

RETHINKING HOMOPHOBIA IN SPORTS: LEGAL PROTECTIONS FOR GAY AND LESBIAN ATHLETES AND COACHES

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INTRODUCTION

“Homosexuality has no place in my life. Never has and never will....Given the times, calling a man gay is the fastest way to tearing him down. I don’t want to be associated with that group of people. Personally, that thought repulses me,”¹ said one professional football player publicly denying that he was gay. A gay former-Olympian describes his experience, “[growing up] homosexuals were thought of primarily as men who really would prefer to be women. And so I threw myself into athletics....I was a *jock*—that’s how I was viewed, and I was comfortable with that.”² One woman described her collegiate athletics experience as follows,

[Our coach] told us when we came on the team that she didn’t go for the lesbian lifestyle, that she didn’t want it on her team—wouldn’t tolerate it. I’m not a lesbian, but when I played for her, I was afraid she might think I was and take away my scholarship.³

A professional woman athlete states, “I’d like to be able to come out, and I know a couple of other women would... I’m afraid—I’ll admit it...I’m just not willing to be a martyr and give it all up.”⁴

These athletes, like many athletes today, were responding to fears and stereotypes about homosexuality and gender roles when they made their comments. Coming out in the sports’ world can be an alienating and difficult experience for gay and lesbian athletes

¹ MESSNER, MICHAEL & DONALD SABO, *SEX, VIOLENCE AND POWER IN SPORTS* 121 (1994).

² *Id.* at 114.

³ Victoria A. Brownworth, *The Competitive Closet*, in *SPORTSDYKES* 79 (Susan Fox Rogers ed., 1994).

⁴ *Id.* at 78.

and coaches. Gays and lesbians in sports, as in other professions and activities, may be subject to discrimination, harassment, threats, and violence. This article will argue that the institution of sports, and its current pro-masculine ideology, make homophobia more common than in the larger society.

It is important to address the issue of homophobia in sports because of the unique and powerful role that sports play in our society. Professional, collegiate, and even some high school athletes are role models for millions of people. Further, millions of sports fans are captivated by the lives of these athletes on and off the playing field. When athletes express homophobic ideas, their unique and powerful positions allow them, whether intentionally or not, to pass on this homophobia to the people who respect them. Further, many youths engage in athletics, such as Little League, pee-wee football, basketball, and softball. These impressionable children are impacted by their coaches' homophobic attitudes. Additionally, homophobia and discrimination also negatively affect numerous gay and lesbian athletes and coaches. These people should not have to live in constant fear of being "found out," or of losing their jobs, playing time, or scholarships.

Part II of this article will explain the cause of homophobia in sports, and illustrate that the prevalence of homophobia in sports is a result of both pro-masculine ideology and gender role stereotyping. Part III of this article, sets out the current legal protections for gay and lesbian athletes, coaches, and other personnel, which incidentally applies to gay and lesbian employees in general. Part IV will conclude this article observing that current legal protections for gay and lesbian athletes and coaches are not adequate.

II. THE WORLD OF SPORTS IS MORE HOMOPHOBIC THAN THE REST OF SOCIETY

A. *Sports are Dominated by Masculine Traits and Preservation*

The sports world is one of the last arenas that continues to be blatantly dominated by men. Male athletes and administrators are paid more than women, hold most of the coaching, athletic direction, and executive jobs, and are seen as the “real athletes” which women may only aspire to emulate. For instance, in professional sports, the average Women’s National Basketball Association (“WNBA”) salary in the 1999-2000 season was \$55,000; the average National Basketball Association (“NBA”) salary was \$3.17 million.⁵ In the NBA, National Football League (“NFL”), National Hockey League (“NHL”), and Major League Baseball (“MLB”) white males accounted for 96.5 percent of team ownership in 2002.⁶ Further, women hold very few of the top management positions available in professional sports, occupying fourteen percent in the NBA, seven percent in the NFL, and four percent in MLB of all team vice-president positions.⁷ Conversely, in the Women’s United Soccer Association (“WUSA”), women held forty-five percent of the executive positions and sixty-six percent of the administrative positions.⁸ In the 2003 season, however, only one out of eight head coaches of WUSA was female.⁹ Thus, while men hold most positions in professional men’s sports, they also hold significant numbers in professional women’s sports.

In amateur sports, only ten of the 127 active members of the International Olympic Committee were women in 2002.¹⁰ College athletics bears a similarity to

⁵ Women’s Sports & Fitness Facts & Statistics (Compiled by the Women’s Sports Foundation), updated Sept. 1, 2003 at 18

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 8.

⁹ *Id.*

¹⁰ *Id.* at 7.

professional sports, in that only forty-four percent of the coaches of women's teams were female in 2002.¹¹ The trend seems to be moving towards hiring more male coaches for women's teams, as ninety percent of the new coaching jobs in women's athletics since 2000 have been filled by men.¹² Meanwhile, women in the coaching ranks of men's teams remain at less than two percent.¹³

This disparity continues with media coverage. ESPN ran 778 stories about males, sixteen about females, and thirteen that mentioned both males and females during a thirty-day analysis of ESPN's "SportsCenter."¹⁴ A study of three major newspapers showed that men received eight-two percent of all coverage while women received only eleven percent.¹⁵ In 2002, women appeared on three *Sports Illustrated* covers—including the swimsuit issue.¹⁶ In looking at only what the media portrays, it appears as though women's sports are virtually nonexistent; or, that even if women do play sports, women are not important or talented enough to be covered to the extent of men.

The domination of men in the sports world, whether through power, money, or media coverage creates a political situation where traditional masculine traits thrive and are preserved in this institution. As Dr. Donald Sabo writes, "Power concerns the ability of one person or group to impose its will on another group with or without its consent or collaboration."¹⁷ In the sports world, men have power, and they seek to preserve it. In doing so, this dynamic "enters into the web of power relations between straights and gays, men and women, and groups of men within the intermale dominance hierarchies

¹¹ *Overview of Findings*, WOMEN IN INTERCOLLEGIATE SPORTS (Women's Sports Foundation), 2002.

¹² *Id.*

¹³ *Id.*

¹⁴ WOMEN'S SPORTS & FITNESS FACTS & STATISTICS, *supra* note 5, at 11.

¹⁵ *Id.*

¹⁶ *Id.* at 12.

¹⁷ MESSNER, *supra* note 1, at 108.

that make up contemporary gender relations.”¹⁸ In the following sections, it will be argued that in the male-dominated sports world stereotyped gender roles are used to preserve male power by relegating anything “non-male” to a secondary status.

B. “Real Boys” are Better than Girls

Our society has divided the traits that people should possess into two sets: masculine and feminine. But what exactly are these masculine and feminine traits? Early on, we learn that maleness equates with competitiveness, dominance over others, self-reliance, toughness, and abstract thinking.¹⁹ Feminine traits involve submission, emotional expression, dependency, vulnerability, quietness, and looking and being “pretty.”²⁰ These qualities are firmly ingrained in us as we are both implicitly and explicitly told that they apply to one gender or the other. For instance, a psychological study that asked people to describe babies that were dressed in either pink or blue produced telling results. Regardless of the actual sex of the baby, the ones dressed in blue were described as “strong” and “alert” while the babies in pink were “soft” and “little.”²¹ From this study, we can infer that people place certain characteristics on a person based on that person’s perceived gender identity.

And, Dr. Minor argues that of these two gender identities, our social institutions instill in us that the masculine one is better.²² For instance, from our laws, texts, and statutes that mostly refer to all human beings as “he,” “man,” and “mankind,” we learn that masculine traits are the “standard by which we measure everything.”²³ “Man” is the

¹⁸ *Id.*

¹⁹ ROBERT N. MINOR, SCARED STRAIGHT 58 (2001).

²⁰ *Id.* at 59.

²¹ Betty Hicks, *Lesbian Athletes*, in SPORTSDYKES 64 (Susan Fox Rogers ed., 1994).

²² MINOR, *supra* note 19, at 76.

²³ MINOR, *supra* note 19, at 76-77.

default human being and a text that refers to “women” is referring to women only. Further, Minor observes that masculine traits rule whom we talk about, how the U.S. should relate to other countries, and how they define our ideal of leadership.²⁴ He observes that we also defend masculinity more vigorously than femininity because femininity is perceived to be of lesser value.²⁵

Little boys, for instance, learn early on that the worst insult is to be equated with a girl. Following from this, a girl learns that “the worst thing she can be is who the culture is training her to be.”²⁶ Thus, by fulfilling her feminine role, she will always be subordinate to men, but if she steps out of that role she will be a threat to masculinity.²⁷ Women in athletics particularly face this “Catch-22” as they aspire towards equality in the world of sports. Of the two gender identities that our society has created, it is often the traits associated with masculinity that one needs to excel at sports.

If women wish to be successful in sports, they often have to exhibit these traits. By doing so, however, they are stepping out of the gender role. In a sports world that is dominated by men, this often is not acceptable. As Dr. Minor states, “Women who live the ‘masculine’ role threaten conditioned males. Men may fear these women are ‘more manly’ than males believe themselves to be.”²⁸ That is, when a woman, who is supposed to be inherently inferior to a man, shows masculine traits, men fear that they are losing power to her. The double-bind for women is that if they do not exhibit masculine traits, they may not be as successful in sports, as measured by society’s standards, as they could otherwise be. As a result, men who have power in the sports world will use this “lack of

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 79.

²⁷ *Id.*

success” as an excuse to keep paying women lower salaries, to not hire them for coaching jobs, and to not cover women’s sports in the media.

C. Sissies and the Lavender Invisibility

Women are not the only ones who suffer from these restrictive gender roles. Men who rely on these masculine stereotypes often use them to assert and preserve their superiority over men who show stereotypically feminine stereotypes. Gay male athletes are assumed not to exist. Part of the reason for this is because our society views gay men as “weak” and “effeminate,” and therefore non-masculine. Accordingly, athletes in sports such as football, basketball, hockey, and baseball—where athletes have to display masculine traits to be successful—are assumed to be heterosexual. Another reason gay males are assumed not to exist in sports is that they often choose to keep their sexuality a secret rather than risk taunting, isolation, and possible physical harm that may accompany the revelation of their sexuality. Gay athletes know that homophobia is prevalent in the sports world. However, what may be subtler is that this homophobia is linked to broader issues of gender roles.

As boys grow up and learn what traits they are supposed to exhibit, they also learn from society that masculinity and homosexuality are incompatible. Boys learn that homosexuality is “the negation of masculinity” and that to be masculine often they must be homophobic.²⁹ The homophobia that men often show towards gays and those they perceive as gay is an attempt to keep men from stepping out of their masculine role. It is the threat of being labeled “gay” that forces men to behave in accordance with male

²⁸ *Id.*

²⁹ MESSNER, *supra* note 1, at 103.

stereotypes.³⁰ After all, how can traditionally masculine men retain their power if there are alternative acceptable ways of being a “man”?

Homophobia in sports is learned in various ways. For example, from joking in locker rooms boys learn that gays are disgusting and something to mock. It is also learned from coaches, that boys who are “weak” or soft,” and thus gay, are something to ridicule.³¹ Further, men who participate in “less masculine” sports, such as fencing and gymnastics, are often ridiculed as being gay. Finally, men who show no interest in sports are also seen as less masculine than men who follow sports. The ridicule of being considered feminine or gay likely stems from masculine males’ being threatened by men who do not cherish the masculine traits that are held as superior in our society. Once again, masculine men are threatened by an alternative way of being a “man.” As Mariah Burton Nelson writes, “the grown man who pays no attention to male sporting dramas must be ...the most secure and confident of all men, because he relinquishes a daily opportunity to identify with the culture’s primary male heroes and in the process risks censure or at least estrangement from other men.”³²

The homophobia that men often show towards gays and those they perceive as gay harms women as well as men. Dr. Sabo argues that calling men “fag” or “effeminate” would not be so insulting if women were not considered inferior to men.³³ Thus, ridiculing men for being gay or “acting” gay is tantamount to telling a boy that he “throws like a girl.”³⁴ Central to both insults is that being feminine, or showing traits that

³⁰ *Id.* at 109.

³¹ *Id.* at 103-104.

³² MARIAH BURTON NELSON, *THE STRONGER WOMEN GET THE MORE MEN LOVE FOOTBALL* 6 (1993). [hereinafter NELSON]

³³ MESSNER, *supra* note 1, at 109.

³⁴ *Id.*

a girl would show, is inferior to being masculine. A boy, for instance, would not try to insult another boy (or girl) by saying “you throw like a man.” Homophobia thus serves a dual purpose in sports: it keeps men in line and keeps women relegated to an inferior status.

D. The Presence of Women in Sports Threatens Masculinity

“The stronger women get, the more enthusiastically male fans, players, coaches and owners seem to be embracing a particular form of masculinity: toughness, aggression, denial of emotion, and a denigration of all that’s considered female.”³⁵ The central idea of this quote is that the more power women get in sports, and the better they get at them, the more men are threatened and seek to preserve their own power in sports. First off, women are seen as stepping out of their gender roles by playing sports, because playing sports is a masculine endeavor. One way of attempting to keep women from stepping out of their feminine roles is by questioning their sexuality when they do so. However, the “oppression of lesbians has nothing to do with sex, sexual orientation, or who is in love with whom. It is the means of installing and enforcing a gender role on women.”³⁶ Thus, in any area of life where women are seen as assuming masculine traits, a claim that she is a lesbian is an attempt to get her to conform to a woman’s gender role. Allegations of lesbianism are sometimes used by men to maintain the existing male power structure in sports, and in other traditionally male-dominated professions as well. Accusations that playing sports “masculinizes” women, or that female coaches or athletic

³⁵ NELSON, *supra* note 31, at 6.

³⁶ MINOR, *supra* note 19, at 94.

personnel are lesbians, serves to discredit women regardless of actual sexual orientation so that men “can retain their higher status and control of resources.”³⁷

One may wonder why female coaches, like the one quoted at the beginning of this article, would discriminate against lesbians on their teams since female coaches are not part of the male power hegemony. These coaches may be genuinely homophobic. However, it is likely that much of the discrimination and homophobia is a result of the fear of being labeled lesbians themselves or fearing the overall assumption that all women athletes are lesbians. While only reinforcing the traditional power structure, some coaches believe that keeping lesbians off of sports teams is important to dispel this stereotype. One college coach states,

[a]s unfortunate as it is [that harassment exists], these girls really bring it on themselves. It just isn't important to be openly lesbian in college and tell everybody that you like other girls and so forth. I don't think it's discrimination if these coaches keep players off their teams. It's for the good of the team. And frankly, in the long run, it can only benefit women's sports.³⁸

Thus, some coaches find it more important to attempt to sweep lesbianism under the rug, than to treat players equally, challenge the status quo, and challenge discrimination.

Some heterosexual women who are attempting to gain legitimacy and equality in sports fear that lesbians will trivialize and harm these efforts. Women know that they are at risk of being labeled lesbians for achieving success in sports; actual lesbians in sports only reinforce this stereotype. When lesbians “come out,” it reinforces people's already-held beliefs that the majority of women athletes are lesbians. This fear has striking similarities to the same fear that played out during the women's liberation movement of

³⁷ MESSNER, *supra* note 1, at 110.

³⁸ Brownworth, *supra* note 3.

the 1960's and 1970's. Then, National Organization for Women ("NOW") founder Betty Friedan described lesbians as the "Lavender Menace."³⁹ She, and other NOW members, believed that lesbians posed a threat to the movement because men labeled all women in the movement as lesbians.⁴⁰ If they were seen as lesbians, Friedan feared they would not be taken seriously. For, if they were lesbians, men could dismiss their cause for equal rights for women by claiming they were just "man-haters." A splinter group of NOW, however, argued that men used this label to discredit the women's movement. And, men would have labeled them lesbians regardless of whether women in the movement were lesbians or not. Specifically, they argued

"[I]esbian is the word, the label, the condition that holds women in line. When a woman hears this word tossed her way, she knows she is stepping out of line.... As long as the word 'dyke' can be used to frighten women into a less militant stand, keep her separate from her sisters, keep her from giving primacy to anything other than men and their family—then to that extent she is controlled by the male culture."⁴¹

According to these women, it was vital for all women, lesbians and not, to remain in solidarity and not succumb to the fears that the label of "lesbian" could generate to gain equality.

E. Opening the Sports' Closet

The stereotype of a woman involved in sports is that she is a lesbian, and the worst thing a man in sports can be is gay or effeminate. In order to eradicate these negative stereotypes regarding sexuality, the culture of sports must change. A major step in eradicating homophobia in sports is to make it acceptable for all people, regardless of gender, to be able to express the myriad traits of human experience. Gender roles are

³⁹ CLENDINEN, DUDLEY & ADAM NAGOURNEY, *OUT FOR GOOD* 90 (1999) [hereinafter *OUT*].

⁴⁰ *Id.*

⁴¹ *Id.* at 91.

limiting for both genders, as they make it unacceptable both for men to show emotion and women to be aggressive—when both of these emotions are a healthy part of everyone’s life. Since the root of homophobia is preservation of male superiority by relegating feminine traits to secondary status, an answer to eliminating homophobia in sports is for women and men to achieve equality in the sports world. This solution is highly complex and beyond the scope of this article, but it would seem to involve ridding ourselves of the assumptions that men are inherently better at, and more interested in, sports than women.

Another way of eliminating homophobia in sports is through the legal system. If gays and lesbians were accepted in sports, alternative notions of gender roles would be commonplace because by being gay or lesbian, people are stepping out of their stereotyped gender roles. While the law cannot force people to like gays and lesbians, it can make it illegal to discriminate against gays and lesbians. Similar to the denial of equal rights to gays and lesbians through sodomy, the absence of laws banning discrimination based on sexual orientation may be used to deny gays and lesbians equal protection under the law.⁴² If anti-discrimination measures were in place, it would help to send a message that discrimination based on sexual orientation is unacceptable. This message would lead to the idea that there is nothing inherently “wrong” with being gay or lesbian.

Until society in general, and the sports world in particular, becomes less homophobic and more accepting of gays and lesbians, legal protections will continue to be necessary. As Dr. Minor states, “[v]ictim groups cannot wait around for those conditioned to be in the oppressor group to finally “get it” and stop the oppression. There

⁴² For instance, several courts in the past have cited sodomy laws (outlawing consensual sex between 2 men or 2 women) as a reason for denying gays other rights such as marriage, adoption, or custody of their

is no historical evidence that such waiting ever ended discrimination and oppression.”⁴³

While it is reasonable for gays and lesbians to fear backlash and violence from their assertion of legal protections, it is unfruitful to wait for the sports world to change on its own. Once in power, a group will not voluntarily hand over this power to another group.

Gays and lesbians should be able to come out without risking alienation, violence, or discrimination. They should not fear losing a job, a scholarship or starting position. Further, gay and lesbian youth deserve role models other than the ones they currently see on television, which only reinforce stereotypes of gay and lesbian behavior and do not come close to touching on the lives of many gays and lesbians.⁴⁴ Other children, too, deserve role models that show that it is acceptable to step out of their traditional gender role. And, all women would benefit by the acceptance of gays and lesbians, as the lesbian label could no longer be used as a fear device to keep women from being too successful.

III. LEGAL PROTECTIONS FOR GAY AND LESBIAN ATHLETES AND EMPLOYEES

It is now necessary to examine the legal protections that are available in the event that gays and lesbians are harassed or discriminated against in an educational or employment environment. Many of the legal protections relating to employees, of course, are available to all gays and lesbian regardless of whether or not they are affiliated with sports.

children.

⁴³ MINOR, *supra* note 19, at 183.

⁴⁴ While there has been an increase in gay and lesbian characters on television, this increase is not necessarily benefiting the gay community. The popular show “Will and Grace” depicts two gay characters who are never in long-term relationships, one of whom is stereotypically feminine and the other who displays neurotic and obsessive-compulsive characteristics. “Queer Eye for the Straight Guy” is another

A. Title IX Protection for Students

Title IX of the Education Amendments of 1972 is a broad law that prohibits discrimination on the basis of sex in education programs and activities receiving federal money. This law is well known for its creation of opportunities for women to participate in high school and college sports. More generally, Title IX prohibits sexual harassment of students in certain circumstances.⁴⁵

The Office of Civil Rights (“OCR”), in its policy guidance to educational institutions, states that sexual harassment directed at gay or lesbian students may constitute sexual harassment prohibited by Title IX.⁴⁶ That is, if the harassing conduct of a sexual nature directed toward a gay or lesbian student creates a sexually hostile environment, the conduct is prohibited under Title IX.⁴⁷ An example of such discrimination would be “if a male student, or group of male students, target a lesbian for physical sexual advances.”⁴⁸ Since the law protects any “person” from such harassment, it applies to both male and female students.

In addition to protecting gay and lesbian students from harassing sexual conduct, Title IX also protects against gender-based harassment. This protection includes acts of verbal, nonverbal, or physical intimidation, or hostility based on sex “if it is sufficiently severe, persistent or pervasive and directed at individuals because of their sex.”⁴⁹ Some courts have been receptive to the idea that gender nonconformity is protected under Title

example as gay men give fashion and decorating advice to straight men. Meanwhile, being a lesbian is apparently less *chic* as lesbian characters are more scarce.

⁴⁵ See generally Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (Dept. of Education) (final policy guidance).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

IX.⁵⁰ For instance, a male student can make an actionable claim if he is harassed because of his “failure to meet masculine stereotypes.”⁵¹

One limitation of Title IX is that it only applies to students; thus, coaches and other personnel cannot bring Title IX claims. Further, as the OCR guideline states, “if students heckle another student with comments based on the student’s sexual orientation, but their actions or language do not involve sexual conduct, their actions would not be sexual harassment covered by Title IX.”⁵² That is, Title IX does not protect against discrimination based on sexual orientation. The claims must involve harassment directed at a person because of his or her gender. This limitation is the “fundamental flaw” in the gender nonconformity argument.⁵³ A lesbian student-athlete may be able to make such a claim because she could argue that she is being discriminated against for not conforming to her gender role, by playing sports. Some gay male athletes likely could not make such a claim, since by playing sports, and exhibiting masculine traits, they are conforming to their gender roles. Because the gender nonconformity argument assumes that all gays and lesbians act stereotypically like the other gender, it cannot be applied to the many gays and lesbians who do not. Similarly, the argument could apply to a heterosexual student who behaved in ways stereotypically of the other gender.

B. Title VII

Title VII of the Civil Rights Act of 1964 is an important federal law prohibiting discrimination in almost all employment on the basis of race, color, religion, sex, or

⁴⁹ *Id.*

⁵⁰ For a more in-depth discussion of Title IX and the “gender nonconformity” argument see 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).

⁵¹ *Id.* at 58.

⁵² Sexual Harassment Guidance, *supra* note 43.

⁵³ Baird, *supra* note 48, at 59.

national origin.⁵⁴ Application of Title VII to employment discrimination based on sexual orientation, though, has been largely unsuccessful. Specifically, courts have held that Title VII does not provide for a private right of action based on sexual orientation discrimination.⁵⁵

In *Desantis v. Pacific Telephone. & Telegraph Co.*, the court rejected the employee's "disproportionate impact" argument, which is explained below.⁵⁶ In *Desantis*, gay and lesbian employees sued claiming that the company discriminated against them in employment decisions because of their sexual orientation.⁵⁷ The men claimed "discrimination against homosexuals disproportionately affects men both because of the greater incidence of homosexuality in the male population and because of the greater likelihood of an employer's discovering male homosexuals compared to female homosexuals."⁵⁸ A similar argument was used in finding that educational tests on blacks disproportionately impacted them, and therefore violated Title VII.⁵⁹ The *Desantis* Court was unwilling to extend this idea to gays. The Court also rejected the argument that if a male employee prefers males as sexual partners, he will be treated differently than a female who prefers male partners.⁶⁰ The reason for the Court's rejection was that Congress intended the prohibition on "sex" discrimination to apply only on the basis of gender and not of sexual orientation.⁶¹ This interpretation of Title VII is consistent with the "fundamental flaw" of Title IX.

⁵⁴ 42 U.S.C. §§ 2000e-2000e-17 (1988).

⁵⁵ *Desantis v. Pac. Tel. & Tel.*, 608 F.2d 327, 329-330 (9th Cir. 1979).

⁵⁶ *Id.*

⁵⁷ *Id.* at 327.

⁵⁸ *Id.* at 330.

⁵⁹ See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁶⁰ *Desantis*, 608 F.2d at 331.

⁶¹ *Id.* at 331-332.

However, in *Oncale v. Sundower Offshore Services, Inc.*, the Supreme Court held that same-sex harassment claims are not necessarily precluded from Title VII.⁶² In *Oncale*, a male employee was subjected to sex-related humiliating actions against him by other employees, physical assault, and threats of rape by these employees.⁶³ Despite the fact that “male on male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII,” the Court held that same-sex harassment claims may be actionable under Title VII.⁶⁴ Thus, although gays and lesbians are not specifically protected under Title VII, if they, or members of one gender, harass members of the same gender, they can be sued under Title VII. The touchstone of whether a claim is actionable is, like Title VII, whether or not the harassment was because of the victim’s gender.

C. Equal Protection and Due Process in Light of Lawrence v. Texas

The summer of 2003 filled many gays and lesbians with hope that they would begin to receive equal treatment under the law when the Supreme Court announced its decision in *Lawrence v. Texas*. *Lawrence* had the potential to apply a heightened level of scrutiny to laws concerning gays and lesbians under the Equal Protection and Due Process clauses of the United States Constitution. Generally, when a court considers discrimination cases under the Equal Protection Clause it applies differing levels of “scrutiny” depending on the type of discrimination. For instance, discrimination based on race is subject to strict scrutiny, which means that a law is upheld if it is proven necessary to achieve a compelling government purpose. Rational basis review, on the other hand, is the minimum level of scrutiny that laws challenged under equal protection

⁶² *Oncale v. Sundower Offshore Services, Inc.*, 523 U.S. 75 (1998).

⁶³ *Id.* at 77.

must meet. The Supreme Court has used rational basis review with regard to laws concerning gays and lesbians.⁶⁵

In 2003, the Supreme Court had the opportunity to apply a new level of scrutiny to laws affecting gays and lesbians. The majority in *Lawrence* resolved the question of whether or not a Texas law that criminalized same-sex sodomy furthered a legitimate state interest.⁶⁶ The Court only considered this question in terms of whether it violated the Due Process Clause of the 14th Amendment and not in terms of whether it violated the Equal Protection Clause.⁶⁷ The Court, while applying rational basis review to declare the law unconstitutional, did not discuss whether rational basis was the appropriate standard to continue to apply to gays and lesbians.⁶⁸

While rational basis review is not as difficult of a standard for states to meet as strict scrutiny, several laws and actions have failed to meet even this standard.⁶⁹ *Nabosny v. Podlesny* is an example case involving action by state officials. In *Nabosny*, a gay public school student in seventh grade was harassed by his fellow students because of he was gay.⁷⁰ The boy's classmates regularly referred to him as "faggot" and subjected him to physical abuse.⁷¹ When the student told the school principal, she promised to protect him, but took no action, after which the harassment worsened.⁷² In one gruesome incident, two boys pushed him to the floor and performed a mock rape on him while

⁶⁴ *Id.* at 82.

⁶⁵ *Romer v. Evans*, 517 U.S. 620 (1996).

⁶⁶ *Lawrence v. Texas*, 123 S.Ct. 2472 (2003).

⁶⁷ *Id.* at 2483.

⁶⁸ A law meets rational basis review if it further a legitimate governmental interest. *Id.*

⁶⁹ *See Romer v. Evans*, 517 U.S. 620 (1996).

⁷⁰ *Nabosny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996).

⁷¹ *Id.* at 451.

⁷² *Id.*

twenty other students looked on and laughed.⁷³ When the student told the principal, her response was “boys will be boys” and if the student were going to be openly gay he should “expect” such treatment from his classmates.⁷⁴ No action was taken against the harassers.⁷⁵

Such harassment continued throughout the student’s education, leading him to attempt suicide twice.⁷⁶ The student withdrew from school in the eleventh grade and brought suit against the school officials.⁷⁷ The Court agreed with the student’s argument that he was denied equal protection based on gender.⁷⁸ However, the Court, when discussing his argument that he was denied equal protection based on sexual orientation, applied the rational basis standard to the officials’ actions.⁷⁹ That is, there is no constitutional violation if ““there is any reasonably conceivable state of facts that would provide a rational basis for the government’s conduct.””⁸⁰ The Court, however, held that the school officials failed to satisfy this standard because it was “unable to garner any rational basis for permitting one student to assault another based on the victim’s sexual orientation.”⁸¹

Nabozny and *Lawrence* are important because they demonstrate that even though the courts continue to apply rational basis review to gays and lesbians, certain state actions and laws can fail this standard. However, the actions in *Nabozny* were extreme and the sodomy law in *Lawrence* was unquestionably irrational. Many cases involving

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 452.

⁷⁷ *Id.* at 452-453.

⁷⁸ *Id.* at 456.

⁷⁹ *Id.* at 458.

⁸⁰ *Id.*

⁸¹ *Id.*

discrimination are more subtle or do not involve harassing conduct carried on over the course of many years as was the case in *Nabozny*. It is likely that actions by state officials involving more subtle forms of discrimination would survive rational basis review. A coach who removed an athlete from her basketball team for being a lesbian would probably be such “subtle” discrimination to survive rational basis review. Another limitation is that equal protection and due process claims can only be brought against state and government actors, such as public schools. Therefore, if similar conduct occurred at a private school or university, there would probably not be a constitutional violation.

D. Other Protections

Non-federal protections, of course, may also exist for gay and lesbian employees. For instance, state constitutions may prohibit discrimination based on sexual orientation by public and even private employers. California’s state constitution, for instance, prohibits the state or any governmental entity from arbitrarily discriminating against any class of individuals, including gays and lesbians.⁸² Additionally, state and local jurisdictions may have antidiscrimination employment laws that apply to gays and lesbians. Employers, often due to collective bargaining, have begun to adopt nondiscrimination policies that include sexual orientation. Such policies are important in sending the message that the employer will not tolerate discrimination. And, gay and lesbian employees may choose to work for an employer based on this expectation of a nondiscriminatory environment. Thus, when an employer has a nondiscrimination policy

⁸² See *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 597 (Cal. 1979) (holding that the state constitution prohibits such discrimination).

it should be enforced. In the next section, I will argue that such policies create binding contracts on the part of the employer.

E. Breach of Contract

Employee handbooks often contain grounds for firing employees, as well as acceptable practices of the company. Such handbooks sometimes prohibit discrimination and harassment based on sexual orientation, among other things. Several jurisdictions have held that clauses in these handbooks may be part of an enforceable employment contract. That is, when such policies are in place, employees may have a claim for breach of contract if these policies are violated. Likewise, many colleges and universities have nondiscrimination policies written into their student handbooks and on promotional materials that they send out to prospective students. When such statements are made, students should be able to enforce the policies as contractual rights.

1. Breach of the Employment Contract

The Illinois Supreme Court has recognized that the terms of an employee contract can be binding on an employer.⁸³ In *Duldulao v. St. Mary of Nazareth Hospital Center*, an employee claimed that her termination violated procedural rights she had by virtue of an implied contract with her employer.⁸⁴ Specifically, the employee handbook prohibited firing an employee without proper notice and investigation; the employee argued that this termination procedure was a term of her contract with the employer and that it had been violated when the employer terminated her employment without the proper notice.⁸⁵

Generally, an employment relationship without a fixed duration is terminable at will by either party. However, the Court in *Duldulao* held that this general rule mandates

⁸³ *Duldulao v. St. Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314 (Ill. 1987).

⁸⁴ *Id.* at 316.

only a presumption that hiring without a fixed term is at will, “a presumption which can be overcome by demonstrating that the parties contracted otherwise.”⁸⁶ The Court then went on to explain how the traditional requirements of offer, acceptance, and consideration are applicable when analyzing an employee handbook.⁸⁷ To constitute an offer,

[T]he language of the policy statement must contain a promise clear enough that an employee would reasonably believe that an offer has been made. Second, the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer. Third, the employee must accept the offer by commencing or continuing work after learning of the policy statement....⁸⁸

So, the language of the handbook constitutes an offer and the employee accepts the offer by working for the employer. When there has been an offer and acceptance in this manner the employee’s continued work for the employer constitutes consideration for the statements in the handbook. Of course, an employer may include a disclaimer, stating that the handbook is not a contract, in order for its statement not to be an offer.

The Wyoming Supreme Court has recognized that an employer’s policies set out in its employee handbook may create contractual rights even when the statement relied upon is quite broad.⁸⁹ In *Johnson v. Celsius Energy Co.*, the employee relied on a statement in the handbook saying that the employer “prohibits unlawful discrimination in all aspects and conditions of employment, including hiring, training, advancement, compensation, transfers, benefits, and terminations.”⁹⁰ The Court held that this statement created an expectation in the employee that the handbook’s statement would be

⁸⁵ *Id.*

⁸⁶ *Id.* at 318.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Johnson v. Celsius Energy Co.*, 1989 WL 260154 (D. Wyo. 1989).

followed.⁹¹ Thus, some jurisdictions may accept the argument that the inclusion of sexual orientation in an employer's nondiscrimination clause creates an enforceable contract right for gays and lesbians. As most educational institutions, and many companies, have employee handbooks stating that discrimination is unacceptable, gay and lesbian employees may then bring suit for breach of contract against their employers if they are discriminated against during employment. Gay and lesbian coaches and employees, then, should scrutinize their handbooks so they are aware of rights that they may have.

2. *Student Claims for Breach of Contract*

Considering the limitations on current legislation to protect gay and lesbian students, these same contract concepts should be applied to create contractual rights for students. Most colleges and universities have nondiscrimination clauses, and many of these include sexual orientation. Victor Hu, in an article for the *Texas Review of Law and Politics*, makes a persuasive case that the private university's recruitment of students has a contractual nature.⁹² First, an open market for university education exists where the schools compete widely to attract students.⁹³ Through brochures, advertisements, recruitment, and other promotional materials, students select the school that "most closely match[es] their educational goals, financial constraints, and ideological commitments."⁹⁴ Further, the student's "offer, by way of application and subsequent

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Victor Hu, *Nondiscrimination or Secular Orthodoxy? Religious Freedom and Breach of Contract at Tufts University*, 6 TEX. REV. L. & POL. 289 (2001). Ironically, Hu's main argument is that nondiscrimination policies that include sexual orientation "have provided an indirect 'backdoor' method for universities to constrain religious freedoms" in a way that defeats the expectations of its students, *id.* at 292.

⁹³ *Id.* at 322.

⁹⁴ *Id.* at 322-323.

acceptance, through matriculation, are premised on the representation the school makes through its promotional materials.”⁹⁵ Thus, the basic elements of offer and acceptance are present. Consideration would be present in the school’s supplying of an education and the student’s paying of tuition. If the student is on an athletic or academic scholarship the student would supply the consideration by performing on the field or in the classroom for the university.

Hu further argues “[N]ot to hold students to [the university’s] representations is to sanction false advertising and the dissemination of misinformation.”⁹⁶ Thus, a school should be held liable for the representations it makes in this competitive market. Using this idea, a university’s nondiscrimination clause is usually printed on its promotional materials, thereby giving students an expectation of nondiscrimination. Therefore, a university should be held accountable for such representations. The same analysis applies to student handbooks. One of the first things most gay and lesbian students do is to look in the promotional materials and student handbooks and read the nondiscrimination clause. They want to know if the school regards discrimination against gays and lesbians negatively. All other factors being the same, if given the opportunity to attend a school that includes sexual orientation in its policy versus a school that does not, a gay or lesbian student will most likely choose the school that includes sexual orientation.

Students, including student-athletes, should have valid breach of contract claims against universities when the university does not meet the expectations of the student when the student has relied on information in the student handbook and promotional

⁹⁵ *Id.* at 323.

⁹⁶ *Id.* at 324.

materials. An objective measure of when a breach occurred would be when the university did not take steps to remedy discrimination. For example, if a day student was denied playing time for being gay, the student reported this discrimination to the athletic director, and the director did nothing about it, the student would have a claim.

If a gay or lesbian student attends a university that does not include sexual orientation in its policy and is subsequently harassed, he or she will have already had an expectation that no complaint could be brought to the school. If, however, a student is harassed at a school that does include sexual orientation and the school does not respond to a complaint or implicitly or explicitly allows the discrimination, the situation is different. The student here would have had an expectation that harassment and discrimination would not be tolerated, and would have relied on this expectation in attending the school. An action for breach of contract would protect such students.

3. Limitations on Contract Damages

A limitation of using this contract theory to protect gays and lesbians in educational institutions is related to the nature of contract remedies in general. Specifically, “[t]he traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from the breach.”⁹⁷ A contract is formed when one party has an expectation, reliance, or restitution interest arising from a promise and deserving of legal protection.⁹⁸ Upon one party’s breach, “the remedy generally aims at compensating the injured party for harm to the contractual interest that sustains the right [to enforce the

⁹⁷ RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note to Ch. 16 (1981).

⁹⁸ *Id.* § 344.

contract.]”⁹⁹ So, if a party has an expectation interest, that party has an expectation remedy upon breach.

The goal of expectation remedies is to put the nonbreaching party in the position it would have been in had the contract been performed.¹⁰⁰ This goal can be accomplished by ordering the breaching party to perform as promised, or by ordering that party to pay money to fully compensate the nonbreaching party for its contractual losses. A contract stemming from an employee handbook, student handbook, or university promotional materials creates an expectation interest in the contents of the handbook or materials. Specifically, if a school includes sexual orientation in its nondiscrimination policy, students and employees have an expectation that the school will not tolerate discrimination against gays and lesbians. Thus, an expectation remedy would be appropriate if the school were to not fulfill this promise.

A court could order the school to take action on a sexual orientation-discrimination complaint. This would be an adequate remedy as the student’s or employee’s expectation would then be fulfilled. It would be more difficult, however, to measure money damages in such a situation. If the employee missed work because of the school’s allowance of discrimination, the employee could receive lost wages. Likewise, a student could be compensated for missed school. But how much of a deterrent effect on the school is it if the school only has to give the student or employee what it initially promised? This problem is exacerbated by the fact that punitive damages are not usually available for breach of contract since the goal of contract remedies is not punishment of the breaching party. Therefore, a court would not be able to send a message, via punitive

⁹⁹ STEVEN J. BURTON, PRINCIPALS OF CONTRACT LAW 286 (2001).

¹⁰⁰ *Id.*

damages, that it is not acceptable to break a promise in regards to a nondiscriminatory environment. Additionally, many gay and lesbian athletes and coaches would not want to return to a setting where they had been discriminated against. So, reinstatement after discrimination may not be an adequate remedy for them.

IV. CONCLUSION

Students and employees of educational institutions should have a contractual remedy available in the event that a school reneges on its nondiscrimination policy. This remedy exists, however, only in the event that the institution has such a policy or has not disclaimed the handbook or its promotional materials by stating that the language contained therein do not create any enforceable rights. For these reasons, it is unfortunate that currently there is no law that bars discrimination based on sexual orientation in all employment environments—public and private. This is especially true in the sports world where blatant and implicit homophobia and discrimination are more prevalent and accepted than in the general population.

As a brief recap, Title IX may protect gays and lesbians from harassing sexual conduct or gender-based harassment. It does not, however, protect from comments or actions directed at a person because of sexual orientation. Title VII does not include sexual orientation as one of its protected classes and therefore, offers similar protections as Title IX. State and local jurisdictions may pass laws that prohibit gays and lesbians from being discriminated against. These laws, however, are unlikely to be passed in very conservative locales.

Gay and lesbian athletes, coaches, students, and employees in general should not have to perform these legal acrobatics to get the same protections that most people in society already have. Some have suggested that there should be a federal law that protects people from discrimination based solely on sexual orientation. A law doing so would be ideal so gays and lesbians would not have to rely on whether or not their state, city, school, or employer happens to have a nondiscrimination law or policy that includes sexual orientation. Until society becomes more accepting of gays and lesbians, however, all of these legal protections will continue to be necessary.

The history of gay and lesbian rights has waxed and waned throughout U.S. history. After victories, the trend has been for setbacks to occur as fundamentalist so-called “moral” forces have stabilized to ensure gays and lesbians do not have equal rights. For instance, after Stonewall and the rise of the gay rights movement, Anita Bryant led a “Save our Children” campaign based on the idea that gays and lesbians were out to recruit children.¹⁰¹ Her campaign was successful in encouraging voters in several states to reject legal protections for gays and lesbians.¹⁰² In the 1980’s, President Reagan first joked about, and then ignored the AIDS crisis.¹⁰³ Then, in the 1996 a supposedly “gay-friendly” president signed the Defense of Marriage Act into law.

¹⁰¹ CLENDINEN, DUDLEY & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA*, 291-311 (1999).

¹⁰² *Id.* Bryant opposed legal protections for “homosexuals” because “[w]hat these people really want, behind obscure legal phrases, is the legal right to propose to our children that there is an acceptable alternative way of life. No one has a human right to corrupt our children. Prostitutes, pimps and drug pushers, like homosexuals have civil rights, too, but they do not have the right to influence our children to choose their way of life.... I will lead such a crusade to stop it as this country has not seen before.” *Id.* at 292.

¹⁰³ COHEN, JOHN, *SHOTS IN THE DARK 1* (2001). This book opens with a transcript of a White House press conference that took place on October 15, 1982. In it a reporter asked about AIDS, to which Reagan’s spokesman answered “What AIDS?” The reporter continued “Over a third [of the people infected] have died. It’s known as a ‘gay plague,’” at which point the briefing room dissolved in laughter. Reagan’s spokesman responded “I don’t have it. Do you?”, to which there was more laughter. The reporter said no to which the spokesman questioned “How do you know?” (more laughter).

This new millenium has been no different as one state's high court ruled that a ban on gay marriage is unconstitutional,¹⁰⁴ while President Bush and many voters are strongly opposed to gay marriage. It seems that there will always be forces in the U.S. opposed to equal rights for all citizens, regardless of sexual orientation. While some would argue that laws should not be contrary to public opinion, the true test of a democracy is how the majority respects the rights of its minority members. As this article demonstrates, legal protections are lacking for our nation's gay and lesbian athletes, coaches, employees, and citizens. However, if the past is any indication of our future, we should be prepared for a new and stronger mobilization of gay and lesbian rights advocacy.

¹⁰⁴ Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003).