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## ESSAY

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### FIT TO PLAY IN THE NBA? RECONCILING THE NBA COLLECTIVE BARGAINING AGREEMENT WITH THE AMERICANS WITH DISABILITIES ACT

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#### INTRODUCTION

“What would you do if you couldn’t do what you love?”<sup>1</sup> That’s the question Chris Bosh posed to his fans during what he called his time in “purgatory.”<sup>2</sup> Bosh, a professional basketball player, is an eleven-time All-Star who helped lead the Miami Heat to back-to-back National Basketball Association (NBA) championships in 2012 and 2013.<sup>3</sup> Two years later, in February 2013, he was diagnosed with a pulmonary embolism in which a blood clot developed in one of his legs and travelled to his lung.<sup>4</sup> He was hospitalized and the Heat announced he would miss the last thirty games of the season as a result.<sup>5</sup>

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<sup>1</sup> *Rebuilt: Episode 1, Lost*, UNINTERRUPTED (Sept. 21, 2016), <https://www.uninterrupted.com/watch/28B1KDRQ/ep-1-lost?playlist=JtDwUMBi> [<http://perma.cc/8C9S-KRV2>].

<sup>2</sup> *Id.*

<sup>3</sup> *HEAT Waive Chris Bosh*, NBA.COM (July 4, 2017), <http://www.nba.com/heat/news/heat-waive-chris-bosh/> [<http://perma.cc/7AAU-22EC>].

<sup>4</sup> Daniel Chang & Manny Navarro, *Medical Experts Weigh in on Miami Heat Star Chris Bosh’s Second Bout With Blood Clot*, MIAMI HERALD (Feb. 16, 2016), <http://www.miamiherald.com/news/health-care/article60753226.html> [<http://perma.cc/GCT5-8TBY>].

<sup>5</sup> *Miami HEAT Statement On Chris Bosh*, NBA.COM (Feb. 21, 2015), <http://www.nba.com/heat/news/miami-heat-statement-chris-bosh> [<https://perma.cc/XY33-6BAQ>].

Despite starting for the Heat the following season, his season was again cut short by the discovery of another clot in his leg.<sup>6</sup> Team doctors told him his season—and career—was probably over.<sup>7</sup> Feeling written off, Bosh continued to work with his doctors toward a comeback by staying in shape and practicing on his own.<sup>8</sup> Despite all his efforts, on the eve of the 2016-2017 season, the Miami Heat team doctors would not clear Bosh to play.<sup>9</sup>

And the blows just kept coming. Shortly after the failed medical evaluation, Pat Riley, the President of the Heat, made a statement to the public claiming Bosh's career was likely over and that the team was not working toward his return. He also openly admitted he had not discussed the situation with Bosh.<sup>10</sup> In fact, Bosh found out later that day from his wife who saw a video of the interview online.<sup>11</sup>

That is how Bosh's situation remained for the next nine months: him pushing to play again and the Heat saying he could not because of his illness. Finally, in June 2017, a physician representing both the NBA and the NBA Players Association (NBPA) ruled his condition to be career ending.<sup>12</sup> The Heat were permitted to waive Bosh, which would remove the remainder of his salary from their payroll for salary cap purposes and allow Bosh to pursue his career with another team, should that team declare him fit to play.<sup>13</sup> Though by that point, NBA team executives had already commented they did not foresee another team signing him.<sup>14</sup>

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<sup>6</sup> Rohan Nadkarni, *Why Chris Bosh's Blood Clot Kept Him Out of the Playoffs*, SPORTS ILLUSTRATED (May 5, 2016), <https://www.si.com/nba/chris-bosh-health-blood-clot-miami-heat-nba-playoffs> [http://perma.cc/4MXP-N9MG].

<sup>7</sup> *Rebuilt: Episode 1, Lost*, *supra* note 1.

<sup>8</sup> *Id.*

<sup>9</sup> *Rebuilt: Episode 2, Renewal*, UNINTERRUPTED (Sept. 24, 2016), <https://www.uninterrupted.com/watch/6f2aFpF3/ep-2-renewal> [http://perma.cc/P6QA-JU2W].

<sup>10</sup> Manny Navarro, *Riley on Bosh: 'Based on the Last Exam . . . His Heat Career Probably is Over'*, MIAMI HERALD (Sep. 26, 2016), <http://www.miamiherald.com/sports/nba/miami-heat/article104205936.html> [http://perma.cc/8W88-VSYK].

<sup>11</sup> *Rebuilt: Episode 4, Crossroads*, UNINTERRUPTED (Sept. 30, 2016), <https://www.uninterrupted.com/watch/820KRX5A/ep-4-crossroads?playlist=JtDwUMBi> [https://perma.cc/C6GJ-NPST].

<sup>12</sup> Andre Vergara, *Chris Bosh Reportedly Ruled to Have a Career-Ending Injury*, FOX SPORTS GO (June 2, 2017), <http://www.foxsports.com/nba/story/chris-bosh-career-ending-injury-miami-heat-blood-clots-060217> [https://perma.cc/PZ9X-KUYH].

<sup>13</sup> Tim Reynolds, *Miami Heat Waive Chris Bosh; Plan to Retire No. 1 Jersey*, NBA.COM (July 4, 2017), <http://www.nba.com/article/2017/07/04/miami-heat-waive-chris-bosh-retire-number-jersey> [https://perma.cc/X5YE-KXHU].

<sup>14</sup> See David Aldridge, *Risks Still Abundant as Chris Bosh Hopes to Get Back on Court in NBA*, NBA.COM (May 29, 2017, 11:17 AM), <http://www.nba.com/article/2017/05/29/morning-tip-next-steps-chris-bosh-miami-heat-if-bought-out> [https://perma.cc/L8NC-QV3B] (noting that the "majority of front office people who gave their (anonymous, obviously) thoughts on Bosh believed that while there would be interest in him, it would be hard for any team to go after him because it would be so hard to find a doctor who would pass him on a physical").

Professional athletes, like Bosh, who face these kinds of adverse employment actions based on their health-related conditions may be entitled to certain protections under state and federal disability rights laws. In fact, at least one NBA player has tried—albeit it unsuccessfully—to raise just such a claim.<sup>15</sup> However, the recently updated NBA–NBPA collective bargaining agreement (CBA) forces players to give up these rights once their fitness to play gets called into question. In this Essay we ask: What are the legal rights of current NBA players to challenge determinations regarding their fitness to play?

In this Essay, we assert that, despite what is written in the CBA, NBA players should—and in fact do—maintain their legal rights under employment discrimination statutes. At first blush, allowing players to sue the team or the NBA itself may seem to impose an unwieldy burden on professional sports. However, current disability discrimination laws like the Americans with Disabilities Act (ADA) already strike the proper balance between the employer’s interest in maintaining a safe workplace and the employee’s interest in being free from discrimination. As we will demonstrate, many ADA claims will only be cognizable when the team chooses to ignore a Fitness-to-Play decision in favor of the player.

This Essay explores the rights of current NBA players regarding their Fitness-to-Play requirements. In Part I, we outline recent changes to the CBA, highlighting how the newly effective agreement governs Fitness-to-Play determinations. Part II turns to players’ rights as employees under disability discrimination statutes, using the ADA as a case study. Lastly, Part III explores the interplay between the policies and procedures articulated in the CBA and NBA players’ statutorily protected antidiscrimination rights. We conclude that, at a minimum, the NBA and the NBPA should eliminate the CBA provision that requires players to waive their antidiscrimination rights. Generally speaking, sophisticated parties should be left to privately agree as to how to resolve issues that arise between them. By contrast, because parties cannot prospectively waive their statutorily guaranteed rights, a blanket exemption from employment discrimination laws for professional sports is a question for legislatures, not for the collective bargaining process. With that said, we propose that a more meaningful and reliable alternative to the current regime would be to make the Fitness-to-Play proceedings—however defined—binding not only on the players, but also on the team and the NBA.

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<sup>15</sup> See *Mobley v. Madison Square Garden LP*, No. 11-8290, 2012 WL 2339270 (S.D.N.Y. June 14, 2012) (alleging employment discrimination for dismissal because of a cardiac condition).

## I. FITNESS-TO-PLAY UNDER THE CBA

Fitness-to-Play determinations are extremely important to teams in the NBA. A situation like Bosh's could leave a team with a player who is unable to play, yet whose salary must be paid and would still count against the salary cap.<sup>16</sup> As a result, the new NBA–NBPA CBA,<sup>17</sup> which took effect on July 1, 2017,<sup>18</sup> provides a unique resolution process for medical disputes.<sup>19</sup>

Article 22, Section 11 of the new CBA provides that the NBA will have “Fitness-to-Play” panels to decide “whether players with potentially life-threatening injuries, illnesses or other health conditions are medically able and medically fit to practice and play basketball in the NBA.”<sup>20</sup> Likely in response to *Mobley*<sup>21</sup> and *Bosh*<sup>22</sup>, the CBA requires two panels to always be available to focus on “(i) cardiac illnesses and conditions and (ii) blood clots and other blood conditions and disorders,” while additional Fitness-to-Play panels may be created if other life-threatening health issues arise.<sup>23</sup> Panels consist of one NBA appointed doctor, one NBPA appointed doctor, and a third doctor appointed by those first two members.<sup>24</sup>

NBPA, NBA, or a team may refer a player to a panel once a physician advises the player is medically unable or medically unfit to play basketball.<sup>25</sup> Unfortunately, the player would have little room to argue against the referral, as the CBA's uniform player contract—which all players must sign—requires players to submit to medical examinations.<sup>26</sup>

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<sup>16</sup> See CHRISTOPHER R. DEUBERT ET AL., COMPARING HEALTH-RELATED POLICIES & PRACTICES IN SPORTS: THE NFL AND OTHER PROFESSIONAL LEAGUES, PETRIE-FLOM CTR. FOR HEALTH L. POL'Y, BIOTECHNOLOGY, & BIOETHICS, HARV. L. SCH., 186 (2017) (“[T]he CBA permits clubs and players to agree to ‘compensation protection,’ *i.e.*, a guarantee of a player's contract in five circumstances, in the event of the player's: lack of skill; death; basketball-related injury; injury or illness; and, mental disability.”).

<sup>17</sup> Collective Bargaining Agreement, NBA-NBAPA (Jan. 19, 2017), <http://nbpa.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> [<https://perma.cc/JUD5-WN8E>] [hereinafter Collective Bargaining Agreement].

<sup>18</sup> DEUBERT ET AL., *supra* note 16, at 182.

<sup>19</sup> See *id.* at 50 (“The ‘Fitness-to-Play’ provision is, as far as we know, unprecedented in professional sports and seemingly arises out of a challenging situation in the NBA.”).

<sup>20</sup> Collective Bargaining Agreement, *supra* note 17, art. 22, § 11(a).

<sup>21</sup> See *Mobley v. Madison Square Garden LP*, No. 11-8290, 2012 WL 2339270 (S.D.N.Y. June 14, 2012) (requesting the court declare the Knicks improperly forced him into retirement based on his disability in order to remove his salary from the cap).

<sup>22</sup> See *Reports: Doctor's Ruling on Chris Bosh's Health Will Help Heat's Cap Situation*, ESPN (June 2, 2017), [http://www.espn.com/nba/story/\\_/id/19523537/doctor-ruling-chris-bosh-health-help-miami-heat-salary-cap-situation](http://www.espn.com/nba/story/_/id/19523537/doctor-ruling-chris-bosh-health-help-miami-heat-salary-cap-situation) [<https://perma.cc/MYK3-GD4B>].

<sup>23</sup> Collective Bargaining Agreement, *supra* note 17, art. 22, § 11(b).

<sup>24</sup> *Id.* § 11(a).

<sup>25</sup> *Id.* § 11(c).

<sup>26</sup> See *id.* at A-7 (“Should the Player suffer an injury, illness, or medical condition, he will submit himself to a medical examination, appropriate medical treatment by a physician designated

Once referred, the Fitness-to-Play panel will determine whether “(i) the player is medically able and medically fit to perform his duties as a professional basketball player; and (ii) performing such duties would not create a materially elevated risk of death for the player.”<sup>27</sup> This structure allows two possible determination paths for the panel after examinations are done; either it will deem the player medically able and fit, or not medically able and fit. If determined to be medically able and fit to play, the player would potentially be able to resume playing for his team. Although, before being permitted to do so by the NBA, he would “be required to sign an informed consent and assumption of risk agreement.”<sup>28</sup> In the event the player is not found to be medically able and fit to play, he may be referred to the same panel in the future, if evidence becomes available to show there has been “materially changed circumstances” regarding his condition.<sup>29</sup>

While a seemingly good solution to situations like that of Chris Bosh, the new CBA Fitness-to-Play panel has two major flaws. First, after referral to a Fitness-to-Play panel, NBA players must seemingly waive their legal rights to challenge the outcome of that determination. The CBA provides that

[s]ubsequent to the player being referred to a Fitness-to-Play-Panel, and prior to the Panels’ review of the player’s injury, illness or other health condition, the player (on behalf of himself, his heirs and assigns) shall be required to *sign a release and covenant not to sue agreement* in the form agreed upon by the parties . . .<sup>30</sup>

The only exception applies to medical malpractice claims against team or NBA/NBPA physicians.<sup>31</sup> As we demonstrate in the Part II, this provision runs counter to safeguards provided by the ADA.

The release and covenant not to sue become particularly powerful because of the second flaw: the Panel’s decision is not binding on the team. A team has the discretion to refuse to play the player or allow him to practice

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by the Team, and such rehabilitation activities as such physician may specify. Such examination when made at the request of the Team shall be at its expense, unless made necessary by some act or conduct of the Player contrary to the terms of this Contract.”)

<sup>27</sup> Collective Bargaining Agreement, *supra* note 17, art. 22, § 11(d)(2).

<sup>28</sup> *Id.* § 11(e).

<sup>29</sup> *Id.* § 11(f). The party making the new referral (the NBA, a Team, or the NBPA) must have, in writing, a physician’s statement of materially changed circumstances. The CBA provides “medical advances or a material change in the player’s medical condition” as examples of what may suffice. *Id.* However, the difficulty in surmounting this persuasive burden is as yet unclear, because what a panel will deem “material” has not been established and could be entirely subjective.

<sup>30</sup> *Id.* § 11(d)(3) (emphasis added).

<sup>31</sup> *Id.*

regardless of the panel's determination.<sup>32</sup> While pursuant to the CBA the team has sixty days to trade or release the player,<sup>33</sup> the lack of finality of the panel's decision would effectively allow the team to waive a medically fit player, file a claim to have insurance pay out the contract, and clear room under its salary cap for new talent.

## II. FITNESS-TO-PLAY UNDER THE ADA

Because NBA players are the employees of their teams<sup>34</sup> (and perhaps also of the NBA<sup>35</sup>), federal and state employment discrimination statutes govern Fitness-to-Play determinations. Specifically, disability rights laws protect employees from intrusive medical examinations and from the discriminatory use of their health-related information in the workplace. While it may seem strange to invoke laws that target disability for elite athletes, as discussed below, these protections apply with equal force to professional sports.<sup>36</sup> Many states have their own statutes that govern disability discrimination in

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<sup>32</sup> *Id.* § 11(g) (providing that “[n]othing in this Section 11 shall obligate a Team to permit a player to play or practice for the Team, even if a Fitness-to-Play Panel determines that the player is medically able to do so”).

<sup>33</sup> *Id.*

<sup>34</sup> See *Tarpley v. Nat'l Basketball Ass'n*, EEOC Determination No. 460-2006-04831 (Sept. 26, 2007) (stating Roy Tarpley, Jr. was an employee of the Dallas Mavericks for purposes of an ADA violation determination); *Mobley v. Madison Square Garden LP*, No. 11-8290, 2012 WL 2339270 (S.D.N.Y. June 14, 2012)

<sup>35</sup> Compare Complaint at 2, *Tarpley v. Nat'l Basketball Ass'n*, No. 4:07-CV-3132 (S.D.T.X. Sept. 26, 2007) (“[T]he NBA has met the definition of an ‘employer’ under all applicable statutes”), with Response of Defendant NBA at 1-2, *Tarpley v. Nat'l Basketball Ass'n*, No. 4:07-CV-3132 (S.D.T.X. Dec. 11, 2007) (noting the NBA “[d]enies the allegations set forth in Paragraph 3 of the Original Complaint [that the NBA was Tarpley’s employer] . . .”). The NBA originally denied being an employer, then subsequently settled the suit before litigation. Order of Dismissal on Settlement Announcement, *Tarpley v. Nat'l Basketball Ass'n*, No. 4:07-CV-3132 (S.D.T.X. Jan. 22, 2009). Courts have made similar findings with respect to the NFL. See *Williams v. Nat'l Football League*, 27-CV-08-29778, 2010 WL 1793130 (Minn. Dist. Ct. May 6, 2010) (finding that for purposes of Minnesota’s Drug and Alcohol Testing in the Workplace Act (DATWA), an employment relationship exists between the players and the NFL). This case went to appeal in *Williams v. Nat'l Football League*, but not on the employee status issue. 794 N.W.2d 391, 396 (Minn. Ct. App. 2011). The appellate court reiterated that “[t]he district court’s findings in this regard are not clearly erroneous, and we agree that the NFL is an employer, and appellants its employees, within the meaning of DATWA.” *Id.* But see *Brown v. Nat'l Football League*, 219 F. Supp. 2d 372 (S.D.N.Y. 2002) (finding that players are employees of the Clubs, not the NFL).

<sup>36</sup> See Jessica L. Roberts, et al., *Evaluating NFL Player Health and Performance: Legal and Ethical Issues*, 165 U. PA. L. REV. 227, 234 (2017) (“[T]he ADA’s employment provisions nonetheless cover professional sports, and a professional athlete may meet the legal definition of a person with a disability.” (footnote omitted)).

employment,<sup>37</sup> so for simplicity's sake we focus here on the relevant federal law, Title I of the Americans with Disabilities Act (ADA).<sup>38</sup>

The ADA has specific provisions that protect employees against certain kinds of medical inquiries, as well as against discrimination on the basis of disability. The ADA adopts a three-prong definition of disability that covers actual, past, and perceived impairments.<sup>39</sup> Thus, a prospective litigant can establish that she is a person with a disability in at least one of three ways: 1) by demonstrating that she has “a physical or mental impairment that substantially limits one or more major life activities of such individual,” 2) by demonstrating that she has “a record of such an impairment” or 3) by demonstrating that she is “being regarded as having such an impairment.”<sup>40</sup> With respect to current employees, an employer cannot require medical examinations or make inquiries related to legally protected disabilities unless those examinations or inquiries are job-related and consistent with business necessity.<sup>41</sup> Employers, however, may conduct voluntary medical examinations and ask employees whether they can perform job-related functions.<sup>42</sup> Yet employers still have obligations when it comes to lawfully acquired medical or disability-related information.<sup>43</sup> First, they must keep any health-related information obtained from the medical examination or inquiry on separate forms in separate files and treat that data as a confidential medical record.<sup>44</sup> Second, employers may not use the information they acquire through legal medical examinations and inquiries to violate the ADA.<sup>45</sup> While these provisions technically apply to pre-employment medical examinations, courts have recognized causes of action for the improper disclosure of employee medical records in other contexts.<sup>46</sup> What these

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<sup>37</sup> See, e.g., *Mobley*, 2012 WL 2339270, at \*3 (discussing New York statutes governing disability law within the Human Rights Law and Administrative Code of the City).

<sup>38</sup> Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (West 2008).

<sup>39</sup> 42 U.S.C. § 12102(1).

<sup>40</sup> *Id.* § 12102(1).

<sup>41</sup> See *id.* § 12112(d)(4)(A).

<sup>42</sup> See *id.* § 12112(d)(4)(B).

<sup>43</sup> See *id.* § 12112(d)(4)(C).

<sup>44</sup> *Id.* § 12112(d)(3)(B). Exceptions to this confidentiality protection include the following “(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and (iii) government officials investigating compliance with this chapter shall be provided relevant information on request.” *Id.*

<sup>45</sup> See *id.* § 12112(d)(3)(C) (explaining that “the results of such examination are used only in accordance with this subchapter”).

<sup>46</sup> See, e.g., *Cossette v. Minn. Power & Light*, 188 F.3d 964 (8th Cir. 1999) (applying 42 §§ 12112(d)(3) to a plaintiff employee, and protecting against unauthorized disclosures); *McPherson v. O'Reilly Auto., Inc.*, 491 F.3d 726, 732 (8th Cir. 1999) (stating that “the ADA prohibits an employer from disclosing confidential medical information about an ex-employee”); *Fisher v. Harvey*, No. 1:05-CV-102, 2006 U.S. Dist. LEXIS 21657 (E.D. Tenn. Mar. 31, 2006) (finding that

provisions effectively mean for NBA players is that the teams and the NBA cannot take what they learn from legal Fitness-to-Play inquiries and disclose it to third parties—including to the press or other teams—or use it to discriminate.

The ADA also prohibits employers from discriminating against qualified individuals on the basis of disability. To pursue a Title I claim, a plaintiff must first make two showings: (1) that she has a legally recognized disability and (2) that she is qualified.<sup>47</sup> Under certain circumstances, NBA players may be able to use Title I's employment discrimination provisions to challenge the decision not to play them following a Fitness-to-Play proceeding.

As noted above, actual, past, and perceived impairments may qualify as disabilities.<sup>48</sup> Despite their outstanding physical abilities, NBA players may also be people with legally recognized disabilities. For example, Chris Bosh's blood clot illness substantially impairs him with respect to his ability to breath, perform physical activities, and travel for long distances, (all necessary for his job) as well as requires him to wear specialized compression clothing and consistently take medication,<sup>49</sup> thus qualifying as an actual impairment. Moreover, NBA players have had careers with a variety of other kinds of physical and mental disabilities, including deafness, anxiety, Tourette syndrome, kidney disease, heart conditions, back problems, obsessive-compulsive disorder, asthma, diabetes, bipolar disorder, and HIV.<sup>50</sup> NBA players may also have a record of a substantially limiting impairment. For instance, after blood clots similar to Bosh's, NBA forward Mirza Teletovic and center Anderson Varejao were able to return to play.<sup>51</sup> These scenarios are not restricted to blood clotting however, as other examples include the Spurs'

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the employers must comply with ADA's confidentiality requirements when conducting voluntary medical examinations); *see also* *McCarthy v. Brennan*, 230 F. Supp. 3d 1049 (N.D. Cal. 2017) (finding that the Rehabilitation Act incorporates the ADA's confidentiality provision and that, as a result, the disclosure of employee medical information is actionable under the Rehabilitation Act).

<sup>47</sup> 42 U.S.C. § 12112(a) (2012).

<sup>48</sup> *See supra* note 39.

<sup>49</sup> *See* Lee Jenkins, *Happy and Healthy: Chris Bosh Values Life After Near-Death Experience*, SPORTS ILLUSTRATED (Sept. 23, 2015), <https://www.si.com/nba/2015/09/23/chris-bosh-heat-raptors-georgia-tech-health-blood-clots-lebron-james> [<https://perma.cc/LH53-XRHW>]; Amitha Kalaichandran, *Chris Bosh's NBA Career is in Jeopardy Because of Blood Clots. Here Are Five Things You Should Know*, STAT (Sept. 27, 2016), <https://www.statnews.com/2016/09/27/bosh-nba-blood-clots/> [<https://perma.cc/D4NA-AG89>].

<sup>50</sup> Gonzo Green, *Top 15 NBA Players Who Overcame Disabilities*, THESPORTSTER (Feb. 25, 2016), <http://www.thesportster.com/basketball/top-15-nba-players-who-overcame-disabilities/>; Danny Groner, *10 Active NBA Players Who Suffer From Conditions or Disorders*, (Nov. 15, 2012), <http://tsminteractive.com/active-nba-players-who-suffer-from-conditions-or-disorders/> [<https://perma.cc/GLU3-G533>].

<sup>51</sup> *See* *Nets' Teletovic Cleared to Return After Blood Clots in Lungs*, FOX SPORTS (Apr. 17, 2016), <http://www.foxsports.com/nba/story/brooklyn-nets-mirza-teletovic-cleared-to-play-after-blood-clot-in-lungs-041715> [<https://perma.cc/M7GZ-5XAF>]; Matt Moore, *Cavaliers' Anthony Bennet, Anderson Varejao Cleared to Return*, CBS SPORTS (Oct. 1, 2013), <https://www.cbssports.com/nba/news/cavaliers-anthony-bennett-anderson-varejao-cleared-to-return/> [<https://perma.cc/V6XC-MMZH>].



LaMarcus Aldridge, who has played despite a genetic heart condition,<sup>52</sup> and legend Steve Nash, who spent a large portion of his career in the NBA playing with a degenerative back disorder.<sup>53</sup> Finally, an NBA player can argue that, despite not having an actual or past impairment, in failing to allow him to play or to practice the team or the NBA perceives him as having a disability.

Plaintiffs must also prove that they are qualified. According to the ADA, a “qualified individual” is a person who can perform “the essential functions” of the relevant job, “with or without reasonable accommodation.”<sup>54</sup> In other words, to be “qualified,” an NBA player must prove that he can perform the essential job functions of a professional basketball player. Yet, in the context of professional sports, nailing down precisely what constitutes an essential job function may prove difficult because the ability to play at an elite level is necessarily relative.<sup>55</sup> The ADA requires courts to consider the employer’s judgment regarding which job functions are essential,<sup>56</sup> so the teams and the NBA will have a role in determining what makes an individual qualified to play professional basketball.

After establishing the ability to sue under the statute, the plaintiff must also allege that the employer discriminated against him on the basis of disability. The ADA takes a broad view of discrimination, prohibiting adverse employment actions “in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”<sup>57</sup> Failing to play the athlete, or to allow him to practice due to a health condition, would appear to be exactly the kind of adverse employment action that Title I covers.

Yet even if a plaintiff successfully makes a prima facie case of disability discrimination, the ADA contains certain statutory defenses.<sup>58</sup> For example, an employer can lawfully discriminate on the basis of disability when the employee poses a “direct threat.”<sup>59</sup> Although the statute defines direct threat

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<sup>52</sup> Andrew Lynch, *Spurs’ LaMarcus Aldridge Cleared to Play After Heart-Related Scare*, FOX SPORTS (Mar. 15, 2017) <http://www.foxsports.com/nba/story/san-antonio-spurs-lamarcus-aldridge-cleared-return-heart-arrythmia-injury-play-031517> [<https://perma.cc/FR6Z-RD9R>].

<sup>53</sup> Jeff Stotts, *A Retrospective Look at Steve Nash & the Injuries He Endured*, IN STREET CLOTHES (Oct. 24, 2014), <http://instreetclothes.com/2014/10/24/retrospective-look-steve-nash-injuries-endured/> [<https://perma.cc/6PH7-8TYX>].

<sup>54</sup> 42 U.S.C. § 12111(8) (2012).

<sup>55</sup> Roberts et al., *supra* note 36, at 302-04.

<sup>56</sup> See 42 U.S.C. § 12111(8) (2012) (“For the purposes of this subchapter, consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.”).

<sup>57</sup> *Id.* § 12112(a).

<sup>58</sup> See generally *id.* § 12113.

<sup>59</sup> *Id.* § 12113(b).

as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation,”<sup>60</sup> the United States Supreme Court extended that definition to also apply to threats the employee poses to himself.<sup>61</sup>

The direct threat defense, which allows employers to discriminate on the basis of disability when the employee poses a significant risk, is particularly salient to Fitness-to-Play inquiries. The CBA makes clear that its Fitness-to-Play proceedings are specifically designed to assess the risk posed by playing professional basketball. Recall that, under the CBA, Fitness-to-Play assesses “whether players with potentially life-threatening injuries, illnesses or other health conditions are medically able and medically fit to practice and play basketball in the NBA.”<sup>62</sup>

To sum up, NBA players may well have valid legal claims related to Fitness-to-Play determinations under either the ADA’s medical examination provision or its antidiscrimination protections. Yet the CBA as written would require them to waive those claims as soon as a Fitness-to-Play proceeding commences.

### III. RECONCILING THE CONFLICT

The recent update to the NBA’s CBA seemingly denies NBA players referred to Fitness-to-Play panels their statutorily guaranteed rights under the ADA and other similar disability discrimination laws. Although the CBA provides some protection for NBA players when a team opts to ignore a favorable Fitness-to-Play determination,<sup>63</sup> these remedies are not a replacement for players’ antidiscrimination rights. Consequently, we advocate the NBA’s and the NBPA’s removing the waiver from the CBA to ensure that players have full access to all of their legal rights.

Importantly, the claims waiver provision is probably not even enforceable. Individuals cannot prospectively waive their rights under federal employment discrimination statutes.<sup>64</sup> Thus, even if the CBA on its face continues to require players to sign covenants not to sue in conjunction with Fitness-to-Play proceedings, the teams or the NBA may not be able to enforce those

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<sup>60</sup> *Id.* § 12111(3).

<sup>61</sup> *See* *Chevron U.S.A. Inc., v. Echazabal*, 536 U.S. 73, 87 (2002) (finding it consistent with the statute to place threat-to-self defense within the job related and business necessity standards).

<sup>62</sup> Collective Bargaining Agreement, *supra* note 17, art. 22, § 11(a).

<sup>63</sup> *See id.* at § 11(g) (requiring a team who disagrees with the Panel’s approval to play to either trade the player, amend his contract in accordance with other CBA provisions, or waive him within sixty days of the report).

<sup>64</sup> *See* U.S. EEOC Notice No. 915.002, Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) enforced statutes (Apr. 10, 1997), <https://www.eeoc.gov/policy/docs/waiver.html> [<https://perma.cc/J2NX-33KW>]; *see also* *EEOC v. U.S. Steel Corp.*, No. 10-12, 2013 WL 625315, at \*24 (W.D. Pa. Feb. 20, 2013) (citing case law that supports “the proposition that a labor agreement may not prospectively waive or alter the substantive protections codified in federal civil rights law.”).

agreements should players opt to pursue claims under the ADA or other applicable statutes.

Moreover, ensuring that NBA players have unfettered access to their statutory antidiscrimination rights will not result in a flood of litigation against the teams or the NBA challenging Fitness-to-Play determinations. As explained, the ADA explicitly permits employers to subject current employees to medical examinations and inquiries when the results of those activities are job-related and consistent with business necessity. As discussed in Part I, under Section 11 of the CBA, a Fitness-to-Play panel determines “whether players with potentially life-threatening injuries, illnesses, or other health conditions are medically able and medically fit to practice and play in the NBA.”<sup>65</sup> Thus, the Fitness-to-Play inquiries devised by the CBA speak directly to an individual’s ability to safely play professional basketball. Assuming that the teams or the NBA would not attempt to use Fitness-to-Play proceedings to punish players or to game the system, these determinations would, as a general rule, appear to be both job-related and consistent with business necessity. As such, the ADA or its state counterparts would not stand in the way of founded requests for Fitness-to-Play determinations.

Furthermore, allowing NBA players to raise ADA claims will not force teams or the NBA to play players who might risk substantial harm, like Chris Bosh. To start, only qualified individuals can raise antidiscrimination claims under the ADA. Take as an example a 2012 case brought by Cuttino Mobley against the New York Knicks.<sup>66</sup> In 2008, following a trade from the Los Angeles Clippers to the Knicks, a medical exam revealed that Mobley had a heart condition, dangerous during “extreme exertion.”<sup>67</sup> Mobley maintained that he had been diagnosed with a hypertrophic cardiomyopathy (HCM) at the beginning of his NBA career in 1998—a full decade before the trade—and that the Knicks were fully aware of his medical history prior to the negotiation.<sup>68</sup> Although HCM can cause light-headedness, falls, and heart failure—in fact, some players have even died<sup>69</sup>—up until the Knicks, every team in Mobley’s professional basketball career had medically cleared him to play, so long as he

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65 Collective Bargaining Agreement, *supra* note 17, art. 22, § 11(a).

66 *Mobley v. Madison Square Garden LP*, No. 11-8290, 2012 WL 2339270 (S.D.N.Y. June 14, 2012).

67 *Id.* at \*1.

68 *Id.*

69 See Shelley Smith, *Death on the Court*, SPORTS ILLUSTRATED (Mar. 12, 1990), <https://www.si.com/vault/1990/03/12/121624/death-on-the-court-loyola-marymounts-hank-gathers-was-at-the-top-one-minute-the-next-he-collapsed-and-lay-dying-as-his-mother-stood-mournfully-by-him> [<https://perma.cc/DLU3-CR3D>] (describing Hank Gathers’ death); Robert Thomas, Jr., *Celtics’ Lewis Dies After Collapsing in a Gym*, N.Y. TIMES (July 28, 1993), <http://www.nytimes.com/1993/07/28/sports/pro-basketball-celtics-lewis-dies-after-collapsing-in-a-gym.html> [<https://perma.cc/R7T5-UXHB>] (describing Reggie Lewis’s death).

waived liability.<sup>70</sup> However, the Knicks sent him to two cardiologists who both concluded he was not medically fit to play and recommended that he end his career in professional basketball.<sup>71</sup> Mobley asked the cardiologist if he had any other options and, after being told he did not, announced his retirement in December 2008.<sup>72</sup>

In his lawsuit, Mobley challenged the Knicks' motivations behind the medical examinations. He asserted that the Knicks tried to use his health as leverage during their negotiations with the Clippers and that the Knicks, fully aware of his heart condition, waived the pre-trade physical to finalize the deal.<sup>73</sup> He also argued that the two cardiologists in question were known opponents of allowing players with HCM to play.<sup>74</sup> Instead, Mobley alleged that the Knicks forced him into retirement for their own financial reasons.<sup>75</sup> Specifically, he argued that declaring him medically unfit saved the Knicks around nineteen million dollars.<sup>76</sup> Mobley sued the team under the New York State Human Rights Law (NYSHRL), alleging that by declaring him medically unfit and forcing him to retire, the Knicks discriminated against him on the basis of actual or perceived disability.<sup>77</sup> The Knicks responded by filing a motion to dismiss for failure to state a claim.<sup>78</sup>

Like the ADA, the NYSHRL requires that plaintiffs who bring disability discrimination claims establish that they are qualified.<sup>79</sup> The district court initially granted the motion to dismiss, finding that Mobley had failed to present evidence that he was qualified but granted him leave to amend his complaint.<sup>80</sup> In his amended complaint, Mobley asserted that there had been no change in his health in 2008 and that leading heart specialists had confirmed that fact as late as 2012.<sup>81</sup> The Knicks filed another motion to dismiss, which the district court denied, finding that Mobley's "factual allegations make it facially plausible that he was qualified to perform the essential functions of a professional basketball player without accommodation

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<sup>70</sup> *Mobley*, 2012 WL 2339270 at \*1.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at \*2.

<sup>73</sup> *Id.* at \*1.

<sup>74</sup> *Id.*

<sup>75</sup> The NBA imposes a "luxury tax" on teams whose payrolls exceed a preset salary cap. However, the salaries of players disqualified for medical reasons do not count toward the cap. *Id.* at \*2.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *See id.* at \*3 ("the disabled individual must have the requisite job qualifications as well as be able to sat[i]sfactorily perform in the job." (quoting N.Y. Codes R. & Regs. tit. 9, § 466.11 (2012))).

<sup>80</sup> *Id.* at \*4. "Plaintiff has only alleged facts to show that he was qualified in the past and does not offer any evidence to discredit the opinions of the Knicks' doctors at the time they evaluated him." *Id.* at \*3.

<sup>81</sup> *See Mobley v. Madison Square Garden LP*, No. 11-8290, 2013 U.S. Dist. LEXIS 46341 (S.D.N.Y. Mar. 15, 2013) (subsequent litigation based on Mobley's amended complaint).

subsequent to his trade to the Knicks.”<sup>82</sup> Mobley eventually dropped his lawsuit in an attempt to return to the NBA.<sup>83</sup>

Mobley’s case demonstrates that courts will take the “qualified” inquiry seriously and will not allow plaintiffs to move forward with their claims without establishing that they can safely perform the essential job functions of a professional basketball player. In cases where the teams or the NBA are acting out of legitimate medical concern—as opposed to financial reasons unrelated to the player’s health—the ADA and its sister statutes include provisions to shelter the teams and the NBA from liability. While we believe these laws as written strike the proper balance, the teams and the NBA would likely prefer the greater protection from liability that they would receive should the CBA’s waiver provision be found enforceable.

Moreover, even if a plaintiff can make a threshold showing that he is qualified to play professional basketball in cases of actual medical risk, the teams or the NBA could turn to the direct threat defense. To successfully raise the defense, the defendants would have to show, using objective scientific evidence, that playing the plaintiff would pose a significant risk to his safety or the safety of others. Because professional athletes face a higher risk of injury than typical employees, the direct threat defense could prove particularly valuable for teams facing ADA claims. Furthermore, recall that under the new CBA, Fitness-to-Play panels make two key determinations: whether “(i) the player is medically able and medically fit to perform his duties as a professional basketball player; and (ii) performing such duties would not create a materially elevated risk of death for the player.”<sup>84</sup> Surely, a clearly heightened risk of death is significant both in terms of likelihood and severity. Hence, even if a player is “qualified” for statutory purposes, if the panel believes he will face a materially elevated risk of death, those findings could form the foundation of a direct threat defense.

Because the ADA and its corollaries have built in safeguards to protect defendants from employing individuals who cannot safely perform the job in question, these statutes would not force the teams or the NBA to play medically unfit players. The teams and the NBA would, however, be most likely to face liability if the team chooses not to play a player whom the Fitness-to-Play panel has determined is medically fit and medically able. Recall from Part I that the CBA specifically allows teams to opt not to play players—pursuant to certain conditions—even after a favorable Fitness-to-

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<sup>82</sup> *Id.* at \*15.

<sup>83</sup> Charles Michael, *Cuttino Mobley Drops Suit Against Knicks*, STEPTOE & JOHNSON LLP: SDNY BLOG (Aug. 9, 2013), <http://www.sdneyblog.com/cuttino-mobley-drops-suit-against-knicks/> [<https://perma.cc/6TK5-HEZW>].

<sup>84</sup> *See supra* note 27.

Play determination. Not allowing a player to practice or to play could form the basis of an ADA claim. First, being referred to a Fitness-to-Play proceeding weighs in favor of the player's being an individual with a legally recognized disability. If he has a current health condition, he may well have a substantially limiting impairment sufficient to qualify as a disability. If he has red flags in medical history, those indicators could establish a record of such impairment. And failing all else, the mere fact that he is being sent before the Fitness-to-Play panel could provide evidence that the team or the NBA regards him as being disabled. Second, a favorable Fitness-to-Play determination weighs heavily in favor of his being qualified, as a panel of experts determined he could play professional basketball. Third, the decision not to play him or not to allow him to practice may constitute discrimination on the basis of his disability. Consequently, the teams and the NBA would be most vulnerable to lawsuits following favorable Fitness-to-Play determinations that they decide to disregard.

Additionally, teams and the NBA might incur liability for violating player confidentiality. The ADA requires that employers keep medical determinations on separate records and only make certain kinds of disclosures.<sup>85</sup> While NBA players themselves are free to discuss their health with the press, insofar as the teams and the NBA do so they could well be in violation of the ADA or other laws. For example, Bosh's own team President, Pat Riley, told reporters in an interview that Bosh's "Heat career [was] probably . . . over" and the team would be moving on, without consulting Bosh.<sup>86</sup> In addition, other NBA team executives put in their two cents. One commented, "Miami had about \$50 million reasons for [Bosh] to play and could not get a doctor to clear him . . . [it's] [v]ery unlikely the answer will be different at a team with \$0 million reasons for him to play."<sup>87</sup> Another executive made the statement, "There will be (interest) if his medical checks out ok, which seems doubtful at this point."<sup>88</sup> Comments such as these flirt the line with breaches in confidentiality, particularly depending on if the player has already made his condition public.

That is not to say, however, that the teams and the NBA would not have access to the fitness examination results or a player's medical information. They could of course request it under the proper circumstances in conjunction with a player's employment. The teams and the NBA would

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<sup>85</sup> 42 U.S.C. § 12112(d)(3)(B).

<sup>86</sup> Navarro, *supra* note 10.

<sup>87</sup> Aldridge, *supra* note 14 (providing responses from anonymous NBA Western Conference Executives when asked whether there will be a market in the league for Bosh once he is a free agent).

<sup>88</sup> *Id.*

simply be barred from making the information they obtain in conjunction with Fitness-to-Play proceedings public.

Considering the relevant law and our foregoing analysis, we end with a few recommendations. First and foremost, we strongly encourage the NBPA and the NBA to rethink the newly added provision requiring players going before Fitness-to-Play panels to prospectively waive potentially valid legal claims. Not only is the provision unenforceable, it is largely unnecessary. As we have demonstrated, although not offering a complete waiver like the CBA, the applicable employment discrimination laws provide the teams, the NBA, and the NBPA with ample protection from unfounded legal liability. Both the qualified requirement and the direct threat defense ensure that the law will not force the teams or the NBA to play players who cannot perform safely. The teams or the NBA are most likely to be liable when they take medically fit and medically able players off the active roster. Such decisions would appear to be *prima facie* cases of disability discrimination, as they would involve taking adverse employment actions against qualified individuals with disabilities. While the teams and the NBA may want to preserve their ability to ignore the outcome of Fitness-to-Play panels, the ADA contains no professional sports exemption. If they wish to be shielded from liability, instead of adopting an unenforceable waiver in a CBA, the teams and the NBA should lobby legislatures to change their statutes.

However, we advocate going even one step further and making the collectively bargained Fitness-to-Play proceedings binding not only the players, but on the teams and the NBA itself. Employers should not be free to simply disregard the results of fitness-for-duty exams. In the case of unfavorable Fitness-to-Play determinations, the CBA currently offers the opportunity for the NBA, the team, or the NBPA to request that the player go before the same panel again to be reevaluated. Recall that favorable determinations are not binding. Moreover, there is not an opportunity to appeal favorable determinations. In fact, the teams do not even need to justify taking a player who received a favorable determination off the active roster. Thus, before making Fitness-to-Play proceedings binding on the relevant parties, the NBPA and the NBA should negotiate a more in-depth process for appeals. Regardless, holding teams and the NBA to the panel determinations would bypass the most likely scenarios for disability discrimination lawsuits and would lend more legitimacy and finality to NBA Fitness-to-Play determinations.

#### CONCLUSION

Despite their elite status and physical prowess, NBA players are employees, just like millions of other Americans. They are therefore entitled to all the

corresponding employment discrimination rights. While a player is free to waive his right to sue in a settlement agreement, he cannot prospectively consent to a violation. As such, the provision in the recent NBA CBA forcing players sent before Fitness-to-Play panels to sign covenants not to sue is not legally enforceable and should be eliminated. One effect of this change would be to strengthen the right to confidentiality that NBA players enjoy with respect to their health. In addition to being the legally correct course of action, the NBA and NBA teams need not be concerned that removing this provision would lead to a flood of litigation. The careful construction of disability rights laws, like the ADA, ensures that the teams and the NBA will not be forced to play someone who cannot safely perform the essential job functions of being a professional basketball player. If the teams and the NBA are truly concerned about increased legal liability, they can go before legislatures and lobby for a professional sports exemption. Alternatively, going one step further and making the Fitness-to-Play determinations binding would avoid many potential antidiscrimination violations.

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