-fact-sheet/> (last visited Nov. 27, 2018).

63. See generally Harry Lyles, Jr., *Texans Kneel During National Anthem in Protest of Bob McNair's "Inmates" Comment*, SB NATION, <https://www.sbnation.com/2017/10/29/16567080/texans-protest-bob-mcnair-inmates-comment> (last updated Oct. 29, 2017). Bob McNair later died on November 23, 2018. Ralph Ellis, *Bob McNair, Owner of NFL's Houston Texans, Dies at 81*, CNN (Nov. 23, 2018), <https://www.cnn.com/2018/11/23/sport/bob-mcnair-houston-texans-obit/index.html>.

64. Lyles, *supra* note 63.

65. Stephen A. Crockett Jr., *Leaked Meeting Audio Proves NFL Owners Worried About Appeasing White Fans, While Players Worried About Kaepernick, Black Lives*, THE ROOT (Apr. 25, 2018, 1:28 PM), <https://www.theroot.com/leaked-meeting-proves-nfl-owners-worried-about-appeasin-1825536463>.

66. *Id.*

67. Martenzie Johnson, *The 50 Quarterbacks Who Have Signed Since Colin Kaepernick Became A Free Agent*, THE UNDEFEATED (Mar. 16, 2018), <https://theundefeated.com/features/33-quarterbacks-signed-before-colin-kaepernick-free-agent/>.

68. *Id.*

Kaepernick is qualified to play for an NFL team.⁶⁹ While he was the 49ers quarterback, Kaepernick lead the team to two NFC Championship games and one Super Bowl, where the San Francisco 49ers were only “yards short of a victory.”⁷⁰ During Kaepernick’s first year of free agency some sports commentators argued that Kaepernick’s skills as a quarterback had even improved since the 49ers went to the Super Bowl in 2013.⁷¹ No quarterback of Kaepernick’s caliber has gone unsigned for as long as Kaepernick has.⁷² Additionally, other football players, such as Tom Brady, quarterback for the New England Patriots, asserted that Kaepernick is qualified to be signed to a NFL team.⁷³ Throughout Kaepernick’s free agency he continued to train and prepare in case a team expressed interest

69. See Lyles, *supra* note 42 (providing other explanations often offered as to why Kaepernick may remain unsigned). See also Daniel Rapaport, *Report: Jerry Jones, Bob McNair, Robert Kraft to be Deposed in Kaepernick Collusion Grievance*, SPORTS ILLUSTRATED (Nov. 3, 2017), <https://www.si.com/nfl/2017/11/03/jerry-jones-robert-kraft-bob-mcnair-deposed-colin-kaepernick-collusion-case>. For a statistical analysis of Kaepernick’s length of free agency in comparison to other quarterbacks throughout the years, see Kyle Wagner & Neil Paine, *Yes, It’s Strange That Colin Kaepernick Doesn’t Have a Deal Yet*, ESPN: FIVETHIRTYEIGHT (Mar. 29, 2017, 3:30 PM), <https://fivethirtyeight.com/features/yes-its-strange-that-colin-kaepernick-doesnt-have-a-deal-yet/>. See also Christina Similien, *Colin Kaepernick Is More Than Qualified to Play in the NFL*, EBONY (Nov. 1, 2018), <https://www.ebony.com/entertainment-culture/colin-kaepernick-is-more-than-qualified-play-nfl>. Kaepernick continues to train and was training with Eric Reid before Reid was signed to the Panthers. See Nihal Kolar, *Colin Kaepernick, Eric Reid Work Out Together in California*, SPORTS ILLUSTRATED (May 8, 2018), <https://www.si.com/nfl/2018/05/08/colin-kaepernick-eric-reid-training-together>; Marcus White, *Eric Reid’s NFL Return ‘Bittersweet’ While Colin Kaepernick Unemployed*, NBC SPORTS (Oct. 7, 2018), <https://www.nbcsports.com/bayarea/49ers/eric-reids-nfl-return-bittersweet-while-colin-kaepernick-unemployed>; Tyler Conway, *Colin Kaepernick Is Still Training for NFL Return, Per Trainer Josh Hidalgo*, BLEACHER REP. (Oct. 18, 2018), <https://bleacherreport.com/articles/2801644-colin-kaepernick-is-still-training-for-nfl-return-per-trainer-josh-hidalgo>. Additionally, Kaepernick’s lawyer stated in September 2018 that two teams were considering signing Kaepernick and that he expected Kaepernick to be signed soon. John Breech, *Colin Kaepernick’s Lawyer Hints that Two Teams Might Be Interested in Adding the Free-Agent QB*, CBS SPORTS (Sept. 20, 2018), <https://www.cbssports.com/nfl/news/colin-kaepernicks-lawyer-hints-that-two-teams-might-be-interested-in-adding-the-free-agent-qb/>.

70. Lyles, *supra* note 42. See also Johnson, *supra* note 67.

71. See Kyle Wagner, *Colin Kaepernick Is Not Supposed to be Unemployed*, ESPN: FIVETHIRTYEIGHT (Aug. 9, 2017, 2:14 PM), <https://fivethirtyeight.com/features/colin-kaepernick-is-not-supposed-to-be-unemployed/>.

72. *Id.*

73. See Scooby Axson, *Tom Brady on Colin Kaepernick: “I Hope He Gets a Shot,”* SPORTS ILLUSTRATED (Sept. 17, 2017), <https://www.si.com/nfl/2017/09/17/tom-brady-colin-kaepernick-qualified>. See also Robert O’Connell, *The NFL Is Making Colin Kaepernick’s Collusion Case for Him*, THE ATLANTIC (Nov. 15, 2017), <https://www.theatlantic.com/entertainment/archive/2017/11/the-nfl-is-making-colin-kaepernicks-collusion-case-for-him/545804/>.

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in him.⁷⁴ While no team has yet to formally express interest in Kaepernick, Ray Lewis, a retired Baltimore Raven, claimed that the Ravens were close to signing Kaepernick until Kaepernick's girlfriend, Nessa Diab posted a tweet with pictures comparing Ray Lewis and Ravens franchise owner, Stephen Biscotti, with two characters from *Django Unchained*.⁷⁵

On October 15, 2017, Colin Kaepernick "filed a grievance" against the NFL for collusion.⁷⁶ Article 17, section 1 of the NFL Collective Bargaining Agreement ("CBA") governs collusion and outlines rules prohibiting the NFL and Clubs from "restrict[ing] or limit[ing] individual Club decision-making" in certain ways concerning making offers to players and entering into contracts with them.⁷⁷ In light of this collusion claim, franchise owners were asked to provide cell phone and e-mail records that pertain to Kaepernick.⁷⁸ The grievance named franchise owners such as Jerry Jones of the Cowboys, Robert Kraft of the Patriots, and Bob McNair of the Texans.⁷⁹ In August 2018, an arbitrator denied the NFL's motion to dismiss Kaepernick's collusion grievance, thus allowing a hearing.⁸⁰

Following the conclusion of the 2018 NFL season, Colin Kaepernick

74. David Fucillo, *Colin Kaepernick's Trainer: "He's Healthy, He's Bigger, He's Faster Than He Was, and He's Ready."*, SB NATION (May 16, 2017, 7:54 AM), <https://www.ninersnation.com/2017/5/16/15646708/colin-kaepernick-trainer-mmqb-column-quarterback>. See also Chris Chavez, *Colin Kaepernick Breaks Silence, Says He to Play: "I'm Ready Right Now,"* SPORTS ILLUSTRATED (Sept. 17, 2017), <https://www.si.com/nfl/2017/09/17/colin-kaepernick-wants-play-2017-season-interview>. For a list of all of the NFL free agents for the 2017 football season please see generally *2017 NFL Free Agents*, SPOTRAC [hereinafter *NFL Free Agents*], <http://www.spotrac.com/nfl/free-agents/2017/> (last visited Jan. 19, 2018).

75. See Jamison Hensley, *Ray Lewis Said Ravens Would Have Signed Colin Kaepernick If Not for Girlfriend's Tweet*, ESPN (Sept. 6, 2017), http://www.espn.com/nfl/story/_/id/20597810/ray-lewis-said-baltimore-ravens-sign-colin-kaepernick-girlfriend-racist-tweet; *Ray Lewis: Ravens Shunned Kaepernick Due to "Racist" Tweet from Girlfriend*, THE GUARDIAN (Sept. 6, 2017), <https://www.theguardian.com/sport/2017/sep/06/colin-kaepernick-ray-lewis-baltimore-ravens-nessa-diab-nfl>.

76. See O'Connell, *supra* note 73; Michael McCann, *Colin Kaepernick's Collusion Claim: Does He Have a Case?*, SPORTS ILLUSTRATED (Oct. 15, 2017), <https://www.si.com/nfl/2017/10/15/colin-kaepernick-collusion-lawsuit-against-nfl>.

77. NFL CBA (2011) art. 17 § 1. Essentially, NFL teams cannot conspire with one another to not sign a player. *Id.*

78. Rapaport, *supra* note 69.

79. *Id.*

80. Ken Belson, *Colin Kaepernick's Collusion Case Against the N.F.L. Will Advance*, N.Y. TIMES (Aug. 30, 2018), <https://www.nytimes.com/2018/08/30/sports/colin-kaepernick-collusion-case-nfl.html>.

remained unsigned.⁸¹ At the end of the 2017 NFL season, Eric Reid held the record for being the “active player with the longest-running record of protesting during the national anthem” as Reid began protesting soon after Kaepernick started.⁸² Like Kaepernick, on May 2, 2018, Reid also filed a collusion suit against the NFL.⁸³ Reid was a free agent for six months, but later signed to the Carolina Panthers on September 27, 2018.⁸⁴ Since being signed to the Panthers, Eric Reid has been drug-tested about six times, including his physical as of November 27, 2018.⁸⁵ Those six tests happened in a two month period, and Reid had only played in six games by the fifth time he was tested, and his sixth test was only two games later.⁸⁶ Throughout the NFL season, “the NFLPA randomly selects 10 players per team to be tested.”⁸⁷ A computer program chooses which

81. See generally Priscilla Totiyapungprasert, *Is Colin Kaepernick at Super Bowl 2018? His Future in the NFL Is Uncertain*, BUSTLE (Feb. 4, 2018), <https://www.bustle.com/p/is-colin-kaepernick-at-super-bowl-2018-his-future-in-the-nfl-is-uncertain-8012817>.

82. Jared Dubin, *Eric Reid Believes Protests Could Cost Him Free-Agent Opportunities*, CBS SPORTS (Dec. 30, 2017), <https://www.cbssports.com/nfl/news/eric-reid-believes-protests-could-cost-him-free-agent-opportunities/>. For a list of players who have continued kneeling during the national anthem, see Louis Bien, *Colin Kaepernick's Movement Continues Just Outside the Walls of Super Bowl 52*, SB NATION (Feb. 4, 2018, 1:00 PM), <https://www.sbnation.com/2018/2/4/16969134/super-bowl-protest-colin-kaepernick-will-players-kneel>.

83. Harry Lyles Jr., *A Law Professor Explains Why It'll Be 'A Bitch' for Eric Reid to Prove NFL Collusion*, SB NATION (May 3, 2018), <https://www.sbnation.com/2018/5/3/17311830/eric-reid-nfl-collusion-case-explained>.

84. James Brady, *Eric Reid, One of the NFL's Best Safeties, Finally Got Signed After Being Unemployed for 6 Months*, SB NATION, <https://www.sbnation.com/nfl/2018/9/27/17094986/eric-reid-anthem-protests-nfl-free-agency-2018> (last updated Sept. 27, 2018); Emily Caron, *Panthers Sign Free Agent Safety Eric Reid to One-Year Contract*, SPORTS ILLUSTRATED (Sept. 27, 2018), <https://www.si.com/nfl/2018/09/27/eric-reid-signs-carolina-panthers-contract>; Around the NFL Staff, *Free-Agent Safety Eric Reid Files Grievance Under CBA*, AROUND THE NFL, <http://www.nfl.com/news/story/0ap3000000930981/article/freeagent-safety-eric-reid-files-grievance-under-cba> (last updated May 2, 2018); Stephen A. Crockett Jr., *NFL Safety Eric Reid Has Been Drug Tested 6 Times in 8 Games But That's Probably Just a Coincidence*, THE ROOT (Nov. 26, 2018), <https://www.theroot.com/nfl-safety-eric-reid-has-been-drug-tested-6-times-in-8-1830665105>.

85. Michael Shapiro, *Eric Reid Says NFL Has Drug-Tested Him Five Times Since Return*, SPORTS ILLUSTRATED (Nov. 9, 2018), <https://www.si.com/nfl/2018/11/09/eric-reid-drug-test-nfl-five-times-panthers-defensive-back-thursday-night-football>; Crockett, *supra* note 84; Ashleigh Atwell, *Eric Reid said he's Been Drug Tested Multiple Times in The Last Two Months: 'It Doesn't Feel Very Random.'* BLAVITY (Nov. 26, 2018), <https://blavity.com/eric-reid-said-hes-been-drug-tested-multiple-times-in-the-last-two-months-it-doesnt-feel-very-random>.

86. Shapiro, *supra* note 85; Crockett, *supra* note 84.

87. Roni Selig & Dr. Sanjay Gupta, *What the NFL Could Learn about Drug Testing from the UFC*, CNN, <https://www.cnn.com/2017/02/05/health/performance-enhancing-drugs-nfl-investigative-explainer/index.html> (last updated Feb. 6, 2017).

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players will be tested.⁸⁸ Reid said that testing “is supposed to be a random system,” but to Reid “[i]t doesn’t feel very random.”⁸⁹ Colin Kaepernick and Eric Reid settled their grievance with the League on February 15, 2019. However the settlement netted them less than \$10 million dollars according to reports. Given Kaepernick was paid \$14 million his last year, and he is splitting this with Reid and paying attorneys, it represents a small portion of his overall economic loss.⁹⁰

On May 23, 2018, the NFL, in conjunction with the franchise owners, decided that “players could no longer kneel during the national anthem without leaving themselves open to punishment or their teams facing possible financial penalties.”⁹¹ The policy extended beyond kneeling, for it imposed fines on teams if “a player or any other team personnel d[id] not show respect for the anthem.”⁹² The policy, however, would allow players to stay in the locker room during the anthem and players would not be forced to “stand on the sideline.”⁹³ Both Donald Trump and Mike Pence expressed support for the NFL’s new policy.⁹⁴ Nonetheless, at the start of the 2018 season, the NFL anthem policy has yet to be put into effect⁹⁵

88. NATIONAL FOOTBALL LEAGUE POLICY ON PERFORMANCE-ENHANCING SUBSTANCES 5 (2018), <https://nflpaweb.blob.core.windows.net/media/Default/PDFs/2018%20Policy%20on%20Performance-Enhancing%20Substances.pdf>. A reporter calculated that the likelihood that Reid would be tested five times in eight weeks is approximately .2%, which is the same probability that someone would flip a coin and get the same outcome “nine times in a row.” Steven Ruiz, *Why It’s Hard to Believe the NFL ‘Randomly’ Drug Tested Eric Reid 5 Times in 8 Weeks*, USA TODAY: FOR THE WIN (Nov. 26, 2018), <https://ftw.usatoday.com/2018/11/nfl-panthers-eric-reid-random-drug-testing-probability>.

89. Atwell, *supra* note 85.

90. Ken Belson, *N.F.L. Settlement With Kaepernick and Reid Is Said to Be Much Less Than \$10 Million*, N.Y. TIMES (Mar. 21, 2019), <https://www.nytimes.com/2019/03/21/sports/colin-kaepernick-nfl-settlement.html>.

91. Matthew Futterman & Victor Mather, *Trump Supports N.F.L.’s New National Anthem Policy*, N.Y. TIMES (May 23, 2018), <https://www.nytimes.com/2018/05/23/sports/nfl-anthem-kneeling.html>.

92. Kevin Seiferet & Dan Graziano, *New Policy Requires On-Field Players, Personnel to Stand for Anthem*, ESPN, http://www.espn.com/nfl/story/_/id/23582533/nfl-owners-approve-new-national-anthem-policy (last updated May 24, 2018).

93. Futterman & Mather, *supra* note 91.

94. *See id.*; Valerie Richardson, *Team Kaepernick Strikes Back at Pence Over His Support for NFL Kneeling Ban*, WASH. TIMES (May 24, 2018), <https://m.washingtontimes.com/news/2018/may/24/team-kaepernick-fires-back-pence-nfl-kneeling-ban/>.

95. *See* Adam Stites, *What the NFL’s Halted Anthem Policy Means for the Players, Teams, and League*, SB NATION, <https://www.sbnation.com/2018/7/23/17596078/nfl-national-anthem-policy-ramifications> (last updated Sept. 9, 2018); Jenny Verentas, *The NFL Is Beginning the 2018 Season with No New National Anthem Policy*, SPORTS ILLUSTRATED: THE MMQB (Sept. 9, 2018), <https://www.si.com/nfl/2018/09/09/national-anthem-policy-hold-2018-nfl-season>; Mark Maske, *NFL*

because the NFL is required by the National Labor Relations Act (“NLRA”) to negotiate with the NFLPA before making such policy changes.⁹⁶ The NFLPA and NFL officials are currently negotiating what the NFL policy should be.⁹⁷ Therefore, there is no NFL Anthem policy at this time.⁹⁸

While Kaepernick’s collusion grievance was pending against the NFL for conspiring to exile him from the league, did he have any other options to seek a remedy for the underlying discrimination? Particularly, does Kaepernick have the option to bring a claim pertaining to race-based discrimination or political speech or affiliation?⁹⁹

C. Title VII Race-Based Employment Discrimination

Title VII is a provision of the Civil Rights Act of 1964 that outlines prohibited discriminatory employment practices.¹⁰⁰ Title VII states:

(a) 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 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 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

and Players’ Union Reps Meet over National Anthem Policy, CHI. TRIB. (Aug. 28, 2018), <http://www.chicagotribune.com/sports/football/ct-spt-nfl-national-anthem-policy-20180828-story.html>.

96. See Michael McCann, *The NFL vs. the NFLPA: New National Anthem Policy Deepens Divide, Prolongs Controversy*, SPORTS ILLUSTRATED (May 23, 2018), <https://www.si.com/nfl/2018/05/23/nfl-new-national-anthem-protest>; Benjamin Sachs, *The NFL’s “Take a Knee” Ban is Flatly Illegal*, VOX (May 25, 2018), <https://www.vox.com/the-big-idea/2018/5/25/17394422/nfl-knee-kneeling-labor-law-kaepernick-free-speech-protest-owners>.

97. See Stites, *supra* note 95.

98. See *id.*

99. See O’Connell, *supra* note 73; McCann, *supra* note 76.

100. See 42 U.S.C. § 2000e-2(a)(1)–(2) (2012).

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status as an employee, because of such individual's race, color, religion, sex, or national origin.¹⁰¹

Congress implemented Title VII to "assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."¹⁰²

Nine years following the creation of the Civil Rights Act of 1964, the United States Supreme Court established the burden-shifting framework for deciding Title VII discrimination claims in *McDonnell Douglas Corp. v. Green*.¹⁰³ *McDonnell Douglas* involved Percy Green, a "[B]lack civil rights activist," who worked as a mechanic and laboratory technician at McDonnell Douglas Corporation ("McDonnell Douglas").¹⁰⁴ Green worked for McDonnell Douglas for eight years, but was "laid off in the course of a general reduction" in McDonnell Douglas' workforce.¹⁰⁵ In response to his termination, Green protested his former employer's decision, and argued that McDonnell Douglas' "general hiring practices . . . were racially motivated."¹⁰⁶ During the protest, Green, along with other members of the Congress on Racial Equality, "illegally stalled their cars" on the main streets leading to McDonnell Douglas' plant to prevent access to the plant during the morning shift change.¹⁰⁷ Subsequently, some McDonnell Douglas employees staged a "lock-in" and the front door of the McDonnell Douglas' plant was chained and padlocked to keep certain company employees from leaving the building.¹⁰⁸

While Green knew about the lock-in before it occurred, the degree of Green's involvement in the lock-in was unknown. A few weeks after the lock-in, McDonnell Douglas posted a public advertisement for "qualified

101. *Id.*

102. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *Chance v. Bd. of Exam'rs*, 458 F.2d 1167 (2d Cir. 1972); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968)).

103. 411 U.S. 792 (1973).

104. *Id.* at 794.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 795.

mechanics.”¹⁰⁹ Following the company’s solicitation for qualified mechanics, Green applied to be re-employed, but his application was denied by McDonnell Douglas.¹¹⁰ Consequently, Green “filed a formal complaint with the Equal Employment Opportunity Commission” (“EEOC”).¹¹¹ The complaint alleged that McDonnell Douglas did not hire him “because of his race and persistent involvement in the civil rights movement, in violation of §§ 703(a)(1) and 704(a) of the Civil Rights Act of 1964.”¹¹²

The Court determined that Green established a prima facie case of employment discrimination.¹¹³ McDonnell Douglas did not contest Green’s qualifications, and McDonnell Douglas then had the burden to show a “legitimate, nondiscriminatory reason for the employee’s rejection.”¹¹⁴ The Court stated that after McDonnell Douglas offered its reason, the burden would shift back to Green to show the proffered reason was pretextual by presenting evidence about McDonnell Douglas’ “reaction, if any” to Green’s “legitimate civil rights activities;” and the company’s “general policy and practice with respect to minority employment.”¹¹⁵ Additionally, Green could provide statistics of McDonnell Douglas’ racial hiring practices and policies to help the Court determine if the company’s denial of Green’s application to be rehired “conformed to a general pattern of discrimination against [Black people].”¹¹⁶ The Court remanded the case for further determination of whether McDonnell Douglas’ explanation for its denial of Green’s application was pretextual.¹¹⁷ Ultimately, the Court found that Green “should have been allowed to pursue his claim under [§] 703(a)(1).”¹¹⁸

Despite Congress’ goal to eradicate discriminatory employment practices against people of color, and the foundation laid in *McDonnell Douglas*, employment discrimination is an issue the courts have continued

109. *Id.* at 796.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 802.

114. *Id.*

115. *Id.* at 804–05.

116. *Id.* at 805.

117. *Id.* at 807.

118. *Id.*

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to parse out in recent years. In *Hagan v. City of New York*,¹¹⁹ a court in the Southern District of New York, addressed the case of Special Hagan, a Black woman who was employed as an “Equal Employment Opportunity (“EEO”) Officer for the City of New York.” Hagan brought a Title VII claim alleging that the City of New York (“the City”) discriminated against her because of her race and provided white “patronage appointees” with “preferential treatment.”¹²⁰ Additionally, Hagan alleged that she had to work in a “hostile work environment” and that she faced retaliation when she sought to investigate and expose the City’s practices.¹²¹ Hagan was an attorney who worked for both the Department of Information Technology and Telecommunications (“DOITT”), where she was the Senior Director of EEO, as well as the Department of Correction (“DOC”).¹²² As a result of the multiple claims Hagan asserted, the court’s opinion in *Hagan* outlines the requirements for each of these claims, which highlights the nuances between them.¹²³

At DOITT, Hagan claimed that she was discriminated against for a number of reasons.¹²⁴ First, Hagan asserted that she was expected to provide more information to validate her income and employment compared to a white female employee with comparable experience, education, and time with the company.¹²⁵ This white employee was also self-employed and had a similar income as Hagan.¹²⁶ Second, Hagan alleged the Commissioner and Deputy Commissioner of DOITT denied her request to be given the title of “Assistant Commissioner or Executive Director,” despite the fact that the Deputy Commission sought to hire EEO Officers to be Assistant Commissioner and for other superior positions.¹²⁷ Hagan contended white female officers were given higher positions than similarly situated Black people at the company.¹²⁸ Third, Hagan maintained that she had “a part-time staff person” while in contrast the

119. *Hagan v. City of New York*, 39 F. Supp. 3d 481 (S.D.N.Y. 2014).

120. *Id.* at 487–88.

121. *Id.* at 488.

122. *Id.*

123. *See generally id.* at 494 (listing the claims Hagan asserted).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

white woman who previously held her position “always had a full-time assistant.”¹²⁹ Subsequently, Hagan brought several claims concerning “disparate treatment, disparate impact, hostile work environment, and retaliation under Title VII, § 1981, §1983, the SHRL and the CHRL.”¹³⁰

To demonstrate disparate treatment, it must be shown that “the defendant acted with a discriminatory intent or motive.” A prima facie case of disparate treatment establishes, “(i) membership within a protected group; (ii) satisfactory performance; (iii) an adverse employment action; and (iv) circumstances surrounding the action that give rise to an inference of unlawful discrimination.”¹³¹ The court ultimately determined that Hagan’s assertions regarding her experience and the practices at her place of employment were “sufficient to survive a motion to dismiss” the disparate treatment claim.¹³²

Additionally, the court ruled that Hagan “plausibly alleged” a disparate impact claim.¹³³ In order to prove a prima facie case of disparate impact one is required to “(1) identify a facially neutral policy or practice; (2) demonstrate that a disparity exists; and (3) establish a causal relationship between the two.”¹³⁴ Evidence of a “causal connection” can be indirect evidence that “the protected activity was followed closely by discriminatory treatment,” circumstantial evidence, “such as disparate treatment of fellow employees who engaged in similar conduct,” or direct evidence “of retaliatory animus directed against the plaintiff by the defendant.”¹³⁵ The neutral policy Hagan pinpointed within her workplace was cronyism, which brought about “inferior terms and conditions of employment for minority employees.”¹³⁶

The court also concluded that Hagan brought a valid hostile work environment claim.¹³⁷ A prima facie case of a hostile work environment consists of “conduct that ‘(1) is objectively severe or pervasive— that is,

129. *Id.*

130. *Id.* at 494.

131. *Id.* at 495 (quoting *Collins v. N.Y.C. Transit Auth.*, 305 F.3d 113, 118 (2d Cir. 2002)).

132. *Id.* at 496 (citing *Boykin v. KeyCorp.*, 521 F.3d 202, 215 (2d Cir. 2008)).

133. *Id.* at 499.

134. *Id.* (quoting *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 160 (2d Cir. 2001)).

135. *Id.* at 502.

136. *Id.* at 499.

137. *Id.* at 500.

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creates an environment that a reasonable person would find hostile or abusive; (2) creates an environment that the plaintiff subjectively perceives as hostile or abusive; and (3) creates such an environment because of the plaintiff's race."¹³⁸ Furthermore, to determine if the hostility is sufficiently severe or pervasive is predicated on "the frequency of the discriminatory conduct; its severity; whether it is physically threatening of humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."¹³⁹ A key part of this analysis is based on the "nature of the workplace environment as a whole."¹⁴⁰ Nevertheless, a "single incident" may be sufficient to prove the existence of a hostile work environment if the incident is "extraordinarily severe."¹⁴¹

To establish a prima facie case of retaliation there must be "(i) engagement by the plaintiff in a protected activity; (ii) awareness by the employer, (iii) an adverse employment action; and (iv) a causal connection between the protected activity and the adverse action."¹⁴² Furthermore, engagement in a protected activity occurs when one "opposes any practice made an unlawful employment practice by Title VII or 'makes a charge, testifies, assists, or participates in any manner in an investigation, or hearing' under Title VII."¹⁴³ The court explained that Hagan "engaged in an opposition activity" because she submitted "complaints on her own behalf, rather than solely on the behalf of others."¹⁴⁴ Additionally, Hagan met the awareness requirement by "plausibly alleg[ing] knowledge on the part of the City."¹⁴⁵ Although the court did not definitively state that Hagan satisfied the causation requirement of a retaliation claim, the court expressed that the assertions made by Hagan were "sufficient to nudge her retaliation claim from possible to plausible."¹⁴⁶

Both Hagan's discrimination and retaliation claims under § 1981 and

138. *Id.* at 499 (quoting *Patane v. Clark*, 508 F.3d 106, 113 (2d Cir. 2007)).

139. *Id.* at 499–00 (quoting *Harris v. Hays*, 510 U.S. 17, 23 (1993)).

140. *Id.* at 500 (citing *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 547 (2d Cir. 2010)).

141. *Id.* at 499 (citing *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 (2d Cir. 2000)).

142. *Id.* at 500 (quoting *Collins v. N.Y.C. Transit Auth.*, 305 F.3d 113, 118 (2d Cir. 2002)).

143. *Id.* at 501 (quoting 42 U.S.C. § 2000e-3(a) (2012)).

144. *Id.* at 502 (citing *McKenzie v. Renberg's, Inc.*, 94 F.3d 1478, 1486-87 (10th Cir. 1996)).

145. *Id.* at 502.

146. *Id.* at 503.

the Equal Protection Clause, and Title VII have very similar standards.¹⁴⁷ To prove violation of both 42 U.S.C.A. § 1981 and a §1983 “denial of equal protection” one “must show that the discrimination was intentional.”¹⁴⁸ Ultimately, Hagan prevailed in proving discrimination under § 1981 and the Equal Protection Clause.¹⁴⁹ Hagan’s assertion alluded to “a policy of retaliation against [Black] EEO Officers on the part of at least” her supervisor, Carole Wallace Post, the former Commissioner of DOITT, and Diane Crothers, Deputy Commissioner of Citywide EEO for the Department of Citywide Administrative Services (DCAS).¹⁵⁰

In *Hagan*, the court not only looked at Hagan’s claims related to discrimination, but the court also examined whether there was an infringement upon her freedom of speech. The First Amendment states that, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹⁵¹ It has been established that, “public employees do not ‘relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest.’”¹⁵² Speech on a matter of public concern or interest is speech that “can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest . . . and of value and concern to the public.”¹⁵³ Nevertheless, public employees do not have absolute rights to free speech.¹⁵⁴ For the speech of public employees to be protected, they must be speaking as citizens and not making “statements pursuant to their

147. *Id.* at 505.

148. *Id.* at 505 (quoting *Patterson v. County of Oneida*, 375 F.3d 206, 225 (2d Cir. 2004)).

149. *Id.*

150. *Id.* at 488, 505.

151. U.S. CONST. amend. I.

152. *Hagan*, 39 F. Supp. 3d at 505 (quoting *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will. Cnty.*, 391 U.S. 563, 568 (1968)).

153. *Id.* at 506 (quoting *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014)).

154. *Id.* at 505. The government in its capacity as an employer “has a legitimate interest in regulating the speech of its employees to promote the efficiency of its public services.” *Id.* (quoting *Mandell v. County of Suffolk*, 316 F.3d 368, 382 (2d Cir. 2003) (citing *Connick v. Myers*, 461 U.S. 138, 140 (1983))).

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official duties.”¹⁵⁵ The speech at issue concerned cronyism, systemic discrimination, corruption, and fraud, all which the court considered “subjects . . . of interest to the public.”¹⁵⁶ Of the five different instances of speech Hagan presented, the court found two of Hagan’s claims to be protected speech as a citizen, one occasion to constitute speech that was pursuant to her official duties, and therefore unprotected, and the court set aside determining whether Hagan’s two other speech claims were protected, as it was “too early” in the process to make a conclusive determination.¹⁵⁷

D. New York: Race-Based Employment Discrimination

When examining discrimination and speech in the context of the NFL, it is important to address what protections state law may provide as well. Although the NFL is made up of teams and individuals from around the country, the NFL’s headquarters are located in Manhattan, New York, and the CBA has a provision designating New York law as the governing law when federal law does not apply.¹⁵⁸

Furthermore, New York law has provided an independent ground to make the NFL address discrimination in the recent past. During the 2013 NFL Draft Combine certain prospects were asked about their sexual orientation. While federal law did not at the time protect against discrimination on the basis of sexual orientation,¹⁵⁹ New York law did.¹⁶⁰ Subsequently, the New York Attorney General informed the NFL that such inquiries violated New York law and could thus form the basis of liability. In response, the NFL posted in all team locker rooms a notice that the NFL policy prohibits discrimination on the basis of sexual orientation.¹⁶¹

New York Executive Law § 291 states, “The opportunity to obtain

155. *Id.* at 507 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)).

156. *Id.* at 506 (alteration in original).

157. *Id.* at 506, 512–14.

158. *See Supporters Hold Rally*, *supra* note 50; NFL CBA (2011) art. 70 § 1 (designating New York law as the governing law when federal law does not apply).

159. *See Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 341 (7th Cir. 2017) (summarizing the case law and noting prior to this 2017 case all federal circuits held Title VII did not apply to discrimination on the basis of sexual orientation).

160. N.Y. EXEC. LAW § 291 (McKinney, Westlaw through L.2018, chapters 1 to 271).

161. Ian Gordon & Matt Connolly, Can the NFL Discriminate Against a Gay Player, MOTHER JONES (Feb. 12, 2014), <https://www.motherjones.com/politics/2014/02/michael-sam-nfl-gay-nondiscrimination-law/>.

employment without discrimination because of age, race, creed, color, national origin, sexual orientation, military status, sex, marital status, or disability is hereby recognized as and declared to be a civil right.”¹⁶² After establishing the ability to acquire employment free of discrimination based on belonging to a protected class, the New York statute goes on in §296 to discuss “unlawful discriminatory practices.”¹⁶³ The law declares that,

It shall be an unlawful discriminatory practice: (a) For an employer or licensing agency, because of an individual's age, race, creed, color . . . to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment. (b) For an employment agency to discriminate against any individual because of age, race, creed, color . . . in receiving, classifying disposing or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or employers. . . . (d) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color . . . or any intent to make any such limitation specification or discrimination unless based upon a bona fide occupational qualification¹⁶⁴

Given that New York Executive Law § 296 outlines a wide variety of unlawful discriminatory practices, how does the court determine if unlawful discriminatory practices exist in a workplace?

New York City Board of Education, Community School District, NO. 1 v. Batista, highlights the difficulty in determining whether or not discrimination has occurred, and suggests methods that aid in pinpointing discrimination.¹⁶⁵ Roberto Batista and Theodore Fletcher were public school administrators who submitted unlawful discrimination complaints

162. N.Y. EXEC. LAW § 291 (McKinney, Westlaw through L.2018, chapters 1 to 271).

163. N.Y. EXEC. LAW § 296 (McKinney, Westlaw through L.2018, chapters 1 to 274).

164. EXEC. § 296(1)(a)–(d).

165. N.Y.C. Bd. of Educ., Cmty. Sch. Dist. No. 1 v. Batista, 430 N.E.2d 877, 878 (N.Y. 1981).

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on the basis of race via the New York Division of Human Rights.¹⁶⁶ Batista was originally from Puerto Rico, and Fletcher was Black.¹⁶⁷ Batista and Fletcher were both appointed to be acting principal and coprincipal, respectively, of two different schools within the same district.¹⁶⁸ About a year later, the school board informed Batista, Fletcher, and four other principals in the school district that “their appointments were invalid” because the board failed to comply with a New York City Board of Education directive mandating advertising “all supervisory openings” for a period of “30 days before being filled.”¹⁶⁹ As a result, Batista, Fletcher, and the other four principals’ positions were changed “from acting principals to interim acting principals.”¹⁷⁰ After, the school board removed Batista and Fletcher from their positions as principals, they were “assigned to other duties.”¹⁷¹ Following this change in positions, Batista and Fletcher filed complaints with the Division of Human Rights.¹⁷² The issue was whether the district had “an unlawful discriminatory pattern and practice of removing [B]lack and Puerto Rican principals . . . from their interim acting principalships and replacing them with white principals.”¹⁷³

In its opinion, the court emphasized that “discrimination is rarely so obvious or its practices so overt that recognition of it is instant and conclusive, it being accomplished usually by devious and subtle means.”¹⁷⁴ Given “the covert nature of discrimination, ‘statistics are valuable and often demonstrate more than the testimony of witnesses’ in showing that discrimination has occurred.”¹⁷⁵ The court cites New York Executive law § 296, subd. 1 and pinpoints race and national origin as the relevant protected classes in *Batista*.¹⁷⁶ Furthermore, despite an employee’s lack of “job security” it “does not mean that he or she has no

166. *Id.* at 877–78.

167. *Id.* at 877.

168. *Id.*

169. *Id.* at 877–78.

170. *Id.* at 878.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 878 (citing 300 Gramatan Ave. Assoc. v. State Div. of Human Rights, 45 N.Y.2d 176, 183 (N.Y. 1978)).

175. *Id.* at 878 (citing State Div. of Human Rights v. Kilian Mfg. Corp., 35 N.Y.2d 201, 210 (1974)).

176. *Id.* at 878.

right to be free from unlawful discrimination.”¹⁷⁷

After examining the statistics of how many Black and Latinx principals were replaced by white principals, and the reasons for their removal, the court found the “evidence was legally sufficient to sustain a finding that a prima facie case of discrimination had been shown.”¹⁷⁸ Moreover, there “was no evidence” that the school board’s criticisms of Fletcher and Batista’s job performance “played any part” in the board’s decisions to replace Batista and Fletcher.¹⁷⁹ However, there was evidence that both Fletcher and Batista “performed their duties as principals effectively.”¹⁸⁰

E. New York Labor Law: Political Activity

Although discrimination laws are often limited to race, religion, gender, sexual orientation, disability, and other similar identities, the state of New York has taken its discrimination laws a step further and has carved out protections for employees who participate in certain political or recreational activities. New York Labor Law § 201-d(2) outlines:

Unless otherwise provided by law, it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of: a. an individual’s political activities outside of working hours, off of the employer’s premises and without the use of the employer’s equipment or other property, if such activities are legal . . . c. an individual’s legal recreational activities outside of work hours, off of the employer’s premises and without the use of the employer’s equipment or other property¹⁸¹

177. *Id.*

178. *Id.* at 878–79. While the court looked at the number replacements of Black and Latinx principals by white principals, the court gave special attention to the removals of Black and Puerto Rican principals. *Id.* Additionally, the court found that the positions of two principals of unspecified racial minorities along with the job of a white man fluent in Spanish, were given to white principals during the 1973-1974 school year. *Id.* at 878. All of the principals who were removed during the same period as Fletcher and Batista were replaced by white people. *Id.* at 878–79.

179. *Id.* at 879.

180. *Id.*

181. N.Y. LAB. LAW § 201-d(2)(a)–(c) (McKinney, Westlaw through L.2018, chapters 1 to 271).

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Political activities, however, are limited to “(i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group.”¹⁸² Work hours constitute “all time, including paid and unpaid breaks and meal periods, that the employee is suffered, permitted or expected to . . . work, and all time the employee is actually engaged in work.”¹⁸³ Whether or not a person’s participation in a political activity occurred during working hours can be proven or disproven by providing “evidentiary proof.”¹⁸⁴ Additionally, when deciding New York Labor Law § 201-d discrimination claims, the court considers the employer’s awareness of an individual’s participation in the activity in question and whether such participation was a “motivating factor” in the employer’s adverse employment decision.¹⁸⁵

F. NFL Collective Bargaining Agreement

While Title VII of the Civil Rights Act of 1964, New York Executive Law § 296, and New York Labor Law § 201-d outline the particular areas or instances where it is unlawful to for employers to discriminate against their employees, the NFL Collective Bargaining Agreement (“CBA”) does not. The CBA states in article 49 § 1 that, “There will be no discrimination in any form against any player by the NFL, the Management Council, any Club or by the NFLPA because of race, religion, national origin, sexual orientation, or activity or lack of activity on behalf of the NFLPA.”¹⁸⁶

Because there are no reported court cases that involve article 49 § 1 of the CBA, it is unclear what is considered when determining whether or not an NFL player has experienced discrimination on the basis of their membership in a protected class under the CBA. In the past when NFL players have brought discrimination claims they have been under Title VII

182. LAB. § 201-d(1)(a).

183. LAB. § 201-d(1)(c).

184. See *McCue v. County of Westchester*, 868 N.Y.S.2d 902 (N.Y. App. Div. 2008) (holding that Defendant should have been granted summary judgment after providing “evidentiary proof” that the political activity leading to Plaintiff’s termination occurred during “working hours,” and thus was not protected under New York Labor Law § 201-d(2)(a)).

185. See *El-Amine v. Avon Prod., Inc.*, 739 N.Y.S.2d 564 (N.Y. App. Div. 2002).

186. NFL CBA (2011) art. 49 § 1.

of the Civil Rights Act of 1964 and 42 U.S.C. §1981.¹⁸⁷ Furthermore, it is unknown what relief or remedy is most likely to be granted to make the individual whole for experiencing such, discrimination.

In *Cox v. NFL*, Bryan Cox, a Miami Dolphins player, was playing against the Buffalo Bills at the Bills' home stadium when various fans hurled racist insults and threats at him.¹⁸⁸ In response, Cox "made an 'obscene gesture' to the crowd" and was fined \$10,000 by the NFL.¹⁸⁹ After Cox submitted "a charge of discrimination" to the EEOC, the NFL decreased Cox's fine to \$3,000.¹⁹⁰ After Cox received a "right-to-sue letter from the EEOC," the NFL subsequently mandated that "teams remove from the stadiums fans who take part in 'racial taunts.'"¹⁹¹ One cannot infer from *Cox* what relief is available in such instances of discrimination under CBA article 49 § 1, because although the NFL took various measures following the racial discrimination Cox experienced by fans, NFL players are only protected from discrimination by "the NFL, the Management Council, any Club or by the NFLPA," which therefore does not include fans.¹⁹²

II. ANALYSIS

Despite there being a number of specific anti-discrimination laws that are relevant to the treatment Colin Kaepernick has experienced in response to his national anthem protest, unfortunately, the majority of them would not provide Kaepernick any remedy.

Congress' goal to "assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens," has yet to be achieved.¹⁹³ If Kaepernick were to file a Title VII

187. See generally *Cox v. NFL*, 889 F. Supp. 118 (S.D.N.Y. 1995); *Black v. Nat'l Football League Players' Ass'n*, 87 F. Supp. 2d 1 (D.D.C. 2000).

188. *Cox*, 889 F. Supp. at 119.

189. *Id.*

190. *Id.*

191. *Id.*

192. See *id.*; NFL CBA (2011) art. 49 § 1.

193. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971)); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *Chance v. Bd. of Examin'r*, 458 F.2d 1167 (2d Cir. 1972). See also German Lopez, *Study: Anti-Black Hiring*

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discrimination claim, he would likely be unsuccessful. First, Kaepernick would need to establish “a prima facie case of racial discrimination.”¹⁹⁴ Kaepernick is included in a protected class, race, under Title VII of the Civil Rights Act of 1964 because he is a Black person.¹⁹⁵ Furthermore, Kaepernick was qualified to play in the NFL when he first entered free agency and he likely remains qualified.¹⁹⁶ Despite Kaepernick’s qualifications NFL teams continued to hire other quarterbacks with similar or lower qualifications than Kaepernick.¹⁹⁷ While Kaepernick’s predicament is similar to Green’s in that Kaepernick and Green both were engaged in several “civil rights activities,” it is unlikely Kaepernick would be able to prove that various NFL teams’ failure to hire him was discriminatory.¹⁹⁸

Second, NFL teams would need to provide a “legitimate, nondiscriminatory reason” for not hiring Kaepernick.¹⁹⁹ It is likely that team officials would state that they were afraid of losing sponsors and fans, or that they actually lost sponsors and fans as a result of Kaepernick remaining in the NFL.²⁰⁰ It is likely a court would find this to be a legitimate, nondiscriminatory reason for not hiring Kaepernick since loss of fans and sponsors is “objective criteri[a].”²⁰¹ However, more subjective reasons offered as evidence against discrimination, “carr[y] little weight.”²⁰² For example, some teams thought that Kaepernick was too focused on doing social justice and charity work.²⁰³ This is a subjective

Discrimination is as Prevalent Today as it was in 1989, VOX (Sept. 18, 2017), <https://www.vox.com/identities/2017/9/18/16307782/study-racism-jobs>; Cary Funk & Kim Parker, *Blacks in STEM Jobs are Especially Concerned About Diversity and Discrimination in the Workplace*, PEW RES. CENTER (Jan. 9, 2018), <http://www.pewsocialtrends.org/2018/01/09/blacks-in-stem-jobs-are-especially-concerned-about-diversity-and-discrimination-in-the-workplace/>.

194. *McDonnell Douglas*, 411 U.S. at 802.

195. See 42 U.S.C. § 2000e-2(a)(1)–(2) (2012).

196. See Lyles, *supra* note 42 for an inquiry into other explanations that are often offered as to why Kaepernick may remain unsigned. See also Rapaport, *supra* note 69. For a statistical analysis of Kaepernick’s length of free agency in comparison to other quarterbacks throughout the years, see Wagner & Paine, *supra* note 69.

197. Johnson, *supra* note 67.

198. See generally *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

199. *Id.* at 802.

200. Crockett, *supra* note 65.

201. *McDonnell Douglas*, 411 U.S. at 803.

²⁰² *Id.*

²⁰³ Lyles, *supra* note 42.

reason that a court would likely view as insufficient evidence to rebut claims of discriminatory employment practices.²⁰⁴

Third, the Court in *McDonnell Douglas* stated that evidence of McDonnell Douglas' reaction to Green's "legitimate civil rights activities" would be relevant in demonstrating a pretextual reason for McDonnell Douglas' adverse employment action against Green.²⁰⁵ Although Kaepernick's protest is neither a protected political activity under New York Labor Law § 201-d(2)(a)-(c), nor protected "speech" under the First Amendment, protesting police brutality is a legitimate civil rights activity.²⁰⁶ Furthermore, there is direct evidence of NFL teams' reactions to Kaepernick's protest as many team officials have commented about the protests and NFL officials involved in Kaepernick's collusion claim were required to provide their cell phone and e-mail records.²⁰⁷ It is unclear, however, whether a court will find these reactions to be racially discriminatory.²⁰⁸

Fourth, while there are different ways of showing an employer's reasons for not hiring someone was pretextual, Kaepernick would face challenges proving pretext at all.²⁰⁹ For example, Kaepernick would have difficulty showing that NFL teams' reasons for not signing him were pretextual based on a "general policy and practice" of discriminating against Black NFL players who protested during the national anthem.²¹⁰ This would be difficult to prove because neither white NFL players significantly engaged in the national anthem protests in a similar capacity as Kaepernick, nor the other Black NFL players, who protested with the explicit intent of decrying police brutality significantly engaged in the national anthem protests in a similar capacity as Kaepernick.²¹¹ Although a white NFL

²⁰⁴ See *McDonnell Douglas*, 411 U.S. at 803.

²⁰⁵ *Id.* at 804.

²⁰⁶ See generally *id.* at 804. See also N.Y. LAB. LAW § 201-d(2)(a)-(c) (McKinney, Westlaw through L.2018 chapters 1 to 271); *Hagan v. City of New York*, 39 F. Supp. 3d 481, 505 (S.D.N.Y. 2014) (quoting *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will. Cnty.*, 391 U.S. 563, 568 (1968)).

²⁰⁷ Rapaport, *supra* note 69.

²⁰⁸ See *id.*

²⁰⁹ *McDonnell Douglas*, 411 U.S. at 804-06.

²¹⁰ *Id.* at 804-05.

²¹¹ See generally Sandritter, *supra* note 10; Patsko, *supra* note 45; Orr, *supra* note 45; Moore, *supra* note 57; Webber, *supra* note 58; McLaughlin & Simon, *supra* note 58; Lauletta, *supra* note 58.

player, Seth DeValve, participated in a prayer circle during the anthem, he primarily did so to support his teammates, and that was ostensibly the only demonstration DeValve made during the anthem.²¹² The other white NFL players who made demonstrations during the anthem did so in response to Donald Trump's comments.²¹³ Furthermore, these anti-Trump demonstrations were predominately sanctioned by NFL officials, as many franchise owners and coaches also participated in the displays in some fashion.²¹⁴ Therefore, while the NFL does not have an official policy requiring players to stand for the anthem,²¹⁵ Kaepernick engaged in unsanctioned protests, while the white players who made anti-Trump demonstrations engaged in sanctioned demonstrations as they were ratified by the franchise owners.

Notwithstanding the challenge to demonstrate that there was a pattern and practice of discriminating against Black players who protested during the national anthem in comparison to white players who did or did not participate in a demonstration during the anthem, other Black players seemingly have not experienced the same sort of treatment as Kaepernick. Prior to Eric Reid's free agency, Kaepernick was the only Black player who participated in an anti-police brutality protest who sought to be hired by another team.²¹⁶ Even though Eric Reid has been signed, Kaepernick's situation is different from other Black players, as Kaepernick was the initiator of the anti-police brutality national anthem protests, and is generally considered the "face" of the protest.²¹⁷ Furthermore, it is

212. See generally Patsko, *supra* note 45; Orr, *supra* note 45; Webber, *supra* note 58 (showing that white players participated in anti-Trump demonstrations).

213. Webber, *supra* note 58.

214. *Id.*

215. See generally Wyche, *supra* note 18.

216. See generally NFL Free Agents, *supra* note 74; Bien, *supra* note 82; Brady, *supra* note 84.

217. Sandritter, *supra* note 10; Brady, *supra* note 84; Jamie Ducharme, 'Believe in Something.' Colin Kaepernick is the Face of Nike's New 'Just Do It' Campaign, TIME (Sept. 3, 2018), <http://time.com/5385539/colin-kaepernick-nike/> (showing how Kaepernick has further been solidified as the face of the NFL anti-police brutality protests through Nike's campaign). See also Erica Harris DeValve, *I'm Proud of My Husband for Kneeling During the Anthem, but Don't Make Him a White Savior*, VERY SMART BROTHAS (Aug. 24, 2017, 12:00 PM), <https://verysmartbrothas.theroot.com/i-m-proud-of-my-husband-for-kneeling-during-the-anthem-1798374605> (demonstrating that Seth DeValve's protest is to be distinguished from the protests Colin Kaepernick and other Black NFL players protesting police brutality and racial discrimination). But see Branigin, *supra* note 51; Rafi Schwartz, *NFL National Anthem Protesters Are Fighting Back After Getting Death Threats*, SPLINTER (Sept. 29, 2017, 12:19 PM), <https://splinternews.com/nfl-national-anthem-protesters-are-fighting-back-after-1818996600>. Nevertheless, as of the end of the 2017 NFL season, Eric Reid held the record for

unlikely that two players who have protested police brutality and have been free agents are enough to establish a pattern of discrimination.²¹⁸

Likewise, as seen with the district court's analysis in *Hagan*, it would be difficult for Kaepernick to bring a disparate treatment claim for similar reasons. Again, Kaepernick is a member of a protected class, race, because he is a Black man.²¹⁹ Also, Kaepernick has continuously demonstrated "satisfactory performance" as an NFL quarterback.²²⁰ Kaepernick would experience an adverse employment action if an NFL team never hires him, or if Kaepernick is signed to an NFL team but receives a significantly diminished salary compared to his previous salary as a quarterback for the San Francisco 49ers.²²¹

Nevertheless, Kaepernick's disparate treatment claim would fail because it is unlikely that Kaepernick could demonstrate that NFL team officials acted with a discriminatory intent or motive for analogous reasons that Kaepernick could not show a general "policy and practice" of discriminating against Black NFL players who protested during the national anthem.²²² Specifically, if Kaepernick was unable to provide direct evidence of racial discrimination it would be a challenge for Kaepernick to provide examples of circumstantial evidence surrounding Kaepernick's continued free agency "that give[s] rise to an inference of unlawful discrimination," as it is doubtful that Kaepernick could establish

being the "active player with the longest-running record of protesting during the national anthem" as Reid began protesting soon after Kaepernick started. Jared Dubin, *Eric Reid Believes Protests Could Cost Him Free-Agent Opportunities*, CBS SPORTS (Dec. 30, 2017), <https://www.cbssports.com/nfl/news/eric-reid-believes-protests-could-cost-him-free-agent-opportunities/>. Reid previously believed there was a "possibility" that when he began his free agency, he could go unsigned to an NFL team like Kaepernick. *Id.*

218. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804–05 (1973); Brady, *supra* note 84.

219. See 42 U.S.C. § 2000e (2012). See also *Hagan v. City of New York*, 39 F. Supp. 3d 481, 495 (S.D.N.Y. 2014) (quoting *Collins v. N.Y.C. Transit Auth.*, 305 F.3d 113, 118 (2d Cir. 2002)).

220. See *Hagan*, 39 F. Supp. 3d at 495. See generally Lyles, *supra* note 42. For a statistical analysis of Kaepernick's length of free agency in comparison to other quarterbacks throughout the years, see Wagner & Paine, *supra* note 69.

221. See *Hagan*, 39 F. Supp. 3d at 495–96. See generally Totiyapungprasert, *supra* note 81. See also Wagner & Paine, *supra* note 69.

222. See *Hagan*, 39 F. Supp. 3d at 495, 497–99. See *McDonnell Douglas*, 411 U.S. at 804–05. See Sandritter, *supra* note 10; Patsko, *supra* note 45; Orr, *supra* note 45; Wilson, *supra* note 55; Moore, *supra* note 57; Webber, *supra* note 58; McLaughlin & Simon, *supra* note 58; Lauletta, *supra* note 58. See also Harris DeValve, *supra* note 217 (demonstrating that Seth DeValve's protest is to be distinguished from the protests Colin Kaepernick and other Black NFL players protesting police).

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that players from other races received “more favorable treatment.”²²³

While Kaepernick may not be able to bring a disparate treatment claim against NFL teams themselves, perhaps Kaepernick could have brought a disparate treatment claim against Bob McNair. Kaepernick may have been able to argue that Bob McNair’s comments that, “We can’t have the inmates running the prison” constituted “invidious comments about others in the protected group,” thus “giv[ing] rise to an inference of unlawful discrimination,” since the comments were directed at NFL players protesting during the national anthem.²²⁴ However, it is likely that a court will not find these comments to be “invidious” enough despite the fact that Black people disproportionately comprise the makeup of the United States prison population,²²⁵ for judges may view this as too attenuated of a connection. However, if Kaepernick could provide evidence of other seemingly discriminatory statements by McNair, this would conceivably strengthen his disparate treatment claim against McNair, as Hagan provided evidence of “several racially insensitive comments.”²²⁶

Kaepernick would face similar impediments to establishing a disparate impact claim. First, the NFL has no formal policy requiring players to stand for the national anthem.²²⁷ Therefore, standing for the national anthem is a “facially neutral practice.”²²⁸ Second, Kaepernick would struggle to demonstrate a disparity in the treatment of players who stood for the national anthem and those who protested during the anthem for the same reasons which contribute to Kaepernick’s inability to prove a “pattern and practice of discrimination” by NFL team officials, or “circumstances . . . giv[ing] rise to an inference of unlawful discrimination.”²²⁹ Subsequently, it is improbable that Kaepernick could “establish a causal relationship” between such a disparity and not being hired by an NFL team, or receiving a considerably lower salary from his

223. See *Hagan*, 39 F. Supp. 3d at 495–96.

224. See *id.* See also Wickersham & Van Natta, Jr., *supra* note 61.

225. See generally Caroline Simon, *There Is a Stunning Gap Between the Number of White and Black Inmates in America’s Prisons*, BUS. INSIDER (June 16, 2016, 12:13 PM), <http://www.businessinsider.com/study-finds-huge-racial-disparity-in-americas-prisons-2016-6>.

226. See *Hagan*, 39 F. Supp. 3d at 495–96.

227. See Wyche, *supra* note 18.

228. See *Hagan*, 39 F. Supp. 3d at 499 (quoting *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 160 (2d Cir. 2001)).

229. See *id.* at 495; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804–05 (1973).

previous salary if he were to be signed to an NFL team.²³⁰ This is improbable because Reid was the only other free agent who has protested police brutality during the national anthem, and Reid has since signed to a team.²³¹ Additionally, even if Reid had remained unsigned, it would likely have been difficult for Kaepernick to show a causal relationship based on the treatment of two players unless Kaepernick had “direct evidence of retaliatory evidence.”²³² Nevertheless, since Kaepernick is the face of the NFL anti-police brutality protests, arguably there are no other players to compare Kaepernick’s treatment to since Kaepernick was the initiator of the protest and other Black NFL players were participants.²³³ More specifically, it is difficult to draw comparisons between Kaepernick and other Black NFL players because “the demand for similarly situated, better-treated others underinclusively misses important forms of discrimination and forecloses many individuals from having even an opportunity to be heard because sufficiently close comparators so rarely exist.”²³⁴ Additionally, discrimination is not just based on “physiological markers of outsider difference,” for some members of a protected class may “experience discrimination because of stereotypes about behaviors or personal styles associated with their identity group rather than because of their phenotype.”²³⁵ Therefore, an individual, such as Kaepernick, who employers may perceive to embody certain “behaviors or personal styles associated with their identity group” may experience discrimination, while another member of that identity group may not because they engage in respectability politics to “make themselves palatable [as an employee] and their . . . employers comfortable.”²³⁶

Additionally, Kaepernick would be unsuccessful in presenting a hostile work environment claim. Kaepernick must demonstrate that there is

230. See *Hagan*, 39 F. Supp. 3d at 499.

231. See generally NFL Free Agents, *supra* note 74; Brady, *supra* note 84.

232. See *Hagan*, 39 F. Supp. 3d at 502.

233. See generally Suzanne B. Goldberg, *supra* note 6 (noting the difficulties in proving a disparate impact claim absent appropriate comparisons).

234. *Id.* at 735.

235. *Id.* at 736, 766-67.

236. *Id.* at 736, 767. See generally Shekinah Mondova, *Systemic Racism Couldn't Care Less About Your Respectability Politics*, THE NATION (June 16, 2017), <https://www.thenation.com/article/systemic-racism-could-care-less-about-your-respectability-politics/>.

frequent and severe racially discriminatory conduct occurring within the NFL that a reasonable person would find hostile or abusive.²³⁷ Other than the comments from Bob McNair, there currently seems to be no evidence of racially discriminatory conduct that Kaepernick experienced from NFL team officials. Moreover, McNair's comments were stray remarks, and may be perceived as too attenuated to be racially discriminatory.²³⁸ Therefore, McNair's comments likely would not be considered "pervasive."²³⁹ However, if such conduct did exist, it would be fairly easy for Kaepernick to prove that he subjectively perceived his work environment to be hostile or abusive.²⁴⁰

Similarly, Kaepernick would not be able to successfully establish a retaliation claim. Kaepernick did not engage in a protected activity, for he neither opposed any unlawful employment practices that are proscribed by Title VII, nor participated in any Title VII investigations or hearings.²⁴¹ Since Kaepernick, did not engage in a protected activity, there could not be any "awareness" by NFL team officials of such participation.²⁴² There would be an adverse employment action if Kaepernick was never hired by another NFL team, or if he received a significantly lower salary on a new team.²⁴³ Nonetheless, since Kaepernick did not engage in a protected activity, there would be no causal connection between the protected activity and Kaepernick's salary decrease or his release from the NFL.²⁴⁴

Furthermore, Kaepernick would neither be able to present a viable Title VII § 1981 claim, nor Equal Protection Clause violation claim. Kaepernick would unlikely be able to prove that he experienced intentional discrimination by NFL team officials, which is necessary to establish both Title VII § 1981 and Equal Protection Clause violation claims.²⁴⁵ Perceivably, the only NFL team official Kaepernick has a slight chance of showing that he was subjected to intentional discrimination from, is Bob

237. See *Hagan*, 39 F. Supp. 3d at 499–00.

238. See *id.* at 499–00; Wickersham & Van Natta, Jr., *supra* note 61.

239. See *Hagan*, 39 F. Supp. 3d at 499–00.

240. See *id.*

241. See *id.* at 500–01.

242. See *id.*

243. *Id.* at 500. Wagner & Paine, *supra* note 69.

244. See *Hagan*, 39 F. Supp. 3d at 500, 503.

245. See *id.* at 505.

McNair.²⁴⁶ Even still, for reasons previously discussed, this claim also is likely to fail.²⁴⁷

Kaepernick also would not be able to claim that a First Amendment violation occurred. Speech protections only exist for public employees speaking as citizens on “matters of public interest.”²⁴⁸ Although Kaepernick was protesting a matter of “public concern” given the political and social nature of his protest, Kaepernick is not a public employee, as he plays for the NFL.²⁴⁹ Therefore, Kaepernick’s “speech” is likely not protected by the First Amendment.

If Kaepernick were to bring a claim under New York Executive Law § 296, Kaepernick would face the same challenges he would in bringing Title VII claims.²⁵⁰ *Batista* emphasized the importance of statistics in proving the existence of unlawful discrimination.²⁵¹ As aforementioned, since Kaepernick and Reid are currently the only people who have specifically participated in an anti-police brutality national anthem protest that have become a free agent, a court would be unable to fully compare the hiring practices concerning other free agents with Kaepernick.²⁵² Additionally, because the majority of NFL players are Black, it would be difficult to make comparisons among Black players who protested and did not protest.²⁵³ Therefore, Kaepernick would be unable to establish that NFL team officials engaged in an “unlawful discriminatory pattern and practice.”²⁵⁴

Despite New York’s efforts to extend anti-discrimination protections to political and recreational activities via New York Labor Law § 201-d, Kaepernick would be unable to bring a claim under this law as well.²⁵⁵

246. See *id.*; Wickersham & Van Natta, Jr., *supra* note 61.

247. See *Hagan*, 39 F. Supp. 3d at 505.

248. See *id.* at 481, 505 (quoting *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will. Cnty.*, 391 U.S. 563, 568 (1968)). But see *Sachs*, *supra* note 96 (referencing *Novosel v. Nationwide Ins. Co.*, a case that extended First Amended rights to the private sector, which *Sachs* urges courts to follow); *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983).

249. See *id.* at 505–06.

250. See generally N.Y. EXEC. LAW § 296 (McKinney, Westlaw through L.2018, chapters 1 to 274).

251. See N.Y.C. Bd. of Educ., Cmty. Sch. Dist. No. 1 v. *Batista*, 430 N.E.2d 877, 878 (N.Y. 1981).

252. See *id.* at 878–79; see generally NFL Free Agents, *supra* note 74.

253. See *id.* at 878–79; see also *infra* note 276 and accompanying text.

254. See *Batista*, 430 N.E.2d at 878–79.

255. See generally N.Y. LAB. LAW § 201-d(2)(a)–(c) (McKinney, Westlaw through L.2018 chapters 1 to 271).

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First, Kaepernick's political activities in question took place during "working hours," therefore precluding Kaepernick from relief under § 201-d.²⁵⁶ Second, Kaepernick's anti-police brutality protest during the national anthem does not fall under § 201-d's narrow definition of a "political activity."²⁵⁷ Therefore, NFL officials would have no "awareness" of Kaepernick's participation in a political activity as outlined by § 201-d.²⁵⁸ Furthermore, due to this lack of awareness, Kaepernick's participation in a political activity could not be a "motivating factor" in NFL officials decisions not to hire Kaepernick or to pay him a diminished salary.²⁵⁹

If Kaepernick were to bring a claim, his best chance may be to pursue a claim under the NFL CBA article 49 § 1.²⁶⁰ Nevertheless, as previously mentioned, NFL CBA article 49 § 1 is very broad, as a result, on its face it does not provide insight into how Kaepernick could present a strong claim under this provision.²⁶¹ Case law, such as *Cox v. NFL*, also does not detail how to present a successful CBA article 49 § 1 claim.²⁶² However, because the alleged discrimination Kaepernick experienced was perpetuated by the NFL, and clubs within the NFL, Kaepernick does meet the requirement that the discrimination be committed by "the NFL, the Management Council, any Club or by the NFLPA."²⁶³ Perhaps, the broadness of the provision and the words "no discrimination" would benefit a claim that various NFL team's failure to hire Kaepernick following his protest or a salary reduction constituted racial discrimination.²⁶⁴ Nevertheless, without further evidence of discrimination, like Bob McNair's comments, there is a risk that this could be seen as too attenuated of a connection.²⁶⁵

256. *Id.*; see also *McCue v. County of Westchester*, 868 N.Y.S.2d 902 (N.Y. App. Div. 2008).

257. LAB. § 201-d(1)(a).

258. See LAB. § 201-d(2)(a)-(c); *El-Amine v. Avon Prods., Inc.*, 739 N.Y.S.2d 564 (N.Y. App. Div. 2002).

259. See *El-Amine*, 739 N.Y.S.2d at 564.

260. NFL CBA (2011) art. 49 § 1.

261. See *id.*

262. See generally *Cox v. Nat'l Football League*, 889 F. Supp. 118 (S.D.N.Y. 1995); *Black v. Nat'l Football League Players' Ass'n*, 87 F. Supp. 2d 1 (D.D.C. 2000).

263. NFL CBA (2011) art. 49 § 1.

264. *Id.*

265. See generally *Wickersham & Van Natta, Jr.*, *supra* note 61.

III. PROPOSAL

Kaepernick's situation demonstrates that there are serious gaps in the laws concerning anti-discrimination, political participation, and free speech. Some sports commentators have suggested that NFL teams should give players the option to remain in the locker room until after the national anthem is played.²⁶⁶ Additionally, the NFL recently has taken measures to donate \$100 million to various racial and social justice initiatives.²⁶⁷ The putative donation could amount to "at least \$89 million . . . over a seven-year period."²⁶⁸ While NFL players were not explicitly asked to stop protesting in exchange for the "donation," this certainly does seem like a bribe.²⁶⁹ Furthermore, in choosing to make this monetary contribution, the NFL failed to consider key players, such as Eric Reid's, concerns.²⁷⁰

These proposed solutions fail to address the root of the issue at hand, and simply are efforts to put a Band-Aid on the larger problem. The NFL protests are about more than the national anthem and funding social justice efforts. The NFL protest is about NFL players using their own platforms to speak out against racial injustice and police brutality in conjunction with striving to find tangible solutions to eradicate these racial issues.²⁷¹ While the CBA's language seems broad enough to provide protections against the backlash Kaepernick is presently experiencing, it is unclear what remedy if any the CBA provided Kaepernick.²⁷² As a result of the ambiguity regarding the enforcement of CBA article 49 § 1, there is a need for additional laws and safeguards outside of the NFL and the NFLPA to protect Kaepernick and other NFL protestors. In order to support NFL protestor's efforts, both United States federal law and state law need to

266. See Christine Brennan, *NFL Players Have One Easy Answer for How to End Protests on Their Own Terms*, USA TODAY SPORTS (Oct. 11, 2017), <https://www.usatoday.com/story/sports/columnist/brennan/2017/10/11/nfl-national-anthem-protests-roger-goodell-donald-trump/754607001/>.

267. Jeanna Thomas, *Why Did Eric Reid and Other Players Withdraw from Players Coalition*, SB NATION, <https://www.sbnation.com/2017/11/30/16719590/eric-reid-russell-okung-michael-thomas-withdraw-nfl-players-coalition-malcolm-jenkins-anquan-boldin> (last updated Dec. 1, 2017).

268. See *id.*

269. See *id.*

270. *Id.*

271. See Thomas, *supra* note 267; Sandritter, *supra* note 10.

272. NFL CBA (2011) art. 49 § 1.

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change. Such changes would afford more permanent remedies to the challenges NFL protestors like Kaepernick and Reid are facing.

First, under Title VII of the Civil Rights act of 1964 the need to show a policy, pattern and practice of discrimination, disparate treatment, or discriminatory motive to bring one of the claims under Title VII puts too narrow of a standard and too restrictive of requirements on those seeking to bring claims alleging the existence of discriminatory policies, patterns and practices of discrimination, disparate treatment, or discriminatory motives.²⁷³ Title VII as applied fails to sufficiently account for the fact that discriminatory actions can be perpetuated against some individuals but not others of the same racial group.²⁷⁴ Although it is not impossible to prove discrimination in such situations, the law does not do enough to account for the evidentiary hurdles such situations present.²⁷⁵ The NFL is primarily comprised of Black players.²⁷⁶ Therefore, courts should give less significance to showing a disparity and pattern or practice and more weight to the circumstances of the alleged discrimination.²⁷⁷ Nevertheless, there may be increased evidentiary challenges in showing that although some members of the same racial group did not experience racial discrimination, other members of that racial group did. Still, such an analysis that focused on the totality of the circumstances and less on comparisons between racial groups would improve the application of the law, since it would do more to account for the systemic nature of racism as opposed to people's individualized experiences.²⁷⁸

273. See generally Goldberg, *supra* note 6, at 753-72 (describing some aspects that make comparisons, showing patterns, and proving discrimination difficult); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); *Hagan v. City of New York*, 39 F. Supp. 3d 481, 499 (S.D.N.Y. 2014).

274. See generally Goldberg, *supra* note 6, at 735-36, 753-72 (describing some aspects that make comparisons, showing patterns, and proving discrimination difficult); *Mondova*, *supra* note 236; Jamil Smith, *Respectability Politics Won't Save Us from Police Violence*, L.A. TIMES (July 14, 2017), <http://www.latimes.com/opinion/op-ed/la-oe-smith-respectability-politics-20170714-story.html>;

Monica Anderson, *Blacks with College Experience More Likely to Say They Faced Discrimination*, PEW RESEARCH CENTER (July 27, 2016), <http://www.pewresearch.org/fact-tank/2016/07/27/blacks-with-college-experience-more-likely-to-say-they-faced-discrimination/>.

275. Goldberg, *supra* note 6, at 735-36, 753-72 (describing some aspects that make comparisons, showing patterns, and proving discrimination difficult).

276. See Gertz, *supra* note 62; LAPCHICK & MARFATIA, *supra* note 62; Goodman, *supra* note 62; Goldberg, *supra* note 6, at 780-85.

277. See generally *Hagan*, 39 F. Supp. 3d at 495.

278. See generally The Good Men Project, *Why It's So Hard to Talk to White People About Racism*, HUFFPOST, <https://www.huffingtonpost.com/good-men-project/why-its-so-hard-to-talk-to-white->

New York's efforts to protect against discrimination concerning participation in certain political activities is too narrow as well²⁷⁹. New York Labor Law § 201-d should be expanded to include other definitions of political activity, such as protesting, that relate to an individual's own political views and activities, as opposed to solely basing the definition on individuals' membership in a group or endorsement of a political candidate.²⁸⁰ The United States was established through colonization, and protest and political dissent were used as integral tools in an effort to legitimize the colonization of the United States and its formation as a nation-state, and these have continued to be crucial political tools throughout the span of this nation's history, such as during the Civil Rights Movement.²⁸¹ Therefore, it is important that New York Labor Law § 201-d reflect this history through a broader, more inclusive definition of political activity. Nevertheless, the statute restricting such political activity to outside of work hours is understandable as individuals during that time period may be viewed as agents of the company and therefore are not acting in their capacity as individual citizens.²⁸² However, the definition work hours should not include work breaks, such as lunch breaks and unpaid breaks.²⁸³

Lastly, there should be speech protections for private employees as well.²⁸⁴ Specifically, there should be a federal statute that provides speech protections for private employees.²⁸⁵ While this speech should also be limited to speech on matters of public concern that was made in one's

people-about-racism_b_7183710.html (last updated Dec. 6, 2017); Mondova, *supra* note 274; Smith, *supra* note 274; Anderson, *supra* note 274.

279. *See generally* N.Y. LAB. LAW § 201-d(1)(a), (2)(a)–(c) (McKinney, Westlaw through L.2018, chapters 1 to 271).

280. *See id.*

281. *See generally* Conor Friedersdorf, *Kneeling for Life and Liberty Is Patriotic*, THE ATLANTIC (Sept. 25, 2017), <https://www.theatlantic.com/politics/archive/2017/09/kneeling-for-life-and-liberty-is-patriotic/540942/>; Amanda Hollenbeck, *This Country Was Built on Political Protest*, ODYSSEY (July 11, 2016), <https://www.theodysseyonline.com/country-built-political-protest>; Nick Carbone, *Top 10 American Protest Movements*, TIME (Oct. 12, 2011), http://content.time.com/time/specials/packages/article/0,28804,2096654_2096653_2096692,00.html.

282. *See* LAB. § 201-d(1)(c), (2)(c).

283. *Id.*

284. *See generally* Hagan v. City of New York, 39 F. Supp. 3d 481, 505 (S.D.N.Y. 2014) (quoting Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will. Cnty., 391 U.S. 563, 568 (1968)).

285. *But see* Sachs, *supra* note 96 (referencing *Novosel v. Nationwide Ins. Co.*, a case that extended First Amended rights to the private sector, which Sachs urges courts to follow).

capacity as a citizen, it is important to realize that at times private employees may engage in speech that is contrary to the beliefs of their employer and may face backlash as well.²⁸⁶ Perhaps, to still limit this speech in some capacity and not grant it the same extent of protections public employees experience, for private citizens, much like New York Labor Law § 201-d, this speech should not protect speech made during work hours, even if the person is speaking as a citizen.²⁸⁷ Furthermore, in some instances, discriminatory or harmful speech by private employees should not be protected.²⁸⁸ Additionally, there should be greater limits on the executive and other elected officials ability to meddle in private employment issues, such as Donald Trump did.²⁸⁹ More specifically, there should be protections for private employees who experience adverse employment actions as a result of an elected official's interference in speech that occurs in the realm of private employment.

To provide increased First Amendment protections for private employees, some scholars have championed the need for “an employee Bill of Rights.”²⁹⁰ A number of states have enacted a “Domestic Workers’ Bill of Rights.”²⁹¹ Nonetheless, it would be a challenge to pass a national “employee Bill of Rights” given the infrequency in which laws are enacted by Congress.²⁹² Additionally, since free speech issues impact everyone in

286. See *Hagan*, 39 F. Supp. 3d at 505 (quoting *Pickering*, 391 U.S. at 568.).

287. See *id.* See generally N.Y. LAB. LAW § 201-d(1)(a), (2)(a)–(c) (McKinney, Westlaw through L.2018, chapters 1 to 271).

288. Such a limitation would further Congress’ goal to “assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments,” for although such statements may not always be directed against an employee, they still contribute to creating discriminatory and harmful work environments that negatively affect racial minorities and other protected classes under Title VII of the Civil Rights Act of 1964. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *Chance v. Bd. of Exam’rs*, 458 F.2d 1167 (2d Cir. 1972); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968)); 42 U.S.C. § 2000e-2(a)(1)–(2) (2012).

289. See Armen Graham, *supra* note 54; Blay, *supra* note 55; Neil Schoenherr, *WashU Expert: NFL Protests Are Free Speech, But Not Protected by First Amendment*, THE SOURCE: WASHU EXPERT (Sept. 28, 2017), <https://source.wustl.edu/2017/09/washu-expert-nfl-protests-not-protected-first-amendment-matter-free-speech/>.

290. See Brad Reid, *Private Sector Employees Have Few Constitutional Rights*, HUFFPOST, https://www.huffingtonpost.com/brad-reid/private-sector-employees_b_12428414.html (last updated Oct. 11, 2017).

291. See *id.*

292. See generally Reid, *supra* note 290; *Statistics and Historical Comparison*, GOVTRACK, <https://www.govtrack.us/congress/bills/statistics> (last visited Feb. 7, 2018).

the United States, it is not enough for individual states to enact laws. Therefore, the best solution would be to expand the current laws to provide greater First Amendment speech protections to private employees.

CONCLUSION

Title VII, First Amendment free speech protections, New York Executive Law § 296, and New York Labor Law § 201-d(2) need to be expanded to provide greater protection pertaining to their respective areas of interest.²⁹³ If these laws are not changed, a number of populations, such as people of color and private employees, will continue to be vulnerable. Furthermore, individuals at the intersection of these groups, such as Kaepernick, who are both a person of color and a private employee are especially susceptible, given the history of retaliation against people of color, and in particular against Black people, who choose to speak out against discrimination and systemic racism.²⁹⁴

Kaepernick sought to make a statement via his protests, in spite of the repercussions he was aware that he would likely face.²⁹⁵ Kaepernick's predicament demonstrates the areas that anti-discrimination and speech laws do not cover, and prompts the nation to further evaluate whether there is a need to close these gaps. Kaepernick's failure to be hired also causes us to question the legal definitions of how discrimination is manifested in light of the historical context of the United States and whether or not certain protected classes, namely racial classes, require additional protections in light of this historical context.

293. See generally 42 U.S.C. § 2000e (2012); Hagan v. City of New York, 39 F. Supp. 3d 481 (S.D.N.Y. 2014); U.S. CONST. amend. I; N.Y. EXEC. LAW § 296 (McKinney, Westlaw through L.2018 chapters 1 to 274).

294. See generally King, *supra* note 29; Legum, *supra* note 29; Martinelli, *supra* note 29.

295. Sandritter, *supra* note 10.