The Case for NCAA Liability for Spectator Racial Harassment of Athletes

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THE CASE FOR NCAA LIABILITY FOR SPECTATOR RACIAL HARASSMENT OF ATHLETES

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Introduction

Athlete abuse in all forms is a systemic issue in sports.¹ For athletes of color, and student-athletes of color, abuse includes

* LLM. Drake University Law School (2018); J.D. Drake University Law School (2018). Many thanks to my writing group for always being a sounding board and providing encouragement. Thanks to my husband, sister, and mom for happily listening to me work through this project—we are all happy this one is over the finish line.

discriminatory conduct and racism from their university, coaches, staff, teammates and competitors, and spectators. In 2022, reported harassment of a Duke University women’s volleyball player, Rachel Richardson, threw spectator harassment into the national spotlight. In August of that year, Rachel Richardson was “targeted and racially heckled” throughout the entirety of Duke University’s match against BYU at BYU, with BYU officials failing to take any action against the offending spectator. Just days later, Jalea Auguste, a Black female volleyball player for the Florida Gators also reported being racially harassed at a recent competition, with no action taken by the home team’s officials, coaches, or event staff.

Spectator harassment occurs when spectators invoke “harmful verbal or physical actions towards others in the sport milieu.” Often used as a tactic to intimidate and rattle opponents, harassment based on race or other immutable characteristics extends past normal...
heckling and instead becomes degrading and dehumanizing.\(^8\) Furthermore, spectator harassment has historically been de facto authorized as there have been few consequences for offenders' behavior.\(^9\) Despite the initial purpose of the NCAA to protect student-athletes,\(^10\) its failure to address and stop athlete abuse in its 117-year existence erodes the legitimacy of the NCAA and raises questions about the efficacy of college sports.\(^11\) The ongoing harm contributes to a racist college sports establishment created and perpetuated by the NCAA in which Black and brown student-athletes are commodified instead of valued and protected like their white counterparts.\(^12\) Black and brown student-athletes have been left voiceless and powerless in the face of enduring racism.\(^13\)

Following the BYU incident, BYU released a public statement indicating that they were unable to substantiate Rachel Richardson’s claims and stated no further remedial action would be taken to either deter BYU spectators from acting in such a manner at future events or deter other member schools’ from tolerating such behavior from their own spectators.\(^14\) The NCAA was silent on the matter.

\(^8\) See Iowa Apologizes to Wisconsin Badgers Wrestler Austin Gomez, Who Was Target of Racial Slur, ESPN (Feb. 8, 2022, 6:12 PM), https://www.espn.com/college-sports/story/_/id/33246420/iowa-apologizes-wisconsin-badgers-wrestler-austin-gomez-was-target-racial-slur [https://perma.cc/F5Z8-C6Q6] ("But there comes a time where certain fans (not all fans) cross a line that doesn’t need to be crossed.").

\(^9\) See, e.g., Flake, supra note 7, at 462–66 (detailing some of key obstacles to targeting and managing spectator harassment, including poorly-worded codes of conduct, poorly-enforced codes of conduct, and obstacles to monitoring thousands of fans in one sporting arena).


\(^11\) See id. (highlighting many instances in which NCAA has failed to create system that protects athletes).

\(^12\) For further discussion of how the NCAA perpetuates racism against student-athletes, see infra notes 66–72 and accompanying text.

\(^13\) See Nathan Kalman-Lamb, Derek Silva, & Johanna Mellis, ‘We Told You So’: For Black Athletes, Racism From College Fans is a Familiar Story, The Guardian (Oct. 6, 2022, 5:00 AM), https://www.theguardian.com/sport/2022/oct/06/college-sports-racism-abuse-rachel-richardson [https://perma.cc/7W7T-5TGB] (discussing how Black and brown voices have been ignored and disregarded over decades of reports of racism).

\(^14\) See Bill Chappell, BYU Apologizes to a Banned Fan, Saying It Found No Proof They Yelled Racial Slurs, NPR (Sept. 14, 2022, 2:21 PM), https://www.npr.org/2022/09/14/1122977386/byu-apologizes-to-a-banned-fan-saying-it-found-no-proof-they-yelled-racial-slurs [https://perma.cc/54XH-JRGJ] ("‘We have not found any evidence to corroborate the allegation that fans engaged in racial heckling or uttered racial slurs at the event,’ BYU Athletics said . . . "). This is not the first time this has happened at BYU, showing not only a pattern of racist actions but also
Rachel Richardson was expected to continue competing for Duke as if the harassment never occurred. Despite enduring racial slurs while trying to do her job, she was given no opportunity for recourse or recovery from the verbal assault enabled by BYU and the NCAA.

This Article seeks to prescribe an avenue of redress for discriminatory spectator harassment under Title VII of the Civil Rights Act creating employer liability for third-party harassment. In light of recent and upcoming case law eroding the power of the NCAA—including the likely outcome from the Third Circuit in Johnson v. NCAA—which will grant the NCAA and member schools joint employer status—this Article outlines a successful complaint by a complete disregard by BYU and the NCAA for holding spectators liable. See Nathan Kalman-Lamb & Derek Silva, BYU Hit By Fresh Allegations of Racist Abuse From Crowd At Athletic Event, Guardian (Sept. 30, 2022, 8:51 AM), https://www.theguardian.com/sport/2022/sep/30/byu-racism-allegations-womens-soccer-college-sports [https://perma.cc/5MNS[JCP]] (detailing several incidents that illustrate disregard for consistent racist attacks). In 2021, five women’s soccer players reported having the n-word yelled at them during the playing of the national anthem by BYU spectators. See id. (noting circumstance of new allegations). “I just remember that there was like a consistent chant of ‘stand up, N-words’ during the anthem and right after,’ one of the players told the Guardian.” See id. (quoting player from visiting team who knelt for national anthem). The player also noted that while she felt disappointed, the harassment was not surprising. See id. (adding incident indicated larger cultural issue at BYU). The BYU coach was told of the event and then an announcement was made over the pitch “warning fans about their behavior.” See id. (reporting no other action was taken). Following Richardson’s report, BYU’s athletic director met with Richardson to update the fans code of conduct. See id. (detailing initial steps taken by BYU leadership). BYU also banned a fan from all athletic events, but later rescinded that ban when it reported it could not find evidence to substantiate Richardson’s claim. See id. (explaining this incident).

15. See Shalise Manza Young, While Duke Volleyball Player Rachel Richardson Endured Racist Abuse From BYU Fans, Authorities Were Far Too Slow to React, Yahoo! Sports (Aug. 29, 2022), https://sports.yahoo.com/while-duke-volleyball-player-rachel-richardson-endured-racist-abuse-atbyu-authorities-around-her-failed-to-react-22280537.html [https://perma.cc/3GHN-F79E] (stating responsibility to protect student-athletes and student-athletes of color should not fall on shoulders of athletes, as it did in this case, but rather officials, coaches, and administration must step up). In fact, because of a lack of corroborating evidence, Rachel Richardson has been accused of lying and fabricating the entire incident. This further substantiates the need for measures to be put in place that meaningfully protect student-athletes of color from race-based abuse and harassment, even absent video tape or audio footage. See Mike Freeman, Right-Wing Conspiracy Theory Involving Duke Volleyball Player is Absurd, USA Today (Sept. 7, 2022, 6:17 AM), https://www.usatoday.com/story/sports/columnist/mike-freeman/2022/09/07/duke-volleyball-rachel-richardson-racial-slu-byu/799409001/ [https://perma.cc/CCN2-XNDA] (breaking down and debunking the conspiracy theory that Rachel Richardson fabricated event).

16. There are perhaps several other claims that could be leveraged as well that do not depend on the NCAA or member school’s status as an employer. See, e.g., Whitfield v. DLP Wilson Med. Ctr., LLC, 482 F. Supp. 3d 485 (E.D.N.C. 2020), (where plaintiff-employee also brought claims of negligence and negligent infliction of emotional distress).


18. For further discussion of the consequences of Johnson v. NCAA, see infra notes 182–314 and accompanying text.
student-athlete against their enrolled institution and the NCAA for liability for spectator harassment. Under a Title VII claim, this Article determines that an athlete could satisfy all four prongs of the workplace harassment test to hold the NCAA and member schools accountable for race-based harassment from spectators.

Section I of this paper discusses the history of spectator harassment, highlighting the ways in which the NCAA and NCAA member institutions have tried or avoided eradicating spectator harassment. Section II analyzes the impact of spectator harassment of student-athletes, looking holistically at the student-athlete experience to further understand the intensified impact of race-based harassment. Section III explains why the NCAA is considered a joint employer with the student-athlete’s member institution when analyzing this legal claim. Section IV dives into an athlete-employee’s third-party workplace harassment claim, discussing the legal standard that an athlete-employee must satisfy and showing ways in which it may be achieved. Section V concludes the Article highlighting the need to prioritize the health of student-athletes of color through anti-racist programming and policies.

I. The History of Spectator Harassment

Race-based spectator harassment has targeted college athletes for decades and shows no signs of declining without intervention and enforcement of the rules by the NCAA and member schools.19

19. Spectator harassment does not just target athletes. Spectators may target each other with racist slurs and while such conduct may not be noticed by student-athletes, it is still unacceptable racist behavior that violates the NCAA’s codes of conduct. See David K. Li, University of Kentucky Apologizes For Fan’s Racial Slur, Bans Her From All Future Games, NBC News (Mar. 5, 2020, 1:24 PM), https://www.nbcnews.com/news/us-news/university-kentucky-apologizes-hoop-fan-s-racial-slur-vows-take-n1150621 [https://perma.cc/4QNR-3Y3N] (detailing a spectator being ejected and permanently banned after hurling racial slurs at another spectator).

20. See, e.g., Chris Chavez, Black Track Athletes Share Their Encounters With Racism in America, Sports Illustrated (June 10, 2020), https://www.si.com/olympics/2020/06/10/black-track-and-field-athletes-racism-experiences-americ [https://perma.cc/45Z7-SYJ4] (sharing stories of fourteen Black athletes, all of whom experienced racism throughout their storied careers, with some detailing racism as early as elementary school); see also Flake, supra note 7, at 454–57 (detailing numerous accounts of racism against professional athletes); Richard Lapchick, Once Again, Racist Acts In Sports Are On the Rise, ESPN (Jan. 3, 2019, 10:09 AM), https://www.espn.com/espn/story/id/25675586/racism-sports-continued-rear-ugly-head-2018 [https://perma.cc/F3N3-SM47] (discussing study conducted by University of Central Florida’s Institute for Diversity and Ethics in Sport “recorded 52 acts of racism in sports in the United States in 2018, up from 41 in 2017. Internationally, there were 137 instances of racism in sports in 2018, a sharp increase from the 29 acts of racism in 2017.”). This included racial abuse at the World Cup and other professional football games, youth and high school games, and college matches. See id. (detailing pervasiveness of racism in sports).
In 1961, the UCLA basketball coach decided to keep his Black athletes on the bench to protect them from “intense racist heckling” and in 1983, Georgetown’s Patrick Ewing had a banana peel thrown at him in a racist nod to the trope likening Black individuals to monkeys.21 In 2014, Oklahoma State basketball star Marcus Smart, Michigan quarterback Devin Gardner, and NBA star Jeremy Lin shared stories of being called racial slurs by fans during collegiate competition.22 Jeremy Lin described harassment at Yale, Vermont, Cornell, and Georgetown as “worse than anything he experienced in the NBA.”23

In 2018, Missouri’s women’s basketball team was subjected to racist slurs from South Carolina fans, and North Arkansas College fans made “monkey noises and crow caws” at Black basketball players from Labette Community College.24 University of Southern California basketball star Minyon Moore reported her and her teammates were called derogatory names by Oregon State University fans after USC’s loss.25 She tweeted OSU fans used a variety of anti-Black racial slurs.26 This incident occurred after University of South Carolina fans targeted the Missouri Tiger’s women’s basketball team with similar slurs earlier in the season.27 Although Oregon State’s Deputy Athletic Director and Senior Woman Administrator Marianne Vydra was made aware of the situation, she stated the university was waiting for an incident report to be filed before any further investigation would be conducted.28 Vydra also fell short of condemning the racist conduct by simply stating she expected “Oregon State fans ‘to be classy at all times.’”29

21. See Nathan Kalman-Lamb et al., supra note 13 (reporting racist attacks against college coaches and student-athletes of color).
22. See id. (describing Smart’s, Gardner’s, and Lin’s experience dealing with racist attacks).
23. See id. (recounting his experience with away game spectators).
24. See id. (adding to long list of racism in college sports from spectators).
26. See id. (citing Moore’s tweets about “unsatisfactory” behavior OSU fans).
27. See David Cloninger, Dawn Staley Calls Alleged Spitting, Racial Slurs by South Carolina Fans ‘Serious and False,’ Post and Courier (Jan. 31, 2018), https://www.postandcourier.com/sports/dawn-staley-calls-alleged-spitting-racial-slurs-by-south-carolina-fans-serious-and-false/article_152e56a0-069e-11e8-a97f-cbc26c3692b1.html (detailing Missouri coach Robin Pingeton was asked Tuesday if she was aware of USC fans spitting on the Tigers as they left the floor, as claimed by former Missouri player Sierra Michaelis, who attended the game.).
28. See Kennedy, supra note 25 (reporting status of situation after Moore tweeted about it).
29. See id. (“Vydra also stated while she has “never dealt with one of these before,” she does expect Oregon State fans “to be classy at all times.”).
In 2019, a group of Seattle University student-athletes yelled “sexist and racist jeers” at a female University of Washington goalie during a soccer match. The student-athletes from Seattle University stood behind the goal, yelling at the goalie when she had no opportunity to walk away or remove herself from the abuse. Spectator and Former U.S. Congressman Brian Baird took photos of the student’s faces and audio recordings of their comments and sent them to administrators at both universities after the match. Following an investigation that identified the students as members of the Seattle University men’s swim team, the harassing athletes met with the harassed goalie and apologized. The team then also removed themselves from a swimming competition the following weekend, “spending the time reflecting and writing” instead of competing. While some may commend the swim team for apologizing and writing letters of apology, there remains no formal recourse or opportunity for recourse for the goalie who was subjected to demeaning and dehumanizing taunts while she was trying to perform. Furthermore, neither the member school nor the NCAA took any formal action against the harassing spectators—a step which would be necessary to deter future conduct.

In July 2021, “[t]he first game of the College World Series was plagued by fans in the stands who shouted out racial epithets during the game.” The College World Series opened with Vanderbilt going


31. See id. (“He pointed out that the alleged harassment was particularly egregious given that the goalie was, in many ways, “captive.”).

32. See id. (“Seattle U learned of the harassment when Former U.S. Congressman Brian Baird, who attended the match with his wife, sent an email to officials at both universities which included photos of the student’s faces and audio recordings of their comments.”).

33. See id. (noting “a group of student-athletes requested to meet with her and apologize for their behavior”).

34. See id. (“Instead of competing, they spent the time reflecting and writing. They identified the many people impacted by their behavior, including the competitors, the fans, the event management staff and the two university communities, and wrote letters of apology.”).

35. See id. (describing incident violation reporting and investigating process at Seattle U).

36. See id. (noting apologizing and self-removing from swim competition was only consequence for behavior).

up against Mississippi State. During the game, “attendees heard . . . spectators who appeared to be Mississippi State fans” throwing racial epithets toward players on the Vanderbilt team.\(^{38}\) Reports shared on Twitter suggested the slurs also targeted “Vandy parents.”\(^{39}\) ESPN reporter Clinton Yates tweeted “a bunch of drunk Miss State fans decided when the game was out of hand that the n-bomb needed to fly.”\(^{40}\) He added, “Most of the black players’ parents sit together. They ROUTINELY deal with micro to macro aggressions that they basically just wear, bc well, black folks have to do that sometimes.”\(^{41}\) While the police reportedly were involved in the incident, there was no reported action taken by either Mississippi State or the NCAA.\(^{42}\)

In 2022, there were at least six separate incidents of race-based spectator harassment reported nationwide. In January 2022, a Wisconsin fan made anti-Asian racist gestures at a men’s basketball game against Northwestern University.\(^{43}\) In February 2022, an Iowa fan shouted a racist slur at a Wisconsin wrestler\(^ {44}\) and the lacrosse fans at Presbyterian College yelled racial slurs at Howard University’s women’s lacrosse team.\(^ {45}\) At the start of the Fall 2022 semester, two women’s volleyball players—Rachel Richardson playing for Duke at BYU\(^ {46}\) and

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\(^{38}\) See id. (noting excitement of game was dampened by racist slurs).

\(^{39}\) See Clinton Yates (@ClintonYates), X (June 29, 2021, 12:40 AM), https://twitter.com/clintonyates/status/1409733481803003954 [https://perma.cc/AD09-7BTD] (“Vandy parents at the stadium tonight were subjected to racial slurs during the game and no one was hurt but the incident was obviously unacceptable and inappropriate.”).


\(^{41}\) See Johnson, supra note 37 (reporting police involvement, but indicating zero action from Mississippi State or NCAA).

\(^{42}\) See Kalman-Lamb et al., supra note 13 (describing incident during college basketball game).


\(^{44}\) See Rashad Grove, Howard Women’s Lacrosse Team Was Subjected to Racial Slurs Before a Game at Presbyterian College in South Carolina, EBONY (Feb. 18, 2022), https://www.ebony.com/howard-womens-lacrosse-team-racial-harassment/ [https://perma.cc/J89P-TQJU] (adding team was in shock after verbal attacks).

\(^{45}\) See Richardson, supra note 4 (tweeting about impact racist slurs had on her); see also Gonzalez, supra note 4 (interviewing Richardson and reporting her suggestions for change).
Jalea Auguste playing for the University of Florida—reported racist slurs yelled at them. To end the year, the Talladega College women’s volleyball team withdrew from the Southern States Athletic Conference tournament after a team member received a “racially motivated picture” during the tournament’s awards banquet.48

In 2023, fans at a Penn State versus Rutgers men’s basketball game allegedly yelled racist slurs at the Rutgers team.49 Penn State released an initial statement condemning the conduct that came from the student section.50 However, less than twenty-four hours after the game, Penn State redacted, indicating its “investigation” did not corroborate claims of racial slurs used amongst other vulgar language.51

This is just a very short list of race-based spectator harassment relative to the exhaustive list of accounts that have not been shared by student-athletes. Nearly every student-athlete from an underrepresented group “has faced something thrown at them that’s racially/sexually charged.”52 Harassment occurs both on and off the field, especially with the growing emergence of social media and the

47. See Auguste, supra note 5 (replying to Richardson’s tweet that she had similar experience).
50. See Lanni & Fonseca, supra note 49 (reporting immediate steps taken after game).
51. See id. (adding investigation involved conversations with Rutgers athletic director and staff).
52. See Kalman-Lamb et al., supra note 13 (quoting Colin Anderson, former Vanderbilt football player). Kalman-Lamb also shares incidents reported by athletes from UCLA, Ohio State University, Clemson University, and University of North Carolina. See id. (reporting pervasive racist incidents at college sports games). Although this Article focuses on spectator harassment during competition, athletes from underrepresented groups are also heavily exposed to racism online and in-person outside of competitive events. See, e.g., Cindy Boren, Another NCAA Tournament Player Received Racist Messages and Death Threats After His Team Lost, Wash. Post (Mar. 23, 2021, 10:16 AM), https://www.washingtonpost.com/sports/2021/03/23/kofi-cockburn-instagram-racist-post/ [https://perma.cc/5UQ8-6MRQ] (detailing just one vicious incident of online harassment from fans).
increased activism of non-white student-athletes against systemic racism. In 2021, E.J. Liddell and Kofi Cockburn, men’s basketball players for Ohio State University and the University of Illinois, respectively, shared anti-Black comments left on their social media. After Illinois lost to Loyola Chicago, an Instagram user told Kofi Cockburn to “[g]o back home ya bum,” and “[g]o sit your monkey a** on the couch.” Just days before, Ohio State player E.J. Liddell shared receiving harassing death threats on his social media following a loss to Oral Roberts.

The high-profile competition between Angel Reese and Caitlin Clark during the 2023 Women’s March Madness tournament also exposed heavy racism among commentators and fans. During the last moments of the game, LSU’s Angel Reese, who is Black, was shown throwing the “you can’t see me” gesture at Iowa’s Caitlin Clark, who is white, and then staring down Caitlin Clark and pointing to her own ring finger after the buzzer sounded to signify Reese receiving the National Championship ring over Clark. Despite the fact that Caitlin Clark had been seen making the same gesture in a previous match, the internet attacked Angel Reese for “classless” and unsportsmanlike conduct. The race-laced response to Angel Reese and LSU’s victory over Iowa did not end there — First Lady Jill Biden was also accused of racist behavior when she invited both LSU and Iowa to the White House for a visit despite such a celebration historically being reserved for the national champion.

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53. See Boren, supra note 52 (reporting this story).
54. See id. (quoting online harassment received by student-athletes of color).
55. See id. (observing Liddell tweeted in response, asking “what [he] did to deserve this?”).
57. See id. (describing these photographed interactions between Reese and Clark).
58. See id. (describing how Clark made gesture during the previous game against University of South Carolina in National Championship Semi-Finals. She was largely praised for making this gesture where people said “the gesture made her ‘so fun to watch’”).
59. See id. (“Trolls like Barstool’s Dave Portnoy called Reese, 20, a ‘classless piece of s***’ for doing so”).
60. See Joseph N. Cooper, Opinion: How White Privilege Plays Into the First Lady’s Idea to Invite Runner-Up Iowa to the White House, Des Moines Reg. (Apr. 9, 2023, 5:45 AM), https://www.desmoinesregister.com/story/opinion/columnists/2023/04/09/iowa-lsu-jill-biden-caitlin-clark-angel-reese-white-privilege/70086070007/ [https://perma.cc/86AT-MPMC] (“Being invited to the White House is traditionally reserved as a coveted reward for the team that wins the championship. The coincidence of first lady Biden inviting a majority white runner-up team signifies white privilege. I’m not aware of any situation where the team that lost a championship got invited to the White House, but it’s particularly difficult for me to
Reese commented on the racist double-standards that vilified her: “All year, I was critiqued for who I was . . . I’m too hood. I’m too ghetto . . . When other people do it, and y’all don’t say nothing. So this is for the girls that look like me.”\footnote{61}

Despite the undeniable prevalence of race-based spectator harassment, no substantive steps have been taken to eradicate this abuse and protect student-athletes. Rather, student-athletes are required to assimilate into member schools that have largely failed to protect their well-being and safety. At places like BYU, where two separate incidents occurred in back-to-back years, coaches from other member institutions have taken stronger steps to protect their Black athletes from BYU’s racist spectator conduct. Just one year before Rachel Richardson was targeted by spectator racist conduct, members of a woman’s soccer team competing at BYU overheard “a consistent chant of ‘stand up, N-words’ during the anthem and right after” when they were kneeling in silent protest of racist police brutality.\footnote{62} Despite being informed of the conduct, the BYU coaching staff did not respond.\footnote{63} When Rachel Richardson’s account was undermined and ultimately disregarded, the University of the Pacific pulled out of their scheduled November volleyball match at BYU\footnote{64} and University of South Carolina women’s basketball coach Dawn Staley made a public announcement that she would not be taking her team to compete at BYU.\footnote{65}

Whether these small steps forward help propel meaningful change in protecting student-athletes remains to be seen. Regardless,
the answer to eradicating spectator harassment is not in preventing student-athletes from playing; rather, schools and the NCAA must enact and enforce stricter measures to enforce protections and show zero-tolerance for abusive fan conduct.

A. The NCAA’s Role in Supporting & Protecting Athletes

The NCAA was created in 1906 as the Intercollegiate Athletic Association of the United States to address athlete safety. However, rates of discrimination and abuse faced by student-athletes from marginalized groups demonstrates the NCAA has fallen short of its original mission.

Although an NCAA Committee on Sportsmanship and Ethical Conduct “to improve the condition of sportsmanship and ethical conduct in all aspects of college athletics” was established in 1997, this committee was disbanded in 2023. The move to disband the committee bolstered the existing constitutional requirement that member institutions “[e]stablish policies for sportsmanship and ethical conduct in intercollegiate athletics consistent with the educational mission and goals of the institution . . .” The NCAA has also embedded anti-harm policies in many of its sports-specific rules books and guidelines, prohibiting team followers such as fans and guests from committing unsportsmanlike acts, such as using “language that is abusive, vulgar, or obscene.”

66. See Hall, supra note 10 (“‘Why does the NCAA exist?’ Cooper asks. ‘Not to protect athletes. It is supposed to exist to protect college athletes and regulate college sports. That is why it was founded in 1906.’”).

67. See Report of the NCAA Board of Governors January 11, 2023 Meeting, NCAA (Jan. 11, 2023), https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec_boardgov/Jan2023BOG_Report.pdf (The NCAA Board of Governors voted to eliminate the NCAA Committee on Sportsmanship and Ethical Conduct and directed the divisional governance bodies to pursue appropriate legislative actions necessary to remove the NCAA Committee on Sportsmanship and Ethical Conduct.).


69. See, e.g., NCAA Basketball 2023 – 2024 Men’s Rules Book, Rule 10, Section 2, Article 8, https://www.ncaapublications.com/productdownloads/BK24.pdf [https://perma.cc/7VMW-R9YT] (requiring administrative technical foul to be issued when team follower engages in throwing objects or using vulgar language); see also, e.g., NCAA Basketball 2023 – 2024 Women’s Rules Book, Rule 10, Section 12, Article 2.h., https://www.ncaapublications.com/productdownloads/WBR24.pdf [https://perma.cc/D822-HAXE] (requiring administrative technical foul to be issued when team follower engages in throwing objects or using vulgar language);
However, the NCAA has failed to both enforce these rules or create a system of reporting and subsequent enforcement that would deter spectators from engaging in harmful conduct. Consider the Penn State versus Rutgers men’s basketball game discussed above. A statement from the Vice President of Penn State’s student section, The Legion of Blue, recounted reports “of a fan throwing a fathead at one of the opposing players/coaches” and also revealed that law enforcement issued a warning to Penn State athletics “due to the alleged explicit, racist, and vulgar language directed to members of the Rutgers men’s basketball team.”

Despite an object being thrown and behavior significant enough that law enforcement issued a warning, none of the game officials took any action or issued a technical foul, which is required by the rules. This highlights the failure of the NCAA to create a system through which offending conduct can be reported and dealt with in the moment, instead of after a match has concluded when schools currently have limited access and resources to determine the veracity of the allegations. Resultingly, student-athletes of color continually experience harm from spectators and fans on and off the field.

B. The Role of Member Institutions in Supporting & Protecting Athletes

Undoubtedly, member institutions share the responsibility to protect student-athletes from harassment and abuse but have largely

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70. See Deren, supra note 49 (adding reported Legion of Blue actions were “out of character”).

71. See id. (discussing the lack of action by any officials during or after the match); see also NCAA Basketball 2023 – 2024 Men’s Rules Book, supra note 69, at Rule 10, Section 2, Article 8 (requiring technical foul to be issued when team follower engages in throwing objects or using vulgar language).

72. At both the Penn State-Rutgers basketball game and the BYU-Duke volleyball match, reports indicated that officials did not see the conduct and were not made aware of the conduct. Because of this, the university was left with no option but to conduct a retroactive investigation that did not allow for any athlete protection. See Lanni & Fonseca, supra note 49 (discussing Penn State’s initial condemnation-turned-toothless investigation); see also Young, supra note 15 (“Officials knew what was happening. Players knew what was happening. Coaches for both teams knew what was happening. And aside from a police officer being stationed near the Duke bench, not a damn thing was done.”).
failed in this task. At the 2023 Black Student Athlete Summit, one presenter asked the attendees—over 600 Black student-athletes—to “[r]aise [their] hand if [they] play a sport.” He then asked the attendees to “[k]eep them raised if your institution makes an effort to support Black student athletes.” Nearly all the hands . . . dropped in an instant.

Athlete protection starts in-house with university and athletic leadership that clearly stands against racism and other forms of discrimination. Not only does anti-racist messaging effectively communicate expectations to the fan base, it also fosters community, belonging, and well-being amongst the athletes. In a study that interviewed four Division I NCAA athletes, the athletes expressed appreciation for their schools’ anti-racist efforts but noted that there is still more to be done to eradicate racism. As one student noted about the ongoing need for anti-racist support:

“I’m glad that players are holding their coaches accountable because almost every sport, major sports, are bringing the most money. The coaches are often white and the players that make up the teams are Black. Coaches have an obligation to speak for equality. On the field they love us, but when we take the helmet off, we’re just Black.”

The athletes emphasized the importance of coaching staff acknowledging that external events and the social climate “impact [the athletes’] lives off the field and thus why they cannot just ‘shut up and dribble.’” Anti-racist messaging from schools can signal

73. See Margo Snipe, Racism Pervades College Sports. It’s Taking an Alarming Toll on Athletes, CAPITAL B NEWS (June 8, 2023, 8:09 AM), https://capitalbnews.org/racism-collegiate-sports/ [https://perma.cc/K9K4-WNSQ] (reporting on Black Student Athlete Summit).

74. See id. (polling Black student-athletes in audience).

75. See id. (adding mood of audience dropped with their hands).

76. See Shannon Jolly & Jepkorir Rose Chepyator-Thomson, “Do You Really See Us?”: Black College Athlete Perceptions of Inclusion at DI Historically White Institutions, 4 J. ATHLET. DEV. & EXPERIENCE 139, 148 (2022) (sharing commentary from Black student-athletes that racism is still prevalent on campus, despite efforts to combat racism from athletics departments).

77. See id. at 149 (quoting student-athlete who sees room for progress).

78. See id. (“Both comments from King 1 and King 2 support the CRT tenet of commitment to social justice and experiential knowledge/counter-narratives. Their sentiments highlight the sense of obligation and support for social justice activism, especially by athletes who can use the social capital for advancement. Their accounts acknowledge the intercentricity of race and racism, particularly the invisibility of their feelings/concerns and needs as it relates to social justice issues beyond playing their sports. The hegemonic realities that exist outside their team dynamics impact their lives off the field and thus why they cannot just ‘shut up and dribble.’” They also highlight a call to action from coaches as supporters and allies, and inadvertently reference the exploitation of Black athletes as they are accepted on game
to both the athletes and the public that racist behavior will not be accepted and that athlete protection and support is a top priority.

Additionally, member schools must implement an effective and clear code of conduct for fans. To successfully eradicate racism, any code of conduct should explicitly prohibit language that is discriminatory and avoid simply using high-level and vague language describing unsportsmanlike conduct as “vulgar” or “crude.” Imprecise terms that fall short of identifying discriminatory and bigoted language lack the specificity required for effective anti-racist efforts.

Lastly, member schools must be ready to follow through on enforcing their code of conduct through effective monitoring, thorough investigation, and immediate fan removal. The mantra “words are not enough” rings true in this context, not only for meaningful change but also for complete athlete protection. Despite engaging in the anti-racist training program, “A Long Talk About The Uncomfortable Truth,” when the BYU women’s soccer coaching staff was made aware of student chants involving the n-word targeting players from UCLA, they were unresponsive and took no action against the harassing fans to ensure all athletes were protected during the match. Failing to commit to enforcement perpetuates a climate accepting of racism, as exemplified by continued spectator harassment the next year.

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80. See Angela M. Haeny, Samantha C. Holmes, & Monnica T. Williams, The Need for Shared Nomenclature on Racism and Related Terminology in Psychology, 16(5) PERSP. ON PNL. SCI. 886, 886–92 (2021) (noting myriad of ways that racial behaviors and attitudes are created and manifest, and highlighting need for shared and specific terminology to best combat racism).

81. See Austin Rustand, BYU Athletics Promotes the Need for ‘A Long Talk About the Uncomfortable Truth,’ UNIVERSE SPORTS (Nov. 2, 2021), https://universe.byu.edu/2021/11/02/byu-athletics-promotes-the-need-for-a-long-talk-about-the-uncomfortable-truth/ [https://perma.cc/NESS2-QD3] (discussing BYU’s athletes and coaches working with facilitators of “A Long Talk About the Uncomfortable Truth” in effort to develop anti-racist athletics program); see also Kalman-Lamb et al., supra note 13 (sharing UCLA’s Kaiya McCullough’s story of being harassed and BYU failing to meaningfully address issue).

82. See Kalman-Lamb et al., supra note 13 (“Then again, BYU itself admits it has a problem.”).
During the 2023 Rutgers versus Penn State men’s basketball game, Penn State initially acknowledged and condemned racist and vulgar language from the Penn State student section, but later reversed and said only allegations of vulgar language could be corroborated. Despite one fan reportedly throwing a fathead at the Rutgers bench and the police issuing a warning to the Penn State athletics department due to the severity of the conduct, the student section received no more than a slap on the wrist and a warning to avoid such language in the future.83

While there have been accounts of fans ejected for racist behavior,84 consequences for discriminatory harassment remain an exception to the long-standing rule that such conduct will go unpunished.85 It is much more comfortable for schools to hide behind the guise of “offender anonymity” and toothless condemnation rhetoric to avoid the responsibility of enacting the measures necessary to

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85. See, e.g., Iowa Apologizes to Wisconsin Badgers Wrestler Austin Gomez, Who Was Target of Racial Slur, * supra* note 8 (finding no action was taken against fan with University of Iowa loosely reporting it was “investigating” allegations).

86. At Penn State, Iowa, and BYU, the initial response consisted of a public statement condemning the incident, and when the offender could not be identified or the story corroborated, no additional steps were taken. See, e.g., Carino, * supra* note 83 (“Further investigation into reported fan behavior at the Penn State versus Rutgers basketball game on Sunday has found that no apparent racial slurs were used by Penn State fans . . . .”); see also Iowa Apologizes to Wisconsin Badgers Wrestler Austin Gomez, Who Was Target of Racial Slur, * supra* note 8 (finding no action was taken against fan with University of Iowa loosely reporting it was “investigating” allegations); Ricky O’Donnell, *Duke Volleyball’s Rachel Richardson Heckled with Racial Slurs, and BYU Didn’t Do Much About It*, SB Nation (Aug. 29, 2022, 2:13 PM), https://www.sbnation.com/2022/8/29/23932720/rachel-richardson-duke-volleyball-byu-coach-no-show-response-quotes [https://perma.cc/R3E4-KSBM] (“The school is saying it investigated itself and found nothing wrong. It did not specify if it talked to Richardson. Richardson’s complaint should count as evidence enough.”). Specifically at Penn State, where the athletics department admitted vulgar and foul language was used, the student section in attendance could have been subjected to a stronger response to ensure conduct does not occur again in the future. See, e.g., Carino, * supra* note 83 (“However, the statement also said PSU officials are aware ‘that some fans were using vulgar language directed toward Rutgers players and fans, and we are disappointed as it does not represent Penn State values, appropriate fan conduct, or the Happy Valley Hospitality for which we are known. Fan behavior is important to the experience of all teams and visitors to Penn State and our goal is to create an environment that is competitive, but welcoming.’”).
truly ensure student-athletes of color are protected from racism and are valued for their whole selves, not just their athletic ability.

C. The Joint Responsibility of the NCAA & Member Institutions

The relationship between the NCAA and the member schools places the responsibility to tackle spectator harassment on the shoulders of both entities. While member schools may have more direct physical control of competition arenas, since they are responsible for hiring athletic event staff, security staff, engaging with local law enforcement, and controlling tickets, the NCAA creates and passes bylaws that bind all member schools. Member schools approve or reject bylaws, and thus the NCAA has a democratic element; however, after an NCAA bylaw has been passed, it is up to the member schools to adhere and the NCAA to enforce. Despite bylaws directly prohibiting racist conduct, enforcement has fallen short by both the NCAA and member schools, harming Black and brown student-athletes.

Through this relationship, both entities also control the collegiate athlete experience. Although the member schools are responsible for recruiting and scholarship allocation, the provisions of athletic scholarships are controlled by the NCAA. Further, while member schools create practice schedules and each division is able


88 See id. (“The Association-wide groups propose changes to the committees in each division, which then debate and vote on the proposals through their legislative processes.”); see also id. (“When governing itself on issues outside the areas of autonomy, though, Division I operates much like the other two divisions: Representatives serve on NCAA committees that determine the division’s direction and develop legislation. Members of the Division I Council vote on these proposals. Both processes often work together to reach a positive outcome for college athletes.”); Division I Infractions Process, NCAA, https://www.ncaa.org/sports/2018/6/20/division-i-infractions-process.aspx [https://perma.cc/M29P-C4JT] (last accessed Aug. 31, 2023) (detailing enforcement process when member school violates NCAA bylaw); NCAA Division I Constitution, Article I.E (Aug. 1, 2022), https://www.ncaapublications.com/productdownloads/D124.pdf [https://perma.cc/KV27-UR46] (“It is the responsibility of each member institution to monitor and control its athletics program and to provide education and training to ensure compliance with the rules established by the Association, its division and conference. It is the responsibility of each member institution to report all rules violations to its NCAA division and conference in a timely manner and to cooperate fully with enforcement efforts. Responsibility for maintaining institutional control ultimately rests with the institution’s campus president or chancellor.”).

to create its playing schedule, the NCAA controls championships, sets parameters around overall practice time, the number of games per season, and the season dates. Finally, where the member schools are in control of meting out suspensions, suspensions are justified through the NCAA Division I manual which details reasons for player discipline. Failure to comply with the NCAA requirements can cause an institution to lose athletic rights, incur financial penalties, or lose accreditation.


91. See Pl.’s Compl. at ¶ 130, Johnson v. NCAA, No. 19-5320, 2019 WL 5847921 (E.D. Pa. Nov. 6, 2019) (citing NCAA D1 Bylaw 17.1.7.3.4) (“NCAA D1 sports require adult supervisors to maintain timesheets for participants.”).

92. See NCAA Division I Bylaws, supra note 89, at Article 17.1.1 (“An institution is permitted to conduct officially recognized practice and competition each academic year only during the playing season as regulated for each sport in accordance with the provisions of this bylaw.”); see also id. at Article 17.1.7 (setting time limitations for “athletically related activities” for Division I sports).

93. See Pl.’s Compl., supra note 91, at ¶ 134 (“In addition to the Rule Book for each NCAA sport that defines related work, NCAA D1 member schools exercise authority, and discretion, to control Student Athlete performance and conduct under threat of discipline, including suspension or dismissal from the team, if a Student Athlete:

• ‘Renders himself/herself ineligible for intercollegiate competition,’ i.e., is suspected or determined to have run afoul of any of the myriad bylaws in the NCAA D1 Manual

• ‘Engages in serious misconduct …. or manifest disobedience,’ i.e., is suspected or determined to have run afoul of ‘Rules and regulations of the Department of Intercollegiate Athletics and specific rules of the recipient’s sport as defined by the head coach as they apply’

• ‘Fails to attend … squad or individual meetings … and participate in athletic practice sessions and scheduled contests, as specified by the sport coach’

• ‘Does not comply with expected personal conduct, appearance and dress, both on and off the University campus, and accepted uniform for athletic contests, when such violations bring discredit to the athletic program’

• ‘Fails to adhere to training rules and regulations’

• ‘Engages in gambling activities on intercollegiate activities prohibited by NCAA legislation’); see also NCAA Division I Bylaws, supra note 89, at Article 10.4 (“Prospective or enrolled student-athletes found in violation of the provisions of this regulation shall be ineligible for further intercollegiate competition, subject to appeal to the Committee on Student-Athlete Reinstatement for restoration of eligibility. Institutional staff members found in violation of the provisions of this regulation shall be subject to disciplinary or corrective action as set forth in Bylaw 19.12, whether such violations occurred at the certifying institution or during the individual’s previous employment at another member institution.”).

94. See NCAA Division I Constitution, supra note 88, at Article 2.D.2 (“An institution’s membership in the NCAA may be suspended, terminated or otherwise disciplined (including loss of or reduction in rights to participate in governance processes or financial penalties) for removal of the member’s accreditation, failure to pay dues or failure to satisfy academic performance progress, or failure to abide
The NCAA’s joint relationship with member institutions ensures each plays a vital role in the athlete’s experience and that neither entity is devoid of power to protect and support athletes. Rather, each entity has the responsibility to leverage its authority to eradicate racism throughout college sports.

II. The Athlete Experience

Competing at the collegiate level as a student-athlete is statistically shown to create desirable outcomes for students, including a higher rate of job placement and long-term career success. Although students relying solely on scholarships may experience financial hardships, the recent NCAA v. Alston development allowing student-athletes to profit from sponsorships and use of their name, image, and likeness (“NIL”) has opened avenues to financial success at levels unimaginable pre-Alston.

95. See A Study of NCAA Student-Athletes: Undergraduate Experiences and Post-College Outcomes, NCAA, 12 (2020), https://ncaaorg.s3.amazonaws.com/research/other/2020/20RES_GallupNCAtoutcomes.pdf ("NCAA student-athletes are slightly more likely (33%) than their nonathlete peers (30%) to have had a good job waiting for them upon their college graduation.").

96. See Michael A. Bongiovanni, Compensation for the Players: An Analysis of the Compensation for an NCAA Athlete, Fordham Research Commons 3 (2020), https://research.library.fordham.edu/cgi/viewcontent.cgi?article=1005&context=fulr-online-blog#:~:text=86%25%20of%20collegiate%20athletes%20live,24%20receive%20full%20ride%20scholarships [https://web.archive.org/web/2023112124638/https://research.library.fordham.edu/cgi/viewcontent.cgi?article=1005&context=fulr-online-blog#:~:text=86%25%20of%20collegiate%20athletes%20live,24%20receive%20full-ride%20scholarships] ("According to a study by Drexel University, 86% of collegiate athletes live below the federal poverty line, even though the average value of a Division I football or basketball player can range anywhere from $120,000 to over $265,000.").


98. See e.g., Bradshaw Catte, NIL Helps Athletes Sell: How the Branding Rule Change is Shaping Collegiate Sports, Geo. Voice (Nov. 6, 2022), https://georgetownvoice.com/2022/11/06/nil-helps-athletes-sell-how-the-branding-rule-change-is-shaping-collegiate-sports/ [https://perma.cc/7ZSQ-R6FM] (identifying ways in which Alston has altered sponsorship opportunities and even recruitment to be more...
The positive outcomes don’t eradicate the burdens carried by student-athletes, especially student-athletes of color. Student-athletes of color must constantly juggle the normal pressures faced by student-athletes: financial concerns, mental health and performance pressure, time management, and prepping for a post-graduate career. However, student-athletes of color must add to their plate facing near-daily, if not daily, battles with racism, isolation due to their racial identity on campus, and managing the disproportionate financial exploitation of Black student-athletes.

A. Managing Racism

Racism is a “daily part of life” for non-white individuals. While racist conduct is often associated with “blatant and overt acts of discrimination,” unconscious or more subtle conduct is equally as harmful. Facing and responding to racism is a near-daily occurrence for students of color and student-athletes of color. The emotional toll of racism, racial slurs, and other race-based harassment is also known as racial battle fatigue and can lead to significant mental health and

99. See Jolly & Chepyator-Thomson, supra note 76, at 141 (“[A] study on former Black male collegiate athletes revealed the existence of racism, racial stereotyping, and self-segregation as central implications of the everyday experience of this group of students on campus.”); see also David R. Williams, Stress and the Mental Health of Populations of Color: Advancing Our Understanding of Race-related Stressors, 59(4) J. HEALTH SOC. BEHAV. 466, 469 (2018) (“This study found that 69% of American adults reported experiencing at least one experience of discrimination and 61% reported experiencing everyday discrimination. Importantly these experiences were patterned by race. For example, 35% of African Americans and Native Americans, 25% of Latinos, 22% of Asians, and 18% of whites reported that they had had an experience of being unfairly not being hired for a job. Similarly, 34% of American Indians, 23% of blacks, 19% of Hispanics, and 11% of Asians and non-Hispanic whites reported that they experienced Everyday Discrimination almost every day or at least once a week.”).

100. See Terrence A. Jordan, The Impact of Racial Microaggressions on Black Athletes: Implications for Counseling and Sport Psychology, GA. S. UNIV. 1, 6–7 (2010) (“It is common for many people to associate racism with blatant and overt acts of discrimination (Sue, 2008). However, current research suggests that these types of discrimination have transformed into less conscious acts that are more subtle in nature . . . . This new form of racism has been coined as microaggressions . . . . What we know about microaggressions is that it leads to psychological distress in Black Americans.”).
identity formation concerns on top of daily emotional wear and tear. In a study of discrimination among children, “[e]xposure to discrimination predicted worse mental health (e.g., anxiety and depression symptoms) in 76 percent of the 127 associations examined.”

Among adults, “discrimination is positively associated with measures of depression and anxiety symptoms and psychological distress, as well as, with defined psychiatric disorders.” Social scientists Fleming, Lamont, and Welburn “conclude[d] that incidents of racial discrimination matter so profoundly for mental health because they are experiences of exclusion that trigger feelings of a ‘defilement of self.’” “This includes feelings of being over-scrutinized, overlooked, underappreciated, misunderstood, and disrespected.”

Racial battle fatigue develops into racial trauma—the emotional impact of stress related to racism, racial discrimination, and race-related stressors that negatively impacts physical, mental, and emotional health. Racial trauma can stem from a variety of

101. See Williams, supra note 99, at 469 (“Research reveals that exposure to discrimination and its negative consequences for mental health begins early in life. A review of research of discrimination among children and adolescents found 121 studies (and 461 outcomes) that had examined the association between discrimination and health among persons zero to 18 years old (Priest et al. 2013). Exposure to discrimination predicted worse mental health (e.g., anxiety and depression symptoms) in 76% of the 127 associations examined. Similarly, discrimination was inversely associated with positive mental health (e.g., resilience, self-worth, self-esteem) in 62% of the 108 associations examined.”).

102. See id. at 468 (citing Téne T. Lewis, Cogburn Courtney D., & Williams David, Self-Reported Experiences of Discrimination and Health: Scientific Advances, Ongoing Controversies, and Emerging Issues, 11 ANNUAL REV. OF CLINICAL PSYCH. 407–40 (Jan. 2, 2015)).

103. See id. at 469 (citing Crystal M. Fleming, Michèle Lamont, & Jessica Welburn, African Americans Respond to Stigmatization: The Meanings and Salience of Confronting, Deflecting Conflict, Educating the Ignorant and ‘Managing the Self’, 35(3) ETHNIC AND RACIAL STUDIES 400–17 (June 5, 2010)) (“Based on in-depth qualitative interviews, Fleming and colleagues conclude that incidents of racial discrimination matter so profoundly for mental health because they are experiences of exclusion that trigger feelings of a ‘defilement of self’. This includes feelings of being over-scrutinized, overlooked, underappreciated, misunderstood and, disrespected. Importantly, experiences of discrimination violate cultural expectations of fairness, morality, dignity, and rights. Pearlman and colleagues (2005) had earlier argued that stressors linked to race may be especially pathogenic because they could be perceived as a direct attack on an individual’s identity.”).

104. See id. (“Based on in-depth qualitative interviews, Fleming and colleagues conclude that incidents of racial discrimination matter so profoundly for mental health because they are experiences of exclusion that trigger feelings of a ‘defilement of self’. This includes feelings of being over-scrutinized, overlooked, underappreciated, misunderstood and, disrespected. Importantly, experiences of discrimination violate cultural expectations of fairness, morality, dignity, and rights. Pearlman and colleagues (2005) had earlier argued that stressors linked to race may be especially pathogenic because they could be perceived as a direct attack on an individual’s identity.”).

sources—it may be the product of one specific incident or “the ongoing, harmful emotional impact of racial discrimination that builds up over time.”

106 It can also stem from an incident directly targeting the individual or from witnessing mistreatment of others due to their racial identity.

Athletics, and the NCAA regime, are deeply racialized at all levels. For student-athletes, racism is prevalent in all facets of their life on- and off-campus. During their athletic career, and especially while enrolled in college, student-athletes experience racism from faculty, peers, athletic staff and coaches, and the public in the form of microaggressions, racial slights, or isolation based on their race from faculty members and campus staff.

107 A 2010 study evaluating the impact of racial microaggressions on Black athletes interviewed nine Black student-athletes from five sports in the southeastern region. All attended NCAA Division I schools. The athletes recounted experiences of racism, both subtle and overt, they experienced on campus. These microaggressions fell into eight categories: (1) Ascription of Intelligence/Status, (2) Assumed Superiority of White Cultural Values/Communication Style, (3) Exoticism of Black Athletes, (4) Second Class Citizen, (5) Assumed Universality, (6) Denial of Individual Racism, (7) Coping, and (8) Underdeveloped Incidents/Unclassifiable Findings. The students described having faculty assume them to be unintelligent with one student reporting, “Sometimes a teacher expects for you to be a little bit

106 See id. (“Racial trauma can refer to a specific incident of racial discrimination or the ongoing, harmful emotional impact of racial discrimination that builds up over time.”).

107 See id. (“People can experience racial trauma from something that happens directly to them or from seeing others mistreated because of their race. Coverage of events caused by racial discrimination in the media can also be upsetting, and repeated viewing or frequent media accounts can amplify those feelings.”).

108 See Jordan, supra note 100, at 12 (describing microaggressions as everyday slights or snubs that are conscious or unconscious stereotypes that are subtle in nature but “send denigrating messages to people of color because they belong to a racial minority group”).

109 See id. at 16–26 (describing author’s study on the impact of racial microaggressions on Black athletes). The author interviewed nine college athletes, all whom identify as Black, who represent five different NCAA Division I sports in the southeastern region of the United States. He identified eight microaggression themes from their accounts of their experience as a Black student-athlete for a Division I school: (1) Ascription of Intelligence/Status, (2) Assumed Superiority of White Cultural Values/Communication Style, (3) Exoticism of Black Athletes, (4) Second Class Citizen, (5) Assumed Universality, (6) Denial of Individual Racism, (7) Coping, and (8) Underdeveloped Incidents/Unclassifiable Findings. See id. at 27-28 (adding several of themes are interconnected).
less capable than what you actually are.” Another student said he felt the teachers “look down on” Black student-athletes and assumed they are “not as smart as the white kids.”

Athletic departments are not immune from racism. A study in 2022 interviewed six Division I athletes and found similar findings to the abovementioned 2010 study—student-athletes are exposed to racism in their everyday lives around campus, from the athletic department staff, and from the public. The students interviewed recounted derogatory comments made about their body and hair-styles from athletic coaching staff. At the 2023 Black Student Athlete Summit, one student reported being called “you people” by a college volleyball coach while another recounted being told by a referee “[t]here is no gangbanging on the field,” after she held up a peace sign. In 2023, coaches from the Northwestern University’s

110. See id. at 29 (quoting “Tyrese,” 20-year-old, Black male football linebacker).
112. See Jolly & Chepyator-Thomson, supra note 76, at 143 (“In the current study, the participants were comprised of two male football players (King 1 & King 2), two male track and field athletes (Prince 1 & Prince 2), and two female track and field athletes (Queen 1 & Queen 2).”) In this study, the six DI athletes described their experiences as Black student-athletes focusing on their racial identity development, their perceptions of diversity and inclusion on campus, their institution’s “overcompensation for racial marginalization,” experiencing gendered racism, their institution’s actual and perceived commitment as well as their commitment to social justice activism and allyship, the existence of an “athlete bubble” on campus, and feeling like their holistic identity is invisible. See id. at 143–150 (discussing findings on these topics from each of athletes).
113. See id. at 148 (“Sometimes African American females have little dips in our lower backs, everyone in my family has them. You don’t see it as much in Caucasian women. My strength and conditioning coach (white woman) told me I need to stop sticking my butt out. She told me I was trying to get attention and being promiscuous by making my butt look bigger. I was so confused. I’m built this way. A lot of us on the team wear weave and headbands to preserve our natural hairstyles during lifting and practice. The guys wear durags, but that’s fashion now. I remember an assistant coach, she stepped to us and decided we had on bandanas, and she was like, ‘What gang are you in?’ I was taken back because she was African American, and she basically said I look ghetto. When it comes to cultural things – would you call that discrimination? Because I think so.”).
114. See Snipe, supra note 73 (“The survey — conducted by Love and USC’s United Black Student-Athlete Association — reveals a troubling truth. Within the more than 100 responses from student athletes from 12 different sports across the country, there was the soccer player who has reported referees multiple times. The first time was in high school when she held up a peace sign and the referee told her, ‘There is no gangbanging on the field.’ . . . Another athlete described being called ‘you people’ by a college volleyball coach, then feeling retaliated against for speaking up. . . . Another who felt ignored when she complained about being in pain. Even outside of sports, physicians have shown a pattern of distrust when Black patients seek treatment for pain across a wide variety of diagnoses. In the emergency room, Black patients with bone fractures are less likely to receive pain medication.”).
football team,\textsuperscript{115} Texas Tech’s men’s basketball team,\textsuperscript{116} Defiance College’s wrestling team,\textsuperscript{117} and Albion College’s men’s basketball team,\textsuperscript{118} were all accused of using racist language towards or about the players. Of these, only Northwestern’s football coach was fired; the remaining only served suspensions or no formal action was taken at all against the coach.\textsuperscript{119}

From the public, student-athletes experience racism in overt forms on social media or in person, either on or off the field.\textsuperscript{120} While spectator heckling is common and even expected in athletic competitions, heckling is not the equivalent of race-based harassment. Yelling racial slurs\textsuperscript{121} or targeting student-athletes based on

\begin{itemize}
  \item \textsuperscript{115} See Amna Nawaz & Karina Cuevas, \textit{Northwestern Fires Football Coach Amid Hazing and Racism Allegations}, PBS (July 11, 2023, 6:30 PM), https://www.pbs.org/newshour/show/northwestern-fires-football-coach-amid-hazing-and-racism-allegations [https://web.archive.org/web/20231121224837/https://www.pbs.org/newshour/show/northwestern-fires-football-coach-amid-hazing-and-racism-allegations] ("Northwestern University fired longtime head football coach Pat Fitzgerald after an investigation found hazing was widespread on the team, including instances of forced sexual acts. The student newspaper, The Daily Northwestern, also reported former players alleged there were racist comments and attacks by the coaching staff.").
  \item \textsuperscript{117} See Tim Miller, \textit{Allegations of Racism Made Against Defiance College Head Wrestling Coach}, W Toledo 11 (Mar. 15, 2023, 6:35 PM), https://www.wtol.com/article/news/local/defiance-college-wrestling-coach-racism-allegations/512-01588b65d-2ac3-4421-b04c-c7d7c9d2a257 [https://perma.cc/SXY4-X347] (detailing Defiance College’s Coach Swinson’s termination after complaining about how “rude” fellow coach for another team from Muskingum University was acting by remarking “[t]his doesn’t surprise me because that’s how all of those Black people are”).
  \item \textsuperscript{118} See Scott Jaschik, \textit{Albion College Coach Used Racial Slur, INSIDE HIGHER ED (Jan. 8, 2023),} https://www.insidehighered.com/quicktakes/2023/01/09/albion-college-coach-used-racial-slu/ [https://perma.cc/LZ4A-4UJQ] (detailing Albion College’s head men’s basketball coach Jody May’s reported use of racial slur four times in practice).
  \item \textsuperscript{119} See Nawaz & Cuevas, supra note 115 (stating head football coach Pat Fitzgerald was fired). \textit{But see} Boone, supra note 116 (men’s basketball coach Mark Adams was suspended); \textit{see also} Miller, supra note 117 (despite calls from team for Coach Swinson to be fired, university did not even put him on probation and stated they would “pursue an ‘informal’ course of action in addressing the allegations”); Jaschik, supra note 118 (stating coach “apologized to the team for this regrettable lapse in judgment,” “sat our several games,” and “under[went] sensitivity training”).
  \item \textsuperscript{120} For further discussion on the types of spectator harassment, see supra notes 19–65 and accompanying text.
\end{itemize}
their race should not be justified under the guise of “heckling” or other acceptable spectator conduct. Accounts of racism historically include spectators calling athletes n***, making references to tropes and stereotypes likening Black individuals to monkeys, and targeting female student-athletes with gendered racism. Slurs such as the n-word and other derogatory terms are extremely psychologically damaging, yet student-athletes targeted by such conduct are expected to continue to play as if nothing had occurred.

Indeed, mental and emotional health concerns associated with identity and the pressure to perform are a constant battle for many student-athletes, regardless of race. However, adding systemic and constant exposure to racism compounds to disproportionately impact identity formation, academic success, and athletic performance for non-white student-athletes.

For athletes of color, “the (finding racial slurs are words intended to “dehumanize ‘the other’” and n-word specifically may be considered “the nuclear bomb of racial epithets” because of its substantial and painful history). Among some scholarly circles, the n-word and other racial slurs may qualify as “fighting words” under Texas v. Johnson, in which the Supreme Court defined fighting words as “a direct personal insult” and removed them from First Amendment protections. See id. (“Communications scholar Lanier Holt argues that the n-word, its history, and the vitriolic reaction that it provokes suggest that it should legally be considered among “fighting words,” which the Supreme Court defined as words that, “by their very utterance, inflict injury or tend to incite an immediate breach of the peace.”); see also Texas v. Johnson, 491 U.S. 397, 409 (1989) (excluding “fighting words” from First Amendment protections).

122. See Cokley, supra note 121 (examining psychological damage of the n-word, noting “the n-word has been weaponized in such a way as to inflict the most psychological damage against Black people possible. It is incredibly painful and serves as a constant reminder to Black people that no matter how much racial progress we have in this country, no matter how successful we are and how much education we have, the n-word will always serve as the trump card to try and put us in our place.”). In his article, Kevin Cokley examines the emotional response of being called the n-word, analyzing the violence it could reasonably incite because of its extremely offensive nature. See id. (“Many Black people experience a visceral reaction to being called the n-word. And while most Black people will not respond in violence, some most definitely will.”). He calls for more studies and research into the emotional and psychological impact of being called the n-word, indicating this is a current gap in social science. See id. (“However, a quick search of research literature in the discipline of psychology reveals that while psychology has a lot to say about the psychological impact of racism, there has been little focus specifically on the psychological impact of racial slurs, particularly the n-word.”).

123. See Gonzalez, supra note 4 (following both incidents of racist spectator harassment at BYU, targeted athletes (soccer players’ kneeling during anthem and Rachel Richardson during volleyball competition) were expected to complete match despite harassment); see also Kalman-Lamb et al., supra note 13 (sharing UCLA’s Kaiya McCullough’s story of being harassed and BYU failing to meaningfully address issue and game continuing as scheduled).

intersections of racism and mental health exist at all levels of play” and this is intensified as an athlete moves up the ranks from youth sports to collegiate sports with an eye towards professional competition. For student-athletes, “[r]ates of exhaustion, anxiety, and depression . . . have remained elevated since 2020 . . . [a]nd the rates among minority groups, such as women, athletes of color, and LGBTQ athletes, were the highest.”

To be a Black athlete on campus, some said, means always feeling behind on LinkedIn and internships while being an athlete minority among the Black minority in higher education, trying to navigate microaggressions. The pressure to perform on the field lingers, too. They manage injuries, sometimes concealing them to keep a spot. And when they finally seek counseling services, few — if any — therapists look like them.

They wonder if the mental health services their athletic departments provide are truly confidential. Hanging over their heads is the fear that their coach might punish them for how much they’re struggling. They juggle a regular course load. And, because most won’t go professional, they will eventually be forced to grapple with figuring out who they are beyond their sport.

Student-athletes of color report a dichotomous experience—they feel an intense pressure to perform that is coupled with a related appreciation from the public and coaching staff. However, any feelings of approval are limited by their racial identity when they are off the field. In athletics, Black student-athletes must always be ready to perform, despite their emotional state. Certainly, the pressure to perform takes an emotional toll. While this pressure is, in part, self-imposed, it also stems from athletes’ communities and families, and, of course, their team and athletic staff. For athletes who come from low-income households or are reliant upon athletic

125. See Asmelash, supra note 124 (discussing pressures facing athletes which heightens as athletes advance in skill and competition level).
126. See Snipe, supra note 73 (reporting on athlete well-being survey results).
127. See id. (describing mental hoops Black athletes have to deal with on campus).
128. See Todd A. Wilkerson, Sarah Stokowski, Alison Fridley, Stephen W. Dittmore, & Charles A. Bell, Black Football Student-Athletes’ Perceived Barriers to Seeking Mental Health Services, ATHLETIC DIRECTOR U, https://athleticdirectoru.com/articles/black-fb-student-athletes-perceived-barriers-to-seeking-mental-health-services/ [https://perma.cc/B8RJ-VN9Z] (last accessed July 26, 2023) (“Many of the participants felt as if it was their responsibility to always be ready to play despite their emotional state.”).
scholarships and opportunities, the pressure to perform is heightened by financial stress. But the ongoing pressure comes at a cost. Once the competition is over, they face limited opportunities, leniency, and compassion because of their racial identity. At the 2023 Black Student Athlete Summit at USC, one student shared feeling, “[i]f you’re not on the field producing, [the coaches] have nothing for you.” Black individuals are taught from a young age

129. See The First in Their Family, NCAA, https://www.ncaa.org/sports/2016/6/16/the-first-in-their-family.aspx (last accessed July 13, 2023) (discussing 2016 NCAA study finding that financing “is a larger concern” for first-generation student-athletes than their counterparts.) Whereas 56% of first-generation students are concerned finances could affect their ability to finish their degree, only 30% of other student-athletes feel the same way.” See id. (emphasizing impact of financial pressures on first-generation student-athletes).

130. See Jordan, supra note 100, at 40 (“So cuz like, I know, my freshman year, a guy had an internship... a black guy had an internship and he was kicked off the team because he didn’t complete Summer workouts. And there were two other white kids with internships and nothing happened”).

131. See Joseph Cooper, Dangerous Stereotypes Stalk Black College Athletes, CONVERSATION (Aug. 20, 2018, 6:31 AM), https://theconversation.com/dangerous-stereotypes-stalk-black-college-athletes-101655 (discussing “win at all costs” mentality that relies on anti-Black stereotype to force Black athletes to push through pain and injury at higher rates than white student-athletes); see also Meghan Walsh, ‘I Trusted ‘Em’: When NCAA Schools Abandon Their Injured Athletes, ATLANTIC (May 1, 2013), https://www.theatlantic.com/entertainment/archive/2013/05/i-trusted-em-when-ncaa-schools-abandon-their-injured-athletes/275407/ (detailing one football player’s experience with two significant injuries, neither of which received proper medical care and instead clearing him to keep playing despite life-threatening risks of injuries). A 2017 study found that NCAA Division I medical staff are not immune to larger patterns of racial biases in medical practice, notably identifying pain and prescribing effective medication. “[T]he present work suggests that medical staff perceive Black athletes as feeling less pain than do White athletes.” See James N. Druckman, Sophie Trawalter, Ivonne Montes, Alexandria Fredendall, Noah Kanter, & Allison Paige Rubenstein, Racial Bias in Sport Medical Staff’s Perceptions of Others’ Pain, 158:6 THE J. OF SOCIAL PSYCHOLOGY, 721, 728 (2017), https://faculty.wcas.northwestern.edu/jnd260/pub/Druckman%20et%20al.%20Racial%20Bias.pdf (suggesting this finding can kickstart interventions). Black student-athletes have also reported not being given the same opportunities to handle personal matters as their white counterparts. See Snipe, supra note 73 (“One young man spoke about not feeling that his coach had empathy for all the deaths in his family during his freshman year. He was going to keep kicking me while I was down,’ the player said of his coach. ‘If you’re not on the field producing, they don’t have anything for you.’ . . . A young woman spoke about being told she could only be off campus for a day while trying to get home for a funeral. What happens when not showing up to practice means not playing the next three games?”).

132. See Jolly & Chepyator-Thomson, supra note 76, at 150 (“They, you know, I feel like they truly see us like – I’m going to be blunt, but it’s about money. You know what I mean. Some of them see us as a tool to pay their bills and that’s it. They have to take care of us and make sure that we’re content with you know, our conditions . . . I’m self-motivated. I do it for my family, but mostly myself.”).

133. See Snipe, supra note 73 (discussing incident that occurred his freshman year where coach failed to show any empathy to student when he experienced multiple family deaths).
that they have to be better than their white counterparts to even get a shot at the same opportunity. Once they get that shot, it is still hampered by racial prejudices and discrimination that permeates their experience as student-athletes.

The NCAA and member schools must recognize and respond to the toll of racism through additional supports and protective measures. Currently, any response that suggests indifference towards or a lack of concern for the impact of racism signals to student-athletes that upholding the status quo protecting white supremacy is more important than protecting student-athletes.\textsuperscript{134} To achieve meaningful change, consequences for discriminatory behavior must go beyond empty rhetoric or unenforced codes of conduct. It is simply not enough to respond by ejecting a spectator from one game without any further action, or worse, determining from the outset that the obstacle of identifying the offending spectator is too great. Rather, consequences must show the athlete they are valued and their contribution to the game and to the school is valued, and show spectators discrimination will not be tolerated.\textsuperscript{135}

\section*{B. Economic Burden}

There is an economic cost to being a college athlete as well, with minority student-athletes disproportionately exploited by member institutions. Student-athletes of color face disproportionate financial concerns compared to their white counterparts. The NCAA regime fails to alleviate these concerns and is instead built on a capitalist system that commodifies Black and brown bodies.

Although across the entire NCAA, only 43 percent of student-athletes are non-white, the top revenue producing sports are predominantly non-white, meaning schools and the NCAA see the highest profits from non-white student-athletes.\textsuperscript{136} Black and brown

\textsuperscript{134} See Jolly & Chepyator-Thomson, supra note 76, at 152 (“The participants suggested the hesitation or silence in support of recent movements for racial equality inadvertently supports white supremacy or the status quo and negatively impacted their sense of belonging on campus.”).


\textsuperscript{136} See NCAA Demographics Database, NCAA, https://www.ncaa.org/sports/2018/12/13/ncaa-demographics-database.aspx [https://perma.cc/GP9G-P497] (last accessed Oct 6, 2023) (choosing data for "Coach and Student-Athlete Demographics by Sport" and selecting top revenue-producing men’s sport under “Select a Sport” drop-down tab, shows Division I men’s football and Division I men’s basketball as top two revenue-producing sports); see also Andrew Zimbalist, Analysis:
student-athletes are also overrepresented in athletics compared to both the undergraduate population and the population at large, being exploited for their athletic ability without receiving the same access to benefits associated with being a NCAA athlete. At the top-revenue producing, predominantly white institutions (“PWIs”) in the NCAA, Black students comprise only 5.7 percent of the population; however, “[b]lack athletes make up 55.9 percent of men’s basketball players, 55.7 percent of men’s football, and 48.1 percent of women’s basketball.” These sixty-five schools generated $8.3 billion in revenue in athletics during the 2018-2019 academic

Who is winning in the high-revenue world of college sports?, PBS (Mar. 18, 2023, 7:14 PM), https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports [https://web.archive.org/web/20231121225715/https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports] (finding that not only are they top two sports, but football and basketball each make more than next four revenue-producing sports combined); George Malone, Which College Sports Make the Most Money?, Yahoo! (Mar. 21, 2022), https://www.yahoo.com/video/college-sports-most-money-130012417.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAACwEXE2jsJZACbuwM5Au1WF6_APjM6x5INgAVbVYTcBP56AmYm18N0ZnWprzFPrv77KkdMj6EOaxGZrSk973uJmNyoJcIKeIg9UH53GyulmDytwWN_LvHEHDVVx5RVV7ayehH18Atu8tXmA8fTWxur8wfrkWeP01pF [https://perma.cc/P2A3-QVL5] (finding ice hockey, baseball, track & field, and equestrian make combined $5.8 million on average annually, while basketball alone brings in $8.1 million on average for each school and football brings in $31.9 million per school per year on average).

137. See Shaun R. Harper, Black Male Student-Athletes and Racial Inequities in NCAA Division I College Sports, USC RACE & EQUITY CTR. (2018), https://abfe.issuelab.org/resources/29858/29858.pdf [https://perma.cc/RB39-V93T] (last accessed July 26, 2023) (noting “pervasive . . . underrepresentation of Black men in the undergraduate student population at predominantly white universities, their overrepresentation on revenue-generating NCAA Division I sports teams, and their comparatively lower six-year graduation rates”); see also Jennifer R. Curry, Franklin A. Soares, Justin E. Maclin, & Imre Csaszar, Black Male Collegiate Athletes’ Perceptions of Their Career and Academic Preparation: A Mixed Methods Study, 6 J. COLLE. ACCES. 111, 113–15 (2021) (detailing study outcomes that consistently found disproportionately lower academic and career results for Black student-athletes including “evidence to suggest that Black males in revenue generating sports constitute a subpopulation of athletes that appear to have reduced academic outcomes (e.g., GPA, graduation rates) compared to their collegiate peers.”).

138. These top schools are the sixty-five schools in the NCAA that make up the Power Five conferences: the Atlantic Coast Conference, Southeastern Conference, Big Ten Conference, Big 12 Conference, and the PAC-12 Conference. See What is the Power Five?, WIRE (June 9, 2023), https://thewire.signedayssports.com/articles/what-is-the-power-5/ [https://perma.cc/354R-T9HJ] (defining and identifying Power Five); see also Nathan Kalman-Lamb, Derek Silva, and Johanna Meliss, I Signed My Life to Rich White Guys: Athletes on the Racial Dynamics of College Sports, GUARDIAN (Mar. 17, 2021, 5:00 PM), https://www.theguardian.com/sport/2021/mar/17/college-sports-racial-dynamics [https://perma.cc/7VY7-7EAE] (finding Power Five is similar to “big business”).

139. See Kalman-Lamb et al., supra note 138 (comparing makeup of college sports teams to general student body).
year. However, “aside from scholarships, players don’t see any of that money directly.” Additionally, graduation rates for Black student-athletes are lower than white student-athletes and because of the demands of their sport, they are not given access to internship opportunities necessary for job placement post-graduation.

Thus, Black students who attend these PWIs are exploited disproportionately for the revenue they produce without any protection. At some institutions, they are asked to check their anti-racist interests at the door if they want to compete and obtain scholarships. Reportedly, students at University of Texas-Austin were told they could choose between being on the field during the traditional singing of The Eyes of Texas before the game or “los[ing] access to job opportunities after graduating.”

See id. (stressing significant size of Power Five conferences). This is almost double from 2006, when the annual revenue of top sports was $4.4 billion. It is estimated that 60% of the annual revenue “was generated by football and basketball teams, much of it derived from the increasingly lucrative sale of broadcast rights to major television networks.” See Christopher Ingraham, NCAA Rules Allow White Students and Coaches to Profit Off Labor of Black Ones, Study Finds, Wash. Post (Sept. 7, 2020, 7:00 AM), https://www.washingtonpost.com/business/2020/09/07/ncaa-student-athletes-pay-equity/ (discussing discrepancy between revenue brought in by majority-Black teams and allocation of revenue to majority-white athletes and coaches).

See Kalman-Lamb et al., supra note 138 (noting Black student-athletes are denied revenue they help bring to schools).

See Harper, supra note 137 (“Black men were 2.4% of undergraduate students enrolled at the 65 universities, but comprised 55% of football teams and 56% of men’s basketball teams on those campuses. Across four cohorts, 55.2% of Black male student-athletes graduated within six years, compared to 69.3% of student-athletes overall, 60.1% of Black undergraduate men overall, and 76.3% of undergraduate students overall. . . . 59% of the universities graduated Black male student-athletes at rates lower than Black undergraduate men who were not members of intercollegiate sports teams.”); see also id. (“Notwithstanding, Black male student-athletes rarely accrue benefits and developmental outcomes associated with high levels of purposeful engagement beyond athletics. This has serious implications for faculty-student interaction, an important form of engagement. Comeaux and Harrison (2007) found that engagement with faculty was essential to academic achievement for Black and White male student-athletes, yet professors spent significantly more out-of-class time with Whites. Furthermore, high-achieving Black male student-athletes in Martin, Harrison, and Bukstein’s (2010) study reported that coaches prioritized athletic accomplishment over academic engagement and discouraged participation in activities beyond their sport.”).

See Kalman-Lamb et al., supra note 138 (reporting athletes are often forced to deal with demands to ensure success on- and off-field). The Eyes of Texas is traditionally performed at athletic events at UT Austin, but football players attempted to protest its performance and the associated racial undertones by remaining in the locker room. After a top donor to the men’s football program threatened to pull funding if the protesting players continued to boycott the anthem, the players were forced back on to the field. See id. (showing players’ needs are put behind interests of sports program).
Startlingly, the picture of exploitation painted so far is clearer when considering that 86 percent of student-athletes live below the federal poverty line during their time enrolled and on a team roster. Most scholarship packages include tuition and related education expenses plus a small stipend for student expenses. While this package seems promising on its face, the value of a college athlete in a top revenue producing sport exemplifies the magnitude of economic abuse of athletes. “[T]he average value of a Division I football or basketball player can range anywhere from $120,000 to $265,000 annually.” This amounts to over $1 million over four years for college football players in the ACC (the lowest value sport/conference) to over $2.7 million for men’s basketball players in the ACC (the highest value sport/conference).

For illustration purposes, consider the following facts:

At the University of Texas, the average football player lives $778 below the federal poverty line despite having a fair

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144. See Kevin Wallsten, Tatishe M. Nieta, & Lauren A. McCarthy, Racial Prejudice is Driving Opposition to Paying College Athletes. Here’s the Evidence, NAT’S COLL. PLAYER’S ASSN (Dec. 30, 2015), https://www.ncpanow.org/news-articles/racial-prejudice-is-driving-opposition-to-paying-college-athletes-heres-the-evidence [https://perma.cc/7TEJ-RVXY] (“[I]t’s exploitation to have players work for such paltry compensation while universities, advertisers, and television networks profit from their efforts . . . . ‘It is not immoral for the NCAA to make money off of athletics. But it is profoundly immoral for the NCAA to restrict athletes from receiving compensation while everyone else profits.’”).

145. See Bongiovanni, supra note 96, at 3 (“According to a study by Drexel University, 86% of collegiate athletes live below the federal poverty line, even though the average value of a Division I football or basketball player can range anywhere from $120,000 to over $265,000.”).


148. See Ramogi Huma, Ellen J. Staurowsky, & Lucy Montgomery, How the NCAA’s Empire Robs Predominately Black Athletes of Billions in Generational Wealth, NAT’S. COLL. PLAYER’S ASSN’ S 3 (July 31, 2020) (sharing “Per Conference Average Football
market value of $513,922.\textsuperscript{149} The UT-Austin football and basketball program is 68.3 percent Black.\textsuperscript{150}

At Duke University, the average basketball player lives just $732 above the federal poverty line despite having a fair market value of $1,025,656.\textsuperscript{151} Duke University’s football and basketball program is 64.8 percent Black.\textsuperscript{152} Basketball and football players at the University of Florida live $2,250 below the poverty line despite the school having the “highest combined football and basketball revenues.”\textsuperscript{153} However, the university’s football and basketball programs are 77.7 percent Black.\textsuperscript{154}

Alternately, there is no question about who is benefiting most from the labor of non-white athletes – university and team leadership that is predominantly white.\textsuperscript{155} Across the Power Five, 84.4 percent of university presidents and chancellors are white, 75 percent of athletic directors are white, and “[a]t the coaching level, 80.6 percent of head men’s basketball coaches, 81.54 percent of head women’s basketball coaches, and 80 percent of head football coaches” are white.\textsuperscript{156} The revenue generated by these sports in the Power Five also “subsidizes the salaries of [predominantly] white individuals in

\textsuperscript{149} See Study: “The Price of Poverty in Big Time College Sport,” supra note 147 (listing fair market value of football and basketball players compared to their socioeconomic status at three DI institutions).

\textsuperscript{150} See Harper, supra note 137 (listing percent of racial minorities on each school’s basketball and football teams in ACC, SEC, Big Ten Conference, Big 12 Conference, and PAC-12).

\textsuperscript{151} See Study: “The Price of Poverty in Big Time College Sport,” supra note 147 (listing fair market value of football and basketball players compared to their socioeconomic status at three DI institutions).

\textsuperscript{152} See Harper, supra note 137 (listing percent of racial minorities on each school’s basketball and football teams in ACC, SEC, Big Ten Conference, Big 12 Conference, and PAC-12).

\textsuperscript{153} See Study: “The Price of Poverty in Big Time College Sport,” supra note 147 (listing fair market value of football and basketball players compared to their socioeconomic status at three DI institutions).

\textsuperscript{154} See Harper, supra note 137 (listing percent of racial minorities on each school’s basketball and football teams in ACC, SEC, Big Ten Conference, Big 12 Conference, and PAC-12).

\textsuperscript{155} See Nathan Kalman-Lamb et al., supra note 138 (“The most recent data available from the NCAA (the 2018-2019 season) makes it clear that the primary beneficiaries of college sport are white.”); see Ingraham, supra note 140 (“The net result: White athletes and coaches profit off the labor of Black athletes, who receive no additional compensation for the considerable revenue they generate.”).

\textsuperscript{156} See Kalman-Lamb et al., supra note 138 (showing stark racial contrast between university leaders and student-athletes).
leadership roles.”157 Due to this exploitation of predominantly non-white athletes at the highest levels of revenue producing sports, the college athletics regime “systematically strips generational wealth from predominantly Black athletes from lower income households to pay lavish salaries of predominantly white coaches, athletic directors, commissions and NCAA administrators.”158

C. The Intersection of Economics and Racism

The economics of college sports is not colorblind. White student-athletes predominantly come from middle- to upper-class households and do not carry the same financial burdens, proportionally, as their non-white counterparts.159 Although the Alston decision resulting granted the top revenue producing sports also the highest income potential, the ability for non-white students to receive that money is based off their athletic performance. This scenario forces non-white students to simultaneously carry the burden of performance despite being faced with systemic and widespread

157. See id. (indicating athletes do not see revenue they bring in); see also Julia Elbaba, Looking At the Top College Football Head Coach Salaries in 2022, NBC Sports Chi. (Sept. 8, 2022, 11:25 AM), https://www.nbcsportschicago.com/ncaa/looking-at-the-top-college-football-head-coach-salaries-in-2022/328860/ [https://web.archive.org/web/20231121230059/https://www.nbcsportschicago.com/ncaa/looking-at-the-top-college-football-head-coach-salaries-in-2022/328860/] (listing salaries of highest paid NCAA and NFL football coaches). This Article does not discuss an accompanying systemic issue in college athletics: the lack of diversity amongst leadership. The diversity in college athletics leadership is not representative of the US population makeup. See Kalman-Lamb et al., supra note 138 ("Former University of Wisconsin men`s basketball star Nigel Hayes explains, ‘It’s always been an interesting situation and dynamic. Black athletes, but white school, white coaches, white fans… minimal Black people.’... ‘Most are aware these university teams, primarily men’s basketball and football, are filled with Black players. Making money for usually white people and not being able to have their share of a billion dollar plus industry. So the visual you get is white institutions recruit Black talent to make millions. While dealing with all the other hurdles of being Black.”). However, it should be acknowledged that the unpaid labor of college athletes allows for college athletics leadership to enjoy large salaries. See Kalman-Lamb et al., supra note 13 ("Ultimately, the racist abuse suffered by players is another symptom of college sports’ plantation dynamics, in which white institutions make money from the labor of unpaid Black labor. It is a fact understood all too well by the players who experience it."). The average football coach’s salary for the 108 NCAA Division I colleges is $1.75 million, with the top ten paid coaches each making over $7 million in 2022. See Elbaba, supra note 157 (listing salaries of highest paid NCAA football coaches in 2022).


racism, mental health concerns, and financial struggles at higher rates than their white teammates.

The economic dimension of college athletics is even more significant for first-generation students, who are predominantly non-white. In 2016, 18 percent of student-athletes were first-generation students, 40 percent of student-athletes came from low-income families, and 86 percent of student-athletes lived below the federal poverty line. Within the student-athlete population, 12 percent of white student athletes reported being first generation and 26 percent of student-athletes from a non-white racial/ethnic group reported being first generation. First-generation students carry heavy burdens at a rate much higher than their counterparts.

160. See Are You a First-Generation Student?, CTR. FOR FIRST-GENERATION STUDENT SUCCESS, https://firstgen.naspa.org/why-first-gen/students/are-you-a-first-generation-student#:~:text=Being%20a%20first%2Dgen%20student%20means%20that%20your%20parent(s),yournav%20college%20journey [https://perma.cc/2595-7FJQ] (last accessed July 26, 2023) (“[B]eing a first-gen student means that your parent(s) did not complete a 4-year college or university degree, regardless of other family member’s level of education.”). While there is some debate on the definition of first-generation student and whether it encompasses degree attainment by extended family members, focusing on degree attainment of parents/guardians is a common definition. Defining First-Generation, CTR. FOR FIRST-GENERATION STUDENT SUCCESS (Nov. 20, 2017), https://firstgen.naspa.org/blog/defining-first-generation [https://perma.cc/NC72-CRZL] (“There are also prevalent research definitions – one considering no parental education after high school and one considering no parental degree completion after high school. However, some institutions, and researchers, choose to remove the first-generation title from students with parents who have even once enrolled in a college course. More recently, some institutions have chosen to include students with parents who completed a four-year degree at an institution outside the United States as first-generation as well.”); see also First Generation Applicants, UCLA, https://admission.ucla.edu/apply/first-generation-applicants#:~:text=A%20%E2%80%9Cfirst%2Dgeneration%20student%20means%20that%20your%20parents,20%20college%20journey [https://perma.cc/NC72-CRZL] (last accessed July 27, 2023) (using definition relying upon parental degree completion in admissions).

161. See The First in Their Family, supra note 129 (“Financing their education is a larger concern for this population. Whereas 56% of first-generation students are concerned finances could affect their ability to finish their degree, only 36% of other student-athletes feel the same way. Additionally, how these students finance their education differs from their non-first-generation peers”); see also First-Generation Students: Approaching Enrollment, Intersectional Identities, & Asset-Based Success, CTR. FOR FIRST-GENERATION STUDENT SUCCESS (Dec. 1, 2017), https://firstgen.naspa.org/blog/first-generation-students-approaching-enrollment-intersectional-identities-and-asset-based-success [https://perma.cc/PXL7-QYAL] (“Often, first-generation students are associated with being low-income, from underrepresented populations or immigrant families . . . ”).


163. See The First in Their Family, supra note 129 (sharing first-generation statistics).
whose parents or another family member also attended college. The key concerns of this group include finances,\textsuperscript{164} familial pressure to succeed,\textsuperscript{165} identity creation,\textsuperscript{166} and navigating unknown territory, as many first-generation students lack the generational knowledge held by those who had parents or other extended family members to lean on when transitioning to higher education.\textsuperscript{167} In short, because a first-generation student does not have parents who completed a degree, there is a possibility that the student "lack[s] the critical cultural capital necessary for college success because their parents did not attend college."\textsuperscript{168}

The transition for non-white first-generation students is a heavier burden as first-generation students not only are transitioning to an unknown environment but are also facing racial barriers without a community of support.\textsuperscript{169} “Black first-generation college students..."
likely arrive at university campuses uninformed about their first-generation college status given that it is an invisible identity.\textsuperscript{170} This section of the student body not only experiences institutionalized racism, microaggressions, isolation from the predominantly-white student body because of their racial identity, but also, “they typically do not have access to the hidden curriculum that will allow them to be successful in college.”\textsuperscript{171}

For first-generation students, especially racially-diverse students, both the athletic scholarships granted and the community of their team eases this transition and becomes vital to achieving success in college. The scholarships students receive from their participation on a team can make the difference between student-athletes receiving a college degree versus not being able to afford an education.\textsuperscript{172} Similarly, for many students, the benefits of NIL deals post-Alston open doors to financial wealth but are still incumbent upon the student-athletes’ ability to perform, increasing the pressure to succeed in interscholastic athletic competitions. Thus, continued athletic performance, even in the face of racism, is vital to degree attainment and post-degree job placement for this group at higher rates than their white counterparts, or counterparts who are not as dependent on athletic scholarships to remain enrolled.\textsuperscript{173}

Student-athletes that are non-white, irrespective of their first-generation status, face financial burdens and racism at levels unexperienced by white student-athletes, irrespective of their white institution (PWI) and being a big Black African American man. I was worried about racism at the time. I did not know what to expect or if I was going to be accepted.’ While minority students were concerned about how they would be treated or how they would fit in at a PWI, White students concerns centered around being away from home. For example, a white participant responded to the same question with ‘Just being homesick and not really being able to go home.’


\textsuperscript{171}See id. (discussing another layer negatively impacting Black first-generation students).

\textsuperscript{172}See The First in Their Family, supra note 129 (according to 2016 NCAA study, “[o]nly 47% of first-generation students strongly agreed they would have attended a four-year college had they not been an athlete, compared with 62% of student-athletes who are not first generation students”).

\textsuperscript{173}See id. (indicating that financially, first-generation student-athletes, who are predominantly non-white, are more dependent on athletic scholarships than non-first-generation counterparts, who are predominantly white); see also Morofsky, supra note 166, at 47–48 (finding through interviewing first-generation students, that nearly all of them rely on student loans and scholarships to be able to pay for their college education and without those scholarships and student loans, college may not be option).
first-generation status.\textsuperscript{174} While it is vital to understand the unique experience of groups of student-athletes based on singular identities such as race, first-generation status, and income levels, the experience of non-white student-athletes transcends many of the same concerns of first-generation students. For Black and non-white students who come from low socioeconomic backgrounds or single-parent households or are first-generation college students, “[h]ardships, poverty, and poor schooling limit the overall college experience.”\textsuperscript{175} Thus, understanding the identity formation of student-athletes of color requires understanding the associated financial hardship, familial pressure, and response to racism on campus and from the public.

It is imperative that the NCAA and member schools more fully understand the experience of this group and strengthen necessary protections. This includes understanding the pressures faced for continued athletic performance and the emotional toll of continued racism.

\textsuperscript{174} While first-generation students experience financial concerns at a greater rate than continuing generation students, these breakdown along racial lines, and thus the experience of student-athletes of color can be compared against white student-athletes notwithstanding first-generation status for a better understanding of the holistic experience of student-athletes of color. Additionally, because a disproportionate number of student-athletes of color come from low-income households or are entering predominantly white spaces without guidance and cultural knowledge, their experience is more akin to first-generation students in that regard that it is separate from that experience. See Morofsky, supra note 166, at 47–48 (finding through interviewing first-generation students, that nearly all of them rely on student loans and scholarships to be able to pay for their college education and without those scholarships and student loans, college may not be an option); see also Black First-Generation College Students Matter: A Call to Action, supra note 171 (“2019 data reveal that the student debt crisis across the nation disproportionately impacts Black students, and women, especially (American Association of University Women, 2018; Kakar et al., 2019). Rarely is this data disaggregated for first-generation college status. Further, reports about student social mobility and student financial literacy should account for historical racism, as well as first-generation college status and the hidden curriculum of higher education.”); Wilkerson et al., supra note 128 (“Many student-athletes come from low socioeconomic backgrounds and single-parent households; often student-athletes, particularly in high profile sports (e.g., basketball, football) are first-generation college students. Hardships, poverty, and poor schooling limit the overall college experience for Black student-athletes. These disadvantages leave Black male student-athletes feeling exploited and isolated.”).

\textsuperscript{175} See Wilkerson et al., supra note 128 (“Many student-athletes come from low socioeconomic backgrounds and single-parent households; often student-athletes, particularly in high profile sports (e.g., basketball, football) are first-generation college students. Hardships, poverty, and poor schooling limit the overall college experience for Black student-athletes. These disadvantages leave Black male student-athletes feeling exploited and isolated.”).
III. THE NCAA AS A JOINT EMPLOYER

The premise of this Article is based not on if the NCAA will be classified as an employer of student-athletes, but rather, when. This paper posits that both the NCAA and the athlete-employee’s member institution would be joint employers. This is in part because of the development of the employer-status case law to date and in part because of how joint employers are determined.

Student-athletes have been fighting to be classified as athlete-employees since 2016 when three athletes on the University of Pennsylvania’s women’s track and field team filed the first of a string of suits against the NCAA and member schools, alleging “by virtue of their participation on the team,” student-athletes were employees of universities for purposes of the Fair Labor Standards Act (“FLSA”), and were therefore entitled under the wage-and-hour provisions of the FLSA to be paid at least minimum wage for the work they performed as student-athletes. In Berger v. NCAA, the Seventh Circuit found that the plaintiffs failed to meet their burden to be classified as employees under the FLSA and also failed to plausibly allege injury traceable to the NCAA because joint employment was not mentioned in the complaint. However, the Seventh Circuit’s

176. Notably, the author is not making a normative argument on whether student-athletes should be given employee status. There are multiple policy concerns associated with that categorization, which are not addressed in this paper. This Article is based on the likely future reality of employee status. In addition to the case law that is discussed below, there is a growing trend enacting and pushing for additional legislation to grant enhanced protections from student-athletes. See, e.g., Anna Davis, Should College Athletes Get Paid?, LinkedIn (Mar. 15, 2021), https://www.linkedin.com/pulse/should-college-athletes-get-paid-anna-davis/ [https://perma.cc/FV48-VABV] (providing overview of some constitutional concerns and legislative progress towards compensating athletes); see also, e.g., Smith, supra note 158 (providing overview of key state legislation advocating for student-athlete compensation). The author is also not detailing the semantics of a joint-employer relationship between the NCAA and member institutions because the Johnson court will rule on whether these entities can be considered joint employers, thus that relationship need not be analyzed in this paper. See Pl.’s Compl., supra note 91, at ¶ 20 (alleging “Defendants jointly employed Plaintiffs and have jointly employed, and continue to jointly employ, similarly situated persons within the meaning of 29 U.S.C. § 203(g)).

177. See Berger v. NCAA, 162 F. Supp. 3d 845, 847 (S.D. Ind. 2016) (“[B]y virtue of their participation on the team, they are employees of Penn for purposes of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (“FLSA”). Therefore, they allege, they are entitled under the wage–and–hour provisions of the FLSA to be paid at least minimum wage for the work they perform as student athletes.”)

178. See id. at 849 (“[J]oint employment is not mentioned in the Amended Complaint, and the only fair reading of the Amended Complaint is that the Plaintiffs are alleging that they are employees of only Penn, not of the other Defendants. Therefore, the arguments in the Plaintiffs’ briefs do not elaborate on the facts in the complaint; they contradict them. The well–pleaded facts in the Amended Complaint do not plausibly suggest that the Plaintiffs have standing to sue any Defendant other than Penn.”).
finding that the plaintiffs plausibly alleged injury traceable to their member school kept the theory of law alive and several additional lawsuits have been filed since, each taking a bite at the apple and getting closer to a finding in favor of student-athletes.\textsuperscript{179}

In the second case to be litigated, \textit{Dawson v. NCAA}, the Ninth Circuit dismissed the case in part because Dawson did not include his member institution as a defendant, instead only naming the PAC-12 conference and the NCAA.\textsuperscript{180} The Ninth Circuit found there was insufficient evidence to find the PAC-12 and the NCAA joint employers.\textsuperscript{181}

In 2019, plaintiff Ralph “Trey” Johnson, a former football player at Villanova University, filed the most recent suit against the NCAA and NCAA Division I member schools seeking relief under the FLSA.\textsuperscript{182} In this case, Johnson brought suit against the NCAA and his member institution as joint employers, thus, the outcome of the case may find that the NCAA and an athlete-employee’s member institution are joint employers.\textsuperscript{183} The Eastern District of Pennsylvania denied the NCAA’s Motion to Dismiss, making the Johnson case the most successful case to-date fighting for employee status for student-athletes.\textsuperscript{184}

\textsuperscript{179} See \textit{Dawson v. NCAA}, 250 F. Supp. 3d 401, 404 (N.D. Cal. 2017) (finding against plaintiff-athlete where plaintiff failed to provide evidence of control and also failed to include member schools as joint employers, only naming PAC-12 and NCAA as defendants); \textit{see also} \textit{Livers v. NCAA}, No. 17-4271, 2018 WL 3609839, at *4 (E.D. Pa. July 26, 2018) (denying plaintiff-athlete’s claim because statute of limitations had tolled but noting that plaintiff-athlete “plausibly state[d] a willful FLSA violation sufficient to survive at the Motion to Dismiss stage.”).

\textsuperscript{180} See \textit{Dawson}, 250 F. Supp. 3d at 405 (finding against plaintiff-athlete where plaintiff failed to provide evidence of control and also failed to include member schools as joint employers, only naming PAC-12 and NCAA as defendants).

\textsuperscript{181} See id. at 407–08 (dismissing Dawson’s argument relying on \textit{O’Bannon} because it “says nothing about the existence of an employment relationship between student athletes and the NCAA”).

\textsuperscript{182} See Pl.’s Compl., \textit{supra} note 91, at ¶ 6 (noting underlying claim). Johnson brought the suit “individually and on behalf of all persons similarly situated,” and included twenty-three named NCAA member schools along with the NCAA as defendants. \textit{See id.} (adding context to suit).

\textsuperscript{183} \textit{See id.} (“WHEREFORE, Plaintiffs seek the following relief on behalf of themselves and all others similarly situated: . . . (i) A declaration that NCAA bylaws, as uniformly interpreted and applied by Defendants to prohibit the proper classification and compensation of Student Athletes, violate wage and hour laws”).

\textsuperscript{184} See \textit{Johnson v. NCAA}, 556 F. Supp. 3d 491, 512 (E.D. Pa. 2021) (ruling complaint plausibly alleges plaintiffs are employees for purposes of FLSA). At the time of writing this article, the Eastern District’s denial of the Motion to Dismiss was appealed to the Third Circuit by the NCAA. \textit{See Brief for Appellees, Johnson v. NCAA}, No. 22-1223, 2023 WL 2828245 (3rd Cir. July 14, 2022). Hearings were held in spring 2023 but a decision had not yet been handed down from the Third Circuit at the time of this Article’s publication. \textit{See Nicole Auerbach, In Johnson v. NCAA, Judges are Asking the Right Questions of the College Sports Model, Athletic} (Feb. 15, 2023), https://theathletic.com/4208822/2023/02/15/johnson-v-ncaa-
Considering these developments since the 2016 *Berger* case—along with other pro-student-athlete developments like *Alston* and *O’Bannon v. NCAA*—it is increasingly likely that NCAA student-athletes will be given employee status in the future.\(^\text{185}\)

Given this, for an athlete-employee to prevail, it is necessary that the NCAA is considered a joint employer with the member school for which the athlete competes.\(^\text{186}\) Although most schools have fan codes of conduct, a lack of enforcement has created an atmosphere in which student-athletes are racially harassed multiple times each year. To end harassment and protect student-athletes, the power of the NCAA must be leveraged as a joint employer.

First, the harassed athlete is often competing at an away school, meaning the athlete’s member school/employer is a different institution than the member school physically in control of the arena. This institution would be the one responsible for fan conduct at that competition. Limiting employer status only to member schools removes recourse for athlete-employees harassed at an away event.\(^\text{188}\)

Second, the NCAA has greater authority and leverage to protect all student-athletes. Even though the member school may have a stronger ability to control fan conduct because they are responsible for the staff that runs the competition, it is the NCAA that has the enforcement arm. The NCAA has authority over member schools through funding, eligibility determinations, and control of pay, benefits, rules, assignments, schedules, and tenure.\(^\text{189}\) This...
leverage enables the NCAA to implement stronger policies to ensure student-athlete protection. Assigning the NCAA joint employer status with the member schools ensures nationwide enforcement of anti-harassment policies to protect athlete-employees at all events, not just at their home stadium.

IV Workplace Harassment – Holding the NCAA Jointly Liable for Third-Party Spectator Harassment

Categorizing student-athletes as joint employees of the NCAA and their respective member schools attaches Title VII liability to the NCAA to protect employees from workplace harassment. Under Title VII of the Civil Rights Act of 1964, an employer may bring a workplace harassment claim for third-party harassment against their employer and show the alleged conduct must be “(1) unwelcome; (2) based on [the protected characteristic]; (3) sufficiently severe or pervasive to alter the conditions of employment and to create an abusive work environment; and (4) imputable to [the] employer.” A third-party harassment claim will be analyzed under the same analysis used for employer workplace harassment. In cases of harassment during competition, it is undisputed that racial slurs or other derogatory comments based on race or gender are both unwelcome and based on a protected characteristic, satisfying the first two prongs. Thus, the crux of the argument lies in satisfying

D123.pdf [https://perma.cc/F3BU-JH4P] (“Each member institution, consistent with the principal of institutional control, shall hold itself accountable and comply with the rules and principles approved by the membership.”); id. (“8.01.3 Responsibility to Monitor and Report. An institution shall comply with all applicable rules and regulations of the Association in the conduct of its intercollegiate athletics programs. It shall monitor its programs to ensure compliance and to identify and report instances in which compliance has not been achieved. An institution shall cooperate fully with any enforcement efforts and shall take appropriate corrective actions, as necessary. Members of an institution’s staff, student-athletes, and other individuals and groups representing the institution’s athletics interests shall comply with the applicable Association rules, including rules requiring cooperation with enforcement efforts, and the member institution shall be responsible for such compliance.”).

190. See, e.g., Pryor v. United Air Lines, Inc., 791 F.3d 488, 495–96 (4th Cir. 2015) (“To survive summary judgment, Pryor must show that a reasonable jury could find that the conduct she alleges was (1) unwelcome; (2) based on her race; (3) sufficiently severe or pervasive to alter the conditions of her employment and to create an abusive work environment; and (4) imputable to her employer.”).


prongs three and four, showing that the harassment is “sufficiently severe or pervasive” and that the third-party spectator conduct is imputable to the NCAA.\footnote{See id. (requiring party to show harassing conduct was sufficiently severe or pervasive).}

A. Analyzing Sufficiently Severe or Pervasive

In a claim for third-party workplace harassment, the plaintiff must show that the conduct was “sufficiently severe or pervasive,” creating a hostile work environment that “alter[ed] the conditions of the victim’s employment.”\footnote{See McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1112–15 (9th Cir. 2004) (quoting Nichols v. Azteca Rest. Enters., 256 F.3d 864, 872 (9th Cir. 2001)) (“In determining if an environment is so hostile as to violate Title VII, we consider whether, in light of ‘all the circumstances’... the harassment is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’”).} To determine whether an incident or incidents were sufficiently severe or pervasive, the court considers “all the circumstances”: (1) the frequency; (2) the severity; (3) whether the conduct was physically threatening or humiliating or a mere offensive utterance; and (4) whether the conduct results in unreasonable interference with the employee’s performance.\footnote{See id. at 1113 (citing Nichols, 256 F.3d at 872) (detailing elements of “totality of the circumstances” test, dubbed as such in Harris v. Forklift Sys.).}

A plaintiff-employee must note that they do not need to satisfy both severity and pervasiveness.\footnote{See Henry v. Corporat Servs. Hous., Ltd., 625 F. App’x 607, 611–612 (5th Cir. 2015) (quoting EEOC v. WC&M Enters., 496 F.3d 393, 400 (5th Cir. 2007)) (“[U]nder the totality of the circumstances test, a single incident of harassment, if sufficiently severe, could give rise to a viable Title VII claim.”); see also Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (implying that isolated incident, if “extremely serious,” can produce hostile work environment); Harris v. Forklift Sys., 510 U.S. 17, 21 (1993) (noting that hostile work environment involves “severe or pervasive” conduct (emphasis added) (citation and internal quotation marks omitted)); Lauderdale v. Tex. Dep’t of Crim. Just., 512 F.3d 157, 163 (5th Cir. 2007) (“An egregious, yet isolated, incident can alter the terms, conditions, or privileges of employment and satisfy the fourth element necessary to constitute a hostile work environment.”); Harvill v. Westward Comm’n, L.L.C., 433 F.3d 428, 434–35 (5th Cir. 2005) (explaining that conduct need not be both severe and pervasive to be actionable under Title VII); La Day v. Catalyst Tech. Inc., 302 F.3d 474, 483 (5th Cir. 2002) (explaining same).} Although frequency and severity are closely linked and often inform each other, the court will consider evidence

\footnote{193. }
of severity separate from pervasiveness. While it is rare for a single incident to satisfy this prong, an isolated incident—especially with surrounding amplifying circumstances—may be sufficiently egregious on its own to satisfy this prong. In other words, a plaintiff-employee need not show severe conduct over a period of time. Rather, a plaintiff-employee may prevail if the conduct occurred repeatedly over a period of time and was significant but not severe; or if the conduct was extremely egregious yet isolated.

Further, the court will evaluate the harassing behavior for both objective and subjective unreasonableness. Objective hostility is determined “from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.” Decisionmakers have a responsibility to view the evidence through the eyes of someone in the same racial group as the plaintiff-employee, especially when that perspective may differ from the decisionmakers’ personal

environment... in isolation;” instead, courts must determine severity and pervasiveness by “looking at all the circumstances...” (citations omitted). See Lauderdale, 512 F.3d at 163 (“An egregious, yet isolated, incident can alter the terms, conditions, or privileges of employment and satisfy the fourth element necessary to constitute a hostile work environment.”)

198. See Henry, 625 F. App’x at 611–612 (“[U]nder the totality of the circumstances test, a single incident of harassment, if sufficiently severe, could give rise to a viable Title VII claim.”); see also EEOC, 496 F.3d at 400 (analyzing claim for evidence of severity or pervasiveness); Faragher, 524 U.S. at 788 (implying that isolated incident, if “extremely serious,” can produce hostile work environment); Harris, 510 U.S. at 21 (noting that hostile work environment involves “severe or pervasive” conduct (emphasis added) (citation and internal quotation marks omitted)); Lauderdale, 512 F.3d at 163 (“An egregious, yet isolated, incident can alter the terms, conditions, or privileges of employment and satisfy the fourth element necessary to constitute a hostile work environment.”); Harvill, 433 F.3d at 434–35 (explaining that conduct need not be both severe and pervasive to be actionable under Title VII); La Day, 302 F.3d at 483 (explaining same).

200. See Henry, 625 Fed. App’x at 611–612 (“[U]nder the totality of the circumstances test, a single incident of harassment, if sufficiently severe, could give rise to a viable Title VII claim.”); see also EEOC, 496 F.3d at 400 (pointing to cases that showed occasional harassment is enough); Faragher, 524 U.S. 775, 788 (1998) (implying that isolated incident, if “extremely serious,” can produce hostile work environment); Harris, 510 U.S. 17, 21 (1993) (noting that hostile work environment involves “severe or pervasive” conduct (emphasis added) (citation and internal quotation marks omitted)); Lauderdale, 512 F.3d at 163 (“An egregious, yet isolated, incident can alter the terms, conditions, or privileges of employment and satisfy the fourth element necessary to constitute a hostile work environment.”). See, e.g., McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1115 (9th Cir. 2004) (noting each incident, in itself, may not have supported hostile work environment claim, but claim was supported considering seriousness over time).

201. Id. (analyzing whether reasonable African–American man would find workplace so objectively and subjectively racially hostile as to create abusive working environment); see also Ellison v. Brady, 924 F.2d 872, 878–79 (9th Cir. 1991) (evaluating objective hostility from perspective of reasonable woman in sexual harassment claim in which plaintiff-employee was female).
experience. This vital shift in perspective respects the notion that while someone who is not part of the targeted group may view the conduct as “only mildly offensive,” from the perspective of a member of the targeted group, the conduct may “be interpreted as degrading, threatening, and offensive” when considering the “omnipresence of race-based attitudes in the lives of [B]lack Americans.”

Notably, Title VII does not distinguish between “subtle” and “overt” racial discrimination—rather, Title VII clearly rejects all race-based discrimination. Subjective hostility is met when the victim did in fact perceive the workplace to be hostile. It is shown through testimony and evidence from the plaintiff of discriminatory conduct and harm resulting from that conduct.

First, the courts will consider whether the conduct was sufficiently severe. Severity of the conduct is determined by the egregiousness, whether it was physically threatening or humiliating, the identity of the offender, and whether others were also witness to the conduct. Evidence of racial epithets, racial graffiti, or

203. See McGinest, 360 F.3d at 1115–16 (“We now state explicitly what was clear from our holding in Ellison, that allegations of a racially hostile workplace must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff. . . . Racially motivated comments or actions may appear innocent or only mildly offensive to one who is not a member of the targeted group, but in reality be intolerably abusive or threatening when understood from the perspective of a plaintiff who is a member of the targeted group. “The omnipresence of race-based attitudes and experiences in the lives of black Americans [may cause] even nonviolent events to be interpreted as degrading, threatening, and offensive.” . . . . By considering both the existence and the severity of discrimination from the perspective of a reasonable person of the plaintiff’s race, we recognize forms of discrimination that are real and hurtful, and yet may be overlooked if considered solely from the perspective of an adjudicator belonging to a different group than the plaintiff.”).

204. See id. at 1116 (quoting Harris v. Int’l Paper Co., 765 F. Supp. 1509, 1516 (D. Me. 1991)) (adding white observers are likely to interpret comments as jokes).

205. See id. (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)) (“Title VII tolerates no racial discrimination, subtle or otherwise.”).

206. See Nichols v. Azteca Rest. Enters., 256 F.3d 864, 873 (9th Cir. 2001) (“Assuming that a reasonable person would find a workplace hostile, if the victim ‘does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.’); see also McGinest, 360 F.3d at 1113 (finding subjective hostility was satisfied through McGinest’s unrebuted testimony and his complaints to supervisors and to EEOC).

207. See McGinest, 360 F.3d at 1113 (“Subjective hostility is clearly established in the instant case through McGinest’s unrebuted testimony and his complaints to supervisors and to the EEOC.”).

208. See Swinton v. Potomac Corp., 270 F.3d 794, 803 (9th Cir. 2001) (noting employer’s liability for harassing conduct is evaluated differently when harasser is supervisor as opposed to coworker); see also, e.g., McGinest, 360 F.3d at 1113 (quoting Nichols, 256 F.3d at 872) (“In evaluating the objective hostility of a work environment, the factors to be considered include the ‘frequency of discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere
allocating hard labor and menial tasks to employees of color all support a finding of sufficiently severe. Additionally, the identity of the offending party—such as supervisory status—can either support or detract from a claim for workplace harassment. While use of the n-word alone can immediately change the atmosphere in the workplace as it is “perhaps the most offensive and inflammatory racial slur in English,” a plaintiff-employee is more likely to prevail when the racial epithets were spoken by a supervisor, in the presence of co-workers, or heard frequently over a period of time.

In McGinest v. GTE Service Corp., McGinest worked at GTE, a telecommunications company, for 23 years. He experienced numerous incidents and practices which, holistically, were found to have created a hostile work environment. According to McGinest, he was forced to work under dangerous conditions without proper equipment, did not receive the same overtime benefits as his non-African-American co-workers, was subjected to several instances of racist graffiti drawn in the bathroom, and his supervisor and co-workers made several comments that were targeted towards McGinest’s racial identity.

He was also subjected to racial epithets, specifically the use of the n-word. The court determined that “it is beyond question that the use of the word ... is highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination. This word is ‘perhaps the most offensive and inflammatory racial slur in

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209. See McGinest, 360 F.3d at 1116 (finding McGinest was subjected to racially-hostile work environment considering evidence of verbal racial slurs, racist graffiti, withholding of overtime pay that was given to white co-workers, and failure by supervisors to maintain safe work environment).

210. See id. (quoting Swinton, 270 F.3d at 817) (“It is beyond question that the use of the word n*** is highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination.”). Compare Woods v. Cantrell, 29 F.4th 284, 285 (5th Cir. 2022) (finding that plaintiff-employee’s allegations that supervisor called him racial epithet in presence of other employees was sufficient to state hostile work environment claim), with Mosley v. Marion County, 111 F. App’x 726, 728 (5th Cir. 2004) (finding hostile work environment claim was not supported when there were three cases of racial epithets but plaintiff-employee of detention facility did not actually hear any of them, only one of them was said by his supervisor, and plaintiff-employee also referred to inmates by racial slurs).

211. See McGinest, 360 F.3d at 1107 (describing plaintiff).

212. See id. at 1109–11 (explaining McGinest provided evidence of derogatory statements from supervisors and superiors, coworkers, and four incidents of graffiti over course of five years, despite continued reporting to management and formal complaints filed with EEOC).

213. See id. at 1107–12 (detailing McGinest’s factual claims).
English, ... a word expressive of racial hatred and bigotry. The court in McGinest analyzed the totality of the circumstances to find that although these incidents may not have been sufficiently severe or pervasive when taken separately; when taken together and considering the duration, there was a hostile work environment.

When considering pervasiveness, there is no “bright-line” standard for number of incidents or duration, but the court does consider the number of incidents over time to be significant in the analysis. McGinest provided evidence of derogatory statements from supervisors and superiors, coworkers, and four incidents of graffiti over the course of five years, in Penn v. USF Holland, plaintiff-employee Penn failed to satisfy the severe or pervasive prong when he provided evidence only of three race-based incidents over a total of fourteen months. However, duration need not be substantial.

214. See id. at 1116 (quoting Swinton, 270 F.3d at 817) (emphasizing enormous impact of n-word).
215. See id. at 1107–12 (“[W]e consider whether, in light of “all the circumstances” the harassment is “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment. ... Simply causing an employee offense based on an isolated comment is not sufficient to create actionable harassment under Title VII. ... It is enough “if such hostile conduct pollutes the victim’s workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay on in her position.”) (citations omitted).
216. See Harris v. Forklift Sys., 510 U.S. 17, 22 (1993) (stating inquiry into severity of unwelcome conduct “is not, and by its nature cannot be, a mathematically precise test”).
218. Compare McGinest, 360 F.3d at 1109–1111 (citing numerous race-based incidents over course of five years from supervisors and co-workers that affected multiple aspects of his work environment), with Penn, 770 F. Supp. 2d at 1232 (citing three race-based incidents over fourteen months). Penn’s accusations included a long history of discipline action against him; however, the court determined the discipline actions were largely based on Penn’s performance issues and not on his race. See Penn, 770 F. Supp. 2d at 1218–29, 1231 (summarizing facts). “The overwhelming majority of harassment complained of by Penn is unsupported by evidence linking that conduct to his race. There is, however, ample evidence in the record indicating that any harassment Penn may have suffered was due to a perception that he was less than a stellar employee. Nevertheless, upon consideration of the entire record, the court cannot say that none of the alleged harassment for which Penn has presented evidence can be considered race-based. In June 2007, Penn found racist graffiti in a trailer and reported it to Norton. In response, Norton allegedly told Penn to “have tough skin.” In September 2007, a co-worker told Penn to “shut the fuck up, black motherfucker.” Almost a year later, on August 14, 2008, Penn found grease on his truck seat and a noose in the tractor. These incidents constitute harassment based upon Penn’s race and, therefore, satisfy the third element of a hostile work environment claim.” See id. at 1231 (expanding on court’s reasoning). Further, Penn reported all three race-based incidents to supervisors, and all were dealt with by supervisors. See id. at 1233 (“In light of the foregoing case law, Penn simply has not presented a triable issue with respect to whether he was subjected to severe or pervasive harassment. The record supports, at most, three race-related incidents over the course of fourteen months, none of which were initiated by management or supervisors. As such, the alleged harassment was ‘isolated,’ ‘sporadic,’ and ‘random.’”). Alternately, in McGinest, supervisors largely ignored McGinest’s reports and directly
In *Henry v. Corp. Car*, the court found that the incidents that took place over just two days were sufficiently harmful and repugnant to constitute actionable discrimination.

One racial slur has the power to create a hostile working environment especially when there is a power imbalance between the speaker and the target, such as supervisor-subordinate. When the speaker is a supervisor, the court has emphasized the extreme impact of this power imbalance, noting “[p]erhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as [ ] by a supervisor in the presence of his subordinates.”

Even if the supervisor is responsible for only one incident, the totality of the circumstances in this case can support a workplace harassment claim.

Alternately, the court has found racial terms used in a derogatory manner may not be sufficiently severe when the speaker was unidentified and not connected to the workplace, they were not a supervisor, or there was only evidence of a single incident.

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219. See *Henry v. Corp. Car*, 625 F. App’x 607, 611–12 (5th Cir. 2015) (“Because the incidents in this case primarily occurred over two days, Corpcar emphasizes the lack of frequency. Nonetheless, it is well established that ‘[u]nder the totality of the circumstances test, a single incident of harassment, if sufficiently severe, could give rise to a viable Title VII claim’ . . . . All in all, of the factors to be considered, the only one not weighing in favor of the verdict is frequency. This is but one factor to be considered, and ‘no single factor is required.’ Even so, this factor does not weigh sufficiently strongly to set aside the verdict.” (citations omitted)).

220. See *Woods v. Cantrell*, 29 F.4th 284, 285 (5th Cir. 2022) (responding to evidence that Woods was subjected to n-word multiple times, including being called “Lazy Monkey A__ N___” in presence of other employees by his supervisor, N’Gai Smith, by noting “[p]erhaps no single act can more quickly alter the conditions of employment and create an abusive working environment’ than the use of an unambiguously racial epithet such as [the N-word] by a supervisor in the presence of his subordinates” (citations omitted)).

221. *McGINEST*, 360 F.3d at 1116 (quoting Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993)). It should be noted here that several courts view use of the n-word by a supervisor as more serious than use of the n-word by co-workers. The role of a spectator may be more akin to a co-worker than a supervisor, however, the power of the spectator to affect the worker’s performance is likened to a supervisor later in this Article.

222. See *Woods*, 29 F.4th at 284 (“The incident Woods has pleaded—that his supervisor directly called him a “Lazy Monkey A__ N___” in front of his fellow employees—states an actionable claim of hostile work environment.”) (citing *Ayis-Elho v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013)) (Kavanaugh, J., concurring) (“In my view, being called the n-word by a supervisor—as [plaintiff] alleges happened to him—suffices by itself to establish a racially hostile work environment.”) (alteration in original).
The totality of the circumstances test analysis further considers whether the offending conduct was sufficiently severe to alter the “terms, conditions, or privileges” of the workplace. To meet this standard, the employee must show “‘the environment would reasonably be perceived, and is perceived, as hostile or abusive,’ even if it is not actually ‘psychologically injurious.’” The court will determine whether the conduct “pollute[d] the victim’s workplace, making it more difficult to do [their] job, to take pride in [their] work, and
to desire to stay on in [their] position.”²³⁰ The workplace may be altered if the conduct permeates the workplace with “discriminatory intimidation, ridicule, and insult.”²³¹ Harassment may also be sufficiently severe if it included death threats or racist remarks, and even more so if those were coupled with threats of termination.²³² Title VII does not require concrete psychological harm or a tangible mental health crisis.²³³

In Pryor v. United Airlines, the court found the workplace had been altered when Pryor received racist death threats in her employee mailbox. The court said the notes alone were not sufficiently pervasive to alter the workplace. However, combining the use of a racial slur with a death threat in a secure location and considering other race-based notes were left in the United Air Lines’ employee area led the court to find the workplace had been altered by sufficiently severe conduct.²³⁴

While behavior that impacts the health, security, or sense of safety of a plaintiff-employee will be found to have altered the workplace, conduct that only impacts the workplace also satisfies this test. In Nichols v. Azteca Restaurant Enters., Nichols endured a “sustained campaign of taunts . . . designed to humiliate and anger him.”²³⁵ The “unrelenting barrage of verbal abuse” while employed sufficiently altered his experience working at the restaurant and satisfied a hostile workplace environment claim.²³⁶

Similarly, race-based harassment that results in changed hours or additional labor can satisfy this analysis. In Rhines v. Salinas Constr. Techs., Ltd., Rhines was required to unload a truck by himself

²³⁰ See McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1113 (9th Cir. 2004) (quoting Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463 (9th Cir. 1994)).
²³¹ See Pryor, 791 F.3d at 496 (adding further requirements for inquiry).
²³² See Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 280 (4th Cir. 2015) (finding in favor of plaintiff-employee Liberto “where Clubb employed racial epithets to cap explicit, angry threats that she was on the verge of utilizing her supervisory powers to terminate Liberto’s employment”).
²³³ See Harris v. Forklift Sys., 510 U.S. 17, 22 (1993) (“We therefore believe the District Court erred in relying on whether the conduct “seriously affect[ed] plaintiff’s psychological well-being” or led her to “suffe[red] injury.” Such an inquiry may needlessly focus the factfinder’s attention on concrete psychological harm, an element Title VII does not require. Certainly Title VII bars conduct that would seriously affect a reasonable person’s psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.” (citations omitted)).
²³⁴ See Pryor, 791 F.3d at 496–97 (holding United Airlines vicariously liable for harassing conduct).
²³⁵ See Nichols v. Azteca Rest. Enters., 256 F.3d 864, 873 (9th Cir. 2001) (detailing facts of case).
²³⁶ See id. at 872–75 (finding in favor of plaintiff).
²³⁷ Rhines v. Salinas Constr. Techs., Ltd., 574 F. App’x 362 (5th Cir. 2014).
while his coworkers looked on. He was also subjected to racial slurs by both coworkers and supervisors, including his supervisor telling his coworkers to, “Let the ma*ate unload the bricks by himself” while he was unloading the truck.238

A plaintiff-employee can also show the workplace was altered even if they were not the target of the harassment. In McGinest, anti-Black behavior that was directed at McGinest’s white co-worker supported McGinest’s claim because “[i]f racial animus motivates a harasser to make provocative comments . . . in order to anger and harass [an individual], such comments are highly relevant in evaluating the creation of a hostile work environment, regardless of the identity of the person to whom the comments were superficially directed.”239

Conversely, the Eastern District of North Carolina found that the workplace was not altered when the plaintiff-employee was called racially derogatory names, including a “Black heifer” and a “Black b*” over the course of six months.240 The court noted that while this conduct was rude and offensive, it was not “physically threatening or humiliating.”241 Further, the court considered co-workers, not supervisors were responsible for the harassing conduct, and all of the co-workers but one stopped following instruction to do so from a

238. See id. at 365 (alterations added) (detailing facts of case). Rhines prevailed in his workplace harassment claim upon showing multiple incidents of racial slurs from his coworkers and supervisors over the course of his one-year employment. See id. at 366–67 (finding, in particular, enough evidence to show harassing conduct affected his employment).

239. See McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1117–18 (9th Cir. 2004) (finding liability attached even where not all of conduct directly targeted plaintiff); see also Woods v. Cantrell, 29 F.4th 284, 284 (5th Cir. 2022) (holding that work environment was racially hostile where Woods was surrounded by racial hostility, and subjected directly to some of it); Stingley v. State of Ariz., 796 F. Supp. 424, 428 (D. Ariz. 1992) (finding racial and sexual harassment based in part on use of racist nicknames and slurs about another worker in presence of plaintiff). This legal concept solidifies the social concept of “vicarious racism” or “secondhand racism,” which teaches that witnessing racism can have negative health impacts similar to experiencing racism. See Sandee LaMotte, Vicarious Racism: You Don’t Have to be the Target to be Harmed, CNN (May 31, 2020, 8:30 AM), https://www.cnn.com/2020/05/31/health/vicarious-racism-wellness/index.html [https://perma.cc/JD77-9GSX] (quoting Chicago pediatrician) (“You don’t have to be the victim to be harmed.”)

240. See Whitfield v. DLP Wilson Med. Ctr., LLC, 482 F. Supp. 3d 485, 492 (E.D.N.C. 2020) (opining isolated events insufficient to be objectively severe or pervasive). But see Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 268 (4th Cir. 2015) (finding in favor of plaintiff-employee where supervisor used racial slurs such as “porch monkey” but did not use n-word); see also Freeman v. Dal-Tiles Corp., 750 F.3d 413, 422 (4th Cir. 2022) (finding in favor of plaintiff-employee when employer used n-word, referred to Black employee as Black b*, and engaged in ongoing racially and sexually offensive talk).

241. See Whitfield, 482 F. Supp. 3d at 492 (“LaPointe’s comments are merely offensive utterances than physically threatening or humiliating remarks.”).
supervisor.\textsuperscript{242} The court found that the totality of the circumstances analysis did not support a claim for a hostile work environment.\textsuperscript{243}

C. NCAA Athlete-Employee Claim to Satisfy Title VII

Notably, these cases are fact-specific inquiries with minimal consistency among circuits because each case presents so uniquely. Seemingly "slam-dunk" cases include a plaintiff-employee who experienced significant ridicule and racial epithets over the course of years, the racial epithets came from supervisors or supervisors who were aware and took no action, and the plaintiff-employee suffered adverse working conditions allegedly on account of their race.\textsuperscript{244} However, there is more inconsistency among circuits when the facts are less severe.\textsuperscript{245} Similarly, no two athlete-employees will have the same experience. Thus, a claim by an NCAA athlete-employee would

\textsuperscript{242} See id. ("Only some of plaintiff’s coworkers referred to plaintiff as “black Christel,” and all of them stopped at plaintiff’s request save LaPointe.").

\textsuperscript{243} See id. at 492–93 ("When compared to the precedents of Boyer-Liberto and Pryor, the totality of the circumstances alleged in the instant case are not so serious as to create a hostile work environment based on a few isolated uses of racial epithets. As alleged, LaPointe is not plaintiff’s supervisor. She was not making angry, explicit threats to terminate plaintiff’s employment. She was not making death threats or otherwise threatening plaintiff’s physical safety. LaPointe’s conduct, though rude and unprofessional, is not so objectively hostile as to amount to a change in the terms or conditions of employment. Perhaps suggesting that LaPointe referred to plaintiff as “black heifer” more than once or “black b** ***” more than twice, plaintiff argues that LaPointe called plaintiff these expletives over a nine-month period. Inferring the frequency of the use of these expletives from the period over which they were allegedly made is speculative. If plaintiff intended to allege that racial epithets were used against her more frequently than the instances alleged, she must allege more than a general time period in which they occurred. Plaintiff’s hostile work environment claim is dismissed without prejudice.").

\textsuperscript{244} See McGinest, 360 F.3d at 1109–1111 (citing numerous race-based incidents over course of five years from supervisors and co-workers that affected multiple aspects of his work environment); see also Rhines v. Salinas Constr. Techs., Ltd., 574 F. App’x 362, 364–69 (5th Cir. 2014) (finding in favor of plaintiff-employee upon showing multiple incidents of racial slurs from his coworkers and supervisors over the course of his one-year employment, including being forced to unload bricks by himself while his co-workers watched); Woods, 29 F.4th at 284–86 (holding that work environment was racially hostile where plaintiff was surrounded by racial hostility, and subjected directly to some of it); See McGinest, 360 F.3d at 1113 ("Simply causing an employee offense based on an isolated comment is not sufficient to create actionable harassment under Title VII . . ."); see also Harris v. Forklift Sys., 510 U.S. 17, 21 (1993) ("Mere utterance of an . . . epithet which engenders offensive feelings in an employee" is insufficient to create an actionable hostile work environment.").

\textsuperscript{245} Compare Mosley v. Marion Cnty., 111 F. App’x 726, 728 (5th Cir. 2004) (finding no hostile work environment despite n-word being used three times in workplace), with Stingley v. Ariz., 796 F. Supp. 424, 428 (D. Ariz. 1992) (finding racial and sexual harassment based in part on use of racist nicknames and slurs about another worker in presence of plaintiff) and Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993) (finding in favor of plaintiff-employee where supervisor used n-word five to ten times along with making other discriminatory comments about Black individuals).
necessarily be a fact-specific inquiry. It is unlikely that a situation in which one fan utters a single racial epithet would satisfy a hostile work environment claim.\textsuperscript{246} Nonetheless, repeated conduct from a spectator could create a hostile work environment when it is pervasive throughout a single competitive event.\textsuperscript{247} An athlete-employee’s claim would be strengthened if the hosting member school knew of the conduct and took no action or the athlete-employee had been affected by other racist spectator conduct vicariously that the NCAA had not responded to.\textsuperscript{248}

Any decisionmaker considering this claim must consider the role of the NCAA as a joint employer with a member school. The decisionmaker should also be well-versed in and aware of the mental and emotional toll of racism on individuals of color.\textsuperscript{249} Considering the NCAA as a joint employer in addition to the member schools allows for the nationwide leverage of the NCAA to bring all athletes, and thus all spectator conduct, within the overarching control of the NCAA. Alternately, considering only the member schools to be employers would limit the control of those schools when their athletes are harassed at away competitive matches.\textsuperscript{250}

Holding the NCAA liable as a joint employer is also vital for athlete-employees when considering the frequency of racist conduct over an athlete’s collegiate career. Student-athletes from underrepresented groups are consistently exposed to racist or other

\textsuperscript{246} See McGinest, 360 F.3d at 1113 (“Simply causing an employee offense based on an isolated comment is not sufficient to create actionable harassment under Title VII . . .; see also Harris, 510 U.S. at 21 (“Mere utterance of an . . . epithet which engenders offensive feelings in an employee” is insufficient to create an actionable hostile work environment.”).

\textsuperscript{247} See Woods, 29 F.4th at 285 (noting that while it is true that single utterance of racial epithet does not support work environment claim, single racial epithet can support claim under totality of circumstances test); see also Henry v. Corpcar Servs. Hous., Ltd., 625 F. App’x 607, 611–612 (5th Cir. 2015) (finding hostile workplace environment claim was supported when conduct only took place over two days but was significantly severe).

\textsuperscript{248} Compare McGinest, 360 F.3d at 1109–1111 (citing numerous race-based incidents over course of five years from supervisors and co-workers that affected multiple aspects of his work environment, he reported those incidents and yet no action was taken to stop the conduct), with Whitfield v. DLP Wilson Med. Ctr., LLC, 482 F. Supp. 3d 485, 492 (E.D.N.C. 2020) (finding against hostile work claim where there was evidence that management did tell offending employees to stop harassing conduct and most employees did stop).

\textsuperscript{249} For further information on member schools’ limited ability to curb spectator harassment against student-athletes, see supra notes 176–189 and accompanying text.

\textsuperscript{250} For further information on member schools’ limited ability to curb spectator harassment against student-athletes, see supra notes 176–189 and accompanying text. In most cases, spectator harassment targets the away team. For further information on numerous incidents of racism in which the overwhelming scenario is home-team fan harassment of the away team, see supra notes 1–86.
discriminatory conduct, but the number of incidents that occur during competition targeting one individual athlete varies amongst sports, the access of the spectators to the athletes, and the popularity of the athlete. While some may only experience one incident of direct racist conduct from spectators during their collegiate athletic career, others may be continually exposed. Still, others may be exposed to conduct targeting more high-profile teammates or teammates located closer to spectators. When considering one single competitive event, while that incident may be sufficiently severe in itself under the tenets of the law, it can also be bolstered by the pervasiveness of racist spectator conduct nationwide.

Harassing conduct can pervade the athletic workplace, even if an individual athlete is not the object of racial harassment.

251. See Kalman-Lamb et al., supra note 13 (highlighting multiple ways in which athletes are targeted by spectators, noting that some are targeted because they knelt during national anthem or participated in social justice protests). Rachel Richardson serves for Duke women’s volleyball team and was thus located right in front of the student section during the match against BYU in 2022. Alternately, her teammates on the bench were not as close to the student section and the general noise of the crowd would have made it harder for spectators to target other players. See Scooby Axson, Duke Volleyball Player Rachel Richardson Details Racist Incident with BYU Fan, USA Today (Aug. 30, 2022, 5:04 PM), https://www.usatoday.com/story/sports/college/2022/08/30/duke-womens-volleyball-player-details-racist-incident-byu-fan/7939843001/ [https://perma.cc/3JCE-5E6B] (“Toward the end of the second set of the match, Richardson said she went to serve when she heard the slur for the first time. When the teams switched sides and Duke was near the student section in the fourth set, she heard the slur again.”).

252. See, e.g., Henry v. Corpscar, 625 F. App’x 607, 611–612 (5th Cir. 2015) (“Under the totality of the circumstances test, a single incident of harassment, if sufficiently severe, could give rise to a viable Title VII claim.”).

253. Racist events are almost commonplace in athletics, although not all are widely reported. Following the Duke-BYU incident, spectator conduct has received heightened scrutiny and press. Thus, it is certainly to be expected that student-athletes would be aware of the incident even if they weren’t at the game or attend a different institution. Under McGinest, Stingley, Kishaba, and others, this form of vicarious racism can support an athlete-employee’s totality of the circumstances evidence. See McGinest, 360 F.3d at 1117–18 (finding anti-Black behavior that was directed at McGinest’s white co-worker supported McGinest’s claim because “[i]f racial animus motivates a harasser to make provocative comments . . . in order to anger and harass [an individual], such comments are highly relevant in evaluating the creation of a hostile work environment, regardless of the identity of the person to whom the comments were superficially directed”); see also Stingley v. Ariz., 796 F. Supp. 424, 426, 428 (D. Ariz. 1992) (finding racial and sexual harassment based in part on use of racist nicknames and slurs about another worker in presence of plaintiff); Kishaba v. Hilton Hotels Corp., 737 F. Supp. 549, 554 (D. Haw. 1990) (“Even if Plaintiff herself was never the object of racial harassment, she might nevertheless have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive.”).

254. See McGinest, 360 F.3d at 1117–18 (finding anti-Black behavior that was directed at McGinest’s white co-worker supported McGinest’s claim because “[i]f racial animus motivates a harasser to make provocative comments . . . in order to anger and harass [an individual], such comments are highly relevant in evaluating the creation of a hostile work environment, regardless of the identity of the person
Student-athletes from institutions not involved in the respective interscholastic competition at which the conduct occurred may be made aware of the incident through news outlets, social media, or word-of-mouth within the athletic community. Under McGinest, racist conduct within the workplace can affect those who belong to the targeted community, even if they themselves were not the target of the conduct. By viewing the situation in this light, the McGinest rule that the plaintiff need not be the target of harassment allows plaintiff-athletes to use evidence of spectator harassment of their teammates and opponents to show a hostile work environment in college athletics. Further in favor of athlete-employees, the McGinest court opened the door for racially-discriminatory comments about a marginalized racial group to support a hostile workplace claim even when the recipient of the comments is a member of the majority racial group.

Mosley v. Marion County may seem in opposition to this argument on its face; however, applying Mosley would ignore the unique nature of college athletics and social media. In Mosley, the plaintiff-employee of a detention center claimed three incidents of racial epithets, but his knowledge of two of them was purely hearsay. He did not hear the racial slurs firsthand and was not able to offer corroborating evidence that they occurred (although the employer admitted to their

to whom the comments were superficially directed”); see also Stingley, 796 F. Supp. at 426, 428 (finding racial and sexual harassment based in part on use of racist nicknames and slurs about another worker in presence of plaintiff); Kishaba, 737 F. Supp. at 554 (“Even if Plaintiff herself was never the object of racial harassment, she might nevertheless have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive.”).

255. See Auguste, supra note 5 (learning of Rachel Richardson’s story through Twitter (now X)).

256. See McGinest, 360 F.3d at 1117–18 (finding anti-Black behavior that was directed at McGinest’s white co-worker supported McGinest’s claim because “[i]f racial animus motivates a harasser to make provocative comments . . . in order to anger and harass [an individual], such comments are highly relevant in evaluating the creation of a hostile work environment, regardless of the identity of the person to whom the comments were superficially directed”).

257. See id. at 1118 (finding anti-Black behavior that was directed at McGinest’s white co-worker supported McGinest’s claim because “[i]f racial animus motivates a harasser to make provocative comments . . . in order to anger and harass [an individual], such comments are highly relevant in evaluating the creation of a hostile work environment, regardless of the identity of the person to whom the comments were superficially directed”). For further information on vicarious racism, see supra notes 239, 253.

258. See id. (explaining conduct that “goad[s] both black and white employees” intensifies, not undermines, conduct’s outrageousness when observing plaintiff’s supervisor directed statements that were racially offensive in nature towards one of McGinest’s white coworkers but supervisor only made these comments when McGinest was present).
occurrence). This is drastically different than spectator harassment, which may be recorded; witnessed by other spectators, athletic staff, or teammates; or widely reported on social media and in the news. Thus, news of spectator harassment extends past the simple hearsay in Mosley when it can be corroborated.

Spectator harassment can also be sufficiently serious to alter the workplace for athletes. Although evidence of sleep loss, weight loss, substance abuse, or other significant and severe behaviors can support this claim, the impact need not be evidenced as such. Rather, it is enough to show the harassment made it more difficult for an athlete to perform, take pride in their work, or even stay on the team. Indeed, the very nature and purpose of spectator heckling and harassment is to interfere with an athlete’s performance during competition. Race-based harassment of an athlete is intended to literally throw them off their game and negatively affect their performance.

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259. See Mosley v. Marion Cnty., 111 F. App’x 726, 728 (5th Cir. 2004) (describing incident).

260. See id. (explaining lack of corroborating evidence). There is evidence that even though after-the-fact investigations have come up short, authorities were made aware of offending conduct in the moment. See Young, supra note 15 (“Officials knew what was happening. Players knew what was happening. Coaches for both teams knew what was happening. And aside from a police officer being stationed near the Duke bench, not a damn thing was done.”); see also Carino, supra note 83 (detailing fact that law enforcement stationed itself by student section when offending conduct was taking place and later issued warning to Penn State athletics). For a student-athlete to prevail, non-white athletes must be heard and believed. Corroboration may become a “he-said/she-said” battle in court in front a jury, or even during an investigation, which is what has likely occurred behind closed doors when athletics departments have initially admitted to the conduct just to later rescind. See Chappell, supra note 14 (“[W]e have not found any evidence to corroborate the allegation that fans engaged in racial heckling or uttered racial slurs at the event,’ BYU Athletics said . . .”). However, the burden on the student-athlete is only to prove that discriminatory conduct occurred. To hold the NCAA liable, the student-athlete need not produce an offender as offender anonymity does not preclude a third-party workplace harassment claim. See EEOC v. Xerxes Corp., 639 F.3d 658, 669 (4th Cir. 2011) (finding offender anonymity did not remove employer liability).

261. See McGinest, 360 F.3d at 1113 (“T]he harassment need not cause diagnosed psychological injury.”).

262. See id. (“[T]he harassment need not cause diagnosed psychological injury.”).

263. See Flake, supra note 77, at 484 (noting public harassment can incur even more intense feelings); see also Flanagan v. Aaron E. Henry Cnty, Health Servs. Ctr., 876 F.2d 1231, 1236 (5th Cir. 1989) (“A certain amount of emotional distress may be assumed from the racially motivated treatment the [plaintiff] received from defendants.”).

264. See Flake, supra note 77, at 487 (“By contrast, in virtually every instance of spectator harassment, the harasser’s intent is to specifically impede the athlete’s ability to perform her job.”).
Following the court’s emphasis on the conduct’s severity when a supervisor is responsible for the offending conduct, an athlete-employee may also be able to liken the power imbalance between a spectator and an athlete-employees to a workplace supervisor-subordinate relationship because spectator harassment can significantly harm athletic performance, which leads to economic harm. A supervisor is defined by the Fourth Circuit as an individual who is empowered to “inflict direct economic injury” on an employee. Spectator conduct can negatively impact athletic performance, or create such extreme pressure to perform that even if performance improves in an attempt to “prove them wrong,” the mental toll of harassment is overwhelming. Further, under Alston, athletes can be compensated by sponsors; however, sponsorship requires the athlete be attractive to the public. An athlete whose performance has faltered could see negative shockwaves sent through their ability to attract and retain sponsorships. Aside from sponsorships and public attractiveness, spectator conduct could threaten an athlete-employee’s ability to play for a school or receive a scholarship for

265. See, e.g., McGinest, 360 F.3d at 1116 (noting “[p]erhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as [] by a supervisor in the presence of his subordinates”).

266. See Bongiovanni, supra note 96, at 1 (noting connection between athletic performance and opportunity for sponsorships, which “provide[] the opportunity for student athletes to simultaneously compete and make a living to provide for their families, many of whom wouldn’t have been able to afford college without their athletic scholarship”); see also Bringing Purpose to Student-Athlete Partnerships, UNDER ARMOUR (June 30, 2022), https://about.underarmour.com/en/stories/2022/06/bringing-purpose-to-student-athlete-partnerships.html (https://perma.cc/D2KE-3YPW) (“We seek partners who can collaborate to create programs that ladder back to the brand’s purpose-first mission. While elite athleticism is incredibly important, a large focus is on finding well-rounded partners who want to provide access to their respective sports for the next generation of athletes.” (emphasis added)).

267. See Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 278 (4th Cir. 2015) (quoting Burlington Indus. In. v. Ellerth, 524 U.S. 742, 761 (1998)) (describing supervisor as one that has “authority to inflict direct economic injury.”). Importantly, the court also notes that a supervisor “need not have the final say as to the tangible employment action; instead, the employee’s decision may be ‘subject to approval by higher management.”’ See id. (expanding supervisor definition).

268. See Rudd, supra note 6, at 105 (“For instance, an athlete said, ‘You will hear them laugh and jeer, but you have to use it as a way to make you perform better. Prove them wrong almost.’”); see also Snipe, supra note 73 (sharing comments from student-athletes of color about overwhelming toll of racism).

269. See Bringing Purpose to Student-Athlete Partnerships, supra note 266 (“We seek partners who can collaborate to create programs that ladder back to the brand’s purpose-first mission. While elite athleticism is incredibly important, a large focus is on finding well-rounded partners who want to provide access to their respective sports for the next generation of athletes.” (emphasis added)).
their position on the team, which could threaten their ability to attain a degree.\footnote{270}{See Desai, supra note 159 (detailing access to athletics due to financial concerns among white and non-white athletes).}

The court must also consider the impact hearing stories of numerous spectator assaults each year has on all athletes, even when the incidents occur at different universities or for different sports.\footnote{271}{For further information on stories of spectator assaults, see supra notes 95–135 and accompanying text.} This type of pervasiveness throughout each year, or even an athlete’s college enrollment, could have a cumulative effect considering the interconnectedness of NCAA athletes within and between member institutions.

The impact of racial slurs from spectators is degrading, physically humiliating, and exceeds “mere offense” according to athletes’ and it is this testimony that must be given great weight to satisfy the “totality of the circumstances” test and show the conduct is sufficiently severe and pervasive.

D. Conduct Imputable to the NCAA

The final prong of a Title VII claim requires the plaintiff to show that the harassing conduct can be imputed onto the employer. Employers are not strictly liable for acts of harassment that occur in the workplace, but employers “may be liable for hostile work environments created by co-workers and third parties ‘if [they] knew or should have known about the harassment and failed to take effective action to stop it.’”\footnote{272}{See Pryor v. United Air Lines, 791 F.3d 488, 498 (4th Cir. 2015) (quoting EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 319 (4th Cir. 2008)) (explaining employer’s responsibility to avoid liability).} The court will determine whether the employer took remedial measures reasonably calculated to end the harassment.\footnote{273}{See McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1120 (9th Cir. 2004) (emphasizing need for measures to be adequate enough to stop harassment).} In determining the reasonableness of the response, the court will evaluate whether the response was immediate or timely; the degree of control exercised over the non-employee; the legal responsibility the employer had with respect to the non-employee’s behavior; and whether the conduct was not only designed to prevent future conduct by the current harasser, but also by other potential harassers, and the harassment did stop.\footnote{274}{See Leroy I, 36 F.4th 469, 476 (2d Cir. 2022) (quoting Summa v. Hofstra Univ., 798 F.3d 115, 124 (2d Cir. 2013)) (explaining court’s analysis); see also Mosley v. Marion Cnty., 111 F. App’x 726, 728 (5th Cir. 2004) (describing analysis); McGinest, 360 F.3d at 1119–20 (citing Fuller v. City of Oakland, 47 F.3d 1522, 1528 (9th Cir. 1995)); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 875 (9th Cir. 2001)
Employers have a responsibility to carry out “dual duties of investigation and protection.”\textsuperscript{275}

An employer may avoid liability by showing evidence of undertaking remedial measures reasonably calculated to end the harassment and that those measures did end the harassment.\textsuperscript{276} Alternately, an employer may avoid liability by invoking a \textit{Faragher-Ellerth} defense, which requires the employer show “(a) that the employer exercised reasonable care to prevent and correct promptly any [] harassing behavior; and (b) the plaintiff-employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to otherwise avoid harm,”\textsuperscript{277} such as failing to report the incident.\textsuperscript{278}

\textit{Leroy v. Delta Air Lines} creates a high standard for NCAA athlete-employees against non-employee behavior. In \textit{Leroy}, an airline passenger called a Black flight attendant a “black b****.”\textsuperscript{279} The pilot was informed of the situation and the pilot “demanded” that Leroy “step out on the jet bridge with the passenger.”\textsuperscript{280} Leroy refused, referencing FAA regulations prohibiting her from exiting the plane and told the pilot that the situation was resolved.\textsuperscript{281} The pilot forcibly had Leroy removed from the flight. Leroy reported the incident on Delta’s reporting system.\textsuperscript{282} Over the course of the next several

\textsuperscript{275} See Pryor, 791 F.3d at 497 (ruling on this dual role).
\textsuperscript{276} See id. at 498 (analyzing “whether a company’s response was proportional by examining the promptness of any investigation, the specific remedial measures taken, and the effectiveness of those measures”).
\textsuperscript{277} See Rhines v. Salinas Const. Techs., Ltd., 574 F. App’x 362, 367 (5th Cir. 2014) (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998)) (implementing and ruling on \textit{Faragher-Ellerth} defense, which is affirmative defense employers may argue to avoid Title VII vicarious liability).
\textsuperscript{278} See id. (noting that Salinas Construction attempted to invoke \textit{Faragher-Ellerth} defense by falsely stating plaintiff-employee Rhines never reported discriminatory conduct).
\textsuperscript{279} See id. (expanding on facts). It was unclear whether the passenger or Leroy notified the pilot of the racial slur from Leroy’s testimony. See id. (citing Appendix 18).
\textsuperscript{280} See id. (noting steps taken by Leroy). There were some factual discrepancies between Leroy’s testimony and her FACTS report, which are discussed in the
weeks, Leroy was submitted to two drug tests, suspended pending results of her drug tests, and ultimately terminated from Delta.\footnote{283}

Leroy was unable to produce sufficient evidence to impute the passenger’s liability to Delta Air Lines. First, the court noted that Delta did not exercise a sufficiently high degree of control over the passenger.\footnote{284} Second, the court noted that Delta had not acted negligently in taking measures to stop this behavior.\footnote{285} On top of finding that the single remark did not rise to the level of “extraordinarily severe,” the court found there was also no indication that Delta “did not monitor the workplace, failed to respond to complaints, or effectively discourage complaints from being filed so as to show Delta’s negligence in failing to prevent the passenger’s comment.”\footnote{286} Generally, in Leroy, the Second Circuit determined that there is no requirement that airline passengers be ejected upon making a single racist remark.\footnote{287}

\emph{Leroy} does not kill an athlete-employee’s claim. In addition to whether the conduct was within the control of the employer, the court will also determine whether the response effectively quashed further harassing conduct. In \emph{Summa v. Hofstra University}, the Second Circuit similarly found that Hofstra University avoided liability for discriminatory conduct by football players based on evidence that Hofstra had taken immediate and swift action to discipline the players and, upon taking such action, the harassment ceased.\footnote{288} Summa highlights the need for employers to respond or have a response mechanism to significant cases of harassment coupled with evidence of an absence of discriminatory conduct in order for an employer to avoid liability.\footnote{289}

\begin{footnotes}
\item[283] See id. at *1–2 (reporting factual details included in FACTS report and complaint).
\item[284] See Leroy I, 36 F.4th 469, 476 (2d Cir. 2022) (“We need not consider whether Leroy has adequately alleged that Delta exercised a ‘high degree of control’ over the passenger because she has failed to allege that Delta’s ‘own negligence permit[ted] or facilitate[d]’ the passenger’s alleged discriminatory conduct.”).
\item[285] See id. (“There is also no allegation in the complaint that Delta ‘did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed’ so as to show Delta’s negligence in failing to prevent the passenger’s comment.”).
\item[286] See id. (expanding on Leroy’s failure to show Delta’s negligence).
\item[287] See id. (“[G]enerally, an employer is not liable for failing to prevent an act of harassment by a first-time customer.”).
\item[288] See Summa v. Hofstra Univ., 708 F.3d 115, 125 (2d Cir. 2013) (finding plaintiff’s claim failed in part where evidence showed University-employer took “prompt response” to incidents of harassment).
\item[289] See id. (finding in favor of employer when evidence showed it swiftly responded to allegations of discrimination and later adverse action taken against plaintiff; however, court found in favor of plaintiff-employee when evidence showed later hiring and firing decisions regarding Summa were in part retaliatory).
\end{footnotes}
Alternately, in *Pryor*, United Airlines’ lack of a prompt response attached liability. The court found United Airlines’ response to the first racist death threat “was neither prompt nor reasonably calculated to end the harassment,” evidenced in part by the fact that there were additional racist incidents targeting Pryor and other Black flight attendants at the Delta terminal and Delta did not take measures to protect its employees.\(^{290}\) The court opined:

“United supervisors did not call police, even though police later suggested that they should have. They did not escalate the matter to the ESC, in apparent violation of the company’s H & D policy. They did not inform corporate security of the racist message on the fliers previously discovered in the break room. They did not promptly install cameras or other monitoring devices. They did not provide Pryor with additional security or protective measures. They did not obtain fingerprints, do other forensics analysis, or interview co-workers. And they remarkably did not inform Pryor when their investigation closed, an event that occurred without management having sent any correspondence to employees to solicit information and/or put them on notice that the company was being vigilant in monitoring the workplace. In short, a reasonable jury could find that United had done very little to deter future acts of harassment up until the time that the airline initially closed its investigation.”\(^{291}\)

The court also gave credence to the mere fact that United Airlines’ initial response to the first threat “was ineffectual in stopping the harassing conduct.”\(^{292}\) Even though the success of a company’s strategy does not exclusively determine the reasonableness of the calculation, the court may use the effectiveness of the response to evaluate the reasonableness of the response.\(^{293}\) The *Cerros v. Steel Techs., Inc.*\(^{294}\) court, in fact, noted that “the efficacy of an employer’s


\(^{291}\) See *id.* at 498–499 (expanding on lack of prompt or reasonably calculated response from United).

\(^{292}\) See *id.* at 499 (proving initial response was ineffectual because notes reappeared).

\(^{293}\) See, e.g., *id.* (“It is also significant, albeit not dispositive, that United’s response to the first threat was ineffectual in stopping the harassing conduct, as the notes reappeared months later in greater number. The mere fact that a company’s strategy was not successful does not necessarily mean the strategy was not a reasonably calculated one. Yet the effectiveness of an employer’s actions remains a factor in evaluating the reasonableness of the response.”).

\(^{294}\) *Cerros v. Steel Techs., Inc.*, 398 F.3d 944 (7th Cir. 2005).
remedial action is material to our determination whether the action was reasonably likely to prevent the harassment from recurring. 295

Spectator anonymity does not preclude an athlete’s claim. This prong may seem, on its face, like an impossible standard for athletes who may hear comments come from stands filled with hundreds, if not thousands, of spectators. However, the difficulty posed by identifying the offending spectator does not alleviate the responsibility of the employer. The Fourth Circuit has noted that in cases of anonymous threats or harassing conduct, the employer may even have a heightened employers' responsibility. 296 In the case of EEOC v. Xerxes Corp., the Fourth Circuit found that where racist graffiti appeared on the worksite and the employer had no way of verifying the authorship of the graffiti, the employee was not precluded from establishing that the graffiti contributed to a hostile work environment. 297 Rather than being a precluding factor, the court uses anonymity and the employer’s ability to manage anonymous conduct to “inform [its] determination of whether a company’s response was reasonably calculated to end the harassment . . .” 298 Thus, the “reasonableness of a company’s actions depends, in part, on the seriousness of the underlying conduct.” 299 And so, where the conduct is grave in nature, the company should have an appropriately severe response to prevent the conduct from reoccurring.

E. The Athlete’s Claim to Satisfy Imputability

To prevail, a plaintiff-athlete must show that the NCAA and member schools, as joint employers, exercised sufficient control over the offender and that the response to the conduct was ineffectual,

295. See id. at 954 (noting this in its opinion). Here, the court noted that the burden is not to show that subsequent harassment stopped, but that the measures taken were reasonably likely to stop the harassment. See id. at 954–55 (adding anti-harassment policy did not suffice). This is a high bar. In McGinest, “the court observed that ‘although painting over the graffiti was a necessary first step,’ it was not enough, in and of itself. See McGinest, 360 F.3d at 1120–21 (9th Cir. 2004) (noting not only did harassment not stop, simply painting over graffiti was insufficient to stop future harassment as well).

296. See Pryor, 791 F.3d at 497 (“Indeed, instances of anonymous harassment pose unique challenges to companies that must work both to identify the perpetrator and to protect victims from a faceless, though ominous threat. But on the other hand, an employer maintains a responsibility to reasonably carry out those dual duties of investigation and protection. The anonymous nature of severe threats or acts of harassment may, in fact, heighten what is required of an employer . . .”).

297. EEOC v. Xerxes Corp., 639 F.3d 658, 669 (4th Cir. 2011) (finding liability attached even when offender was anonymous).

298. See Pryor, 791 F.3d at 498 (considering offender anonymity as factor that increases, not decreases, employer responsibility).

299. See id. (identifying anonymity to be key detail in determining whether employer’s response was reasonably calculated to end harassment).
in part because the conduct continued.\textsuperscript{300} In this analysis, several elements are in favor of the athletes.

First, it is clear the NCAA is aware of the problem. Not only is the history of racial harassment extensive,\textsuperscript{301} but in 2008, the then-president of the NCAA publicly acknowledged that racial harassment of athletes is a “rising problem” that must be addressed.\textsuperscript{302} While it is doubtful the court will hold the NCAA liable for not taking remedial action during the 124 years that it has not been considered an employer, categorizing the NCAA as an employer will start the clock on the NCAA’s implementing measures to address and stop over 100 years’ worth of de facto-approved fan conduct. Given that in 2022 alone, there was at least six different reports of racial harassment targeting individual athletes and entire teams (and only one of these resulted in a negative consequence for the offender),\textsuperscript{303} it is unlikely to be long after the NCAA gains employer status before an athlete experiences racial harassment.

\textsuperscript{300} See id. at 499–500 (noting that reasoning “that there were no grounds to think that the perpetrator would have been found even if the airline had taken additional steps to determine employer was not liable “miscalibrates the test for employer liability”).

\textsuperscript{301} See, e.g., Kalman-Lamb et al., supra note 13 (“In 1983, Georgetown’s Patrick Ewing infamously faced racist mockery when a banana peel was thrown at him during a game, and he was also subjected to racist signs targeting his intellect. After receiving MVP honors at the 1960 Cotton Bowl, the first African-American Heisman Trophy winner Ernie Davis could not accept his own award at a post-game banquet because it was held in a segregated facility. And in 1961, the UCLA basketball team faced such intense racist heckling from white fans that coach John Wooden did not field any of his Black players in a second game . . . . More recently, in 2014, current NBA player and former Oklahoma State star Marcus Smart shoved a Texas Tech fan, saying the fan called him a racist slur. That same year, Michigan quarterback Devin Gardner detailed the numerous instances of racism that he faced during his time with the Wolverines, including being “called the N-word” many times. And former New York Knicks star Jeremy Lin says the racist abuse he was subjected to in college was worse than anything he experienced in the NBA, highlighting incidents at Cornell, Georgetown, Yale, and Vermont . . . . The long, dismal list goes on.”).

\textsuperscript{302} See Rudd, supra note 6, at 96 (quoting then-president of the NCAA Myles Brand’s statement: “Campuses increasingly have student sections in football and basketball that have taken on the role of ensuring a home court advantage with zealous enthusiasm that sometimes moves from rowdy support to over-the-top vulgarity and violent action . . . . These behaviors represent a threat to the integrity of intercollegiate athletics . . . .[sic] It’s time to address the rising problem.”).

\textsuperscript{303} See Kalman-Lamb et al., supra note 13 (listing Wisconsin fan made anti-Asian racist gestures in Northwestern at men’s basketball game, Iowa fan shouted racist slur at Wisconsin wrestler, two women’s volleyball players reported having racist slurs yelled at them; see also Grove, supra note 45 (describing Howard University’s women’s lacrosse team was subjected to racial slurs before game at Presbyterian College in February); HBCU Volleyball Team Quits Tournament After Racist Abuse, supra note 48 (describing Talladega College women’s volleyball team withdrew from Southern States Athletic Conference tournament after team member received “racially motivated picture” during tournament’s awards banquet).
Further, athletes need not show “that taking different measures would have necessarily stopped the harassment.” Rather, athletes must show that the measures that were taken did not stop the harassment. In the case of the NCAA, not only has the NCAA failed to take sufficient action to protect athletes from racial harassment despite decades of evidenced abuse and mistreatment, it has failed to take any action at all. Similarly, while many schools have codes of conduct that require “sportsman-like conduct,” not all explicitly prohibit racist or discriminatory behavior. The enforcement of these codes is also lacking and is dependent upon the offender being readily identifiable. When Rachel Richardson reported being yelled at, BYU conducted an initial investigation, banned a spectator, and then reversed the ban, stating “it had not turned up any proof of the fan’s guilt.” This in turn led to a national backlash against Rachel Richardson, in which she was accused of fantasizing the entire story. BYU and the offender were able to walk away from the incident unscathed, while Rachel Richardson and other Black athletes had

304. See Pryor, 791 F.3d at 500 (“A plaintiff in a hostile work environment case does not bear the burden of making the speculative showing that taking different measures would have necessarily stopped the harassing conduct at issue.”).

305. Compare Leroy II, 2022 WL 12144507, at *4–5 (considering evidence of Delta Air Lines’ robust reporting and monitoring system), with Pryor, 791 F.3d at 498–99 (describing how United’s initial response to first threat was lacking, in part because of failure to take action and keep Pryor apprised of investigation and thus supports finding that “United had done very little to deter future acts of harassment”).

306. See Chappell, supra note 14 (“[W]e have not found any evidence to corroborate the allegation that fans engaged in racial heckling or uttered racial slurs at the event,’ BYU Athletics said . . .,” and no further action was taken to ensure repeated conduct did not occur); see also Patrick Lanni & Brian Fonseca, Penn State Gives Students a Mulligan on Racist, Vulgar Language Fired at Rutgers Players (Update), NJ.com (Feb. 27, 2023, 8:39 PM), https://www.nj.com/rutgers/2023/02/penn-state-investigating-vulgar-racist-language-directed-at-rutgers-during-comeback-win.html [https://perma.cc/837U-7YM8] (noting that Penn State rescinded its initial condemnation of conduct alleged to have come from student section upon realizing offender could not be identified). Importantly, it is likely that if a fan is ejected from a game, that would limit the athlete-employee’s ability to seek recourse, as the Farragher-Ellerth defense would be satisfied. See Rhines v. Salinas Constr. Technologies, Ltd., 574 F. App’x 362, 367 (5th Cir. 2014) (quoting Farragher v. City of Boca Raton, 524 U.S. 775, 807 (1998)) (noting Farragher-Ellerth defense requires employer show “(a) that the employer exercised reasonable care to prevent and correct promptly any [] harassing behavior; and (b) the plaintiff-employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise”).

307. See Chappell, supra note 14 (“[W]e have not found any evidence to corroborate the allegation that fans engaged in racial heckling or uttered racial slurs at the event,’ BYU Athletics said . . .”).

308. See, e.g., id. (“Outside of the circle of people with direct knowledge of the incident, discussion of the allegations quickly became politicized. People who support Richardson say she sparked a deeper look at racism in college athletics, while critics accuse her of fabricating the episode.”).
to carry the emotional labor of “having the burden of proof placed upon the shoulders of those who are oppressed.”

Of course, an athlete-employee could prevail on this element if the NCAA fails to implement any deterrent measures or if deterrent measures have no impact. Under Leroy, the NCAA may not be held liable for the first instance of spectator harassment upon being classified as an employer. However, similar to McGinest and Pryor, evidence of continued spectator harassment at NCAA competitive events would support holding the NCAA vicariously liable due to insufficient remedial measures, even when the harassment is from different spectators at different events.

Notably, the NCAA cannot fall back on any anti-harassment statements it has made in the past. Under Rhines v. Salinas Techs., it is not enough to have an anti-harassment policy. The employer must show the policy is followed and enforced in a manner consistent

309. See Kalman-Lamb et al., supra note 13 (“When Black folks and other people of color make statements about their experiences of racism there is often backlash, people are called ‘too sensitive,’ or flat out accused of lying . . . . the emotional labor does take a toll, having the burden of proof placed upon the shoulders of those who are oppressed is par for the course unfortunately and it is awful.”).

310. See, e.g., Bazemore v. Best Buy, 957 F.3d 195, 201 (4th Cir. 2020) (finding co-worker/harasser’s conduct could not be imputed to Best Buy where Bazemore notified Best Buy of conduct, Best Buy issued written warning to co-worker, and harassment stopped).

311. See Leroy I, 36 F.4th 469, 475 (2d Cir. 2022) (indicating vicarious liability could attach where employer “should have known of the offending employee’s unlawful discriminatory conduct” but failed to take measures to protect against it). Notably, there is sufficient evidence that the NCAA would gain employer status with knowledge of the likelihood of harassing behaviors occurring and may be held liable for failing to take appropriate remedial measures to end the long history of spectator harassment. See id. (indicating standard considers whether employer “should have known” and yet still failed to take implement appropriate deterrence measures).

312. See McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1121 (9th Cir. 2004) (“GTE’s actions may have been successful in persuading identified harassers to cease their activities. But over a ten-year period, McGinest was subjected to inappropriate comments by a minimum of six individuals, and was allegedly physically endangered or financially harmed through the actions of several others. On the record before us, GTE took no action to ensure that this level of harassment did not continue for the rest of McGinest’s tenure at the company.”); see also Pryor v. United Air Lines, Inc., 791 F.3d 488, 499 (4th Cir. 2015) (“It is also significant, albeit not dispositive, that United’s response to the first threat was ineffectual in stopping the harassing conduct, as the notes reappeared months later in greater number. The mere fact that a company’s strategy was not successful does not necessarily mean the strategy was not a reasonably calculated one. Yet the effectiveness of an employer’s actions remains a factor in evaluating the reasonableness of the response.”).

313. See Rhines v. Salinas Constr. Techs., Ltd., 574 F. App’x 362, 367 (5th Cir. 2014) (finding harassing conduct was imputable where Rhines used reporting tool created by company but reports were ignored and anti-harassment policy was not enforced).
with ending harassment. Under this, NCAA or member institution codes of conduct for fans are insufficient evidence if there is not accompanying enforcement action against spectators.

If spectator harassment continues at a similar rate as has been reported in recent years, the NCAA has the responsibility to take immediate and prompt action that ends the race-based harassment of athletes. Failing to do so supports imputing the harassment on the NCAA and member institutions as joint employers.

V. Conclusion

Allowing a culture of racism to continue to overwhelm college athletes is no longer tolerable. Black and non-white athletes have fought for decades “to have [their] voices heard and receive justice for the racism [they] have faced for centuries.” It is time for “athletes, coaches, and leaders in athletics departments . . . to make actionable change to ensure that [racist attacks from spectators] will never be tolerated again.” It is time that the athletic regime “[b]elieve in Black voices, protect Black players, and embrace accountability.”

Holding the NCAA and member schools jointly liable as employers of athletes for third-party spectator harassment will propel anti-racist efforts for a more equitable, healthy, and productive athletic career. The NCAA and member schools should take the responsibility to protect all student-athletes from racism seriously and enforce codes of conduct that prohibit racist and discriminatory behavior through tougher sanctions, enhanced monitoring, and willingness to believe that student-athletes are not fabricating reports of racism. Failure to do so should result in holding the NCAA and member schools vicariously liable for the damages caused by discriminatory workplace harassment.

314. See id. (finding harassing conduct was imputable where Rhines used reporting tool created by company but reports were ignored and anti-harassment policy was not enforced).
315. For further information on six reported cases of spectator harassment in 2022, see supra notes 42–47 and accompanying text.
316. See Kalman-Lamb et al., supra note 13 (quoting Brianna Pinto, former two-time soccer All-American at University of North Carolina and current professional with the NWSL’s North Carolina Courage).
317. See id. (highlighting need to take racist spectator conduct seriously with enforced, zero-tolerance policy).
318. See id. (emphasizing history of ignoring and undermining marginalized voices and calling for action to ensure this is not future of athletics).