SIDELINED: TITLE IX RETALIATION CASES AND WOMEN'S LEADERSHIP IN COLLEGE ATHLETICS

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INTRODUCTION

For fourteen years, Lindy Vivas was the head volleyball coach at California State University at Fresno (Fresno State).[1] In that position, she transformed a program that had never had a winning season into one that regularly produced successful and highly competitive teams.[2] In fact, under Vivas, Fresno State women's volleyball teams had an overall win-loss record of 263-167 and received more invitations to post-season tournaments—including national and NCAA tournaments—than all teams in the history of the program, and the Western Athletic Conference named her coach of the year three times.[3] Her success notwithstanding, Vivas was informed in December 2004 that her contract would not be renewed, ostensibly because she had failed to meet her performance objectives.[4]

Vivas was more than a successful and winning coach. She was an advocate for gender equity at a university with a long history of discrimination against women's athletics in violation of Title IX.[5] Along with other female coaches and administrators, several of whom also lost their jobs,[6] Vivas had complained about discrimination to university officials and government regulators responsible for enforcing Title IX.[7] Specifically, she alleged that Fresno State paid lower salaries and awarded shorter contracts to female coaches and allocated fewer resources, less support, and unequal access to facilities for the women's volleyball team.[8]

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1. Verified Complaint at 1-2, Vivas v. Bd. of Trs. of the Cal. St. Univ., No. 06CECG00440 (Cal. Super. Ct. Fresno County Feb. 9, 2006) [hereinafter *Vivas Complaint*].

2. *Id.* at 2.

3. *Id.* at 2–3.

4. *Id.* at 1, 7; *see also* Bryant-Jon Anteola, *Bulldogs Let Vivas Go*, FRESNO BEE, Dec. 7, 2004, at D1.

5. *Id.* at 4-5.

6. See Part II.A, *infra*.

7. See Part II.A, *infra*. Vivas argued that these disparities violated Title IX as well as the university's obligations under a remediation agreement with OCR and a consent decree that had settled a Title IX lawsuit against the California State University System.

8. *Vivas Complaint*, *supra* note 1, at 3-4.

Vivas filed suit against Fresno State, alleging that although the athletic director cited performance reasons for her termination, she was actually fired for her gender, her marital status, her perceived sexual orientation, and her whistleblowing on gender discrimination within the department.[9] In July 2007, jurors in the Fresno County Superior Court agreed, except as to the marital status claim, and awarded her $5.85 million in damages[10]—at the time, the largest jury award in a Title IX case. Later that year, Fresno State announced a multi-million dollar settlement with Diane Milutinovich, an athletic department official who also claimed she was fired in retaliation for her efforts to ensure the department's compliance with Title IX.[11] Fresno State then lost another high-profile trial involving similar claims of retaliation.[12] This time, the damages award to the plaintiff, former women's basketball coach Stacy Johnson-Klein, was a staggering $19.1 million.[13]

Due to the record-setting jury awards and multiple separate plaintiffs, the Fresno State cases are the most visible examples of Title IX retaliation cases in the wake of the Supreme Court's 2005 decision, *Jackson v. Birmingham Board of Education*,[14] which recognized a private right of action for retaliatory discrimination under Title IX. In the short time since the decision was released, it has already been invoked in a number of retaliation cases involving college athletics.[15] Coaches, administrators, and other university officials from California to Florida—both male and female, but mostly female—have filed suit against their institutions, complaining that their contracts were terminated or not renewed, or that they were harassed or otherwise mistreated, because they raised concerns about gender equity on behalf of students, other coaches, or themselves. These cases, some of which have also resulted in significant verdicts and settlements, provide insight into athletic department culture and reveal obstacles women face in reaching positions of leadership in college

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9. *Id.*

10. Bryant-Jon Anteola, *Jury Awards Former 'Dogs Coach $5.85m: Panel Finds Unanimously on Majority of Questions in Discrimination Suit*, FRESNO BEE, July 10, 2007, at A1. The judge later reduced Vivas's award to $4.52 million, though attorney's fees and costs raised Fresno State's total to more than $5.6 million; eventually, the parties settled Fresno State's appeal for $5.2 million, including attorney's fees. Ken Robison, *Vivas Award Cut to $4.52m: Judge Denies New Trial for Fresno State vs. Fired Volleyball Coach*, FRESNO BEE, Oct. 13, 2007, at A1; George Hostetter, *Vivas, CSU Reach Agreement: Former Fresno State Volleyball Coach to Receive Cash Payment, Annuity in Settling Discrimination Suit*, FRESNO BEE, Dec. 16, 2008, at D1.

11. George Hostetter, *Fresno State Suit Is Settled for $3.5m: Multinovich's Deal Resolves Her Sexual Discrimination Case Against the University*, FRESNO BEE, Oct. 12, 2007, at A1.

12. George Hostetter & Bryant-Jon Anteola, *TRIAL SHOCKER: $19M: Jury Says CSUF Discriminated Against Stacy Johnson-Klein*, FRESNO BEE, Dec. 7, 2007, at A1.

13. *Id.* The judge reduced this award to $6.6 million plus attorney's fees, and the parties settled for $9 million. George Hostetter, *Jury Award Cut for Johnson-Klein: Take $6.6m or Face New Trial, Judge Tells Ex-CSUF Coach*, FRESNO BEE, Feb. 9, 2008, at A1; George Hostetter, *Deal Is Reached in Coach Lawsuit: Stacy Johnson-Klein and Fresno State Agree to Settle for $9 Million*, FRESNO BEE, June 18, 2008, at A1.

14. 544 U.S. 167 (2005).

15. The *Jackson* decision has also been invoked in Title IX retaliation litigation involving school districts. *See* Suzanne E. Eckes & David P. Thompson, *Retaliation Lawsuits in Public Schools: What Effect Has the Jackson v. Birmingham Decision Had on School Personnel?*, 232 WEST EDUC. L. REP. 557, 566 (2008) (noting there have only been a few such cases and that they have generated "mixed results").

athletics. These cultural considerations are particularly relevant in light of the enormous gender gap among college head coaches and athletic administrators. Women fill less than a quarter of head coach and athletic director positions in college athletics, and are even minorities among coaches of women's teams.[16]

Discrimination against women seeking or serving in leadership positions in sport is worthy of analysis, not only for the sake of individual women who desire to self-actualize as a head coach or athletic administrator, but because the unique role of sport in society gives underrepresentation of women in leadership positions additional significance. Due to its high visibility and widespread appeal[17]—its veritable iconic status—sport is a salient site of cultural production.[18] That is, sport operates on a symbolic level, reflecting and transmitting shared cultural values. Among these values, sport helps define the attributes associated with leadership,[19] and thus, derivatively, power.[20] By remaining, in the words of Carole Oglesby, "uniquely impervious to the inclusion of women,"[21] sport operates to ensure women's exclusion from powerful social roles more generally, as both men and women exposed to the male-dominated realm of sport "internalize . . . the dominant vision" of power as a masculine trait.[22] Put another way, when women serve in head coaching

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16. LINDA J. CARPENTER & R. VIVIAN ACOSTA, WOMEN IN INTERCOLLEGIATE SPORT: A LONGITUDINAL, NATIONAL STUDY THIRTY ONE YEAR UPDATE (2008), http://acostacarpenter.org (reporting based on 2008 data that women fill 20.6% of head coach positions for men's and women's teams, 42.8% of head coach positions of women's teams, and 21.3% of athletic director positions).

17. Lois Bryson, *Challenges to Male Hegemony in Sport*, *in* SPORT, MEN AND THE GENDER ORDER: CRITICAL FEMINIST PERSPECTIVES 173, 174 (Michael A. Messner & Donald F. Sabo eds., 1990) (saying sport is "an important, admired social activity . . . something to which we are exposed daily and from very young ages . . . an immediate mass reality [which will only be magnified] with increasing commercialization and media exposure").

18. Carole Oglesby, *Intersections: Women's Sport Leadership and Feminist Praxis*, *in* WOMEN ON POWER: LEADERSHIP REDEFINED 290, 292 (Sue J.M. Freeman, *et al*. eds., 2001) [hereinafter WOMEN ON POWER].

19. Mary Jo Kane, *Leadership, Sport, and Gender*, *in* WOMEN ON POWER, *supra* note 18, at 114, 115.

20. Nancy Theberge, *Gender, Work, and Power: The Case of Women in Coaching*, 15 CANADIAN J. OF SOC. 59, 61 (1990).

21. Oglesby, *supra* note 18, at 291; *see also* Janet S. Fink & Donna L. Pastore, *Diversity in Sport?: Utilizing the Business Literature to Devise a Comprehensive Framework of Diversity Initiatives*, 51 QUEST 310, 311 (1999) ("Perhaps nowhere is discrimination and oppression more evident than in Division I-A intercollegiate athletics."); Kane, *supra* note 19, at 115 (calling sport one of the "few male bastions remaining" and the site of "some of the most extreme examples of oppressive stereotypes concerning gender and leadership").

22. PIERRE BORDIEU, MASCULINE DOMINATION 94-95 (Richard Nice trans., Stanford University Press 2001); *see also id.* ("[As a result of a] whole series of previous experiences, particularly in sport, which often gives rise to experience of discrimination, . . . [women] cannot see themselves giving orders to men, or, quite simply, working in a typically male occupation."); Nancy Theberge, *The Construction of Gender in Sport: Women, Coaching, and the Naturalization of Difference*, 40 SOC. PROBLEMS 301, 301 (1993) (calling sport "one of the cultural practices most significant in the construction of gender" because it has served, for men, as "a setting for the development and display of traits and abilities that signify masculine power and authority"); Warren A. Whisenant *et al.*, *Success and Gender: Determining the Rate of Advancement for Intercollegiate Athletic Directors*, 47 SEX ROLES 485, 486 (2002) (noting that the gender gap in leadership in sport serves to further entrench "hegemonic masculinity").

positions, "the visibility and responsibility associated with coaching implies [sic] that women are capable in leadership positions of any kind."[23]

The current spate of retaliation cases is, therefore, a relevant source of information about an important social problem. Moreover, the fact that plaintiffs in Title IX retaliation cases against college athletic departments are enjoying new levels of success provides an opportunity to speculate optimistically about the power of law to effect positive change in the culture of college athletics. Following the Supreme Court's recent validation of a private right of action to challenge retaliation in *Jackson*, coaches and athletic administrators have never before had more legal remedies with which to tackle sex discrimination in college athletics. Together with the recent high-profile multi-million dollar jury verdicts and settlements, these legal remedies create a strong incentive for athletic departments seeking to avoid liability to monitor for and address institutional practices that drive and deter women from coaching.

With this in mind, this Article proceeds as follows. Part I describes Title IX's role as an employment discrimination statute and examines the contribution of *Jackson v. Birmingham Board of Education* as a catalyst for coaches' retaliation claims. Part II describes in greater detail the wave of Title IX retaliation cases that has followed the *Jackson* decision, including those against Fresno State. Part III examines the content of those cases in connection with existing empirical and theoretical scholarship about women in college coaching and athletic administration. Part IV examines the legal significance of the retaliation cases as a trend, and concludes with cautious optimism about the potential for law to help expose, remedy, and deter discriminatory practices within the leadership of college sport.

PART I

TITLE IX, EMPLOYMENT DISCRIMINATION, AND RETALIATION

Though Title IX is perhaps best known for its role in mitigating sex discrimination against female students and athletes, the statute also protects education sector employees against discrimination on the basis of sex.[24] The Supreme Court has confirmed that the statute contains an implied private right of action,[25] which plaintiffs may use to seek monetary damages.[26] Moreover, Title IX plaintiffs are not subject to the cap on compensatory damages, statute of limitations, or exhaustion requirements that apply to employment discrimination cases filed under Title VII of the Civil Rights Act of 1964,[27] which also governs educational institutions as employers. Some jurisdictions hold that Title VII is the exclusive route for relief for employment discrimination claims in

23. Kurt A. Stahura & Michael Greenwood, *Sex of Head Coach as a Function of Sport Type Prestige and Institutional Structure*, 17 APPLIED RES. IN COACHING AND ATHLETICS 1, 2 (2002).

24. N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535-36 (1982) (upholding Title IX regulations that prohibit schools from discriminating on the basis of sex in their capacities as employers).

25. Cannon v. Univ. of Chicago, 441 U.S. 677, 709 (1979).

26. Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 76 (1992).

27. 42 U.S.C. § 2000e.

the context of education.[28] In jurisdictions where Title IX is not precluded, however, the statute provides an attractive employment discrimination remedy for coaches and other school employees.

Prior to the Court's 2005 decision in *Jackson*, it was unclear whether and to what extent private enforcement of Title IX extended to retaliation claims. Over the years, federal courts including both the Fourth and Fifth Circuit Courts of Appeals[29] had allowed plaintiffs to bring retaliation claims against a college or university employer, but their decisions were called into question by a 2001 Supreme Court decision, *Alexander v. Sandoval*.[30] At issue in *Sandoval* was whether a private right of action existed for violations of Title VI of the Civil Rights Act of 1964,[31] the statute that prohibits race discrimination by programs receiving federal funds.[32] The Court held that the plaintiff's challenge was beyond the scope of the statute's private right of action because the prohibition against discrimination with a disparate racial impact is contained only in Title VI's implementing regulations promulgated by the Department of Justice, rather than within the statute itself.[33] Private enforcement of Title VI is therefore limited to intentional discrimination prohibited by the statute and does not extend to other manners of discrimination prohibited only by regulation. Like the disparate impact discrimination at issue in *Sandoval*, retaliation against employees of educational institutions who complain of discrimination is prohibited under Title IX's regulations,[34] but is not specifically mentioned in the statute itself. Since Title IX was modeled on Title VI and is regularly subject to judicial interpretations of Title VI, some courts therefore interpreted *Sandoval* to foreclose private enforcement of retaliation claims under Title IX.[35]

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28. Lakoski v. James, 66 F.3d 751, 752 (5th Cir. 1995); Gibson v. Hickman, 2 F. Supp. 2d 1481, 1484 (M.D. Ga. 1998); Cooper v. Gustavus Adolphus Coll., 957 F. Supp. 191, 194 (D. Minn. 1997). *But see* Bedard v. Roger Williams Univ., 989 F. Supp. 94, 97 (D.R.I. 1997) (recognizing the existence of a private remedy under Title IX); Nelson v. Univ. of Maine Sys., 923 F. Supp. 275, 278-79 (D. Me. 1996) (same); Bowers v. Baylor Univ., 862 F. Supp. 142, 145 (W.D. Tex. 1994) (same).

29. Lowrey v. Texas A & M Univ. Sys., 117 F.3d 242, 254 (5th Cir. 1997); Preston v. Virginia ex rel. New River Cmty. Coll., 31 F.3d 203, 205-06 (4th Cir. 1994); Litman v. George Mason Univ., 2000 WL 34507658, *3 (E.D. Va. 2000); Murray v. New York Univ. Coll. of Dentistry, 57 F.3d 243, 248-49, 251 (2d Cir. 1995); *Nelson*, 923 F. Supp. at 280.

30. 532 U.S. 275 (2001).

31. *Id*. at 278.

32. 42 U.S.C. § 2000d.

33. *Sandoval,* 532 U.S. at 291 ("Thus, when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.").

34. 34 C.F.R. § 100.7(e) ("No recipient [of federal funds] or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 [of Title VI] or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part."); *see also* 34 C.F.R. § 106.71 (incorporating § 100.7(e) into Title IX implementing regulations).

35. Jackson v. Birmingham Bd. of Educ., 309 F.3d 1333, *passim* (11th Cir. 2002), *rev'd*, 544 U.S. 167 (2005); Litman v. George Mason Univ., 156 F. Supp. 2d 579, *passim* (E.D. Va. 2001); Atkinson v. Lafayette Coll., No. 01-CV-2141, 2002 WL 123449, *5-*7 (E.D. Pa. Jan. 29, 2002); *but see* Peters v. Jenney, 327 F.3d 307, 324-25 (4th Cir. 2003) (holding that *Sandoval* does not foreclose private

One of those courts was the Eleventh Circuit Court of Appeals, in a case brought by Coach Roderick Jackson against the Board of Education in Birmingham, Alabama.[36] Coach Jackson was a physical education teacher and girls' basketball coach at one of the district high schools. After he complained to school district officials about inequitable allocation of athletic facilities and other resources between girls' and boys' basketball teams, he received negative performance evaluations and ultimately lost his coaching position.[37] He sued the school board, arguing that because he was dismissed for blowing the whistle on sex discrimination prohibited by Title IX, Title IX protected him personally. The school board successfully argued before the district court and the Eleventh Circuit that private enforcement of Title IX did not extend to retaliation claims.[38] The court reasoned that the contrast between Title IX, which does not contain an anti-retaliation provision, and Title VII, which does expressly prohibit retaliation against employees who challenge unlawful employment discrimination,[39] suggests that Congress did not intend for Title IX's prohibition on discrimination to encompass retaliation. Applying *Sandoval*, the court concluded that since retaliation is not prohibited by Title IX itself but only by its implementing regulations, private plaintiffs could not rely on Title IX to provide a remedy against retaliation.[40]

Jackson's appeal from this decision gave the Supreme Court an opportunity to clarify the meaning and scope of *Sandoval*. In its 2005 decision,[41] the Court agreed that Title IX's private right of action extends only to conduct prohibited within the statute itself, rather than in a regulatory interpretation.[42] However, as Justice O'Connor's majority opinion reasoned, retaliation against whistleblowers is included in Title IX's broad, statutory prohibition on sex discrimination.[43] O'Connor rejected the appellate court's conclusion, drawn from its comparison of Title IX to Title VII, that Congress intends to include retaliation in anti-

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enforcement of retaliation under Title VI, but that the right does not protect third parties who complain of violations).

36. *Jackson*, 309 F.3d 1333, *passim* (11th Cir. 2002).

37. *Id.* at 1335.

38. *Id.* at 1335-36.

39. *Id.* at 1345 n.12 (citing 42 U.S.C. § 2000e-3(a)). The retaliation alleged by Coach Jackson was outside the scope of Title VII's anti-retaliation provision because his coaching duties were revoked not for complaining about discrimination in the terms and conditions of his employment, but for complaining about discriminatory treatment of his students.

40. *Id.* at 1345-46.

41. 544 U.S. 167.

42. *Id*. at 178.

43. *See id.* at 173-74:

> Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment. Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX (internal citations omitted).

discrimination statutes only when it does so expressly.[44] She pointed out that Title IX prohibits all discrimination in its scope that has not been expressly exempted, whereas Title VII prohibits only that which has been enumerated. Therefore, the fact that retaliation is not expressly mentioned in Title IX does not put retaliation beyond the statute's scope.[45]

Thus, after *Jackson*, it is clear that plaintiffs may rely on Title IX's private right of action to challenge both direct discrimination prohibited under Title IX and punitive action directed at those, such as coaches, who complain about or seek remedy for perceived discrimination. So clarified, Title IX's private right of action is a significant weapon against sex discrimination generally and in the context of college athletics specifically. Whereas Title VII makes private enforcement available to plaintiffs who faced retaliation for challenging discriminatory employment conditions, plaintiffs may use Title IX to seek remedy for retaliation motivated by their complaints about any ostensible Title IX violations. Such violations may include an athletic department's failure to provide an equitable number of athletic opportunities to female students, adequate resources and support to women's programs, or equal treatment of coaches. Moreover, a retaliation plaintiff need not prove that the predicate discrimination occurred, only that the plaintiff reasonably believed the violation to exist.[46] A whistleblower coach will be more likely to challenge the reprisal against her even if she would not (or could not) have directly challenged the discrimination she perceived due to legal or evidentiary weaknesses inherent in such claims. For example, it is difficult for female coaches to challenge sex-based pay discrimination because they must demonstrate the university's failure to treat them similarly to a male coach of comparable responsibility.[47] Due to Title IX's cause of action for retaliation, it is more likely that a coach who is fired for complaining about perceived pay discrimination will pursue some relief against the university than if she was limited to remedies for pay discrimination itself or if her retaliation claim required her to succeed on the pay discrimination claim itself.[48]

In addition, the *Jackson* Court's interpretation of Title IX's private right of action significantly expands statutory protection against employment discrimination in the education sector. While college and university employees may challenge employment discrimination under Title VII as well as (or as an alternative to) Title IX,[49] Title VII's anti-retaliation provision is limited to

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44. *Id.* at 175.

45. *Id.*

46. *See, e.g.*, Howell v. N. Cent. Coll., 331 F. Supp. 2d 660, 663-66 (N.D. Ill. 2004); Nelson v. Univ. of Me. Sys., 923 F. Supp. 275, 284 (D. Me. 1996); *see also* Deborah Brake, *Retaliation*, 90 MINN. L. REV. 18, 76-77 (2005) ("Protection from retaliation would mean little if it were otherwise. Most people lack knowledge about whether what they perceive as discrimination is actually unlawful, and judicial outcomes in discrimination cases frequently depend on the identity of judges and jurors.").

47. *See, e.g.*, Deborah L. Rhode & Christopher J. Walker, *Gender Equity in College Athletics: Women Coaches as a Case Study*, 4 STAN. J. OF CIV. R-CIV. L. 1, 15-19 (2008); Janet Judge *et al.*, *Pay Equity: A Legal and Practical Approach to the Compensation of College Coaches*, 6 SETON HALL J. SPORT L. 549, *passim* (1996).

48. This is examined in detail at Part IV.A, *infra*.

49. Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 589, 590-93 (2003)

retaliation motivated by the employee's complaints about employment discrimination.[50] Therefore, Title VII would not apply to coaches punished for complaining about discrimination against their players. Moreover, as noted earlier, relying on Title IX instead of Title VII avoids the damages cap and extends a remedy for retaliation to those plaintiffs who may have failed to preserve their Title VII claims by filing first with the Equal Employment Opportunity Commission ("EEOC") within 180 days.[51] In addition, while some states have whistleblower protection statutes that may also protect college and university employees who complain about perceived sex discrimination,[52] many are restricted in scope to public employees.[53] Title IX's cause of action for retaliation, on the other hand, applies regardless of state law, and protects employees of any public or private school that receives federal funds. Lastly, while the First Amendment may also protect education sector employees against reprisal for engaging in protected speech, this remedy only applies to public institutions.[54] It is further limited by a recent Supreme Court decision[55] confining this application of the First Amendment to protected speech by employees in their personal rather than professional capacities—a restriction likely to apply to coaches who complain about discrimination in college or university athletic departments.[56]

By expanding the remedies for retaliation in the ways described above, and by raising the profile of retaliation in general, the Supreme Court's decision in *Jackson* laid the groundwork for suits against colleges and universities by numerous coaches and others in athletics administration who raised concerns about gender equity in athletics and experienced adverse employment consequences. To be sure, many of these cases also involve claims of direct discrimination, sexual harassment, or retaliation predicated on employment discrimination complaints, all of which were actionable prior to *Jackson*. Title IX retaliation claims in the mold of *Jackson* are in the foreground of these cases, suggesting they are providing the momentum for this trend. Intersecting and

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(explaining and citing examples that some courts hold Title VII precludes a Title IX right of action for employment discrimination, others have held that Title IX's right of action only applies in such context as retaliation where Title VII's remedy is limited, still others hold that a Title IX cause of action for employment discrimination may be alleged, but differ as to whether Title IX, Title VII, or Title VI standards apply).

50. 42 U.S.C. § 2000e-3(a). The Supreme Court recently held that the retaliatory action prohibited by this provision is not limited to "workplace-related or employment-related" actions, but includes any adverse action that could dissuade the employee from protesting discriminatory workplace conditions. Burlington Northern & Santa Fe Ry. Co., 548 U.S. 53, 67 (2006). Under this expansive reading, a coach who was not only fired, but harassed, investigated, and subjected to closer scrutiny in retaliation for protected activity like complaining of salary discrimination against female coaches would have a cause of action under Title VII as well as Title IX.

51. 42 U.S.C §§ 2000e-5(e)(1), 1981a(b).

52. *See* NATIONAL CONF. OF STATE LEGISLATURES, STATE WHISTLEBLOWER LAWS (Aug. 2005), http://www.ncsl.org/default.aspx?tabid=13390.

53. *See id.*

54. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating the First Amendment into the Due Process Clause of the Fourteenth Amendment).

55. Garcetti v. Ceballos, 547 U.S. 410, 426 (2006).

56. *See, e.g.*, Potera-Haskins v. Gamble, 519 F. Supp. 2d 1110, 1116-17 (D. Mont. 2007), discussed *infra* at Part II.D.2.

related discrimination is either brought to light in the context of the retaliation claim itself, or in separate claims that piggyback on the momentum of the retaliation claim. Thus, a right of action for retaliation is valuable not only as a weapon of enforcement against reprisals for sex discrimination, but for increasing the likelihood of litigation challenging the predicate discrimination itself. Consequently, there is increased visibility and public awareness of the multiple, interrelated components of discrimination operating against women in college athletic departments, which are often difficult to address in a stand-alone claim. Over its next two Parts, this Article will present this trend of cases in greater detail and then examine those cases thematically.

PART II

RETALIATION CASES: HISTORY AND THE RECENT TREND

Gender-based retaliation cases in the context of college athletics are not a new phenomenon and certainly predate the Supreme Court's 2005 decision in *Jackson*. In 1997, for example, former Oregon State University softball coach Vickie Dugan won a $1.3 million jury verdict[57] in a lawsuit that claimed OSU violated her First Amendment rights when it fired her in retaliation for defending the softball team's varsity status and for cooperating with Department of Education Office for Civil Rights' ("OCR") investigation of the university's Title IX compliance.[58] OSU argued that Dugan was fired because her team produced a 0-24 record for the 1994 season.[59] However, Dugan convinced the jury that her team's losing season was a product of the very inadequate and inequitable funding that she was fired for challenging.[60]

Jan Lowrey was another early retaliation plaintiff. In 1995, she charged that she was demoted from her position of Women's Athletic Coordinator at Tarleton State (part of the Texas A&M system) after she complained about gender discrimination within the athletic department, including inequitable distribution of resources between men's and women's teams, as well as lower pay for female athletic department employees.[61] The district court dismissed

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57. The parties later agreed to settle OSU's appeal for over $1 million, a figure that included attorney's fees and costs. Sharon Ginn, *Gender Lawsuit's End Gives "Relief,"* ST. PETERSBURG TIMES, Jan. 17, 1999, at 2C.

58. Abby Haight, *Legal Fight Leaves Former Coach Vindicated but Tired, Frustrated*, OREGONIAN, Nov. 17, 1997, at D03. A similar claim filed today would likely fail as a result of the Supreme Court's subsequent decision in Garcetti v. Ceballos, 547 U.S. 410, 426 (2006), which limited First Amendment protection for public employees to statements made in their personal rather than professional capacities. *See supra* note 55 and accompanying text.

59. Eric Mortenson, *Ex-Oregon State Softball Coach Prevails in Discrimination Suit*, REG.-GUARD, Nov. 13, 1997.

60. American Association of University Women, *Home, Advocacy, Legal, Advocacy, Case Support, Dugan v. Oregon State University* (accessed July 20, 2009) at http://www.aauw.org/advocacy/laf/cases/dugan.cfm; Ginn, *supra* note 57, at 2C; Tad Shannon, *Lawyers for Oregon State Contest Jury Verdict in Gender-Bias Case*, Eugene REG.-GUARD, April 10, 1998; Haight, *supra* note 58; Mortenson, *supra* note 59.

61. Lowrey v. Texas A&M Univ. Sys., 117 F.3d 242, 244-45 (5th Cir. 1997).

Lowrey's case, but the Fifth Circuit Court of Appeals reinstated it, agreeing that Title IX extended relief to retaliation claims not covered by Title VII.[62] Similarly, an undisclosed settlement terminated litigation between Nova Southeastern University and its former softball coach, Robyn Handler. Handler had sued in 2002, alleging that she was given poor performance evaluations and was subsequently terminated in retaliation for filing complaints with OCRabout unequal pay and treatment of the women's softball team.[63]

While retaliation cases in college athletics—even successful ones like those noted above—were not unknown prior to *Jackson*, the cases filed since the Court's 2005 ruling are significant because they are recent and because there are enough of them to examine for trends. Thus, this part will describe those retaliation cases, both resolved and pending, that were filed or litigated in substantial part in the wake of *Jackson v. Birmingham Board of Education*.

A. Fresno State

As mentioned in the Introduction to this Article, the most notorious institutional defendant in this contemporary trend of retaliation cases is Fresno State University. Fresno State has a long history of Title IX complaints. For much of the 1990s, the athletic department was subject to regulatory scrutiny after an investigation by the OCR that revealed widespread Title IX violations including significant disparities in opportunities for female student-athletes[64] and inequities in the treatment of existing men's and women's teams.[65] Under pressure to comply with Title IX or else lose its federal funding, Fresno State committed itself to a Corrective Action Plan to increase support and status for women's sports.[66] In 2001, however, Fresno State's Associate Athletic Director,

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62. *Id.* at 249, n.7 (citing Lakoski v. James, 66 F.3d 751, 755 (5th Cir. 1995)). Thus, Lowrey was allowed to proceed with her claims that she was demoted for protesting inequitable allocation of resources between men's and women's sports as violations of Title IX. However, the Supreme Court, in *Alexander v. Sandoval*, discussed *supra,* cast doubt on the private right of action for retaliation under Title IX that had been recognized by the Fifth Circuit.

63. Jamie Malernee, *Coach Sues NSU, Claims Gender Bias; University Denies Charges, Alleges She Was Unreliable and Belligerent*, SUN-SENTINEL, Oct. 20, 2002, at 1B. In press about the lawsuit, Handler described the athletic director who terminated her, Corey Johnson, as "demeaning and homophobic" and described how he insisted on having more "feminine role models in the office" and required that she wear a dress to an office banquet for fear of what people would "assume" if she "showed up in a pantsuit." *Id.*

64. *See, e.g.*, *Vivas Complaint*, *supra* note 1, at 3. OCR found that Fresno State did not comply with any of the three alternative tests for measuring equity in the number of athletic opportunities available to each sex. Women comprised 54.3% of the student body but received only 27.3% of the athletic opportunities. The university did not have a history and continuous practice of expanding athletic opportunities for women, and it had made no effort to determine whether it was otherwise satisfying the interests and abilities of the female student population. Letter from John E. Palornino, Reg'l Civil Rights Dir., Dep't of Educ., to John E. Welty, President, Cal. State Univ. at Fresno, Apr. 6, 1994 (on file with Duke Journal of Gender Law and Policy) (summarizing OCR's investigatory findings).

65. Fresno State was also party to a consent decree that settled litigation between the California National Organization for Women and the California State University System, which had gender disparities in athletic opportunities, funding, and scholarships. *See Vivas Complaint*, *supra* note 1, at 3.

66. *Vivas Complaint*, *supra* note 1, at 3.

Diane Milutinovich, a 22-year department veteran who had worked on Fresno State's compliance plan, complained internally about the athletic department's backsliding on its obligations under the plan. In a complaint to OCR, she cited the department's failure to raise the proportion of female student-athletes as agreed and its reluctance to devote resources to women's athletics. She pointed out disparities in the compensation paid to employees of men's and women's athletics respectively, and complained that women's sports had been demoted from or denied "tier one" (most favored) status in violation of Fresno State's obligations under the Corrective Action Plan. Soon thereafter, newly-appointed Athletic Director Scott Johnson announced a department reorganization that eliminated Milutinovich's position. This reorganization resulted in her transfer to a different university department.[67] Milutinovich sued, arguing that Johnson transferred her in retaliation for filing the complaint with OCR.[68] She later filed a new lawsuit to challenge her reassignment from her new position as retaliation for her continued efforts in support of gender equity.[69]

Before volleyball coach Lindy Vivas's termination in 2004, she too had filed a complaint with OCR in which she challenged the athletic department's reluctance to promote volleyball to a tier one sport.[70] She also filed an internal grievance with the university's human resources department, challenging the disparity in the length of employment contracts for male and female coaches and, like Milutinovich, Vivas alleged that her termination was retaliation for challenging the department's gender inequities.[71] A few months later, the women's basketball coach, Stacy Johnson-Klein, was placed on administrative leave for mistreating players and ultimately terminated after an investigation revealed that she had "inappropriately obtained" pain medications from students and staff.[72] Although Johnson-Klein admitted to obtaining Vicodin from a player, she too filed suit and claimed that the investigation itself was a retaliatory response to her internal complaints about sexual harassment and gender disparities[73] affecting the women's basketball team and her threat to file a complaint with OCR.[74]

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67. Jim Davis, *Former Fresno State Athletics Official Sues: Milutinovich Contends Title IX Violations*, FRESNO BEE, Oct. 28, 2004, at B1.

68. *Id.*

69. *Id.*

70. *Vivas Complaint*, *supra* note 1, at 4-5; *see also* Andy Boogaard, *Title IX Inquiry Continues: Fresno State Gender Equity Case Reaches 20th Month*, FRESNO BEE, Nov. 13, 2005, at C1.

71. *Vivas Complaint*, *supra* note 1, at 1, 4.

72. Bryant-Jon Anteola, *Reaction Runs the Gamut: Some Express Relief, Others Dismay After Coach's Termination*, FRESNO BEE, Mar. 3, 2005, at A8. In the university's public statement about Johnson-Klein's firing, President John Welty also charged her with insubordination, fiscal improprieties, and disregard for the health and welfare of her players. *Id.*

73. Cyndee Fontana & Doug Hoagland, *Sidelined, Not Silenced: Stacy Johnson-Klein Tells Her Side of a Sports Soap Opera that Riveted the Valley*, FRESNO BEE, Mar. 20, 2005, at A1. In memos to the athletic department officials preceding the investigation, Johnson-Klein had reportedly complained of inequities in marketing, support staff, and athletic training. *Id.*

74. Jeff Davis, *Attorney Points to Coach's Complaint: She Brought Forth Allegations of Sexual Harassment, He Says*, FRESNO BEE, Feb. 11, 2005, at A1; George Hostetter, *Ex-Coach Grilled on Pain-Pill Issue*, FRESNO BEE, Nov. 6, 2007, at D1.

In October 2007, Fresno State settled with Milutinovich for $3.5 million.[75] Both Vivas's and Johnson-Klein's lawsuits proceeded to trial, where they produced not only multi-million dollar verdicts in the plaintiffs' favor, but volumes of testimony about the hostile environment and discriminatory treatment of female coaches and staff. Jurors in Vivas's three-week trial in the summer of 2007 found truth in Vivas's allegations that she was terminated for advocating gender equity, including efforts to hold the department to its promises under the Corrective Action Plan, particularly, to elevate women's athletic programs to tier one status and to move women's volleyball competitions from the gymnasium to the university's premier venue, and for advocating multi-year contracts for successful, long-serving female coaches like herself and softball coach Margie Wright.[76] The jury also agreed that her termination was not only retaliatory but was direct discrimination on the basis of her sex and perceived lesbian sexual orientation.[77] Stacy Johnson-Klein testified on Vivas's behalf about Johnson's plans to "get rid of lesbians in the athletic department," and his preference for hiring "female coaches who were straight and attractive."[78] She also described how Johnson and others referred to Vivas, Milutinovich, and softball coach Margie Wright, as "the other team" in contrast to "the home team" employees who did not make trouble, and how Johnson had instructed other athletic department officials to "make Vivas'[s] life miserable."[79] Wright testified about a 2000 incident in which male athletic department staff made posters depicting stick figures of female athletes' bodies with male administrators' heads and proclaimed "Ugly women's athletes day."[80] Wright also corroborated Johnson-Klein's descriptions of the department's homophobic culture by describing the homophobic comments members of the school's baseball team directed to her players.[81]

Fresno State's defense—that Vivas was fired for performance reasons, including her alleged unwillingness to schedule competitions against top opponents—was exposed as pretext. The jury returned a $5.85 million verdict in Vivas's favor, which was later reduced to $4.52 million due to a weak evidentiary basis for the jury's calculation of Vivas's future nonmonetary

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75. Hostetter, *Fresno State Suit is Settled*, *supra* note 11, at A1.

76. *Vivas Complaint*, *supra* note 1, at 4-5; Bryant-Jon Anteola, *Words Scarce After Lawsuit: In Wake of Vivas Trial, Many Stay Tight-Lipped*, FRESNO BEE, July 15, 2007, at C1. In 2004, Wright filed a complaint with OCR alleging retaliation. *Id.* In 2008, after the Vivas and Johnson-Klein verdicts, Fresno State agreed to pay Wright $605,000 to prevent her from filing a lawsuit of her own. George Hostetter, *Fresno State Settles with Softball Coach for $605k*, FRESNO BEE, July 15, 2008, at A1.

77. Bryant-Jon Anteola & Daniel Lyght, *University to Volley Vivas Trial Verdict: Fresno State Weighs Options, Vows to Appeal*, FRESNO BEE, July 11, 2007, at A1 (reprinting the text of the jury verdict form, including, "2.4 Did CSU discriminate against Lindy Vivas because of her perceived sexual orientation (lesbian)? – Yes").

78. Bryant-Jon Anteola, *Ex-Bulldogs Coach Johnson-Klein Takes Center Stage at Trial*, FRESNO BEE, June 22, 2007, at A1; *see also* Bryant-Jon Anteola, *Fresno State, Vivas Await Jury: Parties Involved Wrap Up Their Cases in Discrimination Suit*, FRESNO BEE, July 6, 2007, at D1.

79. Anteola, *Ex-Bulldogs Coach*, *supra* note 78.

80. Bryant-Jon Anteola, *Wright Tells of Derogatory School Party: Attorneys Become Combative in Vivas Trial*, FRESNO BEE, June 15, 2007, at D1.

81. *Id.*

damages. But even in its reduced form, Lindy Vivas's verdict was the largest awarded in a Title IX case.[82]

Despite addressing a similar pattern of discrimination, harassment, and retaliation, Johnson-Klein's trial was quite different from Vivas's. The lynchpin to Fresno State's defense of Johnson-Klein's wrongful discharge claim was the undisputed fact that she had used painkillers during her tenure as head women's basketball coach and that she had taken Vicodin pills from one of her players.[83] This drug usage provided a legal and persuasive justification for the decision to terminate Johnson-Klein's employment.[84] However, over the course of the two-month trial, Johnson-Klein's attorneys successfully neutralized Fresno State's termination defense with two key arguments. First, they presented evidence suggesting that Athletic Director Scott Johnson called for an investigation of Johnson-Klein in order to find a reason to fire her. Both the timing of the investigation, which commenced soon after Johnson-Klein threatened to file a complaint with OCR over inequitable treatment of the women's basketball team,[85] and the fact that Johnson-Klein's behavior had not been the subject of any serious complaints until the investigation supported this theory. Although the investigation produced a detailed account of Johnson-Klein's drug and behavior problems, in light of the apparently retaliatory nature of the decision to investigate, these reasons did not appear to be the university's primary motive in firing her.

The second way in which Johnson-Klein neutralized the university's argument that she was fired for drug abuse was by turning that argument into evidence of a sexist double standard. According to witness testimony, around the same time that Johnson-Klein was struggling with painkillers, the head men's basketball coach Ray Lopes was helping his players cover up positive drug tests so that they could continue to play.[86] Upon discovering this, Fresno

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82. Robison, *supra* note 10, at A1. *Cf.* Anteola & Lygh, *supra* note 77. Fresno State appealed, but later settled for $5.2 million, including attorney's fees.

Prior to Vivas's case, the largest jury verdict in a Title IX case was the $2 million award to Heather Sue Mercer in 2000, a verdict that was later vacated on appeal. *See Mercer v. Duke Univ.*, No. 01-1512, 2002 WL 31528244 at *644 (4th Cir. Nov. 15, 2002) (unpublished decision) (holding that Title IX does not support private right of action for punitive damages). Mercer had sued Duke University for discriminatory treatment she received as a kicker on the football team.

In cases involving coaches, the largest Title IX jury verdicts prior to Vivas's were Sanya Tyler's $2.4 million verdict (later reduced to $1.1 million) against Howard University in 1994, in a case that alleged sex discrimination and salary inequity, and Vicki Dugan's $1.28 million award against Oregon State University in 1997. *See* Lori Riley, *Equal to the Task: Howard Women's Coach Won't Back Down*, HARTFORD COURANT, Mar. 12, 1996, at C1; *see* Ginn, *supra* note 57 and accompanying text.

83. Jeff Davis, *Coach Took Player's Drug, Lawyer Says: Women's Basketball Team Member Received the Painkiller After Knee Surgery*, FRESNO BEE, Feb. 22, 2005, at A1.

84. *Id.*

85. Johnson-Klein had also recently complained to Johnson of sexual harassment by her supervisor, Randy Welniak. Only three weeks prior to these complaints, Johnson-Klein was told by a department official that she was "doing a great job." Order on Motions for New Trial and Judgment Notwithstanding the Verdict, Johnson-Klein v. Cal. State Univ., Fresno, No. 05CECG02645 at 30 (Cal. Super. Ct. Fresno County Feb. 8, 2008) [hereinafter *Johnson-Klein Order*].

86. George Hostetter, *Bulldog Drug Policy Faulted: Ex-Official, Testifying in Lawsuit, Says Physician Took Issue with Program*, FRESNO BEE, Nov. 8, 2007, at D1; Matt James, *School Better Off Cutting Some Losses*, FRESNO BEE, Nov. 16, 2007, at D1.

State quietly paid Lopes $200,000 in settlement of his employment contract,[87] even though he had also racked up hundreds of NCAA violations and, according to witnesses, stonewalled a police investigation of one of his players for murder.[88] This cast doubt on the university's claim to have zero tolerance for drugs, and suggested that it was not the reason for Johnson-Klein's termination.

Aside from the drug issue, Johnson-Klein's trial also differed from Vivas's in the way sexuality factored into the case. While Vivas alleged and successfully demonstrated to the jury that she was targeted in part because she was perceived as a lesbian (and because she associated with Milutinovich and Wright, who were similarly stigmatized), Johnson-Klein's theory was that she was hired and received favorable treatment initially because of her heterosexy appearance and behavior. Johnson-Klein's sexuality, therefore, was not stigmatized so much as exploited. During Vivas's trial, Johnson-Klein testified that she was hired "as a straight female to clean up the program" and to "sell" a "family atmosphere."[89] In her own case, she described how Athletic Director Johnson publically referred to her as "my Miss America," and once suggested that she "go one-on-one" with a university supporter.[90] Yet, when Johnson-Klein emphasized her femininity and heterosexuality, athletic department officials criticized her appearance[91] and subjected her to sexual harassment in the form of groping, solicitations, and other inappropriate remarks.[92]

Johnson-Klein's jury agreed that she had suffered harassment and retaliation and awarded her $19.1 million in damages. Skeptical of the basis for the noneconomic damages included in this award, the trial judge reduced the award to $6.6 million plus attorney's fees and costs.[93] In June 2008, Fresno State agreed to drop its appeal in exchange for a $9 million total payout over 20 years.[94]

B. Florida Gulf Coast University

Florida Gulf Coast University is, like Fresno State, paying several million dollars to settle Title IX retaliation cases filed by two female coaches and the former university counsel who advocated on their behalf. The dispute giving rise to this litigation began in May 2007, when two female head coaches, Jaye Flood (volleyball) and Holly Vaughn (golf), along with two female assistant

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87. George Hostetter, *Fresno State Drug Policies Contrasted*, Fresno Bee, Oct. 18, 2007, at A1.

88. George Hostetter, *Trial Focuses on Drug Policy: Fresno State Had a Double Standard Based on Gender, Lawyers Say*, FRESNO BEE, Nov. 14, 2007, at A1.

89. Anteola, *Ex-Bulldogs Coach*, *supra* note 78.

90. *Johnson-Klein Order*, *supra* note 85, at 27.

91. In an email to Scott Johnson, Johnson-Klein described the catch-22 in her own words: "I was hired to do a job and you knew exactly who you were getting. Now I am told I misrepresent the University, that my clothing is inappropriate? There is lace on my chest, etc.? Are you kidding me?" Fontana & Hoagland, *supra* note 73.

92. *Johnson-Klein Order*, *supra* note 85, at 22; George Hostetter, *Johnson-Klein Tells Her Side in Court: Ex-Fresno State Coach Testifies About Groping, Criticism, Painkiller*, FRESNO BEE, Nov. 1, 2007, at A1.

93. $14 million of the jury's $19.1 million figure was compensation for past and future emotional harm. Hostetter, *Jury Award Cut*, *supra* note 13, at A1.

94. Hostetter, *Deal Is Reached*, *supra* note 13, at A1.

coaches, had a meeting with FGCU's former athletic director (the director *emerita*), Merrily Dean Baker, and enlisted her support in efforts to address discriminatory treatment against female coaches and student-athletes. Soon after the meeting, Baker wrote a letter to the university's interim president, Richard Pegnetter, summarizing the coaches' concerns.[95] Baker's letter characterized the athletic department's workplace culture as one of "intimidation," "isolation," "intolerance," and "insensitivity."[96] Baker criticized the athletic director for failing to hire female coaches, failing to support female coaches, using closed searches to make hiring decisions in the department, paying female coaches lower salaries under shorter employment contracts, and directing hostility toward a coach because of her sexual orientation.[97] The letter also detailed disparities in the resources allocated to the men's and women's programs.[98]

In their eventual lawsuit, the coaches alleged that soon after Baker's letter was delivered, they were presumed to be the source of the information it contained and were targeted for retaliation as a result.[99] Specifically, soon after the letter was delivered, both head coaches received negative performance evaluations for the first time ever and Flood was placed on administrative leave for what FGCU publically described as "issues involving student welfare."[100] The basis for this action was revealed to be a claim that Flood had inappropriately tugged at a player's shirt during practice.[101]

FGCU's response to the substance of Baker's letter was also controversial. In January 2008, an outside law firm hired by FGCU to conduct an external review of the athletic department's Title IX compliance concluded that the specific grievances Baker alleged did not constitute actual Title IX violations.[102] However, the report does not address a major theme in Baker's letter: the hostile, intimidating atmosphere for female coaches.[103] The external investigation did, however, discredit the negative performance evaluations that

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95. Letter from Merrily Dean Baker, Dir. *Emerita*, Fla. Gulf Coast Univ. Athletics, to Richard Pegnetter, President, Fla. Gulf Coast Univ. (May 24, 2007, http://web.naplesnews.com/static/pdf/npdn/2007/06/fgcu-titleix-baker.pdf).

96. *Id.*

97. *Id.*

98. *Id.*

99. First Amended Complaint at 8-11, Flood v. Bd. of Trs. of the Fla. Gulf Coast Univ., No. 2:08-cv-30-FtM-34-MMH-DNF (M.D. Fla. May 12, 2008) [hereinafter *Flood and Vaughn Complaint*].

100. *Id.* at 10-11, 15.

101. *Id.* at 16.

102. *See* LITTLER MENDELSON, REPORT TO FLORIDA GULF COAST UNIVERSITY: TITLE IX COMPLIANCE REVIEW IN RESPONSE TO THE COMPLAINT OF JAYE FLOOD (Jan. 18, 2008), http://web.naplesnews.com/static/ pdf/npdn/2008/01/fgcu/REDACTED-Complaint-Flood.pdf.

103. The external investigation report documented FGCU's compliance with Title IX's requirements for equitable treatment of men's and women's programs, including access to facilities, coaching, publicity, etc. The report also concluded that the lack of female head coaches (only 2) was not the result of discrimination by the athletic director. The external investigation report documented FGCU's compliance with Title IX's requirements for equitable treatment of men's and women's programs, including access to facilities, coaching, publicity, etc. The report also concluded that, although only one woman had been hired as a head coach in the past 12 months, this was not the result of discrimination. *Id.* at 22-23.

Flood and Vaughn had received and failed to substantiate the "shirt tugging incident" as grounds for disciplinary action.[104] Moreover, the law firm's investigation uncovered evidence suggesting that the Athletic Director and another athletic department official likely created the negative performance evaluations as pretextual grounds to fire the coaches in the future.[105]

The external investigation report contained one final twist. It revealed that FGCU was concerned about more than just the shirt tugging incident: there were also charges that Flood had inappropriate sexual contact with a female person not associated with the University while on a volleyball road trip[106] and that she had been in an inappropriate, "amorous" relationship with a female student intern.[107] The report concluded that this latter charge was substantiated by evidentiary support, and this conclusion provided the basis for FGCU's decision to terminate Flood four days later.[108]

While Flood publically denied that she had had an affair with a student, her lawsuit challenging her termination focused on the reason for FGCU's investigation in the first place.[109] Flood maintained that the investigations into her personal life were, like the negative performance evaluations, part of the athletic department's efforts to "manufacture grounds for her removal"[110] because she had participated in efforts to expose gender disparities which she reasonably believed to constitute sex discrimination in violation of Title IX.

Holly Vaughn joined Flood's lawsuit as a second plaintiff in May 2008.[111] Vaughn had resigned at the beginning of her fall 2007 season in response to the

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104. LITTLER MENDELSON, REPORT TO FLORIDA GULF COAST UNIVERSITY: INVESTIGATION #2 (Jan.18, 2008), http://web.naplesnews.com/static/pdf/npdn/2008/01/fgcu/REDACTED-Flood-Inv2.pdf; *see also* Statement of President Wilson W. Bradshaw on FGCU Athletics Investigation, January 22, 2008 ("[S]uch action did not rise to a level warranting disciplinary action against Ms. Flood. The investigation revealed that the student-athlete said she was not offended by the incident[.]").

105. LITTLER MENDELSON, REPORT TO FLORIDA GULF COAST UNIVERSITY: COACH JAYE FLOOD'S COMPLAINT OF RETALIATION (Jan. 18, 2008), http://web.naplesnews.com/static/pdf/npdn/2008/01/fgcu/REDACTED-Complaint-Flood.pdf. A few months prior to giving Flood her first negative performance evaluation, upon inquiry to the university's general counsel, Intercollegiate Athletics Director Carl McAloose and Senior Woman Administrator Kathy Peterson were informed that Flood's personnel file, lacking a negative performance evaluation, would not support a decision to fire her at that time. Peterson also admitted to the investigators that she did not like Flood and that she would have given a positive evaluation to any other employee who gave the same performance as Flood. *Id.*; *see also* Brad Kane, *Inquiry: FGCU Officials Tried to Fire Coach a Year Ago: Investigation Shows Assistant Athletic Director Changed Evaluation in Attempt to Oust Volleyball Coach*, NAPLES DAILY NEWS, Feb. 8, 2008, *available at* http://www.naplesnews.com/news/2008/feb/08/inquiry-fgcu-officials-tried-fire-coach-year-ago/.

106. LITTLER MENDELSON, REPORT TO FLORIDA GULF COAST UNIVERSITY: INVESTIGATION #1 (Jan.18, 2008).

107. LITTLER MENDELSON, REPORT TO FLORIDA GULF COAST UNIVERSITY: INVESTIGATION #3 (Jan.18, 2008) at 3; *see also* Kane, *supra* note 105.

108. Kane, *supra* note 105.

109. *Flood and Vaughn Complaint*, *supra* note 99, at 17.

110. *Id.* In support of this claim, Flood alleged that the Athletic Director was speaking to a male volleyball coach about her position even before the external investigation report findings had been released. *Id.* at 18.

111. *See id.*

hostility and pressure directed at her following the release of the Baker letter.[112] Vaughn maintained that her negative performance evaluation was retaliation for her presumed role in the Baker meeting as well as her past efforts to challenge the athletic department's discriminatory employment practices.[113]

FGCU's former general counsel, Wendy Morris, was the third plaintiff to bring a retaliation case against the university in the wake of the Baker letter.[114] According to Morris's complaint, filed in April 2008, the former interim president, Richard Pegnetter, targeted her for retaliation because she had urged him to investigate and take seriously the charges of sex discrimination raised in the Baker letter.[115] Pegnetter refused to let Morris's office participate in the internal investigation. She was suspended, then fired, soon after she reported to the Board of Trustees her suspicions that Pegnetter was attempting to cover up Title IX violations.[116]

In October 2008, Flood and Vaughn agreed to drop their case against FGCU in exchange for a combined total payment of $3.4 million and FGCU's agreement to submit to an independent review of its Title IX compliance.[117] FGCU also settled with Wendy Morris for $800,000.[118] Most recently, a fourth plaintiff, former provost Bonnie Yegidis, has come forward alleging that her

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112. *Id*. at 10-122. Assistant Coach LeAnn Freeland also resigned. *Id.* at 11. Assistant Coach Carrie Lundy took over the head volleyball coach position on an interim basis. Despite a 7-1 record, she was not considered a final candidate for the permanent head coach position. Dana Caldwell, *Volleyball: FGCU Not Offering Its Head Coaching Job Until Next Week*, NAPLES DAILY NEWS, Apr. 25, 2008, *available at* http://www.naplesnews.com/news/2008/apr/25/volleyball-fgcu-not-offering-its-head-coaching-job/.

113. *Flood and Vaughn Complaint*, *supra* note 99, at 8-11. Vaughn alleged that throughout the course of her seven years as head coach of the women's golf team, she had complained to athletic director McAloose that she had not been offered additional job duties to allow her to qualify as a full-time employee, although several male coaches had received such offers. She also complained that she and other female coaches received inferior office arrangements, that she lacked administrative support, and that she, unlike male coaches, was not permitted to select her own assistant coach but was instructed to "give . . . things to do" to the male assistant of the athletic director's choosing. *Id*. at 7-8.

114. Verified Complaint at 7-17, Morris v. Bd. of Trs. of Fla. Gulf Coast Univ., No. 2:08-CV-315-FtM-34DNF (M.D. Fla. April 17, 2008).

115. Morris was not consulted about the university's official response to the letter, which Morris points out, quickly labeled Baker's claims "unsubstantiated" before conducting any internal investigation into their veracity. Morris could not even obtain a copy of the Baker letter, despite requests. *Id.* at 10.

116. *Id*. at 13, 15. Morris was fired, she alleged, because her communication to the Trustees violated a gag order that Pegnetter imposed on Morris earlier that year. Morris maintained that the gag order was itself a retaliatory response to her advising the Athletics Director that he could not lawfully fire volleyball coach Jaye Flood based on the present contents of her file. *Id*. at 5, 6.

117. Dana Caldwell & Tom Hanson, *FGCU, Former Coaches Reach $3.4 M Settlement*, NAPLES DAILY NEWS, Oct. 15, 2008, *available at* http://www.naplesnews.com/news/2008/oct/15/fgcu-reaches-settlement-former-volleyball-coach/. Flood's share is $2.965 million and Vaughn's is $435,000. FGCU also agreed to submit to a review of Title IX compliance by an independent expert. *Id.*

118. Tom Hanson, *FGCU Doles Out $800,000 to Settle Another Lawsuit*, NAPLES DAILY NEWS, Oct. 16, 2008, *available at* http://www.naplesnews.com/news/2008/oct/16/fgcu-doles-out-800000-settle-another-discriminatio/.

resignation was requested in response to her efforts to support Morris and the female coaches.[119] Her suit is pending.

C. Other Settled and Decided Cases

1. U.C. Berkeley

In July 2007, the Regents of the University of California agreed to pay more than $3.5 million to Karen Moe Humphreys to settle a wrongful termination lawsuit she had filed against the University of California, Berkeley and its athletic director, Steve Gladstone.[120] Humphreys, an Olympic gold medalist and former head coach of Berkeley's women's swim team, had served as the assistant athletic director for student services from 1993 until the position was eliminated in 2004.[121] Humphreys alleged that before she was terminated, she was passed over to fill a newly-created position as assistant athletic director for compliance, in favor of a man who did not have Humphreys's experience or seniority.[122] Humphreys argued that her position was targeted for elimination and that she was overlooked for the new position because she had complained to university investigators about the athletic director's unfair treatment of female employees—including failure to consider or promote women to senior positions—and a hostile work environment for women in the athletic department.[123] She also claimed that the retaliation she experienced was due in part to her complaints to university officials about the department's violation of certain NCAA rules regarding financial aid.[124] Humphreys further alleged that male supervisors told her that she was "intimidating" and "too strong for a woman."[125] According to Humphreys, after the layoff was announced, another

119. Complaint at 6-8, Yegidis v. Bd. of Trs. of Fla. Gulf Coast Univ., No. 2:09-cv-353-FtM-99DNF (M.D. Fla. June 3, 2009).

120. Amended Complaint at 1, Humphreys v. Regents of the Univ. of Cal., No. C-04-3808, at 2 (N.D. Cal. filed Jan. 13, 2006) [hereinafter *Humphreys Complaint*]; Richard C. Paddock, *U.C. to Pay Ex-Coach Millions in Bias Suit*, L.A. TIMES, July 20, 2007, at B4.

121. *Id.* at 1.

122. *Id.* at 3-6.

123. *Id.* at 3-4. The university interviewed Humphreys as part of a university investigation into a male athletic department employee's claims of race discrimination. *Id.* at 3. Humphreys's comments caused the investigators to expand their investigation to include sex discrimination as well, and their reports (which included Humphreys's comments and attributed them to her) recommended that Gladstone take certain steps to remediate the hostile climate for women. *Id.* Humphreys was passed over for the open position and targeted for elimination after the investigation concluded and Gladstone had received that report. *Id.* at 3-4.

124. *Id.* at 7-10.

125. *Id.* at 7. It is fitting that the phrase "too strong for a woman" would appear in a complaint seeking enforcement of Title IX, as that phrase has been cited as the catalyst for Title IX itself. In 1969, a colleague of Bernice Sandler offered it as an explanation for why she would not get the teaching position for which she had applied. Inspired by that incident, Sandler became an activist and coordinated a national campaign to eradicate sex discrimination in education, a campaign that led to the introduction and enactment of Title IX. *See* BERNICE SANDLER, "TOO STRONG FOR A WOMAN": THE FIVE WORDS THAT CREATED TITLE IX (1997), *available at* http://www.bernicesandler.com/id44.htm.

told her that he hoped she would retire or take a settlement because her husband "makes good money" so she "really does not need to work."[126]

2. San Diego State University

In September 2008, San Diego State University announced it would pay $1.45 million to former swimming and diving head coach Deena Deardurff Schmidt in settlement of her Title IX retaliation case against the university.[127] Schmidt's lawsuit alleged that the university's failure to renew her contract as head coach of the women's swimming and diving program—ostensibly for failing to produce a winning team—was the result of unrealistic expectations, as her team had lacked a permanent facility since the university demolished the pool in 1999.[128] She alleged that her termination was actually in retaliation for complaining to the athletic director about the lack of a pool, gender inequities in head coaches' salaries, and the athletic director's failure to award her a multi-year employment contract. Schmidt's complaint also detailed how her efforts to raise funds for the new pool construction resulted in an incident of sexual harassment by a prospective donor.[129] After terminating Schmidt, SDSU hired a male coach to head the swimming and diving team, reducing the number of female head coaches at SDSU to four of out of sixteen teams (of which ten are women's sports).[130]

3. Iowa State University

In November 2008, an Iowa state trial court jury awarded $287,000 to former Iowa State University softball coach Ruth Crowe.[131] In her Title IX retaliation suit against the university, Crowe had alleged that after nine years in the head coach position, the university dismissed her before her contract expired because she had complained about salary discrimination and the university's

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126. *Humphreys Complaint*, *supra* note 120, at 7.

127. Brett Schrotenboer, *SDSU, Ex-Swim Coach Reach $1.45 Million Settlement*, SAN DIEGO UNION-TRIBUNE, Sept. 26, 2008, at D1.

128. Complaint, at 4-5, 7, Schmidt v. Bd. of Trs. of the Cal. State Univ., No. 37-2007-00081372-CU-OE-CTL (Superior Court San Diego County Nov. 7, 2007) [hereinafter *Schmidt Complaint*]. Until the new facility finally opened in March 2007, a total of six different facilities substituted for a home pool, including one in a dangerous, high-crime area of San Diego. *Id.* at 4-5. Schmidt alleged that the prolonged absence of a permanent swim facility made recruiting difficult and caused irregularities and interruptions to the team's training. *Id.* at 5. The swimming and diving program finished last in its conference for five years. Schrotenboer, *supra* note 127, at D1.

129. *Schmidt Complaint*, *supra* note 128, at 6, 8. Schmidt's efforts to raise funds for a new pool led to an incident of sexual harassment. A potential donor who had made contributions to athletics in the past "repeatedly physically grabbed her and promised to donate money to construct a new pool if she would have sex with him." Schmidt alleges that the athletic director told her that she "needed to deal with it" and did nothing to stop the donor's conduct. *Id.* at 4.

130. San Diego State University Athletics Official Site, http://goaztecs.cstv.com/ (last accessed Oct. 17, 2009).

131. Tom Witosky, *Ex-ISU Coach Awarded $287,000*, DES MOINES REG., Nov 23, 2008, at 1C. The jury's verdict amounted to $90,000 in back pay, $160,000 for past emotional distress, and $37,000 for future distress. *Id.* Iowa State dropped its appeal of the jury verdict in a $425,000 settlement that included attorney's fees. Tom Witosky, *ISU, Fired Coach Reach Settlement*, DES MOINES REG., Jan. 15, 2009, at 1B.

failure to allocate comparable money for recruiting female athletes.[132] The university argued at trial that retaliation was not the motive for Crowe's termination. Rather, she was fired because of an overall losing record and complaints by athletes and parents.[133] However, in finding ISU liable, the jury signaled its conclusion that this explanation was pretext for a retaliatory motive.

4. San Diego Mesa College

In July 2008, Lorri Sulpizio and Cathy Bass sued San Diego Mesa College for direct discrimination and retaliation in violation of Title IX.[134] Sulpizio, formerly the head women's basketball coach, and Bass, the director of basketball operations, were fired after seven years of service, they alleged, because they challenged discriminatory treatment of their team. This discrimination included the dedication of their team's locker room to visiting football teams during a November invitational, disruptions to their practices by the men's football team, and other inequities.[135] Sulpizio and Bass also maintained that the Athletic Director's decision to fire them reflected discrimination on the basis of sexual orientation. They were terminated soon after an Athletic Director who had allegedly investigated and inquired about Sulpizio's sexual orientation and expressed concern about the lesbian "image" of the team identified the two as domestic partners in a local news story.[136] In December 2009, a jury awarded Lorri Sulpizio $28,000 in damages after finding that her termination had been retaliatory. The jury did not find sufficient evidence to support her claim of sexual orientation discrimination, however.[137]

5. University of Nevada, Reno

The one post-*Jackson* retaliation case to generate an unfavorable decision for a female plaintiff was Terri Patraw's lawsuit against University of Nevada, Reno. In May 2009, a state trial court dismissed Patraw's claim that she had been fired from her position of head women's soccer coach in August 2007,[138] in retaliation for blowing the whistle on NCAA violations committed by the men's golf coach[139] and for complaining on numerous occasions to the athletic director

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132. Witosky, *Ex-ISU Coach*, *supra* note 131.

133. Witosky, *ISU, Fired Coach*, *supra* note 131.

134. Verified Complaint, Sulpizio v. San Diego Mesa College, No. 37-2008-00088329-CU-CR-CTL (Cal. Super. July 24, 2008).

135. In September 2008, OCR confirmed these and other Title IX violations at San Diego Mesa. Brent Schrotenboer, *Mesa to Solve Title IX Issues*, SAN DIEGO UNION-TRIB., Sept. 17, 2008, at D6.

136. *See* Jill Lieber Steeg, *Disputes Reflect Continuing Tension Over Title IX*, USA TODAY, May 13, 2008, at 1A; Website of the National Center for Lesbian Rights – Sulpizio and Bass v. San Diego Mesa College, http://www.nclrights.org/site/PageServer?pagename=issue_caseDocket_sulpizio.

137. Brent Schrotenboer, *Former Coach at Mesa Wins Title IX Based Suit*, SAN DIEGO UNION-TRIB., Dec. 4, 2009, at D4.

138. Order on Motions for Summary Judgment, Patraw v. Groth, Nos. CV07-02585 & CV08-00826 (Washoe Cty. Dist. Ct., May 5, 2009) [hereinafter *Patraw Order*]. Amended Complaint at 4, Patraw v. Groth, No. CV07-02585 (Washoe Cty. Dist. Ct., Dec. 11, 2007) [hereinafter *Patraw Complaint*]. Patraw sought reinstatement in an administrative complaint filed with the Nevada State Department of Personnel, under Nevada's whistleblower protection law, NRS 281.641.

139. *Patraw Complaint*, *supra* note 138, at 1-5. Patraw had reported Rich Merritt for giving players unauthorized kickbacks (paying them above the prevailing wage for babysitting, giving one athlete

and other athletic department officials about sexual harassment and disparate treatment for the women's soccer team and women's sports at UNR. These complaints addressed inequities in locker room access and the scheduling of practice facilities as well as inequities in the salaries and employment perquisites like courtesy cars.[140] Oddly, however, nowhere in the judge's 36-page order of dismissal does he address Patraw's Title IX retaliation claim as such. Instead, he reasoned that her Title IX claim was not actionable because it failed to allege protected speech within the meaning of the First Amendment—a standard no court has applied to Title IX claims.[141] In light of this clear divergence from other courts, the decision may be vulnerable on appeal, if one is forthcoming.

D. Other Pending Cases

1. Feather River College

Feather River College, a community college in Quincy, California, is presently defending charges of unlawful sex discrimination and retaliation in several lawsuits. Two of the three plaintiffs are former athletic department personnel, including its former athletic director, Paul Thein, and its one-time women's basketball coach, Laurel Wartluft.[142] Thein and Wartluft had urged FRC President Susan Carroll to commit the college to Title IX compliance. This would entail restructuring the way the athletic department raised and distributed funds for athletics, instituting parity in the classification and compensation of men's and women's coaches, and expanding opportunities for female athletes. As a result of this advocacy,[143] Wartluft, who had been serving as the interim women's basketball coach, was passed over by the hiring

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his personal frequent flyer miles) and gambling with his players. *Id.* at 4-5. Merritt, who has since resigned, was cleared of the gambling charge, but the NCAA continued to investigate the others. Staff Report, *Merritt Resigns*, NEVADA SAGEBRUSH, May 16, 2008, *available at* http://nevadasagebrush.com/blog/2008/05/16/merritt-resigns/.

140. *Patraw Complaint*, *supra* note 138, at 1-3.

141. *Patraw Order*, *supra* note 138, at 5-12. Later in the order, while analyzing Patraw's Equal Protection claim, the judge concluded that the university satisfactorily alleged permissible reasons for terminating her contract—specifically, that she had tendered and withdrawn her resignation on a number of past occasions and that she continued to dwell on a past, romantic relationship she had had with an assistant men's basketball coach—but did not include any analysis of whether these reasons could have been pretextual under the familiar *McDonnell-Douglas* standard that courts regularly apply in Title IX retaliation cases, concluding only that Patraw had not offered specific evidence of pretext. *Id.* at 14-16.

142. Complaint at 2, Thein v. Feather River Cmty. Coll., No 2:06-cv-01777-FCD-GGH (E.D. Cal. Aug. 9, 2006) [hereinafter *Thein Complaint*]; Complaint at 2, Wartluft v. Feather River Cmy. Coll. Dist., No. 2:07-cv-02023-FCD-GGH (E.D. Cal. Sept. 26, 2007) [hereinafter *Wartluft Complaint*].

The third plaintiff is Michelle Jaureguito, formerly the federal grant director. While her case does not relate to athletics, she reported to Thein, and Thein alleges that his termination is in part retaliation for his support of Jaureguito after she blew the whistle on a staff member who allegedly served alcohol to minors and engaged in sexual misconduct. *Thein Complaint*, *supra*, at 5–6.

143. *Wartluft Complaint*, *supra* note 142, at 4-7. Wartluft also alleges that sexual orientation discrimination factored into the committee's decision, as one of its member's referred to her as "a closet lesbian." *Id.* at 7. A similar anti-gay sentiment was also reflected in President Carroll's alleged comments to Thein that Wartluft would not fit in with the college community "because she [is] a lesbian." *Id.* at 8.

committee charged with recommending a candidate to fill the permanent position.[144] Thein then took the unusual but arguably authorized step of disregarding the committee's recommendation and hiring Wartluft anyway.[145] President Carroll, in response, "deleted" Wartluft's position and reassigned her coaching duties. Meanwhile, an unscheduled review of Thein resulted in a negative evaluation, the first of his career, which Carroll then cited as the basis for her decision to place him on administrative leave for the remaining months of his contract.

Thein and Wartluft have each brought Title IX-retaliation claims against FRC in federal court.[146] Each has also sued FRC in state court under California's Fair Housing and Employment Act. In addition, both plaintiffs have filed claims with the California State Personnel Board, which has jurisdiction to adjudicate whistleblower complaints against state employers.[147] The SPB held a hearing on Wartluft and Thein's claims in the summer of 2007; the parties have submitted post-hearing pleadings and are currently awaiting the board's decision.

2. Montana State University

In 2004, Montana State University terminated head coach Robin Potera-Haskins after three years of successful service[148] at the helm of the women's basketball program.[149] Potera-Haskins sued in June 2005, alleging that she was fired in retaliation for complaining about gender inequities within the athletic department.[150] Specifically, Potera-Haskins had lodged regular protests with the athletic director and other senior officials about disparities in compensation (Potera-Haskins's salary was 30% less than that of the men's basketball coach) and support for the women's basketball team in comparison to the men's (including promotion and publicity, funding for hosting tournaments, and access to the weight training facility and medical trainers).[151] MSU defended that Potera-Haskins was terminated because of her "abrasive" style that, while

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144. *Id.* at 7.

145. *Thein Complaint*, *supra* note 142, at 4.

146. *Id.*, at 9; *see also Wartluft Complaint*, *supra* note 142, at 11.

147. The SPB's jurisdiction expressly includes whistleblower complaints against community colleges, but not the University of California and the California State University systems. *See* http://www.spb.ca.gov/legal/appeals/faq.htm#q3.

148. Hired to coach a team that had not posted a winning season in two years, Potera-Haskins coached her team to back to back co-conference championships and three winning seasons. Amended Complaint at 3-4, Potera-Haskins v. Gamble, No. CV05-22-BU-JEIT (D. Mont. July 1, 2005) [hereinafter *Potera-Haskins Complaint*].

149. *Id*. at 3.

150. *Id*. at 19.

151. *Id*. at 5–6. Moreover, Potera-Haskins alleges that she was targeted for retaliation because she resisted pressure from Athletic Director Peter Fields to offer a spot on the team to his daughter, a Division II player whose talent and physical ability Potera-Haskins did not believe was well-suited for Division I. Potera-Haskins did eventually recruit Fields's daughter to the team and awarded her a scholarship; she alleges the fear of reprisal from the Athletic Director motivated these decisions. *Id*. at 7–9; *see also* Associated Press, *Judge Reduces Suit by Ex-MSU Coach*, BILLINGS GAZETTE, Oct. 4, 2007 (identifying the player in question—referred to in the complaint as "Field's acquaintance"—as his daughter). She further alleges that Fields intervened in Potera-Haskins's management of the team to benefit his daughter. For example, after Potera-Haskins assigned Fields's daughter to extra shooting practice, Fields curtailed such practices. *Potera-Haskins Complaint*, *supra* note 148, at 10–11.

producing wins, also garnered complaints from players and parents and compelled several players to quit the team.[152] In 2007, the district court granted MSU's motion to dismiss Potera-Haskins's Title VII and First Amendment claims,[153] but agreed that Potera-Haskins's factual allegations could, if proven, give rise to liability under Title IX on a retaliation theory.[154]

3. University of Tennessee at Martin

In May 2008, Amy Draper, formerly the head volleyball coach at the University of Tennessee at Martin, sued the university in federal court.[155] Draper alleges that she was terminated in retaliation for complaining to the athletic director about inferior treatment of her team and of female coaches.[156] Such inferior treatment was evidenced by the volleyball team's exclusion from the campus's premier athletic facility, which resulted in the need to share a facility with intramurals and physical education classes.[157] She also objected to what she perceived as discriminatory treatment by the assistant athletic director who serves as the Senior Women's Administrator[158] and to the department's practice of requiring female coaches, but not male coaches, to have playing experience in the sports that they coach.[159] Draper maintains that when she pointed out these gender disparities in an email to the athletic director, she was told that if she continued to make allegations of gender discrimination, he would "bring the curtain down" on her.[160] She was eventually fired before the end of her contract and without a hearing, for reasons the university claims are related to her team's "poor performance."[161] Draper alleges that this rationale, if true, constitutes a double standard, as the department chooses to retain several male coaches who have never had a winning season.[162] This case is in discovery. No dispositive motions have been filed, nor has a trial date been set.

4. Texas Southern University

Surina Dixon sued Texas Southern University in October 2008, alleging that she was fired from the head women's basketball coach position to which she had recently been hired after insisting on contract terms equivalent to that of the newly hired men's basketball coach.[163] The athletic director allegedly told Dixon

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152. Gary Jacobson, *Potera-Haskins Fighting to Clear the Record, Get Back on Division I Track*, DALLAS MORNING NEWS, Mar. 25, 2007, at 17C.

153. Potera-Haskins v. Gamble, 519 F. Supp. 2d 1110, 1115-19 (D. Mont. 2007).

154. *Id*.

155. Complaint, Draper v. University of Tenn., No. 1:08-cv-01125-JDB (W.D. Tenn. May 28, 2008) [hereinafter *Draper Complaint*].

156. *Id*.

157. *Id*. at 7.

158. *Id*. at 5–8.

159. Specifically, she points out that men have been hired to coach women's sports such as softball, volleyball, and basketball. *Id*. at 7.

160. *Id*. at 8.

161. *Id*. at 11, 13.

162. *Id*. at 14.

163. Complaint, Dixon v. Tex. S. Univ., No. 4:2008cv02893 (S.D. Tex. Sept. 29, 2008).

the one-year contract term was necessary until she could "prove herself."[164] Dixon maintains, however, that the less experienced men's basketball coach who was hired did not have to prove himself; he was hired with a five-year contract and a salary twice as high as hers.[165]

PART III

RETALIATION CASES AND BARRIERS TO WOMEN'S LEADERSHIP IN COLLEGE ATHLETICS

As noted in the Introduction, women are the minority among college coaches, constituting less than a quarter of head coaches overall and less than half of coaches of women's teams.[166] Similarly, less than a quarter of all athletic directors are women; this percentage drops to below 10% among colleges and universities belonging to NCAA Division I.[167] In contrast, before Title IX was passed in 1972, women's sports were coached and administered almost entirely by women, causing some to describe today's dearth of female coaches as an "unintended consequence"[168] of Title IX. It is argued that the legislation elevated the profile and status of women's sports, with different impacts on men and women regarding leadership positions: greater prestige and compensation make such positions increasingly attractive to men, while simultaneously generating additional pressure, time, and travel demands that make those positions less attractive to women.[169] Accordingly, a popular explanation for the gender gap in college coaching and administration is that women leave or avoid

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164. *Id*. at 14.

165. *Id*. at 15. Citing TSU's own finding of gender inequity submitted to the NCAA, Dixon maintains that pay discrimination reflects a pattern of discrimination against female coaches at TSU. *Id*. at 12.

166. Today the number of intercollegiate women's teams—9101, or 8.65 per school—is at an all-time high, but the percentage of female head coaches for women's teams is 42.8%, only slightly higher than the lowest-ever 42.6% reported in 2006. CARPENTER & ACOSTA, *supra* note 16. Recent data showing that women have garnered only 10% of available head coaching positions for women's intercollegiate teams since 2000 suggests that the gender gap is widening rather than closing. Megan Cooper et al., *Women in Coaching: Exploring Female Athletes' Interest in the Profession*, CHRONICLE OF KINESIOLOGY & PHYSICAL EDUC., May 2007, at 8. Moreover, there is evidence that women are concentrated in the lower status head coaching positions, such as part-time positions and positions in Division III programs. ROBERT DRAGO ET AL., FINAL REPORT FOR CAGE: THE COACHING AND GENDER EQUITY PROJECT 39-41 (2005), *available at* http://lsir.la.psu.edu/workfam/CAGE.htm. More than half of women in coaching are part-time or part-year, compared to one-third of male coaches. *Id*. at 40. Division III has a higher percentage of female coaches (46.6%) than either Division I or Division II (interestingly, however, it is Division II (33.5%), rather than Division I (44.4%), that has the lowest percentage of female head coaches). CARPENTER & ACOSTA, *supra* note 16.

167. CARPENTER & ACOSTA, *supra* note 16.

168. *See, e.g.*, Bob Keisser, *Coaching: Title IX's Unwanted Side-Effect*, LONG BEACH PRESS-TELEGRAM, June 12, 2003, at B9 ("'It's an unintended consequence,' said UCLA women's Athletic Director Betsy Stephensen[.]"); *see also* Robin Wilson, *Where Have All the Women Gone?*, CHRON. OF HIGHER ED., May 4, 2007, at A40 (quoting Professor Deborah Rhode in characterizing the "declining proportion of female coaches [as] an 'ironic byproduct' of Title IX.").

169. *See, e.g.*, DRAGO ET AL., *supra* note 166, at 12-13.

careers in college athletics as a matter of personal preference[170] for jobs that are more family-friendly;[171] indeed, there is empirical evidence to support this theory.[172] Unfortunately, the predominance of this explanation for the gender gap in college coaching creates the perception that college athletics departments are limited in their ability to address the problem because head coach and upper-level administration positions are, due to long hours and travel requirements, family-*un*friendly by their very nature.[173] Yet what these retaliation cases reveal is that other gendered dynamics of college athletic

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170. Traditional notions of gender roles dictate that women will be primary caregivers to their children and families, whereas men are breadwinners. *See, e.g.*, Melanie Dixon & Jennifer Bruening, *Perspectives on Work-Family Conflict in Sport: An Integrated Approach*, 8 SPORT MGMT. REV. 227, 243-44 (2005).

171. Linda J. Carpenter & R. Vivian Acosta, *Status of Women in Athletics: Changes and Causes*, 56 J. OF PHYSICAL EDUC. RECREATION & DANCE 35, 36 (1988) (male athletic directors believed that family obligations were one of the primary reasons why there are not more women in coaching); *see also* Jane Stangl & Mary Jo Kane, *Structural Variables that Offer Explanatory Power for the Underrepresentation of Women Coaches Since Title IX: The Case of Homologous Reproduction*, 8 SOC. OF SPORT J. 47, 48-49 (1991) (citing a study showing male athletic directors' beliefs, based on gender stereotypes, about constraints on women); Sean Gregory, *Where Are the Women Coaches?*, TIME, Aug. 16, 2007, *available at* http://www.time.com/time/magazine/article/0,9171,1653648,00.html; Wilson, *supra* note 168, at A40.

172. For example, in a recent NCAA study, about a third of female coaches surveyed (32%) reported lack of a work-life balance. Similarly, 35% of coaches ranked family commitments as the most common reason why women don't go into coaching. NAT'L COLLEGIATE ATHLETICS ASS'N, GENDER EQUITY IN COL. COACHING AND ADMIN.: PERCEIVED BARRIERS REPORT at 18, 20 (Jan. 2009); *see also* Rhode & Walker, *supra* note 47, at 24-25 (a higher percentage of female coaches (36%) than male coaches (19%) considered flexibility for family a "very important" or "most important" job resource); DRAGO ET AL., *supra* note 166, at 12-13, 18 (explaining that coaching is a profession with an "ideal worker norm" largely incompatible with family commitments and that those responsibilities still tend to disproportionately fall on women, while male coaches enjoy a "daddy privilege" in the form of "greater latitude to meet work/life demands either through having a spouse or because they were praised for attending to the needs of their family").

However, while it is clear that family considerations factor into women's decisions to leave and enter coaching and athletics administration, there is also evidence to suggest that other considerations are equally or even more important. For example, Rhode and Walker, *supra* note 47, at 27–28, report that 83% of coaches of women's sports who responded to their survey agreed or strongly agreed with the statement "my job provides enough flexibility to allow me to take care of my familial and other personal responsibilities" and that there was no significant difference between male and female respondents. By comparison, no other positive statements about the state of the athletic program received as much support; for example, only 62% agreed or strongly agreed that resources were allocated fairly between men's and women's athletics, and 56% agreed or strongly agreed that their programs received the resources necessary for success. *Id*. at 28. Moreover, other studies have found that male coaches are more likely than female coaches to leave coaching because of the job's incompatibility with family life. *See* Cynthia Hasbrook *et al.*, *Sex Bias and the Validity of Believed Differences Between Male and Female Interscholastic Athletic Coaches*, 61 RES. Q. FOR EXERCISE & SPORT 259, 264-65 (1990) (also citing other studies finding similarly); *see also* Cindra Kamphoff & Diane Gill, *Collegiate Athletes Perceptions of the Coaching Profession*, 3 INT'L J. OF SPORTS SCIENCE & COACHING 55, 67 (2008) (finding male and female student athletes responded similarly about how time commitments and family obligations would influence their decision to go into coaching).

173. This is not to say that leadership positions in college athletics could not be made more family-friendly. *See, e.g.*, Rhode & Walker, *supra* note 47, at 41 (suggesting such measures as adequate family leave; flexible time commitments such as part-time, job-sharing, and flex-time initiatives; child-care subsidies and other assistance; and work schedules and meeting times that take into consideration coaches' family obligations). `

department culture are also operating as obstacles to women's participation and advancement in leadership positions in college athletics. Significantly, none of the plaintiffs described in Part II claimed retaliation predicated on discrimination related to motherhood or family considerations. This Part will examine the cases with common themes along these lines, and contextualize these themes within the existing empirical and theoretical scholarship examining women, leadership, and athletic department culture. It will address the commonalities in the predicate discrimination (subpart A) and the retaliation itself (subpart B), as well as themes of double binds (subparts C and D), homophobia (subpart E), double standards (subpart F), and the meaning of women's own participation in the discrimination and retaliation against other women (subpart G).

A. Predicate Discrimination Relating to Employment Conditions and Discrimination Against Female Student Athletes

Like Coach Jackson, all of the plaintiffs in the cases described above experienced retaliation (or alleged retaliation) after challenging ostensible violations of the Title IX regulations that prohibit discrimination in the number of or support for athletic opportunities afforded to students. Associate Athletic Director Milutinovich (Fresno State), for example, alleged that she was targeted for retaliation after she challenged her athletic department's failure to add opportunities for female athletes pursuant to its agreement with OCR. Milutinovich, like Coach Wartluft and Director Thein (Feather River), and Coaches Flood and Vaughn (FGCU), challenged the general disparity in resources allocated to men's and women's athletics.[174] Coach Vivas (Fresno State) and Coach Draper (Tennessee-Martin) alleged they had complained that their women's teams could not access the university's premier athletic facility on the same terms as men's teams.[175] Coaches Sulpizio and Bass (San Diego Mesa), Coach Schmidt (San Diego State) and Coach Patraw (University of Nevada, Reno) challenged impairments to their access to practice facilities.[176] And Coach Crowe (Iowa State) sought a more equitable distribution of resources for recruiting.[177] These coaches' concerns about inequitable distribution of resources are consistent with empirical research demonstrating that this perception is shared by a significant percentage of coaches of women's teams.[178]

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174. 34 C.F.R. § 106.41(c) (2009) (a university's failure to provide necessary funds to members of one sex may be considered as a factor in assessing whether it has provided equal opportunities to both sexes).

175. *Id.* at § 106.41(c)(7) (factors constituting equal opportunities in athletics include equal access to competitive facilities).

176. *Id.* (factors constituting equal opportunities in athletics include equal provision of locker rooms and practice facilities).

177. *Id.* at § 106.41(c) ("other factors" in addition to those enumerated aid in the determination of equal opportunities in athletics).

178. In one study, more than a third (38%) of coaches of women's teams who responded to a survey disagreed or strongly disagreed that resources were allocated fairly between men's and women's teams; furthermore, the responses were similar between male and female coaches in the study. Rhode & Walker, *supra* note 47, at 27–28. For context, coaches were more likely to agree with positive statements about job flexibility, availability of resources to individual athletes, coaches'

In many of the cases included in the post-*Jackson* trend, employment discrimination claims are also the predicate for plaintiffs' alleged or experienced retaliation.[179] Lindy Vivas filed an internal grievance challenging the shorter contract terms and lower salaries afforded to female coaches.[180] Merrily Dean Baker's letter on behalf of the FGCU coaches contained a similar complaint.[181] In addition, Ruth Crowe, Robin Potera-Haskins, Terri Patraw, Deena Deardurff Schmidt, Laurel Wartluft, and Surina Dixon all alleged that they experienced retaliation for challenging, among other things, the lower salaries and shorter contract terms they received relative to their male counterparts.[182] Karen Moe Humphreys claimed she was targeted after challenging the discriminatory hiring practices within her department.[183]

In these ways, the cases are different from Coach Jackson's, which did not include an employment discrimination claim. In fact, it was the absence of a direct discrimination claim that made his case groundbreaking for establishing that Title IX protects a third party who is not a direct target of sex discrimination. The fact that so many of the post-*Jackson* cases involve employment discrimination complaints as a predicate for retaliation exposes and underscores the discrimination female coaches perceive in the terms and conditions of their employment.

This observation is also consistent with empirical evidence that women are over-represented in lower status, part-time coaching jobs[184] and that they earn a lower wage per hour.[185] And it is not necessarily the case that female coaches are self-selecting into positions with fewer hours. For instance, one of Holly Vaughn's complaints against FGCU for which she experienced retaliation was that she was not given the same opportunity as male coaches to take on additional job responsibilities that would have warranted greater job status and compensation.[186]

Moreover, the centrality of employment and programmatic discrimination to the narrative of these retaliation cases complements existing empirical research on the dearth of women coaches, which demonstrates a correlation between their perceptions of discrimination on the one hand, with lower job satisfaction and higher turnover on the other.[187] For instance, one qualitative

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access to mentoring and professional development, and support from the school's administration than with statements about gender equity in resource allocation. *Id*.

179. *See generally* 34 C.F.R § 106.51 (2009) (prohibiting educational institutions from discrimination on the basis of sex in the context of employment).

180. *See supra* part II.A.

181. *See supra* part II.B.

182. *Id*. at § 106.51(b)(3) (prohibiting pay discrimination).

183. *Id*. at § 106.51(b)(2) (prohibiting discrimination in hiring).

184. DRAGO ET AL., *supra* note 166, at 39 (reporting that there are double the number of women in part-time coaching positions than full-time).

185. In one study, full-time male coaches' average annual salary was found to be 30% higher than the average annual salary of full-time female coaches. Male coaches had higher average hourly earnings as well ($16.22 per hour, compared to $12.88 per hour). DRAGO ET AL., *supra* note 166, at 40.

186. *Flood and Vaughn Complaint*, *supra* note 99, at 7.

187. *See* Sue Inglis et al., *Multiple Realities of Women's Work Experiences in Coaching and Athletic Management*, 9 WOMEN IN SPORT & PHYSICAL ACTIVITY J. 1 (2000); Annelies Knoppers et al., *Opportunity and Work Behavior in College Coaching*, 15 J. OF SPORT & SOC. ISSUES 1, 15 (1991) (female

study of female American and Canadian intercollegiate coaches suggests that the coaches' perceptions of gender discrimination in athletic departments in terms of "salary, job security, workload, historic pension contributions, team facilities and operating budgets (e.g., travel, recruitment, scholarship monies)," contributes to the higher rates of job turnover among female coaches compared to male coaches.[188]

Another study found that while both male and female coaches were likely to report high levels of job satisfaction, and thus lower turnover intent, when they perceived their athletic department to be distributing resources equitably among men's and women's teams in compliance with Title IX, the perception of equality was more predictive of female coaches' job satisfaction than it was for male coaches of women's teams.[189] This difference could be due to female coaches' heightened awareness of inequities that affect all women's teams, regardless of the coaches' sex, or it could reflect a greater incidence of discrimination against those women's teams with female coaches.[190] Either way, this study underscores the relationship between employment and programmatic discrimination, as revealed in the narratives of the retaliation plaintiffs examined in this Article. In addition, it sheds light on the career choices of women as they relate to leadership in women's sports.

B. Retaliation Against Coaches and Administrators Challenging Inequalities in Athletics

After challenging some manner of sex discrimination in athletics—related to salary, other employment conditions, or the allocation of resources to women's teams, as described above—all of the female coaches whose cases are examined here experienced some adverse consequence related to their employment. These consequences included termination or nonrenewal (the Fresno State and FGCU plaintiffs, as well as Coaches Crowe, Schmidt, Potera-Haskins, Draper, Sulpizio, Bass, and Patraw), transfer to another department (Milutinovich), failure to promote or hire (Coaches Wartluft and Humphreys), falsified negative performance evaluations (Coaches Flood and Vaughn), and, in

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coaches are less likely than their male counterparts to anticipate a long career in coaching, a finding the authors attributed to the female coaches' perception of fewer opportunities for advancement); Michael Sagas & Frank B. Ashley, *Gender Differences in the Intent to Leave Coaching: Testing the Role of Personal, External, and Work-Related Variables*, 2 INT'L J. SPORT MGMT. 297, 304 (2001) (suggesting that female coaches' perceptions of inequitable resources may explain job dissatisfaction and turnover).

188. Inglis et al., *supra* note 187, at 13. Female coaches' perceptions of a glass ceiling also affects their turnover intentions. *See* Sagas & Ashley, *supra* note 187, at 309 (but finding that male and female coaches had similar perceptions of their career advancement opportunities; the difference is that for female coaches, negative perceptions of career advancement were more likely to translate into turnover intent).

It is worth noting here that such perceptions are, themselves, corroborated by findings that men are more likely to find more lucrative careers in coaching than women, as it has been shown that they earn higher hourly wages. DRAGO ET AL., *supra* note 166, at 40.

189. Michael Sagas & Paul J. Batista, *The Importance of Title IX Compliance on the Job Satisfaction and Occupational Turnover Intent of Intercollegiate Coaches*, 16 APPLIED RES. IN COACHING & ATHLETICS ANNUAL 15, 37 (2001).

190. Sagas & Batista, *supra* note 189, at 37.

two cases, an investigation for the purpose of generating an alternative ground for termination (Coaches Flood and Johnson-Klein).

It is common for employees who challenge discrimination to experience retaliation because those who challenge discrimination are "transgressing the social order."[191] To those who benefit from privilege bestowed on the basis of race or sex, retaliation is an effective, and thus attractive, mechanism for sustaining the social order that creates that privilege.[192]

Retaliation operates to this end by raising the cost of speaking out against discrimination relative to the benefit of doing so.[193] Especially in small professions like college athletics, the risk of losing one's job is a particularly high cost because positions are competitive. Moreover, the insularity of college athletics adds to the cost of challenging discrimination because it creates the possibility that the negative reputation as a troublemaker that a coach or administrator earns by whistleblowing[194] could hinder her future job prospects.

Another important characteristic of retaliation is that it is more likely to target individuals who are not part of the dominant class.[195] Women and persons of color, historically marginalized from athletics, are thus particularly susceptible to reprisals when they challenge athletic departments' discriminatory practices. This is not to say that men do not object to sex discrimination or experience retaliation for doing so. Coach Roderick Jackson's case[196] serves as a primary example of this point, as does Paul Thein's case against Feather River College.[197] Another example is a case which recently settled against University of California at Davis that was filed by former wrestling coach Michael Burch. Burch was fired after—and arguably because—he advocated for the rights of women who wanted to continue to wrestle for the team after the university terminated female wrestling opportunities.[198] And Kevin Wilson was not renewed to his position as head women's basketball coach at Southern Oregon University after he protested discriminatory distribution of budget resources, access to facilities, office space, and other inequities; his Title IX retaliation claim also settled.[199] Despite these cases in

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191. Brake, *supra* note 46, at 20.

192. Generally, the beneficiaries of gender privilege, and thus, the perpetrators of retaliation, are likely to be men. *Id*. at 35 (citing findings that men were more likely than women to respond negatively to women who confronted sexism, due to "men's greater inclination to punish transgressions from expected gender roles . . . "). In the cases examined here, women have played a role in retaliating against other women seeking fairness and equality. This will be examined further in Part III.G, *infra*.

193. Brake, *supra* note 46, at 25.

194. *Id*. at 32 ("Social psychologists have found that women and racial minorities are perceived as troublemakers and hypersensitive when they confront discrimination.").

195. Brake, *supra* note 46, at 36 ("White persons and men are less susceptible to social costs when they publically portray themselves as victims of race or sex discrimination.").

196. *See supra* notes 35-45 and accompanying text.

197. *See supra* Part II.D1.

198. Burch's case settled for $725,000 in 2007. Rick Del Vecchio, *U.C. Davis Settles Former Wrestling Coach's Lawsuit for $725,000*, S.F. CHRON., Jan. 20, 2007, at B3.

199. *See* Wilson v. S. Or. Univ., No. CV-06-3016-CO, 2006 WL 2668468, at *1 (D. Or. Sept. 15, 2006) (issuing findings of fact and dismissing plaintiff's wrongful discharge claim because of the adequacy of the remedy available under Title IX); E-mail from Edward Talmadge, Esq. to Erin E.

which men were the plaintiffs, the fact that female plaintiffs have dominated the trend of retaliation cases post-*Jackson* (even though technically, the legal significance of the *Jackson* decision is to secure protection for those who are not also direct victims of sex discrimination[200]) is consistent with the view that members of the non-dominant group are more vulnerable to retaliation.[201]

Because retaliation works in the service of discrimination itself, and operates to the same end to secure the hierarchy of privilege, retaliation is "more likely to occur in organizations with a high tolerance for, and incidence of, discrimination."[202] The existing entitlement and privilege that inures to men's sport, as well as its significant contribution to the gender order more generally,[203] could explain an athletic department's decision to favor males in the distribution of athletic opportunities to students, men's teams in the distribution of resources, and male coaches in compensation, job security, and other benefits of employment. For example, it is not surprising that the culture of Fresno State's athletic department allowed for widespread Title IX violations in the form of inequities between men's and women's sports, backsliding on obligations to ameliorate the same, and reprisals against women in the athletic department who called that backsliding into question. The correlative desire to retain sport as a male preserve and sustain that hegemonic privilege, and the high cultural stakes of doing so, suggests why an athletic department's leadership would be threatened by, and thus retaliate, against women who seek to challenge it.

C. The Retaliation/Job Performance Double Bind

Having examined generally the nature of the predicate discrimination and the cultural context for the retaliation, this section examines how aspects of both

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Buzuvis, June 24, 2009 (on file with author) (reporting that the Title IX retaliation claim "settled in favor of Mr. Wilson").

200. *See supra* note 44.

201. Two other cases filed post-*Jackson* by male coaches also warrant mention here. In one case, which is pending but has survived summary judgment, a male wrestling coach claims he was terminated (by a female athletic director) in retaliation for his advocacy of men's wrestling. Sabol v. Montclair State Univ., No. 06-3214 (DMC), 2008 WL 2354553, at *1 (D. N.J. June 3, 2008). This is the only case I have found in which a male coach has claimed reprisal for challenging discrimination directed at men's sports. Though it is an outlier for this reason, the low status of wrestling among men's sports lends support to the claim that members of the non-dominant class experience retaliation the most.

In another case, the male plaintiff alleged a more typical basis for retaliatory termination — his advocacy for the women's soccer program, which he coached. However, the trial court dismissed his case after finding that the university's decision not to renew his contract was instead triggered by numerous complaints about his negative attitude and intimidation of his players. Findings of Fact and Conclusions of Law, Swanbeck v. Minn. State Univ. Moorhead, No. C4-06-1747 (Clay County Minn. Dist. Ct., Dec. 14, 2007).

202. Brake, *supra* note 46, at 41.

203. MICHAEL A. MESSNER, POWER AT PLAY: SPORTS AND THE PROBLEM OF MASCULINITY 16 (1992); David Whitson, *Sport in the Social Construction of Masculinity*, *in* SPORT, MEN AND THE GENDER ORDER, *supra* note 17, at 19; *see also* Alina Bernstein, *Is it Time for a Victory Lap? Changes in the Media Coverage of Women in Sport*, 37 INT'L REV. FOR SOC. OF SPORT 415, 415 (2002) ("A number of authors [have] argued that, *perhaps more than any other social institution*, sport perpetuates male superiority and female inferiority.").

operate simultaneously to pose obstacles to women's success. The relationship between these two mechanisms for discrimination consists of a double bind, in which coaches are punished not only for challenging discrimination in the allocation of resources to their programs, but also for failing to produce successful programs in a short time period, despite a discriminatory allocation of resources.[204]

This bind is exacerbated by discrimination in the length of contract terms, discussed in the previous section.[205] Hiring and renewing coaches on a one- or two-year basis provides athletic departments with more frequent opportunities to replace coaches who are not living up to their expectations, which may include expectations to produce winning records or nationally ranked, highly competitive programs.[206] For coaches without the job security of a longer-term contract, one bad season may be the difference between losing and keeping one's job.

A double bind is thus created when, in addition to the job pressure created by high expectations and a short-term contract, a coach is hamstrung by limited resources and support, insufficient access to training and practice facilities, an inadequate number of assistant coaches, insufficient access to scholarship dollars, and inadequate opportunity to attract recruits by competing in the school's premier facility. As the Fresno State and FGCU cases demonstrate, a coach who complains about either the length of her contract or the lack of support for her program puts her job at risk by appearing uncooperative, selfish, and difficult. On the other hand, her job is rendered vulnerable by the fact that discrimination in the allocation of resources and support is itself a barrier to her team's success.[207] This vulnerability is exacerbated by a short period of contractual employment, which limits her opportunity to recover from isolated poor performance. This double bind is perfectly illustrated in the lawsuit filed by Deena Deardurff Schmidt, who was expected to produce a successful swim team even in the absence of a pool. San Diego State denied her the support she needed to achieve the benchmarks of success upon which she was being evaluated, and then fired her either because she advocated for more support (her allegation) or because she did not succeed (SDSU's defense). Amy Draper's

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204. Rhode & Walker, *supra* note 47, at 12-14 (providing statistics demonstrating that women are underrepresented among coaches whose teams make it to the NCAA tournament and national championships, and suggesting that female coaches' lack of access to resources could be contributing to this disparity); *id*. at 33 (reporting that 59.8% of female coaches of women's teams who responded to their survey thought that institutional support of female coaches was necessary for female coaches to succeed, in comparison to 31.5% of male coaches of women's teams).

205. *See supra* Part III.A.

206. Confronted with charges of retaliation, many of the university-defendants in these cases defended that they were motivated instead by the coaches' poor win-loss records (Fresno State, Tennessee-Martin, and San Diego State, for example) suggesting that such reasons, when true, are routine and acceptable.

207. *See*, *e.g.*, Rhode & Walker, *supra* note 47, at 24 (reporting results of a survey of coaches of women's sports, in which more than 90% identified institutional support and financial resources as "very important" or "most important" to a coach's success); *id*. at 26 (reporting coaches' open-ended responses such as "low funding means low performance" and "financial resources are by FAR, the most important item in any college sport. Without equal across the board funding, a program cannot be expected to be highly competitive or of championship caliber.").

case against Tennessee-Martin also reflects this theme, as she alleges that she was fired for lobbying for her team's fair share of resources, and the university defends that she was in fact fired for "poor performance" after having a losing season.[208]

In sum, these cases suggest a tendency in athletic departments to essentially handicap female coaches by failing to provide their teams comparable resources and support, but holding them to the same or higher expectation to produce winning seasons. Thus, a double bind is created when coaches risk being fired in retaliation for complaining about the resources they lack, when this dearth of resources or support undermines their teams' performances and therefore negatively impacts their job evaluations. This double bind, which seems to affect female coaches, may be seen as a barrier to women's leadership in athletics and could even help explain women's underrepresentation in this field.

D. The Gender Conformity/Nonconformity Double Bind

A second thematic double bind also emerges from the retaliation cases described in this Article: female coaches are exploited for gender conforming behavior and punished for gender nonconforming behavior. Robin Potera-Haskins, for example, alleged that she was hired with the expectation that she produce a winning team.[209] Though she succeeded in doing exactly that, she may have ultimately been punished for having an intense and competitive personality and the athletic director's discomfort with her "abrasive" style.[210] These characteristics are typical and acceptable among male coaches and administrators, but in Potera-Haskins's case, may have been seen as gender nonconforming. Similarly, Karen Moe Humphreys reported that her male supervisors at Berkeley criticized her for being "intimidating" and "too strong for a woman."[211] Had either of these women adopted a friendlier, more easy-going style, however, they might have earned personality points with their bosses, but would have jeopardized their continued employment in athletics, a field that places a premium on strength and competitive spirit.[212]

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208. *Draper Complaint*, *supra* note 155, at 11. Draper's allegation that the Athletic Director had assured her that "winning is not the most important thing" as she endeavored to turn around a losing program belies the university's claim that her termination was performance-related. *Id.* at 4. Her allegation that the department retained male coaches who had never had a winning season further underscores the existence of a double standard. *Id.* at 14.

209. *See Potera-Haskins Complaint*, *supra* note 148, at 4.

210. Jacobson, *supra* note 152.

211. *Humphreys Complaint*, *supra* note 120, at 7. *See supra* note 125.

212. Melanie Sartore & George B. Cunningham, *Explaining the Under-Representation of Women in Leadership Positions of Sport Organizations: A Symbolic Interactionist Perspective*, 59 QUEST 244, 248 (2007) (stereotypes about women, such as that they are helpful, warm, kind, and gentle may "undermine perceptions of competence and power"); Rhode & Walker, *supra* note 47, at 35 ("What is assertive in a man seems abrasive in a woman, and female leaders risk seeming too feminine or not feminine enough."); Julie A. Baird, *Playing It Straight: An Analysis of Current Legal Protections to Combat Homophobia and Sexual Orientation Discrimination in Intercollegiate Athletics*, 17 BERKELEY WOMEN'S L.J. 31, 35-36 (2002) ("The harmful Catch-22 is that the characteristics that lead to success in the athletic arena (such as aggressiveness) are the same characteristics that can ultimately lead to stereotyping and discrimination.").

The Fresno State plaintiffs also faced a version of this double bind. Milutinovich, Vivas, and Wright all demonstrated gender nonconforming behavior[213] by challenging the male leadership of the athletic department through their advocacy for gender equity. As a result of speaking out, Milutinovich and Wright were marginalized as "the other team" and received punishment in the form of inferior salaries and contract terms; ultimately, job termination befell Milutinovich and Vivas for their actions.[214] In contrast, Stacy Johnson-Klein was hired for her gender conforming and heterosexy appearance, which she likely felt pressure to retain due to the homophobic sentiments directed at gender nonconforming coaches. But this approach did not protect Johnson-Klein from the subordination she, too, experienced in the form of sexual harassment and exploitation.[215] These examples show how social expectations and stereotypes hamstring women in athletics. For the coaches mentioned here, the operation of the gender nonconformity/conformity double bind resulted in negative employment consequences. By creating additional obstacles for female coaches to maneuver, creating job dissatisfaction, and decreasing the amount of mental energy coaches have available to devote to other aspects of their jobs, the double bind may function as a barrier to women's leadership in athletics.[216]

E. Homophobia and Discrimination on the Basis of Sexual Orientation

Several cases involving the intersection of sex discrimination and sexual orientation discrimination demonstrate how gay-baiting and homophobia continue to be deployed as weapons against female coaches. The litigation against Fresno State is rife with examples. The jury in Lindy Vivas's case validated her claim that she was discriminated against for her perceived sexual orientation after hearing testimony that the athletic director insisted female coaches play on the "home team" instead of the "other team," a reference to the female coaches he apparently suspected were gay.[217] According to witnesses, the athletic director had also said, "we need to get rid of the lesbians,"[218] and that he had a "lesbian hit list" of coaches he wanted to terminate.[219] He also tolerated a climate wherein it was acceptable for staff to "blar[e]" a talk radio program critical of Vivas and softball coach Margie Wright, a program in which the host made homophobic comments about them.[220] This climate was such that the staff felt comfortable declaring "Ugly women's athletes day" while

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213. Brake, *supra* note 46, at 34 (describing research finding that women who challenge the most blatant examples of sex discrimination received the harshest reprisals, a result explained by the possibility that, for a woman, the act of challenging such discrimination is a "more clear challenge to the social order and transgressed traditional gender-role expectations").

214. *Supra* note 79 and accompanying text.

215. *Supra* notes 90-92 and accompanying text.

216. *Cf.* CHRISTINA CRUZ, GENDER GAMES: WHY WOMEN COACHES ARE LOSING THE FIELD 39–40, 77 (2009) (describing internal "tension" faced by female coach as she sought to balance both traditionally feminine and non-feminine roles on the job).

217. *See* Part II.A *supra*.

218. Chris Collins, *Pattern of Hostility Alleged at Fresno State*, FRESNO BEE, June 8, 2007, at A1.

219. Bryant-Jon Anteola, *Defense Contests Anti-Gay Portrait*, FRESNO BEE, June 26, 2007, at D1.

220. Bryant-Jon Anteola, *Vivas Never Heard Direct Slurs*, FRESNO BEE, June 14, 2007, at D1.

symbolically reproducing the stereotype of the mannish (lesbian) athlete by juxtaposing men's faces on female athletes' bodies.[221]

Jaye Flood's case against FGCU also presents elements of homophobic undertones. After it became known that she had participated in the drafting of Merrily Dean Baker's letter about gender discrimination in the athletic department, Flood was charged with having a relationship with a woman on a road trip and inappropriately touching a student by tugging on her shirt.[222] The charge that ultimately resulted in her termination (which she denied and claimed was part of the retaliation against her) was that she had an "amorous" relationship with a female student.[223] The lawsuits against San Diego Mesa College and Feather River College both contain allegations that the college officials were concerned about the image of athletic programs led by lesbian coaches, and the Mesa College plaintiffs allege that they were fired in part because the newspaper mentioned their lesbian relationship.

In 1991, sport scholar Helen Lenskyj described the climate of college athletics as "so anti-woman, anti-lesbian and anti-feminist that most lesbians, whether athletes, coaches, administrators or faculty, remain invisible for reasons of simple survival."[224] Later, in 1998, Pat Griffin's *Strong Women, Deep Closets* described the homophobic climate of athletic departments as either actively hostile toward lesbians (or those perceived to be lesbians) or "conditionally tolerant" of those who agree to cover their lesbianism and to adopt indicia of heterosexuality.[225] The examples of homophobia presented in the contemporary retaliation cases discussed here suggest that, despite increasing public acceptance of gays and lesbians, elements of that same climate described by Lenskyj and Griffin still exist today. The examples also provide support to the theoretical basis for the existence of homophobia in sport.

One explanation for the persistence of homophobia in sport contexts including college athletics is that its primary purpose is not exclusion of gays and lesbians per se. Rather, similar to the discrimination and double binds discussed above, it is a weapon in the service of sex discrimination. Society is deeply invested in gender differentiation and hierarchy, and to that end, relies on sport as the context for creating and valorizing a hegemonic masculinity.[226] Women's sport in general is acceptable and accepted only to the extent it does

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221. *See supra* note 80.

222. The shirt-tugging charge invokes homophobia because it likely derives from, and lends support to, the stereotype of predatory lesbian coaches. PAT GRIFFIN, STRONG WOMEN, DEEP CLOSETS: LESBIANS AND HOMOPHOBIA IN SPORT 57-59 (1998); *see also* Vikki Krane & Heather Barber, *Identity Tensions in Lesbian Intercollegiate Coaches*, 76 RES. Q FOR EXERCISE AND SPORT 67, 73 (2005) (lesbian coaches report going out of their way to not touch players in the usual way that coaches do, due to a perceived likelihood that this could be misperceived as sexual).

223. *See* Part II.B *supra*.

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

225. GRIFFIN, *supra* note 222, at 93-107; *see also* CRUZ, *supra* note 216, at 58 (describing a lesbian coach whose acceptance by her athletic department was "based on the condition that she forego a masculine look").

226. GRIFFIN, *supra* note 222, at 17.

not pose a challenge to the association of sport with masculinity.[227] Women whose appearance evokes feminine stereotypes of weakness, passivity, and lack of aggression or competitiveness do not threaten the hegemonic masculinity in sports, while also allowing women's athletics to be constructed as distinct and "other." This explains athletic departments' hiring preferences for coaches who convey normative femininity, including heterosexuality, and intolerance for coaches whose lesbianism is known or perceived. The Fresno State athletic director's comments on the hiring of Stacey Johnson-Klein, Feather River College's failure to hire Laurel Wartluft, and Mesa College's termination of coaches who were out in the newspaper, serve as examples of these tendencies and is consistent with other qualitative research along these same lines.[228]

It has also been suggested that the sporting world's intolerance for lesbians allows the lesbian label to remain stigmatized and, thus, deployed as a powerful derogatory to intimidate women and control their experience in sport.[229] As Griffin explains, the threat of the lesbian stigma can be used, for example, "to discourage the bonding that occurs among women in athletics" in order to "keep women from discovering their own power."[230] Thus, it is no surprise that anti-lesbian sentiment was present in two athletic departments—those of Florida Gulf Coast University and Fresno State—where female coaches and administrators were cooperating with each other and acted with the support of a high-ranking woman. At FGCU, the female coaches and athletic director *emerita* Merrily Dean Baker worked together to present their concerns to the university administration. Fresno State coaches Vivas and Wright, and eventually Johnson-Klein, received support and advocacy from Milutinovich while she was associate athletic director and even after she had been transferred out of the

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227. *Id.* ("Women's presence in sport as serious participants dilutes the importance and exclusivity of sport as a training ground for learning about and accepting traditional male gender roles and the privileges that their adoption confers on (white, heterosexual) men.").

228. *See* Krane & Barber, *supra* note 222, at 72 (describing how participants witnessed hiring discrimination against open and perceived lesbian applicants for coaching positions, and one participant's report that she received her first ever negative performance evaluation in the wake of coming out, along with a letter in her file that specifically said if her contract was not renewed, "it would *not* be because she was a lesbian").

229. GRIFFIN, *supra* note 222, at 20; *see also* Krane & Barber, *supra* note 222, at 71-73 (reporting coaches' fears that if they are openly lesbian, they won't get promoted, or risk getting fired). For example, after former Howard University basketball coach Sanya Tyler complained about gender inequities in her athletic department, rumors circulated that she received negative evaluations, stole money, and tried to get the university in trouble with the NCAA. Yet it was the rumor that she was a lesbian, which also started at that time, that Tyler called "possibly . . . the most damaging thing said about me." Debra E. Blum, *College Sports' L-Word*, CHRON. OF HIGHER EDUC., Mar. 9, 1994, at A35.

230. GRIFFIN, *supra* note 222, at 20; *see also* Kerrie J. Kauer & Vikki Krane, *"Scary Dykes" and "Feminine Queens": Stereotypes and Female Collegiate Athletes*, 15 WOMEN IN SPORT & PHYSICAL ACTIVITY J. 42, 44 (2006) ("As long as female athletes are divided, it is unlikely that women in sport will come together to challenge the status quo. Therefore, the lesbian label is used as a weapon of power to stigmatize female athletes and create dissention among them.").

While homophobia also exists in men's sports, male coaches are not routinely subjected to antigay bias in the contexts of recruiting, hiring, and daily athletic department culture. *See* Blum, *supra* note 229.

athletic department.[231] The labeling of the Fresno State coaches and Milutinovich as the "other team"[232] was likely intended to discourage other women from joining their efforts by threatening that the lesbian stigma would attach to them by association. FGCU's investigation of Flood on charges having to do with lesbianism[233] could also be seen as an effort to make an example of her in order to threaten, control, and divide the group of women who sought to collectively surmount their powerlessness in the department.

F. Double Standards

Another theme that emerges from the retaliation cases is gender-based double standards for job performance. Surina Dixon's case against Texas Southern is particularly emblematic of this theme. Dixon alleges that, despite being more qualified than a male coach hired at the same time, she was offered a lower salary and a shorter contract term than that male coach because she (but not he) had to "prove herself" to the athletic director.[234] Similarly, Amy Draper complained that Tennessee-Martin held female coaches to a higher standard in two ways: first, by requiring only female coaches to have playing experience in the sports they coached, and second, by requiring female coaches, but not male coaches, to consistently have winning seasons.[235] Karen Moe Humphreys's case against U.C. Berkeley suggested that she and other women were passed over for promotions and subjected to layoffs despite seniority and experience, while men who lacked both were retained and promoted.[236]

Scholars have documented similar double standards in the hiring and retention of coaches. For example, studies have found that female coaches are more likely than male coaches to have majored in physical education and to have intercollegiate playing experience.[237] The hiring of men due to their work experience, despite women's educational background and playing experience, demonstrates a double standard.[238] Along that vein, female coaches, particularly younger ones, reported to focus group interviewers that they perceived having to work "twice as hard" as male counterparts in order to be taken seriously in their jobs.[239] Such double standards contribute to a climate

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231. While she was associate athletic director, and even after she was transferred out of athletics and to the student union, Milutinovich advocated for gender equity on behalf of coaches as well as players, including by filing complaints with OCR. *See, e.g.*, Jeff Davis, *Advocate on Leave at CSUF: Fresno State Gender-Equity Proponent Says She's Been Fired*, FRESNO BEE, Aug. 3, 2006, at A1. After her termination, Milutinovich continued to support Vivas and Johnson-Klein by testifying for both plaintiffs at their trials. *E.g.*, Michele Kort, *Full Court Press*, MS. MAGAZINE, Apr. 1, 2008, at 46.

232. *See* text at note 79, *supra*.

233. *See* text at notes 97-101, *supra*.

234. *See* text at notes 166, *supra*.

235. *See* text at notes158-162, *supra*.

236. *See* text at note 122, *supra*.

237. Cathryn L. Claussen, *Title IX and Employment Discrimination in Coaching Intercollegiate Athletics*, 12 U. MIAMI ENT. & SPORTS L. REV. 149, 158-59 (1994) (describing such studies).

238. *Id*. at 159.

239. DRAGO ET AL., *supra* note 166, at 22; *see also id*. ("Younger women felt particularly disadvantaged as their age and gender worked against them. By way of contrast, young men's gender provided them with an immediate legitimacy not experienced by young women in the

where female coaches are devalued and demeaned, which in turn creates job dissatisfaction and turnover.

G. Women Participating in Discrimination

The cases against Fresno State and FGCU both suggest that women are more likely to be successful in their efforts to challenge sex discrimination in athletics when they cooperate with each other to this end. The Fresno State plaintiffs, for example, worked together by testifying at each others' trials,[240] and collaborated with the Senior Woman Administrator, Assistant Athletic Director Diane Milutinovich, as they advocated for equal treatment for themselves and their teams. At FGCU, the female coaches and assistant coaches worked with the athletic director *emerita*, Merrily Dean Baker, to present their concerns about gender equity to the department and university administration.[241] But women in athletics are not always allies in disputes about sex discrimination. Many of the cases highlighted in this Article involve evidence or charges of women in positions of power actively perpetuating the retaliation alleged. For example, it appears that it was a female athletic department administrator at FGCU who laid the groundwork for Vaughn and Flood's termination by putting falsified negative performance evaluations in their files.[242] Coach Draper of Tennessee-Martin claims the Senior Woman Administrator was instrumental in the discriminatory treatment she and her team received.[243] The female college president at Feather River College was accused both of firing her male athletic director and a female basketball coach who were trying to bring the athletic department into compliance with Title IX and of making homophobic statements about the coach.[244] And a female athletic director was a named defendant in Terri Patraw's suit against University of Nevada, Reno.[245]

While it is impossible to speculate on the specific motivations of individuals involved in the cases described, allegations of women perpetuating or supporting discrimination against other women provide an opportunity to consider how male privilege operates to entrench discrimination against women in athletics. Women, too, may capitalize on male privilege by offering support to the existing gender hierarchy. Moreover, they may have reason to believe that doing so is necessary for retention or consideration for promotion to positions of power (or at least, token positions of power).[246] Because Title IX

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field."); *see also* Rhode & Walker, *supra* note 47, at 32 (some coaches responding to survey expressed that "women had to be 'twice as hardworking' and 'twice as successful' as male counterparts" in order to earn respect).

240. *See* text at notes 80-83, *supra*.

241. *See* text at note 95, *supra*.

242. Brad Kane, *Inquiry: FGCU Officials Tried to Fire Coach a Year Ago, Investigation Shows Assistant Athletic Director Changed Evaluation in Attempt to Oust Volleyball Coach*, NAPLES DAILY NEWS, Feb. 8, 2008.

243. *See* text at note 143, *supra*.

244. *See* text at note142-145, *supra*.

245. *See Patraw Complaint*, *supra* note 138.

246. On tokenism, see Kane, *supra* note 19, at 128 (presenting findings to support the presence of token women in leadership positions in sport and arguing that tokenism is "insidious" because "it gives the impression that the system is open and egalitarian").

issues are often perceived as pitting the interests of women's sports against those of men's sports,[247] women in positions of power in athletics may be motivated to establish their loyalty to men with power over them (athletic directors, university presidents, powerful alumni and donors) or even to men subordinate to them whose support and favor they wish to cultivate, by rebuffing female coaches' demands for parity in pay and equality for female athletes.[248] Feminist theorists describe such practices as complicity in one's own oppression.[249] As the retaliation claims themselves make clear, such complicity cannot be considered without the context of the gender hierarchy that exists in sport: a hierarchy in which actions that sustain that hierarchy are rewarded while efforts to dismantle it are punished.[250] Thus, the fact that women themselves participate in discrimination against other women suggests that another barrier to women's leadership, power, and equality is the effectiveness of the dominant culture at fracturing women's loyalties and rendering them less effective as a group.

In sum, the themes exposed by recently-filed retaliation cases reveal and underscore existing obstacles to women's leadership in athletics. In addition to exposing the fact and manner of retaliation coaches often face for speaking out against sex discrimination in athletics, such cases raise judicial and public awareness of themes inherent in the predicate discrimination itself. Such themes include discrimination against women's sports programs, employment discrimination, discrimination on the basis of gender nonconformity and sexual orientation, and pressure for female administrators and others to support and participate in such practices. However, it is possible such exposure enables a remedy. Thus, the remedial potential of the retaliation trend is examined in the next Part.

PART IV

LEGAL SIGNIFICANCE OF RETALIATION CASES

To those who study sport and gender, the obstacles to women's leadership in athletics described in Part III are neither surprising nor new. What is significant, however, is that these issues are increasingly factoring into litigation and that several of those cases have produced verdicts and settlements favorable to plaintiffs. The retaliation complaints filed in the wake of *Jackson v. Birmingham Board of Education* are exposing judges and juries to double binds, double standards, homophobia, and other nuances of discrimination that sustain athletics leadership as a predominantly male enterprise. For both legal and

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247. *E.g.*, Rhode & Walker, *supra* note 47, at 23–24 (coaches of women's teams who responded to survey both reflected and challenged this viewpoint).

248. *Cf.* Stangl & Kane, *supra* note 171, at 57-59 (suggesting that female athletic directors do not necessarily have the power equal to that of their male counterparts, due to men's strong incentive to maintain their hegemonic privilege and their entrenched control over employment determinations); Kane, *supra* note 19, at 127–28 (making a similar point).

249. *E.g.*, SIMONE DE BEAUVOIR, THE SECOND SEX xxvii (H.M. Parshley trans. Vintage Books ed. 1989).

250. Brake, *supra* note 46, at 20 (explaining how retaliation operates to "suppress discrimination claims and preserve the social order" by silencing those who would challenge inequality).

practical reasons to be addressed in this Part, many of these situations would be difficult to remediate directly. For issues involving compensation discrimination, sexual orientation discrimination, and programmatic discrimination, for example, the retaliation cause of action is helping expose and indirectly make schools accountable for conduct that might otherwise not be litigated because it is marginal, difficult to prove, or outweighed by the financial (and other) costs of bringing a legal challenge. Thus, the right of action for retaliation operates to fill existing gaps in enforcement of Title IX and challenges to sex discrimination in athletics more broadly.

A. Retaliation Claims and Pay Discrimination

The increased profile of retaliation cases may give plaintiffs greater leverage to address disparities in compensation.[251] While salary disparities between coaches of women's and men's teams[252] and between female and male coaches[253] are widespread and well-known, they have proven difficult to remediate in court. Female coaches have sought to challenge salary disparities as sex discrimination under the Equal Pay Act[254] and Title VII[255] with mixed results.[256] Both statutes prohibit employers from paying employees differently

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251. *See supra* Part III.A.

252. *See, e.g.*, NAT'L COLLEGIATE ATHLETIC ASS'N, 2004-06 NCAA REVENUES AND EXPENSES OF DIVISION I INTERCOLLEGIATE ATHLETICS REPORT 46, 47 (Mar. 2008), *available at* http://www.ncaapublications.com/ProductsDetailView.aspx?sku=RE2008 (finding many examples of disparities in mean salaries for head coaches of men's and women's teams of the same sport—for example, among Division I, Football Bowl Subdivision (D-IA) schools, the mean head coach salary for lacrosse teams was $161,900 (men's) and $80,200 (women's); for gymnastics, $107,400 (men's) and $89,200 (women's); and for hockey $222,000 (men's) and $129,600 (women's)—figures that do not include endorsements and other payments coaches received from third parties, which skewed disparities even further).

253. *See supra* note 188.

254. The Equal Pay Act prohibits employers from paying employees at a rate less than employees of the opposite sex at the same establishment "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . " 29 U.S.C. § 206(d)(1) (2006).

255. Title VII prohibits discrimination in the terms and conditions of employment, including compensation. 42 U.S.C. § 2000e-2(a)(1) (2006). Instances of unequal pay for equal work that violate the Equal Pay Act will violate Title VII as well. However, Title VII's prohibition on wage discrimination goes further than the Equal Pay Act, and applies to all wage discrimination, such as, for example, a decision to offer bonuses or other benefits to male but not female coaches (regardless of whether the jobs are substantially equal). Disparate hiring patterns that also create compensation disparities could also violate Title VII outside the context of an "equal pay for equal work" claim.

Title IX regulations also require gender equity in the "assignment and compensation of coaches." 34 C.F.R. § 106.41(c)(6) (2009). However, because these regulations address student athletes, the OCR does not consider the sex of the coaches in evaluating an institution's compliance with these factors, only whether the coaching received by female athletes is comparable to that afforded to their male counterparts. *See* VALERIE M. BONNETTE & LAMAR DANIEL, OFFICE FOR CIVIL RIGHTS, TITLE IX INVESTIGATOR'S MANUAL 58 (1990).

256. *Compare* Hankinson v. Thomas County Sch. Sys., 257 Fed. Appx. 199, 202 (11th Cir. 2007) (affirming summary judgment to defendant on Title VII claim, but reversing summary judgment for defendant on the Equal Pay Act claim); Perdue v. City Univ. of New York, 13 F. Supp. 326, 333-34 (E.D.N.Y. 1998) (upholding jury's award of damages to coach for Equal Pay Act violation); LeGoff v. Trustees. of Boston Univ., 23 F. Supp. 2d 120, 125 (D. Mass. 1998) (female coach established prima facie case under Equal Pay Act, where she was given more responsibilities and paid less than male

for similar work, but in the context of athletics, it can be difficult to compare head coach positions across sports or across teams. It is lawful for universities to offer higher salaries to coaches with greater job responsibilities due to larger rosters, bigger budgets, or greater travel obligations stemming from region of competition and recruiting.[257] Moreover, differences in experience levels and the market value of the coach's services may also justify a decision to compensate some coaches more than others.[258] Though regulatory guidance suggests that differences between head coach positions that derive from sex discrimination do not justify unequal pay,[259] it may be difficult to identify, parse out, and prove such discrimination.[260] Moreover, courts can avoid considering the possibility that such discrimination exists by relying on other differences between the coaches or their positions to justify the disparity in pay.[261]

The difficulty and uncertainty surrounding pay discrimination cases likely deters plaintiffs from litigating them in many instances. But because a retaliation case does not depend on whether the challenged practice constitutes actionable discrimination,[262] a coach may be more likely to file suit when she can bring a retaliation claim as well. The potential cause of action for retaliation also

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coaches), *and* Claussen, *supra* note 237, at 163-64 (describing two additional cases in which juries awarded remedies to female coaches who challenged pay disparities), *with* Stanley v. Univ. of S. Cal., 178 F.3d 1069, 1073-77 (9th Cir. 1999) (dismissing female coach's Equal Pay Act claim); Weaver v. Ohio State Univ., 71 F. Supp. 2d 789, 799-801 (S.D. Ohio 1998); Bartges v. Univ. of N.C., 908 F. Supp. 1312, 1322-24 (W.D.N.C. 1995) (same); Harker v. Utica Coll. of Syracuse Univ., 885 F. Supp. 378, 389-91 (N.D.N.Y. 1995) (same), *and* Deli v. Univ. of Minn., 863 F. Supp. 958, 960-61 (D. Minn. 1994) (same).

257. *See, e.g.*, *Hankinson*, 257 Fed. Appx. at 201 (jury could find that softball and baseball coach positions were comparable, even though baseball coach had more players on his roster, coached more games, and baseball games tend to take more time than softball games, because he had assistants who were more qualified than Haskinson's assistants who helped him manage additional responsibilities); *Perdue*, 13 F. Supp. 2d at 334 (finding that women and men's basketball coaches had comparable jobs due to similar number of players, seasons, and administrative responsibilities); *Deli*, 863 F. Supp. at 961 (rejecting a female gymnastics coach's claim that her salary, less than the coaches of three men's teams—football, hockey, and basketball—was pay discrimination under the Equal Pay Act because those male coaches had more athletes on their rosters, more employees to supervise, and garnered greater spectator attendance which resulted in more revenue).

258. *See, e.g.*, *Stanley*, 178 F.3d at 1073-74 (endorsing higher pay to male coach with 31 years experience compared to female coach with 17); Weaver v. Ohio State Univ., 71 F. Supp. 2d 789, 801(S.D. Ohio 1998) (finding that difference in market value justified higher salary for men's ice hockey coach than women's field hockey coach, since the existence of a professional men's hockey league increased the demand for qualified men's hockey coaches).

259. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON SEX DISCRIMINATION IN THE COMPENSATION OF SPORTS COACHES IN EDUCATIONAL INSTITUTIONS, EEOC NOTICE NO. 915.002 (1997), *available at* http://eeoc.gov/policy/docs/coaches.html (suggesting, for example, that a university cannot justify paying a male coach more based on his ability to generate more revenue, if the university does not offer a female coach equivalent support for marketing and promotion). At least one court has refused to defer to this guidance. *Weaver*, 71 F. Supp. 2d at 802.

260. Rhode & Walker, *supra* note 47, at 18 (describing how difficult it is to prevail in pay discrimination cases).

261. *See, e.g.*, *Stanley*, 178 F.3d at 1075 (avoiding the question of whether the greater market demand for men's basketball justified higher salary for men's team head coach by finding that the men's team coach's higher level of experience alone justified paying him substantially more than the head coach of the women's basketball team).

262. *See supra* note 46 and accompanying text.

provides additional leverage that plaintiffs can use to negotiate for a favorable settlement.[263]

In addition, the availability of a remedy for retaliation deters universities from engaging in unlawful reprisal and therefore makes it safer for a coach to challenge her salary and employment conditions internally. The potential for plaintiffs to win large jury verdicts and settlements in retaliation claims predicated on salary discrimination compels universities to contemplate the public, external costs of disparate salaries. On a societal level, litigation challenging retaliation raises both judicial and public awareness of the underlying problem of unequal pay, which may help pressure universities to distribute salaries more evenly. Given the relationship between salary and job satisfaction,[264] the potential for retaliation cases to influence higher compensation for women coaches may in turn contribute to a solution to the gender gap in college coaching.

B. Retaliation Claims and Homophobia and Sexual Orientation Discrimination

Retaliation claims hold similar promise to address and mitigate homophobia and discrimination on the basis of sexual orientation in athletics. While women in athletics, including coaches, have been disproportionately subjected to scrutiny for gender nonconformity and stigmatized by suspicions of lesbianism,[265] litigation on this issue is exceedingly rare.[266] A likely explanation is that homophobia manifests itself in subtle ways that are difficult to bolster with concrete evidence. Without such proof, a plaintiff may assume the chances of victory are slim and decide not to bring suit.

Another explanation for the absence of litigation in this realm is that the law affords very little reliable protection against discrimination on the basis of sexual orientation. Sexual orientation discrimination generally receives the lowest level of constitutional protection[267] and is not categorically prohibited by

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263. *Cf.* Rhode & Walker, *supra* note 47, at 18 ("Although pay discrimination cases are difficult to win, the prospect of litigation does give women coaches additional negotiation leverage. And in many cases, when claims survive summary judgment, the result is a settlement that redresses some of the compensation disparity.").

264. *See supra* note 190 and accompanying text.

265. *See supra* Parts III.D and E.

266. The only reported decision addressing discrimination against a lesbian coach, who was also a high school teacher, was decided on constitutional grounds. A federal district court held that the school district that dismissed the coach from both positions because she was open about her sexual orientation violated her rights to free speech and equal protection under the First and Fourteenth Amendments. Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279, 1286, 1288-90 (D. Utah 1998). Weaver's lawsuit also included a retaliation claim, on which she also prevailed. *Id.* at 1290-91.

267. The Equal Protection Clause, contained in the Fourteenth Amendment of the U.S. Constitution, prohibits state entities, including public universities, from discriminating against citizens on the basis of membership in a defined group or class. In general, however, this doctrine affords little protection to gay and lesbian plaintiffs. In contrast to discrimination on the basis of race and sex, which is only upheld if done for compelling or important purposes, state actors may permissibly treat gay and lesbian citizens differently so long as they proffer some rational basis for doing so. Under this permissive standard, courts have upheld discrimination against gays and lesbians in the contexts of government employment, military service, adoption, and marriage. *See, e.g.*, Witt v. Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008) (military service); Lofton v. Sec'y of

federal employment discrimination law[268] or the antidiscrimination laws of many states.[269] Courts may construe sex discrimination laws like Title VII and Title IX to prohibit discrimination on the basis of gender nonconformity[270]—a potentially useful theory in the athletic context given the overlap between homophobia and sex stereotyping.[271] But the fact that courts sometimes reject this theory or construe it narrowly[272] likely affects plaintiffs' confidence in the potential to remediate sexual orientation discrimination through litigation.

Finally, the lesbian stigma itself likely causes coaches to be particularly risk averse in deciding to challenge homophobia in sport. By bringing such a claim, a coach associates herself publically with lesbianism, which, so long as this is a stigmatized association in the field of athletics, compromises her future employability.[273] With so much to lose, a coach could easily be dissuaded from filing suit by the legal and factual obstacles that a lawsuit would face. But when she can bolster her sexual orientation discrimination claim with a retaliation claim imbued in the confidence that flows from multimillion dollar verdicts and settlements, she is more likely to do so. Moreover, the fact that a jury validated

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the Dep't of Children and Family Servs., 358 F.3d 804 (11th Cir. 2004) (adoption); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) (federal employment); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006) (prohibition on same-sex marriage survives rational basis scrutiny under the New York Constitution's equal protection clause). *See also* David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J. L. & GENDER 217, 256-57 (2005) ("Courts that have addressed equal protection claims based on sexual orientation discrimination in education have analyzed the school's actions under the most basic equal protection standard, the rational basis test. School action motivated by animus fails this rational basis test. While no court has found a rational basis for indifference toward harassment based on sexual orientation, it is conceivable that courts would permit, under the Constitution, other forms of educational discrimination based on sexual orientation, as they have unfortunately permitted, under the Constitution, discrimination against gays and lesbians in other areas of the law.").

268. The Employment Nondiscrimination Act, H.R. 3017, currently pending in Congress, would add sexual orientation and gender expression to the characteristics protected under federal employment discrimination law.

269. According to Lambda Legal, 20 states plus the District of Columbia prohibit private employers from discriminating on the basis of sexual orientation, while 28 ban such discrimination in the public sector, *available at* http://www.lambdalegal.org/states-regions/.

270. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (plurality opinion) ("[A]n 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."); *see also* Anthony E. Varona & Jeffrey M. Monks, *EN/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67, 131 (2000) ("Gender nonconformity standing alone, as in the Price Waterhouse case, can invoke Title VII relief, but typically not when it is combined with perceived or actual homosexuality.").

271. Baird, *supra* note 212, at 60-61; *supra* Part III.E.

272. *See, e.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1113 (9th Cir. 2006) (en banc) ("Jespersen's claim here materially differs from Hopkins' claim in *Price Waterhouse* because Harrah's grooming standards do not require Jespersen to conform to a stereotypical image that would objectively impede her ability to perform her job requirements as a bartender.").

The sex stereotyping rationale is also limited in the context of sexual orientation discrimination to cases involving gender nonconformity in appearance or behavior. Same-sex orientation itself is not actionable gender nonconformity. Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762-64 (6th Cir. 2006); *see also* Barbara Osborne, *"No Drinking, No Drugs, No Lesbians": Sexual Orientation Discrimination in Intercollegiate Athletics*, 17 MARQ. SPORTS L. REV. 481, 495-96 (2007).

273. *See* Baird, *supra* note 212, at 41.

Coach Sulpizio's retaliation claim but not her sexual orientation discrimination claim illustrates the relative difficulty in prevailing on sexual orientation discrimination claims and the value to plaintiffs in coupling them with retaliation claims. As in the context of pay discrimination discussed above, retaliation claims operate to deter discrimination in this context as well. This deterrence occurs by increasing the potential for litigation, which in turn raises the costs to universities of allowing athletic departments to maintain homophobic climates.

C. Retaliation Claims and Equal Treatment Claims

Retaliation claims also raise the potential for litigation about discrimination in the resources and support allocated to men's and women's athletics. While women's collegiate teams receive only about a third of the operating and recruiting funds allocated to men's teams,[274] the inequities resulting from such disparate funding, in such areas as facilities, equipment, publicity and promotion, and recruiting budgets,[275] have yet to receive much attention from private litigants. Most cases raising Title IX's application to college athletic departments have challenged an inequitable distribution of athletic opportunities to men and women (so-called "equal access" claims), either due to a university's decision to cut or demote an existing team[276] or its failure to add new teams for which there is abundant interest.[277] While OCR's attention is increasingly drawn to issues related to the relative quality of those opportunities (so-called "equal treatment" claims),[278] it is usually the monetary damages—or threat thereof—that come from private enforcement[279] that are credited with

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274. WOMEN'S SPORTS FOUNDATION, 2008 STATISTICS - GENDER EQUITY IN HIGH SCHOOL AND COLLEGE ATHLETICS: MOST RECENT PARTICIPATION & BUDGET STATISTICS, *available at* http://womenssportsfoundation.org (noting that female college athletes receive "36% of sports operating dollars, which is $1.55 billion less than male college athletes," and "33% of athletic team recruitment spending, which is $50 million less recruiting female athletes than male athletes.").

275. *See* Part III.A, *supra*.

276. Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996) (university's decision to demote women's gymnastics and volleyball to donor-funded varsity status violated Title IX); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993) (cutting varsity fast pitch women's softball violated Title IX); Favia v. Indiana Univ. of Penn., 7 F.3d 332 (3d Cir. 1993) (affirming injunction to reinstate women's varsity field hockey and gymnastics programs); Biediger v. Quinnipiac Univ., 616 F. Supp. 2d 277 (D. Conn. 2009) (injunction to preclude the elimination of women's volleyball); Choike v. Slippery Rock Univ. of Penn., 2006 WL 2060576 (W.D.Pa. July 21, 2006) (ordering reinstatement of women's varsity swimming and water polo).

277. Pederson v. La. State Univ., 213 F.3d 858 (5th Cir. 2000) (university's failure to fund women's fast-pitch softball and soccer violated Title IX).

278. Recently, for example, a complaint filed with OCR against the University of Alaska at Anchorage addressed disparities in the amount of locker room space allocated to men's and women's teams. *See* Beth Bragg, *UAA Hit with Title IX Complaint*, THE ANCHORAGE DAILY NEWS, Oct. 29, 2008, *available at* http://www.adn.com/sports/story/571011.html. In another example, an alumna's complaint against the University of Charleston addressed the delays in the construction of a softball field, which was part of a gender inequity settlement between OCR and UC. See Veronica Nett, *Ex-UC Student Files Title IX Complaint*, THE CHARLESTON GAZETTE, Mar. 15, 2008, at P8A.

279. Title IX's private right of action extends to both injunctive relief and damages. *See* Franklin v. Gwinnet County Pub. Sch., 503 U.S. 60, 76 (1992). The sanction at stake in a public enforcement action by the Office for Civil Rights is termination of the educational institution's federal funds.

motivating universities to comply with Title IX and its implementing regulations.[280] Equal treatment claims, however, have not been on the forefront of litigation seeking enforcement of Title IX, which has so far prioritized the lack of opportunity over inequities related to facilities, equipment, uniforms, promotion and publicity, and the like.[281] Moreover, the cases in which student plaintiffs have raised equal treatment claims demonstrate such cases are vulnerable to early dismissal due to lack of standing,[282] mootness,[283] or failure to comply with the statute of limitations.[284]

Retaliation cases predicated on complaints about unequal treatment have the potential to bolster enforcement of this aspect of Title IX as well. The availability of a remedy for retaliation predicated on such discrimination ensures that coaches can safely raise internal and external challenges to such disparities.[285] Thus, after *Jackson* and in the wake of multi-million dollar jury verdicts and settlements awarded to coaches who experienced retaliation, a coach may feel more confident to speak freely about inequities to her Athletic Director, Title IX coordinator, or other appropriate university officials.[286] Such protection may also bolster coaches' participation in the self-study about gender equity (among other issues) that the NCAA requires of its member institutions,[287] and it may give coaches more confidence to file a complaint with

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However, owing to its "draconian" nature and the fact that it would deprive students of the very benefits of education OCR seeks to secure, this sanction has never been imposed. Julie A. Davies & Lisa M. Bohon, *Re-Imagining Public Enforcement of Title IX*, 2007 BYU EDUC. & L.J. 25, 69-70 (2007). Instead, OCR uses the threat of that sanction to secure prospective, corrective measures. *Id*. at 41.

280. Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road to Title IX Compliance*, 3 DUKE J. GENDER L. & POL'Y 51, 60-61 (1996) ("The threat of having to pay out large damage awards also promised to operate as a powerful incentive for schools to bring their athletic programs, as well as their other educational programs, into compliance with Title IX.").

281. *But see* Haffer v. Temple Univ. of Commonwealth Sys. of Higher Educ., 678 F. Supp 517, 524-534 (E.D. Pa. 1987) (successfully challenging disparities in the distribution of athletic opportunities and in the funding of men's and women's athletics under the equal protection clause).

282. Boucher v. Syracuse Univ., 164 F.3d 113, 116 (2d Cir. 1999) (named plaintiffs, none of whom were varsity level, lacked standing to challenge unequal treatment in varsity programs).

283. Grandson v. Univ. of Minn., 272 F.3d 568, 574 (8th Cir. 2002) (dismissing challenge to unequal treatment in the distribution of scholarships and funding, to the extent it sought prospective relief, as moot upon players' NCAA ineligibility or because they lacked varsity status, and also dismissing claim for monetary damages for plaintiffs' failure to put university officials on notice).

284. Mansourian v. Bd. of Regents of the Univ. of Ca. at Davis, 2007 WL 3046034, *5-*9 (E.D. Cal. Oct. 18. 2007) (unequal treatment claim dismissed as untimely).

285. *See* Brake, *supra* note 46, at 78 (discussing the importance of protecting individuals who raise formal and informal objections to discrimination).

286. For example, Karen Moe Humphreys alleged that she experienced retaliation after complaining about gender discrimination to university officials investigating another coach's claims of race discrimination. *See supra* note 123.

287. For Division I institutions, the results of the self-study must be reported to the NCAA, whose approval is required for certification. *See generally* NAT'L COLLEGIATE ATHLETIC ASS'N, 2008-09 DIVISION I ATHLETICS CERTIFICATION HANDBOOK (2008), *available at* http://www.ncaa.org/wps/ncaa?key=/ncaa/NCAA/Legislation%20and%20Governance/Compliance/Certification%20and%20Training/Athletics%20Certification/index-d1_ath_cert_prog. Division II and III schools must also conduct a self-study and generate a report that must be available to the NCAA upon request. *See generally* NATIONAL COLLEGIATE ATHLETIC ASS'N, DIVISION II INSTITUTIONAL SELF-STUDY GUIDE (2008-2009) and DIVISION III INSTITUTIONAL SELF-STUDY GUIDE (2008-2009), *available at*

the Office for Civil Rights.[288] And while internal and external complaints may originate with others, such as students and parents,[289] it is particularly important that coaches avail themselves of those procedures without fear of reprisal. Coaches are uniquely situated to perceive whether the resources their teams receive are adequate and fair and to present evidence of disparities. Coaches also have greater incentive than students or parents to address inequities that require a longer time horizon to redress, such as those related to facilities. Thus, ensuring that coaches can speak freely about programmatic disparities increases the likelihood that those disparities will be redressed.

CONCLUSION

The retaliation cases that have been litigated and filed in the wake of *Jackson v. Birmingham Board of Education* are valuable for what they reveal about obstacles to women's leadership in athletics. Their early success provides grounds for cautious optimism in the potential for these cases to destabilize those institutionalized impediments. With the momentum of multimillion dollar verdicts and settlements on their side, coaches are better situated now than ever before to seek remedies that will help ensure that the values college athletic departments are exercising and modeling include equal opportunity for the leadership of women.

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http://www.ncaa.org/wps/ncaa?key=/ncaa/NCAA/Legislation%20and%20Governance/Compliance/Certification%20and%20Training/Self-study/issg.

288. OCR offers reassurance that its regulations prohibit retaliation against complainants and those who participate in any investigation or proceeding related to the complaint. OFFICE FOR CIVIL RIGHTS, HOW TO FILE A DISCRIMINATION COMPLAINT WITH THE OFFICE FOR CIVIL RIGHTS 3, *available at* http://www.ed.gov/about/offices/list/ocr/docs/howto.pdf; *see also* 34 C.F.R. § 100.7(e) (2000). It also conceals the identity of complainants. *See, e.g.*, Letter from OCR to Erin E. Buzuvis (on file with author) (redacting the names of complainants in documents transmitted in response to FOIA request for documents regarding OCR's investigation of Fresno State, despite the fact that the identity of such individuals would likely be obvious to anyone with knowledge of the case). These measures did not, for example, deter Fresno State from retaliating against coaches who filed complaints with OCR. It is reasonable, therefore, to expect the availability of private enforcement and monetary damages to provide greater reassurance to coaches that their participation in OCR grievances is protected.

289. One does not have to be the victim of discrimination to file a complaint with OCR; anyone may do so. OFFICE FOR CIVIL RIGHTS, *supra* note 288, at 2.