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Playing It Straight: An Analysis of Current Legal Protections to Combat Homophobia and Sexual Orientation Discrimination in Intercollegiate Athletics

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I. INTRODUCTION

"We never should have let you play sports." It is a common misconception: "if my daughter plays sports she will become a lesbian. If she is exposed to teammates or coaches who are lesbians, they will recruit her into lesbianism." It stems from fear and ignorance. It is homophobia. It is prevalent and affects all women who participate in athletics, regardless of their sexual orientation.

This article addresses homophobia in intercollegiate athletics. Not only is it a pervasive influence in college sports, but homophobia can be devastating to an individual's athletic or coaching career. It can affect performance and can lead to harassment, discrimination, verbal abuse, and in some cases, violence. High school and collegiate coaches, administrators, parents, and even athletes themselves, propagate the fear that leads to discrimination. For the most part, society continues to permit discrimination based on sexual orientation and in some cases even encourages it. This cycle needs to stop, and targeted legal protections are a good place to start.

This article will focus primarily on the discrimination faced by lesbians in the athletic realm. This does not mean that gay men, bisexual, or transgendered individuals do not face discrimination. Although this article will focus on the experiences of lesbian athletes, the analysis and legal conclusions reached here could apply to all individuals who identify their sexual orientation as non-heterosexual.
Title IX has the interpretive potential to protect both coaches and student athletes from sexual orientation harassment and discrimination. This interpretation parallels the ways in which Title VII has been used to protect individuals from discrimination based on gender nonconformity.

In order for the reader to better understand discrimination in athletics, Part I of this article will provide a brief history of the development of women's participation in sports. Part II will address the prevalence of homophobia in intercollegiate athletics and will provide examples of how media representations and religious influences reinforce these homophobic attitudes. Additionally, Part II will include a discussion about how homophobia affects the ability of coaches to recruit players. Part III will analyze statutes that can be interpreted to afford protection from sexual orientation discrimination and harassment for both coaches and student athletes. Part III also compares amending current law with the possibility of enacting a new law, the Employment Nondiscrimination Act, and explains why current law is a more realistic approach to combating discrimination based on sexual orientation than enacting the new law would be. Finally, Part IV concludes by suggesting that Title IX is the best available avenue through which to address sexual orientation discrimination and harassment in intercollegiate athletics.

A. Development of Women's Participation in Sports

From the beginning of their participation in sports, female athletes have confronted obstacles. A sphere traditionally dominated by men, athletics were thought unladylike, and still worse, harmful to women's bodies. There were myths about the "possibility of injury to reproductive functions of female participants, which reflected a larger preoccupation with the threat of athletics to women's femininity." In the late 1800s and early 1900s, during the first American feminist movement, women began to participate in athletic activity in increasing numbers, and organized competition commenced in both America and England. At the same time, society stepped up its efforts to limit female involvement in sports and access to athletic facilities. The warnings of health hazards increased with threats of "contracted vaginas," "collapsed uteri," and 1. Dana Scarton, The "L" Image/Women Athletes, Regardless of Sexual Lifestyle, Are Targets for Homophobes, Hous. Chron., Oct. 23, 1994, available at 1994 WL 4598701 [hereinafter Scarton, The "L" Image].
3. The first national women's championship at Wimbledon was held in 1884, the Ladies Golf Union was organized in 1893, the All-England Women's Field Hockey Association began in 1895, the first organized intercollegiate women's basketball game was played in 1896, and the Southern Ladies Lacrosse Club was organized in 1905. MARIAH BURTON NELSON, THE STRONGER WOMEN GET, THE MORE MEN LOVE FOOTBALL 13-15 (1994).
4. See id. at 16.
“overexertion.” Involvement in sports meant getting sweaty, getting strong, getting aggressive—all typically unfeminine characteristics.

Despite threats and criticisms, the number of women participating in sports increased steadily. By guaranteeing equal funding for men’s and women’s sports, the passage of Title IX in 1972 opened the floodgates for women’s participation in intercollegiate athletics. As women entered the sports world in larger numbers, they slowly became a presence in this traditionally male-dominated environment. As women became stronger and more involved in athletics, and likewise became increasingly visible, a different method of discrimination and subordination arose. Rather than preventing access to athletic activity, society “scurried to redefine female athleticism as sexy or romantic, intended not for women’s health, enjoyment, or empowerment, but for men’s pleasure.”

B. Masculine Construction of Sport

While women have broken, and continue to break, gender barriers, the sports arena has traditionally been a place for boys to become men. For men and boys, the playing field has always been a place to build camaraderie and respect. The pressure to be involved in athletics is intense and boys who choose not to play are ridiculed as “sissies or faggots,” or considered “defectors from their own sex.” Society is bombarded with the images of the athletic male on television, in magazines, and on billboards. Strength, speed, power, and aggressiveness are all characteristics coveted in sports, and are characteristics typically thought of as masculine.

The image of the “ideal male”—strong and athletic—also demonstrates and promotes heterosexuality. Due to the conventional perception that gay men are weak and effeminate, athleticism and homosexuality have come to be seen as mutually exclusive. Regardless of the absurdity of such beliefs, this viewpoint is pervasive among boys and

5. Id.
6. See id. at 17.
8. Title IX states in part: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance . . . .” Although the statute was passed in 1972, the passage of the Javits Amendment made it applicable to intercollegiate athletics in 1974. See also discussion infra p. 61-62.
9. NELSON, supra note 3, at 17.
10. Id. at 2.
12. See NELSON, supra note 3, at 1.
13. See generally id. at 55-57.
men who participate in athletics. Male role models—coaches, peers, fathers—at times use derogatory terms such as “sissy,” “faggot,” or “pussy,” to criticize and threaten boys and young men, and encourage traditional masculine behavior. As one scholar concluded, boys begin to view homosexuality as the “negation of masculinity” and therefore “come to equate masculinity with homophobia.”

One male athlete prominent in his sport has said that the perceptions of homosexuality and effeminacy associated with certain sports was a prevailing stereotype among fellow college athletes. Unfortunately, society has already answered for all boys the question of whether or not to even play sports—all real men love sports. One scenario where homophobia is played out is in the male bond that is created through participation in sports.

Many male athletes describe the relationships they form with their teammates as akin to family. However, much of these athletes’ behavior is shaped by homophobia and heterosexism. Locker room talk often revolves around (hetero)sexual conquests in which the female is considered to be an object to be acquired. For a young man to contest this type of banter is to call into question his own heterosexuality. Additionally, men are encouraged to bond with their male teammates, for it is the common blood, sweat, and tears of athletic experiences that tie them together. However, a male athlete who shows too much emotion or becomes too close to his male teammates runs the risk of being labeled a “faggot.” Strength, muscles, power, and a “boys will be boys” attitude are the keys to masculinity and thus define what it means to be a male athlete. Just as athletics are typically constructed through a masculine lens, the feminine construction of the “non-athlete” is a dominating force in the lives of women, particularly female athletes.

Girls and young women are taught not to develop athletic qualities. Or at the very least, if they have them, they should not flaunt them. “Since [athletic attributes] are linked so intimately with masculinity, women’s display of those [attributes] does not mesh well with the dominant femininity that defines women as physically attractive, petite, demure, weak, and supportive rather than aggressive.” A woman who portrays athletic characteristics calls into question her femininity. “Because competitive sports [are] such an exclusively male bastion, women

15. Id. at 103.
16. Id. at 108.
17. Id. at 103 (quoting R.W. Connell, A Very Straight Gay: Masculinity, Homosexual Experience, and the Dynamics of Gender, 57 AM. SOC. REV. 735, 736 (1992) (emphasis omitted)).
18. Id.
19. Id. at 105.
who play[] them [are] perceived as something less than female—women trying to be men, men-haters, or lesbians.\textsuperscript{22} Furthermore, \textquotedblleft[a]thletic success is still equated with masculinity, and women and girls must ‘choose between being a successful girl and being a successful athlete.’\textsuperscript{23}

\section*{II. Prevalence of Homophobia in Intercollegiate Athletics}

Classifying athletic women as unfeminine or stereotyping them as lesbians is harmful to all women in sports, regardless of their sexual orientation, because it discredits their abilities and detracts from their accomplishments. Such stereotyping shifts the focus from talent and capability to inadequacy and deviance. Labeling a female athlete as a lesbian immediately calls into question her achievements, because if she is a lesbian, then she is somehow not a real woman. These perceptions force many women in athletics to either hide their sexual orientation or flaunt heterosexuality. This added pressure takes energy, and once the \textquotedblleft appropriate\textquotedblright image is attained, maintaining such an image requires constant vigilance. For many women, this is the necessary price of admission to the male-dominated athletic world. Homophobia is used as a tool to prevent women from gaining access to the benefits and opportunities of intercollegiate athletics.\textsuperscript{24}

Intercollegiate athletics are big business and an enterprise in which men control the resources. Gaining power and status in an institution’s athletic administration is comparable to climbing the corporate ladder. Donna Lopiano, Executive Director of the Women’s Sports Foundation, agrees that \textquotedblleft homophobia is a political tool used by men to keep women in their place, to maintain the power of the economic structure, to maintain control of the money where [men] want it to be, namely in football and men’s basketball.\textsuperscript{25} The lesbian label is being used \textquotedblleft to control women’s decisions about being involved in sports and choosing a career in sports.\textsuperscript{26}

Navigating through this reality places women in a difficult situation. The road to a coaching or leadership position for women generally begins with a successful athletic career. The harmful Catch-22 is that the characteristics that lead to success in the athletic arena (such as aggressive-

\begin{itemize}
  \item \textsuperscript{22} Brake & Catlin, \textit{supra} note 2, at 52.
  \item \textsuperscript{25} See Scarton, \textit{The “L” Image, supra} note 1.
  \item \textsuperscript{26} Maria F. Durand, \textit{Sexual Slurs Deter Female Athletes}, San Antonio Express-News, Mar. 11, 1997, \textit{available at} 1997 WL 3164487 (quoting Pat Griffin, Associate Professor of Education at the University of Massachusetts).
\end{itemize}
ness) are the same characteristics that can ultimately lead to stereotyping and discrimination. Sex stereotyping in the corporate world, similar to that experienced in the athletic world, has been recognized in the law as an obstacle to equal employment opportunity for women.

This contradiction influences the behavior of coaches and athletes on and off the field. It is common for a female athlete to adopt ultra-feminine behavior in order to overcome the perception that she is lesbian. “[T]hey wear makeup while competing, they dress in ultra feminine clothes when not competing, they talk about their boyfriends, whether they have them or not.” Homophobia can also turn female coaches, athletes, and colleagues against one another, since suspicion about someone else’s sexual orientation will divert attention, albeit temporarily, from suspicion about one’s own sexuality. This animosity caused by lesbian baiting and suspicion is harmful to all women involved in athletics.

A. Effects of Media Portrayals

The media plays a large role in perpetuating the heterosexualization of women in athletics. In the late 1980s, the media guide for the Northwestern Louisiana State women’s basketball team displayed a picture of the team wearing, in addition to their basketball uniforms, rabbit ears and fluffy tails. Under the photo, the caption read, “These Girls can Play, Boy.” This blatantly sexual depiction of the basketball team simultaneously reinforces the perception of heterosexuality and detracts from their athleticism and strength.

When media images focus on athletes, “males are consistently presented in ways that emphasize their athletic strength and competence, whereas females are presented in ways that highlight their physical attractiveness and femininity.” For example, while a male athlete will generally be shown engaged in his athletic event, displaying skill and strength, the female athlete is generally shown out of the athletic arena, wearing feminine clothing and make-up. She is often portrayed in the arms of a

27. This dilemma is also present in the corporate world. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (recognizing that “[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch-22: out of a job if they behave aggressively and out of a job if they do not.”).
28. Id.
31. Mary Jo Kane, Gender & Sport: Setting a Course for College Athletics: Media Coverage of the Post Title IX Female Athlete: A Feminist Analysis of Sport, Gender, and Power, 3 DUKE J. GENDER L. & POL’Y 95, 102 (1996); JENNIFER HARGREAVES, SPORTING FEMALE: CRITICAL ISSUES IN THE HISTORY AND SOCIOLOGY OF WOMEN’S SPORT 163 (1994).
32. Kane, supra note 31, at 102; HARGREAVES, supra note 31, at 163; see generally Durfur, supra note 21.
dominant male figure such as a husband, boyfriend, father, or coach, thus emphasizing her heterosexuality and/or her continued reliance on men, despite her athletic prowess. The female athlete is often captured in passive and sexually suggestive poses, again diminishing her athleticism and accentuating her sexuality. When the media portray sportswomen as traditionally attractive ‘ladies,’ they do more than simply ignore or seriously undermine the athletic competence of women. They also convey the message that female athletes are ‘normal,’ that is, heterosexual.

A prime example of this occurred during the television broadcast of the 1996 NCAA Women’s Basketball Championships. During a halftime show there was a lengthy segment about married female basketball coaches and their families. The biographies focused very little on their athletic and coaching accomplishments. Instead, the viewers learned about Pat Summit, the head women’s basketball coach at the University of Tennessee, and how she enjoys nothing more than to come home from a long day and cook for her husband and son. Rarely, if ever, do media stories of male coaches portray them as loving nothing more than doing household chores for their wives.

### B. Religious Influence in Intercollegiate Athletics

National religious organizations that affiliate with intercollegiate athletics also help to fuel the fire of discrimination and homophobia. Groups such as the Fellowship of Christian Athletes (FCA), Athletes in Action (AIA), and Campus Crusade for Christ are just a few of those prevalent on college campuses. These organizations also have a presence at the Women’s Basketball Coaches Association (WBCA) conferences. At the 1996 WBCA conference, FCA held a prayer breakfast at which the dangers of homosexuality were the topic of discussion, led by an “ex-lesbian.” Pamphlets regarding the dangers of homosexual relationships were distributed throughout the tournament.

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33. See HARGREAVES, supra note 31, at 163-64.
34. Kane, supra note 31, at 102.
35. Id. at 119.
37. Id.
38. Id.
39. Id.
40. Id. at 69-70.
41. See id. at 110-31.
42. Id. at 110.
43. Id. at 118-19.
44. Id. at 119.
45. Id. Additionally, the FCA’s Youth Protection Policy contains a section regarding the FCA Sexual Purity Statement which explicitly condemns homosexuality, Guidelines for FCA Staff which require staff and volunteers to follow the Sexual Purity Policy, and Bible verses depicting homosexuality as a “perversion.” Fellowship of Christian Athletes, at http://www.fca.org (last visited Jan. 31, 2002).
Athletes in Action has also had access to collegiate coaches and athletes.46 During the 1996-97 women’s basketball season, the University of Massachusetts played against the AIA women’s touring team.47 During the game, AIA volunteers fanned out into the stands and distributed material about AIA and its purpose.48 The materials contained a testimonial from former Olympian Nancy Lieberman-Cline, in which she discussed how meaningless her life had been before abandoning her Jewish heritage and accepting Jesus Christ into her life.49 This “meaningless life” included, among other things, a successful Olympic and collegiate basketball career and a lesbian relationship with professional tennis player, Martina Navratilova.50 Lieberman-Cline is now married with children.51 At halftime, the AIA team lined up on the court and Leiberman-Cline elaborated on her testimonial for the audience.52 After her speech, the AIA team encouraged all the spectators at the pavilion that day to personally accept Jesus into their lives and invited them to fill out the information page included in the materials they had been given.53 The AIA team also spoke privately to the members of the University’s basketball team after the game.54 The AIA touring schedule for that year included games with Ohio State, West Virginia, Penn State, Vermont, Rutgers, Old Dominion, North Carolina, Georgia Tech, Auburn, and Alabama—all public universities.55 Not only are these actions a clear violation of the constitutional separation between church and state,56 but they also send a clear message of support from these universities for Christian evangelical organizations—organizations which strongly condemn homosexuality.

C. Effects of Homophobia on Recruiting

A team’s success depends on a coach’s ability to recruit the best players.57 Furthermore, the success of the coach’s team will ultimately determine the success of her own career.58 The pressure to succeed can cause a coach to use whatever advantages she can find, even when they

46. Griffin, supra note 36, at 119.
47. Id.
48. Id.
49. Id.
50. Id.
51. Id.
52. Id. at 120.
53. Id.
54. Id.
55. Id.
56. Id.
58. See generally id.
are detrimental to other coaches. While the NCAA expressly condemns negative recruiting, spreading "information" about a female coach's sexual orientation is a common practice. The label of "lesbian," correctly or incorrectly placed on a coach, can drastically affect her ability to bring in top players to her program. For example, a list of the nation's alleged "lesbian [basketball] programs" is rumored to circulate among high school basketball players who are prospects for collegiate teams. While no one has confirmed the existence of this list, even the threat of its existence is enough to instill fear in many coaches. The perception is that if a parent sends his or her daughter to a certain school, thereby subjecting her to a certain environment, she will fall victim to the lesbian boogey woman; the daughter will be preyed upon by older lesbian coaches or lesbian players on the team.

This fear is perpetuated by high school coaches, and even by college coaches, in the course of their recruiting. Bill Lind, a high-school girls' basketball coach in the Pittsburgh area, estimates that seventy-five percent of his players' parents ask him to determine the sexual orientation of a college coach if she is single and female. Rather than addressing the inappropriateness of these inquiries, Lind complies with the parents' requests. He justifies his actions in the following way:

[I]f there's a woman coach, my players want to know if she is married or if she has a family. The worry is not so much that a female coach is gay. The worry is that she would condone that lifestyle, that there would be gay players on her team.

What Lind fails to recognize is that he and other high school coaches like him play a large part in instilling that "worry" in players. In order to obtain the information he is looking for, Lind will call a coach and ask her about her "sexual preference" or "make phone calls to other coaches and

59. See id.
60. GRIFFIN, supra note 36, at 82.
61. See id. One example of the detrimental effects of labeling occurred at the University of Texas. The women's basketball coach there took a public stand in favor of "diversity." This announcement caused the program to be labeled "pro-lesbian." The effects on the coach's ability to recruit were devastating. Parents became concerned about sending their daughters to a pro-lesbian team and rival universities used the stigma to their recruiting advantage. Id. at 74, 82. The image was tarnished even more when Sheryl Swoopes left the University of Texas early in her freshman year "reportedly because she was bothered by the presence of lesbians on the [women's basketball] team." Since that time, UT has been labeled a "lesbian" program, instilling fear into high school coaches and recruits. The program has fallen severely in the ranks. Fish, supra note 57.
63. Kaufman, supra note 62.
64. GRIFFIN, supra note 36, at 54–63.
66. Id.
67. Id.
people who are familiar with the program." If a coach replies that the information is none of his business, Lind’s response to that coach is that “if there is a 17-year-old player who is concerned about it, [I’m] going to make it [my] business.” Lind’s actions promote homophobia. Rather than discussing homosexuality with his players, Lind perpetuates the perception of fear and justifies his behavior by stating that he is just looking out for the children. Unfortunately, his behavior is not unique.

Mike Flynn, coach of the Philadelphia-based Woman’s Amateur Athletic Union team and operator of recruiting services stated that homosexuality is:

[Pervasive and extensive, and you either walk away or accept it. I tell kids it’s not about the coach being gay, it’s about whether your teammates are and whether they are going to come after you. If you’re around this for four years non-stop, there is a certain amount of pressure. It’s one thing to come out, it’s another to have a gauntlet of lesbians leading you down a path.]

The possibility of older players tempting younger players is not the only homophobic fear advanced.

Coaches are also targeted as potential harassers. Lesbians are seen as a threat to “normal” young female athletes. The stereotype is that lesbians “are particularly unsuited to working with young people [and] that they recruit and molest them .... The truth is that women athletes are much more at risk to be raped, harassed or sexually violated by a male coach than a female coach.” Tara VanDerveer, head women’s basketball coach at Stanford University, agrees that “[r]ecruiters use homophobia to stir fears among parents and high school players of predatory behavior by coaches at rival schools.” This fear and the intensely competitive recruiting process are significant factors that affect lesbian coaches in their decision to come out.

D. Effects of Homophobia on Coaching Careers

College administrators use the fact that high school athletes and their parents are afraid of the presence of lesbians in their athletic programs as a tool to discriminate in their hiring, firing, and promoting decisions. Donna Lopiano, executive director of the Women’s Sports Foundation, stated that:

68. Id.
69. Id.
70. Fish, supra note 57.
71. GRiffin, supra note 36, at 75-76.
72. Cart, supra note 29 (quoting Pat Griffin).
74. Id.
Homophobia is a significant employment issue. Whenever I talk to high school coaches, I hear this all the time. They are maintaining that men are in control of the hiring process and are using the fact that a woman is single to make charges that they can’t prove, that she is unfit or a lesbian or whatever. And you never hear those things said about guys.\(^7\)

In a study of female athletes and coaches conducted in 1988 by the NCAA, one-half of the respondents stated that homophobia was a barrier to attracting and keeping women in athletics.\(^6\)

There have been few reported cases of gay or lesbian coaches who have challenged a school’s decision to fire or deny a position to them based on their sexual orientation. There are a number of possible reasons for the dearth of these cases. First, many employees, including coaches, are not told why they were not hired regardless of the true underlying rationale for the decision.\(^7\) Another possible reason coaches may be reluctant to challenge hiring decisions is that they are not aware of their legal rights.\(^7\) Even if they are aware of their rights, those rights are limited, especially in states that do not include sexual orientation in their antidiscrimination statutes.\(^9\) Additionally, coaches may not want to legally challenge a hiring decision because it would cause their perceived homosexuality to become public.\(^9\) This disclosure could potentially place their future employment opportunities at risk. As long as there are no protections in place for gay and lesbian coaches, very few of these individuals will want to risk public disclosure for an almost certainly unfavorable result.

In the mid-1980s, the Supreme Court had the opportunity to address a similar issue, but denied certiorari.\(^8\) In *Rowland v. Mad River Local School District*, a high school guidance counselor was suspended and not rehired solely because of her bisexuality.\(^8\) A jury found that the plaintiff’s disclosure of her bisexuality had no effect on her job performance and that she had experienced damages in the form of “personal humiliation, mental anguish, and lost earnings.”\(^3\) The trial judge held that these findings supported the plaintiff’s claims of violations of her constitu-

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76. Id.
82. Id. at 1010.
83. Id.
tional rights to free speech and equal protection under the First and Four
teenth Amendments of the Constitution.\footnote{Id.}

The Court of Appeals for the Sixth Circuit reversed the trial court's
finding, reasoning that the plaintiff's speech was not a matter of public
concern and therefore it failed to warrant constitutional protection.\footnote{Id. (citing Rowland v. Mad River Local Sch. Dist., 730 F. 2d 444, 451 (6th Cir. 1984)).}

Additionally, the court held that there was no Equal Protection violation
because there was "no evidence of how other employees with different
sexual preferences were treated."\footnote{Id.}

Justice Brennan, joined by Justice Marshall, dissented from the Su-
preme Court's subsequent denial of certiorari. In that dissent, Justice
Brennan framed the central issue in the case as whether "a State [may]
dismiss a public employee based on her bisexual status alone."\footnote{Id. (quoting Rowland, 730 F. 2d at 450).}

His discussion addressed the plaintiff's Equal Protection claim, by stating that
"discrimination against homosexuals or bisexuals based solely on their
sexual preference raises significant constitutional questions under both
prongs of our settled equal protection analysis."\footnote{Id. at 1011.}

Justice Brennan concluded that "[b]ecause petitioner's case raises serious and unsettled constitu-
tional questions relating to this issue of national importance, an issue
that can not any longer be ignored, I respectfully dissent from the deci-
sion to deny this petition for a writ of certiorari."\footnote{Id. at 1014 (explaining that the fact that homosexuals constitute a significant and insular minority addresses the first prong, and discrimination based on sexual orientation may violate various constitutional rights, which addresses the second prong).}

Several years later, in \textit{Jantz v. Muci},\footnote{Id. at 1018.} a high school teacher and
coach was denied full-time employment based on his "homosexual ten-
dencies."\footnote{976 F.2d 623 (10th Cir. 1992).} Jantz was not gay but was in fact married with two children.\footnote{Id. at 625.}

Jantz brought an action against the principal of the school, as an individ-
ual and in his official capacity, under the Fourteenth Amendment.\footnote{Id. at 626.} The
defendant moved for summary judgment for the plaintiff's failure to place
material facts in issue.\footnote{Id. at 625.}

The district court broke new ground in its holding that "homosexuals
and those perceived as homosexuals are a suspect class deserving of
heightened scrutiny in the equal protection context."\footnote{Id.} Unfortunately,
the lower court reasoned that this type of suspect classification could not

\begin{itemize}
\item 84. \textit{Id.}
\item 85. \textit{Id. (citing Rowland v. Mad River Local Sch. Dist., 730 F. 2d 444, 451 (6th Cir. 1984)).}
\item 86. \textit{Id. (quoting Rowland, 730 F. 2d at 450).}
\item 87. \textit{Id. at 1011.}
\item 88. \textit{Id. at 1014 (explaining that the fact that homosexuals constitute a significant and insular minority addresses the first prong, and discrimination based on sexual orientation may violate various constitutional rights, which addresses the second prong).}
\item 89. \textit{Id. at 1018.}
\item 90. 976 F.2d 623 (10th Cir. 1992).
\item 91. \textit{Id. at 625.}
\item 92. \textit{Id. at 626.}
\item 93. \textit{Id. at 625.}
\item 94. \textit{Id.}
\item 95. \textit{Id.}
\item 96. \textit{Id. at 626. (citing Jantz v. Muci, 759 F. Supp. 1543, 1546-51 (D. Kan. 1991)).}
\end{itemize}
have been established in 1998, the time of the actual discrimination.\textsuperscript{97} Instead, the court focused on the defendant's qualified immunity defense.\textsuperscript{98} Analyzing this defense under a rational basis test, the district court held that "it was clearly established in 1988 that the government could not 'discriminate [against homosexuals] for the sake of discrimination.'"\textsuperscript{99} Since the school official could offer no rational basis for his hiring decision, he was not entitled to a qualified immunity defense.\textsuperscript{100}

Upon review of the qualified immunity issue, the Court of Appeal reversed after conducting an examination of prior court decisions affecting homosexuals. The Court held that prior decisions indicated that "the unlawfulness of the alleged activity must be 'apparent' in light of pre-existing law before [the defendant] can be forced to endure the burdens associated with trial."\textsuperscript{101} In this examination of the case law, the court discussed both Justice Brennan's dissent from the denial of certiorari in \textit{Rowland},\textsuperscript{102} and the differing conclusion reached soon after in \textit{Bowers v. Hardwick},\textsuperscript{103} in determining that there was a "general state of confusion in the law at the time . . . so that any unlawfulness in Defendant's actions was not 'apparent' in 1988."\textsuperscript{104} Based on this state of confusion, the appellate court concluded that the defendant was entitled to qualified immunity.\textsuperscript{105} With that conclusion, the court stated in a footnote that it need not need to address whether classifications based on homosexual status were inherently suspect.\textsuperscript{106}

More recently, a district court in Utah heard a case brought by a lesbian volleyball coach who was not rehired solely because of her sexual orientation.\textsuperscript{107} This case was framed primarily as a First Amendment issue.\textsuperscript{108} Wendy Weaver was a tenured high school faculty member who consistently received rave evaluations.\textsuperscript{109} Additionally, Ms. Weaver had coached the high school girl's volleyball team to four state championships.\textsuperscript{110} When one of her players asked her if she was a lesbian, Ms.

\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id. (quoting Swift v. United States, 649 F. Supp. 596, 602 (D.D.C. 1986)).
\textsuperscript{100} Id. at 626-27.
\textsuperscript{101} Id. at 629.
\textsuperscript{102} Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1015-16 (1985) (asserting that the Supreme Court's failure to address "whether constitutional rights are infringed in sexual preference cases . . . [has] left the lower courts in some disarray.").
\textsuperscript{103} 478 U.S. 186, 194 (1986) (holding that homosexual sodomy was not a fundamental right under the Fourteenth Amendment).
\textsuperscript{104} Janitz v. Muci, 976 F.2d 623, 630 (10th Cir. 1992).
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 630 n.3.
\textsuperscript{108} Id. at 1283.
\textsuperscript{109} Id. at 1280.
\textsuperscript{110} Id.
Weaver responded that she was.\textsuperscript{111} That event precipitated many school administration meetings and phone calls from "adults affiliated, or formerly affiliated with the school."\textsuperscript{112} Several weeks later, Ms. Weaver was informed that she would not be reassigned to the volleyball coaching position.\textsuperscript{113} Ms. Weaver subsequently received a letter from the school district advising her that she could not discuss her "homosexual orientation or lifestyle" with any students, staff, or parents because of the negative impact it would have on the community.\textsuperscript{114} The letter concluded with a threat of termination if the requirements were violated.\textsuperscript{115}

After a lengthy First Amendment analysis, the Utah court held that the letter restricting Ms. Weaver's speech was unconstitutionally overbroad,\textsuperscript{116} thereby invalidated the letter, and ordered it to be removed from her personnel file.\textsuperscript{117} The court additionally held that the letter violated of the Fourteenth Amendment, since other teachers and coaches were not similarly limited in their speech.\textsuperscript{118} Finally, the court found that the principal's decision to not rehire Ms. Weaver constituted retaliation against her assertion of "her First Amendment rights to speak on matters of public concern."\textsuperscript{119}

The court also discussed Ms. Weaver’s Equal Protection claim under the Fourteenth Amendment.\textsuperscript{120} Using \textit{Romer v. Evans}\textsuperscript{121} as a guideline, the court recognized that other courts have held "that government action in a civil . . . setting cannot survive a rational basis review when it is motivated by irrational fear and prejudice towards homosexuals."\textsuperscript{122} The court concluded that the community’s perceptions, "based on nothing more than unsupported assumptions, outdated stereotypes, and animosity," are not legitimate support for the school district’s decision.\textsuperscript{123} The court continued that Ms. Weaver’s sexual orientation did not bear any rational relationship to her coaching ability, which had consistently proved to be outstanding.\textsuperscript{124} Because the principal’s decision not to rehire Ms. Weaver was based entirely on her sexual orientation and had no rela-

\begin{tabular}{l}
111. \textit{Id.} at 1281. \\
112. \textit{Id.} \\
113. \textit{Id.} \\
114. \textit{Id.} at 1281-82. The school district subsequently sent a second letter limiting the requirements of the first letter to apply only within the scope of her employment. \textit{Id.} \\
115. \textit{Id.} at 1282. \\
116. \textit{Id.} at 1286. \\
117. \textit{Id.} at 1290-91. \\
118. \textit{Id.} at 1290. \\
119. \textit{Id.} \\
120. \textit{Id.} at 1287. \\
121. 517 U.S. 620 (1996) (holding that an amendment to Colorado’s state Constitution invalidating any legislative or judicial action designed to protect individuals based on sexual orientation is unconstitutional under the Fourteenth Amendment).
122. \textit{Weaver}, 29 F. Supp. at 1288. \\
123. \textit{Id.} at 1289. \\
124. \textit{Id.} 
\end{tabular}
tionship to her job performance, the decision was in violation of the Fourteenth Amendment. In its opinion, the court stated, "because a community's animus towards homosexuals can never serve as a legitimate basis for state action, the defendants' actions based on that animus violate the Equal Protection Clause." The court ordered that Ms. Weaver be offered the coaching position for the 1999-2000 school year, and that the school district pay her lost wages for the previous school year.

Despite limited court victories for a few coaches, these cases do not begin to reflect the prevalence of homophobic hiring and firing decisions made at high schools, colleges, and universities every year. In addition to the coaches who are affected by these decisions, athletes too are often targets of homophobic attitudes and judgments.

E. The Effect of Homophobia on Athletes

Gay and lesbian students, as well as other students who are questioning their sexuality, face a reality in which attendance at particular schools will dictate their future behavior. A good example of player discrimination is the "no lesbians" policy of Penn State University's women's basketball coach Rene Portland. According to former players, Portland would announce her rules on the first day of practice: "no drinking, no drugs, no lesbians." If she found out that anyone on her team was a lesbian, that player's scholarship would be revoked immediately. This policy remained in place until the early 1990s when the policy became public. Public outrage at the "no lesbians" policy forced the university to adopt a nondiscrimination policy that covered sexual orientation. Portland, however, was not disciplined and she remains the head women's basketball coach at Penn State.

Another coach who has made his homophobic views very clear is the University of Colorado's head football coach who has been quoted as stating that "homosexuality is an abomination and sin against God." For collegiate athletes who view their coaches as leaders and role models,

125. Id.
126. Id.
127. Id. at 1291.
128. Cart, supra note 29.
129. Id.
130. Id.
131. Id.
132. Id.
133. Id. Obviously not hindered by her reputation, Portland has also served as a coach of the USA Women's World University Games and the U.S. Junior National Team, and has served as the president of the Women's Basketball Coaches Association. Penn State Athletics, Meet the Coach: Rene Portland: Head Coach, Women's Basketball Team, GoPSUsports.com, at http://www.gopsusports.com/basketballw/people/coaches/coachProfile.cfm (last visited Jan. 31, 2002).
134. Cart, supra note 29.
these types of public statements can have an incredibly detrimental effect.

Some lesbian athletes discuss the fear and lack of understanding they have felt from their heterosexual teammates: "No one wanted to room with me. . . . They thought I would hit on them or that someone might assume they were a lesbian, too. . . . It was a terrible feeling, coming from your teammates. I think it was out of ignorance." One athlete describes being "caught in a web of silence. I was afraid that if people knew about my lesbian identity, I would lose friends, credibility, and perhaps my place on the team." These fears are instilled early when high school coaches, unaware that a lesbian may be in the audience, warn their players of "lesbian programs." If these fears become strong enough, lesbian women will drop out of the sport completely. Because of these prejudices, lesbian women are and will continue to be deprived of the opportunity to pursue their dreams and desires on the playing field unless they are afforded protection.

In 1993 a female athlete pursued protection from just this type of deprivation. In the case of Yost v. Board of Regents, University of Maryland, the District Court of Maryland addressed a claim brought by a University of Maryland lesbian athlete. Yost played on the university's field hockey team for four years, the maximum amount of eligibility for an NCAA athlete. During that time, Yost alleged that the female Assistant Athletic Director and her female field hockey coach "agreed to project for the Women's Athletic Department an image of heterosexuality. Yost further alleged that it was their goal to suppress any athletic student conduct, speech, appearance, assembly, and association in conflict with that image." While Yost was on the field hockey team, her coach asked her if she was gay. Yost answered that she was, and she was then told by her coach "that her sexual orientation was not acceptable to the University of Maryland" and particularly that it was unacceptable to the Assistant Athletic Director. Additionally, her coach made numerous derogatory and stereotypical remarks about Yost's sexual orientation and ordered her to conceal it from the field hockey team, the Athletic Department, and members of the public who might directly or indirectly associate Yost

135. Id.
136. GRIFFIN, supra note 36, at 4.
137. Fish, supra note 57.
140. Id. at 1-2.
141. Id. at 1.
142. Id. at 2.
143. Id.
with the University of Maryland. In addition [the coach] ordered Yost not to "be seen" with her girlfriend, accept rides to or from practice or class from her, or visit with her on the College Park campus for any reason.144

The coach threatened to revoke Yost's scholarship if she did not comply with these rules.145 When Yost asked for a written release to allow her to transfer to a different university, the coach refused to sign the necessary form.146 During the remainder of Yost's eligibility, her coach continually reaffirmed her position emphasizing that if Yost were to mingle with lesbian friends or join the Gay and Lesbian Student Union she would lose her position on the team and her scholarship.147

Yost claimed that her coach, as an university employee, violated her first amendment rights.148 She further claimed "that the purpose of defendants in restricting her rights was to suppress any public exhibition of any lesbian athlete's sexual orientation in order to project and preserve a false image of heterosexuality among University of Maryland female athletes."149 The court dismissed Yost's § 1985(3) conspiracy claim because she did not belong to a protected class.150 Specifically, the court stated that "homosexuals are not a class within the meaning of § 1985(3)."151

Yost also sought injunctive relief to prevent future harassment, but the court denied this request by holding that Yost failed to state a case or controversy under Article III of the Constitution.152 Specifically, it held that Yost did not have standing to assert a claim because there was no assurance that the harm she experienced would continue now that she was no longer an athlete.153 Yost argued that even though she was no longer an athlete at the university, she was still a student and therefore the threat of continued harm was present.154 The court stated that it would "be impossible" for Yost to experience the type of injury to her constitutional rights in the future that she was alleging in her complaint since the alleged actions were directed only at female athletes.155

Yost attempted to save her request for an injunction by arguing that she had standing to request relief based on the future harm that might af-

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144. Id.
145. Id.
146. Id.
147. Id.
148. Id.
149. Id.
150. Id. at 4.
151. Id. (quoting DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 333 (9th Cir. 1979)).
152. Id.
153. Id.
154. Id. at 5.
155. Id.
fect incoming lesbian athletes at the university.\textsuperscript{156} In response, the court held that Yost had failed to establish her own right for injunctive relief and therefore was unable to assert a third-party claim for injunctive relief.\textsuperscript{157} Implicit in \textit{Yost} is that the choice an athlete faces, as determined by the court, is to stop playing her sport or abandon her First Amendment rights to free expression.

\section*{III. Legal Recourse}

The need for protection for both players and coaches is clear. Currently, there are fifteen states that provide protection from discrimination based on sexual orientation in public employment.\textsuperscript{158} Eleven states include sexual orientation as a protected class in private employment, and seven include it in their education statutes.\textsuperscript{159} Unfortunately, there are still thirty-five states where victims of sexual orientation discrimination have little recourse.

Homosexuality heightened scrutiny under the Due Process Clause of the Fifth and the Fourteenth Amendments,\textsuperscript{160} nor declared a protected class under Title VII.\textsuperscript{161} Therefore, no federal laws prohibit employment discrimination based on sexual orientation. Additionally, no federal statutes protect intercollegiate athletes in federally funded institutions who suffer discrimination or who are harassed because of their sexual orientation or perceived sexual orientation.\textsuperscript{162}

Judicial interpretation of Title VII has been somewhat broadened. In 1989, the Supreme Court held in \textit{Price Waterhouse v. Hopkins} that discrimination based on gender stereotyping was actionable under Title VII.\textsuperscript{163} Nine years later, the Supreme Court interpreted Title VII to cover

\begin{itemize}
  \item \textsuperscript{156} Id. at 6.
  \item \textsuperscript{157} Id.
  \item \textsuperscript{158} The states that prohibit discrimination based on sexual orientation in public employment are: California, Connecticut, Hawaii, Iowa, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio (excludes public officials), Rhode Island, Vermont, and Wisconsin. Summary of States, Cities and Counties which Prohibit Discrimination Based on Sexual Orientation, \textit{at} http://www.lambdalegal.org/cgi-bin/iowa/states/antidiscrimi-map (last visited Jan. 31, 2002).
  \item \textsuperscript{159} States prohibiting sexual orientation discrimination in private employment are: California, Connecticut, Hawaii, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin. States prohibiting discrimination based on sexual orientation in education are: California, Connecticut, Massachusetts, Minnesota, New Jersey, Vermont, and Wisconsin. \textit{Id}.
  \item \textsuperscript{160} See, e.g., Bowers v. Hardwick, 478 U.S. 186 (1986).
  \item \textsuperscript{161} DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979). Title VII states in part: "It shall be an unlawful employment practice for an employer to fail or refuse to hire or discharge any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (1994).
  \item \textsuperscript{162} Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000) (stating that "Title IX prohibits only discrimination based on sex and does not extend to any other form of invidious discrimination.").
  \item \textsuperscript{163} 490 U.S. 228, 250 (1989) (plurality opinion).
\end{itemize}
same-sex sexual harassment in *Oncale v. Sundowner Offshore Services*.164 These cases and others indicate a movement, albeit slow, toward an expansion of the protections provided under Title VII. A broadened interpretation of Title VII to include sexual orientation would benefit coaches due to their employee status, but would still leave student athletes unprotected. An expanded interpretation of the "because . . . of sex" language in Title VII would, however, open the door for an expansion of the "on the basis of sex" language in Title IX, which could then be used to protect both coaches and student athletes. Under this argument, protection would be available under current law.

This section will trace the broadening of Title VII and the resulting implications for Title IX. This section will then summarize case law development under both statutes and examine how current law could be used to address sexual orientation discrimination in intercollegiate athletics. Finally, this section will address briefly the Employment Nondiscrimination Act (ENDA) and the possibility of amending current statutes to guarantee protection against sexual orientation discrimination.

### A. Gender Nonconformity Claims Under Title VII

*Price Waterhouse v. Hopkins*165 is a well known case addressing the idea of discrimination based on gender nonconformity and gender stereotyping. The plaintiff Ann Hopkins was proposed for partnership at Price Waterhouse accounting firm in 1982.166 Her consideration was held over to the following year; however, the partners in her office refused to repropose her for a partnership position.167 Hopkins sued under Title VII of the Civil Rights Act of 1964 alleging sex discrimination in the firm's partnership decisions.168 The U.S. Supreme Court granted certiorari to determine the respective burdens of proof of a plaintiff and a defendant "when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives."169

First, the Court held an employer must show by a preponderance of the evidence that it would have made the same decision in the absence of discrimination.170 The Court then gave a lengthy discussion of the scope and purpose of Title VII.171 The Court found that on its face, Title VII requires that gender be irrelevant to the hiring decision.172 In other words,

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165. 490 U.S. 228 (1989).
166. *Id.* at 228.
167. *Id.*
168. *Id.*
169. *Id.* at 232.
170. *Id.* at 228.
171. *Id.* at 237-39.
172. *Id.* at 240.
the purpose of the statute was to force employers to focus on the qualifications of the applicant, rather than on one of the enumerated protected characteristics. 173 "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." 174 The Court stated that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with that group," 175 and that "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." 176 The Court discussed the "impermissible Catch-22" of requiring aggressive behavior from a woman to succeed in a job, but then using that same aggressive behavior to fire or fail to promote her. 177

The Catch-22 described by the Supreme Court is the same predicament that female coaches face—strength and aggressiveness are necessary to show competence, but are then used as factors to prove deviance and unfitness to work with young people.

In an attempt to reveal Price Waterhouse’s discriminatory behavior, Hopkins called Dr. Susan Fiske—a social psychologist and Associate Professor at Carnegie-Mellon University—as an expert witness to testify about comments made by partners at Price Waterhouse, both written and spoken. 178 These comments included descriptions of Hopkins as "macho," needing "a course at charm school," and "overcompensating for being a woman." 179 Dr. Fiske concluded that "Price Waterhouse was likely influenced by sex stereotyping." 180

Dr. Fiske’s analysis of sex stereotyping relied on the work of Rosabeth Moss Kanter in her discussion of token women in organizations. 181 Kanter’s work explores the experience of women in a male-dominated corporate world. 182 She states that a “token” is often noticed for the particular traits that set her apart rather than for her job performance. 183 Because women are often characterized as feminine or demure—as “mothers,” “madonnas,” or “pets”—any deviation from that stereotype is emphasized. 184 At one company, Kanter found that women who were

173. Id. at 243 (the enumerated protected characteristics are race, color, religion, sex, and national origin).
174. Id. at 250.
175. Id. at 251.
176. Id. (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).
177. Id.
178. Id. at 235-36.
179. Id. at 235.
180. Id.
183. Id. at 216.
184. Id. at 233.
highly successful at garnering business were criticized for being “too aggressive” and “too much of a hustler.”

The token woman can be likened to the position of women coaches and athletes in collegiate athletic organizations. Like women in the corporate world, women athletes are attempting to gain status and recognition in an environment traditionally dominated by men. Under Dr. Fiske’s analysis, it follows that female coaches and athletes are judged more critically either because of their feminine characteristics or their lack thereof.

As a plurality opinion, *Price Waterhouse* is limited in its weight of authority. The court in Lynch v. Belden & Co., relying on Justice O’Conner’s concurrence in *Price Waterhouse*, held that the decision there only applies in cases where the plaintiff has direct evidence of discrimination. Further, in Bruno v. City of Crown Point, the court held that it was not enough for the plaintiff to prove that the employer asked sex-stereotyped questions during the hiring process; in order to provide direct evidence of discrimination, the plaintiff also had to prove the employer actually relied on the answers to those questions.

*Price Waterhouse* was a groundbreaking decision for future discrimination victims. It broadened the scope of potential liability of employers and acknowledged that classifications and stereotypes lead to discrimination. Unfortunately, it has taken years to feel the impact of the decision, for courts have been slow to apply the reasoning used in *Price Waterhouse* to similar cases.

The court in Higgins v. New Balance Athletic Shoe, Inc. indicated that it may have been willing to use the reasoning from *Price Waterhouse* to address a Title VII claim brought by a male employee who experienced harassment based on his sexual orientation. Although the court upheld summary judgment in favor of the employer, it did so because the plaintiff had framed his original complaint around sexual orientation discrimination. Only on appeal did the plaintiff amend his complaint to claim discrimination based on sex. The court explained that harassment based on sexual orientation “is a noxious practice, deserving censure and opprobrium. But we are called upon here to construe a statute as glossed by the Supreme Court, not to make a moral judgment—and we regard it as settled

185. *Id.* at 217.
186. 882 F.2d 262 (7th Cir. 1989).
187. *Id.* But see Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989); Fragante v. Honolulu, 888 F.2d 591 (9th Cir. 1989) (deferring to the plurality in *Price Waterhouse* in giving weight to indirect evidence of discrimination).
188. 950 F.2d 355 (7th Cir. 1991).
189. *Id.* at 362.
190. 194 F.3d 252 (1st Cir. 1999).
191. *Id.* at 259.
law that Title VII does not proscribe harassment simply because of sexual orientation.\textsuperscript{192}

Had the plaintiff originally stated his claim as discrimination based on sex, rather that sexual orientation, the outcome of Higgins might have been different. The court's discussion, goes so far as to state that:

\begin{quote}
JUST as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.\textsuperscript{193}
\end{quote}

The Higgins decision underscores the importance of the way in which a plaintiff chooses to frame the issue. In sex discrimination or harassment cases where sexual orientation is an issue, courts will frequently focus on the sexual orientation aspect and dismiss the claim on summary judgment. Because sexual orientation is not a protected class under Title VII, this is an easy and consistent way for courts to dispose of these types of cases.

An example of this phenomenon is the holding in \textit{Mims v. Carrier Corp.}\textsuperscript{194} In this case the plaintiff claimed he was harassed because of his perceived sexual orientation.\textsuperscript{195} Although he was not gay, the plaintiff claimed that the defendants "suggested that he was engaging in homosexual conduct with a male co-worker"\textsuperscript{196} and that the remarks were sometimes "accompanied by graphic and offensive body gestures."\textsuperscript{197}

The court stated that the plaintiff's claim was not actionable, "as Fifth Circuit law does not allow a claim for discrimination based on sexual preference,"\textsuperscript{198} concluding that "[n]either sexual orientation nor perceived sexual orientation constitute protected classes under the Civil Rights Act."\textsuperscript{199} Although the court reached this conclusion immediately, it carried out a full Title VII analysis. In addressing whether the harassment the plaintiff endured was based on sex, the court concluded that "[t]he clear meaning of 'sex' under Title VII is not 'intercourse,' but 'gender,' and [plaintiff] does not allege that he was discriminated against because of his gender."\textsuperscript{200} The court refused to acknowledge any connection between sex discrimination based on gender nonconformity and sex discrimination based on sexual orientation. Furthermore, because the court relied upon a prior Fifth Circuit decision that failed to find "effemi-

\begin{footnotesize}
192. \textit{Id.}
193. \textit{Id. at 261 n.4} (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 250-51 (1998)).
195. \textit{Id. at 712}.
196. \textit{Id. at 710}.
197. \textit{Id.}
198. \textit{Id. at 713}.
199. \textit{Id. at 714}.
200. \textit{Id.}
\end{footnotesize}
nacy” to merit protection under Title VII, it is doubtful that the outcome would have changed even if the plaintiff had framed his complaint in terms of gender stereotyping rather than sexual orientation.

Since the Ninth Circuit’s ruling in DeSantis v. Pacific Telephone & Telegraph Company, courts have been prohibiting liability under Title VII for discrimination on the basis of sexual orientation. The court in Rene v. MGM Grand Hotel stated the prevailing conception of DeSantis: “While societal attitudes towards homosexuality have undergone some changes since DeSantis was decided, Title VII has not been amended to prohibit discrimination based on sexual orientation; DeSantis remains good law and has been followed in other circuits.”

In MGM Grand Hotel, the plaintiff was verbally and physically harassed in a sexual manner on a daily basis while employed as a butler at the MGM Grand Hotel and Casino in Las Vegas. Although the court found the treatment received by the plaintiff to be “appalling” and “disturbing,” the opinion, following precedent, upheld summary judgment in favor of the defendant.

Despite these decisions, several recent cases have held that a claim for discrimination or harassment based on gender nonconformity or gender stereotyping can successfully withstand a summary judgement motion.

In Janetta v. Putnam Investments, the plaintiff was called “faggot” several times, treated differently from other employees by his supervisor, and eventually threatened with termination. The plaintiff filed discrimination charges with the Massachusetts Commission Against Discrimination, and he was fired one month later. The plaintiff sued Putnam, his former employer, for sexual harassment and retaliation in violation of Title VII. Putnam moved to dismiss, its key argument being that “Title VII does not proscribe harassment based on sexual orientation.” The court agreed that if the plaintiff’s only basis for his discrimination claim was sexual orientation then the case must be dis-

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201. Id. at 713 (citing Smith v. Liberty Mutual Ins. Co., 569 F.2d 325, 326 (5th Cir. 1978)).
202. 608 F.2d 327 (9th Cir. 1979) (holding that “Title VII’s prohibition of ‘sex’ discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference”).
203. Recently however, the Ninth Circuit held that Price Waterhouse dictates current law regarding discrimination based on sex stereotypes, not DeSantis. Nichols v. Azteca Restaurant Enterprises, 256 F.3d 864, 875 (9th Cir. 2001) (“to the extent [DeSantis] conflicts with Price Waterhouse, as we hold it does, DeSantis is no longer good law.”).
204. 243 F.3d 1206 (9th Cir.), reh’g en banc granted, 255 F.3d 1069 (9th Cir. 2001).
205. Id. at 1209.
206. Id.
208. Id. at 133.
209. Id.
210. Id. Plaintiff also brought charges under Massachusetts General Laws ch. 151B. Id.
211. Id.
missed. However, the plaintiff in this case argued that his supervisor’s “use of the term ‘faggot’ and his other actions were made because [the plaintiff] failed to conform to the male gender stereotype.” The plaintiff argued that this type of behavior amounted to discrimination on the basis of sex. Based on these allegations, the court framed the issue as “whether a complaint based on one’s failure to conform to a gender stereotype states a claim for sex discrimination under Title VII.”

Surprisingly, the Ianetta court did not mention Price Waterhouse in its decision. Rather, the court relied completely on Oncale to extend protection to same-sex sexual harassment victims, and on the Higgins holding that a man may base an action on the claim that other men have discriminated against him because he failed to meet stereotypes of masculinity. The Ianetta court held that the plaintiff’s claim of discrimination based on failure to meet masculine stereotypes was a claim for sex discrimination on that basis, and the court denied defendant’s motion for summary judgement.

The Northern District of Illinois issued a similar decision in 2001 in Jones v. Pacific Rail Services. The plaintiff brought suit against his employer under Title VII for the employer’s failure to take corrective action after the plaintiff complained that he was being harassed because “[he] did not conform to male sexual stereotypes.” The court reviewed and denied the defendant’s motion to dismiss. Relying heavily on Oncale and analogizing to Price Waterhouse, the court held that Pacific Rail did not respond to his complaints that he was being harassed because of his alleged effeminacy is sufficient to state a claim. It remains to be seen, of course, whether [the plaintiff] actually will be able to establish that he was harassed based on his gender, but that is an issue for another day. While the court avoided addressing the paramount question—whether the harassment due to his effeminacy was discrimination based on gender—it is clear that courts are showing an increasing willingness to allow plaintiffs to state, at a minimum, a claim of discrimination or harassment based on nonconformity with gender stereotypes under Title VII.

212. Id.
213. Id.
214. Id.
215. Id.
216. Id. at 133-34 (citing Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998) and Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 (1st Cir. 1999)).
217. Id. at 134.
219. Id. at 1.
220. Id. at 3.
B. Title IX

The willingness of courts to expand the interpretation of Title VII to include gender non-conformity could extend to similar language regarding gender in Title IX.\(^{221}\) This statute is widely known as the statute that provided equality in athletic opportunities for women. However, because of the similarity between the “on the basis of sex” language in Title IX,\(^{222}\) and the “because . . . of sex” language in Title VII,\(^{223}\) Title IX can also be used as a vehicle to address discrimination and harassment in educational institutions that receive federal funding.\(^{224}\)

In 1998, the U.S. Supreme Court held in *Gebser v. Lago Vista Independent School District*\(^{225}\) that an institution receiving federal funds can be held liable under Title IX for its deliberate failure to respond to a student’s sexual harassment allegations against a teacher.\(^{226}\) According to the Court, a Title IX violation occurs when the fund recipient (i.e., the school) has actual knowledge of teacher-student harassment and chooses to remain idle.\(^{227}\) In order to invoke Title IX protection, there must be “an official decision by the recipient not to remedy the violation,”\(^{228}\) and that deliberate indifference must effectively cause the discrimination.\(^{229}\) The discrimination at issue is the fact that the victim is essentially barred from an educational opportunity or benefit in violation of Title IX.\(^{230}\) The scope of liability under Title IX extends “only where the funding recipient has some control over the alleged harassment. A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action.”\(^{231}\)

The *Gebser* case is important because it clarified that sexual harassment is a type of discrimination under Title IX, and that “Title IX prescribes harassment with sufficient clarity to satisfy [the] notice requirement and serve as a basis for a damages action.”\(^{232}\)

Relying heavily on its decision in *Gebser*, one year later the U.S. Supreme Court addressed whether a school district can be held liable for deliberate indifference in responding to student-on-student sexual harassment, in *Davis v. Monroe County Board of Education*.\(^{233}\) The ma-
ajority opinion discussed the plain language of Title IX and set forth the specific requirements necessary to find liability under the statute.\footnote{234} The fund recipient must have notice of Title IX’s prohibitions,\footnote{235} must have control over the harasser and the environment in which the harassment occurs,\footnote{236} and if the recipient is not the actual harasser, its “deliberate indifference must . . . ‘cause [students] to undergo’ harassment or ‘make [them] liable or vulnerable’ to it.”\footnote{237} Additionally, the recipient must have “actual knowledge” of the harassment, and that harassment must be “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.”\footnote{238} It is not necessary to show that the victim was physically denied access to an educational opportunity, only that the harassment is so severe as to undermine and detract from the victim’s educational experience.\footnote{239} The behavior must “be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity.”\footnote{240}

In \emph{Davis}, the petitioner was the mother of a fifth-grade student who was the victim of sexual harassment by another student.\footnote{241} The harassment consisted of sexual touching and sexual remarks over several months.\footnote{242} The victim reported the incidents to various teachers and her principal, but no action was taken.\footnote{243} The victim was not the only student to experience this harassment, and, at one point, the severity of the harassment drove the student to contemplate suicide.\footnote{244}

Since the harassment occurred during school hours and on school grounds, the Court found the misconduct to be “taking place ‘under’ an ‘operation’ of the funding recipient.”\footnote{245} In other words, the harasser was under the school’s control.\footnote{246} The Court found that the victim reported the incidents to various officials to no avail during a five-month period, which could show that the recipient had actual knowledge of the harassment, and that it displayed deliberate indifference.\footnote{247} Finally, because the victim’s grades dropped substantially, the five months of harassment could be enough to show a negative effect on her ability to receive an
Based on these findings, the Court reversed the Eleventh Circuit’s dismissal for failure to state a claim and remanded the case for further proceedings.

Based on the decisions in these two cases, there is statutory protection provided for students from sexual harassment by other students, and protection for students from harassment by teachers. This should then also hold true for athlete-on-athlete and coach-on-athlete harassment in collegiate settings. Title IX also provides protection for teachers from sexual harassment and discrimination from federally funded educational institutions. Therefore, both coaches and athletes can be protected under one statute. What is left now is to broaden the “on the basis of sex” standard in Title IX to incorporate gender nonconformity, similar to interpretation of Title VII’s “because . . . of sex” standard.

C. Gender Nonconformity Claims Under Title IX

There is some indication that courts are receptive to the argument that gender nonconformity is protected under Title IX. The Minnesota case of Montgomery v. Independent School District No. 709 provides an example of the analysis. In Montgomery, the plaintiff alleged discrimination in the school board’s response to his complaints of harassment. The plaintiff asserted that he was harassed because of his gender and his perceived sexual orientation. The abuse was severe with verbal taunts beginning in kindergarten, and physical abuse, sometimes sexual in nature, starting in sixth grade. The harassment lasted for eleven years. The plaintiff brought several causes of action including claims under the Minnesota Human Rights Act, the Equal Protection and Due Process Clauses of the United States Constitution, the Minnesota Constitution, and Title IX of the Education Amendments of 1972. The plaintiff’s claims other than the Title IX claim are not relevant to this article and will not be addressed here.

The plaintiff claimed that the harassment he encountered “deprived him of the ability to access significant portions of the educational environment.” In order to avoid his harassers, he remained home from school on numerous occasions; did not participate in intramural sports; stayed away from the school cafeteria and bathrooms whenever possible;
and stopped riding the school bus. The plaintiff allegedly reported the incidents of harassment to "a variety of School District officials, including teachers, bus drivers, principals, assistant principals, playground and cafeteria monitors, locker room attendants, and school counselors." While the officials occasionally responded to these situations, their solutions were generally inconsistent and ineffective, and included removing the plaintiff from his favorite classes, forcing him to meet with his harassers, and designing a seating chart. The plaintiff stated that the disciplinary measures often resulted in retaliatory harassment.

The court began its Title IX analysis by stating that "to the extent that plaintiff asserts Title IX claims based on discrimination due to his sexual orientation or perceived sexual orientation, these claims are not actionable and must be dismissed." However, the court then focused on the plaintiff's claim for gender discrimination and the fact that he was harassed "because he did not meet [the harassers'] stereotyped expectations of masculinity."

The court stated that while the U.S. Supreme Court has held that student-on-student harassment may give rise to a cognizable claim under Title IX, "[n]o federal court appears to have addressed . . . whether the kind of conduct to which plaintiff was subjected constitutes discrimination 'on the basis of sex' within the meaning of Title IX." The plaintiff was abused and taunted with names like "girl," "princess," "fairy," "lesbian," "bitch," and "queen," which indicated that the harassers were singling out his feminine characteristics and that they believed that he did not behave as boys should.

Because no court had addressed this issue in the context of a Title IX claim, the court focused on similar claims brought under Title VII, "noting that Title VII similarly requires that the discrimination resulting in the plaintiff's claims be based on his or her sex." The court reasoned "that no logical rationale appears to exist for distinguishing Title VII and Title IX in connection with the issues raised here regarding the circumstances under which abusive or offensive conduct amounts to harassment 'based on sex.'" The court then proceeded to apply a Title VII analysis, using *Oncale*, *Higgins*, and *Price Waterhouse* to reach its conclusion that the

258. Id.
259. Id.
260. Id.
261. Id.
262. Id. at 1090.
263. Id.
266. Id. at 1084.
267. Id. at 1090.
268. Id. at 1090-91.
269. Id. at 1091-92.
plaintiff's harassment, due to his failure to meet masculine stereotypes, was a cognizable claim under Title IX.\textsuperscript{270}

A similar approach was taken in the Northern District of California in \textit{Ray v. Antioch Unified School District}.\textsuperscript{271} As in \textit{Montgomery}, the plaintiff in this case brought suit against the school district for its deliberate indifference in addressing known sexual harassment directed at plaintiff.\textsuperscript{272} The plaintiff alleged that students “repeatedly threatened, insulted, taunted, and abused [him] during the school day and during school activities.”\textsuperscript{273} The allegation stated that “such harassment was based on the students’ perception that [the p]laintiff was a homosexual, and due to the status and physical appearance of [the p]laintiff’s mother, a transgendered female.”\textsuperscript{274} The plaintiff reported the harassment to appropriate school officials, but those officials failed to take action to stop the harassing behavior.\textsuperscript{275}

Additionally, the plaintiff alleged that the school district knew or should have known that one of the harassers in particular had a history of violent behavior and therefore posed a special threat to the plaintiff.\textsuperscript{276} That particular student eventually physically assaulted the plaintiff resulting in severe and permanent injury.\textsuperscript{277} Due to the school district’s indifference to his well-being, the plaintiff alleged that his “fright and emotional state [were] so severe and pervasive, that it effectively bar[red] [his] access to an educational opportunity or benefit” in violation of Title IX.\textsuperscript{278} In response, the defendant moved for a judgment as a matter of law that Title IX “does not prohibit discrimination on the basis of homosexuality or transsexualism.”\textsuperscript{279}

Relying heavily on the \textit{Davis} opinion, the court stated that funding recipients, such as schools, could be liable when they are found to be “(1) deliberately indifferent, (2) to sexual harassment, (3) of which they have actual knowledge, (4) that is so severe, pervasive, and objectively offensive, (5) that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”\textsuperscript{280} The court cited \textit{Oncale} as a basis for finding same-sex harassment actionable under Title VII,\textsuperscript{281} and \textit{Franklin v. Gwinnett County Public Schools}\textsuperscript{282} as a basis.

\begin{itemize}
\item \textsuperscript{270} \textit{Id.} at 1092.
\item \textsuperscript{271} 107 F. Supp. 2d 1165 (N.D. Cal. 2000).
\item \textsuperscript{272} \textit{Id.} at 1167.
\item \textsuperscript{273} \textit{Id.}
\item \textsuperscript{274} \textit{Id.}
\item \textsuperscript{275} \textit{Id.}
\item \textsuperscript{276} \textit{Id.}
\item \textsuperscript{277} \textit{Id.}
\item \textsuperscript{278} \textit{Id.}
\item \textsuperscript{279} \textit{Id.}
\item \textsuperscript{276} \textit{Id.}
\item \textsuperscript{277} \textit{Id.}
\item \textsuperscript{278} \textit{Id.}
\item \textsuperscript{279} \textit{Id.}
\item \textsuperscript{280} \textit{Id.} at 1169 (quoting \textit{Davis v. Monroe County Bd. of Educ.}, 526 U.S. 629, 650 (1999)).
\item \textsuperscript{281} \textit{Id.} (citing \textit{Oncale v. Sundowner Offshore Servs.}, 523 U.S. 75 (1998)).
\item \textsuperscript{282} 503 U.S. 60 (1992).
\end{itemize}
for using Title VII jurisprudence to interpret Title IX. Based on the facts and following U.S. Supreme Court precedent, the court denied the School Board's motion to dismiss.

Both Montgomery and Ray indicate a willingness by the lower courts to apply Title VII jurisprudence to Title IX claims. This is a significant step toward allowing more students, including student athletes and coaches, relief from discrimination and harassment due to gender nonconformity.

D. Problems With The Gender Nonconformity Argument

While a "gender nonconformity equals sex discrimination" argument may be ideal in some sexual orientation discrimination suits, it still would leave many potential plaintiffs without remedy. The fundamental flaw is that the argument assumes that every gay or lesbian plaintiff acts in a stereotypical way. In other words, the assumption that every lesbian plaintiff walks, talks, and appears masculine, while every gay male plaintiff walks, talks, and acts feminine, leaves out feminine lesbians and masculine gay men. For those individuals, a gender nonconformity argument would be much more difficult to make. When a court is faced with a woman who is or is perceived to be heterosexual, and who looks or acts masculine, it is very easy to single out gender and to find discrimination based on non-feminine appearance or behavior. A progressive court, when faced with an appropriately framed issue, also may be able to single out gender when faced with a lesbian who looks or acts masculine. However, even the most sympathetic court will have difficulty in separating gender discrimination from sexual orientation discrimination in the case of a lesbian who looks or acts feminine and faces discrimination solely because of her sexual orientation. If the state or jurisdiction where the feminine lesbian experiences the discrimination does not have a statute granting protection based on sexual orientation, she has no recourse.

Only in cases where the plaintiff is successful in specifying discrimination based on gender and failure to meet expected gender stereotypes

284. See Anthony E. Varona & Jeffrey M. Monks, EN/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation, 7 WM. & MARY J. WOMEN & L. 67, 107 (2000) (arguing that because sexual orientation is not a protected class under Title VII, gay plaintiffs must show that the discrimination they experienced was the result of sex stereotyping and not anti-gay bias alone).
285. While I would argue that every lesbian and gay man is inherently challenging gender stereotypes, courts are far from recognizing this theory.
286. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 250-51 (1989). For a discussion of this case, see infra Section III. A.
287. See, e.g., Jones v. Pacific Rail Servs., 2001 WL 127645 (N.D. Ill. 2001) (holding that the gay plaintiff's claim that he was harassed because of his effeminate characteristics was sufficient to state a claim).
will the court address the claim. While this may be extremely limiting for most plaintiffs, it may not be as much of a hindrance for female coaches and athletes who face discrimination as it would be for other plaintiffs. If female coaches and athletes are discriminated against because they are strong, aggressive, and confident, characteristics typically thought of as male, then a gender nonconformity argument is plausible. If certain characteristics (strength, muscles, short hair cut, assertiveness) displayed by a woman cause a presumption of lesbianism, which then leads to discrimination based on that presumption, then those characteristics are the basis of the discrimination. The characteristics at the root of the discrimination are those that fail to conform to stereotypically feminine gender norms. The woman who possesses those characteristics is seen as unfeminine—or masculine—and faces discrimination as a result.

This analysis still leaves the feminine lesbian coach or athlete without recourse. Even with a broad reading of Title VII and Title IX, there will still be lesbians who, regardless of their femininity, are denied equal access opportunities purely because of their sexual orientation. Bringing a gender nonconformity action under Title IX is by no means a perfect solution, but it may be the best avenue that is currently available.

**E. Amending Title IX**

Title IX was passed in 1972. The text of the statute is self-explanatory; the relevant section 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. . . . The test for compliance with Title IX has been articulated in a regulation as a comparison of the "benefits, opportunities, and treatment afforded members of both sexes." The regulations define the test for "equal athletic opportunity" as whether the amount spent on athletic scholarships is on a "substantially proportional basis to the number of male and female participants in the institution's athletic program." There are other factors that are also taken into consideration when determining equal athletic opportunity.

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290. Id.
293. The additional program factors are: the selection of sports and levels of competition available to members of both sexes; provisions of equipment and supplies; scheduling of games and practice time; travel and per diem allowances; opportunity to receive coaching and academic tutoring; as-
Since the passage of Title IX, participation by women in sports has increased dramatically. However, this rise has taken time and litigation. In 1974, the Javits Amendment made Title IX applicable to athletics. "In the late 1970s, President Carter’s administration issued Regulations and Policy Interpretations designed to flesh out Title IX’s implications for sports in college and high school." In 1984, however, women’s athletics were dealt a substantial blow by the U.S. Supreme Court. In the case of Grove City College v. Bell, the Court interpreted Title IX as only extending to specific college programs that receive federal funding. Because athletic departments were not offered federal financial assistance, it follows that they would not be subject to Title IX regulations. Congress responded to the Grove ruling by passing the Civil Rights Restoration Act four years later. This Act extended Title IX to all programs at educational institutions receiving any federal funding, including grants and loans made to students. Therefore, if some students at a given school receive funding, then the school’s athletic departments fall under Title IX.

In the early 1990s, Title IX gained its bite when the U.S. Supreme Court began to allow private suits for damages brought by women alleging personal harm resulting from Title IX violations. Allowing for money damages also permitted students to maintain their claims until resolution, whereas previously there would have been a loss of standing upon the student’s graduation.

In 1994, Congress passed the Equity in Athletics Disclosure Act. In order to comply with the Act, schools must publish information regarding the number of male and female athletes in their programs. The Act also requires a listing of varsity teams in the athletic programs with detailed rosters of each team as of the first day of contest and total attributable expenditures to each team. Reporting the gender of the head coach, female or male, as well as number, sex, and employment status of
assistant coaches is also required. In addition, the Act also requires reporting on total financial assistance received by male and female athletes, total revenue generated by men’s and women’s teams, and salary information for head coaches. The rationale behind the Act was that “knowledge of an institution’s expenditures for women’s and men’s athletic programs would help prospective student athletes make informed judgments about the commitments of a given institution of higher education to providing equitable athletic benefits to its men and women students.”

Title IX has given women a tool to demand equal access and opportunity in intercollegiate athletics. By amending Title IX to read “no person . . . shall on the basis of sex or sexual orientation be excluded from participation,” the same access and opportunity could be guaranteed to lesbian and gay athletes.

While women’s athletics owe much gratitude to Title IX, on the twenty-fifth anniversary of its passage, eighty percent of the college and university athletic programs governed by the statute failed to comply fully with the law. This fact alone is troubling. Considering the low rate of compliance with the current statute, it might be unrealistic to think that if amended, Title IX would provide any real protection based on sexual orientation. However, an amended Title IX would provide a legal avenue for victims without forcing the plaintiff to fit her claim into a gender nonconformity case that may or may not be successful.

Title IX might be difficult to amend for a multitude of reasons. The original purpose of the statute was to equalize access to educational facilities for women. Lengthy administrative guidelines have been issued to direct educational institutions to act in compliance with Title IX by balancing the number of and opportunities for female and male athletes in their programs. The goal of amending Title IX to include sexual orientation as a prohibited basis of discrimination, however, is not to have the same number of openly homosexual students as heterosexual students participating in athletics. Rather, the point of the proposed amendment is to prevent discrimination and harassment of coaches and athletes on the basis of sexual orientation. Therefore, amending Title IX to include sexual orientation may be incompatible with the original purpose of the statute because while it would work to eliminate discrimination that is an implicit barrier to equality in collegiate athletics, the number of homosexual athletes would not be a reliable measure of equal access.

The probability of successfully amending Title IX (or Title VII) to include sexual orientation can be predicted by the success, or lack of suc-

305. Id.
306. Id.
307. Id. at § 360B(b)(8).
308. Erik Brady, Colleges Score Low on Gender-Equity Test, USA TODAY, Mar. 3, 1997, at CI.
cess, of similar statutes or acts. A discouraging indicator is the repeated failures of the Employment Non-Discrimination Act to gain the support of the legislature.

F. The Employment Non-Discrimination Act (ENDA)

There are currently no federal laws protecting individuals from employment discrimination based solely on sexual orientation. At the same time, workplace discrimination continues to be “the most common complaint received by the American Civil Liberties Union from gays and lesbians.” The Employment Non-Discrimination Act (ENDA) is a proposed federal statute that would make it “an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual’s sexual orientation.” The bill was first introduced in the 1970s and was reintroduced in 1996. At the time that ENDA was introduced, Congress was also considering the Defense of Marriage Act (DOMA), a bill banning gay marriage. Interestingly, the presence of both bills made it easier for Republicans to vote for the passage of ENDA because they could also vote in favor of DOMA and remain in good stead with their more conservative constituents. In 1996 ENDA was passed by the House of Representatives, but failed in the Senate by one vote. ENDA was again presented to Congress in 1999, but no vote was ever taken. ENDA was reintroduced in July of 2001.

The arguments used to defeat ENDA are the same arguments that might hinder the possibility of amending either Title IX or Title VII to include sexual orientation as a protected class. The least inflammatory, yet still damaging, argument against employment protection for gays and lesbians stems from the results of a survey conducted by the Simmons

314. Id.
316. Peek, supra note 313, at 565.
Market Research Bureau in October of 1988. The results of this survey indicated that homosexuals received an average annual income well above the national average, had a much higher education level than the national average, and were well represented in management and professional jobs. Opponents of employment protections cited this information to argue that protections were not necessary because homosexuals were already economically advantaged. What the survey failed to disclose, however, was that the data it received was from only those individuals who subscribe to one of eight leading gay newspapers. The Simmons Market Research Bureau failed to consider that when a survey only collects data from a privileged group of individuals, the results are likely to reflect that privileged status. A more recent study conducted by Dr. Lee Badgett of the University of Massachusetts at Amherst “showed that gays earn from 11% to 27% less and lesbians earn 5% to 14% less than the national average.”

Other popular arguments against protecting gays and lesbians through ENDA include: (a) ENDA will introduce pro-gay bias into hiring; (b) ENDA will take resources away from individuals who are protected based on characteristics that they cannot change like race; (c) ENDA would prohibit employers from disciplining employees engaging in any sexual act while on the job; (d) ENDA would give homosexuals special rights; (e) ENDA would lead to quotas for gay and lesbians; and (f) ENDA discriminates against religious groups.

The arguments against advancing protections for homosexuals in employment (and other areas) can be reduced to two basic themes: homosexuality is not immutable and homosexuality is against the word of God. First, opponents of ENDA justify discrimination by arguing that homosexuality is only a specific type of conduct, not an immutable characteristic. They argue that because homosexuality is only conduct, individuals have the choice to engage in that conduct. If an individual


320. Employment Discrimination Against Gays & Lesbians, supra note 311.
321. Id.
322. Id.
323. Id.
324. Id.
325. The purpose here is merely to present the main arguments used to deny homosexuals employment protection, not to specifically address the merits of these arguments.
327. Id.
chooses to conduct herself as a homosexual, than she opens herself up to discrimination. 328

It is also argued that discrimination that is based on the word of God is justified by the Bible. 329 Because the Bible states that "a man who lies with a male" is immoral and perverted, the government should not protect these individuals in the workplace. 330 This argument generally explains that by providing homosexuals with protection, the government (or whoever is providing the protection) is endorsing or even promoting a homosexual lifestyle. 331 The related "protect the children" argument holds that the promotion of homosexuality will demonstrate to society's children that being homosexual is an acceptable choice and a viable alternative lifestyle. 332 Additionally, religious arguments often link homosexuality with pedophilia. 333 This argument concludes that if the government promotes homosexuality (through protective laws) pedophiles will have more access to children, putting them in danger. 334

As it stands now, these arguments are succeeding. Homosexuality is not a protected class under Title VII and ENDA is far from becoming a reality. Amending Title VII or Title IX to include homosexuality could meet the same strong resistance that ENDA has met. Amending Title VII and Title IX would serve to protect gay and lesbian individuals from discrimination at work and at school, in much the same way that ENDA would, and therefore might have comparable success (or failure) in passing through the legislature. Until the political and social climate becomes more tolerant and accepting, lesbian, gay, bisexual, and transgendered individuals remain in jeopardy every day.

331. Tooley, supra note 328.
332. See id.
333. See, e.g., VOTERS' PAMPHLET: STATE OF OREGON GENERAL ELECTION NOVEMBER 8, 1992 (Sec'y of State ed., 1992) (Oregon's Ballot Measure 9 prohibited extending anti-discrimination laws to include homosexuality and would have required schools to set standards for youth to discourage homosexuality).
335. Id.
IV. Conclusion

Women in athletics have had to overcome a long history of discrimination. When they first picked up a ball, women invaded male territory and threatened their exclusivity. Slowly women’s presence became stronger, and they worked to gain access to resources and opportunities. Eventually, Title IX was passed and litigated to insure legal recourse in cases where schools or administrators were non-responsive to the growing number of female athletes and coaches. Now, as women are slowly gaining power and acceptance in the athletic arena, a new battle is being fought. Lesbian and unfeminine women, and men who fail to meet the macho male ideal, face targeting, baiting, and discrimination.

Title IX, while it has its share of inadequacies, may be the best avenue that is currently available for addressing discrimination based on sexual orientation in intercollegiate athletics. Although there has never been a successful claim of discrimination specifically based on sexual orientation under Title IX, claimants have had some success, albeit limited, in asserting claims of discrimination based on gender nonconformity. When the court is receptive to this claim, it conducts an analysis that parallels a Title VII gender nonconformity claim. The analogy is workable because both statutes contain language that prohibits discrimination because of sex.336 Title IX is a desirable avenue for protection because it would be applicable to student athletes as well as coaches and administrators, whereas Title VII or ENDA would each only provide causes of action for employees—coaches, administrators, etc.

Gay men, lesbians, bisexuals, and transgendered individuals are discriminated against on a daily basis. They are denied the ability to get married, they lose custody of their children, they are harassed and beaten, they are deported, and they are fired or denied access to jobs that they need and careers that they love. This paper addresses only a small part of the inequality. But just as Title IX was a small step towards insuring equal participation by women in intercollegiate sports, so too could the statute provide a small step towards insuring equal and free participation of lesbians and gay men in intercollegiate athletics.

336. Title IX states, “no person in the United States shall, on the basis of sex, . . . be subjected to discrimination”; Title VII states “. . . shall be made free from any discrimination based on . . . sex.”