NOTES

FAIRNESS ON THE FIELD: AMENDING TITLE VII TO FOSTER GREATER FEMALE PARTICIPATION IN PROFESSIONAL SPORTS*

I. INTRODUCTION

Professional sports are as much a part of American culture[1] as apple pie, "mom," and the Fourth of July. At an early age, participation in sports provides a framework in which children learn important lessons about communication, teamwork, and competition that they will carry throughout their lives.[2] In adulthood, professional sports provide entertainment, excitement, and perhaps a salary. However, most of the children participating in, and the adults earning a living from, sports are male.[3] Indeed, the history of professional sports is scarred with yet another American cultural tradition: sexism.[4]

Social and cultural messages of the "proper" roles for women

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1 "Culture is, in essence, a pattern of expectations about what are appropriate behaviors and beliefs for the members of the society." MARGARET L. ANDERSEN, THINKING ABOUT WOMEN: SOCIOLOGICAL AND FEMINIST PERSPECTIVES 47 (1983).

2 Janet Lever, *Sex Differences in the Complexity of Children's Play and Games*, 43 AM. SOC. REV. 471 (1978). This comprehensive study of fifth graders reveals that the games children participate in affect their conceptualization of themselves as well as others. Sex roles develop, Lever argues, through the ways that boys and girls view the rules and goals of the games in which they participate. Boys interact in games, whereas girls simply play; more specifically, boys' games have more rules and are more competitive than girls' games. Lever concludes that games prepare boys for leadership and organizational skills, whereas they prepare girls to be nurturing—thereby disadvantaging girls for participation in the competitive world.

3 It was only after the passage of Title IX, 20 U.S.C. §§ 1681-1688 (1972), which prohibits sex discrimination in any educational program or activity receiving federal funds, that the number of female athletes at the non-professional level increased. For example, in 1971, boy athletes in the Chicago area outnumbered girls by 3.5 million. By 1991 however, this margin had decreased to 1.5 million. While these numbers shrink, they continue to represent a gender difference in terms of participation at the amateur level. Bob Sakamoto, *Girls in Athletics No Longer a Big Deal*, CHI. TRIB., Mar. 27, 1992, at C14. On the professional level, however, women remain the minority. *See, e.g.*, WALTER CHAMPION, SEX DISCRIMINATION, THE FUNDAMENTALS OF SPORTS LAW 346 (1990).

4 Wendy Olson, *Beyond Title IX: Toward an Agenda for Women and Sports in the 1990s*, 3 YALE J.L. & FEMINISM 105, 136 (1991) (arguing that lack of female participation in professional sports is a "role imposed on women, not one that they have chosen"). *See also* Mary Becker, *The Politics of Women's Wrong and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453 (1992).

> Media sports pervade American culture, and almost all sports heroes are male. Women's team sports do not receive national television coverage. When women do appear in popular sports events, such as Olympic gymnastics or ice skating, aesthetics—watching the female body in motion in a revealing costume—dominate. Even women tennis stars (the most visible non-Olympic wo-

pervade virtually every aspect of an individual woman's being. From homelife to workplace, it is often difficult for women to escape cultural messages concerning what they should or ought to be doing in either of those spheres.[5] Part of this cultural message is that participation in sports is not a particularly female agenda to pursue.[6] Sports are a site where so-called "natural" sex differences are articulated, developed, and perpetuated with rewards and punishments for each gender.[7]

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men athletes in the national media) are held to an aesthetic standard more demanding, especially with respect to weight, than that applied to men.

Id. at 487. *See also* Nat'l Org. for Women v. Little League Baseball, Inc., 318 A.2d 33, 35 (N.J. 1974) (Little League Baseball, in attempting to keep girls from participating, argued that "Little League in its nature is reasonably restricted to boys . . . .").

[5] A recent illustration of these cultural messages was the 1992 presidential campaign's focus on the life choices made by Marilyn Quayle and Hillary Rodham Clinton. The fact that Ms. Quayle had left her law practice to attend to her home, whereas Ms. Rodham Clinton remained working, was assumed to reveal the level of family values that each candidate and his wife possessed. *See, e.g.*, Marilyn Quayle, *Workers, Wives and Mothers*, N.Y. TIMES, Sept. 11, 1992, at A17.

In her recent book, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990), Harvard law school professor Martha Minow points out that "choices by working women . . . [are] influenced . . . by shifting social attitudes about appropriate roles for women. These larger patterns [become] real . . . when internalized and experienced as individual choice." *Id.* at 73-74 (footnote omitted). Similarly, Professor Deborah Rhode contends that working women with children are forced to respond to "competing cultural cues [where they] must put . . . family first, but must not permit it to interfere with [their] employment obligations." Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1184 (1988) (footnotes omitted). In fact, studies have concluded that income disparities between the genders often result from women choosing jobs where fewer hours are necessary or opting for less competitive career tracks in order to fulfill family obligations. *E.g.*, ELLEN FRANKEL PAUL, EQUITY AND GENDER: THE COMPARABLE WORTH DEBATE 49 (1989). These messages impact differently on women who are poor, lesbian, "minority," or differently abled. Indeed, the circumstance of the individual woman will affect the extent to which she is willing or capable of responding to cultural messages about her proper role in the home or at work. *See* PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 163 (1991). *See also* GLORIA I. JOSEPH & JILL LEWIS, COMMON DIFFERENCES: CONFLICTS IN BLACK AND WHITE FEMINIST PERSPECTIVES (1981).

[6] Olson, *supra* note 4, at 119. ("Women athletes face old-fashioned . . . stereotypes about their gender and their place—or lack thereof—in the world of sport."). *Id.* at 119. Professor Marc Fajer has similarly argued that "women may be encouraged to 'accept' their female role and may opt out of 'masculine' activities such as sports programs out of fear of being labeled a 'dyke.'" Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes and Legal Protection for Lesbian Women and Gay Men*, 46 U. MIAMI L. REV 511, 622 (1992) (footnotes omitted).

[7] Susan Jewett summed up this phenomenon, stating:

> Athletic achievement is not part of the "proper" behavior pattern for females, and female athletic endeavor has often been regarded with amusement if not ridicule by the male athletic establishment . . . . Women's sports are simply not regarded as a serious endeavor and female athletes are treated accordingly. Athletics are considered to be a masculine activity with participation by women viewed as an anomaly to be firmly discouraged.

Susan Jewett, *The ERA and Athletics*, 1 HARV. WOMEN'S L.J. 53, 60-61 (1978) (footnotes omitted). Furthermore, undertones of homophobia provide a context for critiquing athletic ability of male and female athletes, labeling an incapable male athlete as gay and a capable female athlete as a lesbian. The psychological purpose of this phenomenon is beyond the scope of this Note, but Professor Catherine MacKinnon has articulated the situation for women well:

A nexus between socialization and the occupational choices made in adulthood reveals that greater male participation in professional sports is largely a result of deeply ingrained psychological ideals concerning gender roles.[8] Girls and boys receive different cultural messages from their participation in childhood activities. One scholar has noted that "through play, children learn the skills of social interaction, develop cognitive and analytical abilities, and are taught the values and attitudes of their culture."[9] These and other gender-specific childhood experiences affect adults differently.[10] In terms of professional sports, socialization can lead, in part, to the appeal of sports that adult males experience and, by the same token, to a general ambivalence towards sports that adult females experience.[11] Participation in, or watching, professional

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> If you doubt that we are not allowed to [participate in athletics,] I suggest that we can tell we've broken some rules when people start calling us what they consider epithets. We all know that women athletes are considered unfeminine. This is integrally related to the fact that women athletes are experienced as having physical self-respect . . . [such] that when a woman comes to own her own body, that makes her heterosexuality problematic . . . .

CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 122 (1987).

8 *See* P.B. Coats and S.J. Overman, *Childhood Play Experiences of Women in Traditional and Nontraditional Professions*, 24 SEX ROLES 261 (1992) (finding that professional business women had participated more in competitive sports as children and—along with women in nontraditional professions—had more male playmates, and fewer female playmates, than did women in traditional professions). Cynthia Fuchs Epstein observes the interconnectedness of these issues:

> [C]ultural views of the proper attitudes and behavior for each sex are communicated to boys and girls through the messages of their parents, the images provided by the media, and the communications of teachers and friends; these messages are then internalized, with consequences for adult life. *Socialization contributes to sex segregation by creating in males and females specific orientations, preferences, and competencies for occupations that have been defined as sex appropriate, while leaving men and women disinclined toward or ignorant of opportunities to pursue other occupations.* Thus, socialization is often considered to limit the kinds of occupationally relevant training women acquire and to account for women's and men's choices among kinds of work.

CYNTHIA FUCHS EPSTEIN, DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER 137 (1988) (emphasis added).

9 ANDERSEN, *supra* note 1, at 52.

10 For an extensive theory concerning the impact of gender roles on childhood development, see CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

11 *See* Denise H. Solomon and Micheal E. Roloff, *Sex Typing, Sports Interests, and Relational Harmony, in* MEDIA, SPORTS, AND SOCIETY 290 (Lawrence A. Wenner ed., 1989) ("Empirical evidence supports the notion that males are more likely than females to participate in sports [and] to prefer watching them on television . . . ." (citations omitted)). Support for this concept was also found in a 1991 study sponsored by *Sports Illustrated*, in which 42 percent of all men responded that they were "very interested" in sports, compared with 19 percent of all women interviewed. Similarly, in a 1985 study conducted by the Roper Organization with almost 2,000 participants, 88 percent of the people interviewed stated it was more true of men than women that men enjoy watching sports on television. Roper Center for Public Opinion Research, U. Conn., Roper Report 84-89, *available in* WESTLAW, Poll Database.

sports as adults, reproduces the experiences of childhood and illuminates gender roles assumed in adult lives.

In the United States, the cultural reverence of professional sports is so acute that one sociologist argues that sports "ha[ve] replaced formal religion as a dominant force in the lives of many Americans, undoubtedly mostly male."[12] It follows that professional sports deserve great attention by feminists, for they provide a site in which a transformation of gender roles is possible and can lead to social change toward equality.[13] In fact, it has been argued that transforming professional sports to include more women will in turn give all women a greater sense of control over,[14] appreciation of, and pride in their bodies,[15] thereby empowering all of their life choices. Greater participation by women in professional sports also will broaden society's traditional views concerning women's capabilities, thereby altering socialization and occupational choices.[16]

Professor Catherine MacKinnon argues that one reason why few women are involved in professional sports is that the pervasive cultural message that they are physically incapable negates the desire to be involved.[17] Female participation in professional sports is important in order to dissolve the foundation of male dominance occurring in that arena which, if left unquestioned, legitimizes all forms of domination and oppression.[18] However, because female

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12 Olson, *supra* note 4, at 136 (quoting Edward Hall, *Desegregating Sexist Sport, in* OUT OF THE BLEACHERS 188 (S. Twin ed., 1979)).

13 "[T]he objective is not only to equalize athletic opportunities, but also to transform them." Deborah Rhode, *The "No Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1763 (1991). Wendy Olson contends that "[a] flood of women into sport[s] at all levels . . . will . . . begin to eradicate false stereotypes . . . and have an immediate impact upon the model of sport in American society." Olson, *supra* note 4, at 146.

14 *See* MACKINNON, *supra* note 7, at 122 ("[A]thletics can give [women] a sense of an actuality of our bodies as our own rather than primarily as an instrument to communicate sexual availability.").

15 *See* Lyn Lemaire, *Women and Athletics: Toward a Physicality Perspective*, 5 HARV. WOMEN'S L.J. 121, 135 (1982) (While "[w]omen have traditionally suffered from low body image[,] . . . physical self-awareness developed through athletic movement could begin to remedy this problem.").

16 *See supra* notes 1-10 and accompanying text. An argument has also been made that greater female participation in both amateur and professional male teams may decrease the occurrence of violence against women by breaking down the sexism which pervades those spheres, which in turn has been found to instigate violence against women. "[A]thletic teams are breeding grounds for rape, particularly gang acquaintance rape. They are organizations which pride themselves on the physical aggressiveness of their members[.] . . . Athletic teams are often populated by men steeped in sexist, rape-supportive beliefs." ROBIN WARSHAW, I NEVER CALLED IT RAPE 112 (1988).

17 "The notion that women cannot do certain things, cannot break certain records, cannot engage in certain physical pursuits has been part of preventing women from doing those things." MACKINNON, *supra* note 7, at 119.

18 Bell Hooks has argued:

> We live in a world . . . governed by politics of domination . . . [where] the belief

participation is necessary to challenge the existing structure of professional sports, and because so few women participate, it is not surprising that professional sports remain an arena where women have had difficulty entering and achieving equality.

While women have made significant headway into other nontraditional occupations,[19] professional and amateur sports have remained largely out of reach.[20] Historically, amateur athletic opportunities available to women were considered socially acceptable because the lack of physical contact suited a woman's "delicate" needs.[21] This narrow conception of capacities has made it difficult for women and girls to participate in the full range of ath-

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> in a notion of superior and inferior and its concomitant ideology—that the superior should rule over the inferior—affects the lives of all people everywhere. . . . Feminism . . . must understand that patriarchal domination shares an ideological foundation with racism and other forms of group oppression, that there is no hope that it can be eradicated while these systems remain intact.

Bell Hooks, *Feminism: A Transformational Politic, in* THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 185-88 (Deborah L. Rhode ed., 1990).

19 *See generally* Sylvia Law, *"Girl's Can't be Plumbers"—Affirmative Action for Women in Construction: Beyond Goals and Quotas*, 24 HARV. C.R.-C.L. L. REV. 45 (1989) (reviewing the gains for women in the trades). *Contra* SUSAN FALUDI, BACKLASH 388 (1991) (arguing that while white-collar opportunities for women increased in the 1980s, Reaganomics resulted in a decrease of blue-collar jobs; the participation of women in the few remaining blue-collar jobs resulted in a "violent explosion" of opposition to them). Faludi quotes then Executive Director of Non-Traditional Employment for Women, Mary Ellen Boyd, who stated the reality in the 1980s was that "women [were] far more economically threatening in blue-collar work, because there . . . [were] a finite number of jobs from which to choose." *Id.*

20 Lack of female participation in professional sports is apparent in the scarcity of female players and employees on male professional teams. There have been a few limited "firsts" in the past year: Manon Rheaume the first woman to ever play in the history of the National Hockey League. George Vecsey, *The Goalie Who Just Wants to Improve*, N.Y. TIMES, Oct. 18, 1992, at 28. Sherry Davis, the first woman to become a public-address announcer in the history of major league baseball. Ms., July/Aug. 1993, at 85. Julie Krone, the first woman to win the Belmont Stakes and Kentucky Derby. Martha Weinman Lear, *She's No Jockette*, N.Y. TIMES MAGAZINE, July 25, 1993. In spite of these recent developments, professional sports remain almost 100 percent male.

The development of women's professional teams has also failed to result in employment opportunities for women. This is due largely to the fact that women's professional teams have a difficult time financially. In a recent *Ms.* magazine article, women's professional teams were described as a "spectacular failure." "Since the mid-seventies, every professional league—softball, basketball, and volleyball—has gone belly-up. . . . The prospects for women's professional teams do not look bright . . . while fans may show up, sponsors, investors and the media do not." Kate Rounds, *Why Men Fear Women's Teams*, Ms., Jan./Feb. 1991, at 43.

Furthermore, the opportunities within professional sports that do exist for women remain racially segregated. It has been argued that African-American women are typecast for particular sports, resulting in a dual barrier: "African-American women who have overcome the barriers to entering athletics next face the barrier of being dragged into only a handful of sports." Olson, *supra* note 4, at 129.

21 Lemaire, *supra* note 15, at 129 (describing the development of half-court basketball rules as a reaction to popular "conception[s] of lady-like behavior in the Victorian Age"). *See also* Olson, *supra* note 4, at 109 ("In the early part of the 20th century, women athletes were to engage only in physical activity that allowed them to walk a fine line—exercise was to make them better women without imbalancing their delicate physiques." (citation omitted)).

letic opportunities open to their male counterparts in both the amateur and professional spheres.[22] However, the second wave of feminism, and the changing conceptualizations of women's capacities that resulted, began the struggle for women and girls who sought access to traditionally male sports.[23]

Seeking access to male-dominated sports clubs was not easy; women and girls met great resistance in their quest for participation and litigated for the simple chance to try out for the team.[24]

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[22] On the amateur level of intercollegiate and high school sports, concepts of physical difference have been successfully articulated as reasons for maintaining separate programs for each sex. The concept of "separate but equal" has been almost consistently applied to amateur sports teams and is the reason given to keep girls off boys' teams. *See, e.g.*, O'Connor v. Board of Educ. of Sch. Dist. 23, 545 F. Supp. 376 (N.D. Ill. 1982); Israel v. W. Va. Secondary Sch. Act. Comm'n, 388 S.E.2d 480, 484 (W. Va. 1989) (citing Michael M. v. Sonoma County, 450 U.S. 464, 484 (1981), for the proposition that the Supreme Court has upheld statutes when gender-based discrimination has reflected realistic differences between men and women). Applying this as the legal basis for maintaining separate teams, the court in *Israel* stated that separate teams are justified by *one or more* of the following reasons: "(1) there are physical and psychological differences between males and females; (2) the maintenance of separate teams promotes athletic opportunities for women; and, as a corollary to (2), (3) if there were not separate teams, men might dominate in certain sports." 388 S.E.2d at 484 (footnote omitted). These same notions of the physical and psychological differences between men and women are articulated outside the legal system as well. For example, when girls were first allowed to participate in Little League, Mimi Murray, the past president of the National Association for Girls and Women in Sport, remembered the hostility of the male participants: "The coaches were all male, and they decided to try to preclude girls from participating. Some men define masculinity in and through sports, so to have females in a sport, what could be more threatening?" Kate Rounds, *Where is Our Field of Dreams?*, Ms., Sept./Oct. 1991, at 44. More recently, Colgate University was forced by a federal judge to elevate women's hockey to a varsity sport and to provide equal athletic opportunities for its male and female players after women hockey players challenged the unequal funding for the two teams. *See Colgate Told to Upgrade Women's Team*, N.Y. TIMES, Sept. 30, 1992, at B12. Even in professional sports, gender difference has been used to exclude women.

Boxing competitions provide an example of how gender difference is derived from the social conception of the sport itself and subsequently transposed onto the legal context. In Lafler v. Athletic Bd. of Control, 536 F. Supp. 104 (W.D. Mich 1982), the Athletic Board of Control of the state of Michigan sought to dissolve a temporary restraining order halting a Golden Gloves competition until Jill Lafler was allowed to try out. The court granted the dissolution of the order and stated that, while no women's competition existed (hence a failure of the separate but equal test), allowing Ms. Lafler to participate "would be irresponsible and possibly dangerous to [her] and other women who might wish to box competitively." *Id.* at 107.

[23] Historian Howard Zinn states that in the "[s]ixties and seventies the women's liberation movement began to alter the nation's perception of women in the workplace, in the home, and in relationships with men, other women, and children." HOWARD ZINN, DECLARATIONS OF INDEPENDENCE: CROSS-EXAMINING AMERICAN IDEOLOGY 291-92 (1990). *See* Glen M. Wong & Richard J. Esnor, *Sex Discrimination, in Athletics: A Review of Two Decades of Accomplishments and Defeats*, 21 GONZ. L. REV. 345, 348 (1985/86) ("Participation in and funding of women's athletics have increased for many reasons. One major factor is the drastic change in society's attitudes toward women, including women's own perception about their athletic capabilities and participation." (citation omitted)). Those who sought access to professional sports in the 1960s have enabled the women of today to have the realistic desire to participate. For example, in a recent article, sportswriter Marie Brenner wrote, "[M]y daughter, Casey, aged 10 . . . is convinced of her future as a first baseman [sic] for the Red Sox." Marie Brenner, *Girls of Summer*, N.Y. TIMES, Apr. 5, 1993, at A17.

[24] *See, e.g.*, Nat'l Org. for Women v. Little League Baseball, Inc., 318 A.2d 33 (N.J. 1974)

Since the late 1970s and early 1980s, as a result of the passage of federal legislation[25] and legal triumphs,[26] women and girls have been participating on the amateur and intercollegiate level in greater numbers. Although women and girls have become active participants, the sports environment as a whole has not proven itself hospitable to their presence.[27] Furthermore, while women and girls receive more training at the non-professional level, professional teams and organizations remain hostile to their participation and are largely untouched by any advancements made by women in non-professional sports.[28] The effect of the history and tradition of female exclusion from professional sports forces women who currently seek access, or damages for, employment discrimination from within professional sports, to swim upstream against the cultural notions that professional sports are for men only.

This Note will examine the challenges faced by women in professional sports. Part II will review the history of women in baseball and discuss *Postema v. National League of Professional Baseball Clubs*[29] as a case study of current employment discrimination law in this area. Part III will suggest a framework for evaluating employment discrimination actions arising out of professional sports, taking into consideration the historical exclusion and traditional sexism within sports. Part IV of this Note will consider a proactive mandatory injunction remedy for prevailing plaintiffs. A

(affirming an order of the State Division of Civil Rights to admit girls aged 8 to 12 to participate in the Little League program of New Jersey).

25 CHAMPION, *supra* note 3, at 346-49 (pointing to Title VII of the Civil Rights Act of 1964, Title IX of the 1972 Education Amendments of 20 U.S.C.S. § 1681(a), and the National College Athletic Association 1984 Statement on Civil Rights as being of great importance to women's participation in sports in greater numbers since the 1970s).

26 *Basketball*: O'Connor v. Board of Educ. of Sch. Dist. 23, 545 F. Supp. 376 (N.D. Ill. 1982); Dodson v. Arkansas Activities Ass'n, 468 F. Supp. 394 (E.D. Ark. 1979); Jones v. Oklahoma Secondary Sch. Activities Ass'n, 453 F. Supp. 150 (W.D. Okla. 1977). *Football*: Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020 (W.D. Mo. 1983). *Baseball*: Nat'l Org. for Women v. Little League Baseball, Inc., 318 A.2d 33 (1974); Magill v. Avonworth Baseball Conference, 516 F.2d 1328 (3d Cir. 1975); Israel v. West Virginia Secondary Sch. Activities Comm'n, 388 S.E.2d 480 (W. Va. 1989).

27 *See* Postema v. Nat'l League of Professional Baseball Clubs, 799 F. Supp. 1475 (S.D.N.Y. 1992) (employment discrimination action based on sexual harassment and gender discrimination brought by a female umpire); Franklin v. Gwinnet County Public Sch., 911 F.2d 617 (11th Cir. 1990), *aff'd*, 117 L. Ed. 208 (1992) (court awarded damages to a graduated high school student sexually harassed by her coach).

28 *See supra* note 22 and accompanying text. It has been argued that "discrimination is more tolerated in the area of athletics than in the areas of housing and employment . . . ." Comment, *Sex Discrimination: Another Hurdle in the Road to Equality*, 7 LOY. ENT. L. J. 167, 167 (1987).

29 799 F. Supp. 1475 (S.D.N.Y. 1992) (Pamela Postema sought Title VII damages from the National Baseball League after they refused to promote her to the major leagues as an umpire.).

mandatory remedy of this sort is currently unavailable under § 2000e-5(g) of the Civil Rights Act of 1964 as amended in 1991.

II. *DIAMONDS ARE A GIRL'S BEST FRIEND:* WOMEN AND THE STRUGGLE TO PARTICIPATE IN PROFESSIONAL BASEBALL

A. *Women Players*

The history of women in baseball begins with professional softball, always perceived as a less strenuous, more "ladylike" game. Softball began in the late 1800s and caught on quickly throughout the country. Women were active participants on softball teams by the mid-1930s[30] while only a smattering of amateur baseball opportunities for women existed.[31] As men's professional baseball was becoming organized, however, women were not encouraged to, and rarely did, participate in that pursuit.[32] An exception was made when chewing gum entrepreneur, Phil Wrigley, formed the All-American Girls League which played its first game of baseball in 1943.[33]

The All-American Girls League began with the purpose of "provid[ing] entertainment during World War II"[34] while male players were away fighting. The League struggled, however, with the fact that women were playing professional baseball, considered to be outside the proper realm of acceptable sex roles. The League became something of a finishing school, which focused on the development of "proper" sex roles alongside athletic capability. A woman's appearance became the primary focus of the League and athletic ability remained secondary.[35] Beauty expert Helena

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30 LOIS BROWNE, GIRLS OF SUMMER: IN THEIR OWN LEAGUE 17 (1992).

31 Karen L. Tokarz, *Separate But Unequal Educational Sports Programs: The Need for a New Theory of Equality*, 1 BERKELEY WOMEN'S L.J. 201, 226 (1985).

32 However, there were exceptions. One woman, Jackie Mitchell, was actually signed with the Class A Chattanooga Lookouts in 1931. She was a seventeen year-old pitcher who pitched against legends like Babe Ruth and Lou Gehrig, striking both men out in an exhibition game of the 1931 season. However, with the possibility that the floodgates would open and women could try out, play, and actually succeed at baseball, then Baseball Commissioner Landis quickly voided Mitchell's contract. BROWNE, *supra* note 30, at 17. When pressed for a reason for voiding the contract, Landis stated, "[B]aseball [is] too strenuous for women." Michael Abramowitz, *Hits and Misses . . .; Women Pitch Their Own Baseball League*, WASH. POST, July 2, 1992, at C1. *See also* BARBARA GREGORICH, WOMEN AT PLAY: THE STORY OF WOMEN IN BASEBALL (1993) (history of women's participation in professional baseball).

33 BROWNE, *supra* note 30, at 193. Karen Tokarz notes, however, that women's professional baseball teams began in the 1880s with the Female Baseball Club. Tokarz, *supra* note 31, at 226. It is significant to note that all of the women in the All-American League were white; no African-American women ever played, although two tried out but were not placed due to so called "various views from different cities." BROWNE, *supra* note 30, at 194.

34 Tokarz, *supra note* 31, at 226.

35 "While not enough fans are willing to watch women play traditional team sports, they love to watch women slugging it out on roller-derby rinks and in mud-wrestling arenas. . . .

Rubinstein was hired to teach the women lessons of "charm" school, and mandatory lessons were given on how to eat, sit, walk, and apply make-up.[36] When Rubinstein's tenure with the League ended, all of the women were given the "Guide for All-American Girls: How to Look Better, Feel Better, Be More Popular," which read in part:

> The All-American girl is a symbol of health, glamor, physical perfection, vim, vigor and a glowing personality. Being included on the All-American roster is indeed a privilege to be granted only to those who are especially chosen for looks, deportment and feminine charm, in addition to natural athletic ability. The accent, of course, is on neatness and feminine appeal. That is true of appearances on the playing field, on the street or in leisure moments. Avoid noisy, rough and raucous talk and actions and be in all respects a truly All-American Girl.[37]

The League survived for only eleven years, failing primarily for financial reasons and the return of the male soldiers at the end of World War II. Yet, by the time it was over, women had played professional baseball, and although it had been for meager funds with little job security, they had tested their own capacities on a professional level in a way women today cannot. The League slipped quietly into history, and it was not until 1988 that a permanent display was erected in the Baseball Hall of Fame, symbolizing the National Baseball Association's recognition of the League.[38]

After the All-American League disappeared, women were left with the choice of organizing their own professional teams or attempting to gain access to male ones. A review of the legal battles for access to male sports teams illustrates that the focus employed by courts was one which evaluated the physiological differences between the two sexes—namely whether alleged differences were sufficient to legally exclude girls from boys' teams.[39] It has been argued that "[t]he average physical differences between males and females do not render *all* females athletically inferior to *all* males."[40] Nevertheless, even when women attempted to participate in professional sports on managerial levels, they were confronted

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The importance of what women [athletes] wear cannot be underestimated." Rounds, *supra* note 22, at 43. *See also* Becker, *supra* note 4 and accompanying text (analysis of the media emphasis on female athletes' physical appearance rather than their skill).

[36] BROWNE, *supra* note 30, at 43.

[37] *Id.* at 45-46.

[38] *Id.* at 194.

[39] *See supra* note 22 and accompanying text.

[40] Tokarz, *supra* note 31, at 219.

with perceived gender differences and forced to enter into litigation concerning the appropriateness of allegedly *bona fide* occupational qualifications ("BFOQ"s).[41] The experience of women umpires in professional baseball provides a clear example of this.

B. *Women Umpires*

The first woman ever hired as an umpire was Bernice Gera. Gera initially was offered a contract in 1969 with the Class-A New York-Pennsylvania Minor League.[42] However, the President of the National Association of Professional Baseball voided the contract based on height and weight requirements, BFOQs, that Gera did not meet. Earlier, the president of the League rejected Gera's request for an application to umpiring school stating: "It is our professional opinion that it would be unwise to expose you or any other lady to [umpiring] situations."[43] In order to become an umpire, Gera brought an action under New York State law.[44] She ultimately prevailed in 1972. The court held that the BFOQ requirements were not necessary because male applicants who did not fit them had been allowed to participate in the past.[45]

Gera finally was awarded a position as an umpire in the New York-Pennslyvania League.[46] Once employed, however, Gera was the victim of extreme harassment by the participants in the game, and received no support from her supervisor or the rest of organized baseball.[47] As a result, Gera terminated her employment and

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[41] Employers may make employment decisions based on sex only if that decision is based on "*bona fide* occupational qualification[s] reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(i) (Law. Co-op. & Supp. 1988). An assertion of a BFOQ defense is an admission of discrimination with a justification. For a thorough review of the defense, see Stephen F. Befort, *BFOQ Revisited: Johnson Controls Halts the Expansion of the Defense to Intentional Sex Discrimination,* 52 OHIO ST. L.J. 5 (1991). *See* New York State Div. of Human Rights v. New York-Pennsylvania Professional Baseball League, 320 N.Y.S.2d 788 (1971) (Bernice Gera successfully challenged the BFOQ of height and weight for umpiring in baseball.).

[42] Craig Davis, *She Never Wanted to Be a Pioneer, First Female Ump Just Loved Baseball,* CHI. TRIB., Oct. 8, 1989, at C10. *See also* PAM POSTEMA, YOU'VE GOT TO HAVE B*LLS TO MAKE IT IN THIS LEAGUE: MY LIFE AS AN UMPIRE 20 (1992) (describing Gera's experience); *Woman Who Fought System to Umpire Dies,* USA TODAY, Sept. 25, 1992, at 2C (reviewing Gera's career).

[43] New York State Div. of Human Rights v. New York-Pennsylvania Professional Baseball League, 320 N.Y.S.2d 788, 791 (1971).

[44] *Id.*

[45] Comment, *Narrowing the Scope of the Bona Fide Occupational Qualification Exception—Sex Discrimination in Professional Baseball Runs Afoul of the Law—New York State Division of Human Rights v. New York-Pennsylvania Baseball League,* 6 U. RICH. L. REV. 435, 436 (1971).

[46] 320 N.Y.S.2d at 790.

[47] Gera told the *Chicago Tribune* that at her first game, none of the other umpires would speak to her and the players and fans taunted her. The game continued with these circumstances and came to a head when Gera made an incorrect call on a play which she quickly reversed. This did not stop a manager of one of the teams playing, to run onto the field and yell at Gera, "You made two mistakes. The first was leaving the kitchen; you should

subsequently her entire career after a single game.[48]

The second woman employed as an umpire in professional baseball was Chris Wren of Seattle, Washington. Wren was a softball umpire who apparently caught the eye of a Los Angeles Dodgers official who encouraged her to enter umpire school in 1974.[49] She graduated tenth in a class of 400 and was hired in 1975 to work as an umpire in the Northwest League, a low-level minor league. She remained an umpire until 1979, never rising above the A-level Midwest League.[50]

The third woman employed in professional baseball was Pamela Postema. Postema was the only woman to be employed for more than four years, and the only woman to be employed on any level above the Class A Minor League.[51] The final woman was Teresa Cox, who graduated fifth in her class of 180 umpires.[52] Cox never worked above the Rookie League, a level even below Class A.[53] Like Gera and Postema, Cox was the target of sexual harassment that ultimately ended her career.[54] Three of these stories share a common denominator: gender-based discrimination. Yet only one woman, Pamela Postema, has brought legal action based on her experiences. Postema's legal battle, currently pending in the Second Circuit, provides insight into the difficulty of such a case.

Postema v. National League of Professional Baseball Clubs[55] is an action for damages and injunctive relief alleging employment discrimination under 42 U.S.C. § 2000e, *et seq.* of the Civil Rights Act of 1964, as amended in 1991 (herein "Title VII").[56] From 1977 until November 1989, Postema was employed as an umpire in Minor League professional baseball.[57] Her goal, like that of her male

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have been home peeling potatoes." At this point, Gera ejected him from the game. Remembering the moment, she told the reporter, "[H]e was judging me as a woman, instead of as an official." Davis, *supra* note 42, at C10.

48 *Id. See also* Complaint at 7, Postema v. Nat'l League of Professional Baseball Clubs, 799 F. Supp. 1475 (S.D.N.Y. 1992).

49 POSTEMA, *supra* note 42, at 21.

50 Complaint, *supra* note 48, at 9.

51 *Id.* at 11.

52 Robin Finn, *Sports World Specials: Baseball; Ohioan on Deck*, N.Y. TIMES, Dec. 25, 1989, at 42.

53 Complaint, *supra* note 48, at 10.

54 Bruce Vielmetti reported, "[M]en within the umpiring fraternity harassed and abused her, ending her career because of prejudice against women umpires." Bruce Vielmetti, *Female Umpire Calls a Balk*, ST. PETERSBURG TIMES, Oct. 21, 1992, at 1B. *See also* Anna Quindlen, *I Don't Know Why a Young Lady Would Want this Job*, CHI. TRIB., Sept. 3, 1991, at C15.

55 799 F. Supp. 1475 (S.D.N.Y. 1992).

56 Postema also argued claims under the New York Human Rights Law, N.Y. Exec. L. § 297(9), and under a common law restraint of trade argument. These issues, while imperative to Postema's individual case, are beyond the scope of this Note.

57 799 F. Supp. at 1478-79.

co-workers, was to become an umpire in the Major Leagues, and by 1987, Postema alleged that she was "fully qualified to be a Major League umpire."[58] Though both the National and American Leagues at various times acknowledged that Postema had demonstrated her qualifications as an umpire in the Minor Leagues, they refused to offer her a Major League position.[59]

In her suit, Postema argues that male umpires were hired and promoted to positions in the Major Leagues over the years she was employed. Postema contends that these male umpires had "inferior experience, qualifications, and abilities, [yet they] were repeatedly and frequently promoted and hired by the National and American Leagues."[60] In 1989, the Baseball Office for Umpire Development asked the American and National Leagues if they would consider Postema for a position.[61] Postema now argues that both leagues knew that if they did not promote her, her position would be terminated.

During her tenure with the Minor Leagues, Postema constantly was confronted with sexual harassment from players and managers.[62] The court made the following findings of fact:

> * On numerous occasions, players and managers addressed her with a four-letter word beginning with the letter "c" that refers to female genitalia. * Players and managers repeatedly told Plaintiff that her proper role was cooking, cleaning, keeping house, or some other form of "women's work," rather than umpiring. * Bob Knepper, a pitcher with the Houston Astros, told the press that although Plaintiff was a good umpire, to have her as a major league umpire would be an affront to God and con-

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58 Complaint, *supra* note 48, at 13.

59 The district court made the following findings of fact, outlining Postema's achievements: In 1987, Postema was the home plate umpire for the Hall of Fame exhibition game between the New York Yankees and the Atlanta Braves; in 1988 she was selected to umpire the Venezuela All Star game; in 1988 and 1989, she was the chief of her umpire crew, with ultimate responsibility for its umpiring calls and performance and was appointed to umpire major league spring training games. In 1989, she was the home plate umpire for the first Triple-A Minor League All Star Game and asked by Triple-A to become supervisor for umpires in the minor league system. From 1987 to 1989, she received high praise from current and former managers of major league teams. 799 F. Supp. at 1478.

60 *Id.* at 1479.

61 Complaint, *supra* note 48, at 7.

62 799 F. Supp. at 1478 (The court described the acts as "continual, repeated and offensive."). Postema told *Ms.*, "I've been called every name you can think of . . . They say I don't belong in the game. I'm just a woman. Go back to your needle and thread. Go back to the kitchen. They put a frying pan on homeplate. They call me bitch and cunt." Rounds, *supra* note 22, at 45. Postema also reported in *The Sporting News* that a team mascot pulled a bra out of his uniform and a manager pulled off her umpiring mask and kissed her at home plate. Pam Postema, *Baseball Treating Women as Equals? Fat Chance; Our National Pastime has Proved it Will Never Welcome Female Umpires*, THE SPORTING NEWS, May 4, 1992, at 8.

> trary to the teachings of the Bible. * During arguments with players and managers, Plaintiff was spat upon and was subjected to verbal and physical abuse to a greater degree than male umpires. * In 1987, the manager of the Nashville Hounds kissed Plaintiff on the lips when he handed her his lineup card. * At a major league spring training game in 1988, Chuck Tanner, then the manager of the Pittsburgh Pirates, asked Plaintiff if she would like a kiss when he gave her his lineup card. * Although Plaintiff was well known throughout baseball as an excellent ball and strike umpire, she was directed and required by Ed Vargo, the Supervisor of Umpiring for the National League, to change her stance and technique to resemble those used by him during his career. No such requirement was placed on male umpires.[63]

Postema continually took action against such conduct through warnings, ejections, and reports. "Although the existence of such conduct was well known throughout baseball, no one in a position of authority, including [both the National and American Leagues], took action to correct, stop, or prevent [it] . . . ."[64]

Postema asserts two separate Title VII claims against the American League: a claim for failure to hire or promote and a claim for wrongful termination.[65] She offers both circumstantial and direct evidence, including, but not limited to, national media reports that acknowledged that discriminatory behavior existed. For example, Dick Butler, then Special Assistant to the President of the American League and the former supervisor of the umpires for the American League, commented to *Newsday*, "[Postema] realizes that she has to be better than the fellow next to her. She's got to be better because of the fact that she's a girl. I'm not saying it's fair, but it exists and she's not going to change it."[66] Similarly, Larry Napp, Assistant Supervisor of Umpires for the American League, told the *Richmond Times-Dispatch*, "The thing is, she's got to do the job twice as good as the guy."[67] Individual players also reported their views about Postema to the media. Particularly outspoken was Houston Astros pitcher Bob Knepper, who told *Sports Illustrated*, "[Umpiring] is not a position women should be in . . . [it's] God's society, woman was created in a role of submission to the husband."[68]

Neither the National nor the American League issued state-

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63 799 F. Supp. at 1478-79 (asterisks in original).
64 *Id.* at 1479.
65 *Id.* at 1480.
66 *Id.* at 1479.
67 *Id.*
68 Craig Neff, *Knepper's Wild Pitch*, SPORTS ILLUSTRATED, Mar. 28, 1988, at 15.

ments denying or rejecting these contentions; similarly, no person was ever disciplined for his treatment of Postema on or off the field. Nevertheless, the American League successfully defended the hiring or promotion claim. They argued that no one, male or female, was hired as an umpire in the Major Leagues during the time Postema sought the position, and since 1988 the League had hired only one umpire.[69] Furthermore, Postema's failure-to-hire claim was time-barred. A timely filing with the EEOC is a mandatory prerequisite to the maintenance of a Title VII claim.[70]

Professional baseball's treatment of Postema was not inconsistent with the male-dominated world of sports. Yet, this treatment is not acceptable, legally or socially. As a woman in nontraditional employment, Postema was in a particularly difficult position because she was the only female umpire on the field.[71] The court, however, at no point discussed the meaning of Postema's unique presence when deciding whether to grant the defendants a variety of pre-trial motions. To facilitate female participation in professional sports, courts need to broaden the examination under Title VII for actions arising out of similar fact patterns. As Postema's case continues, the Second Circuit should consider her allegations in the context of the history of exclusion and tradition of sexism within professional sports.[72]

III. TITLE VII JURISPRUDENCE

Title VII of the Civil Rights Act of 1964,[73] recently amended in 1991,[74] was one of many congressional efforts to eliminate the problem of discrimination in employment.[75] Title VII provides, in relevant part, "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual,

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69 799 F. Supp. at 1480-82.

70 *Id.* at 1480 (citing United Air Lines, Inc. v. Evans, 431 U.S. 553, 555 (1977)).

71 See *infra* note 114 and accompanying text for Vikki Shultz's analysis of women in nontraditional occupations.

72 The most recent legal action on Postema's case was the defendant's interlocutory appeal heard in the Second Circuit. The court held that the Civil Rights Act of 1991 is not retroactive with respect to jury trials and damages provisions. Postema v. League of Professional Baseball Clubs, 998 F.2d 60 (2d Cir. 1993) (per curiam).

73 Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (current version at 42 U.S.C. § 2000e to 2000e-17 (1988 & Supp. I 1993)).

74 The Civil Rights Act of 1991 has five Titles, each expanding or making additions to the original Act of 1964. For a comprehensive analysis of the Act, see Timothy D. Loudon, *The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?*, 71 NEB. L. REV. 304 (1992).

75 These laws include: Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1988); Pregnancy Discrimination Act, 42 U.S.C. § 2000(k); Equal Pay Act of 1963, 29 U.S.C. § 206; Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634; and Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794.

or otherwise to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of . . . sex . . . ."[76]

A Title VII plaintiff may be any victim of discrimination or sexual harassment who works for an employer that affects interstate commerce and has 15 or more employees.[77] To bring an action under Title VII, the complaining party must follow certain procedural steps. A plaintiff's first step is to file a complaint with an office of the Equal Employment Opportunity Commission ("EEOC"), which is responsible for overseeing employment discrimination claims.[78] Women in professional sports are employees of private employers, thus they must file with the EEOC within 180 days of the discriminatory act.[79] Once this complaint has been filed with the EEOC office, the agency serves notice upon the person against whom the complaint is made and conducts an investigation.[80] If the EEOC concludes that the complaint is valid, it will attempt to mediate the dispute without legal intervention. If this fails, the EEOC will either issue a "right to sue" letter or bring an action on behalf of the complaining party.[81] Once the "right to sue" letter has been received by the potential plaintiff, the complainant has ninety days to file an action in federal court.[82]

The EEOC guidelines articulate two types of sexual harassment claims a complaining party may have, commonly known as *quid pro quo* and hostile work environment claims. Under these guidelines sexual harassment includes:

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

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76 42 U.S.C. § 2000e-2(a)(1) (1988).

77 *Id.* § 2000e(b).

78 *Id.* § 2000e-5(a)-(b).

79 *Id.* § 2000e-5(e)(1) (Supp. I 1993). However, this time limit has been subject to waiver. *See* Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398 (1981) (holding "compliance with the filing period [is] . . . subject to waiver as well as tolling when equity so requires").

80 42 U.S.C. § 2000e-5(b).

81 *Id.* § 2000e-5(f)(1). The EEOC rarely litigates on behalf of its clients; however, if the agency chooses to, it costs nothing for the client and she may receive monetary awards. NATIONAL ORGANIZATION FOR WOMEN, NATIONAL ORGANIZATION FOR WOMEN LEGAL RESOURCE KIT: EMPLOYMENT - SEXUAL HARASSMENT 3 (1992).

82 42 U.S.C. § 2000e-5(f)(1).

> an intimidating, hostile, or offensive working environment.[83]

Both hostile work environment and *quid pro quo* claims can arise in any given work setting. In the professional sports arena, however, a hostile work environment claim is more likely and therefore will be the focus here.

Hostile work environment discrimination was first recognized as actionable under Title VII in *Bundy v. Jackson*,[84] and later was affirmed by the Supreme Court in *Meritor Savings v. Vinson*.[85] This type of harassment deprives a woman of "the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[86] The elements necessary for a hostile environment claim are generally:

> (1) the employee was a member of a protected class; (2) the employee was subjected to unwelcome sexual harassment; (3) the harassment was prompted simply because of the employee's gender; (4) the charged harassment affected a term, condition, or privilege of employment; and (5) the existence of respondeat superior liability.[87]

This definition can assist women in professional sports because it acknowledges that harassment can be prompted "simply because of gender," and, correspondingly, this definition has been interpreted to mean that the acts underlying a sexual harassment claim need not be sexual in nature.[88] Within this inquiry, however, the effect of the historical exclusion of women, the pervasiveness of sex role stereotypes, and the cultural meaning attached to male participation in professional sports clubs is minimized or simply not considered by courts. To completely examine a claim from a nontraditional occupation, like professional sports, elements such as its history and tradition of sexism should be evaluated. In fact, particular areas of Title VII jurisprudence, as well as congressional amendments to it, acknowledge that historical exclusion and the pervasiveness of stereotypes must be considered in discriminatory circumstances.[89] This is particularly true in professional sports

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[83] 29 C.F.R. § 1604.11(a) (1992).

[84] 641 F.2d 934 (D.C. Cir. 1981).

[85] 477 U.S. 57 (1986).

[86] *Id.* at 65.

[87] Trotta v. Mobil Oil Corp., 788 F. Supp. 1336, 1348 (S.D.N.Y. 1992). *See also* Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990); Collins v. Baptist Memorial Geriatric Ctr., 937 F.2d 190 (5th Cir. 1991); Burns v. McGregor Elec. Indus., 955 F.2d 559 (8th Cir. 1992).

[88] *See* Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988) ("Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances.").

[89] *Title VII Jurisprudence: Affirmative Action*—In Johnson v. Santa Clara Transp. Agency,

where the exclusion of women is "an unfortunate reality in the long history of sex discrimination."[90]

In *McDonnell Douglas v. Green*,[91] a test was established to determine how a plaintiff may establish a *prima facie* case of discrimination. The *McDonnell Douglas* test was developed to assist plaintiffs who lacked substantial direct evidence to support their case. The test shifts the burden from the plaintiff to the employer who must prove that the employment decision would have been made irrespective of the alleged discrimination.[92] The *McDonnell Douglas* test has three prongs: first, the plaintiff must show that she is a member of the class entitled to protection; second, that she applied and was rejected for the position at issue; third, that she was qualified for it, and the employer ultimately filled the position with someone outside of the protected class.[93] Generally, the *McDonnell Douglas* test has come to stand for the proposition that the plaintiff must

480 U.S. 616 (1987), a voluntary affirmative action program for women which authorized the Transportation Agency to consider "sex as a factor when evaluating qualified candidates for jobs in which [women] were poorly represented" was upheld by the Supreme Court. *Id.* at 622. This plan was challenged by a man who had been denied the promotion he was seeking which ultimately went to a female. The Court upheld the plan and stated, "[The] plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace." *Id.* at 642. Justice Brennan, who wrote the opinion, also noted that there are "strong social pressures" (*Id.* at 634 n.12) against women pursuing certain types of jobs and that this was adequate reason to uphold the validity of a program designed "[to] provide a more realistic indication of the degree to which sex should be taken into account in filling particular positions." *Id.* at 635.

The Court arrived at this decision by evaluating the exclusionary history of the Transportation Agency specifically, and nontraditional occupations generally. Professor Michel Rosenfeld has argued that *Johnson* stands for the proposition that "affirmative action in favor of women can be justified to remedy the present effects of *past social practices* . . . ." MICHEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY 204 (1991) (emphasis added). This proposition supports using the history of exclusion and tradition of sexism within professional sports to evaluate sex discrimination claims arising from professional sports.

Congressional Amendments: The Glass Ceiling Act of 1991—The Glass Ceiling Act of 1991 (Civil Rights Act of 1991), tit. II, §§ 201-210 (1991), established the first federally funded Glass Ceiling Commission to conduct studies on the "artificial barriers" confronted by women and minorities in the workforce. These studies, it is hoped, will then enable the Commission to make "recommendations concerning—(1) [the] elimina[tion] [of] artificial barriers to the advancement of women and minorities; and (2) increas[e] the opportunities and developmental experiences of women and minorities. . . ." Civil Rights Act 203(a). The establishment of the Commission represented a significant advancement for women and minorities in the workplace. It signaled a legislative recognition that "invisible . . . barriers block women from advancing [in the workplace]." 137 CONG. REC. S13057 (daily ed. Sept. 16, 1991) (statement of Sen. Bob Dole). It is this same invisibility that courts should be aware of in respect to stereotypes and individually held beliefs concerning women's participation in sports which constructively restricts their participation therein.

90 Tokarz, *supra* note 31, at 225.

91 411 U.S. 792 (1973).

92 *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977) ("[T]he *McDonnell Douglas* formula does not require direct proof of discrimination . . . .").

93 411 U.S. 792, 802 (1973).

illustrate, through the use of statistics, that there is a disparity in the workforce as compared to the applicant pool[94] and that similarly situated employees are treated differently.[95] The adequate articulation of the *McDonnell Douglas* standards, as construed by the EEOC, places the complaining plaintiff in the position of having "establishe[d] a presumption of [a] discriminatory motive, which the employer may rebut by articulating a legitimate nondiscriminatory reason for its action."[96] Simply stated, once the employer establishes or "articulat[es] a legitimate nondiscriminatory reason for its action . . . the plaintiff can prevail [only] by demonstrating that the defendant's articulated reason was not the true reason for the challenged employment decision."[97] Therefore, a plaintiff must be capable of producing evidence to rebut the articulated nondiscriminatory reason, namely adequate proof of the discriminatory reason for the employment decision. This is often a difficult burden to meet and due to the recent Supreme Court case, *St. Mary's Honor Center v. Hicks*,[98] a plaintiff's burden of proof has increased even more.

St. Mary's stands for the proposition that

> once a Title VII plaintiff succeeds in showing at trial that the defendant has come forward with pretextual reasons for its actions in response to a *prima facie* showing of discrimination, the fact finder still may proceed to roam the record, searching for some nondiscriminatory explanation that the defendant has not raised and that the plaintiff has had no fair opportunity to disprove.[99]

This rule gives the employer capacity to present to a fact finder limitless excuses and reasons for denying an employment benefit or an actual job. This means "proof [that] the falsity of the employer's articulated reasons will not even be sufficient to sustain judgment for the plaintiff,"[100] which leaves plaintiffs in a position of disfavor and "exempt[s employers] from responsibilities [and] lies."[101]

As discussed earlier, in Postema's case, the National Baseball League defended the *McDonnell Douglas* standard by stating that they hired no umpires during the period of Postema's complaint

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94 Martin v. Citibank, 762 F.2d 212, 216 (2d Cir. 1985).
95 Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981).
96 449 Lab. L. Rep. (CCH) 3 (1992).
97 *Id.* at 3-4.
98 *1993 U.S. LEXIS 4401 (1993)*.
99 *Id.* at *42 (1993) (Souter, J., dissenting).
100 *Id.* at *58.
101 *Id.* at *63.

due to an absence of vacancies.[102] The court agreed with the National Baseball League and stated that Postema did not establish a *prima facie* case because she could not show she was treated any differently than male umpires, because "the American League . . . did not hire or promote any umpires during the [relevant time] period, either male or female . . . ."[103] What Postema's complaint and the findings of the court reveal is that the *McDonnell Douglas/St. Mary's* tests may be inadequate for women in sports because they fail to examine the subtle influence that sexism and stereotypes may play in employment decisions. Yet, these stereotypes are often so pervasive that women who ultimately are hired in professional sports are sexually harassed to a degree that forces them to leave their jobs.

A stereotype is a "shared belief or set of beliefs which are only partially or not at all true about a group of people."[104] These beliefs in the workplace are translated into attributes that individual members of a group possess because of their membership within it.[105] The consequence of gender role stereotyping has been described as one which "exclude[s] [women] or steer[s] them away from certain classes of jobs and certain professions."[106] Professor Nadine Taub developed a theory of stereotyping *per se* as a form of actionable employment discrimination.[107] This theory is relevant to the proposal to consider historical and traditional exclusion of women from professional sports. Allowing an action to succeed under it would "increase[ ] awareness of an important mechanism by which equal employment opportunity is denied."[108] Furthermore, such an examination focuses on the effect, rather than the

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102 Postema v. Nat'l League of Professional Baseball Clubs, 799 F. Supp. 1475, 1481 (S.D.N.Y. 1992).

103 *Id.* at 1482.

104 Barbara Gutek, *Introduction*, *in* SEX ROLE STEREOTYPING AND AFFIRMATIVE ACTION POLICY 3 (Barbara Gutek ed., 1982).

105 *See* Mary Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 490 (1990). The author describes the stereotyping process in the workplace as a two-step process: categorization and attribution. The first step is the actual categorization of individuals into groups, usually expressed as opposites (e.g., male and female). The second step involves the attribution of certain traits (e.g., personality characteristics, intentions, goals, motivations, attitudes) to persons by virtue of the group into which they have been categorized.

Sex stereotyping in the workplace is embedded in a complicated matrix of interlocking beliefs that reflect this two-step process. Initially, employees are viewed in the polarized categories of "male" as opposed to "female." Then, particular traits are attributed to each category. *Id.* at 489-90.

106 ROSENFELD, *supra* note 89, at 299.

107 Nadine Taub, *Keeping Women in Their Place: Stereotyping As a Form of Employment Discrimination*, 21 B.C. L. REV. 345 (1980).

108 *Id.* at 402.

motive, of the harassment.[109] The Supreme Court applied this concept in *Price Waterhouse v. Hopkins*,[110] which made clear that sex stereotyping in employment decisions can be evidence of sex discrimination. The Court stated:

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive or that she must not be, has acted on the basis of gender.[111]

More recently, the Ninth Circuit in *Lindahl v. Air France*[112] found the employer liable in a Title VII action where decisions were made "on the basis of stereotypical images of men and women."[113] Unfortunately, reviewing cases of women in nontraditional employment reveals that harassing conduct has been considered against the backdrop of certain purported societal norms, thereby excusing the behavior as "normal."[114]

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109 *Id.* at 418.

110 490 U.S. 228 (1989).

111 *Id.* at 250.

112 930 F.2d 1434 (9th Cir. 1991) (This case was brought by a flight attendant who sued Air France for both sex discrimination under Title VII and age discrimination under the ADEA because Air France promoted a younger man after she had been harassed by her coworkers.).

113 *Id.* at 1439.

114 One court stated:

> Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.

805 F.2d 611, 620 (1986) (citing Rabidue v. Osceola Refining Co., 584 F. Supp. 419, 430 n.5 (1984)).

Vikki Shultz analyzes the effect of working in male-dominated or traditionally male occupations and describes how

> [w]omen understand that behind the symbolism of masculinized job descriptions lies a very real force: the power of men to harass, belittle, ostracize, dismiss, marginalize, discard, and just plain hurt them as workers. The legal system does not adequately protect women from this harassment and abuse. Courts have erected roadblocks to recovery, abandoning women to cope with hostile work environments on their own. The general attitude of the legal system seems to mirror that held by many male workers and managers: if women want to venture into a man's workworld, they must take it as they find it.

Vikki Shultz, *Telling Stories About Women and Work: Judicial Interpretation of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1838-39 (1990) (footnotes omitted).

In *Rabidue v. Osceola Refining Co.*,[115] the Sixth Circuit applied a standard suggesting that women enter male-dominated employment at their own risk:[116]

> [T]he trier of fact, when judging the totality of the circumstances . . . must adopt the perspective of a reasonable person's reaction to a similar environment under . . . similar circumstances . . . . [The assessment of whether the alleged violation of Title VII affected a term or condition of the plaintiff's employment] would invite consideration of such objective and subjective factors as the nature of the alleged harassment, the background and experience of the plaintiff, her coworkers, and supervisors, the totality of the physical environment of the plaintiff's work area, *the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs*, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment.[117]

The Sixth Circuit found that constant anti-female obscenities of one employee and the posters of nude females displayed by numerous male workers did not constitute actionable sexual harassment in a "society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places."[118] Following this lead, the court in *Katz v. Dole*[119] stated, "Title VII is not a clean language act, and it does not require employers to extirpate all signs of centuries-old prejudices."[120] While most courts have rejected the *Rabidue*[121] extreme, the existing *McDonnell Douglas* evaluation and the new *St. Mary's* rule both remain insufficient when considering the discrimination of women in nontraditional employment like sports. The cases illustrate that without proper guidelines, courts are free to give deference to sexist notions of what might be offensive or acceptable in a workplace environment.[122] Furthermore, these cases

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115 805 F.2d 611 (6th Cir. 1986).

116 While the Sixth Circuit has questioned the holding of the *Rabidue* decision, it remains, to date, good law. *See* Davis v. Monsanto Chem. Co., 858 F.2d 345, 350 (6th Cir. 1988); Yates v. Avco, 819 F.2d 630, 637 (6th Cir. 1987). *See also* Ellison v. Brady, 924 F.2d 872, 877 (9th Cir. 1991).

117 805 F.2d at 620 (emphasis added).

118 *Id.* at 622.

119 709 F.2d 251 (4th Cir. 1983).

120 *Id.* at 256. *See also* Hall v. Gus Constr. Co., Inc., 842 F.2d 1010, 1017 (8th Cir. 1988) ("Title VII does not mandate an employment environment worthy of a Victorian salon.").

121 *See supra* note 116.

122 In his illuminating article, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," Professor Charles R. Lawrence points out that in evaluating racial discrimination cases, courts are influenced by "stereotype[s] [which] ha[ve] been tacitly

illustrate that although some courts may examine a hostile environment claim in terms of the totality of the circumstances,[123] the cultural and historical exclusion of women from certain jobs ought to be considered by all courts.

Legal scholars such as Professor Anne Levy argue, "Title VII requires that courts fully adopt the view that women need not accept outdated and debasing modes of conduct, but, rather, that the workplace must change . . . ."[124] Such change is important in the case of women in professional sports where courts, as Professor Vikki Schultz argues, often fail to examine "the structures of the workworld that disempower most working women from ever aspiring to nontraditional work . . . ."[125] Courts must evaluate both the treatment of individual women within sports as well as the fact that few women aspire to enter the world of professional sports. The effect that historical and traditional exclusion and sexism have on women and their employers should not go unnoticed.[126]

Until adherence to social conceptions of women's proper roles is abandoned, courts cannot complete adequate evaluations of discrimination in cases like Postema's. It has been argued that because the "effects . . . [of sexist social attitudes are] not readily perceived by their victims . . . the evil consequences of sexist social

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transmitted and unconsciously learned, [making] the[m] . . . unaware of [their] influence on their decision[s]." Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 343 (1987). Lawrence points out that "the law should be . . . concerned when the mind's censor successfully disguises a socially repugnant wish like racism if that motive produces behavior that has a discriminatory result as injurious as if it flowed from a consciously held motive." *Id.* at 344. Based on this premise, he suggests an analysis of Equal Protection cases which focuses on the cultural meaning of race discrimination, namely evaluating conduct to "determine whether it conveys a symbolic message to which the culture attaches racial significance." *Id.* at 324. Application of Professor Lawrence's premise, that courts are influenced by their own stereotypes, may advance an analysis of gender discrimination cases arising from professional sports which recognizes the force and impact of these stereotypes. *See also* Majorie J. Weinzweig, *Discriminatory Impact and Intent Under the Equal Protection Clause: The Supreme Court and The Mind Body Problem*, 1 LAW & INEQ. J. 277, 339 (1983) (arguing that when motive tests are applied in Equal Protection cases arising from the discrimination of women, both the context of that action and its impact should be considered "as essential ingredients . . . to determin[e] . . . motivation").

123 *See* Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1992) ("[T]he district court should not carve the work environment into a series of discreet incidents . . . ."); Andrews v. Philadelphia, 895 F.2d 1469, 1484 (3d Cir. 1990); Vance v. Southern Bell Tele. and Tele. Co., 863 F.2d 1503, 1510 (11th Cir. 1989). *See also* Broderick v. Ruder, 685 F. Supp. 1269 (D.D.C. 1988) (holding that a hostile work environment created a barrier to *all* female employees even if they were not targets of the sexual harassment).

124 Anne C. Levy, *Sexual Harassment Cases in the 1990s*, 56 ALB. L. REV. 1, 30 (1992).

125 Schultz, *supra* note 114, at 1770 (1990).

126 Wendy Pollack, *Sexual Harassment: Women's Experiences vs. Legal Definitions*, 13 HARV. WOMEN'S L. J. 35, 61 (1990) ("If . . . [sexual harassment] is viewed through a global lens which encompasses gender hierarchy as part of the totality of the circumstances, there would be a greater understanding of the harassment's impact on the individual victim and women as a whole.").

attitudes may be easier to perpetuate[,]"[127] making such evaluations even more important. The ability of courts to conduct the proposed inquiry empowers them with the ability to disrupt the cycle of perpetuating and justifying women's exclusion from professional sports. Furthermore, by recognizing this cycle, inappropriate male behavior toward women on the playing field can be adequately targeted and punished.

Encouraging examinations of the circumstances under which women participate in professional sports will challenge employers to examine their own behavior toward women. Equality for women in professional sports means being allowed to enter, and remain on the field, with the same ease as their male counterparts. Given that Congress enacted Title VII to "prevent the perpetuation of stereotypes . . . which serve to close or discourage employment opportunities for women[,]"[128] it is logical that the pervasiveness, and the effect, of these very stereotypes should be considered by courts in evaluating Title VII claims. Furthermore, to properly evaluate the behavior that has occurred, courts must adhere to a standard that will enable the woman's story to be told from her perspective. Courts need to apply strictly the "reasonable woman standard," which recognizes that when it comes to sexual harassment, "men and women generally have quite different perspectives about what compromises objectional behavior."[129]

In *Ellison v. Brady*,[130] the Ninth Circuit articulated the reasonable woman standard that directs the court to examine alleged harassment from a woman's perspective: "[A] female plaintiff states a *prima facie* case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."[131] The application of this standard is appropriate for all women,[132] but particularly for women like Pamela Postema, who are employed in environments

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127 ROSENFELD, *supra* note 89, at 200 (describing the "vicious cycle created by the exclusion of women from certain jobs . . . which, in turn, apparently justifies their continuing exclusion from these jobs").

128 Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990).

129 Michael S. Jacobs, *Toward a Process-Based Approach to Failure-to-Warn Law*, 71 N.C. L. REV. 121, 154 n.138 (1992) (reviewing current cases which have applied the reasonable woman standard).

130 924 F.2d 872 (9th Cir. 1991).

131 924 F.2d at 879 (footnotes omitted). *See also* Smolsky v. Consolidated Rail Corp., 780 F. Supp. 283, 294 (E.D. Pa. 1991); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991); Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990); Yates v. Avco, 819 F.2d 630, 637 (6th Cir. 1987).

132 *Contra* Comment, *"Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence*, 87 Nw. U. L. REV. 326, 340 (1992).

where sexism is the norm and female participation is unusual. The reasonable woman standard lessens the likelihood that judges will draw conclusions based on their own biases. It places the focus on the individual woman's perceptions and conclusions.[133] In sum, to *evaluate liability in cases of women in professional sports, courts* should adhere to the reasonable woman standard and examine the traditional existence of gender bias and discrimination from this perspective. These initial assessments of liability inform the proposed remedy amendment to Title VII discussed below.

IV. Amending Title VII

The aim of awarding remedies to prevailing plaintiffs in Title VII actions is to "discourag[e] employers from discrimination, and compensat[e] discrimination's victims as fully as possible."[134] The remedies currently available to plaintiffs under Title VII are set out in 42 U.S.C. § 2000e-5(g)(1):

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging[135] in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order *such affirmative action as may be appropriate,* which may include, *but is not limited to,* reinstatement or hiring of employees, with or without back pay . . . *or any other equitable relief as the court deems appropriate* . . . .[136]

There are two general remedies courts may award to a prevailing plaintiff in Title VII actions. The standard remedy is "make-whole" relief. Make-whole relief can take the form of back pay,[137]

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133 In discussing the lessons to be learned from the affirmation of Clarence Thomas to the Supreme Court, it has been argued that this exemplifies the fact that "judges who are appointed to uphold and enforce laws on sexual harassment may share the same male-favored view that is embraced by male harassers, and unless those judges borrow the perspective of female victims they may have no real knowledge of how devastating sexual harassment can be." Comment, *From a Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases,* 60 U. Cin. L. Rev. 1281, 1301 (1992).

134 Thompson v. Sawyer, 678 F.2d 257, 286 (D.C. Cir. 1982).

135 Intent in this context does not mean that courts will only grant relief when an employer has acted intentionally. It has been established that intent is to be interpreted as deliberate conduct on behalf of the employer. *See, e.g.,* Rowe v. General Motors Corp., 457 F.2d 348, 355 (5th Cir. 1972); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006 (9th Cir. 1972).

136 42 U.S.C. § 2000e-5(g)(1) (Supp. I 1993) (emphasis added) (footnote added).

137 Courts are left to their discretion when awarding back pay to plaintiffs. The decision is based on equitable discretion, and denial of back pay should occur "only for reasons which . . . would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Albermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). An employer's liability for back pay may begin two years before the filing of a discrimination charge with the EEOC. 42 U.S.C. § 2000e-5(g) (Supp. I 1993).

which may include lost wages,[138] salary increases,[139] medical expenses incurred while not insured,[140] and annuity or pension payments.[141] A prevailing plaintiff may also be reinstated to the position she lost on account of the discrimination[142] and, where reinstatement is inappropriate, may receive front pay.[143] The second remedy forces the employer to take steps within the workplace to eradicate discrimination. These "twin remedies" were set forth in *Albemarle Paper Co. v. Moody*,[144] wherein Justice Stewart articulated that the first purpose of Title VII remedies is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees."[145] The second purpose is "to make persons whole for injuries suffered on account of unlawful employment discrimination."[146]

Prospective action, or equitable relief, usually takes the form of an injunction. The Court in *Albemarle* asserted that courts have "the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past *as well as bar like discrimination in the future.*"[147] The EEOC similarly supports equitable remedies which are prospective. Indeed, the agency's guidelines state:

Prevention is the best tool for the elimination of sexual harass-

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138 *See* EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919 (S.D.N.Y. 1976), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977); EEOC v. FLC & Brothers Rebel, Inc., 663 F. Supp. 864 (W.D. Va. 1987), *aff'd*, 846 F.2d 70 (4th Cir. 1988).

139 See cases cited *supra* note 138.

140 EEOC v. FLC & Brothers Rebel, Inc., 663 F. Supp. at 870 (awarding plaintiff $250 medical expenses incurred while unemployed); EEOC v. Kallir, Philips, 420 F. Supp. at 924 (entitling plaintiff to recover costs of substitute health insurance or actual out of pocket medical expenses).

141 Boyd v. James S. Hayes Living Health Care Agency, 671 F. Supp. 1155, 1169 (W.D. Tenn. 1987) (awarding plaintiff amount defendant would have deposited into group annuity on her behalf during the time for which the back pay was calculated, plus interest, as well as the $290.66 that these funds would have earned if they had been paid into the annuity promptly). *Cf.* Easter v. Jeep, 538 F. Supp. 515, 522 (N.D. Ohio 1982) (denying damages for lost pension because "[i]t is impossible from the evidence offered to establish that plaintiff would have a right to any amount of pension benefits, either at the time of the hearing or in the future.").

142 Berkman v. New York, 580 F. Supp. 226 (E.D.N.Y 1983) (reinstating firefighters subjected to sexual harassment), *aff'd*, 755 F.2d 913 (2d Cir. 1985). *See also* Carrero v. New York City Hous. Auth., 668 F. Supp. 196 (S.D.N.Y. 1987) (requiring defendant to furnish an equivalent position for plaintiff if her position is no longer available).

143 Shore v. Federal Express Corp., 777 F.2d 1155, 1159 (6th Cir. 1985) (quoting Thompson v. Sawyer, 678 F.2d 257, 259 (D.C. Cir. 1982)) ("Awards of front pay should be evaluated under the standards applied to all Title VII relief: whether the award will aid in ending illegal discrimination and rectifying the harm it causes.").

144 422 U.S. 405 (1975).

145 *Id.* at 417 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)).

146 *Id.* at 418.

147 *Id.* at 418 (quoting Louisiana v. United States, 380 U.S. 145, 154 (1965)) (emphasis added).

> ment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII, and developing methods to sensitize all concerned.[148]

In the case of a hostile work environment claim, the barrier to equal employment opportunities tends to be so ingrained within the workplace culture that only a specifically tailored injunction can remedy the situation. In fact, the first court to recognize a hostile work environment also granted an injunction to the prevailing plaintiff.[149] Until the passage of the 1991 Amendments to Title VII, it was well established that unless there is an economic injury, an injunction may be the only remedy available to prevailing plaintiffs.[150]

The District of Columbia Circuit in *Bundy v. Jackson*[151] was the first court to grant an injunction to a prevailing plaintiff for a hostile work environment claim. Sandra Bundy was a vocational rehabilitation specialist with the District of Columbia Department of Corrections,[152] where she was subjected to sexual intimidation by her male supervisors.[153] Finding that she had "suffered discrimination on the basis of sex,"[154] the court set out to structure a preventive remedy that would include a "prompt and effective procedure for hearing, adjudicating, and remedying complaints of sexual harassment. . . ."[155] The court pointed out that injunctions such as these are particularly important because employers may otherwise "renew [discriminatory] conduct [if] the court denied the relief."[156] Thus, the court held that "[t]he request for injunctive relief will be moot only where there is no reasonable expectation that the conduct will recur, or where interim events have 'completely and irrevocably eradicated the effects of the alleged violation.'"[157] Concluding that there was "no such certainty"[158] that the conduct would not recur, the court set forth "appropriate language for the

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148 29 C.F.R. § 1604.11(f) (1992).
149 Bundy v. Jackson, 641 F.2d 934, 946 (D.C. Cir. 1981).
150 Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1533 (M.D. Fla. 1991) (citing Nord v. United States Steel Corp., 758 F.2d 1462, 1472 (11th Cir. 1985)).
151 641 F.2d 934 (D.C. Cir. 1981).
152 *Id.* at 939.
153 *Id.* at 940.
154 *Id.* at 943.
155 *Id.* at 947.
156 *Id.* at 946 n.13 (*citing* Allee v. Medrano, 416 U.S. 802, 810-11 (1974)).
157 *Id.* (citing United States v. W.T. Grant Co., 345 U.S. 629 (1953), and quoting Los Angeles v. Davis, 440 U.S. 625, 631 (1979)).
158 *Id.*

injunction."[159]

The relevant portions of this injunction, which provide a framework for courts today, included the requirements that the defendant:

> 1. notify all employees and supervisors . . . through individual letters and permanent posting in prominent locations throughout . . . offices . . . that sexual harassment . . . violates Title VII of the Civil Rights Act of 1964 . . . .
> 2. ensure that employees complaining of sexual harassment can avail themselves of the full and effective use of the complaint, hearing, adjudication, and appeals procedures for complaints of discrimination. . . .
> 3. develop appropriate sanctions or disciplinary measures for supervisors or other employees who are found to have sexually harassed female employees, including warnings to the offending person and notations in that person's employment record for reference in the event future complaints are directed against that person.
> 4. develop other appropriate means of instructing employees of . . . the harmful nature of sexual harassment.[160]

Since *Bundy,* injunctions have covered the spectrum, from specifically mandated employee training on sexual harassment and gender discrimination,[161] to complete denial of injunctions on the grounds that such relief would be "too intrusive."[162] Notwithstanding this latitude, courts are clear "that Title VII imposes on employers an affirmative duty to eradicate hostile or offensive work environments"[163] and a failure to do so may result in liability.[164]

It is the role of a court to grant an injunction when an employer is failing his or her duty and therefore creates or maintains a discriminatory or hostile work environment. However, not all injunctions are effective in transforming the workplace. Injunctions with terms that are too vague do not seem adequate with all that is known about the complexities of sexual harassment. If properly

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159 *Id.* at 948 n.15.

160 *Id.*

161 *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1545 (M.D. Fla. 1991).

162 Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *on remand,* 737 F. Supp. 1202, 1216 (D.D.C. 1990) (denying injunction that would allow the court to monitor hiring practices on the grounds that it would be too intrusive).

163 Garziano v. E.I. Du Pont de Nemours & Co., 818 F.2d 380, 388 (5th Cir. 1987) (citing Mentor Savings Bank v. Vinson, 106 S. Ct. 2339 (1986)).

164 *See* Hansel v. Public Serv. Co. of Colo., 778 F. Supp. 1126, 1133 (D. Colo. 1991) (holding that defendant's remedial actions on behalf of sexual harassment plaintiff were "long on words and short on action [where the defendant] . . . merely held classes and posted memos.").

crafted, however, an injunction can play an integral part in the eradication of a hostile work environment.[165] An amendment to Title VII which would mandate the enjoining of any liable nontraditional employer to train employees about sexual harassment, gender discrimination, and bias may be the first step. Employers would be particularly open to the idea of training programs if future liability could be avoided. Certain courts have, in fact, allowed the existence of sexual harassment policies and trainings to preclude or limit liability.[166]

The National Baseball Association has already expressed its belief in the re-training of those with biases. This recently was manifest in the treatment of the owner of the Cincinnati Reds, Marge Schott, who was suspended by Major League Baseball's Executive Council for "making ethnic slurs." Schott was also fined $25,000 for her use of these slurs and was forced to undergo a multi-cultural training program during her one year suspension.[167] Spokespeople for the National Baseball League's Executive Committee stress that the decision to make such training mandatory reflected the fact that she had "embarrassed baseball."[168] Certainly, racism is more than a mere embarrassment to professional baseball; it is, or should be, repugnant to a country that attaches great importance to the sport society has dubbed the "national pastime." Sexism is no less embarrassing or repugnant, particularly where it serves to exclude and harass the women who wish to participate in professional sports.

It has been argued that harassment is more pervasive in the nontraditional fields because the placement of women there "increases the likelihood that discrimination will take place and that the discrimination will be more intense."[169] This suggests that whatever transformation Title VII was intended to effectuate in the

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165 Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1209-15 (1989).

166 *See* Sparks v. Regional Medical Cntr. Bd., 792 F. Supp. 735, 747 (N.D. Ala. 1992) (concluding that a plaintiff's complaint to the hospital was dealt with in an effective manner to "sto[p] both retaliation and future harassment against her[self] and others [therefore precluding liability]"); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1531 (M.D. Fla. 1991) ("[A]n employer can defend [actions] successfully by showing that the conduct [complained of] . . . was not repeated after the employer took action."); Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991) ("To avoid liability under Title VII, employers may have to educate and sensitize their workforce to eliminate conduct which a reasonable victim would consider unlawful sexual harassment.").

167 Claire Smith, *Baseball Bans Cincinnati Owner for a Year Over Racial Remarks*, N.Y. TIMES, Feb. 4, 1993, at A1.

168 *Council Investigating Recent Schott Remarks*, HOU. CHRON., Feb. 14, 1993, at 14 (quoting a statement by the Executive Council of Major League Baseball).

169 Pollack, *supra* note 126, at 66 n.122. *See also* FALUDI, *supra* note 19, at 388 (critique of the blue-collar workforce for women).

workforce will be more difficult to implement in professional sports. Yet, beyond a common law tort action, Title VII is the only remedy available. Hence, the logical next question is how Title VII should be amended to actually transform the playing field.

Fostering Greater Female Participation

In order to recognize the cultural, traditional, and pervasive discrimination of women in professional sports, an injunction mandating training about sexual harassment for professional sports employers and participants should be granted to all prevailing plaintiffs. Working from the premise that sex discrimination in professional sports is the result of "tradition, combined with the effects of socialization, work[ing] powerfully to reinforce sex roles that are commonly regarded as of unequal prestige and worth[,]"[170] the mandated training programs will focus on breaking down stereotypes of women's capabilities and "proper" sex roles through educating the workforce about sexual harassment and gender-based discrimination.

Current remedies, while sometimes effective in making an individual plaintiff whole, do little in terms of transforming the workforce which was discriminating against her.[171] Moreover, sexual harassment and gender discrimination are realities in almost all areas of employment.[172] Current statistics predict that at least one out of two women will experience sexual harassment at some point during her academic or working life.[173] A mandatory injunction amendment to Title VII is long overdue. Professor Anne Levy has pointed out:

> Too often a court's hands are tied with regard to remedies either because the employee has left the employment and the court cannot or will not, as a matter of law, find that the [employment decision] . . . was related to the harassment or because the employer, on the eve of trial resolution, has instituted an anti-harassment policy. For employees who leave a harassing situation, the chance of receiving a monetary award, even for

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170 SUSAN MILLER OKIN, JUSTICE, GENDER, AND THE FAMILY 6 (1989).

171 *See infra* notes 186-208 and accompanying text.

172 NATIONAL COUNCIL FOR RESEARCH ON WOMEN, SEXUAL HARASSMENT: RESEARCH AND RESOURCES: A REPORT-IN-PROGRESS (1991). Indeed, the Executive Committee of the New York State Bar Association has endorsed a Model Sexual Harassment Policy developed by the New York State Bar Association Committee on Women and Law which recognized that "following the Clarence Thomas confirmation hearings, complaints of sexual harassment have increased." *Sexual Harassment: A Report and Model Policy for Law Firms*, N.Y. ST. B.A. J., Mar./Apr. 1993, at 32 (citing John P. Furfaro and Maury B. Josephson, N.Y. L.J., Sept. 4, 1992) [hereinafter *Sexual Harassment*].

173 NATIONAL COUNCIL FOR RESEARCH ON WOMEN, *supra* note 172.

> backpay, is tenuous at best. For those employees who remain on the job, either because they want to try to "work things out" or because financially the possibility of leaving steady employment is unthinkable, the chance is nonexistent.[174]

Sexual harassment remains pervasive and harmful in the workplace causing economic[175] and psychological[176] injuries to women who in turn seek assistance from the federal government.[177] The federal government spends each year an estimated 200 million dollars pursuing Title VII claims,[178] and roughly 10,000 complaints were filed in 1992 with the EEOC.[179] Reducing sexual harassment and gender discrimination, therefore, has many economic benefits, and the education of the workforce may allow this reduction to take place.

The relationship between education and decreasing the effect of sexual harassment has been documented.[180] The connection is a logical one: an improved work environment will decrease the occurrence of sexual harassment and therefore lead to a decrease in the need to seek legal intervention for sexual harassment. Employers, however, may not see this connection or simply may choose not to implement such programs. Overhead costs, employee time, and a desire to maintain the workplace status quo may be reasons for this ambivalence. The desire to maintain the status quo in male-dominated professions is, in certain circumstances, an integral part of the job itself. Professional sports are a primary measure of "maleness" and provide, by the very nature that they are

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174 Anne C. Levy, *Righting the "Unrightable Wrong": A Renewal Call for Adequate Remedies Under Title VII*, 34 ST. LOUIS U. L.J. 567, 599 (1990).

175 *See* John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337 (1989).

176 Peggy Crull, who conducted a study of the complaint letters received by the Working Women's Institute, found that sexual harassment may affect levels of stress, frequency of physical illness, and may cause problems of self-confidence and job performance. Peggy Crull, *Sexual Harassment and Women's Health*, *in* DOUBLE EXPOSURE: WOMEN'S HEALTH HAZARDS ON THE JOB AND AT HOME 107 (Chavkin ed. 1984). *See also* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1506 (M.D. Fla. 1991) ("Victims of sexual harassment suffer stress effects from the harassment. Stress as a result of sexual harassment is recognized as a specific, diagnosable problem by the American Psychiatric Association.").

177 In a 1990 report to the President and Congress, the United States Civil Rights Commission stated, "More, not less, needs to be done to provide redress to persons who have been harmed by employment discrimination and to reduce the amount of discrimination in employment." UNITED STATES COMMISSION ON CIVIL RIGHTS, REPORT OF THE USCCR ON THE CIVIL RIGHTS ACT OF 1990, 14 (1990).

178 Donohue, *supra* note 175, at 1359. *See also* MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 4 (1988) (finding that sexual harassment within government jobs costs the federal government more than 100 million dollars a year).

179 *Clippings*, Ms., July/Aug. 1993, at 87.

180 *E.g.*, Abrams, *supra* note 165, at 1215-20.

male only, important cultural support for phallocentric power.[181]

A mandatory injunction remedy would improve the work environment of professional sports by heightening awareness about what constitutes sexual harassment—the normalcy of sexism on the field. An injunction that forces the participants of professional sports to go through training concerning sexual harassment and gender discrimination would aim to integrate norms that better reflect women's capacities, experiences, and desire to participate. Male control has allowed male norms to prevail and leaves women with no choice but to conform to them, deal with them, or stay completely away from professional sports. Simultaneously, men participating in professional sports remain, on the whole, oblivious to the fact that these norms are harmful and exclusionary.[182]

As discussed in Part I, greater participation in professional sports can have numerous positive effects on women both on and off the field.[183] Granting a mandatory injunction under the proposed amendment to even one plaintiff involved in professional sports will initiate training for all participants, thereby impacting the playing field for those concerned. Allowing the participants in professional sports to be exposed to such information will tend to make the playing field less hostile to women and, therefore, allow more women to participate. Decreasing sexual harassment and discrimination will move toward the integration of women into professional sports. At least one court has recognized that women's choices of occupation may reflect the "public knowledge of the hostile environment rather than any lack of interest on the part of women . . . [which] can be considered as evidence that the [woman] had constructive notice of the hostile environment."[184] A comprehensive training, complaint, and remedy program throughout professional sports would send a clear message that such behavior is not acceptable. Similarly, the message such a program can send to women is that they are free to participate in professional sports

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181 Jewett, *supra* note 7, at 59 ("Athletics develop the desire to achieve and excel and the ability to function competitively, as well as provide a common experience which promotes a sense of camaraderie, both during participation and in later encounters throughout life. . . . [A] discrepancy in the quality of the athletic experience provided for the two sexes discriminates against [women], and denies members of that group the equal chance to develop themselves to the maximum of their potentials in some areas.").

182 Abrams, *supra* note 165, at 1189 (arguing that the expectation that women conform to existing workplace norms "occurs mainly because the men who constitute the workplace, like most proponents of societally dominant standards, do not recognize the partiality of their norms").

183 *See* Lemaire, *supra* note 15 and accompanying text.

184 Pollack, *supra* note 126, at 83 (1990) (citing Libsett v. Univ. of P.R., 864 F.2d 881 (1st Cir. 1988)).

without being subjected to damaging harassment.[185] The result of training could be fewer sexual harassment claims filed and, therefore, less money spent by the federal government on investigating and adjudicating such claims.

Professor Kathryn Abrams has argued that the current remedies available under Title VII fail to "help[ ] employers or employees understand the injury that the legal standard is intended to prevent, nor do [they] help workers learn more acceptable forms of conduct. . . . Readings, films, or simulations . . . can help perpetrators to recognize potential violations and help victims to stand firm in their resistance."[186] Similarly, Professor Mary E. Becker, suggesting remedies to future amendments of Title VII, has articulated that a hypothetical Civil Rights Act of 2001 should include education and training on racism and sexism. She proposes, "Federal funds [sh]ould be used to develop courses at all educational levels addressing the problems of racism and sexism."[187] Professor Sylvia Law, discussing the position of women in construction, notes that, although many courts grant injunctions, "[i]solated individual victims of discrimination rarely have the skill or tenacity to . . . ensure compliance with an antidiscrimination order."[188] Prospective judicial intervention, as well as the maintence of jurisdiction over the work environment in question,[189] may be a possible cure for a discriminatory environment. Professor Vikki Schultz has rightfully pointed out that "judicial decisions are a source of interpretive authority that influence the terms in which sex segregation on the job will be perceived, and bargained over, in the future."[190] By creating a formula to enjoin all employers found liable of employment discrimination, judicial authority can be used to its maximum potential and have an effect on women's lives. An injunction can challenge harassment, break down the structure which serves to keep women out of these occupations, and allow those women currently participating to stay on the job.[191]

The amendment to the Civil Rights Act of 1964, which expanded the Technical Assistance Training Institute of the

185 Abrams, *supra* note 165, at 1217 ("[A] well-publicized [EEOC compliance] program could be an effective recruitment tool for an employer seeking to increase the number of women in its workforce . . . .").

186 *Id.* at 1219.

187 Mary E. Becker, *Needed in the 90s: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO. L.J. 1659, 1692 (1991).

188 Law, *supra* note 19, at 71-72.

189 *E.g.*, Robinson v. Jacksonville Shipyards Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

190 Shultz, *supra* note 114, at 1840.

191 *Id.* at 1839 ("Women are disempowered from pursuing or staying in . . . nontraditional jobs because of the hostile work cultures.").

EEOC,[192] revealed a legislative recognition that education is an important tool in dealing with employment discrimination. The amendment broadened many elements of the education and outreach mandate of the EEOC.[193] In relevant part, the statute now states: "In exercising its powers under this title, the Commission shall carry out educational and outreach activities . . . targeted to—individuals who historically have been victims of employment discrimination and have not been equitably served by the Commission."[194] This amendment extends the preexisting mandate of the EEOC by requiring the Commision to "pay the cost (including administrative and personnel expenses) of providing education, technical assistance, and training relating to laws administered by the Commission."[195] Clearly, the federal government has a commitment to prospective intervention and education.[196] In order to allow this commitment to thrive and make a difference in the workforce, a mandatory injunction is neccessary.

As stated earlier, the first court to grant an injunction in the case of a hostile work environment was *Bundy v. Jackson.*[197] Since that time, courts have applied injunctions containing a variety of criteria to be adhered to by the liable employer. For example, citing directly from *Bundy,* the court in *Ross v. Double Diamond, Inc.*[198] ordered an employer found liable of sexual harassment to

> implement a comprehensive system to safeguard against all kinds of discriminatory conduct. The preventive system which [the employer] implements must conform with the E.E.O.C. Guidelines on Sexual Harassment . . . . In addition, [the employer] should consider the suggestions for implementing such a system in *Bundy v. Jackson* . . . . [The employer] should be particularly mindful of encorporating [sic] within the preventive system a means of educating employees as to their right to work in an environment free of discriminatory conduct . . . .[199]

Another example is *Boyd v. James S. Hayes Living Health Care Agency, Inc.,*[200] where a female employee brought a Title VII action against her former employer alleging sex discrimination and sex-

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192 42 U.S.C. § 2000e-4 (Supp. I 1993).
193 *See* 42 U.S.C. § 2000e-4(h),(j),(k) (Supp. I 1993).
194 *Id.* § 2000e-4(h)(2)(A) (Supp. I 1993).
195 *Id.* § 2000e-4(k)(1) (Supp. I 1993).
196 *See also* 29 C.F.R. § 1604.11(f) (1992) ("Prevention is the best tool for the elimination of sexual harassment.").
197 641 F.2d 932 (D.C. Cir. 1981).
198 672 F. Supp. 261 (N.D. Tex. 1987).
199 *Id.* at 277 (citations omitted).
200 671 F. Supp. 1155 (W.D. Tenn. 1987).

ual harassment.[201] Finding the employer liable on both counts, the court granted back pay, reinstatement, and an injunction.[202] This injunction ordered the employer to

> present to the court . . . a plan outlining the steps it will take to prevent sexual harassment from occurring, including, "affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII and developing methods to sensitize all concerned."[203]

A similar injunction was granted in *EEOC v. Gurnee Inn Corp.*[204] In *Gurnee* the EEOC brought an action on behalf of female employees who had been subjected to sexual harassment by their supervisor. The court awarded the prevailing plaintiffs an injunction which, among other orders, mandated that the employer "shall adopt a training program for its supervisory employees on the prevention of sexual harassment in the workplace; shall certify that each employee has received training; and shall establish disciplinary procedures to be applied whenever any supervisory employee fails to comply with [it]."[205]

Despite these particularly comprehensive injunctions, certain fact patterns have kept courts from issuing injunctions, particularly if the complaining party has left the job.[206] The proposed mandatory injunction amendment, however, would apply even when the party has permanently left the job. Its vision is proactive and seeks a change in the workplace status quo.[207] The proposal is consistent with the point made by Circuit Judge Boyce Martin, Jr. in a recent decision:

> [W]hile Title VII does not require an employer to fire all "Archie Bunkers" in its employ, the law does require that an employer take prompt action to prevent such bigots from expressing their opinions in a way that abuses or offends their co-workers. By informing people that the expression of racist or sexist attitudes

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201 *Id.*

202 *Id.* at 1168-69.

203 *Id.* at 1169 (citing EEOC guidelines at 29 C.F.R. § 1604.11(g)).

204 48 FEP 871 (N.D. Ill. 1988).

205 *Id.* at 883.

206 *See* Christoforou v. Ryder Truck Rental, Inc., 668 F. Supp. 294, 301 n.3 (S.D.N.Y. 1987) ("Any claim for injunctive relief on plaintiff's hostile environment claim would be moot as to plaintiff since she is no longer employed by Ryder and she does not wish to be so employed.").

207 It has been argued that "[m]aintenance of the status quo is itself discriminatory and has more than a merely economic effect on women's lives." Note, *The Civil Rights Act of 1991 and Less Discriminatory Alternatives in Disparate Impact Litigation*, 106 HARV. L. REV. 1621, 1622 (1993).

> in public is unacceptable, people may eventually learn that such views are undesirable. . . . Thus, Title VII may advance the goal of eliminating prejudices and biases in our society.[208]

Most recently, the Jacksonville Division of the Florida District Court laid out an exhaustive injunctive remedy in *Robinson v. Jacksonville Shipyards, Inc.*[209] This case—the most advanced of the *Bundy* injunction progeny—supplies the framework for the proposed amendment.

Lois Robinson was employed by Jacksonville Shipyards, Inc. ("JSI") for eleven years as a welder. JSI was a Florida corporation engaged in ship repair for the Department of the Navy,[210] and like most nontraditional employers, JSI employed few women.[211] From the time her employment began, Robinson was the target of aggressive, extensive, and pervasive harassing behavior by male coworkers and supervisors.[212] The court characterized the attempt to delineate all of the incidents as a very "difficult task."[213] Robinson's testimony described incredibly hostile pictures and portrayals including

> a drawing depicting a frontal view of a nude female torso with the words 'USDA Choice' written on it, . . . a picture of a woman's pubic area with a meat spatula pressed on it, . . . centerfold-style pictures . . . of a nude woman with fluid coming from her genital area, . . . [and] a dart board with a drawing of a woman's breast with her nipple as the bull's eye.[214]

Furthermore, Robinson testified about offensive and sex-role comments that her co-workers addressed to her; these included: "'Hey pussycat, come here and give me a whiff,' . . . '[t]he more you lick it the harder it gets,' . . . [and] '[b]lack women taste like sardines.'"[215] JSI, at trial, admitted that the above-mentioned pictures existed on the work site, leading the court to conclude that "sexually harassing behavior occurred throughout the JSI working environment with both frequency and intensity over the relevant time period [which] Robinson did not welcome."[216]

The court's conclusion was not based on Robinson's testimony alone. Dr. Susan Fiske appeared on Robinson's behalf and

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208 Davis v. Monsanto Chem. Co., 858 F.2d 345, 350 (6th Cir. 1988).
209 760 F. Supp. 1486 (M.D. Fla. 1991).
210 *Id.* at 1493.
211 *Id.* at 1494.
212 *Id.*
213 *Id.* at 1495.
214 *Id.* at 1495-97.
215 *Id.* at 1498.
216 *Id.* at 1502.

testified on the topic of sex-role stereotyping.[217] Citing several studies which outlined the effects of stereotyping in the workplace, Fiske testified that where women are the minority in a workforce, they are "more likely to become the victim[s] of stereotyping."[218] M.K. Wagner, another expert,[219] also appeared on behalf of Robinson and testified that "women in nontraditional employment who form a small minority of the workforce are at particular risk of suffering male worker behaviors such as sexual teasing, sexual joking and the display of materials of a sexual nature."[220]

JSI, surprisingly, had a sexual harassment policy in place which was posted around the office. However, the court noted that it "fell short of effectiveness . . . [and] did not receive . . . distribution . . . [thereby] illustrat[ing] [its] ineffectiveness."[221] Pending Robinson's lawsuit, JSI instituted a new sexual harassment policy. This policy was posted on bulletin boards, but was not widely distributed among employees.[222] Based on both the content of the policy and the lack of distribution, the court concluded that the "policy had little or no impact on the sexually hostile work environment . . . [because] [e]mployees and supervisors lacked knowledge and training in the scope of those acts . . . [and] [t]he company has done an inadequate job of communicating with employees and supervisors regarding the nature and scope of sexually harassing behavior."[223] Ultimately, the court found JSI liable for violating Title VII and granted Robinson attorney's fees, nominal damages, and injunctive relief.

In formulating its injunction, the court paid particular attention to Wagner's testimony concerning the possibility of eliminating sexual harassment in the workplace. Wagner testified that "sexual harassment can be eliminated through a program that trains key supervisors how to investigate . . . complaints, that teaches male and female employees what conduct is prohibited,

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217 *Id.* Dr. Fiske is a professor of psychology at the University of Massachusetts, Amherst. She identified preconditions which affect sex stereotyping, all of which exist within professional sports: (1) rarity [of the victim in the workplace]; (2) priming [specific stimuli in the work environment prime certain categories for the application of stereotypical thinking]; (3) work environment structure; (4) ambiance of the work environment. Dr. Fiske testified that the existence of these four factors "may encourage a significant proportion of the male population in the workforce to view and interact with female coworkers as if those women are sex objects." *Id.* at 1503.

218 *Id.*

219 Ms. Wagner is a self-employed consultant with a particular emphasis on preventing sexual harassment on the job. *Id.* at 1505.

220 *Id.* at 1506.

221 *Id.* at 1510.

222 *Id.* at 1518.

223 *Id.*

and that includes a strong policy statement signed by a top-ranking company executive."[224] Noting that enjoining JSI from engaging in or permitting further sexual harassment would be "insufficient to repair and rehabilitate the sexually hostile working environment,"[225] the court enjoined JSI to "adopt, implement, and enforce a policy and procedures for the prevention and control of sexual harassment."[226] This injunctive procedure met the constitutional requirements of the First Amendment guarantee to free speech by stating that this guarantee "does not impede the remedy of injunctive relief."[227] Several appendices were added to the court's opinion, including an injunction outlining the "Procedures and Rules for Education and Training"[228] which JSI was to adopt.

The Education and Training procedure focused on four distinct groups of employees: all employees, female employees, employees in a supervisory position, and investigative officers. For all employees, the requirement included reading and signing a receipt for the company's policy on sexual harassment[229] to put them on notice of the standards of behavior expected of them.[230] Furthermore, supervisors having received appropriate training were required to explain verbally to employees every six months the kinds of acts which constitute sexual harassment, the company's serious commitment to eliminate it, the penalties for engaging in harassment, and the procedures for reporting incidents of sexual harassment. Female employees were to participate in annual seminars that taught strategies for resisting and preventing sexual harassment. Supervisors were to participate in annual training sessions on sex discrimination, half of which would be devoted to education about workplace harassment including training (with demonstrative evidence) as to exactly what remarks, behavior, and pictures would not be tolerated in the workplace. The president of JSI was required to attend the session and stress the need to elimi-

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224 *Id.* at 1519.

225 *Id.* at 1534.

226 *Id.* at 1537.

227 *Id.* at 1534 (citing Davis v. Monsanto Chem. Co., 858 F.2d 345, 350 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989); Jew v. University of Iowa, 749 F. Supp. 946, 961 (S.D. Iowa 1990)). The court went on to point out, "No first amendment concern arises when the employer has no intention to express itself . . . the pictures and verbal harassment are not protected speech. . . . [T]he regulation of discriminatory speech in the workplace constitutes nothing more than a time, place, and manner regulation of speech." *Id.* at 1534-35 (footnotes omitted). *Contra* Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991).

228 760 F. Supp. at 1545.

229 The court also developed a new sexual harassment policy for JSI, which contained four components: complaints, investigations, cooperation, and monitoring. *Id.* at 1544.

230 *Id.* at 1545.

nate harassment. Each participant was to be informed that he or she was responsible for knowing the contents of JSI's sexual harassment policy and for giving similar presentations at employees' meetings. Investigators were to attend annual trainings to educate them about the problems of sexual harassment in the workplace and techniques for investigating and stopping it. These trainings were to be conducted by an experienced sexual harassment educator chosen jointly by JSI and the NOW Legal Defense and Education Fund.[231]

Robinson teaches many lessons and provides a reminder that sexual harassment and discrimination on the basis of gender are rampant in the American workplace. *Robinson* also serves as a tool that places employers on notice that it is imperative to have a comprehensive and effective sexual harassment policy.[232] In the past, companies attempting to defend sexual harassment claims by alleging to have effective policies, which actually fell short, have been found liable.[233] The *Robinson* court should be applauded for its comprehensive analysis, use of the reasonable woman standard, and willingness to hear testimony concerning events that took place outside of the Title VII timeframe for "the purpose of determining the context of the incidents which are actionable."[234] This sort of legal recognition of women's experiences, specifically in nontraditional occupations, is critical to eliminating sexual harassment and discrimination in all workplace contexts. It is unfortunate, however, that few courts have been willing or able to conduct such evaluations. For this reason legislative guidance is most important.

V. CONCLUSION

It is proposed that 42 U.S.C. § 2000e-5(g) be amended to include the mandatory granting of education and training injunc-

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231 *Id.* at 1546.

232 Dana S. Connell, *Effective Sexual Harassment Policies: Unexpected Lessons from Jacksonville Shipyards*, 17 EMPLOYEE RELATIONS L.J. 191, 198 (1991).

233 *See* Waltman v. Int'l Paper Co., 875 F.2d 468 (5th Cir. 1989); EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989); Brooms v. Regal Tube Co., 881 F.2d 415 (7th Cir. 1989); Sanchez v. City of Miami Beach, 720 F. Supp. 974 (S.D. Fla. 1989); Lipsett v. Univ. of P.R., 864 F.2d 881, 901 (1st Cir. 1988); Shrout v. Black Clawson Co., 689 F. Supp. 774 (S.D. Ohio 1988); Ross v. Double Diamond Inc., 672 F. Supp. 261 (N.D. Tex. 1987). *Cf.* Spencer v. General Elec., 703 F. Supp. 466 (E.D. Va. 1988), *aff'd*, 894 F.2d 651 (4th Cir. 1990). *See also* Equal Opportunity Manual for Managers and Supervisors, 420 Lab. L. Rep. (CCH) 14 (On a sexual harassment compliance checklist for managers, "even if the employer has a policy against sexual harassment, the employer can still be held liable for the actions of any of its [employees] if it knew or should have known of the occurrence and failed to take appropriate action.").

234 *Robinson*, 760 F. Supp. at 1494-95.

tions in cases arising out of nontraditional occupations generally, and professional sports specifically. The goal of the trainings will be to lead toward a non-hostile working environment for women in sports and portray judicial recognition of the history of exclusion and sexism in professional sports. Sexual harassment is an unlawful employment practice under Title VII of the Civil Rights Act of 1964. Until employers are forced to train themselves and the participants in professional sports, women will have to cope with a hostile environment and work under harassing conditions if they choose to enter professional sports.[235] The mandatory injunction amendment will force liable employers to not only implement, but also to communicate sexual harassment policies.[236] Changing the face of professional sports will expand women's visions of their own capacities, as well as eradicate sex role stereotypes that serve to disempower and oppress women. This amendment can also be expanded to apply to all employers found liable, not only nontraditional employers. A broad application of the amendment would be beneficial to the entire workforce, and especially to women who, with the promise of a non-hostile workforce, may begin the ascent from their current status as second-class citizens.[237] The following language, drawn in part from *Robinson v. Jacksonville Shipyards, Inc.* and *EEOC v. Gurnee Inn Corp.*, constitutes the proposed amendment.

MANDATORY EDUCATION AND TRAINING INJUNCTION AMENDMENT

Where it is recognized that education and training for employees at each level of the workforce is critical to the success of eliminating sexual harassment and discrimination based on gender, any nontraditional employer of women found liable for violating Title VII will be permanently enjoined as follows:

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235 Abrams, *supra* note 165, at 1219 ("[O]pportunities for exchange can be of crucial value when the goal is to create an awareness of divergent viewpoints.").

236 As one attorney has pointed out, despite the guidance given by the EEOC, employers have "either failed to implement *and communicate* sexual harassment policies altogether or have developed policies that [some] courts have found to be procedurally deficient." Connel, *supra* note 232, at 193. The New York State Bar Association Committee on Women and Law notes that a key element of any sexual harassment policy is educating employees about sexual harassment generally. In a model policy developed by the group for law firms they state: "Without these key elements, there may be little value to a written policy." *See Sexual Harassment, supra* note 172, at 34.

237 Mary Ellen Gale, an attorney for the Southern California chapter of the A.C.L.U., recently told The New York Times: "Many women are still second-class citizens. . . . It's important . . . to recognize that sexual harassment is widespread and devastating and a fundamental violation of women's equal rights that does real harm to real women in the real world." Neil A. Lewis, *At A.C.L.U., Free-Speech Balancing Act*, N.Y. TIMES, Apr. 4, 1993, at 16.

(1) The employer shall institute semi-annual trainings for all employees on sexual harassment and gender discrimination. After which employees shall be required to sign documents certifying that they attended and understood the training and agree to comply with the employer's sexual harassment policy.

a. After such signing, the employee is officially on notice that such behavior will not be tolerated, and may lead to dismissal.

b. The employer is required to certify that its employees are in compliance with the injunction specified in section (6) of this Amendment.

(2) Supervisors and team managers shall be trained semi-annually to understand a sexual harassment complaint and the procedures for dealing with such complaint.

a. This training shall include a component with how to deal with harassment when the supervisor is a direct witness to it, as well as outline the specific commitment the supervisor has to deterring and eliminating such behavior.

(3) Each office, locker room, or construction site shall prominently display statements of prohibited conduct in obvious and visible places.

(4) Each employee shall receive, with two paychecks per year, a similar copy of statements, as well as an outline of prohibited conduct which, if engaged in, constitutes sexual harassment.

(5) The court granting this injunction shall maintain jurisdiction over the employer.

(6) An employer found liable under this Amendment shall file reports with the court granting the injunction every six months regarding compliance with the injunction.

Melissa M. Beck