# SEXUAL HARASSMENT OF STUDENT ATHLETES AND THE LAW: A REVIEW OF THE RIGHTS AFFORDED STUDENTS

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## I. INTRODUCTION

*"University fires swim coach over conduct issue."*[2]
*"Coach, Wife Plead Not Guilty to Arranging Sex With Players."*[3]
*"High School wrestling coach charged by officials with intent to commit sexual abuse and lascivious conduct with a minor."*[4]
*"Fairfax Woman Guilty of Raping Boy."*[5]
*"Attempted Kidnapping By Coach Stuns Pupils."*[6]

The days when a coach could show emotional support by touching an athlete or motivate them with insults or verbal challenges may be over. The conduct of coaches is being analyzed more critically due to the increased number of reported cases of sexual harassment and misconduct among high school and college coaches, as illustrated by the above national headlines. Sports are no longer immune from public scrutiny of behavior that might be labeled sexual harassment or misconduct. In the public sector an increasing number of lawsuits have been filed in the name of sexual harassment. In sports, such suits have been rare, but coaches and

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2. Karen Allen, *Fla. Fires Swim Coach Over Conduct Issue*, USA TODAY, Oct. 27, 1993, at 12C. University of Florida's swimming coach, Mitch Ivey was fired after a crew from ESPN questioned Ivey's conduct and relationship with female swimmers he coached. *Id.*

Ivey, who came to Florida in 1990, was allegedly involved with athletes he coached on three other occasions. *Id.* In response to the firing, Ivey stated that "[r]ather than saying they're pleased with my performance and standing behind me, they're saying they can't have bad publicity. . . I was told that putting my arm around a girl and using foul language was deemed reason enough [for firing]." *Id.*

3. Tom Gorman, *Coach, Wife Plead Not Guilty to Arranging Sex with Players*, LOS ANGELES TIMES, Apr. 20, 1993, at A3. Hemet High School football coach, Randy Brown and his wife, Kelly, were arrested on conspiracy to commit oral copulation on two minors who were both members of Brown's football team. *Id.* Even though both have pleaded not guilty to the charges, defense attorney, Steve Harmon, declared that Mr. Brown will not be teaching or coaching for a long time. *Id.*

4. *Graettinger Coach Charged*, DES MOINES REGISTER, Jan. 16, 1994, at 1S. Gary Bergmann, a wrestling coach for Graettinger High School was charged with intent to commit sexual abuse and lascivious conduct with a 16-year old female student. *Id.* Bergmann entered a plea of not guilty, denying all allegations. *Id.*

5. Jane Seaberry & Steve Bates, *Fairfax Woman Guilty of Raping Boy*, WASHINGTON POST, Aug. 12, 1993, at A1. Jean-Michelle Whitiak, a Fairfax county swim teacher at a local pool, pleaded guilty to statutory raping a former student who is now 14 years old. *Id.* Police discovered the affair when Whitiak had sex with two of the victim's friends when he broke off the relationship. *Id.* Whitiak faces a maximum of 10 years in prison and a $100,000 fine. *Id.*

6. Douglas Martin, *Attempted Kidnapping by Coach Stuns Pupils*, NEW YORK TIMES, Apr. 27, 1993, at B3. Gary Wilensky, a tennis instructor at the elite Manhattan girls school, Brearly, committed suicide after attacking his tennis student, 17 year old Jennifer Rhodes and her mother with an electric cattle prod. *Id.* Police discovered that Mr. Wilensky had rented a house nearby an upcoming tournament which Jennifer was to compete in. *Id.* The house was outfitted with a stun gun, whips, handcuffs, and other instruments of bondage. *Id.* The authorities also found a pornographic video showing women in bondage entitled, "Jennifer's Nightmares." *Id.*

athletic administrators can no longer ignore sexual harassment as a relevant social issue.

What constitutes sexual harassment in sports? What behavior of coaches, which historically has been viewed as a benign or even a natural part of sports, may now be the basis of a lawsuit? This article attempts to answer the question of what constitutes sexual harassment between coaches and athletes by focusing on two recent United States Supreme Court decisions, *Harris v. Forklift Systems Inc.*[7] and *Franklin v. Gwinnett County Public Schools.*[8] A starting point into this complex issue of sexual harassment requires an examination of sexual harassment case law. Three cases, *Alexander v. Yale,*[9] *Franklin v. Gwinnett County Public Schools*, and *Harris v. Forklift Systems Inc.* demonstrate the evolution of sexual harassment in our legal system. Although non-sports related cases, when viewed together these three cases present a clear picture of the legal development of the sexual harassment revolution. Next, the article reviews the scope of Title IX of the Education Amendments of 1972,[10] and how the courts have applied it to charges of sexual harassment in educational institutions. Finally, this perspective concludes by offering some guidelines to help athletic administrators investigate and prevent sexual harassment.

## II. WHAT CONSTITUTES SEXUAL HARASSMENT?

In the context of the coach - athlete relationship, acts that constitute sexual harassment may take a variety of forms.[11] The

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7. 114 S. Ct. 367 (1993); *see infra* notes 59-70 and accompanying text.

8. 112 S. Ct. 1028 (1992); *see infra* notes 36-54 and accompanying text.

9. 631 F.2d 178 (2d Cir. 1980).

10. PUB. L. NO. 92-318, 86 STAT. 235 (1972) codified at 20 U.S.C. § 1681(a) (1990) [hereinafter Title IX]. Section 901(a) states in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.

*Id.*

11. Letter from John E. Palomino, Regional Civil Rights Director, *Department of Education*, to Karl Pister, Chancellor, *University of California, Santa Cruz* (Apr. 29, 1994) (discussing Department of Education's investigation into complaints of sexual harassment at the University of Santa Cruz in violation of Title IX).

The Department of Education Office of Civil Rights defines sexual harassment under Title IX as:

> [U]nwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, imposed on the basis of sex, that could (a) deny, limit, or provide different aids, benefits, services or opportunities, (b) condition the provision of aids, benefits, services or opportunities, or (c) otherwise limit a student's enjoyment of any right, privilege, advantage or opportunity protected by Title IX.

*Id.*

following are just a few examples of the kind of acts that may constitute sexual harassment by coaches:

- Unwelcome sexual propositions, invitations, solicitations, or flirtations.
- Threats or insinuations that a scholarship athlete's opportunities, athletic assignments, academic grade, or other conditions of employment or academic and athletic life may be adversely affected by not submitting to sexual advances.
- Unwelcome verbal expressions of a sexual nature, including graphic sexual commentaries about a person's body, dress, appearance, or sexual activities; the unwelcome use of sexually degrading language, jokes or innuendoes; unwelcome suggestive or in insulting sounds or whistles; obscene phone calls.
- Sexually suggestive objects, pictures, videotapes, audio recordings or literature, placed in the work or practice area, that may embarrass or offend individuals.
- Unwelcome and inappropriate touching, patting, or pinching; obscene gestures.
- Consensual sexual relationships where such relationships lead to favoritism of one scholarship athlete with whom the coach or teacher is sexually involved and where such favoritism adversely affects other scholarship athletes.

Sexual harassment is a violation of Title IX under either one of two legal theories: (1) quid pro quo or (2) hostile environment.[12] "Quid pro quo sexual harassment" occurs in athletics when a coach grants or withholds benefits, such as scholarship, starting position, or playing time, as a result of an athlete's willingness or refusal to submit to the coach's sexual demands.[13] Because the pressure may be either explicitly or implicitly made a term or condition of the individual's scholarship, starting position, or playing time, the

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12. *Id.* The two theories defined by John E. Palomino are as follows:

> Sexual harassment occurs when (1) submission to such conduct is explicitly or implicitly made a term or condition of the individual's education or is used as the basis for educational decisions affecting that individual (quid pro quo harassment); (2) the conduct has the purpose or effect of unreasonably interfering with an individual's educational performance, or otherwise limiting the ability of that individual to benefit from services, opportunities or privileges, by creating an intimidating, hostile or offensive educational environment (hostile environment harassment).

*Id.*

13. Women's Sports Foundation: Preventing Sexual Harassment in Athletic Settings (1994)(on file with The Women's Sports Foundation, Eisenhower Park, East Meadow, New York, 11554). In July 1994, the Women's Sports Foundation, a non-profit organization founded in 1974 to promote and enhance sport and fitness opportunities for girls and women, published an educational resource manual about sexual harassment. *Id.* The manual is designed to not only inform athletic administrators about sexual harassment and about appropriate institutional responses to sexual harassment, but also on how to develop and implement a sexual harassment policy. *Id.*

critical point is not whether the victim submits voluntarily, but whether the athlete submits to unwanted conduct.[14]

"Hostile environment sexual harassment" in athletics exists when a coach's conduct is so severe that it creates a hostile environment that interferes with the athletes ability to perform.[15] In determining whether the coach's conduct is severe enough to constitute hostile environment sexual harassment, it does not matter if the harasser's behavior is deliberate or simply has the effect of creating an offensive atmosphere.[16] Since hostile environment sexual harassment is motivated by the victim's sex, it is based on sexual gestures, language or activities. An example of hostile environment sexual harassment would be unwelcome verbal expressions which are sexual in nature. This includes graphic sexual commentaries about a person's body or dress, the use of sexually degrading language, jokes or sexually suggestive objects, pictures, video tapes, audio recordings or literature, placed in the work or practice area that may embarrass or offend an individual.[17]

## III. Evolution of Sexual Harassment Case Law.

In order to understand the evolution of case law in the area of sexual harassment, three non-sports related cases must be reviewed. Collectively, these cases have a substantial impact on the interpretation of harassment in sports under Title IX.

### *A. Alexander v. Yale University*

The first case to address the issue of sexual harassment of students under Title IX was *Alexander v. Yale University*.[18] In *Alexander*, five current and former Yale students sued Yale University alleging that they were sexually harassed by male faculty members and administrators. The plaintiffs further alleged that Yale was in violation of Title IX by refusing to seriously consider the students' complaints of sexual harassment.[19] Title IX, which was passed to prohibit sexual discrimination at educational institutes that receive Federal financial assistance, requires such institutions to "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints."[20]

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14. *Id.*
15. *Id.*
16. *Id.*
17. B. Linderman, & D.D. Kadue, Sexual Harassment in Employment Law (1992).
18. 631 F.2d 178 (1980).
19. *Alexander*, 631 F.2d at 180.
20. 34 CFR § 106.8 (1993).

The U.S. District Court for Connecticut granted Yale's motion to dismiss against all of the plaintiffs, except for one, based on the grounds that the plaintiffs had failed to state a claim establishing a violation of Title IX.[21] The District Court found that since the students' had graduated their complaints were moot.[22] A remaining plaintiff, Pamela Price, who was still a student, had argued that she received a poor grade in one of her classes because she rejected a professor's proposition to receive an 'A' in exchange for submission to sexual advances.[23] The Court, after a trial on the issue, found that the alleged incident of sexual proposition never happened and that Price's grade reflected her work. On appeal, Ronni Alexander, another plaintiff in the case, argued that she abandoned her aspiring career to be a professional flutist after repeated sexual advances which include coerced sexual intercourse with her instructor.[24] Alexander's complaint further alleged that she attempted to complain about her instructor's conduct and continued harassment, but was dissuaded by uninterested administrators and *ad hoc* methods.[25]

Another plaintiff in the case, Margery Reifler, alleged that the women's field hockey coach sexually harassed her, causing her to suffer distress and humiliation to her educational detriment.[26] Reifler further claimed that she was intimidated from complaining by the lack of legitimate procedures at Yale to lodge such complaints.[27]

In rejecting the claims of Alexander and Reifler, the Court of

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21. Alexander v. Yale University, 459 F. Supp. 1 (D. Conn. 1977).

22. *Alexander*, 631 F.2d at 179.

23. *Alexander*, 459 F. Supp. at 3-4. Pamela Price asserted that a poor grade she received "was not due to any 'fair evaluation of her academic work,' but as the consequence of her rejecting a professor's outright proposition 'to give her a grade of 'A' in the course in exchange for her compliance with his sexual demands.'" *Id.*

24. *Alexander*, 631 F.2d at 181. The court found that: "Ronnie Alexander, a 1977 graduate of Yale College, alleged that she 'found it impossible to continue playing the flute and abandoned her study of the instrument, thus aborting her desired profession,' because of the repeated sexual advances, 'including coerced sexual intercourse,' by her flute instructor, Keith Brion." *Id.*

25. *Id.* Alexander asserted that she attempted to complain but "was discouraged and intimidated by unresponsive administrators and complex *ad hoc* methods." *Id.*

26. *Id.* Margery Reifler, Yale College's field hockey team manager, alleged that Richard Kentwell, the team's coach, "sexually harassed" her while she was the team's manager, and caused her to suffer "distress and humiliation .... and was denied recognition due her as team manager, all to her educational detriment." *Id.*

27. *Id.* Reifler stated that she "wanted to complain to responsible authorities of defendant about said sexual harassment but was intimidated by the lack of legitimate procedures and was unable to determine if any channels for complaint about sexual harassment were available to her." *Id.*

Appeals for the Second Circuit upheld the District Court's finding that as a result of the alleged harassment, the plaintiffs failed to establish a "distinct and palpable injury" that the Court could redress through its remedial powers.[28] Having already graduated from Yale, the court found that it could not address Alexander's and Reifler's claims and give the requested relief by ordering Yale to promulgate effective procedures in handling sexual harassment complaints.[29] The court noted that Yale had adopted procedures to cure this problem, establishing grievance procedures for hearing future sexual harassment complaints.[30] In essence, the issue was moot. The Court held that in a suit under Title IX the deprivation of "educational" benefits empowers the courts to provide relief.[31] When the alleged injury relates to an activity removed from the ordinary educational process, the Court noted that a more detailed allegation on injury was required.[32] A successful career as a flutist, athlete, or manager of a women's field hockey team, are activities removed from the ordinary educational process.[33] Finally, as related to Alexander's and Reifler's personal injuries, the Court concluded that those claims were too speculative in nature to provide relief.[34]

Although the Court rejected the plaintiffs' claims in *Alexander,* the Court's holding is important and has precedential value because it upheld the District Court's finding that sexual harassment of students was prohibited under Title IX.[35]

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28. *Id.* at 183.

29. Alexander v. Yale University, 631 F.2d 178, 184 (2d Cir. 1980). The court stated, "their graduations appear to prevent the courts both from addressing the predominant injury relied upon - deprivation of an educational environment - and from awarding the relief requested - an order directing Yale to institute effective procedures for receiving and adjudicating complaints of sexual harassment." *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Alexander,* 631 F.2d at 185. The court stated that, "it is difficult to imagine what relief a court could possibly award Reifler and Alexander." *Id.*

35. *Id.* at 4. In *Alexander,* the District Court held that it was perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII's ban against sex discrimination. *Id.* Additionally, the Court went on to say that when a student files a sexual discrimination complaint with a university and the university fails to act, the university's inaction is significant, in that by refusing to investigate, the university may be held responsible for condoning or ratifying such discriminatory action. *Id.* Title VII prohibits sexual harassment in the work place and establishes legal guidelines for sexual harassment claims. Title VII is discussed in more detail *infra* notes 56-70 and accompanying text.

*B. Franklin v. Gwinnett County Public Schools.*

Twelve years later, the issue of sexual harassment against students was brought before the United States Supreme Court when a high school student brought a Title IX action, seeking damages for alleged sexual harassment by a teacher. In *Franklin v. Gwinnett County Public Schools*,[36] the plaintiff, a female high school student, filed suit against the defendant alleging that she was subjected to continual sexual harassment from Andrew Hill, a coach and teacher at the high school, and that school officials failed to stop Hill's continued harassment.[37] According to the complaint, Hill initiated sexual discussions with Franklin in which Hill asked Franklin about her sexual experiences with her boyfriend and whether she would consider having sexual intercourse with an older man, that Hill forcibly kissed Franklin on the school grounds, and that on two or three occasions, Hill interrupted class, requested that Franklin be excused, and took her to a private office where he subjected Franklin to coercive intercourse.[38]

Franklin further alleged that even though school officials investigated and knew of Hill's sexual harassment of her and other female students, school administrators took no action to halt Hill's sexual harassment.[39] In fact, school administrators tried to discourage Franklin from pressing charges against Hill.[40] The principal of the high school closed his investigation into Franklin's allegations when Hill resigned. Hill's resignation at the end of the school year was premised on the condition that all matters pending against him would be dropped.[41]

In August 1988, Franklin filed a complaint with the Department of Education's Office of Civil Rights (OCR),[42] alleging that she had been subject to sexual harassment in violation of Title IX. Following a six month investigation, the OCR found that Gwinnett violated Title IX. In particular, the OCR found that the Gwinnett school district had violated Franklin's rights by subjecting her to physical and verbal sexual harassment and by interfering with her

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36. 112 S. Ct. 1028 (1992).

37. *Id.* at 1028.

38. *Id.* at 1031.

39. *Id.*

40. *Id.*

41. *Franklin,* 112 S.Ct. at 1029.

42. Franklin v. Gwinnett County Public Schools, 911 F.2d 617 (11th Cir. 1990). The Department of Education's Office of Civil Rights is in charge of investigating and enforcing regulations pursuant to Title IX. CFR §§ 106.1-106.71 (1993). *Id.*

right to complain about such conduct.[43] The OCR, however, failed to act and closed its investigation after being assured that the school district would implement a grievance procedure to prevent future violations.[44] Disappointed with the outcome of the OCR's investigation, Franklin filed a Title IX law suit in federal District Court, seeking damages against the Gwinnett County School District.[45]

The U.S. District Court for the Northern District of Georgia dismissed Franklin's suit on the ground that Title IX does not authorize an award of monetary damages. On appeal the Eleventh Circuit Court of Appeals affirmed the District Court, holding that while it was undisputed that an implied private right of action existed under Title IX, an action for monetary damages could not be sustained for an alleged intentional violation of Title IX.[46] In justifying its holding, the Eleventh Circuit Court noted that Title IX was Spending Clause legislation, therefore, it could not allow for the recovery of compensatory relief where Congress had not expressly provided for such a remedy until Congress or the Supreme Court acted on the issue.[47]

The United States Supreme Court, in reversing the lower courts, held that unless Congress expressly indicates otherwise, all appropriate remedies are available to the plaintiff.[48] The Court noted that federal statutes empower the federal courts to use any remedy available to protect legal rights.[49] The Court further held that it was not the intent of Congress to limit the available remedies in a Title IX suit.[50]

The Court found, on the issue of damages, that the Gwinnett County Schools had a duty under Title IX not to discriminate on the basis of sex and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex."[51] The court concluded that the same

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43. *Franklin*, 112 S. Ct. at 1031, n.3.

44. *Franklin*, 911 F.2d at 619.

45. Glenn M. Wong & Carol Barr, *Title IX Wields a Mightier Sword*, ATHLETIC BUSINESS, May 1992, at 16-17.

46. *Franklin*, 911 F.2d at 622.

47. *Id.*

48. *Franklin*, 112 S. Ct. at 1032.

49. *Id.* at 1033 (citing Bell v. Hood, 327 U.S. 678, 684, 66 S. Ct. 773, 777 (1946)). The Court held that, "[w]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.*

50. *Id.* at 1036. "Congress did not intend to limit the remedies available in a suit brought under Title IX." *Id.*

51. *Id.* at 1037 (citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64, 106 S. Ct. 2399, 2401 (1986)). In *Meritor*, a female bank employee filed a Title VII against her male manager and employer claiming that she was subjected to sexual harassment. *Id.*

rule should be applied when a teacher or coach sexually abuses and harasses a student.[52]

Finally, the Gwinnett County Schools argued that the remedies available under Title IX should nevertheless be limited to back pay and prospective relief. Such an approach would leave Franklin remediless. At the time of the lawsuit she was no longer attending a school in the Gwinnett school system and Hill no longer taught in the school system.[53] The Supreme Court, however, rejected this argument and concluded that damages were available for victims of deliberate Title IX discrimination.[54]

After the Supreme Court's ruling in Gwinnett, Title IX has taken on a new force. Prior to *Gwinnett*, if school principals or administrators knew of an improper relationship between a student and coach, they had two options. They could either (1) ignore the problem and hope it would go away or (2) discipline the coach. The majority of school principals and administrators chose the former.[55] The Supreme Court's ruling in *Gwinnett* has signaled to administrators that they must now take a proactive approach. If they do not, and they ignore improper relationships between students and coaches, they could find themselves facing a Title IX lawsuit similar to Gwinnett County Public Schools.

### *C. Harris v. Forklift Systems Inc.*

Another non-sports specific case that bears on any discussion of sexual harassment is *Harris v. Forklift Systems Inc.*[56] In *Harris*, the plaintiff Teresa Harris, a former employee of Forklift Systems, sued her former employer claiming that the conduct of Forklift's president, Charles Hardy, toward her constituted sexual harassment and violated Title VII of the Civil Rights Act of 1964.[57] Title

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52. *Franklin*, 112 S. Ct. at 1037.

53. *Id.* at 1038.

54. *Id.*

55. Dan Wishnietsky & Dennis Felder, *Assessing Coach-Student Relationships*, JOURNAL OF PHYSICAL EDUCATION, RECREATION & DANCE 76-79 (Sept. 1989).

56. 114 S. Ct. 367 (1993).

57. Civil Rights Act of 1964, §§ 701 *et seq.*, 703 (a)(1), as amended, 42 U.S.C.A. §§ 2000-(e) *et seq.* Section 2000(e) states:

> (a) Employer practices - It shall be an unlawful employment practice for an employer:
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

*Id.*

VII makes it "an unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals' race, color, religion, sex, or national origin."[58]

The Magistrate, who first heard the case, found that throughout Harris' employment at Forklift, Hardy, in the presence of other employees, often insulted her and made her the target of unwanted sexual innuendoes.[59] Hardy also suggested, again in front of other employees, that he and Harris go to a hotel to negotiate Harris' raise and that Harris and other female employees get coins from his front pants pocket.[60] When Harris complained to Hardy about his conduct, Hardy apologized claiming that he was only joking.[61] Hardy, who claimed that he was surprised that Harris was offended by his comments, promised he would stop.[62] After several weeks, however, Hardy was again directing unwanted sexual comments at Harris and she quit.

The United States District Court for the Middle District of Tennessee, adopting the report of the Magistrate, held that even though Harris was offended by some of Hardy's comments, and that Hardy's comments would offend a reasonable woman, Hardy's conduct was "not so severe as to seriously affect Harris' psychological well being or lead her to suffer injury."[63] The United States Court of Appeals for the Sixth Circuit in a brief unpublished decision affirmed the District Court's decision.

Harris successfully appealed the appellate decision to the United States Supreme Court. The Supreme Court unanimously decided to reject the standard used by the lower courts, which required the plaintiff to show that the defendant's conduct led to injury or seriously affected the psychological well being of the plai-ntiff.[64] Instead, the Court found that a work environment that is permeated with discriminatory ridicule, insult, and intimidation, which severely or pervasively alters the victim's employment is a violation of Title VII.[65] Title VII is violated before the harassing conduct

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58. 42 U.S.C.A. § 2000e - 2(a)(1). *See* Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n.13, 98 S. Ct. 1370 (1978). In *Los Angeles Dept. of Water and Power*, the court stated, "[t]he phrase 'terms, conditions, or privileges of employment' evidences a congressional intent to 'strike at the entire spectrum of disparate treatment of men and women in employment." *Id.*

59. *Harris*, 114 S. Ct. at 370.

60. *Id.* at 369.

61. *Id.*

62. *Id.*

63. *Id.* at 370.

64. *Harris*, 114 S. Ct. at 371.

65. *Id.* at 370; *see also* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65, 106 S. Ct. 2399, 2405, (1986).

results in a nervous breakdown.[66] The Court noted that discriminatory abusive work environments can exist, without af-fecting an employee's psychological well-being, by detracting from an employee's job performance, discouraging remaining on the job, or keeping employees from advancing in their careers.[67]

While plaintiff's psychological well being is a factor, Justice O'Connor in writing for the Court, held that no single factor is required and that severe psychological injury was only one of many factors used by the Court in determining sexual harassment cases.[68] The Supreme Court further held that Title VII does not require psychological harm. The Court applied an objective and subjective test and found that Title VII, as applied to sexual harassment, is violated when there is an abusive or hostile environment, regardless of psychological injuries.[69]

While broadening the scope of protection under Title VII, the Supreme Court failed to give employers a standard or test to use in determining sexual harassment. Instead, the Court stated that the particular circumstances must be reviewed to determine whether an environment is hostile or abusive. Factors indicating such an environment include, "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[70]

The effect of the Supreme Court's decision in *Harris* is already being felt. The University of New Hampshire is currently embroiled in two sexual harassment suits over what constitutes a hostile environment. In the first case, *Silva v. University of New Hampshire*, J. Donald Silva, a professor of 30-years, was suspended without pay for a year after students claimed that he created a hostile environment.[71] Students complained to University officials after Silva used sexual inferences in class. Silva has appealed his suspension and the case is currently awaiting trial. The second suit which was filed by Melissa Berry, alleges that her English

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66. *Id.*

67. *Id.* at 371.

68. *Id.*

69. *Harris*, 114 S. Ct. at 371 (citing *Meritor*, 477 U.S. at 67). The Court stated, "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious." *Id.*

70. *Id.*

71. Michael S. Greve, *Do "hostile environment" charges chill academic freedom? Yes: Call it what it is, Censorship*, 80 ABA JOURNAL 40 (Feb. 1994); *see also* Linda Hirshman, *Do "hostile environment" charges chill academic freedom? No: This is Teaching*, 80 ABA JOURNAL 41 (Feb. 1994).

professor Ramachandran Sethuraman made sexual remarks to her in class, pursued her outside of class, phoned her at home, and retaliated against her after his advances were rejected.[72] The suit further alleges that the University of New Hampshire failed to hold any formal hearings into the allegations and ignored her complaint.[73]

## IV. APPLICATION OF TITLE IX TO THE COACH - ATHLETE RELATIONSHIP

Title IX states that "[N]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[74] While the words seem clear, as the previous three cases demonstrate, the Court's thinking on the issue of sexual discrimination is still evolving. A prudent athletic administrator should understand the Court's current position on sexual discrimination under Title IX.

Historically, the vast majority of Title IX lawsuits have been filed by plaintiffs attempting to gain equal funding or opportunities in women's athletics.[75] As the Courts in *Alexander* and *Gwinnett* have shown, Title IX also prohibits sexual harassment of students.

Newspaper headlines and articles have already chronicled the problems of sexual harassment of athletes by coaches. Sport socioloogist Helen Lenskyj points out that whether at the high school or college level, the relationship between coaches and their athletes is one of imbalance, prompting potential sexual harassment and sexual abuse.[76] In high school, the coach determines who makes the team, who starts and who plays. The coach, therefore, has a direct impact on future opportunities for college athletic scholarships. In college, athletic scholarships are renewed each year, giving the coach enormous power and control over each athlete's future in the sport. The rejection of a coach's sexual advances and innuendoes, could mean the end of a young athlete's career.[77]

After the Supreme Court's decision in *Harris*, students now are

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72. Courtney Leatherman, *Free Speech or Harassment?*, THE CHRONICLE OF HIGHER EDUCATION, Sept. 28, 1994, at A22.

73. *Id.*

74. 10 U.S.C. § 901 (1990).

75. T. Jesse Wilde, *Title IX: Gathering Momentum*, 3 JOURNAL OF LEGAL ASPECTS OF SPORT 71-87 (1993).

76. Helen Lenskyj, *Unsafe at Home Base: Women's Experiences of Sexual Harassment in University Sport and Physical Education*, 1 WOMEN IN SPORT & PHYSICAL ACTIVITY JOURNAL 19-33 (1992).

77. *Id.*

able to file Title IX claims anytime they can show a "discriminatory abusive work environment," which detracted from the student's athletic performance, discouraged the athlete from remaining on the team or on scholarship, or kept them from advancing in their careers.[78]

## V. SCOPE OF TITLE IX TO THE COACH - ATHLETE RELATIONSHIP

Athletic administrators in the 1990s, need to be particularly aware of the potential for sexual harassment of athletes, due to two factors: one, more men are coaching female athletes today than ever before; and two, damages are available for victims of deliberate Title IX discrimination.

An ironic consequence of Title IX that adds to the potential problem of sexual harassment is that while the number of females participating in high school and college athletics has increased, the number of women coaches has decreased.[79] In 1972, before the enactment of Title IX, over 90 percent of all college female athletes were coached by women.[80] In 1994, the number of college female athletes being coached by women had dropped to 49.4 percent.[81] Due to this increase of men coaching female athletes, the opportunity and possibility of sexual harassment has increased. It is important to note, however, that male coaches are not the lone culprits sexually harassing athletes, female coaches are also guilty of the same actions.

In 1980, when the Second Circuit Court of Appeals decided *Alexander v. Yale*, the true scope of Title IX was unknown. The legislative history of Title IX suggests that it was not originally intended to impose gender equity requirements on specific programs and departments, unless the programs and department received direct federal funding.[82] The United States Supreme Court also believed that to be the correct interpretation when in *Grove*

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78. *Harris*, 114 S. Ct. at 371. A discriminatory abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from an employees' job performance, while it may discourage employees from remaining on the job, or keep them from advancing in their careers. *Id.*

79. Maureen R. Weiss & Candie Stevens, *Motivation and Attrition of Female Coaches: An Application of Social Exchange Theory*, THE SPORT PSYCHOLOGIST, Sept. 1993, at 244-261; *see also* Cynthia A. Hasbrook et al. *Sex Bias and the Validity of Believed Differences Between Male and Female Interscholastic Athletic Coaches*, 61 RESEARCH QUARTERLY FOR EXERCISE AND SPORT 259-267 (1990).

80. D. STANLEY EITZEN & GEORGE H. SAGE, SOCIOLOGY OF NORTH AMERICAN SPORT (5th ed. 1993).

81. VIVIAN R. ACOSTA & LINDA J. CARPENTER, WOMEN IN INTERCOLLEGIATE SPORT, A LONGITUDINAL STUDY - SEVENTEEN YEAR UPDATED 1977-1994.

82. Wilde, *supra* note 75, at 72.

*City College v. Bell*,[83] the Court held that only those programs within the institution directly receiving federal funds should be subjected to Title IX.[84] This "programmatic approach"[85] effectively stripped Title IX of its power to enforce gender equality in federally funded institutions.

Congress, dissatisfied with the Supreme Court's interpretation of Title IX in *Grove City College v. Bell*, enacted the Civil Rights Restoration Act of 1987.[86] The Act, designed to give weight and authority to Title IX, requires that if any program within the institution receives federal funds, then the entire institution shall be covered by Title IX and other anti-discrimination laws.[87] By requiring an "institutional approach"[88] to Title IX, Congress extended the reach of Title IX into every activity, program and department of an institution receiving federal funds. Due to the enactment of the Civil Rights Restoration Act of 1987, athletic departments are no longer able to hide behind the programmatic approach and avoid meeting Title IX guidelines.

With the compensatory damages awarded in the Gwinnett case in 1992, Title IX has turned "from a purely protective statute into an offensive weapon."[89] No longer does a plaintiff have to tolerate sexual harassment by a teacher or coach. If the school fails to act, the plaintiff can now sue to collect compensatory damages for any deliberate violations of Title IX. The plaintiff no longer must show that the coach's sexual harassment caused him or her to suffer a "severe psychological injury." A plaintiff can win a sexual harassment suit if they can demonstrate that they were subjected to a hostile or abusive environment.

Therefore, if a coach subjects an athlete to a hostile or abusive environment by making sexual innuendoes toward the athlete, or by making unwelcome sexual propositions, invitations, solicitations, or flirtations, the coach and school are in violation of Title IX and are in danger of facing a lawsuit.

## VI. CONCLUSION AND RECOMMENDATIONS

Sexual harassment of students is a serious problem that cannot be ignored by school administrators. Interestingly in sports, sexual relationships between athletes and coaches are so common place

83. 465 U.S. 555, 104 S. Ct. 1211 (1984).
84. *Id.*
85. GLENN M. WONG, ESSENTIALS OF AMATEUR SPORTS LAW 420 (1988).
86. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).
87. *Id.*
88. WONG, *supra* note 85 at 420.
89. Wong & Barr, *supra* note 45.

that many athletes think of them as normal.[90] However, the day of student athletes having to tolerate a coach's unwanted sexual advances or language are over. Failure to provide an environment free of hostile or abusive behavior, may prove costly to a school, athletic department, and an employee. It seems essential therefore that athletic departments understand the concept of sexual harassment in order to set policies regarding coach/athlete relationships and avoid a sexual harassment law suit. The following recommendations are offered to assist schools and athletic departments in developing needed sexual harassment policies.

*A. Prevention*

The first step schools should take in preventing sexual harassment of students is to establish a clear policy statement on sexual harassment.[91] The statement should not only explain the organization's policy on sexual harassment and that it will not be tolerated, but the statement should also define what constitutes sexual harassment and give specific examples of prohibited behavior.[92]

Once a clear policy statement on sexual harassment is established, the next step school administrators should take to prevent sexual harassment of students is to carefully screen applicants before hiring new personnel. The following list outlines some warning signs and steps administrators should be aware of when hiring new personnel.

- Large unaccountable gaps on an applicant's resume.
- Contact an applicant's references and past employers.
- Contact not only an applicant's references, but also contact past employers and other professionals in the field to learn more regarding the applicant's character.
- Document all the steps you take in investigating an applicant.[93]

If a school administration fails to adequately inquire into the new employee's background, and that employee has had prior incidents of sexual harassment, the school could be potentially liable in a civil lawsuit for negligently hiring that person.[94] Negligent hi-

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90. Lenskyj, *supra* note 76.

91. BILLIE W. DZIECH & LINDA WEINER, THE LECHEROUS PROFESSOR (2nd ed. 1990).

92. *Id.*

93. Presentation by Ralph Hall and Ron Kanoy, The Annual Sport, Physical Education, Recreation, and Law Conference (Jykell Island, GA, Mar. 11, 1994).

94. *Id.* As of 1994, the following states required criminal background checks of school personnel:

1) Alabama; 2) Alaska; 3) Arizona; 4) California; 5) Colorado; 6) Connecticut; 7) Delaware; 8) Florida; 9) Hawaii; 10) Illinois; 11) Iowa; 12) Kentucky; 13) Louisiana; 14) Maryland; 15) Massachusetts; 16) Michigan; 17) Mississippi; 18) Missouri; 19) Nevada; 20) New Hamp-

ring is a breach of an employer's duty to make an adequate investigation of the employee's fitness before hiring.[95]

Once on the job, it is important that school administrators and athletic directors investigate any rumors of sexual harassment by employees. Most victims of sexual harassment tend to keep incidents of sexual harassment and abuse to themselves. They feel they can deal with the problem or that no one will believe them.[96] Scholarship athletes have an even greater reason for not reporting sexual harassment on the part of their coach. The athletes depend on their coach for their scholarship and the real or perceived risk of losing it is a very real deterrent to repor-ting acts of sexual harassment by the coach. Therefore, an athlete may delay filing a sexual harassment charge against his or her coach until after graduation or the competition of eligibility. If an athletic director knows or hears of a coach, who is sexually harassing his or her athletes, and fails to intervene on the students' behalf, the athletic director should be aware of two areas of potential liability: negligent retention[97] and a violation of the student's li-berty interest recognized under the substantive due process component ot the Fourteenth Amendment.[98]

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shire; 21) New Jersey; 22) North Carolina; 23) Ohio; 24) Oklahoma; 25) Oregon; 26) Pennsylvania; 27) South Carolina; 28) Tennessee; 29) Texas; 30) Utah; 31) Vermont; 32) Virginia; 33) Washington; and 34) West Virginia. *Id.*

4 states are in the process of requiring statutory background checks:

1) Arkansas; 2) Indiana; 3) New York; and 4) Wisconsin. *Id.*

The remaining 12 states require no criminal background check before new school personnel are hired:

1) Georgia; 2) Idaho; 3) Kansas; 4) Maine; 5) Minnesota; 6) Montana; 7) Nebraska; 8) New Mexico; 9) North Dakota; 10) Rhode Island; 11) South Dakota; and 12) Wyoming. *Id.*

95. Michael Silver, *Negligent Hiring Claims Take Off*, 73 ABA JOURNAL 72 (May 1987).

96. MICHELE A. PALUDI, ED., IVORY POWER: SEXUAL HARASSMENT ON CAMPUS (1990).

97. Silver, *supra* note 95. Negligent retention is the breach of an employer's duty to be aware of an employee's unfitness, and to take corrective action through retraining, reassignment or discharge. *Id.*

98. Doe v. Taylor Independent School District, 15 F.3d 443 (5th Cir. 1994). In *Doe*, Jane Doe, a high school student, brought a civil rights action against her principal based on sexual molestation by a teacher. *Id.* Doe argued that the principal knew the teacher had a history of inappropriate behavior concerning the teacher and Doe. *Id.* The principal, however, failed to take any action to protect the student from the teacher. *Id.* The United States Court of Appeals for the Fifth Circuit held:

(1) student was deprived of liberty interest recognized under the substantive due process component of the Fourteenth Amendment when she was sexually abused by a teacher; (2) school official's liability for violation of rights of student by school employees arises only at the point when the student shows that the official, by action or inaction, demonstrates deliberate indifference to student's constitutional right; (3) contours of student's substantive due process right to be free from sexual abuse and violations of her bodily integrity were clearly established in 1987; (4) principal could be found to have been deliberately indifferent to teacher's sexual misconduct with student.

*Id.*

Another step school administrators can take is to allow student-athletes the opportunity to evaluate coaches on a yearly basis, similar to student evaluation of teachers. This procedure allows the athlete an opportunity to anonymously report any incidents of sexual harassment, with little risk of retaliation by the coach. The evaluation also provides school administrators with evidence of the coach's relationship with the team.

### *B. Grievance Procedures*

In an attempt to force federally funded schools to provide an environment free of sexual harassment, Title IX requires that institutions "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints."[99]

Under Title IX, students have 180 days after an alleged incident to file a complaint with the OCR. Therefore, a school which has an internal grievance procedure that handles all complaints seriously and promptly may avoid the need for students to file claims with the OCR. The employee named in the complaint, if unfairly accused, will also want a prompt settlement of the issue.

Additionally, if the victim of sexual harassment is assured that his or her grievance is being taken seriously and that if found guilty, all parties will be disciplined, they may be more likely to come forward to the administration with their allegation. Alternatively, if the victim believes his or her complaint is not being taken seriously, or that the coach is being protected, he or she could bypass the institution's grievance procedures and commence civil or criminal litigation.

### *C. Investigation and Disciplinary Action*

Once a sexual harassment grievance has been filed against a coach or other school personnel by an athlete, the athletic director must take action. The first step the athletic director should take is to begin an investigation by arranging for a confidential meeting with the athlete to determine the facts. After such a meeting, the athletic director should conduct a confidential investigation into the alleged harassment to ascertain the validity of the charges. Depending on the institution, high school or college and its size, the athletic director should either conduct the investigation or assign

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99. 34 CFR § 106 (1993). Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance. *Id.*

another person to do so. All investigations should be confidential so that the rights of both the athlete and coach are protected.[100]

Students are more likely to file claims with the OCR or the courts for compensatory damages if they feel their grievance was ignored or the penalty imposed on the coach was meaningless. Depending on the situation and the alleged conduct of sexual harassment, the athletic director must take the appropriate action and either warn, suspend, transfer or dismiss the coach.[101]

The protection of an abusive coach whether because of friendship, the threat of a lawsuit, or any positive contribution the coach makes to the school, can never outweigh the negative publicity and potential future legal liability of a sexual harassment case. This includes protecting the coach by not disclosing to future employers the reason the coach was dismissed. If contacted for a reference, administrators should inform the potential employer the reason the coach left. By disclosing the information, the administrator not only protects the school from potential future liability, but also future athletes at another institution from an abusive coach.

The true effect Title IX will have on preventing sexual harassment of students-athletes has yet to be tested in the courts. Nevertheless, schools and athletic administrators must be made aware of the fact that sports are not immune from sexual harassment laws, and that administrators need to take a more proactive role in preventing sexual harassment on campus and in the locker room.

100. PALUDI, *supra* note 96.
101. *Id.*