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Bargaining for the Next Gay Player: How Can Jason Collins Help to Develop the National Basketball Association into a More Inclusive Workplace?

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BARGAINING FOR THE NEXT GAY PLAYER: HOW CAN JASON COLLINS HELP TO DEVELOP THE NATIONAL BASKETBALL ASSOCIATION INTO A MORE INCLUSIVE WORKPLACE?

"Tolerance is becoming the message in locker rooms and from teams that recognize they cannot countenance use of pointless slurs like 'faggot,' 'queer,' and 'gay.' Regardless [of] the intent with which those terms are spoken, they classify a group and particular people as synonymous with the lesser, and professional athletes are beginning to understand that."[1]

I. Introduction

On April 29, 2013, National Basketball Association (NBA) free agent, center Jason Collins publicly announced that he is gay.[2]

1. *See* Brief for Chris Kluwe and Brendon Ayanbadejo as Amici Curiae Supporting Respondents at 7, Hollingsworth v. Perry, 133 S.Ct. 786 (2012) (No. 12-144) [hereinafter Kluwe & Ayanbadejo] (advocating by amicus brief in support of equal rights for lesbian, gay, bisexual, and transgender (LGBT) individuals (citing Ben Haggerty (a/k/a Macklemore), *Same Love*, *on* The Heist (Macklemore LLC 2012), *available at* http://bit.ly/ZjcMbe)). This amicus brief in support of marriage equality was submitted by National Football League (NFL) players Chris Kluwe and Brendon Ayanbadejo, who have been vocal advocates for equal rights for LGBT individuals and for promoting sexual orientation acceptance in organized sports. *See id.* at 2.

> Sports figures receive a celebrity status that influences a large majority of the American population. For far too long professional sports have been a bastion of bigotry, intolerance, and small-minded prejudice toward sexual orientation, just as they had been to racial differences decades earlier. That is finally changing, and changing drastically . . . . [A]t the league level, team level, and individual level, [people] are finally speaking out against homophobia and intolerance of LBGTQ individuals.

Id. (alterations added). For more background information on sexual orientation in professional sports, see generally *The Last Barrier* (NBC Bay Area and Comcast SportsNet Bay Area broadcast Dec. 8, 2012) [hereinafter *The Last Barrier*] ("examining personal issues, teammate and locker room acceptance, and team ownership and fan reaction that gay professional athletes face when contemplating coming out during their playing careers"), and for clips from the documentary *The Last Barrier*, see also '*The Last Barrier*' *Examines Challenges Facing Gay Athletes*, NBCBayArea (Dec. 8, 2012, 12:12 PM), http://www.nbcbayarea.com/news/sports/The-Last-Barrier-Examines-Issues-Facing-Gay-Athletes-181473991.html [hereinafter *Challenges Facing Gay Athletes*].

2. Jason Collins publicly disclosed his sexual orientation by writing an editorial article and blog post for Sports Illustrated. *See* Jason Collins & Franz Lidz, *Why NBA Center Jason Collins Is Coming Out Now*, SI.com (Apr. 29, 2013, 11:01AM) http://sportsillustrated.cnn.com/magazine/news/20130429/jason-collins-gay-nba-player/#ixzz2cnhCwlEV [hereinafter Collins & Lidz] (writing for himself, Jason Collins states: "I'm a 34-year-old NBA center. I'm black. And I'm gay. I didn't set out to be the first openly gay athlete playing in a major American team sport. But

Now, after playing twelve seasons in the league, it appears that Collins may never sign a contract with an NBA team as an openly gay player.[3] Which begs the question, is it because he is gay?[4]

Jason Collins's announcement drew immediate support from American leaders, athletes, and celebrities such as Michele Obama, Bill Clinton, Kobe Bryant, Andy Roddick, Barry Sanders, Michael Strahan, Spike Lee, and Oprah Winfrey.[5] The very day that Collins made his announcement, President Barack Obama personally called Collins to express his support.[6] But why all the hype?

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since I am, I'm happy to start the conversation."). But Collins goes on to write, "If I had my way, someone else would have already done this." *See id.*; Jason Collins with Franz Lidz, *The Gay Athlete*, SPORTS ILLUSTRATED (May 6, 2013) [hereinafter *The Gay Athlete*] (outlining more in depth interview with Jason Collins in Sports Illustrated magazine after Collins authored initial blog post disclosing his sexual orientation).

3. *See* Harvey Araton, *After Announcing He's Gay, a Player Still Lacks a Team*, N.Y. TIMES, Oct. 11, 2013, at B10, *available at* http://www.nytimes.com/2013/10/11/sports/basketball/jason-collins-openly-gay-and-still-unsigned-waits-and-wonders.html?_r=0&adxnnl=1&adxnnlx=1399996835-+KLgTBQQVwIDTjxZ51q/LA (discussing Jason Collins's initial public disclosure of his sexual orientation, Collins's lack of NBA contract approaching beginning of 2013-2014 season, speaking with Collins for Collins's first interview since NBA pre-season began in September 2013, and describing him as "perplexed" over fact that team has yet to sign him); *see also* Bruce Jenkins, *Why Can't Jason Collins find an NBA Job?*, S.F. CHRONICLE, Sept. 18, 2013, at B1, *available at* http://www.sfgate.com/sports/jenkins/article/Why-can-t-Jason-Collins-find-an-NBA-job-4822928.php (discussing Jason Collins's lack of NBA contract going into NBA pre-season).

4. *See generally* Jenkins, *supra* note 3 (discussing reasons why Jason Collins has not been able to secure an NBA contract after disclosing his sexual orientation and highlighting that whether Collins's sexuality has anything to do with teams' decision not to sign Collins is difficult to discern because teams have broad discretion to make player acquisition decisions). Also, Collins's marginal statistics and high-priced, minimum veteran contract cost do not necessarily make Collins an attractive bargain in player market. *See* Araton, *supra* note 3.

5. *See* Jared A. Favole, *White House Praises NBA's Jason Collins*, WALL ST. J. (Apr. 29, 2013, 9:18 PM), http://blogs.wsj.com/washwire/2013/04/29/white-house-praises-nbas-jason-collins/ (reporting White House spokesman Jay Carney expressing White House approval of Jason Collins's decision and describing Collins's announcement as "example of the progress that has been made and the evolution that has been taking place in this country"); *see also* Hal Habib, *Reaction on Twitter to Jason Collins' Revelation*, PALM BEACH POST, Apr. 29, 2013, *available at* http://www.palmbeachpost.com/news/sports/basketball/reaction-on-twitter-to-jason-collins-revelation/nXbk5/ (citing supportive twitter responses from Dwayne Johnson, Steve Nash, Kobe Bryant, Ellen DeGeneres, Mardy Fish, Mike Tirico, Chris Kluwe, Brendon Ayanbadejo, Boston Red Sox organization, Scott Fujita, Spike Lee, and Tony Parker); Benjamin Hoffman & Christine Haughney, *Inside N.B.A. and Out, Words of Support (Mostly) for Collins's Revelation*, N.Y. TIMES, Apr. 30, 2013, at B15, *available at* http://www.nytimes.com/2013/04/30/sports/basketball/players-voice-support-of-jason-collins-on-twitter.html (discussing support for Collins from retired professional tennis player Andy Roddick and from retired NFL play and professional football hall or famer Barry Sanders).

6. *See* Mike Wise, *For Collins, Only the Mask Stays in Closet*, WASH. POST, May 5, 2013, at D04 (reporting Collins's reception on phone calls of support from Oprah

Jason Collins was recognized as the first active, openly gay player in one of the four major American professional sports leagues – National Basketball Association (NBA), Major League Baseball (MLB), National Hockey League (NHL), National Football League (NFL).[7] This statistic is significant because although American workers have been more open about sexual orientation diversity in the traditional workplace for over a decade, major American professional sports have been impenetrable to these developments.[8] Reports indicate that the number of openly lesbian,

Winfrey and President Barrack Obama after Collins disclosed his sexual orientation on April 29, 2013).

7. *See* Mike Jensen, *Advocate: Collins, Griner Make April a Milestone Month*, PHILA. INQUIRER, Apr. 30, 2013 (reporting Collins as first active openly gay athlete in major American professional sports); *see also* Dave Sheinin & Michael Lee, *'I'm Gay': Wizards Player Breaks Athletic Barrier*, WASH. POST, Apr. 30, 2013, at A01. However, beyond the NBA, MLB, NHL, and NFL, female and male professional athletes have publicly disclosed their sexual orientation, such as women's professional tennis star Martina Navratilova in 1981, American Olympic diver Greg Louganis in 1988, Major League Soccer (MLS) player Robbie Rogers and Women's National Basketball Association (WNBA) player Brittney Griner in 2013. *See* Larry Schwartz, *Martina was Alone on Top*, ESPN.COM, http://espn.go.com/sportscentury/features/00016378.html (last visited Jan. 11, 2014) (discussing Martina Navratilova's tennis career, illustrating Navratilova "as first legitimate superstar who literally came out while she was a superstar" by publicly describing her sexual orientation as bisexual in column written by Skip Bayless in 1981); *see also* James C. McKinley, Jr., *Louganis Still Performs Like Gold Both Off the Board and on the Mike*, N.Y. TIMES, June 21, 1994, at B16, *available at* http://www.nytimes.com/1994/06/21/sports/gay-games-louganis-still-performs-like-gold-both-off-the-board-and-on-the-mike.html (reporting Greg Louganis's public disclosure of his sexual orientation during 1994 Gay Games in New York City); Billy Witz, *Milestone for Gay Athletes as Robbie Rogers Plays for Galaxy*, N.Y. TIMES, May 28, 2013, *available at* http://www.nytimes.com/2013/05/28/sports/soccer/milestone-for-gay-athletes-as-robbie-rogers-plays-for-galaxy.html (discussing openly gay professional soccer player Robbie Rogers taking field as first gay male professional athlete to compete in American professional sport); Michael O'Keeffe, *Griner's Revelation Applauded: Top WNBA Draft Pick Says She is a Lesbian*, DAILY NEWS N.Y., April 19, 2013, at 82 (describing Griner as never hiding her sexuality before revealing that she is lesbian during interview with Sports Illustrated prior to 2013 WNBA draft in which Griner was selected number one overall).

8. *See* Shannon Green, *Like Jason Collins, Most GLBT Americans Don't Have Workplace Protection*, DAILY REP., May 8, 2013, Vol. 124, No. 90, at 7 (highlighting major American sports for lack of openly gay athletes in comparison to emergence of LGBT employees in private sector and noting developments toward acceptance of sexual orientation diversity among Fortune 500 corporations in United States). *But see* Dan Barry, *A Sports Executive Leaves the Safety of His Shadow Life*, N.Y. TIMES, May 15, 2011, at A1, *available at* http://www.nytimes.com/2011/05/16/sports/basketball/nba-executive-says-he-is-gay.html?pagewanted=all&_r=0 (profiling then NBA club Phoenix Suns president and chief executive Rick Welts who publicly disclosed his sexual orientation in 2011). In the traditional workplace, LGBT workers have risen through the ranks of even conservative professions to become Christian church clergy and judicial officials, such as Philadelphia Court of Common Pleas Judge Daniel Anders, who, in 2007, became the first openly gay male judge in Philadelphia's history. *See* Mark Oppenheimer, *Haunted Man of the Cloth*

gay, and bisexual workers in the United States has steadily increased over the past decade but also that such individuals are subject to disproportionate instances of adverse treatment and hostility in the workplace in relation to their heterosexual counterparts.[9] In the context of professional sports, however, there exists no comparable data because an openly gay athlete has never competed in a major American professional sport; in fact, before Jason Collins, "[t]hroughout the many generations and the tens of thousands of men to have played in the four major American sports leagues . . . not a single [active] athlete ha[d] come out."[10]

These statistics have led some scholars to conclude that the major American professional sports leagues, as a single institution, is homophobic.[11] Further, commentators have identified major American sports as the "final frontier of coming out," and a stronghold for homophobia in American society.[12] These portray-

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and Pioneer of Gay Rights, N.Y. TIMES, Sept. 18, 2010, at A18, *available at* http://www.nytimes.com/2010/09/18/us/18beliefs.html (discussing development of gay rights within sects of American Christianity and identifying that as early as 1972 United Church of Christ ordained openly gay priest and acknowledging existence of openly gay Episcopal priests Lutheran ministers); *see also* Gail Shister, *First Openly Gay Male Judge in Phila. to Take Oath Today*, PHILLY.COM (Oct. 11, 2007), http://articles.philly.com/2007-10-11/news/24996028_1_philadelphia-gay-news-gay-kid-rendell (discussing Judge Anders's background and appointment during midst of campaign for position on Philadelphia Common Pleas Court).

9. For a discussion of the reports and documented statistics on prevalence of workplace discrimination against LGB and LGBT workers, see *infra* notes 40-55 and accompanying text.

10. *See Challenges Facing Gay Athletes*, *supra* note 1 (discussing "teammate and locker room acceptance, and team ownership and fan reaction that gay professional athletes face when contemplating coming out during their playing careers" and advancing idea of near statistical impossibility that no professional athletes identify as homosexual); *see also* Jensen, *supra* note 7 (describing Collins's announcement as milestone); Philip Hersh, K.C. Johnson, Shannon Ryan, Vaughn McClure, *Gay Player's Story Has Impact Beyond NBA \ Collins 1st Active Athlete in a Major Sport to Come Out*, CHI. TRIB., Apr. 30, 2013, at C1 (identifying Collins as first gay male active player in major American professional sports and identifying four major professional leagues as NBA, MLB, NFL, and NHL); Sheinin & Lee, *supra* note 7 (reporting Collins as first gay male active player in major American professional sports).

11. *See* 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, 33 (2002) (discussing homophobia in organized sports); Anne Gregory, Comment, *Rethinking Homophobia in Sports: Legal Protections for Gay and Lesbian Athletes and Coaches*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 264, 264-65 (2004). *See generally* Brandon Sternod, *Come Out and Play: Confronting Homophobia in Sports*, *in* 92 LEARNING CULTURE THROUGH SPORTS: PERSPECTIVES ON SOCIETY AND ORGANIZED SPORTS (Sandra Spickard Prettyman and Brian Lampman ed., 2d ed. 2010) (discussing development of homophobia and masculinity in organized sports).

12. *See* Green, *supra* note 8, at 7 (quoting Carmelyn Malalis, co-chair of Outten & Golden's Lesbian, Gay, Bisexual, and Transgender Workplace Rights Prac-

als may explain why many Americans, particularly "LGBTQ"[13]—lesbian, gay, bisexual, transgender, and gender and sexuality questioning—Americans, viewed Jason Collins' public disclosure of his sexual orientation as an historic milestone.[14] However, Collins's announcement may have effectively barred him from continuing his NBA career.[15]

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tice Group); *see also* Mark Morford, *Where Are The Gay Pro Athletes; No, the WNBA Doesn't Count. What About the NFL? The NBA? What About the Big, Macho Men?*, S.F. GATE (Nov. 2, 2005), http://www.sfgate.com/entertainment/morford/article/Where-Are-The-Gay-Pro-Athletes-No-the-WNBA-2598603.php (opining that major American professional sports are "the last cultural frontier" for homophobia).

13. The acronym LGBTQ is generally used as an all-encompassing term to describe individuals that generally question or do not identify with "heterosexual and gender-conforming norm[s]." *See* Barbara Fedders, *Coming Out for Kids: Recognizing Respecting, and Representing LGBTQ Youth*, 6 NEV. L.J. 774, 775 (2005-2006) (using acronym LGBTQ to describe "people who publicly identify as lesbian, gay, bisexual, transgender, queer, or questioning . . . as well as those whose sexual behaviors and attractions, and/or feelings about their gender identity, place them outside the heterosexual and gender-conforming norm, no matter how they publicly identify"). However, this Comment generally relies on sources that more specifically address sexual orientation issues pertaining to lesbian, gay, and bisexual "LGB" athletes. Where these sources do not necessarily address nor cover issues pertaining to individuals that identify as transgender or gender questioning they use the term LGB, but when transgender individuals are included in the analysis or data the sources use the term LGBT. These terms are not necessarily synonymous and, when practical, this Comment uses them accordingly. Therefore, in order to pursue a precise analysis of the issues and to maintain consistency, this Comment uses the acronym LGBT when generally referring to individuals who identify as non-heterosexual or transgender and uses the acronym LGB when referring specifically to lesbian, gay, and bisexual individuals only. This Comment uses the term LGBTQ at the beginning and end of this article for the purpose of encouraging the reader to further inquire into LGBTQ issues that are beyond the scope of this Comment. For a general introduction to LGBTQ issues and a thorough analysis of the legal issues pertaining to questions of sexuality, gender conformity, and gender and transgender identity, see Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is more Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253 (2004-2005), and Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995-1996). For a more recent discussion of LGBTQ legal issues, generally see Mary Bernstein, Perry *and the LGBTQ Movement*, 37 N.Y.U. REV. L. & SOC. CHANGE 23 (2013).

14. *See* Nicholas Ferroni, *Those Who Changed History but Won't Be in History Books*, HUFFINGTON POST (posted Oct. 3, 2013, 7:05 PM), http://www.huffingtonpost.com/nicholas-ferroni/those-who-changed-history_b_4014503.html (describing Jason Collins as hero and comparing him with athletes who broke racial barriers such as Jackie Robinson, Joe Lewis, and Jack Johnson); *see also* Jensen, *supra* note 7 (describing significance of Jason Collins's announcement).

15. *See* Jenkins, *supra* note 3 (discussing potential reasons why Collins has yet to be signed by an NBA team). Jenkins also notes the difficulty of determining whether homophobia, talent, public relations, or a combination of all three will be the deciding factor of whether Collins will secure a contract. *See id.* Jenkins goes on to opine that "[i]f this historic milestone is bypassed, there will be no accountability, no villains, just an opportunity shamefully missed." *See id.*

As of this writing, it appears that Jason Collins may never actually compete in an NBA game as an openly gay player.[16] Now, nearing the end of the 2013-2014 NBA season, Collins has failed to secure a position with an NBA team.[17] If Collins believes he was denied this opportunity as a result of disclosing his sexual orientation, his legal protections are unclear and novel at best.[18]

First, Title VII of the Civil Rights Act of 1964 ("Title VII") only prohibits employment discrimination based on "race, color, religion, sex, or national origin."[19] Title VII does not protect against discrimination based solely on sexual orientation.[20] Second, many

16. *See Jason Collins: Out And Still Unemployed*, NPR.COM (Oct. 18, 2013, 4:29 PM), http://www.npr.org/templates/story/story.php?storyId=237166792 (discussing Jason Collins and his not being signed to team now that NBA pre-season is under way); *see also* Araton, *supra* note 3 (discussing Collins's disappointment with lack of NBA contract going into preseason, quoting Collins as saying, "'I feel there are players in the league right now that, quite frankly, I'm better than'").

17. *See* Howard Beck, *Praise, But No New Team for Collins*, N.Y. TIMES, July 9, 2013, at B11, *available at* http://www.nytimes.com/2013/07/09/sports/basketball/approval-but-no-new-team-yet-for-collins.html?pagewanted=all&_r=0 (noting Collins's reputation as intelligent veteran with strong work ethic factoring in Collins's favor, which has previously helped Collins secure late-off-season contracts).

18. *See* Green, *supra* note 8, at 7 (noting that currently federal law does not expressly prohibit workplace discrimination based solely on sexual orientation but citing Human Rights Campaign as acknowledging twenty-one states and District of Columbia as having laws prohibiting workplace sexual orientation discrimination). Green goes on to assert that, as of December 2012, eighty-eight percent of Fortune 500 companies employ non-discrimination policies that prohibit sexual orientation discrimination. *See id.*

19. *See* Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-2 (2006) (providing statutory framework of unlawful employment discrimination). Title VII of The Civil Rights Act states:

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

Id. Generally, Title VII is protects employees against employment discrimination based upon five traits – race, color, religion, sex, and national origin – and employment discrimination is generally understood as a situation where an employer makes an employment decision adverse to an employee, such as a decision to terminate an employee's employment or to deny that employee a promotion, because of at least one of these five traits. For a discussion introducing Title VII and concept of employment discrimination, see *infra* notes 40-55 and accompanying text. For a discussion of Title VII and employment discrimination because of sex, see *infra* notes 131-39 and accompanying text.

20. *See* Zachary A. Kramer, *Of Meat and Manhood*, 89 WASH. U. L. REV. 287, 300-01 (2011-2012) ("Unlike sex and gender, courts have been unwilling to extend Title VII's sex provision to reach discrimination claims based on sexual orientation."); Jason E. Shapiro, Note, *Employee Benefits Law: The Hidden Gap Enabling Sexual Orientation Discrimination in Employment*, 12 CARDOZO J.L & GENDER 511, 524 (2012-2013) ("An individual's sexual orientation is not a protected class under the Civil Rights Act."); Lydia E. Lavelle, *Grassroots Gay Rights: Legal Advocacy at the Local Level*, 21 AM. U. J. GENDER SOC. POL'Y & L. 507, 519 (2012-2013) (discussing lack of

states and municipalities employ laws and ordinances to protect LGBT workers.[21] However, the scope and efficacy of these laws may not provide consistent protection.[22] Third, private employers may utilize employment policies that prohibit sexual orientation discrimination and such policies may provide contractual remedies for discrimination.[23] The NBA's employment policies are carefully negotiated under a collective bargaining process whereby the organized NBA team owners and the unionized National Basketball Players Association ("Players Association") agree to certain rules and regulations that are incorporated into a Collective Bargaining Agreement ("CBA").[24]

work place protections for sexual orientation discrimination under federal law); Elliot S. Rozenberg, *Leveling the Playing Field*, 30 ENT. & SPORTS LAW 1, 18, 22 (2012) (discussing Title VII as not recognizing sexual orientation as protected trait); *see also* Jennifer C. Prizer et al., Symposium, *Evidence of Persistent and Pervasive Workplace Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 778-79 (2012) (concluding that although courts have expanded interpretation of Title VII to encompass broader range of "sexualized and gender-based conduct that often feature prominently in the discrimination complaints of lesbian, gay, bisexual, and transgender workers . . . . LGBT workers on the whole are not protected effectively by the existing federal statute and by piecemeal state and local protections").

21. *See* Prizer, *supra* note 20, at 778 (discussing local legal protections for LGBT workers); *see also* Lavelle, *supra* note 20, at 519 (examining local level enforcement of sexual orientation discrimination in workplace); Rozenberg, *supra* note 20, at 18, 22 (arguing that like many workers, athletes must rely on state or local law for protection against discrimination based solely on sexual orientation).

22. *See* Green, *supra* note 8, at 7 (acknowledging Human Rights Campaign report indicating that twenty-one states and District of Columbia have laws prohibiting workplace sexual orientation discrimination, and highlighting that eighty-eight percent of Fortune 500 companies employ non-discrimination policies that include sexual orientation, but also lamenting lack of sufficient workplace protection for LGBTQ workers); Prizer, *supra* note 20, at 778 (advancing that "piecemeal" state and local legislation does not provide sufficient workplace protection for LGBTQ workers).

23. *See* Green, *supra* note 8, at 7 (noting that, as of December 2012, eighty-eight percent for Fortune 500 companies employ non-discrimination policies that include sexual orientation).

24. *See generally* NAT'L BASKETBALL ASS'N, ET AL., NBA COLLECTIVE BARGAINING AGREEMENT (Dec. 2011), *available at* http://www.ipmall.info/hosted_resources/SportsEntLaw_Institute/NBA_CBA(2011)_(newversion_reflectsJeremyLinRuling)May30_2013.pdf [hereinafter "NBA CBA"] (outlining entire employment relationship between NBA, NBA owners, and Players Association). The NBA's general non-discrimination employment policy is available on the NBA's official website. *See* NAT'L BASKETBALL ASS'N, NBA'S NON-DISCRIMINATION POLICY, http://www.nba.com/careers/policy.html (last visited Feb. 15, 2014) [hereinafter NBA's NON-DISCRIMINATION POLICY]. The policy states:

> Equal employment opportunity is a fundamental principle at the NBA. Accordingly, the NBA's EEO Policy provides that all employment decisions will be based on merit and valid job qualifications and will be made without regard to race, color, national origin, religion, sex, age, disability, alienage or citizenship status, ancestry, marital status, creed, genetic predisposition or carrier status, sexual orientation, veteran status, familial

In 2011, the NBA, the NBA team owners, and the Players Association incorporated into its collective bargaining agreement ("NBA CBA"), a provision prohibiting teams, players, and the NBA from making discriminatory employment decisions based on sexual orientation.[25] However, under the NBA CBA, teams have broad discretion to decide whether to sign or cut players.[26] The teams' CBA protected discretion may frustrate the purpose of the CBA's non-discrimination policy.[27]

Nonetheless, the NBA CBA's non-discrimination policy may provide Collins with better protection than that available to him under current federal, employment discrimination law; but the new provision has yet to be tested.[28] Therefore, Jason Collins's protec-

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status, or any or status or characteristic protected by applicable federal, state or local law.

See NBA's NON-DISCRIMINATION POLICY (outlining NBA's employment policy). For a general overview of collective bargaining in the NBA, see Michael A. McCann, *The NBA and the Single Entity Defense: A Better Case?* 1 HARV. J.S.E.L. 40, 44-46 (2010) (discussing collective bargaining in the NBA and the relationship between NBA and National Basketball Players Association. For a thorough discussion on recent developments in collective bargaining agreements in professional sports, see generally Gabriel Feldman, Brady v. NFL *and* Anthony v. NBA*: The Shifting Dynamics in Labor-Management Relations in Professional Sports*, 85 TUL. L. REV. 831, 849-54, 857 (2012), reviewing NFL and NBA lockouts in 2011 and examining the subsequent dissolution of each league's respective players' association in order for players to bring antitrust claims against the NFL and the NBA.

25. *See* NBA CBA, *supra* note 24, Art. XXX, § 5 ("Neither the NBA, any Team nor the Players Association shall discriminate in the interpretation or application of this Agreement against or in favor of any Player because of religion, race, national origin, sexual orientation or activity or lack of activity on behalf of the Players Association."); *see also* NBA's NON-DISCRIMINATION POLICY, *supra* note 24 (mandating employment decisions be made without regard to sexual orientation).

26. *See* NBA CBA, *supra* note 24, Art. II, § 12(g) (allowing team to determine whether player's skill adequately matches cost of that player and outlining provisions of Uniform Player Contract under CBA generally mandating that team's termination of a player contract by reason of player's skill, which shall be "based on the Team's determination that, in view of the player's level of skill (in the sole opinion of the Team), the Compensation paid (or to be paid) to the player is no longer commensurate with the Team's financial plans or needs").

27. *See* Jenkins, *supra* note 3 (outlining potential reasons why Collins was not signed during off-season and opining that homophobia, Collins's age and marginal skill set, potential media attention may all factor into teams' decision not to pursue Collins).

28. *See* Gregory, *supra* note 11, at 284 (2004) (discussing employer utilization of non-discrimination policies to govern employment relationship and potential for athletes to use similar policies to protect against sexual orientation discrimination in context of intercollegiate athletics); *see also* Claire Williams, *Sexual Orientation and Discrimination: Legal Protection for Student-Athletes*, 17 J. LEGAL ASPECTS SPORT. 253, 273 (2007) (discussing non-discrimination policy prohibiting sexual orientation discrimination and creating possible cause of action for college athletes to bring claim against college or university for discriminatory conduct based solely on sexual orientation). At least one college athlete was able to compel her university to make "groundbreaking" changes to its non-discrimination policies

tion under the NBA CBA's new non-discrimination may be illusory, making it unclear whether Collins and NBA players have sufficient legal protection against employment discrimination on the basis of sexual orientation.[29]

This Comment examines Jason Collins's potential legal remedies at the federal, local, and private levels of employment, and discusses how the NBA CBA's non-discrimination provision and the collective bargaining process may provide Collins with an opportunity to substantially impact homophobia in major American professional sports, even if he never plays in another NBA game. Part II of this Comment introduces Jason Collins, outlines general employment law and collective bargaining concepts, examines sexual orientation in the American workplace and in American sports generally, and reviews recent developments in professional sports promoting acceptance of sexual orientation diversity.[30] Part III analyzes potential legal protections for employment discrimination on the basis of sex, gender, and sexual orientation under Title VII.[31] Next, this Part reviews proposed legislation for expanding federal protection against employment discrimination on the basis of sexual orientation under the Employment Non-Discrimination Act ("ENDA").[32] Then this Part assesses possible remedies for em-

and procedures by filing a lawsuit against the university alleging sexual orientation discrimination, leading to an out-of-court settlement under which the university "agreed to begin sexual orientation non-discrimination training for its staff, agreed to amend its non-discrimination materials to include sexual orientation, and agreed to create a reporting method for alleged discrimination." *See id.* at 269-70 (discussing lawsuit filed by University of Florida softball co-captain Andrea Zimbardi against university after she was dismissed from team after reporting that "she was being discriminated against because of her sexual orientation") (citing Antonya English, *UF Settles Suit with Ex-Catcher*, ST. PETERSBURG TIMES (FLORIDA), Jan. 24, 2004, at 3C; UNIV. FLA., *University of Florida Athletics 2006-2007*, 35 (2006), http://www.gatorzone.com/osl/pdf/handbook/2006.pdf); *see also* Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-2 (2006) (proscribing employment discrimination because of an "individual's race, color, religion, sex, or national origin"). Recall that sexual orientation is not considered a protected trait within the meaning of Title VII's sex provision. *See* Green, *supra* note 8, at 7 (noting that Title VII does not prohibit workplace sexual orientation discrimination).

29. *See* Green, *supra* note 8, at 7 (opining that Jason Collins does not have sufficient workplace protections against employment discrimination based on sexual orientation).

30. *See generally* sources cited and discussion *infra* notes 38-66 (outlining principles of employment discrimination and collective bargaining and providing background information on sexual orientation in traditional workplace and in context of major American professional sports).

31. *See generally* 42 U.S.C. § 2000(e)-2 (2006) (providing statutory protection against employment discrimination).

32. *See generally* H.R. 1397, 112th Cong. (1st Sess. 2011) (outlining proposed bill Employment Non-discrimination Act in House of Representatives); *see also* S. 811, 112th Cong. (1st Sess. 2011) (outlining proposed bill Employment Non-dis-

ployment discrimination under the NBA CBA's non-discrimination policy.[33]

Part IV critically analyzes potential causes of action for Jason Collins by applying the relevant facts surrounding Collins's public disclosure of his sexual orientation to the potential remedies discussed in Part III.[34] Part V concludes that the NBA CBA's non-discrimination policy alone does not provide adequate protection against employment discrimination on the basis of sexual orientation.[35] This Part advances that Jason Collins should utilize the collective bargaining process to negotiate new rules and regulations whereby the NBA develops a program that educates NBA players and personnel about LGBT issues and that promotes fostering an NBA environment that is more accepting of sexual orientation diversity.[36] Finally, this Part argues that such a program will make a significant legal and social impact on the NBA and will pave the way for future LGBT athletes.[37]

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crimination Act in Senate). For a discussion examining legal remedies for employment discrimination under laws and legal forms prohibiting discrimination based on sexual orientation, see *infra* notes 179-99 and accompanying text.

33. For a discussion analyzing legal remedies for employment discrimination under NBA CBA non-discrimination policy, see *infra* notes 237-53 and accompanying text.

34. For a discussion introducing proposed federal statute proving framework for federal statutory protection again employment discrimination on basis of sexual orientation, see *infra* notes 179-91 and accompanying text. For a discussion of potential legal remedies for Jason Collins, see *infra* notes 293-331 and accompanying text.

35. For a discussion advancing that NBC CBA non-discrimination policy does not provide tangible protection for NBA players against employment discrimination on basis of sexual orientation, see *infra* notes 332-42 and accompanying text.

36. For a discussion opining that Jason Collins could use collective bargaining process to enhance legal protections against sexual orientation discrimination for future NBA players, see *infra* notes 332-42 and accompanying text.

37. *See* John Branch, *N.F.L. Prospect Michael Sam Proudly Says What Teammates Knew: He's Gay*, N.Y. TIMES, Feb. 9, 2014, at A1, *available at* http://www.nytimes.com/2014/02/10/sports/michael-sam-college-football-star-says-he-is-gay-ahead-of-nfl-draft.html?_r=1 (discussing University of Missouri football player and 2014 NFL draft prospect Michael Sam's decision to publicly disclose his sexual orientation before entering 2014 NFL draft and reporting that prior to Sam's public announcement Sam came out to his teammates and that Sam, along with many other University of Missouri athletes, participated in You Can Play project workshops and seminars on LGBT issues). After participating in the You Can Play workshops, "Mr. Sam was one of several athletes to approach Pat Ivey, the [University of Missouri] associate athletic director for athletic performance, to compliment him for the lesson." *See id.* For more information on the "You Can Play Project," see *Our Mission*, YOU CAN PLAY, http://youcanplayproject.org/pages/our-cause (last visited Feb. 21, 2014) ("You Can Play is dedicated to ensuring equality, respect and safety for all athletes, without regard to sexual orientation . . . . You Can Play seeks to challenge the culture of locker rooms and spectator areas by focusing only on an athlete's skills, work ethic and competitive spirit.").

II. BACKGROUND: SEXUAL ORIENTATION IN THE WORKPLACE AND IN MAJOR AMERICAN PROFESSIONAL SPORTS

This Part outlines recent statistics and reports of sexual orientation discrimination in the workplace generally, discusses homophobic tendencies in organized sports, and reviews recent developments in professional sports and in the NBA towards broader acceptance of sexual orientation diversity.[38]

A. Sexual Orientation Discrimination in the Traditional Workplace

As a preliminary matter, this Section briefly defines employment discrimination and other relevant terms.[39] In the employment context, discrimination is generally understood as a situation where an employer makes an employment decision adverse to an employee, such as a decision to terminate employment or to deny employee a promotion, because of at least one of the five traits protected under Title VII.[40] Title VII prohibits employers from making employment decisions based upon the five traits.[41] A prima facie case for employment discrimination has three elements: first, an employee identifies as having a Title VII trait specified as protected against discrimination; second, the employer has made an employment decision adverse to that employee, and third, that decision was made because of that employee's protected trait.[42] Thus, discrimination does not describe a mere offensive comment made by an employer to an employee.[43] Rather, discrimination refers to an employer's decision or conduct that alters the terms of a worker's employment because of a protected trait, rather than because of an

38. For a discussion of the current state of professional sports in United States and acceptance of sexual orientation diversity, see *infra* notes 105-113 and accompanying text.

39. For a discussion introducing background and concepts of employment discrimination, see *infra* notes 40-55 and accompanying text.

40. *See* Kramer, *supra* note 20, at 295 (discussing employment discrimination). The five traits protected under Title VII are race, color, religion, sex, and national origin. *See id.*

41. *See* 42 U.S.C. § 2000e-2(a)(1) (2006); Kramer, *supra* note 20, at 294 (discussing protected traits under Title VII).

42. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) (discussing burden of proof for proving beyond preponderance of evidence that employer treated employee disparately because of protected trait of that employee for purposes of employment discrimination case); Kramer, *supra* note 20, at 300 (discussing elements of employment discrimination claim).

43. *See* Kramer, *supra* note 20, at 295 (discussing narrow scope of employment discrimination under Title VII).

unprotected trait such as hair color.[44] Part III more thoroughly discusses protected and unprotected traits for purposes of employment discrimination.[45]

Roughly nine million individuals in the United States consider themselves lesbian, gay, bisexual, or transgender.[46] Leading research on the subjects of gender and sexual orientation in the workplace generally indicates that sexual orientation and gender identity are not related to work performance.[47] However, over the past four decades, research shows that LGBT, as well as heterosexual workers, "consistently report having experienced or witnessed discrimination based on sexual orientation . . . in the workplace."[48]

Results of a 2008 General Social Survey (GSS) show that forty-two percent of LGB individuals sampled nationally experienced discrimination because of their sexual orientation at some point in their lives; and twenty-seven percent experienced such discrimina-

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44. Professor Kramer describes the causation requirement of employment discrimination with the following example:

> For instance, say a male employee is passed over for a promotion in favor of a more qualified female candidate. To satisfy the causation requirement, the male employee must show that he was denied the promotion not because he was less qualified than the woman who ultimately secured the promotion, but rather because he is a man. In this sense, the discriminatory causation requirement provides a nexus between the challenged employment action (failure to promote) and the protected trait in question (sex).

Kramer, *supra* note 20, at 295.

45. *See* sources cited *infra* notes 128-30, 137-39 and accompanying text (describing protected and unprotected traits under Title VII).

46. *See* Gary J. Gates, *How Many People are Lesbian, Gay, Bisexual, and Transgender?*, WILLIAMS INST., 1, 1 (2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf. This section, and the sources cited within it, uses the acronym LGB when analyzing data and issues specifically concerning lesbian, gay, and bisexual individuals, and uses the acronym LGBT when transgender individuals are also included in the analysis because sexual orientation issues are not necessarily synonymous with gender issues, both in a legal and social context, and this Comment attempts to use these acronyms accordingly. For a more detailed discussion of use of and differences between acronyms LGB, LGBT, and LGBTQ, see *supra* note 13 and accompanying text.

47. *See* THE BRAD SEARS, NAN HUNTER & CHRISTY MALLORY REPORT, WILLIAMS INST., DOCUMENTING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION & GENDER IDENTITY IN STATE EMPLOYMENT 4-1, 4-4 through 4-9, tbl. 4-A (2009) [hereinafter "DOCUMENTING DISCRIMINATION"] (identifying state and federal courts and state officials determining that sexual orientation is unrelated to individual's ability to contribute to society); BRAD SEARS & CHRISTY MALLORY, THE WILLIAMS INST., DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE 1-2 (2011) [hereinafter "SEARS & MALLORY"].

48. *See* Prizer, *supra* note 20, at 720-21 (discussing reported instances of LGBT individuals receiving adverse treatment from employers in workplace (citing SEARS & MALLORY, *supra* note 47, at 2)).

tion within the five years prior to the study.[49] Of the LGB individuals responding to the GSS that were open about their sexual orientation in the workplace, fifty-six percent reported having experienced employment discrimination because of their sexual orientation.[50]

A study published by the Williams Institute in 2009 ("2009 Report") shows that many courts and legal scholars have begun to recognize that LGBT individuals have faced a history of discrimination.[51] Seven state appellate courts have recognized that LGBT individuals have faced a long history of discrimination, and all fifteen federal courts addressing the substantive issue of whether LGBT individuals have faced a long history of discrimination have uniformly answered in affirmative.[52] The 2009 Report indicated that such discrimination was found at the private, local, state, and federal levels of employment.[53] The 2009 Report referred to LGBT Americans as having faced "refusals to hire, the ruin of careers, un-

49. *See* Prizer, *supra* note 20, at 720-21 (listing statistics of LGB individuals reporting reception of adverse treatment generally (citing SEARS & MALLORY, *supra* note 47, at 4)).

50. *See* Prizer *supra*, note 20, at 720-21 at 723 (reviewing report and statistics on LGB individuals in workplace (citing SEARS & MALLORY, *supra* note 47, at 4)).

51. *See* DOCUMENTING DISCRIMINATION, *supra* note 47, at 6-1 through 6-25 (discussing research on discrimination toward individuals in United States based on sexual orientation).

52. *See* DOCUMENTING DISCRIMINATION, *supra* note 47, at 6-1 through 6-7, tbl. 7-A (discussing federal courts that have identified that LGBT individuals as group have endured persistent and pervasive discrimination, arguing that LGBT individuals should be recognized as suspect class along with current suspect classifications of race, color, religion, sex, and national origin (citing Steffan v. Cheney, 780 F. Supp. 1 (D.D.C. 1991), *rev'd*, Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993), *vacated on rehearing en banc*, Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994); Ben-Shalom v. Marsh, 703 F. Supp. 1372 (E.D. Wis. 1989), *rev'd*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); Dahl v. Secretary of U.S. Navy, 830 F. Supp. 1319 (E.D. Cal. 1993); High Tech Gays v. Def. Indus. Sec. Clearance Office, 668 F. Supp. 1361 (N.D. Cal. 1987), *rev'd in part*, *vacated in part*, 895 F.2d 563 (9th Cir. 1990), *rehearing and rehearing en banc denied*, 909 F.2d 375 (9th Cir. 1990); Dean v. District of Columbia, 653 A.2d 307 (D.C. App. 1995); Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417 (S.D. Ohio 1994), *rev'd and vacated*, 54 F.3d 261 (6th Cir. 1995), *cert. granted*, *judgment vacated*, 518 U.S. 1001 (1996); Witt v. Dep't of Air Force, 527 F.3d 806 (9th Cir. 2008); High Tech Gays v. Def. Indus. Sec. Clearance Office, 909 F.2d 375 (9th Cir. 1990); Able v. U.S., 968 F. Supp. 850 (E.D.N.Y. 1997), *rev'd*, 155 F.3d 628 (2d Cir. 1998); Watkins v. U.S. Army, 847 F.2d 1329 (9th Cir. 1988), rehearing en banc granted, 847 F.2d 1362 (1988), *opinion withdrawn on rehearing*, 875 F.2d 699 (1989), *cert. denied*, 498 U.S. 957 (1990); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989); Equal. Found. of Greater Cincinnati v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995), *cert. granted*, *vacated*, 518 U.S. 1001 (1996); Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009 (1985) (Brennan, J., dissenting from denial of cert.))).

53. *See* DOCUMENTING DISCRIMINATION, *supra* note 47, at 6-8 (outlining results of study concerning sexual orientation discrimination in workplace).

desirable military discharges, [and] denials of occupational licenses" on account of their sexual orientation.[54] Although many states, municipalities, and corporate entities have established laws and policies to protect LGBT employees, there is no cognizable federal cause of action for employment discrimination based solely on sexual orientation.[55]

B. Homophobia in Organized and Professional Sports in the United States

1. *Employment Relations and Employment Discrimination in the NBA*

Unlike the traditional workplace, in the NBA, the employment relationship between teams and players is not presumed at-will, but rather is governed by the NBA CBA and players' contracts.[56] Under the CBA, teams have broad discretion over "basketball related decisions," which includes player contracts, in recognition of the unique needs, budget concerns, business policies, and cultures of each individual basketball club.[57]

Team discretion also highlights the obsessive concern among NBA players over job security in the hyper-competitive NBA job market.[58] The average career length for an NBA player is only 4.8 seasons; the average salary for an NBA player is $5.15 million; the median salary is $2.3 million; and the minimum salary is approxi-

54. *See* DOCUMENTING DISCRIMINATION, *supra* note 47, at 6-8 (providing statistics on discrimination against LGBT workers) (citing Dean v. D.C., 653 A.2d 307, 334 (D.C. 1995) (quoting Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 WOMEN'S RTS. L. REP. 143, 157 (1988))).

55. For a more detailed discussion of lack of protection under Title VII for employment discrimination based solely on sexual orientation, see *supra* notes 31-34 and accompanying text.

56. *See* McCann, *supra* note 24, at 44-45 (outlining function of collective bargaining agreement and how CBAs govern relationship between players and teams).

57. *See* NBA CBA, *supra* note 24, Art. II, § 12(g) (allowing team to determine whether player's skill adequately matches cost of that player and outlining provisions of Uniform Player Contract under CBA generally mandating that team's termination of a player contract by reason of player's "lack of skill shall be interpreted to include a termination based on the Team's determination that, in view of the player's level of skill (in the sole opinion of the Team), the Compensation paid (or to be paid) to the player is no longer commensurate with the Team's financial plans or needs"); Beck, *supra* note 17, at B11 (discussing "locker-room tension" and potential media distractions as deterring teams from signing players).

58. *See* Kevin Arnovitz, *Michael Sam and the Education of Sports*, ESPN.COM (Feb. 10, 2014, 11:40 AM), http://espn.go.com/blog/truehoop/post/_/id/65889/michael-sam-and-the-education-of-sports (describing professional athletes' obsession with job security).

mately $500,000.[59] Further, there are approximately 441 active NBA players and 30 NBA teams, and with new talent entering the market every year through the NBA draft, NBA players have a limited opportunity to succeed in the NBA.[60] It follows that the NBA, like most "[p]ro sports[,] is a brutally competitive industry where obsession over job security is just another occupational hazard."[61] Therefore, in this market, although teams are primarily concerned with a player's statistical output, teams may want to avoid signing a player that might bring distractions into the locker-room or that might upset team chemistry.[62] Indeed, a player would likely want to avoid, at all costs, being perceived as a distraction.[63]

However, the CBA's non-discrimination policy imposes a limit on teams' discretion to make employment decisions.[64] Thus, employment discrimination in the NBA operates similar to the traditional workplace: a player argues (1) that he has one of the traits protected under the non-discrimination policy, (2) that a team made an employment decision adverse to that player, and (3) that the team's decision was not based solely on basketball related considerations, but rather because of the player's protected trait.[65] One caveat is that under the CBA, alleged instances of discrimina-

59. *See* Steve Aschburner, *NBA's 'average' salary – $5.15 – a Trendy, Touchy Subject*, NBA.COM (Aug. 19, 2011, 11:03 AM), http://www.nba.com/2011/news/features/steve_aschburner/08/19/average-salary/index.html (discussing NBA player salary statistics); Cork Gaines, *CHART: The Average NBA Player Will Make a Lot More in His Career than the Other Major Sports*, BUSINESSINSIDER.COM (posted Oct. 10, 2013), http://www.businessinsider.com/chart-the-average-nba-player-will-make-lot-more-in-his-career-than-the-other-major-sports-2013-10 (charting statistics concerning NBA player salaries and average career spans).

60. *See NBA Official Website, Players*, NBA.COM, http://stats.nba.com/players.html (last visited Mar. 3, 2014) (listing all current active NBA players and teams).

61. *See* Arnovitz, *supra* note 58 (discussing professional athletes' obsession with job security).

62. Arnovitz asserted the following:

> When NBA coaches, executives and agents are asked why Collins didn't receive a training cap invite last fall or hasn't caught on with a team midseason, they cite the anticipated "distraction," both in the media and in the locker room, coupled with Collins' age. A few execs said the risk of rankling a superstar or futzing with chemistry wasn't worth the trouble.

Arnovitz, *supra* note 58

63. *See* Arnovitz, *supra* note 58 (advancing that this concern over job security may prevent players from feeling comfortable or even safe disclosing their sexual orientation).

64. *See* NBA CBA, *supra* note 24, Art. XXX, § 5 (stating "Neither the NBA, any Team nor the Players Association shall discriminate in the interpretation or application of this Agreement against or in favor of any Player because of religion, race, national origin, sexual orientation or activity or lack of activity on behalf of the Players Association.").

65. *See* NBA CBA, *supra* note 24, Art. XXX, § 5 (outlining non-discrimination policy). For a more detailed discussion of the definition of employment discrimi-

tion must be resolved under the CBA mandated grievance arbitration process, rather than through the courts.[66]

2. *Homophobia in Organized Sports*

Many scholars and researchers have characterized organized sports in the United States as a "highly homophobic institution."[67] Such scholars argue that sports promote a stereotype that masculinity, heterosexuality, and athleticism are essential characteristics of male identity, and that this ideology makes homophobia more prevalent in sports culture than in popular society.[68] One scholar describes sport as a "leading definer of masculinity in a mass culture that has lost male initiation rituals."[69] Boys are often encouraged at a very young age to play sports, and those that do frequently encounter "[male] role models—coaches, peers, fathers—[who] at times use derogatory terms such as 'sissy,' 'faggot,' or 'pussy,' to criticize and threaten [them,]" further enforcing heterosexual stereotypes and homophobia.[70]

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nation and prima facie case for employment discrimination under Title VII, see *supra* notes 38-55 and accompanying text.

66. *See generally* NBA CBA, *supra* note 24, Art. XXXI and XXXII (outlining grievance arbitration procedure).

67. *See* Eric Anderson, *Openly Gay Athletes: Contesting Hegemonic Masculinity in a Homophobic Environment*, 6 GENDER & SOC'Y 860, 860-76 (2002) (discussing research into openly gay male athletes in organized all-heterosexual team-sport settings and determining that organized sports resisted accepting openly gay athletes by using "homophobic discourse" (citing Robert W. Connell, *Masculinities*, BERKELEY: UNIV. CAL. PRESS (1995); Michael Messner, *Power at Play: Sports and the Problem of Masculinity*, BOSTON: BEACON (1992)).

68. *See* Baird, *supra* note 11, at 33 (discussing masculine construct of organized sports); *see also* Gregory, *supra* note 11, at 264-65 (arguing that "institution of sports, and its current pro-masculine ideology, make homophobia more common than in larger society"). *See generally* Sternod, *supra* note 11 (discussing homophobia in sports).

69. *See* Anderson, *supra* note 67, at 862 (citing Robert W. Connell, *Masculinities*, BERKELEY: UNIV. CAL. PRESS (1995); Pat Griffin, *Strong Women, Deep Closets: Lesbians and Homophobia in Sport*, CHAMPAIGN, IL, HUMAN KINETICS (1998); Gert Hekema, *"As Long as They Don't Make an Issue of it. . .": Gay Men and Lesbians in Organized Sports in the Netherlands*, 35 J. HOMOSEXUALITY 1, 1-23 (1998); MICHAEL MESSNER, POWER AT PLAY: SPORTS AND THE PROBLEM OF MASCULINITY (1992); BRIAN PRONGNER, THE ARENA OF MASCULINITY: SPORTS, HOMOSEXUALITY, AND THE MEANING OF SEX (1990)); *see also* Baird, *supra* note 11, at 33 (2002) (discussing masculinity and sports describing sport as "place for boys to become men," noting intense cultural pressure for boys to be involved in organized sports from a young age in order to promote heterosexuality as right and homosexuality as wrong (citing MARIAH BURTON NELSON, THE STRONGER WOMEN GET, THE MORE MEN LOVE FOOTBALL 4 (1994))).

70. *See* Baird, *supra* note 11, at 33-34 (citing MICHAEL A. MESSNER & DONALD F. SABO, SEX, VIOLENCE & POWER IN SPORTS: RETHINKING MASCULINITY 108 (1994).

These stereotypes are also advanced by popular media where athletes are portrayed as the ideal male, an icon of strength, masculinity, and athleticism, thereby promoting these characteristics as predominately male and heterosexual.[71] In contrast, homosexual males are portrayed as "weak and effeminate."[72] According to these stereotypes, male homosexuality is generally perceived as incongruent with athleticism.[73]

However, homophobia and sexual orientation discrimination in professional sports has not been thoroughly studied or documented.[74] This lack of documentation is largely due to the fact that no openly gay male has ever competed in one of the four major American professional sports.[75] Nonetheless, homophobia and sexual orientation discrimination in organized sports have been documented and studied at the high school and intercollegiate levels.[76] These studies consistently argue that organized sports promote ste-

71. *See id.* at 33 (discussing masculine construct of sport).

72. *See id.* ("Due to the conventional perception that gay men are weak and effeminate, athleticism and homosexuality have come to be seen as mutually exclusive." (citing MESSNER & DONALD F. SABO, SEX, VIOLENCE & POWER IN SPORTS: RETHINKING MASCULINITY 154 (1994)).

73. *See id.* at 33-34 (reviewing stereotypes based on sexual orientation and organized sports (citing MICHAEL A. MESSNER & DONALD F. SABO, SEX, VIOLENCE & POWER IN SPORTS: RETHINKING MASCULINITY 154 (1994)).

74. *See* Anderson, *supra* note 67, at 862 ("Research on male athletes who are publicly out with their homosexuality to their ostensibly heterosexual teams has been nonexistent.").

75. For a detailed discussion of Collins as first active, openly gay male in major American professional sports and acknowledging athletes from minor professional sports that publicly disclosed their sexual orientation, see *supra* note 7 and accompanying text. .

76. Most of this scholarship focuses on female college athletes but these scholars consistently argue that homophobia is a byproduct of the "masculine construction of sport" because athleticism is "so intimately linked with masculinity." *See* Baird, *supra* note 11, at 33-37 (discussing pervasiveness of homophobia in intercollegiate athletics focusing on "lesbians in the athletic realm" but arguing that "conclusions reached could apply to all individuals who identify their sexual orientation as non-heterosexual"). For example, Penn State University's women's basketball coach Maureen T. Portland has been documented as prohibiting lesbians from playing on her teams, which resulted in one of Portland's former players suing Portland after the player was cut from the team for what she believed to be discrimination based upon her perceived sexual orientation. *See* Williams, *supra* note 28, at 253-54 (citing Bill Figel, *Lesbians in World of Athletics*, CHI. SUN-TIMES, June 16, 1986, at 119; Jere Longman, *Lions Women's Basketball Coach is Used to Fighting and Winning: Rene Portlandhas Strong Views on Women's Rights, Lesbian Playersand Large Margins of Victory,* PHILA. INQUIRER, Mar. 10, 1991, at G01; *Penn State Reprimands, Fines Coach Portland*, ESPN.COM (Apr. 18, 2006), http://sports.espn.go.com/ncw/news/story?id=2412730 (Harris says that she is not gay, yet the discrimination and harassment lawsuit is focused on her [perceived] sexuality)). Although the player was a top scorer, Portland claimed her decision was entirely "performance and attitude related." *See id.* (citing Bob Hohler, *When the Fouls Get Very Personal: Player's Suit Claims Penn State Coach was Biased against Lesbians*, BOSTON.COM

reotypes about masculinity, heterosexuality and homophobia, and that LGBT athletes generally lack sufficient protection against discrimination based on sexual orientation.[77]

3. *Instances of Anti-Gay Public Commentary and Alleged Sexual Orientation Discrimination in Professional Sports Generally*

At the professional level, athletes compound the hostility between organized sports and homosexuality by using antigay slurs and speaking out against homosexuality.[78] For example, in 2002, NFL tight end Jeremy Shockey stated that he would not stand for having a gay teammate.[79] In 2006, Ozzie Guillen, then manager of MLB team Chicago White Sox, referred to a sports reporter as a"[expletive] fag."[80] Pro-bowl, NFL linebacker Joey Porter was reported as referring to an opponent as a "fag" and "soft."[81] Further, NHL hockey player Wayne Simmonds called fellow player Sean Avery a "faggot" shortly after Avery had expressed support for marriage equality in a Human Rights Campaign advertisement.[82] Beyond player commentary, New York Attorney General Eric Schneiderman publicly reprimanded the NFL for its practice of asking players their sexual orientation and described the NFL's non-

(March 26, 2006), http://www.boston.com/sports/colleges/womensbasketbalUarticles2006/3/26/whenthe-fouls-getvery-personal!).

77. *See* Baird, *supra* note 11, at 33-37 (discussing lack of protection for LGBT athletes); Anderson, *supra* note 67, at 860-74 (discussing research concerning homophobia in organized sports at high school and collegiate level as resulting from masculine construct of sport and lack of support system); Rozenberg, *supra* note 20, at 18-20 (discussing homophobia and masculinity in professional sports and lack of federal protection but opining that state and local laws may be sufficient); Williams, *supra* note 28, at 253-54 (same); Gregory, *supra* note 11, at 259 ("Title IX as of yet, however, does not provide explicit protection against discrimination based on sexual orientation.").

78. *See* Will Leitch, *When Will a Gay Professional Athlete Finally Come Out?*, N.Y. MAG. (Sep. 11, 2011), http://nymag.com/news/sports/games/gay-athletes-2011-9/ (last visited Sep. 3, 2013) (describing anti-gay commentary among NHL, MLB, NFL, and NBA players and describing major American professional sports as "last bastion of homophobia in American society, even more so than the military").

79. *See* Rozenberg, *supra* note 20, at 18 (discussing anti-gay slurs among professional athletes and quoting Jeremy Shockey as saying he would "not stand" for having gay teammate (citing Sternod, *supra* note 11, at 93)).

80. *See* Rozenberg, *supra* note 20, at 18 (citing *Guillen Apologizes for Use of Homosexual Slur,* ESPN.COM (June 22, 2006, 12:55 PM), http://sports.espn.go.com/mlb/news/story?id=2494491).

81. *See* Rozenberg, *supra* note 20, at 18 (citing Jim Buzinski, *Porter Fined $10,000 for "Fag" Comment*, OUTSPORTS.COM (posted Dec. 14, 2006), http://www.outsports.com/nfl/2006/1214porterfined.htm).

82. *See* Rozenberg, *supra* note 20, at 18 (citing *NHL's Continued Silence on Wayne Simmonds'* [sic] *Anti-Gay Slur Is Unacceptable*, HUMAN RIGHTS CAMPAIGN (Sept. 28, 2011), http://www.hrc.ord/press-releases/entry/nhls-continued-silence-on-wayne-simmonds-anti-gay-slur-unacceptable).

discrimination policy as not providing LGBT individuals with strong enough protection.[83]

Further, at least one NFL player and some sports commentators have alleged that professional sports teams abuse their discretion to make employment decisions by labeling players that sympathize with LGBT issues as "distractions" and that this label is used as a means for discriminating against potentially gay players and players that sympathize with LGBT issues.[84] Former NFL punter Chris Kluwe was released by the Minnesota Vikings on May 6, 2012, and although the team claims that it released Kluwe because of performance issues, Kluwe believes that he was released because he vocally supported LGBT rights and because he complained about a coach's use of anti-gay slurs.[85]

4. *Instances of Anti-Gay Commentary in the NBA*

In the context of professional basketball, in 2007, retired NBA player John Amaechi provided a rare glimpse into the alleged hyper-heterosexual atmosphere that exists within NBA locker

83. *See* Maureen McCarty, *NY Attorney General Call on NFL to Create Non-Discrimination Policy*, HUMAN RIGHTS CAMPAIGN (Mar. 14, 2013), http://www.hrc.org/blog/entry/ny-attorney-general-calls-on-nfl-to-create-non-discrimination-policy (describing letter from New York Attorney General Eric Schneiderman addressed to NFL Commissioner Roger Goodell pressing Goodell to end NFL's practice of asking players their sexual orientation).

84. *See* Mike Florio, *Kluwe Warns That "Distraction" Is Code for Intolerance*, NBCSPORTS.COM (Posted Feb. 10, 2014, 2:21 PM), http://profootballtalk.nbcsports.com/2014/02/10/kluwe-warns-that-distraction-is-code-for- intolerance/ (reporting that former NFL punter Chris Kluwe claims that Minnesota Vikings used "distraction" as an excuse to fire Kluwe because of Kluwe's vocal support of LGBT issues and discussing Kluwe's concern that "distraction" has developed into coded label that teams use to refer to potentially gay players); *see also* Chris Kluwe, *I Was an NFL Player Until I Was Fired by Two Cowards and a Bigot*, DEADSPIN (Jan. 2, 2014, 12:52 PM), http://deadspin.com/i-was-an-nfl-player-until-i-was-fired-by-two-cowards-an-1493208214 (writing for himself, former NFL punter Chris Kluwe retelling his interpretation of how and why Minnesota Vikings fired him for being distraction to team and alleging that distraction was only pretextual justification for firing him and that he was ultimately dismissed because of his vocal support of LGBT issues and because he spoke out against coach's use of anti-gay slurs).

85. *See* Kluwe, *supra* note 84 (writing for himself, former NFL punter Chris Kluwe retelling his interpretation of how and why Minnesota Vikings fired him for being distraction to team and alleging that distraction was only pre-textual justification for firing him and that he was ultimately dismissed because of his vocal support of LGBT issues and because he spoke out against coaches' use of anti-gay slurs); *see also* Florio, *supra* note 84 (reporting that former NFL punter Chris Kluwe claims that Minnesota Vikings used "distraction" as an excuse to fire Kluwe because of Kluwe's vocal support of LGBT issues and discussing Kluwe's concern that "distraction" has developed into coded label that teams use to refer to potentially gay players).

rooms.[86] After retirement, Amaechi publicly revealed his homosexuality in his book *The Man in the Middle*.[87] In the book, Amaechi describes homophobia as a "ballplayer posture, akin to donning a 'game face.'"[88] Although the NBA, as an organization, publicly applauded Amaechi, Amaechi did not receive unanimous support from then active and former NBA players.[89] For example, in reaction to Amaechi's book, retired NBA player Tim Hardaway notoriously stated "I hate gay people," and went on to say the following: "Yeah, I'm homophobic. I don't like it. It shouldn't be in the world . . . or in the United States for that [matter]. So, yeah, I don't like it."[90] Also in reference to Amaechi, NBA all-star LeBron James's reaction was less than enthusiastic, claiming that a gay player hiding his sexuality is not "trustworthy."[91]

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86. *See generally* JOHN AMAECHI, MAN IN THE MIDDLE (ESPN Books 2007) (speaking of hiding homosexuality as an NBA player).

87. *See* AMAECHI, *supra* note 86; Chris Sheridan, *Amaechi Becomes First NBA Player to Come Out*, ESPN.COM (Feb. 9, 2007, 6:30 PM ET), http://sports.espn.go.com/nba/news/story?id=2757105 (identifying Amaechi as sixth professional male athlete from four major American sports to come out as homosexual and further identifying NFL players David Kopay, Roy Simmons and Esera Tuaolo, and MLB players Glenn Burke and Billy Bean as player who have come out during retirement prior to Amaechi); *see also* Michael Stefanilo, Jr., *"If You Can Play . . . You Can Play" – An Exploration of the Current Culture Surrounding Gay Athletes in Professional Sports with a Particular Focus on* Apilado v. NAGAAA, 20 SPORTS LAW. J. 21, 22-24 (2013) (discussing Amaechi publicly coming out, Tim Hardaway's negative comments and other reactions from NBA players and commentators); Ave Sinensky, Comment, *Not That There Is Anything Wrong With That: The Practical and Legal Implications of a Homosexual Professional Athlete*, 10 U. PA. J. BUS. EMP. L. 1009, 1010-11 (2008) (discussing retired athletes coming out and mixed active and retired player reception).

88. *See* Sternod, *supra* note 11, at 92 (discussing Amaechi's book regarding perception of homosexuality among Amaechi's former teammates stating that "[t]he guys I played with just didn't like 'fags'").

89. *See* Sheridan, *supra* note 87 (opining that then NBA All-Star LeBron James did not think "an openly gay person could survive . . . [playing in NBA]" and further quoting James as saying "[w]ith teammates you have to be trustworthy, and if you're gay and you're not admitting that you are, then you are not trustworthy," but going on to quote then active NBA veteran player Grant Hill as expressing support for Amaechi as follows: "[t]he fact that John has done this, maybe it will give others the comfort or confidence to come out as well, whether they are playing or retiring").

90. Ira Winderman, *Hardaway: I Hate Gays; Ex-Heat Star Says He Would Not Have Tolerated a Homosexual Teammate*, S. FLA. SUN-SENTINEL, Feb. 15, 2007, at 1C (quoting former NBA guard Tim Hardaway but also quoting NBA Commissioner David Stern's response as follows: "It is inappropriate for him to be representing us given the disparity between his views and ours[.]").

91. *See* Stefanilo, *supra* note 87, at 23 (discussing LeBron James's and other players' reactions to Amaechi's disclosure).

Unrelated to Amaechi, other instances of homophobia and usage of anti-gay slurs among NBA players have surfaced.[92] NBA great Michael Jordan was reported as routinely referring to his young teammate Kwame Brown as "a flaming faggot," during the 2002-2003 NBA season.[93] In 2011, Kobe Bryant of the Los Angeles Lakers and Joakim Noah of the Chicago Bulls, were each fined $100,000 for using antigay slurs during an NBA game.[94] In 2013, up-and-coming star Roy Hibbert was fined $75,000 for using the antigay slur "no homo" during a televised press conference after the NBA 2013 Eastern Conference Finals.[95] Indeed, the documented instances of gay slurs may be alarming but the shibboleth portraying sports as a homophobic enterprise is the fact that not a single openly gay male has ever competed in the NBA, the NFL, the MLB, or the NHL.[96]

92. *See generally* Rozenberg, *supra* note 20, at 18-20 (outlining instances of public anti-gay comments by NBA players and other professional athletes).

93. *See* Ron Rapoport, *Dr. Jordan and Mr. Hyde*, CHI. SUN-TIMES, Nov. 3, 2004, at 148 (documenting Michael Jordan's last return to NBA playing for Washington Wizards during the 2002-2003 season (citing MICHAEL LEAHY, WHEN NOTHING ELSE MATTERS (2004))).

94. *See* Nate Taylor, *Hibbert's Remarks Result in a Fine*, N.Y. TIMES, June 3, 2013, at D4 (discussing Indiana Pacer's star Roy Hibbert was fined $75,000.00 for using antigay slur "no homo" when answering question during post-game interview after Game 6 of 2013 NBA Eastern Conference Finals and discussing NBA fines for antigay slurs also being imposed on Los Angeles Lakers's Kobe Bryant and Chicago Bulls's Joakim Noah both during 2011 season).

95. *See* Taylor, *supra* note 94 (discussing NBA fines for antigay slurs).

96. For those who have not played organized sports, the proposition that organized sports is a homophobic institution in the United States is an idea that is not readily accessible by merely pointing to specific language or myriad incidents of antigay slurs or bullying but rather is better understood by looking to the fact that the only openly gay male professional athletes that have come out have done so in retirement, and then inquiring into the customs that may have led to that fact. *See* Stefanilo, *supra* note 87, at 35 (acknowledging National American Gay Amateur Athletic Association's "appreciation of the fact that 'many members of the LGBT community come from backgrounds where team sports have been environments of ridicule and humiliation,'" and identifying author's personal discomfort of competing as closeted high school athlete and personal perception of permeating antigay culture associated with organized sports (citing *The Brief History of Gay Athletes*, ESPN.COM (Dec. 18, 1998), http://espn.go.com/otl/world/timeline.html)); *see also* Susan Strum, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) (discussing how modern workplace discrimination cases "involve social practices and patterns of interaction among groups within the workplace that, over time, exclude non-dominant groups. Exclusion is frequently difficult to trace directly to intentional, discrete actions of particular actors, and may sometimes be visible only in the aggregate."); Anderson, *supra* note 67, at 860-74 (discussing research on homosexual high school and collegiate male athletes coming out to their heterosexual teammates describing that although no athlete suffered physical abuse or severe verbal harassment heterosexism predominated along with hostility toward homosexuality leading "gay athletes to feel that they have no right to discuss their sexuality").

C. Developing Inclusivity in Professional Sports

Whether the four major American professional sports are ready to put an openly gay athlete on the field remains to be seen, but some developments in the arena suggest that the time is ripe.[97] Since John Amaechi came out in 2007, athletes and professional sports organizations have made strides toward structuring themselves to be more inclusive and accepting of LGBT individuals.[98]

Although Jason Collins is the first active player in one of the four major American professional sports to publicly disclose his sexual orientation, retired professional athletes and athletes in other professional sports have publicly come out; *see also* Rozenberg, *supra* note 20, at 18 (discussing known former professional male gay athletes). However, Glenn Burke, a professional baseball player in the 1970s, was openly gay but he never publicly announced his sexual orientation and it was not common knowledge beyond his teammates, nor would it have been commonly known because he was not a well-known player. *See* Diane Pucin, *Team Player; Glenn Burke was Well-Respected by his Fellow Dodgers in the late 1970s. He Didn't hide the Fact he was Gay from them, and they Didn't Mind*, L.A. TIMES, Aug. 22, 2013, at C1 (discussing Glenn Burke and professional athletes who have announced their sexual orientation after ending their professional sport careers). Further, openly gay professional soccer player Robbie Rogers was the first gay male professional athlete to compete in an American professional sport when he took the field for the Los Angeles Galaxy in an MLS soccer match; however, because soccer is not considered one of the four major American professional sports the final barrier still stands and Americans wait to see whether an openly gay male athlete will ever compete in major four professional game. *See* Witz, *supra* note 8 (reporting Robbie Rogers as first openly gay male athlete to compete in an American professional sport). For a discussion identifying Jason Collins as the first openly gay male active professional player in major American professional sports, see *supra* note 7 and accompanying text.

97. *See* Stefanilo, *supra* note 87, at 24-28 (discussing American professional player and personnel support and opinion in favor of accepting homosexual professional athletes); Sinensky, *supra* note 87, at 1027 (discussing potential for openly gay player to play in major American professional sports and opining that whether major American professional sports would embrace a homosexual player may "depend on the caliber of the player" otherwise a low-caliber gay player may not have a legal remedy should "his team or league decide[ ] to restrict his ability to play in order to accommodate other players[ ]") (alterations added). *But see* Mike Freeman, *The Inside Story of How the NFL's Plan for Its 1st Openly Gay Player Fell Apart*, BLEACHER REPORT (Nov. 20, 2013), http://bleacherreport.com/articles/1831178-the-inside-story-of-how-the-nfls-plan-for-a-1st-openly-gay-player-fell-apart (reporting that NFL, NFL Players Association, and NFL teams were secretly trying to structure deal where an undisclosed gay player would sign with an NFL team but that deal fell apart in late April 2013 and suggesting reason why deal never came to fruition was that NFL wanted an openly gay player but that disagreement among players and teams has slowed process and that closeted gay NFL players fear coming forward because they are uncertain of whether they would be received by fellow players and coaches).

98. *See, e.g.*, Abby Ohlheiser, *The NHL's New Gay Rights Initiative*, SLATE (Apr. 11, 2013), http://www.slate.com/blogs/the_slatest/2013/04/11/nhl_announces_lgbt_rights_partnership_with_you_can_play_to_support_gay_athletes.html (highlighting NHL's partnership with You Can Play, which "will provide LGBT training for new players on NHL teams, and counseling on related issues for players who want it").

1. *Employment Policies Combatting Sexual Orientation Discrimination*

Currently, nearly every American professional sports association employs a non-discrimination policy that prohibits discrimination on the basis of sexual orientation.[99] Similar to the NBA, the NFL incorporated an employment non-discrimination policy provision into its current CBA prohibiting discrimination on the basis of sexual orientation.[100] In contrast, during the summer of 2013, the NHL went above and beyond the other American professional sports associations by partnering with the You Can Play Project, an organization seeking to end homophobia in sports.[101] Under the partnership, the NHL will follow strict non-discrimination policies, provide education for incoming players, and support players considering coming out.[102] Similar to the NHL, in 2013, the MLB expanded its already existing non-discrimination policy and incorporated a program that includes a player code of conduct, mandatory training programs, and a complaint and reporting system.[103] But the effects such programs are unclear, as there has yet to be an openly gay NHL player.[104]

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99. *See, e.g.*, Michael Jee, *NFL Gets Better with More Inclusive Non-Discrimination Policy*, BLEACHER REPORT (Oct. 2, 2011), http://bleacherreport.com/articles/875079-nfl-gets-better-with-more-inclusive-non-discrimination-policy (reporting NFL's inclusion of non-discrimination policy within its 2011 CBA which prohibited discrimination based on sexual orientation); *see also* Travis Waldron, *Major League Baseball Bolsters Sexual Orientation Non-Discrimination Policy*, THINK PROGRESS (July 16, 2013, 10:07 AM), http://thinkprogress.org/sports/2013/07/16/2307151/major-league-baseball-bolsters-sexual-orientation-non-discrimination-policy/ (reporting MLB's code of conduct adopted to supplement its non-discrimination policy).

100. *See* Waldron, *supra* note 99 (describing code of conduct that "will be distributed to every major and minor league player while also creating training and education programs for players. It will also lay out guidelines for reporting and dealing with harassment and discrimination").

101. *See* Dave Zirin, *NHL Take 'Historic Step' for LGBT Equality*, NATION (Apr. 12, 2013, 10:55 AM), http://www.thenation.com/blog/173797/nhl-takes-historic-step-lgbt-equality# (reporting NHL's partnership with You Can Play project).

102. *See* Ohlheiser, *supra* note 98 (discussing NHL's partnership with You Can Play Project). For more information on the You Can Play Project see the organization's website available at http://youcanplayproject.org/.

103. *See* Maureen McCarty, *MLB to Expand Anti-Discrimination Policy to Include Sexual Orientation*, HUMAN RIGHTS CAMPAIGN (July 16, 2013), http://www.hrc.org/blog/entry/mlb-to-expand-anti-discrimination-policy-to-include-sexual-orientation (last visited Sept. 2, 2013) (describing MLB's new policy as including workplace code of conduct for major and minor league players, providing training, and creating "centralized complaint system to report incidents of harassment and discrimination").

104. *See* Ohlheiser, *supra* note 98 (discussing status of NHL's non-discrimination policy).

2. *Developing Inclusivity in the NBA*

The NBA has also made strides towards inclusivity, largely attributable to progressive policies imposed by former NBA Commissioner David Stern.[105] Commissioner Stern spent his career shaping the NBA as a model of inclusivity and as one of the most progressive major professional sports leagues in the United States, if not the world.[106] As Commissioner, David Stern expanded the scope of the NBA Commissioner's power by incorporating extensive rules regulating players' and coaches' conduct on and off the court to ensure that players and coaches uphold the NBA's public image as a diverse and progressive league.[107]

For example, Commissioner Stern swiftly condemned and disciplined retired NBA player Tim Hardaway for publicly saying "I

105. *See* Beck, *supra* note 17 (reporting support from Collins's former teammates and that "Commissioner David Stern, who has a long track record of progressive policies, welcomed the moment"); *see also* McCann, *supra* note 24, at 42 (opining that David Stern "deserves considerable credit for the [NBA]'s success").

106. *See* Adam G. Yoffie, *There's a New Sherriff in Town: Commissioner-Elect Adam Silver & The Pressing Legal Challenges Facing the NBA*, 21 JEFFREY S. MOORAD SPORTS L.J. 59, 59, 66-67 (2013) ("As one legal scholar has described it, the Stern-led NBA has engaged in the systematic manipulation of fans and media to justify its wholesale usurpation of player autonomy." (citing Michael R. Wilson, *Why So Stern?: The Growing Power of the NBA Commissioner*, 7 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 45, 45 (2010))); Alexander C. Krueger-Wyman, Comment, *Collective Bargaining and the Best Interests of Basketball*, 12 VA. SPORTS & ENT. L.J. 171, 171 (2012) (discussing David Stern's utilization of Commissioner authority to control NBA in manner that Stern believes is in "best interests of the league"); Beck, *supra* note 17 (describing Commissioner Stern as having "a long track record of progressive policies"). *See generally* Michael R. Wilson, *Why So Stern?: The Growing Power of the NBA Commissioner*, 7 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 45, 45 (2010) (discussing NBA under rule of David Stern).

107. *See generally* Wilson, *supra* note 106 (discussing NBA Commissioner David Stern's expansive control via rules and regulations over player and personnel conduct both on and off basketball court); *see also* Wise, *supra* note 6 (describing NBA as "league that trumpets its inclusiveness"). As Commissioner, David Stern has created broad discretionary authority for the Commissioner, arising from rules and regulations within the CBA, "to clean up the games, the players, and the image of the NBA." *See* Brent D. Showalter, *Technical Foul: David Stern's Excessive Use of Rule-Making Authority*, 18 MARQ. SPORTS L. REV. 205, 205 (2007-2008) (describing Commissioner Stern's use of rules and regulations under the 1999 CBA to enforce "player dress code, uniform requirements . . . prohibiting players from attending certain night clubs . . . [and] technical fouls for excessive complaining"). However, although Commissioner sanctions concerning conduct off the playing court is appealable only through the grievance and arbitration system while under the CBA the Commissioner's sanctions for player conduct on the playing court is only appealable to the Commissioner. *See* Nat'l Basketball Ass'n v. Nat'l Basketball Players Ass'n, 2004 U.S. Dist. LEXIS 26244, 1 (S.D.N.Y. 2004) (finding that players' grievance appealing suspension concerning altercation between players and fans in arena's stands was within arbitrator's jurisdiction because "misconduct at issue did not involve 'conduct on the playing court,' which was appealable solely to the commissioner").

hate gay people" in response to the publication of fellow retired NBA player John Amaechi's book in which Amaechi revealed his homosexuality.[108] Stern issued a public statement proclaiming that such rhetoric was not consistent with the NBA's view and banned Hardaway from the upcoming NBA All-Star Weekend festivities.[109] Further, Commissioner Stern has mandated significant fines on players for using antigay slurs, such as the fines, described above, imposed on Kobe Bryant and Joakim Noah in 2011 and on Roy Hibbert in 2013.[110]

On February 1, 2014, Commissioner Stern was succeeded by his protégé Adam Silver.[111] At least one scholar suggests that, "Silver is highly unlikely to reverse th[is] trend towards greater consolidation of power in the Commissioner's Office."[112] However, it is unclear whether Silver would use this authority to insert the NBA Commissioner role into a potential dispute over a player grievance under the NBA CBA's provision prohibiting discrimination based on sexual orientation.[113]

3. *NBA Players' Growing Acceptance of Sexual Orientation Diversity*

Professional athletes also appear to be more accepting of sexual orientation diversity than in the past.[114] Thus far, neither any current nor former NBA players have expressed an outright nega-

108. *See* Winderman, *supra* note 90 (quoting NBA Commissioner David Stern's response as follows: "It is inappropriate for him to be representing us given the disparity between his views and ours[.]").

109. Sheridan, *supra* note 87 (quoting NBA Commissioner David Stern in 2007 speaking out against Tim Hardaway's homophobic comments saying "a player's sexuality is not what matters in the NBA . . . [w]e have a very diverse league").

110. *See* Taylor, *supra* note 94 (discussing fines imposed on NBA players for using antigay slurs).

111. *See Adam Silver Replaces David Stern*, ESPN.COM (Feb. 1, 2014, 1:09 PM ET), http://espn.go.com/nba/story/_/id/10387067/adam-silver-replaces-david-stern-nba-commissioner (reporting Adam Silver officially replacing David Stern as NBA Commissioner); Darren Rovell, *Silver signature on new basketballs*, ESPN.COM (Feb. 1, 2014, 1:24 PM ET), http://espn.go.com/nba/story/_/id/10387106/new-nba-basketballs-bear-adam-silver-signature (reporting Adam Silver's officially replacing David Stern). *See also* Yoffie, *supra* note 106, at 59-62 (discussing Commissioner-to-be Adam Silver, his development under Stern, and legal obstacles Silver faces upon assuming Commissioner position).

112. *See* Yoffie, *supra* note 106, at 59, 66-67 (discussing potential labor and negotiating issues Silver will likely face as Commissioner).

113. *See* NBA CBA, *supra* note 24, Art. XXX (prohibiting any person or entity subject to CBA from making a discriminatory decision regarding CBA on basis on sexual orientation).

114. *See* sources cited *supra* note 6 and accompanying text (discussing players' and celebrities' reactions to Jason Collins's announcement).

tive reaction to Jason Collins's sexual orientation.[115] This fact alone may demonstrate progress since Amaechi's 2007 public disclosure of his sexual orientation, which triggered various negative reactions from NBA players and former player, most notoriously was Tim Hardaway's comment "I hate gay people."[116]

Many current NBA all-stars and veterans expressed their support for Jason Collins, such as veteran NBA player Steve Nash, and Kobe Bryant.[117] Notably, LeBron James, in contrast to his 2007 comment, expressed support for Jason Collins, describing Collins's announcement as "very noble."[118] James went on to say the following: "I think it's a strong thing to do, and I think as NBA players, we all offer him our support."[119] Another Miami Heat player, Chris Andersen, described Jason Collins's revelation as an "historic moment" and said that if it "encourages others to step up and say this is how they feel and this is who they are then more power to them."[120]

Tim Hardaway's reaction to Jason Collins's announcement shows the trend toward a more accepting NBA.[121] In contrast to Tim Hardaway's 2007 comment "I hate gay people," in 2013, Hardaway was celebrated in the media for his outspoken support of same-sex marriage in Florida, where he was the first supporter to sign a petition for a proposed state constitutional amendment allowing same-sex marriage.[122] Further, after Collins came out,

115. However, the Amaechi did not receive such a wholly positive reception in 2007. *See* Stefanilo, *supra* note 87, at 23 (discussing players' reaction to John Amaechi's coming out).

116. *See* Winderman, *supra* note 90 (quoting former NBA guard Tim Hardaway).

117. *See* sources cites *supra* note 6 and accompanying text (describing positive reactions from Kobe Bryant and Steve Nash).

118. *See* Joseph Goodman, *Miami Heat Players Support Gay Colleague Jason Collins*, MIAMI HEARLD (May 1, 2013), http://www.miamiherald.com/2013/05/01/3373727/miami-heat-players-support-gay.html (discussing LeBron James's reaction to Collins's coming out).

119. *See* Goodman, *supra* note 118 (discussing players' reaction to Collins's coming out).

120. *See id.* (reporting Chris Andersen's reaction to Jason Collins's revelation).

121. *See* Wise, *supra* note 6 (reporting Hardaway's positive comments in support of Collins).

122. *Compare* Winderman, *supra* note 90 (quoting former NBA guard Tim Hardaway as saying "Yeah, I'm homophobic. I don't like it. It shouldn't be in the world for that or in the United States for that. So, yeah, I don't like it." Going on to quote NBA Commissioner David Stern's response as follows: "It is inappropriate for him to be representing us given the disparity between his views and ours[.]"), *with* John Kennedy, *Hardaway to be First to Sign Same-Sex Petition; Ex-Heat Star, Once Homophobic, Backs Changing State Law*, PALM BEACH POST, July 4, 2013, at 2B (reporting Hardaway's support for same-sex marriage in Florida).

Hardaway called him personally and told him over the phone "I'm proud of you and I support you."[123]

However, although there have been developments within the NBA, Jason Collins has yet to parlay these developments into an NBA contract so that he can be the first openly gay athlete to play in an NBA game.[124]

III. LEGAL ANALYSIS: EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEX AND SEXUAL ORIENTATION DISCRIMINATION

This Part aims to provide a concise background of employment discrimination law in the United States. The first section of this Part provides an overview of current statutory protections against employment discrimination under Title VII on the basis of sex, and outlines the federal law's shortcomings in preventing employment discrimination based solely on sexual orientation.[125] The second section introduces the proposed Employment Nondiscrimination Act ("ENDA") and discusses its potential to expand workplace protections against sexual orientation discrimination and briefly discusses state and local laws modeled after ENDA.[126] The third section reviews private sector employment non-discrimination policies that potentially provide legal remedies against sexual orientation discrimination in the workplace, focusing specifically on the non-discrimination provision within the NBA CBA as well as the collective bargaining process.[127]

A. Title VII and Employment Discrimination Because of Sex or Gender

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees based on five personal traits: race, color, religion, sex, or national origin.[128] Although United

123. *See* Wise, *supra* note 6 (reporting Hardaway's support for Collins along with expressions of support from Oprah Winfrey and President Barrack Obama).

124. *See* Rozenberg, *supra* note 20, at 18 (reviewing that no publicly known gay male athlete has competed in major American professional sports).

125. For a discussion analyzing potential remedies for employment discrimination under Title VII, see *infra* notes 137-39, 169-78 and accompanying text.

126. For a discussion exploring legal remedies under statutory framework that treats sexual orientation as protected trait, see *infra* notes 179-91 and accompanying text.

127. For a discussion describing legal remedies under NBA's collective bargaining process and arbitration procedures, see *infra* notes 237-53 and accompanying text.

128. *See* 42 U.S.C. § 2000(e)-2 (2006) ("It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation,

States employment relationships are presumed to be at-will, Title VII limits the at-will employment doctrine.[129] Thus, employees may bring claims against their employers under Title VII if they believe that their employers have made an employment decision *because of* one of the five traits protected under Title VII.[130]

1. *Prima Facie Case and Burden Shifting*

Recall that the prima facie case for an employment discrimination claim has three basic elements: (1) an employee identifies as having a Title VII trait specified as protected against discrimination; (2) the employer has made an employment decision adverse to that employee; (3) that decision was made because of that employee's protected trait.[131] The plaintiff has the initial burden of proof in establishing the prima facie case to create the presumption of employment discrimination.[132] Next, the burden shifts to the employer-defendant who then bears only the burden of producing evidence that rebuts the presumption of discrimination by showing a legitimate non-discriminatory reason for the employment decision at issue.[133] Then, the plaintiff has an opportunity to persuade the court that the employer's legitimate reason for making the decision was merely pretext.[134]

For example, in a Title VII sex-discrimination claim the plaintiff bears the burden of persuading the court that the employer discriminated against the plaintiff *because of* sex, such as denying the plaintiff a raise or promotion because that employee is a male,

terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.").

129. For a general discussion of at-will employment see 17 C.J.S. *Contracts* § 127 (2013).

130. *See* Kramer, *supra* note 20, at 294-95 (discussing framework for employment discrimination claim under Title VII and causation element).

131. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) (discussing burden of proof for proving beyond preponderance of evidence that employer treated employee disparately because of protected trait of that employee for purposes of employment discrimination case); *see also* Kramer, *supra* note 20, at 300 (discussing elements of employment discrimination claim).

132. *See* Margaret E. Johnson, *A Unified Approach to Causation in Disparate Treatment Cases: Using Sexual Harassment by Supervisors as the Causal Nexus for the Discriminatory Motivating Factor in Mixed Motive Cases*, 1993 WIS. L. REV. 231, 234-36 (1993) (discussing causation element and evidentiary burdens of employment discrimination cases).

133. *See* Johnson, *supra* note 132, at 234-36 (discussing burdens of proof and burden shifts between adversaries in employment discrimination cases).

134. *See id.* (outlining pleading requirements for employment discrimination claimants and burdens of proof and burden shifts between plaintiff and defendant-employer).

rather than based upon some other characteristic or motivation alleged by defendant that does not involve a protected trait under Title VII.[135] Although the burden of causation may be demanding, the complexity of employment sex-discrimination cases generally results from definitional issues regarding the scope of federal protection under Title VII's sex provision.[136]

2. *Title VII's Sex Provision*

Generally, courts narrowly interpret Title VII's sex provision, which some scholars and courts speculate is due to a lack of legislative history and debate regarding the sex provision.[137] As a result, Title VII's sex provision undoubtedly protects against employment discrimination based on sex in its traditional biological understanding of male and female, which also encompasses discrimination based on gender, but does not include discrimination based solely on an individual's sexual orientation.[138] Gender discrimination, or gender stereotyping, is based upon how an individual expresses gender traits, such as masculinity or femininity, which are personal characteristics that are not necessarily dictated by biology, but rather by an "employer's expectations about how men and women are supposed to present themselves in the workplace."[139]

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135. *See* Kramer, *supra* note 20, at 295 (discussing causation element of employment discrimination claim).

136. *See id.* at 295-96 (discussing problems and difficulty with causation element of employment discrimination under Title VII and limits as well as outer boundaries of Title VII's sex provision).

137. *See id.* at 296-97 (citing Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) (relying on the legislative history of the "sex" amendment in interpreting Title VII); *see also* Barnes v. Costle, 561 F.2d 983, 986-88 (D.C. Cir. 1977) (relying on legislative history of the "sex" amendment in interpreting Title VII); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1090-91 (5th Cir. 1975) (en banc).

138. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998) (describing Title VII's sex provision as protecting men and women from employment discrimination) (citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983)); *see also* City of Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 711 (1978) (discussing Title VII's sex provision as protecting against disparate employment treatment based solely on employee's sex described as male or female).

139. *See* Kramer, *supra* note 20, at 297 (discussing differences between sex discrimination and gender discrimination).

3. Price Waterhouse v. Hopkins*: Title VII's Sex Provision and Gender Stereotyping*

In the seminal case *Price Waterhouse v. Hopkins*,[140] the Supreme Court interpreted Title VII's sex provision to protect against gender discrimination based upon an employer's actions against an employee for failing to act according to traditional notions of femininity and masculinity, rather than the more familiar biological understanding of male and female.[141]

In *Price Waterhouse*, plaintiff Ann Hopkins was a senior manager at the accounting firm Price Waterhouse and was a candidate for a partner position with the firm based upon her stellar work performance; but she was ultimately denied the position because some of the partners believed she was too masculine for a woman.[142] Hopkins was extremely successful in her position and exceeded her peers at "securing major contracts" for the firm.[143] The only negative point of Hopkins's application was that her colleagues described her as "overly aggressive" and "hardnosed," traits which the firm perceived as traditionally masculine characteristics, and her staff had complained of her rigidity in the past, as well as her lack of interpersonal skills.[144] The partner delivering the news to Hopkins, that she failed to secure the position, advised her that in order to create a greater likelihood of obtaining the position in the future, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[145]

Hopkins sued Price Waterhouse under Title VII's prohibition against sex discrimination, claiming that the firm's culture of gen-

140. 490 U.S. 228, 250 (1989) (finding that Title VII's sex provisions encompass employment decisions arising from gender based stereotyping).

141. *See id.* at 250 (holding that employer violated Title VII's prohibition against sex discrimination when employer decided not to promote female employee to partner solely because she did not act feminine enough but rather expressed traits employer believed to be more traditionally masculine). *See generally* Kramer, *supra* note 20 (examining gender issues under Title VII's sex provision through context of male employee who brought gender discrimination claim against employer after employer began treating him disparately after employer discovered that employee was vegetarian).

142. *See Price Waterhouse*, 490 U.S. at 231-35 (discussing Hopkins's position, work ethic, positive professional record, and job performance and reviewing Hopkins's employers describing her interpersonal skills as "macho").

143. *See id.* at 234 (describing Hopkins's work performance and strong character).

144. *See id.* at 234-35 (discussing assertions that despite Hopkins's abilities to execute her job she was generally disliked by her colleagues because of her interpersonal skills).

145. *See id.* at 234 (discussing lower courts' decision and findings of fact).

der stereotyping guided its assessment.[146] The Court determined that Price Waterhouse made its decision to deny Hopkins the promotion on the basis of gender, or based upon "a belief that a woman cannot be aggressive, or that she must not be."[147] The Court held that Title VII's sex provision prohibits employers from making employment decisions based solely on the employee's failure to live up to the employer's workplace gender stereotypes.[148]

4. Oncale v. Sundower*: Same-Sex Sexual Harassment*

The Supreme Court has also interpreted Title VII to protect against same-sex sexual harassment.[149] In *Oncale v. Sundowner*, a male employee brought a Title VII sexual harassment claim against his employer.[150] The employee alleged that he was ultimately forced to resign after enduring ongoing physical and verbal harassment from other male employees on the basis of sex.[151] The federal district court granted summary judgment for the employer, holding, "a male has no cause of action under Title VII for harassment by male co-workers."[152] On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision.[153] The Supreme Court held that, "sex discrimination consisting of same-sex sexual harassment is actionable under Title VII."[154]

The Court reasoned that, similar to "male-female sexual harassment situations," same-sex harassment may give rise to a discrimination claim where the harasser engages in conduct motivated by sexual attraction so long as there is "credible evidence that the har-

146. *See id.* at 232 (discussing Hopkins's claim).

147. *See id.* at 250 (discussing holding and reasoning).

148. *See Price Waterhouse*, 490 U.S. at 258 (holding where "[employee] proves that their gender played a motivating part in an employment decision, the [employer] may avoid a finding of liability by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the [employee]'s gender into account").

149. *See Oncale*, 523 U.S. 75, 79 (finding employee claiming gender discrimination and sexual harassment need not prove that instigator was homosexual or heterosexual but merely that employee was subject to discrimination based on their failure to conform to employer's stereotype of gender and allowed a hostile work environment). For a more in depth discussion on Title VII protection against gender nonconformity, see generally Shawn Clancy, Note, *The Queer Truth: The Need to Update Title VII to Include Sexual Orientation*, 37 J. Legis. 119 (2011-2012).

150. *See Oncale*, 523 U.S. at 77 (discussing factual findings of lower court).

151. *See id.* (discussing facts of case and allegations at issue).

152. *See id.* (outlining procedural history) (citations omitted).

153. *See id.* (discussing background of case) (citations omitted).

154. *See id.* at 82 (asserting holding and outcome of issue at bar).

asser [is] homosexual."[155] Nevertheless, the Court's reasoning outlined narrow circumstances which may give rise to a same-sex sexual harassment claim under Title VII beyond instances where sexual attraction is the motivating factor, such as the harasser's hostility toward individuals of the same sex, or instances where the harasser generally discriminated against men or women specifically.[156]

The ruling in *Oncale* has not translated into a viable claim for workplace sexual harassment claims based on an employee's sexual orientation.[157] Indeed, the Supreme Court in *Oncale* recognized that same-sex sexual harassment claims are cognizable under Title VII.[158] Despite this recognition, the Court's emphasis on credible evidence that the harasser was motivated by sexual attraction leaves LGB individuals with limited bases upon which to fashion a same-sex harassment employment discrimination claim.[159]

A same-sex harassment plaintiff has the evidentiary burden of proving that the harasser's conduct was because of the plaintiff's sex or that such conduct was so "objectively offensive" and so "severe and pervasive" that it created for the plaintiff an "objectively hostile work environment—an environment that a reasonable person would find hostile or abusive."[160] The Court stressed that the objective severity of certain behaviors must be judged in light of all the circumstances, and by example reasoned that "[a] professional football player's working environment is not severely or pervasively abusive . . . if the coach smacks him on the buttocks as he heads onto the field – even if the same behavior would reasonably be ex-

155. *See id.* at 80 (drawing comparison between same-sex sexual harassment and male-female sexual harassment employment discrimination cases where sexual attraction is involved).

156. *See Oncale*, 523 U.S. at 80-81 (describing situations possibly giving rise to Title VII same-sex sexual harassment).

157. *See* Sheerine Alemzadeh, *Protecting the Margins: Intersectional Strategies to Protecting Gender Outlaws from Workplace Harassment*, 37 N.Y.U. REV. L. & SOC. CHANGE 339, 346-48 (2013) (discussing disconnect between gender stereotyping employment discrimination claims and workplace sexual harassment claims); *see also* Baird, *supra* note 11, at 51-52 (discussing harassment based solely on sexual orientation rather than harassment based on sex or gender is not proscribed under Title VII (citing Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1991))).

158. *See Oncale*, 523 U.S. at 79 ("We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.").

159. *See id.* at 80-81 (recognizing potential for same-sex harassment based employment discrimination claim but asserting that such allegation must be accompanied by "credible evidence that [ ] harasser was homosexual" or that harasser fostered general hostility toward specifically females or males in workplace).

160. *See id.* at 81 (discussing evidentiary burden of demonstrating that conduct rises to level of discriminatory workplace sexual harassment).

perienced as abusive by the coach's secretary (male or female) back at the office."[161]

The example provided by the Court demonstrates that *Oncale* does indeed provide a means for preventing same-sex harassment motivated by sexual attraction and conduct evincing hostility towards the presence of a certain sex, male or female, in the workplace.[162] However, *Oncale* fails to reach hostile conduct that may be utilized against employees because of their sexual orientation, or because of their presumed heterosexuality, as a means of enforcing gender norms in the workplace, or on the playing field.[163] Thus, same-sex harassment targeted at an individual's sexual orientation, or presumption thereof, as a means of enforcing gender norms would not generally support a claim for harassment under Title VII.[164] Therefore, absent an amendment to Title VII or new legislation, there is no cognizable cause of action under Title VII or any other federal statute for employees who are discriminated against solely because of their sexual orientation.[165] The lack of express

161. *See id.* (alluding to American societal norms where certain behavior may be appropriate in certain contexts but inappropriate in others).

[161] *See id.* (exemplifying how customs in American professional sports may be acceptable on playing field but would not be acceptable in other contexts).

162. *See* Alemzadeh, *supra* note 157 (discussing Supreme Court's ruling in *Oncale*).

163. *See id.* (describing it as "address[ing] discriminatory attitudes towards the presence of a certain sex in the workplace instead of focusing on harassment as a means of enforcing gender conformity" (alteration added) (citing Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 696 (1996-1997))).

164. *See id.* ("In order to be actionable, harassment must either flow from sexual desire or be directed towards member of a biological sex as a class.") (footnote omitted) (citation omitted).

165. *See* Prizer, *supra* note 20, at 778 ("[D]espite some expansion of coverage under Title VII, LGBT workers on the whole are not protected effectively by the existing federal statute and by piecemeal state and local protections."); Kramer, *supra* note 20, at 294-301 (discussing Title VII's five traits and acknowledging that although sex and gender have been used to successfully protect gay persons alleging employment discrimination based on sexual harassment and gender nonconformity – not acting in accordance with perceived societal norms and characteristic behaviors associated with male and female sex – but noting that employment discrimination based solely on sexual orientation is beyond the scope of expanded Title VII protections as identified by federal case law); Lavelle, *supra* note 20, at 519 (discussing lack of workplace protections for sexual orientation discrimination under Title VII and "growing support for the Employment Non-discrimination Act ("ENDA"), which, with several caveats, would prohibit workplace discrimination with regard to gay persons."); Clancy, *supra* note 149, at 128-43 (discussing ambiguity, difficulty, and disagreement among federal courts when distinguishing employment discrimination claims under Title VII's sex provision along lines of sex and gender, and problems with allowing discrimination claims based on gender stereotyping and gender nonconformity but barring claims based solely on sexual orientation discrimination).

federal protection leaves LGB[166] employees with only one possible federal cause of action for discrimination or harassment based solely on sexual orientation, which is to disguise the claim as a gender nonconformity claim along the lines of *Price Waterhouse*.[167] This strategy is known as "bootstrapping."[168]

5. *Bootstrapping Sexual Orientation-Based Discrimination Claims*

Courts do not allow the bootstrapping of sexual orientation claims to gender nonconformity claims under Title VII.[169] Nonetheless, the gender nonconformity theory of employment discrimination has proved a possible means of relief for some LGB employees to bootstrap a sexual orientation based discrimination claim on to a Title VII gender-based discrimination claim.[170]

Under the bootstrapping theory, the gender nonconformity discrimination claim is a tightrope for LGB employees.[171] In the-

166. This Part mainly uses the acronym LGB rather than LGBT because in the context of employment discrimination law, gender and sex based discrimination claims generally protect transgender and gender transitioning individuals against employment discrimination based on sex, gender, or gender stereotyping whereas gender and sex based discrimination does not encompass discrimination solely on the basis of sexual orientation, thus the strengths and weaknesses of federal employment anti-discrimination law are generally different for lesbian, gay, and bisexual workers than for transgender and gender transitioning workers and therefore, this Part focuses on the law as it applies to a worker's sexual orientation. For a more detailed discussion of acronyms when referring to gender, sex, and sexual orientation issues, see *supra* note 13, and accompanying text.

167. *See* Kramer, *supra* note 20, at 302 (discussing lack of federal cause of action for employment discrimination based solely on sexual orientation).

168. *See id.* at 302 (discussing bootstrapping claims as cases where plaintiffs who have suffered discrimination based on their sexual orientation sue employer for gender stereotyping and attempt to advance claim discrimination based on plaintiff's failure to conform to employer's gender stereotype).

169. *See id.* at 302-03 (discussing bootstrapping claims).

170. *See, e.g.*, Prowel v. Wise Bus. Forms, 579 F.3d 285 (3d Cir. 2009) (finding employee's Title VII complaint was sufficient where employee alleged employer discriminated against him because he was effeminate and failed to conform to employer's stereotype of blue-collar working man as other employees did but noting distinction between gender stereotyping discrimination and possible discrimination based on sexual orientation); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (finding employer discriminated against transgender employee on basis of gender nonconformity but not discussing sexual orientation and instead relying on employer's discrimination based on employee's feminine characteristics and actions which did not conform to employer's stereotyped perception that employee should act more masculine); Doe v. City of Belleville, 119 F.3d 563, 573-74 (7th Cir. 1997), *vacated and remanded,* 523 U.S. 1001 (1998) (case vacated in light of Oncale, 523 U.S. 75). The *Doe* case was settled before rehearing. *See* Clancy, *supra* note 149, at 127 n.80 (providing subsequent case development).

171. *See* Kramer, *supra* note 20, at 302 (discussing bootstrapping cases and difficulty of maintaining courts' focus on gender based discrimination rather than employer behavior motivated by employee's sexual orientation).

ory, the claim is difficult because LGB employees should generally avoid disclosing their actual sexual orientation.[172] In these cases, the employees are caught between proving their employer's gender stereotyping behavior, and concealing their actual sexual orientation because courts interpret sexual orientation as an unprotected trait under Title VII.[173]

For instance, if a court becomes aware of the employee's homosexuality the court may become fixated on the idea that the employer's alleged discriminatory conduct was based upon the employee's sexual orientation, an unprotected trait under Title VII, rather than a protected one, such as sex, which encompasses gender.[174] Therefore, if a plaintiff's sexual orientation becomes an issue before the court it will likely be fatal to that plaintiff's claim because it may lead the court to dismiss the claim as illegitimate bootstrapping case.[175]

Ultimately, U.S. Circuit Courts have almost uniformly held that employment discrimination claims based solely on sexual orientation are beyond the scope of Title VII.[176] Thus, the claimant must prove that the adverse employment action was motivated by the employee's failure to conform to the employer's gender stereotype

172. *See id.* at 303 n.87 ("When bringing a gender stereotyping claim under Title VII, it is almost never a good idea to affirmatively plead or introduce evidence of a plaintiffs' [sic] sexual orientation. It does not help the case and can seriously damage it." (citing Justin M. Schwartz et al., *Nine Tips for Representing LGBT Employees in Discrimination Cases*, 759 PRACTICING L. INST.: LITIG. 95, 103 (2007))) (alteration in original).

173. *See* Kramer, *supra* note 20, at 302-03 (discussing claimant's necessity to rely on outward appearance and characteristics rather than sexual orientation).

174. *See id.* at 302-05 (discussing difficulty of pleading gender nonconformity claim where claimant's sexual orientation is known and is a point of reference before court).

175. *See id.* at 305 (discussing federal district court case where plaintiff "made no attempt to hide her sexuality during the litigation, and that decision ultimately proved fatal to her case, and indicating that "[t]he court held that the [employer's] discriminatory comments were directed at [plaintiff]'s homosexuality rather than her gender nonconformity. As such, she could not state an actionable claim under Title VII" (citing Dawson v. Bumble & Bumble, 398 F.3d 211, 217-20 (2d Cir. 2005)) (alteration added) (footnotes omitted)).

176. *See, e.g.*, Dawson v. Bumble & Bumble, 398 F.3d 211, 217-18 (2d Cir. 2005) (dismissing employees claim alleging employment discrimination based on gender and appearance finding that employee was merely bringing a discrimination based on sexual orientation claim disguised as a gender discrimination claim and thus beyond Title VII's protections); Rene v. MGM Grand Hotel, 243 F.3d 1206, 1209 (9th Cir. 2001) (finding employment discrimination based solely on sexual orientation is beyond Title VII's prohibitions); Higgins v. New Balance Athletic Show, Inc., 194 F.3d 252, 29 (1st Cir. 1999) (finding Title VII does not protect against employment discrimination based solely on sexual orientation).

rather than the employee's perceived sexual orientation or as a result of workplace sexual harassment.[177]

In conclusion, Title VII's sex provision does not encompass employment discrimination based on sexual orientation, despite the fact that federal lawmakers have been attempting to pass a law that does provide such protection for at least the past twenty years.[178]

B. The Proposed Employment Non-Discrimination Act ("ENDA")

The federally proposed Employment Non-Discrimination Act ("ENDA"),[179] if ever enacted, would make it an unlawful employment practice for an employer to refuse to hire or to otherwise discriminate against any individual with regard to an existing employment relationship "because of such individual's actual or perceived sexual orientation or gender identity."[180]

Potentially, ENDA is a legislative means for combating employment discrimination targeted at LGBT individuals.[181] The proposed legislation establishes a cause of action for workers who suffer adverse employment actions because of their sexual orientation.[182] Claims under ENDA would operate in the same manner as under Title VII, in that sexual orientation would be a protected trait similar to race, color, religion, sex, and national origin under Title VII.[183] If ENDA were enacted, LGBT employees would no longer need to navigate their claims through the legal labyrinth of

177. *See* Alemzadeh, *supra* note 157, at 346-48 (discussing disconnect between gender stereotyping employment discrimination claims and workplace sexual harassment claims).

178. *See* Michele Garcia, *A Bipartisan Attempt at ENDA*, ADVOCATE (Apr. 15, 2011, 5:38 PM), http://www.advocate.com/news/daily-news/2011/04/15/bipartisan-attempt-enda (discussing history of legislation introduced to congress to provide workplace protection against sexual orientation discrimination). For a thorough analysis of ENDA, see generally Alemzadeh, *supra* note 157 discussing the pros and cons of enacting ENDA in contrast to developing current Title VII precedent to combat sex and gender workplace discrimination and harassment.

179. *See* H.R. 1397, 112th Cong. (1st Sess. 2011) (introducing ENDA bill into United States House of Representatives); S. 811, 112th Cong. (1st Sess. 2011) (introducing ENDA bill into United States Senate).

180. For an outline of the proposed language of the ENDA bill, see *supra* note 179 and accompanying text.

181. Alemzadeh, *supra* note 157, at 356 (discussing increased protections for LGB workers under ENDA). For an outline of the purpose of the ENDA bill, see *supra* note 179 and accompanying text.

182. *See id.* at 356 (discussing ENDA and how it would potentially prevent employers from making employment decision based on "overt homophobia").

183. *See id.* (discussing ENDA and its procedural similarities to Title VII).

Title VII's sex provision.[184] Further, ENDA's statutory language defining adverse employment actions and discrimination nearly mirror the language of Title VII, which suggests that courts would treat ENDA claims under the same interpretation as Title VII claims.[185] The employee would bear the burden of proving that the employer made an employment decision concerning the employee motivated by the employee's sexual orientation.[186] For example, a gay male worker, who conforms to the stereotype associated with his gender and who is open about his sexual orientation at the workplace, would have a federal statutory cause of action if he was discharged solely because of his sexual orientation.[187]

However, ENDA has yet to be passed, despite the fact that similar legislation has been proposed in some form in nearly every Congress since 1994.[188] In the context of the gridlock plaguing the most recent Congress, it is unlikely that ENDA will be enacted in the immediate future; one commentator notes that the 112th Congress "finished its legislative session in January 2013, [as] the least productive Congress in sixty-five years."[189] However, on November

184. *See id.* (discussing ENDA and Title VII and highlighting specific language within ENDA that expands Title VII sex discrimination protections against sexual orientation discrimination in workplace).

185. *See id.* at 356-57 (outlining framework of discrimination claim under ENDA compared to Title VII and describing ENDA as "[i]ntegrating sexual preference and gender identity into Title VII protections").

186. *See id.* at 357-58 (discussing potential sexual orientation discrimination claim under ENDA and potential requisite judicial inquiry noting ENDA specific prohibition against discrimination based upon sexual orientation rather than Title VII's because of sex provision and how it would force courts to engage in probing analysis of employer's conduct and motivations rather than whether or not employee's traits fall within Title VII protections).

187. *See* Alemzadeh, *supra* note 157, at 356 (citing *Equality at Work: Employment Discrimination Act: Hearing Before the S. Comm. On Health, Education, Labor, and Pensions* 112th Congress (2012) (statement of M.V. Lee Badgett, Research Dir. of the Williams Inst. for Sexual Orientation Law and Pub. Policy at UCLA and Dir. Of the Ctr. for Pub. Policy and Admin. at the Univ. of Mass. Amherst)); *see also* Kramer, *supra* note 20, at 301 n.66 ("[T]ransgender employees, though not uniformly successful, have had more success than lesbian and gay employees in pursuing remedies under Title VII's sex provision").

188. *See* Garcia, *supra* note 178 (discussing ENDA). For a thorough analysis of ENDA, see generally Alemzadeh, *supra* note 157 and accompanying text (discussing the pros and cons of enacting ENDA in contrast to developing current Title VII precedent to combat sex and gender workplace discrimination and harassment).

189. *See* Franita Tolson, et al., *The Union as a Safeguard Against Faction: Congressional Gridlock as State Empowerment, in Symposium, the American Congress: Legal Implications of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2276 (2012-2013) (discussing polarization and self-regarding elected officials impeding legislative efficiency of Congress (citing Stephanie Condon, *Five Big Issues for the New Congress*, CBS NEWS (Jan. 4, 2013, 6:00 AM), http://www.cbsnews.com/8301-250_162-5751973/five-big-issues-for-the-new-congress); Jennifer Steinhauer, *Congress Nearing End of Session*

7, 2013, the Senate of the 113th Congress approved ENDA, but the bill is not expected to pass the House of Representatives because of House republican opposition to the bill.[190] Nonetheless, as of this writing, LGB individuals, who face workplace discrimination based solely on their sexual orientation must rely on state or local law, or a private employment policy.[191]

1. *State and Municipal Workplace Protections for LGBT Workers*

Currently, twenty-one states and the District of Columbia prohibit employment discrimination based on sexual orientation.[192] Of 137 U.S. cities studied in the Human Rights Campaign, 104 cities had at least some form of ordinance prohibiting discrimination on the basis of sexual orientation, either for housing, employment, or public accommodations.[193]

Where Partisan Input Impeded Output, N.Y. TIMES, Sept. 18, 2012, at A21, *available at* http://www.nytimes.com/2012/09/19/us/politics/congress-nears-end-of-least-productive-session.html; *Outgoing 112th Congress Least Productive in 65 Years*, CBS NEWS (Jan. 3, 2013), http://www.cbsnews.com/video/watch/?id=50138133n).

190. *See* Jeremy W. Peters, *Senate Approves Ban on Antigay Bias in Workplace*, N.Y. TIMES, Nov. 7, 2013, http://www.nytimes.com/2013/11/08/us/politics/senate-moves-to-final-vote-on-workplace-gay-bias-ban.html?emc=edit_na_20131107&_r=0 (reporting Senate's approval of ENDA by vote of 64 to 32 but reining in expectations of bill's passage by House of Representatives noting that House Speaker, Republican John A. Boehner, has repeatedly opposed ENDA).

191. *See* Kramer, *supra* note 20, at 301 (discussing lack of federal cause of action for discrimination based solely of sexual orientation).

192. *See* HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS AND POLICIES (July 22, 2013), *available at* http://www.hrc.org/files/assets/resources/employment_laws_072013.pdf (last visited Sep. 1, 2013) (indicating states with non-discrimination laws that include protections for individuals on basis of sexual orientation and gender identity, and years laws were enacted, as follows: California (1992, 2003), Colorado (2007), Connecticut (1991, 2011), Delaware (2009, 2013), District of Columbia (1977, 2006), Hawaii (1991, 2011), Illinois (2006), Iowa (2007), Massachusetts (1989, 2012), Maine (2005), Minnesota (1993), New Jersey (1992, 2007), New Mexico (2003), Nevada (1999, 2011), Oregon (2008), Rhode Island (1995, 2001), Vermont (1991, 2007) and Washington (2006); including four states that have similar laws but do not include gender identity as follows: Maryland (2001), New Hampshire (1998), New York (2003) and Wisconsin (1982)).

193. *See* HUMAN RIGHTS CAMPAIGN, MUNICIPAL EQUALITY INDEX 2012 (2012) [hereinafter "MUNICIPAL EQUALITY INDEX"], *available at* http://www.hrc.org/campaigns/municipal-equality-index (evaluating cities' acceptance of individuals on basis of sexual orientation based on "whether discrimination on the basis of sexual orientation and gender identity is prohibited in areas of employment, housing, and public accommodations[,]" and cities are evaluated and ranked according number out of three categories – housing, employment, and public accommodations – for which they employ ordinances prohibiting discrimination based on sexual orientation or gender identity, and a higher ranking for prohibiting both).

However, bringing and succeeding on a claim at the state level may be complicated.[194] States and municipalities often lack efficient resources and enforcement mechanisms to fully enforce and pursue claims under their non-discrimination laws.[195] Of the 104 cities that have some form of legal non-discrimination protection for LGB individuals, the scope of these laws varies drastically from state to state and city to city, and many only cover public employees.[196] Further, states and municipalities often lack the requisite funding to efficiently enforce their local sexual orientation non-discrimination laws.[197] Additionally, these laws can be particularly vulnerable to frequent repeal and reenactment because of political polarization over the issue of gay rights among local legislative bodies.[198] Therefore, although many state and municipalities have enacted ENDA-like legislation, it may still be difficult to realize sufficient protection under such laws, especially where an em-

194. *See* Lavelle, *supra* note 20, at 519-20 (acknowledging that many states do have some sort of legal protection against sexual orientation based discrimination for certain forms of employment but identifying concerns of tangibility of these protections due to concerns over varying scopes of coverage and lack of resources for enforcement agencies at state and municipal levels).

195. *See id.* at 519-20 (discussing viability of state and local laws as means of protecting against sexual orientation employment discrimination (citing Prizer, *supra* note 20, at 757-59)).

196. *See* MUNICIPAL EQUALITY INDEX, *supra* note 193 (reporting statistics on municipalities that employ anti-discrimination ordinances protecting against sexual orientation discrimination). *See generally* Michael A. Woods, Comment, *The Propriety of Local Government Protections of Gays and Lesbians from Discriminatory Employment Practices*, 52 EMORY L. J. 515 (2003) (examining utility of state and local laws to combat discrimination).

197. *See* Prizer, *supra* note 20, at 755-58 (noting that although states and localities may have laws and ordinances prohibiting sexual orientation based employment discrimination many states and municipalities lack sufficient resources to enforce such prohibitions) (citing DOCUMENTING DISCRIMINATION, *supra* note 47, §§ 1-15)). *But see* Woods, *supra* note 196, at 527-28 (acknowledging argument that states and localities lack sufficient resources to enforce non-discrimination laws but arguing that such laws, "if properly supported, have great potential for effectiveness" and may have strong "prophylactic effect").

198. *See* Prizer, *supra* note 20, at 755-58 (arguing that political turmoil within respective state's or locality's legislative body make efficacy of sexual orientation based anti-discrimination laws and ordinances too inconsistent to provide LGBT workers with realistic protection against employment discrimination) (citing DOCUMENTING DISCRIMINATION, *supra* note 47, §§ 1-15)); *see also* Chad A. Readler, Comment, *Local Government Anti-Discrimination Laws: Do They Make a Difference?*, 31 U. MICH. J.L. REFORM 777, 809-11 (1997-1998) (opining that federal government is most efficient means for regulating discrimination in private employment and discussing political instability (leading to frequent repeal and reenactment of controversial laws), lack of resources, and inconsistent enforcement mechanisms between state, county, and local administrative agencies as primary factors for why local ordinances and state laws proscribing employment discrimination on basis of sexual orientation may not provide LGBT workers with adequate protection).

ployee's contract is sophisticated and contains or is regulated by a collective bargaining agreement.[199]

C. Non-Discrimination Employment Policies

Many employers form employment non-discrimination policies to provide LGBT employees with workplace protections against discrimination and adverse treatment.[200] A 2012 study conducted by the Human Rights Campaign Foundation ("HRC") indicates that eighty-eight percent of Fortune 500 companies include sexual orientation in their non-discrimination policies, and sixty-two percent offer medical benefits equally to domestic partners (cohabiting sexual partners that are not legally married) as to spouses.[201]

Employment non-discrimination policies may equip an employee with a right of private action to seek remedies for breach of contract, should the policy be violated.[202] Employment policies are generally incorporated directly into an employment contract and the contract specifically outlines the terms that regulate the employment relationship between employer and employee.[203] In addition, employment policies may also be gleaned from various factors of a particular employment relationship.[204]

Although contracts for an unspecified time are presumed to be at-will unless the contract states otherwise, employment materials or workplace policies that are distributed to employees may augment an existing contract and such materials may limit an employer's ability to alter the employment relationship at will.[205] Such tangi-

199. *See* Prizer, *supra* note 20, at 757 (discussing state and local law issues and problems that limit effectiveness of state and local prohibitions of sexual orientation based employment discrimination).

200. *See* Green, *supra* note 8, at 7 (reviewing practicality for employers to follow broad non-discrimination policies that can apply to employees nationally, regardless of state in which they are employed, and arguing that expansive non-discrimination policies attract diverse workforce which is an attractive feature for large national and international companies).

201. *See* HUMAN RIGHTS CAMPAIGN FOUND., CORPORATE EQUALITY INDEX 2013, 8 (2013) (discussing annual report's findings).

202. *See* Prizer, *supra* note 20, at 759 (outlining potential contract remedies available under employment policies); Green, *supra* note 8, at 7 (examining growing prevalence among large corporations of employment policies prohibiting sexual orientation discrimination and potential remedies under such policies).

203. *See* Gregory, *supra* note 11, at 284 (discussing employer utilization of non-discrimination policies to govern employment relationship).

204. *See id.* at 284-87 (analyzing potential non-contractual employment policies).

205. *See id.* at 284-87 (discussing non-discrimination policies that may create cognizable contract right for LGBT workers in case of discrimination based on sexual orientation (citing Duldulao v. St. Mary of Nazareth Hosp. Ctr., 505 N.E.2d

ble materials are often distributed to employees during employee trainings or workshops in the form of handbooks, memos, or other documents.[206] Moreover, multiple factors of an employment relationship, such as the conduct between the employer and employee, length of employment, and words exchanged, may create an implied contract incident of the employment relationship and a non-discrimination policy.[207] So long as such employment policies establish the traditional contract elements of offer, acceptance, and consideration, an implied contract may exist between an employer and an employee.[208] Therefore, non-discrimination policies may provide employees with protections from sexual orientation based employment discrimination, so long as they work for an employer that utilizes such a policy.[209]

D. The NBA's Non-Discrimination Policy and Collective Bargaining Agreement

In the context of professional basketball, the NBA's non-discrimination policy is incorporated into the employment relationship through collective bargaining between the NBA and the

314, 316, 318 (Ill. 1987); Johnson v. Celius Energy Co., 1989 WL 260154 (D. Wyo. 1989))).

206. *See id.* at 284-87 (reviewing non-contractual employment policies).

207. *See id.* (analyzing breach of contract claims based on violations of employer non-discrimination policies that encompass sexual orientation as means of legal remedy for employment discrimination on basis of sexual orientation and considering similar cause of action for collegiate student athletes against universities or colleges incorporating similar non-discrimination policies into student handbooks).

208. *See id.* (reviewing employment policies and potential contractual remedies).

209. *See* Gregory, *supra* note 11, at 286 ("some jurisdictions may accept the argument that the inclusion of sexual orientation in an employer's non-discrimination clause creates an enforceable right for gays and lesbians"); *see also* Williams, *supra* note 28, at 273 (discussing Gregory, *supra* note 11, and recognizing non-discrimination policy that prohibits discrimination based on sexual orientation as creating possible cause of action in context of college athletes seeking to bring claim for sexual orientation discrimination against college or university but further highlighting that National Collegiate Athletic Association (NCAA) has "*Principal of Non-discrimination* [sic] in its manual for each division which suggests that each of its members prohibit gender and sexual orientation discrimination," and that individual athletic departments within universities or colleges employ non-discrimination policies suggesting student athletes may reasonably rely on such policies and have cause of action where school or department violates such policy (citing NAT'L COLLEGIATE ATHLETIC ASSOCIATION, 2006-07 NCAA DIVISION I MANUAL, 2.6 *The Principle of Non-discrimination*, 4 (2006), http://www.ncaa.org/library/membership/division_i_manual/; *Our Mission* OHIO STATE DEP'T OF ATHLETICS (2006), http://ohiostatebukceyes.collegesports.com/genrel/mission.html)).

Players Association.[210] Recall that the NBA updated its non-discrimination policy to prohibit discrimination based on sexual orientation and incorporated the policy into the 2011 revised CBA, a decision positively recognized by the Human Rights Campaign.[211] The CBA regulates all aspects of players' employment relationships with their teams and with the NBA.[212] The Players Association represents the interests of all NBA players when negotiating with the NBA.[213] Because of the complexity of antitrust law and labor law issues arising from collective bargaining agreements, a brief overview of the collective bargaining process is necessary before addressing potential player relief under the NBA CBA.[214]

1. *Collective Bargaining and Federal Anti-Trust Law*

The importance of collective bargaining between the Players Association and the NBA to negotiate the complete structure of their employment relationship cannot be understated, for it protects the NBA rules from antitrust liability under Section 1 of the Sherman Act.[215] Generally, contracts, agreements, or conspiracies to collaborate between competing businesses in order to regulate and control a market for the mutual benefit of those businesses are detrimental to competition in that market and to the businesses

210. *See* NBA CBA, *supra* note 24, Art. XXX, § 5 ("Neither the NBA, any Team nor the Players Association shall discriminate in the interpretation or application of this Agreement against or in favor of any Player because of religion, race, national origin, sexual orientation or activity or lack of activity on behalf of the Players Association."); *see also* NBA's NON-DISCRIMINATION POLICY, *supra* note 24 (proscribing employment decisions made on account of sexual orientation).

211. *See HRC Applauds NBA for Non-Discrimination Protection in Collective Bargaining Agreement*, HUMANRIGHTSCAMPAIGN.COM (Dec. 8, 2011), http://www.hrc.org/press-releases/entry/hrc-applauds-nba-for-non-discrimination-protections-in-collective-bargainin (praising NBA for incorporating non-discrimination policy within 2011 CBA).

212. *See* McCann, *supra* note 24, at 44-48 (discussing importance of negotiating terms structuring entire relationship between NBA and Players Association under collective bargaining).

213. *See id.* (outlining relationship between Players Association and NBA and importance of negotiations between them in order to prevent NBA rules and regulations from being subjected to antitrust liability).

214. For a thorough discussion on recent developments in collective bargaining agreements in professional sports, see generally Feldman, *supra* note 24 (discussing recent NFL and NBA lockouts and subsequent dissolution of each respective players' association in order for players to bring antitrust claims against NFL and NBA).

215. *See* Sherman Antitrust Act, 15 U.S.C. § 1 (2006) (prohibiting contracts or conspiracies in restraint of trade or commerce).

outside such collaborative efforts.[216] Thus, collaborative agreements and contracts between competing businesses are a prohibited restraint on trade under the Sherman Antitrust Act.[217] However, collaborative activities between competing business entities are permitted when all businesses and laborers that make up a market are involved and represented in the collaboration, known as collective bargaining.[218]

Collective bargaining is a contractual function used by the NBA, and most professional sports associations, whereby organized employers and unionized employees negotiate uniform terms of employment and regulation that will govern the employment relationship between the two.[219] This mechanism for structuring an employment relationship falls under statutory exemptions from the Sherman Act's Section 1 prohibition against collaborative agreements.[220] Further, the National Labor Relations Act (NLRA) regulates the collective bargaining process.[221] The NLRA allows for collective bargaining of nearly all terms of employment, such as wages, hours, and other employment conditions.[222]

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216. *See* 15 U.S.C. § 1 (outlining prohibiting collaborative activities between competing business). *See generally* Feldman, *supra* note 24, at 833-35 (analyzing development of collective bargaining).

217. *See* 15 U.S.C. § 1 (prohibiting contracts or conspiracies as restraint of trade or commerce).

218. Collectively, multiple federal statutes operate in favor of collective bargaining in order for unionized labor to negotiate terms with associated employers without being subjected to confines of Sherman Act section 1 prohibitions. *See* Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (2006) (legislating that federal courts no longer have jurisdiction over unionized labor disputes); 15 U.S.C. § 17 (describing antitrust laws inapplicability to labor organizations); 29 U.S.C. § 52 (forbidding U.S. courts from granting restraining orders or injunctive relief in cases arising between employers and employees disputing conditions of employment).

219. *See* Feldman, *supra* note 24, at 833-35 (discussing labor policy behind collective bargaining).

220. The National Labor Relations Act (NLRA) covers labor relations between private sector employers and employees and encompasses collective bargaining in professional sports. *See* 29 U.S.C. § 158 *et seq.* (1994) (ensuring that employees have right to organize their interests and are not barred for collective bargaining by their employers). Specifically, NLRA dictates that employers subject to the statute are obligated to engage in collective bargaining. *See* NLRA, 29 U.S.C. § 158(d) (instructing that collective bargain necessary for employers to avail themselves of statutory exemptions).

221. *See generally* 29 U.S.C. § 158 *et seq.* (identifying purpose of regulating employer-labor relations which are governed under collective bargaining); 29 U.S.C. § 152 (defining applicability of statute).

222. *See* NLRA, 29 U.S.C. § 158(d) (describing obligation to bargain over specified terms of employment in order to create governance of employment relationship).

Thus, for the NBA, the NBA CBA is the ultimate authority governing management-labor relations, and neither the Players Association, nor the NBA, may change the terms of the agreement without collective bargaining.[223] This process allows both organized management and organized labor to carefully negotiate their relationship and to create rules and regulations under which both sides are willing to work.[224] If an employment disagreement arises, both the Players Association and the NBA owners may impose economic hardship upon the other through lockouts and strikes as a means of achieving their goals.[225] Therefore, collective bargaining is a form of unionized labor whereby the negotiated CBA governs every aspect of the employment relationship between the players and the owners and thus, by way of the Players Association, players have an opportunity to bring any issue to the immediate attention of their employer by filing a grievance with the Grievance Arbitrator under the CBA's mandatory arbitration process.[226]

2. *Collective Bargaining and Utility of Arbitration*

Under the CBA, all NBA player contracts are subject to the CBA's terms, including the policy not to discriminate on the basis of sexual orientation.[227] Under the CBA, players do not generally have the right to seek relief from a court; rather, when a dispute arises concerning compliance with the CBA or with a player's contract, a player must submit a complaint, or grievance, to the "Grievance Arbitrator" as specified in accordance with the CBA grievance

223. *See* Wilson, *supra* note 106, at 48 (discussing CBA negotiations as providing "professional athletes an opportunity to impose checks on commissioner power, such as rule changes restrictions and arbitration processes").

224. *See* Feldman, *supra* note 24, at 833-35 (discussing labor policy behind collective bargaining).

225. *See id.* at 833-35 (discussing development of collective bargaining in United States).

226. *See id.* at 833 (discussing brief background of labor law and collective bargaining in United States as means of balancing power between management and labor unions such that labor unions have more realistic opportunity to negotiate better terms of employment than would individual laborers). Feldman goes on to identify two goals of labor law policy:

> [L]abor policy seeks to promote twin goals: good faith bargaining between labor and management and the opportunity for both sides to use economic weapons to gain concessions from each other. . . . The overriding policy of these twin goals, of course, is to encourage the parties to enter voluntarily into a collective bargaining agreement without government interference.

Id. at 835.

227. *See* NBA CBA, *supra* note 24, Art. II, § 5(a) (providing terms of uniform player contract in compliance with CBA and discussing conformity with 2011 CBA terms).

and arbitration procedure.[228] Therefore, the NBA's CBA does provide a cause of action for sexual orientation discrimination.[229]

Submitting a grievance to the Grievance Arbitrator is procedurally restrictive, but it is a fairly expeditious process.[230] Before filing a grievance, the player must first bring the issue up with the person with whom he has a problem.[231] A grievance must be initiated the later of thirty days from the occurrence upon which the alleged breach is based, or within thirty days from the date when the facts of the matter became known or reasonably should have become known to the player initiating the grievance.[232]

Under the arbitration process, a single private arbitrator resolves disputes between players, teams, and the NBA by interpreting the CBA and relevant "'contract language,' guided by the parties' intent."[233] Arbitration precludes litigation through the courts, which is an attractive feature for professional sports associations because of its accessibility, expediency, and privacy.[234] The private feature of arbitration "is particularly valuable" for professional sports industry, "which on the one hand, is very conscious of its public image, and on the other hand, is subjected to the constant probing of the news media."[235] Therefore, the collective bargaining process provides bargained-for rules, and the Players Association provides players with a means of seeking relief for alleged

228. *See* NBA CBA, *supra* note 24, Art. XXXI, § 1(a)(i) ("Grievance Arbitrator shall have exclusive jurisdiction to determine . . . any and all disputes involving the interpretation, application, or compliance with, the provisions of this [CBA] of provisions of a Player Contract, including a dispute concerning validity of a Player Contract."); NAT'L BASKETBALL PLAYERS ASS'N, LEGAL DEPARTMENT, *available at* http://www.nbpa.org/legal-department (last visited Sept. 3, 2013); McCann, *supra* note 24, at 44-45 (describing Players Association as sole representative of all NBA players concerning employment issues and rules of conduct related disputes).

229. *See* NBA CBA, *supra* note 24, Art. XXX, § 5, Art. XXXI, § 13 (outlining non-discrimination policy and grievance and arbitration procedure for disputes arising under no discrimination policy).

230. *See generally id.* Art. XXXI and XXXII (outlining grievance arbitration procedure).

231. *See id.* Art. XXXI, § 2(b) ("No party may initiate a Grievance until and unless it has first discussed the matter with the part or parties against whom the Grievance is to be initiated in an attempt to settle it.").

232. *See id.* (outlining time sensitivity of initiating grievance-filing process).

233. *See* Martin J. Greenberg, *Alternative Dispute Resolution in Sports Facility Leases*, 16 MARQ. SPORTS L. REV. 99, 99-102 (2005-2006) (discussing adoption of arbitration in professional sports).

234. *See id.* at 102 (discussing attractive features of arbitration for professional sports organizations).

235. *See id.* (discussing private feature of arbitration in context of professional sports (citing MARTIN J. GREENBERG, SPORTS LAW PRACTICE 70-73 (1993))).

breaches of the CBA and a means for demanding changes to the rules and regulations in a timely and private manner.[236]

3. *Grievance Arbitration Procedures and NBA CBA Article XXX(5)*

The Players Association negotiates employment-related issues, league rules, and disciplinary procedures on behalf of all NBA players.[237] Sexual orientation is a trait expressly protected under the NBA's non-discrimination policy.[238] The CBA's anti-discrimination clause, Article XXX(5), states that "[n]either the NBA, any Team nor the Players Association shall discriminate in the interpretation or application of this [CBA] against or in favor of any Player because of religion, race, national origin, sexual orientation . . . ."[239] Recall that player contracts are subject to the CBA and any disputes arising between a player and a team relating to the contract are to be taken up in accordance with the grievance and arbitration procedure outlined in the CBA.[240] Also, the CBA, including uniform player contracts, is governed by New York state law.[241] Theoretically, a player who believes that he has been discriminated against in the interpretation or application of the CBA on the basis of his sexual orientation may file a grievance under the CBA arbitration.[242]

A player may initiate a grievance against the NBA or against an NBA team by filing written notice with the team and the NBA.[243] The notice must expressly state that the party is initiating a grievance and what the grievance is in reference to.[244] Once a hearing is scheduled, the player has an opportunity to have the grievance

236. *See* Wilson, *supra* note 106, at 48 (discussing CBA negotiations as providing "professional athletes an opportunity to impose checks on commissioner power, such as rule changes restrictions and arbitration processes").

237. *See* NBA CBA, *supra* note 24, XXXIV (recognizing Players Association as exclusive collective bargaining representative); *see also* McCann, *supra* note 24, at 44-45 (discussing relationship between NBA and NBPA, and importance of negotiation and cooperation between them in order to negotiate terms and rules for structuring leagues and their relationship).

238. *See id.* Art. XXX, § 5 (outlining employment anti-discrimination policy prohibiting discrimination under NBA CBA on basis of sexual orientation).

239. *See id.* (describing applicability of no discrimination clause concerning parties to CBA, which include NBA, NBA Teams, NBA Players, and Players Association).

240. *See id.* Exhibit A, para. 17 (providing that disputes must be resolved via grievance and arbitration procedure).

241. *See id.* Art. XXXVIII, § 3 (providing choice of law clause governing CBA).

242. *See id.* Art. XXXI, § 2 (describing procedure for filing grievance).

243. *See* NBA CBA, *supra* note 24, Art. XXXI, § 2(d) (outlining procedure for filing grievance under NBA's CBA).

244. *See id.* Art. XXXI, § 2(d) (defining process for grievance filings).

heard by the arbitrator; however, "[o]nly the NBA and Players Association may schedule hearings before Grievance Arbitrator."[245] Upon a hearing on the facts, the Grievance Arbitrator gives a decision and determines an award, constituting the complete disposition of the grievance, which is binding upon the player, team, and other parties involved.[246]

However, Article XXX(5), the non-discrimination clause, entitles the Players Association to request expedited procedure to bring the alleged breach immediately to arbitration rather than having to bring up the issue with the person or team involved in the dispute.[247] Under expedited procedure, the notice may be given in writing or by facsimile to the other party.[248] Also through this process, "[t]he Grievance Arbitrator shall convene a hearing with respect to such dispute or alleged breach at the earliest possible time, but in no event later than twenty-four[ ] hours following his receipt of [ ]notice."[249] Further, under these circumstances, the Grievance Arbitrator's award shall be issued no later than twenty-four hours after the conclusion of the hearing and shall constitute a full, final, and complete disposition of the alleged breach and shall be binding on all parties.[250]

In resolving disputes or alleged breaches of Article XXX(5), the Grievance Arbitrator is authorized to interpret, apply, and determine compliance with CBA, player contract provisions, validity of player contracts, and to award damages in connection with a proceeding concerning players withholding services.[251] Teams may seek declaratory relief from the Grievance Arbitrator to determine whether a team may terminate a player's contract and the requisite liability resulting from termination.[252] Therefore, a player who be-

245. *See id.* Art. XXXI, § 4(a) (describing arbitration procedures).

246. *See id.* Art. XXXI, § 6(a) (provisioning Grievance Arbitrator's decision and award procedure).

247. *See id.* Art. XXXI, § 13(a) (detailing expedited procedure for "disputes arising under . . . Article XXX").

248. *See id.* Art. XXXI, § 13(a) (mandating that notice must also be given to NBA, the Players Association, and the Grievance Arbitrator).

249. *See* NBA CBA, *supra* note 24, Art. XXXI, § 13(b) (allowing parties to select another arbitrator if Grievance Arbitrator is not immediately able to hear and resolve dispute).

250. *See id.* Art. XXXI, § 13(c) (providing expedited process for certain grievances).

251. *See id.* Art. XXXI, § 6(b) (defining scope of Grievance Arbitrator's jurisdiction and authority).

252. *See id.* Art. XXXI, § 6(b) (instructing that Grievance Arbitrator only has authority to provide certain remedies under certain circumstances specific to NBC CBA).

lieves that the NBA or a team discriminated against him based upon his sexual orientation may submit a grievance to the Grievance Arbitrator and the Players Association may request expedited service.[253]

IV. POTENTIAL CAUSES OF ACTION FOR JASON COLLINS

This Part explores potential protections and grievance arbitration procedures available to Jason Collins should he be denied an opportunity to be the first openly gay player to compete on an NBA team.[254] Section A presents a brief summary and update of the underlying facts and circumstances of Jason Collins's statistics and reputation throughout his career prior to publicly disclosing his homosexuality, the consequences of that disclosure, and his free agency in the context of being unsigned going into the 2013-2014 NBA season.[255] Section B applies the facts to potential legal remedies under Title VII.[256] Section C reviews the viability of filing a grievance against the NBA under the CBA.[257] Part V concludes that Collins's best opportunity for protection, and to substantially impact the legal and social landscape of professional sports, is to file a grievance under the CBA against the NBA for violating its non-discrimination policy.[258]

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253. The non-discrimination policy prohibits discrimination based on sexual orientation under section five of article XXX and section thirteen of article XXXI grants the Players Association the right to request expedited procedure for disputes arising under article XXX. *See* NBA CBA, *supra* note 24, Art XXX, § 5 (prohibiting employment discrimination on basis of sexual orientation); *see also id.* Art. XXXI, § 13 (granting Players Association right to request expedited arbitration process).

254. Currently, Jason Collins has yet to sign a contract with an NBA team. *See* Jenkins, *supra* note 3 (reporting that Collins has yet to secure roster spot on an NBA team).

255. *See* Collins & Lidz, *supra* note 2 (discussing Collins's decision to come out publicly). The facts section will rely primarily on Jason Collins's public statements to the media about his experiences as a player and his decision to come out along with relevant public reactions as portrayed through the media. *See* Collins & Lidz, *supra* note 2; Beck, *supra* note 17 (describing Commissioner Stern as having "a long track record of progressive policies").

256. For a detailed discussion of potential causes of action under Title VII, ENDA, State and Local laws, and the NBA's non-discrimination policy, see *supra* notes 128-253 and accompanying text.

257. For a discussion reviewing whether or not potential claim under particular legal form would be realistic opportunity for relief for Jason Collins, see *infra* notes 293-331 and accompanying text.

258. For a discussion of the practical and future benefits and policy ramifications of establishing form of relief under CBA for player discrimination based on sexual orientation, see *infra* notes 332-42 and accompanying text.

A. Jason Collins

1. *By the Numbers*

Jason Collins, originally from Los Angeles, California, was a standout collegiate basketball player at Stanford University from 1997-2001.[259] During Collins's senior season at Stanford he averaged 14.5 points and 7.8 rebounds per game, and he was named to the All Pac-10 First Team.[260] Collins's was selected with the eighteenth overall pick in the 2001 NBA Draft.[261]

In contrast, Jason Collins was never a statistical standout as an NBA player.[262] Jason Collins's NBA career average is marginal: 3.7 points and 3.8 rebounds per game.[263] During the 2012-2013 NBA season, Collins averaged 1.1 points and 1.5 rebounds per game through thirty-seven games.[264] Collins's numbers are particularly mediocre when taken in consideration with Collins's high veteran price tag, $1,399,507, which is the NBA CBA mandated minimum salary for players with ten or more years of NBA experience.[265] To put Jason Collins's numbers in context, the Detroit Pistons signed forward-center Josh Harrellson over Collins during the off-season, for reportedly $500,000: Harrellson is a third year NBA player and is currently averaging 2.9 points and 2.4 rebounds per game.[266]

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259. *See* Jake Curtis, *Rembering Jason Collins at Stanford*, EXAMINER.COM (April 30, 2013), http://www.examiner.com/article/remembering-jason-collins-at-stanford (discussing Jason Collins's playing for Stanford); *Jason Collins's NBA Biography*, NBA.COM, http://www.nba.com/playerfile/jason_collins/bio/ (last visited Jan. 15, 2014) (listing Collins's statistics throughout twelve NBA seasons and Collins's collegiate accolades).

260. *See* Curtis, *supra* note 259 (discussing Collins's career statistics).

261. *See id.* (outlining Collins's career and background).

262. *See Jason Collins's NBA Biography*, *supra* note 259 (listing Collins's statistical season averages through 2012-2013 season).

263. *See id.* (listing Collins's statistical season averages through 2012-2013 season); Araton, *supra* note 3 (listing Collins's average statistical output).

264. *See Jason Collins's NBA Biography*, *supra* note 259 (listing Collins's statistical season averages through 2012-2013 season); Araton, *supra* note 3 (describing Collins's career average).

265. *See* NBA CBA, *supra* note 24 (graphing projected minimum salaries for NBA players according to upcoming seasons and players' years of service as professional NBA basketball player); Araton, *supra* note 3 (discussing Collins's high price compared with Collins's average statistical output).

266. *See* Araton, *supra* note 3 (reporting that Detroit Pistons did have Collins come work out with team during off-season but ultimately opted to sign Harrellson); *Josh Harrellson Player Profile*, NBA.COM, http://www.nba.com/playerfile/josh_harrellson/ (last visited Mar. 1, 2014) (listing Harrellson's statistics for current 2013-2014 season with Detroit Pistons).

2. *Jason Collins's Intangible Assets: "The Pro's Pro"*

Throughout his career, Jason Collins has been described as the "pro's pro;" an intelligent player with an uncompromising work ethic who was always eager to give a foul, or take one, for his team.[267] Collins was consistently heralded as being a great "locker room player" and good role model for young players coming into the league.[268] Doc Rivers, who coached Collins while both were under contract with the Boston Celtics, described Collins as "one of the best guys I've ever had in the locker room, player or coach[.]"[269] During the 2011 NBA playoffs, while Collins and the Atlanta Hawks were facing the Orlando Magic, then-coach Stan Van Gundy described Collins's defense of all-star center Dwight Howard as "the best defense on Howard all year."[270]

3. *Collins's Experience in the NBA as a Closeted Gay Player*

Collins's personal experience as a gay professional athlete has been less documented than his work ethic and game performance statistics.[271] Since Collins disclosed his sexual orientation in April of 2013, he has generally avoided the media.[272] Collins spent the 2013 summer in his home town of Los Angeles working out, and preparing for a team to call him to play a thirteenth season.[273]

267. *See* Collins & Lidz, *supra* note 2 (describing how Collins was perceived by others in NBA); Beck, *supra* note 17 (noting Collins's reputation as intelligent veteran with strong work ethic factoring in Collins's favor and which has previously helped Collins secure late-off-season contracts); Tim Dahlberg, *Free Agent Collins Has Come Out. Now, Will a Team Come Forward?*, VIRGINIA-PILOT, July 5, 2013, at C1 (quoting Steve Kerr describing Collins as "well regarded around the league" for being smart and physical and Collins's ability to share his "preparation and work ethic" with younger teammates).

268. For a further discussion regarding Jason Collins's character, see *supra* notes 19-20 (discussing Jason Collins's positive characteristics both on and off court).

269. *See* Tom Layman, *Jason Collins Warmly Welcomed Back to Garden*, BOS. HERALD, Apr. 8, 2013, *available at* http://bostonherald.com/sports/celtics_nba/boston_celtics/2013/04/jason_collins_warmly_welcomed_back_to_garden (quoting then Boston Celtics head coach Doc Rivers).

270. *See* Jenkins, *supra* note 3 (quoting Stan Van Gundy and John Hollinger on ESPN.com describing Jason Collins's tactical defense).

271. *See* Collins & Lidz, *supra* note 2 (describing his view that players and people were generally surprised by his revelation of his sexual orientation).

272. *See* Jenkins, *supra* note 3 (stating that Collins has not granted interviews over summer which he has been spending in his hometown of Los Angeles, presumably working out and preparing for season); *see also* Collins & Lidz, *supra* note 2 (describing Collins's regimented summer routine of immediately beginning to prepare for next season at start of off-season).

273. *See* Collins & Lidz, *supra* note 2 (discussing Collin's off season exercise and work-out regimen in preparation for playing another season); *see also* Jenkins, *supra* note 3 (stating that Collins has not granted interviews over summer which he

However, Collins's initial public disclosure does shed some light on his experience as a gay player.[274] In the article that Collins wrote for Sports Illustrated, he explained that the "strain of hiding [his] sexuality became almost unbearable," and that he "endured years of misery and [went] to enormous lengths to live a lie."[275] But Collins noted that he intends to "guard his privacy" and that he hopes that players and coaches show him the respect that he deserves as an NBA veteran.[276] Although Collins expressed that he was happy to be "coming out in 2013 rather than 2003" because "public opinion has shifted," he also noted that he had no idea how the NBA would react to his disclosure.[277]

4. *Jason Collins's Reception as an Active, Openly Gay Professional Athlete*

Indeed, Jason Collins garnered broad public and player support when he publicly disclosed his sexual orientation.[278] Many NBA players and personnel also expressed their support for Collins.[279] But Collins's announcement was not met with complete acceptance in the sports world.[280] During an Outside the Lines broadcast on ESPN, sports columnist Chris Broussard described Collins's sexual orientation as "a sin."[281] Further, Golden State Warriors head coach Mark Jackson had a nonplussed reaction to

has been spending in his hometown of Los Angeles, presumably working out and preparing for season); Collins & Lidz, *supra* note 2 (describing his regimented summer routine of immediately beginning to prepare for next season during offseason).

274. *See* Collins & Lidz, *supra* note 2 (describing difficulty for Collins of hiding his sexuality from friends, family, and at workplace).

275. *See id.* (reporting burden for Collins of avoiding getting close with fellow teammates).

276. *See id.* (describing Collins's desire to be treated fairly and to continue playing professional basketball); Araton, *supra* note 3 (reporting that Collins does not want to pursue playing in Europe but rather that Collins is determined to continue playing in NBA).

277. *See* Collins & Lidz, *supra* note 2 (describing Collins's uncertainty going forward but also tremendous relief to no longer be wearing "mask").

278. For a more detailed discussion of athlete, politician, and celebrity support for Jason Collins, see *supra* notes 2, 3 and accompanying text.

279. For a more detailed discussion of NBA players' positive reactions towards Jason Collins and comments supporting supporting LGBT issues, see *supra* notes 114-124 and accompanying text.

280. *See* Benjamin & Haughney, *supra* note 4 (noting ESPN reporter Chris Broussard responding unfavorably to Collins's announcement and also reporting NFL team Miami Dolphins' Wide Receiver Mike Wallace's twitter comment "[a]ll these beautiful women in the world and guys wanna [sic] mess with guys" (alterations added)).

281. *See id.* (noting ESPN reporter Chris Broussard responding to Collins's announcement by calling homosexuality "a sin" while on air during ESPN's

Jason Collins's coming out: Jackson was quoted as saying "[w]e live in a country that allows you to be whoever you want to be. As a Christian man, I have beliefs of what's right and what's wrong. That being said, I know Jason Collins. I know his family. And certainly I'm praying for them at this time."[282]

5. *The Off-Season: Collins's Failure to Secure an NBA Contract*

Jason Collins's statistical margin has not drawn much attention from teams during his free agency.[283] During the 2013 summer offseason, only the Golden State Warriors and Detroit Pistons reportedly expressed interest in Collins.[284] Both clubs had Collins come and work out with their teams, but neither club offered Collins a contract.[285] At least one reporter speculated whether Warriors head coach Mark Jackson allowed any personally held beliefs, recalling Jackson's un-encouraging remarks about Collins's sexual orientation, to influence his decision not to sign Collins.[286] The journalist did not directly allege that Mark Jackson failed to sign Jason Collins because of Collins's sexual orientation, but the journalist also did not necessarily rule out that possibility.[287]

6. *From the Sidelines: The Beginning of the 2013-2014 NBA Season*

Now that the 2013-2014 NBA season is under way, Collins has resurfaced and is puzzled over the fact that he has not received a contract.[288] Jason Collins has not dismissed the idea that his sexual

Outside the Lines program and also noting ESPN's timely public apology for Broussard's comments).

282. *See* Jenkins, *supra* note 3 (quoting Mark Jackson and describing his response as "less-than-jubilant").

283. *See id.* (describing Collins's minimal attention from interested teams).

284. *See* Araton, *supra* note 3 (reporting Detroit Pistons's initial interest in Collins); *see also* Jenkins, *supra* note 3 (discussing Warriors's initial interest in Collins).

285. *See* Araton, *supra* note 3 (discussing Detroit Pistons's initial interest in Collins but noting that Pistons went on to sign Josh Harrellson for nearly $500,000 less than it would have cost team to sign Collins at minimum veteran salary of nearly $1.4 million); Jenkins, *supra* note 3 (discussing Warriors's initial interest in Collins).

286. *See* Jenkins, *supra* note 3 (advancing that it is "not known how coach Mark Jackson truly felt about adding Collins").

287. *See id.* (outlining potential reasons why Collins has yet to be signed but opining that it would be difficult to discern whether or how Collins's sexual orientation factored into any team's decision not to sign him or not to pursue him).

288. *See* Araton, *supra* note 3 (reporting Collins's disappointment with not being signed going into NBA pre-season); *Jason Collins: Out and Still Unemployed*, NPR.COM (Oct. 18, 2013, 4:29 PM), http://www.npr.org/templates/story/story.php?storyId=237166792 [hereinafter *Jason Collins Unemployed*] (reporting Collins's lack of NBA contract during NBA pre-season).

orientation may have something to do with the fact that he has not been signed.[289] During an interview, Collins would not speculate whether he believed "something more sinister" was preventing a team from signing him, but he said, "I feel there are players in the league right now that, quite frankly, I'm better than.'"[290] However, neither former Commissioner Stern, nor his protégé, Commissioner Adam Silver, have agreed to thoroughly discuss the issue other than commenting that "they were satisfied that teams were making only basketball related decisions."[291]

One reporter suggested that Collins's marginal ability would likely prevent him from obtaining a position on an NBA team and would also leave Collins and spectators begging the question of whether Collins's sexual orientation was a factor; the article goes on to state that, "[i]f this historic milestone is bypassed, there will be no accountability, no villains, just an opportunity shamefully missed."[292]

B. Title VII Sex Discrimination Claim

The crux of succeeding on a Title VII employment sex-discrimination claim is a combination of overcoming the confines of Title VII's sex provision and proving the causation element.[293] In review, Title VII's sex provision has been interpreted to prohibit gender discrimination.[294] Further, recall that federal district courts and

289. *See Jason Collins: Out and Still Unemployed*, *supra* note 288 (reporting Collins's inability to secure roster spot on NBA team and describing Collins's frustration over having not being able to participate in pre-season).

290. *See* Araton, *supra* note 3 (reporting Collins's remarks of disappointment and frustration over failing to secure spot on NBA team).

291. *See id.* (describing Stern's and Silver's limited view on Jason Collins issue and describing Collins's disappointment over prospect of no longer playing basketball in NBA); Rovell, *supra* note 111 (quoting new NBA Commissioner Adam Silver saying "[i]n terms of Jason not getting signed, based on everything I've been told, it's a basketball decision").

292. *See* Jenkins, *supra* note 3 (discussing potential reasons why Collins has yet to sign with NBA team and identifying difficulty of determining whether homophobia, talent, public relations, or combination of all three will be deciding factor).

293. *See* Kramer, *supra* note 20, at 295-97 (discussing outer limits of sex provision's coverage of employment discrimination based on employee's non-conformity to employer's stereotype of employees perceived gender, and difficulty of proving causation because claimant bears burden of showing employer's psychological state of mind was such that employer made adverse employment decisions against employee based solely on employee's sex rather than based upon some other trait not protected under Title VII).

294. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (finding employer violated Title VII's prohibition against sex discrimination when employer decided not to promote female employee to partner solely because she did not act

federal circuit courts have interpreted the outer limits of Title VII's sex provision as protecting against same-sex, gender stereotyping under narrow circumstances.[295] Such claims arise from situations where employees are subjected to discrimination for not conforming to their employer's masculine or feminine gender stereotypes associated with men and women.[296] Gender stereotyping claims are similar to sex-discrimination claims and generally follow a four-part analysis: (1) the employee's sex, male or female, and the employer's gender expectation of that employee's sex, such as masculinity for males; (2) employee's expressed gender, or how the employee's actions align with a certain gender stereotype, such as effeminacy for male, which contrasts the employer's gender expectation for that employee; (3) employer's employment decision that is adverse to employee; and (4) the employer's decision was made because the employee's sex and expressed gender did not align with the employer's stereotype.[297] Outside of this theoretical framework for gender-stereotyping under Title VII's sex provision, federal courts generally view discrimination claims based solely on sexual orientation as beyond Title VII's scope of protection.[298]

Collins would not have a strong Title VII claim because he conforms to the traditional gender stereotype of a masculine male athlete.[299] In Collins's article for Sports Illustrated he described himself as "go[ing] against the gay stereotype" because of his reputation as a tough, veteran center who delivers hard fouls below the basket.[300] In fact, Collins jibes in his article—as an aside addressed to retired NBA center Shaquille O'Neal—that he did not "flop" in

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feminine enough but rather expressed traits employer believed to be more traditionally masculine).

295. *See* Kramer, *supra* note 20, at 298-301 (discussing LGBT individuals' attempt to use gender discrimination under Title VII to bring employment discrimination claims against employers for discriminatory acts or practices based upon individuals' sexual orientation).

296. *See id.* at 299-300 (discussing gender stereotyping claims).

297. *See id.* at 300 (describing three steps to gender stereotyping claim referring to individuals' gender stereotype as "anchor gender").

298. *See id.* at 299-301 (discussing framework for gender-stereotyping claim under Title VII's sex provisions and identifying how LGB individuals may utilize such claim to remedy discrimination sounding more akin to sexual orientation discrimination but identifying that federal courts do not entertain discrimination claims based solely on claimant's sexual orientation).

299. *See* Williams, *supra* note 28, at 271 ("[F]or those who are perceived to be gender-role appropriate (e.g. feminine lesbians [and masculine gay males]), but are discriminated against because of their sexual orientation, [Title VII] provides no protection.").

300. *See* Collins & Lidz, *supra* note 2 (writing for himself, Collins describing his belief that he does not fit homosexuality stereotype).

games due to the fact that he was gay.[301] Collins was implying that he was tactically attempting to draw a foul rather than fulfilling a gay male stereotype of being weak or effeminate.[302] These public manifestations of Collins's professed masculinity factor against him in the context of bringing a successful gender discrimination claim under Title VII.[303]

Furthermore, Collins would not have a strong Title VII claim because his public disclosure, and the subsequent media attention, makes it nearly impossible for him to remove his sexual orientation from his case.[304] Recall that under Title VII sexual orientation is not a protected trait, and thus courts are generally hostile towards (and vigilant of) plaintiffs masking sexual orientation discrimination based claims as gender nonconforming discrimination claims.[305] Therefore, Collins would not have a viable claim under Title VII because Collins's characteristics do not support a claim that he was discriminated against because of his failure to conform to a masculine male gender stereotype.[306]

C. Filing a Grievance Under the NBA Collective Bargaining Agreement

Collins's best available course of legal action is to file a grievance under the NBA CBA.[307] As long as Collins is an NBA free

301. *See id.* (writing for himself, Collins characterizes himself as tough and physical basketball player).

302. *See id.* (describing anecdote between Collins and Shaquille O'Neal).

303. *See* Kramer, *supra* note 20, at 302 (discussing cases in which LGB individuals brought gender discrimination claims to remedy discrimination sounding more akin to sexual orientation discrimination).

304. *See, e.g.*, Collins & Lidz, *supra* note 20 (disclosing Jason Collins's sexual orientation by internet blog posting on major international news source's website); *The Gay Athlete*, *supra* note 2 (printing of Jason Collins's physical article for international distribution).

305. Because sexual orientation is not currently a protected trait under federal law, any discriminatory employment behavior based solely upon Jason Collins's sexual orientation would not support a discrimination claim under Title VII, thus, only discrimination based on sex or gender would be supportive of a potential claim. For a more detailed discussion stating that plaintiff's sexual orientation should not be disclosed when bringing Title VII gender non-conformity discrimination claim because sexual orientation is not protected trait under Title VII, see *supra* notes 112-17 and accompanying text.

306. For a further discussion regarding gender nonconformity issues, see sources cited *supra* note 175 and accompanying text.

307. *See* NBA CBA, *supra* note 24, Art. XXX, § 5 ("Neither the NBA, any Team nor the Players Association shall discriminate in the interpretation or application of this Agreement against or in favor of any Player because of religion, race, national origin, sexual orientation or activity or lack of activity on behalf of the Players Association."); *see also* NBA's NON-DISCRIMINATION POLICY, *supra* note 24 (outlining NBA's general non-discrimination employment policy).

agent seeking employment with an NBA team as a professional basketball player, he will be subject to the terms of the NBA's CBA.[308]

For Collins, the private and expedient features of arbitration may not work in his favor.[309] Recall that arbitration decisions are generally made within a matter of days, and that very few details of such decisions reach the public domain.[310] These characteristics are an advantage to the NBA, and the organization would likely benefit from avoiding prolonged public exposure to the details of Collins's case.[311] This private and expedient process does not bode well for Collins because he receives most of his support from the public, and thus his ability to leverage a settlement with the NBA may depend on whether he can draw out the process and garner the public's attention, which would reflect negatively on the NBA's, and former Commissioner David Stern's, hard fought reputation as a progressive organization.[312]

Also recall that NBA teams have broad discretion in their decisions to terminate or initiate player contracts.[313] The uniform player contract generally provides that a team may terminate a player contract upon written notice to the player if the player fails to exhibit sufficient skill or competitive ability, based upon the team management's sole opinion that that player's skill and cost are no longer commensurate with the team's needs.[314] Not to mention, in the upcoming 2013-2014 season, a veteran player having

308. *See* NBA CBA, *supra* note 24, Art. XXXIV (recognizing Players Association as exclusive collective bargaining representative between NBA and "all persons who have been previously employed by an NBA Team as professional basketball players who are seeking employment with an NBA Team as a professional basketball player").

309. *See* Greenberg, *supra* note 233, at 102 (discussing attractive features of arbitration for professional sports organizations). For further discussion of the grievance arbitration process, see *supra* notes 237-53 and accompanying text.

310. *See* Greenberg, *supra* note 233, at 102 (discussing arbitration in professional sports context).

311. *See id.* at 100-02 (discussing arbitration in professional sports context and benefits of shielding arbitration details from public record).

312. *See id.* (discussing arbitration in professional sports context compared to litigation and stating that parties generally settle out of court under the latter process because of high costs due to complex procedural tactics).

313. *See* NBA CBA, *supra* note 24, Art. II, § 12(g) (outlining provisions of Uniform Player Contract under CBA generally mandating that team's termination of a player contract by reason of player's "lack of skill shall be interpreted to include a termination based on the Team's determination that, in view of the player's level of skill (in the sole opinion of the Team), the Compensation paid (or to be pair) to the player is no longer commensurate with the Team's financial plans or needs").

314. *See* NBA CBA, *supra* note 24, Exhibit A, para. 16(b)(i) (describing team's authority to terminate contract).

played for ten years or more is entitled to a minimum salary of $1,399,507.[315] Therefore, Collins may not succeed in arbitration because NBA teams would likely identify Collins's lack of competitive ability and high price as valid reasons for not offering him a contract.[316]

There are many factors that may motivate a team not to sign Collins, or to terminate his contract if he were eventually signed.[317] Among those factors could be a team's more sinister motivation to avoid contracting with Collins because he is gay; however, it is unlikely that a team would openly expose such bias when that team could simply say that it determined that Collins's skill and cost did not fulfill the team's needs.[318] Thus, generally speaking, it is unlikely that Collins would win a favorable decision from the Grievance Arbitrator.[319]

Such an outcome may further stymie any possible utility the policy and the grievance arbitration system might offer as a means for protecting players from sexual orientation discrimination because such an outcome could potentially deter other players from using the process for fear that taking such action could jeopardize their job security.[320] As one commentator, noted "[o]nce most athletes get a taste of the bigs, they're not inclined to do something

315. *See id.* Exhibit C (graphing projected minimum salaries for NBA players according to upcoming seasons and players' years of service as professional NBA basketball player).

316. *See* Jenkins, *supra* note 3, at B1 (opining that when it comes to NBA teams justifying decision not to sign Collins, Collins's tangible assets support an assertion that decision was "based strictly on talent and/or financial restrictions").

317. *See* NBA CBA, *supra* note 24, Art. II, § 12(g) (describing discretion granted to team under CBA such that team may determine whether or not sign or release players). For further discussion on of discretion granted to NBA teams under CBA, see *supra* notes 57-65 and accompanying text.

318. *See* Araton, *supra* note 3, at B10 (reporting interview with Collins and depicting difficulty of determining whether teams that chose not to sign Collins did so based upon Collins's sexual orientation or Collins's statistics and cost).

319. *See* Harvey Araton, *Collins Finds Spot Again, Moving the N.B.A. Forward*, N.Y. TIMES, Feb. 24, 2014, at D1, *available at* http://www.nytimes.com/2014/02/24/sports/basketball/jason-collins-finds-spot-again-and-moves-nba-forward.html [hereinafter *Collins Finds Spot*] (opining that Collins's case would be hard to prosecute); Rovell, *supra* note 111 (quoting new NBA Commissioner Adam Silver saying "[i]n terms of Jason not getting signed, based on everything I've been told, it's a basketball decision"); Beck, *supra* note 17 (discussing Collins's statistics, cost, and other obstacles that make it difficult for Collins to secure contract with NBA team); Jenkins, *supra* note 3 (discussing potential reasons why Collins has yet to be signed but also noting difficulty of determining whether homophobia was major contributing factor preventing teams from pursuing Collins).

320. *See* Arnovitz, *supra* note 58 (advancing that players' fear of losing their roster spot or being perceived as distraction to team may prevent players from feeling comfortable disclosing their sexual orientation).

voluntary to put that job in jeopardy."[321] Nonetheless, the CBA may be Collins's best and only protection against discrimination, although in light of NBA teams' discretion, that protection may be illusory.[322]

However, another function of the collective bargaining process, negotiating rules and regulations, may provide Collins with an opportunity to substantially impact the social and legal landscape of professional sports in the United States.[323] As of this writing, the You Can Play project and similar programs that educate and train athletes about LGBT issues have opened up the conversation about combatting homophobia in organized sports.[324]

Since the NHL partnered with You Can Play, at least one player from each of the thirty NHL teams has spoken out on behalf of LGBT athletes as part of the program.[325] But You Can Play has also had an impact on college sports, most notably, on February 9, 2014, University of Missouri ("Mizzou") football player, and NFL draft prospect, Michael Sam publicly announced that he is gay.[326] Prior

321. *Id.* (musing over reasons why professional athletes feel need to hide their sexual orientation) (alteration added).

322. *See* NBA CBA, *supra* note 24, Art. II, § 12(g) (describing discretion granted to team under CBA such that team may determine whether or not sign or release players). For further discussion on of discretion granted to NBA teams under CBA, see *supra* notes 57-65 and accompanying text.

323. *See* sources cited *supra* notes 332-342 and accompanying text (concluding that Jason Collins's may utilize NBA CBA and Players Association for reasons other than his own protection against discrimination but also as means of developing educational based model for developing more accepting environment throughout NBA).

324. *Latest News*, YOUCANPLAYPROJECT.ORG, http://youcanplayproject.org/news (last visited Feb. 21, 2014) (outlining latest developments within organized sports involving LGBT issues and You Can Play organization).

325. *The NHL Makes LGBT History*, YOUCANPLAYPROJECT.ORG (Jan. 8, 2014), http://youcanplayproject.org/news/entry/the-nhl-makes-lgbt-history (reporting that each NHL team has been represented by at least one player speaking out about LGBT issues).

326. *See* Branch, *supra* note 37 (discussing University of Missouri football player and 2014 NFL draft prospect Michael Sam's decision to publicly disclose his sexual orientation before entering 2014 NFL draft and reporting that prior to Sam's public announcement Sam came out to his teammates and that Sam, along with many other University of Missouri athletes, participated in You Can Play project workshops and seminars on LGBT issues). After participating in the You Can Play workshops, "Mr. Sam was one of several athletes to approach Pat Ivey, the [University of Missouri] associate athletic director for athletic performance, to compliment him for the lesson." *See* Branch, *supra* note 37. For more information on the You Can Play Project, see *Our Mission*, YOUCANPLAYPROJECT.ORG (last visited Feb. 21, 2014) http://youcanplayproject.org/pages/our-cause ("You Can Play is dedicated to ensuring equality, respect and safety for all athletes, without regard to sexual orientation . . . . You Can Play seeks to challenge the culture of locker rooms and spectator areas by focusing only on an athlete's skills, work ethic and competitive spirit.").

to Michael Sam's announcement, Mizzou's associate athletic director Pat Ivey collaborated with the You Can Play to provide Mizzou athletes with workshops and trainings on LGBT issues.[327] Michael Sam participated in the program and personally thanked Pat Ivey for the lesson, and before Sam made his public announcement, he came out to his team during pre-season training in August of 2013.[328] The Mizzou football team accepted Sam, finished the season with a 12-2 record, won the Cotton Bowl, and Mr. Sam was named Southeastern Athletic Conference defensive player of the year.[329] Mizzou's success might suggest that with a proper curriculum and training program in place, a gay player would not be a distraction to a team.[330] Therefore, for the time being, the immediate remedy for combatting homophobia in sports may not lie within the law but within education and training.[331]

V. CONCLUSION

Like many workers in the United States, Jason Collins does not have sufficient federal legal protection against employment discrimination based solely on sexual orientation.[332] For Collins, as the

327. *See* Branch, *supra* note 37 (reporting Michael Sam's participation in You Can Play seminars at University of Missouri).

328. *See id.* (discussing Michael Sam's encounter with Pat Ivey).

329. *See id.* (reporting Michael Sam's participation in You Can Play seminars at University of Missouri); Arnovitz, *supra* note 58 (opining that Michael Sam's positive reception from his team was not an accident but rather result of, among other factors, Mizzou athletics department's concerted effort to educate Mizzou athletes about LGBT issues).

330. *See* Arnovitz, *supra* note 58 (discussing how teams and programs with strong leadership that allow athletes to become educated about LGBT issues can overcome any potential distractions that players' sexual orientation might bring to team chemistry).

331. "This [Michael Sam announcing his sexual orientation] didn't happen by accident – education matters. Last spring, the You Can Play Project, which educates amateur programs and professional franchises on how to create an environment where gay athletes are accepted and can flourish, led seminars for teams at Mizzou." *See* Arnovitz, *supra* note 58 (discussing Michael Sam's decision to come out and University of Missouri's part in developing environment where an openly gay football player could be accepted by partnering with You Can Play project and developing their own diversity educational programs based upon You Can Play's curriculum).

332. For a more detailed discussion of weaknesses of employment protections for LGBT workers under current employment law, see *supra* note 165 and accompanying text. Although there have been significant developments in equal rights for LGBT Americans there is currently no solid federal legal foundation nor framework for protecting LGBT employees from discrimination based solely of sexual orientation. *See* Prizer, *supra* note 20, at 778 ("[D]espite some expansion of coverage under Title VII, LGBT workers on the whole are not protected effectively by the existing federal statute and by piecemeal state and local protections."); Kramer, *supra* note 20, at 294-301 (discussing Title VII's five traits and acknowledg-

first active NBA player to publicly disclose his sexual orientation, there is uncertainty as to what would constitute sexual orientation discrimination in the context of professional sports.[333] Moreover, the NBA's non-discrimination policy prohibiting discrimination on the basis of sexual orientation has only existed since 2011 and it has never been tested.[334] Thus, Collins's legal remedies are unclear and novel at best.[335] Indeed, for Collins, proving discrimination will be an uphill battle due to his marginal ability, his high cost, and NBA teams' broad discretion to sign players.[336] However, given Collins's experience and reputation, submitting a grievance against an NBA team or the NBA itself for violating its own non-discrimination policy would not be completely frivolous.[337] Whether or not such a grievance is successful, it would test the strength of the NBA CBA's non-discrimination policy, provide a form for future players to enforce their workplace protections, and add substance to that

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ing that although sex and gender have been used to successfully protect gay persons alleging employment discrimination based on sexual harassment and gender nonconformity – not acting in accordance with perceived societal norms associated with male or female gender – but noting that employment discrimination based solely on sexual orientation is beyond the scope of expanded Title VII protections as identified by federal case law); Lavelle, *supra* note 20, at 519 (discussing lack of work place protections for sexual orientation discrimination under Title VII and "growing support for the Employment Non-discrimination Act ("ENDA"), which, with several caveats, would prohibit workplace discrimination with regard to gay persons."); Clancy, *supra* note 149, at 128-43 (discussing ambiguity, difficulty, and disagreement among federal courts when distinguishing employment discrimination claims under Title VII's sex provision along lines of sex and gender, and problems with allowing discrimination claims based on gender stereotyping and gender nonconformity but barring claims based solely on sexual orientation discrimination).

333. For a more detailed discussion of teams' authority under CBA to terminate contracts based on players' lack of skill and teams' financial situation, see *supra* note 314 and accompanying text.

334. For a more detailed discussion showing HRC's approval of NBA incorporation of non-discrimination policy into 2011 CBA, see *supra* note 211 and accompanying text.

335. *See* Gregory, *supra* note 11, at 284-87 (describing employer utilization of non-discrimination policies to govern employment relationship and analyzing whether or not LGBT collegiate athletes could bring claims under their respective school's non-discrimination policy).

336. *See* Beck, *supra* note 17 (reporting Collins's statistics, cost, and other obstacles that make it difficult for Collins to secure contract with NBA team); Jenkins, *supra* note 3 (discussing factors such as Collins's cost and limited skill set as potentially supporting teams' decision not to pursue signing Collins but noting that Collins's sexual orientation may have also been factor that teams considered and determining that it would be difficult to distinguish whether Collins's sexual orientation was primary factor that led to his inability to initially secure an NBA contract).

337. *See* Gregory, *supra* note 11, at 284-87 (observing that breach of contract claim on basis of conduct in breach of non-discrimination clause could be potential means of relief for discrimination).

policy as well as encourage potential closeted players to reveal their sexual orientation if they so desire.[338]

Grievances in the NBA are not the only means of monitoring and enforcing fair treatment for LGBT players in the NBA.[339] Collins could utilize the media, public opinion, and the arbitration process to begin a conversation with the NBA about the strengths and weaknesses of the procedures currently in place, with an eye towards developing a more inclusive environment that supports potential current and future LGBT players.[340] Moreover, with the support of the Players Association, Collins could utilize the collective bargaining process to develop rules and regulations that establish a system similar to the NHL's partnership with the You Can Play project and the MLB's new training and monitoring program, a system that focuses on programs to educate and train coaches, players, and NBA personnel on LGBT issues and inclusivity.[341] Therefore, although Jason Collins is out of the closet, he needs to begin bargaining for the next gay player in order to continue making a substantial impact on homophobia in professional sports in the United States.

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338. At least one college athlete was able to compel her university to make "groundbreaking" changes to its non-discrimination policies and procedures by filing a lawsuit against the university alleging sexual orientation discrimination which led to an out-of-court settlement under which the university "agreed to begin sexual orientation nondiscrimination training for its staff, agreed to amend its nondiscrimination materials to include sexual orientation, and agreed to create a reporting method for alleged discrimination." *See* Williams, *supra* note 28, at 269-70 (referencing instance where University of Florida softball co-captain Andrea Zimbardi filed lawsuit against university after she was dismissed from team subsequent to her report that "she was being discriminated against because of her sexual orientation" (citing Antonya English, *UF Settles Suit with Ex-Catcher*, ST. PETERSBURG TIMES (FLORIDA), Jan. 24, 2004, at 3C; University of Florida, *University of Florida Athletics 2006-2007*, 35 (2006), http://www.gatorzone.com/osl/pdf/handbook/2006.pdf)).

339. *See* Ronald Blum, *A-Rod Grievance Hearing Recesses Until November*, YAHOO .COM (Oct. 18, 2013, 7:33 PM), http://sports.yahoo.com/news/rod-grievance-hearing-recesses-until-224542230—mlb.html (discussing MLB New York Yankee's baseball player Alex Rodriguez's prolonged and highly publicized grievance that Rodriguez filed contesting 211-game suspension).

340. *See* Blum, *supra* note 339 (discussing collegiate athlete's ability to structure settlement between her and college whereby college agreed to create non-discrimination policy and enforce training program for personnel concerning LGBT issues).

341. For a more detailed discussion of recent expansions of both MLB and NHL non-discrimination policy, see *supra* notes 98, 99 and accompanying text.

VI. ADDENDUM

On Sunday February 23, 2014, Jason Collins signed a 10-day contract. with the Brooklyn Nets.[342] That same night, after spending ten months as an unsigned free-agent, Jason Collins took the floor for the Nets, played eleven minutes in the team's road victory over the Los Angeles Lakers, and became the first openly gay player to compete in a major American professional sport.[343]

As Collins checked into the game, he was met with moderate applause and a few standing fans acknowledging the significance of the moment, an almost ambiguous reception.[344] This reception serves as an appropriate analogy for the tension inherent in that moment, a moment that encompassed both celebration and apprehension, the proverbial "now what?"[345]

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342. *See* Andrew Keh, *Jason Collins, First Openly Gay N.B.A. Player, Signs With Nets and Appears in Game*, N.Y. TIMES.COM, Feb. 24, 2014, at D3, *available at* http://www.nytimes.com/2014/02/24/sports/basketball/after-signing-with-nets-jason-collins-becomes-first-openly-gay-nba-player.html?_r=0 (reporting Jason Collins's historical day in which Collins became first openly gay professional athlete in four major American professional sports to sign contract and to play in game).

343. *See* Ramona Shelburne, *Collins' New Life No Different for Nets: Jason Collins Checked in to an Appropriate Applause in Sunday's Historic Debut*, ESPN.COM, (Feb. 24, 2014, 12:24 PM), http://espn.go.com/new-york/nba/story/_/id/10510138/jason-collins-new-life-no-different-brooklyn-nets (reporting Collins's historic debut, circumstances leading up to Collins's contracting with Nets, and atmosphere of Staples center during Collins's entrance into game against Los Angeles Lakers).

344. *See* Shelburne, *supra* note 343 (describing Jason Collins's reception at Staples Center "as odd as it was normal. As confusing as it was inspiring. But really, it was as it should be . . . ."); Billy Witz, *Nets' Win Is Ordinary, Though the Night Is Anything But*, N.Y. TIMES, Feb. 24, 2014, at D2, *available at* http://www.nytimes.com/2014/02/24/sports/basketball/jason-collins-appreciates-milestone-but-focuses-on-his-tasks.html ("If it was a seminal moment, it was not quite treated as one. When Collins was announced as he got ready to enter the game, he was greeted with polite applause, and a smattering of fans stood to cheer."); Andrew Keh, *Nets and Collins Mostly Shrug Off Milestone Game*, N.Y. TIMES, Feb. 25, 2014, at B15, *available at* http://www.nytimes.com/2014/02/25/sports/basketball/nets-players-act-as-if-jason-collins-debut-was-not-a-big-deal.html [hereinafter Keh II] (recounting Collins's reception at Staples Center and describing moment as "subdued, given the hype preceding it," and reporting commentary from NBA players and personnel as generally downplaying moment while quoting veteran Nets player Paul Pierce as saying "[i]n the society we live in, this was going to happen eventually. . . . This is normal."); Kevin Arnovitz, *Collins; extraordinary day, ordinary game*, ESPN.COM, (Feb. 24, 1:30 AM), http://espn.go.com/blog/truehoop/category/_/name/kevin-arnovitz-contributors [hereinafter Arnovitz II] (depicting Collins's reception at Staples Center as unsentimental moment "utterly devoid of drama" and recounting that many individuals in audience "couldn't be bothered to look up from their phones").

345. *See* Keh II, *supra* note 344 (recounting Collins's reception at Staples Center and describing moment as "subdued, given the hype preceding it," and reporting commentary from NBA players and personnel as generally downplaying moment while quoting veteran Nets player Paul Pierce as saying "[i]n the society we live in, this was going to happen eventually. . . . This is normal."); *see also* Shel-

Now, many NBA commentators, players, and personnel are celebrating the NBA's foray into accepting an openly gay player.[346] Yet many others are also musing over whether Collins's inability to secure a contract until now was a result of him being gay, and are speculating as to how this issue will play out going forward.[347] For example, current NBA Commissioner Adam Silver expressed his excitement for welcoming Collins back into the league, and reinforced his stance that the NBA is an inclusive organization; but Silver also stated that he wanted to be "cautious about celebrating it too much because where sports has led in so many ways, this is one of the places where we've trailed."[348]

Adam Silver's apprehension about catching the league up with American society is well placed. Although Jason Collins's situation is currently cause for celebration, Collins's experience shows how difficult it will be for the NBA to discern whether teams are assess-

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burne, *supra* note 343 (opining that not only has public opinion grown more accepting of sexual orientation diversity since Collins first entered NBA in 2001 but also that public opinion has rapidly shifted towards acceptance of sexual orientation diversity in sports since Collins first publicly announced his sexuality in April 2013).

346. Many NBA players and personnel celebrated Jason Collins as a trail blazer and the NBA as a progressive organization, in the context of major American professional sports, ready to be the first to place an openly gay player in competition. *See, e.g.*, Keh, *supra* note 342 (reporting NBA Commissioner Adam Silver's comment concerning Collins: "I know everyone in the N.B.A. family is excited for him and proud that our league fosters an inclusive and respectful environment."); *see also* Witz, *supra* note 344 (quoting Nets' player Paul Pierce's reaction to having Collins join his team: "In the society we live in, this was going to happen eventually," Pierce said. "He is a guy that is going to be able to open up the door for athletes around the world. It doesn't matter your race, gender or sexuality because it's about being part of a team and caring for one another.").

347. *See Collins Finds Spot*, *supra* note 319 (reporting Adam Silver's comments concerning Jason Collins). Many NBA commentators, players, and personnel have expressed cautionary musings over Collins's experience and the path that lies ahead for the NBA. *See, e.g.*, *Collins Finds Spot*, *supra* note 319 (recounting that "[s]ome team officials had feared the distraction of a media circus, as if the N.B.A. had not controlled and even generated countless others. No doubt the same excuse was used until Robinson broke baseball's color barrier in Brooklyn. In the final historical analysis, you are part of the problem or the solution."); *see also, e.g.*, Araton, *supra* note 3 (discussing Collins's lack of NBA contract going into 2013-2014 season); Jenkins, *supra* note 3 (discussing difficulties of determining whether Collins's newly disclosed sexual orientation negatively impacted Collins's ability to secure NBA contract).

348. *See, e.g.*, Araton, *supra* note 3 (discussing Collins's frustration over lack of NBA contract); Jenkins, *supra* note 3 (discussing difficulties of determining whether Collins's newly disclosed sexual orientation negatively impacted Collins's ability to secure NBA contract).

ing players within the appropriate bounds of their discretion or whether something more sinister factors into that evaluation.[349]

This tension revisits the three questions raised in this Comment: (1) Is being gay a per se distraction that justifies a team's decision to sign a heterosexual player over a gay player of similar talent?[350] (2) Does the NBA's non-discrimination policy provide

349. Journalist Harvey Araton has been reporting Jason Collins's experience since Collins first came out in April 2013 and Araton has highlighted how difficult it would be for players to determine whether a team is discriminating against them because of sexual orientation and how potentially simple it could be for a team to disguise such discriminatory conduct when dealing with fringe players such as Jason Collins. *See* Araton, *supra* note 3 (contemplating difficulty of discerning whether team decision not to sign Collins was because of Collins's homosexuality or Collins's marginal statistics). Araton brought the issue to Collins's attention during an interview in October of 2013 and reported the encounter:

> The question Collins has to ponder is why he has not been signed as a free agent. Is it because he is at best a marginal player with modest career statistics (3.6 points and 3.8 rebounds a game) nearing the end of his career, one who would cost more than a younger player based on the league's collectively bargained pay scale? Or is there something more sinister at work related to the new role he would play? Collins did not dismiss the latter notion or address it. 'You don't want to speculate – I don't go there.'

Id. (recounting Collins's response).

350. This question has been the source of ongoing debate among commentators discussing the emergence of openly gay athletes in major American professional sports. Many commentators have argued that the potential for media and locker room distractions has kept professional players from coming out and has scared professional teams away from signing potentially gay players. *See, e.g.*, Arnovitz, *supra* note 58 (advancing that this concern over job security may prevent players from feeling comfortable or even safe disclosing their sexual orientation); Freeman, *supra* note 97 (reporting that NFL, NFL Players Association, and NFL teams were secretly trying to structure deal where an undisclosed gay player would sign with an NFL team but that deal fell apart in late April 2013 after Jason Collins publicly disclosed his homosexuality and suggesting reason why deal never came to fruition was that teams were scared off by media circus that would inevitably follow, opining that NFL wants an openly gay player but that disagreement among players and teams has slowed process and that closeted gay NFL players fear coming forward because they are uncertain if they would be well received by fellow players and coaches); Jenkins, *supra* note 3 (discussing teams' concern with media distractions); Araton, *supra* note 3 (advancing that NBA teams may avoid signing player such as Collins because of added media attention such an acquisition would bring to team). However, since Michael Sam came out, first to his team in August 2013 and later to the public at large during an ESPN Outside the Lines interview on February 9, 2014, commentators have been challenging the proposition that a gay professional player would be a per se distraction to a team. *See, e.g.*, Donté Stallworth, *How Coaches Handled 'Distractions' Like Michael Sam When I Was in the NFL*, THINKPROGRESS.ORG (Feb. 12, 2014, 9:54 AM), http://thinkprogress.org/sports/2014/02/14/3287341/donte-mike-sam/# (writing for himself, former NFL wide receiver Donté Stallworth opining that players' sexual orientation should not be perceived as per se distraction and that only team that allows personal biases within organization, lacks strong leadership, or both, would allow players' sexual orientation alone to create distraction within team's organization, otherwise an NFL team should be able to handle any added media attention or internal strife that might come along with signing an openly gay player); Jason Whitlock, *Michael*

NBA players with sufficient protection against disparate treatment? (3) Can Jason Collins significantly impact the NBA for future NBA players?

As to the first question, Jason Collins's contract with the Nets shows that for an NBA player, being openly gay does attract added media attention.[351] However, joining the Nets, Collins is among friends and fellow veterans; thus there should be little of team chemistry issues.[352] Collins played his first six and a half seasons with the Nets, and during that time he became friends with the Nets current head coach, Jason Kidd.[353] Also, Collins previously played with many current Nets' players, such as fellow veterans Kevin Garnett and Paul Pierce.[354] But the addition of Collins indicates that extra media will make its way into the locker room and will reflect upon the other players on the team.[355]

However, media baggage does not necessarily translate into a distraction that can upset team chemistry.[356] The Nets' leadership downplayed any impact the extra media had on the team, and they reiterated that what matters is to keep the team focused on basket-

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Sam Will Be a Role Model: Sam Won't Be an Off-Field Distraction to Any NFL Team That Drafts Him, ESPN.COM (Feb. 14, 2014, 12:47 AM), http://espn.go.com/college-football/story/_/id/10437883/whitlock-michael-sam-role-model-not-distraction (opining in reference to Michael Sam that Sam will not have negative impact on team chemistry for any NFL team that signs him merely because of his sexual orientation and recounting that Sam was open with his University of Missouri team about his sexual orientation since pre-season camp in August of 2013 and his team went won eleven regular-season games, finished season 12-2 and ranked fifth in overall standings, won Cotton Bowl, and Sam was named SEC defensive player of season); *see also* Arnovitz, *supra* note 58 (outlining Missouri football's strong performance after Michael Sam came out to team). For video footage and online discussion of Michael Sam's Outside the Lines interview see Chris Connelly, *Mizzou's Michael Sam Says He's Gay*, ESPN.COM (Feb. 10, 2013, 5:18 PM), http://espn.go.com/espn/otl/story/_/id/10429030/michael-sam-missouri-tigers-says-gay (providing video footage of interview with Sam discussing his decision to come out publicly).

351. *See* Keh II, *supra* note 344 (discussing mass media attention that Collins and Nets received once Nets signed Collins).

352. *See id.* (reporting Collins's connections with Brooklyn Nets' personnel and players).

353. *See id.* (listing Collins's time playing with Nets and Kidd).

354. *See id.* (highlighting fact that Collins's played with Garnett and Pierce while all three were contracted with Boston Celtics during part of 2012-2013 NBA season, also indicating that Collins previously played with Nets' player Joe Johnson while both were playing with Atlanta Hawks).

355. *See id.* (reporting commentary about Collins multiple players on Nets' team).

356. *See id.* (describing how Nets handled added media attention well and demonstrated strong team leadership among players and head coach Jason Kidd).

ball.[357] Although Nets' owner Mikhail Prokhorov has yet to comment on Collins's contract, the Russian politician has publicly supported LGBT issues.[358] Thus, the Nets seem to be a perfect fit for Collins because of Collins's familiarity with the organization and the team's ability to absorb the attention and keep players focused on the bottom line.[359]

In contrast, a gay player may prove to be a distraction to another team that has less mature players and less aligned personnel.[360] But in this hypothetical situation, it remains unclear whether an NBA organization, one that is self-aware of its team's potential immaturities or weaknesses, would be within its permissible discretion to determine that adding a gay player would not be a good fit for that organization's team chemistry or culture.[361] Nonetheless, for now, it appears that being gay is no longer perceived as a per se distraction, at least from the perspective of increased media attention.[362]

Per the second question, the NBA's non-discrimination policy does not provide NBA players with sufficient protection against employment discrimination based on sexual orientation.[363] As the above hypothetical demonstrates, the difficulties of proving a

357. *See* Keh II, *supra* note 344 (outlining how Nets' players Collins, Kevin Garnett, and Paul Pierce handled media and attempted to keep focus on team's purpose of playing basketball).

358. *See* Net Income, *For Prokhorov, No Doubt an Easy – and Basketball – decision*, NETSDAILY.COM (Feb. 23, 2014, 2:24 PM), http://www.netsdaily.com/2014/2/23/5439774/for-prokhorov-no-doubt-an-easy-and-basketball-decision (reporting that Prokhorov declined to offer comments on signing Jason Collins but noting Prokhorov's public support of LGBT issues in Russia).

359. *See* Witz, *supra* note 344 ("The Nets were the perfect team for Collins to join.").

360. *See* Stallworth, *supra* note 350 (opining that in context of NFL players' sexual orientation will only be distraction to team if that team allows it to be as result of that organization's lack of team and organizational leadership).

361. *See* Arnovitz, *supra* note 58 ("When NBA coaches, executives and agents are asked why Collins didn't receive a training cap invite last fall or hasn't caught on with a team midseason, they cite the anticipated "distraction," both in the media and in the locker room, coupled with Collins' age. A few execs said the risk of rankling a superstar or futzing with chemistry wasn't worth the trouble."); *see also* Arnovitz II, *supra* note 344 (contemplating that indeed team such as Nets situated New York City may be able to handle added media attention accompanying Jason Collins but opining that "not every 24-yea-old NBA play as the confidence, vocabulary or cultural sensibility to speak confidently about homosexuality").

362. *See* Stallworth, *supra* note 350 (stating that professional sports organizations are well equipped to deal with media attention in manner that does not distract teams from competition); Whitlock, *supra* note 350 (advancing that adding openly gay player to team would not be per se distraction).

363. For a more detailed discussion explaining why non-discrimination policy alone does not provide adequate protection for LGBT athletes in professional sports context, see *supra* notes 332-42 and accompanying text.

team's discriminatory conduct coupled with players' concern with job security in a hyper-competitive job market suggest that a player has an incentive to maintain the status quo rather than to disclose his sexual orientation for fear of being perceived by a team as a distraction.[364] Accordingly, in light of Jason Collin's new contract this Comment still concludes that the NBA CBA non-discrimination policy alone does not provide NBA players with sufficient protection against employment discrimination on the basis of sexual orientation.[365]

Per the third question, Jason Collins can and has already substantially impacted the NBA.[366] But more needs to be done.[367] Because the fact remains that after Collins publicly announced that he is gay, he spent the next ten months unable to secure a contract or an invite to an NBA team's training camp, which might suggest that Collins was a valued member of the NBA until he disclosed his sexual orientation.[368]

It appears that Collins is ready to do more as he has been vocal with the media and has been an open advocate for LGBT issues.[369] However, Collins should also utilize the collective bargaining process to initiate an aggressive discussion about developing NBA rules and regulations that take an educational based, holistic approach to

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364. *See* Arnovitz, *supra* note 58 (outlining players' obsessive concern with job security).

365. For a more detailed discussion concluding that education program should supplement non-discrimination policy in order to provide LGBT athletes with sufficient workplace protections in professional sports context, see *supra* notes 332-42 and accompanying text.

366. *See* Kevin Arnovitz, *Jason Collins Is Ready to Play*, ESPN.COM (Feb. 23, 2014, 12:31, PM), http://espn.go.com/blog/truehoop/category/_/name/kevin-arnovitz-contributors [hereinafter Arnovitz III] (reviewing Jason Collins's emergence into public sphere as advocate for LGBT issues and commending Collins's on how he gracefully handled frustration of being on sidelines for majority of 2013-2014 season).

367. *See* Arnovitz, *supra* note 58 (arguing that education and training used by Mizzou football team helped create environment where Michael Sam could open with his team about his sexual orientation).

368. For a more detailed discussion of Collins as first active, openly gay athlete in one of the four major American professional sports, see *supra* note 7 and accompanying text.

369. *See* Arnovitz III, *supra* note 366 (describing Collins's time away from basketball as that of an ambassador and recounting Collins's trips to political events and LGBT fundraisers). "Athlete Ally is a 501(c)(3) tax-exempt nonprofit organization focused on ending homophobia and transphobia in sports by educating allies in the athletic community and empowering them to take a stand." *See generally Our Story*, ATHLETEALLY.ORG, (last visited Mar. 2, 2014), http://www.athleteally.org/about/ (outlining organization's purpose and founding story).

creating a more inclusive NBA that is prepared to embrace and protect all players regardless of their sexual orientation.[370]

Indeed, as the first openly gay player to compete in a major American professional sport, Jason Collins is a role model.[371] Yet the NBA, and all professional sports leagues are trailing American society when it comes to accepting LGBT individuals into the workplace.[372] Therefore, Jason Collins should begin bargaining for the next gay player.

*Timothy A. Galáz**

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370. *See Collins Finds Spot*, *supra* note 319 (describing briefly NBA's relationship with "Hudson Taylor, the executive director of Athlete Ally, a gay rights group, [that] has worked with incoming N.B.A. players for two years, helping them to understand [LGBT] issues better").

371. *See* Arnovitz III, *supra* note 366 (reviewing Jason Collins's emergence into public sphere as advocate for LGBT issues and commending Collins's on how he gracefully handled frustration of being on sidelines for majority of 2013-2014 season).

372. *See* Whitlock, *supra* note 350 ("The sports world is no longer a leader in the battle for social justice. It's a follower. Sports are playing catch-up to the rest of American society.").

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