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Intercollegiate Athletics' Unique Environments for Sexual Harassment Claims: Balancing the Realities of Athletics with Preventing Potential Claims

Nancy Hogshead-Makar

Sheldon Elliot Steinbach

ARTICLES

INTERCOLLEGIATE ATHLETICS' UNIQUE ENVIRONMENTS FOR SEXUAL HARASSMENT CLAIMS: BALANCING THE REALITIES OF ATHLETICS WITH PREVENTING POTENTIAL CLAIMS

NANCY HOGSHEAD-MAKAR

SHELDON ELLIOT STEINBACH*

> Although concrete statistics on sexual harassment in women's sports are minimal, one comprehensive study on the issue reported that one-fifth of female athletes in Canada have been sexually harassed or abused by their coaches.[1]
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> A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field – even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office.[2]
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> While every one of the more than 75 coaches, athletes, sports administrators and academics interviewed by [Sports Illustrated] . . . affirmed that they've had to confront the issues coach-athlete relationships pose, the subject remains one of sport's biggest taboos.[3]

Sexual harassment can devastate student-athletes, coaches, teams, and institutions. It may be the death-knell for a student-athlete's athletic career. In addition to the emotional turmoil that unwanted sexual harassment causes, the student-athlete who flees an athletic program whose environment is one of perceived sexual harassment may be obliged to abstain from collegiate competition for a year or more under National Collegiate Athletic Association (NCAA) rules. Sexual harassment allegations can splinter once-cohesive

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* The views in this article represent those of the author, and not those of the American Council on Education.

1. Annmarie Pinarski, Note, *When Coaches "Cross the Line": Hostile Athletic Environment Sexual Harassment*, 52 RUTGERS L. REV. 911, 915 (2000) (citation omitted).

2. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

3. Grant Wahl et al., *Passion Plays*, SPORTS ILLUSTRATED, Sept. 10, 2001, at 61.

teams irreparably. Coaches accused of harassment may be subject to permanent suspicion. Legal defense expenses, settlement costs, and bad publicity are likely to scar even those athletic departments that prevail in court. In short, sexual harassment dramatically and irreparably interferes with the educational mission of athletics. Nonetheless, sexual harassment, institutional liability for it, and other individual and institutional consequences are largely preventable.

In response to recent Supreme Court decisions, regulatory guidelines, and some recent high profile cases, many colleges and universities have reviewed or are now reviewing institutional sexual harassment policies and procedures to ensure effective sexual harassment prevention and remedial measures. Despite the public attention that sexual harassment in athletics has received lately, few institutions have thoroughly addressed whether general institutional sexual harassment policies are effective and suitable in the context of intercollegiate athletics.[4] As they know or will learn, defining sexual harassment is contextual. It "depends on a constellation of surrounding circumstances, expectations, and relationships."[5] Athletic departments operate in their own unique environments, creating unique circumstances for university counsel seeking to establish guidelines. For example, many sexual harassment policies do not address consensual romantic relationships, which can more easily arise within the context of athletics. Institutions are thus well advised to consider whether existing sexual harassment policies meet preventive and remedial requirements in their athletic departments, particularly as to the more prevalent problem areas.[6] Athletic departments that establish a strongly worded sexual harassment policy communicate a set of institutional values and a code of behavior that go a long way towards preventing an environment of sexual harassment.

Part I addresses some unique considerations in athletics that affect any

4. The Department of Education's Office for Civil Rights (OCR) requires all schools that receive federal funds to adopt grievance procedures and publish an anti-discrimination policy. *See* 34 C.F.R. §§ 106.8(b), 106.9 (2003). "Title IX does not require a school to adopt a policy specifically prohibiting sexual harassment or to provide separate grievance procedures for sexual harassment complaints. However, its nondiscrimination policy and grievance procedures for handling discrimination complaints must provide effective means for preventing and responding to sexual harassment." Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, http://www.ed.gov/offices/OCR/shguide/index.html (Jan. 2001) [hereinafter *OCR Guidance*] at 19.

5. *Oncale*, 523 U.S. at 82.

6. *See* Pinarski, *supra* note 1, at 914-15 ("[F]emale college athletes are reporting more and more incidents of sexual harassment by their male coaches. One of the most high-profile cases involves allegations made by two members of the women's soccer team at the University of North Carolina against their coach, Anson Dorrance.").

developing sexual harassment policy to be adopted. Part II summarizes sexual harassment law under Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. Although sexual harassment of students in athletic programs is the focus of this article, Title VII—which applies to sexual harassment of employees—is briefly discussed as background. Part III provides some concluding thoughts pertaining to appropriate institutional responses to sexual harassment in athletics.

I. PARTICULAR FACTORS THAT GIVE RISE TO SEXUAL HARASSMENT CLAIMS IN INTERCOLLEGIATE ATHLETICS

Athletics breed special opportunities for sexual harassment. Yet, as the Supreme Court recognized in *Oncale v. Sundowner Offshore Services, Inc.*, some behavior that is improper in the classroom may be accepted in the sports arena.[7] These two features—increased opportunity for harassment and an environment that makes some conduct less likely to be considered harassment—make close consideration of the "constellation of... circumstances"[8] in intercollegiate athletics essential. Three features of intercollegiate athletics that affect whether sexual harassment has occurred are the coach/student-athlete relationship, the physical nature of sports, and the focus on the athlete's body.[9]

A. The Coach/Student-Athlete Relationship

Coaches typically have immense authority over athletes. They decide scholarship amounts, playing time, and playing positions. They exert power through praise or criticism, the grant or denial of leadership opportunities, and such restrictions on the athlete's personal life as curfew, dress code, or membership in a sorority or fraternity. A gifted coach can exercise tremendous power over an athlete by holding out the prospect of greater athletic accomplishments. As discussed in Part II, in gauging whether conduct by a coach or other member of the athletic department is "unwelcome," the Office for Civil Rights (OCR) considers, among other factors, the employee's

7. "A professional football player's working environment is not severely or pervasively abusive... if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office." *Oncale*, 523 U.S. at 81.

8. *Id.* at 82.

9. Sexual harassment can, of course, occur in athletics in ways that are similar to other contexts. *See, e.g.*, Norris v. Norwalk Pub. Schs., 124 F. Supp. 2d 791, 792-93 (D. Conn. 2000) (where a coach pinched student-athlete, grabbed her ponytail, and hit her legs and head). This article focuses on the distinguishing features of intercollegiate athletics.

degree of influence, authority, or control over the student.[10] Because many coaches exert significant power over athletes, a reasonable fact-finder may conclude that requests for sexual contact cannot be declined.

In the normal academic setting, students often have limited opportunity for one-on-one contact with professors. In the athletic context, by contrast, opportunities for such contact are common, and often arise in places conducive to sexual behavior. Most athletic teams travel overnight with their coaches to attend away games. Even without travel, coaches and athletes can spend over a third of all waking hours together. Coaches and trainers commonly work on and off the field to massage athletes' sore muscles and rehabilitate common sports injuries. This special authority, together with the coach's one-on-one contact, amplify the potential for harassment.

In *Turner v. McQuarter*, a Chicago State University female basketball player engaged in a sexual relationship initiated by her female coach.[11] The student alleged that

> she would not have entered into or continued a sexual relationship with [the coach] but for her fear that refusal would have resulted in revocation of her athletic and academic scholarships, adverse consequences with respect to playing opportunities and status on the basketball team, imposition of arbitrary and oppressive practice and conditioning requirements, and the loss of her "ability to graduate from CSU."[12]

Although the court dismissed the claim unrelated to the merits of the allegations,[13] the case illustrates hazards inherent in coach/student-athlete relationships.[14]

The coach/student-athlete relationship is also less formal and less structured than in traditional academic settings. Hours of "down-time" can lead to more familial interactions, and may lead some coaches to view romantic relationships as inevitable and acceptable. "Romantic" relationships in a coach-athlete context are, however, an abuse of professional status and power.[15] Many athletic organizations already categorically forbid romantic

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10. *See OCR Guidance, supra* note 4, at 8.

11. 79 F. Supp. 2d 911, 913 (N.D. Ill. 1999).

12. *Id.* at 913-14.

13. *Id.* at 915-16.

14. *See also* Klemencic v. Ohio State Univ., 10 F. Supp. 2d 911 (S.D. Ohio 1998), *aff'd*, 263 F.3d 504 (6th Cir. 2001) (finding no quid pro quo harassment and granting summary judgment on a hostile environment claim because conduct was not sufficiently severe or pervasive where a student who declined coach's requests for sexual relationship was denied opportunity to train with the team).

15. *See* Leslie Heywood, *Backtalk: Female Harassment is Still Widespread in Sports*, N.Y.

relationships between coaches and the athletes they supervise.[16] Sexual harassment guidelines that prohibit romantic relationships encourage prevention by firmly admonishing the entire athletic community that the athletes are not an acceptable group of candidates from which coaches are to draw their intimate partners.[17] Romantic liaisons can constitute sexual harassment and institutional liability, and should be strongly discouraged, if not outright prohibited, by the institution.[18]

B. The Physical Nature of Sports

Sports are physical. Many involve bodily contact. Coaches often apply a "hands-on" approach to demonstrate athletic moves. Coaches and athletes regularly use physical contact, such as a pat on the back or a hug, to convey praise and acknowledge success. Some coaches help athletes stretch before a workout or rub stiff muscles. Such behavior, which can be entirely proper in the context of athletics, would be inappropriate in the classroom in all but the most unusual circumstances (such as a physical therapy course).[19]

In *Snelling v. Fall Mountain Regional School District*, the court held that a jury could find that name-calling, combined with physical abuse, of two basketball players could constitute sexual harassment.[20] There, two brothers on a high school basketball team were subjected to name-calling, taunting, and unnecessary rough behavior by teammates and their coach. The physical abuse included an instance in which the coach "grabbed [the student] by the shirt, swung him around, and shouted at him."[21] In another incident, "a

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TIMES, Nov. 8, 1998, at 11. "Internationally, all major sports foundations take the position that romantic and/or sexual relations between coaches and athletes are an abuse of power that undermines the mission of athletics to improve the well being of women and girls." *Id.*

16. *See, e.g.*, Wahl et al., *supra* note 3, at 70 (USA Diving policy states: "A coach of a collegiate athlete should not engage in sexual relations with any collegiate athlete they coach, regardless of age"; U.S. Ski and Snowboard Association "[p]rohibits coaches from having relationships with athletes"; USA Swimming "[p]rohibits any sexual contact or advance directed towards an athlete by a coach, official, trainer or any other person who, in the context of swimming, is in a position of authority over that athlete"); Women's Sports Foundation, *Sexual Harassment and Sexual Relationships Between Coaches and Athletes: The Foundation Position*, http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/coach/article.html?record=575 (last visited Mar. 1, 2003) [hereinafter *Foundation Position*].

17. *See, e.g.*, Wahl et al., *supra* note 3, at 70.

18. For example, William and Mary College has adopted a blanket prohibition against romantic relationships between employees and the students they oversee. The College of William and Mary, *College Policies: Policy on Consensual Amorous Relationships*, http://www.wm.edu/EO/College_Policies.htm.

19. *See OCR Guidance*, *supra* note 4, at 2.

20. No. Civ. 99-448-JD, 2001 WL 276975 (D.N.H. Mar. 21, 2001).

21. *Id.* at *2.

teammate repeatedly hit [the student] in the head with the basketball asking [him], 'Are you sorry now?' while [the] Athletic Director . . . and Coach . . . sat less than twenty feet away."[22] This type of physical contact, which would not arise in the classroom context, was not overtly sexual. Nonetheless, the court held that there was a triable issue of fact as to whether it violated Title IX.

In another example, two former University of North Carolina women's soccer players alleged that coach Anson Dorrance sexually harassed them. Debbie Keller, a 1996 national player of the year for the Tar Heels, alleged that Dorrance made unwelcome sexual advances towards her and repeatedly made "uninvited, unauthorized, and offensive physical contact."[23] The outcome of the litigation could well turn on how a fact-finder will construe the physical contact between the coach and the athlete.

C. Inappropriate Focus on the Athlete's Body

Athletics appropriately entail much focus on athletes' bodies. Indeed, a primary focus of discourse between athlete and coach will consist of updates on how the athlete's body is responding to training sessions. Sexual harassment claims have arisen when coaches focus on womens' bodies inappropriately. For example, in *Riddick v. School Board*, the coach inappropriately videotaped a track team member in her uniform. During the videotaping, he "instructed [her] to stretch her legs on the floor and over a hurdle. He told her that if the stretching hurt, she could grunt because it would not be heard on the videotape since he would talk over it."[24] He also asked the student to remove her underpants in certain uniforms, and "'zoomed in on her crotch, [and] zoomed in on her rear.'"[25] The incident illustrates how the context of athletics can lead to excessive focus on athletes' bodies and to sexual harassment claims.

Some coaches focus inappropriately on their female athletes' weight and compel mandatory "weigh-ins,"[26] and "[m]any coaches are inordinately preoccupied with what their female athletes eat, and subject them to public

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22. *Id.*

23. Staff, *N.C. Coach Accused of Sexual Harassment*, ATLANTA J. & CON., Aug. 26, 1998, at 5C.

24. 238 F.3d 518, 521 (4th Cir. 2000).

25. *Id.* The court ultimately granted the school board summary judgment in this section 1983 action because it was not deliberately indifferent to the sexual harassment. *Id.* at 526.

26. *See* Leslie Heywood, *Despite the Positive Rhetoric About Women's Sports, Female Athletes Face a Culture of Sexual Harassment*, THE CHRON. OF HIGHER EDUC., Jan. 8, 1999, at B4.

ridicule about their diets and bodies."[27] This emphasis has been blamed for severe eating disorders, in some cases resulting in cessation of the athletic endeavors, withdrawal from school, hospitalization, and permanent health consequences.[28] As described in Part II, a sexual harassment claim can be sustained for mean or rude behavior directed toward one sex without sexual content to the incidents. Even the university that does not officially sanction such practices can be liable if it is deliberately indifferent to practices that are severe and pervasive.[29]

The necessary states of undress in locker rooms also provide unique opportunities for sexual harassment. In *Riddick*, a male track coach secretly videotaped female athletes in various stages of undress in a locker room.[30] In another locker room case, *Snelling*, a student who was the only person who took a shower was taunted in the locker room after a practice.[31] In *Seamons v. Snow*, a high school football player was

> grabbed as he came out of the shower, forcibly restrained and bound to a towel rack with adhesive tape [by several of his teammates]. [His] genital area was also taped. After [he] was restrained, one of his teammates brought a girl that [he] dated into the locker room to view him. All of this took place while other members of the team looked on.[32]

The student alleged not that the incident was sexual harassment, but "that he was subjected to a hostile environment."[33] Although the court found that this was not sexual harassment, the case, decided prior to several Supreme Court decisions that address sexual harassment liability and same-sex

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27. *Id.* at B3.

28. Women's Sports Foundation, *The Female Athlete Triad*, Jan. 22, 2001, http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/body/article.html?record=721(last visited Apr. 15, 2003).

29. *See Riddick*, 238 F.3d at 524-26.

30. *Id.* at 521 (finding no liability for the school board in this section 1983 action because the board could not be held liable for decisions of the superintendent and the principal, and there was no showing of deliberate indifference).

31. *Snelling*, 2001 WL 276975, at *1.

> The next day at school, a basketball team member . . . walked up to [the student] and said, 'How are you, Stiffy? I saw you in the showers last night with another guy and you had a stiffy.' From then on, [the student] says, he was called 'Stiffy' by the other team members. The name-calling also included 'fag,' 'jew boy,' and 'homo,' all of which were said harshly and with hatred.

Id. (some internal quotation marks omitted).

32. 84 F.3d 1226, 1230 (10th Cir. 1996).

33. *Id.*

harassment, might be decided differently today.[34] Such locker room incidents, unique to the athletic context, are instructive. University counsel should consider whether sexual harassment policies are effective to prevent and address such conduct.

II. SEXUAL HARASSMENT LAW

A. Sexual Harassment of Employees – Title VII

1. Sexual harassment is sex discrimination

Title VII of the Civil Rights Act of 1964 forbids employment discrimination "because of" or "on the basis of" sex.[35] The Supreme Court has held that Title VII prohibits sexual advances, fondling, demands for sexual favors, and other improper behaviors.[36] In addition, "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated."[37] Actionable harassment must be objectively severe and pervasive

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34. While the panel dismissed the Title IX claim, a concurring judge wrote:

> I write separately to express my disagreement with the court's analysis of Plaintiff's Title IX claim. I cannot agree that the alleged harassment in this case was not based on sex within the meaning of Title IX. The majority writes that statements such as "boys will be boys" and "take it like a man" are not sufficiently sex related to state a claim. I believe, however, that these statements can only be understood as a response to the original hazing incident. In my view, this incident was clearly sexual in nature. Members of the football team taped Plaintiff to a towel rack while he was naked, taped his genitals, and then displayed their captive to a girl Plaintiff had dated. These actions clearly derive their power to embarrass and to intimidate from their sexual and sex-based nature. It is hard for me to believe that the display of the male genitalia to a female for other than medical or educational reasons has a non-sexual connotation. The coach's statement that "boys will be boys" clearly relates to and flows out of the original sexual harassment. As such, it may be considered to be a continuation by the school official of the student-initiated harassment, even if the statement by itself is not sexual in nature.

Id. at 1239-40 (McKay, J., concurring).

35. 42 U.S.C. §§ 2000e-1—2000e-16 (2003). Title VII provides in relevant part that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2(a)(1).

36. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 60-61, 64 (1986) (Title VII "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment" (internal quotation marks omitted).).

37. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (citations and internal quotation marks omitted).

such that a reasonable person would find it abusive.[38] Severity, the law holds, should be gauged from the perspective of a reasonable person in the plaintiff's position.[39]

The Equal Employment Opportunity Commission (EEOC), which enforces Title VII, defines sexual harassment as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[40]

The EEOC considers "the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis."[41]

2. Same-sex and gender-based harassment

In 1998, the Supreme Court addressed whether workplace harassment violates Title VII when the harasser and the harassed employee are the same sex. In *Oncale*, the plaintiff was repeatedly "subjected to sex-related, humiliating actions against him" by male supervisors and a co-worker, including assault and threatened rape.[42] Noting that Title VII protects both men and women, the Supreme Court held that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."[43] In same-sex harassment cases, courts should consider

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38. *Id.* at 22; *see also* Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001).

39. *Harris*, 510 U.S. at 22.

40. 29 C.F.R. § 1604.11(a) (2003).

41. *Id.* § 1604.11(b).

42. 523 U.S. at 77.

43. *Id.* at 80. Recent cases illustrate Title VII hostile environment claims based on conduct not explicitly sexual in nature. *See, e.g.*, Smith v. Sheahan, 189 F.3d 529, 534 (7th Cir. 1999) (finding that conduct, even without any sexual content, was sufficiently severe and pervasive to support a hostile environment claim where a jail guard was targeted for mistreatment because of her sex by a co-worker); Williams v. Gen. Motors Corp., 187 F.3d 553, 565 (6th Cir. 1999) ("[W]e now take this opportunity to join our sister circuits and make clear that the conduct underlying a sexual harassment claim need not be overtly sexual in nature."); O'Shea v. Yellow Tech. Servs., Inc., 185 F.3d 1093, 1102 (10th Cir. 1999) (finding that when aggravated by other conduct that was sexual in nature, the

> the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field – even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office .... Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive. [44]

Thus, *Oncale* establishes that same-sex harassment and gender-based harassment or gender animus that is not overtly sexual can violate Title VII.

3. Employer liability

In two 1998 decisions, the Supreme Court set new employer liability standards for sexual harassment by supervisors.[45] Both cases distinguish situations in which harassment culminates in a "tangible employment action," such as discharge or failure to promote, from situations in which no tangible employment action occurred. Where there is tangible employment action, the employer has no defense to liability.[46] Where, however, there is no tangible employment action, the plaintiff must prove that the conduct was sufficiently severe and pervasive to amount to harassment.[47] The employer is then liable unless it can prove "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm

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plaintiff's claim could proceed, even though the sexual conduct might not have been sufficient to proceed to a jury); Carter v. Chrysler Corp., 173 F.3d 693 (8th Cir. 1999); Durham Life Ins. Co. v. Evans, 166 F.3d 139 (3d Cir. 1999); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (finding that plaintiff could establish discrimination on the basis of sex in a Title VII case in which defendant employer denied plaintiff partnership because she was not feminine enough).

44. *Oncale,* 523 U.S. at 81-82.

45. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998). Prior to these cases, federal courts generally held employers strictly liable for "quid pro quo" harassment, where a supervisor conditioned job benefits on sexual favors, and liable for "hostile environment" harassment where the employer knew or should have known of the harassment and failed to take proper remedial action. *See, e.g.,* Stacey Dansky, *Eliminating Strict Employer Liability in Quid Pro Quo Sexual Harassment Cases,* 76 TEX. L. REV. 435, 436 (1997).

46. *Faragher,* 524 U.S. at 808; *Ellerth,* 524 U.S. at 765.

47. *See generally Faragher,* 524 U.S. at 786 (citing *Meritor,* 477 U.S. at 67); *Ellerth,* 524 U.S. at 752 (citing *Meritor,* 477 U.S. at 65).

otherwise."[48]

The two decisions, *Faragher* and *Ellerth,* apply only to liability for sexual harassment by supervisors. The negligence standard, which holds the employer liable when it knew or should have known of harassment and failed to take appropriate remedial measures, appears unchanged with respect to harassment by co-workers. Similarly, the negligence standard applies to harassment by third-party non-employees.[49] Thus, "[a]n employer's liability for a hostile work environment sexual harassment claim differs depending on who does the harassing."[50]

B. Sexual Harassment of Students—Title IX

1. Sexual harassment is sex discrimination

Title IX of the Education Amendments of 1972 forbids sex discrimination in any education program or activity that receives federal financial assistance.[51] It applies to almost every public and private education institution and reaches all institutional operations, including athletics.[52] It protects male and female students from opposite-sex and same-sex harassment by school employees, other students, and third parties such as visiting athletes.[53]

In enacting Title IX, Congress had two main goals: "to avoid the use of federal resources to support discriminatory practices [and] to provide individual citizens effective protection against those practices."[54] The OCR is

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48. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765; *see also* EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, No. 915.002 (June 18, 1999), http://www.eeoc.gov/docs/harassment.html#I.

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

50. Curry v. Dist. of Columbia, 195 F.3d 654, 659 (D.C. Cir. 1999), *cert. denied*, 530 U.S. 1215 (2000).

51. *See* 20 U.S.C. § 1681 (2003). Title IX states in pertinent 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 subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.* § 1681(a); *see also* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992).

52. *See OCR Guidance, supra* note 4, at 2-3. Title IX "protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere." *Id.*

53. *See id.* at 2-3 & n.11; *see also Oncale*, 523 U.S. at 75. Although Title IX does not prohibit discrimination based on sexual orientation, "sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX under the circumstances described in [the] guidance." *OCR Guidance, supra* note 4, at 3.

54. Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979).

responsible for enforcement of Title IX. In addition, plaintiffs may seek money for statutory violations by bringing civil lawsuits.[55]

Much of the law defining sexual harassment against students derives from employment-related sexual harassment law. According to the OCR:

> Sexual harassment is unwelcome[56] conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual harassment of a student can deny or limit, on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in the school's program.[57]

Sexual harassment includes "quid pro quo" harassment in which "a teacher or other employee conditions an educational decision or benefit on the student's submission to unwelcome [sexual advances,]" and hostile environment harassment, in which there is no such condition.[58] In considering alleged hostile environment harassment, OCR will consider the "severity and pervasiveness" of the conduct in light of all relevant circumstances, which include:

- The degree to which the conduct affected one or more students' education. [In the athletics context,] a student may be able to remain on a sports team, despite experiencing great difficulty performing at practices and games from the humiliation and anger caused by repeated sexual advances and intimidation by several team members that create a hostile environment.
- The type, frequency, and duration of the conduct.
- The identity of and relationship between the alleged harasser and the subject or subjects of the harassment. . . .For example, due to the power a professor or teacher [or coach] has over a student, sexually based conduct by that person toward a student is more likely to create a hostile environment than similar conduct by another student.

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55. *See id; see also* Alexander v. Sandoval, 532 U.S. 275, 279-80 (2001) (holding that it is beyond dispute that individuals may sue to enforce Title VI, on which Title IX was patterned); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 281, 284 (1998).

56. OCR assesses "welcomeness" based on the nature of the conduct; the relationship of the school employee to the student, including the employee's influence, authority or control over the student; and whether the student was legally or practically unable to consent to the conduct. *OCR Guidance, supra* note 4, at 8.

57. *Id.* at 2.

58. *Id.* at 5.

- The number of individuals involved.
- The age and sex of the alleged harasser and the subject or subjects of the harassment.
- The size of the school, location of the incidents, and context in which they occurred.
- Other incidents at the school.
- Incidents of gender-based, but nonsexual harassment. [59]

Title IX does not prohibit "legitimate nonsexual touching or other nonsexual conduct. For example, a high school athletic coach hugging a student who made a goal or a kindergarten teacher's consoling hug for a child with a skinned knee [would] not be considered sexual harassment."[60] "Similarly, one student's demonstration of a sports maneuver or technique requiring contact with another student will not be considered sexual harassment."[61]

2. Same-sex and gender-based harassment

OCR recognizes that Title IX can protect gay and lesbian students from same-sex harassment[62] because, "[a]lthough Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX."[63]

OCR provided contrasting examples of harassment against gay students to distinguish actionable from non-actionable conduct. For example, "if students heckle another student with comments based on the student's sexual orientation (e.g., 'gay students are not welcome at this table in the cafeteria'), but their actions [or language] do not involve conduct of a sexual nature, [the] actions would not be sexual harassment covered by Title IX."[64] On the other hand, harassing conduct of a sexual nature directed toward gay or lesbian students (*e.g.*, "if a . . . student or a group of . . . students target a gay [or lesbian] student for physical sexual advances") may create a sexually hostile

59. *Id.* at 5-7.

60. *Id.* at 2. However, "a teacher's repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment." *Id.*

61. *Id.* at 2.

62. *See id.* at 3.

63. *Id.*

64. *Id.*

environment if "serious enough to deny or limit the victim's ability to participate in or benefit from the school's program."[65]

Although the OCR Guidance explicitly does not cover gender-based harassment, it states that such harassment,

> which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond, if it rises to a level that denies or limits a student's ability to participate in or benefit from the educational program.[66]

3. Institutional liability

In 1998, the Supreme Court addressed Title IX institutional liability for sexual harassment.[67] In *Gebser*,[68] the Court held that institutions may be liable under Title IX for employee-student harassment only if the institution has "actual notice" of the harassment and responds with "deliberate indifference."[69]

In *Davis v. Monroe County Board of Education*,[70] the Court held that educational institutions can be liable for damages in student-to-student sexual harassment cases if the institution is deliberately indifferent to known severe, pervasive, and objectively offensive sexual harassment that "deprive[s] the victims of access to the educational opportunities or benefits provided by the

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65. *Id.*

66. *Id.* at 3 (footnotes omitted); *see* H.M. & M.M. v. Jefferson County Bd. of Educ., 719 So. 2d 793 (Ala. 1998) (same-sex harassment claim).

67. Colleges and universities may also be liable under other theories not addressed here, such as negligence, *see* Searles v. Trs. of St. Joseph's Coll., 695 A.2d 1206, 1209 (Me. 1997) (finding that the college owed a duty of reasonable care that "encompass[ed] the duty of college coaches and athletic trainers to exercise reasonable care for the health and safety of student athletes"), or state or local anti-discrimination laws. Students may also seek recovery from individual teachers or coaches in their individual capacities under 42 U.S.C. § 1983.

68. 524 U.S. at 292-93.

69. In *Gebser*, a teacher made sexually suggestive comments to students, and eventually initiated sexual contact with Gebser. Although Gebser never reported the sexual relationship to school officials, other students' parents complained to the principal about the teacher's comments in class. The principal met with the teacher, who then apologized to the parents and told them that it would not recur. The principal never reported the incident to the school district's Title IX coordinator. After a police officer discovered Gebser and the teacher having intercourse in an automobile and arrested him, the school district fired him and revoked his teaching license. The school district had not then promulgated an official grievance procedure or issued a formal anti-harassment policy, as OCR requires. *Id.* at 277-78.

70. 526 U.S. 629 (1999).

school."[71] An institution is "deliberately indifferent" if its "response to the harassment or lack of response is clearly unreasonable in light of the known circumstances."[72] An institution can be liable for student-to-student sexual harassment only where "the [institution] exercises substantial control over both the harasser and the context in which the known harassment occurs," and has authority to take remedial action to stop the harassment.[73]

Gebser and *Davis* involved private lawsuits for damages. However, OCR, as the Title IX enforcement agency, can still hold institutions responsible for conduct that does not entail liability for damages in private litigation.[74] Immediately after the Supreme Court's decision in *Gebser*, Secretary of Education Richard Riley issued a statement that warned schools:

> It is discrimination when [a] . . . school teacher abuses the authority given to him or her by the school district and engages in sexual conduct with his or her students. Although a plaintiff cannot obtain money damages where there was no notice to appropriate school officials, it is a violation of Title IX. A school district is therefore still responsible for taking reasonable steps to prevent and eliminate that type of misconduct.[75]

In response to these Supreme Court rulings, OCR issued revised sexual harassment guidance in January 2001. The OCR Guidance statement distinguishes between employees who engage in sexual harassment while carrying out responsibilities to provide aid, benefits, and services to students, and those who act outside the performance of assigned duties.[76] In the former situation, the institution is responsible for the discriminatory conduct, remedying its effects, and prevention, whether or not it has notice of the

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71. *Id.* In *Davis*, a student alleged she endured prolonged sexual harassment by fifth grade classmates. She reported each incident to her mother and several teachers, who assured her that the principal would be notified. Davis and her mother were unable to meet with the principal. Finally, the classmate was charged with and pleaded guilty to sexual battery. Davis alleged that the months of harassment had a specific and negative effect on her ability to receive an education. Her normally high grades dropped because she lost concentration; she "didn't know how much longer she could keep [him] off [of] her." *Id.* at 633-34. Contrary to OCR's requirement, the school board had no peer-on-peer sexual harassment policy. *Id.* at 635.

72. *Id.* at 630.

73. *Id.* The case was remanded and settled under a confidentiality agreement in January 2001 before the Court addressed whether the conduct in question met these requirements. Interview with Plaintiff's counsel, National Women's Law Center, Feb. 19, 2002.

74. *Gebser*, 524 U.S. at 292.

75. Press Release, Statement by U.S. Secretary of Education Richard W. Riley, On the Impact on Title IX of the U.S. Supreme Court's Gebser v. Lago Vista Decision (July 1, 1998), http://www.ed.gov/PressReleases/07-1998/lago.html.

76. *See OCR Guidance, supra* note 4, at 9-12.

harassment.[77] If an employee is not acting within the scope of his or her responsibilities, the institution complies with Title IX when, "upon notice of harassment, [it takes] prompt and effective action to stop the harassment and prevent its recurrence."[78] If the institution fails to act, and allows the student to be "subjected to a hostile environment that denies or limits the student's ability to participate in or benefit from the school's program[,]" the school is deemed to have "engaged in its own discrimination" and must remedy the effects of the harassment on the student that "could reasonably have been prevented had the school responded promptly and effectively."[79] OCR will find a Title IX violation in a student-to-student or third party harassment case if the institution knew or reasonably should have known of the harassment and failed to take prompt and effective action.[80]

III. APPROPRIATE INSTITUTIONAL RESPONSES

University counsel should review not only institutional sexual harassment policies, but also institutional *responses* to known sexual harassment in intercollegiate athletics. When a university knows of possible sexual harassment, "it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again."[81] The OCR advises that "[w]hat constitutes a reasonable response to information about possible sexual harassment will differ depending on the circumstances."[82]

As discussed above, opportunities abound for third-party harassment in athletics because of travel, the physical aspects of training, and the spectator nature of sports. A prompt, effective, and sensible institutional response to third-party harassment will take into account the extent of the institution's control over the third party harasser. As an example,

> if athletes from a visiting team harass the home school's students, the home school may not be able to discipline the athletes. However, it could encourage the other school to take appropriate action to prevent

77. *Id.* at 10. Under OCR's enforcement mechanism, institutions always receive notice and an opportunity to take corrective action before an adverse finding or loss of funds.

78. *Id.* at 11-12.

79. *Id.* at 12.

80. *Id.*

81. *Id.* at 15.

82. *Id.*

further incidents; if necessary, the home school may choose not to invite the other school back.[83]

No bright line defines a universally apt institutional response to sexual harassment. An institution is "deliberately indifferent" to, and hence liable for, known sexual harassment where its response is "clearly unreasonable in light of the known circumstances."[84] It may be difficult to judge where negligent indifference takes on the cast of deliberateness. Therefore, institutions should take pains to investigate alleged harassment and "should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation."[85] Proper responses may include counseling, warning, and discipline, while "[r]esponsive measures . . . should be designed to minimize, as much as possible, the burden on the student who was harassed."[86] Separation of the harasser and the harassed student may present special challenges in the athletics context. For example, in cases of coach-athlete or peer-athlete harassment, separation of the alleged harasser and harassed may be difficult because there is generally only one team for each sport, and removing a student may appear retaliatory.[87]

IV. CONCLUSION

Many sporting associations have counseled intercollegiate athletic departments on the wisdom of implementing guidelines specific to athletic departments.[88] A strong sexual harassment policy, which addresses quid pro quo, hostile environment, and same-sex sexual harassment will serve to prevent misconduct at the outset by creating an atmosphere of respect for and acceptance of others. University counsel should ensure that athletic departments receive effective training on institutional policy and legal requirements. The premise of strong sexual harassment policies is that they help create a harassment-free culture within the context of intercollegiate athletics, and ensure that students and others can report incidents without fear

83. *Id.* at 12.

84. *Davis*, 526 U.S. at 648; *see also* Morse v. Regents of the Univ. of Colo., 154 F.3d 1124, 1127 (10th Cir. 1998); Brzonkala v. Va. Polytechnic Inst., 132 F.3d 949, 958 (4th Cir. 1997), *aff'd sub nom.*, United States v. Morrison, 529 U.S. 598 (2002); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 467-68 (8th Cir. 1996).

85. *OCR Guidance, supra* note 4, at 16.

86. *Id.*

87. *See id.*

88. *See, e.g., Foundation Position, supra* note 16; National Association for Sport and Physical Education, *Sexual Harassment in Athletic Settings*, http://www.aahperd.org/naspe/pdf-files/POS-papers/sex-harr.pdf (Fall 2000).

of adverse consequences. In short, they establish a set of institutional values and a code of behavior that fosters an environment in which sexual harassment is unacceptable, clearly communicates the consequences of sexual harassment, prevents legal entanglements for the college or university, and protects the educational mission of the institution.

SEXUAL HARASSMENT POLICY FOR ATHLETIC DEPARTMENTS[89]

All individuals should be treated with dignity and respect. This Athletic Department intends to provide an environment that is pleasant, healthful, comfortable, and free from intimidation, hostility, or other offenses which might interfere with the educational mission of athletics and of the University. While this Policy targets sexual harassment, harassment of any sort—verbal, physical, or visual—will be a violation of this policy and treated as a disciplinary matter, whether it is sexual or racial or because of gender, national origin, age, religion, disability, sexual orientation, or any other unlawful reason.

WHAT IS HARASSMENT?

Harassment can take many forms. It may be, but is not limited to, slurs, offensive remarks, signs, jokes, pranks, intimidation, physical contact, or violence. Sexual harassment may include unwelcome sexual advances, requests for sexual favors, or other written, oral, or physical contact of a sexual nature when such conduct creates an intimidating environment, prevents an individual from effectively participating in, or denies a person the benefits of, the educational mission of this educational institution. Sexual harassment does not encompass behavior or occasional compliments of a socially acceptable nature. It does encompass behavior of a sexual nature that is not welcome, that is personally offensive, that fails to respect the rights of others, that lowers morale, or that interferes with the educational mission of our Athletic Department. It may consist of demands for sexual favors, sexual innuendoes, sexually suggestive comments, jokes of a sexual nature, sexual propositions, sexually suggestive objects or pictures, suggestive or obscene gestures, and unwanted sexual contact (including touching, pinching, coerced sexual acts, and assault). It may also include witnessing any of these actions, even if the witness is not the target of the harassment.

WHO DOES THE POLICY APPLY TO?

Everyone in the Athletic Department is protected by this sexual harassment policy, and everyone in the Athletic Department must adhere to

89. Several portions of this basic sexual harassment policy were written by Mary Ann Oakley at Holland & Knight, LLP.

this sexual harassment policy. Harassment of student-athletes by Athletic Department employees is a violation of this policy, as is harassment by student-athletes. This policy prohibits sexual harassment regardless of the sex of the harasser (*i.e.*, even if the harasser and the person being harassed are members of the same sex). Student-athletes should not only be free from being sexually harassed, but should also be free from an environment where they are exposed to sexual harassment directed towards another.

HAZING

Hazing and initiation ceremonies can include incidents of sexual harassment and are otherwise prohibited by this educational institution.

RELATIONSHIPS BETWEEN COACHES AND THE ATHLETES THEY COACH

Recognizing that coaches are in positions of authority over the athletes they oversee—determining scholarship amounts, playing time, and playing positions—sexual or romantic relationships between coaches and the athletes they coach are considered an abuse of professional status and power, can constitute sexual harassment, and are prohibited by this Athletic Department and University.

You should also be aware that no coach or Athletic Department personnel has the authority to suggest to any student-athlete that such student-athlete's continued participation or future advancement will be affected in any way by such student-athlete's entering into (or refusing to enter into) any form of personal relationship with a coach or employee of the Athletic Department. Sexual conduct cannot be made a condition of team membership, participation opportunities, or scholarship opportunities, either implicitly or explicitly.

RESPONSIBILITY

All members of the Athletic Department are responsible for keeping the Athletic Department environment free of harassment. Any member of the Department who becomes aware of an incident of harassment, whether by witnessing the incident or hearing a report of sexual harassment, should report it to a senior athletic administrator with whom you feel comfortable speaking or to the Title IX coordinator, _____. We will make every effort to prevent public disclosure of the names of all parties involved, except to the extent necessary to carry out an investigation.

REPORTING

If you feel that you have experienced or witnessed harassment, report the incident immediately to any senior athletic administrator with whom you feel comfortable speaking. You do not need to confront the harasser before doing so. A report or complaint of harassment does not have to be in writing, although written form is preferable. An appropriate investigation will be commenced at once and, if appropriate, disciplinary action will be taken. All reports will be promptly investigated with due regard for the privacy of everyone involved. Any member of the Athletic Department found to have harassed another member will be subject to disciplinary action, up to and including discharge, expulsion from the University, or criminal referral. The Department will also take any additional remedial action necessary to correct the situation appropriately.

NON-RETALIATION

This educational institution will take steps to prevent any retaliation against the student who made the complaint, or was the subject of the harassment. Retaliation is specifically prohibited against anyone who makes a good faith report of sexual harassment in a professional manner, even if the person was in error.

STUDENT CONDUCT

The Athletic Department expressly prohibits harassment of one student-athlete by another student-athlete. An individual who makes unwelcome advances or threatens or in any way harasses another student-athlete is personally responsible for such actions and their consequences. Consistent with the educational mission of our institution, we must take action to stop harassing behavior. This educational institution will not provide legal, financial or any other assistance to an individual accused of harassment if a legal complaint is filed.

REMEMBER, IF YOU EXPERIENCE OR BECOME AWARE OF SEXUAL HARASSMENT, REPORT IT IMMEDIATELY TO ANY SENIOR ATHLETIC DEPARTMENT PERSONNEL WITH WHOM YOU FEEL COMFORTABLE SPEAKING. ONLY IF THE ATHLETIC DEPARTMENT KNOWS ABOUT THE SITUATION CAN WE TAKE CORRECTIVE ACTION.