Pace I.P., Sports & Entertainment Law Forum

Volume 2
Issue 1 *Spring 2012*

Article 3

April 2012

Social Media In Sports: Can Professional Sports League Commissioners Punish 'Twackle Dummies'?

Daniel J. Friedman
Riehl Sports Management LLC

Follow this and additional works at: http://digitalcommons.pace.edu/pipself

Part of the Entertainment and Sports Law Commons, Intellectual Property Commons, and the Internet Law Commons

Recommended Citation
Daniel J. Friedman, *Social Media In Sports: Can Professional Sports League Commissioners Punish 'Twackle Dummies'?*, 2 Pace. Intell. Prop. Sports & Ent. L.F. 74 (2012).
Available at: http://digitalcommons.pace.edu/pipself/vol2/iss1/3

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace I.P., Sports & Entertainment Law Forum by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

Social Media In Sports: Can Professional Sports League Commissioners Punish 'Twackle Dummies'?

Abstract
Daniel J. Friedman writes an article discussing the rise and popularity in social media use by professional athletes. He then discusses some of the new problems that have arisen due to social media misuse and the power of the Commissioner to restrict and punish the players for misuse. The article culminates with a case study hypothetical related to content based social media misuse and whether the Commissioners of professional sports league can punish a player for the content of their social media messages.

Keywords
sports, social media, athletes

Cover Page Footnote
Daniel J. Friedman is a 2011 graduate of Marquette University Law School, where besides earning his Juris Doctorate, he obtained a sports law certificate from the National Sports Law Institute. Currently, he is a baseball agent and advisor with Riehl Sports Management LLC and also volunteers as an Employments Rights Attorney with Beit Tzedek Legal Services in Los Angeles, California. In his free time, he writes and edits the legal blog "Lockout Lowdown", a blog dedicated to employment and labor law issues in professional sports and the entertainment industries. You can follow him on Twitter @Lockout_Lowdown.

This article is available in Pace I.P., Sports & Entertainment Law Forum: http://digitalcommons.pace.edu/pipself/vol2/iss1/3

Social Media In Sports: Can Professional Sports League Commissioners Punish 'Twackle Dummies'?

An Analysis of Professional Sports Leagues Restrictions on Athletes' Use of Social Media

Daniel J. Friedman[1]

I. Introduction

> 'The biggest thing I don't like about New York are the foreigners. I'm not a very big fan of foreigners. You can walk an entire block in Times Square and not hear anybody speaking English. Asians and Koreans and Vietnamese and Indians and Russians and Spanish people and everything up there. How the hell did they get in this country?'[2]
>
> -John Rocker, Atlanta Braves Pitcher

The above quote is a remark made by John Rocker (Rocker), a former closer for the Atlanta Braves, to a *Sports Illustrated* reporter about his distaste for New York Mets fans and New York City.[3] Major League Baseball (MLB) Commissioner Bud Selig punished Rocker for his remarks to the reporter.[4] Although, most professional athletes are less likely to have the same lapse of judgment that Rocker had while talking to a reporter, an athlete is also less likely to censor himself when posting offensive remarks via social media.[5] An example of this lapse of judgment occurred during the NFL Lockout when Pittsburgh Steelers running back, Rashard

---

[1] Daniel J. Friedman is a 2011 graduate of Marquette University Law School, where besides earning his Juris Doctorate, he obtained a sports law certificate from the National Sports Law Institute. Currently, he is a baseball agent and advisor with Riehl Sports Management LLC and also volunteers as an Employments Rights Attorney with Beit Tzedek Legal Services in Los Angeles, California. In his free time, he writes and edits the legal blog "Lockout Lowdown", a blog dedicated to employment and labor law issues in professional sports and the entertainment industries.

[2] Jeff Pearlman, *At Full Blast*, SPORTS ILLUSTRATED (Dec. 23, 1999), http://sportsillustrated.cnn.com/features/cover/news/1999/12/22/rocker/.

[3] *Id*.

[4] Roger I. Abrams, *Off His Rocker: Sports Discipline And Labor Arbitration*, 11 MARQ. SPORTS L. REV. 167, 173, (2001).

[5] Associated Press, *Teams Institute Messaging Restrictions*, ESPN NFL (Aug. 5, 2009), http://sports.espn.go.com/nfl/news/story?id=4379573.

Mendenhall, made outlandish comments shortly after the death of Osama Bin Ladin had been announced.[6] In commenting on 9/11, Mendenhall tweeted "[w]e'll never know what really happened, I Just have a hard time believing a plane could take down a skyscraper demolition style."[7] He further expressed sympathy for Bin Ladin by tweeting: "What kind of person celebrates death? It's amazing how people can HATE a man they never heard speak."[8] Although Mendenhall was not punished for the content of his Tweets, it is possible that a professional athlete's team or the league commissioner may enforce discipline upon an athlete for similar conduct in the future.

This article will address the potential legal issues that could arise due to controlling a professional athlete's access to social media and disciplining an athlete for distributing offensive content via social media. In one instance, the National Football League's (NFL) San Diego Chargers fined cornerback Antonio Cromartie $2,500 for using Twitter as a soapbox to complain about the food he was being served during training camp.[9] Even though Cromartie did not appeal the punishment, it is possible that future players may attempt to challenge social-media-related disciplining.

Part II of this paper will discuss the rise and popularity of social media, including a description of "Twitter" and "Facebook" and the ways in which professional sports leagues and athletes have adopted social media to enhance and market their brands online. Part III will discuss the labor law framework that Professional Sports Leagues Commissioners need to be

---

[6] *See* Mike Florio, *Rashard Mendenhall raises eyebrows with bin Laden tweets*, PFT NBC SPORTS (May 2, 2011), http://profootballtalk.nbcsports.com/2011/05/02/rashard-mendenhall-raises-eyebrows-with-bin-laden-tweets/.
[7] *Id*.
[8] *Id*.
[9] *Id*. *See also* Greg Rosenthal, *Chargers Fine Cromartie for Twitter Complaint*, PFT NBC SPORTS (Aug. 4, 2009), http://profootballtalk.nbcsports.com/2009/08/04/source-chargers-fine-cromartie-for-twitter-complaint/.

aware of before implementing social media restrictions on professional athletes. Due to the fact that commissioners do not have absolute power, part IV will discuss whether or not the social media restrictions that commissioners currently have put in place are legal. Finally, part V will include a legal analysis of whether a league commissioner is able to discipline a player for the content of a Tweet made off-duty outside the playing field beyond the scope of employment.

II. The Rise of Social Media

A recent survey showed that around 73% of Americans regularly use online social media tools such as Facebook and Twitter.[10] Before discussing why social media has become popular, it is a good idea to elaborate on the differences between Twitter and Facebook. Next, it is necessary to discuss the role social media has played in professional sports leagues' marketing plans and increased ability to connect with fans, but yet, there are negative aspects of this direct connection with fans that professional sports leagues are only now beginning to address.

A. The Differences Between Twitter and Facebook

Twitter is a real-time internet information network that connects people and allows them to share information.[11] The mechanics of Twitter allow users to publish Tweets—140-character messages—from a computer or mobile device.[12] As a social network, Twitter revolves around the principle of "followers", which is when a user chooses to follow a fellow Twitter account, and that account's Tweets appear on the follower's main twitter page.[13] The individuals or entities that a user decides to follow will determine their unique mix of Tweets of information

---

[10] Irwin A Kishner & Brooke E. Crescenti, *The Rise Of Social Media: What Professional Teams and Clubs Should Consider*, 27 WTR ENT. & SPORTS L. 24 (Winter, 2010) [hereinafter Kishner & Crescenti].
[11] Twitter, *About Twittter*, TWITTER, http://twitter.com/about (last visited Apr. 30, 2011) [hereinafter Twitter].
[12] Steven Johnson, *How Twitter Will Change the Way We Live*, TIME (June 5, 2009), http://www.time.com/time/business/article/0,8599,1902604,00.html [hereinafter Johnson].
[13] *Id*.

relaying breakfast-cereal updates, interesting news links, music recommendations, professional advice, etc..[14] Some celebrity Tweeters, including many professional athletes, have over one-million followers, effectively giving those users broadcast-size audiences for their Tweets, which also assists them in branding themselves.[15] Twitter claims to have over 175 million registered users and generates over ninety-five million tweets per day.[16] The average Twitter profile seems to follow somewhere in the dozens of other twitter users, usually consisting of a hodgepodge of friends, colleagues and favorite celebrities.[17] This mix may create a unique media experience that is strangely intimate but at the same time celebrity-obsessed.[18]

While Twitter's purpose is mostly for micro-blogging, Facebook has created a social network that connects people via the Internet through creating personal social networks. Facebook's mission is to give people the power to share and make the world a more open and connected place.[19] Every day, millions of people use Facebook to catch up with each other, upload photos, share websites and learn more about their friends, family members and new people they meet.[20] Facebook also allows users to explore and connect with local businesses as well as national corporations.[21]

B. Social Media in a Pro Sports Context

Social media has a large following partially due to what psychologists call "ambient

---

[14] *Id*.
[15] *Id*.
[16] Twitter, *supra* note 10.
[17] *Id*.
[18] *See id*.
[19] Facebook, *Facebook Basic Information*, FACEBOOK, http://www.Facebook.com/Facebook?sk=info, (last visited Apr. 30, 2011).
[20] *Id*.
[21] *See, e.g.*, Jon Fougner, *Exploring Local Businesses On Facebook*, BLOG FACEBOOK (Feb. 26, 2010), http://blog.Facebook.com/blog.php?post=326982572130; Sheryl Sandberg, *The Role of Advertising On Facebook*, FACEBOOK (July 6, 2010), http://blog.Facebook.com/blog.php?post=403570307130.

awareness," where people feel connected to each other without having to pick up the phone and ask friends how they are doing.[22] Since such a large number of people are using social media, marketers and merchandisers have upped their online presence and moved advertising resources to the internet while turning away from traditional advertising such as Super Bowl commercials.[23] Pepsi decided to scrap its Super Bowl sponsorship in order to focus its energy and resources on creating a two-way dialogue with consumers[24] The creation of a two-way dialogue has greatly impacted and benefited the way professional sports leagues and sponsors incorporate social media into their marketing strategies.[25] Some have predicted that "we will be living in a world in which the most effective marketing messages will be the ones conveyed through each consumer's network of connections, or social graph, rather than traditional media."[26]

Teams have started utilizing Twitter's and Facebook's social graph as a way to increase tickets sales.[27] Instead of trying to sell tickets to consumers that teams think are fans, Facebook and Twitter enable sports fans to come to the teams and either "follow" or "like" them. These fans then gain up-to-the-minute information about the team or special promotions exclusively available to Facebook and Twitter subscribers.[28] Not only does this allow the teams to know exactly who comprises their target audience, but it also sheds light onto their fans' interests.

---

[22] Johnson, *supra* note 11.
[23] Associated Press, *Pepsi Turns Ad Focus Online*, ESPN (Dec. 17, 2009), http://sports.espn.go.com/nfl/news/story?id=4751415.
[24] Kishner & Crescenti, *supra* note 9, at 25.
[25] Sean Gregory, *Twitter Craze Is Rapidly Changing The Face Of Sports*, SI (June 5, 2009) http://sportsillustrated.cnn.com/2009/writers/the_bonus/06/05/twitter.sports/index.html [hereinafter Gregory].
[26] Pat Coyle, *Team active in social media build a strategic advantage*, SPORTS BUSINESS JOURNAL DAILY (Jan 4, 2010), http://www.sportsbusinessdaily.com/ (follow "Search" hyperlink; then follow "Pat Coyle, Team active in social media build a strategic advantage").
[27] *Id*.
[28] *Id*.

Furthermore, social media can build sports franchises' brand equity.[29] Social media allows fans of a team to connect and interact with one another.[30] By assisting fans in connecting to one another, a team can enhance their fans' online experience, which may cause them to feel more connected and loyal to the team.[31] Many psychologists believe that "[f]ans are more likely to stay loyal to the team if their friends are loyal to the team."[32] For sports fans, social media allows them to feel a closer bond with the team and the teams' athletes.[33] One of the reasons why sports are so attractive to people is because it allows fans to '"bask in reflected glory' . . . [where fans feel that when they] associate with a winner, [they feel like] a winner."[34]

Many teams and leagues are connecting with their fans through offering ticket deals to their Facebook webpage fans and Twitter followers.[35] MLB's San Francisco Giants sponsored a "Tweet Up" ticket special that included inexpensively priced tickets and a commemorative t-shirt.[36] Besides receiving the goodies, Giants fans were also able to participate in a Tweet panel with Twitter President Biz Stone and Giants Pitcher Jeremy Affeldt.[37] MLB also teamed up with Facebook during the 2010 playoffs for a "TagOramic", a promotion in which fans who attended a playoff game were subsequently able to zoom in on a panorama Facebook picture of themselves at the game and "tag" themselves or their friends location within the picture and

---

[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] Gregory, *supra* note 24.
[34] *Id.*
[35] Christopher Heine, *Financially Pinched MLB Teams Turn To Social Media To Sell Tickets*, CLICKZ.COM (June 11, 2010), http://www.clickz.com/clickz/news/1721771/financially-pinched-mlb-teams-turn-social-media-sell-tickets.
[36] *Id.*
[37] *Id.*

share it digitally.[38]

Professional athletes enjoy social media because it gives them the opportunity for "no-contact contact" with their fans.[39] Social media allows athletes to speak on their own terms, and they do not have to communicate through reporters who may portray or spin their thoughts.[40] Steven Jackson, all-star running-back for the NFL's St. Louis Rams, said of Twitter: "It's going to be useful during the season, because after the game, I'll be able to say my piece instead of just allowing different media outlets to portray me how they want to portray me."[41] Athletes like Steven Jackson are now able to directly communicate their pre and post-game thoughts and reactions to their fans.[42] Twitter also allows for two-way talk where athletes are able to relate to fans, share tips, and give and receive personalized advice.[43] For example, while playing with the Milwaukee Bucks, National Basketball Association (NBA) player Charlie Villaneuva solicited restaurant advice via Twitter on where to eat in Indianapolis."[44] However, Villanueva's use of Twitter is exactly the type of use that upsets teams and their governing bodies, as Villanueva solicited the advice from the locker room during halftime of a NBA regular season game.[45]

III. Social Media Restrictions in Sports Workplaces

Thirty to fifty percent of private work organizations ban social media at work by utilizing

[38] *See* WorldSeries.com, *TagOramic*, MLB.COM, http://mlb.mlb.com/mlb/ps/y2010/gigapan/index.jsp (last visited Apr. 29, 2011).
[39] *Id*.
[40] *Id*.
[41] *Id*.
[42] *Id*.
[43] *See* WorldSeries.com, *TagOramic*, MLB.COM, http://mlb.mlb.com/mlb/ps/y2010/gigapan/index.jsp (last visited Apr. 29, 2011).
[44] *Id*.
[45] *Id*.

computer blocks of sites or they have written policies in place that ban their use.[46] However, even with the blocks and policies in place, Facebook was detected on ninety-two percent of the supposedly protected networks surveyed in one study.[47] Like non-sports enterprise bosses, professional sports league commissioners and teams have a concern that their employee—player—will use social media on company time and be distracted from his job of winning games.

A. Commissioners' Social Media Rule-Making Authority

Professional sports league commissioners possess a great deal of rule-making authority under the league collective bargaining agreement (CBA), constitution and bylaws, which will be discussed more thoroughly *infra*.[48] This power is so extensive that even when the Commissioner is not given the explicit authority to regulate certain conduct or actions under the powers delineated in the CBA and other league documents, the commissioner may implement a rule as long as it does not affect the players' "wages, hours, and other terms and condition of employment."[49]

Because professional athletes have unionized to collectively bargain with their respective leagues, the National Labor Relations Act (NLRA) regulates the players' joint bargaining conduct.[50] The NLRA governs employer-employee relations, and all collective employer-employee bargaining relations.[51] This legal bargaining relationship is based on the premise that in order "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to . . . confer in good faith with respect to wages, hours, and

---

[46] Dan Tynan, *How To Tame The Social Network At Work*, INFOWORLD DAILY NEWS, Oct. 18, 2010.
[47] *Id*.
[48] Brent D. Showalter, *Technical Foul: David Stern's Excessive Use Of Rule-Making Authority*, 18 MARQ. SPORTS L. REV. 205, 207 (2007) [hereinafter Showalter].
[49] *Id*. at 217, *quoting* National Labor Relations Act, 29 U.S.C. § 158(d) (1994).
[50] *Id*.
[51] *Id*. at 218.

other terms and conditions of employment."[52] Therefore, wages, hours and other terms and conditions of employment are mandatory subjects of collective bargaining agreements, and they must be negotiated at the insistence of either the employee union or employer.[53] Issues and rules that do not pertain to "wages, hours, and other terms and conditions of employment" are permissive subjects of collective bargaining. These permissive subjects do not necessarily have to be collectively bargained, and the employer can unilaterally implement the rule or restriction.[54] However, if the employer unilaterally implements a rule or restriction that has some bearing on "wages, hours and other terms and conditions of employment," the employer is in jeopardy of committing an unfair labor practice.[55]

It can be difficult to determine whether a commissioner has the authority to unilaterally implement a rule due to the fact that a lot of restrictions or rules may relate to "other terms and conditions of employment within the bargaining unit," which are mandatory subjects of collective bargaining that are not clearly defined within the NLRA.[56] Additional complications may arise because any "issue arising outside the bargaining unit may be a mandatory subject . . . if it 'vitally affects' the terms and conditions of employment within the bargaining unit."[57] However, if the implementation of a rule or restriction has a negative effect on employees, it would not be considered a mandatory subject of collective bargaining if the commissioner can prove that a challenged rule is legitimate because it relates to the employer's ability to control

[52] 29. U.S.C.A § 158(d) (West 2011).
[53] *Id*.
[54] Showalter, *supra* note 47, at 218.
[55] *See* N. L. R. B. v. Katz, 369 U.S. 736, 743, 82 S. Ct. 1107, 1114, 8 L. Ed. 2d 230 (1962).
[56] 29. U.S.C.A § 158(d) (West 2011).
[57] Pall Corp. v. N.L.R.B, 275 F.3d 116, 119-20 (D.C. Cir. 2002) (*quoting* Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Class Co., 404 U.S. 157, 178-79 (1971)).

"the scope or direction of an enterprise."[58]

Even when a union does not challenge the unilateral implementation of a rule, such a waiver to the specific rule does not bar the Union from challenging the rule or similar rules in the future.[59] The Court stated in *N. L. R. B. v. Miller Brewing Co*. that "each time [a] bargainable incident occurs—each time new rules are issued—[the] Union has the election of requesting negotiations or not. Rejecting an opportunity to negotiate does not result in a permanent 'close-out' and [waiver of the issue]."[60]

It is difficult to hypothesize as to whether certain social media restrictions relate to other terms and conditions of employment. And even if they do, there are definitely some instances in which a League should be able to control social media content and conduct when there is a good chance such content and conduct could impinge on the scope and direction of an enterprise (e.g. when a player is concerned with Tweeting during a league game).

B. History of Professional Sports League Commissioner's Rule Making-Authority & Current Commissioners' Authority Under League CBAs, Constitutions and Bylaws

Commissioners of professional sports leagues have been granted expansive power to govern professional sports leagues ever since Judge Kenesaw Mountain Landis was elected as the first sports commissioner when he became MLB's Commissioner in 1921. Landis was specifically hired to deal with the pernicious evils in baseball, brought to light after the infamous Chicago Black Sox Scandal.[61] Judge Landis only agreed to accept the position if the club

[58] First Nat. Maint. Corp. v. N.L.R.B, 452 U.S. 666, 673, 101 S. Ct. 2573, 2576, 69 L. Ed. 2d 318 (1981).
[59] N. L. R. B. v. Miller Brewing Co., 408 F.2d 12, 15 (9th Cir. 1969).
[60] *Id*.
[61] Showalter, *supra* note 47, at 206.

owners would give him the power[62] to "`investigate, either upon complaint or upon his own initiative, an act, transition or practice, charged, alleged or suspected to be detrimental to the best interest of the national game of baseball, [and if appropriate, to determine, and take,] any remedial, preventive or punitive action."[63] Judge Landis's power was practically limitless as his agreement assured that his "decisions [were] final and could not be challenged by the clubs in court."[64]

Today, MLB's commissioner and the other professional sports leagues' commissioners enjoy comparable authority to the powers granted to Judge Landis.[65] A commissioner receives his authority to make decisions through the league's CBA, constitution and bylaws.[66] However, these league documents can also limit a commissioner's power[67] and a "commissioner's authority to institute new player conduct rules is limited under a league's CBA, and he cannot unilaterally expand his power beyond that given to him."[68] It is therefore, important to understand what limitations a commissioner has in order to decipher if a commissioner has the ability to unilaterally discipline and restrict a player for social media related conduct and content. Out of all the professional sports leagues, the NBA commissioner has the broadest power to institute new rules.[69] Specifically, The NBA commissioner does not have to obtain the National Basketball Player Association's (NBAPA) consent to enact new rules.[70] The NBA Commissioner

---

[62] *See id*.
[63] Major League Baseball, *The Commissionership: A Historical Perspective*, MLB.COM, http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com (last visited Mar. 29, 2011).
[64] *Id*.
[65] Showalter, *supra* note 47, at 207.
[66] *Id*. at 206.
[67] MATTHEW J. MITTEN, ET. AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, 614 (2009).
[68] Showalter, *supra* note 47, at 214.
[69] *Id*. at 212.
[70] *Id*.

is also "entitled to promulgate and enforce reasonable rules governing the conduct of players on the playing court,," and must only *notify* the NBAPA prior to enacting the conduct rule.[71]

> 'Conduct on the playing court' . . . mean[s] conduct in any area within an arena (including, but not limited to, locker rooms, vomitories, loading docks, and other back-of-house and underground areas, including those used by television production . . .) at, during or connection with an NBA Exhibition, All-Star, Regular Season, or Play-off game.[72]

The NBA CBA further defines,

> conduct 'at' and/or 'in connection with' an NBA game . . . [as] conduct engaged in by a player within an arena from the time the player arrives at the arena for an NBA game until the time the player has left the premises of the arena following the conclusion of such game.[73]

However, "[c]onduct engaged in by a player outside of an arena . . . shall not constitute 'conduct on the playing court.'"[74] Thus, the NBA CBA restricts and limits the power of the Commissioner from encroaching or restricting the players' conduct when they are away from the playing court. Even so, the NBA Commissioner has broad authority to "promulgate and enforce reasonable rules governing the conduct that are reasonably related to 'preservation of the integrity of, or the maintenance of public confidence in the game."[75] The NBA Constitution permits the commissioner to discipline a player "for any statement he makes or endorses which is prejudicial or detrimental to the best interests of basketball and to fine the player for conduct that is detrimental to the NBA," which includes conduct that does not conform "to standards of

---

[71] *See* NATIONAL BASKETBALL ASSOCIATION, NBA COLLECTIVE BARGAINING AGREEMENT, art. VI, § 12 (page number??) (2005) (hereinafter NBA COLLECTIVE BARGAINING AGREEMENT).
[72] *Id*. at Art. XXXI, § 8(c).
[73] *Id*.
[74] *Id*.
[75] *Id*.

morality and fair play;" therefore, likely governing an athlete's Tweet containing offensive content.[76]

1. Limitations on the MLB Commissioner's Rule-Making Authority:

Even though the MLB Commissioner generally has the ability to act in the best interest of baseball, MLB's CBA limits the Commissioner's power to change or modify playing rules, major league rules, and any other rules or regulation.[77] When the commissioner proposes a change to a playing or scoring rule, MLB must give notice of the proposed rule change to the Major League Baseball Players Association (MLBPA).[78] If the proposed rule change "significantly affects terms and condition of employment," the MLB and MLBPA must negotiate over the proposed rule change, and if no agreement is reached, the rule cannot "be put into effect until the completion of the next complete succeeding season . . . following the date the change was proposed."[79] The "Terms and conditions of employment" clause includes rule changes that would affect a Player benefit or changed rule that would "impose an obligation upon the Players which had not previously existed."[80] Because a social media policy would likely affect a player's terms and conditions of employment, any such imposition would likely need to be negotiated by the Commissioner and MLBPA. That is---unless the Commissioner can find a way to punish the behavior as part of his other powers as will be discussed in part V.

2. Limitations on NFL Commissioner's Rule-making Authority:

---

[76] *See generally* Michael R. Wilson, *Why So Stern?: The Growing Power of the NBA Commissioner*, 7 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 45 (2010) (*quoting* NATIONAL BASKETBALL ASSOCIATION, NBA CONSTITUTION, art. XXXV(d)-(e) (1989) Author explains that the NBA Commissioner's power over players conduct has continually expanded to regulate conduct away from the playing court).
[77] *See* MAJOR LEAGUE BASEBALL, 2007-2011 BASIC AGREEMENT, art. XVIII (2006).
[78] *Id*.
[79] *Id*.
[80] *Id*.

The NFL CBA only governs the imposition of playing rule changes.[81] The NFL must give the National Football League Players Association (NFLPA) notice of all proposed rule changes.[82] If the NFLPA believes that the proposed rule change will negatively affect a player's safety and health, they can call a meeting to discuss the rule change; and if they do not reach consensus, then they can "request an advisory decision by one of the arbitrators."[83] However, the arbitrator's decision is not binding and the NFL can still implement the rule.[84]

3. Limitations on NHL Commissioner's Rule-making Authority:

The NHL's Commissioner's rule-making authority is the most restricted authority out of all of the professional sports leagues' commissioners.[85] The NHL's CBA states that any rule amending or modifying any league rule or playing rule cannot be unilaterally implemented by the commissioner without the National Hockey League Player Association's consent if the rule "affect[s] terms or conditions of employment of any [p]layer."[86] This rule-making limitation essentially means that the NHL commissioner has no personnel conduct "rule making authority because, under the NLRA, the league must collectively bargain with the NHLPA over 'wages, hours, and other terms and conditions of employment.'"[87]

As shown above, in each league, the commissioner has broad authority to unilaterally implement rules and discipline certain behavior. However, the commissioner's authority is

---

[81] *See* Nat'l Football League, NFL COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MGMT. COUNCIL AND THE NFL PLAYERS ASS'N, art. XIII, § 1(c), APPENDIX C, ¶ 15, (2006) (hereinafter NFL CBA); *see also* NATIONAL FOOTBALL LEAGUE, CONSTITUTION AND BYLAWS OF THE NFL, art. 8.13(A) (rev. 2006).
[82] *Id*. at art. XIII § 1(c).
[83] *Id*.
[84] *Id*.
[85] Showalter, *supra* note 47, at 214.
[86] Nat'l Hockey League, COLLECTIVE BARGAINING AGREEMENT BETWEEN NHL AND NHL PLAYERS' ASSOCIATION, art. 30.1-30.3 (2005).
[87] Showalter, *supra* note 47, at 213 (citing Nat'l Labor Relations Act, 29 U.S.C. § 158(d) (1994)).

neither absolute, nor limitless. Each players' union, have taken steps through the collective bargaining process to limit the commissioner's unilateral rule-making authority, especially when it comes to regulating conduct away from the game during their in season free time and during the off-season.

IV. Commissioner Authority to Institute Social Media Restrictions under the NLRA, League CBAs, Constitutions and Bylaws

The commissioner has the authority to institute social media restrictions only if he is given the authority by the league's CBA and other governing documents, or if the rule is a permissive subject of collective bargaining.[88] The current social media restrictions likely are not mandatory subjects of collective bargaining because the restrictions have to do with how a player conducts himself during games, and thus, affect the scope and direction of the enterprise. These restrictions clarify existing rules that govern a player's behavior and conduct during the scope of their employment as an athlete, and therefore, are within the commissioner's realm of disciplinary authority. Even if the restrictions are not considered to be clarifications of existing rules, a rule that limit's a player's access to social media before, during and immediately after games, likely do not affect the conditions of a player's employment because the restrictions do not have any affect on a player performing his job functions as a competitor on the field.[89]

However, most of the commissioners have given the individual teams broad discretion to implement even stricter social media guidelines that further restrict appropriate content and access.[90] The individual teams' power to impose player conduct restrictions must conform to the

[88] *Id*. at 214.
[89] *Id*. at 221.
[90] Associated Press, *Teams Institute Messaging Restrictions*, ESPN (Aug. 5, 2009), http://sports.espn.go.com/nfl/news/story?id=4379573.

collective bargaining agreement and other league documents.[91] For example, if a team imposes a restriction that curtails a player's social media use during the offseason or away from team activities, the rule would probably be a mandatory subject of collective bargaining.[92] A rule that regulates a player's life must be collectively bargained because it effects their terms and condition of employment when the employee is not performing an essential job function.[93]

A. Do The Current Professional Sports Leagues' Social Media Policies Constitute an Unfair Labor Practice?

To deal with social media deficiencies, many of the professional sports leagues have developed social media guidelines and rules.[94] Most of the social media rules were promulgated by unilateral actions made under the respective commissioners' rule-making authority related to on-field conduct.

1. NBA's Social Media Policy:

The NBA announced guidelines that the use of cell phones, PDAs, and other electronic communicating devices – and, thus, any access to social media sites – by players, coaches, and team personnel involved in the games is prohibited during games.[95] It was reported that the

---

[91] *See* Michael R. Wilson, *Why So Stern?: The Growing Power of the NBA Commissioner*, 7 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 45 (2010).
[92] Showalter, *supra* note 47, at 221.
[93] *Id*.
[94] *See generally* Kishner & Crescenti, *supra* note 9; Marc Stein, *NBA social media guidelines out*, ESPN (Sept. 30, 2009), http://sports.espn.go.com/nba/news/story?id=4520907.; Associated Press, *Roddick calls U.S. Open Twitter Warning 'Lame'*, NBC SPORTS MSNBC (Aug. 28, 2009), http://nbcsports.msnbc.com/id/32603366/ns/sports-tennis/; Will Leitch, *Why a Reported MLB Twitter Crackdown Matters*, NY MAG (Apr. 28,2010), http://nymag.com/daily/sports/2010/04/why_a_reported_mlbcom_twitter.html.; Associated Press, *Teams Institute Messaging Restrictions*, ESPN (Aug. 5, 2009), http://sports.espn.go.com/nfl/news/story?id=4379573.
[95] Associated Press, *NBA Issues Policy On Twitter Use Before, After Games*, NBA (Sept. 30, 2009),

NBA specifically defined '"during games' as the period of time beginning [forty-five] minutes before the opening tip and could resume only 'after the postgame locker room is open to the media and coaches and players have first fulfilled their obligation to be available to media attending the game.'"[96] The guidelines also prevent players and personnel from using social media during halftime, but players are able to access social media during the pregame media sessions that occur ninety minutes before tipoff.[97]

However, the NBA guidelines do allow for one exception; individual teams are "'free to adopt their own rules relating to use of electronic communication devices and social media sites and services during practices, meetings and other team events.'"[98] Already, the Toronto Raptors, Milwaukee Bucks and Los Angeles Clippers have enacted stricter policies that ban social media use by forbidding social media use during any time regarded to be "team time."[99] Also, anyone who posts via social networking during this forbidden time or posts matters that "go over the line" are subject to a team fine.[100]

The NBA's unilateral imposition of social media conduct would likely not be considered an unfair labor practice. The NBA commissioner and teams are legally allowed to implement the social media time restrictions because they have a legitimate concern about how a player conducts his behavior while on the clock. Under the current NBA CBA and Constitution, the commissioner is granted very broad authority to regulate conduct that affects the scope and

---

http://www.nba.com/2009/news/09/30/nba.twitter.rules.ap/index.html; Marc Stein, *NBA social media guidelines out*, ESPN (Sept. 30, 2009), http://sports.espn.go.com/nba/news/story?id=4520907.

[96] Marc Stein, *NBA social media guidelines out*, ESPN (Sept. 30, 2009), http://sports.espn.go.com/nba/news/story?id=4520907.

[97] *Id*.

[98] *Id*.

[99] *Id*.

[100] *Id*.

direction of the NBA as an enterprise.[101] The NBA Constitution also grants the Commissioner the ability to punish players for prejudicial Tweets, even if they are made on the player's own time because the Constitution allows the commissioner to impose a fine "for any statement he makes or endorses which is prejudicial or detrimental to the best interests of basketball and to fine the player for conduct that is detrimental to the NBA," which also likely would encompass any Twitter content that does not conform morality standards.[102]

2. Major League Baseball's Social Media Policy:

MLB, through its digital content subsidiary Major League Baseball Advanced Media, runs Facebook and Twitter accounts for all its teams.[103] MLB teams also requires players to work with media specialists prior to the season to learn how social media affects their team's reputation.[104] However, Ozzie Guillen, manager of the Chicago White Sox may need a refresher course. After being ejected in the first inning, Guillen, during the bottom half of the inning, used Twitter to show displeasure with home plate umpire, Todd Tichenor, who ejected him.[105] Guillen's initial Tweet stated: "This one is going to cost me a lot of money this is patetic [sic]"; followed by: "Today a tough guy [sic] show up yankee stadium" referring to Tichenor.[106] MLB rules state that "all social media messages must stop 30 minutes prior to the first pitch, and they can resume after the game at the individual club's discretion."[107] Even though, MLB does not

---

[101] *See generally* NATIONAL BASKETBALL ASSOCIATION, NBA CONSTITUTION, art. XXXV; NBA COLLECTIVE BARGAINING AGREEMENT, art. VI, § 12.
[102] NATIONAL BASKETBALL ASSOCIATION, NBA CONSTITUTION, art. XXXV.
[103] Amandeep Judge, *The Ever-Changing World of Sports PR*, PLATFORM MAGAZINE (Apr. 30, 2011), http://www.platformmagazine.com/article.cfm?alias=The-EverChanging-World-of-Sports-PR.
[104] *Id*.
[105] Doug Padilla, *MLB Reviewing Ozzie Guillens Tweets*, ESPN CHICAGO, http://sports.espn.go.com/chicago/story?id=6443737 (last visited Apr. 28, 2011),
[106] *Id*.
[107] ESPNChicago.com, *Ozzie Guillen Suspended Two Games*, ESPN CHICAGO,

have a standard discipline policy for a player or coach breaking the rule, MLB punished Guillen with a two-game suspension and $20,000 fine.[108] Guillen is the first person to be disciplined by the Commissioner's office for a tweet-related offense.[109] It is unclear whether Guillen was punished for his Tweet's content of calling out the umpire, his conduct of Tweeting during the game, or a combination of both actions. Ozzie said he would accept the punishment, but he would still Tweet, just not during baseball games.[110]

MLB has also been accused of restricting what type of content can be transmitted via social media.[111] MLB's social media policy prevents all employees and independent contractors of the thirty MLB clubs, from using social media to (1) display content that could be construed to be an official communication from MLB; (2) displaying any disparaging or false content or "content that adversely affects the business interests or reputation of any MLB Entity"; (3) use the name or nickname of any MLB Entity in a social media URL, page title, username or I.D.; (4) "Display[] any [c]ontent containing an MLB Entity's logo, mark, or written, photographic, video, or audio property"; (5) Display[] any confidential or proprietary information, including financial, medical or strategic information; and (6) "Link to the website of any MLB Entity on any Social Media outlet."[112] It is important to note that the policy explicitly states that the social media policy "does not apply to active players represented by the Major League Players

---

http://sports.espn.go.com/chicago/mlb/news/story?id=6450727 (last visited Apr. 29, 2011).

[108] *Id*.

[109] *Id*.

[110] *Id*.

[111] A controversy arose as to whether MLB put into place a restriction on the type of content that their MLB.com reporters were able to post on Twitter. Allegedly, MLB told its MLB.com writers to cease tweeting about non-baseball related activities. However, MLB denied this report; yet, no writers have tweeted about their personal lives. *See* Aaron Gleeman, *MLB Denies Twitter Crackdown, But Facts Say Otherwise*, NBC SPORTS (Apr. 28, 2010), http://hardballtalk.nbcsports.com/2010/04/28/mlb-denies-twitter-crackdown-but-facts-say-otherwise/.

[112] *Major League Baseball Social Medica Policy*, CANT STOP THE BLEEDING, http://www.cantstopthebleeding.com/img/MLB%20Social%20Media%20Policy.pdf (last visited Mar. 25, 2012).

Association (*i.e.*, 40-man roster players)."[113] This disclaimer likely indicates MLB's belief that any unilateral implementation of social media content-based restrictions upon the players is not allowed under the CBA and they would need the MLBPA's consent to be able to impose a content-based restriction. Ozzie faced punishment due to the fact that he is a manager, and therefore, is not represented by the MLBPA.

3. NFL Social Media Policy:

The NFL encourages its players to Tweet and about 300 do.[114] NFL Commissioner Roger Goodell even Tweeted from the April 2009 draft.[115] However, similar to the NBA, the NFL promulgated a social media policy that restricts players, coaches and football operations personnel from using social media after ninety minutes before kickoff, and after the game following obligations to traditional media interviews.[116] Instead of regulating most social media use, the NFL allows for its individual teams to institute its own restrictions.[117] For example, during mini camp, the Miami Dolphins announced that all social media use by anyone was banned at public workouts where neither media nor spectators are even allowed to use social media while they are on campus.[118] Coaches are paranoid that secret information about game plays could be transmitted via handheld devices.[119] Others, such as Denver Broncos Coach Josh

---

[113] *Id*.
[114] Associated Press, *Teams Institute Messaging Restrictions*, ESPN (Aug. 5, 2009), http://sports.espn.go.com/nfl/news/story?id=4379573 [hereinafter *Teams Institute Messaging Restrictions*].
[115] Associated Press, *League Announces Policy On Social Media For Before And After Games*, NFL (Aug. 31, 2009), http://www.nfl.com/news/story?id=09000d5d8124976d&template=without-video-with-comments&confirm=true.
[116] *Id*.
[117] *Teams Institute Messaging Restrictions*, *supra* note 113.
[118] *Id*.
[119] *Id*.

McDaniels, do not have social media policies.[120] Individual teams, like the St. Louis Rams had their media relation staff meet with players during training camp and tell them to keep sensitive information off Twitter and other social media.[121] Houston Texan Running Back must have not gotten the memo to keep sensitive information off Twitter.[122] Foster tweeted an image of an injured hamstring MRI with the caption "This is an MRI of my hamstring, The white stuff surrounding the muscle is known in the medical world as anti-awesomeness [sic]."[123] The NFL's Twitter policy did not cover Foster's actions.[124] Even though Foster meant for his Tweet to be humorous, Texans General Manager Rick Smith stated that disclosing medical information via social media was a violation of team policy, and that the Texans planned to handle the situation internally.[125]

Larry Johnson also must not have met with the Chiefs' media relation staff as illustrated by the fact the Kansas City Chiefs released him for Tweeting offensive content.[126] Although an argument can be made that the Chiefs rightfully released Johnson because of his declining football production, the more notable and likely reason is illustrated by the fact that shortly prior to his release, Johnson was suspended due to a series of inflammatory Tweets, where he Tweeted a homophobic slur, criticized his coach, and made fun of a fan for making less money than him.[127]

---

[120] *Id*.
[121] *See* Gregory, *supra* note 21.
[122] *Arian Foster posts MRI photo*, ESPN (Sept 1, 2011), http://espn.go.com/nfl/story/_/id/6913877/arian-foster-houston-texans-tweets-mri-photo-hamstring.
[123] *Id*.
[124] *Id*.
[125] *Id*.
[126] Judy Battista, *As Johnson's Suspension Ends, So Does His Time With The Chiefs*, NY TIMES (Nov. 9, 2009), http://www.nytimes.com/2009/11/10/sports/football/10chiefs.html.
[127] *Id*.

4. National Hockey League Twitter Policy:

The NHL has embraced social media to enhance fan experiences, evinced by the NHL's innovative Facebook fan-page that includes a custom "tag" for NHL content and includes viral ways NHL fans can interact with one another.[128] The NHL seems to be the only professional sports league to have a collectively bargained a social media policy. [129]

The new NHL social media policy governs both players and hockey operations staff.[130] For players, the policy includes a total "blackout period" on the use of social media during game days, which begins two hours prior to the dropping of the puck and stays in effect until the players have finished their post-game media obligations.[131] For hockey operations staff, the policy suggests a longer blackout period that goes into effect as early as 11:00 AM on game days.[132]

Moreover, the policy also makes clear that personnel and players will be held responsible for the content of their social media communications the same way they are held responsible for other forms of public communication and behavior.[133] Therefore, discipline is possible for any social media statements that have or are designed to have a prejudicial effect on the welfare of the NHL, the sport of Hockey, a member club, or are critical of officiating staff.[134] Lastly, the policy also includes some tips on the best way for players to interact with fans through social

---

[128] *See* Gregory, *supra* note 21.
[129] *NHL institutes new social media policy*, NHL (Sept. 15, 2011), http://www.nhl.com/ice/news.htm?id=588534#&navid=nhl-search.
[130] *Id*.
[131] *Id*.
[132] *Id*.
[133] *Id*.
[134] *Id*.

media.[135]

V. Can a Commissioner Discipline an Athlete for the Content of an Off-Season Tweet?

Besides the possibility that a player's use of social media might affect a player's attention to their job on the playing field, commissioners and teams are likely concerned that social media gives players the ability to speak their mind in an unfiltered, self-moderated way. People are quickly realizing that what they say via social media can have consequences that impact their professional lives negatively. For example, actor and comedian Gilbert Gottfried was fired from his job as the voice of the Aflac Insurance duck mascot after he made a series of distasteful Tweets that joked about the March, 2011 earthquake in Japan.[136] And even though Mendenhall was not punished by the NFL for his insensitive 9/11 conspiracy Tweets, he suffered economic pain as Champion Sports fired him as endorser of their brand.[137] Do the league commissioners have a right to take similar actions against players who make insensitive Tweets?

A. Examples of Sports League's & Team's Concern for Player's Social Media Content

Individual NFL teams are using social media in their draft vetting preparations.[138] NFL teams have set up fake Facebook profiles of attractive women that request the player add "her" to

---

[135] *Id*.
[136] TMZ Staff, *Gilbert Gottfried Fired by Aflac Over Japan Tweets*, TMZ.COM (Mar. 14, 2011), http://www.tmz.com/2011/03/14/gilbert-gottfried-fired-aflac-japan-earthquake-twitter-tweets/.
[137] David Whitley, *No, Rashard Mendenhall, your free-speech rights were not violated*, AOL FANHOUSE (Jul 20, 2011), http://aol.sportingnews.com/nfl/story/2011-07-20/no-rashard-mendenhall-your-free-speech-rights-were-not-violated.
[138] Charles Robinson, *Social Networking a Potential Trap for Prospects*, YAHOO! SPORTS (Apr. 7, 2011), http://sports.yahoo.com/nfl/news?slug=cr-socialnetowrking040709.

her "personal network".[139] The teams then goes through the players' profiles, pictures, archived comments, and dissect all of the information on potential draft picks, which helps aid in the background check and interview process during draft preparations.[140] The more questionable a player's social media content, the less likely that the player may get drafted by a specific team or at an early spot.[141]

Besides being mindful of what they post on their social networking profiles, professional athletes need to be careful when they speak their mind on social media. As discussed above, Antonio Cromatie, was fined $2,500 when he used Twitter to complain about training camp food.[142] Even more drastic, Michael Beasley while a member of the NBA's Miami Heat, was likely disciplined and forced to attend rehab after he Tweeted a picture of his new tattoo, which also happened to reveal a bag in his possession that appeared to contain marijuana.[143]

However, most discipline has been promulgated for a player's Twitter conduct, rather than content. Primarily, league commissioners have punished players for when they Tweet, not what they Tweet. Players such as the NFL's Chad Ochocinco, and the NBA's Amar'e Stoudamire and Brandon Jennings were disciplined for using social media during restricted game time periods; not for content specific reasons.[144] Besides Cromatie and Larry Johnson, few players have been disciplined for the content of their Tweets, and no commissioner has directly punished a player for Tweets that contained offensive content. Surprisingly, NFL players such

---

[139] *Id*.
[140] *Id*.
[141] *See id*.
[142] Associated Press, *Teams Institute Messaging Restrictions*, ESPN (Aug. 5, 2009), http://sports.espn.go.com/nfl/news/story?id=4379573.
[143] Hoops Karma, *NBA Players and Twitter: A Funny Relationship*, OPPOSING VIEWS (Nov. 16, 2010), http://www.opposingviews.com/i/nba-players-and-twitter-a-funny-relationship.
[144] Joe Kay, *Ochocinco tweets apology for in-game tweeting*, HUFFINGTON POST (Aug. 25, 2010), http://www.huffingtonpost.com/huff-wires/20100825/fbn-bengals-ochocinco/.

as Jacksonville Jaguars' Maurice Jones-Drew, and Arizona Cardinals' Darnell Dockett were not fined or reprimanded by NFL Commissioner Roger Goodell for critical tweets they made about Jay Cutler during the NFC Championship game.[145] One can imagine a league commissioner disciplining a player for the content of their Tweet, if for example, the content is similar to the racist and homophobic comments that John Rocker once made in a Sports Illustrated article.[146]

B. A Hypothetical Appeal of Content-Based Twitter Discipline

Do the professional sports league commissioners have the authority to hand down punishment for unsavory Tweets made by a player away while they are away from playing field during their own free time? Most likely, yes, due to the fact that an athletes' off-duty conduct could negatively affect their employer's business.[147] After making unsavory statements about New York and Mets fans, which offended nearly every minority group, MLB Commissioner Bud Selig disciplined Atlanta Braves pitcher John Rocker with a $20,000 fine; a thirty-day suspension; and mandatory participation in an in-season diversity-training program.[148] Even if Rocker had made the homophobic and racist comments via Twitter instead of to a news reporter, MLB Commissioner Selig's decision to discipline Rocker likely would have been upheld by an arbitrator because "Rocker's conduct: (1) violated his obligations under Paragraph 3(a) of the Uniform Player's Contract (UPC); (2) was contrary to the best interests of baseball and, thus, in violation of Major League Rule (MLR) 21(f); and, independently of those two provisions, (3)

---

[145] *See, e.g.*, Pat McManamon, *Jay Cutler Branded a Quitter by NFL Players on Twitter*, AOL NEWS (Jan. 23, 2011), http://www.aolnews.com/2011/01/23/jay-cutler-branded-a-gutless-quitter-by-fellow-players-on-twitte/.
[146] Jeff Pearlman, *At Full Blast*, Sports Illustrated (Dec. 23, 1999), http://sportsillustrated.cnn.com/features/cover/news/1999/12/22/rocker
[147] *Major League Baseball Players Assoc. v. Comm'r (John Rocker)*, 638 PLI/Pat 765 (Feb. 2001) (Manfred, Arb.).
[148] *Id*. at 770.

constituted "just cause" under traditional principles of arbitral jurisprudence."[149]

Paragraph 3 of the UPC states a player agrees to conform to the "high standard of personal conduct, fair play and good sportsmanship."[150] Although, the MLBPA would likely argue that Tweets are speech and speech does not constitute conduct, the commissioner would successfully assert that courts and arbitrators have previously upheld discipline for speech conduct.[151] In the real Rocker case, Commissioner Selig successfully argued that the UPC imposes non-playing obligations that continue even during the off-season, and even while the player was away from the playing field – "workplace".[152] Thus, what a player Tweets away from the "workplace" could violate his non-playing obligations imposed upon him via the UPC.

Lastly, Commissioner Selig could claim that he is able to punish a player for his speech under the auspices of his "best interest of baseball" powers that are binding onto players via a covenant in their UPC.[153] This power allows the commissioner to punish "other misconduct" not necessarily expressed, including Tweeting.[154] The other major professional sports leagues grant their respective commissioners similar "best interest powers."[155] In the Rocker hearing, the arbitrator reasoned by analyzing MLB's governing documents and the documents from other professional sports leagues, that the commissioner's "best interest" powers are broad, and speech generally is considered a form of "conduct".[156] He further reasoned that in the past when "parties intended to limit the penalty that may be imposed for speech-related conduct, they did so

---

[149] *Id*. at 779.
[150] *Id*.
[151] *Id*. at 780.
[152] *Id*.
[153] *Id*.
[154] *See id*.
[155] Showalter, *supra* note 45, at 207.
[156] 638 PLI/Pat, *supra* note 145, at 784.

expressly."[157] The arbitrator reasoned that the MLB CBA does not expressly differentiate between speech-related conduct and other types of conduct.[158]

Employers have widely been given the right to discipline an employee for inappropriate speech, particularly biased and bigoted speech.[159] Moreover, employers are also able to punish for "off-duty" conduct if the off-duty conduct has a sufficient nexus with the workplace.[160] In his opinion, Arbitrator Das wrote that although free speech as misconduct requires special consideration due to the "customary norms of free expression[,] . . . [a]n individual's First Amendment right to speak his . . . mind regardless of the offensive or hateful nature of the speech does not, under a just cause standard, necessarily preclude an employer from taking appropriate disciplinary action where such speech, *even if off-duty*, it has a negative impact on the employer's business."[161] He reasoned that even though Rocker's *Sports Illustrated* interview took place out of uniform during the off-season, Rocker knew he was being interviewed as a baseball player, known for his contributions as an Atlanta Braves player, and he should have known that whatever was published would be associated not only with him, but also reflect on the Atlanta Braves and MLB.[162]

The arbitrator was mindful about the trouble that might occur in drawing a line as to what kind of off-field speech may justify discipline.[163] For future speech-related discipline, the arbitrator stated the "the mark must be set high both with respect to the offensive content of the speech and the harm caused by the speech. Moreover, *due weight must be given to the context in*

---

[157] *Id*. at 784.
[158] *Id*.
[159] *Id*.
[160] *Id*. at 785.
[161] *Id*. at 796 (emphasis added).
[162] *Id*. at 797.
[163] *Id*. at 803.

which the speech is made – here in a publicity-seeking interview with a national sports magazine" contrasted with a situation where the player does not know their statements will be widely disseminated and read.[164] A case-by-case analysis is taken in analyzing speech related discipline, including social media content related discipline.[165] This part of the Rocker decision is important because the arbitrator did not distinguish a bright line rule between disciplining distasteful comments during a media interview and other possible free speech expressions. Had Rocker taken to Twitter to discuss his hate of New York, the commissioner may have had a harder time justifying disciplining the conduct, as it could relate to Rocker's conduct under "other terms and conditions of employment" not in conjunction with his duties under his UPC or the CBA. In fact, MLBPA took issue with the commissioner's use of disciplinary authority and "best interest" power to impose a penalty under the UPC, rather than citing a violation to a written policy or playing rule.[166] The MLBPA may have been more successful in charging the Commissioner with violating the CBA for in unfair labor practice for unilaterally implementing a penalty that affects a mandatory term of collective bargaining.[167] Perhaps, if players start getting penalized frequently for the content of their Tweets, the players unions will challenge the imposition of discipline as an unfair labor practice.[168] Conversely, the players may also attempt to negotiate guidelines on acceptable social media conduct and content as part of the new CBAs that are currently being negotiated. Further, the unions could try to limit the commissioner's rule-making authority and ability to only discipline on-field conduct such as dugout clearing

---

[164] *Id*. (emphasis added).
[165] *Id*.
[166] *Id*.
[167] *See* Showalter, *supra* note 47, at 221.
[168] *Id*.

brawls.

VI. Conclusion

The advent of social media has had many positive economic and social effects on professional sports leagues ability to interact directly with fans. However, because social media allows athletes to speak their mind in an unfiltered manner, there are possible repercussions that may paint the sports in a bad light due to a player's ill-conceived, unfiltered Tweet. The commissioners' power is not absolute because collective bargaining agreement provisions govern how and what players can be discipline for and what restrictions can be imposed on their private lives away from the game. As of now, professional sports has taken a middle ground of restricting social media use during the "work day" at the "work place," but little restrictions (besides the NHL) or penalties have been imposed by the commissioner on how players can express themselves via social media while off-duty. The professional sports leagues should continue this approach as social media connects fans and professional athletes at a fundamental basis that brings the fan closer than ever to the game and their sports heroes.