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Keep Your Mouth Shut and Listen: The NFL Player's Right of Free Expression

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KEEP YOUR MOUTH SHUT AND LISTEN:[1] THE NFL PLAYER'S RIGHT OF FREE EXPRESSION

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[1] Vic Carucci, *"Keep Your Mouth Shut and Listen,"* NFL INSIDER (June 25, 2001), *available at* http://www.nfl.com/insider/symposium_mainbar.html (quoting Mike Anderson, runningback for the Denver Broncos).

In memorial:
This comment is dedicated to the memory of Korey Stringer, 1974-2001,
"a truly remarkable man who was an outstanding husband, father and football player."[2]
"Stringer . . . never said goodbye when he ended a conversation."[3]
"He always said 'peace.'"[4]
"I loved it when he said 'peace.'"[5]

I. INTRODUCTION

On Tuesday, July 31, 2001, Korey Stringer, a 335-pound Pro Bowl[6] football tackle for the Minnesota Vikings walked off the team's training field, at the end of morning practice.[7] The temperature on the field was ninety plus degrees[8] while the humidity raised the heat index to 110 degrees.[9] Despite being sick with heatstroke[10] during practice, Stringer did not complain until the conclusion of practice, when he summoned a trainer and was taken unconscious to the hospital.[11] Fifteen hours later, he was pronounced dead.[12] Stringer's death "sent shock waves"[13] throughout the football world. The day after Stringer's death, fellow professional football

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2 Jarrett Bell, *Korey Stringer 1974-2001 'We Lost a Good Man'*, USA TODAY, Aug. 2, 2001, at 1C (quoting Red McCombs).

3 Bob Velin, *Stringer Far From Ordinary*, USA TODAY, Aug. 2, 2001, at 3C (quoting Jeanne Marie Lukas, a writer who spent four days with Stringer one month before his death).

4 *Id.*

5 *Id.*

6 The National Football League All-Star Game. *See* NFL website, *available at* http://www.nfl.com/probowl2001.

7 *See* Bell, *supra* note 2, at 1C.

8 *Id.*

9 *Id.*

10 Steve Sternberg, *Heat, Dehydration Combine for Deadly Results*, USA TODAY, Aug. 2, 2001, at 2C. If you take a 335-pound man, dress him in football gear and send him to practice in 90-plus degree weather, the hear becomes his major adversary. Facing those conditions Tuesday, Minnesota Vikings Pro Bowl tackle Korey Stringer collapsed and later died, apparently of heatstroke. Stringer's peak body temperature, 108 degrees, was high enough to literally break down the proteins that make up the brain, heart, kidneys, and nerves.

11 *See* Bell, *supra* note 2, at 1C.

12 *See id.*

13 Tom Pedulla, *Players, Coaches Taking Extra Care in Preseason*, USA TODAY, Aug. 2, 2001, at 2C.

players were quoted discussing the reluctance, on the part of the players, to freely express themselves on the matter of workplace conditions: "You don't want to show the coaches you're slowing down. . . ."[14] "It's your macho mentality – only the strongest survive."[15] Just barely a month earlier, 300 newly drafted NFL players were admonished, at the National Football League's[16] annual Rookie Symposium, to "[k]eep your mouth shut and listen."[17] Professional football players have been conditioned to refrain from free expression in the workplace often to the detriment of their own health, safety, and lives.[18]

In contrast to a growing concern over the health and safety of professional football players; and at a time when an open dialog regarding workplace conditions in the professional sports world has reached a level of critical importance,[19] the Cincinnati Bengals have demanded that its players sign a restricted speech addendum[20] to their contract that "would allow the

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[14] Jon Saraceno, *Stinger's Death Raises Tough Issues*, USA TODAY, Aug. 2, 2001, at 3C (quoting New York Giants tackle Lomas Brown).

[15] *Id.*

[16] Brown v. Pro Football, 518 U.S. 231, 233 (1996) ("National Football League..., a group of football clubs.").

[17] Carucci, *supra* note 1.

[18] Diane Pucin, *The Inside Track; Jackson Will Be a Problem, Not Part of the Solution*, L.A. TIMES, Aug. 17, 2001, at Sports, Part 4.

> What should happen now that eight young football players--one NFL all-pro, three from top-20 college programs, three teenagers from high school teams and most recently an eighth-grader—have died either during or shortly after football workouts in the last seven months is a gathering of resources, a sharing of information, a concerted effort by coaches, trainers, doctors, players, parents, the NCAA, the universities, the school boards and the fans to find out what has gone so very wrong.

[19] *See, e.g.*, Thomas George, *On Pro Football; Players Take Back Their Bodies*, N.Y. TIMES, Aug. 15, 2001, at D1.

> "Absolutely, no question about it," said Jerome Bettis, the Pittsburgh runningback entering his ninth season. "But I've talked to a lot of guys around the league now, and every one of them has the same sense of urgency to be more careful about everything relating to this game.
>
> The feeling now is if you're tired, if you're sick, you're coming out. We're telling backups to be even more prepared and ready. It's an attitude that is permeating throughout the NFL because these deaths have put a different twist on the game.
>
> Everything's a little more scrutinized. Everything has to be more in order. It's a whole new ballgame."

[20] The addendum reads as follows:

> ADDENDUM 1
> SIGNING BONUS
> BETWEEN Cincinnati Bengals AND _____
> As additional consideration for the execution of NFL Player Contract(s) for the year(s)

team to take away all or part of a player's signing bonus if he publicly *criticizes team officials, coaches, or teammates.*"[21] During a period in which players are feeling a "sense of urgency"[22] regarding workplace conditions; this restriction on a player's speech could set "a precedent that could reverberate throughout the NFL."[23] The restriction on speech is contrary to the public policy interest of the sports world and will chill a player's right of free expression in connection with his duties as an employee of the various NFL clubs around the country. When asked if he felt that the addendum restricting his speech might impact his ability to perform in his job as a professional football player, Bengals starting quarterback[24] Jon Kitna replied, "it might [affect the ability of] some of the guys" his teammates.[25]

_____ and for Player's adherence to all provisions of said Contract(s), Club agrees to pay Player the sum of _____ payable within 10 days of execution of this rider subject to the terms below.

In the event Player fails or refuses to report to Club, fails or refuses to practice or play with Club, or leaves Club without its consent, or if Player is suspended by NFL or Club for Conduct Detrimental, or if Player is suspended for violations of the NFL Policy and Program for Drugs or Abuse and Alcohol or if Player makes any public comment to the media, including but not limited to the newspaper, magazines, television, radio or internet that breaches Player's obligation of loyalty to Club and/or undermines the public's respect for the Club, Club coaches, or Club management under Paragraph 2 of Player's NFL Player Contract and Article LV, Section 6 of the Collective Bargaining Agreement...upon demand by Club, Player shall forfeit and shall immediately return and refund to the Club that amount of the bonus herein provided as follows:

(A) Voluntary Breach or Failure to Perform before _____.

(B) If Club exercises option pursuant to addendum 3, Voluntary Breach or Failure to Perform, other than Player's Voluntary Retirement for the NFL, after _____ but on or before _____:

Player hereby expressly authorizes the club, in its sole discretion, to deduct and set off at any time and from time to time all or part of any sums owed by Player to Club [in the event of a breach of contract requiring a refund of signing bonus] from any current or deferred wages, salaries, bonuses and/or additional consideration owed to Player by Club

No term or condition of the Contract, and no breach thereof, shall be waived, altered or modified, except by written instrument.

Player Club

(*Player Contract*).

[21] Tom Groeschen, *Bengals' Loyalty Clause is Upheld; Will be Included in 'Most' Contracts*, THE CINCINNATI ENQUIRER, Jan. 23, 2001, at DO1 (emphasis added).

[22] George, *supra* note 19, at D1.

[23] *Id.* (emphasis added).

[24] Chuck Ludwig, *Kitna Rises to Top of QB Battle; Smith Falls to Third*, DAYTON DAILY NEWS, July 31, 2000, *reprinted in* THE SPORTING NEWS, *available at* http://www.cincypost.com/bengals/2001/qbs072301.html (Jon Kitna was selected by Coach Dick LeBeau as the starting quarterback for the season's preseason opener against Chicago.).

[25] Interview during autograph session after practice at the team's training camp facility located at Georgetown College, Georgetown, Kentucky on July 23, 2001. Mr. Kitna's full reply was, "Not me.

This comment argues that professional football players are entitled to full rights of free expression as public figures and members of the National Football League Players Association, a labor union organization. More particularly, the arguments in this comment focus on the requirement made by the restrictions on free expression, known as the *Pickens Clause* and/or *Loyalty Clause*[26] forced on its players by the Cincinnati Bengals. Section II of this comment describes the NFL player's salary structure and the restricted speech provision of the player's contract with the Cincinnati Bengals. The remainder of the comment is divided into two basic arguments. Part A (Section III) contains a discussion on the doctrine of unconscionability including its place in the Uniform Commercial Code and, more importantly, the application of the doctrine of unconscionability to the general law of contracts and its application to the Carl Pickens clause. The second portion of the paper, Part B (Section IV), addresses the constitutional and legal issues surrounding the Bengal's restriction on the player's right to free speech. This part begins with a discussion of the right of free expression under the First Amendment and the historical evolution of free expression before its inclusion in the Constitution. The right to free speech in the workplace applies to the state; however, under some circumstances a private party steps into the shoes of the state for constitutional purposes. In this case, the publicly financed stadium leased to the Bengals on favorable terms creates a nexus that renders the Bengals a state actor responsible in the same manner as an agency of the state for the free speech provisions of the Federal Constitution. Then, the second portion of the comment describes the provisions of the Collective Bargaining Agreement Antidiscrimination Clause, which provide protection of free expression to the players. Finally, Part B provides a description of the entitlement to free expression due to the players as members of an organized labor organization. Section V then concludes this comment.

II. BACKGROUND

A. *NFL Players' Salary Structure*

Professional football players are compensated through a variety of sources. A player's compensation may be composed of his salary, signing bonus, roster bonus, off-season workout bonus, All Pro bonus and Pro-

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It might affect some of the guys. I answer to a higher power – a higher authority. If I have something to say [about management], I'll say it through my agent." Representatives of the Bengal's management refused to grant an interview.

[26] Groeschen, *supra* note 21, at DO1.

Bowl bonus.[27] Each team is limited in the total amount of money they may pay their players during a given season. This limit is known as a *Salary Cap* which is defined as the "absolute maximum amount of Salary that each Club may pay or be obligated to pay or provide to players or Player Affiliates, or may pay or be obligated to pay to third parties at the request of and for the benefit of Players or Player Affiliates, at any time during a particular League Year."[28] The Salary Cap includes the following: Paragraph 5 salary,[29] the roster bonus,[30] off-season workout bonus[31] and prorated signing bonus.[32] The signing bonus is a huge component for the players, because all or part of it is paid "up front." For example, at the time of this writing, the Cincinnati Bengals number one draft pick for the 2001-2002 Season, Justin Smith, was asking for a $10 million dollar signing bonus.[33] The provision of the Pickens Clause puts that entire amount of money at risk for the player.

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[27] Professor Richard L. Katz, Lecture at Northern Kentucky University Sports Law Course (Spring 2001).

[28] NFL Collective Bargaining Agreement 1993-2003 (As Amended June 6, 1996) (*Collective Bargaining Agreement*).

[29] "'Paragraph 5 Salary' means the compensation set forth in paragraph 5 of the NFL Player Contract, or in any amendments thereto." *Id.*

[30] "That amount of money that a team promises to pay to a player for being on the team roster." (Note: Each team is limited to 63 players during the season). Katz, *supra* note 27, at Glossary for accompanying course text.

[31] "[T]hat amount of money which the team pays the player to perform conditioning workout after the season, but before the next season." *Id.*

[32] Ron Del Duca, *The Salary Cap Must-Read Salary Cap 101*, *available at* http://www.ravensnests.com/salary-cap.htm#RonDelDuca'sJuly14,1999Article.

> Signing bonuses and any amounts treated as signing bonuses are prorated equally over the length of the player's contract for purposes of calculating the player's salary cap number. For example, if a $5 million signing bonus is paid on a five-year contract, the signing bonus will count $1 million annually against the team salary for each of the five years even though the player receives the full $5 million in the first year. The amount of the signing bonus is simply divided by the number of contract years. Note, however, if a player is released or retires before the end of the contract period, the general rule is that the remaining portion of the salary cap is accelerated so that the entire remaining portion of the bonus amount is recognized against the team's salary in the year the player's employment terminates.

[33] Reporter Stan Keeler of the Cincinnati Post wrote "Steiner is believed to be seeking a signing bonus that exceeds the $8.47 million given to last year's No. 4 pick, Peter Warrick and a total package worth at least $4 million per season. The Bengals are reluctant to lay out a big bonus because they can only amortize such a bonus through the 2003 season." Stan Keeler, *Heated Start for QB Derby*, THE CINCINNATI POST, July 23, 2001, *available at* http://www.cincypost.com/bengals/2001/bengnt072301.html. The following day, Keeler reported "Steiner is believed to be seeking about a $10 million signing bonus and an 8% increase in average value over the six-year contract signed last summer by Peter Warrick, the Bengals' No. 1 pick in 2000." Stan Keeler, *Dugans Still in WR Picture*, THE CINCINNATI POST, July 24, 2001, *at* http://www.cincypost.com/bengals/2001/bengnt072401.html.

The Club,[34] "in its sole discretion,"[35] is entitled to automatically withhold the bonus and/or set off from future earnings the signing bonus at any time that the Club feels the player has made "any public comment to the media . . . that breaches Player's obligation of loyalty to Club and/or undermines the public's respect for the Club, Club coaches, or Club management."[36] In this example, the current season's number one draft pick could lose up to $10 million dollars for making an inadvertent statement to the media that the Club felt was a breach of loyalty to the Club under the subjective test of the Pickens Clause.

B. *Carl Pickens Clause*

The Pickens Clause restrains a player's right to free expression by penalizing the player by taking away all or part of a player's signing bonus for any public comment to the media that the management of the Club determines to have been disloyal to the Club.[37] "The clause was created in response to Carl Pickens, a wide receiver who tried to get released from his contract . . . by making brassy and negative statements about the Bengals chain of command. Bad words, he hoped . . . might lead the Bengals to fire him."[38] Pickens, a wide receiver signed a $23.3 million contract with the Bengals in 1999 and later criticized the Bengals[39] for retaining Coach Bruce Coslet.[40] Pickens, bound by contract,[41] wanted to have an opportunity to move to another team. By criticizing the club, Pickens thought he could be released from his contract and become a free agent.[42] He would then be

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34 The Cincinnati Bengals.

35 *Pickens Clause* (Agreement on file with author.).

36 *Id.*

37 *See* Groeschen, *supra* note 21, at DO1.

38 John Eckberg, *Be Nice to Your Bosses*, THE CINCINNATI ENQUIRER, June 19, 2000, at Opinion.

39 *See, e.g.*, Ron Borges, *Kraft Decisions Must be by The Book*, THE BOSTON GLOBE, Jan. 2, 2000. Bengals owner Mike Brown declared this week he would not make head coach Bruce Coslet or his staff 'the scapegoat' for a team that is 4-11 entering today's final game. He said Coslet and his staff had done a good job of coaching and motivating the Bengals despite the fact Coslet has the worst winning percentage of any active NFL coach, never has beaten a team with a winning record on the road since he took over October 21, 1996, and leads the losingest team of the decade. Brown mistakenly called this loyalty. Star wide receiver Carl Pickens said he couldn't believe it when he heard the news because "Bruce has never had a winning record anywhere."

40 *Sanders May Rejoin Lions as Non-Player*, THE ARIZONA REPUBLIC, Jan. 23, 2001.

41 *See Player Contract*, *supra* note 20.

42 *Notebook*, KNOXVILLE NEWS-SENTINEL, June 8, 1999, at D5 ("Pickens, 29, has threatened to sit out the season rather than continue to play for the Bengals, who haven't had a winning record since

eligible for consideration by another club. In response to the behavior of Pickens, and in particular to his public airing of his grievances with management, the Bengals management created an addendum to the player's contract for the 2000 season for the purpose of controlling the content of a player's comments to the media.

Addendum 1 of the player's contract reads in part as follows:

> In the event Player . . . makes any public comment to the media, including but not limited to the newspaper, magazines, television, radio or internet that breaches Player's obligation of loyalty to Club and/or undermines the public's respect for the Club, Club coaches, or Club management under Paragraph 2 of Player's NFL Player Contract and Article LV, Section 6 of the Collective Bargaining Agreement . . . upon demand by Club, Player shall forfeit and shall immediately return and refund to the Club that amount of the bonus. . . . "[43]

The addendum then continues to set forth the dates and conditions for determination of the amount of the bonus to be returned under breach of the addendum. Finally, the addendum provides a harsh remedy for breach of the "Player's obligation of loyalty to Club:"

> Player hereby expressly authorizes the club, in its sole discretion, to deduct and set off at any time and from time to time all or part of any sums owed by Player to Club [in the event of a breach of contract requiring a refund of signing bonus] from any current or deferred wages, salaries, bonuses and/or additional consideration owed to Player by Club.[44]

The controversial clause was taken up by the NFL Player's Association (on behalf of the Bengals players) and submitted to arbitration against the NFL Management Council (on behalf of the Bengals management).[45] The Arbitrator upheld the clause on January 17, 2001 in favor of management.[46]

1990. Pickens made it clear last season that he wanted to leave as a free agent, but the Bengals designated him their franchise player.").

[43] *Pickens Clause*, *supra* note 35.

[44] *Id.*

[45] *See* Groeschen, *supra* note 21, at DO1.

[46] *Id.*

III. PART A - AN UNCONSCIONABLE CONTRACT

A. *The Doctrine of Unconscionability*

The first portion of this comment is intended to examine the contractual understanding between the Bengals, as management, and the player, as an employee. Each player signs a contract[47] with management that outlines the agreement between the parties for services to be rendered by the player. Contracts are often defined as a meeting of the minds, mutual assent, and mutual agreement.[48] When one of the parties to a contract is treated in an unfair manner because of the stronger bargaining power of the other party, the contract is considered void as against public policy.[49] The Pickens Clause removes the right of the player to express himself on a variety of views, which affect his ability to make a living and practice his trade as a professional football player. Under the Pickens Clause, players are not free to discuss their work or workplace conditions without fear of losing all or portions of their signing bonus.[50] The manner in which the Bengals demand the player's assent to this particular clause of the contract is unconscionable. The following is a discussion of the unconscionability of the Pickens Clause.

1. HISTORIC VIEW

As early as 1870, the Supreme Court addressed unconscionability: "If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to."[51] In 1912, unconscionability was said to underlie "practically the whole content of the law of equity."[52] Judge Skelly Wright's language from the more recent seminal case on point, *Williams v. Walker-Thomas Furniture Co.*, stated that:

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[47] *See* Katz, *supra* note 27.

[48] *See* BLACK'S LAW DICTIONARY 983 (6th ed. 1990), *citing* Rice v. McKinley, 590 S.W. 2d 305, 306 (Ark. Ct. App. 1979) ("Meeting of minds. An essential element of contract is mutual agreement and assent of parties to contract to substance and terms. It is an agreement reached by the parties to a contract and expressed therein, or as the equivalent of mutual assent or mutual obligation.").

[49] *See id.* at 1525 (Unconscionable bargain *or* contract.).

[50] *See Pickens Clause*, *supra* note 35.

[51] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448 (D.C. Cir. 1965), *citing* Scott v. United States, 79 U.S. 443, 445 (1870).

[52] JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 9.38 (4th ed. 1998) (quoting Teeven, *Decline of Freedom of Contract Since the Emergence of the Modern Business Corporation*, 37 ST. LOUIS U. L.J. 117, 136-40 (1992)).

"[i]t has been held as a matter of common law that unconscionable contracts are not enforceable."[53]

2. THE UNIFORM COMMERCIAL CODE

The doctrine of unconscionability, though deeply rooted in the common law of equity, was ultimately codified in the Uniform Commercial Code:

> If the court, as a matter of law, finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.[54]

This oft-criticized provision of the U.C.C. provides substantial leeway to the courts to apply the doctrine of unconscionability with very little guidance on the legal meaning of the term unconscionability. Comment 1 to U.C.C. Section 2-302(1) does little to assist in the understanding of the legal meaning of the term "unconscionable." It reads as follows: "The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."[55] This portion of Comment 1 leaves us with a basic circular test that defines *unconscionability* as that which is *unconscionable*. However, the comment goes on to say that: "[t]he principle is one of prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power."[56] *Williams* provided additional guidance on the matter stating that: "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[57] One often-quoted interpretation of the term originated with the Supreme Court in 1889 that referred to bargain as one which was "such as no man in his senses and not

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[53] *Williams*, 350 F.2d at 448, *citing* Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. Pa. 1948); Indianapolis Morris Plan Corp. v. Sparks, 172 N.E.2d 899 (1961); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 84-96(1960). *Cf.* 1 CORBIN, CONTRACTS § 128 (1963).

[54] U.C.C. § 2-302(1) (2000).

[55] *Id.* at Comment 1.

[56] *Id.*

[57] *Williams*, 350 F.2d at 449.

under delusion would make on the one hand, and as no honest and fair man would accept on the other. . . ."[58]

Professor Arthur Leff, writing soon after the adoption of the U.C.C., is credited with the development of a two-prong view: "substantive unconscionability" and "procedural unconscionability."[59] "Those two concepts were introduced by Professor Leff to distinguish between 'bargaining naughtiness' (procedural unconscionability) and 'evils in the resulting contract' (substantive unconscionability)."[60] The courts now generally view the U.C.C. as requiring both procedural and substantive unconscionability before they will grant relief from a challenged term.[61] For example, in *Williams*, Judge Wright found an unconscionable contract is one that combines "an absence of meaningful choice on the part of one of the parties [procedural unconscionability] together with contract terms which are unreasonably favorable to the other party [substantive unconscionability]."[62] Some courts have suggested that the concept is a mathematical formula where a large amount of one type of unconscionability makes up for a shortfall in another type of unconscionability.[63] In general, the whole doctrine of unconscionability appears to be disconcerting at best. One author has said that, "[t]he conflict between what the courts said they were doing and what they were in fact doing has had an unsettling effect on the law, giving the sensitive a feeling of lawlessness, the logician a feeling of irrationality and the average lawyer a feeling of confusion."[64]

3. THE MODERN VIEW OF UNCONSCIONABILITY

In addition, the doctrine of unconscionability has entered into the general law of contracts outside the coverage of Article 2 of the U.C.C. and

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58 Hume v. United States, 132 U.S. 406, 415 (1889).

59 Richard Craswell & Carolyn Craig, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1 (1993), *citing* Arthur Allen Leff, *Unconscionability and the Code -- The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

60 *Id.*

61 *Id.*

62 *Williams*, 350 F.2d at 449 (D. Cal. 2000).

63 Craswell & Craig, *supra* note 59.

64 Calamari, *supra* note 52, at § 9.38. The footnote to this comment reads:

"The statement of an Eastern sage may here be apposite: 'Now if names of things are not defined, words will not correspond to facts. When words do not correspond to facts, it is impossible to perfect anything. Where it is impossible to perfect anything, the arts and institutions of civilization cannot flourish, law and justice do not attain their ends; and when law and justice do not attain their ends, the people will be at a loss to know what to do.' Confucius, The Analects, xiii, 3. We are indebted for this reference to Jackson, 53 L. Q. REV. 525, 536 (1937)."

has been accepted as a general doctrine of law by the American Law Institute Restatement, Second, Contracts:

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.[65]

The law of unconscionability has been applied to any number of transactions outside the U.C.C. For instance, in a professional services case, the courts used the law of unconscionability to find that a real estate services contract was unconscionable where a real estate broker demanded payment for services rendered after having found a buyer for his client's house but where the buyer failed to complete the purchase of the house.[66] The NFL player's contract is a contract for services, not goods,[67] as defined by the U.C.C. However, if the law of unconscionability applies to service contracts with real estate agents, then the law would apply to service contracts with a professional football player.

B. *Unconscionability and the Pickens Clause*

NFL players sign a standardized agreement known as the NFL Player Contract.[68] This agreement is periodically re-negotiated between the Club owners and the NFL Players Association. The *loyalty clause*[69] referred throughout this paper is a separate addendum added to the standardized NFL agreement. The Bengals have presented this "take it or leave it" clause as a condition of employment to the players. The issue over the loyalty clause was submitted to arbitration where the arbitrator found in favor of the Club.[70] The player currently has no choice but to sign the addendum if he wants to be employed by the Bengals.[71] The players simply do not have a meaningful choice as required under *Williams*.[72] They must sign the provision or look for another Club.

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65 RESTATEMENT (SECOND) OF CONTRACTS Ch. 9 § 208 (1981).

66 Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d 843 (N.J. 1967).

67 U.C.C. § 2-105(1) (2000).

68 *See Player Contract*, *supra* note 20.

69 *See Pickens Clause*, *supra* note 35.

70 Groeschen, *supra* note 21, at DO1.

71 *Id.*

72 *Williams*, 350 F.2d at 449.

Substantive unconscionability involves oppression of one of the parties.[73] The loyalty clause is nothing more than an effort by the Club to use its superior bargaining powers to oppress its players. However, superior bargaining power must be coupled with an additional element such as "lack of meaningful choice" or a situation where the superior party has control over the negotiations because of the "weaker party's ignorance, feebleness, unsophistication as to . . . business concepts, or general naiveté."[74] Although many of the players are well educated with college degrees, and presumably savvy agents represent most of the players, it is probable that few, if any, of the players have the individual business acumen to fully understand the allocation of risk under the Pickens Clause.[75] Reportedly, some of these young players have never even had a personal checking account. One player, as an example asked that he be paid with cashier's checks. Upon inquiry by his agent, the player admitted that he did not know how to obtain a checking account.[76] Arguably, in order to mitigate the risk, the players are represented by seasoned sports agents, attorneys and accountants. However, even with the best expert counseling, it is the player who must understand the allocation of risk between a potential unintended statement under pressure and the amount of money. "Amid a pressurized sport that includes clashing egos, contrasting personalities and mood swings,"[77] the player is expected, under the Pickens Clause to remain completely in control of his expressions both on and off the field. The players are expected to wreak havoc on the

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[73] *See id.*

[74] Calamari, *supra* note 52, at § 9.40.

[75] *See, e.g.*, Carucci, *supra* note 1.

> In a skit preformed at the NFL's fifth annual Rookie Symposium, "a rookie player returns home from the symposium to find that his brother, whom he had asked to watch his house while he was away, had arranged for him to receive $20,000 of stolen merchandise for $2,500. The player insists he had never asked for the arrangement, and suddenly finds himself in a dilemma. Before the matter could be resolved, Minor, [the skit prompter], ordered the actors to 'freeze!' Then he walked around the audience, asking players what they would do in such a circumstance.
>
> One said he would refuse the merchandise and perhaps call the police. But another said that '80 percent' of the players in the room would probably accept the deal because that's what their street-minded instincts would tell them to do.
>
> 'I think the young man was correct, and that's why we do this,' said Minor, who has taught in New York's public schools and who has counseled inmates. 'And we present it (in the form of a skit) because it's what they do for a living. You practice for that game. Now, we're going to practice for life.
>
> Primarily, for these guys, it's just understanding youth and what coming from nothing (financially) can expose you to, and how you will risk certain things and how you've got to be educated about the new opportunities that you have.'"

[76] *See* Katz, *supra* note 27.

[77] Bell, *supra* note 2, at 1C.

football field[78] and expose themselves to life-threatening conditions[79] or serious personal injury[80] without saying anything negative or embarrassing about their coaches or teammates. This is an unreasonable and unconscionable expectation given the conditions and risk these players are exposed to while providing their sports entertainment services under personal service contracts. In general, a 22 year-old draft pick simply does not have the business acumen or worldly experience to fully understand that even a casual comment, whether intended or not, could cause him to lose $10 million dollars without a due process hearing on the matter. This possible expensive consequence of his words is up to the ***"sole discretion"*** of the Club.[81] There are few situations in the business world where one contracting party knowingly, consciously, and voluntary jeopardizes such a large portion of his property at the "sole discretion" of another party to a contract.

IV. PART B - RESTRAINT ON FREE EXPRESSION

The second portion of this article is intended to examine the player's right of free expression under the U.S. Constitution and as a member of the NFL Player's Association.

A. *The Right to Free Expression*

1. FREE EXPRESSION: THE FIRST AMENDMENT

"Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."[82] Freedom of speech is one of the most valued liberties of a nation of free persons. Free expression is tested in the federal courts with great frequency and emotion including such pressing current issues ranging from a grandmother's right to take nude photos of her grandchildren[83] to a teenager's right to wear a tee shirt proclaiming himself

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[78] *See* Velin, *supra* note 3, at 3C.

[79] *See* Gary Mihoces, *Death Rocks Football World, Vikings' Stringer a Victim of Heatstroke at Training Camp*, USA TODAY, Aug. 2, 2001, at 1. On Aug. 1, 2001, one of the NFL's top players, Vikings's offensive tackle Korey Stringer died from heatstroke after working out in training camp with the team.

[80] *See* Ludwig, *supra* note 24.

[81] *See, e.g., Pickens Clause, supra* note 35 (emphasis added).

[82] EXPRESS YOURSELF: The Free Speech Editorial Page, The Thomas Jefferson Center for Free Expression, at http://www.tjcenter.org/index.html (quoting John Milton, The Areopagitica, (1644)).

[83] The Associated Press, *Federal Judge Orders Nude Photos of Grandkids Returned to Grandmother*, June 20, 2001.

to be a redneck.[84] The importance of free expression to our national consciousness is underlined by its position as the very first amendment to the Constitution of the United States: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise hereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[85] The First Amendment applies to the states through the Fourteenth Amendment: "[N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ."[86] The protection afforded individuals under the U.S. Constitution applies to state action and not necessarily to actions of private parties. However, a few states, such as Massachusetts and Connecticut have Civil Rights Acts, which protect an employee's speech interest against private employers.[87] Connecticut, in particular has an explicit statutory provision aimed at protection of an employee's First Amendment rights:

> Any employer . . . who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages.[88]

Additionally, a private employer may be considered a state actor in some circumstances thereby granting First Amendment protection to the employee.[89]

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[84] The Associated Press, *Teen Sues N.J. School Over Suspension for Redneck T-shirt*, June 26, 2001.

[85] U.S. Const. amend. I.

[86] U.S. Const. amend. XIV.

[87] *See* Lewis Kurlantzick, *Symposium: John Rocker: John Rocker and Employee Discipline for Speech*, 11 MARQ. SPORTS L.J. 185 (2001).

[88] *Id.* at 191-192 (quoting Conn. Gen. Stat. Ann. 31-51q (West 1999)).

[89] *See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

2. HISTORICAL EVOLUTION OF FREE EXPRESSION

Influenced by the works of the early Greeks, the English poet and philosopher John Milton is recognized as the author of the "earliest complete statement of the absolute protection to be accorded controversial ideas"[90] with his writing of his 1644 tract, *Areopagitica*. "In his choice of title, Milton alludes to an analogous written oration of Socrates presented in 355 B.C. to the Athenian Ecclesia, advocating a return of certain powers to the aristocratic Council of the Areopagus."[91] Milton expressed his views on free expression in the *Areopagitica*, a speech for the liberty of unlicensed printing delivered to the parliament of England:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?[92]

John Locke, "opposed the licensing system because it 'injured the printing trade.'"[93]

The nineteenth century philosopher, John Stuart Mills espoused his ideas on the importance of unpopular speech in his essay *On Liberty*:

> [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[94]

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[90] Jonathan Blumen, *The Ethical Spectacle, Freedom of Speech*, (Feb. 1996), *available at* http://www.spectacle.org/296/rulebk.html.

[91] *Id.*

[92] JOHN MILTON, AREOPAGITICA (1644). Reprinted by: Renascence Editions, *available at* http://www.uoregon.edu/~rbear/areopagitica.html.

[93] *Id.* (quoting LEONARD W. LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON (Bobbs-Merrill) (1966)).

[94] Blumen, *supra* note 90 (quoting JOHN STUART MILLS, ON LIBERTY (London, Longmans, Green, and Co.) (1865)).

Supreme Court Justice Oliver Wendell Holmes eloquently set forth his views on the importance of free speech in our American society:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.[95]

Justice Holmes, in his 1925 dissent in *Gitlow v. New York*,[96] defines free speech as the right to expressive belief: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[97]

B. *State Employee's Right of Free Expression*

1. THE BENGALS AS A STATE ACTOR

The provisions of the Bill of Rights were intended to apply to the federal government. Later, the provisions of the Bill of Rights are applicable to the states through the Fourteenth Amendment. "As a general matter the protections of the Fourteenth Amendment do not extend to 'private conduct abridging individual rights.'"[98] The First Amendment does not constrain private employers, private universities, private organizations, or private individuals. The free expression protections run to protecting the individual from state actions. State action is present when the speech is restricted, dictated, or influenced by the government. Private employers are not the government. However, depending upon the circumstances, there are exceptions where a private party may be considered a state actor.

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95 Abrams v. United States, 250 U.S. 616, 630 (1919).

96 Gitlow v. New York, 268 U.S. 652 (1925).

97 *Id.* at 673.

98 NCAA v. Tarkanian, 488 U.S. 179, 191 (1988) (quoting *Burton*, 365 U.S. at 722).

a. Burton v. Wilmington Parking Authority

The Bengals Club is a private corporation leasing a public stadium from Hamilton County, Ohio. In a nearly identical example of a private corporation leasing space from the state, the Supreme Court found that the private entity was a state actor.[99] In *Burton*,[100] the court found that "when a State leases public property in the manner and for the purpose shown to have been the case here [in *Burton*], the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself."[101] The private corporation leasing space from the state and taking advantage of the public benefits that pass through the state lease becomes, for Fourteenth Amendment purposes, a "state actor." In *Burton*, the City of Wilmington, Delaware, created a parking authority "to provide adequate parking facilities for the convenience of the public and thereby relieve the 'parking crisis, which threatens the welfare of the community. . . .'"[102] Then, the newly created Wilmington Parking Authority ("Authority") acquired land and constructed a parking garage in downtown Wilmington.[103] The garage was financed with tax-exempt revenue bonds[104] and the parking garage structure itself was "likewise exempt form state taxation."[105] In order to re-pay the revenue bonds, the parking authority determined that it needed to enter long-term leases with commercial tenants for some of the space in the garage.[106] Thereafter, the Authority advertised for commercial tenants and ultimately entered into leases with various commercial tenants including a long-term, 20-year lease plus a 10-year renewal lease option with the Eagle Coffee Shoppe ("Eagle").[107] The Authority made certain physical improvements to the space in accordance with the needs of Eagle. Additionally, Eagle spent $220,000 on improvements to the space that were tax-exempt under the Authority's status as a tax-exempt entity. "The Authority further agreed to furnish heat for Eagle's premises, gas service for the boiler room, and to make, at its own expense, all necessary structural

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99 *See Burton*, 365 U.S. at 715.

100 *Id.*

101 *Id.* at 726.

102 *Id.* at 717.

103 *See id.* at 718.

104 *See id.*

105 *Id.* at 718.

106 *See id.* at 719.

107 *Id.*

repairs, all repairs to exterior surfaces except store fronts and any repairs caused by lessee's own act or neglect."[108] After Eagle began its operations, Mr. Burton, a black gentleman, entered the shop where Eagle "refused to serve appellant [Burton] food or drink solely because he is [was] a Negro."[109]

At trial, the issue was whether Eagle, as a private corporation, had a responsibility to behave as a state actor because of the state-financed lease, ongoing state maintenance support during operations and the benefit of waiver of taxes.[110] The Delaware Court of Chancery "concluded . . . that whether in fact the lease was a 'device' or was executed in good faith, it would not 'serve to insulate the public authority from the force and effect of the Fourteenth Amendment.'"[111] On appeal, the Supreme Court of Delaware reversed the Court of Chancery and held that Eagle "'in the conduct of its business, is [was] acting in a purely private capacity.'"[112] The U.S. Supreme Court said "'[i]ndividual invasion of individual rights is not the subject-matter of the amendment,' . . . and that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it."[113] The court continued, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[114] After analyzing all of the assistance granted by and through the state to Eagle, a private corporation, the Court concluded that:

> By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.[115]

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108 *Id.* at 720.

109 *Id.* at 716.

110 *See id.*

111 *Id.* at 720 (quoting Burton v. Wilmington Parking Auth., 150 A.2d 197, 198 (Del. Ch. 1959), *rev'd* Wilmington Parking Auth. v. Burton, 157 A.2d 894, (Del. 1960), *rev'd Burton*, 365 U.S. 715).

112 *Id.* at 721 (quoting *Wilmington*, 157 A.2d at 902).

113 *Id.* at 722 (quoting Civil Rights Cases, 109 U.S. 3, 11 (1883)).

114 *Id.* at 722.

115 *Id.* at 725.

An examination of the lease agreement between the Bengals and the Board of Commissioners of Hamilton County, Ohio reveals an even stronger interdependence between the government (Hamilton County, Ohio) and a private corporation, Cincinnati Bengals, Inc., than the case presented in *Burton*.[116] To begin with, the stadium leased by the Bengals from the Hamilton County is a single-use facility for all intents and purposes, that was designed and built for the primary purpose of playing NFL football games. This facility serves no other public purpose, as was the case in *Burton* where the coffee shop was merely an ancillary addition to the parking garage, the primary purpose of the structure.[117] Under *Burton*, the coffee shop lessee, Eagle, not only paid its own way; it actually supplemented the payment of the public revenue bonds for the parking garage.[118] Under the Bengals lease, Hamilton County pays for the stadium through a one-half cent sales tax levy on the citizens of Hamilton County.[119] The Bengals actually pay only a nominal amount of rent on a declining schedule for the first nine years of the lease and thereafter pay nothing for the preferential use of the publicly-financed and publicly-owned football stadium.[120] In exchange for lease payments totaling just under $12,000,000.00[121] over the first nine years, the Bengals receive the use and control of the stadium for up

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[116] *See* Memorandum of Understanding for the Hamilton County Football Stadium dated Sept. 11, 1996; Lease Agreement By and Between The Board of Commissioners of Hamilton County, Ohio and Cincinnati Bengals, Inc. Dated as of May 29, 1997; Amendment of Lease Agreement for Paul Brown Stadium dated Jan. 31, 1998; Second Amendment of Lease Agreement for Paul Brown Stadium dated Apr. 10, 1998 and Third Amendment of Lease Agreement for Paul Brown Stadium By and Between The Board of Commissioners of Hamilton County, Ohio and Cincinnati Bengals, Inc. dated June 24, 2000 *available from* the Office of the County Attorney, Hamilton County, Ohio (*Lease Agreement*).

[117] *See Burton*, 365 U.S. 715.

[118] *Id.*

[119] *See Lease Agreement supra* note 116, at 1. By public vote on Mar. 19, 1996, the citizens of Hamilton County passed a one-half percent increase in the Hamilton County general sales tax to keep competitive and viable major league football and baseball teams in Cincinnati, Ohio by, among other things, the construction of a new football stadium in Hamilton County.

[120] *See id.* at 24. Under Article 6, the Bengals pay an annual rent as follows:

Year 1	$1,700,000.00
Year 2	$1,600,000.00
Year 3	$1,500,000.00
Year 4	$1,400,000.00
Year 5	$1,300,000.00
Year 6	$1,200,000.00
Year 7	$1,100,000.00
Year 8	$1,000,000.00
Year 9	$900,000.00

[121] *Id.*

to thirty-six years at a cost to the taxpayers of $753,000,000.00[122] plus the cost of maintenance and upkeep. Conceivably, the ultimate cost to the taxpayers could run up to one billion dollars,[123] offset only by a nominal lease payment from the Bengals.

In *Burton*, Eagle, the coffee shop, was exempt from real estate taxes for improvements attached to the property.[124] Under the Bengals lease, the Bengals are exempt from payment of both real estate taxes and personal property taxes.[125] The Bengals lease also has a provision providing that should any such taxes be imposed onto the Bengals, "such impositions will be paid by County."[126] Hamilton County also pays for all utilities; maintenance and upkeep of the stadium and the Bengals retain the revenue from concessions and parking surrounding the stadium.[127] The initial lease went so far as to guarantee the sale of 50,000 tickets for each of the first twenty home games played at the stadium.[128] Around the country, there has been an explosion of new stadiums built at taxpayer expense over the past decade.[129] The manner in which government has financed huge new stadiums at public expense to benefit private parties has been referred to as a process involving "deceptive politicians, taxpayer swindles, media slants, the power of big money, and most of all, a political system that serves the rich and powerful at the expense of the average fan, the average taxpayer, the average citizen."[130] "In short . . . states and municipalities purport to be public servants - with the interest of the average taxpayer in mind - but in reality opt to subsidize the corporate ventures of team owners at the expense of taxpayers."[131] Because of this overt subsidization of private sports teams, one commentator has suggested that in a case "where the public sector has paid at least fifty percent of the cost for the playing facility, they in turn

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[122] The stadium, by one report costs $400,300,000.00 plus interest payments, totaling more than $353,000,000.00 over the thirty year life of the revenue bonds issued to build the stadium. *See* Lucy May, *Stadium Tab Tops $753 M County Hopes It Can Pay Off Early*, THE CINCINNATI ENQUIRER, May 21, 1998.

[123] *Id.* Plus a nominal $7,000,000.00 per year allowance for maintenance and upkeep. (The minimal maintenance and upkeep assumption is based on the author's own estimate as a registered architect.)

[124] *See Burton* 365 U.S. 715.

[125] *See Lease Agreement, supra* note 116, at 24.

[126] *Id.*

[127] *See id.*

[128] *See id.* The guaranteed sale of 50,000 tickets per game under the original lease was later removed under Addendum #3 of the Lease.

[129] *See, e.g.*, April R. Anderson, *Field of Schemes: How the Great Stadium Swindle Turns Public Money Into Private Profit*, 8 MARQ. SPORTS L.J. 461 (1998) (book review).

[130] *Id.*

[131] *Id.*

should be entitled the right of first refusal to purchase the team."[132] Teams would be publicly owned just like a local utility company.[133]

Upon examination of the Bengals lease with Hamilton County, compared to the Eagle lease under *Burton*, it is clear that an even stronger interdependence exists where the Supreme Court found under *Burton* that it "it [the lessee Eagle] must be recognized as a ***joint participant*** in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."[134] The weight of the facts and circumstances under the Bengals lease leave the Bengals, for purposes of the Fourteenth Amendment, a state actor.

b. *Stadium Lease Mandate*

Under *Burton*, the Supreme Court found that the state "could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation."[135] Hamilton County apparently intended to impose upon the Bengals its responsibilities under the Fourteenth Amendment.[136] The lease between the Bengals and The Board of Commissioners of Hamilton County, Ohio actually includes an antidiscrimination clause, which creates an obligation on the part of the Bengals to comply with all of the employment practices required of a governmental agency:

> 32.10 Antidiscrimination Clause. Neither Team nor County shall discriminate on the basis of race, color, *political or religious opinion* or affiliation, creed, age, physical or mental handicap, sex, marital status, ancestry or national origin. The Lease shall comply with all applicable state, local and federal laws, rules, regulations, executive orders, and agreements pertaining to *discrimination in employment*, unlawful employment practices and affirmative action.[137]

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132 Michael J. Mondello, Ph.D, *Major League Losers: The Real Cost of Sports and Who's Paying For It*, 11 MARQ. SPORTS L.J. 331 (2001) (book review).

133 *See id.*

134 *Burton*, 365 U.S. at 725 (emphasis added).

135 *Id.*

136 *See Lease Agreement*, *supra* note 116, at 68.

137 *Id.* at 68 (emphasis added).

The so-called loyalty clause imposed by the Bengals upon its players chills the player's individual right to political opinion to the extent that his expressions might undermine "the public's respect for the Club, Club coaches, or Club management."[138] Additionally, the Bengals have an affirmative obligation to avoid any "discrimination in employment"[139] as if they were a state actor under the Antidiscrimination Clause of their lease with Hamilton County.

2. FREE EXPRESSION CASES FOR STATE WORKERS

The Bengals, by their lease contract[140] are required to comply with employment law free speech standards as described in these cases as if they were a state rather than private employer. The following cases outline the obligation of state employers.

Employees of the state are entitled to freely criticize their employer. Similar to the intent of the Pickens Clause, in *Pickering v. Board of Education*,[141] a teacher was fired by the school board for writing a letter criticizing his employer, the board of education.[142] The issue in the case was whether the teacher, as a state employee, had a duty to support management's decision, or whether he had a right, as a citizen, to speak freely on a current political issue. The U.S. Supreme Court considered the balance between these two principles and ultimately held that raising the issue of expenditure of tax money "is a matter of legitimate public concern."[143] "This Court has also indicated, in more general terms, that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors."[144] The public concern in this case outweighed the employee's duty of loyalty to management and preserved Pickering's right to freedom of speech over his loyalty to his employer.

State employee's speech will not prevent a state agency from dismissing the employee if there are mitigating factors that would have in any case led to the employee's dismissal. The fact that free expression constitutes one of the infractions claimed by an agency would not protect the employee from other factors that led to his dismissal. For instance, in *Mt. Healthy City Sch.*

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138 *Pickens Clause, supra* note 35.

139 *Lease Agreement, supra* note 116, at 68.

140 *See id.*

141 Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

142 *See id.*

143 *Id.* at 571.

144 *Id.* at 574 (quoting Garrison v. Louisiana, 379 U.S. 64 (1964)).

Dist. Bd. of Educ. v. Doyle, a public school teacher, Doyle, was dismissed for having called a local radio station in which he "communicated the substance of the school principal's memorandum on teacher dress and appearance to a local radio station which used his communication in a newscast."[145] The radio station reported the memorandum as a news item.[146] The District Court held that the teacher's communication to the radio station was "clearly protected by the First Amendment," and that because it had played a "substantial part" in the decision of the Board not to retain the teacher, he was entitled to reinstatement with back pay.[147] The Court of Appeals affirmed the findings of the District Court.[148] The U.S. Supreme Court, however, held that the Board could lawfully discharge Doyle if the Board could show by "a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct."[149] The effect of this decision was to make it more difficult for employees to be reinstated in a free speech case where there were mitigating factors that might have influenced a state employer's decision to fire an employee. Justice Rehnquist, writing for the Majority, stated that "constitutionally protected conduct" should not be used to continue the employment of a "borderline or marginal candidate."[150] After the *Doyle* case, an employer need only show some other cause for dismissing an employee in order to avoid the violation of an employee's right of free expression.

The Supreme Court has interpreted protected speech to be "political, social, or other concern to the community"[151] not speech on matters relating to the internal operations of a particular governmental agency. In *Connick v. Myers*, an attorney was dismissed from her job in the office of the District Attorney of New Orleans for distributing a questionnaire to other attorneys within the office.[152] Myers' questionnaire addressed issues "concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[153] The District Attorney considered Myers' distribution of the questionnaire to be an act of insubordination. The U.S. District Court, relying on *Pickering,* found Myers employment to be

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145 Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

146 *See id.*

147 *Id.* at 283.

148 *Id.* at 276.

149 *Id.* at 287.

150 *Id.* at 286.

151 Connick v. Myers, 461 U.S. 138 (1982).

152 *Id.*

153 *Id.* at 141.

wrongfully terminated, because she had exercised her right of free speech,[154] and awarded Myers "full back pay from the date of her wrongful termination," attorneys fees, and $1,500 for her "emotional and mental distress."[155] The Fifth Circuit affirmed the District Court's ruling without an opinion.[156] The U.S. Supreme Court overruled both lower courts while modifying the law established in *Pickering* by declaring that thirteen of the fourteen questions on Myers' questionnaire were not a matter of "legitimate public concern."[157] The Court held that "[w]hile as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs."[158] The Supreme Court also said "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[159]

The overall effect of *Myers* was to deny government employees protection for anything other than political speech. The court dismissed matters raised by *Myers* pertaining to the operation of the district attorney's office, a quasi-state office. The *Myers* decision further distanced the right of free speech from the efficient management of government continuing to weaken the Supreme Court's previous holding in *Pickering*. The Court's five to four holding in *Myers* reflects a shift in political orientation of the Justices of the Court compared to the orientation of the Justices who were present on the bench in the 1968 *Pickering* decision that rendered a broader interpretation of the free expression protections available to employees of the government.

Matters of public concern do not necessarily include speech on matters relating to the internal management of a governmental agency. Subsequent to the decision in *Myers,* the Supreme Court in *Waters v. Churchill,*[160] considered the case involving Cheryl Churchill, a nurse, who was employed in the obstetrics department of a government-owned hospital. Ms. Churchill was overheard having a conversation with another nurse in the lunchroom concerning a potential transfer into the obstetrics department during which

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154 Myers v. Connick, 507 F. Supp. 752 (E.D. La. 1981).

155 *Id.* at 760.

156 Myers v. Connick, 654 F.2d 719 (5th Cir. 1981) *rev'd*, 461 U.S. 138 (1982).

157 *Myers*, 654 F.2d 719.

158 *Id.* at 149.

159 *Id.* at 146.

160 Waters v. Churchill, 511 U.S. 661 (1994).

she allegedly criticized her superiors and stated that the conditions were poor in the obstetrics department.[161] The nurse who overheard the conversation elected not to transfer to the obstetrics department allegedly because of the criticisms leveled by Churchill.[162] Because the employee decided not to transfer to the obstetrics department because of Churchill's open criticism of her supervisors, the hospital board fired Churchill.[163] Churchill then sued the hospital for violation of her civil rights.[164] The U.S. District Court for the Central District of Illinois granted summary judgment.[165] The U.S. Court of Appeals for the Seventh Circuit reversed, holding that there was a question of fact of the content of Churchill's speech.[166] The Seventh Circuit held that Churchill's speech was "most certainly a matter of public concern" and "undoubtedly...a matter of public concern" that was protected under *Myers*.[167] The U.S. Supreme Court overturned the Seventh Circuit and held that the operative test was not what the jury or court believed, but rather what the governmental employer reasonably believed.[168] The Supreme Court granted deference to the state and said that government should be able to manage its employees in an efficient way.[169] The Supreme Court clarified the role of the government as an employer as compared to the government as a sovereign with an obligation to respect freedom of speech for all citizens.[170] The Supreme Court went on to say, "management can only spend so much of their time on any one employee decision."[171] *Churchill* was a plurality decision by four Justices, which further weakened the employees' rights under *Myers*. Three of the Justices concurred in the result, but preferred not to overturn the results in *Pickering* and *Myers*.[172] Two of the Justices (Stevens and Blackmun) dissented, stating, "[t]hat Churchill's statements were fully protected by the First Amendment."[173]

In *Myers*, the Supreme Court held that protected speech must be related to matters of "political, social, or other concern to the community."[174] In

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161 *Id.* at 664-65.

162 *See id.*

163 *Id.*

164 *See* Churchill v. Waters, 731 F. Supp. 311 (C.D. Ill, 1990) *rev'd*, Waters v. Churchill, 977 F.2d 1114 (7th Cir. 1992), *rev'd*, 511 U.S. 661.

165 *See id.*

166 *See Churchill*, 977 F.2d at 1121.

167 *Id.* at 1122.

168 *See Churchill*, 511 U.S. at 701.

169 *See id.* at 669.

170 *Id.* at 671-80.

171 *Id.* at 680.

172 *See id.* at 686-94.

173 *Id.* at 695.

174 *Myers*, 654 F.2d 719 at 146.

Churchill, the Supreme Court found that the state should be able to manage its business without interference from the courts.[175] Arguably then, when viewed under *Myers* and *Churchill*, the issue of whether a player's statement on or off the field about the Bengals players, coaches or management was protected speech under the First Amendment, might come down to whether a player's expression was of public concern to the community or one of internal concern by the Bengals' management.[176] In this case, the community has a one billion-dollar obligation at stake in the Bengals.[177] It is hard to imagine any foreseeable statement about the management of the team that the public does not have a vested interest in knowing about unless it is false, libelous, and based on vitriol. Legitimate, objective comments about the Bengals management, staff, coaches, or players made by a player with personal knowledge could serve a valuable public function. Actually, the players may be the only check the citizens have regarding the management of this privately owned corporation in which the community has invested such a substantial sum of money. Any fact-based, legitimate opinion regarding the management and operations of the Bengals could constitute vital public information. Based on the billion-dollar investment made with taxpayer dollars in professional sports, the millions of dollars invested by various media and other businesses dedicated to the coverage of sports it may be concluded that information about sports facilities, personnel, management and events is a vital concern to the public at large. Currently there are hundreds of sports talk radio stations and at least dozens of television networks around the country dedicated to coverage of national sports.[178] Sports information is a vital social concern to the public at large particularly where the community had increased taxes and made a substantial investment in a privately owned football team.

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175 *Churchill*, 511 U.S. at 669.

176 *See Myers*, 654 F.2d 719; *Churchill*, 511 U.S. at 714-15.

177 *See* May, *supra* note 122.

178 For instance, one local cable channel service offers thirty channels of sports broadcasting networks:

> *See, e.g.*, Lone Star Satellite Communications, C-Band/ 4DTV™ Digital Channel Line-Up where the listing of sports channels include the following networks: CNN/SI, ESPN, ESPN2 Alternate (VCII format), ESPN2 Alternate (Clear format), ESPN Classic Sports, ESPN2, ESPNews, Fit TV, Fox Sports and SportsChannel Feeds, Fox Sports Net Base, Fox Sports Net Base 2, Fox Sports Americas, Fox Sports Northwest, Fox Sports West (Los Angeles), Fox Sports West 2, Fox Sports World, Golf Channel, Golf Channel, Home Team Sorts, Madison Square Garden Network, New England Sports Network, Outdoor Channel (Clear format), Outdoor Channel (DCII-C format), Outdoor Life Network, Speedvision, SportsChannel(Alternate) (Clear format), Sunshine Network, Satellite Sports Network Extra and Satellite Sports Network Extra 2, *available at* http://www.lstar.com/digi_cband_c11.htm.

C. *Free Expression – NFL Players Association Collective Bargaining Agreement*

1. NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION

The National Football League Players Association ("NFLPA") is an organized labor union organization that represents the NFL players.[179] The NFL was organized in 1920 but the players were not represented until 1956.[180] "[T]he NFL has been the sight (sic) of some of the most virulent labor-relations battles in professional sports."[181] The players suffered from poor treatment, low pay, and deplorable working conditions.[182] In 1956, the Cleveland Browns players began league-wide organizational efforts that led to the creation of the NFL Player's Association to represent the players.[183] In 1957, the Supreme Court held that the NFL was in subject to the antitrust laws under the Sherman Act.[184] *Radovich* was a landmark case for the players, which began a long road toward recognition under a Collective Bargaining Agreement.[185] During the 1960's, conflict occurred with the creation of the new American Football League and resulting AFL Player's Association. Ultimately, the two groups merged and the newly merged NFLPA was certified by the National Labor Relations Board to represent the players.[186] The struggle for representation continued throughout the 1970's and 80's: first, with a strike in 1974, when the owners refused to participate in collective bargaining; second, with a 1976 decision by the Eighth Circuit finding the owners guilty of violating federal labor and antitrust laws;[187] then with a strike in 1982 because the owners had refused to bargain with the NFLPA; and finally with a strike in 1987.

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[179] *See* National Football League Players Association, *available at* http://www.nflpa.org/main/default.asp (*NFLPA*).

[180] *Id.*

[181] Craig W. Palm, *Strife, Liberty, and the Pursuit if Money: Labor Relations in Professional Sports*, 4 VILL. SPORTS & ENT. L.J. 1 (1997), *citing* C. Peter Goplerud III, *Collective Bargaining In The National Football League: An Historical And Comparative Analysis*, 4 VILL. SPORTS & ENT. L.J. 13, n.11 (1997).

[182] *Id.* By one account the players for the Green Bay Packers were forced to organize after management refused to provide "clean jocks, socks and uniforms for two-a-day workouts."

[183] *See NFLPA, supra* note 179.

[184] *See* Radovich v. NFL, 352 U.S. 445 (1957).

[185] *See NFLPA, supra* note 179.

[186] *Id.*

[187] *See* Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976).

During the strike in 1987, the owners, rejecting the players' free agency demands, used scab players to continue the season.[188] The players returned to finish the season without an agreement and the scabs were let go.[189] Realizing that collective bargaining was not going to work because the clubs were acting as a monopoly, the NFLPA filed an antitrust lawsuit against the owners. The District Court for Minnesota ruled that because of the bargaining impasse, the owners were no longer entitled to their exemption to continue restrictive practices under the antitrust laws.[190] On appeal, the Eighth Circuit overturned the lower court decision holding that the players would have to "choose between being a union and using their right to strike under labor laws, or relinquishing their union rights and pursing their antitrust rights as individuals in court."[191] To the surprise of the owners, the NFLPA abandoned its status as a labor union, re-formed a professional association of players, ***with the primary purpose of supporting individual litigation*** by the players. The reformed players' association paid for several cases challenging the illegal practices of the NFL including the landmark case *McNeil v. NFL*,[192] where the jury found that the owners had ***violated antitrust laws*** by restricting players to a first refusal/compensation system that denied the top thirty-seven players from each team free agency status.[193] Not long thereafter, in 1992, the owners and players settled their differences with an agreement between the parties.[194] The NFLPA applied for and was certified again as a union by the National Labor Relations Board in March of 1993.[195] After meeting almost daily through the month of May of 1993, the parties then reached agreement on a new, five-year Collective Bargaining Agreement[196] that was later extended for another five years through 2003[197] and extended again through 2007.[198] While there has been a decline of labor

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188 *See NFLPA, supra* note 179.

189 *Id.*

190 *See* Powell v. NFL, 678 F. Supp. 777 (D. Minn. 1988), *rev'd* 930 F.2d 1293 (8th Cir. 1989).

191 *NFLPA, supra* note 179.

192 McNeil v. NFL, 1992 U.S. Dist. LEXIS 21561 (4th Div. Minn. 1992).

193 *See id.*

194 *See NFLPA, supra* note 179.

195 *Id.*

196 *Collective Bargaining Agreement, supra* note 28, at Article VII, § 1.

197 *Id.*

198 Barry Wilner, *NFL and Players Extend Labor Agreement Through 2007*, Associated Press, June 5, 2001, *available at* http://ca.sports.yahoo.com/010606/6/5rco.html:

> The NFL will have labour peace through 2007 once the league and the players ratify Tuesday's agreement to extend the collective bargaining agreement for three years. The NFL Management Council and players' association agreed to extend the salary cap through 2006, with the final year of the extension an uncapped season. The players and league owners must vote on the agreement, but that is considered a formality, particularly for the players, who

organization membership and power over the past thirty years, the NFLPA has emerged and only recently achieved effective functioning by reaching a working agreement between professional football players and management.[199] The rights of NFL players are protected by virtue of their status, as members of a union. It has changed the face of professional football. Critical to the continued success of the professional football labor movement is a player's ability to speak freely on matters that concern the professional football labor members.

2. COLLECTIVE BARGAINING AGREEMENT ANTIDISCRIMINATION CLAUSE

In addition to the antidiscrimination clause contained in the lease between the Bengals and Hamilton County,[200] the NFL Collective Bargaining Agreement 1993-2003[201] contains a clause intended to prevent discrimination against the players which reads as follows: "Section 1. No Discrimination: There will be no discrimination in any form against any player by the Management Council, [[202]] any Club or by the NFLPA because of race, religion, national origin or activity or lack of *activity* on behalf of the NFLPA."[203] Activity, which may include expressions to the media, is protected under this provision of the agreement.

D. *Free Expression and the Labor Movement*

1. FREE SPEECH BILL OF RIGHTS

Title 29 of the United States Code ("U.S.C.") contains a provision for freedom of speech and assembly for members of labor organizations:

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could receive an increase in salary to as high as 65.5 per cent of designated gross revenues in 2005.

199 Marjorie Valbrun, *To Reverse Decline, Unions are Targeting Immigrant Workers*, THE N.Y. TIMES COMPANY, May 27, 1999 ("Labor unions are pouring resources into campaigns to recruit new wave of immigrant workers, fastest growing segment of working class; hope to reverse 30 years of decline in union membership and power. . . .").

200 *See Lease Agreement, supra* note 116.

201 *See Collective Bargaining Agreement, supra* note 28.

202 *Id.* at Preamble. "[T]he National Football League Management Council ('Management Council'), . . . is recognized as the sole and exclusive bargaining representative of present and future employer member Clubs of the National Football League. . . ."

203 *Id.* at § 1 (emphasis added).

> Freedom of Speech and Assembly. Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.[204]

The apparent purpose of this provision is to insure that all members of labor organizations are free to meet together and have equal rights to speak at meetings and functions of the labor organizations.[205] The freedom of speech provision is directed toward the member's expression of his views regarding candidates for election and other business before the organization.[206] However, the fundamental purpose of a labor organization is to protect labor's interest against management. Candidates for election to a labor union post inevitably may run on platforms that are against certain corporate management policies due to the adversarial relationship between labor and management.[207] One might argue that the media could be excluded from labor meetings. However, is that guaranteed? Members of the media attend organized labor meetings. For example, a cursory search of the Lexis/Nexis database revealed 478 newspaper stories on file regarding labor meetings.[208] Though the labor movement has declined in recent years,[209] at one time every major paper in the country had a reporter dedicated to covering the meetings and business of labor organizations.[210] The media maintains an active interest in the business of labor organizations. If the players are prevented from making expressions that could be

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204 29 USCS § 411 (a)(2) (2001).

205 *See id.*

206 *Id.*

207 *See, e.g.*, Walgreen Co. v. NLRB, 509 F.2d 1014, (7th Cir. 1995).

208 Search by the author on Lexis/Nexis under News Group File, Beyond Two Years for: NFL Players Association w/15 meeting (May 1, 2002).

209 *See* Valbrun *supra* note 199.

210 Arnold Beichman, *Labor's Straying Legions*, THE WASHINGTON TIMES, May 20, 1995, at C, C3.

considered to have "undermine[d] the public's respect for the Club, Club coaches, or Club management,"[211] they will not be able to speak at a labor union meeting on political and business matters relating to the management of the team. Fundamentally, the Pickens Clause creates a direct violation of a player's right to freedom of speech under Title 29 of the U.S. Code,[212] because, under the Pickens Clause, the players, are not free to speak on matters pertaining to management for fear that the media might become aware of their statements in a meeting.

2. RIGHT TO PICKET

The NFL Players Association went on strike against the NFL Clubs in 1974, 1982, and 1987.[213] "The right to picket [is] protected by the provisions of the Constitution relating to freedom of speech. . . . "[214] The "NLRB [National Labor Relations Board] has concluded in [an] unfair labor practice proceeding that . . . picketing is [also] protected under 29 USCS § 157."[215] In 1940, the Supreme Court struck down an Alabama statute that made it unlawful to picket a place of business finding that "[i]n the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."[216] The Supreme Court also found that " '[the] streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'"[217]

NFL players, under contractual threat by management, are not free to exercise their right to picket a labor dispute without fear of losing their property.[218] The Supreme Court in *Thornhill v. Alabama,* noted that the Alabama statute obstructed the "effective means whereby those interested -- including the employees directly affected -- may enlighten the public on the

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211 *Pickens Clause, supra* note 35.

212 29 USCS § 411 (a)(2) (2001).

213 *See NFLPA, supra* note 179.

214 Alabama Cartage Co. v. Int'l Bd. of Teamsters, 250 Ala. 372, 376 (Ala. 1948).

215 *See* Wiggins & Co. v. Retail Clerks Union 595 SW.2d 802 (1980, Tenn).

216 Thornhill v. Alabama, 310 U.S. 88, 102 (1940) *in turn citing* Hague v. C. I. O., 307 U.S. 496; Schneider v. State, 308 U.S. 147, 155, 162-63 (1939). *See* Senn v. Tile Layers Union, 301 U.S. 468, 478 (1937). *See also* JULIUS G. GETMAN, BERTRAND B. POGREBIN, DAVID L. GREGORY, LABOR MANAGEMENT RELATIONS AND THE LAW (Second ed., Foundation Press, 1999).

217 *Thornhill*, 310 U.S. at 1056.

218 (The individual player's signing bonus.) *See Pickens Clause, supra* note 35.

nature and causes of a labor dispute."[219] The Court then went on to hold that "[t]he safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter, which is of public concern."[220] It is essential that NFL players have the full and unobstructed ability to picket, publicize, and make known any grievances against management. Under a contractual clause that provides for loss of pay, a player is not free to picket or express his differences with club management if his governing contract states that he can lose all or part of his signing bonus if he breaches his "loyalty" to management and the Club finds at "its sole discretion,"[221] that it undermined the public respect for the "Club, Club coaches, or Club Management."[222] A player cannot afford to say anything negative about management or the Club or coaches. The standard is too subjective and impossible to define clearly. *Anything* a player says can be held against him.

3. DISCRIMINATION AGAINST EMPLOYEES

"The National Labor Relations Act (NLRA) is the federal legislation that governs the relationship between employers and employees in the United States."[223] Section 7 of the National Labor Relations Act guarantees that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other ***concerted activities*** for the purpose of collective bargaining or other mutual aid or protection. . . ."[224] An individual speaker may be considered engaging in a concerted activity if it can be shown that the individual was "'engaged in, with or on the authority of other employees, and not solely by and on behalf of the employee himself.'"[225]

Therefore, as an example, if a player complains about a matter and it can be shown that other players were in agreement with his point of view, then,

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219 *Thornhill*, 310 U.S. at 104.

220 *Id.*

221 *Pickens Clause*, *supra* note 35.

222 *Id.*

223 J. Mark DeBord, *Individual Actions as Concerted Activities Under Section 7 of the National Labor Relations Act – The Nonunion Context*, 54 TENN. L. REV. 59 (1986), *citing* 29 U.S.C. §§ 151-169 (1982).

224 29 U.S.C. § 157 (2001) (emphasis added.)

225 *See* DeBord, *supra* note 223, at 60 (quoting Myers Indus., Inc., 268 N.L.R.B. 493 (1984)) (In *Myers Industries*, a truck driver was dismissed for refusing to drive an unsafe vehicle. The driver asserted protection under the act claiming that he was due protection for his concerted activity. The employee was able to show that subsequent drivers agreed and refused to drive the truck. The court found that the employee, though acting alone, was engaged in a concerted activity under § 7 of the NLRA.).

for purposes of Section 7 of the NLRA,[226] the player has engaged in a concerted activity. The protective guarantee under Section 7[227] is reinforced by Section 8(a)(3) of the NLRA[228] which provides that "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."[229] This provision of the Act is aimed at ensuring the right of labor to organize and represent its interest against management without reprisal from management for any "concerted activities"[230] on the part of labor that may occur in carrying out its' right to organize. The Pickens Clause penalizes the player for any so-called disloyal act against management. This fear of reprisal from management is a direct violation of the National Labor Relations Act, which provides that "any term or condition of employment to discourage membership in any labor organization"[231] is an "unfair labor practice."[232] Arguably, the Pickens Clause was not created for the purpose of discouraging membership in a labor organization, however, the Pickens Clause absolutely discourages the free flow of expression necessary to organize and represent the interests of labor against management.

4. WORKPLACE CONDITIONS

Workplace conditions are one of the primary concerns of organized labor as shown by the establishment of representation of NFL players that grew out of complaints regarding workplace conditions.[233] Moreover, safety in the workplace is a paramount public concern.[234] The Section 7 of the NLRA discussed above provides protection to union members for their actions taken to protect the interest of the employees. Many states, including Ohio, have whistleblower statutes, which protect an employee for reporting actions by employers that are in violation of public policy or the health and safety of the worker or the public.[235] Additionally, there has long been a common law

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226 29 U.S.C. § 157 (2001)

227 *Id.*

228 29 U.S.C. § 158 (a)(3) (2001).

229 *Id.*

230 29 U.S.C. § 157 (2001).

231 29 U.S.C. § 158 (a)(3) (2001).

232 *Id.*

233 *See NFLPA, supra* note 179.

234 Gutierrez v. Sundancer Indian Jewelry, 117 N.M. 41, 48 (N.M. Ct. App. 1993).

235 *See, e.g.*, ORC Ann. § 4113.52 (Anderson 2001).

"basis for protecting whistleblowers who expose workplace conditions which violate public policy"[236] as explained by the Supreme Court of Arizona:

> We believe that whistleblowing activity, which serves a public purpose, should be protected. So long as employees' actions are not merely private or proprietary, but instead seek to further the public good, the decision to expose illegal or unsafe practices should be encouraged. We recognize that there is a tension between the obvious societal benefits in having employees with access to information expose activities which may be illegal or which may jeopardize health and safety, and accepted concepts of employee loyalty; nevertheless we conclude that on balance actions which enhance the enforcement of our laws or expose unsafe conditions, or otherwise serve some singularly public purpose, will inure to the benefit of the public . . . .[237]

Professional football players are workers in vulnerable jobs where their safety is at risk every time they go to work whether on the practice field or during the course of actual games. "Injuries are very common in this sport and may end a player's football career."[238] "Pro football players have always known that their sport is dangerous, that the game's violent collisions can naturally lead to torn muscles and broken bones, to concussions and paralysis."[239] One sports commentator has claimed "[o]ver a period of two seasons there can be more than 6,000 injuries in professional football. . . ."[240] Any attempt to quite a player's free expression by a contractual provision that penalizes a player for his expression on matters relating to management, coaches and other players violates established public policy and statutes which provide for the safe harbor reporting by labor of dangerous workplace conditions.

V. CONCLUSION

The Carl Pickens Clause provision to the player contracts with the Cincinnati Bengals football team conflicts with public policy and violates

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[236] *Id.* (quoting Wagner v. City of Globe, 722 P.2d 250, 257 (Ariz. 1986)).

[237] *Id.*

[238] Career Kokua 1998 Selected Occupations, *at* http://www.state.hi.us/dlir/rs/loihi/carinfo/sportocc/football.htm.

[239] George, *supra* note 19, at D1.

[240] Mark Bright Talks About Perfect Penalties: Football Injures, *available at* http://www.open2.net/everwondered/football/injuries.html.

both common law and statutory standards. It is unconscionable to believe that a young, twenty year old athlete is capable of fully understanding the contractual risk he takes by agreeing to a provision that could cause him to lose millions of dollars as the result of an inadvertent comment to the media. Even with financial and legal representation available to explain the implications of the clause, a twenty year old does not have the depth of personal life experience to understand that the risk of a mistake far outweighs the negative benefit to the player of the clause.

Because of the depth of public assistance provided to the Bengals, as a private party, the Bengals are a state actor fully responsible for the individual rights of their players under the U.S. Constitution. Hamilton County has increased taxes and assumed a billion-dollar investment for the Bengals in exchange for a nominal lease amount. The favorable lease terms when analyzed in full, creates such a strong nexus between the Bengals, as a private party and Hamilton County, as a subdivision of the state, that the Bengals become a state actor. To reinforce this principal, the county included an antidiscrimination lease provision that binds the Bengals to "all applicable state, local and federal laws, rules, regulations, executive orders and agreements pertaining to discrimination in employment, unlawful employment practices and affirmative action."[241] The Bengals are obligated to provide a workplace that respects the worker's speech in accordance federal statutes and the line of cases that protect the workers right of expression in the workplace.

The player's interest represented by the NFL Player's Association provides additional protection of their individual right to free expression. The NFLPA and the NFL have agreed to a Collective Bargaining Agreement, which includes a specific provision against "discrimination in any form against any player."[242] The Pickens Clause restriction on speech violates the Collective Bargaining Agreement.

Finally, the players are union members whose right to speech is protected by statutory provisions protecting free speech in connection with their union activities including, speaking during union meetings without fear that their remarks might be overheard by the media, the right to express themselves through publicly picketing the workplace and the right to actively participate in organizational efforts in the workplace without fear of reprisal for publicly participating in such activity. Lastly, union members have a right to report publicly on matters relating to the safety of the workplace.

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241 *Lease Agreement, supra* note 116.

242 *See Collective Bargaining Agreement, supra* note 28.

When taking into consideration all the ways that the Pickens Clause violates public policy, violates statutory standards, and runs afoul of the rights of organized workers, the clause is an offensive provision that should be eliminated from player contracts. Professional football players are entitled to full right of free expression as public figures and members of the National Football League Players Association, a labor union organization.