

“NO DRINKING, NO DRUGS, NO LESBIANS”: SEXUAL ORIENTATION DISCRIMINATION IN INTERCOLLEGIATE ATHLETICS

BARBARA OSBORNE*

INTRODUCTION

Sexual orientation discrimination is a hot topic in the United States. As homosexuals demand the same rights as heterosexuals—to marry, to inherit, and to adopt—public opinion is divided. For every political and legal gain (such as legalized gay marriage in Massachusetts¹) there is an opposing setback (such as states enacting legislation defining marriage as a union of a man and a woman only²). Professional basketball player Sheryl Swoopes and All-American lacrosse goalie Andrew Goldstein’s announcements of their sexual orientation were headline news. This Article will examine the intersection of sexual orientation discrimination and intercollegiate sport.

Jennifer Harris was a highly talented high school basketball player garnering recognition as an All-American by McDonald’s, WBCA, *Parade Magazine* and Nike.³ Rene Portland, the women’s basketball coach at Penn State University, recruited Harris and offered her a full athletic scholarship.⁴ Harris claims that during the recruiting process Portland promised that she would have a position on the women’s basketball team and a scholarship for four years as long as Harris maintained her academic eligibility and complied with National Collegiate Athletic Association (NCAA), conference, university and team rules.⁵

Coach Portland’s anti-gay policy, characterized as “no drinking, no drugs, no lesbians,” was well-known throughout college basketball and had received

* Barbara Osborne, J.D. is an Associate Professor in the Exercise and Sport Science department and an Adjunct Professor in the School of Law at the University of North Carolina at Chapel Hill.

1. Goodridge v. Dep’t of Pub. Health, 798 N.E. 2d 941, 969–70 (2003).

2. WIS. CONST. art XIII, § 13.

3. First Am. Compl. ¶ 13, Harris v. Portland, Civ. A. No. 05-2648 (M.D. Pa. 2005).

4. *Id.* ¶ 20.

5. *Id.* ¶ 18.

extensive local and national media coverage.⁶ Harris claims that Portland advised her in the recruiting process “that she does not permit lesbians to play on Penn State’s team.”⁷ During her freshman season, Portland questioned whether Harris and a teammate were dating.⁸ Harris denied the accusation, but Portland persisted questioning her throughout the remainder of the season. She ultimately concluded that Harris’s teammate was gay, suggested that the teammate was brainwashing Harris, forbade the women’s basketball team members from associating with the player, and dismissed the targeted player at the end of the season.⁹

Harris earned a starting position at the start of her sophomore season, but Portland’s convictions that Harris was a lesbian intensified. Portland accused Harris and another teammate of dating, and although the accusations were denied, Portland targeted Harris as a “bad influence” on her teammates.¹⁰ Throughout the season, Portland publicly and privately directed Harris to dress in more feminine clothing and wear her hair in a more feminine style instead of the cornrows Harris preferred.¹¹ Portland continued to question Harris about her sexual orientation, and questioned Harris’s teammates about her personal relationships as well.¹² When Harris refused to change her appearance, Portland “humiliate[ed], berate[ed] and demean[ed] her in front of her teammates” in practice and individual meetings.¹³ After twenty-two games as a starter, Portland pulled Harris out of the starting line-up and pressured her to take a leave of absence.¹⁴ Although Harris had been a good student with academic aspirations of becoming a pediatrician, her performance in the classroom suffered and she had trouble sleeping and eating due to Portland’s harassing behavior.¹⁵ At the end of the season, Portland dismissed Harris and two other African American team members, prohibited her from attending the team awards banquet or from using athletics facilities, and

6. *Id.* ¶¶ 1, 33, 34. See also Julie Cart, *Lesbian Issue Stirs Discussion; Women’s Sports: Fear and Discrimination are Common as Players Deal with a Perception of Homosexuality*, L.A. TIMES, Apr. 6, 1992, at C1; see also *Group Says Penn State Coach Biased*, Oct. 11, 2005, <http://sports.espn.go.com/espn/print?id=2187880&type=story>.

7. First Am. Compl., *supra* note 3, at ¶ 40.

8. *Id.* ¶ 46.

9. *Id.* ¶¶ 48, 50.

10. *Id.* ¶ 53.

11. *Id.* ¶ 54.

12. *Id.* ¶¶ 55, 56.

13. *Id.* ¶ 57.

14. *Id.* ¶ 59.

15. *Id.* ¶ 61.

forbade the basketball players from associating with Harris.¹⁶ At the time she was dismissed, Harris led the team in points scored, three point shots, free throws, assists and steals, and ranked second in rebounds and rebounds per game.¹⁷

Harris is not the first, nor only, female collegiate athlete to make a claim of sexual orientation discrimination. Andrea Zimbardi was a walk-on to the University of Florida softball team in 1999. She earned a “partial scholarship during her sophomore season, and the amount of the scholarship was increased every year she was with the team.”¹⁸ As a senior, Zimbardi was a team captain and had a reputation as an excellent defensive catcher and team leader. “In 166 career games, she made only six errors and hit .233.”¹⁹

Karen Johns replaced Larry Ray as the head coach in 2000. “Johns made it very clear [to the team] that she was a Christian, and [that] she didn’t approve of homosexual relationships.”²⁰ Johns regularly led the team in the Lord’s Prayer and inserted “Biblical and religious passages in the team’s printed itinerary.”²¹ She frequently referred to “her knowledge of gay [softball] players and coaches and made known her belief that homosexuality was wrong.”²² She made comments to the team about recruits who were good Christians, and regularly contrasted her Christian lifestyle with that of lesbians, making the point that her softball players needed to conform to be good people.²³ Although Zimbardi was uncomfortable with Johns’s pronouncements, she kept her personal life private and concentrated on playing softball.

Heather Compton-Butler, another devout Christian, joined the Gators as the pitching coach for the 2003 season.²⁴ Zimbardi was uncomfortable with Compton-Butler’s questions about her personal relationships, and she soon discovered that Compton-Butler was also trying to obtain information about her from other players on the team.²⁵ Compton-Butler often made comments

16. *Id.* ¶¶ 62, 70, 71.

17. *Id.* ¶ 64.

18. Daniel Shanks, *Former Athlete to File Discrimination Lawsuit*, THE INDEP. FLA. ALLIGATOR ONLINE, June 10, 2003, <http://www.alligator.org/edit/news/issues/stories/030610sports.html>.

19. Joe Schad, *UF May Face Discrimination Lawsuit*, SUN-SENTINEL (Fort Lauderdale), June 7, 2003, at 9C.

20. Shanks, *supra* note 18.

21. Jim Buzinski, *Homophobia Alleged in University of Florida Softball*, OUTSPORTS ON CAMPUS, May 21, 2003, <http://www.outsports.com/campus/20030521andreazimbardi.htm>.

22. Schad, *supra* note 19.

23. Buzinski, *supra* note 21.

24. Schad, *supra* note 19.

25. *Id.*

identifying gay Olympic and professional softball players.²⁶ Although Zimbardi never publicly discussed her private relationships, Compton-Butler “outed” Zimbardi in front of the secretary in the softball office, making a comment about “not getting a butch haircut.”²⁷

Zimbardi became systematically excluded from team practices and activities. Compton-Butler failed to inform her of twice-a-day practices.²⁸ She was not invited to a pitchers-catchers dinner at Compton-Butler’s house, and her teammates noticed that she did not attend other team functions.²⁹ When her playing time was cut, she felt compelled to meet with Johns to discuss Compton-Butler’s treatment. Johns dismissed Zimbardi’s concerns, assuring her that Compton-Butler had no issues with her.³⁰

When the situation did not improve, Zimbardi scheduled a meeting with the athletics administration. Athletic Director Jeremy Foley and Assistant Athletic Director Ann Marie Rogers attended, as well as Johns, Compton-Butler, Zimbardi, and her parents.³¹ Zimbardi expressed her concerns that the coaching staff tried to force their Christian values and beliefs on her, made inappropriate comments, and excluded her from the team activities because of her sexual orientation.³² Foley acknowledged that her perception was her reality and promised to resolve the problems.³³ Johns denied Zimbardi’s claims and indicated that she thought Zimbardi fabricated the incidents to complain about lack of playing time.³⁴ At the end of the meeting, Zimbardi and her parents were assured that Zimbardi would not face retaliation for voicing her concerns.³⁵

Two days later Zimbardi met with Johns, Compton-Butler, and assistant coach Dave Majeski and was told that she was suspended for a week for telling lies and spreading misconceptions about the coaching staff at the meeting with Foley.³⁶ Johns suggested that Zimbardi see a psychologist and gave her the number of one.³⁷ During the week of Zimbardi’s suspension,

26. Buzinski, *supra* note 21.

27. *Id.*

28. *Id.*

29. Shanks, *supra* note 18.

30. Buzinski, *supra* note 21.

31. *Id.*

32. Schad, *supra* note 19.

33. Buzinski, *supra* note 21.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

2007]

“NO DRINKING, NO DRUGS, NO LESBIANS”

485

Compton-Butler allegedly told members of the softball team “that Zimbardi had filed a complaint against her with a gay rights group on campus.”³⁸ Zimbardi had not filed a complaint, and she was very upset that Compton-Butler had violated the promise to keep the details of the meeting with administration confidential.³⁹ At the end of the week’s suspension, Johns released Zimbardi from the team because she did not clear up the misconceptions she had about the coaching staff.⁴⁰

Two other former players corroborated Zimbardi’s claims.⁴¹ Both of these student-athletes had relationships with women and felt that the coaching staff had inappropriately scrutinized their personal lives.⁴² Both players saw their playing time suddenly and dramatically shrink and were released from the team for unspecified reasons.⁴³

Unfortunately, this sort of sexual orientation discrimination exists in many college athletics programs. Although individuals certainly differ in their opinions, tolerance or acceptance of homosexuality, intercollegiate athletics departments need to be aware of and concerned about the issue because of the potential harm suffered by the victims of sexual orientation discrimination, as well as the compensatory and punitive money damages and injunctive relief that the athletics department and university could incur. This Article will examine the impact of sexual orientation discrimination in intercollegiate athletics, the viability of various legal claims and potential remedies, as well as recommendations for intercollegiate athletics programs to protect their athletes and avoid liability.

IMPACT OF SEXUAL ORIENTATION DISCRIMINATION IN ATHLETICS

In athletics environments homosexual athletes suffer fear, humiliation, isolation, and sometimes physical violence.⁴⁴ Homosexuals, both male and female, have been systematically prohibited from participating in the educational benefits of intercollegiate sports.⁴⁵ They live in fear of being

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Julie A. Baird, *Playing it Straight: An Analysis of Current Legal Protections to Combat Homophobia and Sexual Orientation Discrimination in Intercollegiate Athletics*, 17 BERKELEY WOMEN’S L.J. 31 (2002).

45. *Id.*

“outed” and ostracized by peers, teammates, or coaches.⁴⁶ It was alleged in the Harris complaint that Portland had previously threatened a player, Cindy Davies, that she would disclose Davies homosexuality to her parents.⁴⁷ Davies quit the team rather than risk disclosure.⁴⁸ If homosexual athletes are honest about their personal relationships, they are often told to be silent to “protect” the program’s image.⁴⁹ If they try to transfer out of that environment, they may lose eligibility.⁵⁰ They also may suffer financial loss when scholarships are at stake.⁵¹

Even heterosexual girls and boys are impacted by homophobia in sport.⁵² Girls may be deterred from participating for fear of being labeled a lesbian.⁵³ Boys may shy away from participation in less masculine sports, such as figure skating or gymnastics, because it is assumed that males in those sports are gay.⁵⁴ Harris maintains that she is not a lesbian, yet her association with lesbian teammates and failure to conform to social standards of femininity in hair and dress contributed to Portland’s belief that she is homosexual.

Similarly, homosexual coaches have been denied employment, denied advancement, or terminated due to their sexual orientation.⁵⁵ They also live in fear of being “outed” and ostracized by peers or administrators. Opposing coaches may use the sexual orientation of a coach to strike fear in recruits or parents, and even heterosexual coaches who have been accused of being homosexual spend their entire careers under suspicion.⁵⁶ In her complaint, Harris describes her recruiting experience: when Harris indicated to Portland that she had narrowed her choices to Penn State and the University of Virginia, Portland’s response was that at Penn State we “date boys” and at the University of Virginia they “date girls.”⁵⁷ Consequently, many homosexual

46. Nat’l Ctr. for Lesbian Rights, *Sports Project: Realities Faced by Lesbian, Gay, Bisexual and Transgender Athletes and Coaches*, <http://www.nclrights.org/projects/sp-realities.htm> (last visited Apr. 2, 2007).

47. First Am. Compl., *supra* note 3, ¶ 33.

48. *Id.*

49. Nat’l Ctr. for Lesbian Rights, *supra* note 46; see generally *Yost v. Bd. of Regents*, Civ. A. No. HAR 93-471, 1993 WL 52457 (D. Md. Nov. 19, 1993).

50. Nat’l Ctr. for Lesbian Rights, *supra* note 46; see NAT’L COLLEGIATE ATHLETIC ASS’N, 2004–2005 NCAA DIVISION I MANUAL art. 14.5 (2004).

51. Nat’l Ctr. for Lesbian Rights, *supra* note 46.

52. Baird, *supra* note 44, at 34.

53. *Id.*

54. *Id.*

55. See *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998).

56. Baird, *supra* note 44, at 39.

57. First Am. Compl., *supra* note 3, ¶ 40.

2007]

“NO DRINKING, NO DRUGS, NO LESBIANS”

487

coaches present a hetero-sexy image to keep observers from learning their sexual orientation and to preserve marketing and endorsement opportunities. Additionally, homosexual coaches or administrators are denied benefits for their live-in partners.⁵⁸

LEGAL CLAIMS

On December 21, 2005, Jennifer Harris filed a federal lawsuit against Maureen “Rene” Portland, the women’s basketball coach, Timothy Curley, the Athletics Director, and the Pennsylvania State University for harassment and discrimination based on Portland’s perception that Harris is a lesbian.⁵⁹ Harris’s complaint includes federal and state claims based on equal protection, substantive due process, right to privacy, procedural due process, free speech, and freedom of expression.⁶⁰ Additional claims based on state law include right to reputation, sex discrimination, breach of contract, tortious interference with contract, negligent supervision, invasion of privacy, and defamation.⁶¹ Harris also makes an additional federal claim of race discrimination.⁶² Harris seeks compensatory damages of \$50,000, punitive damages, and injunctive relief for her claims.⁶³

What legal recourse do victims of sexual orientation discrimination in intercollegiate athletics have? This section will examine past case law applying constitutional law principles of equal protection and due process, First Amendment free speech issues, federal legislative protection under Title VII and Title IX, and state and local anti-discrimination statutes. Potential remedies will also be discussed.

Attempts to address sexual orientation discrimination with an Equal Protection claim had little success until the 1990s. For equal protection claims, the courts apply a tiered-scrutiny approach dependent upon the issue being addressed. The highest level of review is strict scrutiny, which requires that the government prove the challenged classification is necessary to achieve a compelling state interest.⁶⁴ Strict scrutiny is applied to suspect classifications that are expressly protected in the Constitution, such as race or national origin, or to fundamental freedoms, such as religion.⁶⁵ The

58. Nat’l Ctr. for Lesbian Rights, *supra* note 46.

59. See First Am. Compl., *supra* note 3.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. BARRON’S LAW DICTIONARY, 160 (3d ed. 1991).

65. *Id.* at 468.

intermediate scrutiny level is generally applied in situations of gender and legitimacy, known as quasi-suspect categories.⁶⁶ Intermediate scrutiny requires that the law must be *substantially* related to an *important* government interest.⁶⁷ The courts have acknowledged that differences because of sex may be justifiable relative to certain tasks.⁶⁸ Rational basis review is applied for all other group classifications.⁶⁹ In these situations the law must simply be *reasonably* related to a *legitimate* government interest.⁷⁰

Sexual orientation is not a protected class; therefore, the courts generally apply rational basis review, making it difficult to win the case. However, in 1996, the Supreme Court held in *Romer v. Evans* that Colorado Constitution article II, section 30b, an amendment preventing a government actor from taking any action to protect homosexual citizens from discrimination based on their sexual orientation, violated the Equal Protection Clause of the Fourteenth Amendment.⁷¹ The Court used language in dicta that leans toward intermediate review, but ultimately concluded that the Colorado Constitution's amendment failed rational basis review in stating that the classification of sexual orientation was not related to any legitimate state interest.⁷²

Also in 1996, the Seventh Circuit held in *Nabonzy v. Podlesny* that reasonable persons could conclude that discrimination based on sexual orientation was unconstitutional.⁷³ In this case, the parents of a male student who had been physically abused were told by school administrators that violent actions should be expected due to the student's sexual orientation.⁷⁴ In applying rational basis review, the court stated: "We are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation. . . ."⁷⁵ The Seventh Circuit relied on its decision in *Nabonzy* to make a similar holding in *Flores v. Morgan Hill Unified School District* in 2001, holding that intentional discrimination against or deliberate indifference towards students on the basis of their actual or perceived sexual orientation was unlawful if lacking a rational basis.⁷⁶

66. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

67. *Id.* (emphasis added).

68. *Id.*

69. BARRON'S LAW DICTIONARY, *supra* note 64, at 160.

70. *Id.* (emphasis added).

71. *Romer v. Evans*, 517 U.S. 620, 624 (1996).

72. *Id.* at 635.

73. 92 F.3d 446, 457 (7th Cir. 1996).

74. *Id.* at 451.

75. *Id.* at 458.

76. *Flores v. Morgan Hill Unified Sch. Dist.*, No. C 98-20358 JW, 2001 U.S. Dist. LEXIS 25599 (N.D. Cal. Dec. 20, 2001).

Other constitutional claims have had mixed success. In 1985, a bisexual high school guidance counselor was not successful with her claim that her dismissal was a violation of free speech and equal protection because her speech was not a matter of public concern and she provided no evidence of how other employees with different sexual preferences were treated.⁷⁷ In 1993, a varsity athlete on the University of Maryland field hockey team was also unsuccessful in her claim that orders to conceal her homosexuality were an unconstitutional suppression of speech, appearance, assembly, and association.⁷⁸ Yost was told by her coach that her sexual orientation was not acceptable to the University of Maryland and subsequently “made numerous derogatory and stereotypical remarks about Yost’s sexual orientation.”⁷⁹ Yost was ordered “not to ‘be seen’ with her girlfriend, [not to] accept rides to or from practice or class from her, or visit with her on the [University of Maryland] College Park campus for any reason.”⁸⁰ If Yost did not comply with the rules, the coach threatened to revoke her scholarship.⁸¹ When Yost asked to transfer, the coach refused to sign the necessary written release.⁸² The court failed to address the claims, holding that Yost lacked standing because she had exhausted her eligibility as an athlete.⁸³ However, in 1998, the Utah District Court held that the Nebo School District had violated a high school teacher/volleyball coach’s rights under the First Amendment and the Equal Protection Clause when it prohibited her from speaking about her sexual orientation and dismissed her from her coaching position.⁸⁴

Plaintiffs have also sought the protection of state constitutions. Some state constitutions include sex as a protected category, but few of these state courts have interpreted “sex” to include “sexual orientation.”⁸⁵ Currently, twenty-four states prohibit public employment discrimination based on sexual orientation through civil rights legislation or executive order.⁸⁶ Seventeen states prohibit private employment discrimination based on sexual orientation,⁸⁷ and eight states include protection from sexual orientation

77. *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009 (1985).

78. *Yost v. Bd. of Regents*, Civ. A. No. HAR 93-471, 1993 WL 52457, at *16–17 (D. Md. 1993).

79. *Id.* at *5.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Baird, *supra* note 44, at 43–45.

85. See generally Lambda Legal, <http://lambdalegal.com> (last visited Apr. 2, 2007).

86. Lambda Legal, *Summary of States, Cities, and Counties which Prohibit Discrimination Based on Sexual Orientation*, <http://www.lambdalegal.com> (last visited Apr. 2, 2007).

87. *Id.* These states are California, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota,

discrimination in their education statutes.⁸⁸ However, the Executive Orders that provided protection against sexual orientation discrimination in Iowa, Louisiana, and Maine have either expired or been repealed,⁸⁹ and Ohio's Executive Order was rewritten in 1999 to expressly exclude homosexual state employees.⁹⁰ In *Zimbardi's* case, the Florida Constitution provides no protection against sexual orientation discrimination, and even the University of Florida's non-discrimination policy did not include sexual orientation as protected class.⁹¹ The Pennsylvania Constitution does include sex as a protected class, but it does not include sexual orientation discrimination.⁹² Although state law may provide some protection for homosexual athletes, it is unlikely that a recruit will choose a college or university based on whether the state law will protect them from discrimination.

There are no federal laws prohibiting employment discrimination based on sexual orientation and no federal statute expressly protecting athletes from sexual orientation harassment or discrimination.⁹³ When sexual orientation discrimination is experienced by athletes, coaches, or athletics administrators at educational institutions, can Title IX provide legal recourse?

To fully understand how Title IX might provide protection for a college athlete, coach, or administrator who has been discriminated against due to his or her sexual orientation, Title VII must first be examined. Both statutes are similarly worded, and the law regarding sexual orientation discrimination in employment cases is currently more developed, so courts have relied on Title VII rulings in their interpretations of Title IX.⁹⁴ Thus, decisions related to sexual orientation discrimination in the workplace have an impact on how the courts may decide cases in intercollegiate athletics. However, applications of the statutes to the case law have been inconsistent, paralleling the societal division in the United States regarding the place and rights of homosexuals in our culture.

Title VII of the Civil Rights Act of 1964 provides that "[i]t shall be an

Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Wisconsin, as well as Washington D.C. *Id.*

88. *Id.* These states are California, Connecticut, Massachusetts, Minnesota, New Jersey, New York, Vermont, and Wisconsin, as well as Washington D.C. *Id.*

89. *Id.*

90. Ohio Exec. Order No. 99-25T (Aug. 11, 1999).

91. The University of Florida non-discrimination policy has been updated to include sexual orientation as a protected category. See UNIV. OF FLA., UNIVERSITY OF FLORIDA REGULATIONS, <http://regulations.ufl.edu/chapter1/1006.pdf> (last visited Apr. 6, 2007).

92. PENN. CONST. art. I, § 28.

93. Baird, *supra* note 44, at 48.

94. *Franklin v. Gwinnet County Pub. Sch.*, 503 U.S. 60 (1992).

unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.”⁹⁵ On its face, Title VII does not provide a cause of action for discrimination based upon sexual orientation.⁹⁶ The term “sex” in Title VII refers to only membership in a class delineated by gender, not by sexual orientation.⁹⁷

The Equal Employment Opportunity Commission (EEOC) enforces Title VII. The EEOC Guidelines state specifically that Title VII does not protect individuals from discrimination based on sexual orientation.⁹⁸ The EEOC Compliance Manual states that a victim must show that same-sex harassment was based on sex and not sexual orientation for it to be actionable under Title VII.⁹⁹

However, sexual harassment is “discrimination based on sex” under Title VII.¹⁰⁰ The EEOC, which enforces Title VII, defines sexual harassment as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when

- 1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment
- 2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
- 3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.¹⁰¹

The first two conditions are typically referred to as *quid pro quo* sexual harassment, and the third condition is commonly known as hostile environment. The development of the hostile environment scenario is most

95. Title VII, 42 U.S.C. §§ 2000e-1 to 2000e-16 (2006).

96. See also *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996).

97. *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000).

98. *Id.* at 35. See generally U.S. EQUAL OPPORTUNITY EMPLOYMENT COMM'N, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (June 18, 1999), available at <http://www.eeoc.gov/policy/docs/harassment.html>.

99. *Wrightson*, 99 F.3d at 143 (citing EEOC Compliance Manual, § 615.2(b)(3) (1987)).

100. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986).

101. Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604.11(a) (2003).

significant to a claim of sexual orientation discrimination that will be recognized by a court under Title VII.¹⁰²

The Court expanded the definition of sexual harassment under Title VII to include harassment based on non-conformity to gender stereotypes. In *Price Waterhouse v. Hopkins*, a female executive was denied promotions in spite of producing excellent work.¹⁰³ Although performance evaluations praised Hopkins for her work, she was also criticized for her aggressive masculine behaviors.¹⁰⁴ In order to improve her chances for future promotions, Hopkins was advised to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”¹⁰⁵ The Court held that the employer allowed a discriminatory motive to play a part in the employment decision, rationalizing that it would be unfair to require aggressive behavior from a woman to succeed in the job and then use that same aggressive behavior to fail to promote her.¹⁰⁶

The Supreme Court continued to broaden the definition of sexual harassment under Title VII to include same sex sexual harassment.¹⁰⁷ *Oncale v. Sundowner* involved a male employee on an oilrig that was subjected to severe verbal and physical abuse by his male coworkers.¹⁰⁸ The Court noted that the “harassing conduct [did not need to] be motivated by sexual desire to support an inference of discrimination on the basis of sex.”¹⁰⁹ The Court indicated that the social context in which the behavior occurs and is experienced by its target should be considered and conduct which a reasonable person would find severely hostile or abusive is harassment.¹¹⁰

An employer may have liability under Title VII, dependent upon who is doing the harassing. When there is a tangible employment action by a supervisor, such as discharge or failure to promote, the employer has no defense to liability.¹¹¹ When there is no tangible employment action, the plaintiff must prove that the conduct was sufficiently severe and pervasive to amount to harassment.¹¹² The burden then shifts to the employer to prove that

102. See generally *Meritor Sav. Bank*, 477 U.S. 57.

103. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 233–34 (1989).

104. *Id.* at 234–35.

105. *Id.* at 235 (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

106. *Id.* at 236–37.

107. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 82 (1998).

108. *Id.* at 77.

109. *Id.* at 80.

110. *Id.* at 81–82.

111. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998).

112. *Burlington Indus., Inc.*, 524 U.S. at 752; *Faragher*, 524 U.S. at 786.

it provided reasonable care to prevent and promptly correct any sexually harassing behavior that was occurring, and that the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.¹¹³ If the sexual harasser is a coworker, the employer's liability is defined by the negligence standard: the employer is liable when it knew or should have known of harassment and failed to take appropriate remedial measures.¹¹⁴ The same negligence standard applies to employer liability for harassment by third-party non-employees.¹¹⁵

Whereas Title VII protects against discrimination in employment, it would seem to protect coaches or athletics administrators making a sexual orientation claim if they can prove that the discriminatory action was based on sex or a failure to conform to gender stereotypes, regardless of the sex of the parties. As student-athletes are not recognized as employees of the academic institution they attend, Title VII would not be applicable in the situations described in the Harris and Zimbardi cases. However, Title IX protects against discrimination on the basis of sex in any education program or activity receiving federal funding.¹¹⁶ Title VII case law has served as a model for Title IX interpretation. The statutes are similarly worded, with Title IX stating, “No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .”¹¹⁷

In a line of cases that follows the expansion of the scope of sexual harassment under Title VII, the courts have defined the scope of actionable sexual harassment claims under Title IX. In 1999, the Court in *Davis v. Monroe County Board of Education* held that sexual harassment was discrimination based on sex for Title IX purposes, and that both student-to-student and teacher-to-student harassment were actionable.¹¹⁸ Similarly, quid pro quo and hostile environment harassment are actionable under Title IX.¹¹⁹

113. U.S. EQUAL OPPORTUNITY EMPLOYMENT COMM’N, *supra* note 98.

114. See *Martin v. Howard Univ.*, No. 99-1175, 1999 WL 1295339, at *3 (D.D.C. Dec. 16, 1999).

115. See *Curry v. Dist. of Columbia*, 195 F.3d 654, 659 (D.C. Cir. 1999).

116. Title IX of the Education Amendments of 1972 states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (2003).

117. 20 U.S.C. § 1681(a) (2006).

118. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).

119. *Wills v. Brown Univ.*, 184 F.3d 20, 25–26 (1st Cir. 1999).

In *Doe v. Dallas Independent School District*, the Court held that the parties involved in a Title IX sexual harassment action can be of the same sex.¹²⁰

The facts in the following case illustrate both quid pro quo and hostile environment sexual harassment claims under Title IX. In 1999, Meredith Turner filed a lawsuit against her former basketball coach, Chicago State University, and its Board of Trustees.¹²¹ Turner claimed that she was coerced into pursuing a sexual relationship with her coach and that she stayed in that relationship because she feared that the coach would revoke her athletic and academic scholarships, limit her “playing opportunities and status on the basketball team, impos[e] arbitrary and oppressive practice and conditioning requirements,” and that she would ultimately lose her ability to earn a degree from Chicago State University.¹²² Although the facts of the case were not disputed, the claims against Chicago State University were dismissed because the school was protected by sovereign immunity, and the claims against the coach were dismissed because the statute of limitations had tolled.¹²³

Like Title VII, Title IX does not expressly prohibit discrimination on the basis of sexual orientation. However, the Office for Civil Rights Revised Sexual Harassment Guidance (OCR Guidance) appears to be more inclusive than the EEOC Guidelines. The OCR Guidance states that Title IX protects male and female students from opposite-sex and same-sex harassment by school employees, other students, and third parties such as visiting athletes.¹²⁴ It also acknowledges that “sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student’s ability to participate in or benefit from the school’s program constitutes sexual harassment prohibited by Title IX,” which would seem to allow a cause of action based on sexual orientation.¹²⁵ The OCR Guidance further states that

gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond, if it rises to a level that denies or limits a student’s ability to participate

120. *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 219–20 (5th Cir. 1998).

121. *Turner v. McQuarter*, 79 F. Supp. 2d 911, 913 (N.D. Ill. 1999).

122. *Id.* at 913–14.

123. *Id.* at 916–18.

124. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 3 (2001), available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

125. *Id.* at 3.

in or benefit from the educational program.¹²⁶

The OCR Guidance also explains the liability of the educational institution. If the employee engages in sexual harassment while carrying out responsibilities to provide benefits and services to students, the institution is responsible for the discriminatory conduct, remedying its effects, and preventing future occurrences whether or not it has notice of the harassment.¹²⁷ If the employee is acting outside the scope of his or her assigned duties, the institution must “take prompt and effective action to stop the harassment and prevent its recurrence” upon notice of the harassment.¹²⁸ The institution is considered to have engaged in its own discrimination if it fails to act and allows the student to be subjected to a hostile environment that denies or limits the student’s ability to participate in or benefit from the school’s program.¹²⁹ The institution is responsible for peer or third party harassment if the institution knew or reasonably should have known of the harassment and failed to take prompt and effective action.¹³⁰

In 2000, the court in *Ray v. Antioch Unified School District* clearly defined when recipients of federal funding could be liable for same-sex sexual harassment by student peers.¹³¹ Schools are liable for peer sexual harassment when “they are . . . deliberately indifferent . . . to sexual harassment . . . of which they have actual knowledge . . . that is so severe, pervasive, and objectively offensive . . . that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”¹³² In *Ray*, students harassed another student because they perceived the student to be homosexual.¹³³ The court relied on *Oncale v. Sundowner Offshore Services*¹³⁴ to establish that same-sex harassment is actionable under Title VII, and *Franklin v. Gwinnett County Public Schools*¹³⁵ to use Title VII jurisprudence to interpret Title IX.¹³⁶

Although precedent indicates a willingness of the courts to expand the

126. *Id.*

127. *Id.* at 10.

128. *Id.* at 11–12; *see also* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

129. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, *supra* note 124, at 12.

130. *Id.* at 12–13; *see also* Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).

131. *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1168–69 (N.D. Cal. 2000) (citing *Davis*, 526 U.S. at 648).

132. *Id.* at 1169.

133. *Id.*

134. 523 U.S. at 82.

135. 503 U.S. 60.

136. *Ray*, 107 F. Supp. 2d at 1169.

scope of Title VII and Title IX claims, they have not taken the final step to recognize that homosexuality itself is a failure to conform to gender stereotypes. In the United States, the world of sports is the last bastion of masculinity.¹³⁷ Athletes are strong, aggressive and competitive—all admirable male gender characteristics. The dominant female stereotype in our culture is to be physically attractive, petite, demur, supportive, and nurturing.¹³⁸ Female athletes are caught in a socio-cultural contradiction—to be an athlete is to be masculine, automatically calling the athlete's femininity into question. When a woman's femininity is challenged, her sexuality is questioned as well. In essence, being a female athlete itself is a failure to conform to accepted gender stereotypes. If the courts would recognize that homosexuality is a failure to conform to the majority gender stereotype that only men and women can become couples, then sexual orientation discrimination would be actionable under the statutes.¹³⁹

The courts have not taken that next step; therefore, based on the current status of the case law, the best option for a homosexual who has been discriminated against or harassed is to use the gender stereotyping tactic. When the plaintiff makes a claim based solely on sexual orientation discrimination, it is easy for a court to dismiss the case because sexual orientation is not a protected class under the statutes.¹⁴⁰ A plaintiff needs to frame the claim as a failure to conform to accepted gender stereotypes so that it is actionable under Title IX. In *Bibby v. Philadelphia Bottling Co.*, the court dismissed the claim because it was based on sexual orientation, but stated that if the plaintiff had shown that the harasser's conduct was based on failure to conform to a gender stereotype, it would have been valid under Title VII.¹⁴¹

The facts presented in Harris's claim appear to fall within this framework. Harris alleges that Portland instructs women's basketball team members "to dress and wear their hair in 'feminine' styles, wear jewelry, make-up, and acquire tans."¹⁴² The claim indicates that Portland specifically directed Harris to dress in more feminine clothing and to change her hairstyle from cornrows to more feminine braids if she would not wear it down.¹⁴³

137. Baird, *supra* note 44, at 33–34.

138. *Id.*

139. *Id.* at 60; *see also* Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("Sexual orientation discrimination is often, if not always, motivated by a desire to enforce heterosexually defined gender norms.").

140. Higgins v. New Balance Athletic Shoe, Inc., 194 F. 3d 252, 258–59 (1st Cir. 1999).

141. Bibby v. Phila. Coca Cola Bottling Co., 85 F. Supp. 2d 509, 517 (2000).

142. First Am. Compl., *supra* note 3, ¶ 43.

143. *Id.* ¶ 54.

Even if the claim is framed as a failure to conform to accepted gender stereotypes, this tactic does not always work. In *Mims v. Carrier Corp.*, the plaintiff claimed that he was harassed because of his perceived sexual orientation, although he was not gay.¹⁴⁴ The Fifth Circuit held that Title VII does not allow a claim for discrimination based on sexual preference and that neither sexual orientation nor perceived sexual orientation was harassment based on sex.¹⁴⁵ The court failed to acknowledge any connection between sex discrimination based on gender nonconformity and sex discrimination based on sexual orientation.

Another problem with the “gender non-conformity equals sex discrimination” argument is that it assumes that every homosexual acts in a stereotypical way and does not provide protection for potential plaintiffs that do not.¹⁴⁶ In Zimbardi’s case, she would have a difficult time framing her claims under the gender non-conformity standard. The comment regarding getting a “butch haircut” would not likely be enough to establish a failure to conform to the accepted gender stereotype.

Although Zimbardi never filed a lawsuit based on her situation, the National Center for Lesbian Rights was able to negotiate a settlement with the University of Florida on her behalf.¹⁴⁷ As part of the agreement, the University of Florida will

include a sexual orientation component in its annual non-discrimination staff training; amend its non-discrimination materials to include sexual orientation; create and publish an alternative reporting mechanism through which student athletes may report alleged violations of [u]niversity non-discrimination rules; [and] develop and provide to coaches and athletic personnel guidelines regarding prayer during practices [and] competitions or other athletic events.¹⁴⁸

Additionally, the University promised to submit an application to the NCAA for restoration of Zimbardi’s final year of eligibility.¹⁴⁹ Zimbardi will be reimbursed \$4561.15 for tuition for master’s degree studies in Engineering Management at the University of Florida, as well as receive up to \$1800 for books and supplies.¹⁵⁰ Other perks include two free tickets to all future

144. *Mims v. Carrier Corp.*, 88 F. Supp. 2d 706, 710 (E.D. Texas 2000).

145. *Id.* at 713; see *Smith v. Liberty Mutual Ins. Co.*, 569 F.2d 325 (5th Cir. 1978).

146. Baird, *supra* note 44, at 60.

147. Interview with the National Lesbian Rights Center (Oct. 20, 2004).

148. Jim Buzinski, *Florida Settles with Lesbian Athlete*, OUTSPORTS ON CAMPUS, Jan. 27, 2004, <http://www.outsports.com/campus/20040227zimbardisettlement.htm>.

149. *Id.*

150. *Id.*

University of Florida regular season varsity athletics competitions, including football through June 2004, free athletic shoes each semester, the return of her catcher's mitt and media guide, and a promise to be invited to the softball team's annual alumni event.¹⁵¹

Harris is seeking compensatory damages over \$50,000 as well as punitive damages.¹⁵² Equitable relief requested includes an order enjoining Portland from inquiring about the sexual orientation of Harris and others and from harassing or discriminating on the basis of race, gender, or sexual orientation.¹⁵³ Harris also asks for Penn State to require all athletic department employees to participate in annual mandatory education related to race, gender, and sexual orientation discrimination as well as to adopt meaningful grievance policies and procedures. A full-time staff person hired to monitor the athletics department's compliance with non-discrimination policies and procedures, as well as to assist student athletes and employees who believe they are victims of discrimination has also been requested. Finally, Harris seeks attorney's fees and court costs.¹⁵⁴ Assuming that Harris prevails on her claims, the relief requested seems comparable to the Zimbardi settlement and entirely reasonable based on settlements for approximately \$1,000,000 in the *Flores* and *Nabonzy* cases previously discussed.

RECOMMENDATIONS FOR ATHLETICS PROGRAMS

Many of the conditions that the University of Florida agreed to are excellent recommendations for programs that seek to prevent sexual orientation discrimination from occurring. Athletics departments can prevent harassment by creating an atmosphere of respect for and acceptance of others. It is prudent to be aware of and adhere to the college's or university's non-discrimination policy. At Penn State, Policy AD42 states:

The Pennsylvania State University is committed to the policy that all persons shall have equal access to programs, facilities, admission and employment without regard to personal characteristics not related to ability, performance, or qualifications as determined by University policy or by state or federal authorities. It is the policy of the University to maintain an academic and work environment free of discrimination, including harassment. The Pennsylvania State University prohibits discrimination and harassment against any person

151. *Id.*

152. First Am. Compl., *supra* note 3, ¶ 108.

153. *Id.*

154. *Id.*

2007] “NO DRINKING, NO DRUGS, NO LESBIANS” 499

because of age, ancestry, color, disability or handicap, national origin, race, religious creed, sex, sexual orientation or veteran status. . . .¹⁵⁵

As of June 1, 2006, 562 colleges or universities had expressly included sexual orientation as a protected category in their non-discrimination policies.¹⁵⁶ A strong sexual harassment policy will establish a set of institutional values and a code of behavior that makes sexual harassment unacceptable. The sexual harassment policy should address quid pro quo, hostile environment, and same-sex sexual harassment “clearly communicate[s] the consequences of sexual harassment, prevent legal entanglements [of] the university, and protect the educational mission of the institution.”¹⁵⁷ University counsel should be involved in training athletics departments on institutional policy and legal requirements.¹⁵⁸ Additional sources to help institutions create a hospitable environment for homosexuals are listed in Table 1.

Table 1. Resources for Gender and Homophobia Training

Gay, Lesbian and Straight Education Network

<http://www.glsen.org/>

This site has information on how to create a safe school environment for gay and lesbian students. Also on this site is Pat Griffin’s article *Assessing the Athletic Climate for Lesbian, Gay, and Bisexual Athletes and Coaches*.

Human Rights Campaign

<http://www.hrc.org>

This site has information on how straight individuals can develop an ally program to support gay and lesbian co-workers.

Lambda Legal Defense

www.lambdalegal.org/

Sports persons can find maps and charts of all cities, counties, and states

155. *Id.* ¶ 28.

156. HUMAN RIGHTS CAMPAIGN FOUND., THE STATE OF THE WORKPLACE FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDER AMERICANS 2005–2006, available at http://www.hrc.org/Content/ContentGroups/Publications1/State_of_the_Workplace/SOTW2005-2006.pdf.

157. Nancy Hogshead-Makar & Sheldon E. Steinbach, *Intercollegiate Athletics’ Unique Environments for Sexual Harassment Claims: Balancing the Realities of Athletics with Preventing Potential Claims*, 13 MARQ. SPORTS L. REV. 173, 189–90 (2003).

158. *Id.* at 189.

that prohibit discrimination based on sexual orientation.

OutSports.com

www.outsports.com/outathletes.htm

Outsports has compiled the most extensive listing of out athletes, coaches and administrators available to date.

Project to Eliminate Homophobia in Sport

<http://www.homophobiainsports.com>

A collaborative effort involving seven leading national organizations, designed to create an educated public that respects all athletes and sports-affiliated personnel regardless of sexual orientation and gender identity/expressions.

Sexual Minorities in Athletics (SMIA)

www.smiaonline.org

SMIA is a resource for college athletics with articles, available discussions, etc.

Women's Sports Foundation

www.womenssportsfoundation.org

The Women's Sports Foundation (WSF), founded by Billie Jean King, is a charitable educational organization that works to ensure sports participation and leadership opportunities for all girls and women. The WSF initiated a collaborative for their Project to Eliminate Homophobia in Sports. See homophobiainsport.com above.

A college or university should not only have in place strong policies, but it should also examine the procedures for institutional responses to known sexual harassment.¹⁵⁹ A strong sexual harassment policy will include procedures to ensure that students and others know who to go to if an incident occurs and "can report incidents without fear of adverse consequences."¹⁶⁰ The athletics department procedures should insure that the administration

159. *Id.* at 188.

160. *Id.* at 189–90.

2007] “NO DRINKING, NO DRUGS, NO LESBIANS” 501

responds appropriately to all claims of harassment.¹⁶¹ Upon awareness of harassment, schools must take immediate and appropriate steps to investigate or otherwise determine what occurred. Prompt and effective steps reasonably calculated to end any harassment must be taken. The school must also eliminate a hostile environment if one has been created and prevent harassment from occurring again.¹⁶²

CONCLUSION

Even when sexual orientation is included in the institutional non-discrimination policy, higher education is a long way from achieving equal rights for homosexuals. Gays and lesbians have always been present in sport, as well as society, and that is not likely to change. Homophobia affects all men and women in athletics. As such, it remains the responsibility of the institution to ensure that homosexual student-athletes enjoy the same intercollegiate athletics experience, free from harassment that heterosexual student-athletes enjoy. Until homosexuals receive protection as a class, for athletes, coaches, and administrators at educational institutions, Title IX currently offers the best hope for federal protection, even in its limited way.

161. *Id.*

162. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, *supra* note 124, at 15.

Copyright of *Marquette Sports Law Review* is the property of *Marquette Sports Law Review* and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.