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Sayed Masoud Mortazavi

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ELIMINATION OF THE LOCKER ROOM CLOSET: ANALYSIS OF CURRENT LAWS AND PROFESSIONAL SPORTS LEAGUES' POLICIES TOWARD GAY ATHLETES

SAYED MASOUD MORTAZAVI¹

"When coaches tell you you're a faggot when you play poorly, you can't really share who you are with people."²

INTRODUCTION

"I'm gay."³ On February 9, 2014, Michael Sam, a college football standout who was expected to be a top National Football League ("NFL") draft-pick in 2014, made this groundbreaking public announcement.⁴ At 6'2" and 260 pounds, the All-American defensive lineman was a formidable presence on the field during his four years at the University of Missouri.⁵ Sam was named the top defensive player in the Southeastern Conference,⁶ which is widely considered to be the best conference in the National Collegiate Athletic Association ("NCAA"). With his announcement, Sam placed himself in a position to become the first openly gay player in the NFL.⁷ With his selection by the St. Louis Rams in the 2014 draft, he did just that.⁸

The reaction to Sam's revelation has been strong on both sides. The

¹ J.D. 2015 St. John's University School of Law. Managing Editor, *Journal of Civil Rights and Economic Development*.

² S. Wentworth, *Ex-NFL Player Finds Happiness Living in His Truth*, REALJOCK.COM, <http://www.realjock.com/article/232> (last visited Feb. 8, 2014).

³ John Branch, *College Football Star Michael Sam Says He is Gay; May Become First Publicly Gay Player in N.F.L.*, NYTIMES.COM (Feb. 9, 2014), http://www.nytimes.com/2014/02/10/sports/michael-sam-college-football-star-says-he-is-gay-ahead-of-nfl-draft.html?emc=edit_na_20140209&_r=0.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Ken Belson, *In Historic Pick, Rams Take Michael Sam in Final Round of Draft*, NYTIMES.COM (May 10, 2014), http://www.nytimes.com/2014/05/11/sports/football/michael-sam-picked-by-st-louis-rams-in-nfl-draft.html?_r=0.

University of Missouri has publicly supported Sam.⁹ The NFL has released statements in support of Sam's decision to reveal his sexual orientation.¹⁰ He came out to his teammates in 2013 during his senior year, and was largely well received.¹¹ In spite of this support, Sam has also been met with homophobic remarks and resistance to his entry into the NFL.¹² Following his final-round selection by the St. Louis Rams, the reactions from the sports world were equally mixed. The historic nature of his selection was acknowledged and celebrated by many, including both current and former NFL players.¹³ However, particularly after Sam was shown kissing his boyfriend upon receiving the call that he had been drafted, negative sentiments also abounded across different social media platforms.¹⁴

Although the circumstances of Michael Sam's NFL entry remain to be seen, as he has yet to play in a regular season game, Sam has certainly begun to challenge the hyper-masculine stereotypes that have long defined sports culture. By both identifying as a gay player and being a standout on the field, Sam has directly challenged the perception that gay men cannot also be aggressive, strong, talented athletes. By entering the NFL, Sam has directly challenged the sport's strict adherence to hyper-masculine stereotypes in sports culture in which players, coaches, team owners, fans and staff often insist that a gay man will disrupt the balance of the locker room and negatively impact the performance of his team.¹⁵

Professional athletes in the United States are more than players on a team trying to win a game; they are celebrities, role models, and icons.

⁹ John Branch, *College Football Star Michael Sam Says He is Gay; May Become First Publicly Gay Player in N.F.L.*, NYTIMES.COM (Feb. 9, 2014), http://www.nytimes.com/2014/02/10/sports/michael-sam-college-football-star-says-he-is-gay-ahead-of-nfl-draft.html?emc=edit_na_20140209&r=0.

¹⁰ See Chase Goodbread, *Michael Sam, NFL draft prospect, announces he's gay*, NFL.COM (Feb. 9, 2014), <http://www.nfl.com/news/story/0ap2000000324603/article/michael-sam-nfl-draft-prospect-announces-hes-gay>.

¹¹ Branch, *supra* note 9.

¹² See Ryan Wilson, *Michael Sam responds to lobbyist who wants to ban gays from NFL*, CBSSPORTS.COM (Feb. 25, 2014) <http://www.cbssports.com/nfl/eye-on-football/24456927/michael-sam-responds-to-lobbyist-who-wants-to-ban-gays-from-nfl>; J.R. Gamble, *Michael Sam and The Attack On Heterosexuality In Pro Sports*, THE SHADOW LEAGUE (Feb. 24, 2014) <http://www.theshadowleague.com/articles/michael-sam-and-the-attack-on-heterosexuality-in-pro-sports>; Pete Thamel & Thayer Evans, *How will news that Michael Sam is gay affect his NFL draft stock?*, SPORTS ILLUSTRATED (Feb. 9 2014), available at <http://sportsillustrated.cnn.com/college-football/news/20140209/michael-sam-draft-stock/>.

¹³ See Tyler Conway, *Twitter Reacts as Michael Sam is Selected in the 7th Round*, BLEACHERREPORT.COM (May 10, 2013), <http://bleacherreport.com/articles/2059160-twitter-reacts-as-michael-sam-is-selected-by-st-louis-rams-in-7th-round>.

¹⁴ See Holly Yan, *Reactions heat up after Michael Sam kisses boyfriend on TV*, CNN (May 13, 2014) <http://www.cnn.com/2014/05/12/us/michael-sam-nfl-kiss-reaction/>.

¹⁵ *Id.*

Fans proudly wear their favorite player's jersey and are often willing to pay a lot of money to see that player in action. It is the sport's ability to capture the attention, passion, and love of Americans that make professional players celebrities.¹⁶ Some athletes have used this celebrity status and their role in the public arena to become pioneers and advocates for social change. For professional athletes such as Jackie Robinson,¹⁷ Jesse Owens,¹⁸ Althea Gibson,¹⁹ Billie Jean-King,²⁰ and Erving "Magic" Johnson,²¹ sports were a vehicle to push the boundaries of societal norms. Their careers made statements about the capabilities, and personal qualities, of the groups that they represented. Unfortunately, today's sports culture is lagging behind the rest of our society in one modern civil rights struggle:²² lesbian-gay-bisexual-transgender ("LGBT") rights.

There are up to 450 active players in the National Basketball Association (NBA),²³ 1,696 players in the National Football League (NFL),²⁴ 600

¹⁶ Elliot S. Rozenberg, *Leveling The Playing Field, Making It Easier To Come Out Of The Closet From Inside The Locker Room*, 30 Ent. & Sports Law. 1 (2012).

¹⁷ See Kels Dayton, SPORTZEDGE.COM, *10 Greatest Pioneers in Sports: Jackie Robinson*, <http://sportzedge.com/2013/04/30/10-greatest-pioneers-in-sports-history/11/> (changing not only baseball history but American history as well, Jackie Robinson was the first African-American to play in Major League Baseball in 1947).

¹⁸ See Jeremy Schaap, *Owens' 1936 Feat Stands Test of Time*, ESPN OLYMPIC SPORTS (Aug. 14, 2009), <http://sports.espn.go.com/oly/trackandfield/columns/story?id=4396363> (arguing that Jesse Owens' performance in the 1936 Olympics held Nazi Germany "stands as the greatest accomplishment ever in sports." Owens won four gold medals in 1936, during a time when the United States treated him as a second-class citizen because he was African American, and Nazi Germany considered his race as "something less than human").

¹⁹ AMERICANPOPULARCULTURE.COM, *Who Was Althea Gibson?* (Oct. 2003), http://www.americanpopularculture.com/archive/sports/althea_gibson.htm#top (hurdling the walls of racism and sexism, Gibson was the first African-American woman to play in the international tennis tournament Wimbledon. During her career she won 11 tennis tournaments in the United States and internationally. In 1957 and 1958 she was named Associated Press Female Athlete of the Year. Gibson was a pioneer for African-American and female athletes, and shattered conceptions of that era).

²⁰ See Kels Dayton, SPORTZEDGE.COM, *10 Greatest Pioneers in Sports: Billie Jean-King*, <http://sportzedge.com/2013/04/30/10-greatest-pioneers-in-sports-history/7/> (noting the importance of Jean-King's 1973 "Battle of the Sexes" tennis match against male tennis star Bobby Riggs. After decidedly defeating Riggs, Jean-King became an activist for gender equality and fought for equal prize money at the top tennis tournament in the United States, the U.S. Open. Jean-King also was the first prominent female athlete to announce that she was lesbian. She has long been a champion for gay and women's rights and was awarded the Presidential Medal of Freedom by President Obama in 2009); see also ESPN TENNIS, *Billie Jean King Talks Coming Out*, ESPN.COM (Aug. 6, 2013), http://espn.go.com/tennis/story/_/id/9545526/billie-jean-king-discusses-coming-pbs-show (explaining that Jean-King came out as lesbian in "1981 after her partner filed a palimony lawsuit against her").

²¹ See Kels Dayton, SPORTZEDGE.COM, *10 Greatest Pioneers in Sports: Magic Johnson*, <http://sportzedge.com/2013/04/30/10-greatest-pioneers-in-sports-history/7/> (explaining how Johnson publicly announced he was HIV positive in 1991. Johnson has since become a champion for HIV awareness.).

²² See Rozenberg, *supra* note 16 at 1.

²³ *Frequently Asked Questions-FAQs*, NBA.COM, <http://www.supersport.com/basketball/nba/FAQs> (last visited Feb. 8, 2016) (There are 12-15 players on an active NBA team roster, and there are 30 teams in the NBA (15x30=450)).

²⁴ See *Player Cuts for all 32 Teams Before 53-man Roster Deadline*, NFL.COM,

players in the National Hockey League (NHL),²⁵ and 1,280 players in Major League Baseball (MLB);²⁶ in total, the four major sports leagues have over 4,000 active players. Of the 4,000 active players only *two*, NBA player Jason Collins²⁷ and now NFL player Michael Sam, have disclosed their identity as gay men. “I’m a 34-year-old NBA center. I’m black. And I’m gay,”²⁸ announced Jason Collins in a May 2013 interview with *Sports Illustrated*. Collins made history when he became the first active player to reveal his sexuality to the public, making him a modern day pioneer for LGBT athletes.²⁹

A February 2013 Gallup Poll estimated that the percentage of LGBT Americans is 3.5% nationwide.³⁰ Applying this percentage to the number of players in the four major sports leagues, assuming *arguendo* that the proportions in the ranks of professional players make up the same proportions as the general population, there are potentially 140 LGBT athletes among the 4,000 active players. These Gallup Poll findings are further substantiated by comments from retired gay NBA athlete John Amaechi. Amaechi told CBS Sports that he has spoken to current gay athletes who are not yet ready to publicly announce their sexuality.³¹

<http://www.nfl.com/news/story/0ap1000000233304/article/player-cuts-for-all-32-nfl-teams-before-53man-roster-deadline> (last updated Aug. 31, 2013) (There are 53 players on a regular season NFL team roster, and there are 32 teams in the NFL (53x32=1696)).

²⁵ See *Hockey Operations Guidelines*, NHL.COM, <http://www.nhl.com/ice/page.htm?id=26377> (last visited Feb. 8, 2016) (There are 20 players on game day NHL team roster); *NHL Teams*, ESPN.COM, <http://espn.go.com/nhl/teams> (last visited Feb. 8, 2016) (There are 30 teams within the NHL (20x30=600)).

²⁶ See Mark Bowman, *Are Expanded Rosters Fair For All?*, MLB.COM (Sep. 21, 2009), <http://m.mlb.com/news/article/7060926/> (There are 40 players on a MLB team expanded roster); *Team-by-Team Information*, MLB.COM, <http://mlb.mlb.com/team/> (last visited Feb. 8, 2016) (There are 32 teams within the MLB (40x32=1280)).

²⁷ See Jason Collins, *Why NBA Center Jason Collins is Coming Out Now*, SPORTS ILLUSTRATED, Jun. 20, 2014, available at <http://www.si.com/more-sports/2013/04/29/jason-collins-gay-nba-player>; John Branch, *College Football Star Michael Sam Says He is Gay; May Become First Publicly Gay Player in N.F.L.*, NYTIMES.COM (Feb. 9, 2014), http://www.nytimes.com/2014/02/10/sports/michael-sam-college-football-star-says-he-is-gay-ahead-of-nfl-draft.html?emc=edit_na_20140209&r=0.

²⁸ *Id.*

²⁹ Ramona Shelburne, *Jason Collins makes NBA return*, ESPN.COM (Feb. 24, 2014), http://espn.go.com/new-york/nba/story/_/id/10510087/jason-collins-brooklyn-nets-makes-nba-return-los-angeles-lakers (On February 23, 2014, Collins signed a ten-game contract with the Brooklyn Nets, making him the first openly gay player to sign with an NBA team and play professionally.).

³⁰ Gary J. Gates & Frank Newport, *LGBT Percentage Highest in D.C., Lowest in North Dakota*, GALLUP (Feb. 15, 2013), <http://www.gallup.com/poll/160517/lgbt-percentage-highest-lowest-north-dakota.aspx>; see also TSN, *ReOrientation Part Two: The Transition – ReOrientation Videos*, TSN.CA, at minute 4:55 of 9:52 (Jan. 16, 2014), <http://www.tsn.ca/videohub/Default.aspx?collection=188&show=275170§ion=Sports> (interviewing Cyd Zeigler, co-founder of Outsports.com. Zeigler denounces the assumption that gay people do not play sports, and that there is no evidence to say that the percentage of gay players in sports is not the same as the general population).

³¹ See Royce Young, CBSSPORTS.COM, *John Amaechi says he has talked to other players about coming out* (Apr. 30, 2013), <http://www.cbssports.com/nba/eye-on-basketball/22170513/john-amaechi>

Raising the question: why are LGBT players choosing to remain quiet and hide their sexuality? Scholars and sports commentators have attempted to provide an answer. Eric Anderson, a sociologist at the University of Winchester in England, interviewed a number of LGBT athletes for his book *In the Game*.³² Anderson wrote: “Ultimately, it is not knowing what *might* happen after coming out of the closet that cripples gay athletes.”³³ Similarly, Myles Dolphin, a reporter for *The Northern News Service*, notes: “Fearful of the backlash and scrutiny gay professional athletes may face from their teammates and once-adoring fans, many other athletes are keeping [quiet], too.”³⁴ Furthermore, Pat Griffin, professor emeritus at the University of Massachusetts Amherst, notes the risks to LGBT athletes; if their heterosexuality is even questioned, “their athletic career could be in jeopardy.”³⁵

The explanations above provide some insight into the difficulties facing gay athletes; however, there is not a simple explanation as to why a gay athlete would choose to hide his sexual orientation. The purpose of this note is not to identify a single reason that gay athletes make this choice, but rather to identify and suggest solutions for the cultural norms that inhibit gay athletes’ freedom to reveal their sexual orientation. In an attempt to offer education and guidance, this note outlines the possible avenues of protection afforded to gay athletes through Title VII of the Civil Rights Act of 1964 and New York State and City’s Human Rights Laws, along with the policies implemented by the four major sports leagues.³⁶

Although some legal and league protections against discrimination based on sexual orientation already exist, the hyper-masculine stereotypes that dominate sports culture are perhaps the greatest challenge facing gay athletes. Patrick Burke, Co-Founder of the pro-LGBT rights organization,

says-there-are-other-players-hes-talking-to-about-coming-out (“There are other people who I’m chatting to, other people who are perhaps not as amazingly equipped to handle the rigors of this type of media circus as [Jason Collins]. And when they’ll be ready, I don’t know”).

³² ERIC ANDERSON, *IN THE GAME AND THE CULT OF MASCULINITY* 148 (2005) (emphasis in original).

³³ *Id.*

³⁴ Myles Dolphin, *THESHEAF.COM*, *David Testo comes out: Big Four athletes should follow suit* (Dec. 7, 2011), <http://thesheaf.com/2011/12/07/david-testo-comes-out-big-four-athletes-should-follow-suit/>.

³⁵ Pat Griffin, *COACHES CHALK TALKS*, *Chalk Talk: Addressing Concerns about LGBT Athletes and Coaches in the Locker Room*, http://www.caaws-homophobiansport.ca/e/pdfs/coaches_chalk_talk_4.pdf.

³⁶ The discussion of LGBT athletes is not limited to the four major sports leagues or to male athletes only, however to focus this note, the analysis will be limited to athletes in the NBA, NFL, NHL, MLB.

the You Can Play Project,³⁷ commented on this challenge, stating, “male sports is a masculine culture, and you are supposed to be big, tough, and strong. There is a fallacy that you cannot be gay and masculine.”³⁸

In order to break down stereotypes and change the culture of sports, the four major sports leagues should combine efforts in a singular marketing campaign. The purpose of this campaign should be to challenge the hyper-masculine stereotypes that dominate sports culture and establish a talent-based culture based on the acceptance of a player regardless of his sexual orientation. Furthermore, each league should implement educational seminars for league and team employees and officials. The seminars should have a dual focus. First, they should teach team staff, administrators and officials how to foster an atmosphere of acceptance in the locker room. Second, the programs should educate team staff, administrators and officials about legal and league sanctions for discriminating against gay players.

Part I of this note discusses the reasons a gay athlete might decide to keep his sexuality hidden. Although each person has his own reasons, this note examines the comments on sports culture by Esera Tuaolo, John Amaechi and Jason Collins, all professional or former professional gay athletes. These comments offer explanations as to why an athlete might be reluctant and examine the culture of sports and how it affects a player’s decision. Part II outlines the legal protections under Title VII, New York State law and New York City law that are available to gay players who have been discriminated against due to their sexual orientation. Part III discusses the internal steps the four major sports leagues have taken towards acceptance and protection of gay players, and analyzes the shortcomings of such policies. Part IV discusses how the leagues are responding to the changing social climate towards LGBT rights, which includes taking part in the national discourse regarding discrimination against LGBT individuals. Part V explains a proposed two-part solution.

³⁷ The You Can Play Project is a social activism campaign dedicated to the eradication of homophobia in sports; its mission is “dedicated to ensuring equality, respect and safety for all athletes, without regard to sexual orientation.” See YOU CAN PLAY, *Mission Statement*, [YOU CAN PLAY PROJECT.ORG](http://youcanplayproject.org/pages/mission-statement) (last visited, Feb. 8, 2014), <http://youcanplayproject.org/pages/mission-statement>.

³⁸ See TSN, *ReOrientation Part One: the Culture of Casual Homophobia – ReOrientation Videos*, TSN.ca, at minute 3:45 of 9:30 (Jan. 15, 2014), <http://www.tsn.ca/videohub/Default.aspx?collection=188&show=274129§ion=Sports>.

I. "COMING OUT" OF THE LOCKER ROOM PRESENTS UNIQUE CHALLENGES FOR LGBT ATHLETES

On the field, on the court, in the locker room and in their personal lives, professional athletes are subjected to a standard of behavior that is rigidly defined by masculine stereotypes.³⁹ Stereotypes that are enforced and perpetuated by their peers and the teams they play for.⁴⁰ The culture of professional sports is one of hyper-masculinity; male athletes are expected to be tough, aggressive, strong and thick-skinned at all times and to womanize when off the field.⁴¹ This stereotype of what it means to be masculine falls in stark contrast with the stereotype of gay men common in sports culture.⁴² These stereotypes, both deeply entrenched within professional sports culture, create a perceived dichotomy in which a player cannot be both a successful athlete and a gay person.⁴³

Perhaps nowhere in sports is this notion more apparent than in the locker room.⁴⁴ The culture of the sports locker room can be so chilling to a gay athlete's desire to reveal his sexual orientation that it is sometimes referred to as "the locker room closet."⁴⁵ Within this cultural microcosm, player interactions frequently cement the notion that being gay inherently decreases the value and talent of an athlete.⁴⁶ From the regular and pejorative use of the word "faggot" to the importance placed on heterosexual encounters and many examples in between, the locker room is

³⁹ See Eric Anderson, *IN THE GAME: GAY ATHLETES AND THE CULT OF MASCULINITY* 13 (2005); TSN, *ReOrientation Part One: the Culture of Casual Homophobia – ReOrientation Videos*, TSN.ca, at minute 3:45 of 9:30 (Jan. 15, 2014), <http://www.tsn.ca/videohub/Default.aspx?collection=188&show=274129§ion=Sports>.

⁴⁰ See *id.*

⁴¹ See Esera Tuaolo & John Rosenberg, *ALONE IN THE TRENCHES: MY LIFE AS A GAY MAN IN THE NFL*, 145 (2006).

⁴² See TSN, *ReOrientation Part One: the Culture of Casual Homophobia – ReOrientation Videos*, TSN.ca, at minute 3:45 of 9:30 (Jan. 15, 2014), <http://www.tsn.ca/videohub/Default.aspx?collection=188&show=274129§ion=Sports>.

⁴³ See generally Maya Dusenbery, *What About the Guys Who Do Fit the 'Gay Stereotype'?*, THE ATLANTIC (May 31, 2013), <http://www.theatlantic.com/sexes/archive/2013/05/what-about-the-guys-who-do-fit-the-gay-stereotype/276407/>.

⁴⁴ See Dave Zirin, *The Locker Room Closet*, LA TIMES (Feb. 18, 2007), available at <http://articles.latimes.com/2007/feb/18/opinion/op-zirin18>; Eric Anderson, *IN THE GAME: GAY ATHLETES AND THE CULT OF MASCULINITY* 13 (2005); TSN, *ReOrientation Part One: the Culture of Casual Homophobia – ReOrientation Videos*, TSN.ca, at minute 3:45 of 9:30 (Jan. 15, 2014), <http://www.tsn.ca/videohub/Default.aspx?collection=188&show=274129§ion=Sports>.

⁴⁵ See Zirin, *supra* note 44.

⁴⁶ See Pete Thamel & Thayer Evans, *How will news that Michael Sam is gay affect his NFL draft stock?*, SPORTS ILLUSTRATED (Feb. 9 2014), available at <http://sportsillustrated.cnn.com/college-football/news/20140209/michael-sam-draft-stock/>; TSN, *ReOrientation Part One: the Culture of Casual Homophobia – ReOrientation Videos*, TSN.ca, at minute 3:45 of 9:30 (Jan. 15, 2014), <http://www.tsn.ca/videohub/Default.aspx?collection=188&show=274129§ion=Sports>.

often a decidedly unfriendly place for a gay player.⁴⁷ The locker room culture, within the already hostile sports culture, has specifically been cited as a barrier to gay athletes revealing their orientation to their teams and teammates.⁴⁸ Furthermore, the preservation of the current locker room culture has been a reason that professional sports team owners, staff and administration resist signing openly gay players to their organization for fear that introducing a gay athlete would be disruptive to the team.⁴⁹

The experiences of gay athletes who have played for professional sports teams exemplify the effect of this hyper-masculine sports culture on players' decisions not to reveal their sexual orientation over the course of their professional careers. Retired NFL lineman Esera Tuaolo, in his book *Alone in the Trenches: My Life as a Gay Man in the NFL*, described his struggle with hiding his sexuality as a football player.⁵⁰ As a youth, Tuaolo first started to play football to escape troubles he faced in his life, including the death of his father and abuse at the hands of his uncle and older brother.⁵¹ Unfortunately, the game that he used as an escape for his troubles caused him far more pain than he could have foreseen. Throughout his college and professional career, Tuaolo hid his sexual orientation from others; he lied to teammates and even slept with women to ensure his sexuality would not be questioned.⁵² Tuaolo observes: "It's rough down in the trenches, where linemen weighing more than three-hundred pounds hurl themselves at one another in brutal hand-to-hand combat, but it is nothing compared to the pain I kept buried inside so I could play out my dream."⁵³

The pain that Tuaolo faced hiding his sexuality caused anxiety attacks, hallucinations, depression, problems with alcohol and drugs, and suicidal thoughts and actions.⁵⁴ Tuaolo retired in 2000 after playing nine seasons in the NFL for five teams,⁵⁵ but it was not until an October 2002 interview on the HBO series *Real Sports* that he revealed his sexuality.⁵⁶ Describing his

⁴⁷ Robbie Couch, *A Gay Michael Sam Is the Locker Room 'Imbalance' We All Need*, HUFFINGTON POST (Feb. 10, 2014).

⁴⁸ See Esera Tuaolo & John Rosenberg, *ALONE IN THE TRENCHES: MY LIFE AS A GAY MAN IN THE NFL* (2006).

⁴⁹ See Thamel & Evans, *supra* note 46.

⁵⁰ Tuaolo & Rosenberg, *supra* note 48.

⁵¹ *Id.* at 20.

⁵² *Id.* at 145.

⁵³ *Id.* at 13.

⁵⁴ See Rozenberg, *supra* note 16 at 1.

⁵⁵ ESPN.COM, *Esera Tuaolo Stats*, http://espn.go.com/nfl/player/stats/_/id/248/esera-tuaolo (Tuaolo played for the Green Bay Packers, Minnesota Vikings, Jacksonville Jaguars, Atlanta Falcons, and the Carolina Panthers).

⁵⁶ Esera Tuaolo & Luke Cyphers, ESPNMAG.COM, *Free and Clear* (Oct. 30, 2002), <http://espn.go.com/magazine/vol5no23tuaolo.html>.

reluctance, Tualo told *ESPN Magazine*,

The one thing I could never do was talk about it. Never. No one in the NFL wanted to hear it, and if anyone did hear it, that would be the end for me. I'd wind up cut or injured. I was sure that if a GM didn't get rid of me for the sake of team chemistry, another player would intentionally hurt me, to keep up the image. *Because the NFL is a supermacho culture. It's a place for gladiators. And gladiators aren't supposed to be gay.*⁵⁷

Tualo's story exemplifies how professional sports is immersed in a masculine "super macho" culture that leaves LGBT athletes alienated.

In addition to feelings of alienation, gay players often feel as though their position on their teams would be threatened if they chose to reveal their sexual orientation. John Amaechi retired from playing in the NBA in 2003 after playing six seasons for four teams.⁵⁸ In 2007, four years after retirement, Amaechi revealed that he was gay, becoming the first NBA athlete to disclose his sexuality.⁵⁹ Amaechi, a PhD in psychology,⁶⁰ has become a spokesperson for the LGBT community and an advocate for LGBT rights.⁶¹ While discussing his book *Man in the Middle*, Amaechi described to ESPN Radio that, while playing for the Utah Jazz, his place on the roster "constantly felt under threat."⁶² He described one particular incident when the team's former owner, Larry H. Miller, explicitly told the players, "Stay where you are. We may know that you're gay but we don't want to deal with the ramifications of you coming out publicly."⁶³ The owner's statements made Amaechi feel that if his sexuality were to become public, he would certainly lose his job.⁶⁴ For Amaechi, the fear of losing his job, coupled with the uncertainty of not knowing what would happen to

⁵⁷ *Id.* (emphasis added).

⁵⁸ See Royce Young, CBSSPORTS.COM, *John Amaechi says he has talked to other players about coming out* (Apr. 30, 2013), <http://www.cbssports.com/nba/eye-on-basketball/22170513/john-amaechi-says-there-are-other-players-hes-talking-to-about-coming-out>.

⁵⁹ *Id.*

⁶⁰ *Biography for John Amaechi OBE*, <http://www.johnamaechi.com/bio/>.

⁶¹ JR Tungal, *LGBT History Month Icon of the Day: John Amaechi*, THE HUFFINGTON POST (Oct. 14, 2012), http://www.huffingtonpost.com/2012/10/14/lgbt-history-month-icon-john-amaechi_n_1955492.html.

⁶² *Gay former NBA player, John Amaechi, calls out Larry Miller, Tony Dungy for homophobic views*, Sportingnews.com (May 17, 2011), <http://www.sportingnews.com/nba/story/2011-05-17/gay-former-nba-player-john-amaechi-calls-out-larry-miller-tony-dungy-for-homopho>.

⁶³ *Id.*

⁶⁴ *Id.* ("That's a not too subtle way of letting everybody know where he stands on the position of homosexuality, and it's not the kind of thing that inspires you to then stand up and say, 'Yes, I'm gay.' I absolutely was convinced that at that point I would've lost my job.")

his life outside of sports, kept him from publicizing his sexuality.⁶⁵ This type of job insecurity is unique to gay athletes; their position on the team is not only in jeopardy from the highly competitive nature of professional sports, but it is very directly threatened by the simple fact that they are gay. The attitudes of team owners, as evidenced by Amaechi's testimony,⁶⁶ have made clear that an openly gay player would not be welcome on their sports teams.

Active NBA center Jason Collins, who has played for twelve seasons on six different teams,⁶⁷ made headlines by revealing that he is gay, but the announcement did not come easily. Collins stated, "Imagine you're in the oven, baking. Some of us know and accept our sexuality right away and some need more time to cook. I should know—I baked for 33 years."⁶⁸ It was the 2011 NBA lockout that initially placed Collins on the path to revealing his sexuality publicly; the lockout took Collins out of his normal basketball routine of workouts and practices, a routine that had distracted him for so many years.⁶⁹ Collins observed: "It takes an enormous amount of energy to guard such a big secret. I've endured years of misery and gone to enormous lengths to live a lie. I was certain that my world would fall apart if anyone knew."⁷⁰

Eric Anderson, author of *In the Game*, notes: "To [many athletes,] homosexuality is synonymous with physical weakness and emotional frailty, and the term gay athlete therefore remains an oxymoron."⁷¹ It is disheartening that our sports culture requires male athletes to meet a very narrow standard of masculinity; the stories of Esera Tualo, John Amaechi, and Jason Collins illustrate the emotionally and physically exhausting ordeal a gay athlete goes through to adhere to that standard of masculinity. Athletes make their living because people want to watch them play, and if

⁶⁵ Ramon Johnson, *Interview with Gay Former NBA Player John Amaechi*, ABOUT.COM, <http://gaylife.about.com/od/gaycelebrityprofiles/a/gaynbaplayer.htm> (responding to the question of what affected his decision to stay in the closet, Amaechi said "my own thoughts were centered around [concerns], like: What happens to my charity? What happens to my work with young people? What happens?").

⁶⁶ *Gay former NBA player, John Amaechi, calls out Larry Miller, Tony Dungy for homophobic views*, Sportingnews.com (May 17, 2011), <http://www.sportingnews.com/nba/story/2011-05-17/gay-former-nba-player-john-amaechi-calls-out-larry-miller-tony-dungy-for-homopho>.

⁶⁷ ESPN.COM, *Jason Collins Stats*, http://espn.go.com/nba/player/stats/_id/987/jason-collins (last visited Oct. 25, 2013).

⁶⁸ See Jason Collins & Franz Lidz, *Why NBA Center Jason Collins is Coming Out Now*, SPORTS ILLUSTRATED (May 2013), [available at http://sportsillustrated.cnn.com/magazine/news/20130429/jason-collins-gay-nba-player/#all](http://sportsillustrated.cnn.com/magazine/news/20130429/jason-collins-gay-nba-player/#all).

⁶⁹ See *Id.*

⁷⁰ See *Id.*

⁷¹ Eric Anderson, IN THE GAME: GAY ATHLETES AND THE CULT OF MASCULINITY 13 (2005).

they are not celebrities garnering crowd attention, then they are mere “role players.”⁷² A gay athlete must consider not only what effect revealing his sexuality will have on his fan appeal, but also, more importantly, whether a coach or team will play him. A gay player may experience these soul-searching questions: “what happens after I come out?” or “what if a team will no longer want me to play?” and “what if I lose respect from other players because I will be considered soft?” These questions have no specific answers, but steps can be made to calm these fears by educating the fans, teams, coaches, and general managers.

The following part of this note outlines possible legal actions that a gay player might pursue against his team and league due to discrimination. The commentaries of Esera Tuaolo, John Amaechi and Jason Collins are exemplary of the anxiety and fear with which gay athletes struggle as a direct result of their sexual orientation. One of Tuaolo’s principal anxieties was that a team official would terminate him “for the sake of team chemistry.”⁷³ John Amaechi faced similar fears. If Tuaolo and Amaechi knew that a team could not legally cut them for being gay, it is possible that they may have come out during their careers.

II. GAY ATHLETES HAVE THE OPTION OF LEGAL RECOURSE IF FACED WITH DISCRIMINATION

Gay athletes often live in fear that revealing their sexuality could threaten their playing time and position on a team.⁷⁴ It may surprise many to know that in their Collective Bargaining Agreements (CBA) the four major sports leagues provide protections against sexual orientation discrimination.⁷⁵ However, in spite of these protections, gay athletes like

⁷² The term “role player” refers to a player who plays a specific and essential role on the team. Commonly, role players are substitutes that come off the bench. See SPORTINGCHARTS.COM, <http://www.sportingcharts.com/dictionary/nba/role-player.aspx>.

⁷³ Esera Tuaolo & Luke Cyphers, *Free and Clear*, ESPNMAG.COM (Oct. 30, 2002), <http://espn.go.com/magazine/vol5no23tuaolo.html>.

⁷⁴ See Myles Dolphin, THESHEAF.COM, *David Testo comes out: Big Four athletes should follow suit* (Dec. 7, 2011), <http://thesheaf.com/2011/12/07/david-testo-comes-out-big-four-athletes-should-follow-suit/>; Pat Griffin, COACHES CHALK TALKS, *Chalk Talk: Addressing Concerns about LGBT Athletes and Coaches in the Locker Room*, http://www.caaws-homophobiainsport.ca/e/pdfs/coaches_chalk_talk_4.pdf.

⁷⁵ NBA COLLECTIVE BARGAINING AGREEMENT, Article XXX (2011), available at <http://www.scribd.com/doc/172760974/NBA-NBPA-CBA-2011>; MLB COLLECTIVE BARGAINING AGREEMENT, Article XV (2012), available at http://www.mlb.com/pa/pdf/cba_english.pdf; NHL COLLECTIVE BARGAINING AGREEMENT, Article 7.2 (2012), available at http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLPACOM_2013_CBA.pdf; NFL CBA, Article 49 Section 1 (2012), available at [http://images.nflplayers.com/mediaResources/files/PDFs/General/2011_Final_CBA_Searchable_Book marked.pdf](http://images.nflplayers.com/mediaResources/files/PDFs/General/2011_Final_CBA_Searchable_Book_marked.pdf).

Esera Tuaolo often feel team officials do not want them to reveal their sexuality, in order to maintain the team's status quo.⁷⁶ For this reason, gay athletes must be aware of additional legal protections from discrimination. This part of the note focuses on two possible legal avenues available to gay athletes in professional sports: Title VII of the Civil Rights Act of 1964 and New York State and City Human Rights Laws. The following section will establish that an athlete's league may be named as his "employer" for the purpose of filing suit, and the subsequent sections will discuss the significance of Title VII, New York State Law and New York City Law protections.

A. League as an Athlete's Employer

All four major sports leagues are incorporated in New York State,⁷⁷ and naming the league as a defendant allows a gay athlete to sue under New York law. New York State and City Human Rights Laws prohibit discrimination based on sexual orientation.⁷⁸ New York State and New York City Human Rights Laws allow an individual to sue his employer on the grounds of discrimination based on sexual orientation. Not all states provide such protections,⁷⁹ and it is therefore important that gay athletes name their league as a defendant so that the suit may be brought under the more plaintiff-friendly New York laws.⁸⁰ For example, if a gay athlete playing for the Tennessee Titans was subjected to harassment or discrimination by players, team staff, or team officials, he would not have any legal recourse under Tennessee law, but would be protected under New York law.⁸¹

An initial hurdle that a gay athlete will face is proving the league is the athlete's employer.⁸² For purposes of New York Law, the court in

⁷⁶ Tuaolo & Cyphers, *supra* note 73.

⁷⁷ See MLB.COM, http://www.mlb.com/mlb/official_info/about_mlb/; NFL.COM, <http://www.nfl.com/help/faq>; NBA.COM, http://www.nba.com/help/fan_relations_faq.html; NHL.COM, <http://www.nhl.com/ice/page.htm?id=26387>.

⁷⁸ See *infra* notes 79 and accompanying text.

⁷⁹ See Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies*, CENTER FOR AMERICAN PROGRESS ACTION FUND AT 3-4 (June 2012), http://www.americanprogress.org/issues/2012/06/pdf/state_nondiscrimination.pdf (listing state laws and policies regarding sexual orientation protection).

⁸⁰ See *infra* notes 136 and accompanying text.

⁸¹ See THRA Title 4 Chapter 21-102 ("Discriminatory practices" means any direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons because of race, creed, color, religion, sex, age or national origin.)

⁸² Athletes in the four major sports leagues are employees of the teams for which they play because teams have sufficient control over an athlete's work, therefore athletes will be entitled to employment

*Gallagher v. Gallagher*⁸³ established a four-factor test to determine whether an entity is an employer. Considering these factors, a court would find a league is the athlete's employer. The factors are:

(1) whether the proposed employer had the power of selection and engagement over the employee; (2) whether the proposed employer made the payment of wages and salary to the employee; (3) whether the proposed employer had the power of dismissal over the employee; and (4) whether the proposed employer had the power to control the employee's conduct The most important consideration in this analysis is whether the alleged employer exercised control over the employee's conduct and the incidents of his employment.⁸⁴

1. Leagues Have Power of Selection and Engagement Over Athletes

Although none of the four sports leagues can specifically make a player join a team or make a team choose a player, each league does maintain control of when and how players can be selected.⁸⁵ Leagues' CBAs contain rules that establish minimum requirements for eligibility, such as age, education, and years out of high school.⁸⁶ Furthermore, leagues also control the way teams can trade players and when players can be considered free agents available to engage in negotiations with other teams for new contacts.⁸⁷ All these factors will likely lead a court to determine that leagues exercise substantial control over a player's selection and engagement.

2. Leagues Maintain Control Over Players' Compensation

The four major sports leagues do not directly pay a player's salary, but the leagues do control aspects of a player's compensation.⁸⁸ These aspects include establishing minimum annual salaries, benefits, and fines. Each of

non-discrimination protection. *See* *Bryant v. Fox*, 515 N.E.2d 775, 776 (Ill. App. Ct. 1987) (holding that two football players on the Chicago Bears were employees and not independent contractors); *see also* *Weber v. Commissioner*, 60 F.3d 1104, 1110 (4th Cir. 1995) ("The 'right-to-control' test is the crucial test to determine the nature of a working relationship).

⁸³ 130 F. Supp. 2d 359 (N.D.N.Y. 2001).

⁸⁴ *Id.* at 363.

⁸⁵ *See* NBA CBA, Article 10 (2012), available at <http://www.scribd.com/doc/172760974/NBA-NBPA-CBA-2011>; NFL CBA, Article 6 (2012), available at http://images.nflplayers.com/mediaResources/files/PDFs/General/2011_Final_CBA_Searchable_Book_marked.pdf; MLB CBA, Article XXI Section A (2012), available at http://www.mlb.com/pa/pdf/cba_english.pdf; NHL CBA, Article 8 (2012), available at http://cdn.agilitycms.com/nhlpaom/PDF/NHL_NHLPA_2013_CBA.pdf.

⁸⁶ *Id.*

⁸⁷ *See Id.*

⁸⁸ *See Id.*

the four major sports leagues establishes a minimum annual player salary.⁸⁹ For example, the MLB CBA sets minimum annual salaries based on a player's years of service with the league.⁹⁰ The NBA and NHL contain provisions in their CBAs that set a maximum salary a player can receive.⁹¹ Leagues also exercise control over players' compensation through benefits offered by the leagues. For example, each league offers its players a pension plan.⁹² The MLB offers its players lifetime healthcare coverage after serving only one day on an active roster;⁹³ the NFL, NBA, and NHL offer 401(k) plans.⁹⁴ Furthermore, leagues implement fines that affect a player's salary.⁹⁵ Therefore, since leagues dictate a player's minimum salary (and, in the NBA and NHL, the player's maximum salary), provide direct compensation through benefits, and can reduce a player's salary through fines, a player will likely satisfy the requirement of showing the league maintains significant control over a player's compensation.

3. Leagues Have the Power to Dismiss Players

Each of the four leagues' CBAs allows the league to suspend or dismiss a player.⁹⁶ Players can be suspended for conduct during games, conduct off the field, and violations of league rules banning the use of illicit and performance-enhancing drugs.⁹⁷ For example, the NFL suspended superstar

⁸⁹ See *Id.*

⁹⁰ MLB COLLECTIVE BARGAINING AGREEMENT, Article VI (2012), available at http://www.mlb.com/pa/pdf/cba_english.pdf.

⁹¹ See NHL Collective Bargaining Agreement, Article 50-50.6 (2012), available at http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLPA_2013_CBA.pdf; NBA Collective Bargaining Agreement, Article 2 section 7 (2011), available at <http://www.scribd.com/doc/172760974/NBA-NBPA-CBA-2011>.

⁹² See NBA CBA, Article IV (2012), available at <http://www.scribd.com/doc/172760974/NBA-NBPA-CBA-2011>; NFL CBA, Article 10 section 2 (2012), available at http://images.nflplayers.com/mediaResources/files/PDFs/General/2011_Final_CBA_Searchable_Book_marked.pdf; MLB CBA, Article XIII (2012), available at http://www.mlb.com/pa/pdf/cba_english.pdf; NHL CBA, Article 21 (2012), available at http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLPA_2013_CBA.pdf.

⁹³ Kevin Baumer, BUSINESS INSIDER, *MLB Players Earn A Pension After Just 43 Days In The Majors* (Jan. 26, 2011),

⁹³ <http://www.businessinsider.com/nfl-nhl-nba-mlb-retirement-pension-plans-lockout-2011-1>.

⁹⁴ NBA and NFL 401(k) pension plan provisions; NHL Collective Bargaining Agreement, Article 50-50.6 (2012), available at http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLPA_2013_CBA.pdf.

⁹⁵ See NBA CBA, Article 11 (2012), available at <http://www.scribd.com/doc/172760974/NBA-NBPA-CBA-2011>; NFL CBA, Article 46 (2012), available at http://images.nflplayers.com/mediaResources/files/PDFs/General/2011_Final_CBA_Searchable_Book_marked.pdf; MLB CBA, Article XII (2012), available at http://www.mlb.com/pa/pdf/cba_english.pdf; NHL CBA, Article 18, 18-A (2012), available at http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLPA_2013_CBA.pdf.

⁹⁶ See *Id.*

⁹⁷ *Id.*

Michael Vick in 2007 after he pled guilty for his involvement in dog fighting competitions.⁹⁸ Similarly, the NBA suspended nine players after a fight broke out between the Indiana Pacers and the Detroit Pistons in 2004; Ron Artest received the longest suspension of 73 games.⁹⁹ Further, New York Yankee superstar Alex Rodriguez was suspended by the MLB for 162 games for the 2014 season due to allegations of violating the league's prohibition on performance enhancing drug use.¹⁰⁰ All four leagues have exercised their power to ban players from participating in games for drug use and abuse,¹⁰¹ gambling,¹⁰² and fighting.¹⁰³ League rules establish that a league has the power to suspend or dismiss players and these powers have been frequently used. Therefore, this factor of the test is satisfied.

4. Leagues Have Power to Control Players' Conduct

Each of the above three factors giving the leagues power of selection and engagement over the players, control of players' compensation, and power to dismiss players, establishes the fourth criteria: that the leagues have power to control player conduct. Leagues establish requirements for draft eligibility, free agency, minimum annual or maximum annual salaries, benefits, and player suspensions. Leagues require athletes to participate in mandatory training programs¹⁰⁴ and set fourth rules of conduct¹⁰⁵ and the

⁹⁸ See THE TIMES PICAYUNE: GREATER NEW ORLEANS, *Michael Vick, O.J., Ryan Leaf and Other NFL Notables Who've Been Arrested* (June 26, 2013), http://www.nola.com/saints/index.ssf/2013/06/michael_vick_oj_ryan_leaf_and.html.

⁹⁹ ESPN.COM, *Suspensions without pay, won't be staggered* (Nov. 22, 2004) (describing the NBA's disciplinary actions after the Indiana Pacers and Detroit Pistons fight).

¹⁰⁰ Bob Nightengale, *Alex Rodriguez Withdraws Lawsuit, Accepts 162-Game Suspension*, USATODAY.COM (Feb 7, 2014), <http://www.usatoday.com/story/sports/mlb/2014/02/07/rodriguez-withdraws-lawsuit-to-overturn-suspension/5290907/>.

¹⁰¹ See, e.g., Harlan Schreiber, *The Roy Tarpley Saga*, HOOPS ANALYST (Aug. 29, 2009), <http://hoopsanalyst.com/blog/?p=55> (banning Tarpley for continued drug abuse).

¹⁰² See, e.g., Rick Weinberg, *Pete Rose Banned From Baseball*, ESPN.COM, <http://sports.espn.go.com/espn/espn25/story?page=moments/5> (banning Rose for gambling on games in which he played); THE TIMES PICAYUNE: GREATER NEW ORLEANS, *Michael Vick, O.J., Ryan Leaf and Other NFL Notables Who've Been Arrested* (June 26, 2013), http://www.nola.com/saints/index.ssf/2013/06/michael_vick_oj_ryan_leaf_and.html (explaining that Indianapolis Colts' quarterback Art Schlichter pleaded guilty to illegal gambling in 1987 and was denied reinstatement into the NFL by Commissioner Pete Rozelle).

¹⁰³ See Dave Stubbs, *Coutu's Lifetime Ban Still a Controversy*, HOCKEYINSIDEOUT.COM (Dec. 27, 2007), <http://www.hockeyinsideout.com/news/coutus-1927-lifetime-ban-still-a-controversy>.

¹⁰⁴ The NBA, NFL and MLB each have mandatory rookie training programs. See LEGENDS OF BASKETBALL, *Rookie Transition Program* (Feb. 1, 2012), <http://www.legendsofbasketball.com/2012/02/rookie-transition-program/>; Tim Brown, YAHOO!SPORTS.COM, *Top Rookies are Taught Life Lessons* (Jan. 16, 2008), <http://sports.yahoo.com/news/top-rookies-taught-life-lessons-011100480--mlb.html>.

¹⁰⁵ See NBA CBA, Article VI (2012); NFL CBA, Article 4 section 4 (2011); MLB CBA, Article XII section B (2012); NHL CBA, Article 18, 18-A (2012).

NBA and NHL even have dress code requirements.¹⁰⁶ Requiring players to follow these rules shows that leagues exercise considerable control over a player's conduct.

An analysis of the four factors set forth by the court *Gallagher* establishes that the major sports leagues are employers of athletes because leagues have control over the requirements of player eligibility and selection, set standards for annual salaries and impose fines, have the power to dismiss players and exercise considerable control over a player's conduct. Therefore, under this test, a gay athlete bringing a claim of discrimination would be able to name his league as a defendant. Doing so is legally imperative because it permits a gay athlete to sue in New York, the state where all four major sports leagues have their headquarters and also to file a claim under Title IX. Making New York the venue for these discrimination suits solves the issue raised by the lack of uniform employment non-discrimination laws among states, because New York employment laws include sexual orientation as a protected class.¹⁰⁷

B. Possibility of a Gay Athlete Bringing a Claim Under Title VII

An employee claiming discrimination under Title VII of the Civil Rights Act of 1964¹⁰⁸ would have difficulty establishing a claim because Title VII does not include sexual orientation as a protected class against employment discrimination.¹⁰⁹ There is, however, a possible avenue available to gay athletes to sue under Title VII's provision that prohibits discrimination because of "sex."¹¹⁰ To state an actionable sex discrimination claim, a plaintiff must prove discrimination "because of" sex and not "because of" some other characteristic that is not protected by Title VII, such as sexual orientation.¹¹¹ Gay athletes might find it difficult to satisfy this causation requirement because a court may determine that the discrimination the gay athlete endured was not because of his sex, but because of his sexual

¹⁰⁶ See NBA.COM, *NBA Player Dress Code* (Oct. 20, 2005), http://www.nba.com/news/player_dress_code_051017.html; NHL CBA, Exhibit 14 paragraph 5-6 (2012); see also Scott Burnside, *Dress Code Suits NHLers Just Fine*, ESPN.COM (Oct. 20 2005), <http://sports.espn.go.com/nhl/columns/story?id=2198862>. (explaining the NHL's dress code policy).

¹⁰⁷ See *supra* note 79-80 and accompanying text.

¹⁰⁸ 42 U.S.C. § 2000e-2(a)(1)(2000) ("It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise 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").

¹⁰⁹ See *Id.*

¹¹⁰ See *Id.*

¹¹¹ See *Id.*; Zachary A. Kramer, *Heterosexuality and Title VII*, 9 DUKEMINIER AWARDS 227, 234 (2010).

orientation. However, gay athletes can argue they faced discrimination because they did not conform to the masculine stereotype of the male sex required in the culture in which they are employed (aggressive, tough, womanizing, etc.),¹¹² thus making their claim sex-based.

For example, in *Price Waterhouse v. Hopkins*,¹¹³ a plurality of the Supreme Court recognized a claim of discrimination based on Hopkins' allegations that her employer discriminated against her because of her failure to conform to sexual stereotypes.¹¹⁴ In *Price Waterhouse*, the employer deferred considering Hopkins for partnership in the firm in part because she was perceived as "overly aggressive," "macho" and "somewhat masculine," and she was advised that to improve her chances she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."¹¹⁵ Finding that the employer's action gave rise to a sufficient basis for relief under Title VII, the Supreme Court declared:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for 'in [enacting Title VII] Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'¹¹⁶

Price Waterhouse anchored sex stereotyping in Title VII's prohibition on discrimination "because of" sex.

A majority of circuit courts have followed the Supreme Court's plurality opinion.¹¹⁷ In the Third Circuit case *Prowel v. Wise Business Forms*,¹¹⁸ the plaintiff Prowel worked for Wise as a machine operator for 13 years. During the final two years of that employment, co-workers discovered that

¹¹² See Esera Tualo & John Rosenberg, ALONE IN THE TRENCHES: MY LIFE AS A GAY MAN IN THE NFL, 145 (2006); TSN, *ReOrientation Part One: the Culture of Casual Homophobia – ReOrientation Videos*, TSN.ca, at minute 3:45 of 9:30 (Jan. 15, 2014), <http://www.tsn.ca/videohub/Default.aspx?collection=188&show=274129§ion=Sports>.

¹¹³ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989).

¹¹⁴ See *Id.*

¹¹⁵ *Id.* at 235.

¹¹⁶ *Id.* at 251.

¹¹⁷ See *Chadwick v. WellPoint, Inc.*, 561 F.3d 38 (1st Cir. 2009); *Sassaman v. Gamache*, 566 F.3d 307 (2d Cir. 2009); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2004); *Doe v. City of Belleville, Ill.*, 119 F.3d 563 (7th Cir. 1997); *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033 (8th Cir. 2010); *Kastl v. Maricopa County Cmty. College Dist.*, 2009 U.S. App. LEXIS 7833 (9th Cir. 2009); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

¹¹⁸ 579 F.3d 285 (3rd Circuit 2009).

Prowel was homosexual and began harassing him.¹¹⁹ Prowel sued Wise under Title VII alleging he was harassed because he failed to meet the perceived standard of manliness.¹²⁰ Prowel described the stereotypical male at the plant: “[B]lue jeans, t-shirt, blue collar worker, very rough around the edges. Most of the guys there hunted. Most of the guys there fished. They drank beer not gin and tonic. Just you know, all into football, sports, all that kind of stuff, everything I wasn’t.”¹²¹ Prowel’s claim of discrimination was dismissed by the district court because it determined that the harassment he faced was because of his sexual orientation, which is not actionable under Title VII.¹²² The Third Circuit Court of Appeals, citing *Price Waterhouse*, reversed the lower court’s decision. The court explained that Wise could not persuasively argue that because Prowel is homosexual, he is precluded from bringing a claim based on sex stereotyping.¹²³ There is no basis in the statute or case law to support the notion that an effeminate heterosexual man can bring a sex-stereotyping claim while an effeminate homosexual man may not.¹²⁴ As long as the employee, regardless of his or her sexual orientation, marshals sufficient evidence such that a reasonable jury could conclude that harassment or discrimination occurred “because of sex,” the case is not appropriate for dismissal.¹²⁵

Recently in *Equal Employment Opportunity Commission v. Boh Brothers Construction Co.*,¹²⁶ the Fifth Circuit recognized the plaintiff, Kerry Woods’, sex stereotype discrimination claim.¹²⁷ Woods claimed that the crew superintendent engaged in same-sex harassment against him by referring to him in homophobic epithets and using lewd gestures, including exposing himself to Woods.¹²⁸ He also claimed that Wolfe called him girlish for using Wet Ones, instead of toilet paper, when he used the bathroom.¹²⁹ Woods complained to Boh Brothers management about the harassment, and when questioned, the crew superintendent said that he “didn’t care for Woods” because Woods was “different” and “didn’t fit

¹¹⁹ *Id.* at 287.

¹²⁰ *Id.* at 286.

¹²¹ *Id.* at 287.

¹²² *Id.* at 286.

¹²³ *Id.* at 292.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *EEOC v. Boh Bros. Constr. Co., L.L.C.*, 731 F.3d 444 (5th Cir. 2013).

¹²⁷ *Id.* at 454.

¹²⁸ *Id.* at 473.

¹²⁹ *Id.* at 450.

in.”¹³⁰ Woods was subsequently terminated for “lack of work.”¹³¹ Woods then filed a harassment claim against Boh Brothers in federal district court.¹³² Woods’ claim was successful in the lower court, but the Fifth Circuit Court of Appeals overturned the lower court’s decision.¹³³ The court did not answer the question whether gender stereotyping could be a form of same-sex harassment under Title VII.¹³⁴ In response to the court’s original resistance to designating sex stereotyping as an actionable offense under Title VII, the Equal Employment Opportunity Commission (“EEOC”) appealed and sought an en banc hearing.¹³⁵ The EEOC prevailed, making the Fifth Circuit the latest federal circuit where “a plaintiff may establish a [Title VII] claim with evidence of sex-stereotyping.”¹³⁶

As evidenced above, gay athletes are not barred from asserting Title VII protection even though Title VII does not enumerate sexual orientation as a protected class; Title VII does, however, require that gay athletes overcome some legal obstacles.¹³⁷ The Supreme Court’s decision in *Price Waterhouse* provided gay athletes with the necessary tool to surpass the legal obstacles of Title VII; that tool is sex stereotype discrimination.¹³⁸ The widely accepted fallacy that an athlete “cannot be gay and masculine” is a major reason that gay athletes face discrimination.¹³⁹ Under *Price Waterhouse* and the subsequent circuit court decisions, gay athletes have protection against discrimination based on the fact that they do not adhere to the masculine sports stereotype.¹⁴⁰

¹³⁰ *Id.*

¹³¹ *Id.* at 451.

¹³² *Id.*

¹³³ *Id.* at 444.

¹³⁴ *Id.* at 451.

¹³⁵ *Id.*

¹³⁶ *Id.* at 454.

¹³⁷ The obstacles are proving that the discrimination complained of was “because of” the gay athlete’s sex and not sexual orientation. A gay athlete can overcome this hurdle by showing the discrimination he faced was “because of” his perceived inability to meet the masculine stereotype and not because he was gay.

¹³⁸ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989).

¹³⁹ TSN, *ReOrientation Part One: the Culture of Casual Homophobia – ReOrientation Videos*, TSN.ca, at minute 3:45 of 9:30 (Jan. 15, 2014), <http://www.tsn.ca/videohub/Default.aspx?collection=188&show=274129§ion=Sports>.

¹⁴⁰ See *Price Waterhouse*, 490 U.S. at 295.

C. Gay Athletes Are Protected Under New York State and New York City Human Rights Law

New York State Human Rights Law (“NYSHRL”) section 296 (1)(a)¹⁴¹ and New York City Human Rights Law (“NYCHRL”) section 8-107 (a)(1)¹⁴² have similar statutory language and include sexual orientation as a protected class. Specifically, courts have interpreted NYCHRL as being most favorable for plaintiffs.¹⁴³ Unlike NYSHRL, which requires a showing that the harassment was “sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment,”¹⁴⁴ courts have determined that under NYCHRL “liability should be determined by the existence of unequal treatment, and questions of severity and frequency reserved for consideration of damages.”¹⁴⁵ The difference in the courts’ interpretation of the two statutes can be critical to the outcome of a discrimination claim brought by a gay athlete. A gay athlete can, and should, sue under both NYSHRL and NYCHRL to increase his likelihood of success, but is most likely to prevail under NYCHRL.¹⁴⁶

In *Williams v. New York City Housing Authority*,¹⁴⁷ the court noted that the traditional “severe or pervasive” test prior courts used to analyze discrimination claims under NYSHRL “reduces the incentive for employers to create workplaces that have zero tolerance for conduct demeaning to a worker because of protected class status” because it sets a higher burden of proof for the plaintiff.¹⁴⁸ The court in *Williams* stated that

¹⁴¹ See N.Y. Exec. Law § 296(1)(a) (McKinney 2010). (“It shall be an unlawful discriminatory practice: (a) For an employer or licensing agency, because of an individual’s age, race, creed, color...sexual orientation...to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment”).

¹⁴² See N.Y. ADC. Law § 8-107(1)(a) (1991) (“It shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color...sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment”).

¹⁴³ See N.Y.C. Local Law No. 85 §1 (2005), Local Civil Rights Restoration Act of 2005 (amending NYC’s Human Rights Law in order to clarify its scope and to stop courts from interpreting the City’s Human Rights Law too narrowly. The Restoration Act’s purpose was to make sure courts construed the Human Rights Law liberally for the accomplishment of its uniquely broad and remedial purposes).

¹⁴⁴ See *Farrugia v. North Shore Univ. Hosp.*, 820 N.Y.S.2d 718, 724 (N.Y. Sup. Ct. 2006).

¹⁴⁵ *Farrugia*, at 725; see *Williams v. N.Y.C. Hous. Auth.*, 872 N.Y.S.2d 27, 38 (App. Div. 1st Dept. 2009) (following *Farrugia*, that the issues of “severity and pervasiveness are applicable to the consideration of the scope of permissible damages, but not to the question of underlying liability”).

¹⁴⁶ See Rozenberg, *supra* note 16 at 22-24.

¹⁴⁷ *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 872 N.Y.S.2d 27 (2009).

¹⁴⁸ *Id.*

NYCHRL's deterrent effect is most effective, as liability is determined "simply by the existence of differential treatment."¹⁴⁹ The court stated further that focusing on unequal treatment based on protected class status, "regardless of whether the conduct is 'tangible (like hiring or firing) or not,' is in fact the approach that is most faithful to the uniquely broad and remedial purposes of the local statute."¹⁵⁰ Under this ruling, all harassing conduct based on protected class status is actionable except for conduct that a "reasonable victim of discrimination would consider 'petty slights and trivial inconveniences.'"¹⁵¹ Additionally, the court stated that the burden is on the employer, not the employee, to show that the conduct at issue was no more than a "petty slight" or "trivial inconvenience."¹⁵² In contrast to the requirements under NYSHRL. Therefore, a gay athlete suing under NYCHRL, according to *Williams*, has a lower standard to prove that he was subject to differential treatment because of his sexual orientation.

To establish a claim of hostile work environment under NYCHRL, a "plaintiff must show that (1) he belongs to a protected group; (2) he was subjected to unwelcome sexual harassment; and (3) the harassment complained of was based upon his [protected status]."¹⁵³ A gay athlete can satisfy the first element by simply stating that he is gay.¹⁵⁴ The second element will be based on factual circumstances surrounding the athlete's claim. A gay athlete could cite locker room conduct; language used by teammates, coaches, team staff, and league employees; name-calling; violence; discrepancies in playing time; and other discriminatory conduct to show he was subject to unwelcome harassment. Finally, presenting evidence of slurs such as "faggot" or "homo" could satisfy the third element of a gay athlete's claim, as this pejorative and abusive language would likely be considered more than "petty slights and trivial inconveniences."¹⁵⁵ Additionally, comments such as those allegedly made by Utah Jazz owner Larry H. Miller instructing gay athletes to "stay where [they] are,"¹⁵⁶ were obviously based on players' sexual orientation and would show that the harassment was based upon protected status.¹⁵⁷

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 40.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Farrugia v. North Shore Univ. Hosp.*, 820 N.Y.S.2d 718, 724 (N.Y. Sup. Ct. 2006).

¹⁵⁴ *See Rozenberg*, *supra* note 16 at 23.

¹⁵⁵ *Williams*, 872 N.Y.S.2d 27 (App. Div. 1st Dept. 2009).

¹⁵⁶ *Gay former NBA player, John Amaechi, calls out Larry Miller, Tony Dungy for homophobic views*, SPORTINGNEWS.COM (May 17, 2011), <http://www.sportingnews.com/nba/story/2011-05-17/gay-former-nba-player-john-amaechi-calls-out-larry-miller-tony-dungy-for-homopho>.

¹⁵⁷ A team or league may attempt to argue that all players, regardless of sexual orientation, are

Although sports culture is hostile towards gay athletes, the law does not accept that individuals should be subjected to discrimination based on hyper-masculine stereotypes. Courts have determined that discrimination claims based on an individual's failure to adhere to gender stereotypes are actionable under Title VII.¹⁵⁸ NYSHRL and NYCHRL both specifically protect employees against discrimination by their employers based on their sexual orientation,¹⁵⁹ and leagues meet the criteria to be considered an athlete's employer.¹⁶⁰ Gay athletes should be educated about the fact that these protections exist; if the knowledge that discrimination based on sexual orientation is legally actionable becomes widespread, it is possible that some of the fear and uncertainty faced by gay athletes would be alleviated.

III. ALL FOUR MAJOR SPORTS LEAGUES ARE TAKING STEPS TO FOSTER AN ATMOSPHERE OF ACCEPTANCE

While legal protections exist, the issue of adjusting attitudes and cultural norms remains a challenge; within each league, players and other individuals have taken steps towards adjusting the climate towards gay athletes. Several NFL players have attempted to expand the NFL's steps toward acceptance of LGBT athletes; Chris Kluwe, formerly of the Minnesota Vikings,¹⁶¹ Baltimore Ravens' Brendon Ayanbadejo, and the New Orleans Saints' Scott Fujita are all ambassadors for Athlete Ally, an organization working to end homophobia in sports.¹⁶² All three athletes have openly spoken out against homophobia and actively defended LGBT rights.¹⁶³ Kluwe encouraged gay players to come out; while admitting that a gay player will be subject to media attention and heightened scrutiny, he asserted that an openly gay player would not be considered a distraction but

subject to being called "faggot" and exposed to the same hostile work environment. However, courts have rejected "equal opportunity discrimination defenses. See Rozenberg, *supra* note 16 at 23.

¹⁵⁸ See note 112-113 and accompanying text.

¹⁵⁹ See note 137-138 and accompanying text.

¹⁶⁰ See *supra* Part III.

¹⁶¹ Ben Goessling, *Kluwe: Cut Due To Outspoken Views*, ESPN.COM (Jan. 3, 2014) http://espn.go.com/nfl/story/_id/10232522/chris-kluwe-former-member-minnesota-vikings-says-was-cut-due-views.

¹⁶² See Chris Kluwe, *An Openly Gay Player in the NFL is not a Distraction*, A Special to CNN, CNN.COM (Apr. 1, 2013), <http://www.cnn.com/2013/03/31/opinion/kluwe-gay-player-distraction/index.html>.

¹⁶³ See *Id.*; Dan Levy, *Time has Never Been Better for a Gay NFL Player to Come Out*, BLEACHERREPORT.COM (Mar. 27, 2013), <http://bleacherreport.com/articles/1583214-time-has-never-been-better-for-a-gay-nfl-player-to-come-out>.

rather a teammate and friend.¹⁶⁴

The NFL has made progress, but there are still examples of negative attitudes towards gay players within the league.¹⁶⁵ In 2012, the San Francisco 49ers were the first team to film an “It Gets Better” video.¹⁶⁶ “It Gets Better” is an organization whose website features hundreds of videos from teams, groups and individuals eager to voice their support to encourage acceptance and hope for LGBT teens who are bullied. What should have been a celebrated event marking change in the NFL turned into a controversy when the co-founder of “It Gets Better” pulled the video in response to the 49ers players denying their involvement.¹⁶⁷ When asked about the video, 49ers linebacker Ahmad Brooks and lineman Isaac Sopoaga both claimed ignorance of the video’s intentions and declined to comment.

The NFL has acknowledged that further steps need to be taken to promote acceptance of LGBT athletes. In June 2013, the NFL added the topic of sexual orientation to its Rookie Symposium schedule.¹⁶⁸ While discussing the symposium and the possibility of an openly gay player, NFL Commissioner Roger Goodell said: “I don’t think [openly gay players in the NFL] will just be tolerated, I think [they] will be accepted. These are individuals who play in our league. We’re all different in some fashion, and we’re accepting of our differences. That’s what this is all about.”¹⁶⁹

Major League Baseball added sexual orientation as a protected class to

¹⁶⁴ See Chris Kluwe, *An Openly Gay Player in the NFL is not a Distraction*, A Special to CNN, CNN.com (Apr. 1, 2013), <http://www.cnn.com/2013/03/31/opinion/kluwe-gay-player-distraction/index.html>.

¹⁶⁵ John Breech, *Dolphins fine and suspend DB Don Jones for anti-Michael Sam tweet*, CBSSPORTS.COM (May 11, 2014), <http://www.cbssports.com/nfl/eye-on-football/24559187/dolphins-fine-and-suspend-db-don-jones-for-anti-michael-sam-tweet> (“Miami Dolphins defensive back Don Jones has been fined an undisclosed amount by the team following an incident on Saturday where he sent out a tweet critical of Michael Sam. Jones has also been banned from team activities until he undergoes sensitivity training.” Jones tweeted “OMG Horrible,” in response to Sam’s public kiss with his boyfriend after being drafted to the St. Luis Rams).

¹⁶⁶ Kevin Kaduk, *‘It Gets Better’ Movement Pulls 49ers Video After Two Players Deny Participation in Anti-bullying Ad*, YAHOSPORTS.COM (Feb. 1, 2013), <http://sports.yahoo.com/blogs/nfl-shutdown-corner/gets-better-movement-pulls-49ers-video-two-players-214212867--nfl.html>.

¹⁶⁷ *Id.*

¹⁶⁸ See Ryan Wilson, *2013 NFL Rookie Symposium to Address Sexual Orientation*, CBSSPORTS.COM (June 18, 2013), <http://www.cbssports.com/nfl/eye-on-football/22467458/nfl-rookie-symposium-to-address-sexual-orientation>; James Brady, *2013 NFL Rookie Symposium to Feature Speakers on Sexual Orientation*, SBNATION.COM (June 18, 2013), <http://www.sbnation.com/nfl/2013/6/18/4443548/rookie-symposium-2013-sexual-orientation>.

¹⁶⁹ Ryan Wilson, *2013 NFL Rookie Symposium to Address Sexual Orientation*, CBSSPORTS.COM (June 18, 2013), <http://www.cbssports.com/nfl/eye-on-football/22467458/nfl-rookie-symposium-to-address-sexual-orientation>.

its CBA in 2011.¹⁷⁰ New York Attorney General Eric Schneiderman, MLB Commissioner Allan Selig, and current representative of the players association Tony Clark unveiled the new CBA protection during the MLB All-Star Fanfest convention.¹⁷¹ The MLB has been serious in encouraging gay athletes to feel comfortable about their sexuality. Unlike the NFL, the MLB has had several teams successfully launch “It Gets Better” videos.¹⁷² The San Francisco Giants were the first professional sports team to make a video for the organization.¹⁷³ Steps such as those taken by the MLB are necessary to change sports culture and combat homophobia.

The National Hockey League was the first league to prohibit discrimination based on sexual orientation in its 2005 CBA,¹⁷⁴ and this trend has continued with the adoption of the 2012 CBA.¹⁷⁵ In April 2013, the NHL announced a formal partnership with You Can Play,¹⁷⁶ an organization dedicated to ensuring athletes are given a fair opportunity to compete without regard to sexual orientation.¹⁷⁷ The NHL and You Can Play campaign will help educate NHL rookies on sexual orientation issues. The NHL offers behavioral health programs, traditionally recommended for substance abuse, but the league will begin to integrate counseling regarding matters of sexual orientation into their behavioral health program.¹⁷⁸ The NHL is moving in the right direction, but it does not change the fact that the NHL has not had an active player reveal that he is gay, and unlike the other three leagues, not even a retired player.¹⁷⁹

¹⁷⁰ MLB COLLECTIVE BARGAINING AGREEMENT, Article XV (2012), available at http://www.mlb.com/pa/pdf/cba_english.pdf.

¹⁷¹ Lila Shapiro, *Homophobia and Baseball: Fans React to MLB's Plan to Combat Discrimination*, THE HUFFINGTON POST (July, 18 2013), http://www.huffingtonpost.com/2013/07/17/homophobia-baseball_n_3607620.html.

¹⁷² See *San Francisco Giants to Make 'It Gets Better' Video to Combat Homophobia*, SPORTINGNEWS.COM (May 18, 2011), <http://www.sportingnews.com/mlb/story/2011-05-18/san-francisco-giants-to-make-it-gets-better-video-to-combat-homophobia>; ESPN, *Pirates, A's Make "It Gets Better" Videos*, ESPN.COM (May 5, 2012), http://espn.go.com/blog/playbook/visuals/post/_id/1701/pirates-as-make-it-gets-better-videos.

¹⁷³ See *San Francisco Giants Release 'It Gets Better' Video*, SPORTINGNEWS.COM, <http://www.sportingnews.com/mlb/story/2011-06-01/san-francisco-giants-release-it-gets-better-video>.

¹⁷⁴ See Michael Pearson, *NHL Partners with Advocacy Group to Stamp Out Homophobia*, CNN.COM (Apr. 12, 2013), <http://www.cnn.com/2013/04/11/us/sports-nhl-tolerance/>.

¹⁷⁵ NHL COLLECTIVE BARGAINING AGREEMENT, Article 7.2 (2012), available at http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLP_A_2013_CBA.pdf.

¹⁷⁶ Jeff Z. Klein, *N.H.L. and Players Union Take Lead on Gay Issues*, THE NEW YORK TIMES (Apr. 11, 2013), http://www.nytimes.com/2013/04/12/sports/hockey/nhl-and-players-union-take-lead-on-gay-issues-with-you-can-play-project.html?_r=0.

¹⁷⁷ See YOU CAN PLAY PROJECT, *Our Cause*, <http://youcanplayproject.org/pages/our-cause>.

¹⁷⁸ Jeff Z. Klein, *N.H.L. and Players Union Take Lead on Gay Issues*, THE NEW YORK TIMES (Apr. 11, 2013), http://www.nytimes.com/2013/04/12/sports/hockey/nhl-and-players-union-take-lead-on-gay-issues-with-you-can-play-project.html?_r=0.

¹⁷⁹ See Steve Keating, *NHL Ready for Arrival of First Gay Player*, REUTERS (Apr. 30, 2013),

The National Basketball Association added sexual orientation as a protected class to its CBA in 2011.¹⁸⁰ The NBA was the first league to have an openly gay active player.¹⁸¹ There is no definite explanation as to why an NBA player was the first of the four major sports leagues to publicly announce his sexuality, but the NBA has made some strides towards LGBT acceptance within the league.¹⁸² In 2011, the NBA along with the Gay, Lesbian, and Straight Education Network launched a public service announcement during the NBA Playoffs.¹⁸³ The commercial featured NBA star Grant Hill and his teammate on the Phoenix Suns, Jared Dudley, and Hill expresses how it is uncool to use gay when you mean dumb or stupid.¹⁸⁴ A month before the commercial aired, the NBA took another step toward acceptance of LGBT athletes by fining NBA superstar Kobe Bryant \$100,000 for calling a referee a homophobic slur.¹⁸⁵ This move was significant because it sent a message to the other players in the league; if NBA superstar and five-time champion Kobe Bryant cannot get away with using gay slurs, then no one will.

IV. SPORTS LEAGUES AS ACTORS ON A NATIONAL SCALE

The movement for LGBT equality has experienced several major victories as of the date this Note was written in 2014. In 2004, Massachusetts became the first state to legalize gay marriage.¹⁸⁶ As of 2014, twenty states and the District of Columbia followed suit¹⁸⁷ and in 2015, the Supreme Court held that states can no longer ban same-sex

<http://www.reuters.com/article/2013/04/30/us-nba-gay-nhl-idUSBRE93T18220130430>.

¹⁸⁰ NBA COLLECTIVE BARGAINING AGREEMENT, Article XXX (2011), available at <http://www.scribd.com/doc/172760974/NBA-NBPA-CBA-2011>.

¹⁸¹ See Jason Collins and Franz Lidz, *Why NBA Center Jason Collins is Coming Out Now*, *Sports Illustrated* (May 2013), available at <http://sportsillustrated.cnn.com/magazine/news/20130429/jason-collins-gay-nba-player/#all>.

¹⁸² Although it was not in response to discrimination of LGBT athletes, the NBA has recently shown that it will not tolerate discrimination of any kind by banning the owner of the L.A. Clippers Donald Sterling. Sterling was banned for life from the NBA for using racial slurs. This also shows the power the NBA wields to combat discrimination from both players and management. See *Donald Sterling receives lifetime ban*, ESPN.COM (Apr. 30, 2014), http://espn.go.com/los-angeles/nba/story/_/id/10857580/donald-sterling-los-angeles-clippers-owner-receives-life-ban-nba.

¹⁸³ See Karmah Elmusa, *The NBA's Full-Court Press Against Homophobia*, MOTHER JONES (May 19, 2011); <http://www.motherjones.com/mixed-media/2011/05/nba-gay-slur-campaign-barkley-lgbt>.

¹⁸⁴ *Id.*

¹⁸⁵ See *id.*; see also *Kobe Bryant fined \$100,000 for gay slur*, ESPNLOSANGELES.COM (Apr. 15, 2011), <http://sports.espn.go.com/los-angeles/nba/news/story?id=6344596>.

¹⁸⁶ *Same-Sex Couples Ready to Make History in Massachusetts*, CNN.COM (May 17, 2004), <http://www.cnn.com/2004/LAW/05/17/mass.gay.marriage/>.

¹⁸⁷ *Map: Same Sex Marriage in the United States*, CNN.COM, <http://www.cnn.com/interactive/us/map-same-sex-marriage/> (last updated Jun. 26, 2015)

marriages.¹⁸⁸ This general trend was supported by the June 2013 Supreme Court decision, *United States v. Windsor*,¹⁸⁹ to strike down Section Three of the Defense of Marriage Act (“DOMA”),¹⁹⁰ which defined marriage as between one man and one woman and thereby denied legally married gay couples federal benefits.¹⁹¹ In the eight months following this landmark ruling, fifteen different courts relied upon *Windsor* and the change to DOMA to strike down legislation preventing the recognition of gay marriage as a constitutionally protected right.¹⁹² Several states, including the historically conservative states of Kentucky and Indiana, have appeals pending after anti-gay legislation was struck down in court.¹⁹³ However, a total of thirty states still have statutory or constitutional bans on same-sex marriage,¹⁹⁴ and anti-gay legislation is still being produced by state legislatures.

The major sports leagues have not sidelined themselves from the national discourse regarding the advancement of LGBT equal rights. On February 19, 2014, the Arizona House of Representatives passed Senate Bill 1062.¹⁹⁵ SB 1062¹⁹⁶ sought to amend the Religious Freedom Restoration Act, thereby allowing business owners to refuse service to prospective LGBT patrons as long as the refusal was based upon firmly held religious beliefs.¹⁹⁷ Proponents of the bill argued that the bill merely protected the religious freedom of private business owners, but its critics,

¹⁸⁸ *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) (holding that “[t]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty . . .”).

¹⁸⁹ *US v. Windsor* 133 S. Ct. 2675 (2013).

¹⁹⁰ Defense of Marriage Act, HR 3396.

¹⁹¹ Roberta Kaplan, *If Doma Was The Battle Of Normandy, This Week Was The Liberation Of Paris*, THE GUARDIAN (Mar. 1, 2014), <http://www.theguardian.com/commentisfree/2014/mar/01/doma-gay-marriage-rulings-this-week>.

¹⁹² *Id.*

¹⁹³ Niraj Chokshi, *Federal Judge Strikes Down Kentucky’s Ban On Same-Sex Marriage*, THE WASHINGTON POST.COM (July 1, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/07/01/federal-judge-strikes-down-kentuckys-same-sex-marriage-ban/>.

¹⁹⁴ <http://www.cnn.com/interactive/us/map-same-sex-marriage/> (last visited July 6, 2014); see also Masuma Ahuja, et al., *The Changing Landscape On Same-Sex Marriage*, WASHINGTONPOST.COM (Feb. 27, 2014) <http://www.washingtonpost.com/wp-srv/special/politics/same-sex-marriage/>.

¹⁹⁵ *Arizona Senate OKs bill boosting service refusal*, AZCENTRAL.COM (Mar. 3, 2104) <http://www.azcentral.com/news/politics/free/20140219arizona-senate-oks-bill-boosting-service-refusal.html>.

¹⁹⁶ See language of proposed legislation at <http://www.azleg.gov/legtext/51leg/2r/bills/sb1062p.pdf>.

¹⁹⁷ Ray Sanchez & Miguel Marquez, *Arizona lawmakers pass controversial anti-gay bill*, CNN.COM (Feb. 21, 2014) <http://www.cnn.com/2014/02/21/us/arizona-anti-gay-bill/index.html?ref=allsearch>.

including Senator Ana Tovar (D-AZ), felt that the bill would “permit discrimination under the guise of religious freedom.”¹⁹⁸ Arizona is home to teams from all four major sports leagues: the Cardinals (NFL), the Suns (NBA), the Coyotes (NHL) and the Diamondbacks (MLB). Arizona is also slated to host Super Bowl XLIX in 2015. Adding to mounting pressure from businesses, the public, fellow politicians, and economists for Governor Jan Brewer to veto the bill,¹⁹⁹ the MLB and the NFL released league statements opposing SB 1062, and the Phoenix Suns released a joint statement with the WNBA’s Arizona Mercury.²⁰⁰

Additionally, through its public relations Twitter account, the MLB released a statement in which it invoked the memory of Jackie Robinson and stated that the league and its thirty teams “stand united behind the principles of respect, inclusion and acceptance. . . We welcome individuals of different sexual orientations, races, religions, genders and national origins.”²⁰¹ The statement went on to say that the MLB “has a zero-tolerance policy for harassment or discrimination based on sexual orientation, as reflected by [the MLB CBA]. Accordingly, MLB will neither support nor tolerate any words, attitudes or actions that imperil the inclusive communities that we have strived to foster within our game.”²⁰² The Suns and the Mercury’s joint statement echoed this sentiment, stating in part that “[both teams] are steadfastly committed to the principles of inclusivity and acceptance, and cannot support anything that is not in line with that philosophy.”²⁰³

The potential of lost revenue for Arizona from the 2015 Super Bowl makes the actions taken by the NFL possibly the most impactful. In response to the bill, NFL Spokesman Greg Aiello wrote, “Our policies emphasize tolerance and inclusiveness and prohibit discrimination based on age, gender, race, religion, sexual orientation or any other improper standard. We are following the issue in Arizona and will continue to do so

¹⁹⁸ Cindy Carcamo, *Gay Rights Activists In Uproar Over Arizona ‘Religious Freedom’ Bill*, LATIMES.COM (Feb. 20, 2014) <http://www.latimes.com/nation/nationnow/la-na-nn-ff-gay-rights-arizona-bill-20140220,0,6953661.story#axzz2ul20u99P>.

¹⁹⁹ Ray Sanchez & Miguel Marquez, *Arizona lawmakers pass controversial anti-gay bill*, CNN.COM (Feb. 21, 2014) <http://www.cnn.com/2014/02/21/us/arizona-anti-gay-bill/index.html?iref=allsearch>.

²⁰⁰ Tim Daniels, *NFL, MLB, NBA, WNBA Teams React to Arizona’s Controversial Bill*, BLEACHERREPORT.COM (Feb. 26, 2014) <http://bleacherreport.com/articles/1974264-sports-world-reacts-to-arizonas-controversial-anti-lgbt-bill>.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

should the bill be signed into law. . .”²⁰⁴ Following this announcement, the NFL reportedly began investigating the necessary steps to remove Super Bowl XLIX from Arizona.²⁰⁵ This was not the first time that a controversy over equal rights threatened an Arizona Super Bowl; in 1993, the game, and its revenue, was moved from Arizona to California after state voters did not approve recognition of Rev. Martin Luther King, Jr. Day as a holiday.²⁰⁶ On February 26, 2014, Governor Brewer vetoed SB 1062.²⁰⁷

Each league now protects players from sexual orientation discrimination, and each league has implemented league specific campaigns to generate a culture of inclusion within their sport. The four major sports leagues have moved in the right direction, but the fact still remains, *only two of the 4,000* active players have come out. If the leagues are serious about change, which they appear to be,²⁰⁸ they should be willing to do more to implement additional measures necessary to protect gay athletes and build a culture of acceptance. Legal protections against discrimination and harassment due to sexual orientation are essential, but additional factors play into gay athletes’ decisions not to disclose their orientation. If gay athletes remained hidden solely because they were not a part of an enumerated protected class, then the NHL should have been the league with the first active gay player due to its early protections for this group.²⁰⁹ Gay athletes’ decisions not to disclose their sexual orientation are multifaceted, as evidenced by the testimony of Esera Tuaolo, John Amaechi, and Jason Collins.²¹⁰ The following section proposes further action that the four major sports leagues should take to continue the process of creating a culture of acceptance, not in steps but in bounds.

²⁰⁴ *Id.*

²⁰⁵ Don Banks, *Source: NFL Begins Exploring Super Bowl XLIX Relocation Options*, SPORTS ILLUSTRATED (Feb. 26, 2014), <http://sportsillustrated.cnn.com/nfl/news/2014/02/26/super-bowl-xl-ix-relocation-arizona/#ixzz2uT6QlOqC>.

²⁰⁶ *Id.*

²⁰⁷ Catherine E. Shoichet & Halimah Abdullah, *Arizona Gov. Jan Brewer vetoes controversial anti-gay bill, SB 1062*, CNN.COM (Feb. 26, 2014) <http://www.cnn.com/2014/02/26/politics/arizona-brewer-bill/>

²⁰⁸ All four major sports leagues now include sexual orientation as a protected class in their anti-discrimination policy. *See above.*

²⁰⁹ The NHL has protected sexual orientation since 2005. *See* Michael Pearson, *NHL Partners with Advocacy Group to Stamp Out Homophobia*, CNN.COM (Apr. 12, 2013), <http://www.cnn.com/2013/04/11/us/sports-nhl-tolerance/>.

²¹⁰ *See supra* Part I.

V. A UNIFIED APPROACH OF ACCEPTANCE SHOULD BE IMPLEMENTED BY THE FOUR MAJOR SPORTS LEAGUES, ALONG WITH A TWO-PART EDUCATIONAL PROGRAM

There are several reasons why a gay athlete may not feel free to disclose his sexual orientation, some of which may be mitigated by awareness of existing legal protections. A gay athlete has the legal protections afforded by Title VII, as it has been interpreted in several cases to include anti-gay bias as a form of sexual discrimination, and New York State and New York City Human Rights Laws. Gay athletes are also protected by bans on sexual orientation discrimination in the CBAs of all four major sports leagues. As a consequence, an openly gay athlete would have recourse if a team official fired him. The leagues should ensure that players understand the legal protection available to them to ensure that all players understand their options. While knowledge and awareness of these legal protections may mitigate fear and feelings of isolation for gay athletes, this is only part of the problem. The solutions proposed in this section are aimed at creating a culture of acceptance in the four major sports leagues in hopes of eliminating “the locker room closet.”²¹¹ This Note offers two specific solutions that each league should implement. First, the four major sports leagues should combine to create a uniform advertising campaign addressing the misconception that athletes cannot be both gay and welcomed in sports. Second, each league should implement a two-part educational program for team staff, administrators and officials in which they are educated on how to foster an atmosphere of acceptance and about the legal ramifications of discriminating against gay players.

A. A Uniform Advertising Campaign Will Foster a Culture of Acceptance

Sports leagues have little control over the actions of their fans, but they have control over the message conveyed to the fans. In order to convey a message of acceptance the NBA aired an anti-homophobia commercial,²¹² the MLB made videos for the “It Gets Better” campaign,²¹³ the NHL has

²¹¹ See Dave Zirin, *The Locker Room Closet*, LA TIMES (Feb. 18, 2007), available at <http://articles.latimes.com/2007/feb/18/opinion/op-zirin18>.

²¹² See Karmah Elmusa, *The NBA's Full-Court Press Against Homophobia*, MOTHER JONES (May 19, 2011); <http://www.motherjones.com/mixed-media/2011/05/nba-gay-slur-campaign-barkley-lgbt>.

²¹³ See *San Francisco Giants to Make 'It Gets Better' Video to Combat Homophobia*, SPORTINGNEWS.COM (May 18, 2011), <http://www.sportingnews.com/mlb/story/2011-05-18/san-francisco-giants-to-make-it-gets-better-video-to-combat-homophobia>; *ESPN Pirates, A's Make "It Gets Better" Videos*, ESPN.COM (May 5, 2012), http://espn.go.com/blog/playbook/visuals/post/_id/1701/pirates-as-make-it-gets-better-videos.

teamed up with You Can Play in an attempt to rid the league of homophobia.²¹⁴ The NFL has made an “It Gets Better” video, but after players denied involvement in the video, the organization’s co-founder removed the video from public domains.²¹⁵ Individually, these attempts are noble, but a unified campaign against discrimination and harassment of gay players in sports would transcend preconceived stereotypes and solidify the four major sports leagues’ stance in the eyes of their fans.

The campaign should include the messages of the You Can Play, “It Gets Better,” and the NBA’s anti-homophobia campaign.²¹⁶ All of these initiatives convey the message that gay athletes should be welcomed and appreciated,²¹⁷ and the proposed collaborative multi-league campaign should do the same. The damaging effects of hyper-masculine stereotypes, including the fear, anxiety and emotional toll that expectations to live up to this stereotype takes on players,²¹⁸ as well as the misperception that a player cannot be both gay and a valued member of a professional team,²¹⁹ should be addressed as part of this campaign. The campaign’s purpose should be fan education. The campaign should clearly state that homophobic remarks have no place in sports; that a player should never, at any stage of sport, be bullied for any reason; and that a player’s talent is based on his ability not his sexual orientation. The multi-league campaign should be aired during major regular season games and throughout each leagues’ playoff games to ensure maximum exposure to sports fans. When fans see that players from each league are supporting athletes regardless of their sexual orientation, then the fans will likely follow the players’ example. Additionally, having a multi-league campaign emphasizing that

²¹⁴ Jeff Z. Klein, *N.H.L. and Players Union Take Lead on Gay Issues*, THE NEW YORK TIMES (Apr. 11, 2013), http://www.nytimes.com/2013/04/12/sports/hockey/nhl-and-players-union-take-lead-on-gay-issues-with-you-can-play-project.html?_r=0.

²¹⁵ Kevin Kaduk, *‘It Gets Better’ Movement Pulls 49ers Video After Two Players Deny Participation in Anti-bullying Ad*, YAHOO SPORTS.COM (Feb. 1, 2013), <http://sports.yahoo.com/blogs/nfl-shutdown-corner/gets-better-movement-pulls-49ers-video-two-players-214212867--nfl.html>.

²¹⁶ See *San Francisco Giants to Make ‘It Gets Better’ Video to Combat Homophobia*, SPORTINGNEWS.COM (May 18, 2011), <http://www.sportingnews.com/mlb/story/2011-05-18/san-francisco-giants-to-make-it-gets-better-video-to-combat-homophobia>; ESPN, *Pirates, A’s Make ‘It Gets Better’ Videos*, ESPN.COM (May 5, 2012), http://espn.go.com/blog/playbook/visuals/post/_id/1701/pirates-as-make-it-gets-better-videos; Karmah Elmusa, *The NBA’s Full-Court Press Against Homophobia*, MOTHER JONES (May 19, 2011), <http://www.motherjones.com/mixed-media/2011/05/nba-gay-slur-campaign-barkley-lgbt>.

²¹⁷ *Id.*

²¹⁸ See, e.g., Esera Tualo & John Rosenberg, *ALONE IN THE TRENCHES: MY LIFE AS A GAY MAN IN THE NFL* (2006).

²¹⁹ See TSN, *ReOrientation Part One: the Culture of Casual Homophobia – ReOrientation Videos*, TSN.ca, at minute 3:45 of 9:30 (Jan. 15, 2014), <http://www.tsn.ca/videohub/Default.aspx?collection=188&show=274129§ion=Sports>.

each player's talent is his most important trait will mitigate a gay athlete's fear of how fans will react to an openly gay player.²²⁰

The cost of buying airtime to advertise these commercials should be evenly split among the four leagues; this will ensure that each league has a monetary interest in the success of the campaign. Having leagues split costs would likely not be a contentious issue due to the fact that each league has already taken steps to create an atmosphere of acceptance in the league. Furthermore, it should not be difficult to find players willing to play a role in this multi-league campaign; as already noted, the leagues have already done similar commercials or videos, indicating that there is a preexisting pool of athletes from which to draw support.

A multi-league campaign will have benefits beyond changing fans' attitudes; it will also have desirable effects on young gay athletes. Athletes are common role models for young people. When a young athlete sees professional players of all sports coming out against homophobia, then that young gay athlete might be more willing to be open about his sexual orientation at a younger age.

B. Two-Part Educational Program

Each league should have a yearly mandatory educational program for league and team staff. The program should have a dual focus. First, the leagues should educate players and staff members on how to foster an atmosphere of acceptance in the locker room and on the field or court. The program should have former players, like John Amaechi and Esera Tuaolo, tell their stories of how they struggled while keeping their sexual orientation hidden, and what league and team staff can do to ensure future gay athletes feel comfortable to come out of the closet. Leagues already require players to attend similar educational programs; for example, the NFL includes sexual orientation as a topic of discussion during its Rookie Symposium.²²¹ These programs will be most effective if they are done in conjunction with a program specifically for team staff, administrators and officials. These individuals might be the ones who are in the best position

²²⁰ John Amaechi expressed fears of how fans would react and what would happen to his work off the court, such as his charity. *See supra* note 62 and accompanying text.

²²¹ The NBA, NFL and MLB each have mandatory rookie training programs. *See* LEGENDS OF BASKETBALL, *Rookie Transition Program* (Feb. 1, 2012), <http://www.legendsofbasketball.com/2012/02/rookie-transition-program/>; Tim Brown, YAHOSPORTS.COM, *Top Rookies are Taught Life Lessons* (Jan. 16, 2008), <http://sports.yahoo.com/news/top-rookies-taught-life-lessons-011100480--mlb.html>; *see supra* note 163 and accompanying text.

to effect cultural change because of their positions in leadership and their ability to discipline players who detract from the desired culture of acceptance.

The educational program proposed for league and team staff should teach them how to engage athletes and other staff members who use homophobic remarks or exhibit homophobic tendencies to maximize the effectiveness of the education players receive. By listening to speakers, such as former players, who were victimized by the culture of discrimination, they will be able to understand the negative effects of discrimination and likely show an increased willingness to intervene if they witness discrimination or victimization. Educating league and team staff about the negative effects a homophobic locker room has on closeted gay athletes will hopefully diminish the hyper-masculine and homophobic culture of professional sports.

The first part of the educational program should be supplemented with a course on the legal ramifications and league sanctions for discrimination of gay athletes. The leagues should make it clear that they will support a gay athlete who claims he is being subjected to discrimination based on his sexual orientation.²²² The second part of the educational program is to make league and team staff aware homophobia is forbidden in sports, and if discrimination takes place then league and team staff can be fired, sued and fined.²²³ Taking a clear stance that leagues will be on the side of gay athletes will put league and team officials on notice that remarks such as the one former Utah Jazz owner made in his locker room, instructing gay athletes to “stay where [they] are,”²²⁴ will in no way be tolerated.

Conclusion

Sports are, undoubtedly, a major facet of American culture. As fans, we look to professional athletes as role models and as celebrities that entertain us. Certain athletes have even taken on, or been thrust into, the role of pioneer, changing the way our culture perceives a social justice issue.²²⁵ Jason Collins stepped into that pioneering role when he announced that he was gay; he is the first active athlete in any of the four major sports leagues

²²² This is evidenced by the professional sports leagues' stance against the Arizona S.B. 1062 and the addition of sexual orientation to each leagues' CBA. See *supra* Part III and IV.

²²³ Leagues should make league and team staff aware of the monetary loss they can face due homophobia in their locker room or discriminatory acts against gay athletes.

²²⁴ See *supra* notes 59-62 and accompanying text.

²²⁵ See *supra* notes 17-21 and accompanying text.

to disclose his sexuality.²²⁶

The culture of sports is dominated by a masculine stereotype to which athletes are expected to conform, and the stereotype of a gay player does not fit into this expectation. Fears of being ridiculed by fans, teammates or coaches, along with fears that their careers will be terminated if their sexual orientation is revealed, have caused many gay athletes to hide their sexuality. Gay athletes should understand that they have legal recourse if they are discriminated against because of their sexual orientation. Gay athletes are afforded protection from discrimination based on sexual orientation through courts' interpretations of Title VII sex-based discrimination and explicitly under New York State and New York City Human Rights Laws.

In addition to legal protections, each league has listed sexual orientation as a protected class in its collective bargaining agreements. Legal and league protection should alleviate the fear that teams will act negatively toward an openly gay athlete. However, further action can be taken by the leagues to help a gay athlete feel free to reveal his sexual orientation without fear of discrimination if he chooses to do so. By implementing a multi-league advertising campaign with the purpose of fan education, leagues can help ensure that an openly gay athlete will receive less ridicule or negative treatment from fans. Additionally, requiring team staff, administrators and officials to attend yearly educational training will help implement an attitude of acceptance in the locker room.

There have been signs of the hyper-masculine sports culture beginning to change; from leagues weighing in on Arizona's SB 1062 to their inclusion of protections in their CBAs, steps have been made in the right direction. Still, there is more to be done. By implementing the proposed solutions offered in this Note and by continuing to effect changes both internally and on a national level, sports can once again be the vehicle for progress that they have historically been.

²²⁶ See Jason Collins & Franz Lidz, *SPORTS ILLUSTRATED, Why NBA Center Jason Collins is Coming Out Now* (May 2013), available at: *Sports Illustrated* Article: <http://sportsillustrated.cnn.com/magazine/news/20130429/jason-collins-gay-nba-player/#all>.